

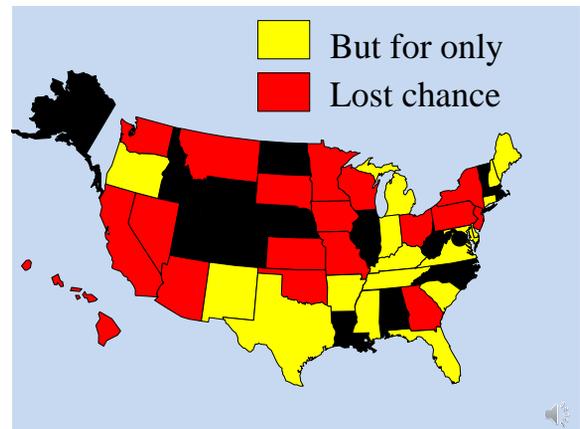
# Health Law: Quality & Liability

Prof. Thaddeus Pope

Medical Malpractice -  
Lost Chance Causation

# Lost chance causation

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



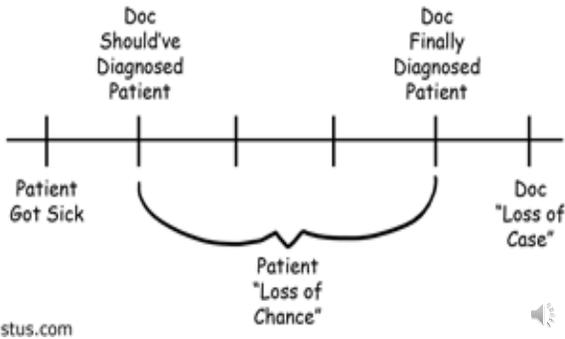
Malpractice PTFs often  
**start out** sick

Bad baseline

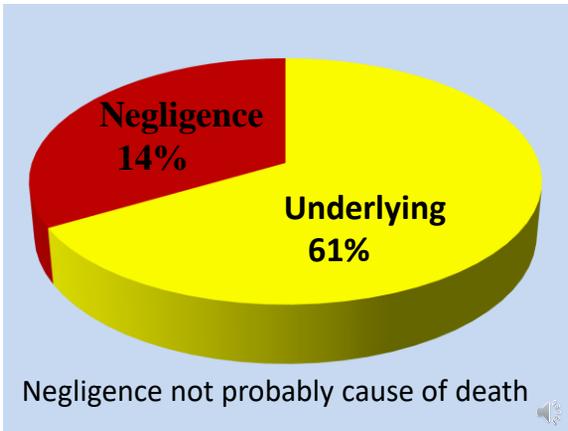
Hard to show “but for”  
causation

**Herskovits**  
**v.**  
**Group Health**

Delayed diagnosis = negligence



	Chance survive	Chance death
Without negligence	<b>39%</b>	<b>61%</b>
With negligence	<b>25%</b>	<b>75%</b>



**Lost chance causation**

**Definition**

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

Negligence does not change probable outcome

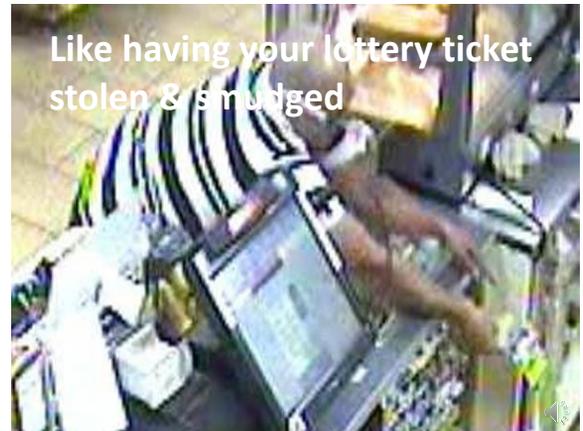
With negligence  
Probably dead

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