

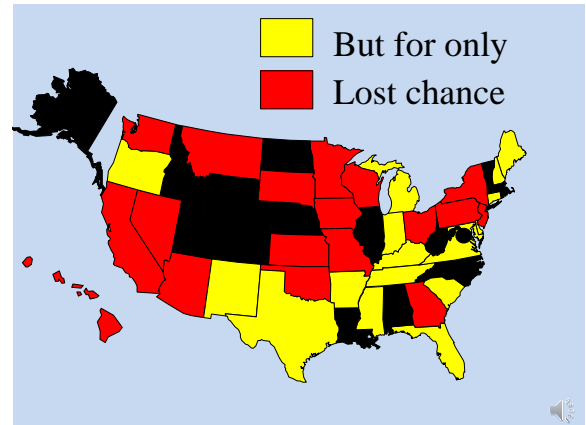
Health Law: Quality & Liability

Prof. Thaddeus Pope

Medical Malpractice -
Lost Chance Causation

Lost chance causation

An alternative
(backup) to
“but for” in
some states



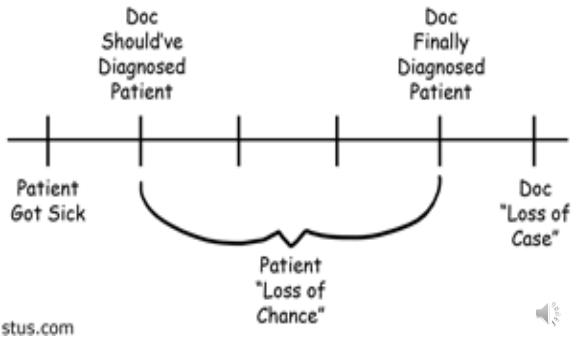
Malpractice PTFs often
start out sick

Bad baseline

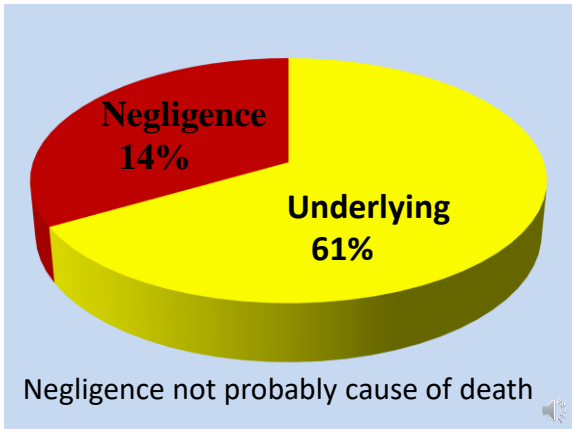
Hard to show “but for”
causation

Herskovits
v.
Group Health

Delayed diagnosis = negligence



	Chance survive	Chance death
Without negligence	39%	61%
With negligence	25%	75%



Lost chance causation

Definition

PTF can recover **even if** DEF negligence is **not** probable cause of injury

Negligence does not change probable outcome

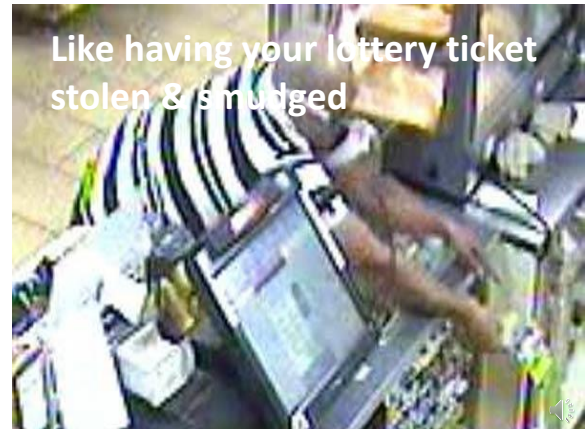
With negligence
Probably dead

Without negligence
Probably dead

Suing for an injury that was **probably** going to happen **anyway** – even without DEF negligence

DEF just made a probable outcome (e.g. death) **even more** probable

Injury **IS** the lost chance itself



PTF **not** claim DEF negligence caused **death**

PTF claim DEF negligence caused X% greater chance of death (or Y% lower **chance** survival)

Lost chance causation

Consequences

If you can establish
“but for”
causation, do
that. Get 100% of
damages.

PTF has 45% chance
recovery

DEF negligence
reduces that to 15%

DEF negligence
reduced chance
recovery by 30%
(45% - 15%)

55% risk death
Negligence
raised to 85%

No but for

55 > 30

Full (but for) damages
\$600k

Lost chance = \$600k x
0.30 - \$180k

Wendland
v.
Sparks

Hospital cancer patient
codes – but doc says:
no CPR “I just can’t
do it to her”

CPR is the only
procedure MD needs
consent **NOT** to
perform

Need consent to DNR

No but for

CPR probably
was not going
to work

Cannot sue
for causing
death

But can sue
for depriving
of chance /
opportunity

But for

I ← → N

Physical
harm

Lost chance

I ← → N