

A man was admitted to a hospital after complaining of persistent severe headaches. While he was there, hospital staff failed to diagnose his condition, and he was discharged. Two days later, the man died of a massive brain hemorrhage due to a congenital defect in an artery.

The man's wife has brought a wrongful death action against the hospital. The wife offers expert testimony that the man would have had a "reasonable chance" (not greater than 50%) of surviving the hemorrhage if he had been given appropriate medical care at the hospital.

In what type of jurisdiction would the wife's suit most likely be successful?

- A. A jurisdiction that allows recovery based on strict liability.
- B. A jurisdiction that allows recovery for the loss of the chance of survival.
- C. A jurisdiction that applies traditional common law rules concerning burden of proof.
- D. A jurisdiction that recognizes loss of spousal consortium.

Explanation:

Actual causation

(in wrongful death claims based on medical malpractice)

Traditional common law rule	Decedent probably would have survived (ie, greater than 50% chance) but for defendant's malpractice
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Modern rule (loss-of-chance doctrine)	Decedent's chance of survival was reduced by defendant's malpractice (eg, 45% chance reduced to 20%)
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Wrongful death statutes allow a decedent's spouse, next of kin, or personal representative to sue a defendant for wrongfully causing the decedent's death. These lawsuits are often based on **medical malpractice** (eg, failure to diagnose—as seen here), which requires the plaintiff to prove **actual causation** by a preponderance of the evidence. Traditionally, this standard is met if it is **more likely than not** (ie, **greater than 50% chance**) that the decedent **would have survived** but for the defendant's malpractice.

Here, the wife offered expert testimony that the man had a *reasonable* chance—not greater than 50 percent—of survival had he received appropriate medical care. As a result, her suit would not be successful in a jurisdiction that applies traditional common law rules concerning burden of proof (**Choice C**). However, most jurisdictions recognize the **loss-of-chance doctrine**, which allows the plaintiff to recover if the malpractice caused **any loss of the chance of survival**. Therefore, the wife's suit is most likely to be successful in such a jurisdiction.

(Choice A) Strict liability subjects a defendant to liability regardless of the defendant's level of fault. But it would still require proof of actual causation, which cannot be proved here unless this jurisdiction allows recovery for loss of chance.

(Choice D) In a wrongful death action, most jurisdictions allow recovery for loss of spousal consortium (ie, spousal support, companionship, and sexual relations). But even if this jurisdiction does so, the wife cannot establish actual causation or succeed in her claim unless this is a loss-of-chance jurisdiction.

Educational objective:

The loss-of-chance doctrine allows a plaintiff to recover in a wrongful death action based on medical malpractice if the defendant's malpractice caused *any* reduction in the decedent's chance of survival.

References

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm, § 26 cmt. n (Am. Law Inst. 2010) (explaining that many courts recognize a lost chance for cure of a medical condition as a legally cognizable harm).

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