The Practical Effects of Dickhoff v. Green on Wrongful Death Actions in Minnesota: Drawing a Line in the Sand or Committing to a Fair Solution

Ashley N. Biermann

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THE PRACTICAL EFFECTS OF DICKHOFF V. GREEN
ON WRONGFUL DEATH ACTIONS IN MINNESOTA:
DRAWING A LINE IN THE SAND OR COMMITTING
TO A FAIR SOLUTION?

Ashley N. Biermann†

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I. INTRODUCTION

Imagine yourself as a patient. You go into the hospital for your annual physical examination with Dr. Mosley, and you ask him about an unusual mole that has formed on your abdomen. Dr. Mosley does a screening and within a short period of time diagnoses the mole as benign and tells you “not to worry about it.” You let out a sigh of relief and return to your regular life. About thirteen months later you attend your annual physical examination as scheduled, but this time with Dr. Shea because Dr. Mosley has retired. Dr. Shea analyzes your mole and after running a gamut of tests determines the mole is cancerous and has metastasized into Stage IV melanoma. You start treatment immediately, but the outlook is not promising. Your specialist determined that if Dr. Mosley had diagnosed your mole as cancerous a year earlier, you would have had Stage II melanoma with a seventy percent recovery rate. However, because of the late diagnosis, you instead face a bleak thirty percent chance of surviving your illness. This lapse of time equates to a forty percent difference in your chance of survival.

Under the traditional principles of medical malpractice, you would be unable to prevail against Dr. Mosley for his misdiagnosis and your corresponding loss of chance, because you have less than a fifty percent chance of surviving your illness.¹ For a patient to bring a successful medical malpractice claim, he or she must prove that the physician’s negligence more likely than not caused the injury.²

¹ Fabio v. Bellomo, 504 N.W.2d 758, 763 (Minn. 1993) (holding an increased chance of recurrence of cancer and a decreased chance of survival were inactionable injuries).
negligence, and not the patient’s underlying disease, caused the patient’s injury or death.\textsuperscript{3} Thus, under the traditional malpractice rule, physicians were provided with a virtual shield when it came to patients with less than a fifty percent chance of survival.\textsuperscript{4}

The Minnesota Supreme Court sought to remedy these harsh and illogical results by establishing the loss of chance doctrine in \textit{Dickhoff v. Green}\.\textsuperscript{5} Through the adoption of this doctrine, the arbitrary distinction made between patients with more than a fifty percent chance of survival and patients with less than a fifty percent chance of survival was eliminated.\textsuperscript{6} Plaintiffs are now able to recover under the loss of chance doctrine so long as the defendant’s malpractice reduced the plaintiff’s chances of survival.\textsuperscript{7}

Despite the logical benefits of this doctrine, many questions remain unanswered regarding the practical application of the loss of chance doctrine. The Minnesota Supreme Court described loss of chance in broad terms and did not define what type of provider negligence constitutes a loss of chance claim.\textsuperscript{8} The scenarios for which a provider could be found liable under the loss of chance theory could include negligently diagnosing, referring, treating, prescribing, or similar actions, and there is speculation that the loss of chance doctrine may be expanded beyond the medical malpractice arena.\textsuperscript{9} Questions also remain regarding how damages will be calculated, how the jury will be instructed, and what implications may be in store for \textit{Frye-Mack} challenges to experts’ quantifications of a patient’s loss of chance.\textsuperscript{10} The defense bar is

\begin{itemize}
\item \textsuperscript{3} Dickhoff \textit{ex rel.} Dickhoff v. Green, 836 N.W.2d 321, 333 (Minn. 2013).
\item \textsuperscript{4} \textit{Id.} (quoting McMackin v. Johnson Cnty. Healthcare Ctr., 73 P.3d 1094, 1099 (Wyo. 2003)).
\item \textsuperscript{5} \textit{Id.} at 333, 337.
\item \textsuperscript{6} \textit{See id.}
\item \textsuperscript{7} \textit{Id.} at 338. Because the harm in a loss of chance case is the loss of chance of survival, it is also interesting to note that under \textit{Dickhoff}, a patient would likely succeed on a loss of chance claim even if she had a forty percent chance of recovery from her disease, which fell to ten percent due to her doctor’s malpractice.
\item \textsuperscript{8} Sarah E. Bushnell, \textit{Loss of Chance: New Medical Malpractice Risk in Minnesota}, BENCH \& B. MINN., Nov. 2013, at 18, 21, available at http://mnbenchbar.com/2013/11/loss-of-chance (“The court’s description is fairly broad: ‘a physician harms a patient by negligently depriving her of a chance of recovery or survival and should be liable for the value of that chance.’”).
\item \textsuperscript{9} \textit{Id.}
\item \textsuperscript{10} \textit{Id.}
\end{itemize}
also concerned that Minnesota’s adoption of loss of chance will lead to more claims against medical providers, which would increase the amount of malpractice insurance premiums and the cost of medical treatment to patients.\textsuperscript{11} Although \textit{Dickhoff v. Green} could usher in expansive changes to medical malpractice lawsuits, this note seeks to address only the lingering questions surrounding the loss of chance doctrine as it may be applied to Minnesota’s wrongful death statute.

In analyzing and attempting to resolve the conflict between the loss of chance doctrine and Minnesota’s wrongful death statute, this note will examine the history of the wrongful death statute,\textsuperscript{12} how the statute is applied today,\textsuperscript{13} and the supporting policy rationales.\textsuperscript{14} It will then analyze the \textit{Dickhoff} decision\textsuperscript{15} and discuss the implications of the loss of chance doctrine within the current legal framework. This note concludes by presenting various options that other states have adopted to align the loss of chance doctrine with the wrongful death statute,\textsuperscript{16} and recommends that the Minnesota legislature amend the wrongful death statute to explicitly provide for the loss of chance doctrine.\textsuperscript{17}

\section{Brief History of Wrongful Death Actions}

\subsection{The General Development of Wrongful Death Actions}

Wrongful death actions in the common law have a complicated history.\textsuperscript{18} The first wrinkle began with the seminal English case \textit{Baker v. Bolton}, which proclaimed, “In a Civil Court, the death of a human being could not be complained of as an injury.”\textsuperscript{19} The courts in the United States had a mixed reaction to this opinion—some states directly admonished the opinion, while

\begin{thebibliography}{9}
\bibitem{11} \textit{Id.}
\bibitem{12} \textit{See infra} Part II.
\bibitem{13} \textit{See infra} Part III.
\bibitem{14} \textit{See infra} Part III.B.
\bibitem{15} \textit{See infra} Part IV.
\bibitem{16} \textit{See infra} Part V.
\bibitem{17} \textit{See infra} Part VI.
\end{thebibliography}
others adopted its reasoning. The states that retained wrongful death actions at common law focused the recovery on the loss of services and allowed third parties with an interest in the life of the decedent to bring an action exclusively for the loss of the decedent’s services.

By the mid-nineteenth century, the question of whether there was a common law action for wrongful death became a contested issue in most jurisdictions, including those jurisdictions previously allowing wrongful death actions. This uncertainty, propelled by an increase in the frequency of accidents in the growing industrial economy, prompted state legislatures to take action and enact wrongful death statutes. The state of Massachusetts was the first to enact a wrongful death statute in 1840. This statute created a quasi-criminal remedy, which allowed the “widows and heirs” of a passenger killed by the negligence of a common carrier to collect a sum of money charged to the common carrier. Six years later, the


21. See, e.g., Plummer v. Webb, 19 F. Cas. 891, 892 (C.C.D. Me. 1827) (No. 11,233) (holding father could sue for the loss of services of his son); Shields v. Yonge, 15 Ga. 349, 349–50 (1854) (holding father could recover for death of his minor son brought after son died in a railroad accident); Ford v. Monroe, 20 Wend. 210, 210 (N.Y. 1838) (holding father could sue for loss of services of his ten-year-old son after son died in a carriage accident); Lynch v. Davis, 12 How. Pr. 323, 323 (N.Y. Sup. Ct. 1855) (holding a husband could bring an action against a doctor for the death of his wife).

22. Witt, supra note 20, at 733; see, e.g., Plummer, 19 F. Cas. at 895–96 (holding a father can sue for the wages earned by his minor son who was killed by abusive superiors and overwork during a maritime voyage); Shields, 15 Ga. at 353–357 (discussing when a wrongful death action should be allowed to proceed); Carey v. Berkshire R.R., 55 Mass. (1 Cush.) 475, 477–80 (1848), overruled in part by Gaudette v. Webb, 284 N.E.2d 222, 229 (Mass. 1972) (holding there is no common law wrongful death action and it is for the legislature to authorize such a claim).

23. Witt, supra note 20, at 733; see also Needham v. Grand Trunk Ry., 38 Vt. 294, 301 (1865) (“In view of the numerous deaths resulting from wrongful acts . . . and of the consequent deprivation suffered by the wife and children . . . for which injury neither the common law, nor existing statutes had provided a remedy, our legislature in 1849 passed [a wrongful death statute].”).


25. Id. The Act stated:
English Parliament enacted a wrongful death statute referred to as Lord Campbell’s Act. This Act established what would become the basis of many wrongful death statutes in the United States, including Minnesota.

Lord Campbell’s Act codified the idea that a remedy in tort “dies with the person, unless statutory law makes an exception.” The purpose of limiting a claimant’s ability to recover in a wrongful death action is twofold. First, it is based on the idea that the law provides a remedy only for harms that affect one’s legal rights. Because a person does not have a legal right to the life of his or her family members, it is thought there is no legal obligation to pursue. Second, as a practical matter, it is difficult, if not impossible, to determine the value of a human life. These rationales similarly justified the common law view that wrongful death actions were not actionable.

If the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any rail-road, steam-boat, stage coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, in this Commonwealth, such proprietor or proprietors, and common carriers, shall be liable to a fine not exceeding five thousand dollars...for the benefit of his widow and heirs...

Id.  
27. Compare MINN. STAT. § 573.01 (2012) (“A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in section 573.02.”), and id. § 573.02 (stating that when death is caused by a wrongful act, an appointed trustee may maintain an action for an injury caused by the wrongful act, so long as the decedent might have maintained an action had the decedent lived), with Lord Campbell’s Act, supra note 26 (stating a wrongful death action can be brought when the death of a person is caused by a wrongful act that would have entitled the injured party to maintain an action if the person had survived).  
28. 1 THOMAS BEVEN, NEGLIGENCE IN LAW 180 (3d ed. 1908).  
29. At common law, these rationales were also used to justify not recognizing wrongful death actions. See id.  
30. Id.  
31. Id.  
32. Id.  
33. See Carey v. Berkshire R.R., 55 Mass. (1 Cush.) 475, 480 (1848) (holding that in the absence of a statutory provision, an action cannot be maintained for
However, Lord Campbell’s Act provided the “exception” for when a person could sue for the wrongful death of his or her family members. It provided that when the death of a person was “caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if the death had not ensued) have entitled the party injured to maintain an action,” then a wrongful death action could be brought. Recovery under these actions was limited to “the wife, husband, parent, and child of the person whose death shall have been so caused,” and the action had to be brought to court “by and in the name of the executor or administrator of the person deceased.” The purpose of this Act was to address the inequity that existed at common law—where an action could not be maintained for wrongful death but was permitted for a personal injury claim if the actor survived. Therefore, prior to Lord Campbell’s Act, it was a legal windfall to the tortfeasor if the injured victim died from the injuries he or she sustained.

Importantly, at least initially following Lord Campbell’s Act, courts allowed plaintiffs to collect not only for pecuniary losses incurred by the decedent’s death, but also for the pain and suffering of the decedent. However, the next of kin could not recover for their own feelings of sorrow or remorse.

B. The Development of Wrongful Death Actions in Minnesota

Minnesota’s first wrongful death statute was enacted in 1851 while Minnesota was still a territory. Minnesota’s statute began by stating the expression implicit in Lord Campbell’s Act: “A cause of action arising out of an injury to the person, dies with the person of the wrongful death of another), overruled in part by Gaudette v. Webb, 284 N.E.2d 222 (Mass. 1972).

34. See Lord Campbell’s Act, supra note 26.
35. Id.
36. Id.
38. Id.
39. BEVEN, supra note 28, at 183.
40. Id.
41. Minn. Rev. Stat. (Terr.) ch. 78, §§ 1–3 (1851); see also Cashman v. Hedberg, 215 Minn. 463, 466, 10 N.W.2d 388, 390 (1943) (holding the wrongful death statute is in derogation of the common law and establishing a new cause of action).
either party, except as provided [in the applicable statutory provision].\textsuperscript{42} In pertinent part, the statute provided:

> When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former, may maintain an action against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury caused by the same act or omission . . . .

By stating the plaintiff may maintain an action if the decedent “might have maintained an action, had he lived,” the statute seems to imply that the plaintiff may recover the same damages the decedent would have been able to collect.\textsuperscript{43} However, this is not how the courts interpreted the statute. Instead, the courts interpreted the statute as allowing recovery for only the pecuniary losses suffered by the next of kin.\textsuperscript{44}

In 1905, the wrongful death statute was revised to incorporate these limitations on the next of kin’s recovery:\textsuperscript{45}

> The damages awarded must be solely by way of compensation for pecuniary loss. Punitive damages are not allowed. No compensation can be awarded for wounded feelings, for the loss of the companionship and comfort of the deceased or for his pain and suffering. The true test is, what, in view of all the facts in evidence, was the probable pecuniary interest of the beneficiaries in the continuance of the life of the deceased? The proper estimate may be arrived at by taking into account the calling of the deceased and the income derived

\begin{itemize}
  \item \textsuperscript{42} Minn. Rev. Stat. (Terr.) ch. 78, § 1.
  \item \textsuperscript{43} Id.
  \item \textsuperscript{44} Id.; see BEVEN, supra note 28, at 183.
  \item \textsuperscript{45} Gunderson v. Nw. Elevator Co., 47 Minn. 161, 164, 49 N.W. 694, 695 (1891) (holding damages in a wrongful death action “relate wholly to the pecuniary injury suffered by the next of kin” and cannot include recovery for “injured feelings[,] or a solatium”); Opsahl v. Judd, 30 Minn. 126, 128, 14 N.W. 575, 575 (1883) (focusing on decedent’s ability to provide future pecuniary benefit to next of kin had he lived).
  \item \textsuperscript{46} REVISED LAWS MINNESOTA 1905, § 4503, at 961 (Mark B. Dunnell ed., 1906) (“When death is caused by a wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission.”).
\end{itemize}
therefrom, his health, age, probable duration of life, talents, habits of industry, success in life in the past and the amount of aid in money or services which he was accustomed to furnish the beneficiaries.\footnote{47}

The statute also provided an additional avenue for damages if the deceased was the “head of the family”:

If the deceased was the head of a family the value of his services to the family cannot be limited in a pecuniary sense to the amount of his daily wages earned for their support. His constant daily services, attention, and care in their behalf, in the relation which he sustained to them, may be considered as well . . . .\footnote{48}

While the damages allowed under the 1905 statute seem somewhat expansive, the legislature limited a wrongful death claim under the statute to $5000.\footnote{49} The next substantial revision to Minnesota’s wrongful death statute occurred in 1951\footnote{50} when the legislature again amended the type of damages a claimant could recover.\footnote{51} The statute as amended stated: “The recovery in [a wrongful death] action in such an amount as the jury may deem fair and just in reference to the pecuniary loss, resulting from such death, shall not exceed $17,500, and shall be for the exclusive benefit of the surviving spouse and next of kin . . . .”\footnote{52} This revision again limited the scope of a wrongful death claim by removing the language regarding the “head of household” damages and reinstated that a claimant could only recover pecuniary damages.\footnote{53}

In 1983, the legislature removed the cap on recovery and opened the door for claimants to recover punitive damages in appropriate cases.\footnote{54} This amendment was important because it significantly increased a plaintiff’s potential recovery under the

\footnote{47} Id. § 4503, subdiv. 16, at 962.\footnote{48} Id.\footnote{49} Id. § 4503, at 961.\footnote{50} Minnesota’s wrongful death statute was amended in 1911 and 1935, which increased the cap on wrongful death damages to $7500 and $10,000, respectively. Act of Apr. 19, 1911, ch. 281, § 4503, 1911 Minn. Laws 395; Act of July 1, 1935, ch. 325, § 1, 9657, 1935 Minn. Laws 596.\footnote{51} Act of Apr. 23, 1951, ch. 697, § 1, 1951 Minn. Laws 1215.\footnote{52} Id.\footnote{53} See id.\footnote{54} Act of June 14, 1983, ch. 347, § 2, 1983 Minn. Laws 2397, 2398 (“Punitive damages may be awarded as provided in section 549.20.”).
statute, as it went from allowing plaintiffs to recover only for pecuniary losses in the amount of $35,000 or less, to removing the cap on damages and allowing for the recovery of punitive damages.\(^{55}\) In addition, the legislature’s amendment divided the provisions and expanded the scope of the statute\(^{56}\) to reflect the structure of the present wrongful death statute.\(^{57}\)

III. MINNESOTA’S WRONGFUL DEATH STATUTE

A. What Is Necessary to Bring a Wrongful Death Claim Today?

Today, a wrongful death claim is still a creature of statute and a reflection of Lord Campbell’s Act. Minnesota Statutes section 573.01 states:

A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in section 573.02. All other causes of action by one against another, whether arising on contract or not, survive to the personal representatives of the former and against those of the latter.\(^{58}\)

In other words, unless the exception listed in Minnesota Statutes section 573.02 applies, the cause of action dies with the plaintiff.\(^{59}\)

In pertinent part, Minnesota Statutes section 573.02 provides:

When death is caused by the wrongful act or omission of any person or corporation, the trustee . . . may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission.\(^{60}\)

\(^{55}\) See id.

\(^{56}\) Under this revision, the statute made reference to the damages that are recoverable after murder or professional negligence. See id.

\(^{57}\) See id. (paralleling the current wrongful death statute through use of nearly identical language and structure).

\(^{58}\) Minn. Stat. § 573.01 (2012).

\(^{59}\) See, e.g., Ortiz v. Gavenda, 590 N.W.2d 119, 121 (Minn. 1999) (“A wrongful death claim is purely statutory, as common law recognized no such actions on the theory that a claim for personal injuries died with the victim.”); Fussner v. Andert, 261 Minn. 347, 350, 113 N.W.2d 355, 357 (1961) (“At common law a civil action for wrongful death was not permitted . . . . It was, therefore, to the wrongdoer’s financial interest if his injured victim died.”).

\(^{60}\) Minn. Stat. § 573.02, subdiv. 1.
This section further provides that damages are limited in a wrongful death claim. With reference to damages the statute specifically states:

The recovery in the action is the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death, and shall be for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death.\(^{61}\)

Taken together, the present wrongful death statute in Minnesota requires a party to establish four elements to recover:

1. a proper appointment of a trustee pursuant to Minnesota Statutes section 573.02, subdivision 3;\(^{62}\)
2. the fact of death;
3. caused by the wrongful act of the defendant; and
4. causing pecuniary loss\(^{63}\) to a surviving spouse or next of kin.\(^{64}\)

B. What Types of Damages Are Recoverable Under Minnesota’s Wrongful Death Statute?

While the wrongful death statute is written only in terms of pecuniary damages, Minnesota courts have expanded the definition of “pecuniary loss” to apply not only actual loss of income, contributions, and services, but also to include the loss of advice, comfort, and protection the decedent may have provided to his or her family.\(^{65}\) As statutory revisions and case law have

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61. Id.
62. The appointed trustee for a wrongful death action is usually the family member who filed the wrongful death statute. However, the statute dictates:

Upon written petition by the surviving spouse or one of the next of kin, the court having jurisdiction of an action falling within the provisions of subdivisions 1 or 2, shall appoint a suitable and competent person as trustee to commence or continue such action and obtain recovery of damages therein. The trustee, before commencing duties shall file a consent and oath. Before receiving any money, the trustee shall file a bond as security therefor in such form and with such sureties as the court may require.

63. Pecuniary loss is defined as “[a] loss of money or of something having monetary value.” BLACK’S LAW DICTIONARY 1030 (9th ed. 2009). But see Fussner, 261 Minn. at 359, 113 N.W.2d at 363 (holding “pecuniary loss” as described in Minnesota’s wrongful death statute is not limited to a loss of income).

65. Fussner, 261 Minn. at 360, 113 N.W.2d at 363; see also Rath v. Hamilton
highlighted, the law seems to reflect a growing appreciation of the intangible value in family relationships, which is why the law allows family members to recover damages not just for the loss of services that the decedent family member could have provided, but also for the aid, comfort, and assistance that could have been derived from a continued relationship with the decedent.66

However, it is important to note that there can be no recovery by the surviving family members under a wrongful death action for the pain and suffering of the decedent or for grief or sorrow of the family members.67 This black letter rule of law is a reflection of the purpose of the present-day wrongful death statute—that of compensating surviving spouses and next-of-kin for the monetary value of lost support, services, and property.68 The emphasis of a wrongful death action is on the losses the decedent’s family suffered as a result of the decedent’s death; family members are unable to recover for losses that were distinctly the decedent’s.69

Accordingly, all necessary funeral, hospital, and medical expenses are recoverable by the decedent’s heirs because this is

Standard Div. of United Techs. Corp., 292 N.W.2d 282, 284 (Minn. 1980) (explaining pecuniary loss not limited to income loss); Cummins v. Rachner, 257 N.W.2d 808, 815 (Minn. 1977) (stating jury should consider loss of counsel, guidance, advice, comfort, assistance, and protection decedent would have given children had decedent lived); McGorkell v. City of Northfield, 272 Minn. 24, 30, 136 N.W.2d 840, 844 (1965) (holding damages for potential support of children may be awarded even if children were adults).

66. See Cummins, 257 N.W.2d at 815 (stating pecuniary loss to the decedent’s family is measured against achievements of the deceased and her daily contributions to the family).

67. See Hutchins v. St. Paul, M&M Ry., 44 Minn. 5, 9, 46 N.W. 79, 80–81 (1890) (holding wrongful death actions are distinguishable from personal injury actions, which allow a plaintiff to collect for pain and suffering because the next of kin cannot receive compensation for the decedent’s pain and suffering or their feelings of sorrow); see, e.g., Lundman v. McKown, 550 N.W.2d 807, 829 (Minn. Ct. App. 1995) (holding father of decedent could not recover for emotional distress or suffering in wrongful death action).

68. 27 MICHAEL K. STEENSON ET AL., MINNESOTA PRACTICE: PRODUCTS LIABILITY LAW § 13.13 (2013 ed.) (interpreting MINN. STAT. § 573.01, subdiv. 1 (2012)).

69. Id. The most illustrative example of this type of loss is pain and suffering. In a personal injury action the person who underwent this pain and suffering is bringing the action and therefore can recover for this loss. However, if this plaintiff were to die while bringing this claim, the claim is transitioned into a statutory wrongful death claim, and recovery for pain and suffering is no longer a proper measure of damages.
money that would otherwise have to come out of the decedent’s estate.\footnote{Prescott v. Swanson, 197 Minn. 325, 339, 267 N.W. 251, 258–59 (1936).} As noted above,\footnote{See supra Part II.A.} a fairly recent change to the wrongful death statute allows for heirs to recover punitive damages in a wrongful death action.\footnote{See MINN. STAT. § 573.02, subdiv. 1 (“Punitive damages may be awarded as provided in [Minnesota Statutes] section 549.20.”). Minnesota Statutes section 549.20 provides that punitive damages are recoverable “upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.” Id. § 549.20, subdiv. 1.} The Minnesota legislature made this amendment in 1983, and it significantly expanded an area of damages where courts had not previously allowed recovery.\footnote{See, e.g., Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226, 228 (Minn. 1982) (denying punitive damages in wrongful death action).}

In sum, surviving family members may recover for loss of income, contributions, services, advice, comfort, and protection under Minnesota’s wrongful death statute. They may also recover for the decedent’s medical expenses and funeral costs, but they are unable to recover for the pain and suffering the decedent experienced from the defendant’s negligence.\footnote{See MINN. STAT. §§ 573.01, 573.02, subdiv. 1.} According to Minnesota’s present wrongful death statute, this type of claim dies with the decedent.\footnote{836 N.W.2d 321 (Minn. 2013).}

IV. THE DICKHOFF V. GREEN DECISION

A. Introduction to the Significance of Dickhoff v. Green on Wrongful Death Actions in Minnesota

At the end of May 2013, the Minnesota Supreme Court issued an opinion that will have lasting implications for medical malpractice law in Minnesota. In Dickhoff,\footnote{Id. at 334 n.12 (citing Matsuyama v. Birnbaum, 890 N.E.2d 819, 828 n.23} the court recognized the loss of chance doctrine for the first time in Minnesota history. While twenty-one states across the country and the District of Columbia already recognize loss of chance and have been applying the law for a number of years in their own states,\footnote{27 STEENSON ET AL., supra note 68, § 13.13.} the doctrine...
presents a novel question in Minnesota because of our unique wrongful death statute. As this note explained in Part III, Minnesota law forecloses recovery to claimants for any damages that were suffered solely by the decedent, for example, for pain and suffering damages. And as delineated by Minnesota Statutes section 573.01, this type of personal injury claim dies with the decedent.79

Therefore, in the wake of the Dickhoff decision, vital questions remain open and unanswered: Will loss of chance claims be available to plaintiffs through the wrongful death statute? Will damages for loss of chance be measured in terms of personal injury (including pain and suffering damages), or will damages be measured in terms of traditional wrongful death damages (pecuniary loss to the next of kin)? And, what implications might this have for Minnesota’s wrongful death statute? In the sections that follow, this note will provide insight into the Dickhoff decision and will then explore the case law developed in other states to understand how these questions may be addressed.

B. Facts and Procedure

Jocelyn Dickhoff was a newborn when her parents, Joseph and Kayla Dickhoff, observed a lump on her backside.80 Her parents (Plaintiffs) testified they immediately brought the lump to their pediatrician’s attention at Jocelyn’s two-week appointment.81 At this time the lump was pea-sized and Dr. Tollefsrud told the Dickhoffs she would “keep an eye on it.”82 Despite this assurance, it was not until after their daughter’s one-year examination that the lump’s growth was properly assessed by Jocelyn’s pediatrician and diagnosed as a cancerous tumor.83 The time that had elapsed between her two-week check-up and her one-year examination was significant because the disease had advanced and metastasized.84

79. MINN. STAT. § 573.01; see also Tiedeken, 363 N.W.2d at 910–11.
80. Dickhoff, 836 N.W.2d at 324.
81. Id. at 325.
82. Id.
83. Id.
84. Id.
Following her diagnosis, Jocelyn began an intense course of treatment, consisting of chemotherapy, surgery, and radiation.\textsuperscript{85} On April 6, 2009, Plaintiffs commenced a medical malpractice action against Jocelyn’s physician and the hospital (Defendants).\textsuperscript{86} Plaintiffs’ experts indicated that the delay in Jocelyn’s diagnosis took her from a sixty percent chance of surviving her disease to a forty percent chance of survival.\textsuperscript{87} Stated differently, Jocelyn went from likely surviving her cancer to probably dying from it due to her doctor’s negligence in failing to diagnose her cancer or refer her to a specialist.\textsuperscript{88} Therefore, Plaintiffs sought compensation for (1) the cost of medical treatment related to the 2010 recurrence of Jocelyn’s cancer, as well as pain and suffering that Jocelyn experienced as a result of that treatment; and (2) Jocelyn’s decreased chance of surviving the cancer in the future and the probability that she will die from the disease.\textsuperscript{89}

The district court ruled Plaintiffs could not recover for Jocelyn’s past medical expenses because she would have received essentially the same treatments even in the absence of Defendants’ negligence.\textsuperscript{90} Defendants moved for summary judgment and the district court granted the motion, concluding Plaintiffs’ claim to recover for “reduced life expectancy and increased risk of reoccurrence” was essentially a loss of chance claim and was not recognized in Minnesota.\textsuperscript{91}

Plaintiffs appealed and the court of appeals reversed the district court.\textsuperscript{92} Here it became important that Plaintiffs framed their claim as one for improbable survival instead of as one for a loss of chance.\textsuperscript{93} Plaintiffs likely chose to frame their case as one as

\begin{itemize}
  \item 85. Id.
  \item 86. Id. at 326.
  \item 87. Id. at 326.
  \item 88. Id.
  \item 89. Id. at 338 (Dietzen, J., dissenting).
  \item 90. Plaintiffs conceded that Jocelyn would have received chemotherapy, surgery, and radiation even without Defendants’ negligence. Id. at 327 (majority opinion).
  \item 91. Id.
  \item 92. Id.
  \item 93. Id. at 328.
  \item 94. See id.
\end{itemize}
improbable survival instead of loss of chance because of the
Minnesota Supreme Court’s ruling in *Fabio v. Bellomo*.95

In *Fabio*, the Minnesota Supreme Court was presented with a
similar fact pattern: the plaintiff had two physical examinations by
her physician in which her physician discovered a lump in the
plaintiff’s breast.96 He told the plaintiff that the lump was a fibrous
mass and “not to worry about it.”97 Upon an examination by
another doctor, a biopsy was ordered and it was discovered plaintiff
had two tumors and her cancer had metastasized.98 The plaintiff
argued that the defendant’s negligence created a reduced chance
of survival and an increased chance of reoccurrence of cancer
because he misdiagnosed and failed to promptly treat the mass in
the plaintiff’s breast.99 In *Fabio*, the Minnesota Supreme Court
recognized this as a loss of chance argument and declined to adopt
it as a new cause of action.100

Nevertheless, the court of appeals was persuaded by Plaintiffs’
distinction between loss of chance and improbable recovery, and
ruled Plaintiffs’ arguments amounted to a claim for medical
malpractice and did not constitute an inactionable loss of chance
claim.101 However, despite Plaintiffs’ carefully phrased arguments,
the supreme court labeled the action as one of loss of chance and
analyzed the case within that context.

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95. 504 N.W.2d 758 (Minn. 1993).
96. Id. at 760.
97. Id.
98. Id.
99. Id. at 762.
100. Id. (“We have never recognized loss of chance in the context of a medical

malpractice action, and we decline to recognize it in this case.”).

2012), aff’d, 836 N.W.2d 321 (Minn. 2013).

We believe that the supreme court did not intend to completely
foreclose the possibility of malpractice actions for negligent cancer-
misdiagnosis cases involving a lengthy illness with a potentially fatal
outcome. Instead, we read the caselaw only to limit those actions to
circumstances in which it has become more probable than not that the
patient will not survive the cancer.

Id. (citing MacRae v. Grp. Health Plan, Inc., 753 N.W.2d 711, 722 (Minn. 2008)).
C. The Minnesota Supreme Court Decision

On review, the Minnesota Supreme Court distinguished Dickhoff from Fabio and recognized loss of chance as an actionable doctrine under Minnesota law. The loss of chance doctrine allows recovery when a physician’s negligence causes a reduction in the patient’s chance to survive or recover from his or her illness. The court also decided a patient can successfully sue his or her physician for an increased risk of not recovering from the underlying illness and for a decreased life expectancy as standalone damages. There seems to be only one limitation to this new theory of recovery: the patient’s increased risk of dying and decreased life expectancy must be “substantial.” In establishing loss of chance, the court reasoned the loss of chance of survival and recovery is a real injury to a person, and prohibiting the cause of action “fails to deter” medical negligence because it immunizes “whole areas of medical malpractice from liability,” namely immunizing doctors from liability when a patient’s chance of recovery is below fifty percent. Accordingly, the court concluded, “a physician harms a patient by negligently depriving her of a chance of recovery or survival and should be liable for the value of that lost chance.”

102. Dickhoff, 836 N.W.2d at 331–33. Interestingly, because Justice Barry Anderson and Justice Wright did not take part in the decision, the opinion establishing loss of chance in Minnesota was decided by only a 3-2 decision. See id. at 338.

103. Id. at 333.

104. Id. at 334 (“[W]e conclude that a physician harms a patient by negligently depriving her of a chance of recovery or survival and should be liable for the value of that lost chance.”).

105. Id. at 337 (noting that the court of appeals’ theory of causation is unreasonable because a plaintiff whose odds of survival dropped slightly from fifty-one to forty-nine percent would have a recognized medical malpractice claim, but a plaintiff whose odds of survival dropped from forty-nine to zero percent, as a result of a physician’s negligence, would not be able to establish that the physician caused any harm); see Bushnell, supra note 8, at 19 (“To be actionable, the diminution of chance must be more than ‘token’ or ‘de minimis.’”); Alex Stein, A Patient’s Decreased Chance to Survive or Recover Held Actionable as a Standalone Damage, STEIN ON MEDICAL MALPRACTICE, http://steinmedicalmalpractice.com/dickhoff-v-green-nw2d-2013-wl-2363550-minn-2013 (last visited April 21, 2014).

106. Dickhoff, 836 N.W.2d at 333 (quoting Matsuyama v. Birnbaum, 890 N.E.2d 819, 830 (Mass. 2008)).

107. Id. at 334.
The Minnesota Supreme Court also provided guidance on how to measure damages for a loss of chance claim. The court explained that this determination includes a two-step process where the lost chance is first measured and then valued. The damages for a loss of chance analysis are “measured as ‘the percentage probability by which the defendant’s tortious conduct diminished the likelihood of achieving some more favorable outcome.’” With respect to valuing that loss of chance, the court noted that other jurisdictions that had recognized loss of chance as a “distinct and compensable injury,” had “tended to adopt the proportional-recovery approach.”

Under the proportional-recovery approach, a patient’s damages for injury or death “are discounted by the value of the chance that the physician’s negligence destroyed.” In other words, the total amount of damages recoverable “is equal to the percentage chance of survival or cure lost, multiplied by the total amount of damages allowable for the death or injury.”

108. See id. at 335–36. For an easy example of the ideas behind the loss of chance doctrine outside the medical malpractice realm, see Chaplin v. Hicks, [1911] 2 K.B. 786 (Eng.). In this case, the plaintiff entered into a contract to compete for selection as one of twelve finalists in a pageant. If selected, the plaintiff would have gained employment for three years on stage within the theater. However, because the contest manager failed to notify the plaintiff that she qualified for an interview, the plaintiff missed the interview and was not selected as a finalist. The court explained that while each contestant had no better than a twenty-five percent chance of winning, that chance was a viable legal interest.

109. Dickhoff, 836 N.W.2d at 335.

110. Id. (quoting Matsuyama, 890 N.E.2d at 839).

111. Id.

112. Id.

113. Id. at 336. The following is an example provided by the court in Dickhoff:

For example, assume that a physician negligently fails to diagnose a patient’s cancer. The patient dies. If the patient had only a 40 percent chance of survival before the medical malpractice, but the physician’s negligence reduced her chance of survival to 0 percent, then the physician should be liable for 40 percent of the damages, or the portion of the value that the defendant’s negligence destroyed. . . . If the fact-finder determines that total damages for the patient’s death are $100,000, then the patient’s loss of chance damages would be $40,000.

Id. at 336 n.15 (internal citation omitted).
In applying this formula to the present case, the court stated that the appropriate baseline to determine the damages for Jocelyn's injury was to subtract the value of the reduction of Jocelyn's life expectancy from her pre-negligence life expectancy. However, the court indicated this formula would have been altered if Jocelyn had died from her illness. Ultimately, the court left it to the fact-finder to determine the amount of damages necessary to provide compensation for Jocelyn’s reduced life expectancy.

After setting out the general standard to be used in damage calculations, the court analyzed whether Plaintiffs provided a sufficient causal link between Jocelyn's injury and defendants' negligence. The court first considered the reasoning used by the court of appeals. The court of appeals, relying on dicta from the supreme court's decision in MacRae v. Group Health Plan, Inc., held that Plaintiffs “must prove only that Jocelyn’s chances of death from her cancer moved from unlikely to likely.” However, the supreme court rejected this approach and asserted that, “a plaintiff must prove, among other things, that it is more probable than not that his or her injury was a result of the defendant health care provider’s negligence.” It reasoned the court of appeals' rationale must be abandoned because of its potentially “troubling consequences” and instead held “a plaintiff must prove that the

114.  Id. at 336 (citing Alexander v. Scheid, 726 N.E.2d 272, 282–83 (Ind. 2000)).
115.  Id. (“[U]nder our view of the loss of chance doctrine, the total amount of damages recoverable is equal to the percentage chance of survival or cure lost, multiplied by the total amount of damages allowable for the death or injury [of the patient].” (emphasis added)). Though Jocelyn Dickhoff was alive for the entirety of this case, sadly, she passed away on July 6, 2013, from her illness at the age of seven. Randy Olson, Death Brings Change in Dickhoff Case, SAUK CENTRE HERALD (July 12, 2013), http://www.saukherald.com/articles/2013/07/12/death-brings-change-dickhoff-case.
116.  Dickhoff, 836 N.W.2d at 336.
117.  See id. at 337–38.
118.  Id. at 337.
119.  753 N.W.2d 711 (Minn. 2008).
120.  Dickhoff, 836 N.W.2d at 337.
121.  Id. (quoting Leubner v. Sterner, 493 N.W.2d 119, 121 (Minn. 1992)).
122.  Id.

The troubling consequence of the court of appeals' holding is that a plaintiff whose odds of survival drop from 51 percent to 49 percent has a cognizable medical malpractice claim, while a patient whose odds of survival are reduced from 49 percent to 0 percent as a result of a
defendant health care provider’s negligence more likely than not caused the claimed injury.”

In this case, the supreme court concluded that Plaintiffs’ expert affidavits, which opined defendants’ failure to timely diagnose Jocelyn’s cancer caused a substantial increase in the likelihood that Jocelyn’s cancer would reoccur and decreased her chances of survival by at least twenty percent, were sufficient to create a genuine issue of material fact on the element of causation. Consistent with its holdings establishing loss of chance and causation, the court concluded a reasonable jury could find that Jocelyn’s injury—the loss of chance of survival—was a result of defendants’ negligence. It ruled the district court erred by granting summary judgment for Defendants and remanded the case for trial.

V. THE OPTIONS: WHERE SHOULD MINNESOTA GO FROM HERE?

In the last three decades, twenty-two states and the District of Columbia have adopted some form of the loss of chance doctrine, nine states have declined to adopt the doctrine, and nineteen states have not yet ruled on the issue. Among the states that have adopted loss of chance into their jurisprudence, many have already overcome the practical issues that Minnesota is now facing, and these states provide valuable insight on Minnesota’s physician’s negligence is unable to ever establish, as a matter of law, that the physician caused any harm.

Id.

123. Id. (citing Leubner, 493 N.W.2d at 121; Smith v. Knowles, 281 N.W.2d 653, 656 (Minn. 1979)).
124. Id. at 338.
125. Id.
126. Id.
127. Id. at 334 n.12 (citing Matsuyama v. Birnbaum, 890 N.E.2d 819, 828 n.23 (2008)). These states include Arizona, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, South Dakota, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Id. Also included in the count is Minnesota.
128. Id. These states include Florida, Idaho, Maryland, Mississippi, New Hampshire, South Carolina, Tennessee, Texas, and Vermont. Id.
129. See id. The states that have not yet ruled on the doctrine are Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Kentucky, Maine, Michigan, Nebraska, New York, North Carolina, North Dakota, Oregon, Rhode Island, and Utah. See id.
present quandary: how does a plaintiff bringing a loss of chance claim surmount the legal barriers imposed by the wrongful death statute? The following sections will address how the adoption of loss of chance will affect medical malpractice claims. It will then present various routes that other states have taken to address the potentially prohibitive wrongful death statute.

A. How Does the Loss of Chance Doctrine Affect a Claim for Medical Malpractice?

The Minnesota Supreme Court, in Dickhoff, explained that to establish a prima facie case of medical malpractice, a plaintiff must prove, on the basis of expert medical testimony, “(1) the standard of care recognized by the medical community as applicable to the particular defendant’s conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant’s departure from the standard was a direct cause of [the patient’s] injuries.”

This standard is similar to the standard used in other states, the main difference being that many states do not use the standard common to the community to establish duty, and instead use a straightforward negligence approach. However, using either method of recovery, a traditional medical malpractice claim prevents recovery for plaintiffs whose chances of survival were less than fifty-one percent before the defendant’s negligence. Over the past two decades, courts have utilized the loss of chance doctrine to correct this “all or nothing” approach and allow a plaintiff to recover even if the plaintiff’s chances for survival were less than fifty-one percent before the defendant's negligence.

130. Id. at 329 (quoting Plutshack v. Univ. of Minn. Hosp., 316 N.W.2d 1, 5 (Minn. 1982)).
131. In a medical malpractice suit, a plaintiff must prove the four elements of negligence to recover: (1) the physician owed a duty of care to the patient; (2) the physician breached this duty; (3) the breach actually caused the patient’s injury; and (4) the patient suffered damages from the breach. See, e.g., Gooding v. Univ. Hosp. Bldg. Inc., 445 So. 2d 1015, 1018 (Fla. 1984); see also Robert A. Reisig. Jr., The Loss of A Chance Theory in Medical Malpractice Cases: An Overview, 13 Am. J. Trial Advoc. 1163, 1164 (1990).
132. See Dickhoff, 836 N.W.2d at 333 (arguing the “all or nothing” approach to causation undermines the fundamental aims of tort law and instead immunizes entire areas of medical malpractice from liability).
133. Joseph H. King, Jr., Causation, Valuation, and Chance in Personal Injury
was argued, and the Minnesota Supreme Court seemed to accept,\textsuperscript{134} that the proportional damages approach to loss of chance allows damages to be awarded in direct proportion to the harm caused, while preserving the traditional principles of causation.\textsuperscript{135}

B. The Damages Available Under Loss of Chance and Wrongful Death Statutes

While on its face the loss of chance doctrine seems like a fairly straightforward answer to a lingering policy question in the medical malpractice arena, courts in many jurisdictions have struggled with its practical applications. One of the central questions presented in Minnesota is how the doctrine will affect wrongful death claims and the future of the wrongful death statute. It can be argued that wrongful death statutes, which are designed to compensate survivors for the loss of a loved one,\textsuperscript{136} are at odds with loss of chance and could actually prevent recovery. This is because most wrongful death statutes require a showing that the defendant’s negligent act or omission “caused” the plaintiff’s death.\textsuperscript{137} A wrongful death statute allows for recovery when the defendant caused the death of the decedent and compensates survivors for their loss,\textsuperscript{138} while loss of chance allows for recovery when the defendant

\textit{Torts Involving Preexisting Conditions and Future Consequences}, 90 YALE L.J. 1353, 1377–78 (1981) (describing how the all or nothing approach to causation weakens the compensatory, risk spreading, and deterrence objectives of tort law); \textit{cf.} \textit{Restatement (Second) of Torts} § 901 (1979) (listing the purposes for awarding tort damages, including deterrence).

\textsuperscript{134} See \textit{Dickhoff}, 836 N.W.2d at 335–37.
\textsuperscript{135} See, e.g., \textit{Mead v. Adrian}, 670 N.W.2d 174, 188 (Iowa 2003) (Cady, J., concurring); \textit{Matsuyama v. Birnbaum}, 890 N.E.2d 819, 840 (Mass. 2008); \textit{Roberts v. Ohio Permanente Med. Grp., Inc.}, 668 N.E.2d 480, 484 (Ohio 1996). See generally Stephen F. Brennwald, \textit{Proving Causation in “Loss of a Chance” Cases: A Proportional Approach}, 34 CATH. U. L. REV. 747, 754 (1985). The traditional standards of causation are maintained because the injury complained of is the lost chance of survival. This means the causation question is: But-for the defendant’s negligent treatment or diagnosis, would the plaintiff have suffered the lost chance of survival?
\textsuperscript{136} 27 \textit{Steenson et al.}, \textit{supra} note 68, § 13.13.
\textsuperscript{137} Brennwald, \textit{supra} note 135, at 786–88; \textit{see, e.g., Minn. Stat.} § 573.02 (2012); \textit{S.C. Code Ann.} § 13-51-10 (West, Westlaw through 2013 Reg. Sess.).
\textsuperscript{138} \textit{See Minn. Stat.} § 573.02 (“When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed as provided in subdivision 3 may maintain an action therefor . . . .” (emphasis added)).
caused the lost chance and does not compensate the survivors for their loss. Instead, the focus of a loss of chance claim is on the decedent—on the loss he or she suffered before death.

C. What Have Other States Done?

1. Decisive Legislative Action

In two states where the high courts have endorsed loss of chance, Michigan and South Dakota, the legislature stepped in and extinguished a plaintiff’s right to recover under the doctrine. In Michigan, after the court established the loss of chance cause of action, the legislature responded by altering a plaintiff’s recovery under a loss of chance theory. Similarly, after South Dakota’s high court adopted loss of chance, the legislature abrogated the decision. The statute directly states:

The Legislature finds that in those actions founded upon an alleged want of ordinary care or skill the conduct of the responsible party must be shown to have been the proximate cause of the injury complained of. The Legislature also finds that the application of the so called loss of chance doctrine in such cases improperly alters or eliminates the requirement of proximate causation.

139. Dickhoff, 836 N.W.2d at 337–38.
142. For Michigan, see Mich. Comp. Laws § 600.2912a(2) (West, Westlaw through 2014 Reg. Sess.) (stating in a medical malpractice action plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than fifty percent); see also Weymers v. Khera, 563 N.W.2d 647, 650 (Mich. 1997) (holding that Michigan “does not recognize a cause of action for the loss of an opportunity to avoid physical harm less than death”). For South Dakota, see S.D. Codified Laws §§ 20-9-1.1, 1.2 (2013) (West, Westlaw through 2013 Reg. Sess.) (abrogating the holding in Jorgenson and declaring the application of loss of chance “improperly alters or eliminates the requirement of proximate causation”).
143. See Mich. Comp. Laws § 600.2912a(2) (Westlaw) (limiting loss of chance claims to plaintiffs who had a greater than fifty percent opportunity of surviving his or her illness).
Therefore, the rule in Jorgenson v. Vener, 2000 SD 87, 616 N.W. 2d 366 (2000) is hereby abrogated.\textsuperscript{144} In other words, though the high courts in these states chose to adopt loss of chance, the legislature abrogated the rulings due to the weighty public policy concerns associated with the doctrine’s establishment.\textsuperscript{145} Conversely, in California and Maryland, the courts have declined to adopt loss of chance because the policy concerns at issue were deemed to be better suited for legislative debate and action.\textsuperscript{146} It does not appear, however, that any other states have taken similar legislative recourse after the imposition of loss of chance within their borders.

2. Circumventing the Wrongful Death Statute

The defense bar may assert Minnesota’s wrongful death statute does not apply to loss of chance actions based on the statutory interpretation of Minnesota Statutes section 573.02. As explained in Part III of this note, the statute states “[w]hen death is caused by the wrongful act or omission of any person . . . the trustee . . . may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission.”\textsuperscript{147} Because the decedent’s death was not caused by the defendant-doctor’s negligence but rather was caused by the decedent’s underlying disease, the defense bar may argue the wrongful death statute is not applicable and the patient’s next of kin is foreclosed from bringing a loss of chance claim.

\textsuperscript{144} S.D. CODIFIED LAWS § 20-9-1.1 (Westlaw).
\textsuperscript{145} See id. (stating concerns about implications on proximate causation).
\textsuperscript{147} MINN. STAT. § 573.02 (2012) (emphasis added).
\textsuperscript{148} See Matsuyama v. Birnbaum, 890 N.E.2d 819, 835 (Mass. 2008) (defendant made the same argument). The Massachusetts wrongful death statute is similarly worded to the Minnesota wrongful death statute in that they both require the defendant to “cause the death of the person.” Compare MASS. GEN. LAWS ch. 229, § 2 (West, Westlaw through Ch. 38 of the 2014 2nd Ann. Sess.), with MINN. STAT. § 573.02 (2012). The defense in Matsuyama argued that the language of the statute—“causes the death”—precludes loss of chance claims and “allows only claims that the defendant was a but-for cause of the decedent’s death.” Matsuyama, 890 N.E.2d at 835. The Massachusetts Supreme Court rejected this
However, adopting this restrictive interpretation would draw an arbitrary line between plaintiffs who survive their illnesses and plaintiffs who die during trial or prior to filing suit. Drawing this distinction between plaintiffs could render the loss of chance doctrine all but meaningless. For example, in *Dickhoff*, the patient, Jocelyn, was able to survive the legal proceedings and recover against her doctor for failing to properly diagnose her disease.  

However, not even two months after the Minnesota Supreme Court issued its decision on her case, Jocelyn tragically passed away from her disease.  

Because the injury in this action is the loss of chance to live, it is an unfortunate guarantee that many plaintiffs with viable claims would be foreclosed from bringing an action simply because they died before the action could be brought, or before the action concluded, unless they are allowed to bring a claim via the wrongful death statute. If Jocelyn had passed away at the end of May, instead of the beginning of July, her parents would have had to convert her claim into a wrongful death action. Therefore, if the argument presented in this section is accepted, Jocelyn’s parents would have been foreclosed from asserting her loss of chance claim via the wrongful death statute, and Jocelyn’s action would have been dismissed without recovery upon her death.  

The practical implications of this type of ruling would be unjust and far reaching. Patients with viable loss of chance claims may not bring a claim if their health is uncertain, because if they were to die prior to the case being resolved, their case would be dismissed and would not be converted into a wrongful death claim for the benefit of their next of kin.  

Furthermore, practically speaking, attorneys would be hesitant to represent plaintiffs for loss of chance claims because, given the nature of the cause of action, most, if not all, of these plaintiffs would have uncertain health conditions, and an attorney would not want to pursue a claim that could be dismissed if the plaintiff dies during the trial. Overall, while a resolution by this type of statutory interpretation may be an attractive bright-line rule at first glance, Minnesota courts should reject it for the policy reasons expressed above.

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150. *Olson*, *supra* note 115.
151. *MINN. STAT. § 573.02*, subdiv. 1.
152. In addition, it is arguable, based on common sense, that if the Minnesota
3. Amending or Interpreting the Wrongful Death Statute: The Massachusetts Approach

To allow plaintiffs to bring a loss of chance claim under Minnesota’s wrongful death statute, the legislature could amend the existing wrongful death statute to explicitly allow the loss of chance of survival. Or, the court may choose to interpret the wrongful death statute as encompassing loss of chance claims.\textsuperscript{153} Under this approach, the language allowing recovery when the defendant negligently caused the death of another would be interpreted as incorporating another meaning: the defendant will be deemed to have negligently caused the death of another whenever he or she causes a reduction in a person’s chance of survival.\textsuperscript{154} An example of this type of solution is the Massachusetts high court’s decision in \textit{Matsuyama v. Birnbaum}.\textsuperscript{155}

In \textit{Matsuyama}, the court directly addressed the issue of whether Massachusetts’s wrongful death statute precluded loss of chance and decided the statute only sets forth procedural requirements on recovery, while the common law wrongful death doctrine provides the actual right to recovery and has evolved to encompass loss of chance.\textsuperscript{156} Specifically, the court held that as medical science has progressed and developed methods that are able to quantify

\begin{itemize}
\item Supreme Court established the loss of chance doctrine, the court did so because it wanted to provide plaintiffs with the cause of action. The court did not establish the cause of action, so it could be rendered meaningless through statutory interpretation.
\item \textit{See Matsuyama}, 890 N.E.2d at 838 (interpreting the Massachusetts wrongful death statute to allow for loss of chance claims though the claim is not authorized by the express wording of the statute).
\item 890 N.E.2d 819.
\item \textit{Id.} at 838; \textit{see, e.g., Gaudette v. Webb}, 284 N.E.2d 222 (Mass. 1972) (allowing plaintiff to bring a claim under the wrongful death statute where the language of the statute did not provide plaintiff with a right to recover but the wrongful death statute was interpreted to provide only the procedural requirements). \textit{But see} Tory A. Weigand, \textit{Loss of Chance in Medical Malpractice: The Need for Caution}, 87 MASS. L. REV. 3, 16–17 (2002) (contending the Massachusetts wrongful death statute is “fundamentally inconsistent” with loss of chance doctrine).
\end{itemize}
the extent to which malpractice damaged the patient’s prospects for survival, and in light of the strong public policy favoring compensation for victims of medical malpractice and the deterrence of deviations from appropriate standards of care, loss of chance of survival rightly assumes a place in our common law of wrongful death . . . .  

Though the Massachusetts wrongful death statute and the loss of chance doctrine were arguably in conflict, the Massachusetts Supreme Court interpreted the statute to implicitly incorporate a loss of chance claim because “claims for loss of chance . . . are sufficiently akin to wrongful death claims as to be cognizable under the wrongful death statute.”  

Massachusetts’s and Minnesota’s wrongful death statutes are similarly worded as both require a defendant’s negligence or conduct to “cause[] the death of a person” in order to bring a wrongful death action. The states also took similar paths in creating their wrongful death statutes. Massachusetts, during colonial times, allowed for wrongful death claims at common law, but like Minnesota, after Baker v. Bolton was decided in 1808, it embraced the holding that no cause of action for wrongful death existed apart from statute. However, in Gaudette v. Webb, the Massachusetts Supreme Court acknowledged there was a common law wrongful death action, and held that the wrongful death statute merely provided the procedural requirements to bring such a claim. On the other hand, Minnesota has never explicitly acknowledged the existence of a common law wrongful death

158. Id. at 837.  
159. Compare MASS. GEN. LAWS ch. 229, § 2 (2013) (West, Westlaw through Ch. 38 of the 2014 2nd Ann. Sess.) (imposing liability on anyone who “by his negligence causes the death of a person”), with MINN. STAT. § 573.02 (2012) (“When death is caused by the wrongful act or omission of any person . . . the trustee appointed . . . may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission.”).  
161. See Matsuyama, 890 N.E.2d at 835–36; supra Part II; see, e.g., Carey v. Berkshire R.R., 55 Mass. 475 (1848) (holding the death of a person is not proper grounds for an action for damages).  
Despite these differences, Minnesota could still follow a similar path, and interpret its wrongful death statute to implicitly incorporate a loss of chance claim, because the two claims are “sufficiently akin” to one another.\footnote{164} The Minnesota Supreme Court found the Matsuyama opinion very persuasive, as evidenced by its heavy reliance on the opinion throughout its analysis in Dickhoff.\footnote{165} In addition, for practical reasons, this could be the best route for Minnesota courts to take, because it would avoid drawing an arbitrary line between plaintiffs\footnote{166} and would be a relatively “easy” solution compared to a legislative amendment of the statute.\footnote{167} Once the courts have interpreted loss of chance as properly falling within the ambit of the wrongful death statute, the courts could decide loss of chance would be best settled as a matter of fault apportionment. For example, on the special verdict form the court could ask the jury to determine whether the physician was negligent in his or her diagnosis or treatment of the decedent. If answered in the affirmative, the next question would be what share of the fault the physician bore for the decedent’s death. This would

\begin{enumerate}
\item[163.] See supra Part II.
\item[164.] See Matsuyama, 890 N.E.2d at 837.
\item[165.] See Dickhoff ex rel. Dickhoff v. Green, 836 N.W.2d 321 (Minn. 2013) (citing to the Matsuyama decision twelve times as the court explained the loss of chance doctrine and its implications).
\item[166.] The arbitrary line would be drawn between plaintiffs who have suffered a loss of chance of survival but live long enough to bring the action to completion, and plaintiffs who suffered a loss of chance of survival but unfortunately do not survive their illnesses long enough to bring a claim or do not survive the trial. Because the Minnesota Supreme Court based its decision in Dickhoff on certain policy rationales—namely, that it was harsh and arbitrary to draw a line between plaintiffs with a pre-negligence chance of survival of fifty-one percent (who were able to recover full damages) and plaintiffs with a pre-negligence chance of survival of forty-nine percent or lower (who were denied a loss of chance recovery)—it does not seem likely that the court would draw another arbitrary line in the application of the loss of chance doctrine.
\item[167.] It would be easy in the sense that the court must simply interpret the words of the legislature in the wrongful death statute, and it would not require the legislature to embark on the process of amending the statute. Additionally, if the legislature did not intend to incorporate the loss of chance claims in the wrongful death statute, it could amend the wrongful death statute and overturn the court’s ruling. This would be similar to what the Michigan and South Dakota legislatures did after the high court established loss of chance.
be compared to the portion of the ‘fault’ attributable to the underlying disease running its natural course—which would amount to the percentage of fault attributable to the defendant in the loss of chance claim.\(^\text{168}\) This process would be a fairly effortless way of incorporating the loss of chance doctrine within Minnesota’s existing framework.\(^\text{169}\)

4. **Survivorship Actions: The Missouri Approach**

There are meritorious arguments suggesting the Minnesota Legislature could adopt a survival statute, which would allow for a survivorship action to be brought by family members of the decedent. This would create a distinction between a traditional wrongful death claim and recovery under loss of chance.\(^\text{170}\) The wrongful death claims would be left for the specific instances where a survivor is recovering for his or her own loss (and not the decedent’s loss).\(^\text{171}\) A good example of how this would function is set out by Missouri’s approach to loss of chance.

The Supreme Court of Missouri adopted the loss of chance doctrine in *Wollen v. DePaul Health Center*.\(^\text{172}\) In *Wollen*, the plaintiff brought a wrongful death action in accordance with Missouri’s wrongful death statute\(^\text{173}\) and argued her husband would not have passed away if he had been correctly diagnosed and given the appropriate treatment.\(^\text{174}\) Specifically, the plaintiff contended if the defendants would have properly diagnosed and treated the decedent, he would have “‘had a thirty percent chance . . . of survival and cure.’”\(^\text{175}\)

168. This suggested framework for apportionment parallels the existing jury instructions for negligence and comparative fault. See, e.g., 4 STEENSON & KNAPP, supra note 2, § 28.90. See also Mahoney v. Podolnick, 773 A.2d 1102, 1103–04 (N.J. 2001) (comparing the doctor’s fault to the “fault” of the underlying disease in a loss of chance claim).

169. Id.


171. Id.


173. See MO. REV. STAT. § 537.080 (West, Westlaw through 2014 2nd Reg. Sess.).

174. Wollen, 828 S.W.2d at 682.

175. Id.
The court concluded that a patient suffers harm when a doctor fails to diagnose or adequately treat a serious injury or disease; just as the Minnesota Supreme Court concluded in *Dickhoff*, this loss of chance of recovery is a separately compensable harm. Also like Minnesota, the Missouri court adopted a proportional damage calculation. Despite recognizing and adopting a recovery based on loss of chance, the Missouri Supreme Court remanded the plaintiff’s case back to the trial court so that the plaintiff could amend her petition and sue under the state’s survivorship statute instead of the wrongful death statute. The court explained the fundamental difference between the two statutes is that the “survivorship statute applies when the injury alleged did not cause death, and the wrongful death statute applies when the injury did cause death.”

In other words, to bring an action under the wrongful death statute, the plaintiff must be able to prove the death of the decedent was the result of the negligence of the tortfeasors. In a loss of chance claim, the plaintiff must rely on the patient’s statistical chance of recovery in making his or her claim, and argue this chance would not have been lost if the defendant would have properly diagnosed the patient. However, it cannot be argued based on this statistical measurement that the decedent would have survived had he or she been properly diagnosed. This cannot be argued because the plaintiff is not armed with this information, and even if there is medical certainty regarding the chance that the patient would have survived his or her injuries, this does not inform

176. *Id.* at 684. In an interesting analogy, the Missouri Supreme Court described the harm in a loss of chance action as being similar to a scenario where a person was forced to choose between three unmarked doors, two of which contained death and the last containing life. *Id.* A doctor “who deprived a patient of this opportunity [to choose], even though only a one-third chance, would have caused her real harm.” *Id.*

177. *Id.* at 684 n.2. Missouri instructs the jury to find the value of the lost life and in a percentage measurement, the exact chance of recovery lost. The court takes these numbers and multiplies them together to determine the net value of the damage award.

179. *Id.* § 537.080 (Westlaw); *Wollen*, 828 S.W.2d at 685.
180. *Wollen*, 828 S.W.2d at 685.
181. *Mo. Rev. Stat.* § 537.080 (Westlaw); *Wollen*, 828 S.W.2d at 685.
182. *Wollen*, 828 S.W.2d at 685.
183. *Id.*
the court whether this particular patient died (or will die) as a result of the defendant’s negligence.\footnote{Id. at 685–86.} Therefore, it is impossible to prove the decedent’s death resulted from the defendant’s failure to properly diagnose and treat, and the plaintiff is precluded from bringing an action under the wrongful death statute.\footnote{Id. at 686.}

Instead, the plaintiff is able to bring a claim under Missouri’s survivorship statute, which states:

> Causes of action for personal injuries, other than those resulting in death, whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death . . . such a cause of action shall survive to the personal representative of such injured party, and against the person . . . liable for such injuries . . . and the measure of damages shall be the same as if such death or deaths had not occurred.\footnote{MO. REV. STAT. § 537.020(1) (Westlaw).}

This provision allows the personal representative to bring a loss of chance claim under the same statute regardless of whether the patient ultimately dies from his or her disease.\footnote{Id.} Because the measure of damages is the same whether the patient is alive or dead, all patients seeking to recover under loss of chance can receive the same recovery, and their actions do not have to be transitioned into wrongful death claims upon the patient’s death.\footnote{See id.}

Missouri’s survivorship statute stands in stark contrast to the Minnesota wrongful death statute because the latter draws a bright dividing line between wrongful death actions and personal injury claims, and it allows for the recovery of different types of damages depending on whether the plaintiff dies during the cause of action.\footnote{Tiedeken v. Tiedeken, 363 N.W.2d 909, 910–11 (Minn. Ct. App. 1985) (citing Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226 (Minn. 1982)) (“A wrongful death claim, unlike a claim for personal injuries does not include compensation for pain and suffering.”); 27 STEENSON ET AL., supra note 68, § 13.13.} In fact, under the present circumstances in Minnesota, a patient who brings a loss of chance claim against a defendant likely could collect damages for pain and suffering, past and future economic loss, and past and future medical expenses that were the
result of the physician’s negligence. In contrast, if the patient dies during the process of his or her claim, the action must be converted into a wrongful death action, the damages available for the same claim would be limited to the pecuniary loss suffered by the next of kin from the patient’s death, and damages such as pain and suffering would be uncollectible.190 Missouri’s use of a survivorship statute to complement its wrongful death claim seamlessly introduces loss of chance into Missouri law and does not create the same inconsistencies that are currently present with the Minnesota wrongful death statute alone.

VI. PREDICTIONS FOR MINNESOTA

In the wake of the Minnesota Supreme Court’s decision in Dickhoff, the State has many options regarding how it will introduce loss of chance into its existing legal framework. As presented by Part V, the legislature could abrogate191 or amend192 the wrongful death statute to bring harmony between the loss of chance doctrine and the wrongful death statute. The courts could interpret the loss of chance doctrine as falling within the ambit of the wrongful death statute193 or interpret the statute as limiting the loss of chance

190. Outside of Missouri, many other states allow the next of kin to recover for a decedent’s pain and suffering. See, e.g., Bass v. Wallenstein, 769 F.2d 1173 (7th Cir. 1985) (applying federal common law); Rewis v. United States, 536 F.2d 594 (5th Cir. 1976) (applying New Mexico law); Williams v. Bay Hosp., 471 So. 2d 626 (Fla. Dist. Ct. App. 1985) (illustrating Florida has survivorship actions similar to those in Missouri that allow for pain and suffering damages to be collected by next of kin); Mahoney v. Podolnick, 773 A.2d 1102, 1103–04 (N.J. 2001) (awarding $50,000 for decedent’s pain and suffering in a loss of chance claim); Barenbrugge v. Rich, 490 N.E.2d 1368, 1374–75 (Ill. App. Ct. 1986) (finding the jury could consider the suffering of a decedent who died during the course of a loss of chance trial); McKellips v. Saint Francis Hosp., 741 P.2d 467, 476 n.26 (Okla. 1987) (holding in a loss of chance action the next of kin can recover for a decedent’s “mental pain and anguish”). Additionally, some states have survivor statutes that allow an injured party’s claim to survive even after the injured plaintiff has died. See, e.g., Gauthe v. Asbestos Corp., 97-456 (La. App. 5 Cir. 11/25/97), 703 So. 2d 763 (recognizing both survival actions, which are ordinary tort actions filed directly by injured party, and wrongful death actions, which are tort actions filed by survivors of deceased injured party for their own pain and suffering as result of death).

191. See supra Part V.D.1.
192. See supra Part V.D.3.
193. See supra Part V.D.3.
doctrine to living plaintiffs, thus avoiding the issue altogether. Or even further still, the legislature could model its jurisprudence after Missouri and adopt a survivorship statute to complement the existing wrongful death statute. Given the long history of Minnesota’s wrongful death statute and the court’s lack of clear direction on the issue in Dickhoff, there is no easy answer.

However, despite the lack of clarity about what will transpire in Minnesota, the supreme court was supportive of allowing loss of chance claims to proceed via the wrongful death statute. In Dickhoff, the court stated, “under our view of the loss of chance doctrine, the total amount of damages recoverable is equal to the percentage chance of survival or cure lost, multiplied by the total amount of damages allowable for the death or injury [of the patient].” By discussing loss of chance in the express context of death, it is evident the court envisioned the loss of chance doctrine to apply to patients equally, regardless of whether they ultimately survived their condition. From this it can be inferred that the court intended to allow loss of chance claims to be brought via the wrongful death statute, because the statute is the sole avenue available to parties bringing claims on behalf of a deceased person. This decreases the options available to Minnesota, so the most feasible option would be for the court to adopt the Massachusetts approach in resolving the conflict between the wrongful death statute and the loss of chance doctrine. Alternatively, while less feasible, the better option would be for the Minnesota Legislature to amend the wrongful death statute and create clear parameters for the new doctrine and the traditional wrongful death action.

It is feasible for the supreme court to adopt the Massachusetts approach, because the court seemed amenable to the Massachusetts resolution as it was presented in Matsuyama. In fact, the court was so persuaded by the reasoning of this decision that it

\begin{enumerate}
\item[194.]
See supra Part V.D.2.
\item[195.]
See supra Part V.D.4.
\item[196.]
Dickhoff ex rel. Dickhoff v. Green, 836 N.W.2d 321, 336 (Minn. 2013).
\item[197.]
Id. (emphasis added).
\item[198.]
See id.
\item[199.]
MINN. STAT. § 573.01 (2012) (“A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in section 573.02.”).
\end{enumerate}
relied on the case to establish loss of chance in Minnesota.\(^\text{200}\) Given this reliance, it would make sense that the court would further rely on *Matsuyama* when it determines how to fit the loss of chance doctrine into the Minnesota law.

The basic tension between the wrongful death statute and the loss of chance doctrine is causation.\(^\text{201}\) Wrongful death plaintiffs phrase their complaints in terms of causation of death because this is mandated by statute to bring a claim.\(^\text{202}\) However, in a loss of chance claim a plaintiff is not trying to recover for wrongful death, but rather for a family member’s loss of chance to avoid death.\(^\text{203}\) In response to this problem, Judge Pearson of the Washington Supreme Court explained that he would interpret the wrongful death statute as being applicable to loss of chance cases because of the vague meaning of the word “cause.”\(^\text{204}\) A person would be found to have “caused” another’s death “whenever he cause[d] a substantial reduction in that person’s chance of survival.”\(^\text{205}\)

In addition to the imprecise meaning of causation, it is feasible that the courts will interpret the wrongful death statute as allowing a loss of chance claim to be brought via the statute because of the strong policy reasons underlying the loss of chance doctrine. In *Dickhoff*, the court determined recognizing loss of chance as a compensable injury will advance the fundamental principles of tort law: deterrence and compensation.\(^\text{206}\) If the court was not compelled by these underlying policy rationales, it would not have established loss of chance in *Dickhoff*, and would have instead reasserted its holding in *Fabio*. Its interpretation of the wrongful death statute as encompassing loss of chance would further these

\(^{200}\) See *Dickhoff*, 836 N.W.2d at 329–37 (citing to the *Matsuyama* decision twelve times as the court was explaining the loss of chance doctrine and its implications).

\(^{201}\) See *supra* Part V.C.

\(^{202}\) See MINN. STAT. § 573.02 (requiring death be caused by actor’s negligence).

\(^{203}\) Brennwald, *supra* note 135, at 786–87; see *Dickhoff*, 836 N.W.2d at 336.


\(^{205}\) *Id.* at 487.

\(^{206}\) *Dickhoff*, 836 N.W.2d at 336; see also Pletan v. Gaines, 494 N.W.2d 38, 42 (Minn. 1992) (“Tort liability seeks to compensate the injured and to deter wrongdoing.”).
policy initiatives by allowing a greater number of plaintiffs to bring an action.  

However, it could be argued that this method is unattractive because the court cannot cleanly interpret into the statute what is not mentioned, and this, arguably, would be an infringement on the power of the legislature. However, courts are permitted to interpret statutes, and the Minnesota courts have interpreted state statutes on many occasions in the past. Furthermore, it is important to recognize that there is a procedural safeguard given to the legislature in these circumstances—amendment power. If the legislature believes the court erred in interpreting the wrongful death statute as authorizing loss of chance claims, the legislature is free to amend the statute to reflect its actual intent. Overall, given the relative ease of the method and the court’s reliance on Massachusetts’ law in establishing loss of chance, it makes sense that the court would follow Matsuyama’s lead and interpret the wrongful death statute as allowing loss of chance claims.

While the interpretation method provided by Matsuyama seems to be the most feasible method of incorporating loss of chance into Minnesota jurisprudence, it may not be the best

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207. However, see Bushnell, supra note 8, at 21, for an argument that an increased number of claims may be disadvantageous to consumers.

208. See Minn. Stat. § 645.16 (2012) (providing factors for the court to consider when interpreting a statute); State v. McCoy, 682 N.W.2d 153, 158–59 (Minn. 2004) (stating a court can interpret a statute when it is ambiguous or subject to more than one reasonable meaning); see, e.g., Zurich Am. Ins. v. Bjelland, 710 N.W.2d 64 (Minn. 2006) (interpreting Minn. Stat. § 176.061 to hold a workers compensation insurer’s recovery was limited to wrongful death damages); Tolerton & Stetson Co. v. Ferguson, 84 Minn. 497, 88 N.W. 19 (1901) (interpreting statute regarding service of process for corporations).


method. A cleaner and more effective way of incorporating the doctrine would be for the legislature to amend the wrongful death statute to reflect the inclusion of loss of chance.\textsuperscript{211} This would allow a loss of chance plaintiff to receive a full recovery without drawing arbitrary lines based on the plaintiff surviving his or her cause of action.\textsuperscript{212} It would also bring a greater degree of clarity to the law, because the court would not simply be interpreting loss of chance as fitting into the causation element of the wrongful death statute. Instead, a plaintiff would have a distinct cause of action with clearly defined rules and boundaries.

The amendment process would also provide the legislature with the opportunity to update Minnesota’s wrongful death statute. As it stands, Minnesota’s wrongful death statute still bears the historical influences of the common law rule, which banned next of kin from bringing a wrongful death action. Minnesota’s statute is an outlier in the way it is worded, because it expressly states that all causes of action die with the decedent unless explicitly saved by statute.\textsuperscript{213} Instead of incorporating language extinguishing all claims at death, most states favor a construction that more closely resembles Lord Campbell’s Act.\textsuperscript{214} A good example of this type of statute is South Carolina’s wrongful death statute, which states:

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . . .\textsuperscript{215}

While Minnesota Statute section 573.02 incorporates similar language to that of South Carolina and other such states, it nevertheless is couched in the initial premise that all actions die with the decedent unless otherwise “brought back to life” by statute. This presents an extra layer of difficulty when trying to interpret new causes of action into the existing statutory framework

\begin{footnotes}
\footnotetext{211}{See supra Part V.D.3.}
\footnotetext{212}{See supra Part V.D.2.}
\footnotetext{213}{Minn. Stat. § 573.01.}
\footnotetext{214}{Brennwald, supra note 135, at 786–87.}
\end{footnotes}
and could be improved by more closely mirroring Lord Campbell’s Act or by adopting a survivorship statute. Overall, the best response to the adoption of loss of chance claims in Minnesota would be for the legislature to amend the wrongful death statute to provide for the loss of chance doctrine. This could just be a minor wording change, but it would allow a seamless introduction of loss of chance into the existing legal framework, eliminate inconsistencies and arbitrary line drawing, dispel the mysteries regarding how loss of chance should be applied, and would allow plaintiffs to seek a full recovery.

V. CONCLUSION

In Dickhoff, the court established loss of chance and, by holding that a patient can recover when a physician’s negligence causes a reduction in the patient’s chances to survive or recover from his or her illness, introduced a host of questions in its wake. Among these questions is whether a loss of chance claim can be brought via the wrongful death statute, or whether a decedent’s claim is permanently extinguished. The most feasible way for the court to answer this question would be to adopt the reasoning set out in Matsuyama and allow loss of chance claims to be brought via the wrongful death statute through a broad interpretation of the statute. However, because Minnesota appears to be an outlier in the way its wrongful death statute is worded, the best method in responding to the loss of chance doctrine is an amendment to the existing wrongful death statute. The legislature, through an amendment, could ensure loss of chance plaintiffs would be able to (1) obtain contingency-fee legal counsel, and (2) have clear parameters within which to bring a claim for relief.

216. See supra Part V.D.4. The adoption of a survivorship statute would eliminate the need for future interpretation of the wrongful death statute in this context, and in some ways would draw cleaner lines for a loss of chance claim, because the action would not have to be converted upon the plaintiff’s death. Rather, under a survivorship statute, the same action could be brought by the patient (or the patient’s estate), and Minnesota would not have to try to fit loss of chance within the parameters of a wrongful death claim. Id.