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## Cutting through the Confusion of the Loss-of-Chance Doctrine under Ohio Law: A New Cause of Action or a New Standard of Causation

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CUTTING THROUGH THE CONFUSION OF THE LOSS-OF-  
CHANCE DOCTRINE UNDER OHIO LAW: A NEW CAUSE OF  
ACTION OR A NEW STANDARD OF CAUSATION?

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I. INTRODUCTION

Imagine that you are the parent of an infant child suffering under the effects of a medical condition that is treatable, but potentially fatal. Suppose further that the health care provider you have contracted with to provide critical services necessary for your child’s welfare negligently fails to act in a manner that would prevent the

condition from worsening and your child dies. It is clear that the medical condition was a cause of your child's death, but timely action by the health care provider might have prevented the tragedy. Does the child's estate have a viable cause of action sounding in tort against the health care provider,<sup>1</sup> and if so how do you determine the damages? The answer depends, in large part, upon probabilities. What was the probability your child would have died even if the health care provider had not acted negligently? What was the probability of survival after the negligent failure to act by the health care provider? What if these probabilities are unknown or unknowable?

Prior to the 1996 Ohio Supreme Court decision in *Roberts v. Ohio Permanente Med. Group, Inc.*,<sup>2</sup> if your child had a less than 50% chance of survival before the negligent act, under Ohio law there would be no cause of action.<sup>3</sup> In *Roberts*, the court changed direction and recognized a plaintiff's cause of action for the loss of a less-than-even chance of recovery or survival.<sup>4</sup> However, *Roberts* leaves unanswered some important questions and has caused a great deal of confusion among courts, scholars, and practicing lawyers. In particular, *Roberts* has left uncertainty as to whether, under Ohio law, the loss-of-chance doctrine is merely a change in the standard of causation or whether it has created an entirely new compensable injury.<sup>5</sup>

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<sup>1</sup>Causes of action for wrongful death are in the hands of the decedent's estate. Action for Wrongful Death, OHIO REV. CODE ANN. § 2125.01 (West 2002), states:

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter. When the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person. No action for the wrongful death of a person may be maintained against the owner or lessee of the real property upon which the death occurred if the cause of the death was the violent unprovoked act of a party other than the owner, lessee, or a person under the control of the owner or lessee, unless the acts or omissions of the owner, lessee, or person under the control of the owner or lessee constitute gross negligence.

When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance of such cause of action.

<sup>2</sup>*Roberts*, 668 N.E.2d 480 (Ohio 1996), *overruling* *Cooper v. Sisters of Charity of Cincinnati, Inc.* 272 N.E.2d 97 (Ohio 1971).

<sup>3</sup>*Cooper*, 272 N.E.2d 97 (Ohio 1971) *overruled by Roberts*, 668 N.E.2d 480.

<sup>4</sup>*See Roberts*, 668 N.E.2d at 481. "The time has come to discard the traditionally harsh view we previously followed and to join the majority of states that have adopted the loss-of-chance theory." *Id.* at 484.

<sup>5</sup>*See id.* at 481.

This Note will examine specific language used in the *Roberts* decision and the law in Ohio after *Roberts*.

The central argument advanced in this Note is that a loss of chance should be recognized as an independent injury. This approach best serves the policy of the new loss of chance doctrine, and it avoids the very significant doctrinal problems that arise if the alternative approach is taken, which is to treat the compensability of lost chances as merely a relaxation of traditional tort law causation requirements. The primary focus of this Note is on the loss of a less-than-even chance of recovery or survival,<sup>6</sup> wherein a victim will be entitled to damages resulting from the negligent reduction of the chance of avoiding adverse physical consequences that followed the defendant's negligent act or omission.<sup>7</sup>

Part II of this note discusses the historical development of the loss-of-chance doctrine and observes that this allegedly new doctrine of loss-of-chance can be traced back much further than most scholars and courts generally recognize. Judge Learned Hand used the loss-of-chance rationale over forty years before the case most often credited with establishing the doctrine.<sup>8</sup> Part II also presents an overview of the three primary approaches employed by various jurisdictions in dealing with the tortiously destroyed loss-of-chance situation. In addition, Part II discusses why the loss-of-chance doctrine has been limited almost exclusively to cases of medical malpractice and why the doctrine is not likely to expand beyond this area of tort law in the future. This fact in itself turns out to have policy consequences relevant to the argument presented in this Note. Finally, Part II presents and scrutinizes the holding in *Roberts*.

Part III discusses the doctrinal problem left unresolved by *Roberts* (i.e., the injury vs. causation dilemma). Part III also examines how Ohio courts have applied *Roberts* in subsequent cases and how the lack of clear guidance by the Ohio Supreme Court has led lower courts to interpret *Roberts* incorrectly and inconsistently. Finally, Part

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<sup>6</sup>In other words, this Note will not discuss the distinct, and much more problematic, question of whether Ohio law should compensate lost chances where the victim had better-than-even chances of experiencing the desired outcome before the defendant's negligent act. In *Roberts*, the court limited the application of the loss-of-chance doctrine to cases where the victim initially had a less than 50% chance of survival before the health care provider's negligent act or omission. *See id.* at 481. However, at least one prominent scholar has advocated applying the loss-of-chance doctrine in all cases of tortiously reduced loss-of-chance regardless of the victim's chances of survival before the negligent act or omission. *See generally* Joseph H. King, "Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss-of-A-Chance Doctrine, 28 U. MEM. L. REV. 491, 492 (1998) [hereinafter King, *Reformulation*].

<sup>7</sup>This Note addresses loss-of-chance of recovery or survival when it is manifested in a physical result. Questions concerning the doctrine's applicability can arise in the context of a claim for future damages, medical monitoring, and mental distress (frequently in the context of toxic torts). However, a discussion of the application of the doctrine in those cases is beyond the scope of this Note and is covered extensively by other authors. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002); Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951 (1993).

<sup>8</sup>*Compare* Zinnel v. United States Shipping Bd. Emergency Fleet Corp., 10 F.2d 47 (2d Cir. 1925), *with* Hicks v. United States, 368 F.2d 626 (4<sup>th</sup> Cir. 1966).

III recommends clarifying the definition of the injury as the loss-of-chance itself and clarifying the standard of causation as the traditional preponderance standard.

Part III.D addresses anticipated counterarguments to the suggested refinements to the loss-of-chance doctrine advocated by this Note. Part IV summarizes the recommendations for modifying and clarifying the law concerning loss-of-chance in Ohio and concludes the Note.

## II. OVERVIEW OF LOSS-OF-CHANCE DOCTRINE

### A. Background

The nearly universal circumstance in which the loss-of-chance doctrine has been employed in the United States has been in the medical malpractice context and involves a patient suffering from a preexisting condition.<sup>9</sup> The health care provider negligently fails to prevent the adverse consequences from progressing (usually from a delay in proper diagnosis or treatment) frequently resulting in the loss of the patient's life or permanent disability.<sup>10</sup> Under the loss-of-chance doctrine, the plaintiff would be compensated for the extent to which the defendant's negligence reduced the plaintiff's chance of survival or achieving a more favorable outcome.<sup>11</sup> Some scholars and courts see the doctrine primarily as a theory of causation,<sup>12</sup> while others place more emphasis on the valuation aspect of damages.<sup>13</sup> In practice, courts have struggled with both problems.<sup>14</sup> These problems concerning lost chances must be evaluated in light of the traditional requirements to maintain a cause of action for negligence.

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<sup>9</sup>See RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 26 cmt. n (Tentative Draft No. 2, 2002); see also David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1800 n.42 (1997).

<sup>10</sup>See King, *Reformulation*, *supra* note 6, at 492; see also Martin J. McMahon, Annotation, *Medical Malpractice: Measure and Elements of Damages in Actions Based on Loss of Chance*, 81 A.L.R. 4<sup>th</sup> 485, §1(a) (1990) [hereinafter McMahon, *Loss of Chance*].

<sup>11</sup>See King, *Reformulation*, *supra* note 6, at 492, 545-46.

<sup>12</sup>See, e.g., David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605, 605 (2001) (describing loss-of-chance as a novel theory of causation).

<sup>13</sup>See, e.g., *Cooper v. Hartman*, 533 A.2d 1294 (Md. 1987) (finding that the lost chance theory does not create a new tort, but rather a redefinition of damages, so that a plaintiff's compensation for the loss of chance is a percentage of the full amount of damages sustained); see generally King, *Reformulation*, *supra* note 6, at 491, 516-46, 554.

<sup>14</sup>See, e.g., *Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1978) (focusing on loss-of-chance from perspective of causation); *Delaney v. Cade* 873 P.2d 175 (Kan. 1994) (examining cases addressing causation aspects of loss-of-chance and valuation of damages aspects of loss-of-chance); see also John D. Hodson, Annotation, *Medical Malpractice: "Loss of Chance" Causality* 54 A.L.R.4<sup>th</sup> 10 (1987), for a survey of cases addressing the causation aspect of lost opportunity; Martin J. McMahon, *Damages for Loss of Chance of Cure*, 12 AM. JUR. PROOF OF FACTS 3d 621 (1991) [hereinafter McMahon, *Damages for Loss of Chance*], for a detailed discussion of cases dealing with the valuation of damages aspects of lost opportunity.

*B. Elements of Negligence—Generally*

Traditionally, to prove medical malpractice, the plaintiff's claim is based on the tort of negligence and the plaintiff bears the burden of proving five elements.<sup>15</sup> First, the plaintiff must prove the defendant owed a duty to the plaintiff/victim.<sup>16</sup> In the context of loss-of-chance, this duty is often a duty to act to protect the plaintiff against some injury from a preexisting condition and is based on a special relationship between the plaintiff and the defendant.<sup>17</sup> Second, the plaintiff must prove, usually through expert testimony, that the defendant breached his duty (i.e., the defendant failed to conform to the relevant standard of care).<sup>18</sup> The breach of duty in loss-of-chance cases is almost always an act of omission rather than commission.<sup>19</sup>

The third element the plaintiff must prove is that the defendant's act or omission was the cause in fact of the injury he suffered.<sup>20</sup> The plaintiff must prove, by a preponderance of the evidence, that but-for the defendant's wrongful conduct the injury would not have occurred.<sup>21</sup> Satisfaction of the burden of persuasion in a normal civil case "requires that the trier of fact find that the existence of the proposition to be proved is more probably true than not true."<sup>22</sup> The *Roberts* court stated the general rule in medical malpractice cases under Ohio law "is that the plaintiff must prove causation through medical expert testimony in terms of probability to establish the injury was, more likely than not, caused by the defendant's negligence."<sup>23</sup> Courts that apply the loss-of-chance doctrine have in

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<sup>15</sup>W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5<sup>th</sup> ed. 1984).

<sup>16</sup>See KEETON, *supra* note 15, at 164-65; see also James Lockhart, *Cause of Action for Medical Malpractice Based on Loss of Chance of Cure*, 4 COA2d 1, 19 (1994) (the relevant standard of care is proven through expert testimony).

<sup>17</sup>See RESTATEMENT (SECOND) OF TORTS § 323 (1963-1964 Main Vol.); see also King, *Reformulation*, *supra* note 6, at 497.

<sup>18</sup>See KEETON, *supra* note 15, at 164-65; see also Lockhart, *supra* note 16, at 20.

<sup>19</sup>See generally McMahan, *Loss of Chance*, *supra* note 10.

<sup>20</sup>See KEETON, *supra* note 15, at 164-65.

<sup>21</sup>See King, *Reformulation*, *supra* note 6, at 497; see also Robertson, *supra* note 9, 1784 (expert testimony is generally required to establish but-for causation in medical cases). Courts often emphasize that it is a mistake to insist on too much certainty when applying the but-for test especially when the plaintiff relied upon the defendant (and the relevant standard of care) to protect against injury from the very type of risk to which the plaintiff was exposed. See Robertson, *supra* note 9, at 1774. In addition, courts have often found "where the negligence of the defendant greatly multiplies the chances of accident ... and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without negligence is not sufficient to break the chain of cause and effect." *Id.* at 1775.

<sup>22</sup>Michael H. Graham, *Handbook of Federal Evidence* § 301.05 (5<sup>th</sup> ed. 2001).

<sup>23</sup>*Roberts*, 668 N.E.2d at 482.

most cases modified this element;<sup>24</sup> however, it has proven to be perhaps the most confusing aspect of the doctrine.

Fourth, the plaintiff must prove the defendant's breach of duty was the proximate cause of the plaintiff's injury.<sup>25</sup> Proximate cause requires that the injury be within the foreseeable risk created by the defendant's breach of duty.<sup>26</sup> Although the term proximate cause is often mistakenly used as a synonym for causation generally,<sup>27</sup> loss-of-chance cases decided in Ohio have focused primarily on issues of cause in fact and proximate cause has not proved troublesome to plaintiffs.<sup>28</sup>

Finally, the plaintiff must have suffered a compensable injury.<sup>29</sup> This element, along with causation, has proven to be the primary challenge to plaintiffs in loss-of-chance cases.<sup>30</sup> In the loss-of-chance context, questions of valuation are frequently mistaken as questions of causation.<sup>31</sup> Before a plaintiff can establish causation, he has to know how to define the injury the defendant's negligence allegedly caused (i.e., the resulting physical injury or the lost chance itself). As discussed further in Part III, in Ohio a significant question exists as to how to define the injury in loss-of-chance cases.<sup>32</sup>

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<sup>24</sup>See generally *Delaney*, 873 P.2d 175 (examining cases from several jurisdictions addressing causation aspects of loss-of-chance and valuation of damages aspects of loss-of-chance); *Hodson*, *supra* note 14.

<sup>25</sup>See *KEETON*, *supra* note 15, at 164-65; see also *Lockhart*, *supra* note 16, at 22-23.

<sup>26</sup>See *King*, *Reformulation*, *supra* note 6, at 497.

<sup>27</sup>See RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 26 REPORTERS' NOTE cmt. a (Tentative Draft No. 2, 2002).

<sup>28</sup>Compare *Starkey v. St. Rita's Med. Ctr.*, 690 N.E.2d 57, 63 (3d Dist. Ohio Ct. App. 1997) (interpreting *Roberts* to mean the plaintiff need not prove by a reasonable probability that the defendant's medical malpractice was the "proximate cause" of plaintiff's injury), with *Paul v. Metrohealth St. Luke's Med. Ctr.*, No. 71195, 1998 WL 742173, at \*7 (8<sup>th</sup> Dist. Ohio Ct. App. Oct. 22, 1998) (finding that the plaintiff's expert failed to show that defendant's alleged medical malpractice was the proximate cause of the plaintiff's injury to a degree of medical certainty or medical probability as required by *Roberts*; and holding that *Roberts* does not relieve the plaintiff of the burden of proving "but-for" causation; and further holding that plaintiff's expert failed to demonstrate that "but-for" defendant's actions either the risk of harm to the decedent was increased or the decedent would have had a "chance of recovery").

<sup>29</sup>See *King*, *Reformulation*, *supra* note 6, at 497; see also *KEETON*, *supra* note 15, at 164-65.

<sup>30</sup>See *King*, *Reformulation*, *supra* note 6, at 497.

<sup>31</sup>*Id.* at 519. The confusion is particularly apparent in cases where the victim lost a chance of less than 50%. In applying the loss-of-chance doctrine in this case, the percentage of chance lost is relevant for purposes of valuing the plaintiff's injury. That same percentage should not be the basis of determining whether the plaintiff has met the burden of proving causation. See, e.g., *Roberts*, 668 N.E.2d at 481.

<sup>32</sup>See generally *Roberts*, 668 N.E.2d 480; see discussion *infra* Part III.

*C. Development of the Doctrine of Loss-of-Chance*

Though many courts and scholars trace the roots of the loss-of-chance doctrine in the United States to the 1966 Fourth Circuit decision in *Hicks v. United States*,<sup>33</sup> this Note contends the doctrine is much older and more eminently placed: it surfaces at least as early as a 1925 opinion by Judge Learned Hand in *Zinnel v. United States Shipping Bd. Emergency Fleet Corp.*<sup>34</sup> *Hicks* involved a medical malpractice suit where the decedent died from an intestinal disorder after being misdiagnosed.<sup>35</sup> The plaintiff's experts testified that the decedent would have survived if given proper treatment, but the defendant argued there was a failure of causation because even with proper treatment, the patient's survival was speculative.<sup>36</sup> The court, in finding causation had been established by the plaintiff, stated:

When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstances require the plaintiff to show to a certainty that the patient would have lived had she been hospitalized and operated on promptly.<sup>37</sup>

In *Hicks*, the court noted that both of the plaintiff's experts testified that the victim would have survived if operated on promptly, and the defendant did not effectively contradict this testimony.<sup>38</sup> Based on this evidence, the plaintiff arguably proved that it was more likely than not that the defendant's negligence caused the victim's death.<sup>39</sup>

I would go back further than *Hicks*, however, in finding similar reasoning used by a court to find a plaintiff had established causation sufficient to get to the jury on the question of negligence. In *Zinnel*, the decedent was a seaman who was swept overboard in a storm at sea and he drowned after ineffectual efforts to rescue him.<sup>40</sup>

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<sup>33</sup>See, e.g., Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1368 n.53 (1981) [hereinafter King, *Valuation*]; see also, *Roberts*, 668 N.E.2d at 482 (citing *Hicks v. United States*, 368 F.2d 626 (4<sup>th</sup> Cir. 1966)).

<sup>34</sup>10 F.2d 47 (2d Cir. 1925).

<sup>35</sup>See *Hicks*, 368 F.2d at 626-27.

<sup>36</sup>See *id.* at 629-32.

<sup>37</sup>*Id.* at 632.

<sup>38</sup>See *id.* at 632.

<sup>39</sup>See, e.g., *Herskovits v. Group Health Coop. of Puget Sound, Inc.*, 664 P.2d 474, 491 (Wash. 1983) (Dolliver, J., dissenting) (finding that, factually, *Hicks* does not support the loss-of-chance doctrine because the plaintiff's chance of survival was over 50%).

<sup>40</sup>See *Zinnel*, 10 F.2d at 47.



Judge Learned Hand, in addressing whether the failure by the defendant to maintain a safety rope caused the loss, stated:

There ... remains the question whether they might have also said that the fault caused the loss. About that we agree no certain conclusion was possible. Nobody could, in the nature of things, be sure that the intestate would have seized the rope, or, if he had not, that it would have stopped his body. But we are not dealing with a criminal case, nor are we justified, where certainty is impossible, in insisting upon it. We cannot say that there was no likelihood that a rope three feet above the deck ... would not have saved the seaman.... Considering that such lines were run for the express purpose, among others, of protecting seamen, we think it a question about which reasonable men might at least differ whether the intestate would not have been saved, had it been there.<sup>41</sup>

While not specifically stating that the case was a loss-of-chance for survival case, the court in *Zinnel* used essentially the same reasoning as later courts have used in loss-of-chance cases.<sup>42</sup>

#### *D. Various Approaches to the Tortiously Destroyed Loss-of-Chance Situation*

Courts have not uniformly adopted the “substantial possibility” rule of *Hicks*, which permits recovery even if there was only a substantial possibility of avoiding the result but-for the tortious conduct.<sup>43</sup> Since *Hicks*, courts have generally followed one of three approaches to the tortiously destroyed loss-of-chance situation.

##### 1. The Traditional “All or Nothing” Approach

The traditional approach to evaluating claims of lost chance of a more favorable outcome focuses on causation and is known as the “all-or-nothing rule.”<sup>44</sup> The plaintiff must prove by a preponderance of the evidence that but-for the defendant’s negligence the plaintiff would not have suffered the harm.<sup>45</sup> This approach is essentially the traditional negligence analysis,<sup>46</sup> and, while a minority position,<sup>47</sup> is still followed in several jurisdictions.<sup>48</sup> If the plaintiff can prove causation by this standard, damages will be awarded to the plaintiff in full (i.e., as though the

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<sup>41</sup>*Id.* at 49.

<sup>42</sup>*See, e.g., Hicks*, 368 F.2d at 632.

<sup>43</sup>*See infra* Parts II.D.1-3, II.F., and cases cited therein.

<sup>44</sup>*See King, Reformulation, supra* note 6, at 499.

<sup>45</sup>*See id.*; *see also Lockhart, supra* note 16, at 14.

<sup>46</sup>*See Delaney*, 873 P.2d at 183.

<sup>47</sup>*See id.* at 183 (stating the traditional approach is probably now the minority position).

<sup>48</sup>*See, e.g., Williams v. Spring Hill Mem’l Hosp.*, 646 So. 2d 1373, 1375 (Ala. 1994); *Jones v. Owings*, 456 S.E.2d 371, 374 (S.C. 1995); *Abille v. United States*, 482 F. Supp. 703 (N.D. Cal. 1980) (applying Alaska law); *Hilden v. Ball*, 787 P.2d 1122 (Idaho 1989); *Clayton v. Thompson*, 475 So. 2d 439 (Miss. 1985).

likelihood of success was 100%).<sup>49</sup> If not, no damages will be awarded.<sup>50</sup> This was the approach of the Ohio Supreme Court prior to *Roberts*. In *Cooper v. Sisters of Charity of Cincinnati, Inc.*,<sup>51</sup> the court reasoned:

Lesser standards of proof are understandably attractive in malpractice cases where physical well being, and life itself, are the subject of litigation. The strong intuitive sense of humanity tends to emotionally direct us toward a conclusion that in an action for wrongful death an injured person should be compensated for the loss of any chance for survival, regardless of its remoteness. However, we have trepidations that such a rule would be so loose that it would produce more injustice than justice.<sup>52</sup>

Courts utilizing this rule place a great deal of weight upon the policy rationale that tort liability should be based on fault and fault is only proven when the defendant is more than 50% responsible for causing the injury.<sup>53</sup> Additionally, many courts may view this standard as being a more manageable and bright line approach to resolving these questions.

The problem with this approach, and the reason a majority of the states have now done away with it, is that it ignores the policy objectives of deterrence and compensation,<sup>54</sup> and places an emphasis on manipulating the rules because it forces the parties to search out expert witnesses willing to say what each party needs to show under the rule.<sup>55</sup>

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<sup>49</sup>See King, *Valuation*, *supra* note 33, at 1387-90; see generally McMahon, *Loss of Chance*, *supra* note 10; see also KEETON, *supra* note 15, § 127, at 945-60 (discussing damages under wrongful death statutes).

<sup>50</sup>See KEETON, *supra* note 15, at 164-65; see generally McMahon, *Loss of Chance*, *supra* note 10.

<sup>51</sup>272 N.E.2d 97, 104, *overruled by Roberts*, 668 N.E.2d 480. In *Cooper*, the court held that plaintiff had the burden to prove the probability of victim's survival absent the defendant's negligence. *Id.* The court held that probable means more than 50%. *Id.*

<sup>52</sup>*Cooper*, 272 N.E.2d at 103, *overruled by Roberts*, 668 N.E.2d 480.

<sup>53</sup>See cases cited *supra* notes 46-48.

<sup>54</sup>See Vincent R. Johnson & Alan Gunn, *Studies in American Tort Law* 6-9 (2d ed. 1999).

<sup>55</sup>See, e.g., *De Burkarte v. Louvar*, 393 N.W.2d 131 (Iowa 1986) (reasoning that allowing recovery for a lost chance, and not for all damages, is the most equitable approach; and further reasoning that the all-or-nothing approach subverts deterrence objectives of tort law by denying recovery for the effects of conduct that causes statistically demonstrable losses; and that by not recognizing a lost chance as a compensable interest, the all-or-nothing rule distorts the loss assigning role of tort law and creates pressure to manipulate and distort other rules affecting causation and damages, and places a premium on the search for a willing witness).

## 2. Relaxed Proof of Causation Approaches

Courts following this second approach generally continue to view the underlying physical injury or death as the ultimate injury for which the patient is compensated.<sup>56</sup> The relaxed proof approach attempts to ameliorate what some courts view as the harshness of the traditional “all-or-nothing approach.”<sup>57</sup> In understanding how courts can relax the traditional requirements of proving causation, it is useful to look at what Professor Joseph H. King has identified as the “four dimensions” of the causation requirement.<sup>58</sup> The first aspect of causation is the “but-for” test.<sup>59</sup> The second dimension is the standard of proof, which defines the degree of certainty required to establish causation.<sup>60</sup> This usually means it was more likely than not that the defendant’s tortious conduct caused the plaintiff’s injury.<sup>61</sup> Third is the sufficiency of the evidence, which, in medical malpractice cases, relates to the requirements for expert testimony.<sup>62</sup> The final dimension is the burden of proof.<sup>63</sup> The burden of proving causation is normally on the plaintiff, but courts do, under certain circumstances, shift the burden to the defendant.<sup>64</sup>

Some courts have relaxed either the standard of proof required or the sufficiency of the evidence called for<sup>65</sup> rather than defining the injury as the loss of chance for a better result. A number of courts purporting to adopt some version of loss-of-chance have relied on Restatement (Second) of Torts Section 323.<sup>66</sup> However, there are

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<sup>56</sup>See, e.g., *Hamil*, 392 A.2d at 1285-87; see generally Beth Clemens Boggs, *Lost Chance of Survival Doctrine: Should the Court Ever Tinker with Chance?*, 16 S. ILL. U. L.J. 421, 432 (1992).

<sup>57</sup>See generally *Thompson v. Sun City Cmty. Hosp., Inc.*, 688 P.2d 605 (Ariz. 1984); *McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467 (Okla. 1987); *Mayhue v. Sparkman*, 653 N.E.2d 1384 (Ind. 1995); *Roberts*, 668 N.E.2d at 483.

<sup>58</sup>See King, *Reformulation*, *supra* note 6, at 497-98.

<sup>59</sup>See *id.*

<sup>60</sup>See *id.*

<sup>61</sup>See *id.*

<sup>62</sup>See *id.*

<sup>63</sup>See King, *Reformulation*, *supra* note 6, at 497-98.

<sup>64</sup>See Robertson, *supra* note 9, at 1781.

<sup>65</sup>See, e.g., *McKellips*, 741 P.2d at 475; see also RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 26 REPORTERS’ NOTE cmt. n (Tentative Draft No. 2, 2002).

<sup>66</sup>See, e.g., *Roberts*, 668 N.E.2d at 484; *Thompson*, 688 P.2d at 615; *Hamil v. Bashline*, 392 A.2d 1280, 1288 (Pa. 1978); *McKellips*, 741 P.2d at 474-75. In *McKellips*, the patient died shortly after a physician negligently diagnosed the patient’s condition as minor. See *McKellips*, 741 P.2d at 470. An expert testified that the plaintiff’s chances of survival would have been significantly improved if the physician had not been negligent in his diagnosis, but the expert could not reduce the lost chance to a statistical probability. See *id.* In adopting the Section 323 approach, the Oklahoma Supreme Court held that if a plaintiff can show the physician’s negligence caused a substantial reduction in the plaintiff’s chance of recovery or survival, the question of proximate cause is for the jury, regardless of statistical evidence. See *id.* at 474, 477.

considerable differences among courts on whether and how juries should be instructed under Section 323,<sup>67</sup> and in fact significant disagreement often surrounds whether a particular case is even a Section 323 case.<sup>68</sup> In *Roberts*, the Ohio Supreme Court indicated it recognizes the loss-of-chance theory and will follow the approach set forth in Restatement (Second) of Torts Section 323.<sup>69</sup> Part III of this Note discusses some of the problems and confusion with this approach as adopted by the court in *Roberts*.<sup>70</sup>

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Courts and commentators, in fact, call this the Restatement Section 323 approach. See, e.g., Christopher Paul Reuscher, Note, *McMullen v. Ohio State University Hospitals: This isn't Vegas, but don't Tell the Courts—Playing with Percentages and the Loss-Of-Chance Doctrine*, 34 AKRON L. REV. 767, 777 (2001); Michelle L. Truckor, Comment, *The Loss Of Chance Doctrine: Legal Recovery for Patients on the Edge of Survival*, 24 U. DAYTON L. REV. 349, 356 (1999); RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 26 REPORTERS' NOTE cmt. n (Tentative Draft No. 2, 2002). "Section 323(a) was designed to relax a plaintiff's burden of proving causation, not to compound it." *McMullen v. Ohio State Univ. Hosp.*, 725 N.E.2d 1117, 1123-24 (Ohio 2000) (citation omitted).

<sup>67</sup>*Compare Thompson*, 688 P.2d at 615-16 (adopting Section 323 and allowing a jury to consider evidence of an increase in harm on the issue of causation, but holding this did not mean the jury was to be instructed on the rule, rather it was a rule allowing the court to permit evidence of an increased risk of harm; and adding that the jury must still be instructed to find for the defendant unless it finds a probability the defendant was a cause of the plaintiff's injury), with *Jones v. Montefiore Hosp.*, 431 A.2d 920 (Pa. 1981) (holding that the plaintiff was entitled to jury instruction based on Section 323; and that proximate cause could be established by evidence that the defendant's negligent act or failure to act was a substantial factor in bringing about the plaintiff's harm; and adding that medical opinion need only show, with a reasonable degree of medical certainty, that the defendant's conduct increased the risk of harm ultimately sustained and it is then for the jury to decide whether the conduct was a substantial factor in bringing about the harm).

<sup>68</sup>See, e.g., *Herskovits v. Group Health Coop. of Puget Sound, Inc.*, 664 P.2d 474 (Wash. 1983). In *Herskovits*, a majority of the Washington Supreme Court found that recovery was appropriate on behalf of a deceased patient whose chances of surviving cancer, according to expert testimony, had been reduced from 39% to 25% as a result of the defendant's failure to properly diagnose the condition. See *id.* at 474 (voting 6-3 in favor of recognizing the plaintiff's cause of action for loss-of-chance). Two justices, of the six vote majority, held they would allow wrongful death damages when the trier of fact found an act, which reduced the chance of survival, to be a substantial factor in the death's occurrence. *Id.* at 479. This view could properly be classified as a relaxed standard of proof. Four justices in the majority, however, found that it was the reduced chance of survival itself that was the compensable injury. *Id.* at 487. These four justices indicated that because the experts agreed the defendant's negligence probably did not cause the death, damages could not, under established principles of causation, be awarded if the injury was the death. *Id.* at 481 (Pearson, J., concurring). This view cannot fairly be described as a relaxed causation standard because these justices found that the injury (defined as the loss of a less than even chance of survival) was more likely than not caused by the defendant's negligence. *Id.* at 487 (Pearson, J., concurring).

<sup>69</sup>*Roberts*, 668 N.E.2d at 484.

<sup>70</sup>See discussion *infra* Part III. "Those plaintiffs utilizing this new cause of action no longer must prove causation in terms of probability through the medical expert to establish that the injury was, more likely than not, caused by the defendant's negligence." *Starkey*, 690 N.E.2d at 62 (citing *Roberts*, 668 N.E.2d at 482-83). In *Starkey*, the court also stated:

### 3. Pure Loss-of-Chance Approach

In 1981 Professor King wrote an extremely influential article on this subject advocating that lost opportunity should generally be recognized as a legally compensable harm and valued on a proportional basis.<sup>71</sup> This approach defines the injury as the loss of a chance of achieving a more favorable outcome,<sup>72</sup> rather than the subsequent death or physical injury. Defining the injury in this manner requires a plaintiff to prove only that the defendant's act or omission caused the loss of chance rather than proving the act or omission caused the physical injury, a much more difficult question of causation. Professor King advocates a proportional damage approach that compensates an injured victim in proportion to their loss, whether that loss is a 1% or 99% loss of chance.<sup>73</sup> Professor King suggests that preexisting conditions should be taken into account when valuing the interest destroyed. Professor King would apply this approach broadly, including a reduction in damages to reflect preexisting conditions in cases where a defendant tortiously and directly causes physical injuries unrelated to the victim's preexisting condition.<sup>74</sup> A review of the cases which Professor King himself cites as adopting this approach reveal that

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“[a]lthough the plaintiff still has the burden of persuading the jury by a preponderance of the evidence that defendant brought about the harm plaintiff has suffered, the jury, rather than the medical expert is given the task of balancing the probabilities.” *Id.* However, as an indication of the confusion *Roberts* has created, Professor King, focusing on how the Ohio Supreme Court holds damages should be valued in loss-of-chance cases, cites *Roberts* as an example of the application of the loss-of-chance approach as opposed to the relaxed proof approach. *See King, Reformulation, supra* note 6, at 508.

<sup>71</sup>Many courts that have adopted the loss-of-chance doctrine have relied on this article. *See, e.g., Roberts*, 668 N.E.2d at 483-84 (citing King, *Valuation, supra* note 33). In 1998, Professor King updated his views and provided some guidelines for when he feels it is appropriate to apply the loss-of-chance doctrine. *See King, Reformulation, supra* note 7. Some commentators refer to this approach as the “King Approach.” *See, e.g., Reuscher, supra* note 66, at 778.

<sup>72</sup>*See King, Reformulation, supra* note 6, at 508-09.

<sup>73</sup>*See King, Valuation, supra* note 33, at 1372-73 and 1381-87.

<sup>74</sup>*See King, Reformulation, supra* note 6, at 543. King states:

A special relationship, undertaking, or other basis supporting a preexisting duty should not be required when a defendant's active tortious conduct is proven to have probably caused a materialized injury, and the only question is to what extent to reduce damages for that injury to reflect the fact that the victim suffered from a preexisting condition creating a possibility of harm independent of the tortious conduct. For example, the doctrine should be applied to a situation in which an ambulance transporting the victim to the hospital is struck by an eighteen-wheeler negligently operated by the defendant, and the victim was immediately killed. The fact that prior to the accident the victim was having a heart attack and had only a forty percent likelihood of surviving should not, under the loss-of-a-chance doctrine, completely preclude damages for the value of the victim's life. Instead, it would call for an appropriate reduction to reflect the effect of the preexisting condition on the interest destroyed by the negligent operation of the truck.

*Id.*

they have not fully adopted the “pure loss-of-chance” approach.<sup>75</sup> In *Roberts*, the Ohio Supreme Court approvingly cited Professor King’s article and adopted a proportional approach to valuing the loss of a less than even chance of recovery or survival; however, it is not clear *Roberts* agrees with Professor King’s definition of the injury or application of the doctrine in cases where the plaintiff initially had a greater than 50% chance of survival.<sup>76</sup>

#### E. Limited Scope of Loss-of-Chance Doctrine

Some scholars fear that the loss-of-chance doctrine is broad enough to swallow up traditional negligence in any case of questionable causation.<sup>77</sup> The practical reality is, however, that the loss-of-chance doctrine is limited almost exclusively to medical malpractice cases,<sup>78</sup> and this reality is not likely to change. The reasons for this involve both economic and policy considerations. In a 1997 article Professor David Robertson notes:

[The historically] ‘protective attitude of the law toward the medical [defendant]’ and a strong judicial tradition of deference to medical

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<sup>75</sup>See King, *Reformulation*, *supra* note 6, at 560 n.58. Professor King cites the following cases as approving the loss-of-chance approach for some type of injuries: *Delaney*, 873 P.2d at 185; *Perez v. Las Vegas Med. Ctr.*, 805 P.2d 589, 592 (Nev. 1991); *Roberts*, 668 N.E.2d at 484. In *Perez*, the Supreme Court of Nevada adopted the loss-of-chance approach in a medical malpractice case where the decedent patient had less than a 50% chance of survival before the defendant’s negligence. See *Perez*, 805 P.2d at 592. The court held the amount of damages was “equal to the percent of chance [of survival] lost [due to negligence] multiplied by the total amount of damages which are ordinarily allowed in a wrongful death action.” *Id.* at 592 (quoting *McKellips*, 741 P.2d at 476). The court defined the injury as not the death itself, but rather as the decreased chance of survival caused by the medical malpractice. See *id.* at 592. By defining the injury in this manner, the traditional rule of preponderance is fully satisfied if the plaintiff can show, “to a reasonable medical probability, that some negligent act or omission by health care providers reduced a substantial chance of survival.” *Id.* at 592. The court declined to clarify what percentage reduction amounted to a substantial chance, but doubted that a ten percent chance of survival would be actionable. See *id.* at 592. The court made a very important point by noting “in cases where the chances of survival were modest, plaintiffs will have little monetary incentive to bring a case to trial because damages would be drastically reduced to account for the preexisting condition.” See *Perez*, 805 P.2d at 592.

<sup>76</sup>See *Roberts*, 668 N.E.2d at 484-85; see also discussion, *supra* note 6 (discussing differences between King’s approach and *Roberts*).

<sup>77</sup>See, e.g., Fischer, *supra* note 12, at 605 (noting that the theory has a vastly broad potential application to virtually every questionable case of causation, but cautioning that it would be unwise to apply the doctrine so broadly that it would replace traditional causation rules); RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 26 REPORTERS’ NOTE cmt. n (Tentative Draft No. 2, 2002) (noting that the lost-opportunity development has been halting as courts have sought to find appropriate limits for this reconceptualization of legally cognizable harm; and without limits, this reform is of potentially enormous scope, implicating a large swath of tortious conduct in which there is uncertainty about factual cause, including failures to warn, provide rescue or safety equipment, and otherwise take precautions to protect a person from a risk of harm that exists).

<sup>78</sup>See RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 26 REPORTERS’ NOTE cmt. n (Tentative Draft No. 2, 2002).

expertise led virtually all courts considering the problem [of the cause-in-fact burden on the plaintiff in a medical malpractice suit] to say that expert testimony that proper medical treatment 'would have increased the patient's chance [of achieving a better medical result] from, for example, twenty to forty percent' could not satisfy the plaintiff's cause-in-fact burden.<sup>79</sup>

Professor Robertson notes, however, that judicial attitudes regarding these matters have changed, leading to the loss-of-chance approach in medical malpractice.<sup>80</sup> That same historical deference, however, has not been extended to areas beyond medical malpractice. In a 1956 article, Professor Wex Malone discussed the degree of proof of causation required by courts.<sup>81</sup> He noted that where the rule of conduct was designed to protect against the exact risk to which the plaintiff was exposed, courts were likely to let plaintiffs get to the jury on a minimal showing of causation,<sup>82</sup> even when chances of rescue appeared slim;<sup>83</sup> in these cases policy considerations of fairness, full compensation to accident victims, and deterrence favor a relaxed causation approach toward plaintiffs.<sup>84</sup>

In addition to these policy reasons, strong economic considerations limit the use of loss-of-chance doctrine. Because the kinds of physical injury situations that implicate loss-of-chance are those in which courts already give plaintiffs a drastically reduced burden of proof,<sup>85</sup> plaintiffs would have little reason to invoke the loss-of-chance doctrine if it would have the effect of reducing their damages based on the percentage of lost opportunity when the alternative under the relaxed causation approach affords them full damages.<sup>86</sup> Additionally, plaintiffs will rarely have the ability to provide expert testimony on the percentage of opportunity lost, as this type of information rarely exists outside the arena of medical malpractice. These reasons may explain why courts and practitioners have only applied the loss-of-chance theory to medical malpractice.

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<sup>79</sup>See Robertson, *supra* note 9, at 1784 (quoting from Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 86 (1956)).

<sup>80</sup>See Robertson, *supra* note 9, at 1784-85.

<sup>81</sup>See Malone, *supra* note 79, at 72-77.

<sup>82</sup>See *id.*

<sup>83</sup>See *id.*; see also *Zinnel*, 10 F.2d 47 (holding question of ship owner's liability for failure to properly maintain safety ropes and rescue a seaman that fell overboard and drowned should be submitted to a jury).

<sup>84</sup>See *JOHNSON & GUNN*, *supra* note 54.

<sup>85</sup>See Fischer, *supra* note 12, at 652.

<sup>86</sup>See generally *Haft v. Lone Palm Hotel*, 478 P.2d 465 (Cal. 1970); *McMullen*, 725 N.E.2d 1117.

*F. Loss-of-Chance in Ohio After Roberts*

1. Statement of the Case in Roberts

In *Roberts*,<sup>87</sup> the plaintiff-appellant, executor of the patient-decedent's estate, brought a wrongful death suit against the defendants, which included an HMO, a physician, and a hospital, for failure timely to diagnose and treat the victim's lung cancer.<sup>88</sup> The plaintiff alleged a seventeen-month delay in the diagnosis and treatment of the cancer.<sup>89</sup> Expert testimony established that, even with timely diagnosis and treatment, the victim had only a 28% chance of survival and recovery.<sup>90</sup> The plaintiff, relying on the loss-of-chance theory, argued the defendant's negligence decreased the decedent's chance of survival from 28% to 0%, and thus established a triable issue of fact.<sup>91</sup> The trial court granted defendant's summary judgment motion relying on the authority of *Cooper*.<sup>92</sup> In *Cooper*,<sup>93</sup> Ohio rejected the loss-of-chance theory in favor of the traditional causation requirement that a result was more likely than not caused by the defendant's act.<sup>94</sup>

2. Statement of the Holding in Roberts.

In overruling *Cooper*, the *Roberts* court joined the majority of states and adopted the loss-of-chance doctrine.<sup>95</sup> The court stated:

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<sup>87</sup>*Roberts*, 668 N.E.2d 480.

<sup>88</sup>*See id.* at 481.

<sup>89</sup>*See id.*

<sup>90</sup>*See id.*

<sup>91</sup>*See id.*

<sup>92</sup>*See Roberts*, 668 N.E.2d at 481 (citing *Cooper*, 272 N.E.2d 97).

<sup>93</sup>*Cooper*, 272 N.E.2d 97, *overruled by Roberts*, 668 N.E.2d 480.

<sup>94</sup>In *Cooper*, the court stated:

In an action for wrongful death, where medical malpractice is alleged as the proximate cause of death, and plaintiff's evidence indicates that a failure to diagnose the injury prevented the patient from an opportunity to be operated on, which failure eliminated any chance of the patient's survival, the issue of proximate cause can be submitted to a jury only if there is sufficient evidence showing that with proper diagnosis, treatment and surgery the patient probably would have survived.

*Id.* at 104.

<sup>95</sup>*See Roberts*, 668 N.E.2d at 481, *overruling Cooper*, 272 N.E.2d 97. The court stated: [W]e recognize that our court has traditionally acted as the embodiment of justice and fundamental fairness. Rarely does the law present so clear an opportunity to correct an unfair situation as does this case before us. The time has come to discard the traditionally harsh view we previously followed and join the majority of states that have adopted the loss of chance theory. A patient who seeks medical assistance from a professional caregiver has the right to expect proper care and should be compensated for *any injury* caused by the caregiver's negligence which has reduced his or her chance of survival.... Thus, a health care provider should not be insulated from liability where there is expert medical testimony showing that he or she reduced the patient's chances of survival. Unfortunately, under the traditional view this is precisely



[W]e recognize the loss-of-chance theory and follow the approach set forth in Section 323, Restatement of Torts. Under this view, we hold as follows: 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. It then becomes a jury question as to whether the defendant's negligence was the cause of the plaintiff's injury or death. Once this burden is met, the trier of fact may then assess the degree to which the plaintiff's chances of recovery or survival have been decreased and calculate the appropriate measure of damages. The plaintiff is not required to establish the lost chance of recovery or survival in an exact percentage in order for the matter to be submitted to the jury. Instead, the jury is to consider evidence of percentages of the lost chance in the assessment and apportionment of damages.<sup>96</sup>

The court held that to determine the amount of damages the jury should consider expert testimony presented and determine the total amount of damages from the date of the alleged negligence; ascertain the percentage of the patient's lost chance of survival or recovery; and multiply that percentage by the total amount of damages.<sup>97</sup> The court provides the following illustration of how damages should be calculated:

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the outcome.... We can no longer condone this view and consequently overrule *Cooper v. Sisters of Charity of Cincinnati, Inc.*  
*Id.* at 484.

<sup>96</sup>*Roberts*, 668 N.E.2d at 484.

<sup>97</sup>*See id.* at 481, 484-85 (citing as rational the proportional damage approach advocated in King, *Valuation*, *supra* note 33, at 1381-1387, and the approach taken by the courts in *Delaney*, 873 P.2d at 186-87; *McKellips*, 741 P.2d at 475-76).

A problem with this approach in determining damages is in what appears to be its exclusive reliance on expert testimony concerning the percentage of the patient's lost chance. *See Roberts*, 668 N.E.2d at 484. Assume a hypothetical case where the decedent was suffering under the effects of a life threatening preexisting condition and all parties acknowledge the defendant, a health care provider with whom the victim had a special relationship under Section 323, was negligent (i.e., expert testimony establishes the applicable standard of care and that the defendant breached that standard). Assume further that the percentage of lost chance is unknowable and no expert can be *persuaded* to provide testimony as to a statistical probability as to the loss-of-chance. The outcome of such a case under *Roberts* is unclear.

*Roberts* specifically states that the plaintiff is not required to establish the lost chance in an exact percentage in order for the matter to go to the jury. *See id.* *Roberts* did hold, however, that to determine the amount of damages, the jury should consider expert testimony presented and determine the total amount of damages from the date of the alleged negligence; ascertain the percentage of the patient's lost chance of survival or recovery; and multiply that percentage by the total amount of damages. *See id.* Even if the jury found that the defendant's omission was the cause of the injury or death, how are they to handle the fact that no expert will place a figure on the percentage of the patient's lost chance? The court has not ruled on a case like this; however, in *Roberts*, the discussion and the sole illustration of how damages should be computed implies the court would not award damages in such a case because of the lack of definitive statistical probability put forth by experts. *See id.* This result would be counter to fundamental tort policies of fairness, compensating victims, and deterrence. *See JOHNSON & GUNN*, *supra* note 54.

To illustrate ... where the jury determines from statistical findings combined with the specific facts relevant to the patient [that] the patient originally had a 40% chance of cure and the physician's negligence reduced the chance of cure to 25%, (40%-25%) 15% represents the patient's loss of survival. If the total amount of damages proved by the evidence is \$500,000, the damages caused by the defendant is [*sic*] 15% x \$500,000 or \$75,000.<sup>98</sup>

The *Roberts* court made clear that it was adopting the loss-of-chance doctrine in medical malpractice cases. The problem is that the holding does not clearly tell us what the injury is nor does it tell us what standard of causation the trier of fact must apply.

### III. THE "INJURY VS. CAUSATION" DILEMMA

Part III.A outlines the problem created by the different ways of approaching the loss-of-chance doctrine and Part III.B illustrates the confusion and uncertainty surrounding the doctrine in Ohio courts. Since *Roberts* was decided in 1996, courts, practitioners, and commentators have had an opportunity to evaluate various approaches to the loss-of-chance doctrine.<sup>99</sup> Part III.C analyzes the problems created by the *Roberts* decision and proposes recommendations for resolving the problems. Specifically, this Note suggests the doctrine be clarified in two ways. First, the injury in loss-of-chance cases should be clearly defined as the lost chance itself. Second, the doctrine should clearly require a plaintiff meet the traditional standard of proving causation by a preponderance of the evidence. These recommendations do not advocate overruling *Roberts* or changing the doctrine; rather they are directed at

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Professor Robertson has observed that "once we know [the defendant] has caused some harm, we need not worry overmuch about making him pay too much." See Robertson, *supra* note 9, at 1794. Judge Posner also reminds us not to forget the difference between the cause-in-fact issue and the damage issue and has written, "a tort plaintiff's burden of proving the extent of his injury is not a heavy one. Doubts are resolved against the tortfeasor." *DePass v. United States*, 721 F.2d 203, 209 (7<sup>th</sup> Cir. 1983) (Posner, J., dissenting). Concerns over equitable treatment of defendants and basing their liability on their proportional fault must be considered in light of the fact that the plaintiff did not bargain for, nor knowingly submit to, the increased risk the defendant's negligence exposed him to. Rather, the victim relied on the defendant to protect him from the very harm that has occurred. In fact, lack of statistics aside, the reason we do not know more definitively whether the preexisting condition would have taken the victim's life is because the defendant's tortious conduct removed any chance we would have of knowing whether a more favorable outcome would have come to pass. While that chance cannot be reduced to a specific statistical probability, all would agree it had substantial value to the victim and his family. Under these circumstances, as a practical matter, requiring a plaintiff to prove something that cannot be proven should not be required. It is worth recalling Justice Frankfurter's admonition that "there comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. State of Ind.*, 338 U.S. 49, 52 (1949). Under these circumstances we should rely on the jury to apply their judgment, experience and knowledge of the community in arriving at a fair assessment of the damages. See RESTATEMENT (SECOND) OF TORTS § 433B cmt. b (1965).

<sup>98</sup>*Roberts*, 668 N.E.2d at 485.

<sup>99</sup>See, e.g., McMullen v. Ohio State Univ. Hosp., 725 N.E.2d 1117 (Ohio 2000); King, *Reformulation*, *supra* note 6; Fischer, *supra* note 12, See RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 26 REPORTERS' NOTE cmt. n (Tentative Draft No. 2, 2002).

creating a brighter line approach (i.e. clarifying the doctrine and how it should be applied). These proposals should have the beneficial effects of fostering predictability and eliminating arbitrariness by courts in their interpretations of the doctrine and juries in their evaluation of causation of a previously ill-defined injury. Part III.C then evaluates these proposals considering the cases and authorities cited by the *Roberts* court. Finally, Part III.D responds to the anticipated counterarguments to the proposals advocated in Part III.C.

#### A. *The Theoretical Problem*

The doctrinal problem of compensating lost chances could be approached in two ways: it could be approached by relaxing the traditional causation requirement, or by defining the lost chance itself as a separate, compensable injury. Different legal consequences follow depending on which option is chosen.

It remains unclear under *Roberts* which choice is now the law of Ohio, and the lower courts have accordingly come to some conflicting conclusions. From a policy standpoint, the lack of a clear definition of the injury in a loss-of-chance case and causation requirements results in: (1) inefficiency in the courts; (2) a lack of clear standards for juries in determining whether a plaintiff has satisfied their burden of proving causation; and (3) arbitrariness and unfairness to both plaintiffs and defendants alike as it becomes a matter of chance as to how a court will interpret *Roberts* and how a jury will respond lacking clear guidance from the court.

#### B. *The Significance of the Theoretical Problem, as Shown by Confusion in Lower Ohio Court Cases Decided under Roberts*

Conflicting decisions and views in cases decided after *Roberts* demonstrate the confusion *Roberts* has created as to: (1) what standard of proof is required to prove causation; and (2) how to define the injury in a loss-of-chance case.

##### 1. Standard of Proof Requirements.

A review of cases decided since *Roberts* indicates that Ohio courts have not exactly agreed on how *Roberts* should be applied. In *Starkey v. St. Rita's Med. Ctr.*,<sup>100</sup> the court cites *Roberts* for the proposition that under the loss-of-chance doctrine, the plaintiff need not prove, through a medical expert, that the injury was more likely than not caused by the defendant's negligence although the plaintiff still has the burden of persuading the jury by a preponderance of the evidence that the defendant brought about the harm the plaintiff has suffered.<sup>101</sup> In *Starkey*, the court overturned a judgment for the defendant because it could not determine whether the jury found that the defendant was simply not negligent, or was negligent, but the plaintiff failed to prove causation by a reasonable probability (because under *Roberts*, the plaintiffs no longer have to prove causation by a reasonable probability

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<sup>100</sup>690 N.E.2d 57 (Ohio Ct. App. 1997).

<sup>101</sup>*See id.* at 62. The *Starkey* court does not address the issue of whether the injury is the loss of chance or the physical result of the defendant's acts or omissions, rather the court focuses on the standard of causation that the plaintiff must prove.

standard).<sup>102</sup> It is far from clear what standard of proof this court feels a plaintiff must meet.<sup>103</sup>

In *Paul v. Metrohealth St. Lukes Med. Ctr.*,<sup>104</sup> a wrongful death action based on medical malpractice, the plaintiff's expert testified that, within a reasonable degree of medical probability, the care provided to the plaintiff by the defendant fell below the accepted standard of care and that the hospital staff should have acted immediately when the victim began experiencing seizures.<sup>105</sup> The court upheld a judgment in favor of the defendant and held that the plaintiff's expert failed to demonstrate that defendant's alleged medical malpractice was the proximate cause to a degree of medical certainty or medical probability as required by *Roberts*.<sup>106</sup> Further, the court held that *Roberts* does not relieve the plaintiff of the burden of proving "but-for" causation and that the plaintiff failed to establish a probable causal link between the defendant's actions and the resulting harm to the decedent.<sup>107</sup> This court appears to have reached an entirely different conclusion than the *Starkey* court as to what *Roberts* requires a plaintiff to prove. In *Paul*, the court, by defining the injury as the death and requiring the plaintiff to meet a "but-for" causation standard, has placed a greater burden on the plaintiff to establish causation than appears to be called for by *Roberts*.<sup>108</sup>

## 2. Defining the Injury.

In *Shockey v. Our Lady of Mercy Mariemont*,<sup>109</sup> a medical malpractice case, the court stated, "the decision in *Roberts* did not so much change the law of causation ... as it recognized a new compensable harm. [Here the plaintiff] did not assert that this harm—the loss of a chance of recovery—occurred."<sup>110</sup> This interpretation of *Roberts* appears to define the injury as the loss of chance and not the physical harm.

In *McMullen v. Ohio State Univ. Hosp.*,<sup>111</sup> a majority of the Ohio Supreme Court concluded the loss-of-chance doctrine did not apply where negligence of hospital personnel directly caused the ultimate harm to the patient and decided the case based on traditional negligence principles.<sup>112</sup> Justice Resnick, in dicta discussing the loss-

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<sup>102</sup>See *id.* at 63.

<sup>103</sup>See *supra* Part II.D.2.

<sup>104</sup>No. 71195, 1998 WL 742173, at \*1 (8<sup>th</sup> Dist. Ohio App. Oct. 22, 1998).

<sup>105</sup>See *id.* at \*15.

<sup>106</sup>See *id.* at \*7.

<sup>107</sup>*Id.*

<sup>108</sup>See *supra* Part II.F.

<sup>109</sup>No. C-960492, 1997 WL 346104, at \*1 (1<sup>st</sup> Dist. Ohio Ct. App. June 25, 1997).

<sup>110</sup>*Id.* at \*3.

<sup>111</sup>*McMullen*, 725 N.E.2d 1117 (Ohio 2000).

<sup>112</sup>See *id.* at 1124-25. For a thorough discussion of the holding and impact of this case see Jason Perkins, Note, *McMullen v. Ohio State University Hospitals: Legal Recovery for Terminally Ill and Injured Patients Without the Lost Chance Doctrine*, 32 U. TOL. L. REV. 451 (2001); see also Reuscher, *supra* note 66.

of-chance doctrine, gave some insight into her view concerning the injury in loss-of-chance when she stated “[t]he focus then shifts away from the cause of the *ultimate harm itself*, and is directed instead on the extent to which the defendant’s negligence caused a reduction in the victim’s likelihood of achieving a more favorable outcome.”<sup>113</sup> This implied that Justice Resnick felt the injury was the ultimate physical injury and not the loss-of-chance itself. However, in his dissent, Chief Justice Moyer described the injury in loss-of-chance cases as “the injury of having been deprived of a chance of a more favorable ultimate result.”<sup>114</sup> Further, Chief Justice Moyer touched on the causation standard under *Roberts* when he stated:

Accordingly, in lost chance cases, those plaintiffs who are unable to meet the “but for” test (that the full extent of their injuries would not have occurred but for negligence on the part of medical providers) are not completely barred from recovery. Rather, they receive damages in proportion to the percentage of chance of recovery of which they were deprived.<sup>115</sup>

Under this view, a plaintiff does not have to meet the “but for” causation standard. This seems to contradict the view of the Ohio Court of Appeals in *Paul*, which requires a plaintiff to prove “but for” causation as to the ultimate injury.<sup>116</sup>

*C. Proposed Solution: Consider Loss of Chance a Compensable “Injury” in Medical Malpractice cases and Require Plaintiffs Prove Causation by a Preponderance*

1. The Injury Suffered in a Loss-of-Chance Should be Defined as the Lost Chance Itself.

Determining the injury is critical because the trier of fact cannot answer the question of causation unless it knows which injury the defendant’s act or omission is said to have caused. If the injury is the ultimate physical harm (e.g., death or physical disability), then the causation question is whether the defendant’s negligent act caused the death or disability. Alternatively, the causation question is much clearer for the trier of fact if the injury is defined as the loss-of-chance itself.<sup>117</sup> In the latter case, a plaintiff need prove only that it was more likely than not that the defendant’s negligence caused the loss-of-chance.<sup>118</sup>

The majority in *Roberts* does not clearly define the injury. However, both Chief Justice Moyer and Justice Cook acknowledge the issue of identifying the injury in

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<sup>113</sup>*McMullen*, 725 N.E.2d at 1123 (emphasis added).

<sup>114</sup>*Id.* at 1128 (Moyer, C.J., dissenting).

<sup>115</sup>*Id.*

<sup>116</sup>*See Paul*, No. 71195, 1998 WL 742173, at \*7.

<sup>117</sup>*See, e.g., Robertson, supra* note 9, at 1785; *Herskovits*, 664 P.2d at 479-87 (Pearson, J., concurring).

<sup>118</sup>*See, e.g., Robertson, supra* note 9; *Herskovits*, 664 P.2d at 479-87 (Pearson, J., concurring); *Truckor, supra* note 66, at 358.

their dissenting opinions in *Roberts*.<sup>119</sup> Chief Justice Moyer argues that the holding of the case goes beyond wrongful death cases and creates a new common law cause of action for loss-of-chance noting that the holding makes it a “jury question as to whether the defendant’s negligence was a cause of the plaintiff’s *injury* or death.”<sup>120</sup> Justice Cook, in dissenting, notes that the injury and the basis of the claim in loss-of-chance cases, in some jurisdictions, is “the reduced possibility of survival, and not the death itself.”<sup>121</sup>

The majority in *Roberts* cite a number of cases from other jurisdictions in support of the decision; however, this only adds to the confusion because the cases are not in agreement as to whether the injury is the physical harm or the discrete injury of the loss-of-chance itself.<sup>122</sup> The majority also cites Professor King’s article, discussed above, in which he advocates the loss-of-chance itself as a legally compensable interest.<sup>123</sup> While the majority has not clearly adopted King’s position, they did adopt his proportional damage approach<sup>124</sup> to ascertaining the amount of damages recoverable.<sup>125</sup>

Professor King<sup>126</sup> and a plurality of the Washington Supreme Court in *Herskovits v. Group Health Co-op of Puget Sound*,<sup>127</sup> have defined the injury as the loss-of-chance itself. The benefit of defining the injury in this manner is that it establishes a bright-line test, promotes efficiency and fairness, and logically connects the injury to the valuation of damages as set forth by the court in *Roberts*. Defining the injury as the physical harm creates uncertainty and unfairness due to confusion over causation.

## 2. The Plaintiff Should be Required to Prove Causation by Traditional Preponderance Standards.<sup>128</sup>

The syllabus in *Roberts* states:

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. It then becomes a jury question

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<sup>119</sup>See *Roberts*, 668 N.E.2d at 485-86 (Moyer, C.J., dissenting and Cook, J., separately dissenting).

<sup>120</sup>See *id.* at 485 (emphasis in original). In his dissent in *McMullen*, Chief Justice Moyer, citing *Roberts*, once again implied the injury in loss-of-chance is not the death itself, rather it is the “injury of having been deprived of a chance of a more favorable ultimate result.” *McMullen*, 725 N.E.2d at 1128 (Moyer, C.J., dissenting).

<sup>121</sup>*Roberts*, 668 N.E.2d at 486 (Cook, J., dissenting).

<sup>122</sup>See, e.g., *Herskovits*, 664 N.W.2d at 474-87, for the best illustration of this conflict.

<sup>123</sup>See *Roberts*, 668 N.E.2d at 483-84 (citing King, *Valuation*, *supra* note 33, at 1353-54).

<sup>124</sup>See King, *Valuation*, *supra* note 33, at 1372-73 and 1381-87.

<sup>125</sup>See *Roberts*, 668 N.E.2d at 484 (citing King, *Valuation*, *supra* note 33, at 1381-87).

<sup>126</sup>See King, *Valuation*, *supra* note 33, at 1353-54.

<sup>127</sup>See *Herskovits*, 664 P.2d at 479-87 (Pearson, J., concurring).

<sup>128</sup>For an excellent discussion of cause in fact see Robertson, *supra* note 9.

as to whether the defendant's negligence was the cause of the plaintiff's injury or death.<sup>129</sup>

This statement is not a bright-line rule; rather it appears to leave the question to the jury to decide whether the defendant caused the injury or death. By what standard is the jury to determine causation? If the answer is by a preponderance, the question remains - what is the injury? If the injury is the ultimate physical injury and the standard to be applied is the preponderance, how then is the jury ever to reach a conclusion that it was more likely than not that a defendant caused the death of a victim with a 40% chance of survival before the defendant's negligence and a 25% chance after the negligence?<sup>130</sup> This would be illogical since *Roberts* requires the jury to consider expert testimony in ascertaining the percentage of the patient's lost chance of survival or recovery in calculating damages.<sup>131</sup> For a jury to find a defendant liable in this situation would require it to find it more likely than not that the defendant caused the ultimate physical injury, but that the chance of survival or recovery was already less than 50%. Such a finding is contradictory on its face.

In adopting the loss of less-than-even chance of survival rule stated above, the *Roberts* court states that it is following the approach set forth in Section 323, Restatement of Torts.<sup>132</sup> The court cites *Herskovits*<sup>133</sup> and *Hamil v. Bashline*<sup>134</sup> as examples of courts that apply Section 323 and standing for the proposition that:

[O]nce the plaintiff proves that the defendant has increased the risk of harm by depriving the patient of a chance to recover, the case can go to the jury on the issue of causation regardless of whether the plaintiff could prove to a degree of medical probability that the defendant caused the patient's injury or death.<sup>135</sup>

The court implies that Section 323 is an alternative to the "substantial possibility" causation standard in *Hicks*.<sup>136</sup> Causation requirements for cases falling under Section 323, and the cases cited by the court in *Roberts*, are generally regarded by commentators as falling into the category of "relaxed proof of causation."<sup>137</sup> The "relaxed causation" approach generally takes the underlying injury (i.e., patient's death or physical disability) as the injury for which the patient is compensated and allows the question to go to the jury with less than a normal threshold of proof.<sup>138</sup>

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<sup>129</sup>*Roberts*, 668 N.E.2d at 481 syllabus n.1.

<sup>130</sup>This is the illustration used by the court in *Roberts*, 668 N.E.2d at 485.

<sup>131</sup>*See id.* at 481 syllabus n.3.

<sup>132</sup>*See Roberts*, 668 N.E.2d at 484.

<sup>133</sup>*Herskovits*, 664 P.2d 474.

<sup>134</sup>392 A.2d 1280 (Pa. 1978).

<sup>135</sup>*Roberts*, 668 N.E.2d at 483.

<sup>136</sup>*See id.* at 482-83 (citing *Hicks*, 368 F.2d 626).

<sup>137</sup>*See cases and articles cited supra* notes 56-69.

<sup>138</sup>*See id.*

There are several problems with the court's reliance on Section 323 and these cases. Section 323 provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.<sup>139</sup>

The Reporters' Note to Section 26 of the Restatement (Third) of Torts discusses the fact that a number of courts adopting a lost-opportunity version of harm have relied on Section 323.<sup>140</sup> As the reporter points out:

This reliance on § 323 is misplaced. Section 323 is contained in Chapter 12, which addresses the general principles of a negligence claim. Its placement in Topic 7, entitled 'Duties of Affirmative Action,' reveals that it addresses the question of the existence of a duty and its scope for a person who undertakes to protect another from harm. The Second Restatement addresses causal matters in Chapter 16, The Causal Relation Necessary to Responsibility for Negligence, in §§ 430-461.<sup>141</sup>

As the above discussion makes clear, Section 323 deals with the duty and breach elements of negligence and not causation.<sup>142</sup> Relying on a Section 323 approach to causation is misplaced because Section 323 does not address causation.

Even when Section 323 applies,<sup>143</sup> causation must still be proven according to the traditional rules of negligence.<sup>144</sup> In a situation to which Section 323 applies, the

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<sup>139</sup>RESTATEMENT (SECOND) OF TORTS § 323 (1965).

<sup>140</sup>See RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 26 REPORTERS' NOTE cmt. n (Tentative Draft No. 2, 2002).

<sup>141</sup>RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 26 REPORTERS' NOTE cmt. n (Tentative Draft No. 2, 2002).

<sup>142</sup>See KEETON ET AL., *supra* note 15, at 164-65.

<sup>143</sup>Courts that have adopted Section 323 have not necessarily agreed on how the jury should be instructed when Section 323 applies. Compare *Thompson*, 688 P.2d 605 (holding that the jury in medical malpractice cases should be allowed to consider an increase in the chance of harm on the issue of causation, but this did not mean the jury should be instructed under the Restatement rule, rather the Restatement rule merely allows the court to permit evidence of increased risk of harm and the jury must still be instructed to decide in favor of the defendant unless it finds it probable that the defendant was a cause of the plaintiff's injury), with *DeBurkate v. Louvar* 393 N.W.2d 131 (Iowa 1986) (upholding jury instructions in a medical malpractice case that permitted the jury to award damages based on a finding that the defendant's tortious conduct increased the risk of harm to the victim by depriving her of an opportunity to receive timely treatment, but did not permit the jury to find that the defendant caused the victim's imminent death), and with *Jones v. Montefiore Hospital*, 431 A.2d 920 (Pa. 1981) (finding that a plaintiff was entitled to an instruction based on Section 323 and that proximate cause could be established by evidence that the defendant's negligent act or omission was a substantial factor in bringing about the harm suffered by the plaintiff).



negligence is frequently an omission (e.g., a failure to act to protect the injured party from some other force). In such cases the other force (e.g., a preexisting medical condition or a storm that washes a seaman overboard) is what causes the ultimate physical injury; consequently, as the drafters of the second Restatement themselves observe, we will almost always be unable to say with certainty that the failure to act caused the ultimate injury.<sup>145</sup> Such cases will always involve an analysis of *what might have happened* if the alleged tortfeasor had acted with reasonable care; the loss-of-chance is the very thing that might have happened. As discussed in Part II.E, policy considerations have historically led courts to allow non-medical cases to reach a jury upon a minimal showing of causation<sup>146</sup> (e.g., the seaman who drowns due to negligent safety precautions or rescue efforts).<sup>147</sup> In the non-medical cases, courts have often held that if the matter was within the common experience of the community, and was a question in which reasonable minds could differ, then the jury was capable of balancing the equities.<sup>148</sup> If they found in favor of the plaintiff, he was awarded full damages.<sup>149</sup>

The policies that courts consider in reducing the plaintiff's causation burden in non-medical cases do not apply to medical malpractice cases. Loss-of-chance in the medical malpractice context is different than non-medical cases for at least two reasons. First, medical malpractice is not normally within the common experience of the community. Second, in the non-medical case, the victim's chance of avoiding the adverse consequence in the absence of the defendant's negligence is generally unknowable. In the loss of a less-than-even chance of recovery or survival in the medical malpractice situation, the victim's chance of survival, by definition, is less

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<sup>144</sup>See RESTATEMENT (SECOND) OF TORTS § 433B cmt. b (1965) (addressing burden of proof). The Restatement states:

The plaintiff is not however, required to prove his case beyond a reasonable doubt. He is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case. Thus when a child is drowned in a swimming pool, no one can say with absolute certainty that a lifeguard would have saved him; but the common experience of the community permits the conclusion that the guard would more probably than not have done so, and hence that the absence of the guard has played a substantial part in bringing about the death of the child. Such questions are normally for the jury, and the court may seldom rule on them as matters of law.

*Id.*

<sup>145</sup>See RESTATEMENT (SECOND) OF TORTS § 433B cmt. b (1965).

<sup>146</sup>See discussion *supra* Part II.D.2.

<sup>147</sup>See *Zinnel*, 10 F.2d 47.

<sup>148</sup>See Restatement (Second) of Torts § 433B cmt. b (1965).

<sup>149</sup>See Fischer, *supra* note 12, at 652.

than 50% before the negligent act or omission. However, even if a patient's chances are less than 50%, advances in medical technology mean patients can often survive diseases and injuries they could never have survived just a few years earlier; frequently these favorable outcomes can be demonstrated statistically. Lay jurors may understand this intuitively, but are still not likely to be in a position to conclude that malpractice caused the adverse consequence. Assisted by expert testimony, lay jurors can apply their judgment and make a determination whether the malpractice caused the injury of the loss of chance itself. Under these circumstances, there should be no need to relax the causation standards. The focus of causation should not be on the ultimate physical harm, but instead upon the lost opportunity, which can be established through expert testimony and frequently reduced to statistical probabilities.<sup>150</sup> Since proximate causation is almost never an issue in loss-of-chance cases,<sup>151</sup> if the plaintiff can prove that it is more likely than not that but-for the defendant's negligence the injury of the loss-of-chance itself would not have occurred, then the only remaining question should be the amount of damages.<sup>152</sup>

The *Roberts* court cites *Hamil*<sup>153</sup> and *Herskovits*<sup>154</sup> as two cases in support of its approach to applying Section 323 to loss-of-chance.<sup>155</sup> Important differences exist, however, between the holdings in these cases and the approach adopted by the *Roberts* court.

In *Hamil*, the court clearly defined the injury as the ultimate physical harm suffered, not merely the loss-of-chance.<sup>156</sup> By contrast, the *Roberts* court did not define the injury as the ultimate physical harm.<sup>157</sup> Further, the *Hamil* court gave no indication that the damages should be reduced to reflect the percentage of lost opportunity.<sup>158</sup> The *Roberts* court, on the other hand, clearly adopted the proportional approach to valuing the loss of a less than even chance of recovery or survival.<sup>159</sup> Because the plaintiff in *Hamil* arguably demonstrated that the victim lost

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<sup>150</sup>This Note is not advocating that the doctrine should only apply to medical malpractice cases when it can be proven through the use of statistical probabilities. However, statistics are useful in many cases, particularly as a *factor* in ascertaining damages. See *supra* note 97.

<sup>151</sup>See *supra* Part II.B.

<sup>152</sup>See *Robertson*, *supra* note 9.

<sup>153</sup>*Hamil*, 392 A.2d 1280. In *Hamil*, the alleged medical malpractice was the defendant's failure to properly diagnose and treat the plaintiff's condition in a manner that might have prevented the harm. The Pennsylvania Supreme Court interpreted Section 323 to relax the degree of certainty normally required of plaintiff's evidence. See *id.* at 1286. Once the plaintiff has introduced evidence that a defendant's negligent act or omission increased the risk of harm to the plaintiff, and that harm was in fact sustained, it becomes a jury question whether or not the increased risk was a *substantial factor* in producing the harm. *Id.* at 1286.

<sup>154</sup>*Herskovits*, 664 P.2d 474.

<sup>155</sup>See *Roberts*, 668 N.E.2d at 483 (citing *Hamil*, 392 A. 2d 1280; *Herskovits*, 664 P.2d 474).

<sup>156</sup>See *Hamil*, 392 A.2d at 1286, n.5.

<sup>157</sup>See *Roberts*, 668 N.E.2d 480.

<sup>158</sup>See *Hamil*, 392 A.2d at 1282-83.

<sup>159</sup>See *Roberts*, 668 N.E.2d at 484-85.

a greater than 50% chance of survival due to the defendant's negligence, it is not clear how much, if at all, the *Hamil* court actually relaxed the standard of proof for causation.<sup>160</sup> The court noted that the burden of proof necessary to warrant a jury verdict for the plaintiff is a preponderance of the evidence,<sup>161</sup> and the jury, not the medical expert, has the task of balancing the probabilities.<sup>162</sup>

*Herskovits*<sup>163</sup> is another case cited by the court in *Roberts* as standing for the proposition that under Section 323, once the plaintiff proves that the defendant increased the risk of harm by depriving the patient of a chance to recover, the case can go to the jury on the issue of causation regardless of whether the plaintiff could prove to a degree of medical probability that the defendant caused the patient's injury or death.<sup>164</sup>

The problem with relying on *Herskovits* is that the majority of the Washington Supreme Court recognized the loss-of-chance doctrine, but they were split as to their reasoning.<sup>165</sup> Two of the six justices in the majority held the view that the plaintiff proved that the defendant caused the plaintiff's subsequent death because they

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<sup>160</sup>In *Hamil*, the court stated that the testimony of the plaintiff's expert was that there was a 75% chance of recovery had prompt treatment been rendered and this was a sufficient basis upon which the jury could have concluded that it was more likely than not that the defendant's omissions were a substantial factor in causing the plaintiff's death. See *Hamil*, 392 A.2d at 1288, n.9.

<sup>161</sup>In *Hamil*, the court stated:

The quantum of proof necessary to warrant a jury verdict for the plaintiff is ... a preponderance of the evidence. This is made clear in Comment (a) to Section 433B of the Restatement: 'a. Subsection (1) states the general rule (that burden of proof as to causation is on the plaintiff). As on other issues in civil cases, the plaintiff is required to produce evidence that the conduct of the defendant has been a substantial factor in bringing about the harm he has suffered, and to sustain his burden of proof by a preponderance of the evidence. This means that he must make it appear that it is more likely than not the conduct of the defendant was a substantial factor in bringing about the harm. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes a duty of the court to direct a verdict for the defendant.'

*Hamil*, 392 A.2d at 1288, n.9.

<sup>162</sup>See *id.* at 1288.

<sup>163</sup>*Herskovits*, 664 P.2d 474.

<sup>164</sup>See *Roberts*, 668 N.E.2d at 483.

<sup>165</sup>*Herskovits*, 664 P.2d 474, 474-87. In *Herskovits*, the Washington Supreme Court concluded that recovery was proper on behalf of a plaintiff-decedent whose chances of surviving cancer had been reduced, according to expert testimony, from 39% to 25% as a result of the defendant's medical malpractice. See, *id.* The majority was split with only two of the justices holding the view that the plaintiff proved the defendant caused the plaintiff's subsequent death because they proved that the defendant's negligent act was a substantial factor that increased the risk of death. *Id.* at 474-79. The remaining four justices on the majority took the view that, based on the expert testimony, the defendant's negligence probably did not cause (under traditional requirements of establishing proximate cause) the decedent's death and damages were not appropriate on that basis. *Id.* at 479-87 (Pearson, J., concurring). However, these four justices felt that the loss of a less than even chance itself was an actionable injury. *Id.*

proved that the defendant's negligent act was a "substantial factor" that increased the risk of death.<sup>166</sup> Concurring in the opinion, four of the justices took the view that, based on the expert testimony, the defendant's negligence probably did not cause (under traditional requirements of establishing proximate cause) the decedent's death and damages were not appropriate on that basis; however, these four justices felt that the loss of a less than even chance itself was an actionable injury.<sup>167</sup> In concurring, Justice Pearson stated that "[u]nder this interpretation, a person will 'cause' the death of another person [within the meaning of the wrongful death statute] whenever he causes a substantial reduction in that person's chance of survival."<sup>168</sup>

The *Roberts* court did not adopt the *substantial factor* test advocated by two of the justices in the majority in *Herskovits*, nor did they clearly state that they agreed with the four justices in the plurality. There are several ways to interpret the *Roberts* court's reliance on *Herskovits*. Arguably, it could be fairly implied that the *Roberts* court did not so much relax causation standards as it redefined the injury (or perhaps relaxed the definition of the injury) as the lost chance itself.

Ultimately, the problem we are left with is that the *Roberts* court did not provide a clear statement that resolves important questions concerning the injury and causation elements. The cases cited, as well as the adoption of the proportional damages approach to valuing lost chances advocated by Professor King, by the *Roberts* court, however, make a strong argument for applying traditional notions of proving causation<sup>169</sup> to an injury defined as the lost chance itself.

#### D. Counterarguments to the Proposed Solution

Critics of this proposal to clarify the loss-of-chance doctrine may argue that this would be bad policy because it creates an economic incentive for plaintiffs to litigate and thus invites a flood of frivolous litigation. The risk of frivolous litigation, however, is not unique to causes of action based on loss-of-chance. Frivolous litigation is a cost of contingency fees and the American Rule, which generally prohibits recovery of legal fees by the prevailing party in litigation.<sup>170</sup> The reality is that the decision in *Roberts* merely brings Ohio in line with the majority of jurisdictions throughout the country in recognizing a plaintiff's right to recover for the tortious destruction of the loss-of-chance. Given that plaintiffs can currently bring suit under the loss-of-chance doctrine, it is hard to see how clarifying the definition of the injury and standards of causation significantly adds to the risk that new plaintiffs will see this as an opportunity to initiate a frivolous suit.

Critics may argue that because of loss-of-chance claims medical providers will either be driven out of the practice of medicine (or at least stay away from patients with preexisting conditions) or pass on the costs of higher malpractice insurance; either way, the results are higher healthcare costs for society. To a certain degree these observations seem reasonable. These criticisms, however, overlook several

<sup>166</sup>*Id.* at 474-79.

<sup>167</sup>*Id.* at 479-87.

<sup>168</sup>*Id.*

<sup>169</sup>See generally RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 26 cmt. n (Tentative Draft No. 2, 2002); Robertson, *supra* note 9; KEETON ET AL., *supra* note 15.

<sup>170</sup>10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 54.170 (3d ed. 1997).

points. First, as discussed above, the loss-of-chance doctrine is already with us and it is not clear that clarifying certain aspects of the doctrine will add such significant costs that it would be an unfair burden on society. Second, this is really a criticism of the tort system in general, and medical malpractice in particular. It would be unfair to single out the victims of loss-of-chance for harsher treatment than victims of other torts.

It is also worth noting that recent studies show that medical malpractice causes more deaths each year than motor vehicle accidents,<sup>171</sup> but the vast majority of these victims never pursue these medical malpractice cases.<sup>172</sup> If one accepts the accuracy of these studies, it seems fair to conclude that most of the cost of malpractice is not borne by the tortfeasors themselves or society overall, but rather by individual victims of malpractice. The real question we should ask is whether it is fair to make a victim of medical malpractice bear the entire cost of the injury. Tort policies of deterrence, fairness, victim compensation, and loss spreading would seem to favor recovery even where the injury sustained is a lost chance.<sup>173</sup> Concerns over the equitable treatment of a defendant in these cases must be considered in light of the fact that the victim did not bargain for, nor knowingly submit to, the increased risk that the defendant's negligence exposed the victim to. Rather, the victim relied on the defendant to protect the victim from the very harm that occurred.<sup>174</sup>

Critics may also point out that current political trends indicate a strong desire for tort reform and a desire to cap damages by tort plaintiffs.<sup>175</sup> These legislative initiatives, however, are not aimed at eliminating legitimate causes of action, but rather limiting excessive damage awards.<sup>176</sup> The reality is that there is nothing inconsistent with this proposal to eliminate much of the uncertainty in the law concerning loss-of-chance and a cap on noneconomic damage awards. Both proposals, if enacted, can peacefully coexist.

Critics may argue that the transaction costs (i.e., legal fees, court costs, etc.) to defendants and society will in many cases exceed the total damages. This criticism overlooks the economic reality on the plaintiff's side. Plaintiffs' lawyers may be disinclined to take loss-of-chance cases on a contingency basis because damages are likely to be drastically reduced to reflect the loss-of-chance.<sup>177</sup> In addition, plaintiffs will themselves incur the cost of obtaining expert testimony to establish causation and the applicable standard of care. The economic reality is that many plaintiffs and their lawyers will frequently decline to take the economic risks associated with loss-of-chance cases when the potential damages are not significant. In addition, clarifying the law as proposed by this Note establishes a brighter line approach, and

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<sup>171</sup>See Fischer, *supra* note 12, at 652.

<sup>172</sup>See *id.* (citing studies showing only one claim is filed for every five to ten negligently inflicted injuries).

<sup>173</sup>See JOHNSON & GUNN, *supra* note 54.

<sup>174</sup>See *supra* note 97.

<sup>175</sup>See, e.g., S.B. 281, 124<sup>th</sup> Gen. Assem. (Ohio 2002).

<sup>176</sup>See *id.*

<sup>177</sup>See *Roberts*, 668 N.E.2d at 484; see also *supra* Part II.E, and note 97.

should have the beneficial effect of reducing resources expended by both lawyers and courts handling loss-of-chance cases.

Another criticism is that the loss-of-chance doctrine could swallow up the traditional law of negligence because arguably the doctrine could be raised in virtually every case of tortious conduct involving questionable causation.<sup>178</sup> As discussed in detail in Part II.E, the loss-of-chance doctrine has been applied almost exclusively in the context of medical malpractice. Defining the injury in loss-of-chance cases as the lost opportunity itself is not likely to cause courts to become less reluctant to allow the doctrine to be applied in nonmedical malpractice cases. Additionally, plaintiffs in non-malpractice cases have an incentive to use traditional negligence concepts of injury and causation because in non-malpractice cases causation requirements are already relaxed and by relying on traditional concepts plaintiffs can win full damages for the ultimate injury rather than proportionally reduced compensation for lost chances.<sup>179</sup>

#### IV. CONCLUSION

The decision in *Roberts* was an important step by the Ohio Supreme Court in correcting a view that was unfair to victims of lost chances in medical malpractice cases. The decision, however, has created confusion and left unanswered some important questions. Most importantly, in considering the case of a loss of a less-than-even chance of recovery or survival, defining the injury as the lost chance itself is the fairest and most logical means of solving the fundamental problem of proving causation. Importantly, it has the beneficial effect of retaining the traditional test for causation.<sup>180</sup> This bright line approach fosters predictability and is less arbitrary than a relaxed causation approach. Indeed, relaxed causation approaches are inherently illogical because they ask the jury to find it more likely than not that the defendant's negligence *caused* a death or disability that there was already a less-than-even chance of avoiding. Until either the state legislature or the Ohio Supreme Court addresses these problems, victims of medical malpractice cannot be certain of fair treatment in Ohio courts in the case of a loss of chance of recovery or survival.

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<sup>178</sup>See *supra* note 77.

<sup>179</sup>See discussion *supra* Part II.E, and note 97.

<sup>180</sup>See Robertson, *supra* note 9.

<sup>181</sup>Editor-in-Chief, Cleveland State Law Review. J.D. expected May 2004. The author is the father of Samuel J. Zilich whose tragic death in 1998 led the author on a journey through the tort worlds of causation and the loss-of-chance doctrine and inspired this article.