

# OREGON CASE UPDATE

## Amendments Retroactive if Legislature Indicates They Are

case in point...

**From the desk of Ryan McLellan:** Typically, legislative amendments to statutes do not apply retroactively. This means that causes of action that arose prior to the amendments being adopted are typically analyzed under the prior version of the statute. However, the legislature has the option of allowing amendments to apply retroactively to still-pending causes of action. Read on to see how courts grapple with these retroactive amendments.

**Claims Pointer:** In this case arising out of child abuse, the Oregon Court of Appeals held that because the legislature expressly made the applicable statute retroactive, it applied to all causes of action for which a final judgment had not yet been entered, including the plaintiff's claims. The case is a reminder of both the legislature's ability to amend statutes retroactively, and also of the retroactivity of causes of action based on child abuse.

Doe v. Silverman, 287 Or App 247 (August 16, 2017)

One afternoon in 2011, Joseph Smith ("Smith") began experiencing visual difficulties, confusion, slurred speech, and headache. Worried he might be having a stroke, he went to an emergency room ("ER") operated by Providence Health & Services ("Providence"). The ER physician did not correctly diagnose Smith's symptoms and discharged him. He returned to the ER the following day with significantly increased symptoms, and the physician again failed to correctly diagnose his condition. It was not until end of the following week that an MRI was obtained, which revealed that Smith had suffered substantial brain damage from a stroke. His stroke-related injuries were permanent and severe. Smith sued the doctors who had attended him, their respective medical groups, and Providence for medical negligence. He alleged that the defendants were negligent for, among other things, failing to conduct thorough physical and neurological examinations, failing to order an MRI, and failing to start Smith on aspirin. He further alleged that as a result of their negligence, he lost a chance for treatment of his stroke, which, 33 percent of the time, provides a much better outcome with reduced or no stroke symptoms.

The defendants moved to dismiss the

complaint, arguing that Smith had failed to state a claim on two grounds: first, that Oregon law does not permit recovery for loss of chance; and second, that if such a theory were recognized in Oregon, it would subvert the requirement that a plaintiff in a medical malpractice case must plead and prove a causal connection between the defendant's breach of duty and the plaintiff's injuries. The trial court agreed and granted defendants' motion. Smith appealed, and the Court of Appeals affirmed the trial court's dismissal, determining that Smith's allegation that he lost a 33 percent chance for a better outcome was insufficient to allege that there was a reasonable probability that defendants' alleged negligent omissions resulted in his injury. Smith appealed to the Oregon Supreme Court.

The Supreme Court framed the issue as whether the loss-of-chance theory of injury should be cognizable in the context of common-law negligence claims of medical malpractice in Oregon. The Court explained that the loss-of-chance theory is responsive to cases like this one, where the defendants undertook care of Smith when he presented with symptoms of a stroke, they breached their duty to Smith by performing below the standard of care, Smith suffered brain damage, and the defendants caused Smith to lose a 33 percent chance at recovering

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from the stroke. The Court examined cases from other jurisdictions discussing the loss-of-chance theory of injury. The Court noted that when the theory was accepted, it was usually limited to medical malpractice cases because in the context of medical malpractice, it is the alleged malpractice itself that prevents the plaintiff from proving that he or she would have had a better outcome. For the Court, it would be unjust to deny a person the chance to recover because he or she could not prove what would have happened had the physician provided proper treatment.

The Court explained that when the lost chance is considered the “injury” in a medical malpractice action, the plaintiff must then prove that, more likely than not, the defendant’s negligence caused the plaintiff to lose the chance of a favorable medical outcome. For the Court, such claims should be permitted proceed because not recognizing the loss-of-chance theory of injury would insulate medical providers from malpractice claims when the odds of a favorable outcome were less than 51 percent before treatment, even if the plaintiff could prove that they had an opportunity to realize a favorable outcome with appropriate treatment. Without the loss-of-chance doctrine, a negligent doctor could not be found liable as long as the patient’s opportunity for recovery from the missed diagnosis was less than 50%. According to the court, this would force the patient would bear the entire cost of the negligent conduct, which would prevent the risk of injury from being distributed among the responsible parties. Moreover, it would avoid another important function of the tort system—preventing future harm.

In light of these considerations, the Court concluded that a limited loss-of-chance theory of recovery should be recognized in common-law negligence cases involving medical malpractice in Oregon. The trial court’s dismissal was reversed, and the case was remanded for further proceedings.

View full opinion at: <http://www.publications.ojd.state.or.us/docs/A158501.pdf>

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