

## Loss of Chance

PLF also claims that DFT's negligence harmed him/her/DCD by reducing his/her chances for a more favorable medical outcome, namely [to live longer / experience a better quality of life / or give other description of injury].<sup>1</sup> We call this a "loss of chance" claim.<sup>2</sup>

You will not reach this claim if you already awarded damages in response to question \_\_, because a doctor [other medical professional] can be liable either for causing the patient's [injury; death] or for causing the patient's loss of a chance [to survive; for a better outcome], but not both. In other words, you will decide the "loss of chance" claim only if you decide that DFT was negligent, but the negligence was not a cause of [DCD's death] [describe injury].

The law recognizes that, when a doctor's negligence reduces a patient's chance [of survival OR of a better medical outcome], the patient has lost something of value, and this counts as a real injury.<sup>3 4</sup>

< *if plaintiff's chances were indisputably below 50%* > PLF can recover for loss of chance even if his/her odds of a better outcome were less than 50-50 as long as PLF proves that DFT's negligence reduced those odds even further.

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<sup>1</sup> *Matsuyama v. Birnbaum*, 452 Mass. 1, 2 (2008) ("Where a physician's negligence reduces or eliminates the patient's prospects for achieving a more favorable medical outcome, the physician has harmed the patient and is liable for damages.")

<sup>2</sup> "The claim that a defendant caused the decedent's death is not the same as the claim that the defendant caused her a loss of chance to survive. The two theories of injury are distinct... A jury may find the defendant liable *either* for causing the patient's wrongful death *or* for causing the patient's loss of a chance to survive, but not for both." *Renzi v. Paredes*, 452 Mass., 38, 45. 46 (2008) (emphasis in original).

<sup>3</sup> *Matsuyama v. Birnbaum*, 452 Mass at 16.

<sup>4</sup> *Matsuyama v. Birnbaum*, 452 Mass at 16 ("[W]e recognize loss of chance not as a theory of causation," but as a theory of injury.

< *if plaintiff's chances may have exceeded 50%* > PLF can recover for loss of chance, for example, if a doctor's negligence reduced his/her survival rate from 90% to 60%, from 60% to 40% or from 40% to 10%.

To prove damages for loss of chance, the plaintiff must prove that, more likely than not, the following two things are true:

1. PLF/DCD lost at least some of his/her chance [to survive] [for a cure] [for a better medical outcome]; and
2. DFT's negligence caused that loss of chance.<sup>5</sup>

PLF must prove these two things through expert testimony, because they both involve medical issues. In particular, you must decide what the relevant [survival rates/chances for a better outcome] were. To do that, you must rely upon expert testimony that you find to be believable about those [survival rates/statistics concerning medical outcome]<sup>6</sup> The expert testimony must be based on data that the relevant medical community has obtained, analyzed scientifically and accepted. You cannot base your decision about [survival rates/chances for a better outcome] upon your own lay opinion or knowledge.

If you decide that PLF has proven these two things, you must decide what amount of damages to award. To do this, you determine or calculate several numbers, which the verdict slip describes. I will explain these numbers right now, but rest assured that loss of chance damages are not as complicated as some of you may think on first listening. Usually, the jury finds it easier to follow each question on the verdict slip along my written instructions during deliberations. My advice is just to take each question one at a time.

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<sup>5</sup> A patient failing to attend a routine follow-up visit does not break the chain of causation because it is foreseeable that a patient may do so. The original negligence remains the legal cause. *Goudreault v. Nine*, 87 Mass. App. Ct. 304, 311 (2015).

<sup>6</sup> *Matsuyama v. Birnbaum*, 452 Mass at 17. See also *Curreri v. Isihara*, 80 Mass. App. Ct. 193, 202 (2011) ("Without probability of survival evidence, the jury does not have the information that it needs to properly conduct the loss of chance damages calculation. ... Thus, testimony that the tumor was smaller and therefore more susceptible to treatment does not adequately establish the statistical evidence that is required by *Matsuyama*."

[NOTE TO JUDGE: It may be easiest for the jury to follow this instruction if it can see the verdict slip.]

- **Step 1:** First, determine the total amount of damages for [wrongful death] [harm to PLF] and write the number in response to question \_\_ (a). Here, you should use the same basic rules of damages that I explained to you earlier. This number should reflect the full amount that PLF would recover if s/he had proven that DFT's negligence caused [DCD's death] [PLF's harm].
- **Step 2.** Next, you write down a percentage. This is [DCD's percentage chance of survival] [PLF's percentage chance for cure/ a better outcome] if no medical malpractice had occurred. You must rely on expert testimony to determine this percentage, which you will write down in response to question \_\_ (b).
- **Step 3.** Then you write down a second percentage, based upon the medical evidence. This is the percentage chance of [survival] [cure/ a better outcome] that DCD/PLF had as a result of the medical malpractice. You will write that percentage in response to question \_\_ (c),
- **Step 4.** Then you do two calculations, based on the numbers you already determined. First, you subtract the amount derived in Step 3 from the amount derived in Step 2 and write the answer in response to question \_\_ (d).
- **Step 5.** Finally, you multiply the amount determined in Step 1 by the percentage calculated in Step 4. This gives you the amount of damages for loss of chance. You should write that amount on the verdict slip, both in numbers and in words, in response to question \_\_ (e), which asks: "What amount will fully and fairly compensate PLF for loss of chance?"