Mohr v. Grantham, et ux., et al.

No. 84712-6

MADSEN, C.J. (dissenting)—A central tenet of tort liability for medical malpractice is that a plaintiff must prove a physician's acts or omissions caused a patient's actual physical or mental injury before liability will attach. The lost chance doctrine adopted by the majority punishes physicians for negligent acts or omissions that cannot be shown to have caused any *actual* physical or mental harm. Because traditional tort justifications for imposing liability are missing, we should not extend a cause of action for a lost chance of a better outcome as a form of medical malpractice claim beyond its current application.

Black letter negligence law requires proof on a more probable than not basis that the injury was caused by the negligence of another. The majority holding rests on the fiction that the "injury" is actually the loss of a chance of a better outcome. This is semantic pretense. No matter how the cause of action is described, at the end of the day liability is based on no more than the mere *possibility* that the physician's negligence has caused harm, a result that conflicts with black letter law that "negligence in the air" is not actionable.

The majority claims that the tort principles of deterrence and compensation are served by adopting the doctrine. It is incorrect. Deterrence of negligence that does not cause actual harm is a meaningless proposition, and there can be no compensation of injury because the actual injury that occurs may be the result of the preexisting condition. Compensating plaintiffs for preexisting harm is not a legitimate goal of the tort system.

The majority's holding is also contrary to RCW 7.70.040. If the lost chance doctrine is to be accepted in this state, it should be through action of the legislature, which can consider the numerous public policy questions implicated by the doctrine that the majority never considers and, indeed, is not suitably in a position to consider.

The lost chance doctrine is also uniquely unfair because only the health care profession is exposed to liability under it. This court, like others, has refused to apply the basic doctrine against members of any other profession. If a lawyer is sued for malpractice, the plaintiff must prove proximate causation of real harm, but this is not true under the lost chance doctrine when a plaintiff sues a physician for negligent treatment that cannot be shown to have proximately caused real harm. The inequity is obvious.

Analysis

It is a fundamental principle that in a medical malpractice action the plaintiff must prove causation of the plaintiff's actual physical (or mental) injury before tort liability will be imposed. To avoid the difficulty posed by this requirement, the majority recognizes a cause of action for which the plaintiff does not have to prove that "but for" the physician's negligence, the injury would not have occurred. Majority at 7 (citing

Herskovits v. Group Health Coop. of Puget Sound, 99 Wn.2d 609, 619, 664 P.2d 474 (1983) (Dore, J., lead opinion); *id*. at 634-35 (Pearson, J., plurality)). That is, because the majority finds the traditional causation-of-injury requirement to be an insurmountable obstacle, it employs a different concept to anchor a lost chance claim. Majority at 15. The majority simply redefines the injury as the lost chance. With this semantic leap—essentially a fiction—the causation problem is fixed.

But in reality the problem remains. No matter how the lost chance cause of action is characterized, the plaintiff is freed of the requirement of proving causation because, no matter how the action is described, the end result is that liability is imposed based on *possibilities* and not on probabilities. *See*, *e.g.*, *Jones v. Owings*, 318 S.C. 72, 77, 456 S.E.2d 371 (1995) ("[l]egal responsibility in this approach is in reality assigned based on the mere *possibility* that a tortfeasor's negligence was a cause of the ultimate harm"); *Pillsbury-Flood v. Portsmouth Hosp.*, 128 N.H. 299, 305, 512 A.2d 1126 (1986) (rejecting plaintiff's reliance on the "loss of a chance" doctrine expressed in *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966); the *Hicks* rule that allows relaxation of the causation requirement where the defendant increased the risk of harm is ill advised; "[c]ausation is a matter of probability, not possibility").

The lost chance doctrine contravenes the long-standing rule that a verdict in a medical malpractice action must not rest on "'conjecture and speculation.'" *Douglas v. Bussabarger*, 73 Wn.2d 476, 505, 438 P.2d 829 (1968) (internal quotation marks omitted) (quoting *Glazer v. Adams*, 64 Wn.2d 144, 148, 391 P.2d 195 (1964)). A

"'possibility'" is not enough. *Id*.

Trying to skirt this obstacle by saying that "a plaintiff would still have to establish the loss of chance by a preponderance of the evidence," as the plaintiff argued in *Crosby v. United States*, 48 F. Supp. 2d 924, 931 (D. Alaska 1999), is not an acceptable excuse because it leads to unacceptable results. As the court in *Crosby* correctly responded, "[i]f a plaintiff's chance of recovery was reduced from 20 percent to 10 percent, then permitting recovery for that 10 percent loss enables a plaintiff to recover damages even when the plaintiff's actual physical injury was *not* more likely than not caused by a defendant's alleged negligence." *Id*. (emphasis added).

The majority tries to justify the lost chance doctrine on the ground that it serves the tort principles of deterring negligence and compensating for injury when "the ultimate harm is permanent disability." Majority at 13. But as the majority itself explains, these justifications rest on *actual* physical harm to the plaintiff, "permanent disability" in the majority's own words. But a *chance* of a better outcome, by definition, is not the same as an *actual* better outcome because there is no way to establish that any physical harm in fact resulted from the negligent act or omission of the physician. Not only does the doctrine not require proof of "but for" causation, "but for" causation *cannot* be proved in any event.

The "deterrence" justification identified by the majority is in fact unrelated to preventing harm-causing negligence. As Benjamin Cardozo famously explained long ago, "'negligence in the air'" is not actionable.[1] Physicians, and indeed individuals

involved in thousands of actions, are negligent every day without legal consequence because, despite the involvement or presence of others, their acts *do not actually cause harm* to the other persons.

The Texas Supreme Court aptly observed, when it "reject[ed] the notion that the enhanced deterrence of the loss of chance approach might be so valuable as to justify scrapping [the] traditional concepts of causation," that "[*i*]*f deterrence were the sole value to be served by tort law, we could dispense with the notion of causation altogether and award damages on the basis of negligence alone*." *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 406 (Tex. 1993) (emphasis added). By rejecting the traditional causation in favor of the possible deterrent effect of the lost chance doctrine, the majority imposes liability for damages based on negligence alone—"negligence in the air."

Moreover, the goal of compensation is not served, either, because there is no way to prove a physician's acts or omissions in fact caused the actual physical harm, rather than the actual harm resulting from the preexisting condition. In fact, under this theory of liability, plaintiffs may be compensated where they suffer absolutely no physical injury as a result of the physician's conduct. Indeed, the Maryland high court has determined that the lost chance doctrine does not result in accurate compensation for any plaintiff's injuries (when the lost chance is less than 50 percent). *Fennell v. S. Maryland Hosp. Ctr., Inc.*, 320 Md. 776, 789-90, 580 A.2d 206 (1990).[2]

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[1] *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99 (1928) (quoting Frederick Pollock, The Law of Torts 455 (5th ed. 1920)).

[2] In *Fennell*, 320 Md. at 789, the court, noting that loss of chance recovery is based on statistical probabilities, examined "the statistical probabilities of achieving a 'just' result with loss of chance

Of perhaps greater importance, in a practical sense, the lost chance doctrine does not conform to RCW 7.70.040. Under this statute, a plaintiff in a medical malpractice action must prove:

> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
> (2) Such failure was a proximate cause of the injury complained of.

RCW 7.70.040.[3] Expert testimony is generally required to establish the standard of care and causation. *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 988, 216 P.3d 374 (2009); *Berger v. Sonneland*, 144 Wn.2d 91, 110-11, 26 P.3d 257 (2001); *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). To remove the issue of cause in fact "from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained of 'probably' or 'more likely

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damages." Drawing from Stephen F. Brennwald, Comment, *Proving Causation in "Loss of a Chance" Cases: A Proportional Approach*, 34 Cath. U. L. Rev. 747, 779 n.254 (1985), the Maryland court described a hypothetical example involving 99 cancer patients, each with a 1/3 chance of survival (the example can also be applied to facts involving a chance of a better outcome, rather than survival), each of whom received negligent treatment, and all of whom died. *Fennell*, 320 Md. at 789.

Statistically, if all had received proper treatment, 33 would have lived and 66 would have died. *Id*. Under the lost chance doctrine, all would be permitted recovery of 33 1/3 percent of the normal value of the case. *Id*. at 789-90. However, the 33 who would have survived with proper care would be compensated by only 33 1/3 percent of the appropriate damages for the actual injury, i.e., a recovery one-third that which would be necessary to compensate for the actual harm. *Id*. In the other 66 cases, where the decedents died as a result of the preexisting cancer and not as a result of the negligence, the patients would be overcompensated for actual injury to the extent of the entire one-third recovery. *Id*.

The result, the Maryland court said, is that the lost chance doctrine results in errors in compensation for actual injury in all 99 cases. *Id*.

[3] The statute was amended in 2011 to be gender neutral. Laws of 2011, ch. 336, § 251. The substantive provisions were not changed.

than not' caused the subsequent disability." *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968) (quoting *Ugolini v. States Marine Lines*, 71 Wn.2d 404, 407, 429 P.2d 213 (1967)).

The statute provides that a plaintiff must prove the health care provider failed to exercise the requisite degree "of care, skill, and learning" and this failure "was a proximate cause of the injury complained of." RCW 7.70.040. "Injury" in the statute undoubtedly reflects prevailing law stated in *O'Donoghue*, 73 Wn.2d at 824, that the failure to exercise the required degree of care must be a proximate cause of "the subsequent disability." In other words, the legislature meant an actual physical disability resulting from the failure to exercise proper care, not an amorphous "lost chance" that may well involve no actual disability at all.

In considering the comparable Alaska statute, which like ours requires a plaintiff to prove the health care provider failed to exercise the proper standard of care and as a "proximate result of this" failure "the plaintiff suffered injuries that would not otherwise have been incurred," Alaska Stat. § 09.55.540(a)(3), the federal court in *Crosby*, 48 F. Supp. 2d at 931, concluded that "the 'loss of chance' theory disrupts traditional causation principles set forth by statute." The court said "AS 09.55.540 clearly and unambiguously requires plaintiffs to establish that a defendant's alleged negligence was more likely than not the cause of injury." *Id.* The federal court aptly said that, "[t]he statute rejects any presumption of negligence." *Id.* The court concluded that "[r]ecognizing a 'loss of chance' theory under the circumstances of this case would enable plaintiff to recover

even when her injury was not proximately caused by the defendant" and contravene the statute. *Id.*

Similarly, the Vermont Supreme Court reached the same conclusion in connection with its comparable state statute, observing that the statutory elements traditionally required that plaintiff produce evidence of a "'reasonable probability or reasonable degree of medical certainty' that the defendant's conduct caused the injury." *Smith v. Parrott*, 2003 VT 64, 175 Vt. 375, 380, 833 A.2d 843 (2003) (quoting *Greene v. Bell*, 171 Vt. 280, 285, 762 A.2d 865 (2000)). The court said that the "loss of chance theory of recovery is thus fundamentally at odds with the settled common law" codified in the statute. *Id.*

The same is true in Washington. Our statute setting out the elements that a plaintiff must prove in a medical malpractice action does not permit a presumption of negligence. It requires proof of proximate cause, not as to a *chance* of malpractice resulting in *possible* injury, but as to actual physical injury to the plaintiff.

If there is to be any change in this law, it should come from the legislature, after appropriate hearings, collection of data, and consideration of competing interests. Only the legislature has the authority to amend the statute.

Moreover, the legislature is best positioned to consider the myriad of public policy matters implicated by the lost chance doctrine. Among them are concerns about the potential impact on the practice of medicine, the costs of medical malpractice insurance, the costs of medical care, and the costs to society as a whole of compensating an entirely

new class of plaintiffs who formerly had no claim under the common law. *See Smith*, 175 Vt. at 381; *Fennell*, 320 Md. at 792-95. As one court mentioned, "society is wallowing near the water line with the burdensome and astronomical economic costs of universal healthcare and medical services." *Kemper v. Gordon*, 272 S.W.3d 146, 152 (Ky. 2008). Malpractice insurance costs are rising and are a part of this financial burden. *Id*. At the same time, medical science and technology are advancing at a phenomenal pace and our expectations based upon these advancements rise as they advance. *Id*. But humans must still effectuate the advances, and there are no guarantees notwithstanding our expectations.

The lost chance doctrine also gives rise to other questions. "For instance, what is a 'late diagnosis'? Does a diagnosis missed this week, but made next week, rise to the level of diminished chance?" *Id*. What about a case where experts could present "evidence . . . that an MRI misread on Monday, but accurately discerned on Friday, perhaps gives rise to an infinitesimal loss of a chance to recover. Yet, under this doctrine, even a small percentage of the value of human life could generate substantial recovery and place burdensome costs on healthcare providers" that would ultimately be passed on to each person in the jurisdiction. *Id*.

What about in the very case before this court, where we are not considering the passage of weeks, or even days, but of hours?

In addition, even courts rejecting the doctrine have noted "'appealing'" arguments exist in favor of the lost chance doctrine, *e.g.*, *id*. (quoting *Smith*, 175 Vt. at 381), and

these, too, should be considered by the legislature.

The ramifications of the majority's opinion are unknown but potentially far-reaching. The majority opinion has the potential to alter health care in this state, as physicians would have to contemplate whether to provide an unprecedented level of care to avoid liability for even a slightly diminished *chance* of a better outcome. As noted, even a small percentage of chance can equal a substantial award. At the same time, it is no secret that health care insurance coverage is already strained, for those who even have such insurance, and adopting this doctrine cannot help but impact the nature and extent of insurance reimbursement for potential tests and treatments ordered as an eventual result of the majority's decision to expand liability to an unprecedented degree in this state.

All of these matters are public policy considerations for the legislature.

Another issue is the inequity of applying the lost chance doctrine in the medical field. As in other states, this court has declined to extend the lost chance of survival doctrine, the specific form set out in *Herskovits*, to permit suits against other professionals. *See Daugert v. Pappas*, 104 Wn.2d 254, 704 P.2d 600 (1985) (refusing to extend lost chance doctrine to legal malpractice actions). Courts have questioned the inconsistent application of the doctrine depending upon whether the action is for medical malpractice or other professional malpractice. *Smith*, 175 Vt. at 381; *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1019-20 (Fla. 1984) ("[h]ealth care providers could find themselves defending cases simply because a patient fails to improve or where serious disease processes are not arrested because another course of action could possibly

bring a better result" while "[n]o other professional malpractice defendant carries this burden of liability without the requirement that plaintiffs prove the alleged negligence probably rather than possibly caused the injury").

This basic inequity weighs against extension of the doctrine, yet the majority never considers it. In fact, the majority declines to fully consider any of the many reasons why the doctrine should not be accepted. Instead, the majority says that they simply mirror concerns addressed in *Herskovits*, that *Herskovits* has not caused any problems, and for the same reasons favoring *Herskovits*, the lost chance doctrine should be adopted where the ultimate harm is injury short of death.[4]

I do not share the majority's view that *Herskovits* has caused no serious harm and therefore it is unlikely that the majority's present opinion will. Nor do I agree that because the majority can find no reason to distinguish the rationale for the decision in *Herskovits*, this court's hands are essentially tied and we must reach a similar conclusion here.

First, we have no idea what the impact of *Herskovits* has been. We do not know how often the case is followed, how often actions brought under it have been settled, or what cases were decided but not appealed. Second, whatever the effect of *Herskovits*, it is impossible to conclude that effects of the present case will be comparable. If nothing else, the added burdens to society presented by this case will be cumulative to any

[4] Curiously, the majority couches this at one point in its opinion as "some serious injury short of death." Majority at 15. Whatever this means, it is not explained or supported by any analysis in the opinion. If it means that the doctrine is to apply where "serious" versus "something less serious" harm actually results, even more questions arise.

produced by *Herskovits*. But in any event, and regardless of *Herskovits*, we are simply not in a position to casually conclude that there will be little discernible negative impact. We simply do not know, and the court does not represent the branch of government with the capability of weighing all of the policy arguments and other considerations that should be weighed.

Rather than assume that the issue before us is essentially already determined, as the majority does, this case presents issues and concerns that should be carefully examined before extending the lost chance doctrine and effecting such a sweeping change in the law. The court should not just apply *Herskovits* to injury short of death, but should instead take the opportunity to examine the issue much more closely.[5] At the end of the examination, the court's conclusion should be that extending the lost chance doctrine is incompatible with RCW 7.70.040[6] and that whether the doctrine should be adopted is a question that must be decided by the legislature.

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[5] The majority effectively treats *Herskovits* as binding precedent because although a six-member majority of the court disagreed on *how* the lost chance doctrine should be applied in a case where death ensued, it agreed that the doctrine should be adopted. Majority at 8. More than a minor disagreement in *Herskovits* is involved, however. The two-member lead opinion in *Herskovits* would alter the standard of proof. The four-member plurality would alter the characterization of the harm. The two positions were not and are not the same. A plaintiff meeting the lower standard of causation would not necessarily satisfy the "more probable than not" standard adhered to in the plurality. Rather, a plaintiff could prevail by introducing evidence that a physician's conduct increased the risk of harm and the harm in fact was sustained, with the jury then taking a permissible step from increased harm to causation and the conclusion that increased risk was a substantial factor in bringing about the resultant injury (death). *See Herskovits*, 99 Wn.2d at 615-17 (Dore, J., lead opinion). To prevail under the plurality's theory, the plaintiff could establish a prima facie issue of proximate causation only if the plaintiff produced evidence that the defendant probably caused a substantial reduction in the decedent's chance of survival. *Id*. at 634-35 (Pearson, J., plurality).

[6] This statute was not considered in *Herskovits*.

Given that the decision whether to extend the lost chance doctrine should belong to the legislature, it is my hope that the legislature will examine this issue. If the legislature concludes that the doctrine should become a part of our state law, then it will be doing so as a duly informed representative body. If not, or if the legislature determines that a different version of the doctrine should be adopted, the legislature can effectively abrogate the majority's holding by amending RCW 7.70.040.[7]

For the reasons stated in this opinion, I dissent.

[7] The South Dakota legislature expressly abrogated the state supreme court's adoption of the lost chance doctrine. South Dakota Codified Laws § 20-9-1.1 provides:

> The Legislature finds that in those actions founded upon an alleged want of ordinary care or skill the conduct of the responsible party must be shown to have been the proximate cause of the injury complained of. The Legislature also finds that the application of the so called loss of chance doctrine in such cases improperly alters or eliminates the requirement of proximate causation. Therefore, the rule in Jorgenson v. Vener, 2000 SD 87, 616 N.W. 2d 366 (2000) is hereby abrogated.

Similarly, the Michigan legislature effectively rescinded *Falcon v. Memorial Hospital*, 436 Mich. 443, 462 N.W.2d 44 (1990), when it enacted Michigan Compiled Laws § 600.2912a(2), which provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: