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LOST CHANCE IN ILLINOIS? THAT MAY STILL BE THE CASE.

LISA PETRILLI*

I. INTRODUCTION

You, an average juror with no legal background, have just ended two and a half weeks of testimony regarding a very complex issue in a medical malpractice case. You know that the end is near, and you can return to your life because the attorneys have just given their closing arguments. You think all that is left is decision of either guilty or not guilty, but then the judge starts to read a long list of what sounds to you like rules. You find out that this is not a matter of guilt or innocence and instead of one issue to decide, you have three or four. The more instructions the judge reads, the more confused you get about what should be the end result. Phrases like “standard of care” and “proximate cause” cloud what was once a crystal decision. Then, the twelve of you are told that you are on your own to make sense of the extensive testimony and instructions from the judge. You think to yourself, “I really hope someone knows what is going on because I am lost.”

Illinois recognizes many theories of action in medical malpractice cases, including the doctrine of lost chance. Despite the variety of theories, Illinois courts consistently limit jury instructions to the available pattern jury instructions. These pattern instructions, while technically adequate, fail to address the specifics of the doctrine of lost chance. The pattern instructions confuse the jury, rather than helping them understand the theories they have just heard. Thus, these juries tend to find in favor of the defendant, rather than the lost chance plaintiff.

Part I of this comment gives a brief introduction to the loss of chance doctrine in Illinois medical malpractice cases. Part I also gives a history of the use of pattern jury instructions in Illinois.

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Part II explores and compares the use of loss of chance jury instructions in Illinois with states that recognize the doctrine of lost chance and the use of a specific jury instruction. Part III proposes a pattern jury instruction to use in Illinois loss of chance cases.

II. THE HISTORY OF "LOSS OF CHANCE" IN ILLINOIS

A. History of "Loss of Chance" in Illinois

1. Medical Malpractice Generally

In order to have a medical negligence claim in Illinois, the plaintiff must show that the doctor had a duty, that the doctor breached that duty, and that the breach proximately caused the plaintiff's injury.¹ Proximate cause is made up of two separate and distinct elements.² The plaintiff must first show that the breach of duty was the legal cause of the plaintiff's injury.³ A reasonably foreseeable injury is the basis for legal cause in medical malpractice claims.⁴ Generally, policy considerations dictate when courts extend liability.⁵ The second part of proximate cause is cause in fact. Cause in fact shows that the defendant's negligence caused the plaintiff's injury to a reasonable degree of medical certainty.⁶ The cause in fact element of proximate cause is at issue in "loss of chance" cases.⁷

1. See *Holton v. Mem'l Hosp.*, 679 N.E.2d 1202, 1206 (Ill. 1997) (establishing the general elements of medical negligence without reference to loss of chance). In Illinois medical malpractice negligence refers to duty and breach, and proximate cause refers to both cause in fact and legal cause. See Christopher White, *A Survey of Illinois Medical Malpractice Law*, 24 S. ILL. U. L.J. 935, 957-58 (2000) (setting forth that the doctrine of lost chance is an available action in Illinois).

2. *White*, *supra* note 1, at 957. Proximate cause in Illinois refers to the general causation element of negligence. *Holton*, 679 N.E.2d at 1209. Legal cause in Illinois is what is commonly known as proximate cause. See generally *Henry v. McKechnie*, 698 N.E.2d 696 (Ill. App. Ct. 1998) (reiterating the reasoning and holding of *Holton*).

3. *White*, *supra* note 1 at 957; *Holton*, 679 N.E.2d at 1206. Legal cause is the element of causation that relates to the foreseeability of the breach as the cause of the injury. See generally *Henry*, 698 N.E.2d at 699-702.

4. *Holton*, 679 N.E.2d at 1206. See also *White*, *supra* note 1, at 957-58 (outlining the basics of medical negligence and briefly discussing each individual element).

5. *Holton*, 679 N.E.2d at 1206. The *Holton* court discussed the role of proximate cause as it relates to loss of chance. *Id.*

6. *Id.* The court explained the general elements of medical negligence and broke causation into two elements. *Id.*

7. See generally *Holton*, 679 N.E.2d at 1206-13; *Lambie v. Schneider*, 713 N.E.2d 603, 608-610 (Ill. App. Ct. 4th Dist. 1999); *Henry*, 698 N.E.2d at 699-702 (applying the lost chance doctrine that relaxes causation where the plaintiff experiences a lost chance of survival or effective treatment as a result

In order to prove cause in fact, a plaintiff must show by a preponderance of the evidence that the defendant's breach caused the plaintiff's injury.⁸ The doctrine of lost chance arises in cases where the injury that the plaintiff complained of was not the condition that took him to the doctor, rather the loss of an opportunity to receive effective treatment from a condition that the doctor failed to discover.⁹ Thus, cause in fact becomes impossible to show if the condition that the plaintiff was originally suffering from caused him to have a less than a fifty percent chance of survival.¹⁰ Since the plaintiff must prove the elements of negligence by a preponderance of the evidence, meaning that it is more likely than not that the defendant committed negligence, the plaintiff would also have to show the chance of survival by a preponderance of the evidence. Prior to the lost chance doctrine, the outcome was that the plaintiff, who would likely die prior to the defendant's negligence, would not recover, whereas a plaintiff who was more likely to survive prior to the negligence would have a cause of action. This would be true in cases where the action by the defendant doctor was the same. To deal with this inequality in outcomes, Illinois adopted the lost chance doctrine.

2. Loss of Chance and Proximate Cause

In 1997 the Illinois Supreme Court recognized the lost chance doctrine in *Holton v. Memorial Hospital*.¹¹ The doctrine flowed

of a doctor's negligence). See White, *supra* note 1, at 957-58 (summarizing the elements of medical negligence and identifying the issue in lost chance cases as cause in fact).

8. *Holton*, 679 N.E.2d at 1206. See White *supra* note 1, at 957-58 (establishing the elements of medical negligence).

9. See *Meck v. Paramedic Serv. of Ill.*, 695 N.E.2d 1321, 1325 (Ill. App. Ct. 1998) (stating that the plaintiff is not claiming that the defendant caused the plaintiff to have a heart attack, but that the defendant lessened the effectiveness of possible treatment options to prevent further damage as a result of the heart attack). Once shown that the defendant's negligence caused the decrease of the chance of survival of lessening of effective treatment, the plaintiff must show that the plaintiff actually sustained harm. *Id.* at 1326. The question regarding whether the defendant's negligence was a substantial factor in causing the plaintiff's injury is one for the jury. *Id.* (citing *Chambers v. Rush-Presbyterian-St. Luke's Med. Cent.*, 508 N.E.2d 426, 429-31 (Ill. App. Ct. 1987)).

10. *Id.* at 1325-26.

11. See *Holton*, 679 N.E.2d at 1202 (recognizing a cause of action for loss of chance, which relaxes the proximate cause element so that the plaintiff need not show that her chance of survival prior to the defendant's negligence would have been greater than fifty percent). Prior to 1997 and the *Holton* decision, Illinois courts required the plaintiff to prove each element by a preponderance of the evidence, which meant that the plaintiff would have to show that her chance of survival or a better outcome was more than fifty percent, or a preponderance of the evidence. *Id.* at 1206-13.

from the Restatement (Second) of Torts, section 323.¹² In *Holton*, the court held that a plaintiff may recover damages provided he or she can show—by a preponderance of evidence—that the defendant either: 1) negligently lessened the effectiveness of treatment causing loss of chance of survival; or 2) increased the risk of a worse outcome even where the chance of survival of a person with a condition similar to the plaintiff's was less than fifty percent prior to the defendant's negligent actions.¹³

B. Pattern Jury Instructions in Illinois

Illinois requires that courts give pattern instructions to juries wherever they are applicable.¹⁴ In Illinois, a party has the right to be heard on his or her theory of the case.¹⁵ While a trial court is to instruct the jury on all the issues, the instructions should not mislead or confuse the jury. Illinois courts require parties to use Illinois Pattern Instructions (IPI) where applicable.¹⁶ Where the instructions are applicable, courts refuse to allow a party to read

12. *Meck*, 695 N.E.2d at 1325 (citing the RESTATEMENT (SECOND) OF TORTS, § 323 (1965) [hereinafter section 323]). Section 323 states:

One who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other's person . . . is subject to liability to the other for the physical harm . . . from his failure to exercise reasonable care to perform his undertaking if (a) his failure to exercise such care increases the risk of such harm.

RESTATEMENT (SECOND) OF TORTS, § 323(a) (1965).

This section was first applied in *Northern Trust Co. v. Louis A. Weiss Mem'l Hosp.*, 493 N.E.2d 6 (Ill. App. Ct. 1986). *Meck*, 695 N.E. at 1325-26. The court in *Northern Trust Co.* suggested that evidence tending to show negligent delay in diagnosis or lessened effectiveness of treatment is sufficient to establish proximate cause. *Northern Trust Co.*, 493 N.E.2d at 11.

13. *Holton*, 679 N.E.2d at 1213. Until 1997, the Illinois district courts had been deeply divided as to the application of the loss of chance doctrine in certain medical malpractice cases. Several cases in Illinois recognized a cause of action for loss of chance. *See generally Northern Trust*, 493 N.E.2d 6, 11-16; *Chambers*, 508 N.E.2d at 429-33; *Pumala v. Sipos*, 517 N.E.2d 295, 298-99 (Ill. App. Ct. 1987); *Hajian v. Holy Family Hosp.*, 652 N.E.2d 1132, 1136-39 (Ill. App. Ct. 1995). However, many Illinois courts refuse to recognize a cause of action for loss of chance when the plaintiff cannot prove that the chance of survival would have been greater than fifty percent. *See generally Hare v. Foster G. McGaw Hosp.*, 549 N.E.2d 778, 781-83 (Ill. App. Ct. 1989); *Netto v. Goldenberg*, 640 N.E.2d 948, 953-56 (Ill. App. Ct. 1994).

14. *See generally Preston v. Simmons*, 747 N.E.2d 1059, 1069 (Ill. App. Ct. 2001) (stating generally that where a pattern jury instruction is applicable, the use of a non-pattern instruction is improper).

15. *See generally LaFever v. Kemlite Co.*, 706 N.E.2d 441, 446-58 (Ill. 1998); *Wille v. Navistar Int'l Transp. Corp.*, 584 N.E.2d 425, 429-31 (Ill. App. Ct. 1991) (stating that each party has the right to inform the jury as to applicable legal theories that the parties can use to prove their case).

16. *See generally Irwin v. Omar Bakeries, Inc.*, 198 N.E.2d 700, 703-05 (Ill. App. Ct. 1964).

non-pattern instructions to the jury.¹⁷

Even where a non-pattern instruction accurately reflects state law, courts refuse the instruction if an IPI exists on the same issue.¹⁸ The categorical rejection of non-IPI instructions presents a problem for parties seeking to use the new lost chance doctrine, especially since the courts entitle parties to a jury instruction on an issue when the issue is supported by some evidence in the record.¹⁹ While standard proximate cause instructions are adequate, they are still confusing to the jury. Standard proximate cause instructions lead the jury to believe that the plaintiff must establish the increased risk to a reasonable degree of medical certainty. However, the plaintiff need only establish to a reasonable degree of medical certainty that the negligence of the defendant caused any increased risk.²⁰

C. "Lost Chance" Instructions in Illinois

Following *Holton*, many parties set forth jury instructions specifically relating to the doctrine of lost chance.²¹ The IPI for juries do not contain an instruction for loss of chance.²² Since Illinois courts do not generally admit non-IPI instructions, plaintiffs instead begrudgingly accept the standard instruction for proximate cause.²³

For example, in *Lambie v. Schneider*, doctors diagnosed a young child with a heart defect.²⁴ The child underwent surgery to

17. *Id.*; see generally James A. Dooley, *Illinois Pattern Instructions: An Appraisal by a Plaintiff's Attorney*, 1963 U. OF ILL. LAW FORUM 586 (1963) (setting forth that courts prefer pattern jury instructions because, by design, they simplify the law for juries).

18. *Erikson v. Muskin Corp.*, 535 N.E.2d 475, 480 (Ill. App. Ct. 1989).

19. *Demos v. Ferris-Shell Oil, Co.*, 740 N.E.2d 9, 21 (Ill. App. Ct. 2000).

20. See generally Philip H. Corboy, *Pattern Jury Instructions-Their Function and Effectiveness*, 32 INSURANCE COUNCIL J. 57 (1965).

21. See generally *Henry*, 698 N.E.2d at 699-702; *Lambie*, 713 N.E.2d at 608-10; *Sinclair v. Berlin*, 758 N.E.2d 442, 447-50 (Ill. App. Ct. 2001) (illustrating cases where the plaintiff requested a jury instruction specifically dealing with loss of chance and the relaxed form of proximate cause). See also Jennifer Deitchman, Case Note, *Meck v. Paramedic Services of Illinois: Proximate Cause and the Lost Chance Doctrine in Illinois* 11 LOY. CONSUMER L. REV. 241, 242 (stating that Illinois courts must apply the lost chance standard in certain cases that would otherwise be very difficult to prove).

22. See cases cited *supra* note 12 (proposing instructions for loss of chance because the IPI instructions do not contain an instruction for loss of chance).

23. See *Henry*, 698 N.E.2d at 701 (stating that parties are entitled to have the jury instructed as to the law governing the case, but departure from IPI instructions requires careful scrutiny and only used when necessary to provide a fair trial even if the instruction accurately states the law of the case). See also *Lambie*, 713 N.E.2d at 608; *Sinclair*, 758 N.E.2d at 448-49 (reiterating the court's view in *Henry*).

24. *Lambie*, 713 N.E.2d at 605-06. The child in *Lambie* was born with respiratory distress, and within days developed a heart murmur. *Id.* at 605.

repair the defect to the left side of her heart.²⁵ During the surgery, the doctor could not locate the cause of the problems with the left side of the child's heart and placed bands on her arteries.²⁶ Following the surgery the child suffered severe right heart and nerve damage.²⁷ The plaintiff brought action claiming that although the doctor may not have been able to repair the damage to the left side of the heart during the procedure, the doctor's negligence was the cause of the damage to the right side of the heart and the nerve damage.²⁸ The plaintiff claimed that the doctor's negligence caused the child to remain disordered and reduced the effectiveness of treatment.²⁹

The plaintiff proposed a jury instruction on loss of chance. The plaintiff based the instruction on a section of the Restatement (Second) of Torts and provided:

A physician who undertakes to render services to a patient which he should recognize as necessary for the protection of the patient is subject to liability to the patient for physical harm resulting from his failure to exercise reasonable care to perform his medical services, if his failure to exercise such care increases the risk of such harm.³⁰

The court rejected this instruction for two reasons. First, the court believed that the proposed instruction would cause unnecessary confusion.³¹ Second, the court stated that the

The child was diagnosed as having congestive heart failure and later with "truncus arteriosus, a condition where the blood vessels carrying the blood to the body merges with the blood vessels carrying blood to the lungs." *Id.* at 605-06.

25. *Id.* at 605.

26. *Id.* at 606.

27. *Id.* The child suffered from severe right heart failure with abnormal PDA or AP window and phrenic nerve damage following the defendant's operation on the child. *Id.*

28. *Id.* It was the child's contention that the permanent damage resulted from the surgery performed by the defendant. *Id.* The plaintiff charged that the child suffered from mild left heart damage prior to the surgery and severe right side damage and nerve damage following the negligent performance of surgery. *Id.*

29. *Id.* The plaintiff's cause of action alleged the defendant's negligence proximately caused the child to suffer unnecessary pain and suffering and to remain disordered and weakened. *Id.* at 607.

30. *Id.* The plaintiff's cause of action alleged that the defendant's negligence was the proximate cause of the child's sufferance of unnecessary pain. *Id.* For the text of the Restatement, see section 323, *supra* note 12.

31. *Lambie*, 713 N.E.2d at 608. The court found that the non-pattern jury instruction would cause unnecessary confusion for the jury. *Id.* Coincidentally, the plaintiff in *Lambie* cited to *Henry*. The plaintiff noted the following language from *Henry*:

In cases discussing jury instructions on the lost chance doctrine, the courts have variously required a finding of probability of causation, a finding of substantial possibility of a better result, language based on

standard jury instruction for proximate cause was sufficient.³²

The *Lambie* court relied on the decision in *Henry v. McKechnie*.³³ In *Henry*, the plaintiff submitted a jury instruction based upon the same Restatement section relied upon in *Lambie*.³⁴ The instruction stated that “[a] person who undertakes to render services to another is liable for physical harm resulting from his failure to exercise reasonable care if that failure increased their risk of harm.”³⁵ The court rejected the instruction and found that juries should only receive non-IPI instructions if the standard instructions are inadequate.³⁶ Furthermore, the court in both *Lambie* and *Henry* found that instructions based on section 323 of the Restatement of Torts may have instructed the jury as to cause in fact but failed to instruct the jury as to proximate cause.³⁷

The most recent Illinois case specifically dealing with jury instructions for loss of chance is *Sinclair v. Berlin*,³⁸ recently decided in September 2001.³⁹ In *Sinclair*, the plaintiff had

section 323 of the Restatement (second) [sic] of Torts, or modifying the substantial factors formula for causation.

Lambie, 713 N.E.2d at 608. (citing *Henry*, 698 N.E.2d at 701).

32. *Id.* The court found that the plaintiff misread the court in *Henry* and that the use of a specific instruction for loss of chance will only confuse the jury as to the relevant substantive law of Illinois. *Id.*

33. *Id.* The *Lambie* court cited *Henry* and found that the court in *Henry* rejected jury instructions based on section 323. *Id.* The court in *Lambie* also based its reasoning on a pre-*Holton* decision in *Curry v. Summer*, 483 N.E.2d 711 (1985). *Id.*

34. *Id.* at 609. The court stated that although the plaintiff attempted to distinguish the instruction in *Lambie* from the instruction in *Henry*, both instructions contain the same language from section 323. *Id.* The plaintiff in *Lambie* further argued that long form instruction given did not accurately inform the jury as to the applicable law, and since the short form IPI dealing with proximate cause was given in *Henry* and the long form at trial in this case, the court should distinguish between *Henry* and *Lambie*. *Id.*

35. *Henry*, 698 N.E. 2d at 698 (quoting the full language of the instruction that the plaintiff proposed). The jury instruction in *Henry* was identical to the instruction tendered in *Curry*. See also, *Curry*, 483 N.E.2d at 717-18. *Curry* was a pre-*Holton* case where the plaintiff attempted to use the loss of chance doctrine and the court rejected the doctrine and the proposed instruction that the plaintiff offered. *Id.* at 717-18.

36. *Lambie*, 713 N.E.2d at 608; *Henry*, 698 N.E.2d at 701. Though litigants are entitled to have the jury instructed about their theory of the case, IPI instructions will be used when applicable. *Id.* The instructions are to be used to adequately instruct the jury and if the instructions are adequate, non-IPI instructions that correctly state the law of the case will not be used. *Id.*

37. *Lambie*, 713 N.E.2d at 609; *Henry*, 698 N.E.2d at 701-02. Both courts found that section 323 was misleading and failed to accurately state Illinois law. *Id.* The reason that both courts used for the inadequacy of the instruction based on section 323 was that it indicated that a defendant *may* be found liable for any increased risk resulting from his conduct, regardless of whether the increased risk was foreseeable. *Lambie*, 713 N.E.2d at 608.

38. 758 N.E.2d 442 (Ill. App. Ct. 2001).

39. *Sinclair* is the first First Judicial Circuit decision relating to a jury

complaints of pain in her eye.⁴⁰ The plaintiff claimed she visited the defendant's office and called on several occasions.⁴¹ The plaintiff's vision gradually weakened and eventually lead to blindness.⁴² The plaintiff claimed that the defendant's negligent failure to diagnose and treat her eye condition caused a worsening of her condition until she completely lost vision.⁴³ In essence, the defendant's negligence caused a lost chance of effective treatment.⁴⁴

Again, the plaintiff introduced a non-pattern jury instruction on the lost chance doctrine.⁴⁵ The plaintiff contended that if the jury was not specifically instructed on the doctrine of lost chance, the jury would not know what to do with the lost chance evidence introduced at trial.⁴⁶ The proposed instruction in *Sinclair*⁴⁷ differed from the instructions rejected in both *Henry*⁴⁸ and *Lambie*.⁴⁹ The instruction stated that "[p]roximate causation may be established by proving or showing that [the] Defendant's conduct increased the risk of harm to the plaintiff, or lessened the effectiveness of the plaintiff's treatment."⁵⁰ The court refused to allow the instruction, citing both *Henry* and *Lambie*.⁵¹ However, in *Sinclair* the court

instruction for loss of chance. See generally *Sinclair*, 758 N.E.2d 442. *Henry* and *Lambie* were both Fourth Judicial Circuit cases. See generally *Lambie*, 713 N.E.2d at 603; *Henry*, 698 N.E.2d at 696.

40. *Sinclair*, 758 N.E.2d at 445. The plaintiff suffered from a cataract condition as diagnosed by the defendant. *Id.*

41. *Id.* at 445-46.

42. *Id.* at 446.

43. *Id.* The plaintiff alleged that she repeatedly came to the defendant's office for follow-up visits, but that the doctor still failed to treat her vision condition. *Id.* The plaintiff claimed that she went to the doctor's office on several occasions complaining of eye pain, dryness, black floaters and bubbles in her eye. *Id.* The plaintiff further claimed that the defendant's failure to examine and treat her resulted in complete legal blindness in her right eye. *Id.*

44. *Id.* at 446-47. The plaintiff underwent three surgeries in an attempt to repair the damage to her right eye, but all three surgeries failed to correct her vision. *Id.* at 446.

45. *Id.* at 448. The plaintiff contended that she was entitled to an instruction for loss of chance in light of the Illinois Supreme Courts holding in *Holton*. *Id.*

46. *Id.* at 449. The plaintiff introduced evidence of the doctor's failure to diagnose and treat her condition, but never claimed or produced any evidence that the doctor caused the cataract. *Id.* at 446.

47. *Id.* at 449.

48. *Henry*, 698 N.E.2d at 698.

49. *Lambie*, 713 N.E.2d at 608.

50. *Sinclair*, 758 N.E.2d at 449. The plaintiff's instruction differed from the *Henry* and *Lambie* instructions in that it was not derived from section 323, but from the decision in *Holton*. *Id.* The instruction was based upon the language in *Holton* that defined loss of chance in medical malpractice actions. *Id.*; *Holton*, 679 N.E.2d at 1209.

51. *Sinclair*, 758 N.E.2d at 449. The court rejected the plaintiff's proposed instruction and instead gave the long-form instruction on proximate cause to

found that the instruction properly instructed the jury on Illinois law, but was unnecessary.⁵² The court found, as in *Henry* and *Lambie*, that the IPI instructions on proximate cause were adequate.⁵³

In Illinois, a party seeking to introduce a non-IPI instruction must meet a high burden. Under Supreme Court Rule 239(a), IPI instructions are given deference over non-IPI instructions, even if the non-IPI accurately reflects the current state of the law.⁵⁴ If IPI instructions adequately instruct the jury on the applicable law of a case, the court views the non-IPI instructions as unnecessary.⁵⁵

The lost chance doctrine in Illinois is a recent development that relaxed the cause in fact element of causation in certain medical malpractice cases. In the three cases where a loss of chance jury instruction was proposed and denied, the court found

the jury. *Id.* The trial judge decided to give IPI Civil 3d No. 15.01 that states:

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.

Id. at 449.

52. *Id.* The court stated that although the plaintiff's instruction accurately states the law in lost chance medical malpractice cases, the trial court is required by Illinois Supreme Court Rule 239(a) to use the IPI wherever applicable. *Id.* See also *Snelson v. Kamm*, 745 N.E.2d 128, 150-51 (Ill. App. Ct. 2001) (citing the Illinois Supreme Court Rule 239). Supreme Court Rule 239(a) provides:

Whenever the Illinois Pattern Instructions (IPI) contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the IPI instruction shall be used, unless the court determines that it does not accurately state the law.

ILL. S. CT. R. 239(a).

53. *Sinclair*, 758 N.E.2d at 449-50. See also, *Henry*, 698 N.E.2d at 701; *Lambie*, 713 N.E.2d at 608 (stating that non-IPI instructions will not be used when an adequate IPI instruction does exist).

54. *Snelson*, 745 N.E.2d at 151; *Sinclair*, 758 N.E.2d at 449. According to Illinois Supreme Court Rule 239(a) and the interpretation of the rule, the trial court should not "tinker" with IPI instructions. ILL. S. CT. R. 239(a). The court in *Snelson* further stated that the trial court's inquiry should be limited to following three questions: (1) whether there is an instruction on a particular area of law is appropriate or necessary; (2) whether there is a pattern instruction on point; and (3) whether the IPI accurately states the law. *Snelson*, 745 N.E.2d at 151..

55. *People v. Hall*, 743 N.E.2d 126, 143 (Ill. 2000) (citing *People v. Haywood*, 413 N.E.2d 410 (Ill. 1980)). The court in *Haywood* stated:

Instructions found in IPI were drafted with the goal of sharply reducing the number of cases in which jury verdicts were set aside because of erroneous instructions. Consequently, each instruction was painstakingly drafted with the use of simple, brief and unslanted language so as to clearly and concisely state the law.

Haywood, 413 N.E.2d at 413.

that the plaintiff satisfied the elements of a prima facie case of medical negligence using a loss of chance theory.⁵⁶ However, in each case, the court deemed the loss of chance instruction as unnecessary.⁵⁷ In each case, the jury received the standard instruction on proximate cause and in each case the plaintiff was denied recovery.⁵⁸

Illinois courts allow non-IPI instructions where the IPI instructions do not adequately inform the jury on the applicable Illinois law. The IPI lacks a specific instruction on the lost chance doctrine, so it seems only logical that courts should allow a plaintiff to use a non-IPI instruction in lost chance cases.⁵⁹ Since the courts forbid the use of non-IPI instructions in lost chance cases simply because they are non-IPI instructions, there is a need for an IPI on the lost chance doctrine.

III. USE OF LOSS OF CHANCE JURY INSTRUCTION IN STATES THAT ALLOW THE INSTRUCTION

A. Pennsylvania

1. *The History of Hamil v. Bashline*⁶⁰

In 1973 the Pennsylvania Supreme Court expressly accepted Section 323(a) of the Restatement (Second) of Torts as the law in Pennsylvania in *Hamil v. Bashline*.⁶¹ The plaintiff in *Bashline I* alleged that the defendant doctor failed to diagnose and treat the plaintiff's condition in a manner that may have prevented harm to

56. See generally *Holton*, 679 N.E.2d at 1206-13; *Sinclair*, 758 N.E.2d at 447-50; *Lambie*, 713 N.E.2d at 608-10; *Henry*, 698 N.E.2d at 699-702 (establishing that a cause of action for loss of chance exists and is applicable in these cases).

57. *Id.* Each case holds that jury instructions for loss of chance are not necessary unless an IPI does not adequately state the applicable Illinois law. *Id.* In both *Henry* and *Lambie*, the court also found that the instruction based upon section 323 did not accurately state the law of Illinois. See also *Lambie*, 713 N.E.2d at 608; *Henry*, 698 N.E.2d at 701 (stating that Illinois law still applied traditional proximate cause standards).

58. See *Sinclair*, 758 N.E.2d at 447-50; *Lambie*, 713 N.E.2d at 608-10; *Henry*, 698 N.E.2d 699-702 (stating that the outcome in each case is a denial of the jury instruction on loss of chance, as well as upholding the denial of recovery to the plaintiff).

59. See *id.* (citing Illinois Supreme Court Rule 239(a) that states that non-IPI instructions would not be given if not necessary, and where the IPI instructions adequately state Illinois law).

60. 392 A.2d 1280, 1286 (Pa. 1978)

61. *Bashline*, 392 A.2d at 1286. The court in *Bashline* held that section 323 had been adopted in medical malpractice cases where the plaintiff had shown the negligent non-performance increased the risk of harm. [Hereinafter *Bashline I*].

the plaintiff.⁶² The trial court granted a directed verdict in favor of the defendant. The Superior Court reversed, relying on section 323 of the Restatement (Second) of Torts and granted a new trial.⁶³

The second trial (*Bashline II*) generally consisted of the same testimony as the first trial.⁶⁴ The jury found for the defendants and the plaintiffs again appealed to the Superior Court.⁶⁵ The plaintiffs alleged that the trial court failed to adequately instruct the jury and therefore failed to comply with the Superior Courts ruling in *Bashline I*.⁶⁶ The Superior Court affirmed the entry of judgment for the defendant without addressing the issue.⁶⁷ The plaintiff again appealed (*Bashline III*).⁶⁸

2. Holding of the Bashline Cases

Under section 323(a), a plaintiff may bring a claim on the theory that the defendant's action or omission constituted a failure to perform a duty to protect a person against harm from another source.⁶⁹ In a case that falls within section 323(a), "a fact-finder

62. *Id.* at 1283. Mrs. Hamil called the defendant hospital just before midnight on May 31, 1968. *Id.* She told the night supervisor that her husband was suffering from severe chest pains. *Id.* The supervisor told Mrs. Hamil to bring her husband to the Emergency Room. *Id.* When Mr. and Mrs. Hamil arrived, the doctor assigned to the ER ordered an electrocardiogram (EKG) to be taken. *Id.* The EKG machine failed and the doctor ordered the staff to find another EKG machine, but another machine could not be found. *Id.* Mr. Hamil received no further aid or treatment and Mrs. Hamil took her husband to a private doctor. *Id.* Mr. Hamil died while the EKG was being taken at the private office. *Id.* The cause of death was a myocardial infarction. *Id.* Mrs. Hamil then brought a cause of action against numerous defendants, including the hospital and doctor on duty in the Emergency room. *Id.* The complaint alleged that the defendants failed to employ recognized and available methods of treatment. *Id.*

63. *Id.* at 1283. The court found that plaintiff "had in fact established a prima facie case of negligence therefore reversing the trial court and granting a new trial." *Id.*

64. *Id.*

65. *Id.* at 1283-84. Substantially, the same evidence was produced at both trials. *Id.* "The jury returned a verdict for the defendant in the second trial and by special interrogatories expressed its belief that although the defendant acted in a negligent manner the plaintiff failed to establish that defendant's negligence was the proximate cause of the decedent's death." *Id.*

66. *Id.* at 1284.

67. *Id.* at 1284, n.3. The Pennsylvania Supreme Court felt the lower court was mistaken in its grounds for reversal in *Bashline I*. *Id.* The divided court consisted of three members who rejected the rationale in *Bashline I* and concluded that the original directed verdict was correct. *Id.* Therefore, the court concluded that any further error in the second trial was harmless. *Id.*

68. *Id.* at 1286. The court determined that the reason for the plaintiff's appeal was to reassert the reasoning of the Superior Court in *Bashline I*. *Id.*

69. *Id.* The court found that section 323 is unlike the typical tort cause of action where the plaintiff is alleging that the defendant set in motion the events that caused the harm. *Id.*

must consider what did occur as well as what might have occurred.⁷⁰ Where a plaintiff can show how the injury happened and also that the victim may have saved himself from death or further injury by taking advantage of a precaution that the defendant failed to afford, courts should let the jury decide whether the doctor's failure caused the harm.⁷¹ When a defendant's negligence has effectively eliminated a person's chance of survival, the defendant cannot then say that he is not answerable for the injury because the plaintiff cannot establish that the victim would have survived to a reasonable degree of medical certainty.⁷² The injury is the loss of the opportunity to live as the result of defendant's negligence.

The court in *Bashline III* found that the plaintiff could establish how the injury occurred.⁷³ The court found that had the victim been able to take advantage of a precaution not afforded to him by some negligent act or omission of the defendants, he might have survived.⁷⁴ The Court also held where causation is the critical issue as it was in *Bashline II*, a jury instruction relating to the doctrine now known as loss of chance must be given to avoid confusion.⁷⁵

70. *Id.* at 1286-87. The court stated that the fact-finder should consider whether decedent's death "would have occurred from an independent source even if the defendant had performed the duty in a non-negligent manner." *Id.*

71. *Id.* at 1287. The court decided that the determination as to what might have happened involved weighing probabilities and should be submitted to the jury to determine if "it is more probable that the event was caused by the defendant than that it was not." *Id.* (citing F. HARPER AND F. JAMES, *THE LAW OF TORTS*, Vol. 2, § 20.2 at 1113 (1956)) (claiming that where a plaintiff can show how an accident happened and also that the victim may have lived or had a better outcome if offered a precaution that the defendant negligently failed to afford, courts have generally let a jury find that failure caused the harm even though it is speculative). A plaintiff cannot always positively establish with medical certainty that the precaution would have helped. *Id.*

72. *Hicks v. United States*, 368 F.2d 626, 632 (4th Cir. 1968). The court held that if there is any substantial possibility that the victim could have survived and the defendant destroyed that possibility, then the defendant is answerable even if it is not established with absolute certainty. *Id.*

73. *Bashline*, 392 A.2d at 1287-90.

74. *See generally Bashline*, 392 A.2d at 1287-90 (stating that the plaintiff still had the burden of proving that the defendant had a duty that he breached and that the breach caused the plaintiff's injury). Under section 323(a), the plaintiff is not released from proving an element of medical malpractice. *Id.* at 1286. *Bashline I* provided the court with a chance to establish the importance of section 323(a) because plaintiff had established a prima facie case for negligence. *Id.* at 1289. The goal of adopting section 323(a) is to prevent defendants in medical malpractice from escaping liability when a plaintiff cannot establish that she would have not suffered the injury to a reasonable degree of medical certainty. *Id.* at 1287-88.

75. *See id.* at 1289-90 (recognizing the importance of the loss of chance doctrine as based upon section 323(a) and an applicable instruction). The court found that even in situations where the instruction tendered to the jury

3. Other Pennsylvania Cases

Numerous cases have cited the *Bashline* trilogy decisions, and at least four Pennsylvania cases have found that where section 323(a) applies, the plaintiff is entitled to a corresponding instruction on causation.⁷⁶ In cases where the court refused the instruction, higher courts reversed on the ground that refusing a loss of chance instruction constitutes reversible error and abuse of discretion by the trial court.⁷⁷

a. *Hoeke v. Mercy Hospital*⁷⁸

The plaintiffs in *Hoeke* filed a medical malpractice suit against the defendants claiming that the victim sustained further injury as a result of negligent care in the performance of an operation and postoperative care.⁷⁹ The defendants conceded that section 323(a) applies and the issue became whether the defendant's negligent failure to treat the condition caused the victim's injury.⁸⁰ The plaintiff introduced evidence that established the defendant's negligence caused an increased risk of leg amputation and kidney removal.⁸¹

accurately stated the law, an instruction on "loss of chance" was necessary to avoid confusion. *Id.*

76. Pennsylvania courts recognize that when a plaintiff establishes that the defendant's acts or omissions in a section 323(a) situation have increased the risk of harm, the evidence furnished by the plaintiff to establish this principle goes to the fact finder. *See generally* *Jones v. Montefiore Hosp.*, 431 A.2d 920, 923-25 (Pa. 1981); *Hoeke v. Mercy Hosp.*, 445 A.2d 140, 143-46 (Pa. Super. Ct. 1982); *Brozana v. Flanigan*, 454 A.2d 1125, 1127-28 (Pa. Super. Ct. 1983); *Clark v. Hoerner*, 525 A.2d 377, 379-384 (Pa. Super. Ct. 1987) (upholding the decision in *Bashline I*). In each case, traditional standards of a reasonable degree of medical certainty still applied. *See generally id.* The prevailing theory requires the plaintiff to establish to a reasonable degree of medical certainty that the defendant's act or omission caused an increased risk of harm. *See generally id.*

77. *See generally id.* (upholding the decision in *Bashline I*).

78. 445 A.2d 140 (Pa. Super. Ct. 1982).

79. *Hoeke*, 445 A.2d at 141. The plaintiff claims that she sustained the loss of her right kidney and right leg as the result of the negligent performance of an abdominal hysterectomy and negligent postoperative care. *Id.* *Hoeke* originally sought treatment for excessive vaginal bleeding and pain. *Id.* at 142. The defendant recommended the operation to alleviate the bleeding and pain. *Id.* During the operation excessive bleeding occurred in the operative area. *Id.* It was conceded that the bleeding was a result of the surgery. *Id.* Following the surgery the blood supply to the victim's leg was diminished. *Id.* The defendant left for vacation following the surgery and failed to notify his associate of the victim's condition. *Id.* When the condition was finally detected, the damage was irreversible and the leg was amputated. *Id.*

80. *Id.* at 143. Specifically the plaintiff's theory under section 323(a) was that the defendant's failure to act caused the removal of the plaintiff's leg and kidney. *Id.*

81. *Id.* The court found that a question of fact existed as to the issue of whether the failure increased the risk and that the judge properly allowed the

The plaintiff requested a jury instruction relating to section 323(a) and the instruction was allowed.⁸² The jury subsequently found for the plaintiff and the defendant appealed, claiming that the instruction in effect created a de facto directed a verdict for the plaintiff.⁸³ The Court disagreed and affirmed the decision stating that instructions using section 323(a) language accurately state Pennsylvania law, and courts will give the instruction when the plaintiff establishes a prima facie case.⁸⁴

b. *Clark v. Hoerner*

Continuing with the reasoning in the *Bashline* line of cases, the Pennsylvania Superior Court in *Clark* applied section 323(a) and its corresponding jury instruction.⁸⁵ In *Clark*, the plaintiff claimed that the doctor acted in a negligent manner by failing to diagnose the afflicting condition, and that if he had first diagnosed the condition, she might have survived.⁸⁶ The plaintiff requested a section 323(a) instruction and the trial court allowed the

jury to decide the factual issue. *Id.* at 145-46.

82. *Id.* at 143. The instruction read as follows:

[W]hen a defendant physician negligently fails to act, or negligently delays in employing indicated diagnostic or therapeutic measures, and his negligence proximately causes injuries to his patient, the plaintiff does not have to prove to a certainty that proper care would have, as a medical fact, prevented the injuries in question. If a defendant physician's negligent action or inaction has effectively terminated his patient's chances of avoiding injuries, he may not raise conjectures as to the measure of the chances he has put beyond the possibility of realization. If there was any substantial possibility of avoiding injuries and the defendant has destroyed that possibility, he is liable to the plaintiff.

Id.

83. *Id.* at 143-44. The court decided that the defendant's claim that the instruction directed a verdict for the plaintiff was unfounded and the instruction based on the *Bashline* decision was an accurate statement of the law.

84. *Id.* at 143-45. (citing *Bashline*, 392 A.2d at 1288). The court further stated that section 323(a) is recognized as the law in Pennsylvania. *Id.* at 143.

85. See generally *Clark*, 525 A.2d at 379-84 (holding that when section 323(a) applies, a fact finder can determine that the increased risk caused the harm).

86. *Id.* at 378. In *Clark*, the plaintiff brought a wrongful death and survival action against defendant doctor and hospital for negligently failing to diagnose the child's condition that ultimately led to her death. *Id.* The child was brought to the defendant on December 26, 1980 and he diagnosed the child as having the flu. *Id.* The defendant prescribed antihistamines and Tylenol. *Id.* On December 29th the girl was again brought to the defendant after complaining of a sore throat and chest pains. *Id.* Again the defendant diagnosed the condition as the flu and refused antibiotics. *Id.* at 378. The girl's condition worsened and she began to vomit blood. *Id.* at 379. The girl's parents took her to the emergency room and she was diagnosed with a rapidly progressing fulminating pneumonia of the right lung. *Id.* She suffered kidney and respiratory failure and ultimately died. *Id.*

instruction.⁸⁷ The jury ultimately found for the plaintiff, and the defendant appealed, claiming that the instruction should have been denied.⁸⁸

The court found that where causation in medical malpractice cases is at issue and brought within section 323(a), the task of balancing the conflicting evidence is for the jury.⁸⁹ In *Clark*, the plaintiff established that section 323(a) applied.⁹⁰ The plaintiff also presented evidence showing that the negligent act or omission increased the risk of death, and therefore the court rightfully sent the question of causation to the jury with a corresponding instruction.⁹¹

B. Iowa

1. *DeBurkarte v. Louvar*⁹²

In *DeBurkarte*, the Iowa Supreme Court decision affirmed a jury verdict against the defendant in a medical malpractice action using the lost chance theory.⁹³ The plaintiff alleged that the defendant failed to diagnose the victim's cancer, and that this failure to diagnose increased the risk of injury suffered by the victim.⁹⁴ The jury found for the plaintiff and the defendant

87. *Id.* The court found that both sides presented conflicting evidence that created a question of fact as to whether the risk of injury had been increased. *Id.* at 380-81. The author believes that this is a perfect example of a situation where the proposed instruction should be given. The court cited *Bashline* and stated that once a plaintiff has established that the defendant's negligent acts or omissions have increased the risk of harm to the victim the evidence should then go to the fact finder. *Id.* at 379-80. Again, it is the author's contention that in situations like this, a corresponding jury instruction should be given to avoid confusion.

88. *Id.* at 379.

89. *Id.* at 380.

90. *Id.*

91. *Id.* (citing D.Danner and E. Segall, *Mediocolegal Causation: A source of Profession Misunderstanding*, 3 AM.J.L. & MED. 303, 311 (1978)).

92. 393 N.W.2d 131 (Iowa 1986).

93. *DeBurkarte*, 393 N.W.2d at 135. Prior to this decision, Iowa had not decided a case based upon the doctrine of lost chance. *Id.* The court used *DeBurkarte* as the vehicle to establish loss of chance in Iowa. *Id.*

94. *Id.* at 132. In *DeBurkarte*, the Plaintiff claimed that the defendant failed to detect cancer in the plaintiff and his negligence increased her risk of injury. *Id.* The plaintiff detected a lump in her breast. *Id.* The defendant ordered a mammogram and diagnosed the lump as a cyst. *Id.* The lump did not go away and the victim returned to the defendant who reassured her that the lump was a cyst. *Id.* Over the next nine months the victim returned to the defendant nine times drawing the defendant's attention to the lump each time. *Id.* The defendant repeatedly dismissed the lump as a cyst. *Id.* The defendant was aware that the victim's family had a history of breast cancer. *Id.* Furthermore, the defendant was aware that the lump was in an area of the breast where most cancerous tumors are found. *Id.* The victim then found another lump near her nipple and again went to the defendant who referred

appealed.⁹⁵ The defendant claimed that the plaintiff had failed to prove causation and the trial court erroneously instructed the jury on proximate cause.⁹⁶

For the first time, the court applied section 323(a) and found that the plaintiff's injury was her loss of chance to survive the cancer.⁹⁷ The court found that the jury was reasonable in finding the defendant's failure to diagnose and treat the cancer as the likely cause of a reduction in the plaintiff's chance to survive the cancer.⁹⁸ Furthermore, the court found that the trial court did not err in instructing the jury on doctrine of lost chance.⁹⁹

2. *Sanders v. Ghrist*¹⁰⁰

The plaintiff in *Sanders* appealed a verdict for the defendant in a medical malpractice action, stating that the refusal of an instruction on lost chance was erroneous.¹⁰¹ The plaintiff brought the action against a doctor who failed to diagnose and treat the victim's tumor.¹⁰² The Supreme Court of Iowa reversed the trial court's decision, and found that where the doctrine of lost chance applies, failure to give a corresponding jury instruction constitutes an abuse of discretion and amounts to reversible error.¹⁰³

In reaffirming the decision in *DeBurkarte*, the court stated that parties are entitled have their legal theories submitted to the jury.¹⁰⁴ When a party establishes that the doctrine of lost chance applies, the court shall allow that party to use a jury instruction

her to a surgeon. *Id.* The surgeon performed two procedures, a needle aspiration and a biopsy of both lumps and determined that the lumps were cancerous. *Id.* The victim had a mastectomy, however the cancer had spread to her spine and leg. *Id.* The victim's ovaries were eventually removed and the victim underwent chemotherapy. *Id.*

95. *Id.*

96. *Id.* at 134. The court determined that the plaintiff failed to establish proximate cause to a reasonable degree of medical certainty thereby necessitating a directed verdict for the defendant. *Id.* at 134-35.

97. *Id.* at 135. The court remarked that although the plaintiff's chance of survival was less than fifty percent, the evidence established that the defendant's negligence decreased the already low chance of survival. *Id.*

98. *Id.* at 136 (citing *Hicks*, 368 F.2d at 632).

99. *Id.* at 137. The court held that the plaintiff's tendered instruction using the language of section 323(a) encompassed the loss of chance theory and accurately defined proximate cause. *Id.* at 138.

100. 421 N.W.2d 520 (Iowa 1988).

101. *Sanders*, 421 N.W.2d at 521. The Supreme Court of Iowa ruled that the trial court erred in refusing to give the plaintiff's loss of chance instruction that was based upon section 323(a) and the *DeBurkarte* decision. *Id.* at 523.

102. *Id.* at 521. In *Sanders*, the plaintiff claimed that the defendant failed to diagnose and treat a malignant tumor increasing the risk of the victim's ultimate death. *Id.*

103. *Id.* at 523. (citing *DeBurkarte*).

104. *Id.* at 522.

that corresponds to the doctrine.¹⁰⁵ To refuse the instruction would effectively prevent the jury from hearing the offering party's theory of the case.¹⁰⁶

C. Montana

In addition, Montana recognizes the loss of chance doctrine. The only case dealing with the issue of a jury instruction for loss of chance is *Aasheim v. Humberger*.¹⁰⁷ In *Aasheim*, the plaintiff told the doctor that she was having many problems in her knee, but the defendant doctor failed to accurately diagnose the condition as a tumor that ultimately required the implantation of a prosthetic knee device.¹⁰⁸ The plaintiff brought a medical malpractice action against the defendant, claiming that his failure to diagnose the condition resulted in her losing a chance to save her knee.¹⁰⁹

The jury found for the defendant and the plaintiff appealed claiming that the trial court erred in refusing her a jury instruction on the doctrine of lost chance.¹¹⁰ The Supreme Court of Montana agreed with the plaintiff and found that the instruction on legal cause given to the jury during the trial required that the plaintiff prove a probability of greater than fifty percent that earlier detection would have saved her knee.¹¹¹ Under the doctrine of lost chance, the plaintiff need not show that the probability of risk would be greater than fifty percent, but that the failure to diagnose caused an increased risk.¹¹² Because the plaintiff had already established that the doctrine of lost chance applied, the trial court should give an instruction on the doctrine in order to accurately reflect Montana law.¹¹³

D. South Carolina

South Carolina recognizes a cause of action for the doctrine of lost chance based upon section 323(a). In *Sherer v. James*,¹¹⁴ the court found that the trial court's failure to give a jury instruction

105. *Id.*

106. *Id.*

107. *Aasheim v. Humberger*, 695 P.2d 824, 825 (Mont. 1985).

108. *Id.*, at 825. The court determined that the defendant incorrectly diagnosed the condition as chondromalacia. *Id.* When the plaintiff's condition did not improve, she sought treatment from another doctor who correctly diagnosed the condition as a giant cell tumor. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 827.

112. *Id.*

113. *Id.* at 828. The court found that where loss of chance is used, an instruction must be given to reflect Montana law. *Id.* Montana law is based upon section 323(a) and instructions using section 323(a)'s language should be given where applicable. *Id.*

114. 334 S.E.2d 283 (S.C. Ct. App. 1985).

in cases where the doctrine was applicable warranted reversal.¹¹⁵ The plaintiff in *Sherer* claimed that the negligent failure to diagnose and treat the victim's condition resulted in an increased risk of harm.¹¹⁶ The plaintiff requested an instruction on loss of chance, but the trial court refused.¹¹⁷ The jury ultimately returned a verdict for the defendant and the plaintiff appealed.¹¹⁸

The only issue on appeal was whether the trial court erred in refusing the tendered instruction on the doctrine of lost of chance.¹¹⁹ The court found that the trial courts instruction on legal cause failed to adequately state the plaintiff's lost chance theory.¹²⁰ The court further found that where the plaintiff establishes that the doctrine of lost chance applies prima facially, the trial court must give a corresponding jury instruction.¹²¹

IV. PROPOSAL

In 1997, when the Illinois Supreme Court adopted the loss of chance doctrine in *Holton*, the Supreme Court of Illinois relaxed the burden of proximate cause to allow recovery in certain situations where the plaintiff could not prove causation to a reasonable degree of medical certainty.¹²² Since the adoption of loss of chance in Illinois, several plaintiffs have sought recovery using the loss of chance doctrine.¹²³ However, plaintiffs still encounter problems recovering under the doctrine and attribute the problems to a lack of jury understanding of the complexities of the doctrine.¹²⁴ In an attempt to clarify the doctrine for the jury, many plaintiff attorney's developed jury instructions patterned after the Restatement section 323(a), the basis of the cause of action.¹²⁵

115. *Sherer*, 334 S.E.2d at 285.

116. *Id.* at 284. In *Sherer*, the victim complained of abdominal pain and a swollen testicle. *Id.* The symptoms were later diagnosed as a torsion of the testicle, a condition that ultimately led to its removal. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 285.

121. *Id.*

122. *See Holton*, 679 N.E.2d at 1209-10 (reiterating the elements of medical negligence as a background for introduction of the loss of chance doctrine and how it fits into the elements of medical negligence).

123. *See generally* cases cited *supra* note 7 (applying the lost chance doctrine that relaxes causation where the plaintiff experiences a lost chance of survival or effective treatment as a result of a doctor's negligence). *See also* White, *supra* note 1, at 957-58 (summarizing the elements of medical negligence and identifying the issue in lost chance cases as cause in fact).

124. *See generally* cases cited *supra* note 7 (requesting instructions for loss of chance and subsequently being refused by the respective trial court). The juries denied recovery to the plaintiffs in each case where the court refused to issue the instruction to the jury. *Id.*

125. *Id.* (illustrating cases where the plaintiff requested a jury instruction

The plaintiffs in these situations then encounter another problem; because Illinois follows a system of pattern jury instructions, Illinois trial courts generally do not give proposed non-pattern instructions to the jury.¹²⁶ Certainly it is apparent that the current pattern jury instructions do technically state the law of proximate cause. However, to an average jury member, the law is not so simple to understand.

Proximate cause in a medical malpractice case is generally proven if the plaintiff can establish to a reasonable degree of medical certainty that the defendant caused the plaintiff's injury.¹²⁷ This means that the plaintiff must prove that it was more likely than not that the defendant's negligence caused the injury.¹²⁸ In lost chance cases, where the injury is a loss of chance of survival, the plaintiff must establish that it was more likely than not that the defendant caused the loss of chance.¹²⁹ Technically, the plaintiff still must prove traditional proximate cause, which is why the Illinois courts have not allowed additional instructions for loss of chance. Technically, the instruction is adequate.¹³⁰

The instructions generally state that the plaintiff has the burden to prove to a reasonable degree of medical certainty that the defendant was negligent and that his negligence caused the injury for which the plaintiff is seeking recovery.¹³¹ However, the IPI do not mention the doctrine of lost chance. This forces the jury

specially dealing with loss of chance and the relaxed form of proximate cause). See also Deitchman, *supra* note 21, at 242 (noting that the standard for proximate cause in lost chance cases was borrowed from the Pennsylvania Supreme Court who relied on the Restatement Second of Torts).

126. See generally *Curry*, 483 N.E.2d at 716-720 (refusing to give a jury instruction based upon section 323(a) of the Restatement of Torts). See also cases cited *supra* note 58 (noting that instructions that are not a part of the pattern instructions in Illinois will generally be refused).

127. See generally cases cited *supra* note 7 (utilizing the lost chance doctrine that relaxes causation where the plaintiff experiences a lost chance of survival or effective treatment as a result of a doctor's negligence). See also *White*, *supra* note 1, at 957-58 (summarizing the elements of medical negligence and identifying the issue in lost chance cases as cause in fact).

128. See cases cited *supra* note 58 (stating that in order to meet its burden of proof, plaintiffs must demonstrate the elements of its medical malpractice cause of action by a preponderance of the evidence – a more probable than not standard).

129. *Sinclair*, 758 N.E.2d at 447. Although the plaintiff's instruction accurately stated the law in lost chance medical malpractice cases, the trial court was required by Illinois Supreme Court Rule 239(a) to use the IPI instruction wherever applicable. *Id.* at 449. See also *Snelson*, 745 N.E.2d at 150-51 (citing Illinois Supreme Court Rule 239). For the text of the rule see ILL S. CT. R. 239(a) *supra* note 52 (stating the rule for jury instructions in Illinois medical malpractice cases).

130. ILL S. CT. R. 239(a)

131. See generally cases cited *supra* note 58 (giving the court the text of the jury instruction and the general reasons for proposing the instruction).

to figure out the doctrine of lost chance doctrine on their own.¹³²

Courts do not apply the doctrine of lost chance in every medical malpractice case.¹³³ There are only certain situations where the judge makes a preliminary determination that the doctrine applies and that the plaintiff may present evidence supporting a loss of chance to the jury.¹³⁴ The trial court should only give the corresponding instruction in those situations.

When the trial court allows the evidence to support a theory of recovery under the doctrine of lost chance, the jury may be confused about what to do with that evidence if it is given no direction. An instruction for loss of chance would allow the jury to more fully understand how to apply the evidence presented in each case.¹³⁵

Other courts recognizing the cause of action for the doctrine of lost chance allow corresponding jury instructions out of necessity and fairness.¹³⁶ The cause of action for the doctrine of lost chance in Illinois is patterned after the Restatement Second of Torts section 323(a).¹³⁷ Iowa, Montana, South Carolina and Pennsylvania

132. See generally, ILLINOIS PATTERN INSTRUCTIONS FOR JURIES, 2001 ed. (setting forth the instructions lawyer should use in presenting their theories of action to juries in Illinois).

133. *Holton*, 679 N.E.2d at 1209. The lost chance in medical malpractice cases relate to the injury suffered by the plaintiff "whose medical providers are alleged to have negligently deprived the plaintiff of a chance to survive or recover from a health problem, or where the malpractice has lessened the effectiveness of treatment or increased the risk of an unfavorable outcome to the plaintiff." *Id.*

134. See generally cases cited *supra* note 126 (reiterating the fact that loss of chance will not be applied in every medical malpractice situation).

135. But see *Sinclair*, 758 N.E.2d at 449 (holding, contrary of the previously stated proposition, that juries should not receive special jury instructions). The *Sinclair* case is a perfect example of why trial courts should give the doctrine of lost chance instruction to the jury. See textual discussion and corresponding cases *supra* notes 39-53 and accompanying text (discussing the Sinclair case's factual history and the court's findings).

136. See *Snelson*, 745 N.E.2d at 151 (according to Illinois Supreme Court Rule 239(a) and the interpretation of the rule the trial court should not "tinker" with IPI instructions). See also cases cited *supra* notes 54-55 (relating why Illinois courts favor IPI when they adequately state the law of the case).

137. See *Holton*, 679 N.E.2d at 1209 (recognizing a cause of action for loss of chance that relaxes the proximate cause element so that the plaintiff need not show that her chance of survival prior to the defendant's negligence would have been greater than fifty percent). In Illinois prior to 1997 and the *Holton* decision, the plaintiff needed to prove each element by a preponderance of the evidence, which meant that the plaintiff would have to show that her chance of survival or a better outcome was more than fifty percent. See generally *id.*; *Meck*, 695 N.E.2d at 1325-26. For the text of the Restatement, see section 323 *supra* note 11. The section was first applied in *Northern Trust v. Weiss Memorial Hospital*, 493 N.E.2d 6 (Ill. App. Ct. 1st Dist. 1986). In *Northern Trust*, the court stated that evidence showing negligent delay in diagnosis or treatment lessened the effectiveness of treatment is sufficient to establish proximate cause. *Id.* at 12.

courts base the cause of action for the doctrine of lost chance on section 323(a).¹³⁸ Those states allow a jury instruction for loss of chance. Each one of those courts stated that the rationale for the instruction is the concept that each party is entitled to have the jury hear their theory of the case.¹³⁹

The courts in other states allowing a cause of action for the doctrine of lost chance discovered that where the doctrine of lost chance applies, the trial court should give a corresponding instruction to the jury. Each court found a need for the instruction in order to alleviate the confusion presented to the jury who is unsure how to interpret and use the evidence presented.¹⁴⁰ The courts determined that as long as the doctrine of lost chance doctrine applies *prima facie* and the instruction accurately stated the law of the state, the trial court should give the instruction to the jury.¹⁴¹

Every party has a right to have a jury or finder of fact hear its theory of the case. In situations where the plaintiff's theory for recovery lies under the doctrine of lost chance, the plaintiff has a right to present evidence in support of the theory and also has the right to have a jury instruction to explain to the jurors how they are to use that evidence. Denying jury instructions that clarify the law effectively denies parties the right to be heard.

In Illinois, parties have the same right to have a jury hear their theory of the case.¹⁴² Even if the instruction that the court gives is *technically* adequate it essentially deprives the party of her right to be heard. Technically adequate statements of law in lost chance cases fail to serve the purpose for which they were created if the end result is deprivation of the chance for informed jury deliberation.¹⁴³ The Illinois pattern instructions on proximate

138. See generally *Sanders*, 421 N.W.2d at 521-23; *DeBurkarte*, 393 N.W.2d at 134-38; *Aashiem*, 695 P.2d at 827-28; *Jones*, 431 A.2d at 923-25; *Clark*, 525 A.2d at 379-84; *Brozana*, 454 A.2d at 1127-28; *Hoeke*, 445 A.2d at 143-46; *Bashline*, 307 A.2d at 61-63; *Sherer*, 334 S.E.2d at 284-286 (each recognizing a cause of action for loss of chance and the need for a corresponding jury instruction).

139. See cases cited *supra* notes 7 and 54-55 (noting that the reasoning for the administration for jury instructions is the same in the states that allow instructions for loss of chance as the reasoning for tendering instructions in Illinois).

140. See cases cited *supra* notes 7 and 54-55 (stating that juries will generally be instructed on the applicable law so long as the tendered instructions are not confusing or misleading in their choice of wording).

141. See cases cited *supra* notes 7 and 54-55 (noting that this is the approach that Illinois courts take when a non-pattern instruction is not available on a particular issue).

142. See generally *Demos*, 740 N.E.2d at 15-21; *Erikson*, 535 N.E.2d at 481-82 (stating that parties are entitled to jury instructions that apply to the relevant issues of their case).

143. See cases cited *supra* note 7 (denying recovery to plaintiffs where loss of

cause may be technically adequate, however, they do not serve to clarify in loss of chance cases. Rather, they only serve to further confuse the jury.¹⁴⁴

To allow for an instruction on lost chance will not harm the defendant, as it is a true and accurate statement of the law.¹⁴⁵ The plaintiff in lost chance cases does not ask the trial court for an unfair advantage. Parties using the doctrine of lost chance merely ask the court to provide the jury with an accurate statement of the law of lost chance as it is applied in Illinois.

Because of the need for an instruction as demonstrated in other cases that apply the doctrine of lost chance and the right for parties to have the jury hear their theory of their case, parties in Illinois seeking to use the doctrine of lost chance should be entitled to a corresponding instruction. Since Illinois courts do not allow non-pattern instructions that state the law of lost chance, the court should adopt a pattern instruction for loss of chance cases to clarify the law of the new doctrine.

V. CONCLUSION

The theory of loss of chance is relatively new and still causes confusion in many states. In the states that have adopted the doctrine, confusion exists as to whether the parties are then entitled to a corresponding jury instruction. In Illinois where a system of pattern instructions is in place, instructions that are not a part of the pattern instructions are generally not given. Illinois courts will only give non-pattern instructions if the pattern instructions fail to adequately state the law and are not confusing to the jury. Because the pattern instructions in Illinois do technically state the law of Illinois, Illinois courts do not give non-pattern instructions for cases involving the doctrine lost chance.

In other states where that cause of action for loss of chance is recognized under the same Restatement Second of Torts section as in Illinois, those courts use corresponding instructions including the language of the section out of necessity and fairness. Illinois should follow the trend of these states by either allowing instructions for the doctrine of lost chance or approving a pattern instruction for the loss of chance doctrine.

chance instructions were not tendered).

144. See cases cited *supra* note 7 (showing that where instructions are not given, plaintiffs do not recover). See cases cited *supra* notes 54-55 (analyzing the outcome of cases where instructions on loss of chance were not given compared to the outcomes of cases where the instruction was given).

145. See *Holton*, 679 N.E.2d at 1209 (noting that instructions that are given are accurate statements of the law which in no way harm the defendant or cause undue prejudice).