Herskovits v. Group Health Cooperative:  
Negligent Creation of a Substantial Risk of Injury is a Compensable Harm

I. INTRODUCTION

In Herskovits v. Group Health Cooperative of Puget Sound, the Supreme Court of Washington announced its willingness to permit recovery in tort for "loss-of-a-chance" claims. For the purposes of this Note, a loss-of-a-chance claim is an action for the negligent deprivation of a less-than-probable chance to survive a preexisting, life-threatening condition. The

2. The "loss-of-a-chance" claim seeks recovery for the negligent destruction of an opportunity to avoid a harm that, under the circumstances, was likely to occur in any event. The loss-of-a-chance plaintiff is unable to demonstrate that the negligent defendant caused the resultant injury: the effects of the defendant's negligence are indistinguishable from the effects of the harm to which the defendant increased the plaintiff's risk. Nevertheless, the plaintiff seeks recovery for wrongful interference with valued chance interests in the avoidance of harm. See generally King, Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 Yale L.J. 1353 (1981); 30 Am. Jur. Trials § 4 (1983).

3. This Note primarily concerns actions for the loss of a chance to survive a preexisting disease or injury. Courts have permitted recovery for the negligent destruction of chance interests in the avoidance of harm in other contexts as well. Some courts permit recovery for the negligent creation of a susceptibility to future injury even when the injury in question is unlikely. See infra notes 73-78 and accompanying text. A Washington trial court permitted recovery, in reliance on Herskovits, for the negligent deprivation of a 20% possibility of winning reversal of an adverse lower court judgment. Daugert ex rel. Simms v. Pappas, No. 83-2-00823-5 (Superior Court for Whatcom Co. 1984), rev'd, Daugert v. Pappas, ___ Wash. 2d ___, 704 P.2d 600 (1985).

The Daugert decision is a fascinating sequel to the Herskovits case. The Daugert plaintiff brought a legal malpractice action against an attorney who had represented it in an earlier contract dispute. The plaintiff had suffered an adverse judgment in the contract dispute and instructed its attorney to petition the Supreme Court of Washington for review. The attorney, Pappas, filed the petition one day late and failed to secure an extension of time, with the result that his client lost the opportunity to win reversal of the lower court judgment. The client then brought a legal malpractice action against Pappas, seeking damages for the loss of a chance to win the relief it sought in the foreclosed appeal. Daugert, ___ Wash. 2d ___, 704 P.2d 600, 602.

The trial court entered summary judgment in favor of the disappointed client-plaintiff on the issues of duty and breach of duty; the defendant attorney was negligent in failing to make a timely filing. On the issue of causation, the trial court permitted the jury to hear expert testimony as to the likelihood that the plaintiff would have won the relief it had sought if the defendant-attorney had properly filed for review. The jury concluded that the defendant's breach of duty to his client caused the client to lose a

251
issue before the Herskovits court was whether a defendant hos-

20% chance of winning the relief sought before the high court. Id. at —, 704 P.2d at 602-03.

Relying on Herskovits, the trial court permitted recovery for the loss of a 20% chance of winning the appeal. Consistent with Herskovits, the loss of a chance to secure a favorable result was treated as an injury in its own right, an injury to be compensated according to the magnitude of the chance interest destroyed. Id. at —, 704 P.2d at 603. Accordingly, the trial court entered judgment against the defendant attorney in the amount of 20% of the judgment entered against the plaintiff client in the earlier contract dispute. Id. at — n.1, 704 P.2d at 603 n.1. The plaintiff had held what might be regarded as a lottery ticket with a proven one-in-five shot at winning. The defendant wrongfully deprived the plaintiff of that ticket. The fact that the ticket's chance of winning was less than 51% (a probability) did not warrant a conclusion that the chance was valueless. Hence, the plaintiff was deemed entitled to recover that percentage of the “jackpot” corresponding to the likelihood that his ticket would have won.

The Supreme Court of Washington reversed the trial court, however, distinguishing the unique needs of the medical malpractice plaintiff from those of the legal malpractice plaintiff. When, as in the Herskovits case, a physician negligently increases a patient’s chance of dying from a preexisting condition likely in itself to prove fatal, the plaintiff cannot prove that but for the physician’s negligence the patient probably would have lived longer. Under such circumstances, tort law must recognize the fact that the loss of a substantial opportunity to survive is itself a grievous loss to the patient and should be compensated according to the magnitude of the chance foreclosed. Justice Pearson, writing for a unanimous Daugert court, indicated the high court’s continuing approval of the result in Herskovits: “A reduction in one’s opportunity to recover (loss of chance) is a very real injury which requires compensation.” Id. at —, 704 P.2d 605.

By contrast, in the legal malpractice setting, the Daugert court held that loss-of-a-chance recovery is inappropriate because “there is no lost chance.” Id. Despite the negligent foreclosure of the Daugert plaintiff’s opportunity to win reversal on appeal, the plaintiff will still enjoy an opportunity to be heard on the merits of the suit he would have pursued. Id. A legal malpractice action requires a trial within a trial. The “outer” trial addresses and resolves the questions of the malpractice defendant’s duty and breach of duty. In order to resolve the questions of causation and damages, the trial court must conduct the “inner” trial on the issue of whether the negligently foreclosed appeal would have provided the relief sought. The Daugert court held that the trial court should have ruled, as a matter of law, on whether or not the appeal would have been successful. The merits of the defunct appeal are properly treated as a question of law for the court, not as a question of fact for the jury. Accordingly, the trial court must substitute its legal judgment for that of the forum withheld from the plaintiff. Because the trial court is qualified to make this substitute judgment, there is no need for the finder of fact to estimate the probability that the plaintiff’s appeal would have been successful. The judge must rule on the issue of causation and damages according to the judge’s yes-or-no determination of whether the foreclosed appeal would have won the relief sought. Id. at —, 704 P.2d at 604.

In effect, the Daugert court held that in the legal malpractice setting the plaintiff gets a second bite at the “apple” wrongfully withheld from him by the negligent attorney. The Daugert court further provided that if the malpractice plaintiff remains unsatisfied with the trial court’s judgment on the merits of the stillborn appeal, the plaintiff may appeal the trial court’s judgment and thus enjoy even a third bite at the apple. Id. at —, 704 P.2d at 605. An appeal to the Washington Supreme Court would be necessary to ensure a just result especially in those cases in which the foreclosed appeal urged a result requiring a significant departure from settled legal doctrine. If, for example, Ms. Herskovits' attorney had negligently failed to perfect her appeal from the trial court's
pital may be liable for wrongful death if, as a result of the hospital's negligent diagnosis, its patient suffered a delay in treatment for cancer that reduced his chance of survival from thirty-nine percent to twenty-five percent. The doctrinal question thus presented was whether the negligent destruction of a mere possibility of survival should support wrongful death recovery absent proof that the defendant's conduct was a cause in fact of the victim's death. The majority concluded that evidence sufficient to support a finding that the defendant negligently increased a risk of injury or death will suffice to create a jury question on the issue of causation in a wrongful death action. Thus, the

entry of summary judgment for Group Health, the trial court in her subsequent malpractice action probably would have concluded that her appeal would have been in vain in any event. Only the supreme court itself could make an authoritative judgment as to the merits of her ambitious legal theory.

The significance of Daugert for the purpose of this Note is that it has recognized a reasoned exception to the Herskovits doctrine while at the same time emphasizing the court's continuing endorsement of loss-of-a-chance recovery in the medical malpractice context.


5. The testimony of the plaintiff's expert, when taken in the light most favorable to the plaintiff, indicated that Group Health's negligent diagnosis led to a six-month delay in treatment that caused Mr. Herskovits' chance of survival to fall from 39% to 25%. Herskovits, 99 Wash. 2d at 612, 664 P.2d at 475. The plaintiff was in no position, then, to prove that but for the negligence of Group Health, the victim probably would have survived—even as long as five years. Under Washington law, "[c]ause in fact can be established by proving that but for the breach of duty, the injury would not have occurred." Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 476, 656 P.2d 483, 493 (1983). Accordingly, the conduct of the Herskovits defendant could not have been shown to have been a cause-in-fact of the victim's death; it was more probable than not that Mr. Herskovits would have died of cancer within five years in any event.

6. The Herskovits court issued four opinions. Justice Dore wrote the "lead" opinion on behalf of the majority with Justice Rosellini concurring in it. Justice Pearson concurred specially and wrote a separate opinion that won the support of a plurality of the court (Williams, C.J., and Utter and Stafford, JJ.) Justice Brachtenbach filed a dissenting opinion in which Justice Dimmick joined. Justice Dolliver filed a separate dissent.

The Herskovits majority, consisting of those six justices who favored either the Dore "lead" approach or the Pearson "plurality" approach to loss-of-a-chance recovery, agreed to reverse and remand the case for trial on the merits. Herskovits, 99 Wash. 2d at 619, 664 P.2d at 479. The lead opinion and the plurality opinion agreed only on the actual holding of the court, that the loss-of-a-chance plaintiff states a prima facie case on the issue of causation in a wrongful death action by presenting evidence that the defendant negligently increased the risk that the victim would die of the condition that, in fact, proved fatal. See infra notes 164-80 & 194-211 and accompanying text. Because neither opinion won the support of a majority of the court (the Pearson plurality opinion was signed by only four justices), the decision of the Herskovits court to remand the action provided a result without a controlling rationale. Hence, the significance of the decision as precedent is simply that it suggests that future loss-of-a-chance actions may be held to support recovery under Washington law.
Herskovits court acknowledged an action for the negligent destruction of a less-than-probable chance of survival.

Recognition of the loss-of-a-chance claim is a dramatic development in the evolution of Washington tort law. Before Herskovits, the negligent deprivation of a chance of survival was not regarded as a compensable injury in Washington courts unless the chance destroyed was at least a reasonable probability of survival.\textsuperscript{7} The wrongful destruction of a reasonable probability of survival will support an action for wrongful death: but for the defendant’s conduct, the victim probably would have survived. Following Herskovits, the negligent destruction of a less-than-probable chance of survival may\textsuperscript{8} permit recovery even when the odds suggest that the chance destroyed would have been unavailing.\textsuperscript{9} Thus, the umbrella of Washington’s tort law has been expanded to protect a hitherto unrecognized field of personal interests in survival.

This Note commends the Herskovits court for recognizing the loss of-a-chance claim as a legitimate cause of action. Chance interests are worthy of the protection of tort law. We can be statistically certain that the destruction of chance interests in survival results in actual losses.\textsuperscript{10} The burden of such losses should not fall exclusively on the victim, particularly when the interfering conduct of the wrongdoer has deprived the individual victim of the ability to know and prove with certainty the value of the lost chance.\textsuperscript{11} The burden of the loss can be shifted in an equitable manner to the negligent actor.\textsuperscript{12} Moreover, the risk of tort liability will provide a useful spur to the medical community to exercise due care in the diagnosis and treatment of typi-

\textsuperscript{7} “The causal relationship of an accident or injury to a resulting physical condition must be established by medical testimony beyond speculation and conjecture. The evidence must be more than the accident ‘might have’...cause[d] the physical condition. It must rise to the degree of proof that the resulting condition was probably caused by the accident, or that the resulting condition more likely than not resulted from the accident, to establish a causal relation.” Miller v. Staton, 58 Wash. 2d 879, 886, 365 P.2d 333, 337 (1961).

\textsuperscript{8} See supra note 6.

\textsuperscript{9} Despite the fact that the Herskovits court assumed that the victim’s chance of surviving five years was no greater than 39% at any relevant time, Herskovits, 99 Wash. 2d at 610, 664 P.2d at 475, the court remanded the action for trial, suggesting that Mr. Herskovits’ loss of a chance to survive is a compensable injury.

\textsuperscript{10} See infra notes 134-35 and accompanying text.

\textsuperscript{11} See infra note 131 and accompanying text.

\textsuperscript{12} See infra notes 169-71 and accompanying text.
cally fatal diseases and conditions. Finally, the recognition of the value of a chance interest in survival is the rational culmination of a deepening commitment within the law of torts to compensating those whose exposure to grave risks of harm has been negligently increased. The Herskovits decision, while dramatic, builds upon a well-documented tradition of solicitude toward loss-of-a-chance victims.

The Herskovits court was deeply divided, however, as to both whether and under what restrictions loss-of-a-chance recovery should be permitted. The theory of recovery adopted by the court’s lead opinion contrasts so starkly with that of the specially concurring plurality that the majority’s decision to remand the case for trial lacks a controlling rationale. The two opinions proposed conflicting methods of calculating damages in loss-of-a-chance actions. Hence, the value of Herskovits as precedent lies only in its pronouncement that Washington courts are willing to recognize the loss-of-chance claim as one upon which relief may be granted.

This Note recommends that Washington courts adopt the approach to loss-of-a-chance recovery proposed by the Herskovits plurality. The plurality’s approach provides for a recovery commensurate with the magnitude of the chance interest destroyed, thereby ensuring fairness to both the plaintiff and the defendant. The proposal permits recovery without resort to corruption of well-settled tort causation doctrine, thus providing the most efficient accommodation of the competing policy concerns. The Note identifies the presumption of proportionate causation underlying the plurality’s approach to loss-of-a-chance actions. The Note also explores appropriate limitations on loss-of-a-chance recovery and the implications of Washington’s adoption of the doctrine.

The lead opinion, by contrast, is internally inconsistent and unworkable as an approach to the loss-of-a-chance problem.

13. See infra note 133 and accompanying text.
14. See infra notes 59-163 and accompanying text.
15. See infra notes 38-58 and accompanying text.
16. See infra notes 194-98 and accompanying text.
17. See infra notes 169-71 & 210-11 and accompanying text.
18. See supra note 6.
19. See infra notes 167-68 and accompanying text.
20. See infra notes 175-76 and accompanying text.
21. See infra notes 181-83 and accompanying text.
22. See infra notes 184-93 and accompanying text.
This Note will discuss the weaknesses of the lead opinion’s analysis and the insubstantiality of the dissenters’ concerns.

II. THE FACTUAL SETTING OF THE Herskovits CLAIM

Leslie Herskovits, a member of Group Health Cooperative of Puget Sound (Group Health) since 1955, visited the hospital in June and July of 1974, complaining of chest pain. In December of 1974, Mr. Herskovits returned to the hospital, seeking relief from a cough that had plagued him for the previous six weeks. Group Health doctors failed to detect any indication of lung cancer from the tests they administered during the patient’s visits in 1974.

In May of 1975, Mr. Herskovits, again suffering from chest pain and coughing, consulted a private physician, Dr. Jonathon Ostrow, whose evaluation led to a diagnosis of lung cancer. Group Health surgeons removed Mr. Herskovits’ left lung in July of 1975. Twenty months later, at the age of sixty, Mr. Herskovits died of cancer.

Acting as the personal representative of Mr. Herskovits’ estate, the decedent’s widow brought a wrongful death action, alleging that Group Health had been negligent in failing to diagnose her husband’s lung cancer. The complaint alleged that if the defendant had exercised due care in its investigation of Mr. Herskovits’ symptoms, the hospital probably would have discovered his condition by December of 1974. The plaintiff’s expert testified that “if the tumor was a ‘stage 1’ tumor in December 1974, Herskovits’ chance of a 5-year survival would have been 39 percent. In June 1975, his chances of survival were 25 percent assuming the tumor had progressed to ‘stage 2.’ Thus, the delay in diagnosis may have reduced the chance of a 5 year survival by 14 percent.” The complaint thus alleged that the defendant’s failure to diagnose the decedent’s lung cancer “led to and caused

23. See infra notes 194-211 and accompanying text.
24. See infra notes 212-18 and accompanying text.
26. Id. at A-3.
27. Id.
28. Id. at A-3, A-4.
29. Id. at A-4.
30. Id. at A-5.
31. Herskovits, 99 Wash. 2d at 610, 664 P.2d at 475.
33. Herskovits, 99 Wash. 2d at 612, 664 P.2d at 475.
his death."\textsuperscript{34}

Group Health moved for summary judgment on the claim, arguing that the plaintiff had failed to offer evidence sufficient to support a finding that the hospital’s conduct was a cause in fact of Mr. Herskovits’ death.\textsuperscript{35} The trial court granted the defendant’s motion, finding that “[t]he plaintiff failed to produce expert testimony which would establish that the decedent probably would not have died on or about March, 1977, but for the conduct of the defendant”\textsuperscript{36} The plaintiff appealed the decision directly to the Washington Supreme Court.\textsuperscript{37}

III. THE COURT’S RESPONSES TO THE Herskovits DILEMMA

Under existing Washington law, the trial court properly granted Group Health’s motion for summary judgment on the Herskovits wrongful death claim.\textsuperscript{38} Arguably, the defendant breached a duty of care in its treatment of the patient’s complaints.\textsuperscript{39} Nevertheless, the defendant was entitled to judgment as a matter of law because no reasonable jury could conclude, on the basis of the plaintiff’s proofs, that the defendant’s negligence probably caused Mr. Herskovits’ death.\textsuperscript{40} Only by resort to “speculation and conjecture” could a jury find that Mr. Herskovits more likely than not would have survived but for the negligent reduction of his already marginal expectation of survival. According to the plaintiff’s own statistics, the decedent’s cancer probably would have taken the course it took regardless of the

\textsuperscript{34} Id. at 620, 664 P.2d at 479.

\textsuperscript{35} Id. at 611, 664 P.2d at 475.


\textsuperscript{37} Brief for Appellant at 4, Herskovits, 99 Wash. 2d 609, 664 P.2d 474 (1983).

\textsuperscript{38} Despite the fact that the Herskovits majority reversed the judgment of the trial court, the lead and plurality opinions recognized that on the basis of the plaintiff’s proofs Group Health could not be found to have caused the death of Mr. Herskovits. The lead opinion announced that negligent destruction of a possibility of survival would not “necessitate a total recovery . . . for all damages caused by the victim’s death.” Herskovits, 99 Wash. 2d at 619, 664 P.2d at 479. The plurality viewed the injury to be compensated not as Mr. Herskovits’ death but as the negligent destruction of a less-than-probable chance of survival. Id. at 634, 664 P.2d at 487 (Pearson, J., concurring). Unless Mr. Herskovits probably would have survived but for the negligence of Group Health, the causal relationship between the defendant’s wrongdoing and the victim’s subsequent death is not sufficient to support liability for the victim’s death. See supra note 6.

\textsuperscript{39} The Herskovits court assumed, for the purpose of reviewing the lower court’s entry of summary judgment for the defendant, that Group Health was negligent in failing to diagnose Mr. Herskovits’ lung cancer following the examination it performed in December, 1974. Herskovits, 99 Wash. 2d at 610, 664 P.2d at 475.

\textsuperscript{40} See supra note 38.
University of Puget Sound Law Review [Vol. 9:251

six-month delay in diagnosis and treatment.\textsuperscript{41}

On the other hand, each of the Herskovits opinions acknowledged the "apparent harshness" of denying compensation to one who suffers, by reason of another's wrongdoing, the loss of a chance to survive.\textsuperscript{42} The fact that the justices were unanimous in their sympathy for the loss-of-a-chance victim suggests that respect for the value of a chance interest in survival rests upon more than mere sentimentality.\textsuperscript{43}

Faced with the conflict between well-settled tort causation doctrine (and the policy interests protected thereby)\textsuperscript{44} and the justices' reluctance to permit the wrongfully destroyed chance interest to go unredressed, the Herskovits court split three ways.

The dissenting justices urged the court to affirm the trial court's adherence to the "but for" formulation of the cause in fact\textsuperscript{45} requirement. The dissenters stressed the importance of the policy concerns protected by the cause in fact standard\textsuperscript{46} and argued that Herskovits was a hard case making bad law.\textsuperscript{47}

The lead opinion, in effect, permitted a relaxation of the traditional cause in fact standard in order to permit wrongful death recovery in loss-of-a-chance actions.\textsuperscript{48} The court reversed

\textsuperscript{41} A cancer patient with a 39\% chance of surviving five years is probably going to die of cancer within five years whether or not that chance is subsequently reduced.

\textsuperscript{42} The Herskovits plurality noted the "harsh and arbitrary results" of denying recovery for negligence that destroys a possibility of survival that falls short, by any margin, of a probability of survival. Herskovits, 99 Wash. 2d at 635 n.1, 664 P.2d at 487 n.1 (Pearson, J., concurring). Even the dissenters conceded that "the apparent harshness of this result cannot be overlooked." Id. at 642, 664 P.2d at 491 (Brachtenbach, J., dissenting).

\textsuperscript{43} Substantial considerations of fairness and public policy require protection of chance interests in survival. See infra notes 131-35 and accompanying text.

\textsuperscript{44} The cause in fact requirement protects the negligent defendant from liability for injuries that probably would have occurred even in the absence of his wrongful conduct. "The 'but-for' test seems to be the best the law can do in its effort to offer an approximate expression of an accepted popular attitude toward responsibility. In passing homely judgments on everyday affairs, we assume that we should not blame a person whose conduct 'had nothing to do with' some unfortunate occurrence that followed." Malone, Ruminations On Cause-In-Fact, 9 Stan. L. Rev. 60, 66 (1956).

\textsuperscript{45} "To hold a defendant liable without proof that his actions caused plaintiff harm would open up untold abuses of the litigation system." Herskovits, 99 Wash. 2d at 642, 664 P.2d at 491 (Brachtenbach, J., dissenting).

\textsuperscript{46} Justice Brachtenbach was especially concerned that to give medical malpractice plaintiffs the benefit of a relaxed standard or proof of causation would adversely affect the delivery of medical care. Id. at 638, 664 P.2d at 488-89 (Brachtenbach, J., dissenting). For a critique of this concern see infra notes 212-13 and accompanying text.

\textsuperscript{47} Herskovits, 99 Wash. 2d at 642, 664 P.2d at 491 (Brachtenbach, J., dissenting); id. at 643, 664 P.2d at 491 (Dolliver, J., dissenting).

\textsuperscript{48} See infra notes 194-211 and accompanying text.
the lower court's entry of summary judgment for the defendant and remanded the action for trial.49 According to the lead opinion, once the plaintiff has offered evidence sufficient to support a finding that the defendant has negligently exposed the victim to an increased risk of injury, it is within the province of the jury to determine whether the increased risk was "a substantial factor" in bringing about the harm.50 "The step from the increased risk to causation is one for the jury to make."51 Presumably, then, the jury's determination that the defendant's conduct was a substantial factor in causing the victim's injury will not be disturbed even when such conduct was neither alleged nor proven to have been a "but for" cause of the harm.52 The loss-of-a-chance plaintiff is deemed entitled to this procedural advantage (a relaxed burden of producing evidence of causation) in order that the negligent defendant not enjoy the benefit of the uncertainty created by the defendant's own conduct.53

The Herskovits plurality proposed that the negligent destruction of a possibility of survival be treated as an injury in its own right.54 By characterizing the injury to be compensated as the chance interest destroyed, rather than as the death made marginally more likely, the plurality approach permits recovery for the loss suffered without corrupting the cause in fact standard.55 In order to recover, the loss-of-a-chance plaintiff must prove that but for the negligence of the defendant, the victim would have enjoyed an enhanced (albeit less-than-probable) expectation of survival.56 The justifiable reluctance of the majority of courts to relax the but-for standard of causation in negligence actions has been the principal obstacle to loss-of-a-chance recovery.57 The plurality's argument permits recovery for the

49. Herskovits, 99 Wash. 2d at 619, 664 P.2d at 479.
50. Id. at 617, 664 P.2d at 478.
51. Id.
52. See infra note 209 and accompanying text.
53. See infra notes 204-10 and accompanying text.
55. The plaintiff in Herskovits was in a position, after all, to prove that but for the alleged negligence of Group Health, Mr. Herskovits would not have suffered the loss of a possibility of survival.
57. The but-for standard of cause in fact requires, at a minimum, that the injured plaintiff prove that the injury probably would not have occurred if the defendant had exercised due care. "[T]he 'preponderance of the evidence' rule or the 'more likely than not' standard is the most widely followed approach . . . for causation questions in general . . . . This rule denies compensation for the loss of a not-better-than-even chance of
negligent destruction of cherished interests in survival while preserving the integrity of tort causation doctrine, thus neatly harmonizing policy concerns previously thought to be antithetical. 58

The plurality’s analysis of the loss-of-a-chance problem is both theoretically and practically superior to the approaches adopted respectively by the lead opinion and by the Herskovits dissenters. The lead and dissenting opinions represent opposite horns of an avoidable dilemma, one that arises from a failure to recognize that the wrongful destruction of a chance interest in survival is an injury worthy in itself of redress. Both public policy and precedent militate in favor of tort law’s commitment to protecting chance interests from negligent interference.

IV. THE EVOLUTION OF TORT LAW TOWARD PROTECTING CHANCE INTERESTS IN SURVIVAL

Tort law is dynamic. 59 “New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before.” 60 Yet courts are essentially adjudicatory rather than legislative bodies. 61 The primary role of the judiciary is to apply the existing law, not to create new torts on an ad hoc basis when moved by novel, emotionally compelling claims for relief. 62 Accordingly, while “mere novelty” is not a conclusive objection to a proposed remedy, the claim must be cognizable within the general rules governing recovery in tort. 63

When presented with a novel but emotionally compelling claim, a court inclined to permit recovery may extend the protective reach of an existing cause of action by creative interpretation and elaboration. 64 But when applicable tort doctrine fails

avoiding some adverse result.” King, supra note 2, at 1367.

58. See infra notes 164-76 and accompanying text.


60. Id. at 3.

61. 20 AM. JUR. COURTS § 64 (1983).

62. Despite the readiness of courts to extend the protection of tort law to hitherto unrecognized personal interests, there persists among judges a devotion to precedent. “The general practice of adherence to precedent is, of course, supported by strong policy arguments concerned with like treatment of like cases and predictability of decisions.” PROSSER & KEETON, supra note 59, at 19.


64. For example, courts applied a unique “trespass to chattels” theory before an
to protect interests indirectly acknowledged to be worthy, a court may finally announce the law's independent commitment to affording redress for injury to the interest in question.65

The approach to loss-of-a-chance recovery proposed by the Herskovits plurality simply articulates and explains an increasingly explicit commitment within the law of torts to those wrongfully deprived of chance interests in survival.66 The solicitude of the courts toward loss-of-a-chance victims is evident in a variety of contexts.

A. Collateral Recognition Within the Law of Torts of the Significance of the Loss of a Chance

Tort law tacitly acknowledges the personal significance of a chance interest in the avoidance of harm by providing recovery for the emotional distress that may beset a person wrongfully deprived of such a chance.67 One of the leading cases in this area is the 1958 New York decision Ferrara v. Galluchio.68 The Ferrara court recognized an action for "cancerphobia," a morbid fear of cancer the plaintiff developed after the defendant radiologist caused her to be burned by overdoses of x-rays.69 Similarly, in Dempsey v. Hartley,70 the plaintiff was held entitled to offer evidence that she had developed a reasonable fear of contracting cancer as a result of the injuries she suffered through the defendant's negligence.71 In neither Ferrara nor Dempsey did the plaintiff attempt to prove that she probably would develop cancer. Nevertheless, in each case the presiding court held that negligently inflicted injury giving rise to an increased susceptibility to cancer may justify recovery for the victim's proximately resulting emotional distress. The loss of a chance to lead a can-

action for emotional distress was recognized in order to redress the emotional harm inflicted when the defendant mishandled the corpse of the plaintiff's loved one. Prosser & Keeton, supra note 59, at 63.

65. An example of this process is the development of the recognition that freedom from emotional distress is an interest worthy of the protection of tort law. The interest was recognized early in assault cases but it has not been "until comparatively recent decades [that] the infliction of mental distress [has] served as the basis of an action, apart from any other tort." Prosser & Keeton, supra note 59, at 55.

66. See infra notes 67-135 and accompanying text.

67. See Elliot v. Arrowsmith, 149 Wash. 631, 272 P.32 (1928) (reasonable dread of possible future disease or disability is a compensable injury in tort).


69. Id. at 22, 152 N.E.2d at 253, 176 N.Y.S.2d at 1000.

70. 94 F. Supp. 918 (E.D. Pa. 1951).

71. Id. at 920-21.
cer-free life was acknowledged to be a grievous injury that could be expected to cause serious emotional harm.

Significantly, although the focus of the court’s attention in such an action for mental distress is on the plaintiff’s emotional suffering, the court must also concern itself with the magnitude of the chance interest destroyed. The recovery of the cancerphobia plaintiff, for example, must reflect not only the gravity of her suffering but the degree to which she was actually put at risk of that which she has come to fear. After all, “[t]here should be no recovery for hypersensitive mental disturbance where a normal individual would not be affected under the circumstances.”72 Indirectly, then, the plaintiff’s increased susceptibility to harm is treated as an injury the magnitude of which will govern the recovery available for emotional distress.

Many courts permit recovery of parasitic damages for the negligent creation of a susceptibility to future disease or disability when that susceptibility arises from a present, proven injury.73 Unless the future harm to which the plaintiff is prone is reasonably likely to occur, the plaintiff may not recover for the losses associated with the condition itself.74 But when the plaintiff’s immediate injuries give rise to a risk of future medical complication, the jury will be permitted to consider the extent and the gravity of that risk when estimating appropriate damages for the plaintiff’s present loss.75 The Supreme Court of Oregon, for example, upheld a trial court ruling in Feist v. Sears, Roebuck & Company permitting the jury to hear expert testimony that the plaintiff’s skull fracture left her susceptible to a slight risk of meningitis.76 Affirming the trial court’s ruling on the admissibility of the medical expert’s testimony, the supreme court explained:

We believe, as a matter of common sense, that a jury can properly make a larger award of damages in a case involving a skull fracture of such a nature as to result in a susceptibility to meningitis than in a case involving a skull fracture of such a nature


74. Damages In Tort Actions, supra note 73, at § 13.01 (courts generally will not permit recovery for future conditions unless the future conditions are proven to be reasonably certain or at least reasonably probable to arise).

75. Id. at § 13.03.

as not to result in any such danger, risk or susceptibility.\textsuperscript{77}

For purposes of cause in fact scrutiny, the risk of future harm, once proven, becomes an integral aspect of the plaintiff’s current injury. But for the defendant’s conduct the plaintiff would not have suffered a skull fracture-with-a-risk-of-meningitis. The plaintiff’s additional recovery does not require proof that she will or probably will suffer the future harm.\textsuperscript{78}

The availability of recovery for emotional distress and of parasitic damages for risks of future medical complications reflects the value courts attach to chance interests in the avoidance of harm.\textsuperscript{79} Recovery of damages for either type of injury is feasible within the constraints of the cause in fact requirement: the plaintiff is able to prove the requisite but-for relationship between the defendant’s conduct and the resulting emotional harm or injury-including-susceptibility. But when the defendant’s conduct has simply increased a preexisting probability that the victim would suffer harm that in fact occurred, the plaintiff is unable to demonstrate that the defendant caused the victim’s injury. For example, the physician who negligently increases a probability that a patient will die from cancer cannot be shown to have caused the cancer-related death. Nevertheless, some American courts have been willing to compensate wrongfully destroyed chance interests even when the plaintiff cannot prove that the already probable injury was caused in fact by the loss of a marginal chance to avoid it.

B. \textit{The Malone Analysis: Manipulation of the Cause-In-Fact Requirement as a Means of Providing Loss-of-a-Chance Recovery}

American courts have demonstrated a willingness to compensate wrongfully destroyed chance interests by selectively

\textsuperscript{77} Id. at 412, 517 P.2d at 680.

\textsuperscript{78} The \textit{Feist} court implicitly takes the position that evidence tending to prove a susceptibility to injury may be reliable enough to justify additional recovery even though the demonstrated susceptibility fails to rise to the level of a reasonable probability of harm. Other jurisdictions, including Washington, see infra text accompanying notes 186-93, have held inadmissible expert testimony as to a less-than-probable complication of plaintiff’s current injury. \textit{Damages In Tort Actions}, supra note 73, at § 13.04. The virtue of the \textit{Feist} approach over the Washington position is that the former avoids the arbitrary and unfair result that a reasonable probability of future harm will support recovery as if the harm were certain to occur while even a substantial possibility of future injury will receive no consideration at all.

\textsuperscript{79} See King, supra note 2, at 1381.
relaxing the plaintiff's burden of proof of causation.\textsuperscript{80} Ordinarily, the plaintiff may not recover unless the evidence demonstrates, at a minimum, that but for the defendant's wrongful conduct the injury complained of would not have occurred.\textsuperscript{81} But while the cause in fact requirement performs a vital function in the administration of justice,\textsuperscript{82} it has proven remarkably elastic when courts have found competing policy concerns more compelling.\textsuperscript{83} When the law has extended its special solicitude to a particular category of persons in order to protect them against a particular category of risks, "courts have shown very little patience with the efforts of defendant[s] to question the sufficiency of the proof on cause."\textsuperscript{84}

Professor Malone, in his article \textit{Ruminations On Cause-In-Fact},\textsuperscript{85} illustrates the elasticity of tort causation standards by documenting the effect of statutorily created duties of care on judicial administration of the cause in fact requirement.\textsuperscript{86} For example, prior to the 1920s, courts rarely found a common law basis on which to impose a duty of care on sea captains to attempt the rescue of seamen lost overboard.\textsuperscript{87} Even when a duty of care was acknowledged, courts generally refused to permit the jury to find that \textit{but for} the captain's breach of a duty to rescue, the seaman's life would have been saved.\textsuperscript{88} The judges concluded, not implausibly, that a crew member discovered missing from a ship at sea had less than a probable chance to survive even had rescue been attempted.\textsuperscript{89} The causal relationship between the captain's conduct and the seaman's death was regarded as too speculative to support wrongful death recovery.\textsuperscript{90} In the early 1920s, however, the federal government enacted extensive legislation designed to enhance the safety of maritime working conditions and to provide tort recovery for

\textsuperscript{80} See Malone, supra note 44, at 68-85.
\textsuperscript{81} See PROSSER \& KEETON, supra note 59, at 265. Whether a court adopts the "but for" or "substantial factor" approach to causation in fact, the plaintiff, as a general matter, will be denied recovery if the injury probably would have resulted even in the absence of the defendant's wrongdoing. \textit{Id.} at 268.
\textsuperscript{82} See Malone, supra note 44, at 66.
\textsuperscript{83} \textit{Id.} at 68-85.
\textsuperscript{84} \textit{Id.} at 73.
\textsuperscript{85} See supra note 44.
\textsuperscript{86} \textit{Id.} at 75-81.
\textsuperscript{87} \textit{Id.} at 75-76.
\textsuperscript{88} \textit{Id.} at 76.
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.}
seamen in the event of negligence by their employers. Since the early 1930s, courts have furthered the policy objectives underlying the federal maritime statutes by covertly relaxing the plaintiff's burden of proof on causation in "man overboard" cases. A captain's failure to undertake reasonable rescue efforts has resulted in liability even when the actual possibility of rescue was remote.

One such "man overboard" wrongful death action, Gardner v. National Bulk Carriers, Inc., often cited as early authority for loss-of-a-chance recovery, provides an excellent illustration of Professor Malone's thesis. In Gardner, the captain of defendant's ship learned sometime after 11:30 p.m., December 8, 1958, that a crewman had not been seen since 6:00 p.m. that evening. The captain elected not to make a rescue attempt nor even to slow the ship's speed during the search of the vessel. The evidence at trial indicated the difficulty of a search at night of the eighty-five miles of ocean the ship had covered since the victim had last been seen. The defendant argued that even if the ship's propeller or the indigenous sharks and barracuda had not killed the seaman, the prevailing currents could have carried him far from the ship's original path. Backtracking would have been of questionable value.


92. Id. at 77.

93. Id.

94. 310 F.2d 284 (4th Cir. 1962), cert. denied, 372 U.S. 913 (1963). Note that Gardner was decided six years after the publication of professor Malone's Ruminations On Cause-In-Fact in 1956.

95. The Gardner court permitted wrongful death recovery for the negligent destruction of what the court found to have been a reasonable possibility of rescue at sea. 310 F.2d 284, 287-88 (4th Cir. 1962). Four years later, the Fourth Circuit cited Gardner as authority for relaxing the plaintiff's burden of proof of causation in a medical malpractice action for the negligent destruction of probability of survival. Hicks v. United States, 368 F.2d 626, 632-33 (4th Cir. 1966). Although the plaintiff in Hicks was deprived of a probability of survival, the court strongly suggested that the wrongful destruction of a reasonable possibility of survival would support recovery in the medical malpractice context just as it had in the "man overboard" context. On the basis of this suggestion in Hicks, other courts have elected to resolve doubts on the issue of causation in favor of the loss-of-a-chance plaintiff. See infra note 130.

96. Gardner, 310 F.2d 284-85.

97. Id.

98. Gardner, 310 F.2d at 289 (Haynsworth, J., dissenting).

99. Id.

100. Id. at 290.
Nevertheless, the court imposed liability on the vessel owner for the seaman’s death.\textsuperscript{101} The court held that “[o]nce the evidence sustains the reasonable possibility of rescue, ample or narrow, according to the circumstances, total disregard of the duty, refusal to make even a try, as was the case here, imposes liability.”\textsuperscript{102} The master had a solemn duty to make “every reasonable effort” to rescue the seaman.\textsuperscript{103} Although the master’s neglect of the duty may not have foreclosed a probability of rescue, it rendered the seaman’s death a virtual certainty. Under such circumstances, “[p]roximate cause . . . is implicit in the breach of duty.”\textsuperscript{104}

The failure of the captain to make a reasonable rescue attempt not only destroyed the seaman’s residual chance of survival; it also deprived the plaintiff of the only means by which the magnitude of the chance destroyed could be meaningfully evaluated.\textsuperscript{105} If the captain had performed his duty, either the seaman would have been rescued or his survivors would at least have known that a rescue was unlikely. The \textit{Gardner} court suggested in dicta that when the defendant’s negligence has “destroyed the victim’s power of proof,”\textsuperscript{106} the defendant may not be heard to complain that the plaintiff has failed to demonstrate the loss of a reasonable possibility of rescue. The defendant “has not only violated the victim’s substantive right to security, but he has also culpably impaired the latter’s remedial right of establishing liability . . . . The legal consequence of that is . . . that the onus is then shifted to the wrongdoer to exculpate himself.”\textsuperscript{107}

Professor Malone observed the same relaxation of plaintiff’s burden of causation in fact in what he termed the “escape from fire” cases.\textsuperscript{108} When, for example, a railroad has negligently run over a firehose or otherwise blocked a fire crew’s access to a fire on plaintiff’s property, courts have permitted the plaintiff to recover notwithstanding substantial evidence that the efforts of

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\textsuperscript{101}. \textit{Gardner}, 310 F.2d at 288.
\textsuperscript{102}. \textit{Id.} at 287 (emphasis added).
\textsuperscript{103}. \textit{Id.}
\textsuperscript{104}. \textit{Id.}
\textsuperscript{105}. \textit{Id.}
\textsuperscript{107}. \textit{See supra} note 106.
\textsuperscript{108}. \textit{See} Malone, supra note 44, at 77-80.
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the firefighters would have salvaged little in any event.\textsuperscript{109}

Ironically, Professor Malone, writing in 1956, was convinced that victims of medical malpractice would not enjoy such judicial indulgence on cause in fact issues.\textsuperscript{110} Malone believed that the courts would continue to impose an exacting burden of proof of causation in negligence actions against health care providers.\textsuperscript{111} The exercise of professional judgment would be unduly inhibited by a more lenient standard.\textsuperscript{112} In fact, however, since 1966 courts have manifested a willingness to relax the plaintiff’s burden of proof of causation in the medical malpractice context.\textsuperscript{113} When the victim’s death from a pre-existing illness has been made more probable by a physician’s negligence, courts have demonstrated an increasing impatience with the defendant’s complaint that survival would not have been assured even in the absence of such negligence.

C. Loss of a Chance Recovery in the Medical Malpractice Setting

1. Hicks v. United States:\textsuperscript{114} Equitable Considerations Lead Courts to Relax the Loss-of-a-Chance Plaintiff’s Burden of Proof of Causation.—In 1966, the United States Court of Appeals for the Fourth Circuit found authority in its decision in Gardner v. National Bulk Carriers, Inc. to relax a medical malpractice plaintiff’s burden of proof of causation.\textsuperscript{115} In Hicks v. United States, the court held that if the plaintiff’s decedent probably would have survived but for the defendant physician’s negligent diagnosis, the plaintiff need not prove to a certainty that proper care would have saved her life.\textsuperscript{116} The Hicks plaintiff was deemed entitled to a less exacting standard of proof of causation because the negligent defendant destroyed not only a probability of recovery but also the only means of proving that

\textsuperscript{109} Id. at 79-80.
\textsuperscript{110} Id. at 85-88.
\textsuperscript{111} Id. at 85.
\textsuperscript{112} Id. at 86.
\textsuperscript{113} See infra notes 114-30 and accompanying text.
\textsuperscript{114} 368 F.2d 626 (4th Cir. 1966).
\textsuperscript{115} Id. at 632-33.
\textsuperscript{116} “The law does not in the existing circumstances require the plaintiff to show to a certainty that the patient would have lived had she been hospitalized and operated on promptly.” Hicks, 368 F.2d at 632. The Herskovits plurality cited Hicks for the proposition that wrongful destruction of a probability of survival will support recovery. Herskovits, 99 Wash. 2d at 627, 664 P.2d at 483 (Pearson, J. concurring).
the lost opportunity would have ensured recovery.\textsuperscript{117} Under such circumstances, the defendant cannot equitably object that the plaintiff’s proofs are hypothetical and probabilistic.\textsuperscript{118}

The Supreme Court of Pennsylvania relied upon Hicks in Hamil v. Bashline\textsuperscript{119} as authority for relaxing the plaintiff’s burden of proving injury to a reasonable medical certainty. The defendant hospital allegedly deprived Mr. Hamil of a seventy-five percent chance of surviving a heart attack when it negligently failed to provide adequate emergency room care.\textsuperscript{120} Mr. Hamil’s widow subsequently brought a wrongful death action for damages resulting from her husband’s death.\textsuperscript{121} The Hamil court pronounced the “reasonable medical certainty” standard of proof of causation unrealistic when the “fact finder must consider not only what \textit{did} occur, but also what \textit{might} have occurred, i.e., whether the harm would have resulted from the independent source even if defendant had performed his service in a non-negligent manner. Such a determination as to what might have happened necessarily requires a weighing of probabilities.”\textsuperscript{122}

The Hicks decision illustrates Professor Malone’s thesis that judicial administration of the cause in fact requirement is responsive to whether, in a particular action, the plaintiff or defendant belongs to a category of persons to which the law extends special solicitude. When the “policy thrust of the rule violated by defendant is short and timid,” a court may dismiss the plaintiff’s suit if the plaintiff’s proof on causation requires any degree of speculation.\textsuperscript{123} But when (as in Gardner) the plaintiff’s interests are a subject of special concern within the law, “the court neatly turns the weapon upon the defendant and focuses attention on the speculative character of the competing cause advanced by him.”\textsuperscript{124} The Hicks court analogized the physician’s duty of care to a patient to a ship master’s duty toward

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\textsuperscript{117} & Hicks, 368 F.2d at 632. \\
\textsuperscript{118} & Id. \\
\textsuperscript{120} & Id. at 263, 392 A.2d at 1283. \\
\textsuperscript{121} & Id. \\
\textsuperscript{122} & Id. at 269-70, 392 A.2d at 1287. \\
\textsuperscript{123} & See Malone, supra note 44, at 81. \\
\textsuperscript{124} & Id. at 70. \\
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a crew member lost overboard. The duty of the master to the crewman is so solemn that neglect of the duty to attempt rescue will shift to the plaintiff the benefit of every reasonable doubt on the issue of causation: "[p]roximate cause here is implicit in the breach of duty." The reliance of the Hicks court on Gardner suggests that the court has come to view the duty of a physician to a patient as comparable in its solemnity to the duty of a ship captain to a crew member. Hence, now in the medical malpractice setting,

[w]hen a defendant’s negligent action or inaction has effectively terminated a person’s chance of survival, it does not lie in the defendant’s mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass.

The Hicks court’s suggestion that the negligent destruction of a substantial possibility of survival will support recovery was unnecessary to decide the case, and hence was simply dicta. The plaintiff in Hicks, like the plaintiff in Hamil, suffered the loss of a probability of survival. Each court permitted recovery within the modified constraints of the cause in fact requirement: but for the defendant’s negligence, the victim probably would have survived. The Hicks dictum, however, indicates a willingness to permit recovery even when the chance destroyed was no more than a possibility of survival. The frequency with which

125. Hicks, 368 F.2d at 632-33.
126. Id. at 633 (quoting Gardner v. National Bulk Carriers, Inc., 310 F.2d 284, 287 (4th Cir. 1962)).
127. It is not at all surprising that the special concern that legislatures and courts began to show in the 1960s for the isolated and dependent consumer should in time accrue to the benefit of the health care consumer. Justice Brachtenbach, in his Herskovits dissent, agreed with the Malone view that medical malpractice actions represent a "class of controversies" in which "extreme caution should be exercised in relaxing causation requirements." Herskovits, 99 Wash. 2d 609, 637-38, 664 P.2d 474, 488 (1983) (Brachtenbach, J., dissenting). Nevertheless, health care providers no longer enjoy quite the degree of deference to which they were once deemed entitled. Witness, for example, the demise of the charitable immunity defense for nonprofit hospitals. See Pierce v. Yakima Valley Memorial Hosp. Assn., 43 Wash. 2d 162, 260 P.2d 765 (1953) (overruling a long line of cases that upheld the charitable immunity defense for nonprofit hospitals).
128. Hicks, 368 F.2d at 632.
the *Hicks* dictum is cited suggests that other courts are also willing to permit recovery for the negligent destruction of a mere possibility of survival.\(^{130}\) There are substantial arguments in favor of permitting recovery for the loss of a possibility of survival.

2) *Loss-of-a-Chance Recovery: The Major Arguments.—* Four major arguments have been advanced in support of recovery for the negligent destruction of a possibility of survival. First, fairness requires that when the defendant's tort has not only deprived the victim of a substantial possibility of survival but also destroyed the plaintiff's ability to know and to prove

\(^{130}\) The *Herskovits* plurality relied upon three cases as authority for the proposition that the negligent destruction of a less-than-probable chance of survival is a compensable injury. *Id.* at 631-32, 664 P.2d at 485 (Pearson, J., concurring). These cases [O'Brien v. Stover, 443 F.2d 1013 (8th Cir. 1971); Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970); James v. United States, 483 F. Supp. 581 (N.D. Cal. 1980)] each cite *Hicks* for the proposition that the negligent destruction of a substantial possibility of survival imposes liability. Moreover, according to the *Herskovits* plurality view, these courts viewed "the reduction in or loss of the chance of survival, rather than the death itself, as the injury." *Herskovits* at 632, 664 P.2d at 485.

Each of these cases is equivocal, however, as to the nature of the injury being compensated. On the one hand, each plaintiff offered evidence that the victim suffered unnecessary physical and mental suffering as a proximate result of the defendant's failure to render an accurate and timely diagnosis. Negligent *aggravation* of a preexisting injury is a compensable harm within the constraints of the standard cause in fact formulation: but for the defendant's wrongdoing, the victim would not have suffered the additional harm. On the other hand, these courts seemed willing to *presume* that the loss of an abstract, statistical chance of survival operated to the physical detriment of the victim and that the presumed physical harm, whether in the form of additional physical suffering or shortened lifespan, should somehow be compensated.

The willingness of these courts to presume that the loss of a chance to survive, resulting from a negligently delayed diagnosis of cancer, causes actual physical harm is well illustrated by Jeanes v. Milner, 428 F. 2d 598 (8th Cir. 1970). In *Jeanes*, the defendant's negligent failure to render a prompt diagnosis of cancer caused the victim's chance of survival to fall from 35% to 24%. *Id.* at 604. Recovery could have been predicated on the substantial evidence before the court that an earlier diagnosis would have made treatments possible that would have spared the victim several weeks of severe discomfort. *Id.* The court went further, however, and expressed a willingness to infer that, but for the defendant's negligence, the victim's life "would have been saved or at least prolonged . . . had he received early treatment." *Id.* The only factual basis in the opinion for this inference of causation was expert testimony that "every day's delay was prejudicial to [the victim's] recovery." *Id.* While every day's delay may indeed be prejudicial to the victim's abstract prospect of survival, no automatic inference arises that a one-month delay in arriving at a diagnosis of cancer actually prevents the victim's recovery or even shortens his lifespan. The *Jeanes* court's willingness to permit recovery for the loss of an 11% prospect of recovery seems, therefore, to rest on a tacit presumption that the lost chance actually causes, to one degree or another, a premature death. See *infra* text accompanying notes 181-83 for a discussion of the presumption of proportionate causation underlying the approach to loss-of-a-chance recovery adopted by the *Herskovits* plurality.
with certainty whether that chance would have been availing, the defendant must be answerable. The Hicks dictum reflects a sense of outrage that a negligent defendant might reap the ill-gotten benefit of the plaintiff's inability to prove whether the lost chance would have mattered to the victim.

Second, the one percent distinction between a fifty-one percent probability of survival and a 50% possibility of survival has no talismanic property such that destruction of the former warrants full wrongful death recovery while destruction of the latter warrants no consideration at all. Nevertheless, the wrongful death plaintiff who seeks recovery predicated on the negligent destruction of a fifty percent possibility of survival will lose if the but-for standard is scrupulously applied: the plaintiff will be unable to prove that but for the defendant's conduct, the victim probably would have survived.

Third, the availability of loss-of-a-chance recovery will reinforce vigilance in the observance of due care by health care providers. To deny this recovery "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."

Finally, Professor King has argued that when courts refuse to provide recovery for the negligent destruction of a proven possibility of survival, tort law fails to perform its loss-allocating function. Within the universe of those who suffer from a disease, that only one person in four survives is a statistically predictable number for whom that twenty-five percent chance will mean the difference between life and death. Traditionally, if any one of those who would have benefitted from that twenty-five percent chance fell victim to wrongdoing that eliminated the residual chance of survival, the victim and not the wrongdoer shouldered the burden of the loss (at least whenever the effects of the wrongdoing were indistinguishable from the typical effects of the disease itself). Because we can predict that in some percentage of those cases the chance destroyed would have been availing, we can conclude that the wrongful destruction of chance interests in survival results in actual losses. Tort law's

131. See King, supra note 2, at 1378.
132. Id. at 1365, 1376.
133. Herskovits, 99 Wash. 2d at 614, 664 P.2d at 477.
134. See King, supra note 2, at 1377.
135. Id.
commitment to shifting the burden of injury from the innocent victim to the negligent actor is better served by recovery commensurate with the magnitude of the chance interest destroyed than by no recovery at all.

Nevertheless, in order to protect defendants from liability imposed by "speculation and conjecture," courts generally have continued to insist that, in order to recover, the plaintiff prove that but for the defendant's tort, the victim probably would have survived.\textsuperscript{136}

3) Overcompensation: The Countervailing Concern.—In Cooper v. Sisters of Charity,\textsuperscript{137} the Supreme Court of Ohio held that a wrongful death plaintiff may not recover wrongful death damages in a medical malpractice action unless defendant's negligence more probably than not caused the death of plaintiff's decedent.\textsuperscript{138} In Cooper, the plaintiff's sixteen-year-old son suffered a basal skull fracture after having been struck by a truck while riding his bicycle.\textsuperscript{139} Evidence at trial demonstrated that persons with such injuries suffer "practically a 100\% mortality rate without surgery."\textsuperscript{140} When the injured boy arrived at the emergency room of defendant's hospital, the treating physician neglected to conduct "mandatory routine procedures" that would have revealed the injury.\textsuperscript{141} Instead, the physician directed that the boy be sent home for bedrest and periodic observation.\textsuperscript{142} The boy died of his injury the following morning.\textsuperscript{143} The Cooper court affirmed a directed verdict for the defendant on the ground that the plaintiff offered no evidence that her son's prospect of survival would have exceeded fifty percent even with proper treatment.\textsuperscript{144} Because the victim's prospect of survival was no more than a possibility, "maybe some place around fifty percent" according to the plaintiff's expert, no jury would be entitled to find that but for the defendant's negligence the plaintiff probably would have survived.\textsuperscript{145}

\textsuperscript{136} Id. at 1365-67. See supra note 57.
\textsuperscript{137} 27 Ohio St. 2d 242, 272 N.E.2d 97 (1971) (discussed in King, supra note 2, at 1367-68).
\textsuperscript{138} 27 Ohio St. 2d 242, 252, 272 N.E.2d 97, 103 (1971).
\textsuperscript{139} Id. at 242, 272 N.E.2d at 99.
\textsuperscript{140} Id. at 247, 272 N.E.2d at 101.
\textsuperscript{141} Id. at 246, 272 N.E.2d at 99.
\textsuperscript{142} Id. at 243, 272 N.E.2d at 99.
\textsuperscript{143} Id. at 244, 272 N.E.2d at 99.
\textsuperscript{144} Id. at 254, 272 N.E.2d at 104-05.
\textsuperscript{145} Id. at 252-53, 272 N.E.2d at 101.
The Cooper court approved language from an earlier Ohio decision holding that "[l]oss of chance of recovery, standing alone, is not an injury from which damages will flow."\(^{146}\) The court insisted on adhering to "well-established and valuable proximate cause considerations" in order to protect the defendant from liability imposed by conjecture.\(^{147}\)

The Cooper court adhered to the but-for standard of causation in fact in order to prevent a sympathetic jury from providing wrongful death recovery for the negligent destruction of a mere possibility of survival. The but-for standard ensures that a rough justice is done: the plaintiff enjoys the benefit of any doubt on causation when the chance of survival destroyed was greater than fifty percent; the defendant is entitled to the benefit of the doubt on causation when the chance interest foreclosed was fifty percent or less.

Several courts have expressed dissatisfaction, however, with the roughness of such justice in the loss-of-a-chance context.\(^{148}\) When the defendant has destroyed not only a possibility of survival but also the opportunity to determine whether nature would have teased that cherished possibility into survival itself, the plaintiff may be entitled to recovery despite the tenuousness of the relationship between the defendant's wrongdoing and the victim's subsequent death.

The most compelling argument in support of the result in Cooper is that the defendant should not be held liable for the entire measure of damages accruing from a death that the defendant may or may not have caused.\(^{149}\) But relaxing the cause in fact requirement in order to permit loss-of-a-chance recovery does not necessarily overcompensate the plaintiff. The jury retains sufficient discretion on the issue of damages to discriminate between negligence that causes loss of life and negligence that causes the loss of a chance to live. In Kallenberg v. Beth Israel Hospital,\(^{150}\) the plaintiff was permitted to recover wrongful death damages for the negligent destruction of a twenty percent to forty percent chance of survival. The Kallenberg jury

\(^{146}\) Id. at 250, 272 N.E. 2d at 102 (quoting from Kuhn v. Banker, 133 Ohio St. 304, 315, 13 N.E.2d 242, 247 (1938)).

\(^{147}\) Cooper, 27 Ohio St.2d at 251, 272 N.E.2d at 103.

\(^{148}\) See supra note 130.

\(^{149}\) See King, supra note 2, at 1359: "Holding the defendant liable for the entire harm without any consideration of the preexisting condition . . . is unsound."

may well have been sensitive, in making its damages award, to the magnitude of the chance interest destroyed and the strength of the plaintiff's proof as to the loss. The defendant was held liable for the victim's death, but whatever doubts the jury harbored as to the relationship between the defendant's conduct and the victim's death were perhaps reflected in the size of the plaintiff's verdict. "It is noteworthy that uncertainties on the issue of cause in fact are in nearly every instance susceptible, in theory at least, of being resolved in terms of an adjustment of damages."

But relaxing the plaintiff's burden of proof of causation in fact in order to permit loss-of-a-chance recovery in a wrongful death action has its costs. First, to leave the availability of loss-of-a-chance recovery to the discretion of individual trial courts produces arbitrariness and uncertainty in the law: witness the respective postures of the Cooper and Kallenberg courts. This unpredictability of result creates an incentive to litigate rather than to settle. The plaintiff stands a chance to "win big" (Kallenberg) despite the formal requirements of the law on causation; on the other hand, the defendant may convince the court to dismiss as a matter of law (Cooper) or, failing that, may win reversal on appeal. Second, to trust the jury to covertly adjust the plaintiff's recovery according to the sufficiency of proof of causation is an undisciplined approach to loss-of-a-chance recovery and sends the jury to its deliberations with no more guidance than a mandate to do equity. Finally, in so far as we prefer a government of law to one of caprice, we must honor the rules we have adopted or find a reasoned justification for the exceptions justice seems to require.

4. The Focus of Analysis Shifts from Causation to the "Chance Evaluation Problem." When the Chance Interest in Survival is Recognized as an Interest Worthy in Itself of Pro-

151. See Malone, supra note 2, at 80. The jury's role in permitting recovery for the negligent destruction of a substantial opportunity to survive is comparable to the role the jury has played in ameliorating the harshness of the contributory negligence doctrine. When faced with the dilemma of having to choose between providing full recovery for injury suffered by a contributorily negligent plaintiff and denying such recovery altogether, juries were "notoriously inclined to find that there had been no such negligence, or to make some more or less haphazard reduction of the plaintiff's damages in proportion to his fault." PROSSER & KEETON, supra note 59, at 469. Similarly, when a court permits a jury to determine whether the destruction of a substantial possibility of survival was a cause in fact of the victim's death, a jury may be inclined to impose liability yet limit recovery in a way that reflects its doubts on the issue of causation.
tection.—Professor Malone recognized that when a court permits a compelling claim, such as that of the Gardner plaintiff, to go to the jury on less than a prima facie showing of causation in fact, "the interest which the law is protecting is the chance itself, and the chief problem is the evaluation of the chance, which is a function peculiarly within the province of the jury." He went on to suggest, in a provocative aside, that justice could be achieved in such cases "by recognizing the chance as an interest that is worthy of protection and that will admit of a fair evaluation."153

Indeed, Ruminations on Cause-in-Fact simply illustrates the doctrinal distortions the law of torts has undergone as courts struggle to recognize chance interests in survival as interests worthy in themselves of protection. Professor Malone’s thesis in Ruminations is that the cause in fact inquiry is properly regarded as an aspect of the jury’s larger concern with proximate cause, the question of whether the relationship between the defendant’s wrongdoing and the plaintiff’s injury is sufficiently strong that liability should attach. Malone regarded the but-for standard of cause in fact as an awkward, off-the-rack limitation on liability that could and should be ignored when the plaintiff has suffered the loss of a chance to avoid a harm from which the law has taken special pains to protect him. Once the chance interest is recognized as an interest worthy of the protection of tort law, however, courts need not manipulate the cause in fact standard in order to provide recovery. The loss-of-a-chance plaintiff is in a position to prove that but for the defendant’s wrongdoing, the decedent would have enjoyed an enhanced and valued opportunity to survive.

Professor Joseph King, in his seminal study of the loss-of-a-chance problem, recommends that courts recognize an action for the wrongful destruction of a chance interest in survival. By making explicit the law’s implicit acknowledgment that the

152. See Malone, supra note 44, at 80.
153. Id.
154. Id. at 65-68.
155. Id. at 97-99.
156. See King, supra note 2, at 1377 (“The injustice created by the all-or-nothing concept of chance also creates pressure to manipulate and distort other rules affecting causation and damages in an effort to mitigate this perceived harshness.”).
157. Id., supra note 2.
158. Id. at 1376.
loss of a chance to survive is an injury worthy of redress, courts can provide recovery in a manner that serves the legitimate interests of the parties, preserves the integrity of the cause in fact requirement, and achieves the deterrence and loss-allocating objectives of tort law.

At least three courts since 1970 have suggested that the loss of a chance to survive is to be regarded as a compensable injury. But not until Herskovits v. Group Health Cooperative was the question so starkly presented as to whether the negligent destruction of a possibility of survival could support recovery in tort.

V. COMPARING THE Herskovits OPINIONS

A. The Plurality Opinion.

1. A Comprehensive Solution That Accommodates the Competing Policy Concerns.—Justice Pearson’s plurality opinion in Herskovits recommends that the negligent destruction of a substantial opportunity to survive be regarded as a compensable injury in tort. The plurality reasoned that the plaintiff could satisfy its burden of producing evidence of causation by offering proof that but for the negligence of Group Health, Mr. Herskovits would have enjoyed a substantially increased—albeit less than probable—chance to survive. Acknowledging his debt to Professor King’s critique of the loss-of-a-chance problem, Justice Pearson argued that to recognize a loss-of-a-chance action would accommodate the competing interests of the parties and would further the deterrence and loss-allocating objectives of tort law, while preserving the integrity of Washington tort causation doctrine.

To permit recovery for the wrongful destruction of chance interests in survival accommodates the competing interests of the parties by ensuring a disciplined recovery. Because the court would not have to decide whether the deprivation of the chance caused the victim’s death (in the but-for sense), the court would

159. Id. at 1381.
160. Id. at 1360.
161. Id. at 1377.
162. Id.
163. See supra note 130.
165. Id. at 634, 664 P.2d at 487.
166. Id. at 634, 664 P.2d at 486-87.
not have to choose, on an all-or-nothing basis, between full wrongful death recovery and no recovery at all.\textsuperscript{167} The plaintiff would be permitted to recover for the wrongful destruction of a cherished interest in survival. But by tailoring plaintiff's recovery to the magnitude of the chance interest destroyed, the court would avoid holding the defendant liable for all of the plaintiff's death-related losses.\textsuperscript{168}

The plurality adopted Professor King's suggestion for computing damages in an action for the loss of a chance to survive.\textsuperscript{169} To compute the value of the lost chance interest in survival, first the trial court must calculate, in percentage terms, the degree to which the defendant reduced the victim's preexisting chance of survival. Taking the facts of Cooper as an illustration, the sixteen-year-old victim had a skull fracture and a fifty percent chance of survival at the point at which the defendant negligently destroyed his remaining chance of survival. Given these facts, the court must calculate the compensable value of the life of a sixteen year old boy who, had he survived, would have lived with the short and long term effects of the skull fracture. Finally, the court must multiply the compensable value of the victim's life (evaluated from the point in time just prior to the intervention of the defendant's negligence) by the percentage by which the defendant reduced the possibility that the victim would live to enjoy that life. Thus, the Cooper defendant would be liable, under the King analysis, for fifty percent of the compensable value of the victim's life, taking into account that the victim's life would have been affected by all of the factors unique to his biography, including his pre-negligence skull fracture.

Justice Pearson did not apply the King damages formula\textsuperscript{170} to the facts of Herskovits, but to do so is straightforward. If just prior to Group Health's negligence, Mr. Herskovits' chance of surviving five years was thirty-nine percent, then that factor will determine the compensable value of the victim's life. Group Health allegedly reduced that outstanding thirty-nine percent chance to twenty-five percent. The loss of fourteen percentage points represents approximately one third of Mr. Herskovits'

\begin{enumerate}
\item \textsuperscript{167} See King, \textit{supra} note 2, at 1363-64.
\item \textsuperscript{168} \textit{Id.} at 1382.
\item \textsuperscript{169} \textit{Herskovits} at 635-36, 664 P.2d at 487 (citing to King, \textit{see supra} note 2, at 1382).
\item \textsuperscript{170} Cf. King, \textit{supra} note 2, at 1382.
\end{enumerate}
preexisting chance of survival (14/39 = 36/100). So, assuming negligence, Group Health would be liable for approximately one-third of the compensable value of the life of a cancer victim with Mr. Herskovits' biography and pre-negligence prognosis. 171

The creation of an action for the wrongful destruction of a chance interest in survival will reinforce the exercise of reasonable care in the diagnosis and treatment of typically fatal diseases and conditions. 172 Negligence in the diagnosis and treatment of such conditions causes a statistically predictable incidence of actual deaths, even if such negligence cannot be shown to have determined the death of any individual loss-of-a-chance victim. 173 By recognizing an action for the loss-of-a-chance to survive, tort law will both deter the negligence that causes such deaths and shift the risk of loss in an equitable manner from the innocent victim to the culpable actor who has destroyed the victim's power of concrete proof. 174

The availability of loss-of-a-chance recovery preserves the integrity of tort causation doctrine by removing the incentive to manipulate the cause in fact requirement. 175 Courts are tempted to relax the cause in fact requirement in the loss-of-a-chance setting for two reasons: first, to avoid the unseemly arbitrariness of permitting full recovery for the destruction of a fifty-one percent probability of survival while denying any compensation for the destruction of a fifty percent possibility of survival; second,

171. Neither Professor King nor Justice Pearson explicitly recognized that the damages rule they proposed actually treats the lost chance as a contributing cause of the victim's death. The conclusion is unavoidable, however, because under the King rule, the value of the lost chance is determined by multiplying the compensable value of the victim's life, had he or she survived, by the percentage by which the negligent defendant reduced the victim's prospect of survival. King, supra note 2, at 1382. Accordingly, the negligent defendant is treated as having helped to cause the death of a person with the victim's pre-negligence prospect of recovery. The defendant will have contributed to cause that death by the ratio that the chance destroyed bears to the victim's preexisting chance of survival. Thus, for example, if Group Health were found to have caused Mr. Herskovits to suffer the loss of a 14% chance of survival, and his preexisting chance of surviving five years stood at only 39%, Group Health would be treated as having contributed by one third in causing the death of a man with Mr. Herskovits' biography and pre-negligence prognosis. When the plurality's damages rule is recognized as resting on a presumption of proportionate causation (see infra notes 181-83 and accompanying text), the plurality's recommendation that loss-of-a-chance actions be cognizable under Washington's wrongful death statute, WASH. REV. CODE § 4.20.010 (1984), becomes more understandable.

172. See King, supra note 2, at 1377.
173. Id.
174. Id. at 1378.
175. Id. at 1377.
to preclude the defendant from setting up as a defense the uncertainty of causation created by the defendant's own conduct.\textsuperscript{176} When the loss of a possibility of survival is treated as a compensable injury in its own right, the court need not corrupt the cause in fact requirement in order to permit recovery. The plaintiff is in a position to prove that but for the defendant's wrongful conduct, the victim would have enjoyed an enhanced opportunity to survive. Hence, by recharacterizing the injury to be redressed, the court can avoid the arbitrariness of the all-or-nothing dilemma and can render irrelevant the defendant's complaint that his conduct cannot be shown to have caused the victim's death.

An additional benefit, mentioned neither by Professor King nor by Justice Pearson, is that the availability of loss-of-a-chance recovery will promote judicial economy.\textsuperscript{177} In those jurisdictions that deny recovery for the loss of a possibility of survival, a compelling loss-of-a-chance case can go either way, depending on the trial court's inclination to turn the matter of causation over to the jury. In \textit{Kallenberg v. Beth Israel Hospital},\textsuperscript{178} for example, the court permitted wrongful death recovery for the negligent destruction of a twenty-to-forty percent chance of survival.\textsuperscript{179} Despite the obvious absence of cause in fact, the court affirmed the jury's verdict, asserting simply that "[t]he question of proximate cause is a jury question."\textsuperscript{180} Under such circumstances, both plaintiff and defendant have an opportunity to "win big" because the court will decide the claim on an all-or-nothing basis: either the defendant did or did not cause the victim's death. Accordingly, both parties have a substantial incentive to litigate rather than to compromise the claim. On the other hand, when the plaintiff's loss-of-a-chance claim will support recovery commensurate only with the magnitude of the chance destroyed, both plaintiff and defendant have an increased incentive to settle the matter between themselves.

Thus, the \textit{Herskovits} plurality opinion provides an approach to the loss-of-a-chance problem that ensures fairness to both plaintiff and defendant, eliminates an unseemly arbitrar-

\begin{footnotesize}
\textsuperscript{176} \textit{Id.} at 1377-78.  \\
\textsuperscript{177} I am grateful to Professor Richard Settle of the University of Puget Sound School of Law for suggesting this consideration.  \\
\textsuperscript{178} 45 A.D.2d 177, 357 N.Y.S.2d 508 (1974).  \\
\textsuperscript{179} \textit{Id.} at 179-80, 357 N.Y.S.2d at 509-11.  \\
\textsuperscript{180} \textit{Id.} at 180, 357 N.Y.S.2d at 511.
\end{footnotesize}
iness in the law, preserves the integrity of the cause in fact standard, deters conduct that imposes actual losses on society, and promotes judicial economy.

2. The Implicit Doctrinal Basis of Loss-of-a-Chance Recovery: A Conclusive Presumption of Proportionate Causation.—The availability of recovery for the loss of a chance to survive gives the plaintiff the benefit of a conclusive presumption of proportionate causation. Once the plaintiff proves that the negligent defendant rendered the victim's death from a preexisting condition substantially more probable, the defendant is treated as having contributed to the resulting death. The loss-of-a-chance plaintiff is deemed entitled to this presumption because, by commingling the consequences of his negligence with the effects of a preexisting threat of harm, the defendant has destroyed the plaintiff's power of proof.

The single most influential concern181 underlying the solicitude the courts have shown loss-of-a-chance victims is that expressed by the Hicks dictum:

When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization . . . . Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass.182

In order to disable the negligent defendant from relying for his defense on the plaintiff's inability to prove that the destroyed possibility of survival would have mattered, the Herskovits plurality proposed that the lost chance be treated as a compensable injury.183 Thus, once the victim's death from the preexisting condition masks the causal role played by the defendant's tort, the plaintiff is entitled to the benefit of a conclusive presump-

181. The powerful appeal to fairness underlying the Hicks dictum appears to be the force that has moved courts to either relax the loss-of-a-chance plaintiff's burden of proof of causation or to recharacterize the injury to be compensated as the chance interest destroyed. Professor King's recitation of arguments in favor of loss-of-a-chance recovery is impressive (loss-allocation, avoidance of corruption of tort causation doctrine, avoidance of the arbitrariness of the too-fine probability/possibility distinction, etc.), but courts have neither mentioned nor relied upon these considerations, at least until Herskovits.

182. Hicks, 368 F.2d at 632.

tion that the destruction of the chance contributed pro tanto to cause the victim’s death. The court will accept statistical proof of the magnitude of the chance destroyed because no other evidence exists. When the court has determined the magnitude of the lost chance, the negligent defendant will be held to have contributed to causing the victim’s death by the degree to which he increased the likelihood of that death. The defendant’s only means of avoiding liability is to demonstrate that the plaintiff’s proofs as to the magnitude of the chance interest destroyed are irrelevant or that the chance destroyed was not substantial.

3. The Scope of the Plurality’s Loss of a Chance Doctrine: Its Beneficiaries and Boundaries.

(a) No wrongful death recovery prior to the victim’s death.—Nothing in the plurality’s analysis strictly precludes recovery during one’s lifetime for the loss of an abstract, statistical possibility of survival. The loss of a theoretical possibility of survival is certainly perceived by the victim as an injury. The reasonable person in Mr. Herskovits’ position would have been distressed to learn that his already grim prospect of survival had been reduced by more than a third. Indeed, the wrongful destruction of an opportunity to survive will support recovery for the victim’s proximately resulting emotional distress. If the negligent destruction of a substantial opportunity to survive is a compensable injury in its own right, then it would seem to follow that recovery need not depend on whether the harm made more likely actually arose. The plaintiff’s cause of action accrues, in theory at least, when the defendant wrongfully causes the loss of a chance to survive.

To require that an action for the loss-of-a-chance to survive be brought as a wrongful death action, however, (as the Herskovits plurality suggests) is an entirely rational limitation on the availability of loss-of-a-chance recovery. When the defendant has negligently increased the probability that the victim’s preexisting condition will prove fatal, and the condition does prove fatal, the Herskovits plurality would invoke the presumption that the defendant’s tort was a contributing cause of the victim’s death. But to permit loss-of-a-chance recovery during the victim’s lifetime would give the victim the benefit not only of the presumption of proportionate causation but also of an assumption that the victim would die at an ascertained time of the con-

184. See supra notes 67-72 and accompanying text.
dition made more deadly by the defendant's wrongdoing. As long as the lost chance is no more than a foreboding statistic and was not the product of a physical injury, there is no special exigency to justify further assumptions at the defendant's expense.\(^{185}\)

There are circumstances, however, in which recovery should be permitted, consistent with the plurality's analysis, for the wrongful creation of a susceptibility to future injury. When the negligent defendant has caused a present physical injury that creates a susceptibility to future medical complications, the plaintiff is entitled to recover for an enhanced risk of future injury. The plaintiff's present injury provides the special exigency that justifies invoking the presumption of pro tanto causation.

(b) **Recovery for less-than-probable future complications of present injury.**—The Herskovits plurality urged recognition of an action for the negligent destruction of a less-than-probable chance of survival. The plurality's thesis, stated abstractly, is that a chance interest in the avoidance of physical harm is an interest worthy of the protection of tort law. The Herskovits court confronted factual circumstances in which the harm made more probable by the defendant's tort had already come to pass: after Group Health caused a fourteen percent reduction of his already marginal chance to recover from cancer, Mr. Herskovits died of the disease. The circumstances moved the plurality to suggest that the defendant's tort be regarded, in effect, as a contributing cause of the victim's death, even though that conduct could not be regarded as a "but for" cause of the death. By contrast, when the defendant's conduct has created in the plaintiff a susceptibility to a less-than-probable harm that

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185. Courts have consistently refused to recognize heightened susceptibility to harm, standing alone, as a compensable injury. For example, courts have refused to certify classes of plaintiffs composed of DES (diethylstilbestrol) daughters whose common injury is a heightened risk of developing adenocarcinoma. A DES daughter lives with a likelihood of developing adenocarcinoma that is 100 times greater than the risk among the general population. Comment, *Emotional Distress Damages for Cancerphobia: A Case for the DES Daughter*, 14 Pac. L. J. 1215, 1216 (1983). The Appellate Court of Illinois has held that "[t]he nexus thus suggested between exposure to DES in utero and the possibility of developing cancer or other injurious conditions in the future is an insufficient basis upon which to recognize a present injury." Morrisey v. Eli Lilly and Co., 76 Ill. App. 3d 753, 761, 394 N.E. 2d 1369, 1376 (1979); acc. McDaniel v. Johns-Manville Sales Corp., No. 77-3534 (N.D. Ill. May 31, 1979); Ryan v. Eli Lilly and Co., No. 77-246 (D.S.C. July 10, 1979); Austin v. Johns-Manville Products Corp., No. 75-754 (D.N.J. 1978).
may occur in the future, recovery is more difficult to justify. When the plaintiff asks recovery for the ten percent possibility that his skull fracture will lead to meningitis, for example, the court is asked to assume that if the plaintiff develops meningitis in the future, the defendant’s conduct in causing the skull fracture will have contributed to causing the disease.

The negligent creation of a susceptibility to future injury is, however, an injury cognizable under the plurality’s loss-of-a-chance doctrine and should be compensated in conjunction with the physical injury that gives rise to that susceptibility. The plaintiff must bring his action “within the time limitations fixed by law and all damages, past, present, and future, must be determined in that one action.”\(^{186}\) The time constraints placed on the plaintiff’s right of recourse provide the special exigency that justifies recovery for the loss of a chance to avoid a less-than-probable future injury.

Washington courts have maintained that a plaintiff may not recover for a foreseeable future consequence of tortious conduct unless that consequence is reasonably probable.\(^ {187}\) A timely objection on relevancy grounds will render inadmissible testimony that a plaintiff’s injuries expose him to a mere possibility of future medical complications.\(^ {188}\) Unless such complications are reasonably likely to arise, the jury may not consider them, over defendant’s objection, in its estimate of damages for the plaintiff’s personal injuries.\(^ {189}\)

If the loss-of-a-chance doctrine advocated by the Herskovits plurality wins the respect of Washington courts, the doctrine will retire the “reasonable probability” threshold and permit recovery for the negligent creation of a verifiable susceptibility to injury. When the plaintiff’s susceptibility to future harm arises from the plaintiff’s current physical injuries, the plaintiff will be eligible to recover for the risk of future harm according to the magnitude and gravity of that risk.

Many of the same arguments that support recovery for the loss of a chance to survive militate in favor of recovery for the negligent creation of susceptibility to future complication.

First, we intuitively acknowledge that the negligent inflic-
tion of a susceptibility to physical harm is a significant loss to the victim. As the Supreme Court of Oregon has put it,

We believe, as a matter of common sense, that a jury can properly make a larger award of damages in a case involving a skull fracture of such a nature as to result in a susceptibility to meningitis than in a case involving a skull fracture of such a nature as not to result in any such danger, risk, or susceptibility.\textsuperscript{190}

The wrongful creation of a susceptibility to future harm is an injury worthy of compensation even if the risk of future harm is less than probable.

Second, the law acknowledges the grievousness of the wrongful creation of a susceptibility to future injury by providing recovery for the emotional distress the victim may suffer.\textsuperscript{191} The anxiety the victim suffers having to live under a Sword of Damocles is a compensable injury even if the sword is not likely to fall. When, for example, as a result of her head injuries, the plaintiff suffers intermittent spinal fluid leakage exposing her to a possibility of developing meningitis, the plaintiff may recover for the fear she suffers of developing the disease.\textsuperscript{192}

Third, harsh and arbitrary results arise from the failure to recognize that the negligent creation of a possibility of future harm is an injury worthy of redress. Under Washington law, if Plaintiff \#1 proves to a reasonable probability that her current injury will lead to a specific future injury, the plaintiff may recover for the losses to be anticipated from the impending harm. By contrast, if Plaintiff \#2 is able to prove only that there is a substantial possibility that he will suffer the same complication from the same present injury, the plaintiff will recover nothing for the risk of future harm. Because Plaintiff \#2 has but one day in court, he will have no recourse against the negligent defendant should that substantial possibility of harm later become actual. Hence, Washington law provides recovery to Plaintiff \#1 as if she were certain to suffer the future harm and denies recovery to Plaintiff \#2 as if he were certain not to.

The negligent creation of a possibility of future injury is an injury worthy of redress and may be compensated fairly accord-

\textsuperscript{190} Feist, 267 Or. at 412, 517 P.2d at 680.
\textsuperscript{191} See supra notes 67-72 and accompanying text.
\textsuperscript{192} Davis v. Graviss, 672 S.W. 2d 928, 931 (Ky. 1984).
ing to the magnitude of the present risk. If, for example, the plaintiff, as a result of her current injury, suffers a forty percent chance of developing epilepsy, the plaintiff is entitled to forty percent of the value of the losses to be associated with that future harm (discounted to present value). Because the defendant may be found to a reasonable medical certainty to have created a forty percent risk of meningitis, the damages can be apportioned to fairly reflect the uncertainty of result by treating the defendant as having caused the future condition by that percentage by which he increased the likelihood of its occurrence.

Here again, however, there is no justification for providing recovery for the negligent creation of susceptibility to injury "in the air." When the plaintiff has suffered concrete physical injuries that give rise to the possibility of future complications, the plaintiff should be entitled to recover for the risk of future complication according to the magnitude and gravity of the risk. The plaintiff has but one day in court and deserves some consideration on that day for the extent to which his current losses bear risks of future losses. By contrast, when the negligently created susceptibility remains nothing more than an ominous statistic, the destruction of the victim's chance interest in the avoidance of harm should not be compensated. When, for example, a physician's negligent failure to diagnose the plaintiff's high blood pressure leads to an increased susceptibility to stroke, the plaintiff is not entitled to recover for the increased risk of stroke, standing alone. Although the diagnostic failure caused the loss of a chance interest in the avoidance of harm, to permit recovery for such an injury requires unnecessary speculation at the defendant's expense and is not justified by considerations of res judicata.

B. The Lead Opinion: An Unworkable "Substantial Factor" Approach

The lead opinion of the Herskovits court proposed to permit recovery for the negligent destruction of a possibility of survival by relaxing the plaintiff's burden on the issue of cause in fact. In concert with the majority, the opinion held that the plaintiff's claim is sufficient to withstand the defendant's motion for summary judgment: the plaintiff's proof that Group Health

193. See King, supra note 2, at 1383.
substantially reduced Mr. Herskovits’ prospect of recovery will support a finding that the defendant’s negligence was the cause in fact of a compensable injury.\textsuperscript{194}

The plurality favored reversal, of course, because the plurality viewed the plaintiff’s evidence as sufficient to support a finding that but for the negligence of Group Health, Mr. Herskovits would have enjoyed a substantially increased opportunity to survive.\textsuperscript{195} The plurality regarded the wrongful destruction of a chance interest in survival as a compensable injury in its own right.\textsuperscript{196}

By contrast, the lead opinion assumed that the injury to be compensated was the victim’s death, but favored relieving the plaintiff of the threshold burden of showing a but-for relationship between the defendant’s negligence and the victim’s subsequent death.\textsuperscript{197} On remand the jury would be entitled to decide whether the negligently enhanced susceptibility to injury was a “substantial factor” in bringing about the resultant harm.\textsuperscript{198} The opinion offered no guidance as to how the jury should perform the substantial factor analysis, but the conclusion is inescapable that the jury may impose liability even without proof that the defendant’s conduct was a “but-for” cause of the victim’s death.

The lead opinion extended the reasoning of the Supreme Court of Pennsylvania in Hamil v. Bashline.\textsuperscript{199} The Hamil court cited Section 323 of the \textsc{Restatement (Second) of Torts} as authority for relaxing “the degree of certitude normally required of plaintiff’s evidence in order to make a case for the jury as to whether a defendant may be held liable for the plaintiff’s injuries.”\textsuperscript{200}

\section*{§323. Negligent Performance of Undertaking to Render Services}
One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if a) his failure to exercise such care increases the risk of

\textsuperscript{194} Herskovits, 99 Wash. 2d 609, 619, 664 P.2d 474, 479 (1983).
\textsuperscript{195} Id. at 634-36, 474 P.2d at 487 (Pearson, J., concurring).
\textsuperscript{196} Id.
\textsuperscript{197} Herskovits at 619, 664 P.2d at 479.
\textsuperscript{198} Id. at 617, 664 P.2d at 478.
\textsuperscript{199} 481 Pa. 256, 392 A.2d 1280 (1978).
\textsuperscript{200} Id. at 269, 392 A.2d at 1286.
such harm.201

The *Hamil* court held that in circumstances governed by section 323, the plaintiff states a prima facie case on the issue of causation simply by offering evidence that by breaching a duty of care the defendant undertook for the protection of the victim's person, the defendant wrongfully increased the risk of the harm that subsequently befell the victim.202 The jury must then decide whether the negligent conduct that increased the risk of harm to the victim was a "substantial factor" in producing the harm thereby made more likely.203

In circumstances to which section 323 applies, the effect of the defendant's negligence cannot be clearly distinguished from the effects of the harm against which the defendant had a duty to protect the victim.204 Therefore, in determining whether the defendant's conduct was a substantial factor in bringing about the victim's injury, the jury need find only that the injury in question was a reasonably probable rather than a reasonably certain consequence of the defendant's negligence.205 Although the *Hamil* court relaxed the plaintiff's burden of proof on causation, the court expressly stated that the defendant's conduct could not be a substantial factor in producing the plaintiff's injury unless that conduct was at least a but-for cause of the harm.206

The lead opinion in *Herskovits* adopted the theory and procedural approach of the *Hamil* court in order to permit the *Herskovits* wrongful death action to survive summary judgment and reach the jury for a trial on the merits.207 The circumstances of the *Herskovits* case appear to be governed by section 323: the defendant undertook to provide medical care to the victim; the defendant is alleged to have increased the risk of the victim's death from cancer through negligent treatment; and, finally, the cancer that the defendant failed to diagnose allegedly caused the

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201. **Restatement (Second) of Torts** § 323 (1965).
203. Id.
204. Id. at 269-70, 392 A.2d at 1286-87.
205. Id. at 273, 392 A.2d at 1288.
206. Id. at 265, 392 A.2d at 1284. The *Restatement* view of the "substantial factor" test of cause in fact is that the test requires, at a minimum, a finding of but-for causation. **Restatement (Second) of Torts** § 433B comment a (1965). Accordingly, § 323 is not authority for the proposition that substantial factor causation may be found on the basis of the wrongful deprivation of a less-than-probable chance to avoid injury.
victim’s death. Accordingly, concluded the lead opinion, the plaintiff, under Hamil, has stated a prima facie case on the issue of causation.\textsuperscript{208} The plaintiff is entitled, then, to have a finder of fact decide whether the conduct of Group Health was a substantial factor in causing the death of Mr. Herskovits.

As the Hamil court reduced the plaintiff’s ultimate burden of proof on causation from a “reasonable certainty” standard to a “reasonable probability” standard, the lead opinion would reduce the plaintiff’s burden of proof at trial from “reasonable probability” to what amounts to a “substantial possibility” standard. The lead opinion suggested that a jury would be permitted to find the defendant’s conduct a “substantial factor” in causing the victim’s death even in the absence of but-for causation. “To decide otherwise would be a blanket release from liability for doctors and hospitals anytime there was less than a 50 percent chance of survival, regardless of how flagrant the negligence.”\textsuperscript{209}

To mitigate the injustice of imposing on the negligent defendant liability for the victim’s death (when the defendant simply increased an outstanding probability that the victim would suffer the fate that befell him), the lead opinion would restrict the plaintiff’s recovery. “Causing reduction of the opportunity to survive . . . by one’s negligence, however, does not necessitate a total recovery against the negligent party for all damages caused by the victim’s death.” Instead, recovery will be limited to “damages caused directly by premature death.”\textsuperscript{210}

The lead opinion’s object is to protect chance interests in the avoidance of harm. The relationship between the negligent defendant and the injured plaintiff in circumstances governed by section 323 justifies special solicitude to the injured plaintiff. The negligent defendant voluntarily assumed a duty of care to protect the dependent victim. The victim was injured by the very harm against which the negligent defendant failed in his duty to take proper precautions. By commingling the effects of his negligence with the effects of the harm that he failed to prevent, the defendant created substantial problems of proof for the plaintiff. Under such circumstances, a court is likely, as we have seen, to impose liability for the resulting injury on less than the conventionally required showing of causation.

\textsuperscript{208} Id. at 619, 664 P.2d at 479.  
\textsuperscript{209} Id. at 614, 664 P.2d at 477.  
\textsuperscript{210} Id. at 619, 664 P.2d at 479.
The lead opinion's proposed approach to the loss-of-a-chance problem is, however, ultimately unhelpful. The opinion's "substantial factor" formulation provides no guidance to the finder of fact. It evidently requires no finding even of but-for causation. The proposed substantial factor test simply permits the jury to exercise unfettered discretion to impose liability for the victim's injury. The suggested limitation on damages is designed to protect the defendant whose negligence merely reduced an already marginal chance to survive from bearing liability for the whole of the plaintiff's death-related damages. But the proposal that damages be limited to those caused directly by premature death is unhelpful in the Herskovits circumstance, where the plaintiff's precise problem is that it is impossible to prove that the defendant's negligence caused the victim to die sooner than he otherwise would have. Under the facts of Herskovits, the influence of the lost chance is unknowable. The lost chance should be redressed according to its magnitude by treating it as a pro tanto cause of the victim's death.

C. The Dissents: Insubstantial Concerns

The dissenters in Herskovits raised two principal objections to permitting recovery. First, recognition of loss-of-a-chance actions may impose an unrealistic standard of care on the medical community. To permit recovery for the negligent destruction of a less-than-probable chance to survive, however, does not alter the standard of care for health care providers. In order to sustain a claim in any negligent action, the plaintiff must prove that the defendant breached an existing duty of care. The loss-of-a-chance doctrine, as articulated by the Herskovits plurality, does not alter the standard of professional care required of physicians.

Although loss-of-a-chance recovery would not alter the standard of professional care owed by health care providers, it may

211. Id.
212. Id. at 637-38, 664 P.2d at 488-89 (Brachtenbach, J., dissenting).
213. In Washington, "[a] qualified medical or dental practitioner should be subject to liability, in an action for negligence, if he fails to exercise that degree of care and skill which is expected of the average practitioner in the class to which he belongs, acting in the same or similar circumstance." Pederson v. Dumouchel, 72 Wash. 2d 73, 79, 431 P.2d 973, 978 (1967).
reinforce vigilance in the observance of that standard. Admittedly, caregivers cannot reliably predict that a given act of negligence will result in the loss of a chance to survive and not in some palpable, indisputably actionable injury. Yet, "[i]mmunity fosters neglect and breeds irresponsibility, while liability promotes care and caution."\(^{215}\)

The dissent also questioned the sufficiency of statistical evidence to prove the specific loss alleged in Hershkovits, the loss of a marginal opportunity to survive.\(^{216}\) The concern was that loss-of-a-chance actions would amount to bewildering and inconclusive debates between medical statisticians, debates which will fail to bring the alleged statistical loss home to the victim. The finder of fact thus would be forced to guess whether and to what extent the victim was injured. "Statistics alone should not be sufficient to prove proximate cause. What is necessary, at the minimum, is some evidence connecting the statistics with the facts of the case."\(^{217}\)

The dissent, however, failed to appreciate that the evidence offered in support of a loss-of-a-chance claim must of necessity be hypothetical and statistical. Neither the plaintiff nor the defendant is in a position to prove with certainty what course the victim’s illness would have taken in the absence of the defendant’s negligence. If the plaintiff comes forward with probative evidence that the defendant’s breach of a duty of care reduced the victim’s opportunity to survive, the plaintiff has a claim for relief under the plurality’s analysis.\(^{218}\) Both parties may come forward with evidence tending to prove that the opponent’s statistics are inapplicable.\(^{219}\) But because the defen-

\(^{215}\) Abernathy v. Sisters of St. Mary’s, 446 S.W. 2d 599, 603 (Mo. 1969).

\(^{216}\) Hershkovits, 99 Wash. 2d at 636, 639-42, 664 P.2d at 487, 489-91 (Brachtenbach, J., dissenting).

\(^{217}\) Id. at 640, 664 P.2d at 490.

\(^{218}\) If the plaintiff can come forward with probative evidence that the defendant's breach of a duty of care reduced the victim's opportunity to survive, the plaintiff has a claim for relief under the plurality’s analysis. Hershkovits, 99 Wash. 2d at 634, 664 P.2d at 487 (Pearson, J., concurring).

\(^{219}\) Medical malpractice attorneys are well aware of scientific evidence tending to prove that a delay in the diagnosis of cancer is not necessarily prejudicial to the patient's chance of survival or recovery.

A defense being used with relative frequency in cases involving a delayed diagnosis or misdiagnosis of cancer is the technique of calculating tumor duration through the application of Potential Tumor Doubling Time (PTDT). The defense position is that the delay encountered between the original allegedly negligent act and the true diagnosis has no bearing on the eventual outcome because they claim to be able to show, through the use of PTDT, that theoreti-
dant's negligent conduct has deprived the plaintiff of the opportunity to know with certainty whether the lost chance would have been availing, the defendant cannot equitably object when plaintiff's evidence is hypothetical. "A defendant's tort not only destroys a 'raffle ticket,' in so doing it destroys any chance of ever knowing how that raffle ticket would have fared in the drawing." Hence, if the finder of fact is satisfied by the statistical proofs offered that the decedent suffered the loss of a substantial opportunity to survive, the plaintiff is entitled to recovery. On the facts of Herskovits, a reasonable jury could find that but for the defendant's negligence, the plaintiff's husband would have enjoyed a thirty-nine percent rather than a twenty-five percent chance of surviving five years.

VII. CONCLUSION

Four of the nine justices of the Herskovits court endorsed the view that the loss of a substantial opportunity to survive is a legitimate basis for tort recovery. To consider such a loss an injury in its own right comports with our conviction that life and health are precious. To provide recovery for the loss of a chance to survive according to the magnitude of the chance destroyed ensures fair treatment to both plaintiff and defendant. Recovery may be provided without corruption of the cause in fact requirement; the plaintiff must prove the requisite but-for relationship between the defendant's wrongdoing and the lost chance. It is time that we acknowledge, in a deliberate and straightforward manner, that valued interests in survival are worthy of the protection of tort law.

Warner Miller

cally the plaintiff's life expectancy would not have been altered by diagnosing the cancer at the first instance.


220. See King, supra note 2, at 1378.