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DUPONT, J., dissenting. I respectfully dissent. This case presents the issue of whether the plaintiffs' statistical probability evidence alone, in a medical malpractice action, based on the doctrine of a lost chance of survival, would prevent the defendants from obtaining a summary judgment. I do not agree that summary judgment should have been rendered because I think that the statistical evidence offered by the plaintiffs in this case sufficed for denying the motion. The plaintiffs submitted evidence of the deposition of a medical expert that there was a statistical probability that up to 75 percent of all young children with the same disease as the plaintiffs' daughter would survive, given appropriate medical care.[1]

There is no dispute that in Connecticut, in a loss of chance case, a plaintiff must prove entitlement to recovery by a traditional approach, namely, proof that the defendants' negligence, by a preponderance of the evidence, proximately caused the injury, that is, the loss of a chance to survive.[2] The unanswered question in Connecticut, however, is whether, in some instances, statistical evidence from a medical expert, not particular to the patient, is sufficient to prove that it is more likely than not that a patient was deprived of a chance to survive. I would, in this case, answer the question by concluding that the statistical evidence alone was sufficient.

Loss of a chance to survive cases typically arise when a patient, already suffering from a preexisting, known or unknown condition, which places the patient at risk of death, alleges that the negligence of a defendant decreased that patient's chance to survive. In this case, the preexisting condition was not known until after the sixteen month old child of the plaintiffs died and an autopsy was performed. When a patient is very young, with no medical history of the disease or treatment of it, or no medical history at all, I would allow proof by a statistical analysis only. Without the use of statistical evidence, a prior blank medical slate would mean that such children could never be proven to have any probability of survival.

The quantum aspects of a loss of a chance to survive can never be precisely known. ''Chance'' connotes uncertainty and the unknown. The concept of the cause of action for lost chance or loss of chance arises out of a lack of information as to the future or as to what might have been, absent negligence, and can only be an estimate based on hypotheticals. The many courts, in addition to Connecticut, that recognize such actions; see, e.g., *Hicks* v. *United States*, 368 F.2d 626 (4th Cir. 1966); *Thompson* v. *Sun City Community Hospital, Inc.*, 141 Ariz. 597, 688 P.2d 605 (1984); *Roberson* v.

Counselman, 235 Kan. 1006, 686 P.2d 149 (1984); *Perez* v. *Las Vegas Medical Center*, 107 Nev. 1, 805 P.2d 589 (1991); *Hamil* v. *Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978); *Ehlinger* v. *Sipes*, 155 Wis. 2d 1, 454 N.W.2d 754 (1990); see also 2 Restatement (Second), Torts § 323 (1965); Restatement, Torts § 26 (Tentative Draft No. 2); and the many law review articles written on the cause of action; see, e.g., J. King, Jr., ''Causation, Valuation, and Chance in Personal Injury Torts Involving Preexiting Conditions and Future Consequences,'' 90 Yale L.J. 1353 (1981); D. Fischer, ''Tort Recovery for Loss of a Chance,'' 36 Wake Forest L. Rev. 605 (2001); all recognize that the destruction of a chance to survive in medical malpractice cases merits compensation, if causation is proven by the particular standard of proof required by the decisional jurisdiction. All of the authorities are aware that the more that is known statistically and otherwise about the particular patient, the better able medical experts can identify with some degree of accuracy who would survive and who would not if the negligent act alleged had not happened. But no matter how much information we have, it cannot ever be known with absolute certainty which patients would live and which would die.

Because the probability of survival in this case could never be known without statistics, the loss of a chance doctrine could never be utilized to effect a recovery because no individualized information was available due to the age of the child and the fact that the disease had not previously been diagnosed. ''It should not matter whether the victim's prospects are assessed by individualized or statistical evidence, or both.'' J. King, Jr., '' 'Reduction of Likelihood' Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. Mem. L. Rev. 492, 542 (1998).

In some cases, such as this one, the patient is very young, and the preexisting condition is not known until after death and after an autopsy has been performed. The only existing evidence in such cases is statistical. Children of parents who have not had pediatric care from birth to the date of the alleged injury may have no prior medical records and would have no way of ever proving the probability of survival without the use of statistics. In cases where a small child has a nonexistent medical slate, nothing can be known except the circumstances of the death and an autopsy report, unless statistics are used.

We use statistics in other types of cases. Statistical analyses, namely, actuarial tables for life expectancy, unrelated to a particular person, are used in determining compensation for the destruction of earning capacity in death actions. ''With respect to awards for permanent injuries, actuarial tables of average life expectancy are commonly used to assist the trier in measuring the loss a plaintiff is likely to sustain from the future effects of

an injury. Such statistical evidence does, of course, satisfy the more likely than not standard as to the duration of a permanent injury.'' *Petriello* v. *Kalaman*, 215 Conn. 377, 397, 576 A.2d 474 (1990); see also *State* v. *Villafane*, 164 Conn. 637, 647, 325 A.2d 251 (1973) (statistics in the context of grand jury selection). *Petriello* is cited by the leading commentator on lost chance, Professor Joseph King, Jr., as applying ''the loss of a chance doctrine in the future consequences situation.'' J. King, Jr., supra, 28 U. Mem. L. Rev. 510 n.64. If statistics can be used to evaluate the future effects of an injury to gauge the length of time over which the effects may last, without regard to the particular life expectancy of a claimant, which can never be known with certainty, I think a statistical analysis can be used in some lost chance of survival cases.

''The nature of the evidence should not matter except to aid the trier of fact in estimating the likelihood that the desired outcome would have been achieved but for the plaintiff's negligence.'' Id., 492. In many cases, a determination of the probable likelihood may be an amalgam of all of the evidence, both personalized and statistical. In other cases, that likelihood may be known only through the use of statistics or averages.

The loss of a chance in this case is based on a hypothetical event, namely, the survival of a child if she had been transferred to a pediatric intensive care or tertiary care center several hours before she experienced cardiopulmonary arrest. I would have denied the defendants' motions for summary judgment because the statistical evidence alone, in my view, was sufficient to establish that this young child had a chance of survival of up to 75 percent. Viewing this statistical evidence, the child's age and the information on her autopsy report in the light most favorable to the plaintiffs, as must be done in determining the defendants' motion for summary judgment, I would not have granted the motion. I think that a jury, as fact finders, should have been allowed to consider the plaintiffs' claim of the lost chance of survival of their daughter.

[1] The majority has quoted the relevant deposition testimony and affidavit statements of Robert J. Sommer, a physician specializing in pediatric cardiology, which need not be repeated. I note, however, that some of the statements are equivocal as to whether the physician was opining about the relationship between the plaintiffs' child and the statistics or as to whether he could form no opinion as to the relationship between the statistics and the particular child's chance to survive had the alleged negligence not occurred.

[2] A leading Connecticut case, *Borkowski* v. *Sacheti*, 43 Conn. App. 294, 299–315, 682 A.2d 1095, cert. denied, 239 Conn. 945, 686 A.2d 120 (1996), provides an excellent discussion of the differing standards of proof adopted by the states for the sufficiency of evidence to prove such claims. See also *Wallace* v. *St. Francis Hospital & Medical Center*, 44 Conn. App. 257, 688 A.2d 352 (1997); *LaBieniec* v. *Baker*, 11 Conn. App. 199, 526 A.2d 1341 (1987). *Borkowski* relied heavily on *Cooper* v. *Sisters of Charity of Cincinnati, Inc.*, 27 Ohio St. 2d 242, 272 N.E.2d 97 (1971), as did *LaBieniec*. The Ohio Supreme Court since has overruled *Cooper*. *Roberts* v. *Ohio Permanente Medical*

Group, Inc., 76 Ohio St. 3d 483, 488, 668 N.E.2d 480 (1996). The Connecticut rule and the former Ohio rule follow the traditional ''all-or-nothing rule,'' which ''went largely unchallenged in United States personal injury cases until about fifteen years ago. Since then, however, there has been a dramatic shift in the law, especially in the setting of medical malpractice.'' J. King, Jr., '' 'Reduction of Likelihood' Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. Mem. L. Rev. 492, 502 (1998).