Louisiana Law Review

Volume 81
Number 3 *Spring 2021*

Article 8

4-29-2021

Properly Limiting the Lost Chance Doctrine in Medical Malpractice Cases: A Practitioners' Rejoinder

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INTRODUCTION

A fundamental tenet of tort law is that plaintiffs bear the burden to prove their claims by a preponderance of the evidence. This burden includes the requirement to prove that a defendant's misconduct more likely than not caused the plaintiff's alleged injuries.[1] In *Burchfield v. Wright*,[2] the Louisiana Second Circuit Court of Appeal cast this seemingly settled legal principle into doubt, until the Louisiana Supreme Court reversed the decision.[3] In *Burchfield*, the Second Circuit awarded full medical malpractice damages despite the fact that the plaintiff could not prove that the defendant's negligence caused a traditional tort injury, but only that it caused a loss of a less-than-50% chance of a better outcome.[4] A recent student Comment (the "Morgan Comment" or "Morgan Proposal")[5] expressed support for the Second Circuit's approach and called for legislative reform of this area.

In this rejoinder, written from the perspective of two defense practitioners, we argue that the Morgan Proposal is flawed because it would significantly relax the plaintiff's burden to prove causation, allowing plaintiffs to recover full or near-full medical malpractice damages, including special damages, potentially far in excess of the $500,000 cap, even when a plaintiff cannot prove causation of a traditional injury. We argue that the Louisiana Supreme Court ruled correctly in *Burchfield v. Wright*. Finally, we agree with the Morgan Proposal that the time has come for legislative clarification of the lost chance cause of action, but we propose a very different legislative fix. We believe it should

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1. *See* Lasha v. Olin Corp., 625 So. 2d 1002, 1005 (La. 1993) (citing Jordan v. Travelers Ins. Co., 245 So. 2d 151 (La. 1971); WILLIAM L. PROSSER & PAGE KEETON, PROSSER AND KEETON ON TORTS § 41 (5th ed. 1984); 2 CHARLES TILFORD MCCORMICK & KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 339 (4th ed. 1992); 9 JOHN HENRY WIGMORE, EVIDENCE §§ 2497, 2498 (3d ed. 1940)).

2. Burchfield v. Wright, 224 So. 3d 1170 (La. Ct. App. 2d Cir. 2017), *rev'd*, 275 So. 3d 855 (La. 2018).

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

4. This Article refers to the doctrine as the "lost chance doctrine." This concept is also known as the "loss of a chance of survival" or "loss of a chance of a better result."

5. Madeleine K. Morgan, Comment, *Revitalizing Louisiana's Lost Chance Doctrine:* Burchfield v. Wright *Sheds Light on the Need for Medical Expenses*, 80 LA. L. REV. 487 (2020).

involve establishing clear requirements regarding the narrow circumstances in which the lost chance doctrine may be applied, and overturning *Smith v. State* by adopting a percentage probability approach for the calculation of damages.

Part I of this Article outlines the fundamental fairness problems with the lost chance doctrine as it exists today, illustrating why attempts to expand the doctrine should be met with skepticism. Part II responds to the Morgan Proposal. Part III proposes alternative compromises for reforming the lost chance doctrine.

I. PRACTICAL SHORTCOMINGS OF THE LOST CHANCE DOCTRINE

The Morgan Comment provides an exhaustive summary of the origins and rationale underpinning the lost chance doctrine,[6] which we will address only briefly. The Louisiana Supreme Court first recognized the lost chance doctrine in *Hastings v. Baton Rouge General Hospital*.[7] It is a judicially created legal theory intended to remedy the perceived unfairness that occurs when a medical malpractice plaintiff can prove negligence on the part of a healthcare provider, but the plaintiff struggles to prove causation by a preponderance of the evidence, that is, a more-likely-than-not standard.[8] In a typical lost chance case, the finder of fact is unable to conclude that the improperly withheld treatment would have made a difference—either because the treatment, although medically indicated, is not particularly effective, or because the patient was in such bad shape before the negligence occurred that the probability of recovery was less-than-even in any scenario.

The doctrine represents an attempted compromise, established to provide partial compensation to medical malpractice plaintiffs with difficult causation cases who would otherwise recover nothing.[9] As crafted

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6. *Id.* at 492–513.

7. Hastings v. Baton Rouge Gen. Hosp., 498 So. 2d 713 (La. 1986).

8. *Id.* at 721 ("Requiring [defendant's] survivors to prove that surgery would have saved him would be an unreasonable burden.").

9. Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 547 (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."); Niang v. Dryades YMCA Sch. of Com., Inc., 286 So. 3d 506, 507 (La. Ct. App. 4th Cir. 2019) (declining to apply lost chance outside the medical malpractice context); Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 SAN DIEGO L. REV. 401, 481 (2000) ("Loss of chance is a compromise.").

by the Louisiana Supreme Court, the doctrine is explicitly not intended to "make a plaintiff whole."[10] In lost chance cases, a plaintiff can recover, at most, $500,000 plus judicial interest and costs, the amount of the cap on damages under the Medical Malpractice Act.[11] In this regard, lost chance cases differ from traditional medical malpractice cases, in which a plaintiff's general damages are subject to the cap, but medical expenses are not.[12] The Supreme Court has acknowledged that less-than-full damages are appropriate in a lost chance case, since the plaintiff is unable to prove that the defendant's conduct more likely than not caused her injury.[13] Further, the Supreme Court has emphasized that the lost chance doctrine does not represent a relaxation of the typical burden of proof—rather, it calls for a lesser award in light of the lesser injury that the plaintiff could prove.[14]

The doctrine is best illustrated by way of example: in the case of *Coody v. Barraza*, the patient had been in remission for ovarian cancer.[15] The patient's cancer recurred, but allegedly it was not diagnosed until seven months later than it should have been.[16] The patient died and was survived by three children and a husband of 47 years.[17] Under a traditional wrongful death theory, the *Coody* plaintiff would face a significant causation hurdle, as the testimony suggested that even with timely diagnosis, only about 10% of recurrent ovarian cancer patients achieve a second remission.[18] But the *Coody* plaintiffs asserted a lost chance theory, arguing that, even if the chance of a second remission was small, being deprived of that chance was an injury unto itself.[19] The jury agreed and awarded $250,000, less than a typical wrongful death award, representing the jury's determination of how much that chance was worth; the court of appeal affirmed.[20]

While *Coody* paints a relatively clean theoretical framework, in practice the lost chance doctrine often unfolds in haphazard fashion, creating fundamental fairness issues for the litigants. Common issues,

10. *Smith*, 676 So. 2d at 547.
11. LA. REV. STAT. § 40:1231.2(B)(1) (2020); Burchfield v. Wright, 275 So. 3d 855, 868 (La. 2018).
12. *Id.* § 40:1231.2(B)(1); *id.* § 40:1231.3(D).
13. *Smith*, 676 So. 2d at 547.
14. *Id.*
15. Coody v. Barraza, 111 So. 3d 485, 493 (La. Ct. App. 2d Cir. 2013).
16. *Id.* at 488–89.
17. *Id.* at 493.
18. *Id.* at 491–92.
19. *Id.*
20. *Id.* at 488.

which remain unresolved or muddled by the jurisprudence, include: How do courts of appeal determine whether a lost chance award is excessive? When must a plaintiff assert the lost chance doctrine? And what evidence must a plaintiff submit to warrant a lost chance interrogatory on the verdict form?

Although the Morgan Comment suggests that lost chance is well accepted and urges expansion of the doctrine, we note that the obvious, fundamental fairness issues presented by the lost chance doctrine have caused approximately half of states, along with Canada and the United Kingdom, to reject the doctrine.[21] The below discussion of these issues illustrates why any attempts to expand the doctrine should be met with caution.

A. It is Often Impossible for Courts of Appeal to Determine Whether a Lost Chance Award Is Excessive under the Current Scheme

The first shortcoming of the lost chance doctrine is that it carries a significant risk of jury confusion, often resulting in substantial jury awards that are nearly immune from appellate review.[22] Review is difficult because juries are not required to specify their factual findings regarding the degree of lost chance that the defendant's conduct caused. Consider the example of *Braud v. Woodland Village L.L.C.*, where a nursing home resident suffered a heart attack, which was not caused by the fault of any defendant and which likely would have been fatal under any circumstances.[23] In pursuing a claim for malpractice, the plaintiff alleged that the nursing home attendants had a duty to administer CPR but failed to do so, and the patient died.[24] A jury found loss of a chance and awarded $1.65 million.[25] Perhaps such an award would be reasonable if the jury made a factual finding that the patient would have had a 40 to 50% chance of survival if the defendant administered CPR.[26] On the other hand, if the

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21. *See infra* Section I.D.

22. *See* Stroud v. Golson, 744 So. 2d 1286 (La. 1999) (Victory, J., dissenting).

23. Braud v. Woodland Vill. L.L.C., 54 So. 3d 745 (La. Ct. App. 4th Cir. 2010).

24. *Id.* at 748–49.

25. *Id.* at 749.

26. This jury confusion was partially attributable to the trial court's decision to give jury verdict interrogatories only on the issue of wrongful death, and not lost chance, despite the apparent lack of any evidence supporting causation for wrongful death—one of many examples illustrating that even the courts struggle to apply the lost chance doctrine in a fair and consistent manner. *Id.* at 752.

jury concluded that administering CPR would have provided a 5 to 10% chance of survival, which is likely closer to reality,[27] then the $1.65 million would seemingly be excessive. Unfortunately, the courts of appeal are not equipped to perform such an exercise, because juries are not required to quantify the chance that is lost.

This lack of clarity is traceable directly to the Louisiana Supreme Court's opinion in *Smith v. State*, wherein the Court created a valuation model for lost chance cases in Louisiana.[28] The *Smith* Court rejected the "percentage probability" model, whereby the award would be based upon the jury's determination of the percentage of the probability by which the defendant's conduct diminished the likelihood of achieving a more favorable outcome.[29] In other words, using the example of the nursing home patient discussed above: if the patient's typical wrongful death damages would be $1.65 million, and the jury found the failure to administer CPR deprived her of a 10% chance of survival, that would result in a $165,000 award—arguably a reasonable result given the small chance of survival. The *Smith* Court rejected this model as inviting too much "uncertainty," and instead embraced a "lump sum" valuation model.[30]

Critics of the *Smith* Court's "lump sum" approach, including former Justice Victory, claimed that it is a "rabbit-out-of-the-hat" exercise.[31] These critics point to the vague, holistic standards governing the doctrine—juries are asked to assign a value to the lost chance, "in and of itself," and such value is to be "based on all of the relevant evidence in the record, as is done for any other measurement of general damages."[32] Further, the jury "will be allowed to consider an abundance of evidence and factors, including evidence of percentages of chance of survival along

27. *See* Richard A. Field et al., *Systematic Review of Interventions to Improve Appropriate Use and Outcomes Associated with Do-Not-Attempt-Cardiopulmonary-Resuscitation Decisions*, 85 RESUSCITATION 1418 (2014), *available at* https://doi.org/10.1016/j.resuscitation.2014.08.024 [https://perma.cc/B8QD-6A68] ("Survival to hospital discharge rates [for patients receiving CPR] are less than 20% for in-hospital arrests and less than 10% for out of hospital cardiac arrest."); Donald D. Tresch et al., *Outcomes of Cardiopulmonary Resuscitation in Nursing Homes: Can We Predict Who Will Benefit?*, 95 AM. J. MED. 123 (1993), *available at* https://doi.org/10.1016/0002-9343(93)90252-k [https://perma.cc/66BC-G7MQ] (5% of nursing home patients receiving CPR survived to be discharged from hospital).

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

29. *Id.* at 548.

30. *Id.* at 548–50.

31. *Id.* at 551.

32. *Id.* at 549.

with evidence such as loss of support and loss of love and affection, and any other evidence bearing on the value of the lost chance."[33] These open-ended standards amount to little more than telling the jury "you write down whatever number feels right to you"—and it is not surprising that juries often respond with substantial numbers, approximating or even exceeding wrongful death awards, in an effort to compensate injured, sympathetic plaintiffs.[34]

When the *Smith* Court predicted that courts of appeal would be capable of reviewing these awards based on the record before them, the Court failed to acknowledge that the record often contains conflicting testimony from opposing experts on the percentage chances of the lost chance. It is the jury's duty to decide which position is more credible. In many other lost chance cases, there is no evidence presented on the percentage probability of survival at all. For example, in delayed treatment cases, we routinely hear plaintiff experts, when asked about the chance of survival, testify: "I can't put a number on it, but earlier treatment is always better." Such testimony can lead a jury to reach a wide range of conclusions—but because they are not required to make an actual finding on the percentage probability, it is nearly impossible for the court of appeal to determine what the jury accepted as the amount of chance deprived, and whether the jury's award was excessive or not.

Appellate review of lost chance awards is crucial, as jury confusion is a significant risk with the *Smith* Court's "lump sum" approach.[35] In *Stroud*, Justice Victory dissented from the Court's denial of writs and urged the Court to reconsider the "lump sum" approach.[36] The *Stroud* jury had awarded $1.5 million in lost chance damages, despite the plaintiff's own expert testifying that the plaintiff was deprived of, at most, a 20% chance

33. *Id.*

34. *See also* Jury Verdict Form at 3, Doyle v. La. Med. Mut. Ins. Co., 2018 WL 6927616 (La. Dist. Ct. May 24, 2018) (award of $500,000 despite finding that plaintiff suffered a loss of a 30% chance of survival); Burchfield v. Wright, 275 So. 3d 855, 859 (La. 2018) (lump sum of $680,000); Jury Verdict Form at 1, Norwood v. Medina, 2008 WL 5868763 (La. Dist. Ct. Jan. 8, 2008) (lump sum of $500,000); Verdict and Settlement Summary at 1, Anderson v. LaSalle Gen. Hosp., 2006 WL 3873282 (La. 24th Dist. Ct. June 27, 2006) (lump sum of $600,000); Hargroder v. Unkel, 888 So. 2d 953 (La. Ct. App. 2d Cir. 2004) (found that jury improperly awarded damages for stroke victim's full injury and complications, as opposed to just compensating for the lost chance of a better result); Lewis v. State Med. Ctr. of La., 983 So. 2d 231, 238 (La. Ct. App. 4th Cir. 2008), *cert. denied sub nom*, 989 So. 2d 105 (La. 2008) (lump sum of $1,834,914.31).

35. *See* Stroud v. Golson, 744 So. 2d 1286 (La. 1999).

36. *Id.*

of survival.[37] Justice Victory analyzed recent wrongful death awards and concluded that $1 million would be a typical award at that time for *full* wrongful death damages.[38] That a jury awarded a significantly greater amount, when lost chance awards were supposed to be *less* than full wrongful death awards, led Justice Victory to view the case as "a glaring example of why the majority's opinion in *Smith* does not work and why the percentage probability test should be adopted by this court."[39] The *Stroud* case is but one of many examples demonstrating that juries often award a "lump sum" amount that exceeds the medical malpractice cap of $500,000.[40] Excessive lost chance awards are even more concerning to non-qualified healthcare providers, whose damages awards are not subject to the cap.

The recognized propensity for jury confusion and the absence of effective appellate review weigh against any attempt to expand the lost chance doctrine.

B. Plaintiffs Are Typically Allowed to Assert a Lost Chance Theory for the First Time Very Late in the Litigation

Just as the lack of clear guidance on the lost chance doctrine results in appellate confusion, it similarly results in trial confusion. Because there are no hard rules, plaintiffs are often allowed to assert a lost chance theory for the first time very late in the litigation, placing defendants in the position of defending a claim that did not exist during the discovery phase.

In our experience, it is rare that a plaintiff raises a lost chance theory in her medical review panel complaint (the initial pleading in medical malpractice cases, which must be presented to a medical review panel before they can be asserted in court). Rather, the much more common scenario is that a medical malpractice plaintiff asserts a traditional injury claim, such as wrongful death, to the medical review panel, and after the panel renders an opinion, she files a post-panel petition in court that again asserts a traditional injury claim. As discovery unfolds, and after the plaintiff retains an expert, at some point the plaintiff realizes that her wrongful death claim might actually be a lost chance claim, that is, because the plaintiff realizes she has a causation problem. When a plaintiff raises the lost chance theory multiple years after the initial medical review panel complaint, either through an amended petition or less formal means, what remedies does a defendant have?

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37. *Id.* at 1286–87.
38. *Id.* at 1287.
39. *Id.* at 1286.
40. *See* sources cited *supra* note 34.

This remained an open question until 2016, when the Supreme Court ruled in *Bailey v. Knatt*. In that case, the patient underwent a hip replacement in 2010 that resulted in complications.[41] The plaintiff filed a panel complaint in 2011 alleging a traditional medical malpractice claim—namely, that the healthcare providers caused her injuries. In 2013, a medical review panel rendered an opinion in favor of the defendants. In 2014, the plaintiff filed a post-panel petition in court, again alleging a traditional medical malpractice claim. On July 14, 2015, more than four years from the last date of any alleged malpractice, the plaintiff amended her petition to assert a lost chance claim—that is, that the defendants' negligence deprived her of a chance of a better outcome.

The *Bailey* defendants responded to the amended petition with an exception of prescription, arguing that the lost chance claim constituted a new cause of action that was premature, as it was never presented to a medical review panel,[42] and for which prescription was never interrupted, making it untimely.[43] The trial court granted the exception and dismissed the lost chance claim. After the First Circuit denied writs, the Supreme Court granted writs and reversed, providing this brief opinion:

> Granted. Plaintiff's claim based on the loss of the chance of a better outcome is a theory of recovery arising from the same transaction or occurrence as her other claims and is not a separate cause of action. *See Everything on Wheels Subaru, Inc. v. Subaru South, Inc*., 616 So.2d 1234 (La. 1993).[44] Accordingly, the

41. Brief for Petitioner-Appellant at 3, Bailey v. Knatt, 207 So. 3d 407 (La. 2016) (No. 2016-CC-1130).

42. The MMA requires, "All malpractice claims against health care providers . . . shall be reviewed by a medical review panel . . . ." LA. REV. STAT. § 40:1231.8 (2020). When a plaintiff asserts a malpractice claim in court without first submitting that claim to a medical review panel, a defendant's remedy is to seek dismissal by way of a dilatory exception of prematurity. LA. CODE CIV. PROC. art. 926(A)(1) (2010).

43. The prescriptive period for a medical malpractice claim may only be interrupted by timely filing a request for a medical review panel. A plaintiff's assertion of a medical malpractice claim in a district court, without having submitted that claim to a medical review panel, does not interrupt prescription. Bush v. Nat'l Health Care of Leesville, 939 So. 2d 1216 (La. 2006); LeBreton v. Rabito, 714 So. 2d 1226 (La. 1998).

44. *See* Everything on Wheels Subaru, Inc. v. Subaru S., Inc., 616 So. 2d 1234, 1238–39 (La. 1993) ("There is only *one* cause of action (although several demands or theories of recovery may be asserted thereon) when the operative facts of one transaction or occurrence give rise to the plaintiff's right to assert the action against the defendant.").

> judgment of the district court is reversed, and the case remanded for further proceedings.[45]

After *Bailey,* it is not clear that a defendant has any basis for objecting that a lost chance claim was "added too late." *Bailey* certainly undercuts any argument that a lost chance claim should have been part of the plaintiff's original medical review panel complaint, seemingly doing away with any basis for filing exceptions of prematurity or prescription on those grounds.

So when is the latest a plaintiff may assert a lost chance theory? According to at least one recent appellate decision, the answer may be *as late as the jury charge conference.*[46]

The *Matranga* case[47] involved an 80-year-old female who was admitted for a heart surgery to provide a new aortic heart valve, which required intubation for anesthesia.[48] Shortly after intubation, she suffered a bleed in her right lung, experienced a cardiac arrest, and her brain was deprived of oxygen.[49] By the time she was successfully ventilated, her brain had been deprived of oxygen for long enough to cause significant brain damage, and she died shortly later.[50]

At all times during the litigation, the *Matranga* plaintiffs pleaded only wrongful death theories of recovery, not lost chance.[51] Likewise, at trial, the plaintiffs presented only wrongful death evidence.[52] However, at the jury charge conference, plaintiffs requested jury charges regarding lost chance.[53] The trial judge declined to include lost chance on the verdict form or jury instructions due to the lack of lost chance evidence introduced during trial.[54] The jury returned a verdict in favor of all defendants, finding no breach in the standard of care.[55]

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45. Bailey v. Knatt, 207 So. 3d 407 (La. 2016).

46. *See* Matranga v. Par. Anesthesia of Jefferson, LLC, 170 So. 3d 1077 (La. Ct. App. 5th Cir.), *cert. denied*, 178 So. 3d 148 (La. 2015), *and cert. denied*, 178 So. 3d 152 (La. 2015).

47. Our law firm represented one of the *Matranga* defendants at trial and on appeal. *Id.*

48. *Id.* at 1082–84.

49. *Id.* at 1083.

50. *Id.* at 1084.

51. *Id.* at 1095.

52. Brief of Defendant-Appellees at 2, 6–8, Matranga v. Par. Anesthesia of Jefferson, LLC, 170 So. 3d 1077 (La. Ct. App. 5th Cir. 2015) (No. 14–CA–448).

53. *Matranga*, 170 So. 3d at 1094–96.

54. *Id.* at 1095–96.

55. *Id.* at 1089.

On appeal, the Louisiana Fifth Circuit held that the trial court's failure to instruct the jury on lost chance was reversible error and remanded the case for a new trial.[56] The language of the Fifth Circuit's opinion in *Matranga* is sweeping, and presents a host of alarming implications for lost chance defendants, discussed further below. But first and foremost, *Matranga* seems to support the notion that plaintiffs can assert a lost chance theory for the first time at virtually any stage of the litigation, including just before the case is submitted to the jury. This presents a high risk of prejudice to defendants, which would be exacerbated by expansion of the lost chance doctrine.

C. A Lost Chance Claim Can Potentially Be Submitted to Jury Even If Only Wrongful Death Evidence Is Presented at Trial

To a defense practitioner, the most troubling aspect of the *Matranga* decision is the idea that plaintiffs may be allowed to ask a jury for a lost chance award, as an alternative to wrongful death damages, even if they submitted no lost chance evidence at trial, thereby depriving the defendant of the opportunity to address and rebut that evidence. This is a strategy we have encountered multiple times, and we refer to this theory colloquially as medical malpractice's "lesser included offense."

The *Matranga* plaintiffs presented no evidence of a lost chance, and did not raise the issue of lost chance at any point in the litigation until the jury charge conference.[57] The *Matranga* trial court found that the jury should not be asked to award damages for lost chance, as there was no evidence in the record to support this theory.[58] In reversing the trial court, the Fifth Circuit implied that in *any* wrongful death case, the judge must instruct the jury as to the lost chance doctrine if requested, otherwise the judge will have misinformed the jury as to the burden of proving causation and thus committed reversible error—clearly running afoul of the Supreme Court's decision in *Smith.*[59]

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56. *Id.* at 1098–99.
57. Brief of Defendant-Appellees, *supra* note 52, at 2, 6–8.
58. *See Matranga*, 170 So. 3d at 1094–96.
59. *Smith v. State, Department of Health & Hospitals* held:

> Allowing recovery for the loss of a chance of survival is not, as the court of appeal suggested, a change or a relaxation of the usual burden of proof by a preponderance of the evidence. Rather, allowing such recovery is a recognition of the loss of a chance of survival as a distinct compensable injury caused by the defendant's negligence, to be distinguished from the loss of life in wrongful death cases, and there is no variance from the usual burden in proving that distinct loss.

The *Matranga* court explained that a lost chance jury charge was necessary because:

> Loss of chance of survival is a legal doctrine which governs [the element of causation] of a medical malpractice action when the alleged malpractice results in a patient's death. Under Louisiana law, a plaintiff in a medical malpractice action is not required to prove that a healthcare provider directly caused their patient's death.[60]

In so holding, *Matranga* fails to acknowledge the distinctions between the lost chance theory and the wrongful death theory, instead seemingly treating them as one and the same. In attempting to avoid the Supreme Court's opinion in *Smith,* which drew a clear distinction between wrongful death and lost chance claims, the *Matranga* court noted: "*Smith* does not stand for the proposition that plaintiffs in a wrongful death or survival action are prohibited from supporting their theory of recovery with regard to causation using the loss of chance of survival doctrine."[61] This is a misreading of *Smith* and an obvious conflation of two distinct legal theories.

Despite the *Smith* Court's seemingly clear guidance that a lost chance claim addresses a distinct compensable harm, *Matranga* seems to imply that lost chance jury instructions must be given in *all* medical malpractice wrongful death actions. The *Matranga* court stated very matter-of-factly: "loss of chance of survival was applicable in the case at bar because of the plaintiffs' claim that Ms. Greathouse died as a result the defendants' alleged malpractice."[62] Even more perplexing, the *Matranga* court found error only in the jury instructions' failure to address lost chance, but not with the verdict form itself, which included only interrogatories related to wrongful death damages.[63] This suggests that the *Matranga* court did not see lost chance as a distinct injury subject to special verdict forms and a unique method of valuation, such as one line for a lump sum award as *Smith* called for, but rather as the standard of proof for causation in a wrongful death claim. The *Matranga* court even recited, with seeming approval, the plaintiff's argument that "by excluding the instruction on

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676 So. 2d 543, 547 (La. 1996).

60. *Matranga*, 170 So. 3d at 1094.

61. *Id.* at 1095.

62. *Id.*

63. *See id.* at 1094–96.

loss of chance of survival, the trial court was holding the plaintiffs to an improper standard of proof."[64]

Matranga suggests that courts should allow plaintiffs to plead traditional injury claims, such as wrongful death, and later re-define the alleged injury when convenient. *Matranga* also suggests that plaintiffs may seek traditional wrongful death damages, including medical expenses in excess of the cap, but request that the jury be instructed that the plaintiff bears the burden of proving only the loss of a chance of a better result. Such a result would essentially be a relaxation of a plaintiff's burden to prove causation of wrongful death damages—which is exactly what the Supreme Court warned against in *Smith*.[65]

While *Matranga* has not been overturned and will continue to muddy the waters on these issues, there is reason to believe that the courts have recognized that *Matranga* went too far. Just two years after *Matranga*, the same Fifth Circuit panel appeared to walk back the implications of *Matranga* in the case of *Deykin v. Ochsner*.[66] Although *Deykin* did not explicitly overrule *Matranga,* it upheld the trial court's decision to not provide jury charges or interrogatories regarding the loss of a chance of survival, holding that:

> not every malpractice claim involving death necessarily implicates the loss of a chance of survival doctrine, or necessitates the giving of a loss of a chance of survival instruction. Only in malpractice cases involving death where the evidence presented indicates that the loss of a chance of survival doctrine is applicable is it appropriate to give such an instruction.[67]

In other words, a plaintiff must present evidence to justify a lost chance instruction. If that remains the law, *Matranga* will prove to be an anomaly, and courts will prohibit plaintiffs from using lost chance jury instructions to confuse juries about the burden of proof in traditional wrongful death cases. Still, *Matranga* and *Deykin* serve as clear evidence that even the courts struggle to conceptualize lost chance and to apply it in a fair and consistent manner,[68] which should raise further concerns over any efforts to expand the doctrine.

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64. *Id.* at 1095 n.19.

65. Smith v. State, Dep't of Health & Hosps., 676 So. 2d 543, 547 (La. 1996).

66. *See* Deykin v. Ochsner Clinic Found., 219 So. 3d 1234, 1240 (La. Ct. App. 5th Cir. 2017).

67. *Id.*

68. As originally crafted by the *Smith* Court, the lost chance doctrine was intended to address causation problems in wrongful death cases. 676 So. 2d at

D. Many Jurisdictions Have Rejected the Lost Chance Doctrine Altogether

It is for these reasons, and others, that fewer than half of the states have adopted the lost chance doctrine, with many jurisdictions explicitly rejecting it. Specifically, 24 states have adopted some version of the lost chance doctrine, 17 have rejected it, 4 have deferred ruling on the doctrine, and 5 have yet to address the matter.[69] Further, the lost chance doctrine has been met with hostility by the Supreme Court of Canada and by courts in the United Kingdom.[70]

The rationales from these jurisdictions should also be considered during any discussion of expanding the doctrine in Louisiana. Common criticisms from courts rejecting the lost chance doctrine are that it represents a relaxation of the normal burden of proof,[71] and that it

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548–49. Over the years, the doctrine was expanded such that it applied not only to death cases, but to any medical malpractice claim in which a plaintiff alleged the loss of a chance of a "better outcome." *See, e.g.*, Hargroder v. Unkel, 888 So. 2d 953, 956 (La. Ct. App. 2d Cir. 2004) (plaintiff alleged that failure to diagnose a stroke caused continued weakness and necessitated early retirement). The judiciary's broadening of the lost chance doctrine represents even further erosion of traditional burden of proof and causation standards, and further illustrates the need for the legislature to address the issue.

69. 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, 55 (2015).

70. *See* Nayha Acharya, *No More Chances for Lost Chances: A Weinribian Response to Weinrib*, 12 MCGILL J. L. & HEALTH 205 (2019); Harold Luntz, *Loss of Chance in Medical Negligence*, 522 U. MELB. LEGAL STUD. RES. PAPER NO. 522 at 22 (2011), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743862 [https://perma.cc/P7WB-XEBD] (discussing Laferriére v. Lawson, [1991] 1 S.C.R. 541 (Can.); Hotson v. E. Berkshire Health Auth., [1987] AC 750 (HL), [1987] 2 All ER 909 (UK); Gregg v. Scott, [2005] 2 AC 176 (HL), [2005] 4 All ER 812 (UK)).

71. *See, e.g.*, Fennell v. S. Md. Hosp. Ctr., Inc., 580 A.2d 206, 213 (Md. 1990). The court reasoned:

> Re-defining loss of chance of survival as a new form of damages so that the compensable injury is not the death, but is the loss of chance of survival itself, may really be an exercise in semantics. Loss of chance of survival in itself is not compensable unless and until death ensues. Thus, it would seem that the true injury is the death. While we should not award damages if there is no injury, the logical extension of the loss of chance damages theory arguably should allow loss of chance damages for negligence, even when the patient miraculously recovers.

Id.

represents a drastic shift in tort liability that would be best left up to state legislatures.[72] The Supreme Court of Texas has further noted the risk of creating a slippery slope—if lost chance can be applied in the medical malpractice context, why should it not apply to a legal malpractice plaintiff's claim of a lost chance of victory at trial due to poor lawyering, or perhaps an entrepreneur's lost chance of success for a new failed business due to the actions of another?[73] In rejecting the doctrine, the Supreme Court of Texas concluded: "We see nothing unique about the healing arts which should make its practitioners more responsible for possible but not probable consequences than any other negligent actor."[74]

Louisiana courts have thus far refused to apply lost chance outside of the medical malpractice context, even in cases that seem analogous. In *Niang v. Dryades YMCA School of Commerce, Inc*., Mr. Niang collapsed while playing basketball at the YMCA.[75] His wife was present and requested an automated external defibrillator (AED).[76] YMCA staff informed her that an AED was not available.[77] Mr. Niang was hospitalized and died shortly later.[78] His wife filed suit against the YMCA, alleging a violation of statutory duty to keep an AED on the premises.[79] Her petition specifically asserted both a traditional wrongful death claim, as well as a loss of a chance of survival claim.[80]

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72. *See, e.g.*, Dumas v. Cooney, 235 Cal. App. 3d 1593, 1608, 1611 (Ct. App. 1991). The court explained:

> [D]isagreement on such weighty matters of public policy militates against judicial tampering with the long-standing meaning of causation in deference to legislative consideration of the issue. . . .The debate on lost chance is vigorous, and we favor the established rule of tort causation. More fundamentally, however, we believe that "[s]weeping modifications of tort liability law fall more suitably within the domain of the Legislature, before which all affected interests can be heard and which can enact statutes providing uniform standards and guidelines for the future.

Id.

73. *See* Kramer v. Lewisville Mem'l. Hosp., 858 S.W.2d 397, 406 (Tex. 1993).

74. *Id.*

75. Niang v. Dryades YMCA Sch. of Com., Inc., 286 So. 3d 506, 508 (La. Ct. App. 4th Cir. 2019).

76. *Id.*

77. *Id.*

78. *Id.*

79. *See* LA. REV. STAT. § 40:1137.3 (2020).

80. *Niang*, 286 So. 3d at 508.

The *Niang* defendant sought dismissal of the lost chance claim, arguing that Louisiana law limited the doctrine to medical malpractice actions.[81] The trial court agreed and dismissed the claim.[82] The court of appeal affirmed, holding that, outside of the medical context, it is overly speculative to determine whether a plaintiff was deprived of a chance of survival; on the other hand, "the loss of chance as a result of medical treatment has a definitive value and is not speculative."[83]

From a logical perspective, the *Niang* claim seems indistinguishable from the claims in *Hastings* and *Smith*. If the loss of a chance truly represents a "distinct compensable injury"[84] holding a value in and of itself, then why should that injury not be compensable in a general negligence context? If it is too speculative to determine whether a plaintiff would have possessed a chance of survival if provided access to an AED, it would seemingly also be too speculative in other medical malpractice contexts, such as the failure to administer CPR.[85]

Niang confirms that the lost chance theory does not naturally follow from our fundamental notions of tort liability, but is rather a judicially created compromise that the courts apply in a narrow legal context. Further expansion of the lost chance doctrine would make Louisiana an outlier, which warrants further skepticism of such efforts.

II. CRITIQUE OF THE MORGAN PROPOSAL

Having established that the lost chance doctrine presents fundamental fairness concerns even in its current form, we turn now to the Morgan Comment, which proposes expansion of the doctrine. Specifically, the Morgan Comment proposes that juries finding a loss of chance shall award two categories of damages: first, a "lump sum" similar to the *Smith* approach which would be subject to the $500,000 cap, and would account for the plaintiff's pain and suffering, emotional distress, disability and disfigurement, and loss of consortium, but not medical expenses; and second, an award for the full amount of plaintiff's medical expenses, not discounted for the failure to prove injury by a preponderance, and not subject to the cap.

This proposal, while well intentioned, is significantly flawed, as it would establish a relaxed burden on causation, would create an

81. *Id.* at 508–09.
82. *Id.*
83. *Id.* at 512.
84. Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 547 (La. 1996).
85. Braud v. Woodland Vill. L.L.C., 54 So. 3d 745 (La. Ct. App. 4th Cir. 2010).

unworkable framework for determining which medical expenses are recoverable, and would be inconsistent with the original purpose of the Supreme Court in adopting the lost chance doctrine, which is explicitly not intended to "make a plaintiff whole."

A. The Morgan Proposal Would Establish a Significantly Relaxed Burden on Causation

The Morgan Proposal would award plaintiffs with full or near full medical malpractice damages despite their inability to prove a traditional injury. As already set forth above, juries routinely award lost chance "lump sum" awards exceeding the $500,000 cap.[86] To allow plaintiffs to recover a lump sum of that size, plus full medical expenses, would result in lost chance plaintiffs receiving the same or nearly the same level of compensation as traditional medical malpractice plaintiffs who are able to prove their injuries by a preponderance of the evidence. Awarding full damages to lost chance plaintiffs is exactly what the Supreme Court forbade in *Smith*, because "[t]o 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."[87]

This would essentially result in a relaxation of the burden of proof. Under the Morgan Proposal, it is difficult to imagine why plaintiff attorneys would ever assert a traditional wrongful death claim or other injury requiring proof of causation greater than 50%, when they could instead assert a lost chance claim, for which they must prove only a chance of a better result and still receive full or near full damages. This would be especially true in cases involving substantial medical expenses, which is what drives the value of medical malpractice cases in light of the $500,000 cap. Thus, the Morgan Proposal cannot be squared with the Supreme Court's recognition in *Smith* that a relaxation of the burden of proof would violate basic tenets of Louisiana tort law.[88] This point has been emphasized not just by the courts, but also by academics. Professors Maraist and Galligan summarized the issue well when they observed:

> To allow full recovery would do violence to the "redefinition of injury" theory. It is one thing to say a wrongdoer who destroys the victim's chance to survive, no matter how slight, must pay damages equaling the value of the lost chance of survival, and quite another to say that he must pay the full amount of the

86. *See* sources cited *supra* note 34.
87. *Smith*, 676 So. 2d at 547.
88. *See id.*

> wrongful death damages. The lost chance of survival theory is a sound one, but the damages should be fixed at the value of the chance.[89]

B. The Morgan Proposal Would Create an Unworkable Framework for Determining Which Medical Expenses Are Recoverable

Next, the Morgan Proposal is flawed as it would create an unworkable framework for determining which medical expenses are recoverable. The lost chance doctrine often arises in the context of patients with significant pre-existing conditions,[90] or who suffer a serious injury not caused by the defendant's conduct.[91] The Morgan Proposal calls for juries to award medical expenses, but it creates a significant risk that juries will compensate plaintiffs for medical expenses that have nothing to do with the defendant's conduct.

For example, in *Burchfield v. Wright*, the plaintiff suffered from numerous pre-existing conditions, "including congestive heart failure, hypertension, and at least two, but possibly four, prior heart attacks."[92] Mr. Burchfield suffered another heart attack, and eventually required a heart transplant.[93] The jury found that the plaintiff failed to prove that the defendant's conduct more likely than not caused Mr. Burchfield's heart attack or any of his subsequent complications.[94] But the plaintiff argued, and the jury apparently accepted, that if not for the defendant's negligence, the plaintiff would have had a less-than-50% chance of being a candidate for a heart bypass surgery, as opposed to the transplant.[95]

In support of damages, the plaintiff offered evidence of medical expenses not only related to the transplant surgery itself but also evidence

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89. FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW § 4.04 (2010); *see also* William R. Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law?*, 75 OHIO ST. L. J. 1027, 1073 (2014) (opining that the notion of lost chance as a distinct compensable harm, as opposed to a different standard of causation, is of "debatable" merit and persuasiveness).

90. *See, e.g.*, Burchfield v. Wright, 275 So. 3d 855, 861 (La. 2018) (plaintiff suffered from pre-existing conditions, "including congestive heart failure, hypertension, and two, but possibly four, prior heart attacks").

91. Braud v. Woodland Vill. LLC, 54 So. 3d 745, 752 (La. Ct. App. 4th Cir. 2010), *cert. denied*, 60 So. 3d 1254 (La. 2011) (both sides' experts agreed that the patient would have suffered a heart attack regardless of the defendant's conduct).

92. *Burchfield*, 275 So. 3d at 861.

93. *Id.* at 858.

94. *Id.* at 859.

95. *Id.*

that "Mr. Burchfield would require future medical care for the rest of his life."[96] Of course, given his serious pre-existing heart disease, Mr. Burchfield almost certainly would have required extensive cardiology care regardless of any negligence by the defendants. Under the Morgan Proposal, defendants would face the risk of being burdened with compensating a plaintiff for the costs of all future medical care in any way related to the condition at issue, even if the plaintiff has not proven causation of any concrete injury, and even if the plaintiff would have sustained many of those costs in the absence of any negligence by the defendant. The Morgan Comment acknowledges this danger, and professes to provide a solution: "The court would carefully instruct the jury to award only medical expenses that a plaintiff incurred *as a result of* the physician's negligence. 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."[97]

But how could a jury possibly determine which expenses were "a result of," that is, were caused by, a defendant's negligence if they have already concluded that the plaintiff *cannot* prove traditional causation? Moreover, some courts do not require a plaintiff to proffer evidence tailored to the lost chance claim.[98] The whole point of the lost chance doctrine is to provide a remedy in cases that have very poor quality of evidence on causation—and in the absence of such evidence, it is not realistic to expect a jury to be able to isolate the relevant medical expenses in the manner the Morgan Comment proposes.

This conundrum is even more difficult in pediatric cases, which are a significant source of medical malpractice litigation. We have litigated numerous cases involving babies who were unfortunately born with serious physical or neurological complications, where the parents later allege negligence in the treatment of these complications. Sadly, for many babies born with severe complications, the full extent and nature of the present-at-birth complications do not reveal themselves until the baby develops into a toddler and beyond. Such cases present significant exposure to defendants, as it is difficult to isolate the complications which are arguably related to the allegedly negligent act from those which would be expected in the absence of negligence. Under traditional "eggshell" theories, defendants are liable for the full consequences of their conduct, even if they merely aggravated a pre-existing condition.[99]

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96. *Id.* at 861.

97. Morgan, *supra* note 5, at 532 (emphasis added).

98. See *supra* Section I.C, discussing the *Matranga* case.

99. *See* Aisole v. Dean, 574 So. 2d 1248, 1253 (La. 1991) ("It is a well-established principle of law that a tortfeasor takes his victim as he finds him and

When it comes to medical expenses that an "eggshell plaintiff" likely would have incurred even in the absence of negligence, perhaps the risk of over-burdening a defendant with such costs is a necessary evil in cases in which the plaintiff can actually prove causation of a concrete injury. But asking a jury to determine which future medical expenses, which may be legion, shall be charged against the defendant—at full price—when the plaintiff has not proven traditional causation would almost certainly result in defendants being unfairly burdened with paying for damages they did not cause.

C. The Morgan Proposal Is Based on the False Premise That the Lost Chance Doctrine Is Intended to "Make Plaintiffs Whole"

Finally, the Morgan Proposal is flawed as it is based on the notion that the lost chance doctrine is intended to "make plaintiffs whole"[100]—which is false. In *Smith,* the Supreme Court confirmed that Louisiana adopted the lost chance doctrine, which approximately half of the states have rejected, in order to provide *partial* compensation to plaintiffs who would otherwise recover nothing given their problems of proof.[101] This is a judicially created compromise. If the lost chance doctrine were truly a natural offshoot of traditional tort theories, then one would expect to see it widely embraced by the states and expanded to general negligence cases[102]—but neither has happened.

The Morgan Comment argues that the legislature "intended" for full medical expenses to be awarded to lost chance plaintiffs, and that "strict construction" of the Medical Malpractice Act (MMA) dictates such a result.[103] This argument is puzzling. The MMA is indeed supposed to be strictly construed, and that is why many commentators object to the judiciary's creation of the lost chance doctrine in the first place, because the legal basis for the lost chance doctrine is found nowhere in the

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although the damages caused are greater because of the victims' prior condition which is aggravated by the tort, the tortfeasor is nevertheless responsible for the consequences of his tort."); Gaunt v. Progressive Sec. Ins. Co., 92 So. 3d 1250, 1271 (La. Ct. App. 4th Cir.), *cert. denied*, 102 So. 3d 33 (La. 2012), *cert. denied*, 102 So. 3d 37 (La. 2012) ("This concept is often referred to as the 'eggshell' plaintiff principle.").

100. Morgan, *supra* note 5.

101. Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 547 (La. 1996).

102. *See* Kramer v. Lewisville Mem'l. Hosp., 858 S.W.2d 397, 406 (Tex. 1993) ("[I]t is doubtful that there is any principled way we could prevent [the lost chance doctrine's] application to similar actions involving other professions.").

103. Morgan, *supra* note 5, at 527–28.

MMA.[104] Rather, the MMA provides that medical malpractice plaintiffs have the burden of proving by a preponderance of the evidence that as a proximate result of the defendant's negligence "the plaintiff suffered injuries that would not otherwise have been incurred."[105]

Proponents of lost chance argue that the lost chance is an injury unto itself, therefore fitting within the statutory language. But the courts' refusal to apply this rationale outside of the medical malpractice context, as recently re-affirmed in *Niang v. YMCA,*[106] indicates that lost chance is not naturally encompassed by definitions of a tort injury,[107] but is instead a judicially created compromise. Simply put, the MMA does not require the application of the lost chance doctrine, and it certainly does not support its expansion.

The Morgan Comment argues that the inevitable result of *Burchfield* is that some injured plaintiffs will not be compensated for the full extent of their medical expenses, even if they have proven negligence on the part of a defendant. This is true, and it has always been true for plaintiffs lacking proof of causation, as bedrock legal principles establish that defendants shall not be charged with bearing the burden of compensating victims in the absence of sufficient proof of causation.[108] Allegedly undercompensated lost chance plaintiffs will be placed in a similar position as any other member of society with an unfortunate medical ailment—namely, he or she requires medical treatment not because of negligence but because of a medical condition. Under such circumstances, the health insurance system must bear the cost of care.

III. PROPOSAL FOR REFORMING THE LOST CHANCE DOCTRINE

The Louisiana Supreme Court ruled correctly in *Burchfield v. Wright,* as the Second Circuit's decision effectively created a relaxed burden of proof in violation of fundamental legal principles. Nevertheless, we agree

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104. *Smith*, 676 So. 2d at 550 (Victory, J., dissenting) (citing LA. REV. STAT. § 9:2794(A)(3) (2020) as a basis for rejecting the lost chance doctrine).

105. LA. REV. STAT. § 9:2794(A)(3) (2020).

106. Niang v. Dryades YMCA Sch. of Com., Inc., 286 So. 3d 506 (La. Ct. App. 4th Cir. 2019).

107. *See* LA. CIV. CODE art. 2315 (2020). This Article broadly calls for compensating plaintiffs for "[e]very act whatever of man that causes damage to another." *Id.*

108. Lasha v. Olin Corp., 625 So. 2d 1002, 1005 (La. 1993) (citing Jordan v. Travelers Ins. Co., 245 So. 2d 151 (La. 1971); PROSSER & KEETON, *supra* note 1, § 41; 2 MCCORMICK & BROUN, *supra* note 1, § 339; 9 WIGMORE, *supra* note 1, §§ 2497, 2498).

with the Morgan Comment that the legislature should address the lost chance doctrine. We propose that the legislature first engage in an appropriate debate about whether the doctrine belongs in Louisiana at all. Assuming the lost chance doctrine is allowed to live on, the legislature should charge plaintiffs with providing timely notice of lost chance claims, and only allow lost chance to be submitted to a jury when warranted by the evidence, eliminating the "lesser included offense" in medical malpractice.

Likewise, we would encourage reform on the issue of how to value the loss of a chance. As set forth above, we believe the "lump sum" approach causes jury confusion and prevents appellate review of seemingly excessive awards. We endorse a version of the percentage probability approach that Professor Joseph H. King, Jr. proposed,[109] but *Smith* rejected.[110] Under our proposal, a court would be charged with reducing the total damages based on the percentage probability assigned by the jury—for example, if the jury found damages of $1 million, but a deprivation of only a 10% chance of a better result, the plaintiff would be awarded $100,000.

Our proposal is superior to the "lump sum" approach because it reduces the risk of jury confusion, it provides greater ability for appellate review of damage awards, and it incentivizes plaintiffs to submit specific, quality evidence on the amount of the lost chance, rather than presenting the jury with vague, unhelpful testimony like "early treatment is better." Critics of percentage probability approaches, including the *Smith* Court, argue that the approach invites too much "uncertainty," and that plaintiffs would be too easily prejudiced by juries who struggle with determining an appropriate percentage.[111] This argument gives juries too little credit and fails to recognize that juries are routinely asked to determine percentages in making comparative fault determinations. If juries can be trusted to divide fault among numerous asbestos defendants, with findings within the hundredths of a percent,[112] then surely they are capable of weighing

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109. Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L. J. 1353 (1981).

110. Smith v. State Dep't of Health & Hosps., 676 So. 2d 543, 548–50 (La. 1996).

111. *Id.* at 548.

112. *See* Chaisson v. Avondale Indus., Inc., 947 So. 2d 171, 179 (La. Ct. App. 4th Cir. 2006), *cert. denied*, 954 So. 2d 145 (La. 2007) (affirming jury's finding that six asbestos defendants' fault could be broken down in amounts of 37.5%, 7.5%, 42.58%, 8.68%, .83%, and 2.91%).

expert testimony and determining whether the patient's chance of survival was closer to 5% or 45%.

Our proposal includes the application of the MMA's hard cap of $500,000, in that it does not allow for an award of medical expenses in excess of the cap. While this may be less generous than what is available in traditional medical malpractice cases, this proposal is fair in light of the fact that the plaintiff is unable to prove by a preponderance of evidence that any medical expenses would have been incurred if not for the defendant's negligence, particularly in light of the *Smith* Court's clear statement that the award is not designed to make the plaintiff whole.

CONCLUSION

We agree that the *Burchfield* decision brings us to a point at which reform of lost chance is warranted, especially since the judiciary created the doctrine, and the legislature has not addressed it. However, we have fundamental objections to the Morgan Proposal, which calls for an award of medical expenses to lost chance plaintiffs, not subject to the cap and not discounted for the plaintiff's failure to prove causation of those medical expenses. Such a proposal would inevitably result in a relaxation of the burden of proof, as plaintiffs would be allowed to recover full or near full medical malpractice damages, despite having failed to prove causation of a traditional injury. Such an expansion of the lost chance doctrine in Louisiana would make the state an outlier nationally. We propose instead that the legislature adopt a percentage probability approach to valuing lost chance awards, which would reduce the risk of jury confusion and better enable appellate review of seemingly excessive awards.