The *Dillon* Proportionate Damage Rule Should Apply to *Holton* Lost Chance/Increased Risk of Harm Cases

By: Hugh C. Griffin*
Lord, Bissell & Brook LLP
Chicago

In *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 679 N.E.2d 1202 (1997), and *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 771 N.E.2d 357 (2002), the Illinois Supreme Court dealt with two types of medical malpractice claims, claims for “lost chance” or “increased risk of harm” and claims for the increased risk of future injuries. Each of these types of claims had caused a split in the appellate courts.

*Holton v. Memorial Hospital*

In *Holton*, the court dealt with the issue of whether recovery is permitted to a plaintiff who is able to establish to a reasonable degree of medical certainty the defendant’s negligence caused the plaintiff to lose a chance of survival or increased the plaintiff’s risk of an unfavorable outcome, even though the plaintiff may have had less than a 50% chance of survival or of a better outcome had defendant’s negligence never occurred. *Holton*, 176 Ill. 2d at 119. For example, although a plaintiff’s expert may be unable to state to a reasonable degree of medical certainty the plaintiff’s paralysis would likely not have occurred absent the defendant doctor’s delay in diagnosing the plaintiff’s condition, he could state to a reasonable degree of medical certainty the delay lowered the plaintiff’s chances of recovery from 40% to 20% and therefore “increased the risk” of an unfavorable outcome by 20%. Stated another way, the opinion might be the defendant’s negligence caused the plaintiff to “lose a 20% chance” of full recovery. In holding such a lost chance recovery is permitted, the *Holton* court stated:

*To the extent a plaintiff’s chance of recovery or survival is lessened by the malpractice, he or she should be able to present evidence to a jury that the defendant’s malpractice, to a reasonable degree of medical certainty, proximately caused the increased risk of harm or lost chance of recovery.* Id. [Italics added].

Because the parties in *Holton* did not brief the issue or ask the Supreme Court to adopt a separate injury/proportionate damages rule – whereby a plaintiff’s damages are limited to proportionate damages reflecting the percentage of lost chance or increased risk shown by the evidence – the court did not expressly adopt such a rule in *Holton*. Id. at 112 n.1. However, the *Holton* court foreshadowed such a rule when it noted lost chance cases throughout the country fall into two groups: 1) those adopting a “relaxed causation” approach; and 2) those adopting a “separate injury” approach. Id. at 112. The *Holton* court then explicitly rejected the relaxed causation approach and cited with approval case law explicitly adopting the separate injury rule. See, e.g., *McKellips v. St. Frances Hospital*, 741
P.2d 467, 476 (Okla. 1987), cited in Holton, 176 Ill. 2d at 120 n.2, holding: “[t]he amount of damages recoverable is equal to the percent of chance lost multiplied by the total amount of damages which are ordinarily allowed” in such an action. For additional cases expressly adopting the separate injury-proportionate damages rule in lost chance/increased risk of harm cases, see Jorgenson v. Vener, 616 N.W.2d 366, 371 (S.D. 2000); Roberts v. Ohio Permanente Medical Group, 668 N.E.2d 480, 484-85 (Ohio 1996); Smith v. State Dept. of Health and Hospitals, 676 So.2d 543, 546 (La. 1996); Delaney v. Cade, 873 P.2d 175, 185-87 (Kan. 1994); Perez v. Las Vegas Medical Center, 805 P.2d 589, 592 (Nev. 1991)

**Dillon v. Evanston Hospital**

In Dillon, the Illinois Supreme Court faced the issue of whether recovery is permitted where it is shown a defendant’s negligence created a possible (although not likely) risk the plaintiff would sustain future harm. In Dillon, the defendant performed surgery to remove a cardiac catheter from the plaintiff’s body, but negligently left in place a nine-centimeter fragment of the catheter. Dillon, 199 Ill. 2d at 487. The plaintiff sued, alleging the presence of the remaining fragment of the catheter created a risk of future infection, arrhythmia, heart perforation, embolization and further migration of the fragment. Id. at 496. No expert could say to a reasonable degree of medical certainty any of those risks was likely (a greater than 50% chance) to occur. Id. at 496-97. Instead, the experts opined the risk these injuries would occur ranged between 0% and 20%, depending on the risk involved. Id. at 497. The jury awarded the plaintiff $500,000 for all of these increased risks of future injury. Id. The Dillon court held that recovery for this increased risk of future injury was permissible even though the future injury was not likely to occur. In so holding, the court, citing Holton, noted that:

The theories of lost chance of recovery and increased risk of future injury have similar theoretical underpinnings. See Anderson, 669 A.2d at 75-76; 2 D. Dobbs, Remedies § 8.1(7), at 408 (2d ed. 1993). Dillon, 199 Ill. 2d at 503, 771 N.E.2d at 370 (emphasis added).

Nevertheless, the Dillon court reversed the jury’s award and ordered a new trial on the plaintiff’s increased risk of future injury claim, holding “the increased risk must be based on evidence and not speculation, and, more importantly, the size of the award must reflect the probability of occurrence,” Id. at 506, and therefore, the jury had to be instructed on this proportionate damages rule. Specifically, the Dillon court held in the new trial the jury should be expressly instructed to “multiply***the total compensation to which the plaintiff would be entitled if the harm in question were certain to occur by the proven probability the harm in question will in fact occur.” Id. (Emphasis omitted).

**Proportionate Damages Rule in Dillon Logically Applies to Holton Lost Chance Case**

As the Dillon court stressed, the claims involved in Dillon and Holton have “similar underpinnings.” Dillon, 199 Ill. 2d at 503. In the Dillon situation (increased risk of future harm), the plaintiff is unable to prove to a reasonable degree of medical certainty the likelihood the defendant’s negligence will cause a future injury to occur. In the Holton situation (lost chance), the plaintiff is unable to prove to a reasonable degree of medical certainty the likelihood the defendant’s negligence has caused the ultimate injury that occurred. In both cases, plaintiffs are allowed to recover even though they cannot establish to a reasonable degree of medical certainty the likelihood a defendant’s negligence has caused harm (Holton) or will cause harm (Dillon). In both cases, it is the chance, not the actual physical harm, that must be valued and, as Dillon makes explicit, “the size of the award must reflect the probability of occurrence.” Id. at 506. In both cases, the injury being compensated is not defendant-caused physical harm, but the increased risk or chance of such physical harm attributable to the defendant’s conduct. In both cases, therefore, the appropriate percentage of
probability must be applied to keep from over-valuing that chance. In both cases, the jury must assign damages to a chance – a lost chance of recovery or a chance of future harm. In both cases, unless the jury award is discounted by the appropriate percentage, the defendant will have to pay for the entire physical harm, rather than the chance, which is the real injury to be compensated.

Furthermore, failure to apply Dillon’s proportionate damages rule to Holton lost chance/increased risk of harm cases could lead to unfair and inequitable results whereby a defendant who deprives a plaintiff of a 10% chance of recovery would owe the same damages as a defendant that deprived the plaintiff of a 100% chance of recovery. The “separate injury” or “proportionate damage” theory avoids such a result and is the only theory that does. Accordingly, numerous scholars advocate the “separate injury” proportionate damage rule in lost chance cases. See, e.g., Joseph H. King, Jr., Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 Yale L.J. 1353, 1365-66, 1376 (1981) (recognizing “loss of a chance as a compensable interest valued in its own right” and “[l]oss of a chance should be***valued as such rather than as an all-or-nothing proposition” (cited in Holton, 176 Ill. 2d at 112 n.1); Joseph H. King, “Reduction of Likelihood” Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. Mem. L. Rev. 491, 543 (1998) (“The plaintiff’s loss should be measured by the extent to which the percentage likelihood of the victim achieving a more favorable outcome was reduced by the defendant’s tortious conduct.”). As stated in one Illinois law journal article:

In all lost chance cases, expert testimony is required to establish the percentages. The trier of fact, faced with conflicting experts, will choose the percentages it believes are most likely***. After choosing the proper percentages, the trier of fact calculates a percentage of lost chance***. Once the percentage of lost chance is calculated, the trier of fact’s task is simple. The “percentage for the occurrence of a particular harm***can be applied to the damages that would be justified if that harm should be realized.” As a result, the patient is compensated for the lost chance and the doctor is not punished for the effects of a pre-existing condition.


**Instructing The Jury In Lost Chance/Increased Risk Of Harm Cases**

Outside of Illinois, the overwhelming majority of states that have defined the “injury” as the loss of chance or the increased risk of harm have held the jury must be given specific instruction as to how to value that loss of chance/increased risk of harm similar to the instruction approved by the Supreme Court in Dillon for risk of future harm cases. Many of these states have pattern instructions to this effect, e.g., Kansas, Missouri, Montana, and Oklahoma. The Oklahoma model instructions are included as an appendix to this article. Basically, these instructions ask the jury to compute plaintiff’s chance of recovery “before and after defendant’s negligence,” and to award damages for the total injury – which the court then reduces by multiplying the total damages by the difference in the two percentages found by the jury. Based on these models from the other states, the following instructions should be tendered in an Illinois lost chance/increased risk of harm case, depending on whether plaintiff’s claim is for injuries or wrongful death:

**VERDICT FORM**

**LOST CHANCE - BODILY INJURY**
The plaintiff claims that he/she has suffered [an increased risk of injury] or a lost chance of recovery proximately caused by the defendant’s negligence. In the event that you find that defendant’s negligence proximately caused plaintiff to lose a chance of recovery [or to suffer increased plaintiff’s risk of harm], the plaintiff is entitled to compensation for that lost chance [or increased risk]. In order to award plaintiff compensation for that lost chance of recovery [or increased risk of harm], you must determine the following:

1) the plaintiff’s original chance of recovery [or risk of harm] before defendant’s negligence occurred (___%);

2) plaintiff’s chance of recovery [risk of harm] after defendant’s negligence occurred (___%);

3) the total damages to which plaintiff would be entitled under these instructions without considering the chances of recovery or [increased risk of harm] ($____).

The court will make the final calculation of the damages awarded to the plaintiff by taking the difference between the two percentages in question in subparagraphs 1 and 2, and multiplying that percentage by the total amount of damages awarded in subparagraph 3.

VERDICT FORM
LOST CHANCE - WRONGFUL DEATH

The plaintiff claims that the defendant’s negligence proximately caused [name of the plaintiff’s decedent] to lose a chance of survival. In the event you find that the defendant’s negligence proximately caused [decedent’s name] to lose a chance of survival, the plaintiff is entitled to compensation for that lost chance of survival. In order to award the plaintiff compensation for that lost chance of survival, you must determine the following:

1) [decedent’s name’s] chance of survival before the defendant’s negligence occurred (___%);

2) [decedent’s name’s] chance of survival after the defendant’s negligence occurred (___%);

3) the total wrongful death damages to which the plaintiff would be entitled under these instructions without considering the chance of survival ($____).

The court will make the final calculation of the damages awarded to the plaintiff by taking the difference between the two percentages in question in subparagraphs 1 and 2, and multiplying that percentage by the total amount of damages awarded in subparagraph 3.

Caveat: There is one instance where it may not be advisable to attempt to limit the jury verdict to a lost chance percentage of total damages. That is where there has been a previous substantial settlement which the remaining defendants wish to set-off against any verdict against them. If the lost chance theory is argued as a “separate injury” limiting the plaintiff to a percentage of total damages, the plaintiff may be able to argue successfully there should be no set-off against the lost chance award – unless it can be shown the claim against the settling defendant was for the same lost chance or increased risk of harm as the claim against the remaining defendants.

Appendix:
Oklahoma Model Jury Instruction on Lost Chance
Instruction No. 4.11

MEASURE OF DAMAGES-MEDICAL
MALPRACTICE-LOSS OF CHANCE

A patient who faced a risk of death [or disability] at the time of treatment is entitled to recover damages for an increase in the risk of death [or disability] caused by the treatment [or failure to treat]. In order to recover damages for an increased risk of death [or disability], the patient must have had a significant chance of survival [or recovery] before the treatment [or failure to treat], even if the original chance of survival [or recovery] was less than 50 percent.

If you decide that the treatment [or failure to treat] caused an increased risk of death [or disability] for [Plaintiff], you must determine the following in order to fix the amount of damages:

1. [Plaintiff]’s percentage of original chance of survival [or recovery] before the treatment; and

2. The percentage reduced chance of survival [or recovery] after the treatment [or failure to treat]; and

3. The total amount of damages that would be allowed under the [following] instruction on account of [Plaintiff]’s death [or disability].

I will make the final calculation of the damages to award to [Plaintiff] by taking the difference between these two percentages and multiplying that by the total amount of damages.

Endnotes


2 The verdict and judgment in plaintiff’s favor in Holton was reversed on other grounds. 176 Ill. 2d at 120-29, 679 N.E.2d at 1213-17.

3 Indeed, a recent review of loss of chance cases cites Holton as authority for the “separate injury” approach. See S.M. Nichols, Jorgenson v. Vener, the South Dakota Supreme Court Declares Loss-of-Chance Doctrine as Part of Our Medical Malpractice Torts, 46 S.D.L.Rev. 618, 632 (2001).

4 U.S. v. Anderson, 669 A.2d 73, 77 (Del. 1995) (expressly referring to “proportional loss of chance or increased risk” (emphasis added)).
ABOUT THE AUTHOR: Hugh C. Griffin is a partner in the Chicago office of Lord, Bissell & Brook LLP, where he leads the firm’s appellate practice group. Mr. Griffin received his J.D. from Notre Dame Law School in 1968. He is a member of the American Academy of Appellate Lawyers, the American Bar Association, the Appellate Lawyers Association, the Chicago Bar Association, the Illinois Appellate Lawyers Association, the Illinois Association of Defense Trial Counsel, the Illinois State Bar Association, and the National Association of Railroad Trial Counsel.

* The author wishes to thank his associate, Gary Y. Leung, for his research assistance in the preparation of this article.