“Loss of a Chance”
Sometimes the nature of a disease means that a patient has virtually no chance of long-term survival, but an early diagnosis may prolong the patient’s life or permit a slim chance of survival. Should a practitioner who negligently fails to make that early diagnosis be liable even though the chances are that she could not ultimately prevent the patient’s death? The courts have been divided on this question. Some jurisdictions have held that defendant should not be liable if it was more likely than not that the patient would have died anyway. 65 Other courts have concluded that if the defendant increased the risk of death by lessening the chance of survival, such conduct was enough to permit the jury to decide the proximate-cause issue, at least where the chance of survival aw significant.66 “The underlying reason is that it is not for the wrongdoer, who put the possibility of recovery beyond realization, to say afterward that the result was inevitable.”67
 In a Washington case the defendant allegedly failed to make an early diagnosis of the patient’s lung cancer, and the patient eventually died.68 The defendants offered evidence that, given that type of lung cancer, death within several years was virtually certain, regardless of how early the diagnosis was made. The defendants moved for summary judgment. Because the plaintiff could not produce expert testimony that the delay in diagnosis “more likely than not” caused her husband’s death, the trial court dismissed the suit. For purposes of appeal, both parties stipulated that if the cancer had been diagnosed when the patient first saw the defendants, his chances of surviving five years would have been 39 percent, and that at the time the cancer was actually diagnosed his chances were 25 percent. Thus, the delay in diagnosis may have reduced the chance of a five-year survival by 14 percent. The appellate court held that the reduction was sufficient evidence of causation to allow the issue to go to the jury, who would then decide whether the negligence was a substantial factor in producing the injury. “To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence.”69 The court also noted, however, that if the jury found the defendants liable they would not necessarily be liable for al damages caused by the patient’s death but only for those resulting from the early death.

 The question of damages is closely related to the element of causation. In addition to proving that the injury was caused by negligence, the plaintiff must prove which injuries resulted from the negligent conduct and what those injuries are worth. These compensate the plaintiff for out-of-pocket loss, such as the cost of medical and rehabilitation treatments and lost earnings, and for noneconomic loss, such as pain and suffering.70 (While economic losses can be fairly accurately demonstrated, it can be difficult to attach dollar values to pain and suffering. Nevertheless, juries do assign dollar amounts to these noneconomic injuries, sometimes in very large amounts. For this reason some of those who argue for reform in the tort system suggest limitations on recovery for pain and suffering, and in fact several states have enacted statutes limiting these damages. One such statute was recently upheld as constitutional.) Punitive damages are seldom awarded in negligence cases