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RECOVERY FOR "LOSS OF CHANCE" IN A WRONGFUL DEATH ACTION—*Herskovits v. Group Health*, 99 Wn. 2d 609, 664 P.2d 474 (1983).

In *Herskovits v. Group Health,*[1] the Washington Supreme Court held that loss of a less-than-50% chance of survival is a compensable injury under the Washington wrongful death statute.[2] The court did not agree, however, on the proper method for determining causation in a loss of chance case. Neither of the two methods of causation analysis proposed by the court is satisfactory. Recovery for loss of a less-than-50% chance of survival is not possible under traditional causation principles, and should be allowed only if a court is willing to adopt a possibility standard of proof and adjust damages to reflect the uncertainty of causation.

This Note first outlines the policy justifications for allowing recovery for loss of a less-than-50% chance of survival. It then describes and evaluates the attempts by the *Herskovits* plurality and "lead" opinions to solve the causation problem. It concludes that neither approach is analytically successful, and that only a result-oriented approach can lead to recovery. Under this result-oriented approach, a court would adopt a possibility standard of proof for causation, and assess damages based on the statistical likelihood of causation.

I. FACTUAL AND LEGAL BACKGROUND

Mr. Herskovits died of lung cancer approximately two years after doctors discovered a tumor and removed one of his lungs. Mrs. Herskovits, his wife and personal representative, brought a wrongful death action[3] against Group Health Hospital alleging medical malpractice because of Group Health's failure to diagnose the cancer earlier. Group Health filed a motion for summary judgment.

At the summary judgment hearing, Mrs. Herskovits presented an affidavit by the private doctor whose independent examination finally led to diagnosis of Mr. Herskovits' cancer. The doctor stated that Group Health

1. 99 Wn. 2d 609, 664 P.2d 474 (1983).

2. The plaintiff claimed damages consistent with both the Washington wrongful death statute, WASH. REV. CODE § 4.20.010 (1984), and the Washington survival statutes, *id.* §§ 4.20.046, .060. *See* Record at 240, Herskovits v. Group Health, 99 Wn. 2d 609, 664 P.2d 474 (1983). The *Herskovits* court, however, viewed the action as a wrongful death action. In the plurality opinion Justice Pearson expressly indicated that the action was a wrongful death action. 99 Wn. 2d at 635 n.1, 664 P.2d at 487 n.1. In the "lead" opinion, although Justice Dore stated that the action was a survivorship action, *id.* at 611, 664 P.2d at 475, he later defined the compensable injury as death, *id.* at 614, 664 P.2d at 476–77.

3. *See supra* note 2.

could have diagnosed the tumor through testing six months earlier, when Mr. Herskovits sought treatment from Group Health for a chronic cough.[4] He indicated that the delay in diagnosis probably reduced Mr. Herskovits' chance of survival "substantially."[5] He also indicated that the reduction in five-year[6] chance of survival could have been as much as a 14% drop, from a 39% chance of survival at the time the tumor should have been diagnosed to a 25% chance of survival at the time it was diagnosed.[7]

The trial court granted Group Health's summary judgment motion because it found that Mrs. Herskovits had failed to establish that Group Health caused Mr. Herskovits' death.[8] The trial court based its finding on traditional causation principles, which require proof under the but-for test,[9] and a probability standard[10] that the defendant's conduct was a cause-in-fact of the injury. The court found that Mrs. Herskovits could not meet the traditional test, because she could not prove that but for the negligent conduct of Group Health, Mr. Herskovits' death probably would not have occurred within five years. She could not prove this because even in the absence of negligence, the probability that Mr. Herskovits would have survived for five years was less than 50%.

The Washington Supreme Court accepted a direct appeal from Mrs. Herskovits. For purposes of appeal, the parties stipulated that Group

4. Mr. Herskovits was a long-time patient of Group Health, was almost 60 years old and had a history of smoking. *Herskovits*, 99 Wn. 2d at 612, 620, 664 P.2d at 475, 480.

5. *Id.* at 622, 664 P.2d at 480.

Group Health's doctor disagreed. He testified that earlier diagnosis would not have prevented Mr. Herskovits' death nor lengthened his life. He stated that this type of cancer is virtually certain to cause death within several years regardless of when the tumor is diagnosed. *Id.* at 612, 664 P.2d at 475.

6. "Survival" in lung cancer cases is defined as five years. Brief of Appellant at 14 n 3, Herskovits v. Group Health, 99 Wn. 2d 609, 664 P.2d 474 (1983). Thus, a statistic such as 39% chance of survival refers to a 39% chance of surviving for five years after diagnosis.

7. A cancerous tumor increases in size over time, and the patient's chances of survival decline accordingly. *Herskovits*, 99 Wn. 2d at 621, 664 P.2d at 480. When discovered, Mr. Herskovits' tumor was a "stage 2" tumor. *Id.* at 621, 664 P.2d at 480. The private doctor testified that the tumor might have been only a "stage 1" tumor when it should have been diagnosed six months earlier. *Id.* He indicated that the statistical chance of survival after discovery of a "stage 1" tumor is 39%, while the statistical chance of survival after discovery of a "stage 2" tumor is 25%. *Id.*

The doctor also testified, however, that he could not indicate in terms of certainty, probability, or statistical chance the likelihood of the tumor's being at "stage 1" six months earlier. *Id.* at 622, 664 P.2d at 480. He did state that tumors do increase in size over time, and the patient's chance of survival declines accordingly. *Id.* at 621, 664 P.2d at 480.

8. *Id.* at 621, 664 P.2d at 480.

9. The Washington Supreme Court has stated that cause-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 Wn. 2d 460, 476, 656 P.2d 483, 493 (1983); King v. Seattle, 84 Wn. 2d 239, 249, 525 P.2d 228, 234 (1974).

10. The Washington Supreme Court has also stated that in medical malpractice cases, cause-in-fact must be established by expert testimony and the standard of proof for such testimony is one of probability. O'Donoghue v. Riggs, 73 Wn. 2d 814, 824, 440 P.2d 823, 830 (1968).

Health was negligent, and that Group Health's negligence proximately caused a 14% drop in Mr. Herskovits' chance of survival. They also stipulated that Mr. Herskovits would have had less than a 50% chance of survival even with timely diagnosis. The supreme court reversed the trial court and remanded the case for trial on the merits. The supreme court split four ways, however, and failed to produce a majority opinion.[11] The "lead" opinion and plurality opinion justices departed from traditional causation principles to reach their results.

II. POLICY JUSTIFICATIONS FOR COMPENSATING LOSS OF A LESS-THAN-50% CHANCE OF SURVIVAL

Although a plaintiff like Mrs. Herskovits cannot recover under traditional causation principles,[12] a court may feel at least some of the burden of harm should be shifted to the defendant. This would be based on precedents such as *Summers v. Tice*[13] and *Sindell v. Abbott Laboratories*,[14] in which courts faced with uncertainty of causation decided to place the burden of harm on negligent defendants rather than innocent plaintiffs. Those cases, however, are distinguishable from the *Herskovits* situation. In those cases, it was certain that one of the defendants negligently caused the harm, although it was impossible to prove which defendants were responsible. In *Herskovits*, on the other hand, the hospital's negligence may have caused the patient's death (if the cancer had been diagnosed and treated earlier, Mr. Herskovits might have survived five years), or it may have had no effect at all on the course of his disease (even with timely diagnosis, Mr. Herskovits might have died within five years). Thus, shifting liability to the defendant in *Herskovits* would be more tenuous than in the other cases. Nonetheless, a court may feel that denying any recovery to the plaintiff would be harsh.[15]

A court may also wish to allow recovery in order to deter others in the medical profession from negligence.[16] According to this view, if doctors

11. Two justices, Dore and Rosellini, joined in the "lead" opinion; four justices, Pearson, Williams, Stafford, and Utter, joined in the concurring opinion; and three justices, Brachtenbach, Dimmick, and Dolliver, dissented in two separate opinions.

12. *See supra* notes 9–10 and accompanying text.

13. 33 Cal. 2d 80, 199 P.2d 1 (1948) (two hunters were both capable of firing the shot which injured plaintiff; court assigned joint and several liablility).

14. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (each of several defendant drug manufacturers could not prove that it could not have produced the drug that injured plaintiff. The court assigned liability based on the probability that each defendant caused the injury—its percentage share of the market for that drug), *cert. denied*, 449 U.S. 912 (1980).

15. *Herskovits*, 99 Wn. 2d at 620, 664 P.2d at 479.

16. Although deterrence is a secondary purpose of tort law, which seldom has controlling force, courts often give it weight. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4, at 23 (4th ed. 1971).

and hospitals are shielded from liability for negligent conduct resulting in loss of a less-than-50% chance of survival, they might be less inclined to perform the full spectrum of diagnostic and treatment procedures in seemingly hopeless cases. This would be especially likely given the ever-increasing emphasis on cost control in modern medical care.[17]

III. THE *HERSKOVITS* PLURALITY OPINION—REDEFINING THE INJURY

In the *Herskovits* plurality opinion, Justice Pearson endeavored to allow recovery for Mrs. Herskovits without contravening the traditional principles of causation.[18] To accomplish this, he defined the compensable injury not as the death, but as the loss of chance of survival itself.[19] Mrs. Herskovits could show, under the traditional principles, that but for Group Health's conduct, Mr. Herskovits' *loss of chance of survival* probably would not have occurred.

On its face, this approach appears to solve the causation problem. However, the redefinition is only an exercise in semantics. It hides the inescapable fact that loss of chance of survival in itself is no injury until death or other physical harm ensues.[20] The true injury is death, and the

Justice Dore in the *Herskovits* "lead" opinion referred to deterrence as a ground for allowing recovery. 99 Wn. 2d at 614, 664 P.2d at 477.

17. The deterrence theory is problematic, however. The effects of deterrence might go too far by discouraging doctors from using innovative techniques. If fear of potential malpractice liability caused doctors to refrain from using techniques which carried a risk of loss of chance of survival, some patients might be denied potentially successful treatment. Society should encourage rather than discourage doctors' taking of such risks. *Herskovits*, 99 Wn. 2d at 637–38, 642, 664 P.2d at 488, 491 (Brachtenbach, J., dissenting); Malone, *Ruminations on Cause-In-Fact*, 9 STAN L. REV 60, 85–88 (1956).

The problem of discouraging doctors' risk-taking could be avoided, however, if judges carefully instruct juries that a doctor is liable only when he fails to comply with an accepted standard of care—not when he reasonably employs a somewhat risky technique with the patient's consent. Such instructions should help juries to distinguish between true malpractice and a patient's knowing assumption of risk when he agrees to his doctor's use of a certain technique.

18. *See supra* notes 9–10 and accompanying text.

19. *Herskovits*, 99 Wn. 2d at 624, 664 P.2d at 481. Justice Pearson found support for defining the injury as the loss of chance itself in three cases from other jurisdictions: O'Brien v. Stover, 443 F.2d 1013 (8th Cir. 1971), Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970), and James v. United States, 483 F. Supp. 581 (N.D. Cal. 1980). *Herskovits*, 99 Wn. 2d at 632, 664 P.2d at 485.

20. *See* W. PROSSER, *supra* note 16, § 30, at 143 (the threat of future harm, not yet realized, is not a compensable injury).

The argument for recognizing loss of chance as the compensable injury in itself is extensively outlined in King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981). King suggests broad-ranging reforms of the tort damage evaluation system that would essentially require almost every case—even cases with a greater-than-50% probability of causation—to be considered a loss of chance case, with the plaintiff recovering a percentage of full recovery based on the percent likelihood of causation. King's method does not provide answers, however, to the issues raised *infra* in notes 21–26 and

ultimate causation issue is whether the loss of chance caused the death. Thus, Justice Pearson's redefinition of the injury conceals rather than solves the causation problem.

Several factors point to the conclusion that the death, not the loss of chance, is the true injury in *Herskovits*. First, if the loss of chance itself were the actual injury, a court would logically have to provide compensation to a plaintiff who suffered a loss of chance but "beat the odds" and survived five years. This result seems anomalous, because the survivor would have suffered no actual damage from the loss of chance.[21] If such a suit were brought, the fact that loss of chance alone produces no injury would seem obvious.

Second, Justice Pearson had to struggle to fit his causation analysis within Washington's wrongful death statute. Redefining the harm as "loss of chance" rather than "death" seems to place recovery outside the bounds of the statute, which permits an action for damages only when "death" is caused.[22] Justice Pearson essentially sidestepped the statutory problem by suggesting that courts interpret the statute to mean that a defendant will "cause" death whenever he causes a substantial reduction in a decedent's chance of survival.[23] Justice Pearson supported his liberal construction of the statute by pointing out that the word "cause" already has a "notoriously elusive" meaning.[24]

Third, Justice Pearson's method of damage assessment was essentially built on the concept of death as the injury.[25] As compensation for loss of chance, Justice Pearson would award the value of the life multiplied by the percentage chance of survival lost.[26] Although loss of chance is the

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accompanying text. He insists that there is "inherent worth" in a chance, which should be recognized and compensated. *Id.* at 1378.

21. A survivor might be able to recover for negligent infliction of emotional distress rather than loss of chance if he demonstrated "objective symptomatology." Hunsley v. Giard, 87 Wn. 2d 424, 436, 553 P.2d 1096, 1103 (1976). (Recovery for emotional distress is not possible in a wrongful death action, however. *See* WASH. REV. CODE § 4.20.010 (1984)).

22. WASH. REV. CODE § 4.20.010 (1984).

23. *Herskovits*, 99 Wn. 2d at 634–35, 664 P.2d at 487.

24. *Id.* at 635 n.1, 664 P.2d at 487 n.1.

This justification is weak. Many legal terms have elusive meanings, but that fact does not ordinarily replace consideration of legislative intent as the basis for reinterpretatin of a statute.

25. Because *Herskovits* was an appeal from a summary judgment, the justices did not assess damages. They did, however, consider the general method of damage assessment that should be used by a jury finding liability in a *Herskovits*-type trial. *Id.* at 618–19, 635, 664 P.2d at 478–79, 487. The justices' very brief expositions on this subject are hard to understand and fail to give meaningful guidance to a trial judge. *See infra* notes 26, 27 (discussion of damage assessment methods).

26. Justice Pearson implied that he would first ask a jury to compute a figure representing the value of Mr. Herskovits' life at the time the tumor should have been discovered. He would then discount that value-of-life figure by multiplying it by a figure representing the percentage chance lost because of Group Health's negligence. Justice Pearson indicated that he would use this method of damage assessment by citing with approval a passage from King, *supra* note 20, at 1382. *Herskovits*,

alleged injury, the actual injury being valued is the underlying death. Multiplying by the chance of survival is merely a way of acknowledging the uncertainty of causation. Thus, Justice Pearson's own measure of damages belies his premise that the compensable injury is loss of chance.

The device of redefining the injury in a wrongful death action is ultimately ineffective. The true injury is the death, and focusing attention on whether the defendant caused the loss of chance begs the ultimate question of whether the defendant caused the death. Although Mrs. Herskovits can show that the defendant probably caused the loss of chance, she cannot show that the loss of chance probably caused the death. This is the key question. If the loss of chance had nothing to do with the death, there was no injury.

Justice Pearson's approach of redefining the harm to be the loss of chance itself does not resolve the issue of whether there was injury. It dodges the question of whether the loss of chance caused the death. Thus, Justice Pearson's analysis never addresses the true liability issue.

IV. THE *HERSKOVITS* "LEAD" OPINION—AN ALTERNATIVE TO THE BUT-FOR TEST

In the *Herskovits* "lead" opinion, Justice Dore properly focused on death as the injury, but also failed to solve the causation problem. Justice Dore chose a different way of deviating from traditional causation principles in order to allow recovery for Mrs. Herskovits. Unlike Justice Pearson, he did not redefine the injury; he acknowledged that the compensable injury was Mr. Herskovits' death.[27] Instead, he proposed adoption of an

99 Wn. 2d at 635, 664 P.2d at 487. The passage referred to a situation where a patient died after negligent misdiagnosis of a heart attack. The patient had a 40% chance of survival absent negligence and the plaintiff could show that the defendant reduced the patient's chance from 40% to 0%. King suggested that a jury determining recovery in that situation would compute the value of decedent's life, assuming he had survived the heart attack, and then multiply that value-of-life figure by 40%. King stated that the measure of a compensable chance is "the percentage probability by which the defendant's tortious conduct diminished the likelihood of achieving some more favorable outcome." King, *supra* note 20, at 1382.

Justice Pearson did not illustrate application of King's discount method to the facts of *Herskovits*. A motion for reconsideration requesting the addition to Justice Pearson's opinion of an explicit reference to use of a 14% multiplier under the *Herskovits* facts was rejected. 99 Wn. 2d at 645. The court provided no opinion explaining its denial of this motion, but its reasons may have been based on concerns regarding the applicability of a statistical figure to a particular patient. *See infra* note 41 and accompanying text.

Justice Pearson did not find guidance in prior cases as to the exact method a jury should use to assess loss of chance damages. He suggested that courts in the prior loss of chance cases that defined the compensable harm to be the loss of chance "implicitly" advocated use of King's method. *Id.* at 632, 664 P.2d at 486.

27. *Id.* at 614, 664 P.2d at 476–77.

alternative to the but-for test of causation, at least at the prima facie level.[28] Under Justice Dore's alternative prima facie test, medical evidence that the defendant caused the death would be unnecessary. A plaintiff could raise an issue of material fact merely through presenting medical evidence that the defendant "increase[d] the risk of harm"[29] to the plaintiff (in other words, decreased the patient's chance of survival). Under this alternative test, Mrs. Herskovits could avoid summary judgment, because she could show that Group Health probably decreased Mr. Herskovits' chance of survival.

Use of the alternative test at the prima facie level, however, does not solve the *Herskovits* causation problem.[30] At trial, Mrs. Herskovits would still have to meet the traditional but-for test—she would have to show that Group Health probably caused Mr. Herskovits' death. Contrary to a suggestion in Justice Dore's opinion, Mrs. Herskovits could not recover merely by showing that the loss of chance was a substantial factor in causing the death.[31] Use of the alternative test at the prima facie level

28. *Id.* at 619, 664 P.2d at 479. The new test is drawn from RESTATEMENT (SECOND) OF TORTS § 323 (1965). *Herskovits*, 99 Wn. 2d at 613, 664 P.2d at 476. Section 323 states:

> 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 such harm . . . .

RESTATEMENT, *supra*.

The appropriateness of basing a causation test on § 323 is questionable. Section 323 appears in a portion of the *Restatement* that describes affirmative duties, not causation. The *Restatement* authors probably wrote the sections in that portion of the *Restatement* with the assumption that causation was assumed in the situations described. This is apparent from the wording of § 323 itself, which indicates that liability exists for physical harm "resulting" from the actor's failure to exercise care.

29. *Herskovits*, 99 Wn. 2d at 613, 664 P.2d at 476.

30. The court that originated use of the alternative § 323 test at the prima facie level did so in a case where plaintiff could meet the traditional causation requirement with its but-for test and probability standard. In Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978), testimony indicated that but for the defendant's negligent conduct, the decedent would have had a 75% chance of survival. 392 A.2d at 1288 n.9.

The *Hamil* court invoked the alternative § 323 test merely as a means of accommodating Pennsylvania's certainty standard of proof for medical testimony of cause-in-fact. 392 A.2d at 1288; King, *supra* note 20, at 1367 n.44. The Pennsylvania court recognized that, in a case involving the question of whether an independent source of harm would have caused the same result even in the absence of defendant's conduct, requiring an expert to testify with certainty on but-for causation would be unreasonable. *Hamil*, 392 A.2d at 1288. Washington courts do not face this problem because Washington already follows a probability rather than certainty standard of proof for medical testimony of cause-in-fact. O'Donoghue v. Riggs, 73 Wn. 2d 814, 824, 440 P.2d 823, 830 (1968).

31. Justice Dore's suggestion that a jury in a *Herskovits*-type trial should use the "substantial factor" test, 99 Wn. 2d at 616, 617, 664 P.2d at 477, 478, does not obviate the but-for requirement. The but-for requirement is incorporated in the substantial factor test, except in situations in which each of two forces combining to produce an injury could have alone produced the injury. RESTATEMENT, *supra* note 28 § 432. In *Herskovits*, Group Health's negligence could not have produced Mr. Herskovits' death without the preexisting disease.

in *Herskovits* is thus ineffective. The plaintiff survives a summary judgment motion only to proceed to trial lacking evidence sufficient to meet the standard of proof.

A court could allow a plaintiff like Mrs. Herskovits to recover only by lowering the standard of proof. Under a lower standard of proof, a *Herskovits* jury could find for Mrs. Herskovits if she merely showed that but for Group Health's conduct Mr. Herskovits' death *possibly*, rather than *probably*, would not have occurred within five years. Summary judgment would then be inappropriate, and Justice Dore's result would be correct.

Use of a possibility standard of proof is unfair, however. It contradicts the basic notion that a mere possibility of causation is not enough to hold a defendant liable for injury.[32] The reasoning behind this notion is that a jury using a possibility standard could assign liability based on speculation and conjecture, which is unfair to the defendant.[33]

A court might, however, justify adoption of a possibility standard either on the policy ground of spreading the burden of loss when causation is uncertain, or on the policy ground of deterring negligent treatment of patients with less than a 50% chance of survival.[34] Some jurisdictions have advocated a possibility standard of proof in medical malpractice situations, but their legal bases were flawed or unsupported by precedent.[35]

The Pennsylvania case on which Justice Dore based his suggestion that a jury would use the substantial factor test, Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978), did not use a definition of the substantial factor test different from that of the *Restatement*. Commentary to the Pennsylvania standard jury instructions indicates that Pennsylvania courts have adopted the *Restatement's* definition of the substantial factor test. CIVIL INSTRUCTIONS SUBCOMM., PA SUPREME COURT COMM FOR PROPOSED STANDARD JURY INSTRUCTIONS, PENNSYLVANIA SUGGESTED STANDARD JURY INSTRUCTION (CIVIL) § 3.25 Comment (1981) (Last Revision Oct. 1973) (citing Whitner v. Lojeski, 437 Pa. 448, 263 A.2d 889 (1970)).

Washington has explicitly rejected use of the substantial factor test in jury instructions. WASH SUPREME COURT COMM. ON JURY INSTRUCTIONS, WASHINGTON PATTERN JURY INSTRUCTIONS (CIVIL) § 15.01 Comment (2d ed. 1980) (citing Blasick v. Yakima, 45 Wn. 2d 309, 274 P.2d 122 (1954)) [Hereinafter cited as WASH. PATTERN JURY INSTRUCTIONS]. Thus, by advocating use of the substantial factor test, Justice Dore would apparently overrule *Blasick*.

32. W. PROSSER, *supra* note 16, § 41, at 241.

33. *Id.*; O'Donoghue v. Riggs, 73 Wn. 2d 814, 824, 440 P.2d 823, 830 (1968).

34. *See supra* notes 12–17 and accompanying text.

35. Several juridsictions have adopted the language used in Hicks v. United States, 368 F.2d 626 (4th Cir. 1966) as supporting a possibility standard. Jeanes v. Milner, 428 F.2d 598, 605 (8th Cir. 1970); James v. United States, 483 F. Supp. 581, 585 (N.D. Cal. 1980). The *Hicks* court stated, "If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable." *Hicks*, 368 F.2d at 632.

The language in *Hicks* was dicta, however, because the *Hicks* plaintiff could have met a probability standard of proof. Expert testimony for the plaintiff indicated that the decedent would have survived if operated upon promptly. *Id.* Moreover, the *Hicks* court apparently used the "possibility" language merely for the purpose of rejecting a certainty standard of proof. *Id.*; *Herskovits*, 99 Wn. 2d at 627, 664 P.2d at 483; *King*, *supra* note 20, at 1369 n.53.

Kallenberg v. Beth Israel Hosp., 45 A.D.2d 177, 357 N.Y.S.2d 508 (1974), *aff'd mem.*, 37 N.Y.2d 719, 337 N.E.2d 128, 374 N.Y.S.2d 615 (1975), supported a possibility standard of proof in

IV. A RESULT-ORIENTED DAMAGE AWARD

If a court chooses to bypass traditional causation principles and adopt a possibility standard of proof in a *Herskovits*-type case, it will be faced with a damages question that also cannot be solved under traditional principles. Courts traditionally deal with damages according to an all-or-nothing rule tied to the probability of causation: if the plaintiff can prove that the defendant probably caused the harm, full damages can be recovered; if the plaintiff cannot prove probable causation, recovery is denied.[36]

If a court adopts a possibility rather than probability standard of proof, it should at least limit the liability of the defendant to reflect the likelihood that the defendant caused the injury. Otherwise, the unfairness of using a lower standard of proof would be exacerbated. In *Herskovits,* for example, Group Health might be found liable under a possibility standard and forced to pay full damages for Mr. Herskovits' life, as if it had probably caused Mr. Herskovits' death. Mrs. Herskovits would be overcompensated, and Group Health would be punished. Justice Dore, in a cryptic discussion of damages, gave no indication that he would adjust the damage award to reflect the uncertainty of causation.[37]

One might argue that a court can rely on jurors to use their own sense of justice to tailor the size of the award to the probability that the defen-

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a wrongful death action without relying on the *Hicks* dicta. The New York court allowed wrongful death recovery for loss of a 20% to 40% chance of survival. *Kallenberg,* 357 N.Y.S.2d at 510. The court did not cite any authority to support this proposition. A later New York case, without overruling *Kallenberg,* indicated that *Kallenberg* did not stand for the proposition that the jury may use a mere possibility standard. Kimball v. Scors, 59 A.D.2d 984, 399 N.Y.S.2d 350, 351 (1977). In some contexts, a possibility standard has been approved through legislation. Gardner v. National Bulk Carriers, Inc., 310 F.2d 284 (4th Cir. 1962), *cert. denied,* 372 U.S. 913 (1963).

Examples of other cases that could be interpreted as supporting a possibility standard of proof are provided in *King, supra* note 20, at 1368 n.53. *King* suggests that these cases' support for the possibility standard of proof is often limited, problematic, or ambiguous. *Id.* at 1368.

36. *King, supra* note 20, at 1354.

37. Justice Dore did suggest that a loss of chance damage award should not provide "total recovery" but only recovery based on harm "caused directly by premature death, such as lost earnings and additional medical expenses, etc." *Herskovits,* 99 Wn. 2d at 619, 664 P.2d at 479. A clue to the meaning of these words is found in Justice Dore's approval of the method of damage assessment used in Chester v. United States, 403 F. Supp. 458 (W.D. Pa. 1975). *Herskovits,* 99 Wn. 2d at 618, 664 P.2d at 478–79. In *Chester,* the court based a damage award not on the normal life expectancy of a person in decedent's actuarial class, but on the life expectancy of a person with the decedent's disease and personal history. Thus, Justice Dore's statement that a court should not provide "total recovery" merely seems to draw the distinction between basing a damage award on the life expectancy of an average, healthy 60-year-old man or a man in Mr. Herskovits' condition.

This distinction is a standard part of the Washington pattern jury instruction on factors to be considered in a wrongful death damage award. *See* WASH. PATTERN JURY INSTRUCTIONS, *supra* note 31, at § 31.02. Justice Dore, therefore, would apparently give a *Herskovits* jury a standard wrongful death damage instruction.

dant caused the harm.[38] Such reliance would be unrealistic, however, given the emotionally-packed context of a wrongful death action involving a misdiagnosed cancer patient. The likely result would be a windfall gain for plaintiffs, and an unmanageable influx of loss of chance suits on already-crowded court dockets.

Justice Pearson's suggestion of discounting the damage award[39] would be useful in achieving a fairer allocation of the loss. The loss of chance multiplier represents the likelihood that the defendant was the cause of the harm. The jury would indicate the proper multiplier figure through a special verdict. The court would then apply this muliplier to the value-of-life figure to compute the amount of damages to be awarded.[40]

Although statistics by their nature can never reflect the situation of any one individual, a trial court should insist that the plaintiff produce evidence that the statistics being used are as closely tailored to the decedent's circumstances as possible.[41] Even so, the court must be willing to accept

38. *See* Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV 543, 574–76 (1962) (juries use their great latitude in setting the damage award to balance doubtful findings on other issues such as causation). A jury's common sense damage award is unlikely to be challenged unless it is outrageously large or small. *Id.* at 575.

39. *See supra* note 26 and accompanying text.

40. This method of damage assessment, based on a possibility standard, already has been applied in at least one Washington trial case. In a recent legal malpractice action, Daugert *ex rel.* Simms v. Pappas, No. 83-2-00823-5 (Whatcom County Super. Ct. 1984), the plaintiff recovered for a less-than-50% chance of winning a Petition for Review to the Washington Supreme Court. The testimony of various expert witnesses as to the possibility of winning ranged from 6% to 50%. *"Loss of Chance" Applied in Lawyer Malpractice Verdict*, 19 Trial News (Official Publication of Wa. State Trial Lawyers Ass'n) No. 6 at 15 (April 1984). The jury picked a compromise figure, 20%, which it reported through a special verdict. The judge used this figure as a multiplier to arrive at the final damage award. *Id.* at 15.

41. In a *Herskovits* trial, for example, the discount method should not be applied based on the 14% difference between the 39% and 25% statistical chance of survival figures assumed in the summary judgment action. A 14% multiplier would be fair only coincidentally. This is because the 14% figure represents the difference between statistical findings of survival chance at various disease stages.

The statistical chance of survival at any stage does not necessarily relate to any one patient's individual chance of survival at that stage. Justice Brachtenbach discussed the need for patient-specific facts in his *Herskovits* dissent. 99 Wn. 2d at 641, 664 P.2d at 490.

For example, the statistics used in *Herskovits* for stage 1 and 2 tumors were derived from a pool of lung cancer patients with the same tumor size and cell-type as Mr. Herskovits. Slack, Chamberlain and Bross, *Predicting Survival Following Surgery for Bronchogenic Carcinoma*, 62 CHEST 433, 437 (Table 4) (1972). Beyond those similarities among the study patients, however, the individual patients possessed differing traits. The effects of the differing traits cancel each other out in the group figure. On an individual basis, however, they are important.

The authors emphasized that these statistics merely form a base estimate of survival, from which an intuitive amount should be added or subtracted for other factors that may be influential. *Id.* at 438. For example, one of the major factors with prognostic significance, the presence or absence of surgical complications, *id.* at 434, was not considered in developing the quoted statistical figures. *Id.* at 436. The authors urged that in determining survival chance for a particular patient, the ability of the

the fact that although the damage multiplier may be adjusted to reflect individual tendencies, at base it is a statistical figure which is not geared to the individual patient. This may present a problem regarding requirements for certainty as to the amount of damage. The plaintiff is required to provide a "just and reasonable" basis for estimating damages.[42] This need not approach mathematical certainty, however; the plaintiff may only be required to prove the amount of damages with as much accuracy as is reasonably attainable given the nature of the claim and the circumstances.[43]

There is no rule as to the degree of certainty required; rather courts will accept or reject damage estimates based on the importance they assign to the vindication of a given claim.[44] If a court is willing, as in *Herskovits*, to suspend traditional causation requirements to enable a loss of less-than-50% chance claim to proceed, it may well be willing to accept damages based on statistical information not geared to the specific patient. A result-oriented liability analysis thus leads to an equally result-oriented damage award.

V. CONCLUSION

Recovery for loss of a less-than-50% chance of survival is not possible under traditional causation principles. A court wishing to provide recovery may do so only by adopting a possibility standard of proof. The damage award should then be reduced to reflect the probability that the defendant caused the death. Statistical evidence of chance of survival is not in itself sufficient to make this damage determination. Evidence of

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individual patient to withstand surgery should be weighted with the survival prediction derived from the study. *Id.* at 437.

The multiplier figure that would be used to represent Mr. Herskovits' individual loss of survival chance attributable to Group Health would have to be selected by the jury from various options presented. Presumably, in a *Herskovits* trial a doctor would testify as to the individual five-year survival chance of Mr. Herskovits at stage 1 and stage 2. (Although we know that Mr. Herskovits died within five years from stage 2, his survival chance at that diagnosis was not necessarily zero. Someone might have a 98% chance of surviving five years, but still die within five years. The "chance" of surviving is always accompanied by the "chance" of death, and either one may materialize.) These figures might be based on a statistical finding but would include consideration of Mr. Herskovits' individual traits.

Admittedly, this evidence for stage 1 might be hard or impossible to produce if the patient's medical records from the time the disease should have been diagnosed are inadequate to supply such information. An opposing expert might testify that different figures should be used at either stage. The jury would consider all the figures presented and choose from among them, or choose a compromise figure, to arrive at the proper figure.

42. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.3, at 151 (1973).

43. *Id.*

44. *Id.* at 152.

discrepancies between the patient's individual condition and the conditions of study-group patients in statistical findings must be considered. Even then, a court must be willing to accept a damage figure ultimately based on statistical information which is not specific to the individual patient.

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