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LOSS-OF-CHANCE DOCTRINE IN WASHINGTON: FROM *HERSKOVITS* TO *MOHR* AND THE NEED FOR CLARIFICATION

Matthew Wurdeman

Abstract: Loss of chance is a well-established tort doctrine that seeks to balance traditional tort causation principles with the need to provide a remedy to patients whose injuries or illnesses are seriously exacerbated by physician negligence. In Washington, the doctrine continues to create significant difficulties for judges, juries, and practitioners. Wherever it has been applied, it has often created difficulties. The loss-of-chance doctrine needs clarification—definitive, sensible, and workable guidelines to ensure that loss of chance is consistently and fairly applied. Part of the problem lies in the fact that courts and litigants use the term “loss of chance” as if it has a single, fixed meaning, when in fact it is an umbrella term that covers three separate—though sometimes overlapping—theories of recovery. This Comment first identifies and explains the different meanings attached to loss of chance, and briefly describe its varying implementation among states over the past three decades. Next, it tracks the evolution of loss-of-chance doctrine in Washington State from its inception to its current ambiguous status. Then this Comment analyzes the difficulties arising from ambiguities in the Washington State Supreme Court’s decisions in *Herskovits v. Group Health Coop. of Puget Sound* and *Mohr v. Grantham*, as well as and the recent Washington State Court of Appeals for Division III decision in *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*. The critique of these three cases underscores the extent to which ambiguities in loss-of-chance doctrine currently lead to inconsistent and unpredictable standards of causation and burdens of proof. This Comment concludes by suggesting concrete solutions to create a coherent and equitable doctrine that will allow plaintiffs to recover for loss of chance without creating incentives for unfair manipulation of common law tort standards. In order to illustrate the workability of these suggestions, this Comment applies them to the facts of *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*. While this Comment focuses primarily on Washington State law, the solutions presented are applicable in any jurisdiction that struggles with the loss-of-chance doctrine.

INTRODUCTION

Loss of chance is a well-established tort doctrine, and yet it remains something of a mystery. Loss of chance allows a plaintiff to recover for a lost opportunity to survive or recover from an injury or illness due to the negligence of a defendant, typically a physician.¹ When it applies, the doctrine stretches traditional causation boundaries, allowing recovery to plaintiffs who were never more likely than not to survive their illness

1. Alice Férot, *The Theory of Loss of Chance: Between Reticence and Acceptance*, 8 FIU L. REV. 591, 591–92 (2013).

or injury.² Such plaintiffs would have no viable claim under a rigid interpretation of common law tort principles.³ Although the concept is simple, and there is widespread agreement among states on the general principles of the doctrine, in practice courts have struggled to develop consistent, workable rules for loss of chance. Similarly, legal scholars underestimated the complexity of this doctrine. In the almost fifty years since loss of chance was first addressed by a federal court sitting in diversity in *Hicks v. United States*,⁴ scholars have given little attention to the doctrine beyond its basic contours. Much of the scholarship advocates for the adoption or rejection of the doctrine as a whole.⁵ Yet in loss of chance cases, details matter.

This Comment critiques the struggle for coherence in the development of Washington State's loss-of-chance doctrine, and offers concrete suggestions to ameliorate the inequities and inconsistencies in current doctrine. While this Comment focuses on Washington law, these suggestions are also relevant to other jurisdictions encountering similar difficulties.

The 1983 decision in *Herskovits v. Group Health Cooperative of Puget Sound*⁶ is a landmark case for loss-of-chance precedent.⁷ A staple in many torts casebooks,⁸ *Herskovits* addresses three potential approaches to the loss-of-chance doctrine—the all-or-nothing approach,⁹ the substantial-factor approach,¹⁰ and the proportional approach.¹¹ *Herskovits* officially incorporated loss-of-chance doctrine into

2. See, e.g., *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wash. 2d 609, 619, 664 P.2d 474, 479 (1983) (allowing a 14% loss of chance of survival to go to the jury on proximate cause).

3. *Id.*

4. 368 F.2d 626, 633 (4th Cir. 1966).

5. See, e.g., Férot, *supra* note 1, at 621 (suggesting legislation on loss of chance may be the best option); Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1396–97 (1981) (advocating for adoption of the loss-of-chance doctrine).

6. 99 Wash. 2d 609, 664 P.2d 474.

7. *Id.* at 619, 664 P.2d at 479.

8. See, e.g., JOHN L. DIAMOND, CASES AND MATERIALS ON TORTS 211–18 (2d ed. 2008) (using *Herskovits* to explain loss of chance); RICHARD EPSTEIN, CASES AND MATERIALS ON TORTS 482–91 (6th ed. 1995) (same); FARNSWORTH & GRADY, TORTS: CASES AND QUESTIONS 317–32 (2004) (same); VICTOR E. SCHWARTZ ET AL., CASES AND MATERIALS ON TORTS 279–84 (12th ed. 2010) (same).

9. See *Herskovits*, 99 Wash. 2d at 614, 623–25, 632–34, 664 P.2d at 476–77, 481–82, 485–87 (addressing the all-or-nothing approach).

10. See *id.* at 614–19, 664 P.2d at 477–79 (addressing the substantial-factor approach).

11. See *id.* at 624–35, 664 P.2d at 481–87 (Pearson, J., concurring) (addressing the proportional approach).

Washington State law, at least in cases where a physician's negligence is one cause of a patient's death.¹² However, the court divided on whether to employ the substantial factor or proportional approach.¹³ The lead opinion employed the substantial factor approach, which is a theory of causation even if the lost chance is less than even.¹⁴ The concurrence employed the proportional approach, which is a theory of valuation—it determines what the lost chance is worth.¹⁵

Almost thirty years later, in *Mohr v. Grantham*,¹⁶ the Washington State Supreme Court again addressed the loss-of-chance doctrine.¹⁷ The Court officially adopted the *Herskovits* concurrence's proportional approach for the loss of a less than even chance, and extended the doctrine to include loss of chance of a better outcome in situations where patients survive negligent care but sustain serious injuries.¹⁸ It seems as if the Court intended *Mohr* to clarify the loose ends of *Herskovits*. In fact, however, *Mohr* created more problems than it solved, potentially sowing confusion in future cases.

A recent Washington State Court of Appeals case, *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*,¹⁹ illustrates the practical effects of the many unanswered questions of *Herskovits* and *Mohr*.²⁰ In an internally contradictory opinion, *Dormaier* utilizes all three loss of chance approaches to different ends, depending on the issue it is trying to resolve.²¹ The *Dormaier* opinion demonstrates the need for clarification and distinct boundaries to help guide trial courts, practitioners, and juries.

In Part I, this Comment first defines the loss of chance, and then

12. *See id.* at 619, 664 P.2d at 479 (lead opinion) (holding that a 14% reduction of chance of survival is sufficient evidence to go to the jury).

13. *See id.* at 619–20, 664 P.2d at 479 (Pearson, J., concurring) (agreeing with the court's lead opinion, but not its reasoning).

14. *See id.* at 614–19, 664 P.2d at 476–79 (lead opinion) (employing the substantial-factor approach).

15. *See id.* at 631–35, 664 P.2d at 485–87 (Pearson, J., concurring) (employing the proportional approach).

16. 172 Wash. 2d 844, 262 P.3d 490 (2011).

17. *See id.* at 846–47, 262 P.3d at 491 (“This case compels consideration of whether, in the medical malpractice context, there is a cause of action for a lost chance, even when the ultimate result is some serious harm short of death.”).

18. *Id.* at 857, 262 P.3d at 496.

19. 177 Wash. App. 828, 313 P.3d 431 (2013).

20. *See id.* at 844–47, 313 P.3d at 438–39 (addressing the questions remaining after *Herskovits* and *Mohr*).

21. *See id.* at 844–70, 313 P.3d at 438–51 (employing the all-or-noting, substantial factor, and proportional approaches); *see also infra* Part II.D.1.

identifies and explains the five distinct doctrines for which the seemingly unitary label “loss of chance” has come to stand. It then demonstrates the uneven implementation of the different approaches among the states.

Part II traces the history of the loss-of-chance doctrine in Washington focusing primarily on *Herskovits*, and the more recent decisions in *Mohr* and *Dormaier*. Following its discussion of each case, this Comment highlights unresolved legal questions and demonstrates their potential negative implications in future cases. Parts I and II, taken together, explain the source of the confusion in loss-of-chance doctrine in Washington medical malpractice cases.

Part III of this Comment offers a coherent, predictable framework for Washington courts as they consider future loss of chance cases. It provides specific solutions to the problems inherent in *Mohr* and *Dormaier*. While this Comment’s solutions are specific to the proportional approach as it stands in Washington State, the reasoning behind them is applicable in any jurisdiction currently struggling with loss of chance.

Finally, Part IV demonstrates the feasibility of implementing the proposed solutions by applying these solutions to the facts of *Dormaier*. Part IV clearly lays out what would be required of a plaintiff’s attorney in order to successfully bring a loss of chance claim, and provides guidance to trial courts on how to handle the claim.

I. LOSS OF CHANCE: COURTS BLUR CAUSATION BOUNDARIES TO BENEFIT PLAINTIFFS

The loss-of-chance doctrine has been frequently misunderstood.²² In part, this misconception arises from the term itself. *Black’s Law Dictionary* defines the loss-of-chance doctrine as “a rule in some states providing a claim against a doctor who has engaged in medical malpractice that, although it does not result in a particular injury, decreases or eliminates the chance of surviving or recovering from the preexisting condition for which the doctor was consulted.”²³ In the medical malpractice context, loss of chance is most frequently applied in cases of misdiagnoses, where a timely diagnosis would have given the patient a statistically better opportunity to achieve a more favorable

22. See Férot, *supra* note 1, at 591 (“[W]herever [loss of chance] is implemented, it tends to be . . . misunderstood . . .”).

23. BLACK’S LAW DICTIONARY 1031 (9th ed. 2009).

outcome.²⁴ For example, a patient arrives at the doctor's office with a complaint and, due to a breach of the applicable standard of care, the doctor makes an incorrect diagnosis or fails to make a diagnosis. Sometime later, the patient is properly diagnosed. Had the patient been properly diagnosed at the outset, her chances of recovery would have been 40%. However, due to the delayed diagnosis, the patient's chances of recovery are now 10%. This classic example of loss of chance is deceptively intuitive. In fact, it conceals the complexity of the doctrine. In practice, loss of chance is an umbrella term, the meaning of which varies between jurisdictions²⁵ and sometimes—as in Washington—even within jurisdictions.²⁶ For example, in medical malpractice cases—the paradigmatic loss of chance context—there are currently no less than five different approaches to loss of chance, the differences between which can affect whether a plaintiff has a viable cause of action in a particular case. This Part explains those five approaches.

A. *Approaches to the Loss-of-Chance Doctrine*

Much of the confusion surrounding loss of chance centers on whether it is classified as a theory of causation or an injury in and of itself.²⁷ The “traditional approach” or “all-or-nothing” approach does not recognize the loss of a less-than-even chance at all. The “substantial factor” approach deals with loss of chance as a type of causation. The “proportional approach” classifies the lost chance as the injury itself, and damages are based on the percentage of chance lost. Two states, Michigan and South Dakota, passed legislation on loss of chance, abrogating state Supreme Court decisions that recognized the loss-of-chance doctrine.²⁸ Three states—Oregon, Utah, and Rhode Island—have yet to rule on the loss-of-chance doctrine.²⁹ To aid in explaining the

24. See King, *supra* note 5, at 1363–64 (illustrating a hypothetical in which a misdiagnosis led to a 30% lost chance of survival).

25. See generally Férot, *supra* note 1, at 609–17 (discussing the different approaches); Joseph King, “Reduction of Likelihood” Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. MEM. L. REV. 492, 505–11 (1998) (same).

26. See *infra* Part II.

27. See King, *supra* note 25, at 494 (acknowledging the difficulty of distinguishing between causation and valuation).

28. Falcon v. Mem'l Hosp., 462 N.W.2d 44, 56–57 (Mich. 1990), *superseded by statute*, 1993 Mich. Pub. Acts 411; Jorgenson v. Vener, 616 N.W.2d 366, (S.D. 2000), *superseded by statute*, 2002 S.D. Sess. Laws 176.

29. Mandros v. Prescod, 948 A.2d 304, 311 (R.I. 2008) (“[W]e conclude that because the loss-of-chance doctrine affects only the causation part of the tort analysis and because the jury never was required to reach the question of causation, the trial justice's failure to instruct on the loss-of-chance

various approaches, this Comment uses the facts from *Herskovits v. Group Health Cooperative of Puget Sound*, in which the parties stipulated to an assumption that the doctor's negligence caused a 14% loss of chance of survival and that the decedent's pre-negligence chances of survival were less than 50%.³⁰

1. *The "Traditional" or "All-or-Nothing" Approach*

One of the criticisms of the loss-of-chance doctrine is the speculative nature of the harm.³¹ For example, if a doctor misdiagnoses a patient for cancer, and the patient later dies, it is almost impossible to know with certainty whether the patient would have lived had a timely diagnosis been made.³² Furthermore, and more importantly, the cause of the patient's death was cancer.³³ The doctor's negligence did not give the patient cancer but only impacted his or her chances of survival. The "traditional approach," therefore, refuses to acknowledge loss of chance because the doctrine goes against "traditional principles of tort causation."³⁴

Some states have adopted a form of loss-of-chance doctrine called the "all-or-nothing"³⁵ approach.³⁶ Under the all-or-nothing approach, the

doctrine is moot."); *Joshi v. Providence Health Sys. of Oregon Corp.*, 149 P.3d 1164, 1170 (Or. 2006) (holding that under the wrongful death statute, causation cannot be proven by showing an increased risk of death, and therefore the lost chance argument did not apply); *Seale v. Gowans*, 923 P.2d 1361, 1365 (Utah 1996) (holding that the case was barred by the statute of limitations, but stating in dicta that the loss of chance, without proof of actual damages, was insufficient to sustain a cause of action).

30. *See Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wash. 2d 609, 619, 664 P.2d 474, 479 (1983) (finding that both parties agreed that the Court assume Mr. Herskovits's chance of survival was 39%, and the doctor's negligence reduced the chance to 25%, or a reduction of 14%).

31. *See Férot*, *supra* note 1, at 600 ("The loss of chance, as an injury, is often criticized for being no more than a speculative harm.").

32. *See, e.g., id.* ("The identification of the injury . . . requires making assumptions about what should have been the course of events in the absence of the tortious act.").

33. *See, e.g., Mohr v. Grantham*, 172 Wash. 2d 844, 873-74, 262 P.3d 490, 504 (2011) (Johnson, J., dissenting) (reasoning that the plaintiff crashing her car caused her ultimate injury, not the medical professionals).

34. *United States v. Cumberbatch*, 647 A.2d 1098, 1100 (Del. 1994); *see also Cooper v. Sisters of Charity of Cincinnati, Inc.*, 272 N.E. 2d 97, 103 (Ohio 1971) ("We consider the better rule to be that in order to comport with the standard of proof of proximate cause, plaintiff in a malpractice case must prove that defendant's negligence, *in probability*, proximately caused the death." (emphasis in original)).

35. The "traditional" and "all-or-nothing" approaches are essentially interchangeable. *See King*, *supra* note 25, at 505-06 (using the two terms interchangeably).

36. *See Férot*, *supra* note 1, at 611.

patient's lost chance must have been greater than even.³⁷ Technically, this is a rejection of the loss-of-chance doctrine, as a loss of a greater-than-even chance comports with traditional tort notions of causation; in other words the doctor's negligence more probably than not caused the patient's death or poor outcome.³⁸ Under such an approach, a plaintiff who lost a 50% or less chance at a better outcome has no remedy.³⁹ For a plaintiff who shows a loss of a 51% or greater chance, the issue can go to the jury on proximate cause.⁴⁰ The "all-or-nothing" approach treats the lost chance as satisfying the burden of proof for causation.⁴¹ Eighteen states plus the District of Columbia take this approach.⁴² Using the 14% loss of chance above, the plaintiff would have no remedy under

37. See *id.* at 611–15.

38. See, e.g., *Ladner v. Campbell*, 515 So. 2d 882, 888–89 (Miss. 1987) ("Mississippi law does not permit recovery of damages because of mere diminishment of the 'chance of recovery.' Recovery is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition." (quoting *Clayton v. Thompson*, 475 So. 2d 439, 445 (Miss. 1985))).

39. Stephen Brennwald, *Proving Causation in "Loss of a Chance" Cases: A Proportional Approach*, 34 CATH. U. L. REV. 747, 766 (1985) ("[This] approach requires the finder of fact to determine whether the decedent's chances to live or to achieve a more favorable result were more probable than not. Once the evidence shows that a probability did or did not exist, the inquiry ends. As a result, chances of less than fifty-one percent are treated as if they were nonexistent."); see also *Rankin v. Stetson*, 749 N.W.2d 460, 469 (Neb. 2008) ("While a 49-percent chance of a better recovery may be medically significant, it does not meet the legal requirements for proof of causation.").

40. See, e.g., *Stetson*, 749 N.W.2d at 469 ("[A]n opinion expressed in terms that it is more likely than not that a plaintiff 'would have had a better outcome' is sufficiently certain to establish causation.").

41. See *King*, *supra* note 25, at 505–06 (stating that a plaintiff may prove causation for the ultimate harm if the lost opportunity was greater than 50%).

42. The all-or-nothing approach is currently used in Alabama, Alaska, Arkansas, California, Connecticut, Florida, Idaho, Kentucky, Maine, Maryland, Mississippi, Nebraska, North Carolina, South Carolina, Tennessee, Texas, Vermont, and the District of Columbia. See *Férot*, *supra* note 1, at 611 (listing states that have adopted the all-or-nothing approach); Stephen Koch, *Whose Loss Is It Anyway? Effects of the "Lost-Chance" Doctrine on Civil Litigation and Medical Malpractice Insurance*, 88 N.C. L. REV. 595, 607–08 nn.57–59 (2010) (same); see also *Boone v. William W. Backus Hosp.*, 864 A.2d 1, 18 (Conn. 2005) ("[I]t is not sufficient for a lost chance plaintiff to prove merely that a defendant's negligent conduct has deprived him or her of *some* chance; in Connecticut, such plaintiff must prove that the negligent conduct *more likely than not* affected the actual outcome." (emphasis in original) (internal quotation marks omitted)); *Phillips v. E. Maine Med. Ctr.*, 565 A.2d 306, 308 (Me. 1989) (allowing a medical malpractice claim to go forward after plaintiff provided evidence that, absent the doctor's negligence, patient would have had a better than even chance of survival); *Ladner v. Campbell*, 515 So. 2d 882, 888 (Miss. 1987) ("Mississippi law does not permit the recovery of damages because of mere diminishment of the 'chance of recovery' . . . [A cause of action] is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition." (internal quotation marks omitted)).

the “traditional” or “all-or-nothing” approach, as he was more likely than not going to die anyway.

2. *The “Substantial Factor” Approach*

Perhaps the most controversial⁴³ of the approaches, the “substantial factor” approach, allows for the lost chance—irrespective of the actual percentage lost—to go to the jury on the issue of proximate cause provided that the lost chance was a substantial factor in bringing about the harm.⁴⁴ The Supreme Court of Kansas held that “the loss of chance of recovery theory basically entails the adoption of a different standard of causation than usually applies in negligence cases.”⁴⁵ And the Supreme Court of Oklahoma held that the loss-of-chance doctrine “relax[es] the standard for sufficiency of proof of causation ordinarily required of a plaintiff.”⁴⁶ Thus, the 14% lost chance used above may impose liability on the defendant, as the jury is free to determine whether the lost chance was a substantial factor in bringing about the harm. This is also known as the “relaxed causation approach” and is criticized as an exception to traditional causation standards.⁴⁷ Five states adhere to this theory.⁴⁸

43. See, e.g., King, *supra* note 25, at 508 (“[This] approach represents the worst of both worlds.”).

44. See *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wash. 2d 609, 613–14, 664 P.2d 474, 476 (1983) (discussing the relationship between an increased risk of harm and death).

45. *Delaney v. Cade*, 873 P.2d 175, 182 (Kan. 1994).

46. *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467, 471 (Okla. 1987).

47. See, e.g., *United States v. Cumberbatch*, 647 A.2d 1098, 1100 (Del. 1994) (commenting that the “relaxed causation approach” is an exception to traditional causation requirements); *Herskovits*, 99 Wash. 2d at 38, 664 P.2d at 489 (Brachtenbach, J., dissenting) (“[A]pplication of the substantial factor test in these circumstances is truly novel.”); *Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 987 (Colo. App. 2011) (holding that a possible increase in chance of harm being an issue of causation is inconsistent with the traditional but-for test).

48. The relaxed causation approach is currently used in Kansas, Oklahoma, Colorado, North Dakota, and Pennsylvania. See *Delaney v. Cade*, 873 P.2d 175, 187 (Kan. 1994) (holding that a substantial loss of chance is sufficient to withstand summary judgment); *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467, 475 (Okla. 1987) (“[T]he jury may determine that the tortious act of malpractice was in turn a substantial factor in causing a patient’s injury or death.”); *Sharp v. Kaiser Found. Health Plan*, 710 P.2d 1153, 1156 (Colo. App. 1985) (“Once a plaintiff has introduced evidence that a defendant’s neglig[en]ce . . . substantially increased the risk of harm . . . , and that the harm in fact has been sustained, it becomes a question of fact for the jury to determine whether that increased risk of harm was a substantial factor in producing the harm.”), *aff’d on other grounds*, 741 P.2d 714 (Colo. 1987); *VanVleet v. Pfeifle*, 289 N.W.2d 781, 784 (N.D. 1980) (“[I]f the doctors in this case were negligent in failing to discover Donald VanVleet’s cancerous condition and thereby hastened and prematurely caused his death, the doctors should not be able to escape liability simply because the cancer would eventually have resulted in VanVleet’s death even if it were discovered sooner.”); *Hamil v. Bashline*, 392 A.2d 1280, 1289 (Pa. 1978) (“[L]iability could attach

3. *The “Proportional” Approach*

Under the proportional approach, the loss of chance itself is the actionable injury.⁴⁹ Here the patient’s lost opportunity for a better outcome is the compensable injury, not the patient’s final outcome.⁵⁰ To prevail, a plaintiff must prove duty, breach, and that the provider’s negligence proximately caused the loss of chance.⁵¹ The negative outcome and the loss of chance are two distinct injuries.⁵² However, courts typically award damages if the patient suffers the negative outcome in addition to the lost chance.⁵³ Otherwise it is difficult to reasonably calculate damages. For example, if a doctor causes a 20% reduction in a person’s chances of surviving cancer, and that person dies, the damages will be 20% of what the wrongful death damages would have been had the doctor’s negligence been the cause-in-fact of the death.⁵⁴ This approach to loss of chance is not inevitable. For example, courts could award damages for loss of chance based on mental anguish⁵⁵ or a more difficult recovery process, rather than confining recovery to the negative outcome itself.⁵⁶ Twenty-two states have adopted this approach.⁵⁷

if the negligence of the defendant were but a substantial factor in bringing about the death.”).

49. See *Cumberbatch*, 647 A.2d at 1100 (commenting that the proportional approach compensates the lost chance); *Herskovits*, 99 Wash. 2d at 623–24, 664 P.2d at 481 (conceiving the injury as the reduced chance of survival).

50. See *Cumberbatch*, 647 A.2d at 1102 (noting that the proportional approach calls for the redefinition of the injury as the lost chance and not the physical harm); *Herskovits*, 99 Wash. 2d at 624, 664 P.2d at 481 (“[I]f we perceive the death of Mr. Herskovits as the injury in this case, we must affirm the trial court . . .”); Férot, *supra* note 1, at 596.

51. Férot, *supra* note 1, at 595.

52. See *id.* at 596 (“[T]he loss of chance causes an injury independent from the unfavorable outcome.”).

53. *Id.* at 596–97.

54. King, *supra* note 4, at 1381–82.

55. *DeBurkarte v. Louvar*, 393 N.W. 2d 131, 139 (Iowa 1986) (recognizing mental anguish as a basis for damages because the patient “knew her cancer was incurable and her days were numbered”).

56. See, e.g., *Alexander v. Scheid*, 726 N.E.2d 272, 281 (Ind. 2000) (holding that worsening of the patient’s condition was compensable even though he did not die, because while the cancer remained undiagnosed, the plaintiff suffered the loss of healthy lung tissue, the collapse of a lung, and the growth of a malignant tumor); *Falcon v. Mem’l Hosp.*, 462 N.W.2d 44, 56 n.43 (Mich. 1990) (noting that harm could be the worsening of the patient’s condition prior to remission), *superseded by statute*, 1993 Mich. Pub. Acts 411, *as recognized in* *O’Neal v. St. John Hosp. & Med. Ctr.*, 791 N.W. 2d 853, 857–58 (Mich. 2010).

57. The proportional approach is currently used in Arizona, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Virginia, Washington, West Virginia, Wisconsin, and

4. *The Legislative Approach*

The Supreme Courts of both Michigan and South Dakota approved the loss-of-chance doctrine.⁵⁸ However, following those decisions the state legislatures passed laws repudiating this judicially created cause of action.⁵⁹ The Michigan Legislature specifically stated that recovery would not be allowed for a “loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%,” which puts Michigan in the all-or-nothing category.⁶⁰ South Dakota is also now an all-or-nothing state.⁶¹ Michigan and South Dakota remain the only two states that have dealt with loss of chance in the legislature.⁶²

Other states, however, are attempting to deal with the doctrine through legislation. In 2013 the Ohio State Legislature proposed a bill in which “[a]ny loss or diminution of a chance of recovery or survival by itself is not an injury, death, or loss to person for which damages may be recovered.”⁶³ This statute was proposed explicitly to abrogate *Roberts v. Ohio Permanente Medical Group, Inc.*,⁶⁴ in which the Supreme Court of Ohio endorsed the proportional approach to loss of chance.⁶⁵ The Massachusetts Legislature also proposed a bill⁶⁶ to abrogate the

Wyoming. See Férot, *supra* note 1, at 610 (listing states that have adopted the theory); see also *Dickhoff v. Green*, 836 N.W. 2d 321, 337 (Minn. 2013) (recognizing plaintiff’s loss of chance claim); *Lord v. Lovett*, 770 A.2d 1103, 1106–08 (N.H. 2001) (recognizing the proportional approach to loss of chance).

58. *Jorgenson v. Vener*, 616 N.W. 2d 366, 372–73 (S.D. 2000), *superseded by statute*, 2002 S.D. Sess. Laws 176; *Falcon*, 462 N.W.2d at 57.

59. 1993 Mich. Pub. Acts 411; 2002 S.D. Sess. Laws 176; see also *O’Neal*, 791 N.W.2d at 857 (recognizing that 1993 Mich. Pub. Acts 411 superseded *Falcon*).

60. 1993 Mich. Pub. Acts 411.

61. *Smith v. Bubak*, 643 F.3d 1137, 1142 (8th Cir. 2011) (“[T]his result does not reveal whether giving a patient tPA will more likely than not cause a stroke patient to improve, which is the material inquiry under a traditional proximate cause regime.”).

62. Férot, *supra* note 1, at 608–09.

63. H.B. 276, 130th Gen. Assemb., Reg. Sess. (Ohio 2013) (proposing to enact section 2323.40(B). At the time of publication, this bill had been referred to the Committee House Judiciary.).

64. 668 N.E.2d 480 (Ohio 1996).

65. *Id.* at 484 (“In order to maintain an action for the loss of a less-than-even chance of recovery or survival, the plaintiff must present expert medical testimony showing that the health care provider’s negligent act or omission increased the risk of harm to the plaintiff.”).

66. S.B. 1038, 188th Gen. Court (Mass. 2013) (“This section is intended to prohibit the filing of claims or causes of action based upon the loss-of-chance doctrine adopted by the Massachusetts Supreme Judicial Court in the case of *Matsuyama v. Birnbaum*.”).

proportional approach adopted in *Matsuyama v. Birnbaum*.⁶⁷ The bill states that a “plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.”⁶⁸ If approved, this bill will put Massachusetts in the all-or-nothing category. New Hampshire passed legislation on the burden of proof in medical injury actions in 2003.⁶⁹ The statute was amended to add a third paragraph, which reads:

The requirements of this section are not satisfied by evidence of loss of opportunity for a substantially better outcome. However, this paragraph shall not bar claims based on evidence that negligent conduct by the defendant medical provider or providers proximately caused the ultimate harm, regardless of the chance of survival or recovery from an underlying condition.⁷⁰

Some scholars have interpreted this legislation to supersede the holding in *Lord v. Lovett*,⁷¹ which recognized the proportional approach to the loss-of-chance doctrine.⁷² This Comment maintains that the statute expressly rejects the substantial factor approach. However, it still allows a cause of action when it can be shown, for example, that a physician’s negligence affirmatively caused the patient’s death even if the patient had a less than even chance of survival pre-negligence. The statute does not, however, abrogate the proportional approach employed in *Lovett*.

5. *Loss of Chance Not Addressed*

Three states have yet to rule on or formally address the loss-of-chance doctrine—Oregon, Utah, and Rhode Island. In *Joshi v. Providence Health System of Oregon Corp.*,⁷³ the plaintiff did not argue loss of chance under the proportional approach, and therefore the Supreme Court of Oregon declined to rule on whether that would be a cognizable cause of action in the future.⁷⁴ The *Joshi* Court did hold that loss of

67. 890 N.E.2d 819, 823, 838–41 (Mass. 2008) (adopting the proportional approach).

68. Mass. S.B. 1038.

69. N.H. REV. STAT. ANN § 507-E:2 (2014).

70. *Id.* § 507-E:2(III).

71. 770 A.2d 1103, 1106–08 (N.H. 2001).

72. *See, e.g., Koch, supra* note 42, at 607 n.57 (acknowledging the statute as superseding *Lord v. Lovett*).

73. 149 P.3d 1164 (Or. 2006).

74. *See id.* at 1170 (“We cannot accept plaintiff’s invitation to adopt [the loss of chance] theory brought under [Oregon’s wrongful death statute.]”); OR. REV. STAT. § 30.020 (2012) (“When the death of a person is caused by the wrongful act or omission of another, the personal representative

chance is incompatible with Oregon's wrongful death statute.⁷⁵ Although the Supreme Court of Utah has never explicitly adopted or rejected the loss-of-chance doctrine, in *Seale v. Gowans*⁷⁶ the Court stated in dicta that the loss of chance, without proof of actual damages, was insufficient to sustain a cause of action.⁷⁷ The Supreme Court of Rhode Island twice refused to accept or reject the loss-of-chance doctrine. In 2004, the Court stated "[a]lthough we may revisit the loss-of-chance doctrine under an appropriate factual scenario, we hold that for the reasons set forth here the facts presented in this case are inadequate."⁷⁸ The Court had another opportunity to address the loss-of-chance doctrine in 2008, however it declined to do so because the physician was found not negligent, and therefore further inquiry into whether a chance was lost was moot.⁷⁹

II. HISTORY OF THE LOSS-OF-CHANCE DOCTRINE IN WASHINGTON

The Washington State Supreme Court first recognized the loss-of-chance doctrine in *Herskovits v. Group Health Cooperative of Puget Sound*.⁸⁰ The Court then expanded the doctrine to include loss of chance of a better outcome short of death in *Mohr v. Grantham*.⁸¹ While *Mohr* officially adopted the *Herskovits* concurrence's endorsement of the proportional approach,⁸² the doctrine in its present form is incoherent.⁸³ The *Mohr* court focused on justifying expanding the doctrine,⁸⁴ but

of the decedent . . . may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer for an injury done by the same act or omission.").

75. *Joshi*, 149 P.3d at 1170 ("Although deprivation of a 30 percent chance of survival may constitute an injury, the injury that is compensable under ORS 30.020 is death.").

76. 923 P.2d 1361 (Utah 1996).

77. *Id.* at 1365 (holding that the case was barred by the statute of limitations).

78. *Contois v. W. Warwick*, 865 A.2d 1019, 1025 (R.I. 2004).

79. *Madros v. Prescod*, 948 A.2d 304, 311 (R.I. 2008) ("[W]e conclude that because the loss-of-chance doctrine affects only the causation part of the tort analysis and because the jury never was required to reach the question of causation, the trial justice's failure to instruct on the loss-of-chance doctrine is moot.").

80. 99 Wash. 2d 609, 619, 664 P.2d 474, 479 (1983).

81. 172 Wash. 2d 844, 857, 262 P.3d 490, 496 (2011).

82. *Id.*

83. *See infra* Part II.C.1.

84. *See Mohr*, 172 Wash. 2d at 854–56, 262 P.3d at 495 ("To limit *Herskovits* to cases that result in death is arbitrary; the same underlying principles of deterring negligence and compensating for injury apply when the ultimate harm is permanent disability.").

failed to address many of the problems the opinion created.⁸⁵ *Mohr* was almost entirely silent on providing guidance to courts and practitioners when dealing with a loss of chance claim.⁸⁶ Most recently, the Washington State Court of Appeals for Division III attempted to tackle many of the problems left behind by *Mohr* in *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*.⁸⁷ However, the *Dormaier* court only served to further muddle the doctrine.⁸⁸

This Comment will now explore the loss-of-chance doctrine's development in Washington. The discussion includes an overview of each pertinent loss of chance case, followed by an explanation of the issues remaining or created by each opinion. This Part proceeds chronologically, beginning with *Herskovits v. Group Health Cooperative of Puget Sound*,⁸⁹ and ending with *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*.⁹⁰

A. *Herskovits and the Adoption of the Loss-of-Chance Doctrine*

In *Herskovits v. Group Health Cooperative of Puget Sound*, a medical malpractice suit by a plaintiff who died after his physician initially failed to diagnose the plaintiff's lung cancer, the Washington State Supreme Court first adopted loss of chance as a matter of common law.⁹¹ The Court addressed the issue of whether plaintiff-patient *Herskovits*—who had a 39% chance of survival that was reduced to 25%—could maintain a cause of action against the hospital and its doctors for the negligence that resulted in a 14% decrease in his chance of survival.⁹²

Decedent Leslie *Herskovits* began visiting Group Health Hospital in early 1974 with lung problems.⁹³ By December of 1974, he had a persistent cough and lung pain, but was treated only with cough syrup.⁹⁴

85. See *infra* Part II.C.1.

86. See *infra* Part II.C.1.

87. 177 Wash. App. 828, 313 P.3d 431 (2013).

88. See *infra* Part II.D.1.

89. 99 Wash. 2d 609, 664 P.2d 474 (1983).

90. 177 Wash. App. 828, 313 P.3d 431 (2013).

91. 99 Wash. 2d at 619, 664 P.2d at 479. *Herskovits* was the first case to adopt loss of chance in Washington State; however, *Brown v. MacPherson's, Inc.*, 86 Wash. 2d 293, 545 P.2d 13 (1975), held that, under RESTATEMENT (SECOND) OF TORTS section 323, one who negligently renders aid and increases the risk of harm is liable for damages caused. *Brown*, 86 Wash. 2d at 299, 545 P.2d at 17–18.

92. *Herskovits*, 99 Wash. 2d at 611, 664 P.2d at 475.

93. *Id.*

94. *Id.*

In the spring of 1975, he saw a private practice physician, who diagnosed him with lung cancer.⁹⁵ In July 1975, Mr. Herskovits had his lung removed. He died twenty months later.⁹⁶

Edith Herskovits, widow and personal representative of Leslie Herskovits's estate, brought suit against Group Health Cooperative of Puget Sound for failure to timely diagnose her husband's lung cancer.⁹⁷ At the hearing on summary judgment, the plaintiff was unable to show that the failure to initially diagnose his lung cancer more probably than not caused his death.⁹⁸ Experts, in affidavits, opined that the delayed diagnosis resulted in a 14% reduction in the decedent's chances of survival.⁹⁹ The Superior Court for King County employed the traditional approach and granted summary judgment to the defendant based on the plaintiff's failure to produce evidence that the alleged negligence more probably than not caused the death.¹⁰⁰

In a fractured decision, the Washington State Supreme Court addressed the issue of whether, under *Restatement (Second) of Torts* section 323(a),¹⁰¹ proof that a defendant's conduct increased the risk of death by decreasing the chances of survival was sufficient to take the issue of proximate cause to the jury.¹⁰² In its lead opinion the Court answered yes,¹⁰³ relying on decisions from other jurisdictions¹⁰⁴ that allowed cases to go to a jury based on evidence that the defendant's conduct deprived decedents of a "significant" chance to survive or recover.¹⁰⁵ The cases that the Court relied on did not require proof to a

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 611–12, 664 P.2d at 475–76.

99. *Id.* at 612, 664 P.2d at 475.

100. *See id.* at 620–21, 664 P.2d at 480 (Pearson, J., concurring) ("The trial court granted the motion and dismissed the action, holding that plaintiff had '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.'" (emphasis in original)).

101. RESTATEMENT (SECOND) OF TORTS § 323 (1965) ("One who undertakes . . . to render services to another . . . 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 . . .").

102. *Herskovits*, 99 Wash. 2d at 613, 664 P.2d at 476 (lead opinion).

103. *Id.* at 614, 664 P.2d at 476–77.

104. *Id.* at 625, 664 P.2d at 482 (Pearson, J., concurring) (citing *McBride v. United States*, 462 F.2d 72 (9th Cir. 1972); *Jeanes v. Milner*, 428 F.2d 598 (8th Cir. 1970); *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966); *Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1978); *Kallenberg v. Beth Israel Hosp.*, 357 N.Y.S. 2d 508 (N.Y. App. Div. 1974)).

105. *Id.* at 613–14, 664 P.2d at 476–77 (lead opinion).

degree of “absolute certainty” that the defendant’s actions caused the injury or death.¹⁰⁶

The Court’s reasoning was two-fold.¹⁰⁷ First, the Court held it was not for the tortfeasor, “who put the possibility of recovery beyond realization, to say afterwards that the result was inevitable.”¹⁰⁸ Second, the Court concluded that not allowing such a claim to go forward would in effect 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.”¹⁰⁹ Departing from traditional tort law, which requires a “but-for” test for causation,¹¹⁰ the Court determined the defendant could still be held liable although the defendant did not cause the decedent’s lung cancer to initially manifest, but instead failed in a duty to protect against harm from another source.¹¹¹ With that analysis as the starting point, the jury could then consider whether the increased risk or decreased chance of recovery was a substantial factor in bringing about the harm.¹¹² The plaintiff did not need to present evidence sufficient to show that the negligence resulted in the harm, but only that it increased the risk of harm.¹¹³ It would then be for the jury to bridge the gap between increased risk and causation.¹¹⁴ Further, the *Herskovits* Court held: “[n]o matter how small that chance may have been—and its magnitude cannot be ascertained—no one can say that the chance of prolonging one’s life or decreasing suffering is valueless.”¹¹⁵ Thus, the lead opinion adopted the substantial factor approach.

The *Herskovits* Court attempted to address candidly the problems inherent in the probabilistic nature of its new approach.¹¹⁶ A criticism of

106. *Id.* at 614, 664 P.2d 476.

107. *Id.* at 614–15, 664 P.2d 476–77.

108. *Id.* at 614, 664 P.2d at 476.

109. *Id.* at 664 P.2d at 477.

110. *Id.* at 616, 664 P.2d 477.

111. *Id.*; see also *Hamil v. Bashline*, 392 A.2d 1280, 1287–88 (Pa. 1978) (“In order than an actor is not completely insulated because of uncertainties as to the consequences of his negligent conduct, section 323(a) tacitly acknowledges this difficulty and permits the issue to go to the jury upon a less than normal threshold of proof.”).

112. *Herskovits*, 99 Wash. 2d at 617, 664 P.2d at 478.

113. *Id.*

114. *Id.*; see also *Hamil*, 392 A.2d at 1288 (“[S]uch evidence furnishes a basis for the fact-finder to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm.”).

115. *Herskovits*, 99 Wash. 2d at 618, 664 P.2d at 478–79 (emphasis in original) (quoting *James v. United States*, 483 F. Supp. 581, 587 (N.D. Cal. 1980)).

116. *Id.* at 617–18, 664 P.2d at 478.

the loss-of-chance doctrine is that it is based on speculation and conjecture.¹¹⁷ In response to this critique, the *Herskovits* court stated that “[w]here percentage probabilities and decreased probabilities are submitted into evidence, there is simply no danger of speculation on the part of the jury. More speculation is involved in requiring the medical expert to testify as to what would have happened had the defendant not been negligent.”¹¹⁸

The four-justice concurrence in *Herskovits* took a different approach.¹¹⁹ Of importance was the nature of the injury.¹²⁰ The concurrence determined that if death was the injury, then the standards for establishing cause in fact in a medical malpractice case, set forth in *O’Donoghue v. Riggs*,¹²¹ were not satisfied.¹²² The defendant’s negligence—causing a 14% reduction as opposed to a 51% or greater reduction in chance—did not more probably than not cause the decedent’s death.¹²³ If so, the concurrence wrote that the trial court decision must be affirmed.¹²⁴ To do otherwise would be to “depart substantially from the traditional requirements of establishing proximate cause in this type of case.”¹²⁵ The concurrence rejected the lead opinion’s adoption of the substantial factor approach, because this approach did not comport with the traditional elements of causation in medical malpractice cases.

However, if the reduced chance of survival in itself is the injury,¹²⁶

117. See *Jeanes v. Milner*, 428 F.2d 598, 604–05 (8th Cir. 1970) (rejecting the argument that the jury’s decision involved “speculation and conjecture”); Férot, *supra* note 1, at 599–600 (stating that loss of chance as an injury is often criticized for being a speculative harm).

118. *Herskovits*, 99 Wash. 2d at 618, 664 P.2d at 478; see also *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) (“It is no answer to say that the jury’s verdict involved speculation and conjecture . . . [A] measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.”); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 31 (1935) (addressing the value of a chance).

119. See *Herskovits*, 99 Wash. 2d at 619–36, 664 P.2d at 479–86 (Pearson, J., concurring).

120. See *id.* at 623, 664 P.2d at 481.

121. 73 Wash. 2d 814, 440 P.2d 823 (1968).

122. *Id.* at 824, 440 P.2d at 830 (“To remove the issue from the realm of speculation, the medical testimony must at least be sufficiently definite to establish that the act complained of ‘probably’ or ‘more likely than not’ caused the subsequent disability.”).

123. See *Herskovits*, 99 Wash. 2d at 623, 664 P.2d at 481 (Pearson, J., concurring) (“Dr. Ostrow was unable to state that probably, or more likely than not, Mr. Herskovits’s death was caused by defendant’s negligence.”).

124. *Id.*

125. *Id.*

126. Viewing the lost chance as the injury separates the distinction between causation and valuation. The question is not “Did the lost chance cause the injury?” but rather, “What is the lost

then the *O'Donoghue* test is met.¹²⁷ The concurrence relied on the approach taken in three cases—*Jeanes v. Milner*,¹²⁸ *O'Brien v. Stover*,¹²⁹ and *James v. United States*.¹³⁰ In *Jeanes*, *O'Brien*, and *James*, the reduction in, or loss of, the chance of survival was the actionable injury.¹³¹ As such, the defendant was liable only for damages pertaining to the diminished or lost chance of survival, not for the death itself.¹³² The concurrence also drew on Joseph King's article, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*,¹³³ which advocates for allowing recovery for a loss of chance, even if the chance of recovery was less than 50%.¹³⁴ To do otherwise—employing the all-or-nothing approach to recovery—would “[subvert] the deterrence objectives of tort law by denying recovery for the effects of conduct that causes statistically demonstrable losses A failure to allocate the cost of these losses to their tortious sources . . . strikes at the integrity of the torts system of loss allocation.”¹³⁵ This reasoning is at the heart of the proportional approach.

Thus, the concurrence found that the loss of a less-than-even chance on its own is an actionable injury.¹³⁶ The claim may be brought by the decedent's personal representative¹³⁷ via Washington's wrongful death statute.¹³⁸ Under such a scheme, a person will “cause” someone's death if he causes a “substantial reduction in that person's chance of

chance—the injury—worth?” The all-or-nothing and substantial-factor approaches deal in terms of causation, whereas the proportional approach, which the *Herskovits* concurrence adopted, is a theory of valuation. *Id.* at 634–35, 664 P.2d at 487.

127. *Id.* at 624, 664 P.2d at 481.

128. 428 F.2d 598 (8th Cir. 1970).

129. 443 F.2d 1013 (8th Cir. 1971).

130. 483 F. Supp. 581 (N.D. Cal. 1980).

131. *See Stover*, 443 F.2d at 1019 (approving damages for patient's reduced “chances of survival,” or at least “living longer and more comfortably”); *Milner*, 428 F.2d at 604–05 (finding delayed diagnosis of cancer reduced survival rate from 35% to 24%); *James*, 483 F. Supp. at 587 (“No matter how small that chance may have been—and its magnitude cannot be ascertained—no one can say that the chance of prolonging one's life or decreasing suffering is valueless.”).

132. *Herskovits*, 99 Wash. 2d at 632, 664 P.2d at 485–86.

133. 90 YALE L.J. 1353 (1981).

134. *Id.* at 1363–64.

135. *Herskovits*, 99 Wash. 2d at 634, 664 P.2d at 486–87 (Pearson, J., concurring) (quoting King, *supra* note 5, at 1377).

136. *Id.*

137. *Id.*; WASH. REV. CODE § 4.20.046 (2012).

138. *Herskovits*, 99 Wash. 2d at 634–35, 664 P.2d at 486–87 (Pearson, J., concurring); WASH. REV. CODE § 4.20.010 (2012).

survival.”¹³⁹ Again citing King’s article, the concurrence found that damages for a loss of chance claim would be allocated proportionally, and a 14% loss of survival acts as 14% liability for a person’s death.¹⁴⁰ In this case, if Herskovits’s estate was successful on its claim, the estate would recover 14% of what it would have recovered had the defendant affirmatively caused his death.¹⁴¹

In sum, the *Herskovits* lead opinion created relaxed causation standards in that the “substantial factor” test pertaining to chance lost need not necessarily be 51% or greater to establish proximate causation.¹⁴² The concurrence adopted the proportional approach, and stated that the loss of chance itself is the actionable injury, and traditional elements of tort law apply.¹⁴³ Negligence must be the proximate cause of the lost chance, not the ultimate outcome.¹⁴⁴

1. *The Lead Opinion’s Adoption of the Substantial Factor Approach Rewrites Tort Principles of Causation and Is Subject to Manipulation*

The *Herskovits* majority opinion did not address several issues with the loss-of-chance doctrine. As pointed out by the dissenting opinion in *Herskovits*, allowing a less than 51% loss of chance to go to the jury on proximate cause upsets traditional notions of tort law.¹⁴⁵ Calculation of damages is also an issue. The lead opinion states that “[d]amages should be awarded to the injured party or his family based only on damages caused directly by premature death, such as lost earning and additional medical expenses, etc.”¹⁴⁶ This language, while intended to soften the blow, still promotes overcompensating the plaintiff.¹⁴⁷ Based on the relaxed causation standards, a defendant would be liable for 100% of

139. *Herskovits*, 99 Wash. 2d at 634–35, 664 P.2d at 486–87 (Pearson, J., concurring); *see also id.* at 635 n.1, 664 P.2d at 487 n.1 (advocating for a liberal construction of the wrongful death statute because the word “cause” has a “notoriously elusive meaning” and is “flexible” enough to fit this interpretation).

140. *Id.* at 635, 664 P.2d at 487; King, *supra* note 5, at 1382.

141. *See Herskovits*, 99 Wash. 2d at 635, 664 P.2d at 487 (Pearson, J., concurring) (stating that recovery would be the percentage lost times the value of the decedent’s life).

142. *Id.* at 610–19, 664 P.2d at 474–79 (lead opinion).

143. *Id.* at 619–636, 664 P.2d at 479–87 (Pearson, J., concurring).

144. *Id.* at 619, 664 P.2d at 479.

145. *See id.* at 639, 664 P.2d at 489 (Brachtenbach, J., dissenting) (“Except in situations where there are coequal causes, however, defendant’s act cannot be a substantial factor when the event would have occurred without it.”).

146. *Id.* at 619, 664 P.2d at 479 (lead opinion).

147. King, *supra* note 5, at 1368–70.

future lost earnings and medical expenses based on a 14% reduction of a chance of survival.¹⁴⁸ Some scholars believe that the relaxed causation standard overcompensates plaintiffs and holds physicians liable for too much.¹⁴⁹

Furthermore, the opinion is unclear as to how to calculate the actual percentage lost.¹⁵⁰ At one point, the court uses 14%, as stipulated by the parties, which would be the proportional percentage, based on a 100% expectation of survival scale.¹⁵¹ Later on, the court moves to a relative proportional percentage,¹⁵² stating that a reduction from 39% to 25% is a 36% loss of chance.¹⁵³ This poses significant problems both in terms of the substantial factor test and in damages. For example, say Patient *A* has a 4% chance of survival, which is reduced to 1%. That is either a 3% loss of chance, or a 75% loss of chance, depending on which type of proportionality is applied. Patient *B* had a 60% chance of survival that was reduced to 40% because of the defendant's negligence. The strict proportional difference would be 20%, and the relative proportional difference would be 33.3%. Under the all-or-nothing approach, and if relative proportionality is applied, Patient *A* might stand to recover the full amount of damages when the possibility of dying was 96%, while Patient *B* would get nothing. However, it takes no stretch of the imagination to see that Patient *B* has been more harmed by defendant's negligence. Under the proportional approach, Patient *A* could recover either 3% or 75%,¹⁵⁴ and Patient *B* would recover 20% or 33%. Under the substantial factor approach, both Patient *A* and *B* are eligible to

148. *Herskovits*, 99 Wash. 2d at 633, 664 P.2d at 486 (Pearson, J., concurring).

149. *See e.g.*, King, *supra* note 25, at 508 (“[By] relaxing the proof requirements, it increases the likelihood that a plaintiff will be able to convince a jury to award full damages.”).

150. *Herskovits*, 99 Wash. 2d at 610, 614, 664 P.2d at 474, 476–77 (lead opinion) (stating a 14% reduction at one point and a 36% reduction later on).

151. *Id.* at 610, 664 P.2d at 474; King, *supra* note 5, at 1382.

152. An easy way to distinguish between strict proportional percentage and relative proportional percentage is the type of math involved. Strict proportional percentage uses simple subtraction. 40% to 10% is a reduction of 30%. Relative proportional percentage involves a more complicated equation. If we are taking a reduction in chance from 40% to 10%, we first subtract 10% from 40%, which leaves us with 30%. The equation then becomes, 30 is what percentage of 40? Or $30 = 40 \times / 100$. The answer is 75%.

153. *Herskovits*, 99 Wash. 2d at 614, 664 P.2d at 476–77.

154. Seventy-five percent recovery is just a theoretical example. As the law in Washington stands, once the percentage lost exceeds 50%, the loss-of-chance doctrine morphs from the proportional approach to the all-or-nothing approach. *See Dormaier v. Columbia Basin Anesthesia*, 177 Wash. App 828, 850, 313 P.3d 431, 441 (2013) (“As a matter of law, a greater than 50 percent reduction in the decedent’s chance of survival is the same as proximate cause of the decedent’s death under traditional tort principles.”) As will be demonstrated, this morphing is one of the complications arising from using loss of chance as an umbrella term. *See infra* Part II.D.1.

recover 100% of damages. However, seeing as how percentages are manipulable, using relative proportionality makes the lost chance appear more substantial than it actually is.

2. *Solutions, and Problems, of the Concurrence*

The concurrence's plurality opinion,¹⁵⁵ if followed, solves two of the lead opinion's problems.¹⁵⁶ By making the loss of chance the actionable injury,¹⁵⁷ the concurrence solves the problem of distorting traditional tort law.¹⁵⁸ Furthermore, the concurrence eliminates the all-or-nothing approach of the 51% requirement, employs proportional percentages to the percentage lost as well as damages, and still adequately leaves plaintiffs with an avenue of redress.¹⁵⁹ However, by saying that the negligence was not the proximate cause of death, but that it "caused" the death for purposes of the statute, the concurrence seems to—in theory—revert to the relaxed causation standard, only via a different route.¹⁶⁰

B. *Loss of Chance Between Herskovits and Mohr*

Although unclear following *Herskovits*, the loss-of-chance doctrine remained viable from its adoption in 1983 through 2011, when the Washington State Supreme Court again addressed it in *Mohr v. Grantham*.¹⁶¹ In 1990, the Washington State Court of Appeals for Division One, in *Zueger v. Public Hospital District Number 2*,¹⁶² held that the *Herskovits* "plurality represents the law on a loss of the chance of survival."¹⁶³ In 2000, in *Shellenbarger v. Brigman*¹⁶⁴ the Washington State Court of Appeals for Division Two held that "Washington recognizes loss of chance as a compensable injury."¹⁶⁵ In *Shellenbarger*,

155. The concurrence, signed by four Justices as opposed to the two-Justice lead opinion, is the plurality opinion. Therefore, "concurrence" and "plurality" are used interchangeably throughout this Comment.

156. *Herskovits*, 99 Wash. 2d at 632–35, 664 P.2d at 485–87 (Pearson, J., concurring).

157. *Id.* at 634, 664 P.2d at 487.

158. *Id.* (holding that the negligence was a proximate cause, established by expert testimony and proven by a preponderance of the evidence, of the lost chance).

159. *Id.* at 635, 664 P.2d at 487.

160. *Id.*; WASH. REV. CODE § 4.20.010 (2012).

161. 172 Wash. 2d 844, 262 P.3d 490 (2011).

162. 57 Wash. App. 584, 789 P.2d 326 (1990).

163. *Id.* at 591, 789 P.2d at 329.

164. 101 Wash. App. 339, 3 P.3d 211 (2000).

165. *Id.* at 348, 3 P.3d at 216.

the court addressed a 20% reduction in slowing the progression of decedent's lung disease initially caused by asbestos.¹⁶⁶ The court found that it was no different from *Herskovits's* lost chance of survival.¹⁶⁷ The slight deviation from *Herskovits*—the loss of chance was only to slow the disease, not a 20% loss of chance of recovery—may have signaled the beginnings of the expansion found in *Mohr*.¹⁶⁸ The 2000 version of *Washington Practice* appeared to endorse the lead opinion of *Herskovits*: “Another exception to the cause in fact requirement is available when the plaintiff more probably than not would have suffered the injury complained of, but the defendant's negligence deprived him of a chance to avoid the injury.”¹⁶⁹

C. *Mohr and the Expansion of the Loss-of-Chance Doctrine*

In 2011, the Washington State Supreme Court revisited the loss-of-chance doctrine in *Mohr v. Grantham*.¹⁷⁰ This opinion seemed to cure some of the defects left by *Herskovits* and expanded the loss-of-chance doctrine to include the loss of chance of a better outcome not resulting in death.¹⁷¹ The plaintiff, Mrs. Mohr, alleged that negligent care led to a delayed diagnosis of a dissected carotid artery that resulted in permanent brain damage.¹⁷² Mrs. Mohr and her husband filed suit, claiming the doctors' negligence in failing to diagnose and treat her dissected carotid artery “substantially diminished her chance of recovery.”¹⁷³ Plaintiff's expert testified that Mrs. Mohr's treatment violated the standard of care, and had she received non-negligent treatment, would have had a 50% to 60% chance at a better outcome.¹⁷⁴

Hesitant to expand *Herskovits*, the Benton County Superior Court granted summary judgment to the defendants, holding that the Mohrs did not show but-for causation.¹⁷⁵ On appeal, the Washington State Supreme

166. *Id.* at 345, 3 P.3d at 214.

167. *Id.* at 349, 3 P.3d at 216.

168. *Id.*

169. 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 4.10, at 110 (2d ed. 2000).

170. 172 Wash. 2d 844, 262 P.3d 490 (2011).

171. *See id.* at 857, 262 P.3d at 498 (officially adopting the *Herskovits* concurrence and extending it to include the loss of a chance of a better outcome short of death).

172. *Id.* at 847–49, 262 P.3d at 491–92.

173. *Id.* at 849, 262 P.3d at 492.

174. *Id.*

175. *Id.* at 849–50, 262 P.3d at 492–93.

Court formally adopted the reasoning of the *Herskovits* concurrence¹⁷⁶ and extended the loss-of-chance doctrine to cases in which the end result is something short of death.¹⁷⁷ Loss of chance of survival was expanded to loss of chance of a better outcome.¹⁷⁸

The Court reasoned that “[t]o limit *Herskovits* to cases that result in death is arbitrary.”¹⁷⁹ Building on *Shellenbarger v. Brigman*,¹⁸⁰ which recognized the “loss of chance as a compensable interest,”¹⁸¹ the Court noted that the expansion fits within Washington’s statute for medical malpractice.¹⁸² However, the Court’s reasoning was that “nothing in the medical malpractice statute precludes a lost chance cause of action,” and that the chapter did not define “proximate cause” and “injury.”¹⁸³

With the loss of chance as the actionable injury, the *Mohr* formulation requires a plaintiff to prove duty, breach, and that the breach proximately caused—not the ultimate outcome¹⁸⁴—but the loss of chance.¹⁸⁵ In addressing the concern surrounding assessment of damages, the Court relied on reasoning from a similar loss of chance case from Massachusetts—*Matsuyama v. Birnbaum*.¹⁸⁶ The *Matsuyama* court concluded that “[s]uch difficulties are not confined to loss of chance claims. A wide range of medical malpractice cases, as well as numerous other tort actions, are complex and involve actuarial or other probabilistic estimates.”¹⁸⁷ Estimates are nothing new as judges and juries often must decide what the value of a better outcome would be.¹⁸⁸

The *Mohr* court also adopted the *Herskovits* concurrence’s method of

176. *Id.* at 857, 262 P.3d at 496.

177. *Id.* at 855–56, 262 P.3d at 495–96.

178. *Id.* at 850–57, 262 P.3d at 493–96.

179. *Id.* at 856, 262 P.3d at 495.

180. 101 Wash. App. 339, 3 P.3d 211 (2000).

181. *Id.* at 348, 3 P.3d at 216.

182. *Mohr*, 172 Wash. 2d at 856, 262 P.3d at 496; WASH. REV. CODE § 7.70.040 (2012).

183. *Mohr*, 172 Wash. 2d at 856, 262 P.3d at 496; WASH. REV. CODE §§ 7.70.020, 7.70.040.

184. The “ultimate outcome” refers to the end result, not the lost chance. For example, if a patient’s chance of surviving a type of cancer is reduced from 40% to 20%, and the patient dies, the ultimate outcome is death. However the actionable injury would be the lost chance, not the death. *See, e.g., Mohr*, 172 Wash. 2d at 857, 262 P.3d at 496 (distinguishing between the lost chance as the compensable injury and the ultimate outcome).

185. *Id.*

186. 890 N.E. 2d 819 (Mass. 2008).

187. *Id.* at 833.

188. *See, e.g., Hawkins v. McGee*, 146 A. 641 (N.H. 1929) (holding that the court had to determine the value of a 100% perfect hand).

calculating damages—the proportional damages approach.¹⁸⁹ This damages calculation technique alleviated the *Herskovits* lead opinion’s potential problem of whether to apply relative or proportional percentages.¹⁹⁰

Finally, *Mohr* held true to the principal rationale of *Herskovits*—that to not recognize a loss of chance would be a blanket release of liability for anyone who had less than a 51% chance of survival or avoiding injury or disability, no matter how egregious the negligence.¹⁹¹

The *Mohr* opinion solved some of the problems left behind by *Herskovits*. First, in rejecting the *Herskovits* lead opinion, the holding in *Mohr* clarifies that Washington is not adopting a relaxed theory of causation.¹⁹² By explicitly holding that the loss of chance is the actionable injury, although it in effect created a new class of plaintiffs, the Court brought the loss-of-chance doctrine back into the traditional confines of tort law, which require a plaintiff to prove that a defendant more likely than not caused her injury.¹⁹³ Now, the negligence must be the “but-for” and proximate cause of the patient’s lost chance of a better outcome, not the ultimate outcome itself.¹⁹⁴ Second, the damages scheme is fairer to medical practitioners than the *Herskovits* lead opinion’s damages calculation method because the Court adopted the concurrence and rejected the relaxation of the “substantial factor” test.¹⁹⁵ Under the lead opinion of *Herskovits*, it is possible that a defendant could be liable for 100% of damages for causing 14% of the harm.¹⁹⁶ By adopting the proportional damages approach, the court curbed the possibility of overcompensating plaintiffs while ensuring that legitimately aggrieved plaintiffs get their day in court.

1. *Uncertainty After Mohr: The Problems of Expanding a Doctrine Without Providing Guidance on Its Application in Practice*

While *Mohr* solved one problem of *Herskovits*, it resolved little of the uncertainty regarding this doctrine. In fact, the *Mohr* decision presented

189. *Mohr*, 172 Wash. 2d at 858–59, 262 P.3d at 496–97.

190. *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wash. 2d 609, 610–19, 664 P.2d 474, 474–79 (1983).

191. *Mohr*, 172 Wash. 2d at 855–58, 262 P.3d at 495–97.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 858–59, 262 P.3d at 496–97.

196. *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wash. 2d 609, 610–19, 664 P.2d 474, 474–79 (1983).

more questions than answers. All the *Mohr* court effectively held was the adoption of the *Herskovits* concurrence and the extension of loss of chance to include loss of chance of a better outcome. The problems implicated by the decision, yet left unaddressed, are principally what this Comment attempts to resolve.

a. When Is the Loss of Chance Argument Appropriate?

The plaintiffs in *Mohr* argued a loss of a 50% to 60% chance at a better outcome.¹⁹⁷ The *Mohr* opinion's main focus was on whether or not to extend the doctrine to include the loss of a chance of a better outcome,¹⁹⁸ but did not address the fact that, under the *Herskovits* concurrence, which the *Mohr* court officially adopted, a loss of chance over 51% qualifies as proximate causation.¹⁹⁹ Can one have a greater than 51% loss of chance that does not qualify as proximate cause of the end result? The Court was silent on this matter.

Furthermore, what must the starting percentage be? If an analysis starts at 50% or less, the lost chance will always be less than 51%. But what if the starting percentage is 85% and the ending percentage is 60%, a 25% loss of chance? The patient had a better than even chance of a good outcome pre- and post- negligence, but the lost chance was less than 50%. And what if the patient, pre-negligence, had a 60% chance of survival, and post-negligence had a 40% chance of survival? The plaintiff has gone from more likely than not going to survive, to more likely than not going to die. The evidence presented in *Mohr* was for a 50% to 60% lost chance,²⁰⁰ but the opinion did not explain whether 50% to 60% was the starting percentage, or whether 50% to 60% was the total percentage lost and the starting percentage is irrelevant because the 50% threshold of lost chance is met. In short, *Mohr* gives no guidance as to whether—in order to claim a loss of chance—the starting percentage must be 50% or less, or the total chance lost must be 50% or less.

b. What Evidence Is Necessary to Satisfy the Burden of Proof?

The *Mohr* court provides little guidance about the evidentiary standards necessary to satisfy the burden of proof for a loss of chance claim. The Court states that “[t]o prove causation, a plaintiff would then

197. *Mohr*, 172 Wash. 2d at 849, 262 P.3d at 492.

198. *Id.* at 850, 262 P.3d at 493.

199. *Herskovits*, 99 Wash. 2d at 631, 664 P.2d at 485 (Pearson, J., concurring).

200. *Mohr*, 172 Wash. 2d at 860, 262 P.3d at 497.

rely on established tort causation doctrines permitted by law and the specific evidence of the case.”²⁰¹ We are told that “calculation of a loss of chance . . . is based on expert testimony, which in turn is based on significant practical experience and ‘on data obtained and analyzed scientifically . . . as part of the repertoire of diagnosis and treatment, as applied to the specific facts of the plaintiff’s case.’”²⁰² However, what the ‘specific facts’ are remains unclear. In a given loss of chance case, the establishing causation may be a two-step process. For example, assume a patient is misdiagnosed with cancer. At the time of the misdiagnosis, it is alleged the patient was at stage I and had a 40% chance of survival. Two years later, the patient is diagnosed with stage III cancer and the patient’s chance of survival is 10%. In order to prove causation of the lost chance, must the experts testify only to the chances of survival at each stage of cancer? Or must the experts also demonstrate, by a preponderance of the evidence, that the patient was in fact at stage I when the misdiagnosis occurred?²⁰³

c. Must the Ultimate Outcome Occur?

In both *Herskovits* and *Mohr*, the ultimate outcomes transpired.²⁰⁴ This makes the lost chance relevant, and provides a basis for calculating damages—the ultimate outcome. But if the injury is the lost chance, and not the ultimate outcome, what happens in cases when a plaintiff loses a significant chance at a better outcome, yet the outcome does not or has not yet come to pass? Is the claim still actionable? How would damages be calculated? How does the doctrine anticipate and account for possible future harm that may never come to pass? These questions were left unraised and unanswered by the Court.

d. Do Mohr and Herskovits Govern Different Types of Loss of Chance Cases?

Mohr adopted the *Herskovits* concurrence,²⁰⁵ but does that mean

201. *Id.* at 862, 262 P.3d at 499.

202. *Id.* at 857–58, 262 P.3d at 496 (quoting *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 833 (Mass. 2008)).

203. *See e.g.*, *Dickhoff v. Green*, 836 N.W.2d 321, 325 (Minn. 2013) (finding that the expert concluded cancer had not metastasized at time of misdiagnosis, but was at Stage III or IV when finally diagnosed).

204. *See Mohr*, 172 Wash. 2d at 849, 262 P.3d at 492 (plaintiff permanently brain damaged); *Herskovits*, 99 Wash. 2d at 611, 664 P.2d at 475 (plaintiff died).

205. *Mohr*, 172 Wash. 2d at 857, 262 P.3d at 496.

Mohr now governs loss of chance cases in which the end result is death? Is *Herskovits* still good law? And if so, does *Mohr* dictate that the *Herskovits* concurrence applies to wrongful death cases, and *Mohr* to loss of chance of a better outcome cases? While it may intuitively seem that *Mohr* applies to all loss of chance cases, it is not clear. *Mohr* was cabined in the medical malpractice statute,²⁰⁶ and *Herskovits* in the wrongful death statute.²⁰⁷ How are these to be reconciled? This confusion is highlighted in the *Dormaier* opinion, discussed in Part II.D.

e. When Must Loss of Chance Be Pleaded?

Must loss of chance be pleaded in the initial complaint? Or is it enough for a plaintiff to present evidence of a lost chance to receive the jury instruction? If a defendant presents expert testimony to the effect that the lost chance was a very small percentage, as an affirmative defense, has it just argued itself into a lost chance jury instruction for the plaintiff?

f. Is Loss of Chance Statutory?

As addressed by the *Mohr* dissent, the loss of chance of a better outcome does not conform to the medical malpractice statute.²⁰⁸ Forcing it into the statute—even though “injury,” as used in the statute, can be used to mean the loss of a chance—runs the risk of confusing the lost chance with proximate causation for the ultimate outcome. It does not belong in the statute, just as Justice Pearson’s notion of “causation” did not bring loss of chance into the wrongful death statute.²⁰⁹ It is, in essence, rewriting the statute, and creating a potential source of confusion.

206. WASH. REV. CODE § 7.70.040 (2012) (providing that a plaintiff must establish breach and causation) (“(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider . . . ; and (2) Such failure was a proximate cause of the injury complained of”).

207. *Id.* § 4.20.010 (“When the death of a person is caused by the wrongful act, neglect, or default of another his or her personal representative may maintain an action for damages against the person causing the death . . .”).

208. *Mohr*, 172 Wash. 2d at 868, 262 P.3d at 501 (Madsen, J., dissenting) (“[T]he legislature meant an actual physical disability resulting from the failure to exercise proper care, not an amorphous ‘lost chance’ that may well involve no actual disability at all.”); WASH. REV. CODE § 7.70.040.

209. *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wash. 2d 609, 634–35, 664 P.2d 486–87 (1983) (Pearson, J., concurring).

g. What Is the Conjunction Principle and When Should It Be Used?

The *Mohr* opinion mentions the conjunction principle²¹⁰ in a citation parenthetical, as a way to mitigate percentage lost in the face of uncertainty.²¹¹ Specifically the Court states that “[w]here appropriate, [the lost chance percentage] may otherwise be discounted for margins of error to further reflect the uncertainty of outcome even with a nonnegligent standard of care.”²¹² However the Court does not define the conjunction principle, or provide guidance as to when it would be appropriate to apply it.

D. Estate of Dormaier and Its Application of Mohr and Herskovits

The most recent case to tackle the loss-of-chance doctrine was *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*.²¹³ This Washington State Court of Appeals case concerned a patient who had died from a pulmonary embolism that detached from her hip during surgery.²¹⁴ The complaint alleged that Mrs. Dormaier “died as a proximate result of the negligence of the Defendants” and “sustained injuries and damages and died due to the negligence of Defendants.”²¹⁵ At trial, Plaintiff presented expert witnesses who testified that, had the pulmonary embolus been detected, the patient would have had a 90% chance of surviving.²¹⁶ The experts stated that the misdiagnoses reduced Mrs. Dormaier’s chances of survival by 50% to 90%.²¹⁷ At the close of trial, the plaintiffs requested a jury instruction on the decedent’s lost chance of survival, which the trial court granted because both sides had addressed loss of chance in their

210. The conjunction principle takes into account possible or known discrepancies in percentage. Depending on the facts, it can be used by either plaintiff or defendant. For example, if the lost chance is 30%, and the probability that the plaintiff was at the proposed starting percentage was 80%, the total lost chance would be 30% times 80%, or 24%. In that instance, the defendant is using the conjunction principle to mitigate the proportional damages. However, if the total lost chance was 50%, and the probability that the plaintiff was at the proposed starting percentage was 40% (thus not meeting the preponderance of the evidence standard to show causation for the lost chance). The conjunction principle could be applied to circumvent proximate cause, i.e., 50% times 40% equals a 20% total lost chance, even though the burden of proving causation has not been met. The conjunction principle, in some ways, can be seen as a sort of proportional approach twice applied. See King, *supra* note 25, at 554–56 (explaining the conjunction principle).

211. *Mohr*, 172 Wash. 2d at 858, 262 P.3d at 497.

212. *Id.* (citing King, *supra* note 25, at 554–56).

213. 177 Wash. App. 828, 313 P.3d 431 (2013).

214. *Id.* at 836–38, 313 P.3d at 434–35.

215. *Id.* at 838, 313 P.3d at 435.

216. *Id.* at 839, 313 P.3d at 435–36.

217. *Id.*

cases.²¹⁸ In a special verdict, the jury returned the following responses: (1) the defendant was negligent; (2) the defendant's negligence *was not* the proximate cause of Mrs. Dormaier's death; (3) the defendant's negligence was a proximate cause of Mrs. Dormaier's lost chance of survival; and (4) the percentage lost was 70%.²¹⁹ Defendants sought a directed verdict based on the inconsistency between answers two and four.²²⁰ In other words, because *Mohr* and the *Herskovits* concurrence made loss of chance a separate and distinct injury, the defendants contended that the plaintiffs should not be able to argue a 50% loss of chance to get the jury instruction for loss of chance, and then use it to circumvent proximate cause for the ultimate outcome. The trial court concluded that the two entries were not irreconcilable, because "[i]t was . . . not inconsistent with the jury's rejection of negligence as a proximate cause of the death itself, for the jury to consider the percentage by which negligence diminished Mrs. Dormaier's chance to survive the death-causing event."²²¹ Defendants also asked that the award be limited to 70% of the damages because the jury did not find proximate cause of the death, but only the 70% loss of chance.²²² The trial court refused, concluding

[h]ad the jury found that the diminution of chance to survive was less than 50%, then the court would have been required to reduce the jury's finding of damages by that figure. However, where the reduction in chance to survive is itself found to be greater than 50%, it becomes, as a matter of law, a concurrent proximate cause of the death²²³

On appeal, the Court of Appeals considered: 1) whether a plaintiff may argue the lost chance doctrine if the chance lost was greater than 50%; (2) whether plaintiffs must plead loss of chance as a separate cause of action; (3) whether the special verdict answers were irreconcilable; and (4) whether damages should be reduced to 70% of the total award.²²⁴

As to the first issue, the court looked back at *Herskovits* and *Mohr*, and concluded "a plaintiff may not argue the lost chance doctrine where the defendant's negligence reduced the decedent's chance of survival by

218. *Id.* at 840–41, 313 P.3d at 436.

219. *Id.* at 841–42, 313 P.3d at 437.

220. *Id.*

221. *Id.* at 843, 313 P.3d at 437.

222. *Id.*

223. *Id.* at 843–44, 313 P.3d at 437–38.

224. *Id.* at 844–70, 313 P.3d at 438–51.

greater than 50 percent.”²²⁵ Because the lost chance presented was 50% to 90%—with 50% being the threshold percentage—arguing loss of chance was appropriate.²²⁶

On the second issue, appellants argued that not pleading lost chance of survival as a separate cause of action was inconsistent with *Mohr* and violated *Superior Court Civil Rule 8*,²²⁷ which states, in part, “[a] pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief.”²²⁸ The court disagreed, citing *Herskovits*’s recognizing loss of chance as an “actionable injury” and that “a person will ‘cause’ the death of another person (within the meaning of *Revised Code of Washington* 4.20.010) whenever he causes a substantial reduction in that person’s chance of survival.”²²⁹ The court then went on to say “the *Mohr* court reaffirmed a lost chance of survival is fundamentally an alternative manner of proving wrongful death causation, available solely where the defendant’s negligence reduced the decedent’s chance of survival by less than or equal to 50 percent.”²³⁰ Because the *Mohr* Court did not decide how to classify a loss of chance for *Civil Rule 8* pleading purposes, the *Dormaier* court concluded that it was not intended that loss of chance be considered a separate cause of action.²³¹ Because wrongful death was the theory upon which the plaintiff’s sought relief, whether or not the complaint pleaded the lost chance was irrelevant.²³²

The third issue deals with the fact that the jury, on question four, answered that defendant’s negligence caused a 70% loss of chance of survival.²³³ Yet, for question two, the jury answered that defendant’s negligence was not a proximate cause of her death.²³⁴ The lost chance instruction read, “[i]f you find that the loss or diminution of a chance to survive was in excess of 50%, then you have found that such negligence was a proximate cause of the death.”²³⁵ The court reasoned that the two

225. *Id.* at 851, 313 P.3d at 441.

226. *Id.*

227. *Id.* at 853–57, 313 P.3d at 442–44; WASH. SUPER. CT. CIV. R. 8 (2013).

228. *Dormaier*, 177 Wash. App. at 853–55, 313 P.3d at 442–43. The Court went on state that “[w]e construe a complaint liberally so as to do substantial justice.” *Id.* at 866, 313 P.3d at 449.

229. *Id.* at 854–55, 313 P.3d at 440 (quoting *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wash. 2d 609, 634–35, 664 P.2d 487 (1983) (Pearson, J., concurring)).

230. *Id.* at 854, 313 P.3d at 443.

231. *Id.*

232. *Id.* at 856–57, 313 P.3d at 444.

233. *Id.* at 867, 313 P.3d at 449.

234. *Id.*

235. *Id.*

answers could be harmonized because “a lost chance of survival is an actionable injury distinct from death . . . the jury could generally find proximate cause of the former without finding proximate cause of the latter.”²³⁶ In light of the jury instruction, the court held that “writing ‘70%’ in answer 4 had the same legal effect as writing ‘Yes’ in answer 2.”²³⁷

In analyzing the fourth issue, whether the damages award should be reduced to 70%, the court’s reasoning was two-fold.²³⁸ First, the court referred to its analysis regarding the inconsistent jury verdict, holding that the special verdict had the same legal effect as if the jury decided the negligence was the proximate cause of decedent’s death.²³⁹ Second, the court cited the *Herskovits* Court’s reasoning for adopting loss of chance—that it did not want “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”²⁴⁰—and decided that the “rationale is [not] furthered by reducing recovery where the defendant’s negligence proximately caused the decedent’s death.”²⁴¹

1. *The Dormaier Opinion Exemplifies the Doctrinal Incoherence that Plagues the Loss-of-Chance Doctrine*

The *Dormaier* decision is an excellent example of the doctrinal incoherence that accompanies loss of chance. While the *Dormaier* decision points out many of the problems inherent in the loss-of-chance doctrine,²⁴² it does little in the way of solving them, and possibly further complicates the doctrine. The main issue is that throughout the opinion, three different approaches to the loss-of-chance doctrine are employed—the substantial factor approach,²⁴³ the proportional approach,²⁴⁴ and the all-or-nothing approach.²⁴⁵ There is a tendency for the court to confuse causation principles with valuation principles. This begins with a

236. *Id.*

237. *Id.* at 868, 313 P.3d at 449–50.

238. *Id.* at 868–70, 313 P.3d at 450–51.

239. *Id.* at 868–69, 313 P.3d at 450.

240. *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wash. 2d 609, 614, 664 P.2d 474, 477 (1983).

241. *Dormaier*, 177 Wash. App. at 870, 313 P.3d at 451.

242. *See id.* at 843–44, 313 P.3d 437–38 (identifying appellants’ arguments that were based on uncertainty in the doctrine).

243. *See supra* Part I.A.1.

244. *See supra* Part I.A.2.

245. *See supra* Part I.A.3.

misinterpretation of the *Herskovits* concurrence, and culminates in inconsistent application of *Herskovits* and *Mohr*.

The first problem is the misinterpretation of *Herskovits*. The court in *Dormaier* states that “[b]y reconceptualizing the decedent’s injury as a reduction in his chance to survive his death-causing condition, the plurality concluded the plaintiff could now prove wrongful death causation in the form of a reduced chance of survival by a ‘probably’ or ‘more likely than not’ standard.”²⁴⁶ It then went on to conclude that

the *Herskovits* plurality and *Mohr* court intended the lost chance doctrine to reconceptualize the decedent’s injury and aid the plaintiff in proving wrongful death causation solely where the plaintiff cannot do so under traditional tort principles, that is, where the defendant’s negligence reduced the decedent’s chance of survival by less than or equal to 50 percent.²⁴⁷

This is incorrect. The lost chance is the injury itself; it is not a way to prove causation.²⁴⁸ This misconception is understandable, given that the *Herskovits* concurrence stated in one brief paragraph that the loss of chance injury may be brought under Washington’s wrongful death statute.²⁴⁹ Yet the *Dormaier* court interprets this principle in a way that makes it identical in all but name to the “substantial factor” approach of the *Herskovits* lead opinion.²⁵⁰ As noted earlier in this Comment,²⁵¹ one of the shortfalls of the *Herskovits*’s concurrence was that it tried to force the loss of chance injury into the wrongful death statute. This is an accurate representation of why forcing the lost chance into the wrongful death statute is problematic.

The *Dormaier* court’s interpretation is incorrect for two reasons. First, reading it as the *Dormaier* court does, the *Herskovits*’s concurrence is no different than the lead opinion, in that both would

246. *Dormaier*, 177 Wash. App. at 849, 313 P.3d at 440 (quoting *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wash. 2d 609, 632–34, 664 P.2d 485–86 (1983)).

247. *Id.* at 850, 313 P.3d at 441.

248. Compare *Herskovits*, 99 Wash. 2d at 624, 664 P.2d at 481 (Pearson, J., concurring) (“[I]f we perceive the death of Mr. Herskovits as the injury in this case, we must affirm the trial court If, on the other hand, we view the injury to be the reduction of Mr. Herskovits’s chance of survival, our analysis might well be different.”), with *id.* at 634, 664 P.2d at 487 (“[T]he best resolution of the issue before us is to recognize the loss of a less than even chance as an actionable injury.”), and *Mohr*, 172 Wash. 2d at 859, 262 P.3d at 497 (“[W]e hold that . . . the injury is the lost chance.”).

249. *Herskovits*, 99 Wash. 2d at 634–35, 664 P.2d at 487 (Pearson, J., concurring) (“I would interpret the wrongful death statute, RCW 4.20.010, to apply to cases of this type. Under this interpretation, a person will ‘cause’ the death of another person (within the meaning of RCW 4.20.010) whenever he causes a substantial reduction in that person’s chance of survival.”).

250. *Dormaier*, 177 Wash. App. at 849, 313 P.3d at 440.

251. See *supra* Part II.A.1.

employ the “substantial factor” approach to prove causation, even if the lost chance is less than even. As pointed out in *Mohr*, the *Herskovits* court was “divided by different reasoning”²⁵² and “the lead and plurality opinions split over *how*, not whether, to recognize a cause of action.”²⁵³ Second, interpreting the concurrence in this way makes its adoption of proportional damages moot. Employing the “substantial factor” approach, as the lead opinion does, results in full damages regardless of the percentage of chance lost, provided the jury concluded the lost chance was a substantial factor in bringing about the harm.²⁵⁴ The *Herskovits* concurrence adopted the “proportional” approach, and the lead opinion advocated for the “substantial factor” approach. The two are not reconcilable.²⁵⁵

This misinterpretation explains why the *Dormaier* court classified the loss-of-chance doctrine under three separate approaches. This highlights the problem with the loss-of-chance doctrine perfectly: it can mean three different things depending on how it is applied to a certain set of facts.²⁵⁶

The next potential issue raised by *Dormaier* is when the loss of chance argument may be made.²⁵⁷ Accurately noting that the *Mohr* court did not specify “whether the plaintiff could argue the lost chance doctrine upon the 51 to 60 percent figures as well as the 50 percent figure,”²⁵⁸ the court went on to hold that “a plaintiff may not argue the lost chance doctrine where the defendant’s negligence reduced the decedent’s chance of survival by greater than 50 percent.”²⁵⁹ Important

252. *Mohr*, 172 Wash. 2d at 851, 262 P.3d at 493.

253. *Id.* at 852, 262 P.3d at 494.

254. *Herskovits*, 99 Wash. 2d at 619, 664 P.2d at 479 (lead opinion).

255. *Compare id.* (“[R]eduction of chance of survival from 39 percent to 25 percent is sufficient evidence to allow the proximate cause issue to go to the jury.”), *with id.* at 634, 664 P.2d at 487 (Pearson, J., concurring) (“The family of the decedent should also be allowed to maintain an action for the lost chance of recovery by the decedent.”).

256. *See Dormaier*, 177 Wash. App. at 851, 313 P.3d at 441 (highlighting the substantial factor approach) (“We conclude the *Herskovits* plurality and *Mohr* court intended the lost chance doctrine to reconceptualize the decedent’s injury and aid the plaintiff in proving wrongful death causation solely where the plaintiff cannot do so under traditional tort principles”); *id.* at 851, 313 P.3d at 441 (highlighting the proportional approach) (“[W]here the defendant’s negligence reduced the decedent’s chance of survival by less than or equal to 50 percent, the loss of a chance is the injury and the plaintiff receives proportional compensation under the lost chance doctrine”); *id.* (highlighting the all-or-nothing approach) (“[W]here the defendant’s negligence reduced the decedent’s chance of survival by greater than 50 percent, as a matter of law, the death remains the injury and the plaintiff receives all-or-nothing recovery under traditional tort principles.”).

257. *Id.* at 844–45, 313 P.3d at 438.

258. *Id.* at 849–50, 313 P.3d at 441.

259. *Id.* at 851, 313 P.3d at 441.

to that determination was the fact that once the lost chance is greater than 50%, death, or the adverse outcome is the injury as a matter of law.²⁶⁰ On its face, the *Dormaier* opinion appears to advocate for applying the “proportional approach” when the lost chance is 50% or less, and the “all-or-nothing approach” when the lost chance is greater than 50%.²⁶¹ This seems simple enough, however, that the court uses the term “loss of chance” to represent two distinct injuries. One injury is the lost chance, the other injury is the ultimate outcome. The two injuries are separate and distinct.

The holding in *Dormaier* seems to create an incentive for plaintiffs’ attorneys to elicit expert testimony in which the lower threshold of the lost chance always includes 50%. An analysis of how *Dormaier* played out at the trial level reveals this clear incentive. In *Dormaier*, loss of chance was not included in the pleadings,²⁶² however the jury instruction on loss of chance was allowed because the plaintiff argued a loss of chance from 50% to 90%.²⁶³ According to the holding, however, the plaintiff would not have been able to request a loss of chance jury instruction had the 50% or less threshold not been met.²⁶⁴ Yet, based on the special verdict responses, the lost chance instruction is what eventually enabled the trial court to award full damages to the plaintiff even though the jury decided that the defendant’s negligence was not the proximate cause of Mrs. *Dormaier*’s death.²⁶⁵ It is possible, therefore, that had the plaintiff not argued a 50% loss of chance, and thus not been given the lost chance jury instruction, the plaintiff would have lost the case. The jury concluded that there was a 70% loss of chance, but not proximate cause for the death, and the court imputed proximate cause based on the percentage of lost chance.²⁶⁶ The appellate court approved the “all-or-nothing” approach to the lost chance even after arguing that lost chance may only be argued when the chance lost is less than 50%.²⁶⁷

In addition, this reasoning creates an untenable position for the defense. The court allowed the loss of chance jury instruction because there was testimony to the effect that the lost chance could have been

260. *Id.*

261. *Id.*

262. *Id.* at 853, 313 P.3d at 442.

263. *Id.* at 849–57, 313 P.3d at 441–44.

264. *Id.* at 849–50, 313 P.3d at 441.

265. *Id.* at 868–70, 313 P.3d at 450–51.

266. *Id.*

267. *Id.* at 850, 313 P.3d at 441.

50%.²⁶⁸ By this rationale, a defendant would open herself up to a new cause of action and distinct injury if the defendant argued that plaintiff only lost a chance of 50% or less. The plaintiff might be arguing for proximate cause of the ultimate outcome, but now loss of chance will be allowed to come into the equation based on an affirmative defense.

Of course it is easy to say that a lost chance under 50% requires the proportional approach, and a lost chance over 50% requires the all-or-nothing approach. But then there is one distinct injury morphing into a second separate and distinct injury. And when a plaintiff's attorney argues a lost chance of 50% to 90%, the judge, jury, and opposing counsel must juggle two distinct theories of recovery under the same name. This confusion demonstrates the need for clarification surrounding the loss-of-chance doctrine.

Finally, the *Dormaier* court, depending on which issue it is addressing, uses conflicting reasoning. For example, in reconciling the jury's verdict, the court found that "[b]ecause a lost chance of survival is an actionable injury distinct from death, the jury could generally find proximate cause of the former without finding proximate cause of the latter."²⁶⁹ The court is saying that a jury can find proximate cause of a 70% loss of chance, but not proximate cause of the ultimate outcome. Yet it also stated that "[l]ogic compels our conclusion because where the loss is greater than 50 percent, no 'separate and distinguishable harm' exists."²⁷⁰ Furthermore, in reasoning why lost chance need not be pleaded, the court held "[n]othing suggests the *Mohr* court intended to set the loss of a chance apart as an autonomous cause of action, claim, or ground for relief," and "wrongful death remained the legal theory upon which respondents sought relief. Thus it is immaterial whether the complaint expressly named the lost chance injury."²⁷¹

In its reasoning for approving the lost chance instruction, the court held that when the defendant's negligence reduced the decedent's chance of survival by more than 50%, death remains the injury and the plaintiff receives all-or-nothing recovery under tort principles.²⁷² So is the court then saying a jury may find proximate cause for the lost chance—but not the death or ultimate outcome—and if it finds

268. *Id.*

269. *Id.* at 867, 313 P.3d at 449 (citations omitted). Furthermore, the court, by reconciling the verdict, effectively imputed on the jury a finding of both. *Id.*

270. *Id.* at 850, 313 P.3d at 441 (emphasis added) (quoting *Daugert v. Pappas*, 104 Wash. 2d 254, 261, 704 P.2d 600, 605 (1985)).

271. *Id.* at 855–56, 313 P.3d at 443–44 (internal quotation marks omitted).

272. *Id.* at 850, 313 P.3d at 441.

proximate cause for the lost chance over 50%, the court will impute proximate causation for the ultimate outcome? This shifts loss of chance from a theory of valuation to a theory of causation, and the separating line is difficult to distinguish.

IV. SOLUTIONS TO CLARIFY THE LOSS-OF-CHANCE DOCTRINE IN WASHINGTON

As has been demonstrated, in Washington loss of chance is an umbrella term that papers over a doctrinal incoherence. It is possible, and even necessary, that the issue will return to the state Supreme Court. If and when it does, this Comment proposes the following clarifications that will both make loss of chance easier for juries, practitioners, and judges to understand and apply, and will be equitable to both plaintiffs and defendants alike. Because the Washington State Supreme Court has made it clear that the loss of chance is the actionable injury, distinct from the ultimate outcome,²⁷³ adopting the proportional approach regardless of the percentage is appropriate. Furthermore, this Comment's suggestions on evidentiary admissibility and pleading requirements comport with current Washington law.

A. *The Court Should Exclusively Adopt the Proportional Approach, Regardless of the Percentage Lost*

Currently in Washington, the loss-of-chance doctrine is used to represent the proportional approach for lost chances of 50% or fewer,²⁷⁴ and it is used to represent the all-or-nothing approach for lost chances of 51% or higher.²⁷⁵ The *Dormaier* decision is an excellent example of this. The problem is that the court is asking the jurors to keep straight in their heads two distinct theories of lost chance, but the court labels them under the same title. The two theories require the application and evaluation of two distinct proximate causes. For the proportional approach, proximate cause must be established as to the lost chance.²⁷⁶ For the all-or-nothing approach, proximate cause must be shown for the

273. See *Mohr v. Grantham*, 172 Wash. 2d 844, 857, 262 P.3d 490, 498 (2011) (“[T]he loss of chance is the compensable injury.”).

274. See *Dormaier*, 177 Wash. App. at 850, 313 P.3d at 441 (concluding that *Herskovits* and *Mohr* intended loss of chance to be argued only when the lost chance was 50% or less).

275. See *id.* (finding that the reduction of a greater than 50% chance of recovery constitutes proximate cause for the injury itself).

276. See *Mohr*, 172 Wash. 2d at 857, 262 P.3d at 496 (holding that plaintiff must show breach of duty proximately caused the lost chance of a better outcome).

ultimate outcome.²⁷⁷ For example, if the plaintiff argues a lost chance of 50%–90%, the jury is considering proximate cause for the lost chance of 50% and the injury is the lost chance. But at 51%, the injury morphs from the lost chance to the ultimate outcome, and the proximate cause shifts from the lost chance to the ultimate outcome even though it is still labeled a lost chance. This is difficult at times for judges and practitioners to keep straight, let alone jurors with no legal education.

Loss of chance should adhere to a single approach. The havoc of utilizing three, or even two, of the approaches was made clear in the *Dormaier* decision.²⁷⁸ The Supreme Court must decide whether loss of chance should be brought under the “substantial factor,” “proportional,” or “all-or-nothing” approach, and only that approach.

This Comment advocates for the “proportional” approach. This author remains persuaded by the *Herskovits* Court’s reasoning: “To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence.”²⁷⁹ However, this Comment advocates for a proportional approach that encompasses any lost chance, where the lost chance—whatever the percentage—is the injury, and damages can be calculated proportionally. The *Dormaier* court admitted this approach is logical, yet left the task to the Supreme Court or legislature.²⁸⁰

As the jury in *Dormaier* demonstrated, it is possible to find that a doctor’s negligence may reduce a patient’s chances of a better outcome by greater than 50%, but still not be the cause in fact of the ultimate outcome.²⁸¹ It is important to distinguish the lost chance and the ultimate outcome as two separate and distinct injuries. This Comment proposes the adoption of only the proportional approach. Any time loss of chance is argued, because it is a separate and distinct injury from the ultimate outcome, it will be its own cause of action. And even if the lost chance is 51% or greater, regardless of the starting point, damages will still be applied proportionally. If the plaintiff wants to prove proximate cause for the ultimate outcome, that is fine. The plaintiff is free to argue both,

277. See *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wash. 2d 609, 631, 664 P.2d 474 (1983) (Pearson, J., concurring) (noting that a lost chance of greater than 50% satisfies proximate cause for the ultimate injury).

278. See *Dormaier*, 177 Wash. App. at 850, 313 P.3d at 441.

279. *Herskovits*, 99 Wash. 2d at 614, 664 P.2d at 477 (lead opinion).

280. *Dormaier*, 177 Wash. App. at 851, 313 P.3d at 441.

281. *Id.* at 841–42, 313 P.3d at 437 (noting that the jury found the defendant reduced chances of survival by 70%, but was not the proximate cause of death).

but the plaintiff should not argue a loss of a 51% or greater chance to prove proximate cause for the ultimate outcome. If the jury decides there is proximate cause for the ultimate outcome, the lost chance argument is mooted. If, however, the jury finds that the defendant's negligence caused a reduction in the chance for a better outcome, no matter the percentage, the plaintiff will still have an avenue of redress, and proportional damages will apply.

B. Evidentiary Standards in a Loss of Chance Case Should Be Stricter

Loss of chance should be proven by traditional tort standards—duty, breach, causation, and damages.²⁸² The burden of proof is by a preponderance of the evidence,²⁸³ and the evidence will almost always require expert testimony. First, the doctor must owe the patient a duty.²⁸⁴ In the medical malpractice context, there generally must be a physician-patient relationship,²⁸⁵ or at the least a duty of a health care professional to follow the accepted standard of care.²⁸⁶ Second, the plaintiff bears the burden to show that the defendant breached that duty by failing to conform to the standard of care.²⁸⁷ Loss of chance cases typically involve a misdiagnosis.²⁸⁸ However, a misdiagnosis in and of itself is not evidence of negligence.²⁸⁹ Rather, the doctor must behave negligently in arriving at the wrong diagnosis.²⁹⁰ This must be proven through expert testimony establishing the standard of care and how it was breached and

282. See Koch, *supra* note 42, at 602 (describing necessary tort standards in a medical malpractice case); Férot, *supra* note 1, at 595 (listing traditional elements of negligence).

283. See Koch, *supra* note 42, at 602.

284. See, e.g., JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS §§ 8.01–8.05 (1996) (discussing duty in negligence cases).

285. See Doyle v. Planned Parenthood, 31 Wash. App. 126, 129, 639 P.2d 240, 242 (1982) (“A wrongful act cannot occur after the termination of the physician-patient relationship.”).

286. See Eelbode v. Chec Med. Ctrs., Inc., 97 Wash. App. 462, 467, 984 P.2d 436, 438 (1999) (“[A] claim of failure to follow the accepted standard of care does not require a physician-patient relationship.”). This can be misinterpreted to mean that a physician-patient relationship is not required to impose a duty on a physician. However, *Eelbode* stands for the fact that one need not be a “physician” to commit medical malpractice. A physical therapist, as was the case in *Eelbode*, is not a physician, and does not have a physician-patient relationship; yet a duty still exists. *Id.*

287. See DIAMOND, *supra* note 284, at § 8.02 (noting that plaintiff must show breach and causation in addition to duty).

288. See Koch, *supra* note 42, at 603–04 (using medical misdiagnoses for each example).

289. See Keogan v. Holy Family Hosp., 95 Wash. 2d 306, 327, 622 P.2d 1246, 1259 (1980) (holding that a wrong diagnosis by itself is not negligence).

290. See *id.* (holding that the doctor must have breached the standard of care in arriving at the misdiagnosis).

how that breach led to the misdiagnosis.²⁹¹ Third, the plaintiff must prove “but-for” cause and effect between the tortious conduct and the lost chance.²⁹² But for the defendant’s negligence, the condition would have been diagnosed. Or to phrase it more simply, if the doctor was not negligent, he or she would have made the correct diagnosis. Fourth, the tortious conduct must have been a proximate cause of the lost chance.²⁹³ This principle can be described as the lost chance being within the foreseeable risk created by the defendant’s negligence,²⁹⁴ and thus asks: if a wrong diagnosis is made in this situation, is it foreseeable that the patient will lose a chance at achieving a better outcome? If the trier of fact answers no, then the plaintiff’s cause of action fails. If it answers yes, then causation is proven for the lost chance but not, however, for the ultimate outcome. Finally, the plaintiff must suffer compensable harm.²⁹⁵ The compensable harm will be dealt with in more detail in Part IV.C.

Perhaps the most important factor in adhering to the above standards is the judge’s role as gatekeeper for the admission of expert testimony. Although Washington criminal courts have accepted the *Frye*²⁹⁶ test,²⁹⁷ Washington civil courts have neither expressly adopted the *Frye* test, nor have they expressly rejected the *Daubert*²⁹⁸ test for the admission of expert testimony.²⁹⁹ The Washington State Supreme Court held that “[e]vidence must be probative and relevant, and meet the appropriate standard of probability.”³⁰⁰ And while the *Frye* test has not been officially adopted in civil cases, “scientific evidence must satisfy the *Frye* requirement that the theory and technique or methodology relied

291. See *Smith v. Shannon*, 100 Wash. 2d 26, 33, 666 P.2d 351, 356 (1983) (noting that expert testimony is required for matters involving medical science).

292. See *DIAMOND*, *supra* note 284, at §§ 11.01–11.04 (discussing cause-in-fact).

293. See *id.* § 12.01 (giving an overview of proximate cause).

294. See *id.* § 12.03 (explaining different proximate cause tests).

295. See *id.* § 3.01 (providing an overview of negligence).

296. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (requiring that there must be general acceptance in the relevant scientific community of the theory proffered by the expert).

297. See *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wash. 2d 593, 602, 260 P.3d 857, 861 (2011) (“Washington courts, at least in criminal cases, have long adopted the *Frye* ‘general acceptance’ standard.”).

298. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 US. 579, 591 (1993) (requiring a court to determine if the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts at hand).

299. See *Akzo Nobel Coatings, Inc.*, 172 Wash. 2d at 602, 260 P.3d at 861–62 (“In civil cases, we have neither expressly adopted *Frye* nor expressly rejected *Daubert*.”).

300. *Id.* at 606, 260 P.3d at 863; see also *WASH. R. EVID.* 401–403; *State v. Riker*, 123 Wash. 2d 351, 359, 869 P.2d 43, 47–8 (1994).

upon are generally accepted in the relevant scientific community.”³⁰¹ Furthermore, “[e]xpert medical testimony must meet the standard of reasonable medical certainty or reasonable medical probability.”³⁰² Because the loss-of-chance doctrine deals with percentages, which are easily manipulable,³⁰³ the judge’s role as gatekeeper for the admission of expert testimony is crucial.

For example, taking the facts of *Herskovits*, the expert testimony first would be necessary to show the standard of care was breached by not initially diagnosing the lung cancer. Next, the expert must show that statistically, the chances of survival at one stage are different from another stage. This can be done using condensed, yet extensive, statistical data based on the survival rates of cancer at the time of diagnosis.³⁰⁴ However, the most important piece of expert testimony needs to establish that, at the time of the misdiagnosis, the patient was at the claimed stage of cancer. This expert opinion can be developed by looking at the x-rays,³⁰⁵ although that may be too speculative, as it is possible Mr. Herskovits did not, in fact have cancer at the beginning. The expert opinion may also be proven if there is statistical data on the growth rate of this specific type of tumor.³⁰⁶ If so, the expert can take the size of the tumor when it was actually diagnosed, and back date it to determine what size the tumor was at the time of the diagnosis, or alternatively, if there was a tumor at all. In sum, it is not enough for an expert to simply opine there was a loss of chance. She must demonstrate, through reliable data and to a degree of reasonable medical certainty every aspect of the lost chance.

301. *Anderson*, 172 Wash. 2d at 606, 260 P.3d at 863 (citing *State v. Martin*, 101 Wash. 2d 713, 719, 684 P.2d 651, 654 (1984)).

302. *Id.* at 606–07, 260 P.3d at 864.

303. For example, an increase from 0.1% to 7.5% is an increase of a factor of 75, or an increase of 7,500%. Both are mathematically correct.

304. *See, e.g., Matsuyama v. Birnbaum*, 890 N.E.2d 819, 843 (Mass. 2008) (giving stage-specific cancer survival rates in a special verdict form); King, *supra* note 25, at 546–47 (“[The doctrine’s] successful application depends on the quality of the appraisal of the decreased likelihood of a more favorable outcome”); *see also* Mayo Clinic Staff, *Cancer Survival Rate: What It Means For Your Prognosis*, MAYO CLINIC (Apr. 15, 2014), <http://www.mayoclinic.org/diseases-conditions/cancer/in-depth/cancer/art-20044517> (discussing survival rates of different stages of lung cancer).

305. *See, e.g., Diagnostic Imaging*, STANFORD MED. CANCER INST., <http://cancer.stanford.edu/information/cancerDiagnosis/diagnosticImaging.html> (listing x-rays as one of three types of imaging used to diagnose cancer) (last visited May 8, 2014).

306. *See, e.g., Harald Weedon-Fekjaer et al., Breast Cancer Tumor Growth Estimated Through Mammography Screening Data*, 10 BREAST CANCER RES., no. 3, 2008, available at <http://breast-cancer-research.com/content/pdf/bcr2092.pdf> (“Tumor growth can be estimated by comparing tumor sizes from clinical-detected and screening-detected cases”).

C. *In Order to Accurately Calculate Damages, the Ultimate Harm Must Occur*

Mohr and *Dormaier* did not specify whether the ultimate outcome must come to pass, even though it is not the compensable injury. This Comment argues that the harm must come about. This may seem confusing at first, especially since this Comment advocates that the lost chance and the harm must be kept separate. While the lost chance and the harm are separate, they are also complementary, and necessary in terms of calculating damages. If the ultimate outcome is death, but the defendant's negligence was not the proximate cause of the death, damages will be what would have been awarded had the defendant legally caused the death, multiplied by the percentage of chance lost. For example, in *Dormaier*, the damages were calculated at \$1,300,000.³⁰⁷ Applying the proportional approach, based on the jury's verdict, the award should have been $0.70 \times 1,300,000 = \$910,000$.

There may be a case where the harm has yet to come about.³⁰⁸ This may be handled by relaxing the statute of limitations, and allowing for suit to be brought when the harm materializes.³⁰⁹ An argument has been made to allow damages for mental distress, but this seems too attenuated a claim, especially if redress is available due to a relaxed statute of limitations.³¹⁰ This ensures that defendants are not liable for a harm that may never come about, resulting in a windfall to the plaintiff.

In addition to requiring the ultimate negative result, courts should be careful not to award damages that would have been incurred anyway. For example, in *Dickhoff v. Green*,³¹¹ a recent Supreme Court of Minnesota case in which the court recognized the proportional approach, the plaintiff baby had a visible tumor that went undiagnosed for a year before treatment began.³¹² However, the trial court correctly refused to award damages for past medical expenses, and pain and suffering.³¹³ Had the plaintiff been diagnosed initially, she would still have had to undergo all the same treatments.³¹⁴ These are the types of damages that

307. *Estate of Dormaier v. Columbia Basin Anesthesia*, 177 Wash. App. 828, 842, 313 P.3d 431, 437 (2013).

308. King, *supra* note 23, at 510–11.

309. *Id.*

310. *Id.* at 511–15.

311. 836 N.W.2d 321, 326–27 (Minn. 2013).

312. *Id.* at 324–27.

313. *Id.* at 327.

314. *Id.*

should be avoided.

D. Relative Proportional Percentages Must Be Avoided

Relative proportional damages take into account the absolute percentage of the chance lost.³¹⁵ For example, a patient who went from a 40% chance of survival to a 20% chance of survival would not have lost a 20% chance, but a 50% chance. Under relative proportionality, the starting percentage is the absolute total. It is no longer on a 100% scale.³¹⁶ A patient who went from a 4% chance of survival to a 1% chance of survival would have lost a 75% chance, not 3%. This brief analysis of the math of the relative proportional approach shows the relative proportional approach's inherent unfairness to defendants.

E. The Conjunction Principle Should Not Be Employed

Damages and liability imposed based on the conjunction principle should also be avoided.³¹⁷ The conjunction principle is a type of loss of chance twice imposed. A good example may be found in the Illinois Court of Appeals decision *Bishop v. Tri County Radiologists Ltd.*,³¹⁸ in which the plaintiff alleged there was a 10% to 20% chance the patient's cancer was in stage I rather than stage II when it was misdiagnosed and, if so, the patient would have had a 40% to 50% better chance at survival.³¹⁹ The 10% to 20% chance of the cancer being in an earlier stage does not meet the preponderance of the evidence standard, however some scholars would have loss of chance, in effect, applied twice.³²⁰ Damages would be calculated based on the conjunction principle.³²¹ The conjunction principle multiplies both percentages by each other and then multiplies that amount by the award for the ultimate outcome.³²² In *Bishop*, for example, assume damages for death were valued at \$100,000, the chance the cancer was in another stage at

315. Zaven T. Saroyan, *The Current Injustice of the Loss of a Chance Doctrine: An Argument for a New Approach to Damages*, 33 CUMB. L. REV. 15, 16–17 (2003).

316. See *supra* note 126 and accompanying text (providing a more in-depth explanation of the difference between relative and proportional percentages).

317. See King, *supra* note 25, at 554–56 (explaining the conjunction principle).

318. 653 N.E.2d 421 (Ill. App. Ct. 1995).

319. *Id.* at 421–22.

320. See, e.g., King, *supra* note 25, at 536–39, 554–56 (advocating for the application of the conjunction principle).

321. *Id.* at 554–56.

322. *Id.*

misdiagnosis was 10%, and the lost chance as a result of the misdiagnosis was 40%. The equation would be $0.10 \times 0.40 \times \$100,000 = \$4,000$. The miniscule damages indicate it is unlikely a plaintiff will employ this principle; however it is an unnecessary complication and should not be used.

The conjunction principle may also be used by defendants to mitigate damages. For example, if the test upon which the expert bases her opinion has a known error rate of 10%, defendants could ask the jury to apply the conjunction principle to account for the error rate.³²³ Thus, if the lost chance was 30% and the known error rate was 10%, we would multiply 30% times 90% (accounting for the 10% error rate) to arrive at a total lost chance of 27%.³²⁴ Again, this is too complicated and should not be allowed by either side. If there is a question as to the reliability of the evidence, it should fall on the judge, as the gatekeeper, to determine its admissibility. It should not be collaterally attacked through the conjunction principle.

F. Loss of a Chance Should Be a Judge-Made Tort and Not Forced into an Existing Statute

It is unclear whether loss of chance may be brought under Washington's wrongful death statute³²⁵ or its medical malpractice statute.³²⁶ This Comment advocates for a judge-made tort, as opposed to trying to fit the doctrine into an existing statute. Such an approach created great confusion in the *Dormaier* decision.³²⁷ However, if the doctrine were to be housed under a statute, the medical malpractice statute³²⁸ is more appropriate as it uses the language "injury", and loss of chance has been classified as an injury. Under the wrongful death statute, Judge Pearson classified the loss of chance—for purposes of fitting it into the statute—as the "cause" of the patient's death.³²⁹ That classification is part of what led to future confusion. In the absence of a judge-made tort, and because loss of chance under the proportional

323. See, e.g., King, *supra* note 25, at 555 (accounting for a 15% false negative rate, and therefore multiplying the lost chance by .85 in arriving at net lost chance).

324. See *id.*

325. WASH. REV. CODE § 4.20.010 (2012).

326. WASH. REV. CODE § 7.70.040 (2012).

327. See *supra* Part II.D.1.

328. WASH. REV. CODE § 7.70.040.

329. *Herskovits v. Grp. Health Coop. of Puget Sound*, 99 Wash. 2d 609, 634, 664 P.2d 474, 487 (1983) (Pearson, J., concurring).

approach is the injury itself, the medical malpractice statute, *Revised Code of Washington* section 7.70.040, is a more fitting home for the doctrine. If the ultimate outcome relating to the lost chance is death, Washington's survival statute, *Revised Code of Washington* section 4.2.046,³³⁰ permits the bringing of the lost chance claim under the medical malpractice statute because had the patient survived, the patient could have brought that cause of action.

G. A Loss of Chance Cause of Action Must Be Raised in the Complaint

If a plaintiff wishes to argue loss of chance, the plaintiff must raise it in the pleadings. The defendant must be fairly in a position to obtain experts familiar with the science at issue and to present relevant evidence to the jury. Fairness requires that the defendant know from the very start that the defendant is defending not just causation for the ultimate outcome, but against loss of chance as well, so that an appropriate approach to discovery can be taken. The *Dormaier* Court—in justifying why loss of chance need not be pleaded—stated that “a complaint must identify the legal theory upon which the plaintiff seeks relief.”³³¹ The loss-of-chance doctrine is a different theory upon which to seek relief, distinct from the ultimate harm. Therefore, the complaint should identify the loss of chance as a separate cause of action. As demonstrated by the *Dormaier* decision, the loss-of-chance doctrine can have significant impacts on the defense's theory of the case. If the defendant thinks he or she is defending solely against a wrongful death claim, the defendant will focus on whether negligence caused the death. If, during trial, the plaintiff elicits testimony to the effect of a 50% loss of chance (especially when, as in *Dormaier*, the plaintiff also argued a 90% loss of chance),³³² the plaintiff now has a new cause of action to bring to the jury. This in effect allows the plaintiff to hedge her bets at the expense of the defendant. This can also confuse the jury—as may have been the case in *Dormaier*³³³—causing the jury to unwittingly grant proximate cause of the ultimate outcome. Furthermore, if the defense is on notice for wrongful death, and argues the negligence caused only a

330. WASH. REV. CODE § 4.20.046 (2012).

331. *Estate of Dormaier v. Columbia Basin Anesthesia*, 177 Wash. App. 828, 854, 313 P.3d 431, 443 (2013).

332. *Id.* at 852, 313 P.3d at 442.

333. The jury found that defendant's negligence caused a 70% loss of chance, but was not the proximate cause of death. *Id.* at 841–42, 313 P.3d at 437.

20% loss of chance, as an affirmative defense, the defense has just argued itself into a lost chance instruction for the jury. In the interest of fairness, and to facilitate discovery, loss of chance should be pleaded in the complaint.

IV. SOLUTIONS IN PRACTICE: APPLYING THE FACTS OF *DORMAIER* TO A CLARIFIED LOSS-OF-CHANCE DOCTRINE

To demonstrate the applicability of the above-suggested solutions designed to clarify the application of the loss-of-chance doctrine, this Comment will now apply the solutions to the facts of *Dormaier*.

Mrs. Dormaier broke her elbow in a fall on September 15, 2007.³³⁴ After receiving emergency care and following up with Dr. Canfield, she was scheduled for surgery to repair the fracture on September 20.³³⁵ On September 18, Dr. Hart conducted a preoperative evaluation and concluded she was fit for surgery.³³⁶ The next day, Mrs. Dormaier complained of chest and hip pain, and shortness of breath.³³⁷ Dr. Canfield ordered hip x-rays, which showed no fractures, and chest x-rays, which revealed patchy infiltrate³³⁸ or atelectasis³³⁹ in one lung.³⁴⁰ The doctors concluded the atelectasis was a result of her shallow breathing due to pain, and decided to go ahead with the planned surgery.³⁴¹ Mr. Misasi, her nurse anesthetist on the day of surgery, consulted with Dr.'s Hart and Canfield and anesthetized her at 12:10 p.m.³⁴² Mrs. Dormaier suffered a cardiac arrest during surgery and passed away at 3:00 p.m.³⁴³ The autopsy showed that a large blood clot had detached from a pelvic deep vein thrombosis in her hip and blocked her lung arteries.³⁴⁴ In the hours and days leading up to her death, many

334. *Id.* at 836, 313 P.3d at 434.

335. *Id.* at 837, 313 P.3d at 434.

336. *Id.*

337. *Id.*

338. *Id.* at 837 n.1, 313 P.3d at 434 n.1 (“‘Patchy infiltrate’ is the displacement of air space by an infiltrating substance in the lung. It is a nonspecific chest x-ray finding that could indicate, for example, atelectasis, pneumonia, or pulmonary embolism.”).

339. *Id.* at 837 n.2, 313 P.3d at 434 n.2 (“‘Atelectasis’ is the collapse of tiny air sacs in the lung.”).

340. *Id.* at 837, 313 P.3d at 434

341. *Id.*

342. *Id.* at 835–38, 313 P.3d at 435.

343. *Id.* at 837–38, 313 P.3d at 435.

344. *Id.*

smaller blood clots had been lodging in her lung arteries.³⁴⁵ The pelvic deep vein thrombosis (PDVT)³⁴⁶ “released many smaller emboli, which caused survivable pulmonary embolisms, but finally released a large embolus, which caused a fatal pulmonary embolism.”³⁴⁷ Following the close of evidence, the plaintiff successfully requested a loss of chance jury instruction.³⁴⁸ The jury found that Mr. Misasi’s negligence was not the proximate cause of Mrs. Dormaier’s death, but did cause a 70% loss of chance of survival.³⁴⁹

The facts of *Dormaier* do warrant the bringing of a loss of chance cause of action. However, as the following application will demonstrate, certain requirements must be met in the interests of clarity and fairness.

First, loss of chance as a cause of action must be pleaded in the initial complaint. It may be brought under Washington’s medical malpractice statute,³⁵⁰ or by its standing as a judge-made tort. Even though the ultimate outcome in this case is death, the lost chance is the actionable injury, and thus not bringing the claim under the wrongful death statute is appropriate. In *Dormaier*, the plaintiff only pleaded that the defendant’s negligence resulted in Mrs. Dormaier’s death,³⁵¹ which, under the proposed solutions, would not allow for a lost chance jury instruction. The plaintiff is free to plead loss of chance, regardless of the starting or total percentage, but a lost chance argument of 50%–90% is too broad. Because loss of chance may now be pleaded at any percentage, there is no longer a need for the plaintiff’s attorneys to “hedge their bets” in assigning percentage lost, being certain to hit the 50% or below benchmark. Therefore, the plaintiff can be, and should be, more precise in assigning the percentage lost. At the time of pleading, the exact or estimated percentage lost may not be definitively established, but pleading the cause of action will at least put the defense on notice that it will be defending against a distinct claim.

Furthermore, pleading loss of chance would not, in this case, foreclose the option of pleading wrongful death. The two may be

345. *Id.* at 838, 313 P.3d at 435.

346. *Id.* at 838 n.4, 313 P.3d at 435 n.4 (“A blood clot is a thrombus when attached to a blood vessel wall and an embolus when detached and migrating through the bloodstream. A pelvic deep venous thrombosis is the formation of a thrombus in the hip’s deep veins. A pulmonary embolism is the lodging of an embolus in the lung’s arteries.”).

347. *Id.* at 838, 313 P.3d at 435.

348. *Id.* at 840–41, 313 P.3d at 436–37.

349. *Id.* at 841–42, 313 P.3d at 437.

350. WASH. REV. CODE § 7.70.040 (2012).

351. *See* Joint Brief of Appellants at 12, *Estate of Dormaier v. Columbia Basin Anesthesia*, 177 Wash. App. 828, 313 P.3d 431 (2013) (No. 30864-2-III).

pleaded in the alternative. However, in employing solely the proportional approach, a lost chance of 51% or greater will only result in proportional damages. It will not morph into the all-or-nothing approach to qualify as proximate cause for the wrongful death.³⁵²

Second, once pleaded, it is crucial that the judge, as gate keeper, adhere to strict evidentiary standards. The admissibility of evidence is where the *Dormaier* trial court fell short. Based on the evidence presented, the case should have been dismissed as a matter of law for failure to provide evidence of causation for the lost chance or death.³⁵³ In its summary of the facts the Court of Appeals stated that “a pelvic deep vein thrombosis initially released many smaller emboli, which caused survivable pulmonary embolisms, but finally released a large embolus, which caused a fatal pulmonary embolism.”³⁵⁴ However, the testimony used at trial, and cited by the Court of Appeals, dealt with the small, survivable pulmonary embolisms, not the large, fatal embolus from the PDVT.³⁵⁵ Had Mrs. Dormaier been diagnosed with these “survivable pulmonary embolisms,” she would have had a 90% chance of survival. However, the pulmonary embolisms present before surgery did not kill her. It was the detachment of a massive one-centimeter embolus from her hip that blocked the artery that feeds both lung branches.³⁵⁶ The plaintiff’s expert testimony also admitted that administering heparin would not have dissolved the fatal clot in time; that even if detected, a skilled surgeon would have needed to be present to remove the clot in time; and did not opine as to the probability of survival of patients with very large pelvic clots.³⁵⁷ Because the evidence presented did not show that any action or inaction by Mr. Misasi impacted Mrs. Dormaier’s chances of survival, the testimony was insufficient to allow the case to continue.

Therefore, under the proposed solutions of this Comment, the evidence must accomplish two things. First, the evidence must purport to establish that the defendants negligently failed to diagnose Mrs. Dormaier’s PDVT, not that they negligently failed to diagnose a

352. See *infra* Appendix A; Appendix B; Appendix C.

353. See *Rasmussen v. Bendotti*, 107 Wash. App. 947, 958, 29 P.3d 56, 62 (2001) (“The consideration is whether the ultimate result and the defendant’s acts are substantially connected, and not too remote to impose liability.”).

354. *Dormaier*, 177 Wash. App. at 837–38, 313 P.3d at 435 (emphasis added).

355. *Id.* at 839–40, 313 P.3d at 435–36.

356. Joint Reply Brief of Appellants at 8–10, *Estate of Dormaier v. Columbia Basin Anesthesia*, 177 Wash. App. 828, 313 P.3d 431 (2013) (No. 30864-2-III).

357. *Id.* at 9–12.

condition that did not cause her death. At the very least, testimony should be given to the effect that Mrs. Dormaier's pulmonary embolisms should have been diagnosed, and the presence of such, in conjunction with her unexplained hip pain would have led a reasonable doctor to conduct further tests to check for PDVT. Second, the evidence must show—on a diagnosis of the PDVT—what the chances are of breaking up the PDVT using heparin. For example, testimony would need to establish that when a PDVT of “x” size is diagnosed and promptly treated, the chances of an embolus detaching and creating a fatal pulmonary embolism are “y%.”

Not only must this evidence be presented, it must also be reliable. As *Mohr* indicates, this needs to be shown, among other things, through data.³⁵⁸ In *Dormaier*, Dr. Swenson testified that “[i]t's been my experience over the entire time of my career that if we can diagnose this, we have a good chance once beginning therapy to take a mortality rate of possibly 70 to 80 percent, and bring it down into the 10 to 20 percent rate.”³⁵⁹ The actual lost percentage is 50% to 70%, but testimony was also elicited that the lost percentage was 90%.³⁶⁰ Notwithstanding the fact that this testimony pertained to a condition that did not kill Mrs. Dormaier, this was based on the doctor's experience, not data. How can a trier of fact know if these percentages are accurate? Did the doctor compile patient data in order to arrive at this percentage? Did he use recognized studies? Furthermore, per *Akzo*, an argued lost chance of 50% to 90% does not fall within a reasonable degree of medical certainty.³⁶¹ A lost chance spanning 40% is simply too broad.

As for the application of the other proposed solutions: (1) the ultimate outcome did come to pass; (2) avoiding relative proportionality depends on the lost chance percentage settled on. For example, if Mrs. Dormaier's chances of survival went from 90% to 20%, the lost percentage is 70%, not the relative proportional percentage of 78%; and (3) nothing in the fact pattern suggests the use of a conjunction principle, and even if it did, that principle should not be employed.

To summarize how this Comment's proposed solutions would deal with the *Dormaier* facts, the plaintiff may maintain a cause of action for loss of chance of survival or a better outcome, however certain criteria must be met. First, the cause of action must be pleaded in the initial

358. See *Mohr v. Grantham*, 172 Wash. 2d 844, 857–58, 262 P.3d 490, 496–97 (2011).

359. *Dormaier*, 177 Wash. App. at 839, 313 P.3d at 435.

360. *Id.* at 839, 313 P.3d at 436.

361. See *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wash. 2d 593, 606–07, 260 P.3d 857, 864 (2011) (“Expert medical testimony must meet the standard of reasonable medical certainty . . .”).

complaint and brought under Washington's medical malpractice statute. Second, any lost percentage may be claimed. However, regardless of the percentage lost, if proven, the lost chance remains the distinct injury and does not morph into proximate cause for the ultimate outcome. Finally, there must be reliable expert evidence, based on data and experience, relating both to the cause of the lost chance, and the reliability of the percentage presented.

CONCLUSION

The loss-of-chance doctrine has created no small amount of confusion, both in Washington and the rest of the country. The path to adoption or rejection of the loss-of-chance doctrine is often fraught with confusion and misinterpretation. While the doctrine's heart is in the right place, its application can be terribly confusing. Much of the difficulty surrounding loss of chance is that "loss of chance" is used as an umbrella term for no less than three distinct approaches. The three approaches—all-or-nothing, substantial factor, and proportional—have different legal requirements and apply differently to the same set of facts. To further complicate matters, some states, like Washington, wind up employing two approaches, as the proportional approach can morph into the all-or-nothing approach after the lost chance is 51% or greater. The key is identifying which approach to associate with loss of chance and sticking to it. Having the loss of chance stand for two or more approaches is untenable and unworkable. This Comment first advocates for the proportional approach, applied at any percentage. This eliminates the all-or-nothing approach, and keeps the lost chance as a separate and distinct injury from the ultimate outcome. Second, this Comment advocates for stricter evidentiary standards when dealing with percentages and lost chances. Finally, in the interest of fairness, loss of chance as a cause of action should be pleaded in the initial complaint. The application of the proposed solutions proves that they can, and should, be applied in a practical setting.

APPENDIX

a. Loss of a Chance Jury Instruction

The loss of a chance is a separate and distinct injury from the ultimate outcome. If you find the defendant's negligence caused the ultimate harm or injury to the plaintiff, you do not need to consider loss of a chance any further. If, however, you find that the defendant's negligence caused the plaintiff to lose a chance at a better outcome, but did not

cause the ultimate harm, the lost chance is the injury, and you must decide what percentage the lost chance is. Loss of chance must be proven by traditional tort standards. Therefore, the defendant health care provider must have owed the patient a duty. The health care provider must then have acted negligently. That negligence must have proximately caused the lost chance, but not the ultimate outcome. If the ultimate outcome was proximately caused by the defendant's negligence, the loss of chance is irrelevant. Damages must be calculated proportionally. In order to determine damages, you must first determine what the damages would be had the defendant's negligence caused the ultimate outcome. Then you must multiply the damages for the ultimate harm by the percentage of the chance lost.

b. Definitions

“Ultimate harm or injury” means the final outcome, i.e., death or other significant injury.

“Loss of chance” is a separate injury, distinct from the ultimate outcome. It is the percentage by which the Plaintiff's chances of avoiding the ultimate harm or injury were reduced.

c. Special Verdict Form

1. Was Defendant negligent in his treatment of the Plaintiff?

Answer:

INSTRUCTION: If you answer “no” to Question 1, do not answer any other questions. If you answered “yes” to Question 1, proceed to Question 2.

2. Was the Defendant's negligence a proximate cause of the Plaintiff's _____(ultimate injury or harm)?

Answer:

INSTRUCTION: If you answer “yes” to Question 2, do not answer Questions 3 or 4, and skip to Question 5. If you answer “no” to Question 2, proceed to Question 3.

3. Was the Defendant's negligence a proximate cause of the Plaintiff's lost chance of a better outcome?

Answer:

INSTRUCTION: If you answer “no” to Question 3, do not answer any other questions. If you answer “yes” to Question 3, proceed to Question 4.

4. What was the percentage lost?

Answer: ___%

INSTRUCTIONS: Proceed to Question 5.

5. What do you find to be the amount of the Plaintiff’s damages? (Calculate damages for the ultimate harm, even if you found that the Defendant’s negligence was not the proximate cause of the Plaintiff’s ultimate harm or injury.)

Answer: \$_____

INSTRUCTIONS: If you answered Question 4, proceed to Question 6. If you answered “yes” to Question 2, these are your total damages.

6. Multiply the percentage lost by the damages:

_____% x \$_____ = \$_____

INSTRUCTIONS: These are your damages for the loss of a chance.