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Revitalizing Louisiana's Lost Chance Doctrine: Burchfield v. Wright Sheds Light on the Need for Medical Expenses

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Madeleine K. Morgan[*]

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INTRODUCTION

In the Louisiana Supreme Court case *Burchfield v. Wright*, Dr. Wright, a physician at Willis-Knighton Medical Center, failed to review Burchfield's charts prior to a routine gallbladder surgery.[1] Had he reviewed the charts, Dr. Wright would have discovered that his patient's

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1. Burchfield v. Wright, 275 So. 3d 855, 857 (La. 2018).

underlying heart condition necessitated a cardiac consult before surgery.[2] Burchfield suffered a heart attack 30 hours after his surgery and eventually underwent a heart transplant.[3] Burchfield and his wife brought suit, but because Burchfield had a pre-existing heart condition, he was unable to prove that Dr. Wright's error alone caused his heart attack and subsequent heart transplant.[4]

Reviewing the Burchfields' case, the Louisiana Supreme Court allowed the plaintiffs to recover for Burchfield's lost chance of a better outcome even though he could not prove that the doctor's breach caused his ultimate injuries.[5] Generally, the Louisiana Medical Malpractice Act ("MMA") limits total recovery in a medical malpractice case to $500,000.[6] The cap, however, does not apply to medical expenses.[7] The MMA also limits a physician's liability to $100,000.[8] If a defendant physician settles for $100,000, a plaintiff may proceed against the Louisiana Patient's Compensation Fund (PCF) for excess damages up to $500,000, exclusive of medical expenses.[9] Despite the fact that the physician in *Burchfield*

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2. *Id.*

3. *Id.*

4. *Id*. at 858, 863. The causation standard the Court applied was that of "substantial factor." *Id*. at 863. Under this standard, the plaintiff must show the defendant's negligence was a "substantial factor in depriving the patient of some chance of life, recovery, or, as in the instant case, a better outcome." *Id*. Under the substantial factor standard, the defendant's negligence need not be the only cause of the plaintiff's damages, but it must have increased the harm to the plaintiff. *Id*.

5. *Id*. at 868. In some instances, a patient may have a pre-existing condition that puts her chances of achieving a favorable medical outcome below 50%. Tory A. Weigand, *Loss of Chance in Medical Malpractice: The Need for Caution*, 87 MASS. L. REV. 3, 4 (2002). A patient's pre-existing condition may make it difficult to discern whether the ultimate malpractice damages stemmed from the pre-existing condition or the doctor's error. *See* Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1354 (1981). In this situation, the "lost chance of a better outcome" theory of recovery allows plaintiffs to recover damages where a physician deprives the plaintiff of a less than 50% chance to avoid a bad outcome or advancement of a medical condition. Steven E. Pegalis, *Loss of a Chance*, 1 AM. LAW MED. MALP. § 5:3, Westlaw (database updated June 2019). Although not every jurisdiction accepts this doctrine, the Louisiana Supreme Court had recognized it as a valid means of recovery prior to *Burchfield*. *See* Graham v. Willis-Knighton Med. Ctr., 699 So. 2d 365 (La. 1997).

6. LA. REV. STAT. § 40:1231.2(B)(1) (2015).

7. *Id.*

8. *Id.* § 40:1231.2(B)(2).

9. *Id.* § 40:1231.2(D)(5). Since the defendant physician settled pursuant to this subsection of the MMA, the Burchfields recovered their remaining damages

breached his duty of care and stipulated to his breach by settling with the plaintiff for $100,000, the Court did not allow Burchfield to recover any medical bills as special damages outside of Louisiana's $500,000 cap on recovery.[10]

Burchfield could not return to his job because of the trauma from his heart transplant.[11] To compound the problem, medical bills for his medications and continued monitoring of his condition were piling up.[12] Yet because of the Supreme Court's holding, he could not recover for past, present, or future medical bills as a separate, uncapped category of damages.[13] As the law now stands in Louisiana, plaintiffs who experience a lost chance of a better outcome may not recover medical bills as separate damages.[14] This result is contrary to the legislature's intent and the objectives of tort law.[15]

Tort law's traditional causation standard, preponderance of the evidence, requires the plaintiff to prove a greater than 50% chance, or "more likely than not," that the defendant's negligence caused her damages.[16] The lost chance doctrine developed to allow plaintiffs to recover damages in situations where meeting the traditional causation requirement was impossible.[17] Although courts have traditionally limited the general doctrine of lost chance to medical malpractice claims, courts have applied the theory in a wide array of factual variations.[18] In the "lost chance of survival" variation, the survivors of an ill or injured patient who died from her condition may recover for harm resulting from a physician's breach even when the plaintiffs cannot prove that the breach was the cause of death.[19] Even if a patient's chance to survive the condition at the outset of treatment was below 50%, a plaintiff can still recover for the lost chance

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from the Louisiana Patient's Compensation Fund (PCF), an administrative system of medical payouts. *See Louisiana Patient's Compensation Fund*, LA. DIV. OF ADMIN., https://www.doa.la.gov/Pages/pcf/Index.aspx [https: //perma.cc/75SV-ABV3].

10. *Burchfield*, 275 So. 3d at 868.
11. Burchfield v. Wright, 224 So. 3d 1170, 1176 (La. Ct. App. 2d Cir. 2017).
12. *Id*.
13. *Burchfield*, 275 So. 3d at 867.
14. *Id*. at n.5.
15. *See* LA. REV. STAT. § 40:1231.2(B)(1) (2015); Kelty v. Brumfield, 633 So. 2d 1210, 1217 (La. 1994) (explaining the Louisiana Legislature's intent in including the "future medical care and related benefits" exception).
16. Weigand, *supra* note 5, at 3.
17. *Id.* at 4.
18. *See, e.g.*, Mohr v. Grantham, 262 P.3d 490, 495 (Wash. 2011).
19. *See* King, *supra* note 5, at 1354.

of survival that the physician destroyed.[20] In a lost chance of survival claim, death is the physical consequence, but the recoverable damages correspond to the lost chance to avoid that consequence.[21]

In the "lost chance of a better outcome" variation, an ill or injured patient can recover for a lost chance even after surviving the harm.[22] A plaintiff can bring a claim for lost chance of a better outcome when a physician negligently misdiagnoses or mistreats an illness or injury, depriving the patient of a chance of a better prognosis or outcome.[23] Although a plaintiff in a lost chance of a better outcome case does not die, the consequences of the loss can still be extremely grave, as evidenced by the facts of *Burchfield v. Wright*.[24] Thus, lawyers and judges must examine the lost chance of a better outcome doctrine with care and with knowledge of the doctrine's underlying policies. Medical malpractice cases present novel issues for the doctrine because each patient inevitably brings a unique medical history to the table—and that history may affect one's ability to prove causation.[25]

Pre-existing conditions in medical malpractice cases are "unavoidable realities" that the courts must confront head-on.[26] In awarding damages for a lost chance of a better outcome, courts must question the extent that a pre-existing condition should affect a plaintiff's recovery.[27] The *Burchfield* case does not satisfactorily answer this inquiry for several reasons.[28] First, the opinion is not in harmony with the Louisiana Legislature's intent to allow medical malpractice plaintiffs to recover future medical expenses in excess of the medical malpractice cap.[29] Second, the Supreme Court relied on *Smith v. State*, the cornerstone of the lost chance damage valuation in Louisiana, without considering the fundamental difference between speculative damages and readily

20. Matthew Wurdeman, *Loss-of-Chance Doctrine in Washington: From* Herskovits *to* Mohr *and the Need for Clarification*, 89 WASH. L. REV. 603, 603–04 (2014).

21. Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 549 (La. 1996).

22. *See* Wurdeman, *supra* note 20, at 605.

23. *See* King, *supra* note 5, at 1354.

24. *See* discussion *infra* Section II.B; Burchfield v. Wright, 275 So. 3d 855, 858–59 (La. 2018).

25. *See* King, *supra* note 5, at 1354.

26. *Id*.

27. *Id.* at 1360.

28. *See generally Burchfield*, 275 So. 3d 855.

29. LA. REV. STAT. § 40:1231.2 (2015).

calculable damages in lost chance claims.[30] By not allowing plaintiffs to recover any medical bills as a separate damage in lost chance claims, the *Burchfield* opinion fails to satisfy the compensatory objective of tort law: making plaintiffs whole for their losses.[31]

This Comment proposes how Louisiana should address the compensation issue in both lost chance of survival and lost chance of a better outcome cases. This Comment recommends that Louisiana law should allow plaintiffs to recover medical bills when they have suffered a lost chance. Further, these medical payments should be separate from the jury's lump sum award and should not be subject to the medical malpractice cap under Louisiana Revised Statutes § 40:1231.2.

Part I of this Comment provides background on relevant law regarding the lost chance doctrine and will trace the lost chance doctrine's development in the United States and Louisiana. Part II articulates Louisiana's approach to lost chance of a better outcome damages and will present the case *Burchfield v. Wright*. Part III offers an overview of the tort law objectives underlying lost chance claims. Part IV highlights the issues that *Burchfield* raises for the lost chance doctrine. Part V advocates for an approach that divides the valuation of lost chance damages between general damages and medical expenses. Requiring separate calculations of general damages and medical expenses on a trial court's verdict form is superior to both the current lumpsum approach[32] and a "percentage probability" approach.[33]

I. THE POLICY-DRIVEN ROAD TO ADOPTING LOST CHANCE OF A BETTER OUTCOME

Tort law serves a number of purposes, including compensation, deterrence, and fairness.[34] Scholars commonly take the position that tort

30. *Burchfield*, 275 So. 3d at 864 (citing Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 549 (La. 1996)).

31. Zaven T. Saroyan, *The Current Injustice of the Loss of Chance Doctrine: An Argument for a New Approach to Damages*, 33 CUMB. L. REV. 15, 29 (2003); Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958).

32. Dionne Carney, Smith v. State of Louisiana, Department of Health and Hospitals: *Loss Chance of Survival: The Valuation Debate*, 58 LA. L. REV. 339, 361 (1997).

33. *See* King, *supra* note 5, at 1382–87.

34. Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 180–200 (2004).

damages serve to "make the plaintiff whole"[35]—in other words, to restore the plaintiff to the condition she would have been in had the injury-causing event never occurred.[36] Damages may also deter potential tortfeasors by increasing their exposure to liability for a plaintiff's injuries.[37] A number of states, including Louisiana, have developed the lost chance of a better outcome claim to more adequately serve the functions of medical malpractice tort law.[38] Cases originally limited the lost chance doctrine to lost chance of survival cases, but the doctrine later expanded, with courts eventually recognizing the lost chance of a better outcome as a compensable interest.[39] Through the lost chance of a better outcome doctrine, courts allowed plaintiffs to recover damages even when they survived a condition that a defendant's negligence caused or exacerbated.[40] Before the lost chance doctrine could develop in the medical malpractice context, however, the law first had to embrace lost chances in general as compensable interests.[41] The origins of the doctrine shed light on the purpose for which lost chance developed.

A. Origins of the Lost Chance Doctrine

The concept of recovery for a lost chance originated in English common law, allowing plaintiffs to recover for the lost chance of obtaining a favorable contractual result.[42] The seminal English contract law case, *Chaplin v. Hicks*, involved a plaintiff who was one of 50 beauty pageant

35. "The purpose of tort damages is to make the victim whole." Bellard v. Am. Cent. Ins. Co., 980 So. 2d 654, 668 (La. 2008); Rebecca Korzec, *Maryland Tort Damages: A Form of Sex-Based Discrimination*, 37 U. BALT. L.F. 97, 109 (2007) (stating that making the tort victim whole is the "major compensation paradigm" of tort law); Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1577–79 (1997) (explaining courts have traditionally stated that "to make the victim whole" is the purpose of tort damages); *see also* W. Page Keeton et al., PROSSER & KEETON ON THE LAW OF TORTS 2, 7 (5th ed. 1984); Kalven, *supra* note 31, at 160.

36. Robert Hernquist, Arthur v. Catour: *An Examination of the Collateral Source Rule in Illinois*, 38 LOY. U. CHI. L.J. 169, 172–73 (2006); *see also* King, *supra* note 34, at 165.

37. David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605, 627 (2001).

38. *See, e.g.*, Mohr v. Grantham, 262 P.3d 490 (Wash. 2011).

39. *Id.*

40. *Id.*

41. *See* Howard Ross Feldman, *Chances as Protected Interests: Recovery for the Loss of a Chance and Increased Risk*, 17 U. BALT. L. REV. 139, 140–41 (1987).

42. *Id.* at 141.

participants, 12 of whom would win an acting contract.[43] The defendant failed to timely notify the plaintiff of her selection as a semi-finalist, and she missed the final evaluation round as a result.[44] The plaintiff sued for breach of contract, and the court recognized her lost chance of winning the acting contract as a compensable interest.[45] Most notably, the court opined that difficulty in calculating damages could not bar the plaintiff's recovery.[46] American courts eventually adopted the English common law approach in contract, allowing plaintiffs to recover pro rata in contract disputes—meaning that plaintiffs only recovered a certain proportion or percentage of their damages.[47]

Although American courts allowed recovery for lost chances in contract, the courts hesitated to recognize lost chances in tort because the doctrine threatened to destabilize tort law's traditional notions of causation.[48] The traditional causation standard—preponderance of the evidence—requires the plaintiff to prove by a more than 50% likelihood that a defendant caused the harm.[49] The 1938 Ohio Supreme Court case *Kuhn v. Banker* reflects the longstanding position of the American courts toward the preponderance of the evidence causation standard and the less-than-traditional lost chance doctrine.[50] In *Kuhn*, the plaintiff tried to recover against a physician for alleged malpractice in treatment of a broken hipbone.[51] Adhering to the traditional preponderance standard, the *Kuhn* court held that a lost chance is "not an injury from which damages will flow."[52] The court reasoned that an abundance of uncertainty prevented the court from attributing causation to the defendant when the plaintiff may have had no real chance of recovering from the broken hip,

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43. Chaplin v. Hicks, 2 K.B. 786, 787 (C.A. 1911); *see also* Feldman, *supra* note 41, at 140 n.11.

44. *Chaplin*, 2 K.B. at 788.

45. *Id.* at 793.

46. *Id.* at 791.

47. *Pro-rata*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See* Feldman, *supra* note 41, at 141. As an example of pro-rata recovery, in *Chaplin*, the plaintiff recovered a percentage of the profits she would have received if the defendant's actions did not deprive her of the chance of winning the acting contract. 2 K.B. at 786.

48. *See* Lisa Perrochet, *Lost Chance Recovery and the Folly of Expanding Medical Malpractice Liability*, 27 TORT & INS. L.J. 615, 622 (1992).

49. The greater-than-even, or greater than 50%, standard is simply a reflection of the "preponderance of the evidence" burden of proof in civil cases. Feldman, *supra* note 41, at 153.

50. Kuhn v. Banker, 13 N.E.2d 242 (Ohio 1938).

51. *Id.* at 243.

52. *Id.* at 247.

even without the malpractice.[53] American courts continued to mandate the traditional preponderance of the evidence standard until 1966, when courts began to take notice of the injustices that persistently applying the traditional negligence standard could inflict.[54] The medical malpractice landscape has shifted over time in an effort to correct these injustices.

B. Lost Chance in Medical Malpractice: A Cure for What Seemed Impossible

In the past, American courts did not recognize lost chances in medical malpractice suits due to the strict causation requirements in tort.[55] Recognizing the inequities that a strict preponderance standard of causation might yield, courts eventually moved away from the traditional standard's limitations.[56] The remedy for a lost chance varies by state, with some states adopting methods such as relaxing the "but-for" standard or redefining the injury as the actual lost chance.[57] Each jurisdiction that has adopted the doctrine, however, has made recovery feasible for plaintiffs with pre-existing conditions who, before, could not have received any compensation for their losses.[58]

1. The Traditional Negligence Standard's Limitations

Generally, Louisiana tort law requires that a plaintiff alleging medical malpractice prove by a preponderance of the evidence: (1) the applicable standard of care, including the ordinary degree of knowledge, skill, and care that physicians licensed to practice in Louisiana exercise; (2) that the physician breached the applicable standard of care; and (3) as a "proximate result" of the breach, the plaintiff suffered injuries otherwise avoidable.[59] This standard requires the plaintiff to show that the doctor's negligence

53. *Id.* at 246.

54. *See* Hicks v. United States, 368 F.2d 626, 628 (4th Cir. 1966). *See generally* Fischer, *supra* note 37, at 627.

55. *See Kuhn*, 13 N.E.2d at 242.

56. Saroyan, *supra* note 31, at 29.

57. Weigand, *supra* note 5, at 6–7; *see infra* notes 84–86 and cases cited therein.

58. *See* Herskovitz v. Grp. Health Coop. of Puget Sound, 664 P.2d 474 (Wash. 1983).

59. LA. REV. STAT. § 9:2794(A) (2003); *see also* Pfiffner v. Correa, 643 So. 2d 1228, 1233 (La. 1994).

was the cause-in-fact of the patient's injury and that the breach fell within the scope of the doctor's duty to the plaintiff.[60]

Over time, American courts recognized that the stringent requirement of but-for causation should not exclusively govern recovery.[61] Courts reasoned that the traditional negligence standard created "obvious inequities" in cases where a physician's negligence and pre-existing conditions combine to cause a plaintiff's injuries.[62] Under the traditional negligence standard, a plaintiff who cannot prove causation will recover nothing against a defendant physician who took away a 49% chance of achieving a certain medical outcome.[63] Conversely, another plaintiff could prove causation and recover full damages against a physician who took away a 51% chance of achieving a certain medical outcome because the physician's fault exceeded a 50% cause of the injury.[64] The 50% line, an expression of the preponderance of the evidence standard, may create absurd consequences: a mere 2% variation in a physician's fault—from 49% to 51%—makes the difference between recovering nothing and recovering everything.[65] Applying the strict preponderance standard essentially releases a doctor from liability when a patient's initial chance was below 50%, thus falling short of the deterrence function of tort law.[66] Moreover, the standard fails to recognize that a chance at survival or recovery may be worth a great deal to patients and merits compensation.[67] Now, a majority of the 50 states have recognized the traditional standard's limitations—a failure to deter physicians from inadequate treatment and a

60. Carney, *supra* note 32, at 341.

61. *Id.* at 342.

62. *Id.*; *see also* Lauren Guest et al., *The "Loss of Chance" Rule as a Special Category of Damages in Medical Malpractice: A State-by-State Analysis*, 21 J. LEGAL ECON. 53, 54 (2015).

63. Carney, *supra* note 32, at 342.

64. *Id.*

65. *See* King, *supra* note 5, at 1377; Stephen F. Brennwald, *Proving Causation in "Loss of Chance" Cases: A Proportional Approach*, 34 CATH. U. L. REV. 747, 773 (1985); Weigand, *supra* note 5, at 6.

66. Herskovitz v. Grp. Health Coop. of Puget Sound, 664 P.2d 474, 477 (Wash. 1983).

67. *See* Fischer, *supra* note 37, at 624 ("Because people value a chance, its destruction is a thing of value that merits compensation . . . ."). Commentator Nils Jansen has argued that no matter the nature of the chance, people as a practical matter always value a chance to avoid harm. *See* Nils Jansen, *The Idea of a Lost Chance*, 19 OXFORD J. LEGAL STUD. 271 (1999).

failure to properly compensate plaintiffs—and have expanded their laws accordingly by adopting the lost chance doctrine.[68]

2. Lost Chance Doctrine as a Solution

Courts had to conceptualize the notion of "lost chances" as compensable interests because of society's limited knowledge of future outcomes.[69] Medical experts can project percentages of the approximate chance of recovery a doctor took away.[70] Due to the malpractice, however, courts cannot know exactly how the patient's condition would have progressed otherwise.[71] Although science has advanced markedly to give patients better chances of recovery, science also remains riddled with uncertainties that might frustrate a plaintiff's recovery by precluding definitive proof that a defendant's negligence caused the harm.[72] Thus, the lost chance doctrine recognizes that proving "but-for" causation of a death or injury is sometimes a legal impossibility.[73] A patient with a pre-existing

68. As of 2017, 26 of the 50 states had adopted lost chance of some form. Jed Kurzban et al., *It Is Time for Florida Courts to Revisit* Gooding, 91 FLA. B.J., Nov. 2017, at 9, 16 n.8 (collecting 26 cases in which state supreme courts have recognized the doctrine); *see also* Lord v. Lovett, 770 A.2d 1103, 1105–06 (N.H. 2001); King, *supra* note 5, at 1377.

69. *See* Fischer, *supra* note 37, at 618–19 ("Chance is a concept that arises out of a lack of information.").

70. "[M]edical science has progressed to the point that physicians can gauge a patient's chances of survival to a reasonable degree of medical certainty . . . . [S]urvival rates are not random guesses; they are estimates based on data obtained and analyzed scientifically and accepted by the relevant medical community." Beth Holliday, *Cause of Action for Medical Malpractice Based on Loss of Chance or Opportunity for Cure*, 73 CAUSES OF ACTION 2d 559, § 22 (Westlaw May 2019 Update).

71. *See* Kramer v. Lewisville Memorial Hosp., 858 S.W.2d 397, 409 (Tex. 1993) (Hightower, J., dissenting).

72. Jeanes v. Milner, 428 F.2d 596, 604 (8th Cir. 1970) ("[M]edicine is not an exact science."); Michelle L. Truckor, *The Loss of Chance Doctrine: Legal Recovery for Patients on the Edge of Survival*, 24 U. DAYTON L. REV. 349, 350 (1999) (noting that despite the "advent of evermore sophisticated medical technology," physicians are still fallible.); Jim M. Perdue, *Recovery for a Lost Chance of Survival: When the Doctor Gambles, Who Puts Up the Stakes?*, 28 S. TEX. L. REV. 37, 44 (1986) ("[M]edical or scientific uncertainties may make it impossible for any expert to establish that a given regime of treatment would probably have restored the patient's health.").

73. Steven R. Koch, *Whose Loss Is It Anyway? Effects of the "Lost-Chance" Doctrine on Civil Litigation and Medical Malpractice Insurance*, 88 N.C. L. REV. 595, 604 (2010).

medical condition who possesses only a 40% chance of recovering at the time of a doctor's negligence cannot mathematically show that the doctor's malpractice is the proximate cause of her ultimate injury.[74] Courts have recognized that by losing a chance, however, the patient still loses something of great value: a chance to survive, a chance to avoid grievous physical and emotional harm, or a chance to achieve a more favorable outcome.[75] The lost chance doctrine, as a result, seeks to bridge the gap between the law and medical uncertainties by upholding the lost chance itself as something of value.[76]

In an influential article, Joseph H. King, Jr., advocated for adopting the lost chance doctrine as a solution to the inequities that the traditional causation standard created, asserting that to deny recovery for a plaintiff's "statistically demonstrable losses" caused by the defendant "subverts the deterrence objective of tort law."[77] The adoption of the doctrine in various jurisdictions now provides plaintiffs with a mechanism to recover for their losses of certain medical outcomes at the hands of physicians' negligence, even when a plaintiff cannot prove that the negligent treatment was the but-for cause of the death or injury.[78]

A common thread among the factual variations of the lost chance doctrine exists when a doctor's breach prevents the patient from seeking a certain favorable treatment: once the patient learns of her pre-existing condition, the window of opportunity for seeking the most ideal treatment has closed.[79] Another thread of cases involves patients who have a pre-existing illness or injury at the outset of treatment of which the doctor is aware, but the doctor fails to render the best possible treatment, causing the patient to lose the chance of recovering from the pre-existing condition.[80] The unifying theme in these cases is that the negligent treatment never proves to be the sole cause of the plaintiff's final condition; rather, the pre-existing condition and the negligence combine to cause the ultimate harm.[81]

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74. Perdue, *supra* note 72, at 44.

75. Matsuyama v. Birnbaum, 890 N.E.2d 819, 832 (Mass. 2008).

76. *See* Fischer, *supra* note 37, at 620, 622–23.

77. King, *supra* note 5, at 1377.

78. Allen E. Schoenberger, *Medical Malpractice Injury: Causation and Valuation of the Loss of Chance to Survive*, 6 J. LEGAL MED. 51, 58 (1985).

79. Pfiffner v. Correa, 643 So. 2d 1228, 1235 (La. 1994); *see also* Hargroder v. Unkel, 888 So. 2d 953 (La. Ct. App. 2d Cir. 2004).

80. *See, e.g.*, Graham v. Willis-Knighton Med. Ctr., 699 So. 2d 365 (La. 1997).

81. Guest et al., *supra* note 62, at 54.

Notably, of the 50 states, 26 have adopted a form of the lost chance doctrine.[82] The lost chance doctrine generally lowers the barriers to a plaintiff's recovery, and its method for doing so varies depending on the jurisdiction.[83] The most common approaches include: (1) relaxing the but-for causation standard and instead only requiring the plaintiff to prove that the negligence was a "substantial factor" in the resulting harm;[84] (2) requiring the percent chance lost to be "substantial";[85] or (3) redefining the damages in a lost chance case as not the ultimate harm, such as death or the final injury, but instead awarding the plaintiff for the actual chance lost.[86] These approaches have evolved over time, demonstrating courts' inclination to craft different remedies that suit the needs of each respective state.[87]

C. The Evolution of the Lost Chance Doctrine in the United States and Louisiana

The lost chance doctrine began to gain acceptance and evolve throughout the United States as courts built upon the principle for which

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82. Kurzban et al., *supra* note 68, at 8 n.8.

83. *See infra* notes 84–86.

84. Wurdeman, *supra* note 20, at 652 n.48; *see, e.g.*, Sharp v. Kaiser Found. Health Plan, 710 P.2d 1153, 1156 (Colo. App. 1985) ("Once a plaintiff has introduced evidence that a defendant's negligen[ce] . . . substantially increased the risk of harm . . . , and that the harm in fact has been sustained, it becomes a question of fact for the jury to determine whether that increased risk of harm was a substantial factor in producing the harm."); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467, 475 (Okla. 1987) ("[T]he jury may determine that the tortious act of malpractice was in turn a substantial factor in causing a patient's injury or death."); Hamil v. Bashline, 392 A.2d 1280, 1289 (Pa. 1978) ("[L]iability could attach if the negligence of the defendant were but a substantial factor in bringing about the death.").

85. *See, e.g.*, Delaney v. Cade, 873 P.2d 175, 214 (Kan. 1994) (holding that the plaintiff must prove that defendant was negligent, and that the negligence caused the plaintiff to suffer damages; moreover, the "damages" have to be a "substantial" loss of chance, but the court declined to set an exact standard for what constitutes a "substantial" loss); Perez v. Las Vegas Med. Ctr., 805 P.2d 589, 592 (Nev. 1991) (holding that, in order to recover, plaintiffs must prove that a doctor's actions reduced a "substantial" chance of survival).

86. Louisiana chose not to relax the causation requirement but instead redefined the injury in lost chance cases as not ultimate harm to the plaintiff, such as death or an adverse condition, but the lost chance itself. *See* Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 548 (La. 1996).

87. *See infra* Section I.C.

King's article advocated: identifying the compensable value of a chance.[88] At last, the courts' recognition of the doctrine turned into a remedy for those who previously had none.[89] As the doctrine advanced, state courts were able to shape it to suit their respective jurisdictions. As a result, the lost chance doctrine took on several forms, but the need for fairness in compensating patients and deterring physicians persisted in each of its forms.

1. Lost Chance Doctrine in the United States: from Hicks *to* Herskovitz

In 1966, the United States Court of Appeals for the Fourth Circuit first addressed the possibility of recovery for a medical lost chance in *Hicks v. United States*.[90] Harry Hicks, the administrator of Greitens's estate, sued a physician for negligently misdiagnosing a condition of the small intestine, which led to the death of Greitens.[91] Since Hicks actually succeeded in proving that the doctor caused Greitens's death, the court did not need to rely on the lost chance doctrine.[92] The Fourth Circuit, however, noted that Hicks could recover by proving that the defendant had "substantially destroyed a chance of survival."[93] The commonly quoted dicta from *Hicks* recognizing the possibility of a lost chance recovery pushed more courts to adopt the lost chance doctrine.[94]

Although many states now recognize lost chance of a better outcome as a theory of recovery, the doctrine initially took shape as a more limited

88. Darrell L. Keith, *Loss of Chance: A Modern Proportional Approach to Damages in Texas*, 44 BAYLOR L. REV. 759, 770–71 (1992); King, *supra* note 5, at 1353.

89. *See generally* Keith, *supra* note 88, at 764–69.

90. Hicks v. United States, 368 F.2d 626, 628 (4th Cir. 1966).

91. *Id.* at 629.

92. Feldman, *supra* note 41, at 145. *But see* Brennwald, *supra* note 65, at 757 (arguing that *Hicks* merely restates the holding of *Kuhn v. Banker*). Brennwald further argued that courts have misconstrued the *Hicks* holding to be the adoption of a new standard of proof for plaintiffs who can only prove a chance of survival was lost. *Id*. at 757 n.80.

93. Even though the expert testimony at trial established that the plaintiff *did* suffer the loss of a better-than-even chance of survival, the *Hicks* court went on to say as dicta: "The law does not in the existing circumstances require the plaintiff to show to a certainty that the patient would have lived had she been hospitalized and operated on promptly." *Hicks*, 368 F.2d at 632; *see also* Feldman, *supra* note 41, at 144.

94. *Hicks*, 368 F.2d at 632; Carney, *supra* note 32, at 344.

version: lost chance of survival.[95] Commentators have recognized that *Kallenberg v. Beth Israel Hospital*, a lost chance of survival case, was the first to "expressly authorize recovery under loss of chance."[96] In *Kallenberg*, defendant doctors improperly treated the patient, Belle Kallenberg, for her condition, and her family brought a wrongful death suit after she passed away.[97] A jury found that the Kallenbergs could recover because a defendant physician deprived Belle of a 20%–40% chance of survival.[98] The court upheld this verdict, recognizing that even though it was uncertain whether Belle would have recovered, the physician's improper treatment deprived her of any remaining chance.[99]

In adopting lost chance, some courts chose to simply relax causation requirements.[100] For example, the Supreme Court of Pennsylvania in *Hamil v. Bashline* adopted a "substantial factor" standard of causation in a medical malpractice case.[101] Referring to the Restatement (Second) of Torts § 323(a), the *Hamil* court reasoned that it did not require strict causation evidence to allow the case to go to a jury.[102] Rather, for the jury to hear the case, the plaintiff need only present evidence that the defendant's negligent act or omission increased the risk of harm to the plaintiff.[103] So long as the jury found that the negligent act was a "substantial factor" in the harm, a plaintiff could establish causation.[104]

Through lost chance of survival cases, courts continued to shape the lost chance doctrine. The landmark Washington Supreme Court case

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95. *See, e.g.*, Kallenberg v. Beth Israel Hospital, 357 N.Y.S.2d 508 (1974).

96. *Id. See also* Margaret T. Mangan, *The Loss of Chance Doctrine: A Small Price to Pay for Human Life*, 42 S.D. L. REV. 279, 287 (1996); Keith, *supra* note 88, at 765 n.32.

97. Mangan, *supra* note 96, at 288.

98. *Id.*

99. *Id.*

100. *See, e.g.*, Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978); *see also* discussion *supra* note 84.

101. Carney, *supra* note 32, at 344.

102. RESTATEMENT (SECOND) OF TORTS § 323 (AM. L. INST.1965):

> 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.

103. Herskovitz v. Grp. Health Coop. of Puget Sound, 664 P.2d 474, 477 (Wash. 1983).

104. Carney, *supra* note 32, at 344.

Herskovitz v. Group Health Cooperative of Puget Sound, for example, advanced the lost chance doctrine even further than *Hamil* by expressly holding that a patient's family could recover for just a 14% reduction in chance of survival.[105] In *Herskovitz*, the defendant physician failed to timely diagnose a patient with lung cancer.[106] The court found that due to the defendant's negligence, the patient lost the compensable interest of a chance to recover.[107] The patient's family, however, could not receive full damages, but only those caused directly by the patient's premature death.[108]

In his concurring opinion in *Herskovitz*, Justice Pearson argued that the plaintiff's compensable injury was not death, but rather the chance of survival lost.[109] Justice Pearson's opinion helped advance the notion that rather than relaxing the standard of causation, courts should simply reconceptualize the injury for which the plaintiff recovers.[110] Redefining the injury as a lost chance allowed courts to maintain the traditional but-for standard.[111] Rather than requiring plaintiffs to prove that the physician's negligence was a substantial factor in causing their harm, courts could simply require each plaintiff to prove that "but for" the physician's negligence, the plaintiff would not have lost a chance of survival.[112] Four years after Washington decided *Herskovitz*, the lost chance trend reached Louisiana.[113]

2. Development of the Lost Chance Doctrine in Louisiana: From Hastings *to* Smith

The Louisiana Supreme Court did not adopt the doctrine of lost chance until 1987.[114] Similar to other jurisdictions, Louisiana courts originally limited the doctrine to the lost chance of survival context.[115] In *Hastings*

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105. *Herskovitz*, 664 P.2d at 476.
106. *Id.* at 474.
107. *Id.*
108. *Id.* The *Herkovitz* court noted that the damages that directly related to a patient's premature death included medical expenses and lost earnings.
109. *Id.* at 487.
110. Carney, *supra* note 32, at 345.
111. *Id.*
112. *Id.*
113. *See* Hastings v. Baton Rouge Gen. Hosp., 498 So. 2d 713, 715 (La. 1987); *Herskovitz*, 664 P.2d at 477.
114. *Hastings*, 498 So. 2d at 715.
115. *See Herskovitz*, 664 P.2d at 477; Mohr v. Grantham, 262 P.3d 490 (Wash. 2011).

v. Baton Rouge General Hospital, a lost chance of survival case, the defendant emergency room doctor treated the decedent at a private hospital for stab wounds.[116] The defendant transferred the patient to a public hospital for an emergency surgery because the patient did not have insurance to cover his treatment at the private hospital.[117] The patient died from cardiac arrest after doctors disconnected him from a chest pump while loading him into the ambulance.[118]

Citing *Hicks*, the Louisiana Supreme Court held that the plaintiffs did not need to show that the decedent would have survived absent the defendant's breach.[119] The *Hastings* Court found that when a physician destroys any "substantial possibility of survival," the physician is answerable because the negligence precludes any possibility of knowing what would have happened otherwise.[120] Although the *Hastings* Court was the first to allow a jury to hear evidence on a lost chance of survival theory of recovery, the Court did not reach the issue of valuing lost chance damages.[121] Lacking a clear rule, Louisiana trial and appellate courts were split on the issue until 1996, when the Louisiana Supreme Court settled the matter with *Smith v. State Department of Health and Hospitals.*[122]

The Louisiana Supreme Court granted certiorari in *Smith* to address the nature of a lost chance of survival claim and established a rule for valuing damages.[123] In the facts of *Smith*, hospital staff negligently failed to inform the plaintiff of an x-ray that revealed a mass in his trachea.[124] Nearly 15 months later, the plaintiff returned to the hospital complaining of chest pain, fever, and chills.[125] A chest x-ray revealed that the mass had

116. *Hastings*, 498 So. 2d at 715.
117. *Id.*
118. *Id.* at 716.
119. *Id.* at 720.
120. *Id.*
121. The *Hastings* Court only ruled on the issue of whether or not the trial court erred in granting a directed verdict for the defendants. *Id.* at 721–23; Carney, *supra* note 32, at 347.
122. Carney, *supra* note 32, at 352 ("Before *Rachel Smith*, the loss of a chance cause of action was anything but clear. Not only did the courts have no clear indication of how to value these damages, but they were also left without an articulate test for finding liability. However, with the Louisiana Supreme Court's decision in *Rachel Smith*, the uncertainty was finally resolved.").
123. *See generally* Smith v. State Dep't of Health & Hosps., 676 So. 2d 543 (La. 1996). For an in-depth summary of the *Smith* case, see Carney, *supra* note 32, at 339.
124. *Smith*, 676 So. 2d at 545.
125. *Id.*

doubled in size.[126] Doctors then diagnosed the plaintiff with lung cancer at an "extensive" stage, and the plaintiff underwent chemotherapy but ultimately died four months later.[127]

The Louisiana Supreme Court found that the patient in *Smith* lost a chance of survival.[128] On the issue of damages, the appellate court found full wrongful death damages for the loss and simply reduced them by the percentage of chance lost.[129] The Supreme Court explicitly rejected this approach.[130] Rather, the *Smith* Court held that the lost chance itself is a "distinct compensable injury," and a jury is to subjectively determine the value of the chance lost as a "lump sum" award based on all of the evidence in the record, as is done for any other general damages.[131] The Court reasoned that when a jury must find a hypothetical amount of general damages for the wrongful death of a patient, reduced by a finding of percentage chance lost, the calculation involves too many speculative numbers.[132] Since the general damages for a lost chance could not be calculated with mathematical certainty, simply allowing the jury to assign a lump sum was in harmony with the subjective nature of the loss.[133] Other states' courts have applied this same approach of redefining the injury in other contexts besides lost chance of survival.[134] The lost chance of a "better outcome" or "better recovery" claim gained acceptance over time, and the doctrine's progression raised new issues of damages and valuation.[135]

3. Extension of the Lost Chance Doctrine to "Lost Chance of a Better Outcome"

Previously, other states recognized lost chance of survival but still held the view that a plaintiff had no cause of action for a loss of chance

126. *Id.*
127. *Id.*
128. *Id.* at 548.
129. *Id.*
130. *Id.*
131. *Id.*
132. *See id.* ("When these total hypothetical damages are reduced by a numerical factor determined from evidence of percentage rates of survival for certain periods after discovery of the disease at various stages of the disease, the uncertainty progresses geometrically.").
133. *Id.* at 550.
134. *See, e.g.*, Mohr v. Grantham, 262 P.3d 490, 495 (Wash. 2011).
135. *See* discussion *infra* Part II.

when the ultimate harm was not death.[136] Over time, states adopted a more progressive view—that a plaintiff may recover even when the plaintiff survives the malpractice.[137] This "lost chance of a better outcome" theory resembles the lost chance of survival claim, but the ultimate harm[138] is different.[139] Rather than death, the ultimate harm suffered in a lost chance of a better outcome case is the advancement, hastening, or worsening of the plaintiff's pre-existing condition.[140] As a result, the patient survives her pre-existing injury or illness, but she cannot meet the "extent or quality of recovery" that she otherwise would have without the doctor's breach.[141]

Although a few scholars have questioned the basic wisdom of the lost chance doctrine, disagreement over the proper way to value lost chance damages has prompted a much larger debate in which Louisiana courts have generally settled on the *Smith* lump sum method.[142] The doctrine's progression from "lost chance of survival" to "lost chance of a better outcome" also raises the question of whether the two injuries should be valued in the same manner.[143] Further, a recent Louisiana lost chance case, *Burchfield v. Wright*, raised the issue of whether special damages, such as medical expenses and lost wages, should be available to a lost chance plaintiff.[144] As Louisiana struggles to craft a remedy that suits the needs of

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136. *See, e.g.,* Weymers v. Khera, 563 N.W.2d 647, 655 (Mich. 1997); Keith W. Lapeze, *Recovery for Increased Risk of Disease in Louisiana*, 58 LA. L. REV. 249, 278 (1997).

137. *See, e.g.*, Smith v. Providence Health & Servs., 393 P.3d 1106, 1120 (Or. 2017); *Mohr*, 262 P.3d at 495; Graham v. Willis-Knighton Med. Ctr., 699 So. 2d 365 (La. 1997); Delaney v. Cade, 873 P.2d 175, 202 (Kan. 1994); Aasheim v. Humberger, 695 P.2d 824, 827 (Mont. 1985).

138. To clarify, "ultimate harm" here refers to the final condition resulting from the combination of the patient's pre-existing condition and the doctor's negligence, not the distinct tort injury for which the lost chance plaintiff may recover. *See* Wurdeman, *supra* note 20, at 620; Todd S. Aagaard, *Identifying and Valuing the Injury in Lost Chance Cases*, 96 MICH. L. REV. 1335, 1342 (1998).

139. *See generally* King, *supra* note 5, at 1353.

140. *Id.*

141. *Mohr*, 262 P.3d at 495; *Delaney*, 873 P.2d at 202.

142. "Proponents of the doctrine have proffered arguments for why the law should compensate plaintiffs in lost chance cases without addressing what the compensation should be." Aagaard, *supra* note 138, at 1338. *Compare* Weigand, *supra* note 5, at 21, *and* Perrochet, *supra* note 48, at 615, *with* Truckor, *supra* note 72, at 350.

143. *Compare* Burchfield v. Wright, 275 So. 3d 855 (La. 2018) *with* Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 549 (La. 1996).

144. *See generally Burchfield*, 275 So. 3d 855. "The acceptance of the loss of a chance theory raises unique issues in the area of damage recovery." Robert A.

both the lost chance of survival plaintiff and the lost chance of better outcome plaintiff, Louisiana's medical malpractice law demonstrates the issues present in *Burchfield*.[145]

D. Fashioning Lost Chance Remedies: Louisiana's Take on Medical Malpractice Damages

The true quality and extent of a plaintiff's recovery will hinge not only on the amount but also on the nature of damages a plaintiff receives in a lost chance claim.[146] In a negligence action, a plaintiff can potentially recover special damages, general damages, or a combination of both.[147] Special damages, otherwise known as economic damages, have a readily determinable value.[148] A jury can typically determine an award of special damages with relative certainty.[149] In most medical malpractice actions, special damages may include lost wages, past medical expenses, and future medical expenses.[150]

The other kind of recoverable damages in a medical malpractice action are general damages, or noneconomic damages, which a jury usually cannot calculate with mathematical certainty.[151] The jury will thus determine general damages—pain and suffering, mental anguish, and similar harms—because of the damages' subjective nature.[152] Further, awarding general damages requires fact-specific inquiries, and the jury has

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Reisig, Jr., *The Loss of A Chance Theory in Medical Malpractice Cases: An Overview*, 13 AM. J. TRIAL ADVOC. 1163, 1182 (1990).

145. *Compare Burchfield*, 275 So. 3d 855, *with Smith*, 676 So. 2d 543.

146. *See* King, *supra* note 34, at 164–67 (2004) (arguing that damages related to loss of earning capacity and medical expenses will more adequately make a tort victim whole, as opposed to classic pain and suffering damages).

147. Urquhart v. Spencer, 224 So. 3d 1022, 1032 (La. Ct. App. 4th Cir. 2017).

148. Antley v. Rodgers, 251 So. 3d 607, 624 (La. Ct. App. 2d Cir. 2018).

149. *Id.*

150. Oliver v. Magnolia Clinic, 51 So. 3d 874, 883 (La. Ct. App. 3d Cir. 2010).

151. *Urquhart*, 224 So. 3d at 1032; Boutte v. Hargrove, 290 So. 2d 319, 322 (La. 1974).

152. *Urquhart*, 224 So. 3d at 1032; *see also* Doe v. McNulty, 630 So. 2d 825, 827–28 (La. Ct. App. 4th Cir. 1993). There is "no obvious way to translate an intangible, nonmonetary injury into a monetary award. Moreover, there is no objective test that measures the severity of the victim's pain and suffering injury." Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 776 (1995). Thus, the determination of general damages is best left to the discretion of the jury.

the benefit of seeing the witnesses and evidence at the trial court level.[153] As a result, appellate courts owe great deference to the fact-finder's award of general damages and may only overturn an excessively high or abusively low award upon a finding of abuse of discretion.[154] Thus, courts tend to vest great responsibility in the jury to account for the subjective losses stemming from medical malpractice.[155]

Specific to a lost chance of survival claim, the recoverable damages include funeral expenses, loss of consortium, past medical expenses, emotional distress, pain and suffering, and future lost wages.[156] Other than future lost wages, past medicals, and funeral expenses, these damages are all general, subjective damages.[157] Similar to a lost chance of survival claim, the damages potentially recoverable in a lost chance of a better outcome claim include loss of consortium, emotional distress, pain and suffering, permanent physical injury, disability,[158] past medicals,[159] future lost wages, and, in the appropriate case, a decreased life expectancy.[160] The special damage of future medical bills, however, is particularly prevalent in a lost chance of a better outcome claim because, unlike a lost chance of survival patient, the patient who loses a chance of a better outcome does not die but rather lives on to incur future medical bills.[161]

Since general damages are subjective in nature and difficult to calculate, the jury uses its discretion to award these damages based on the particular facts and circumstances of each case.[162] State legislatures have worried that juries without sufficient guidance may award an inappropriately high amount of damages.[163] Further exacerbating the

153. *Boutte*, 290 So. 2d at 321–22. In upholding the jury's discretion, the Louisiana Supreme Court reasoned: "Adequacy or inadequacy of an award should be determined by the facts and circumstances peculiar to the case under consideration. Additionally, the jury or trial judge has the advantage of seeing the witnesses and hearing and evaluating the testimony given at trial." *Id.*

154. *Id.*

155. *Urquhart*, 224 So. 3d at 1032.

156. Holliday, *supra* note 70, § 27 (2016).

157. Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 549 (La. 1996).

158. *See, e.g.*, Pesses v. Angelica, 165 So. 3d 131 (La. Ct. App. 5th Cir. 2014).

159. *See, e.g.*, Greer v. Lammico, 779 So. 2d 894 (La. Ct. App. 2d Cir. 2000).

160. Burchfield v. Wright, 275 So. 3d 855, 866 (La. 2018); Holliday, *supra* note 70, § 27.

161. *See* Mohr v. Grantham, 262 P.3d 490 (Wash. 2011).

162. Allyson Fish, *Noneconomic Damage Caps in Medical Malpractice Litigation: Finding a Solution That Satisfies All Affected Parties*, 17 NEXUS: CHAP. J.L. & POL'Y 135, 137 (2012).

163. Starting with California in 1975, a number of states addressed this concern with noneconomic damage caps in medical malpractice cases. *Id.*

problem, these excessively high awards are difficult to overturn because an appellate court affords great deference to the jury's finding.[164] Inflated jury verdicts also expose doctors to greater potential liability, prompting concerns within the insurance industry.[165]

The main concern with excessive jury awards was that liability insurers would increase their insurance rates to match an increase in medical malpractice judgment amounts.[166] Members of the Louisiana Legislature believed that excessively high jury awards and rising medical malpractice insurance were culprits of the insurance crisis in the 1970s.[167] In response to the purported insurance crisis,[168] the Louisiana Legislature adopted the Medical Malpractice Act (MMA) in 1975, which fixed a statutory limit of $500,000 on the total amount of damages recoverable for "injuries to or death of a patient."[169] With the MMA, the legislature intended to stabilize the health care industry and ensure affordable care to the public.[170] Louisiana's cap under the MMA has endured, with the Louisiana Supreme Court reaffirming the constitutionality of the cap in 2012.[171] In *Oliver v. Magnolia Clinic,* the Louisiana Supreme Court explained that the right to recover damages in a malpractice claim is not a constitutional right, and even though the cap discriminates based on

164. Carney, *supra* note 32, at 361; *see also* Claudet v. Weyrich, 662 So. 2d 131, 134 (La Ct. App. 4th Cir. 1995) (quoting Youn v. Maritime Overseas Corp., 623 So. 2d 1257, 1261 (La. 1993)) ("The standard for appellate review of general damages awards is difficult to express . . . . [T]he requirement of an articulated basis for disturbing such awards gives little guidance as to what articulation suffices to justify modification of a generous or stingy award.").

165. Sarah M. Nickel, *The Medical Malpractice Cure: Stitching Together the* Coleman *Factors*, 78 LA. L. REV. 311, 315 (2017).

166. Beverly P. Spearman, *Tort Law—The Supreme Court Provides a Remedy for Injured Plaintiffs Under the Theory of Loss of Chance—*Alberts v. Schultz, 30 N.M. L. REV. 387, 400 (2000).

167. *See* Nickel, *supra* note 165, at 315.

168. The "insurance crisis" refers to a time in the 1970s when malpractice insurance premiums were rising "drastically," causing insurers to withdraw from the market. In Louisiana, four malpractice insurers withdrew from the market, leaving only two insurers to provide coverage for medical liability. Nickel, *supra* note 165, at 315; Emily Townsend Black Grey, *The Medical Malpractice Damages Cap: What Is Included?*, 60 LA. L. REV. 547, 547 (2000).

169. LA. REV. STAT. § 40:1231.2(B)(1) (2015).

170. *See* Luther v. IOM Co., 130 So. 3d 817, 922 (La. 2013); Hutchinson v. Patel, 637 So. 2d 415 (La. 1994).

171. *See* Oliver v. Magnolia Clinic, 85 So. 3d 39 (La. 2012).

physical condition,[172] it substantially furthers a legitimate state interest: lowering malpractice insurance costs for practitioners, which thereby lowers medical costs and ensures accessible, affordable health care for the public.[173] Thus, the Court viewed the cap as a reasonable compromise between private interests and public interests.[174] Even though the cap discriminated against more gravely injured plaintiffs whose damages exceeded $500,000, the Court found that those plaintiffs would still benefit from an "alternative remedy"—a higher likelihood of available funds to compensate for their losses.[175]

The $500,000 cap does not distinguish between economic and noneconomic damages; rather, it caps the "total amount recoverable," subject to some exceptions.[176] The Louisiana Legislature recognized that the cap adversely affected plaintiffs who were severely injured and incurred higher amounts of medical expenses.[177] Instead of simply raising the cap as other states had done, Louisiana chose to utilize an administrative medical relief program—the Louisiana Patient's Compensation Fund—to pay for severely injured plaintiffs' medical expenses.[178] Toward this end, in 1984, the legislature amended the MMA's cap on medical malpractice damages to allow plaintiffs to recover for

172. *Id.* at 44–45 ("[T]he medical malpractice cap creates two classes: those who are fully compensated by an award equal to or less than $500,000.00 and those whose severity of injuries require an award in excess of $500,000.00 and who, therefore, receive less than full compensation. The separate statutory classification discriminates on the basis of physical condition.").

173. *Id.* at 45; Natalie J. Dekaris & Michael C. Mims, *Recent Developments: Louisiana Medical Malpractice Law*, 74 LA. L. REV. 873 (2014).

174. *See Oliver*, 85 So. 3d at 45. There are three benefits to medical malpractice plaintiffs that justify the cap: "(1) a greater likelihood that the offending physician or other health care provider has malpractice insurance; (2) a greater assurance of collection from a solvent fund; and (3) payment of all medical care and related benefits." Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517, 521 (La. 1992).

175. *See Oliver*, 85 So. 3d at 45.

176. Dekaris & Mims, *supr*a note 173, at 883.

177. Kelty v. Brumfield, 633 So. 2d 1210, 1217 (La. 1994).

178. *See id.* at 1217–18.

future medical care and related benefits[179] that exceed the $500,000 cap.[180] Louisiana jurisprudence has interpreted this provision to include "all past, present, and future medical and related care services" that a physician's malpractice necessitated.[181] By amending the MMA, the legislature intended to remedy the cap's "harsh tendency to prune recovery inversely to the injury" by allowing recovery for necessary medical expenses in excess of $500,000.[182] Moreover, the Louisiana Supreme Court has found that where the MMA addresses the cap's adverse effect upon severely injured plaintiffs with "mitigating benefits or advantages," those benefits must be liberally construed.[183] The severely injured plaintiff falls within the exact class of individuals that the legislature intended to protect with the 1984 amendment, yet Louisiana's approach to lost chance claims still does not provide adequate medical compensation for this class.[184] By requiring an award of all damages in a lump sum—which is subject to the cap—Louisiana's approach denies plaintiffs of needed medical bills in lost chance cases, which is in direct contradiction with the MMA's intent.[185]

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179. *Id.* at 1217. The statute defines "future medical care and related benefits" as "[a]ll reasonable medical, surgical, hospitalization, physical rehabilitation, and custodial services and includes drugs, prosthetic devices, and other similar materials reasonably necessary in the provision of such services." LA. REV. STAT. § 40:1231.3(B)(1)(a) (2015).

180. LA. REV. STAT. § 40:1231.2; Oliver v. Magnolia Clinic, 85 So. 3d 39, 47 (La. 2012) (citing approvingly to *Kelty*, 633 So. 2d at 1217).

181. "The objects of the provisions are fairly clear and simple. First, the added MMA provision comprehends all past, present, and future medical and related care services necessitated by a qualified health care provider's malpractice—not just what is usually thought of as 'future' medical needs." *Kelty*, 633 So. 2d at 1217; *see also* Dekaris & Mims, *supra* note 173, at 887; Grey, *supra* note 168, at 549.

182. *Kelty*, 633 So. 2d at 1216–17; *see also* Sarah R. Levin, *The Medical Malpractice System and the Payment of Future Medical Damages: On Life Support Elsewhere, Resuscitated in Louisiana*, 68 LA. L. REV. 955, 969 (2008) (advocating for other states to adopt Louisiana's system of paying out medical expenses to tort victims).

183. *Kelty*, 633 So. 2d at 1216. The *Kelty* Court hinted that a failure to liberally construe these "mitigating benefits"—future medical expenses—could result in an equal protection violation. *Id*. If the cap applied evenly to both classes but the MMA provided no supplemental payments to severely injured plaintiffs, there would be a "disparity of treatment" between the two classifications of claimants: severely injured plaintiffs whose damages exceed the cap and those whose damages do not exceed the cap. *Id*. (citing Williams v. Kushner, 549 So. 2d 294 (La. 1989)).

184. *See generally* Burchfield v. Wright, 275 So. 3d 855 (La. 2018).

185. *Kelty*, 633 So. 2d at 1216–17.

As the lost chance of a better outcome theory gained acceptance in Louisiana, a noticeable tension arose between the MMA's cap on damages and the cap's exception for medical expenses.[186]

II. THE DEVELOPMENT OF LOST CHANCE OF A BETTER OUTCOME IN LOUISIANA

Beginning with *Graham v. Willis-Knighton* in 1997, the Louisiana Supreme Court extended its lost chance of survival principles to lost chance of a better outcome.[187] *Graham* recognized the lost chance of a better outcome as a cognizable injury but left the lower courts without sufficient guidance in fashioning damages.[188] Louisiana courts faced with the matter continually deferred to the reasoning in *Smith*, applying the "lump sum" method to both kinds of lost chance claims.[189] The question, however, remained: what exactly is encompassed in the lump sum? *Burchfield v. Wright*, the Louisiana Supreme Court's most recent lost chance of a better outcome case, provided an answer as to the nature of the remedy and how it interacts with the medical malpractice cap.[190]

A. Graham v. Willis-Knighton *and Its Evasion of the Damages Issue*

In *Graham*, the first Louisiana Supreme Court case to recognize the lost chance of a better outcome theory, the patient, Melvin Graham, arrived at the Willis-Knighton Medical Center after he was shot in the abdomen.[191] The treating physician stopped Graham's internal bleeding but failed to timely summon a surgeon to perform a revascularization of the patient's leg.[192] Nearly four hours after the intestinal surgery, doctors transferred Graham to another hospital for the revascularization, but his leg ultimately had to be amputated.[193]

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186. *See* discussion *infra* Section II.B.2.

187. Graham v. Willis-Knighton Med. Ctr., 699 So. 2d 365 (La. 1997).

188. "The cited cases on the 'loss of chance' cause of action provide little guidance to this Court in fashioning a damage award in the absence of more specific evidence." Pesses v. Angelica, 165 So. 3d 131, 143 (La. Ct. App. 5th Cir. 2014).

189. *See, e.g.*, *id.* at 131; Bianchi v. Kufoy, 53 So. 3d 530 (La. Ct. App. 3d Cir. 2010); Hargroder v. Unkel, 888 So. 2d 953 (La. Ct. App. 2d Cir. 2004).

190. Burchfield v. Wright, 275 So. 3d 855, 866–67 (La. 2018).

191. *Graham*, 699 So. 2d at 366.

192. Interestingly, it appears that the treating physician in *Graham*, Dr. Forrest Wright, was the same physician that treated the *Burchfield* plaintiff over 20 years later. *Id.* at 369.

193. *Id.* at 366.

The Louisiana Supreme Court found that the delay diminished the window of opportunity for a successful revascularization[194] of the patient's leg, therefore requiring amputation.[195] Citing *Smith*, the Court noted that the loss of a less-than-even[196] chance of survival—or chance of saving a leg—is a distinct, compensable injury, and the fact-finder should make a subjective determination of the value of that loss.[197] Reasoning that: (1) the trial court's original award for $470,000 was for the full value of a lost leg rather than the value of the lost *chance* of saving the leg; and (2) the plaintiff lost a less-than-even chance of between 20% and 33%, the Court reduced the damages to $140,000.[198]

Although *Graham* recognized a cause of action for a "better chance of recovery" and used the *Smith* lump sum approach to value the damages, the *Graham* Court's significant reduction in the award left unsettled the issue of exactly what a plaintiff may recover in a case involving the lost chance of a better outcome.[199] Following *Graham*, several Louisiana courts of appeal addressed the issue of valuation of a lost chance of a better outcome, but the approach remained unclear.[200]

B. The Louisiana Supreme Court's Current Approach

In June 2018, the Louisiana Supreme Court heard *Burchfield v. Wright,* wherein the Court dealt with damages for lost chance of a better outcome, which previously lacked a clear valuation method.[201] Ultimately, the Court held that a lost chance of a better outcome plaintiff may not

194. A revascularization procedure restores the blood circulation to an organ or certain part of the body. *See Revascularization*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/revascularization [https://perma.cc/2X6P-Y5UE] (last visited Sep. 18, 2018).

195. *Graham*, 699 So. 2d at 373.

196. The language "less-than-even," as the *Smith* and *Graham* Courts used it, means a less than 50% chance. *Id. See also* Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 548 (La. 1996).

197. *Graham*, 699 So. 2d at 373.

198. *Id.* Notably, the *Graham* decision focused on the standard of proof for causation in the lost chance of a better outcome claim. It found that the defendant doctor's admission of liability alone was not sufficient proof of causation of damages.

199. *Id.*

200. *See* Pesses v. Angelica, 165 So. 3d 131 (La. Ct. App. 5th Cir. 2014); Bianchi v. Kufoy, 53 So. 3d 530 (La. Ct. App. 3d Cir. 2010); Hargroder v. Unkel, 888 So. 2d 953 (La. Ct. App. 2d Cir. 2004).

201. Burchfield v. Wright, 275 So. 3d 855, 860 (La. 2018).

recover medical bills independent from a jury's lump sum award or recover medical bills in excess of the medical malpractice cap.[202]

1. Cutting into Burchfield v. Wright

On August 14, 2013, Roger Burchfield arrived at Willis-Knighton Medical Center in preparation for an elective gallbladder surgery.[203] His surgeon, Dr. Wright, ordered pre-operative tests, including a chest x-ray and an electrocardiogram.[204] The x-ray would have revealed to Dr. Wright that Burchfield had congestive heart failure,[205] and the EKG would have revealed possible heart blockages, an intraventricular block, and two possible prior heart attacks.[206] Dr. Wright, however, never looked at the test results and did not know that Burchfield needed a pre-operative cardiac consultation.[207] Burchfield similarly did not know of his heart ailments prior to the surgery.[208] Without any sense of what grave consequences would follow, the doctors put Burchfield under general anesthesia, and Dr. Wright performed the gallbladder surgery.[209]

Initially, the surgery was successful. With no apparent complications, the hospital discharged Burchfield that same day.[210] Some 30 hours later, however, Burchfield began to experience edema in his lower extremities.[211] Upon going to the emergency room, doctors determined that he was in critical condition.[212] He had suffered a heart attack, respiratory failure, worsening of his pulmonary edema, congestive heart

202. *Id.* at 868.
203. *Id.* at 858.
204. *Id.* An electrocardiogram, or an EKG, is a procedure in which a doctor measures the electrical activity of the patient's heart by attaching electrodes to the body. Through this procedure, the doctor is able to check heart rhythm, diagnose a heart attack, and diagnose other heart abnormalities. *Heart Disease and Electrocardiograms*, WEB MD, https://www.webmd.com/heart-disease/electrocardiogram-ekgs#1 [https://perma.cc/P8MU-6E7J] (last visited Dec. 24, 2019).
205. *Burchfield*, 275 So. 3d at 858.
206. *Id.*
207. *Id.*
208. *Id*.
209. *Id*.
210. *Id.*
211. *Id.* Edema is the medical term for swelling, which is often a symptom of congestive heart failure. *Edema*, MAYOCLINIC.ORG, https://www.mayoclinic.org/diseases-conditions/edema/symptoms-causes/syc-20366493 [https://perma.cc/9M2R-G5J9] (last visited Sep. 19, 2018).
212. *Burchfield*, 275 So. 3d at 858.

failure, and a buildup of fluid in his lungs.[213] Doctors placed Burchfield in a medically induced coma; an intra-aortic balloon pump[214] and ventilator kept him alive.[215] Burchfield was not a candidate for heart bypass surgery, so Burchfield underwent a heart transplant on September 3, 2013.[216]

Although the transplant was successful, Burchfield will continue to undergo treatment for the heart transplant for the rest of his life, and he will pay about $1,718.78 per month for medication.[217] He was also unable to return to his job due to its strenuous nature, and he lost approximately $493,020 in future wages.[218] The life expectancy for heart transplant patients is 13 years; Burchfield was 58 years old at the time of the malpractice.[219] Burchfield and his wife brought suit; the defendant physician settled for $100,000, and the trial proceeded against the Louisiana Patient's Compensation Fund.[220]

2. The Burchfield *Opinion: Lost Chance Plaintiffs May Not Recover Medical Expenses as Special Damages*

At trial, the jury found that the plaintiffs failed to prove that the defendant's breach caused the heart attack and subsequent heart transplant, but the breach did result in the lost chance of a better outcome, with that chance being below 50%.[221] The verdict form asked the jury seven questions, but the judge only gave the jury the option to award specific damages if it found causation.[222] The verdict form asked the jury to award

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213. *Id.*

214. An intra-aortic balloon pump is a therapeutic device that helps one's heart pump blood. The balloon intermittently deflates and inflates according to one's heartbeat, allowing blood to either stay in the heart or flow out with each contraction. *Intra-Aortic Balloon Pump Therapy*, JOHNS HOPKINS MEDICINE, https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/intra-aortic-balloon-pump-therapy [https://perma.cc/G3UY-Q3UX] (last visited Oct. 21, 2019).

215. *Burchfield*, 275 So. 3d at 858.

216. *Id.* at 859.

217. *Id.* at 859, 868.

218. *Id.*

219. Burchfield v. Wright, 224 So. 3d 1170, 1177 (La. Ct. App. 2d Cir. 2017).

220. *Burchfield*, 275 So. 3d at 858. When a plaintiff has damages in excess of $100,000 in a medical malpractice action, the plaintiff may proceed against the PCF for the remaining damages. *See* LA. REV. STAT. § 40:1231.2(D)(5) (2015).

221. *Burchfield*, 275 So. 3d at 859.

222. The jury verdict form had seven questions. question number one asked the jury whether Dr. Wright's breach was a "substantial factor" of the injuries of the plaintiff. If the jury answered "Yes," they were directed to question numbers two through five, which concerned damages for "past and future pain and

one lump sum if they found that the plaintiffs had suffered a lost chance of a better outcome.[223] The jury awarded $680,000 for the Burchfields' lost chance, but the trial court reduced the award to $400,000 pursuant to the MMA's limitation on recovery and the plaintiff's previous $100,000 settlement with the doctor.[224]

The Louisiana Second Circuit Court of Appeal affirmed the trial court's finding that the plaintiff had suffered a lost chance of a better outcome, but it found that the trial court incorrectly subjected part of the damages award to the MMA's cap.[225] The court of appeal reasoned that the trial court erred by not awarding special damages for lost wages and future medical care and that the trial court did not properly instruct the jury on how to value the claim on the verdict form.[226] Relying on *Bianchi v. Kufoy*—in which the Louisiana Third Circuit Court of Appeal awarded medical expenses and lost wages as a separate, uncapped damage—the Second Circuit in *Burchfield* similarly awarded special damages: $493,020 in lost wages, $692,850 in past medical expenses, and future medical care.[227] The Second Circuit reduced neither the lost wages nor the medical expenses pursuant to the MMA's cap on damages.[228]

The Louisiana Supreme Court subsequently reviewed *Burchfield,* determining that the appellate court erroneously awarded damages for past medical expenses, future medical care, and lost wages.[229] The Court further found that any award compensating the plaintiff for special damages should be reduced under the MMA cap.[230] It held that the lump

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suffering, past and future disability, past medical expenses, past lost wages, future lost wages, future medical care, and loss of consortium" for the plaintiff's wife. Because the jury answered "No" to question number one, the Verdict Form directed them to proceed to question number six, which asked whether the plaintiff suffered a lost chance of a better outcome. The jury answered "Yes" to question number six. Question number seven then asked them to provide a damage amount for the lost chance of a better outcome. *Id*.

223. *Id*.

224. *Id*. If a physician settles with a plaintiff, the plaintiff may proceed against the PCF for the remaining damages. In that case, the court "shall reduce any judgment to the plaintiff in the amount of malpractice liability insurance in force." LA. REV. STAT. § 40:1231.2(D)(5). Thus, in *Burchfield*, the trial court properly subtracted the $100,000 settlement from the plaintiff's $500,000 judgment. *Burchfield*, 275 So. 3d at 859.

225. *Burchfield*, 275 So. 3d at 860.

226. *Id.*

227. *Id.*; Bianchi v. Kufoy, 53 So. 3d 530 (La. Ct. App. 3d Cir. 2010).

228. *Burchfield*, 275 So. 3d at 860.

229. *Id.* at 866–68.

230. *Id.* at 866.

sum method of valuation from *Smith* applied to lost chance of a better outcome.[231] The Court stated that the jury must consider all of the evidence in awarding damages, including the expert medical testimony estimating chances of survival, and assign a number to the loss.[232] Finally, the Court opined that a jury may still look at evidence of special damages in making its award, but any finding of special damages will be included in the lump sum and will be subject to the $500,000 cap.[233]

As an effect of the Court's holding, the plaintiff was not able to recover any medical expenses pursuant to the MMA's exception of "future medical care and related benefits."[234] Any medical expenses the jury awarded were encompassed within the lump sum and were not separated as an itemized damage.[235] Accordingly, the Court reinstated the trial court's award of $400,000 pursuant to the defendant physician's settlement and the MMA cap.[236] Since the *Burchfield* decision simply deferred to *Smith* without accounting for the plaintiff's need for medical compensation, the decision fell short of a number of principles that should guide courts in developing new areas of tort law.

III. ROLE OF TORT LAW FUNDAMENTALS IN DEVELOPING A LOST CHANCE REMEDY

One commentator reflected that tort law is "a battleground for social theory and policy," recognizing that tort law is an expression of the social will—more so than any other area of the law.[237] As such, tort law in the states is constantly in flux as the fundamental objectives of tort law are reconciled with society's evolving sense of justice.[238] The public

231. *Id.*

232. *Id.* at 867; Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 549 (La. 1996).

233. *Burchfield*, 275 So. 3d at 868.

234. LA. REV. STAT. § 40:1231.2(B)(1) (2015); *Burchfield*, 275 So. 3d at 866–68.

235. *Burchfield*, 275 So. 3d at 868. The Louisiana Supreme Court may have simply deferred to the trial court's discretion because the verdict form at the trial court level had only allowed the jury to award one lump sum for lost chance. *Id.*

236. *Id.* at 868.

237. Tory A. Weigand, *Lost Chances, Felt Necessities, and the Tale of Two Cities*, 43 SUFFOLK U. L. REV. 327, 329 (2010) (quoting W. Paige Keeton et al., PROSSER AND KEETON ON TORTS § 3 at 15 (5th ed. 1984)).

238. "Accordingly, where tort law is no longer compatible with the realities or attitudes of modern society or in keeping with the advances of science or technology, adoption of a new rule or change in existing precedent has been found to be warranted if otherwise consistent with tort principles." *Id.* at 331–32.

perception of justice is so important that courts have willingly bent causation rules with the lost chance doctrine in order to satisfy it.[239]

Any progress with the lost chance of a better outcome doctrine must similarly keep the fundamental purpose of tort law in mind.[240] The lost chance doctrine's expansion ultimately resulted from society's desire to compensate plaintiffs in unique situations, even when they have not met the traditional causation requirements.[241] Judgments against physicians in lost chance of a better outcome cases may provide a deterrence function;[242] however, the MMA insulates physicians from liability, limiting any deterrence functions that damage awards may have.[243] Based on the nature of the lost chance claim and the MMA's strict regulation of medical malpractice awards, damages for lost chance of a better outcome must primarily serve to make the plaintiff whole rather than to deter the physician.[244]

A. Deterrence of Negligent Treatment

A fundamental objective of tort law, particularly in professional liability claims, is deterrence.[245] As a result of increased potential for liability, physicians may become more aware of liability risks and adjust their practices accordingly.[246] On the other hand, increasing liability exposure of practitioners can put a strain on the health care system and, in turn, increase medical costs.[247] Commentators have debated whether the threat of tort litigation truly is a deterrent on potential tortfeasors, such as physicians.[248] Notwithstanding issues in deterrence, other concerns may arise when expanding a physician's liability exposure.[249] If physicians are vulnerable to extensive liability in cases involving lost chance of a better

239. Saroyan, *supra* note 31, at 31.
240. *See* King, *supra* note 34, at 166.
241. *See* Saroyan, *supra* note 31, at 29.
242. *See* King, *supra* note 34, at 166.
243. *See id.*
244. *Id.*
245. Carney, *supra* note 32, at 358.
246. Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 2, 56–57 (1990).
247. *See* discussion *supra*, Section I.D.; *see also* Carney, *supra* note 32, at 361.
248. *See* King, *supra* note 34, at 187–90 (offering a number of cognitive psychology findings that raise doubts about tort law's deterrent effect, the primary reason being that punishment for torts does not immediately follow the tortious conduct and therefore does not affect the deliberative cognitive processes of potential defendants).
249. *See id.*

outcome, they may be less willing to try and treat patients who fall below the 50% chance threshold for fear that any failed treatment attempts will result in litigation.[250] Commentators have rejected this fear, arguing that no evidence supports the idea that physicians will simply stop treating patients.[251] Furthermore, this argument is inconsistent with the application of the lost chance of a better outcome doctrine because, in these cases, the doctor does not know the full extent of the patient's injury or illness at the time of treatment.[252]

Alternatively, expanding doctors' potential liability too much might cause doctors to practice defensive medicine.[253] Increased liability exposure may force health care providers to "place the requirements of the legal system before the needs and the finances of the patient."[254] Doctors may perform unnecessary tests and be excessively thorough to protect themselves from liability, which could potentially drive up Louisiana's health care costs.[255] Increased medical malpractice premiums translating to increased health care costs are the precise trend that the Louisiana MMA's limitation on recovery aimed to combat.[256]

Although commentators have heavily debated the policy concerns with expanding physician liability, in reality, any intended deterrent effect of medical malpractice judgments may be null because physicians have medical malpractice insurance to bear the brunt of their mistakes.[257] Louisiana's health care and insurance systems, rather than defendant physicians, have purportedly suffered from excessively high jury awards, necessitating that the legislature adopt the MMA.[258] The MMA also affords physicians an extra layer of protection from liability because the MMA requires a plaintiff to request a panel of doctors to review a claim before the plaintiff can file suit, thereby creating another administrative hurdle for each plaintiff.[259] Further, a defendant physician's liability is

250. Truckor, *supra* note 72, at 369.
251. Weigand, *supra* note 5, at 15.
252. *Id.*
253. Carney, *supra* note 32, at 361.
254. Perrochet, *supra* note 48, at 625.
255. *Id.* at 622.
256. Dekaris & Mims, *supra* note 173, at 39.
257. "[T]here is a disjunction between those who actually pay for tort liability and those who actually engaged in the tortious conduct." King, *supra* note 34, at 187–90.
258. Spearman, *supra* note 166, at 400; Nickel, *supra* note 165, at 315.
259. LA. REV. STAT. § 40:1231.8(A)(1)(a) (2018). Failing to submit the claim to a medical review panel subjects a medical malpractice plaintiff's claim to an

limited to $100,000; the Louisiana PCF pays any damages the plaintiff proves in excess of this amount.[260] Since legislation heavily insulates defendant physicians from liability, the main purpose of awarding tort damages in the particular context of medical malpractice must be to adequately compensate the plaintiff.

B. Compensation and Corrective Justice

The ancient Greek philosopher Aristotle, as well as modern commentators, have advanced the view that corrective justice is the primary purpose of tort law.[261] One of the fundamental goals of tort law is to make plaintiffs whole for their losses.[262] Courts may not compensate for the full loss[263] when a plaintiff started with a less-than-even chance of a better outcome because the plaintiff cannot prove but-for causation; however, the lost chance in and of itself still has a distinct compensable value that deserves adequate redress.[264] When a physician breaches a duty to protect the plaintiff from certain harm, the average plaintiff would place a high value on a less than 50% chance to avoid that harm.[265] Compensating for this kind of loss is important because a plaintiff's lost chance of a better outcome could greatly alter the course of her life, as the facts of *Burchfield* show.[266]

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exception of prematurity. William E. Crawford, 12 LA. CIV. L. TREATISE, TORT LAW § 15:5 (2d ed.) (Nov. 2018).

260. LA. REV. STAT. § 40:1231.2(B)(2) (2015); *see also Louisiana Patient's Compensation Fund*, LA. DIV. OF ADMIN., https://www.doa.la.gov/Pages/pcf/Index.aspx [https://perma.cc/9SVX-54DF] ("The vast majority of health care providers are enrolled in the Patient's Compensation Fund and pay surcharges for the coverage and protection provided. The Patient's Compensation Fund provides protection for the healthcare system, keeping costs down, and providing a guaranteed pool of funds to pay those citizens injured from medical malpractice of private health care providers.") (last visited Dec. 24, 2019).

261. Saroyan, *supra* note 31, at 30; Fischer, *supra* note 37, at 627.

262. Kalven, *supra* note 31, at 158.

263. "Full loss" means full wrongful death and survival damages in a lost chance of survival case, or full damages for the resulting injury in a lost chance of a better outcome case. *See* Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 548 (La. 1996) ("To allow full recovery would ignore the claimants' inability to prove by a preponderance of the evidence that the malpractice victim would have survived but for the malpractice, which is a requirement for full recovery.").

264. *See id.*; Fischer, *supra* note 37, at 624; Jansen, *supra* note 67, at 271.

265. Fischer, *supra* note 37, at 611.

266. Burchfield v. Wright, 275 So. 3d 855, 868 (La. 2018).

The corrective justice principle provides that courts should "restore equality" amongst tortfeasors and their victims by penalizing the tortfeasor and returning to the victim what he has lost.[267] Moreover, corrective justice only restores a victim to the extent that the defendant caused the harm: "in order to allow corrective justice its appropriate workings, damages paid must be equal to damages caused. It is at this point which corrective justice and deterrence are inextricably linked."[268]

An act gives rise to liability only to the extent that it causes an injury; thus, a physician should not be liable for more than the extent to which he caused or aggravated a patient's injury.[269] Courts must evenly balance corrective justice and compensation in medical malpractice—awarding damages must not shift the balance too far in the plaintiff's favor and unjustly penalize physicians, creating over-deterrence.[270]

IV. COMPLICATIONS FROM LOUISIANA'S CURRENT LOST CHANCE APPROACH

The *Burchfield* opinion poses several problems for lost chance plaintiffs. First, the Louisiana Supreme Court did not conduct thorough analysis of the lost chance of a better outcome and failed to meaningfully distinguish the nature of the claim from that of lost chance of survival.[271] Second, the opinion simply defers to *Smith* without contemplating the implications that the lump sum method might have on lost chance of a better outcome plaintiffs.[272] Third, this lack of analysis also raises policy issues concerning fundamental fairness to the plaintiff: Louisiana jurisprudence has held that tort law is intended to make a victim whole, but *Burchfield,* by holding that medical expenses are not recoverable, fails to do so.[273] Further, the reasoning of *Burchfield,* which simply lumps medical expenses together with the rest of lost chance damages, is inadequate in cases where a plaintiff's deserved medical expenses exceed the $500,000 limit.[274]

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267. Saroyan, *supra* note 31, at 31.
268. *Id.*
269. Aagaard, *supra* note 138, at 1338.
270. *See* Saroyan, *supra* note 31, at 31.
271. *Burchfield*, 275 So. 3d at 866–68.
272. *Id.*
273. *Id.* at 868.
274. *Id.* at 867; Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 547 (La. 1996); Kelty v. Brumfield, 633 So. 2d 1210, 1216–17 (La. 1994).

A. Burchfield*'s Deference to* Smith*'s Lump Sum Approach Lacks Nuance*

In *Burchfield*, the Louisiana Supreme Court overturned the Second Circuit's decision because the court "misapplied [the Louisiana Supreme Court's] settled jurisprudence on the determination of damages in a lost chance of a better outcome case."[275] The settled jurisprudence to which the *Burchfield* Court refers includes *Graham*, *Smith,* and *Hargroder v. Unkel*.[276]

In *Smith*, the Louisiana Supreme Court settled on a method for calculating damages in a lost chance of survival claim.[277] *Smith* adopted the method of allowing the jury to consider all evidence of the lost chance claim and subjectively value the chance lost as an item of general damages.[278] The Court reasoned that because the lost chance of survival is subjective in nature, a subjective valuation method is required.[279] There was a gap in the *Smith* Court's analysis because it did not contemplate the possibility that a lost chance plaintiff may recover special medical damages, which are exempt from the MMA cap.[280] *Smith*'s logic worked under the facts of that case, as medical expenses were evidently not at issue and therefore the facts did not implicate the medical care exception to the cap.[281] The previously dormant gap in *Smith*'s reasoning, however, came to light in *Burchfield* over 20 years later. Unlike *Smith*, *Burchfield*'s facts involved a great deal of medical expenses and the implication of the MMA's cap.[282] Nonetheless, the *Burchfield* Court simply deferred to *Smith*, and the gap in *Smith*'s logic became baked into the *Burchfield* opinion.[283] As a result, the *Burchfield* opinion yields results contrary to the MMA's legislative intent: it prevents recovery of future medical bills in a statutory malpractice action.[284]

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275. *Burchfield*, 275 So. 3d at 862.

276. *Smith*, 676 So. 2d at 543; Graham v. Willis-Knighton Med. Ctr., 699 So. 2d 365 (La. 1997); Hargroder v. Unkel, 888 So. 2d 953 (La. Ct. App. 2d Cir. 2004).

277. *See generally Smith*, 676 So. 2d at 543.

278. *Id.* at 547.

279. *Id.*

280. Notably, it appears that the plaintiffs in *Smith* did not seek medical expenses. This could explain the *Smith* Court's lack of analysis regarding this aspect of damages. *See generally Smith*, 676 So. 2d at 543; *See* Plaintiff's Petition for Damages, Smith v. State Dep't of Health & Hosps., 1991 WL 11689464 (La. Dist. Ct. June 19, 1991).

281. *See generally Smith*, 676 So. 2d at 543.

282. *See generally* Burchfield v. Wright, 275 So. 3d 855 (La. 2018).

283. *Id.* at 866.

284. *Id.* at 863–64, 868; LA. REV. STAT. § 40:1231.2 (2015); *Smith*, 676 So. 2d at 543.

Graham, the Louisiana Supreme Court's first lost chance of a better outcome case, adhered to the *Smith* method, but without justification other than the fact that *Smith* also involved a lost chance of some form.[285] Like the *Smith* Court, the *Graham* Court did not distinguish between general and special damages.[286] The *Graham* Court simply employed the *Smith* lump sum method, examining the evidence surrounding the injury and putting a number value on the chance lost.[287] Even though *Graham* first recognized lost chance of a better outcome in Louisiana, the discussion in *Graham* focused more closely on the issue of whether a physician's settlement admitted liability, rather than damages, and as a result, the court conducted minimal analysis of the lost chance doctrine.[288] The Louisiana Second Circuit in *Hargroder* followed suit, employing the *Smith* method to calculate damages for a patient whose doctor failed to timely diagnose and treat the patient's stoke, causing him to suffer a lost chance of a better outcome.[289] The *Hargroder* opinion made no distinction between medical expenses and general damages awarded for a lost chance.[290]

Similar to *Graham* and *Hargroder*, the *Burchfield* Court simply deferred to the lump sum approach without any scrutiny or examination of policy and related laws, such as the MMA—and in particular, the MMA's explicit provision for uncapped medical expenses.[291] In adhering to an old precedent, the *Burchfield* Court gave little justification for strictly following the *Smith* approach, other than the fact that *Graham* and *Hargroder* had also cited to *Smith* to guide their lost chance of a better outcome awards.[292] None of these opinions distinguished between the general damage—the lost chance itself—and the special damage of medical expenses that a plaintiff incurs along with her lost chance.[293] The

285. Graham v. Willis-Knighton Med. Ctr., 699 So. 2d 365 (La. 1997).

286. *See generally id.*

287. *Id.*

288. *Id.*

289. Hargroder v. Unkel, 888 So. 2d 953, 957–58 (La. Ct. App. 2d Cir. 2004), followed the same pattern as *Graham* by relying on *Smith* for guidance on calculating damages.

290. *Id.* at 960–61.

291. LA. REV. STAT. § 40:1231.2 (2015).

292. Burchfield v. Wright, 275 So. 3d 855, 864 (La. 2018).

293. Several commentators have recognized that medical expenses should be available to the plaintiffs in lost chance cases and need not be reduced in all cases. DAN B. DOBBS ET AL., THE LAW OF TORTS § 196 (2d ed. Westlaw 2018 Update). Richard E. Kaye, *Damages for Loss of Chance of Cure*, 154 AM. JUR. PROOF OF FACTS 3d 273, § 9 (Westlaw Mar. 2019 Update); Fischer, *supra* note 37, at 620; Aagaard, *supra* note 138, at 1355. *See also* King, *supra* note 34, at 165 (arguing that future medical expenses for rehabilitation and compensation for loss of

difference between the two kinds of damages warrants a nuanced approach to awarding lost chance damages.[294] Further, the commingling of the speculative lost chance injury and objectively determinable medical expenses leads to an award that few appellate courts will be able to properly review.[295]

B. Lack of an Easily Reviewable Award

Aside from the lack of necessary analysis, the *Burchfield* Court additionally erred by approving a trial court verdict form that did not require the jury to enumerate what damages it awarded.[296] The *Smith* Court reasoned that appellate courts could test the accuracy of the jury's lump sum award by examining evidence in the record.[297] As one commentator pointed out, however, general damage awards are practically unreviewable when juries do not have to identify the specific damages that are awarded on the verdict form.[298] The jury's $680,000 award for Burchfield's lost chance of a better outcome was a lump sum.[299] The jury did not have to find the percentage of fault of the doctor, nor did the form require the jury to specify an amount for past medicals, lost wages, loss of consortium, or future medicals.[300] The award in *Burchfield* was likely difficult to review because the Louisiana Supreme Court could not have discerned what portion of the $680,000 trial court award constituted either special or general damages.[301] Thus, without more specific information, the

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earning capacity truly return a plaintiff to his pre-accident state, while general damages for pain and suffering cannot make a plaintiff whole).

294. *See* King, *supra* note 34, at 165.

295. *See* Carney, *supra* note 32, at 365.

296. The plaintiff's attorneys evidently did not ask for these lines on the verdict form. The plaintiffs did, however, argue that the trial court's jury charges "did not comport" with the Supreme Court's preferred civil jury charges. *Burchfield*, 275 So. 3d at 861.

297. Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 549 (La. 1996). *Burchfield* also cited this safeguard against speculative verdicts approvingly. *Burchfield*, 275 So. 3d at 867.

298. Carney, *supra* note 32, at 365; *see also Burchfield*, 224 So. 3d at 1175 (holding that the verdict form was flawed as a matter of law because the lump sum method did not reflect the specific damages that the jury intended to award).

299. *Burchfield*, 275 So. 3d at 858.

300. *Id.* at 868.

301. *Id.* at 859–60.

Burchfield Court lacked a good foundation for analysis.[302] As a result, the Court simply subjected the entire lump sum to the MMA damage cap.[303]

When two fundamentally different remedies are intertwined, an appellate court cannot properly review medical expense awards.[304] Medical expenses have become blurred with general damages in a manner detrimental to lost chance plaintiffs, even though medical expenses are special damages that compensate for a different aspect of a plaintiff's injury.[305] The *Burchfield* holding's future implications will deny much needed compensation to severely injured plaintiffs whose damages exceed the cap.[306] Further, the holding contravenes Louisiana jurisprudence, the legislative intent to provide medical relief to these severely injured plaintiffs, and the primary objective of tort law of making the plaintiff whole.[307]

C. Fundamental Fairness Issues the Burchfield *Opinion Poses*

Aside from its deficiencies in analysis, the *Burchfield* opinion also raises issues of fundamental fairness to victims of lost chances.[308] It is well-settled in Louisiana jurisprudence that a tortfeasor "takes his victim as he finds him" and is thus accountable for all "natural and probable consequences" of his actions.[309] As a general rule, Louisiana courts have held that "[w]hen a defendant's tortious conduct aggravates a pre-existing condition, the defendant must compensate the victim to the full extent of the aggravation."[310] As the *Burchfield* case illustrates, Louisiana's approach to lost chance fails to adequately compensate lost chance plaintiffs in the "severely injured" category—those whose damages

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302. *Id*.

303. *Id.* at 867.

304. *See* Carney, *supra* note 32, at 365.

305. *See* Antley v. Rodgers, 251 So. 3d 607, 624 (La. Ct. App. 2d Cir. 2018); Urquhart v. Spencer, 224 So. 3d 1022, 1032 (La. Ct. App. 4th Cir. 2017); Boutte v. Hargrove, 290 So. 2d 319, 322 (La. 1974).

306. LA. REV. STAT. § 40:1231.2 (2015); *see also* Oliver v. Magnolia Clinic, 85 So. 3d 39 (La. 2012).

307. Kalven, *supra* note 31, at 158.

308. *See generally Burchfield*, 275 So. 3d 855.

309. *Urquhart*, 224 So. 3d at 1031; Lasha v. Olin Corp., 625 So. 2d 1002, 1005 (La. 1993).

310. *Urquhart*, 224 So. 3d at 1031 (quoting *Lasha*, 625 So. 2d at 1005). It should be noted, however, that not every lost chance of a better outcome case necessarily involves an "aggravation" in the sense that an "aggravation" occurred in *Lasha*.

exceed the cap.[311] The evidence put on at the trial court level showed that the plaintiff would have to pay $1,718.78 for medication every month—a medical expense directly related to his heart transplant.[312] Further, the plaintiff could not return to his job, and evidence showed that he would lose future wages totaling $493,020.[313] The incident left the plaintiff unable to work and unable to pay for his past medical bills and the future expenses he would incur for the continued monitoring of his condition.[314] Despite this drastic change in financial position after the incident, the plaintiff only recovered $500,000.[315]

Preventing recovery of future medical bills does not compensate a plaintiff "to the full extent of the aggravation" because the defendant's negligence may have caused a large portion, if not all, of a plaintiff's medical bills.[316] Although a plaintiff might have eventually incurred expenses to treat a pre-existing condition anyway, the defendant could have caused a plaintiff to incur more medical expenses than she otherwise would have by aggravating a pre-existing condition or failing to diagnose a condition.[317] Further, as Joseph H. King, Jr., argued, general damages—such as pain and suffering—will not actually restore injured plaintiffs to their pre-injury states.[318] Rather, King asserted that economic damages, such as future medical expenses, can genuinely ease a plaintiff's pain by funding treatment of the plaintiff's poor condition.[319]

Aside from releasing a defendant physician from a portion of tort liability, the *Burchfield* holding fails to satisfy the compensatory objective of tort law because it does not allow plaintiffs to recover medical expenses outside of the MMA's cap on damages.[320] A judge or jury in the fact-finding role can distinguish medical expenses that a plaintiff would have paid to treat her pre-existing condition, regardless of the negligence, from

311. *See generally Burchfield*, 275 So. 3d 855; Kelty v. Brumfield, 633 So. 2d 1210, 1216–17 (La. 1994).

312. Burchfield v. Wright, 224 So. 3d 1170, 1176 (La. Ct. App. 2d Cir. 2017).

313. *Id.*

314. *Id.*

315. *Burchfield*, 275 So. 3d at 868.

316. Lasha v. Olin Corp., 625 So. 2d 1002, 1006 (La. 1993).

317. "The fact that there was a likelihood that future treatments would have been required even absent any malpractice should not preclude recovery of a portion of the future medical expenses." Kaye, *supra* note 293.

318. "The only damages that realistically can be said to contribute to the return of the plaintiff to his pre-injury state are economic damages that address loss of earning capacity and medical expenses." King, *supra* note 34, at 165.

319. *Id.*

320. *Lasha*, 625 So. 2d at 1006; Kalven, *supra* note 31, at 158.

those expenses caused by the malpractice.[321] Thus, a method separating the medical expense calculation from the general damage calculation could remedy the issues that *Burchfield* brought to light.[322]

V. RECOVERY: SOLUTIONS TO THE PROBLEM *BURCHFIELD* PRESENTS IN LOUISIANA

By ruling that the lump sum method alone should govern lost chance of a better outcome damages, *Burchfield* did not adequately analyze the lost chance of a better outcome claim.[323] Since a lost chance claim is a "statutory malpractice action," the MMA damage cap should not apply to medical damages in a lost chance case, and plaintiffs should benefit from the exception that the Louisiana Legislature implemented in 1984.[324] *Burchfield* also sheds light on the nature of lost chance of survival remedies—for the same reasons, lost chance of survival plaintiffs should also benefit from the "future medical care and related benefits" exception of the MMA.[325] Procedural changes in adjudicating lost chance claims, particularly at the phase in the trial when the fact-finder calculates damages, could remedy the problem *Burchfield* presents. The proper solution to this problem ultimately calls for a mandatory separation between the award of medical damages and general damages, and several approaches can implement this method into Louisiana's lost chance doctrine.

A. The Subjective Lump Sum Method Alone Should Not Apply to Lost Chance

Lost chance of a better outcome plaintiffs survive their illnesses, but they go on to live with diminished quality and additional burdens, such as expensive medical treatments and the impaired capability to work.[326] Louisiana courts, therefore, should allow all lost chance plaintiffs to recover medical bills as a separate damage from the jury's general lump sum award. Courts should still allow juries to use the lump sum approach in awarding general damages for the lost chance itself, which would include emotional distress from the advancement of a condition, pain and

321. *See* Aagaard, *supra* note 138, at 1350–51.
322. *Id.*; Burchfield v. Wright, 275 So. 3d 855 (La. 2018).
323. *Burchfield*, 275 So. 3d 855.
324. *See* LA. REV. STAT. § 40:1231.2 (2015).
325. *Id*.
326. King, *supra* note 34, at 165.

suffering, a decreased life expectancy, and loss of consortium.[327] Additionally, although future medical expenses are exclusive to the lost chance of a better outcome claim, lost chance of survival plaintiffs may have a claim to past medicals, which the courts must also award separate from the lump sum.[328] By dividing the damage inquiry, courts can ensure that medical expenses are not capped.[329] If these medical expenses are no longer confined to the lump sum, courts can more readily review their accuracy.[330]

B. The Medical Malpractice Cap Should Not Limit Lost Chance Plaintiffs' Recovery of Future Medical Expenses

In holding that the plaintiff could not recover any future medical expenses for lost chance of a better outcome, the Louisiana Supreme Court's opinion in *Burchfield* diverged from the MMA's intent to allow administrative recovery of medical expenses.[331] The MMA's cap on damages implicitly discriminated against severely injured plaintiffs because it limited recovery on the basis of physical condition.[332] The intent behind the "future medical care" exception of the MMA was to provide additional compensation for those who fell within that class because their damages exceeded the cap.[333] Rather than raising the cap, the legislature added the exception to remedy the cap's drastic effects.[334]

The Louisiana Supreme Court has noted that the MMA must be "strictly construed" because it is special legislation that grants "immunities or advantages" to certain classes—that is, qualified health care providers—and inherently restricts the rights typically available to tort victims.[335] The language of the MMA provides that in *all* malpractice

327. Kaye, *supra* note 293.

328. *See, e.g.*, Greer v. Lammico, 779 So. 2d 894 (La. Ct. App. 2d Cir. 2000); *see also* Kaye, *supra* note 293.

329. *See* discussion *supra* note 293.

330. *See* discussion *supra* Section IV.B.

331. Burchfield v. Wright, 275 So. 3d 855 (La. 2018).

332. Kelty v. Brumfield, 633 So. 2d 1210, 1217 (La. 1994).

333. *Id.* at 1216–17.

334. *Id.* The language of Louisiana Revised Statutes § 40:1231.2(B)(1) is as follows: "The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R.S. 40:1231.3, shall not exceed five hundred thousand dollars plus interest and costs."

335. *Kelty*, 633 So. 2d at 1216 (citing Galloway v. Baton Rouge Gen. Hosp., 602 So. 2d 1003, 1005 (La. 1992)). *See also* Romero v. Elias, 972 So. 2d 450 (La. Ct. App. 3d Cir. 2007).

claims filed with the board[336] that proceed to jury trial, the court must give the jury a special interrogatory asking whether the patient is in need of future medical care and related benefits.[337] Further, the language requires that in a bench trial, the trial court's finding "*shall* include a recitation that the patient is or is not in need of future medical care and related benefits."[338] The plain language of the future medical care exception, read *in pari materia*[339] with the MMA's two provisions that mandate a special jury interrogatory or a specific trial court recitation for all malpractice claims, indicates that the legislature intended the medical expense exception to apply to all statutory malpractice claims.[340]

The well-settled jurisprudence cited in *Burchfield* states that the lost chance claim is not a "separate cause of action"—rather, lost chance is a theory of recovery that one may assert in a statutory malpractice claim.[341] The *Burchfield* Court clearly conceived of lost chance of a better outcome as a standard malpractice claim; the only distinguishing factor of lost chance is the kind of injury the plaintiff incurs.[342] If the Louisiana Supreme

336. The "board" to which this provision refers is the Patient's Compensation Fund Oversight Board. LA. REV. STAT. § 40:1231.1(A)(3) (2015).

337. *Id.* § 40:1231.3(A)(1) ("In all malpractice claims filed with the board which proceed to trial, the jury shall be given a special interrogatory asking if the patient is in need of future medical care and related benefits that will be incurred after the date of the response to the special interrogatory, and the amount thereof.").

338. *Id.* § 40:1231.3(A)(2) (emphasis added). The provision also contemplates that the court should include a specific amount in this recitation. *Id*. *But see* Lamark v. NME Hosps., Inc., 522 So. 2d 634 (La. Ct. App. 4th Cir. 1988) (holding that a trial court need not specify an amount in the initial recitation where the amount is not in dispute).

339. *In pari materia* is a civilian method of interpretation providing that laws on the same subject matter should be interpreted in light of one another. ALAIN A. LEVASSEUR, DECIPHERING A CIVIL CODE: SOURCES OF LAW AND METHODS OF INTERPRETATION 94 (2015); *see also* LA. CIV. CODE art. 13 (2019) ("Laws on the same subject matter must be interpreted in reference to each other.").

340. LA. REV. STAT. §§ 40:1231.2(B)(1), 40:1231.3(A)(1)–(2).

341. "The loss of a chance of a better outcome is a theory of recovery . . . It is not a separate cause of action distinct from a statutory malpractice claim." *Burchfield*, 275 So. 3d at 863 (citing Bailey v. Knatt, 207 So. 3d 407 (La. 2016)).

342. Burchfield v. Wright, 275 So. 3d 855, 863 (La. 2018); *see also* Lewis v. Cornerstone Hosp. of Bossier City, LLC, 280 So. 3d 1262 (La. Ct. App. 2d Cir. 2019). In *Lewis*, the Louisiana Second Circuit approvingly cited *Burchfield*'s proposition that the lost chance of a better outcome claim operates as a statutory malpractice claim. *Lewis*, 280 So. 3d at 1271. As such, the court required the plaintiff to prove duty, breach, and "substantial factor" causation under the medical malpractice burden of proof statute. *Id.* (citing LA. REV. STAT. §

Court treats lost chance cases as statutory malpractice actions while giving the MMA a strict construction, it should follow that the "future medical" exception to the MMA cap should also apply in the lost chance claim.[343] As such, lost chance plaintiffs should recover all medical expenses incurred following the malpractice.

When a plaintiff has a pre-existing condition, some future harm incurred may be attributed to that pre-existing condition.[344] A defendant physician, however, should not be liable for more than his proportion of fault.[345] A possible objection to awarding future medical expenses to lost chance of a better outcome plaintiffs may be that it is unreasonable to award a plaintiff future medical bills for the rest of her life when she cannot prove that a defendant physician's mistake was the cause of all medical bills incurred. Awarding high quantities of medical expenses could strain the PCF, much like excessive jury awards strained the insurance system.[346] Further, injuries that the plaintiff incurred from the alleged malpractice may dissipate in the future, and future medicals would over-compensate plaintiffs in that instance.[347] The MMA's provisions, however, have already addressed these concerns.[348]

The MMA established the Patient's Compensation Fund Oversight Board (PCFOB), which is responsible for the management, operation, and defense of the fund.[349] Another provision in the MMA requires the PCFOB to meet annually to discuss new rates the PCF will charge health care providers, and this provision also requires the PCFOB to ensure the fund remains actuarially sound.[350] The legislature also built a number of administrative checks into the MMA that help avoid economic strain on the PCF.

First, the PCF pays future medical damages "as incurred and presented for payment," rather than in a lump sum at the time of initial judgment.[351] This provision avoids unnecessarily over-compensating a plaintiff.[352] For example, a patient receiving PCF payments may later die from her injuries,

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9:2794(A)). Ultimately, the Second Circuit found evidence that the physician did not breach, so the court did not reach the issue of lost chance damages. *Id*.

343. *See* LA. REV. STAT. § 40:1231.2.
344. *See* King, *supra* note 5, at 1360.
345. *Id.*
346. *See* Carney, *supra* note 32, at 361; Fish, *supra* note 162, at 137.
347. Weigand, *supra* note 5, at 15.
348. *See*, *e.g.*, LA REV. STAT. § 40:1231.3(G).
349. *Id.* § 40:1231.4(D)(1)(a)–(2)(a).
350. *Id.* § 40:1231.4(A)(2)(a)–(g).
351. *Id.* § 40:1231.3(A)(4).
352. *See* Levin, *supra* note 182, at 973.

and this provision would prevent a family member from obtaining a windfall if there are leftover funds.[353] Second, the PCF is entitled to have a physician examine a patient from time to time to ensure that the patient is in continued need of future medical care.[354] Third, the MMA has provisions that prevent the fund from being exhausted entirely: for example, the MMA provides that the PCF may make prorated payments when a full payment of all final claims would exhaust the fund.[355] Since the MMA ensures PCF payouts are limited to only those that are truly necessary, breaking down plaintiffs' barriers to recovering medical expenses in lost chance cases will not unduly burden the PCF.[356]

C. Lost Chance of Survival Plaintiffs Should Recover Past Medical Expenses

If the MMA's exception to the damages cap, including "future medical care and related benefits," applies to lost chance of a better outcome medical expenses, it should also apply to any medical expenses potentially recoverable in a lost chance of survival claim.[357] Even though it is important to compensate lost chance of a better outcome plaintiffs, who will likely need medical care long after litigation, courts must also ensure that lost chance of survival plaintiffs receive just compensation.[358] The *Smith* plaintiffs did not request medical expenses,[359] which explains why the *Smith* Court did not say whether a lost chance plaintiff could recover separate medical expenses or whether medical expenses are contained in the jury's lump sum award.[360]

A number of Louisiana lost chance of survival cases have involved explicit requests for past medical expenses.[361] Because the MMA provides that medical expenses in a malpractice action are not capped, Louisiana courts must allow past medical expenses as a separate damage in lost

353. *Id.*
354. LA REV. STAT. § 40:1231.3(G).
355. *Id.* § 40:1231.3(A)(7)(a).
356. For more discussion on the PCF and the process of paying out future medical expenses, see Levin, *supra* note 182.
357. Fischer, *supra* note 37, at 620.
358. *See generally* Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 549 (La. 1996).
359. *Id.*
360. *Id.*
361. *See, e.g.*, Guilbeau v. Bayou Chateau Nursing Ctr., 930 So. 2d 1167 (La. Ct. App. 3d Cir. 2006); Greer v. Lammico, 779 So. 2d 894 (La. Ct. App. 2d Cir. 2000).

chance of survival cases as well.[362] The reliability in calculating medical expenses warrants an assessment separate from the subjective injury of the actual loss of chance; further, the medical expenses arise from the lost chance, but they are not the lost chance injury in and of themselves.[363] When medical expenses are at issue in lost chance cases, requiring the trial court or jury to render a separate finding of medical expenses will solve this problem for *both* lost chance of a better outcome claims and lost chance of survival claims. This solution will be easy to implement and will account for the needs of all lost chance plaintiffs.

D. Implementing a Solution: Louisiana Should Require Separation of Medical Damages and General Damages in Awarding Lost Chance Damages

Louisiana must adopt a method of determining lost chance damages that accounts for the MMA's express provision that medical expenses are exempt from the damage cap.[364] As a solution, trial courts could simply require the fact-finder to employ discretion and make a special finding of medical expenses when parties litigate a lost chance. Under this approach, a jury verdict form would require a medical expense calculation separate from the lost chance inquiry.[365] Similarly, in a bench trial, a judge must make specific findings of medical expenses.[366] Separating the two calculations would eliminate any risk that the medical expenses would be lumped in with the general damages, and it would avoid situations like *Burchfield* in which an appellate court is unable to adequately review awards for specific damages because they are all encompassed in one amount.[367]

At trial, the court would allow a medical expert to testify to the approximate amount of past medical expenses incurred and whether the plaintiff will require future medical care.[368] If a judge allows lost chance

362. LA. REV. STAT. § 40:1231.2(B)(1)(a) (2015).
363. *See* Aagaard, *supra* note 138, at 1350–51.
364. LA. REV. STAT. § 40:1231.3(G) (2018).
365. LA. CODE. CIV. PROC. art. 1812(C)(4) (1983).
366. *Id.* art. 1917(B) (1980).
367. Burchfield v. Wright, 275 So. 3d 855, 868 (La. 2018).
368. Although an expert physician can attest to the need of medical damages, the Fourth Circuit has held an expert is not necessary. Cooper v. Bouchard Transp., 130 So. 3d 1, 6–7 (La. Ct. App. 4th Cir. 2013). Rather, a plaintiff can prove the amount of future medical expenses "through the testimony of an expert in vocational rehabilitation counseling and life care planning, paired with

as a remedy, the jury should have the opportunity to award the medical expenses on a line separate from the general damages. The court would carefully instruct the jury to award only medical expenses that a plaintiff incurred as a result of the physician's negligence.[369] Essentially, the jury will use its discretion to isolate the medical expenses that resulted from the defendant's breach and only award medical expenses in that amount. The following provides an example of an ideal verdict form:[370]

> We, the jury, present the following answers to the questions submitted by the court:
>
> 1. Do you find _____ was denied a chance of a [better outcome/survival] due to the fault of the defendant? Yes _____ No _____
>
> [If answered yes to question 1, proceed to question 2.]
>
> 2. Without considering your answers under any of the above questions, proceed to determine the damages sustained by _____.
>
> Loss of Chance Damages: _____
>
> Medical Expenses to Date: _____
>
> Future Medical Expenses: _____

Using the lump sum method from *Smith*, the jury would still determine the speculative value of the lost chance under "Loss of Chance Damages," considering evidence of the plaintiff's pain and suffering, emotional distress, disability and disfigurement, and loss of consortium, as *Smith* directed.[371] The verdict form, as well as the trial court's jury instructions, must clearly explain to the jury that it should not consider medical

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testimony of a forensic accountant to calculate the present value of the medical expenses." Dekaris & Mims, *supra* note 173, at 886–87.

369. Kaye, *supra* note 293.

370. These jury instructions are modeled off of PATTERN INST. KAN. CIVIL 181.06.

371. Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 549 (La. 1996).

expenses when awarding the lump sum lost chance damages.[372] As a result, the plaintiff would potentially receive a lump sum award for general damages, which the court will then reduce pursuant to the MMA's damage cap.[373] The plaintiff may also receive medical expenses, not subject to the MMA's cap.[374]

In ideal circumstances, the Louisiana Supreme Court would reverse or modify its ruling in *Burchfield* to reflect legislative intent. The more expedient route, however, will be a legislative amendment. To implement this solution, the Louisiana Legislature should amend the MMA to require specific jury interrogatories when lost chance is at issue.[375] Additionally, the provision should direct a judge to make the same findings of medical expenses—both past and future—in a bench trial.[376] Article 1812 of the Louisiana Code of Civil Procedure addresses the trial court's general duty to submit special verdict forms to the jury.[377] The article does not mandate a special verdict form; a judge only submits a special verdict form if requested by the parties.[378] Since the MMA already establishes procedures in medical malpractice actions that diverge from article 1812's general

372. Well-crafted and clear jury instructions can assist the fact-finder in awarding damages more consistent with the injury at issue. *See* Aagaard, *supra* note 138, at 1350–51.

373. LA. REV. STAT. § 40:1231.2 (2015).

374. *Id.*

375. This revision would ideally occur within a subsection of Louisiana Revised Statutes § 40:1231.3(A), which addresses the procedure in determining "future medical care and related benefits." Specifically, subsection (A)(6) states that the provisions requiring a special finding of future medical care apply to "all malpractice claims." The legislature could amend subsection (A)(6) to state that these procedural requirements apply to "all malpractice claims, regardless of the plaintiff's theory of recovery." This substantive change would allow lost chance plaintiffs to receive the full benefit of the future medical care exception that the MMA already provides. Although the amended subsection would conflict with the *Burchfield* holding, a number of other states have developed legislation to address their supreme courts' rulings on the lost chance doctrine. *See* Guest et al., *supra* note 62, at 104–07.

376. LA. REV. STAT. § 40:1231.3(A) (2015).

377. LA. CODE. CIV. PROC. art. 1812 (1983). Subsection (C)(4) requires that at the request of any party, the court shall submit jury instructions inquiring as to the total amount of special damages and general damages resulting from the loss. A potential legislative amendment to the MMA could ensure that courts submit a special interrogatory in lost chance cases, regardless of whether a party requests such an instruction.

378. *Id.* art. 1812(C) (1983). Generally, a trial judge has broad discretion to fashion jury charges and verdict forms. Adams v. Rhodia, Inc., 983 So. 2d 798, 804 (La. 2008).

rule, the MMA is the most appropriate place to effect change in trial court procedure.[379]

Requiring the judge to submit a special verdict form for lost chance would still allow the jury to make the pertinent fact-finding determinations, therefore raising the least due process concerns by safeguarding the fact-finder's role in the trial process.[380] Further, this approach adequately compensates severely injured plaintiffs by allowing recovery of at least some medical expenses, just as the legislature's 1984 amendment to the MMA intended.[381] Separating medical expenses and general damages will also ensure that damage awards do not grow excessively high and strain the health care system: the MMA damage cap serves as a check on general damages, while the fact-finder's discretionary role serves as a check on medical damages.

Requiring an itemized verdict form is the appropriate way for a jury to award lost chance damages because the form accounts for the special nature of the lost chance of a better outcome claim.[382] Further, this remedy would be fairly easy to implement for both types of lost chance claims. Louisiana courts will not adopt this method of their own volition, as they have continued to require an undivided lump sum award at the trial court level.[383] Thus, the legislature can mandate special findings of medical expenses at the trial court level with a simple amendment to the MMA. Administration of this remedy would be straightforward—the judiciary could easily modify the jury charges and verdict forms it uses in lost chance cases. The special verdict form approach is superior to the following solutions: (1) the pure lump sum approach that the Louisiana Supreme Court currently uses; and (2) the percentage probability approach

379. LA. REV. STAT. § 40:1231.3(A) (2015). Unlike Louisiana Code of Civil Procedure article 1812, the MMA states that "the jury *shall* be given a special interrogatory" regardless of whether a party requests it. *Id.* § 40:1231.3(A)(1) (emphasis added).

380. Pitts v. La. Med. Mut. Ins. Co., 218 So. 3d 58, 66 (La. 2017) (in which the Louisiana Supreme Court emphasized the importance of the "great deference given to the jury in its fact-finding role").

381. LA. REV. STAT. § 40:1231.2(B)(1); Kelty v. Brumfield, 633 So. 2d 1210, 1217 (La. 1994).

382. Here, the lost chance of a better outcome claim is "special" insofar as it may require the award of future medical expenses.

383. *See, e.g.,* Malbrough v. Rodgers, 2020 WL 466025 at *1 (La. Ct. App. 3d.Cir. Jan. 29, 2020). Although the amount awarded in *Malbrough* did not involve medical expenses, it demonstrates the courts' reluctance to deviate from the *Smith* framework. One would expect this result, given the *Burchfield* Court's express disapproval of awarding special damages separate from the lump sum in lost chance cases.

for which King advocated.[384] The itemized verdict form, with the fact-finder's discretion, ensures reviewability of awards, most fairly compensates plaintiffs and deters defendants, and creates a system in which the award bears the closest possible nexus to the injury.[385]

1. General "Lump Sum" Damages as Provided in Smith: *Too General*

Retaining the "lump sum" method from *Smith* for lost chance of a better outcome claims would allow the jury to look at all of the evidence of a lost chance of a better outcome claim and assign a number to it.[386] The lump sum method has the greatest potential for inaccurate and skewed results.[387] Due to the emotional nature of some lost chance of a better outcome damages, a jury may tend to overvalue a small lost chance.[388] When a physician causes the very harm from which a doctor is expected to protect a patient, a jury may construe this tortious conduct as "betrayal," and the stronger emotional response will likely lead to a higher jury award.[389] The lump sum approach gives juries more leeway to express bias and make errors.[390]

Further, where a jury award does not separate medical expenses from lump sum damages, appellate courts would be virtually unable to review the amount of medical expenses at issue in lost chance judgments.[391] The standard for appellate review gives little guidance on assessing awards, and with a general damage award, there is little justification for overturning or adjusting a jury's award.[392] The Louisiana Supreme Court's adoption of the lump sum approach in *Burchfield* shows how this method can fall short of tort law's objectives.[393] Used alone, the lump sum method for calculating lost chance damages creates obvious inequities because it

384. King, *supra* note 5, at 1363–64.

385. "In sum, the discretionary valuation approach exhibits a closer conceptual nexus to the compensable tort injury in a lost chance case than do either the full damages approach or the proportional valuation approach." Aagaard, *supra* note 138, at 1353.

386. Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 549 (La. 1996).

387. Carney, *supra* note 32, at 361.

388. *Id.*

389. Boaz Shnoor, *Loss of Chance: A Behavioral Analysis of the Difference Between Medical Negligence and Toxic Torts*, 33 AM. J. TRIAL ADVOC. 71, 74 (2009).

390. *See* Carney, *supra* note 32, at 361.

391. *Id.*

392. Claudet v. Weyrich, 662 So. 2d 131, 134 (La Ct. App. 4th Cir. 1995).

393. *See generally* Burchfield v. Wright, 275 So. 3d 855 (La. 2018).

deprives plaintiffs of medical bills in excess of the $500,000 cap and leaves them without adequate means to truly recover from their injuries. Similarly, a percentage probability approach is inadequate because it fails to account for the unique nature of lost chance damages.

2. Percentage Probability Damages: Not Proportional Enough

The percentage probability method, for which King advocated in his article, would allow a jury to find full damages for whatever injury that occurred, then reduce those damages by the percentage of chance lost due to the defendant physician's negligence.[394] If the trial court in *Burchfield* had used this method, the jury would have first put a number on Burchfield's ultimate harm: the heart transplant.[395] Imagine, hypothetically, that the jury valued Burchfield's ultimate physical injury at $1,500,000. Then, the jury would have calculated the actual chance he lost. If the jury decided that he lost a 30% chance of a better outcome, he would have recovered $450,000.[396] Other states have employed this method because it is the most administratively sound and because it tends to create more consistent jury awards than the lump sum approach.[397] The percentage probability method also creates a record of the jury's process of awarding damages, allowing an appellate court to more accurately review the award later on.[398] Some commentators have argued that this approach most accurately compensates plaintiffs for their losses.[399] Others still doubt the accuracy of expert-provided percentage estimates and argue that a court's reliance on hired experts makes valuing the chance an inherently imprecise process.[400] For Louisiana, the primary countervailing policy concern is judicial economy.[401] As the Louisiana Supreme Court pointed out in *Smith*, it appears arbitrary to have the jury come up with a hypothetical number and then reduce it by a another imprecise percentage: it's extra, unnecessary work.[402]

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394. Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 549 (La. 1996); King, *supra* note 5, at 1363–64.

395. *See Burchfield*, 275 So. 3d at 859.

396. Perrochet, *supra* note 48, at 620. The calculation would go as follows: $1,500,000 (cost of ultimate injury) x .30 (percent chance lost) = $450,000.

397. *See, e.g.*, DeBurkarte v. Louvar, 393 N.W.2d 131, 137 (Iowa 1986).

398. Carney, *supra* note 32, at 363.

399. Truckor, *supra* note 72, at 365.

400. Spearman, *supra* note 166, at 401.

401. Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 549 (La. 1996).

402. *Id.*

Further, although the verdict form approach provides a method that targets only the actual compensable injuries a plaintiff incurs, the percentage probability method tends to overcompensate or undercompensate.[403] Simply reducing the total damages by a percentage does not always reflect what expenses a plaintiff actually incurs as a result of the negligence.[404] As one commentator pointed out, the percentage probability method is unnecessarily rigid: no one formula should govern the calculation exclusively.[405] Awarding tort damages is a fact-intensive inquiry, and a jury with a wide array of backgrounds can more accurately quantify lost chance damages.[406] This flexibility is important particularly for awarding medical expenses.

Now imagine a man who suffered a late diagnosis of a heart condition.[407] Without the late diagnosis, the man would have potentially paid the average cost of $135,000 for coronary bypass surgery[408] and continued monitoring and medication in the amount of $7,000 per year.[409] Now, however, because the doctor failed to diagnose his condition, he had

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403. *See* Aagaard, *supra* note 138, at 1353.

404. *Id.*

405. *Id.* at 1355.

406. *Id.*

> The discretionary method avoids the imposition of a legal rule on what is a purely factual determination and thus allows for individualized damage determinations that accurately reflect the loss that a particular lost chance plaintiff suffers. By contrast, the proportional valuation method applies a fixed mathematical formula to all assessments of lost chance injuries, inappropriately imposing a legal principle on a factual issue, and thus encroaches upon the rightful domain of the jury.

Id.

407. This hypothetical is loosely based on the facts of *Burchfield*, but the numbers are rounded in order to more readily demonstrate the difference between the discretionary and percentage probability methods. *See* Burchfield v. Wright, 275 So. 3d 855 (La. 2018).

408. A coronary bypass surgery can cost between $70,000 and $200,000. *Heart Bypass Surgery Cost*, COSTHELPER, https://health.costhelper.com/bypass.html [https://perma.cc/KG86-C96W] (last visited Oct. 21, 2019). It should be noted, however, that the surgery cost could vary widely depending on the region, facility, and level of complication. *See Coronary Artery Bypass Surgery Costs and How to Pay for Them*, LENDING POINT (Feb. 7, 2018), https://www.lendingpoint.com/blog/coronary-bypass-what-it-costs-and-how-to-pay-for-it/ [https://perma.cc/2SZK-7GZK].

409. Costs of post-operative care for a coronary bypass surgery may include costs for physical therapy, blood-thinning medications, an ACE inhibitor to control blood pressure, and medications to lower cholesterol. *See Heart Bypass Surgery Cost*, *supra* note 408.

to undergo a heart transplant costing $690,000[410] and will pay even more for advanced monitoring of his condition and anti-rejection medication in the amount of $20,600 per year.[411] Under the discretionary method that the verdict form solution proposes, the man would likely recover $555,000 in past medicals and $13,600 per year in future medicals.[412] This result appears to fairly compensate him, given that the doctor's negligence gave rise to those increased medical costs.

Under the percentage probability method, however, the man's recovery could be quite different. Perhaps the jury finds that he lost a 10% chance of receiving a coronary bypass rather than a heart transplant. He would recover $69,000 in past medicals (10% of $690,00) and $2,060 per year in future medicals (10% of $20,600). Even if the jury found that a higher percent chance was lost—perhaps around 20%—the patient would still receive far less than what would make him whole: $138,000 in past medicals (20% of $690,000) and $4,120 in future medicals (20% of $20,600). Accounting for the fact that this patient can no longer work, the percentage probability method clearly falls short of making him whole.

Under different facts, the percentage probability method may yield a more balanced result, but because the lost chance inquiry is so fact-intensive, it is best left to the jury's discretion.[413] Thus, the verdict form solution accounts for the unique calculations inherent in each lost chance case and assures that the plaintiffs will receive medical expenses to which they are entitled because of the defendant's negligence, but no more. The verdict form allows the jury to calculate medical expenses separately from general damages, safeguarding the principles of appellate reviewability and just compensation.

CONCLUSION

Twenty years after *Smith*, the Louisiana Supreme Court in *Burchfield* reached a decision that fell short of the Louisiana Legislature's intent.[414]

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410. The *Burchfield* Court noted that the court of appeal was correct to find that the plaintiff incurred a total of $692,850.24 in medical expenses for the heart transplant itself. *Burchfield*, 275 So. 3d at 868.

411. The *Burchfield* Court also noted that there was evidence to find that future medications resulting from the plaintiff's heart transplant would total $1,718.78 per month—which totals $20,625.36 per year. *Id*.

412. The calculation would go as follows: (1) past medicals ($690,000 – $135,000 = $555,000); and (2) future medicals ($20,600 – $7,000= $13,600 per year).

413. Aagaard, *supra* note 138, at 1355.

414. Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 548 (La. 1996).

The MMA cap's exception for medical expenses was meant to compensate severely injured plaintiffs that the cap drastically affected; thus, moving forward, the legislature's intent must guide the interpretation of Louisiana's lost chance doctrine.[415] Since the lost chance claim has evolved since *Smith*, the courts require a nuanced approach to account for the distinction between the two injuries present in a lost chance case: the medical expenses incurred as a result of a physician's negligence and the lost chance itself.[416]

If the *Burchfield* Court had allowed the jury to calculate damages through the proposed special verdict form, the plaintiff would have recovered what the jury believed his subjective lost claim was worth.[417] Additionally, the plaintiff would have recovered a portion of the medical expenses he was required to pay for the continued treatment of his heart condition.[418] To revitalize the lost chance doctrine, Louisiana should adopt a method that allows for a medical expense calculation separate from general damages in lost chance claims. A verdict form that mandates separate jury awards as the paradigm for valuation would most adequately compensate for both categories of losses—special and general damages—while still leaving the fact-finding role to the jury.

415. *See* Kelty v. Brumfield, 633 So. 2d 1210, 1217 (La. 1994).
416. *See supra* Section V.D.
417. *See supra* Section V.D.
418. *See supra* Section V.D.