

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

11 JAN 10 PM 2:06

BY RONALD R. CARPENTER

No. 84712-6

~~DEAR~~

SUPREME COURT OF THE STATE OF WASHINGTON

LINDA MOHR and CHARLES MOHR, her husband,

Plaintiffs/Appellants,

vs.

DALE C. GRANTHAM, M.D. and JANE DOE GRANTHAM, and their
marital community; BRIAN J. DAWSON, M.D. and JANE DOE
DAWSON, and their marital community; KADLEC MEDICAL
CENTER, a Washington corporation; and NORTHWEST EMERGENCY
PHYSICIANS, INC., a Washington Corporation,

Defendants/Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION

George M. Ahrend
WSBA #25160
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000

Bryan P. Harnetiaux
WSBA #5169
517 E. 17th Ave.
Spokane, WA 99203
(509) 624-3890

On behalf of
Washington State Association for Justice Foundation

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

FILED
SUPREME COURT
STATE OF WASHINGTON
2011 JAN 11 A 11:38
BY RONALD R. CARPENTER
DEAR

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUES PRESENTED	4
IV. SUMMARY OF ARGUMENT	5
V. ARGUMENT	6
A. Overview Of Loss Of A Chance And Its Adoption In Washington.	6
B. Loss Of A Chance Claims Are Also Cognizable In Inter Vivos Actions Where The Chance Is Irretrievably Lost.	12
C. The Court Should Clarify The Manner Of Assessing Damages For Loss Of A Chance, And Allow The Jury To Assess Damages In Light Of The Totality Of The Evidence, Including, But Not Limited To, Statistical Estimates Of The Chance Lost.	14
D. Loss Of A Chance Is Distinct From Proximate Cause, And Either The But For Test Or The Substantial Factor Test Of Causation May Be Warranted In A Particular Case.	18
VI. CONCLUSION	20
APPENDIX	

TABLE OF AUTHORITIES

Cases:

<u>Cavazos v. Franklin,</u> 73 Wn.App. 116, 867 P.2d 674 (1994)	12
<u>Daugert v. Pappas,</u> 104 Wn.2d 254, 704 P.2d 600 (1985)	passim
<u>Eckerson v. Ford’s Prairie Sch. Dist.,</u> 3 Wn.2d 475, 101 P.2d 345 (1940)	20
<u>Hamil v. Bashline,</u> 392 A.2d 1280 (Pa. 1978)	13
<u>Haner v. Quincy Farm Chems., Inc.,</u> 97 Wn.2d 753, 649 P.2d 828 (1982)	16
<u>Herskovits v. Group Health Coop.,</u> 99 Wn.2d 609, 664 P.2d 474 (1983)	passim
<u>Kramer v. Lewisville Mem. Hosp.,</u> 858 S.W.2d 397 (Tex. 1993)	6
<u>Lewis R. Golf, Inc. v. O.M. Scott & Sons,</u> 120 Wn.2d 712, 845 P.2d 987 (1993)	16
<u>McMackin v. Johnson County Healthcare Ctr.,</u> 73 P.3d 1094 (Wyo. 2003), <i>on rehearing</i> , 88 P.3d 491 (2004)	6
<u>Otani ex rel. Shigaki v. Broudy,</u> 151 Wn.2d 750, 92 P.3d 192 (2004)	12
<u>Sharbono v. Universal Underwriters Ins. Co.,</u> 139 Wn.App. 383, 161 P.3d 406 (2007)	10
<u>Shellenbarger v. Brigman,</u> 101 Wn.App. 339, 3 P.3d 211 (2000)	10, 14
<u>Sofie v. Fibreboard Corp.,</u> 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989)	17

<u>Spain v. Employment Dec. Dep't,</u> 164 Wn.2d 252, 185 P.3d 1188 (2008)	10
<u>State ex rel. Lemon v. Langlie,</u> 45 Wn.2d 82, 273 P.2d 464 (1954)	12
<u>State v. Russell,</u> 68 Wn.2d 748, 415 P.2d 503 (1966)	15
<u>Washburn v. Beatt Equip. Co.,</u> 120 Wn.2d 246, 840 P.2d 860 (1992)	16
<u>Wenzler & Ward Plumbing & Heating Co. v. Sellen,</u> 53 Wn.2d 96, 330 P.2d 1068 (1958)	16
<u>Zueger v. Public Hosp. Dist. No. 2,</u> 57 Wn.App. 584, 789 P.2d 326 (1990)	10

Statutes:

RCW 4.20.010	13
RCW 4.20.046	13
RCW 4.24.290	6, 18-20
RCW 7.70.040	6, 19-20

Other Authorities:

Jim M. Perdue, <u>Recovery for a Lost Chance of Survival,</u> 28 So. Tex. L. Rev. 37 (1987).	17
Joseph H. King, <u>Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences,</u> 90 Yale L. J. 1353 (1981)	8, 15
WPI 15.02 & cmt.	20

WPI 31.01.01	16
WPI 31.02.01	16
WPI 105.09 cmt	17

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association, now renamed WSAJ. WSAJ Foundation has an interest in the substantive and procedural aspects of negligence claims against health care providers, including claims for loss of a chance.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case involves the interpretation and application of the rule permitting recovery for “loss of a chance” first recognized in Herskovits v. Group Health Coop., 99 Wn.2d 609, 664 P.2d 474 (1983). Linda J. Mohr (Mohr) and her husband sued certain of her health care providers,¹ alleging that they negligently failed to diagnose and treat her for a trauma

¹ The health care providers in question are emergency room physicians Dale C. Grantham, M.D. (Grantham), and Brian J. Dawson, M.D. (Dawson), their group Northwest Emergency Physicians, Inc., and Brooks Watson II, M.D. (Watson), a “hospitalist.” See Merriam-Webster OnLine, s.v. “hospitalist” (defined as “a physician who specializes in treating hospitalized patients of other physicians in order to minimize the number of hospital visits by other physicians”; viewed Jan. 2, 2011). The individual physicians and Northwest Emergency Physicians are referred to collectively as “physicians” in this brief. Kadlec Medical Center (Kadlec) is also a party defendant, whose liability, if any, appears to be vicarious, based on the acts or omissions of the physicians.

induced stroke in sufficient time to minimize or prevent injury. The facts relevant to this amicus curiae brief are drawn from the briefing of the parties. See Mohr App. Br. at 3-22; Physicians Resp. Br. at 2-17; Kadlec Resp. Br. at 2-4.

Mohr was injured in an automobile accident, apparently caused by an unexpected hypoglycemic event related to diabetes. After hitting several other vehicles, her vehicle struck a telephone pole at approximately 45 miles per hour. She suffered an apparent head injury and was taken by ambulance to the Kadlec emergency room.

While in the emergency room, Mohr claims that she developed neurological problems, including difficulty walking, numbness in her left hand, drowsiness and pain. She further alleges that the attending physician, Grantham, negligently failed to perform a neurological assessment once these problems became apparent. As a result, Mohr contends Grantham failed to discover that she was undergoing what is described as an "evolving stroke." Instead, he prescribed narcotic medication that masked the signs of stroke and sent Mohr home. For his part, Graham denies any wrongdoing.

Mohr's husband called paramedics early the next day because she was very lethargic, and they transported her back to the Kadlec emergency room. After her return to the emergency room, Mohr was diagnosed with

an evolving stroke by Dawson, based on the results of a CT scan. Mohr contends that Dawson negligently failed to prescribe medication or otherwise treat Mohr during the time she was under his care. Dawson denies any wrongdoing.

After the stroke was diagnosed, Dawson transferred the care of Mohr to Watson. While Watson ordered further diagnostic studies, and prescribed aspirin, Mohr contends that Watson negligently failed to ensure that she received the aspirin or any other treatment while under his care. As with Grantham and Dawson, Watson denies any wrongdoing.

As a consequence of the stroke, Mohr is now profoundly brain damaged. She and her husband filed suit against physicians based on loss of a chance, and against Kadlec for vicarious liability. Before trial, physicians and Kadlec moved for summary judgment, principally on grounds that Mohr could not establish that physicians' conduct was a proximate cause of her injuries.

In response to the motion, Mohr submitted deposition testimony from her current treating neurologist. The neurologist testified that, had she received timely and appropriate treatment, "there's at least a 50 to 60 percent chance that things could have had a better outcome." See Mohr App. Br. at 10 (quoting deposition testimony). When asked to define what the better outcome would be, she described it as "[l]ess disability, less

neglect, less ... of the symptoms of right hemispheric stroke. If the stroke were smaller in size, she ... likely would have less disability.” Id.

Another neurologist retained by Mohr as an expert witness testified that proper treatment would have given Mohr a 50-60% chance of completely avoiding the major problems resulting from the stroke. See id. at 21 (quoting deposition testimony). However, both neurologists admitted that Mohr would have suffered at least some injury as a result of the stroke. See Kadlec Resp. Br. at 22-23. There was no testimony that Mohr’s stroke would not have occurred with proper treatment.

The superior court granted summary judgment on grounds that the loss of a chance claim recognized in Herskovits does not apply to inter vivos actions – what the parties describe as a lost chance of a better outcome, as opposed to a lost chance of survival. Mohr appealed.

Division III of the Court of Appeals certified Mohr’s appeal of the superior court decision to this Court on the issue of whether Herskovits should apply in the inter vivos context. See Order of Certification, dated June 17, 2010. This Court accepted review of the case in its entirety. See Ruling Accepting Certification, dated June 30, 2010.

III. ISSUES PRESENTED

1. What is the nature of a claim for loss of a chance under Washington law?

2. Should a medical negligence claim based upon loss of a chance be allowed in inter vivos actions where the chance in question is irretrievably lost?
3. If inter vivos actions for loss of a chance are permitted, how should the plaintiff's damages be determined?
4. What is the relationship between loss of a chance and the but for and substantial factor tests of causation?

IV. SUMMARY OF ARGUMENT

This Court has recognized recovery in tort for loss of a chance, as a distinct type of claim. This view was first articulated in Herskovits, and later validated in the Court's unanimous opinion in Daugert v. Pappas, 104 Wn.2d 254, 704 P.2d 600 (1985).

Loss of chance injuries should be cognizable in inter vivos actions when the chance is irretrievably lost. The availability of loss of a chance in inter vivos actions is implicitly recognized in Herskovits, where the Court remanded a survival claim for trial along with the wrongful death claim. It is also supported by Daugert, which focuses on the irretrievable nature of the injury in question rather than a particular type of injury, such as wrongful death. The analysis in inter vivos actions is similar to that applied in the wrongful death and survival context, and the rationale is the same in both instances.

In loss of a chance claims, the trier of fact should be allowed to determine damages based on the totality of the evidence, including but not

limited to, statistical estimates of the chance lost. This approach, referred to as the “jury valuation” approach, is in keeping with the traditional manner of assessing damages and the proper role of the jury.

Because loss of chance is a distinct type of injury under Herskovits and Daugert, the Court’s traditional causation analysis is unaffected, and remains conceptually distinct. The “but for” and “substantial factor” tests of proximate cause should continue to be applied, as warranted by the particular facts of a given case. Washington recognizes the substantial factor test as a valid alternative test of proximate cause. As a result, the statutes requiring proof of proximate cause in medical negligence cases (RCW 4.24.290 & 7.70.040) do not preclude application of the substantial factor test when it is appropriate under the facts.

V. ARGUMENT

A. Overview Of Loss Of A Chance And Its Adoption In Washington.

This Court first recognized a claim for loss of a chance in Herskovits, a landmark decision² where six justices concluded that the plaintiff had established a prima facie claim based upon a 14% decrease in the statistical chance of survival. See 99 Wn.2d at 614 (Dore, J., lead

² See McMackin v. Johnson County Healthcare Ctr., 73 P.3d 1094, 1100 (Wyo. 2003) (describing Herskovits as the leading case), *on rehearing*, 88 P.3d 491 (2004); Kramer v. Lewisville Mem. Hosp., 858 S.W.2d 397, 408 n.1 (Tex. 1993) (Hightower, J., dissenting, describing Herskovits as the landmark case).

opinion); id. at 634 (Pearson, J., concurring). Herskovits involved a wrongful death and survival action based on the negligence of the decedent's health care provider in failing to timely diagnose and treat his lung cancer. See id. at 611 (lead opinion). The plaintiff's theory of recovery was that the decedent had suffered a loss of a chance to survive lung cancer. In opposition to the provider's motion for summary judgment, the plaintiff presented evidence that the delay in diagnosis reduced the decedent's statistical chance of surviving five years after diagnosis from 39% to 25% (i.e., a loss of a 14% chance of survival). See id. at 610-11. It was conceded that the decedent's chance of five-year survival never exceeded 50%, and he died approximately three years after first consulting the provider about a cough and chest pain. See id. at 611. The trial court granted summary judgment based upon the estate's failure to produce evidence that the alleged negligence more likely than not caused the decedent's death. See id. at 611-12.

On review, this Court reversed and remanded for trial. Both the lead opinion by Justice Dore, representing the view of two justices, and the concurring opinion by Justice Pearson, representing the view of four justices, conclude that policy reasons justify recognition of recovery in tort for loss of a chance. The policy choice underlying both opinions is the same: health care providers should not be permitted to question the

speculative nature of the lost chance when their negligence has put it beyond the possibility of realization.³

In the concurrence, Justice Pearson justifies this policy choice, explaining that failure to recognize loss of a chance

subverts the deterrence objectives of tort law by denying recovery for the effects of conduct that causes statistically demonstrable losses A failure to allocate the cost of these losses to their tortious sources ... strikes at the integrity of the torts system of loss allocation.

Id. at 634 (quoting King, supra at 1377; ellipses in original). In the same vein, Justice Dore notes in the lead opinion that “[t]o decide otherwise would be a blanket release from liability for doctors and hospitals anytime there was less than a 50 percent chance of survival, regardless of how flagrant the negligence.” Id. at 614.

However, the lead opinion and the concurrence in Herskovits propose implementing this policy choice in different ways. While the lead opinion adjusts the analysis of causation to accommodate loss of a chance,

³ See Herskovits at 614 (Dore, J., lead opinion, stating “[t]he underlying reason is that it is not for the wrongdoer, who put the possibility of recovery beyond realization, to say afterward that the result was inevitable”); id. at 634 (Pearson, J., concurring, stating “the all or nothing approach gives certain defendants the benefit of an uncertainty which, were it not for their tortious conduct, would not exist”); see also id. at 642-43 (Dolliver, J., dissenting, recognizing “the court is called upon to make a policy decision”); see generally Joseph H. King, Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 Yale L. J. 1353, 1378 (1981) (explaining that “[d]estruction of a chance should also be compensated for reasons of fairness”).

the concurrence recasts the nature of injury, with a corresponding adjustment in the calculation of damages.

In the lead opinion, Justice Dore starts with the assumption that injury for loss of a chance of survival is the same as in any other wrongful death and survival action. He phrases the “ultimate question” in terms of whether the increased risk of death is sufficient to hold the defendant responsible for the death itself, see id. at 614, although he later seems to acknowledge that this does not necessitate a total recovery for all damages that would be available in a wrongful death and survival action, see id. at 619. To effectuate the policies of compensation and deterrence underlying the tort system, he seeks “to relax the degree of certitude normally required of plaintiff’s evidence in order to make a case for the jury” by employing the substantial factor approach to causation, See id. at 615-16.

In the concurrence, Justice Pearson retains the traditional but for test of proximate cause. See id. at 622-23. To effectuate the same policies as the lead opinion, he separates the standard of causation from the analysis of loss of a chance, and then recasts loss of a chance as a distinct type of actionable injury. See id. at 623-24 & 632-34. Justice Pearson concludes by offering a mathematical formula to calculate damages for loss of a chance, based on the damages otherwise recoverable in a

wrongful death and survival action, multiplied by a statistical estimate of the chance lost. See id. at 635.⁴

Although the lead opinion and the concurrence in Herskovits may each be persuasive, arguably neither opinion standing alone is precedential or binding. See Spain v. Employment Dec. Dep't, 164 Wn.2d 252, 260 n.8, 185 P.3d 1188 (2008) (stating “[a] holding of a plurality of the court may be persuasive to some but has little precedential value”). The Court of Appeals has, at different times, referenced each of these opinions. See Sharbono v. Universal Underwriters Ins. Co., 139 Wn.App. 383, 421-22, 161 P.3d 406 (2007) (describing loss of chance in terms of the substantial factor test of proximate cause, citing the lead opinion in Herskovits); Shellenbarger v. Brigman, 101 Wn.App. 339, 348-49, 3 P.3d 211 (2000) (describing loss of chance in terms of “a compensable interest”, relying on the concurrence in Herskovits); Zueger v. Public Hosp. Dist. No. 2, 57 Wn.App. 584, 789 P.2d 326 (1990) (stating “if *Herskovits* stands for anything beyond its result, we believe the plurality represents the law on loss of the chance of survival”).

Two years after Herskovits, a unanimous opinion of this Court in Daugert, supra, elevated Justice Pearson’s formulation of loss of a chance

⁴ The dissenting opinions in Herskovits focus their criticism on the causation analysis of Justice Dore’s lead opinion, and do not take issue with Justice Pearson’s concurrence. See Herskovits at 636-42 (Brachtenbach, J., dissenting); id. at 642-45 (Dolliver, J., dissenting).

as a distinct type of injury to the level of binding precedent. Daugert involved a claim of legal malpractice against a lawyer who failed to file a timely petition for review of an adverse decision by the Court of Appeals. See 104 Wn.2d at 255. The jury was instructed on loss of a chance based on Herskovits and returned a verdict against the lawyer. See id. at 256-57.

On review of the verdict, after first distinguishing the respective functions of the judge and the jury in a legal malpractice case, see id. at 257-59, the Court turned to the analysis of loss of a chance. The Court separated its analysis of the standard of causation from loss of a chance, and noted that loss of a chance is a distinct type of injury rather than a standard of causation:

The primary thrust of *Herskovits* was that a doctor's misdiagnosis of cancer either deprives a decedent of a chance of surviving a potentially fatal condition or reduces that chance. **A reduction in one's opportunity to recover (loss of chance) is a very real injury which requires compensation.**

See id. at 261 (emphasis added); see also id. at 261-62 (stating "a doctor's misdiagnosis of cancer causes a separate and distinguishable harm, *i.e.*, diminished chance of survival").

Ultimately, the Court held in Daugert that loss of a chance did not apply to the malpractice claim against the lawyer because the chance was not irretrievably lost. See id. at 261. Nonetheless, the articulation of loss of a chance as a distinct type of injury in Daugert should be controlling. See

State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 90, 273 P.2d 464 (1954) (stating “[e]ven though we held that he had not shown compliance with the rule, the statement of this legal principle was still necessary to the decision reached,” and holding that the statement of the inapplicable legal principle was “controlling” as precedent in a subsequent case).

B. Loss Of A Chance Claims Are Also Cognizable In Inter Vivos Actions Where The Chance Is Irretrievably Lost.

While Herskovits involved wrongful death and survival claims, nothing in the analysis of the lead or concurring opinions, nor in Daugert, limits application of loss of a chance to this context. On the contrary, the viability of loss of a chance in an inter vivos action is suggested by the fact that the plaintiff’s survival action in Herskovits was remanded for trial along with the wrongful death action. Under the survival statutes, a claim only survives if it would have been viable during the decedent’s lifetime. See Cavazos v. Franklin, 73 Wn.App. 116, 119, 867 P.2d 674 (1994) (stating “the only prerequisite to maintaining a survival action is that the decedent could have maintained the action *had he or she lived*”); Otani ex rel. Shigaki v. Broudy, 151 Wn.2d 750, 761, 92 P.3d 192 (2004) (stating damages are recoverable “for a decedent’s conscious suffering prior to death” under survival statutes).

This principle is evident in Herskovits. Justice Dore's lead opinion states "[i]t is not necessary for a plaintiff to introduce evidence to establish that the negligence resulted in the **injury or death**, but simply that the negligence increased the risk of **injury or death**." Herskovits at 617 (following Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978); emphasis added). The double reference to "injury" and the disjunctive double reference to "death" in the foregoing quotation confirms that a claim for loss of a chance for injury short of death is contemplated.

Likewise, in the Herskovits concurrence, Justice Pearson states that "[t]he decedent's personal action for loss of this chance will survive to his personal representatives as provided by RCW 4.20.046." 99 Wn.2d at 634. This is juxtaposed with his statement of approval of an independent action by the family of the decedent under the wrongful death statute, RCW 4.20.010. See id. In this way, both opinions in Herskovits support inter vivos claims for loss of a chance.

Daugert also supports an inter vivos claim for loss of a chance when it focuses on the irretrievable nature of the injury, rather than the specific type of injury. Daugert involved a lost chance to recover contract damages resulting from a lawyer's negligent failure to file a petition for review. The Court held loss of a chance inapplicable because the loss was not irretrievable, i.e., the client could still obtain appellate review as part

of his subsequent malpractice claim against his lawyer. See Daugert, 104 Wn.2d at 261-62. The fact that the damages arose from contract, and the fact that the plaintiff was alive at the time of the action, played no role in the Court's analysis of loss of a chance.

There is no principled reason for limiting loss of a chance to wrongful death and survival actions. See Shellenbarger, 101 Wn.App. at 348-49 (reversing summary judgment against plaintiff in an inter vivos medical negligence action seeking lost 20% chance of slowing his lung disease). Injuries short of death are just as real and have tangible value. Fashioning a recovery for loss of a chance in inter vivos actions is no less workable than in wrongful death and survival actions. In either case, the fact finder undertakes a post hoc analysis of the specific interest lost, and attaches a value to that interest.

C. The Court Should Clarify The Manner Of Assessing Damages For Loss Of A Chance, And Allow The Jury To Assess Damages In Light Of The Totality Of The Evidence, Including, But Not Limited To, Statistical Estimates Of The Chance Lost.

There is no consensus in Herskovits regarding the measure of damages for loss of a chance, and given its holding in Daugert, the Court did not have an occasion to clarify the measure of damages in that case. In the intervening 25 years, the issue has not reached the Court until now. The Court may properly clarify an issue on appeal for the benefit of the

parties and the trial court on remand. See State v. Russell, 68 Wn.2d 748, 751, 415 P.2d 503 (1966) (addressing issues “[f]or guidance of court and counsel upon remand”).

With respect to the measure of damages for loss of a chance, the lead opinion of Justice Dore in Herskovits states at one point that:

Causing a reduction of the opportunity to recover (loss of chance) by one’s negligence ... does not necessitate a total recovery against the negligent party for all damages caused by the victim’s death. Damages should be awarded to the injured party or his family based only on damages caused directly by premature death, such as lost earnings and additional medical expenses, etc.

Herskovits at 619. This approach seems intuitively correct, but it is underdeveloped and offers little guidance to trial courts and counsel. In a sense, all wrongful death actions are for premature death. It is not clear what, if any, items of damage otherwise recoverable in a wrongful death and survival action would be excluded by the adverb “directly” or the adjective “premature.”

If the lead opinion of Justice Dore is imprecise, the concurring opinion of Justice Pearson is inordinately precise. He proposes to multiply the total damages that would otherwise be recoverable in a traditional wrongful death and survival action by a statistical estimate of the chance lost. See id. at 635 (relying on King, supra). This formula imposes a degree of precision that is otherwise foreign to the law of damages, which

only requires reasonable certainty, not mathematical exactitude. See Haner v. Quincy Farm Chems., Inc., 97 Wn.2d 753, 757, 649 P.2d 828 (1982); see also Herskovits, 99 Wn.2d at 640 n.1 (Brachtenbach, J., dissenting, noting “[c]ourts are willing to relax proof requirements on the issue of damages, once liability is shown”). With respect to economic damages, once the fact of damage is proved, an injured party is entitled to latitude in proving the amount of damage, and uncertainty as to the amount will not preclude a recovery. See Wenzler & Ward Plumbing & Heating Co. v. Sellen, 53 Wn.2d 96, 98, 330 P.2d 1068 (1958); Lewis R. Golf, Inc. v. O.M. Scott & Sons, 120 Wn.2d 712, 717, 845 P.2d 987 (1993). With respect to noneconomic damages, by their very nature they are incapable of being calculated with precision. See Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 279, 840 P.2d 860 (1992).

The valuation of a loss of a chance requires no more precision than is required in wrongful death litigation, where in the course of assessing damages the trier of fact predicts what the decedent’s life would have been if he or she had lived. See WPI 31.01.01 & 31.02.01. No mathematical formula is necessary or even desirable.

Requiring greater precision for loss of a chance undermines the very policy upon which recognition of the claim is based. As noted above, recovery in tort for loss of a chance is premised on the policy choice that a

tortfeasor should not receive a windfall from the uncertainty created by his or her wrongful conduct. See supra at 7-8 & n.3.⁵

Moreover, Justice Pearson's mathematical formula impinges upon the constitutional role of the jury in assessing damages. See Sofie v. Fibreboard Corp., 112 Wn.2d 636, 645-47, 771 P.2d 711, 780 P.2d 260 (1989) (discussing state constitutional right to have jury determine damages); see also WPI 105.09 cmt. (questioning "whether the formula for determining damages set forth in the concurring opinion [of Herskovits] is valid after *Sofie*").

The jury should instead be allowed to determine damages for the loss of a chance based on the totality of the evidence, including, but not limited to, the available statistical estimates of the chance lost. This approach has been referred to as the "jury valuation" approach. See Jim M. Perdue, Recovery for a Lost Chance of Survival, 28 So. Tex. L. Rev. 37, 68 (1987). In keeping with the traditional manner of assessing damages and the proper role of the jury, the Court should adopt the jury valuation approach to the assessment of damages in loss of a chance claims in Washington.

⁵ Although physicians argue that Mohr must prove the exact degree of her disability but for their alleged negligence, see Physicians Resp. Br. at 37-38, this argument appears to misapprehend the nature of the injury. In accordance with Justice Pearson's concurrence in Herskovits and the unanimous opinion in Daugert, the injury is the lost chance itself. See also King, supra at 1378 (discussing the "inherent worth of a chance").

D. Loss Of A Chance Is Distinct From Proximate Cause, And Either The But For Test Or Substantial Factor Test Of Causation May Be Warranted In A Particular Case.

Mohr argues that the substantial factor test of causation applies to these facts, based in part on the lead opinion in Herskovits, where Justice Dore formulated loss of a chance in terms of a relaxation of the standard of causation. See Mohr App. Br. at 38 (stating substantial factor test articulated by Herskovits applies to this case, citing lead opinion at 617). Mohr also appears to base her argument in part on Daugert, where the Court summarized the traditional circumstances when the substantial factor test is applicable. See id. at 34-37 (quoting and discussing Daugert).

Throughout their briefing, both physicians and Kadlec presume that the but for test is the only valid test of causation in medical negligence actions, although they also argue that the substantial factor test is inapplicable, whether based on the lead opinion in Herskovits, or the traditional application of the test. See Physicians Resp. Br. at 31-33; Kadlec Resp. Br. at 24-33. Kadlec further argues that loss of a chance (at least when understood in terms of relaxing the standard of causation), and the substantial factor test of causation, are foreclosed by RCW 4.24.290, which requires proof of “proximate result” in medical negligence actions,

and by RCW 7.70.040, which requires proof of “proximate cause” in such actions. See Kadlec Resp. Br. at 36-39.⁶

All parties appear to misapprehend the relationship between loss of a chance and the relevant standard of proximate cause. Because loss of a chance is a distinct type of injury, at least after Daugert, the Court’s traditional causation analysis is unaffected, and remains conceptually distinct. The but for test of causation undoubtedly applies in many loss of a chance cases, as in Justice Pearson’s concurrence in Herskovits. However, the substantial factor test of causation will apply in at least three types of cases:

First, the test is used where either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the but for test. In such cases, it is quite clear that each cause has played so important a part in producing the result that responsibility should be imposed on it. Second, the test is used where a similar, but not identical, result would have followed without the defendant’s act. Third, the test is used where one defendant has made a clearly proven but quite insignificant contribution to the result, as where he throws a lighted match onto a forest fire.

Daugert, 104 Wn.2d at 262; see also Herskovits, 99 Wn.2d at 638 (Brachtenbach, J., dissenting, discussing substantial factor test). The but for and substantial factor tests of proximate cause should continue to be applied, as warranted by the particular facts of a given case.

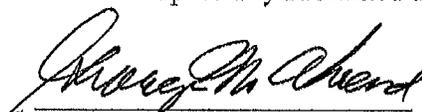
⁶ The current versions of RCW 4.24.290 and RCW 7.70.040 are reproduced in the Appendix.

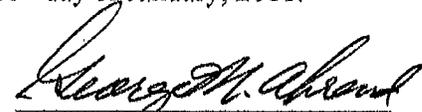
The statutes requiring proof of “proximate result” and “proximate cause” in medical negligence actions do not alter this causation analysis. See RCW 4.24.290; RCW 7.70.040. “Considerations of justice and public policy require that a certain degree of proximity exist between the act done or omitted and the harm sustained before legal liability may be predicated upon the ‘cause’ in question.” Eckerson v. Ford’s Prairie Sch. Dist., 3 Wn.2d 475, 482, 101 P.2d 345 (1940). Those considerations of justice and public policy may require application of either the but for test or the substantial factor test of causation. Whichever one of these equally valid alternative tests is warranted under the facts, the resulting cause, if any, is deemed to be “proximate,” and the statutes requiring proof of proximate cause are satisfied. See WPI 15.02 & cmt. (casting substantial factor test as a specie of proximate cause).

VI. CONCLUSION

The Court should resolve this appeal according to the principles advanced in this brief.

Respectfully submitted this 10th day of January, 2011.


George M. Ahrend

 *for* Bryan P. Harnetiaux, *with authority*

On behalf of WSAJ Foundation

APPENDIX

RCW 4.24.290. Action for damages based on professional negligence of hospitals or members of healing arts--Standard of proof--Evidence--Exception

In any civil action for damages based on professional negligence against a hospital which is licensed by the state of Washington or against the personnel of any such hospital, or against a member of the healing arts including, but not limited to, an East Asian medicine practitioner licensed under chapter 18.06 RCW, a physician licensed under chapter 18.71 RCW, an osteopathic physician licensed under chapter 18.57 RCW, a chiropractor licensed under chapter 18.25 RCW, a dentist licensed under chapter 18.32 RCW, a podiatric physician and surgeon licensed under chapter 18.22 RCW, or a nurse licensed under chapter 18.79 RCW, the plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession, and that as a proximate result of such failure the plaintiff suffered damages, but in no event shall the provisions of this section apply to an action based on the failure to obtain the informed consent of a patient.

[2010 c 286 § 12, eff. June 10, 2010; 1995 c 323 § 2; 1994 sp.s. c 9 § 702; 1985 c 326 § 26; 1983 c 149 § 1; 1975 1st ex.s. c 35 § 1.]

RCW 7.70.040. Necessary elements of proof that injury resulted from failure to follow accepted standard of care

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

[1983 c 149 § 2; 1975-'76 2nd ex.s. c 56 § 9.]