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LOST CHANCE RECOVERY AND THE FOLLY OF EXPANDING MEDICAL MALPRACTICE LIABILITY

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I. INTRODUCTION

In personal injury tort actions, principles of proximate cause traditionally allow recovery for damages only where "it is more probable than not that the conduct of the defendant was a cause in fact of the result."[1] In the medical malpractice context, plaintiffs must demonstrate that there was a reasonable medical probability the physician's negligence caused the plaintiff's injuries. The phrase "reasonable medical probability" means a more-than-50-percent chance.[2]

A majority of jurisdictions apply this traditional analysis in cases where the plaintiff had a preexisting condition which might have been cured or ameliorated but for the physician's improper diagnosis or treatment.[3] While a plaintiff in these jurisdictions may recover for physical harm stemming from *aggravation* of an existing illness, the patient may not recover damages for the loss of a less-than-even chance of obtaining a more favorable result. Stated differently, a patient who probably would have suffered the same harm had he or she received proper treatment is entitled to no compensation.

Other jurisdictions, however, have balked at barring recovery on causation grounds where a physician has acted negligently. Those jurisdictions have taken two approaches to allow a patient to sue for damages even though the patient probably would have been in the same physical condition absent the defendant doctor's negligence. The first approach is to relax the reasonable medical probability causation standard and allow recovery where the patient proves the physician's conduct deprived the patient of a possibility of a better medical result.[4] In effect, this approach permits recovery

1. W. PROSSER & R. KEETON, THE LAW OF TORTS § 41 (5th ed. 1984); *see generally* Wright, *Causation in Tort Law*, 75 CALIF. L. REV. 1735 (1985).
2. Simmons v. West Covina Medical Clinic, 212 Cal. App. 3d 696, 702–3 (1989).
3. *See* Appendix A.
4. *Id.*

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