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LOSS OF CHANCE IN LEGAL MALPRACTICE

Courts decide legal malpractice actions by applying both contract and tort principles. Traditional negligence doctrines are used in most tort malpractice claims. Even so, standards for proving professional malpractice, legal and otherwise, remain remarkably unresolved. One tenacious problem has been distinguishing harms caused by professional negligence from those caused by other, nonculpable factors beyond the professional’s control.

In the medical malpractice context, some courts have isolated harms caused by a physician’s negligence from those injuries caused by a preexisting condition, and then compensated patients for the “loss of a chance.” The loss of chance doctrine recognizes that the chance of avoiding some adverse result, or achieving some favorable result, is a compensable interest even if the chance is less than fifty percent. In contrast, the traditional all or nothing approach allows recovery for the entire harm only if the plaintiff can prove causation by a preponderance of the evidence.


3. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 1, at 2 (2d ed. 1981) (hereinafter MALLEN & LEVIT) (there is little agreement on the meaning of “legal malpractice” and no precise formula for determining culpability).


5. See Cooper v. Sisters of Charity of Cincinnati, Inc., 27 Ohio St. 2d 242, 272 N.E.2d 97 (1971) (rejecting loss of chance in favor of the all or nothing approach). See generally King, supra note 4, at
The current procedure for proving causation in legal malpractice, known as the trial-within-a-trial method, has dissatisfied courts. One unexplored alternative is the loss of chance doctrine. Compensable chances lost in legal malpractice are capable of definition, and methods for valuing those chances are available. Procedural ramifications of proving legal loss of chance and policy justifications for the doctrine support the incorporation of loss of chance into some legal malpractice litigation.

I. METHODS OF PROOF OF LITIGATION MALPRACTICE

A. Traditional Approach

Courts have been reluctant to deviate from standards of traditional negligence actions. The burden of proving all elements of the legal malpractice tort rests with the aggrieved client. The formidable obstacle is proving cause and injury, which together determine whether the negligence will give rise to an action for damages. Most courts determine whether a claim is actionable by the trial-within-a-trial method whenever the client's claim is based on an attorney's negligence regarding litigation. Under this method, the client's cause of action depends on the

1376–78 (criticizing the all or nothing approach as arbitrary and contrary to deterrent objectives of tort).

6. See infra notes 10–36 and accompanying text.
7. See infra notes 37–48 and 81–90 and accompanying text.
8. See infra notes 91–116 and accompanying text.
9. See infra notes 117–33 and accompanying text. This Comment discusses legal malpractice only in the context of litigation. Although malpractice actions exist for any facet of the client-attorney relationship, litigation malpractice is clearly distinguishable. According to one recent study, 48.1% of all claims arise out of litigation activities. Gates, The Newest Data, 70 A.B.A. J. 78, 79 (Apr. 1984). To illustrate, the two largest areas of legal malpractice other than litigation are preparation of documents other than pleadings and consultation or advice. Id. at 79 (the two totalling 35.7% of the source of malpractice claims).
10. See infra notes 15–36 and accompanying text.
11. See generally MALLEN & LEVIT, supra note 3, § 551, at 675–76 (various statements of elements required). The client bears the burden of proving every essential element of cause even when the attorney's delay or failure to conduct discovery has impaired the plaintiff's ability to produce evidence. Id. § 657, at 811–12. See, e.g., Hansen v. Wightman, 14 Wn. App. 78, 88, 538 P.2d 1238, 1246 (1975) (the elements required for a case in tort are: (1) duty, (2) breach, (3) proximate cause, and (4) damages).
12. Proof of the breach of a duty owed establishes negligence; the two elements of cause and injury merely determine whether negligence is actionable, meaning whether it will give rise to an action for damages, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 165 (5th ed. 1984) [hereinafter PROSSER & KEETON].
13. Cause in fact has been accepted to mean the client's ability to establish that, but for the attorney's negligence, the underlying action would have terminated in a more favorable result than actually occurred. Spangler v. Sellers, 5 F. 882, 894–95 (C.C.S.D. Ohio 1881) (first enunciating the principle of obtaining a better result). See generally Coggin, Attorney Negligence . . . A Suit Within a Suit, 60 W. Va. L. Rev. 225 (1958) (coining the phrase "suit within a suit").
resolution of the underlying action for which the attorney-client relationship was formed. The reasoning is that if the result of the action would have been the same, the client suffered no injury due to the attorney's negligence.

In the trial-within-a-trial method, the malpractice client must reconstruct the underlying action. If the client were a plaintiff in the litigation, the burden is to show the existence of a valid claim upon which there was a greater than fifty percent likelihood of prevailing but for the attorney's error. For defendants, the evidence must affirmatively show a meritorious defense which would have either precluded any recovery or reduced the amount of the judgment but for the attorney's negligence. Failure-to-appeal cases typically require the client to prove that the attorney's negligence prevented both an appeal and a remand which more likely than not would have resulted favorably.

Evidence in the malpractice trial is restricted to that which would have been admitted in the underlying proceeding. Where the trial has not been entirely foreclosed, a full-scale replication might be unnecessary. Instead, courts will merely relitigate the parts of the trial affected by the alleged error, using the prior pleadings, transcripts, and existing records to supply the remaining evidence. With failure-to-appeal cases, the client does not

14. **Mallen & Levitt**, supra note 3, § 551, at 675-76 ("[t]he existence of a cause of action depends on the client's ability to establish that but for the attorney's neglect, the litigation would have terminated in a result more favorable."). To achieve this standard, the client actually recreates the underlying trial for the malpractice court. Id. § 656, at 810.

15. See, e.g., *Godbout v. Norton*, 262 N.W.2d 374 (Minn. 1977), cert. denied, 437 U.S. 901 (1978); see also **Mallen & Levitt**, supra note 3, § 557, at 690 (the plaintiff also bears the burden of proving that judgment was collectible).


18. See, e.g., *Pusey v. Reed*, 258 A.2d 460, 461 (Del. Super. Ct. 1969) ("[w]here the negligence relied upon is a failure to take an appeal, it must be shown that, if an appeal had been taken, a more favorable result would have been reached."). See generally Comment, *Attorney Malpractice: Problems Associated With Failure-to-Appeal Cases*, 31 BUFFALO L. REV. 583, 589 (1982) (the failure-to-appeal client must prove not only that the appellate court would have accepted the review and ruled favorably, but also that the remand would have been successful, an "added variable" which makes plaintiff's burden more difficult than in simple malpractice suits).

19. *Kessler v. Gray*, 77 Cal. App. 3d 284, 143 Cal. Rptr. 496, 499 (1978). In general, the trier of fact decides the underlying action just as if that were the claim being litigated at the malpractice trial, and the evidence and jury instructions are subject to the same rules and standards as would have been applied in the underlying action. E.g., *Ortiz v. Barrett*, 222 Va. 118, 278 S.E.2d 833 (1981). See generally **Mallen & Levitt**, supra note 3, § 661, at 830 (criterion for determining admissibility is whether evidence would have been admissible in underlying action). Experts who would have been used in the underlying action are allowed only to testify as they might have in that preceding action. Id. at 846-47.

receive the benefit of extrinsic evidence regarding the result of appeal.\textsuperscript{21} The outcome of the remanded action is concluded from existing records.\textsuperscript{22}

The recreation of the underlying action also determines the amount of damages awarded.\textsuperscript{23} The measure of damages is what the client should have recovered in the original trial, less what was actually recovered.\textsuperscript{24} The jury in the malpractice trial is presented with the same evidence to aid in its determination of damages as the jury in the underlying proceeding would have been allowed to consider.\textsuperscript{25} Thus, the attorney is liable for any amount the malpractice jury determines would have been the judgment in the underlying action.

\textbf{B. Dissatisfaction with Current Practice}

The reality of the trial-within-a-trial method clearly does not meet the promise of a full, theoretically complete reconstruction of the original lawsuit. Dissatisfied courts have struggled with the method, partly because

\footnotesize{(1978), reh'g granted, 616 F.2d 924 (6th Cir.), cert. denied, 449 U.S. 888 (1980) (transcript of underlying action read to the jury); Walker v. Bangs, 92 Wn. 2d 854, 861, 601 P.2d 1279, 1283–84 (1979) (transcript provides the best evidence of what transpired). \textit{See generally} M\textsc{allen} \& L\textsc{eivit}, supra note 3, \S 670, at 852–53 (proving the underlying action by use of transcripts and existing records).}

\textsuperscript{21} \textit{See}, \textit{e.g.}, Chocktoot v. Smith, 280 Or. 567, 571 P.2d 1255, 1256 (1977); Pete v. Henderson, 124 Cal. App. 2d 487, 269 P.2d 78, 80 (1954). Failure-to-appeal cases, unlike other legal malpractice cases, treat causation as a question of law, and evidentiary restrictions flow directly from this premise. M\textsc{allen} \& L\textsc{eivit}, supra note 3, \S 583, at 738–40. \textit{See generally} Breslin \& McMonigle, \textit{The Use of Expert Testimony in Actions Against Attorneys}, 47 INS. COUNS. J. 119 (1980) (failure-to-appeal cases do not admit experts to show that the original action would have been modified on appeal because such testimony is irrelevant on legal issues).

\textsuperscript{22} \textit{See}, \textit{e.g.}, Better Homes, Inc. v. Rodgers, 195 F. Supp. 93, 94 (N.D. W.Va. 1961) (record and transcript submitted by stipulation); Collins v. Wanner, 382 P.2d 105, 108 (Okla. 1963) (trial court reversed on appeal for admitting testimony outside the record below). \textit{See generally} Comment, supra note 18, at 601 (in determining the result of the hypothetically remanded action, the only type of evidence admissible is that which was a part of the earlier adjudication).

\textsuperscript{23} \textit{See}, \textit{e.g.}, Williams v. Bashman, 457 F. Supp. 322, 326 (D.C. Pa. 1978) (damages measured by amount of judgment which could have been recovered in underlying action).

\textsuperscript{24} \textit{E.g.}, Ware v. Durham, 246 Ga. 84, 268 S.E.2d 669, 669 (1980). Expenses incurred because of negligence, such as attorney's fees in mitigating losses, will sometimes be awarded. \textit{E.g.}, Coats v. Bussard, 94 Mich. App. 558, 288 N.W.2d 651, 654–55 (1980) (cost of unsuccessful appeal allowed). The causation issue is often treated as one of damages because the trial-within-a-trial method both determines cause and ascertains the amount of damages. Coggin, \textit{supra} note 13, at 226; \textit{see also} Maryland Casualty Co. v. Price, 231 F. 397, 402 (4th Cir. 1916) (court noted this problem); Comment, \textit{A Modern Approach to the Legal Malpractice Tori}, 52 IND. L.J. 689, 694 (1977) ("since the litigation malpractice plaintiff must also prove causation in order to prove damages, the suit within a suit requirement produces a bootstrapping effect which denies recovery to clients who have lost valid underlying actions as well as to those who had no valid action at the outset . . . .")

\textsuperscript{25} The defendant-attorney may present evidence to argue damages just as the original defendant would have. \textit{See}, \textit{e.g.}, Kirsch v. Duryea, 21 Cal. 3d 303, 578 P.2d 935, 938, 146 Cal. Rptr. 218, 221 (1978) (client found to be 2.5% contributorily negligent in comparative negligence jurisdiction); Hansen v. Wightman, 14 Wn. App. 78, 87, 538 P.2d 1238, 1245 (1975) (contributory negligence for trier of fact).
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of the impossibility of accurate reconstruction, and partly because of the client’s difficult burden of proof. Commentators assert that the trial-within-a-trial method actually insulates attorneys from liability and is inaccurate because “parties face academic claims of liability and use evidence which is not quite what it seems.” The evidence is restricted to what would have been admitted had the underlying action taken place, despite the fact that the passing of time is bound to impact the quality of the evidence. The ultimate irony is that the attorney is placed in an adversary position and must oppose a cause which he once advocated. Moreover, the attorney has better insights concerning weaknesses in the client’s case than did the original defendant.

Some courts have experimented with the use of presumptions, burden shifting, and res ipsa loquitur to aid the legal malpractice plaintiff. The analysis in one line of cases is that once the client has shown a causal connection between the defendant’s negligence and the loss of the action, the defendant has the burden of showing that the underlying action was not meritorious. In an alternative approach reaching the same result, the


27. MALLEN & LEVIT, supra note 3, § 650, at 797. See generally Wallach & Kelly, Attorney Malpractice in California: A Shaky Citadel, 10 SANTA CLARA L. REV. 257 (1970) (“The lawyer who commits a malpractice in the representation of his clients . . . is protected by a maze of ancient legal principles which make it virtually impossible for the injured client to be made whole or even for the lawyer to be reprimanded.”); Comment, supra note 26, at 670 (“A standard of proof that requires a plaintiff to prove to a virtual certainty that, but for the defendant’s negligence, the plaintiff would have prevailed in the underlying action, in effect immunizes most negligent attorneys from liability.”); Comment, supra note 24, at 689 (“As a result of the persistent application of legal principles long abandoned in other areas of tort law, the legal malpractice plaintiff often loses even before he is heard on the merits of his action.”).

28. The harshness of evidentiary restrictions is illustrated by Fuschetti v. Bierman, 128 N.J. Super. 290, 319 A.2d 781 (1974), where the attorney’s failure to pursue discovery led to the loss of evidence crucial to the client’s underlying claim and actually increased the plaintiff’s difficulties for proof in the malpractice action because the passage of time had precluded obtaining that information. See also MALLEN & LEVIT, supra note 3, § 656, at 810.

29. MALLEN & LEVIT, supra note 3, § 650, at 797.

30. Proponents of these techniques cite Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970) (unattended hotel swimming pool), and Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (cross-firing hunters), as support for the proposition that the defendant should share responsibility for proof of causation when the defendant’s negligence has made it impossible or difficult for the plaintiff to bear the full burden of proof. See Comment, supra note 24, at 701 (suggesting a “modified res ipsa loquitur” as a solution to the plaintiff’s dilemma).

31. See, for instance, Baker v. Beal, 225 N.W.2d 106, 110 (Iowa 1975), where the court employed the presumption that the client’s underlying claim was meritorious because the attorney’s decision to bring the action evidences the existence of a valid claim. See also Fuschetti v. Bierman, 128 N.J. Super. 290, 319 A.2d 781, 784 (1974) (“Once plaintiff has shown that defendant allowed the statute to run against her claim, defendant should have the burden of coming forward with evidence that the statute would not be a bar.”). See generally Haughey, supra note 1, at 893 (“[I]t might not be too unreasonable
attorney, not the client, bears the burden of ascertaining the value of the client's loss by proving the extent of harm not attributable to the prima facie malpractice error.\textsuperscript{32} Other courts have altered the trial-within-a-trial method more directly, by reducing the amount of evidence required to reach the jury.\textsuperscript{33}

Most of the legal malpractice cases in which courts have deviated from traditional standards of causation are based on clear-cut, nonjudgmental negligence evidenced by violations of court or statutory rules.\textsuperscript{34} Courts have been less likely to make such departures for allegations of attorney negligence based on violations of the standard of care. The former is akin to negligence per se, while the latter is more difficult for a client to prove.\textsuperscript{35} Where the malpractice action rests on a procedural error which cannot be attributed to attorney judgment, courts are reluctant to allow attorneys to escape liability simply because the client's underlying lawsuit would not have been successful.\textsuperscript{36} Thus, courts are most willing to permit clients to escape the rigors of the trial-within-a-trial method where there is no question of the standard of care, and when breach of duty is not an issue.

to require the attorney to prove the lack of merit in the claim he encouraged his client to pursue.

\textsuperscript{32} See, e.g., Winter v. Brown, 365 A.2d 381 (D.C. 1976); see also Grayson v. Wilkinson, 7 Miss. (5 S. & M.) 268 (1845) (where the attorney failed to appear, the court held that the lawyer responsible for a default judgment must prove the client suffered no actual damages, rather than requiring the client to show he would have prevailed).

\textsuperscript{33} In Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 596 n.9, 118 Cal. Rptr. 621, 628 n.9 (1975) despite the absence of a trial-within-a-trial and traditional proof of causation, Judge Mosk refused to upset the jury's inference of malpractice based on the attorney's negligence in failing to assert the client's community interest. This case followed Walker v. Porter, 44 Cal. App. 3d 174, 118 Cal. Rptr. 468, 470 (1974), where the plaintiff was unable to prove which of three defendants in the underlying action was responsible for her harm, but the California court nevertheless rejected the defendant/attorney's contention that the plaintiff was required to prove this additional burden. These two cases are seen as seriously undermining the requirement that the client prove the merits of his case by the trial-within-a-trial method. Comment, supra note 26, at 677; see also Note, Legal Malpractice—Erosion of the Traditional Suit Within a Suit Requirement, 7 U. TOL. L. Rev. 328, 339 (1975).


\textsuperscript{35} See, e.g., Fuschetti v. Bierman, 128 N.J. Super. 290, 319 A.2d 781, 784 (1974) ("[F]ailure of an attorney to commence an action within the time of the statute would ordinarily be considered neglect.").

\textsuperscript{36} See, for instance, Ruchti v. Goldfein, 113 Cal. App. 3d 928, 170 Cal. Rptr. 375, 378–79 (1980), where failure to assert a client's community property rights to retirement benefits in a divorce proceeding resulted in loss of income, the court excused the attorney's conduct on the grounds that community property law regarding interests in retirement benefits was unsettled. \textit{Id}. In contrast, see Baker v. Beal, 225 N.W.2d 106 (Iowa 1975), in which the attorney's failure to plead the statutory element of the existence of a license in a dramshop action resulted in dismissal. The court went outside the accepted bounds of malpractice procedures to impose liability through the use of presumptions. \textit{Id}. at 110. The former situation is at least partially attributable to judgment; the latter is a technical violation.
II. LOSS OF CHANCE

A. The Medical Context

Medical malpractice law has preceded legal malpractice in reconceptualizing what constitutes injury rather than changing traditional standards of causation. The issue has arisen where alleged mistreatment exacerbates a preexisting condition, and both contribute to some end result that does not appear readily divisible. Loss of chance operates as a device to compensate for the chance to avoid or decrease the harm that results.

There are two approaches to the loss of chance doctrine in medical malpractice, emphasizing cause and injury, respectively. The Washington Supreme Court had recent occasion to review both approaches in a case of mistreatment of a preexisting condition. In *Herskovits v. Group Health Cooperative of Puget Sound*, the personal representative of a lung-cancer victim recovered for the harm resulting from misdiagnosis. Since the cancer was terminal, the estate was unable to prove that but for the misdiagnosis, the decedent would have lived. While the court failed to reach a majority on the loss of chance doctrine (the lead opinion applied the concept to causation, and the plurality opinion viewed its relevance to injury), the court agreed that a cause of action had been stated and remanded for a trial on the merits.

The causation approach presented by the lead opinion in *Herskovits* rests on the “increased risks” principle of torts. Under this principle, if the defendant’s conduct has not created a dangerous force, but has increased the plaintiff’s risk of harm from that force, the threshold of proof required to make a prima facie case of negligence is relaxed. Once it has been determined that the defendant’s negligence increased the risk, the plaintiff need only prove the negligence was a substantial factor in producing the harm.

37. *King*, *infra* note 4, at 1359.
38. *Id.*
40. *Herskovits*, 99 Wn. 2d at 610, 664 P.2d at 474. The evidence showed that at most the delay in diagnosis might have reduced the chance of a five year survival by 14%. *Id.* at 611, 664 P.2d at 475.
41. *Id.* at 619, 664 P.2d at 479.
42. *Id.* at 610–19, 664 P.2d at 474–79.
43. *Restatement (Second) of Torts* § 323(a) (1965). For cases applying the increased risks notion, see McBride v. United States, 462 F.2d 72 (9th Cir. 1972); Hicks v. United States, 368 F.2d 626 (4th Cir. 1966); and Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978). Justice Dore’s opinion in *Herskovits* allowed recovery where the lost chance of survival was a “substantial factor” in causing death rather than requiring the patient to prove that but for the misdiagnosis, he would have lived. 99 Wn. 2d at 614–15, 664 P.2d at 477.
44. *Herskovits v. Group Health Coop.*, 99 Wn. 2d 609, 664 P.2d 474 (1983). In more tangible terms, the patient had to only prove that the 14% loss of chance was a substantial factor in causing death. *Herskovits*, 99 Wn. 2d at 619, 664 P.2d at 479.
The injury approach of the doctrine emphasizes separation of causation and injury. Under this approach, what caused the lost chance is removed from what the nature and extent of the loss are. Once the patient proves that but for the negligent conduct, a better opportunity existed, the injury approach to loss of chance simply provides a method of placing compensable worth upon the reduction or destruction of that opportunity. Justice Pearson’s plurality opinion in Herskovits argued that the injury approach of loss of chance is preferable because cause in fact is proved in terms consistent with traditional tort principles. Rather than lowering the standard of proof, this approach defines injury as the chance lost, not the total harm. Loss of chance operates when it can be proved by a but for standard that the malpractice reduced the possibility of a better result.

B. The Legal Context

I. Daugert v. Pappas

In Daugert v. Pappas, the Washington Supreme Court declined to apply the loss of chance method to the legal context of negligence in failing to perfect an appeal, but at the same time clarified the loss of chance doctrine. The reasoning in Daugert warrants careful analysis both

45. The injury strand relies on Professor King’s thesis set forth in his article on loss of chance. King, supra note 4; see O’Brien v. Stover, 443 F.2d 1013 (8th Cir. 1971); Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970); James v. United States, 483 F. Supp. 581 (N.D. Cal. 1980).
46. King, supra note 4, at 1364–65; see, e.g., Jeanes v. Milner, 428 F.2d 598, 604 (8th Cir. 1970) (reduction of a statistical survival rate from 35% to 24% sufficient evidence to show that patient’s “life would have been saved or at least prolonged and his pain lessened had he received early treatment”).
47. Herskovits, 99 Wn. 2d at 634, 664 P.2d at 487. Under the injury approach, the plaintiff did not need to prove that the misdiagnosis caused death. Rather, the burden was to prove that but for the physician’s negligence, the 14% chance of five-year survival would not have been lost. Id. One writer referred to Justice Pearson’s plurality opinion in Herskovits as “the clearest judicial understanding to date of the notion of recovery for loss of a chance....” Comment, supra note 4, at 768.
48. Compensation for the injury “would depend on the extent to which it appeared that cancer killed the patient sooner than it would have with timely diagnosis and treatment, and on the extent to which the delay in diagnosis aggravated the patient’s condition ....” King, supra note 4, at 1364. In Herskovits, Justice Pearson, citing an illustration from Professor King’s article, implies that the proper award for the patient would be 14% of the wrongful death award. 99 Wn. 2d at 634, 664 P.2d at 487. But see Note, supra note 4, at 985 (criticizing application of the wrongful death statute because redefining the harm as loss of chance rather than death would seem to “place recovery outside the bounds of the [wrongful death] statute ....”).
49. 104 Wn. 2d 254, 704 P.2d 600 (1985).
50. Daugert, 104 Wn. 2d at 261, 704 P.2d at 605. In the underlying litigation which gave rise to the malpractice action of Daugert v. Pappas, the client was the defendant in a contract dispute. Id. at 255, 704 P.2d at 602. The client/developer sold a recreational complex under an agreement with an arbitration clause, but subsequently refuted findings made by an independent appraiser. The client/developer’s refusal to abide by the settlement agreement prompted the purchaser to bring an action for
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because it is the first legal malpractice case to discuss loss of chance, and because the Washington court has been a jurisprudential bellwether in its application of loss of chance to medical malpractice.\textsuperscript{51}

The client in \textit{Daugert} brought a failure-to-appeal malpractice action under the loss of chance doctrine rather than the traditional trial-within-a-trial method of proving causation in legal malpractice.\textsuperscript{52} The jury was asked to determine whether the attorney’s negligence was a substantial factor in judgment being entered against the client; jury instructions followed the lead opinion in \textit{Herskovits}.\textsuperscript{53} The verdict that the attorney’s negligence had caused the loss of a twenty percent chance for successful appeal was based on expert testimony.\textsuperscript{54} Because that twenty percent was also found to be a substantial factor in judgment being entered against the client, the attorney was liable for the injury.\textsuperscript{55}

\begin{thebibliography}{99}
\bibitem{51} \textit{Herskovits} has influenced numerous court holdings. \textit{See}, e.g., \textit{Mays v. United States}, 608 F. Supp. 1476, 1481 (Colo. 1985); \textit{Curry v. Sumner}, 136 Ill. App. 3d 468, 483 N.E.2d 711, 719 (1985); \textit{Aasheim v. Humberger}, 695 P.2d 824, 827–28 (Mont. 1985). The case has also been the topic of several recent articles on loss of chance. \textit{See}, e.g., \textit{Comment, supra note 4; Comment, Increased Risk of Disease from Hazardous Waste: A Proposal for Judicial Relief}, 60 \textit{WASH. L. REV.} 635 (1985); \textit{Note, supra note 4}.

\bibitem{52} \textit{Daugert}, 104 Wn. 2d at 256, 704 P.2d at 602; \textit{see also supra notes 10–25 and accompanying text}. Negligence was not an issue in \textit{Daugert}. The determination of negligence precedes causation: whether the attorney erred is for the court to determine as a matter of law before the trier of fact decides causation. \textit{See}, e.g., \textit{Stafford v. Garrett}, 46 Or. App. 781, 613 P.2d 99 (1980). \textit{See generally MALLEN & LEVIT, supra note 3, § 659, at 819–26 (issues of law or fact)}. Following that, most determinations of cause in fact are made by the jury consistent with the principles of proof and causation in an ordinary negligence case. \textit{Ward v. Arnold}, 52 Wn. 2d 581, 584, 328 P.2d 164, 166 (1958), \textit{cited by Daugert v. Pappas}, 104 Wn. 2d 254, 257, 704 P.2d 600, 603 (1985). An exception is that failure-to-appeal cases, like \textit{Daugert}, decide both negligence and causation as questions of law. \textit{See infra notes 69–73 and accompanying text}.

\bibitem{53} \textit{Daugert}, 104 Wn. 2d at 256, 704 P.2d at 602. The jury was given a three-step analytic to use in deciding if the client met the necessary burden of proof. The first question was whether the attorney’s malpractice was a cause in fact of the loss of chance to avoid damages. The next step was to determine the percentage chance, if any, that the supreme court would have accepted review and reversed the court of appeals. Finally, the jury was to decide whether the percentage chance lost was a substantial factor in bringing about the judgment entered against the client. \textit{Id}.

\bibitem{54} \textit{Id} at 256, 704 P.2d at 602.

\bibitem{55} \textit{Id} at 256, 704 P.2d at 603. Twenty percent of the total amount of damages incurred in the underlying action was awarded to the client.
The Washington Supreme Court rejected the trial court’s formulation of cause. The court unanimously reaffirmed the traditional method and standard of proving cause in legal malpractice, holding that the plaintiff must use the trial-within-a-trial method and prove that but for the attorney’s negligence, the client probably would have prevailed on appeal.\footnote{Id. at 256, 263, 704 P.2d at 603, 606.}

The court considered the appropriate standards and methods for determining cause in fact.\footnote{Id. at 259, 704 P.2d at 604.} Justice Pearson commented that the traditional standard burdens the client with proving that the underlying case would have been successful but for the negligence of the attorney.\footnote{Id. at 260, 704 P.2d at 604. Justice Pearson also held more-likely-than-not as the degree of proof required for causation. \textit{Id.} at 263, 704 P.2d at 606. (citing O'Donoghue v. Riggs, 73 Wn. 2d 814, 824, 440 P.2d 823 (1968)). In doing so, the court rejected the line of cases which have extended the degree of proof to the stricter standard of certainty. See, \textit{e.g.}, Coon v. Ginsberg, 32 Colo. App. 206, 509 P.2d 1293 (1973), noted in Daugert v. Pappas, 104 Wn. 2d 254, 263, 704 P.2d 600, 606 (1985).} Justice Pearson acknowledged that the but for test had been the subject of criticism and recognized “the harsh consequences of applying the but for test in the traditional manner.”\footnote{Daugert, 104 Wn. 2d at 260, 704 P.2d at 605. See Comment, supra note 24, at 693 (criticism that the trial-within-a-trial method extends the burden of proof normally required by making the plaintiff prove two actions); see also supra notes 26–36 and accompanying text.} He also noted that but for causation had been “recently reevaluated” in the Herskovits medical malpractice case.\footnote{Daugert, 104 Wn. 2d at 260, 704 P.2d at 605.} However, as he saw it, that case redefined the injury to mean “[a] reduction in one’s opportunity to recover,” and because the lost chance is the injury, proof of causation by the but for standard was not discarded.\footnote{Daugert, 104 Wn. 2d at 261, 704 P.2d at 605. Thus, while the method of proving cause is different under loss of chance, the standard of proof remains unchanged. “The primary thrust of Herskovits was that a doctor’s misdiagnosis of cancer either deprives a decedent of a chance of surviving a potentially fatal condition or reduces that chance.” \textit{Id.}}

The \textit{Daugert} opinion related loss of chance to the concept of injury and retained the traditional but for standard of causation. The court rejected the causation approach to loss of chance, believing it “inappropriate at this time to change the [but for] test” in legal malpractice actions.\footnote{Daugert, 104 Wn. 2d at 260, 704 P.2d at 604–05 (citing Herskovits v. Group Health Coop., 99 Wn. 2d 609, 664 P.2d 474 (1983)); see supra notes 38–48 and accompanying text.} The \textit{Daugert} formula redefined injury so that the aggravation of preexisting

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\footnote{Id. at 256, 263, 704 P.2d at 603, 606.} \footnote{Id. at 259, 704 P.2d at 604.} \footnote{Id. at 260, 704 P.2d at 604.} \footnote{Id. at 263, 704 P.2d at 606. (citing O'Donoghue v. Riggs, 73 Wn. 2d 814, 824, 440 P.2d 823 (1968)). In doing so, the court rejected the line of cases which have extended the degree of proof to the stricter standard of certainty. See, \textit{e.g.}, Coon v. Ginsberg, 32 Colo. App. 206, 509 P.2d 1293 (1973), noted in Daugert v. Pappas, 104 Wn. 2d 254, 263, 704 P.2d 600, 606 (1985).} \footnote{Daugert, 104 Wn. 2d at 260, 704 P.2d at 605. See Comment, supra note 24, at 693 (criticism that the trial-within-a-trial method extends the burden of proof normally required by making the plaintiff prove two actions); see also supra notes 26–36 and accompanying text.} \footnote{Daugert, 104 Wn. 2d at 260, 704 P.2d at 604–05 (citing Herskovits v. Group Health Coop., 99 Wn. 2d 609, 664 P.2d 474 (1983)); see supra notes 38–48 and accompanying text.} \footnote{Daugert, 104 Wn. 2d at 261, 704 P.2d at 605. Thus, while the method of proving cause is different under loss of chance, the standard of proof remains unchanged. “The primary thrust of Herskovits was that a doctor’s misdiagnosis of cancer either deprives a decedent of a chance of surviving a potentially fatal condition or reduces that chance.” \textit{Id.}}
conditions or the loss of a chance to avoid harm or achieve a favorable result was viewed as a compensable interest.63

After stating that "a reduction in one's opportunity to recover" requires compensation, the Daugert court declined to view the loss of a chance to appeal as within the purview of the doctrine.64 In dicta, the court distinguished a failure-to-appeal client from a terminally ill patient.65 Acknowledging that any "reduction in one's opportunity to recover" should be compensable, the court emphasized that a failure-to-appeal client has not lost any chance because a failure-to-appeal client's case eventually will be reviewed.66 If the malpractice trial judge decides the appeal would not have succeeded, that decision is itself subject to review by higher courts.67 The court acknowledged the confusion over the but for standard prompted by Herskovits and, in an unprecedented move, invited the client to submit his petition to determine whether review would have been accepted and whether the remand would have been favorable.68

2. Impact of the Daugert v. Pappas Decision

The holding of Daugert rests largely on the court's acceptance that failure-to-appeal cases are different in nature from most legal malpractice actions.69 Causation is a question of law in failure-to-appeal cases,70 an

63. Daugert, 104 Wn. 2d at 261, 704 P.2d at 605. Under loss of chance, two kinds of losses are compensable. One is “definitive” loss of either completely avoiding a specific harm or of achieving a fairly definitive favorable result. The other is “partial” loss due to aggravation or acceleration of the untoward effects of some preexisting condition, or acceleration of some adverse preordained result. King, supra note 4, at 1363–64.

64. Daugert, 104 Wn. 2d at 261–62, 704 P.2d at 605.

65. Id. at 261, 704 P.2d at 605.

66. Id.

67. Id.

[Where the issue is whether the Supreme Court would have accepted review and rendered a decision more favorable to the client, there is no lost chance. . . . the client's underlying claim was not reviewed by the court initially because of the attorney's negligence. However, in the subsequent malpractice action the trial judge should have decided whether the Supreme Court would have accepted review and held in favor of the client. If the trial judge found review would have been denied, the client could have sought review in the Court of Appeals and ultimately in the Supreme Court.

Id.

68. Id. at 263, 704 P.2d at 606. The court noted that this would only determine the legal question of cause, leaving the factual determination of injury as measured by the underlying claim up to the jury. Id. at 264, 704 P.2d at 606.

69. Id. at 263, 704 P.2d at 606. “[W]e hold the client must prove that, but for the attorney’s negligence, the plaintiff would probably have prevailed upon appeal in a legal malpractice action wherein the negligence occurs at the appellate level.” Id. (emphasis added).

70. Id. at 258, 704 P.2d at 603. The Washington court is in line with the overwhelming majority of
anomaly largely due to practical considerations of judicial efficiency.\textsuperscript{71} The judge is in a "much better position" to determine questions of legal analysis and rules of appellate procedure, even though the question of causation is usually for the jury.\textsuperscript{72} These strong practical considerations are emphasized by Daugert's unusual conclusion of allowing the parties to petition the supreme court, enabling a definitive determination of causation.\textsuperscript{73}

Apparently, these considerations preclude the application of loss of chance to failure-to-appeal cases in Washington. Despite this fact, or perhaps because of it, the Daugert opinion nonetheless is important because it presented the Washington court with an opportunity to clarify loss of chance.

First, on a broad level of analysis, the court applied the loss of chance doctrine to injury. Justice Pearson called this doctrine "nontraditional" because the injury is reconceptualized, not because the standard of proof is changed.\textsuperscript{74} After the initial step of reconceptualizing the harm, loss of chance still requires the plaintiff to prove causation by a but for standard.\textsuperscript{75}
Second, on a more specific factual level, the Daugert court found that
the harm caused by failure to file an appeal was not susceptible to
this reconceptualization process.\textsuperscript{76} The primary basis for this conclusion was
that the failure-to-appeal client has not yet lost all opportunities to appeal
the case, and thus the loss is not sufficiently final to justify loss of chance.\textsuperscript{77}

This conclusion leaves open the question of whether incorporating
the loss of chance doctrine into legal malpractice analysis should ever occur.
At the very least, the case is significant because it shows a willingness of
the court to consider loss of chance in legal malpractice.\textsuperscript{78} Also, failure-to-
appeal cases are unique and rare malpractice situations, and excluding this
type of case from the loss of chance doctrine has little practical effect.\textsuperscript{79}
Finally, the court's reasons for rejecting loss of chance may not have been
totally correct.\textsuperscript{80} When analyzed in terms of the loss of chance doctrine as
it arose in the medical context, the elements all seem to exist in the failure-
to-appeal legal context as well.

III. ANALYSIS

A. The Elements of a Loss of Chance Cause of Action

Four elements make up the loss of chance doctrine in the medical
context. First, loss of chance operates where the patient has a health
problem which may be treated by professional medical treatment. This is
called the preexisting condition.\textsuperscript{81} Using the prototypical case, the cancer
which the patient had before seeking the physician's treatment is the
preexisting condition.\textsuperscript{82}
Second, given the patient’s preexisting condition when a doctor is consulted, the patient has a certain likelihood of recovering from the health problem if the physician exercises proper care in treating the condition. In loss of chance parlance, this is called the opportunity to recover. For example, when a cancer patient seeks medical advice, the patient at that point has a certain likelihood of surviving that cancer, so long as the doctor exercises ordinary care. The term opportunity to recover does not mean that total recovery must be probable. Often the patient does not have a greater than fifty percent probability of being cured. Even if the cancer is terminal, the patient nonetheless has some opportunity to recover when the physician’s care is first sought. Loss of chance focuses on the potential chance, however slight, that the patient will recover.

Third, the patient’s potential opportunity to recover from the preexisting illness must be foreshortened or diminished by the physician’s negligent treatment. When the doctor negligently misdiagnoses the patient’s cancer and causes a six month delay in treatment, the patient’s likelihood of recovery is reduced. While the physician is not a guarantor of positive results, the duty of care requires that no negligence occur. The loss of chance doctrine addresses the reduced opportunity to recover caused by the physician’s negligence.

The fourth and final element of loss of chance is that the lost opportunity must be entirely foreclosed; the patient’s chance for recovery must be irretrievably lost. A cancer patient cannot replace a lost opportunity for beneficial treatment due to a six month delay in treatment.

F.2d 1013 (8th Cir. 1971); Herskovits v. Group Health Coop., 99 Wn. 2d 609, 664 P.2d 474 (1983). The four elements of loss of chance are particularly clear where the patient’s opportunity to survive preexisting cancer is diminished by the physician’s treatment.

83. See Wolstone & Wolstone, Recovery of Damage for the Loss of a Chance, 1982 MED. TRIAL TECH. Q. 121; see also James v. United States, 483 F. Supp. 581, 587 (N.D. Cal. 1980) ("No matter how small that chance may have been . . . no one can say that the chance of prolonging one's life . . . is valueless.").

84. For instance, the survival rate for cancer patients is determined by reference to three stages of deterioration. Jeanes v. Milner, 428 F.2d 598, 604 (1970). Even in the final stage, there is still some possibility of survival for a six-month period. See Herskovits, 99 Wn. 2d at 612, 664 P.2d at 475.


86. See Comment, supra note 4, at 749 (in medical loss of chance cases, a tortfeasor, through his negligence, causes an individual to lose a chance to avoid some form of harm).

87. King, supra note 4, at 1356, 1359 ("[D]efendant's conduct generally will not have been a cause of the entire harm, because the effect of the preexisting force almost always will have reduced the value of the interest that the defendant destroyed." (emphasis in original)).

88. King, supra note 4, at 1364 (the author distinguishes between partial and definitive losses, but states that both must be "destroyed").

89. Herskovits, 99 Wn. 2d at 612, 664 P.2d at 475.
can be mitigated, however, then the loss of chance doctrine is inapplicable. For example, if a miracle cancer cure were available, then the patient may not claim that a chance for recovery was entirely lost.90

Loss of chance is operational only in those medical malpractice cases in which these elements exist. Initially, the patient must have a preexisting condition. Then, although treatment may not affect the existence of the patient's preexisting condition, a potential opportunity for recovery must exist, assuming ordinary health care. Next, the physician's negligence must foreshorten that opportunity for recovery. Finally, the treatment must be such that this reduction in opportunity to recover is entirely foreclosed.

B. Analogy to Legal Malpractice

If the loss of chance doctrine is to be applied in legal malpractice, the circumstances giving rise to the cause of action must satisfy the requisite elements of loss of chance. The terminology may be different in the legal context, but the conditions producing loss of chance are not merely rhetorical.

In the legal context, the preexisting condition consists of the facts and circumstances that make up the client's cause of action or defense. The facts underlying this cause of action or defense are analogous to the injury or disease that is the preexisting condition in the medical context. In both situations, the clients come to the professional to seek advice to solve their "problem." The facts surrounding that problem, like the patient's injury, exist before he or she seeks professional help.91

Given the facts of the client's case when legal advice is sought, there exists a certain likelihood of receiving a successful result based on these facts. This potential is the client's opportunity to recover. The value of this opportunity is based on the strength or weakness of the facts underlying the client's cause of action or defense. In terms of present value, the lost opportunity for recovery ranges between a maximum trial result to a minimum settlement value.92

This opportunity for recovery must be foreshortened or reduced by attorney conduct that breaches the duty of care. Because of the attorney's

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90. Daugert, 104 Wn. 2d at 261, 704 P.2d at 604.
91. Lawyers themselves produce parts of a client's case, such as providing insight that testimony of a particular expert would be efficacious. See H. Edwards & J. White, The Lawyer as a Negotiator 211-21 (1977) [hereinafter Edwards & White] (attorney conduct seen as a determinant of bargaining behavior). However, while questions asked during depositions, and like discovery techniques, have a definite impact on the case, these developments occur after the client's cause of action has walked through the attorney's door.
92. H. Baer & A. Broder, How to Prepare and Negotiate Cases for Settlement 63 (1967) [hereinafter Baer & Broder] (the basic question asked initially by both plaintiff's and defendant's attorneys is, "What is the maximum and minimum sustainable verdict?").
negligence, the client’s potential recovery is diminished. The client’s range of opportunity, demarcated by the maximum trial value and the minimum settlement value, would be shifted downward.

Lastly, the attorney’s negligence would have to foreclose that opportunity for beneficial treatment before loss of chance could be considered. If the client can still fully recover, then no chances have been lost. For example, if a plaintiff’s attorney fails to plead an available cause of action and the pleadings can be amended to include that claim, then no chance has been lost. It is only when the opportunity to recover fully is irretrievably foreclosed that the doctrine applies.

As with medical malpractice, loss of chance would not operate in all legal malpractice situations, but only those in which the requisite elements exist. All four elements must be met in the legal context before loss of chance can compensate for the difference between the potential opportunity to recover before the negligence occurs and the actual opportunity to recover after it has been diminished by negligence.

C. Specific Legal Malpractice Contexts

1. The Failure-to-Appeal Context

The Daugert court refused to apply loss of chance to a legal malpractice case because it found the elements of loss of chance lacking in a failure-to-appeal context. Although the court identified the client’s opportunity to recover, it reasoned that the client’s opportunity had been neither foreshortened nor foreclosed by the attorney’s failure to perfect the appeal. The client’s chance to recover had not been foreshortened because there was no “separate and distinguishable harm.” The negligent attorney would ultimately be liable for all the client’s damages and therefore the client’s chance for success had not been diminished. Further, the client’s opportunity was not foreclosed because in a legal malpractice situation, the client’s case can eventually be reviewed.

93. Daugert, 104 Wn. 2d at 262, 704 P.2d at 605. See also supra notes 49-80 and accompanying text.
94. The client has both a preexisting cause of action and potential chance for success, so that the first two elements of loss of chance are met. The client’s preexisting condition is defined by the underlying judgment against the client, and the facts in the transcripts, records, and pleadings. Also, the failure-to-appeal client has a potential opportunity for recovery, the next element required, because the client has a chance to obtain a favorable ruling on appeal. The value of this potential opportunity may range from a favorable ruling on appeal and a successful verdict on remand, to a minimum settlement amount, either of which arguably might be zero. But regardless of the exact value of the case, the failure-to-appeal client has a measurable interest before the attorney’s negligence occurs.
95. Daugert, 104 Wn. 2d at 261, 704 P.2d at 604.
96. Id.
97. Id.
However, the client's opportunity was foreshortened, and in concluding otherwise the *Daugert* court was wrong for two reasons. First, to say that the client's opportunity was not diminished is contrary to the notion that a chance of avoiding some adverse result or of achieving some favorable result is a compensable interest. The loss of chance doctrine focuses on an opportunity foreshortened, not on the ultimate success or failure. For loss of chance, the cancer victim's ultimate survival is not the focus; so, for the failure-to-appeal client, the success or failure of appeal should not be the focus of the court. Looking to ultimate success or failure subsumes the opportunity to recover into the final result, which is similar to requiring the cancer victim to prove that the physician's misdiagnosis caused death. In the failure-to-appeal case, the court's approach measures the harm caused by the client's preexisting cause of action, not the attorney's negligence. Rather, loss of chance would measure the difference between the client's potential opportunity for a successful appeal before the negligence and the client's actual opportunity for recovery after the lawyer's malpractice.

The *Daugert* court was incorrect in concluding that the result on appeal was not foreshortened for another reason. Recreated actions in malpractice are an inferior substitute for the original litigation and are not an equivalent replacement for the trial opportunity lost. The client's opportunity to make a successful claim or defense has been diminished. For instance, where an underlying appeal is based on a claim that findings of fact are contrary to the weight of the evidence, the appellate court would review the record and determine as a matter of law whether the evidence was sufficient to support the finding. In a malpractice context, however, the nature of the review is different. If the malpractice judge concludes that the petition for appeal based on insufficient evidence would have been denied, the reviewing court would now be considering whether that conclusion is legally supportable. Although this determination would necessarily involve considering the nature of the evidence presented, the appeal is tempered by greater deference to the malpractice trial judge's decision.

Next, the court implied that complete foreclosure, the fourth element of loss of chance, was lacking because the client had not exhausted all routes of appeal. The client could appeal an unfavorable decision at the trial level, and again at the appeal level. The Washington court found that no

99. See *supra* notes 37–48 and accompanying text.
100. See *Comment, supra* note 4, at 769 (in loss of chance the harm is not death or some other obvious harm, but rather it is loss of a chance to avoid the harm or to achieve a positive outcome).
101. See *supra* notes 10–28 and accompanying text.
102. *Daugert*, 104 Wn. 2d at 261, 704 P.2d at 604. For a definition of the element of foreclosure, see *supra* notes 81–90 and accompanying text.
chance had been irretrievably lost because the failure-to-appeal client had
not yet suffered a foreclosed opportunity to recover.\textsuperscript{103}

The conclusion that no opportunities have been entirely foreclosed for
the failure-to-appeal client is also incorrect. The client's settlement oppor-
tunities, however minimal, have indeed been irretrievably lost by the at-
torney's action.\textsuperscript{104} Also, because reconstruction by the trial-within-a-trial
method is inferior, the foreshortened opportunity to recover produced by
this inadequacy cannot be regained by a "retrial" of the appeal.\textsuperscript{105} The
original appeal has been entirely foreclosed, and the alternate appeals
referred to by Justice Pearson are not literal replacements of the oppor-
tunity lost.

Malpractice courts treat failure-to-appeal cases differently, largely due
to practical considerations.\textsuperscript{106} In addition, because causation is a question
of law rather than fact, failure-to-appeal cases are unique.\textsuperscript{107} Other kinds of
legal malpractice cases present more compelling circumstances for
application of the doctrine.

2. \textit{Technical Violations: The Prototypical Case}

Just as the cancer victim is the prototypical medical loss of chance
victim, the client whose attorney missed a statute of limitations or failed to
file an appearance presents the clearest example of when loss of chance
should operate in the legal context. Here, the client has come to the attorney
for assistance with litigation, and a potential opportunity to recover is
presented. When a statute of limitations is missed, the client's opportunity
is both foreshortened and foreclosed by the attorney's conduct.

First, it does not follow that no opportunity was foreshortened merely
because the malpractice procedure of trial-within-a-trial is still available for
the client. The reconstructed trial is particularly inaccurate when a statute
of limitations is missed, and substantially diminishes the quality of the
original opportunity for trial. The evidence is outdated and the claim is
stale, but the client must nonetheless recreate the underlying action.\textsuperscript{108}
Therefore, the client's opportunity to recover the value of the claim at trial
has been diminished by the delay the lawyer's malpractice caused. Current

\textsuperscript{103}. \textit{Daugert}, 104 Wn. 2d at 261, 704 P.2d at 604.
\textsuperscript{104}. \textit{See infra} notes 126–30 and accompanying text.
\textsuperscript{105}. \textit{See supra} notes 98–101 and accompanying text.
\textsuperscript{106}. For a discussion of the practical rationales for different treatment of failure-to-appeal cases,
\textit{see supra} notes 70–74 and accompanying text.
\textsuperscript{107}. \textit{See supra} notes 69–73 and accompanying text.
\textsuperscript{108}. \textit{See supra} notes 19–22 and accompanying text.
methods of proof entirely ignore this difference in value between the original trial opportunity and the second-rate trial-within-a-trial.\textsuperscript{109}

Moreover, the technical violation of missing the statute of limitations or failing to appear entirely forecloses the client’s opportunity to settle. The lawyer’s inaction has destroyed any motivation for the opponent to offer or accept settlement. Even a weak cause of action may have some minimal settlement value, which will never be realized due to the malpractice.\textsuperscript{110}

Before considering loss of chance, the question of whether the attorney breached the standard of care must be answered.\textsuperscript{111} The client’s potential recovery value assumes only reasonable care, and does not make the attorney a guarantor. A plaintiff may in fact have a worthless cause of action and recover nothing, even with skillful treatment. Judgmental decisions made in good faith and with a fully informed client could not be called into question, regardless of the result.\textsuperscript{112}

3. \textit{Errors During Trial or Trial Preparation}

An attorney’s negligence during the discovery or trial phase may also foreshorten a client’s opportunity to recover from or defend against a cause of action. If the attorney’s negligence reduces the client’s potential recovery range, shifting the values of settlement and trial downward, the attorney has caused a loss of chance.\textsuperscript{113} Merely creating a reduced opportunity does not end the inquiry, however. The next consideration is whether the negligence has also completely foreclosed the client’s chance to recover.

A number of factors influence the foreclosure issue when the attorney’s conduct occurs after initiation of the litigation process. Discovery errors may or may not reduce the settlement or trial value of the case. For instance, the opposing party’s awareness of the error would affect settlement opportunities, which may depend on the degree of error committed. The more egregious the attorney’s conduct, the more likely it is to directly affect the client’s opportunity.

\textsuperscript{109} See supra notes 10–25 and accompanying text (traditional methods of proof in legal malpractice).

\textsuperscript{110} See \textit{Baer} & \textit{Broder}, supra note 92, at 63 (the authors note the importance of determining both the minimum and maximum value of any case, regardless of the opponent’s assessment).

\textsuperscript{111} See supra note 52 and accompanying text (negligence is proven before causation and loss of chance can be considered).

\textsuperscript{112} See supra notes 34–36 and accompanying text (courts take different attitudes toward judgmental negligence than toward technical violations).

\textsuperscript{113} See King, supra note 4, at 1364 (in discussing partial losses, Professor King’s medically-oriented analysis is similar to that which leads to the conclusion that a reduction in a client’s range of opportunity is a partial loss).
A reduction in opportunity created by during-trial error is more closely connected to the result at trial and is more difficult to isolate as a measurable loss. For example, if a key witness is negligently questioned, possibly reducing the judgment in favor of the client, the only way to measure the loss is by comparison to the actual trial result. The trial-within-a-trial method becomes easier to rationalize in this context. However, since trial conduct involves more discretionary attorney conduct, these malpractice actions rarely pass the threshold question of whether negligence occurred.

Whether loss of chance can be applied in legal malpractice rests on the issues raised in Daugert. Under what circumstances can it truly be said that negligence, first, reduced an opportunity for beneficial treatment, and, second, resulted in complete foreclosure of that opportunity? The answer depends on how far the courts are willing to strain the idea that the trial-within-a-trial provides a replacement for the client’s lost opportunity. The answer also depends on whether the courts are willing to recognize the reality of settlement opportunities.

D. Procedural and Equitable Considerations

If the injury approach to loss of chance were recognized in legal malpractice, courts could retain traditional standards of proof, yet achieve practical and equitable results. Dissatisfaction with but for causation focuses on the plaintiff’s procedural difficulties as reflected in the trial-within-a-trial method. As noted by Professor King, “The problem, however, is not the standard of proof, but the object to which that standard is applied.”

Under loss of chance, causation and injury must be isolated. Whether negligence exists should be a separate question from the nature and extent

114. See Comment, supra note 4, at 769 (setting forth the current methods available to assign value to partial losses, each of which depends on reference to the value of some greater whole).

115. It is difficult for a client to prove that allegations based on handling of witnesses, evidence, or trial procedures are not within the attorney’s exercise of judgment. See, e.g., Woodruff v. Tomlin, 616 F.2d 924, 930-35 (6th Cir.), cert. denied, 449 U.S. 888 (1980) (methods of preparing a case, manners of presenting proof, and styles of examining witnesses are clearly discretionary areas of litigation). See generally MALLIN & LEVIT, supra note 3, § 578, at 719 (“[R]arely can the client prove [charges of negligence during trial as] outside the spectrum of permissible tactics.”). In England, the barrister is virtually immune from liability for any act or omission that occurs at trial. Rondel v. Worsley, [1967] 3 All E.R. 993; Baikie v. Chankless, [1811] 3 Camp. 17. Perhaps there is no satisfactory method of handling during-trial negligence.

116. See supra notes 93–107 and accompanying text for an analysis of the Daugert opinion.

117. See supra notes 26–29 and accompanying text for some of the reasons for dissatisfaction given by judicial and collegiate critics.

118. King, supra note 4, at 1366.

119. Id. at 1363. See Herskovits, 99 Wn. 2d at 634, 664 P.2d at 487.
of the loss. To establish an injury under the loss of chance doctrine, the client must prove that, but for the attorney's negligence, the diminished opportunity to recover was lost. In order to prove cause, the client must show that the claim or defense was meritorious by a but for standard.\textsuperscript{120} The trial-within-a-trial method of proof would not be necessary. The pleadings should suffice to meet this causal burden, analogous to a motion to dismiss for failure to state a claim.\textsuperscript{121}

Tort law requires only that the plaintiff prove cause by a more-likely-than-not standard.\textsuperscript{122} The substantial factor standard, although inapplicable with loss of chance, supports the notion that courts do not require the injured plaintiff to prove his harm beyond a reasonable doubt.\textsuperscript{123} In contrast, the trial-within-a-trial method treats the loss of chance as if it were either a certainty or an impossibility, depending on whether the result of the underlying trial is found to be different or the same.\textsuperscript{124}

The process of identifying and assessing the value of the interest destroyed\textsuperscript{125} would be most substantially affected by loss of chance because restrictions against expert testimony would not be justified.\textsuperscript{126}

\textsuperscript{120} The rejection of the all or nothing approach to valuing loss of chance does not necessarily affect the continuing validity of the all or nothing rule for causation, and loss of chance still requires the plaintiff to meet the but for standard. King, \textit{supra} note 4, at 1394.

\textsuperscript{121} The claim has merit unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45–46 (1957). Note that motions to dismiss for failure to state a claim are frequently granted, so that redefining the injury in no way approximates strict liability for litigation attorneys.

\textsuperscript{122} \textit{Daugert}, 104 Wn. 2d at 260, 704 P.2d at 604. Negligence requires that the event more probably than not caused the harm. \textit{See}, e.g., O'Donoghue v. Riggs, 73 Wn. 2d 814, 824, 440 P.2d 823 (1968), \textit{noted in} Daugert v. Pappas, 104 Wn. 2d 254, 704 P.2d 600 (1985); \textit{Prosser & Keeton, supra note 12, \S 42; see also supra note 58}.

\textsuperscript{123} \textit{See generally} \textit{Restatement (Second) of Torts} §§ 431–433 (1965) (use of the substantial factor test recommended in certain examples); \textit{Prosser & Keeton, supra note 12, §§ 30–342 (multiple causal elements)}.

\textsuperscript{124} The line of cases applying the certainty standard have been criticized as insulating lawyers from liability because the degree of proof is so difficult to satisfy. \textit{See Comment, supra note 26, at 670 ("Except in those rare instances where the initial action was a 'sure thing,' the certainty requirement protects attorneys . . . ."); see also supra note 58}.

\textsuperscript{125} The valuation process identifies and assesses the value of the interest destroyed. King, \textit{supra} note 4, at 1353.

\textsuperscript{126} Proof of settlement opportunities should require "the expert testimony of attorneys familiar with trial and settlement of such disputes." Peck, \textit{A New Tort Liability for Lack of Informed Consent in Legal Matters}, 44 La. L. Rev. 1289, 1299 (1984). Where the question is whether the attorney has breached an express or implied contract, or violated the duty of care in conduct unconnected with litigation, the use of expert evidence is generally allowed as to the standard of care. \textit{See, e.g.}, Bent v. Green, 39 Conn. Supp. 416, 466 A.2d 322 (1983); Walker v. Bangs, 92 Wn. 2d 854, 601 P.2d 1279 (1979). \textit{But see Comment, Use of Expert Testimony in Attorney Malpractice Cases}, 15 Hastings L.J. 584, 584 (1964) (noting that expert testimony is "nonexistent" in California). There is some authority for admitting expert evidence to prove the probable outcome of the underlying trial, but courts are reluctant to admit such evidence when an objection is raised. \textit{See, e.g.}, Fuschetti v. Bierman, 128 N.J.
With current methods of proof, testimony as to settlement value is not admitted because the trial-within-a-trial jury's determination of damages is thought to be less speculative than expert testimony on settlement. Current practice fails to consider that a large majority of cases are settled before trial. It also ignores the fact that expert testimony as to settlement is less speculative than the trial-within-a-trial verdict. In valuing the lost legal chance, however, expert's testimony of settlement value would be used.


127. See, e.g., Fuschetti v. Bierman, 128 N.J. Super 290, 319 A.2d 781, 784 (1974) ("[N]o expert can suppose with certainty the private blends of hopes and fears that might have come together to produce a settlement . . . ."). Under current practice, the difference should be noted between settlement as damages, where evidence is strictly prohibited, and settlement as the source of negligence, where testimony may be permitted. See Fulton v. Woodford, 26 Ariz. App. 17, 545 P.2d 979, 985 (1976) (evidence only admitted upon proof that the parties would have agreed to a settlement and the sum would have been paid); but see Duncan v. Lord, 409 F. Supp. 687, 693 (E.D. Pa. 1976) (allowing settlement value as an award for damages).

128. See Bridgeman, Legal Malpractice—A Consideration of the Elements of a Strong Plaintiff's Case, 30 S.C.L. Rev. 213, 234–36 (1979) (92.9% of personal injury suits filed are settled without trial). "If most of the cases handled by lawyers are settled, it would be preferable to determine what should have resulted if negotiations for settlement had been conducted in accordance with settlement standards of the profession rather than what would have happened in the unlikely event the case had gone to trial.” Peck, supra note 126, at 1300.

129. Lost chances have been given legitimate value in other contexts. The "hypothetical market theory" is an early contract notion which rests on the premise that chances possess value in their own right and loss of such value merits redress. Mange v. Unicorn Press, 129 F. Supp. 727 (S.D.N.Y. 1955) (the chance to win a puzzle contest was compensable to one of 23,548 contestants); Kansas City, M. & O. Ry. v. Bell, 197 S.W. 322 (Tex. Civ. App. 1917) (delay in shipment of hogs, value of chance lost between first and second prize awarded as compensation); Chaplin v. Hicks, [1911] 2 K.B. 786 (C.A.) (the chance to compete in a beauty contest was redressable). The hypothetical market theory places value on the lost chance by using evidence of the value that a market trader would be willing to pay for the chance. D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 3.3, at 155 (1973); Comment, supra note 4, at 771 ("If a thirty percent chance to live could be purchased in a market, would a patient having no chance to live be willing to buy the thirty percent chance?"). Assessing settlement value is analogous to the hypothetical market theory. In a sense, the amount represents the present value of the client's cause of action. Edwards & White, supra note 91, at 217–18. The authors tabulated factors augmenting and limiting the amount of tort settlement and, without soliciting answers, found a high correlation in the answers given from both plaintiffs' and defendants' attorneys. This suggests that, while settlement value is not subject to an arbitrary formula, the methods used by attorneys are consistent enough to justify the use of expert testimony. See also Baer & Broder, supra note 92, at 63–73 (setting forth 15 questions to use in appraising the settlement value of a case).

130. Inroads to admissibility of settlement evidence have recently been made. See Chocktoot v. Smith, 289 Or. 567, 571 P.2d 1255 (1977) (the purpose of the trial-within-a-trial method is to show what should have happened, not what actually would have happened); Fuschetti v. Bierman, 128 N.J. Super. 290, 319 A.2d 781 (1974) (under some circumstances, expert testimony may be used as an alternative or in addition to the trial-within-a-trial method). Settlement evidence might benefit either side of the litigation. For instance, a defendant whose attorney failed to file an appearance might want to introduce evidence of settlement value to rebut expert testimony on the attorney's behalf that the underlying
Legal Loss of Chance

Loss of chance could properly be applied to technical violation cases. These cases create the most sympathy for the client and emphasize the harshness of the but for standard in the trial-within-a-trial method. Limiting the application of loss of chance to this well-defined class of cases would promote administrative efficiency. Further, since missed statute of limitations cases account for a large percentage of litigation malpractice, these cases can be seen as ideal situations for operation of the loss of chance doctrine.

Recovery for loss of the right to trial finds support in constitutional law. Deprivation of due process is a compensable right and by analogy a client's loss of right to litigate should be compensated. Loss of chance recognizes that the client should be able to present evidence regarding the settlement value of the case, and it would be a question of fact whether the loss of the right to trial should be more than nominal.

Incorporating loss of chance into legal malpractice would provide the courts with a procedural and substantive basis for accurately compensating a client for the interests destroyed by professional negligence. Transferring this doctrine from medical to legal malpractice would make legal principles consistent between professions where similar circumstantial factors dictate analogy.

defense had little value. On the other hand, an attorney might want to introduce settlement evidence where the amount entered against the defendant was excessive.

131. See supra notes 34–36 and 108–12 and accompanying text.


The complementary situation for the defense attorney is failure to file an appearance. In these cases, proof of proximate cause again requires evidence of better results if the action had been defended. Mallen & Levit, supra note 3, § 562, at 697–98.

133. In Carey v. Piphus, 435 U.S. 247 (1978), the Court held that plaintiffs who had suffered injury to their procedural due process rights but had failed to demonstrate consequential injury were entitled to recover nominal damages. However, the Court limited its holding to the procedural due process violation before it and directed courts to examine common law tort rules in determining principles of compensation relevant to any particular claim. Id. at 267; see also Williams v. Trans World Airlines, 660 F.2d 1267, 1272 (8th Cir. 1981) (“[D]amages for emotional harm are to be presumed where there is an infringement of a substantive constitutional right.”).

134. While some of the same problems of multiple causation exist with legal and medical malpractice, factual distinctions emerge immediately. Because legal services are by nature judgmental and tactical, courts are reluctant to impose liability too quickly. See, e.g., Woodruff v. Tomlin, 616 F.2d 924, 930–35 (6th Cir.), cert. denied, 449 U.S. 888 (1980) (broad immunity for trial tactics). See generally Mallen & Levit, supra note 3, § 553, at 677–79 (other settled areas of discretion for litigation attorneys). Also, half of the lawsuits brought to lawyers are “losers” in the broad conceptual framework of litigation as conflict-resolution: there are two sides to every lawsuit, and only one can prevail. The approach of health sciences is conceptually more optimistic, and patients are not paired off, with one living and the other dying. Such distinctions, however, may be overemphasized. Doctors also
IV. CONCLUSION

The Washington court has laid the groundwork for applying loss of chance to legal malpractice. The doctrine involves two steps, the first in reconceptualizing the harm and the second in measuring damages. Where the circumstances of the attorney-client relationship satisfy the four elements of loss of chance, the doctrine applies a realistic measurement of damages for the aggrieved client without exposing a litigation attorney to strict liability. The harshness of the trial-within-a-trial method can be alleviated without changing traditional standards of causation.

Polly A. Lord