
Which Chance was Lost? The Psychology of Damage Awards under the Loss of Chance Doctrine

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1. INTRODUCTION

Behavioral decision theorists commonly think about their discipline in the binary terms given by normative and descriptive theory. Whereas normative theory is concerned with how people *should* behave (as given by models such as subjective expected utility or Bayes theorem), descriptive theory is concerned with how people *actually do* behave. Thanks in large part to the pioneering work of Amos Tversky and Daniel Kahneman, behavioral research has shown that people frequently and systematically violate normative theory. For example, people violate various axioms of subjective expected utility theory (Kahneman and Tversky 1979; Tversky and Kahneman 1986) and make probability judgments that deviate from Bayesian norms (Wells and Harvey 1978). Although some deviations from normative theory are properly treated as errors, others may help us reflect on the completeness of normative theory as a guide for real world decision-making.

For example, it is well known that lay people do not evaluate risks according to the criteria that experts recommend. Whereas experts are guided by probability, outcome, and expected value computations, the general public pays close attention to a risk's controllability, catastrophic potential, and the feelings of dread that it inspires (Slovic 1987, 1997; Zeckhauser and Viscusi 1990). Is the public's approach in error? The answer depends on the breadth of the perspective one adopts. If one wishes to minimize expected harm, then perhaps these psychological influences should be resisted. However, if one's goal is more complex (e.g. to *feel* safe, to eliminate certain types of future risks), then it may be reasonable to consider various psychological factors.

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1.1. The Law

Until recently, the law had little use for psychological research that suggested that people behave in ways other than that prescribed by standard normative theories. The dominant paradigm for understanding legal rules and behaviors was *homo economicus* (see, for example, Posner 1998). Under this view, behavioral studies of legal decision-making were unnecessary because, in the high stakes arena of the courtroom, standard economic models were presumed to provide adequate descriptive accounts.

Recently, though, an interdisciplinary movement called “law and behavioral science” (Korobkin and Ulen 2000) or “behavioral law and economics” (Sunstein 2000) has emerged that provides an important reality check on the economic paradigm. Scholarly studies that this movement has encouraged are beginning to provide a richer and more realistic analysis of legal rules and judgments (Farber 2001).

Consider, for example, the world of tort law where factfinders determine the size of damage awards that negligent defendants must pay injured plaintiffs. Recent research with mock jurors suggests that the amount of outrage (Kahneman, Schkade, and Sunstein 1998; Sunstein, Kahneman, and Schkade 1998) and anger (Koehler and Gershoff, [in press](#); experiment 3) factfinders feel affect the size of the awards they give. Although some have argued that such emotional responses “interfere” with legal decision-making (Posner 1999: 321), others have suggested that “the law should be structured to encourage those emotions that promote socially desired outcomes” (Kahan and Nussbaum 1996: 354).

Regardless of one’s position on the normative status of emotions in legal decision-making, it is important to learn more about the psychology that affects factfinders’ reactions. Of special interest here are factors that affect jurors’ judgments in medical malpractice cases. Specifically, this chapter examines damage awards mock jurors provide to patients (as represented by surviving family members) who were deprived of a chance to live due to a doctor’s negligence.

The policies that govern malpractice award valuations vary widely across states and jurisdictions. Sometimes jurors’ judgment plays a large role and sometimes it plays a small role or no role at all. In the coming pages, I suggest that there is a psychology to these award valuations that has its roots in classic research on the psychology of risky decision-making.

2. HOW TO COMPENSATE A LOST CHANCE TO LIVE

How much money should a person receive as compensation for a lost chance to live? On the one side are those who would argue that life is priceless, and that any attempt to assign dollar values to lives or probabilistic parts of lives is misguided. On the other side are those who would argue that monetary

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compensation for a lost chance to live should be determined by an algebraic formula based on such estimable variables as the amount of chance and future income that was lost.

Though offensive to some (cf. Fiske and Tetlock 1997), the law is largely on the side of the second group. It does not shy away from the assignment of dollars for lives even when the valuations include highly subjective variables such as lost companionship or lost hedonic value. One of the fundamental goals of American tort law is to translate injuries suffered by plaintiffs into monetary values that must be paid by negligent defendants. However, the issue of whether a lost chance for a better outcome is compensable has been controversial.

2.1. The Traditional All-or-Nothing Rule

Under traditional tort principles, monetary damages awards are provided to the plaintiff (the injured party or representatives of the injured party) on an all or nothing basis. If a defendant's negligent conduct "more likely than not" caused an injury to a plaintiff, the plaintiff is entitled to a full recovery. If the injury was death, then the defendant is required to pay the plaintiff (as represented by family members) the full value of the victim's life.

Consider a medical malpractice case in which Suzy appears at her doctor's office with a disease that affords her a 51 percent chance to live, and a 49 percent chance to die.¹ Suppose further that Suzy's doctor treats her in a negligent fashion and, in doing so, reduces her chance to live from 51 to 0 percent. Under traditional tort law Suzy's estate can recover 100 percent of the value of Suzy's life after she dies. Even though Suzy might have died from her disease if treated properly, because her death *more likely than not* was caused by the negligent behavior of her doctor, the traditional law holds the doctor fully responsible for her death. Algebraically, if $(D_2 - D_1)/D_2 > 0.50$ where $D_1 =$ pre-negligence $P(\text{death})$, and $D_2 =$ post-negligence $P(\text{death})$, then traditional tort law holds negligent party responsible for the death. This is commonly referred to as "but for" causation. That is, death probably would not have occurred "but for" the negligent conduct. If Suzy's chance to live was *less* than 50 percent prior to her doctor's negligent actions (i.e. $D_1 > 50$ percent), then the plaintiff would be unable to demonstrate "but for" causation. Algebraically, if $D_1 > 50$ percent, then $(D_2 - D_1)/D_2 < 0.50$ for all values of D_2 . Under traditional tort law, a summary judgment in favor of the defendant must be entered in such cases.

2.2. The Loss of Chance Doctrine

The all-or-nothing traditional rule may seem arbitrary to a probabilist. Does it really make sense to allow a full recovery for patients who lose a 51 percent

¹ Evidence of pre- and post-injury probabilities of death in medical malpractice cases are usually provided by experts via 5-year survival data for patients with comparable illnesses.

chance to live but to deny any recovery for patients who lose a 49 percent chance to live? Should not a 49 percent lost chance to live be treated both as an injury and one that is practically as severe as a 51 percent lost chance?

In recent years, courts in England, Canada, Australia, New Zealand, Belgium, and about half of the states in the United States have embraced a controversial alternative to the all-or-nothing rule in malpractice cases² called the “loss of chance” doctrine. According to this doctrine, if negligence is proven (usually by a preponderance of the evidence), then the defendant must compensate the plaintiff.

When the loss of chance doctrine is applied in a medical malpractice case, injury is not defined as the physical harm (usually death) that may result from the negligent acts of the defendant. Instead, the lost chance for a better outcome is the injury. In its purest form, a loss of chance occurs regardless of whether the physical injury is suffered.³ The idea is that patients have been injured by the very fact that they have been forced to accept their fate in a lottery that has worse odds than the lottery they would have faced absent the negligent acts of their doctors. Damages are awarded because doctors deprived patients of a chance to live—not because the doctors caused the ailment or the death of the patient. Accordingly, it is the value of the lost chance that must be assessed by the factfinder, and not merely the value of the life that was injured or lost.

2.3. Lost Chance Valuation: Proportional versus Discretionary

Having drawn the distinction between the value of a life and the value of a lost chance to live, it is no doubt true that the former will and should influence the latter. In his classic article on lost chance valuations, Joseph King suggested that lost chance damages should be computed by multiplying the total value of the patient’s life by the percentage lost due to negligence (King 1981). Thus, if a patient lost a 30 percent chance to live due to a doctor’s negligence, the doctor should pay the patient 30 percent of the total value of his life. Such a proportional valuation method has several nice properties. It ensures that patients who have less than a 50 percent chance to live receive compensation for their injuries. It also provides a closer link between magnitude of injury and size of the damage award than that provided by an all-or-nothing approach. Consequently, proportional valuation not only deters negligent treatment of those who have less than a 50 percent chance to live by otherwise untouchable doctors, but it also protects doctors from overpaying for the harm that they cause.

Whereas some loss of chance jurisdictions use a proportional approach to valuation, others use a more flexible discretionary valuation approach. In such

² In some countries, the loss of chance doctrine is employed in medical malpractice cases, whereas in others it is employed in legal malpractice cases.

³ In practice, courts that hear loss of chance cases usually require that a physical injury has occurred. For an exception, see *Claudet v. Weyrich* (1995).

jurisdictions, valuation of the lost chance is left entirely up to the judgment of a jury. Although some have argued that discretionary valuation “lead[s] to more just results because the jury has the opportunity to assess and evaluate all factors,” (Smith 1991: 177), some courts do not agree:

We feel that there is no real difference between either method. Whichever method is used, the decisionmaker must make a highly subjective decision. In the [discretionary valuation] method . . . the decisionmaker must make the subjective decision of what amount of money would fully compensate the plaintiff for her injuries. The [proportional valuation] approach requires the decisionmaker to make the subjective decision of allotting a monetary amount for the value of plaintiff’s life. We agree with plaintiff’s counsel in the present case that the [proportional valuation] approach basically involves a subjective judgment being mathematically discounted. We are unconvinced that the mathematical discounting of the subjective value of human life somehow makes that approach any more precise and more accurate than the approach we have chosen. (*Borgren v. U.S.* 1989: p. 583)

2.4. An Early Case: *Chaplin v. Hicks* (1911)

One of the earliest applications of discretionary valuation in a loss of chance case occurred in the English case *Chaplin v. Hicks* (1911). The defendant Hicks was a theatrical manager who set up a contest for “young ladies desirous of obtaining engagements as actresses” (1911: 786). The prize was a 3-year acting contract. According to the rules, the United Kingdom would be divided into ten districts and photographs of the aspiring actresses would be placed in various newspapers. The five actresses who received the most votes from newspaper readers in each of the districts were then promised interviews with Hicks. From among that group of fifty finalists, Hicks would choose twelve winners. Approximately 6000 women participated in the contest. The plaintiff Chaplin received the most votes from her district, and thus became one of the fifty finalists. However, Hicks breached his contract by failing to provide Chaplin with adequate notice of her interview. Chaplin was not interviewed hence was not among the twelve winners. The contractual breach by Hicks reduced Chaplin’s chance to win from 24 percent (twelve out of fifty) to 0 percent. At trial, a jury found in favor of Chaplin and awarded her £100. This amount was approximately 16 percent of the value of the average winner’s contract. An appellate court affirmed on grounds that “expulsion from a limited class of competitors . . . is an injury and may be a very substantial one” (1911: 795).

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The discretionary valuation in *Chaplin* resulted in an award that was smaller than what a proportionate approach would have yielded. Though interesting, it is hard to assess the significance of this outcome. The award may have been influenced by a desire to produce a round number, bad math, or jury compromise. It might also have resulted from a shared belief that, because Ms. Chaplin was unlikely to win the contest even if the negligence had not occurred, her lost chance was worth less than 24 percent of the value of the contract.

3. LOST CHANCE: A FOREGONE DISCOUNT OR CONCRETE LOSS?

By its very name, the “loss of chance” calls to mind lost opportunity: A lost opportunity to receive a more positive outcome. This idea is much like a foregone discount. Therefore, one possibility is that jurors who are asked to value lost chances may do so much as they would other foregone discounts. A second possibility is that jurors may regard a lost chance as an injury or concrete loss. Under this view, the lost chance is a penalty or surcharge. Whether jurors view a lost chance as a foregone gain or as a concrete loss may influence the damage awards they provide.

According to the value function of prospect theory (Kahneman and Tversky 1979), people think about gains and losses relative to reference points rather than in terms of absolute amounts. Losses are disliked about twice as much as the absolute equivalent gains are liked, and the shape of the utility curve is concave in the domain of gains and convex in the domain of losses. Figure 12.1 depicts the prospect theory value function.

If the prospect theory value function describes injury valuations in loss of chance cases, jurors’ damage awards will not be well described by a proportional

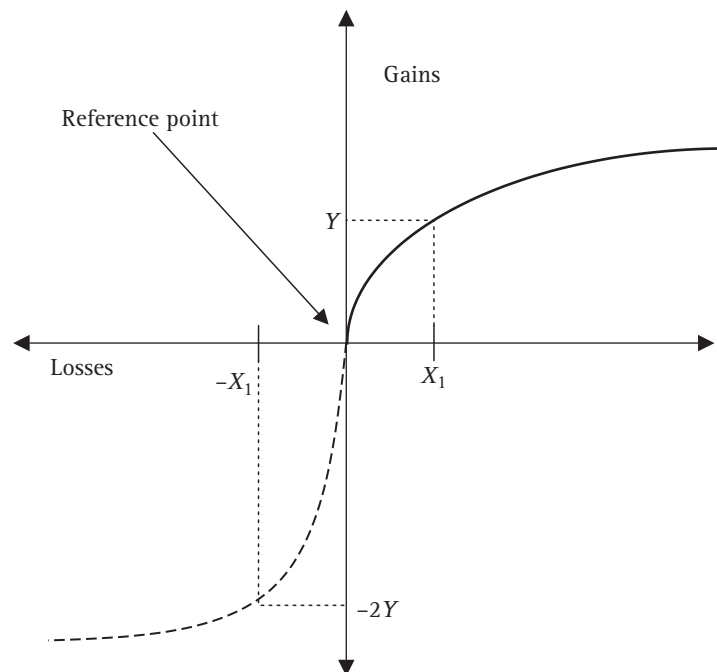


Figure 12.1. *Prospect theory value function*

valuation scheme.⁴ Whereas a proportional valuation treats every fixed X percent lost chance equivalently regardless of pre- and post-negligence chance to live, prospect theory suggests that deviations from reference points will play a key role. It is, therefore, important to identify which reference point jurors use.⁵ There are several possibilities.

3.1. Lost Chance as Foregone Discount

3.1.1. Reference Point: $P(\text{Live}) = 0$ percent

Because loss of chance cases are usually brought to trial after the patient has died, jurors may use a 0 percent live reference point. Under this scenario, lost chances to live are viewed as foregone chances for better outcomes in the concave portion of the value function (upper right quadrant). If true, then for a fixed $(A - B)$ percent lost chance, where $A =$ pre-negligence chance to live, and $B =$ post-negligence chance to live, the injury will appear *more* damaging when it occurs to sicker people (i.e. low A values) and higher awards will be assigned in these cases.⁶ Thus, a 20 percent lost chance will be viewed as worse (hence deserving of a higher damage award) when the victim's pre-negligence chance to live was 20 percent rather than, say, 100 percent. This is because the concave utility curve for gains shows a greater difference between the utilities of a 0 percent chance to live and a 20 percent chance to live than between the utilities of 80 and 100 percent.

3.2. Lost Chance as Concrete Loss

If lost chances are viewed as concrete losses, then the convex portion of the prospect theory value function (lower left quadrant) applies. It provides a very different set of predictions about how jurors will treat a fixed $(A - B)$ percent lost chance. Under this scenario, either of two reference points seems reasonable.

3.2.1. Reference Point: $P(\text{Live}) = P(\text{Live}, \text{pre-negligence})$

One possible reference point is the patient's pre-negligence chance to live. Under this scenario, a lost chance will be viewed as a movement from a neutral reference point onto the steepest part of the loss function. All fixed $(A - B)$ percent

⁴ At first blush, one might presume that the prospect theory decision weight function provides a better model for understanding how people think about lost chances than the prospect theory value function. The weighting function describes how people weight or "distort" (Gonzalez and Wu 1999) probabilities, whereas the value function concerns the values that people assign to different prospects. In the tort law context, prospects typically include physical injuries such as a broken leg or death. But, as noted previously, the injury in loss of chance cases is the lost chance itself rather than the physical harm that may result from a defendant's negligent actions. In these cases, the lost chance is the prospect to which jurors attach value. Consequently, I look to the value function to provide insight on valuations of lost chances.

⁵ Prospect theory does not provide a clear account of reference point formation. It only supplies a model for the evaluation of options conditioned on the use of certain reference points.

⁶ For simplicity, uncertainty regarding proof of negligence is ignored throughout.

lost chances will have identical disutilities. This implies that jurors will assign identical damage awards for fixed $(A - B)$ percent lost chances, regardless of whether the negligence is inflicted on a relatively healthy or sick patient. Thus, a 20 percent lost chance will lead to the same jury award whether the victim's pre-negligence chance to live was 20, 100 percent, or any other value. This insensitivity to starting point is a property shared by the proportional valuation model. However, given that lost chances in the present discretionary valuation model take place on the steepest part of the loss curve (i.e. just to the left of the reference point), the model also implies that jurors will provide damage awards that are systematically *larger* than those assigned by proportional valuation.

3.2.2. Reference Point: $P(\text{Live}) = 100$ percent

Another possible reference point is a 100 percent chance to live. This reference point may exist if jurors fail to adjust for the preexisting injury suffered by patients prior to the negligent conduct of their doctors. As in the $P(\text{Live}) = P(\text{Live, pre-negligence})$ scenario, the $P(\text{Live}) = 100$ percent scenario implies that lost chances take place in the domain of losses, and that injuries that occur to healthy people (e.g. 100 percent chance to live, pre-negligence) will take place on the steepest part of the loss curve (which, in turn, produces relatively large damage awards). However, unlike the $P(\text{Live}) = P(\text{Live, pre-negligence})$ scenario, the $P(\text{Live}) = 100$ percent scenario implies that lost chances will not seem as bad when they occur to relatively unhealthy patients relative to healthy patients. Thus, a 20 percent lost chance will receive a smaller damage award when the victim's pre-negligence chance to live was only 20 percent to begin with as opposed to, say, 100 percent. This is because the convex utility curve for losses at this reference point (100 percent chance to live) shows a smaller difference between the utilities of a 20 percent chance to live and a 0 percent chance to live than between the utilities of 100 and 80 percent. Figure 12.2 depicts the shape of

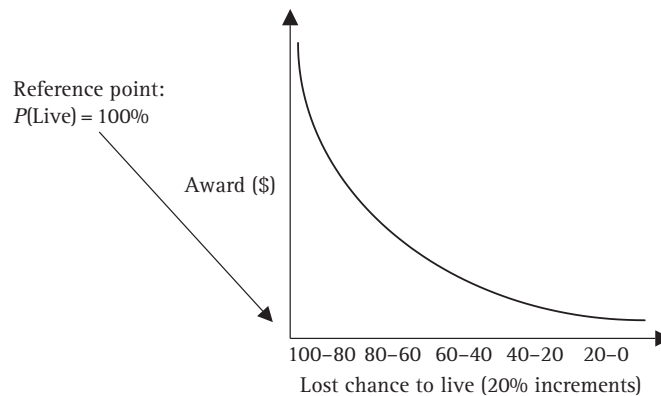


Figure 12.2. Theoretical award curve for lost chances

Note: Reference point = 100% chance to live.

the theoretical damage award curve that corresponds to a $P(\text{Live}) = 100$ percent reference point.

4. LOST CHANCE: CERTAINTY AND FRAMING EFFECTS

Thus far, I have suggested that jurors' damage award judgments in loss of chance cases may depend, in part, on *which* X percent chance was lost. Depending on the reference point jurors adopt, a person who loses their last 20 percent chance to live may be compensated differently than one who loses their first 20 percent chance.

4.1. Certainty

A related possibility is that award judgments may depend on whether jurors believe that the injury caused a change in the patient's chance to live from certain to uncertain or vice versa. A patient who was certain to live pre-negligence has incurred a life status change from certainty to uncertainty. Where there once was no risk, now risk appears. Conversely, a patient whose *post-negligence* chance to live is 0 percent has incurred a life status change from uncertainty to certainty. Where the patient once had a chance to live, he or she now has no chance at all. However, a patient who faced *some* chance to die pre-negligence and retains *some* chance to live post-negligence has not experienced a change of status from certain to uncertain or vice versa. Will jurors find that negligent acts that move patients between risk and certainty are more harmful?

Kahneman and Tversky (1979) and Tversky and Kahneman (1981) identified the presence of "certainty effects" in judgment. Recently, Loewenstein et al. (2001) offered a general framework for understanding how people feel about risk and certainty. They note that there is something about changes from the perception of certain safety to the perception of possible harm that arouses our emotions. Likewise, we feel relief when risks are eliminated completely, no matter how small the risks were initially. For example, psychophysical studies indicate that the mere possibility of harm—as opposed to the precise probability that the harm will occur—impacts arousal levels. If true, then there may be an arousal response in loss of chance cases such that jurors respond with higher awards in response to injuries that move a patient away from and/or toward certainty and uncertainty.

4.2. Framing Effects: Lost Chance to Live versus Increased Chance to Die

The framing literature is replete with studies that show foregone gains can be translated into sustained losses (Levin, Schneider, and Gaeth 1998). Sometimes this is accomplished by altering the perceived reference point from which

an outcome is evaluated. For example, a food product that is described as containing 25 percent fat may appear unhealthy because 25 percent fat is implicitly compared to a 0 percent fat reference point. However, when the same product is described as 75 percent lean, it may appear more healthy because the implicit reference point is 0 percent lean (see Levin and Gaeth 1988). This finding has special relevance to loss of chance cases because a 20 percent *loss of chance to live* could also be presented to jurors as a 20 percent *increased chance to die*. Unlike the loss of chance frame, the increased chance to die frame unambiguously places the decision-maker in the domain of losses. Thus, although the two frames describe identical outcomes, jurors who learn of an “increased chance to die” may find the injury to be more severe (and thus deserving of a higher damage award) than jurors who learn of a “loss of chance.”

5. RESULTS OF STUDIES WITH MOCK JURORS

To test these ideas, Koehler (2002: experiment 1) presented several hundred mock jurors with a written breast cancer medical malpractice case. The jurors were asked to identify how much money, if any, they would award the plaintiff. In this case, there was uncontroversial evidence that the patient lost a 20 percent chance to live and that the value of her life was \$10,000,000. The patient’s pre-negligence chance to live was identified as either 100, 80, 60, 40, or 20 percent.

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The results were most consistent with a prospect theory loss function in which jurors evaluate lost chances relative against a reference point of a 100 percent chance to live (or, equivalently, a 0 percent chance to die). However, even this model was not perfectly predictive of damage awards. Jurors assigned much higher awards for cases involving a perfectly healthy patient (i.e. $P(\text{Live, pre-negligence} = 100 \text{ percent})$) than for cases involving sick patients (i.e. $P(\text{Live, pre-negligence} < 100 \text{ percent})$). Among the sick patients, awards did not vary as a function of degree of illness. The certainty effect predictions were only partially supported. Whereas relatively high awards were given for patients whose chance to live was reduced to 80 percent from 100 percent, there was no comparable boost in awards for patients whose chance to live was reduced from 20 to 0 percent. In stark contrast to the predictions of a proportional valuation model, median awards were significantly larger than \$2,000,000 regardless of pre-negligence chance to live.

Koehler (2002) also reported an effect for frame, though the effect apparently did not involve a reference point shift. Jurors awarded more money at each of five pre-negligence probability levels when the doctor’s negligent acts were framed as increasing the patient’s risk of death rather than as decreasing the patient’s chance to live. However, the pattern of results between the two frames was otherwise similar. That is, in both frames, higher awards were given to patients whose pre-negligence chance to survive was 100 percent.

In a follow-up study using (a) different versions of a videotaped hypothetical colon cancer trial, and (b) deliberation by seventy-five juries ($n = 5$ to 6 people

per jury), Koehler (2002: experiment 2) essentially replicated the frame effect. Jurors who learned about a 10 percent increased risk of death gave higher ratings to the strength of the plaintiff's case and assigned higher damage awards than jurors who learned about a 10 percent loss of chance to live. These follow-up results are significant because they indicate that the framing effect can appear even in the context of a rich, complex trial environment.

6. CONCLUSIONS AND IMPLICATIONS

I noted at the outset that behaviors that violate normative theory sometimes challenge the prescriptive status of that theory. However, the law has a long history of neglecting the results of behavioral studies (Saks and Baron 1980). Not only do high court judges frequently favor untutored behavioral intuitions over scientific data (see, for example, Saks 1974), but no Supreme Court majority opinion from 1970 to 1988 “relied even partly on the psychology of jury behavior to justify a decision about the proper way to conduct a trial” (Tanford 1990: 139).

Against this backdrop, it is unclear how the legal establishment will respond to empirical data that show how people value losses of chance. If the views of one law professor are any indication, these data may need to be bolstered with *legal arguments* before they impact the rule of law. Fischer (2001) accepts the finding that people value lost chances differently depending on where the loss falls on the probability to live spectrum. But he contends that this descriptive result reflects little more than erroneous human judgment: “[A] 10 percent chance of losing \$100,000 in support is \$10,000 regardless of whether the reduction is from 10 percent to 0 percent or from 40 percent to 30%” (p. 620). In response, I note that the question of interest—“How much is a 10 percent chance of losing \$100,000 worth?”—is not identical to the mathematical question “What is 10% of \$100,000?” Loss of chance jurisdictions that rely on discretionary valuations rather than proportional valuations do so out of an implicit recognition that jurors should use some judgment—rather than a mathematical rule—when deciding how much money to award. Indeed, it would defeat the purpose of a discretionary valuation rule if it required that lost chance awards be identical to the expected value of lost wages or any other tangible loss.⁷

Although courts in discretionary valuation loss of chance jurisdictions allow jurors to value awards as they see fit, only one court has expressly suggested that jurors may wish to consider where the lost chance falls on the probability spectrum. The Louisiana Supreme Court concluded that a plaintiff may wish to argue that “a ten percent chance of survival may be more significant when reduced from ten percent to zero than when reduced from forty to thirty percent,” (*Smith v. State Dept. of Health and Hosps.* 1996: 549).

⁷ Fischer (2001) notes that where the loss falls on the probability spectrum may properly influence mental distress damages.

Interestingly, the empirical results summarized here and detailed in Koehler (2002) suggest that the court's intuition may be flawed. Jurors probably do not value the loss of a final X percent chance to live more than other losses. In fact, the available data suggest that current loss of chance law may not be at odds with the psychology of judgment.

First, consider the finding that mock jurors reserve their highest awards for lost chances suffered by those who were not previously at risk (i.e. 100 percent chance to live). In most loss of chance states, a perfectly healthy person who suffers an injury is not entitled to participate in a loss of chance claim. A lost chance claim ordinarily requires a preexisting injury. For claims made by those who were perfectly healthy prior to the negligent actions, the all or nothing doctrine is applicable. Thus, a judgment for the plaintiff results in an award for 100 percent of the value of the patient's life regardless of the amount of chance that was lost. This outcome is fairly consistent with the awards provided by mock jurors in Koehler (2002) which averaged 85 percent of the value of the victim's life when a perfectly healthy patients lost a 20 percent chance to live.

Second, with the exception of perfectly healthy patients, mock jurors in Koehler (2002) gave similar awards for a 20 percent lost chance, regardless of which 20 percent on the probability spectrum was lost. This result is consistent with current practice in the many proportional valuation jurisdictions. However, the awards mock jurors provided were significantly larger than proportional valuations. Though the ecological validity of this study remains to be examined, the data suggest that discretionary valuation jurisdictions may have higher awards than proportional valuation jurisdictions.

Finally, a word about the strategic use of the data. First, the finding that mock jurors assigned high discretionary valuations may influence decisions about (a) whether to proceed to trial, and (b) what constitutes a reasonable settlement offer. The data suggest that defendants in discretionary valuation jurisdictions who are likely to be found negligent may wish to make a proportional settlement offer rather than take their chances with the jury. Second, empirical evidence from two studies that mock jurors gave larger awards for injuries that were presented as increased chances to die rather than as decreased chances to live has strategic value. There seems to be something worse about a doctor who increases a patient's chance to die relative to one who decreases a patient's chance to live. If true, then plaintiffs should use increased risk language whereas defendants should use lost chance language. What effect, if any, the combined use of these phrases has on factfinders awaits future research.

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AQ: please check if deletion of 'n' in "Nonnuse" is okay

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