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# 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

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***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***

*“The burning candle of life is such a precious thing in anyone’s existence that no one has the right to extinguish it before it flickers out into perpetual darkness and oblivion.”<sup>1</sup>*

I. INTRODUCTION

People place an enormous amount of trust, not to mention their own lives, in the “hands” of our medical practitioners. In today’s society, modern technology has allowed doctors to possess “god-like” powers. In fact, doctors may play the most vital role in maintaining the future of our society. However, no doctor is infallible. Imagine, as unfortunate as it may be, that a loved one requires immediate medical care. During this treatment, the doctor, or someone within the immediate supervision of the doctor, incorrectly performs a portion of the procedure and directly causes the death of the patient.

Is it fair for the courts to limit the amount of damages recoverable by a grieving survivor because the doctor only eliminated a chance of survival? Should the doctor be able to argue that he should be responsible for only a minimal amount of damages, even though he was the direct cause of death? Unfortunately, these problematic, emotional, and monetary issues faced the justices of the *McMullen* Court.

Part II of this note presents a background on the history of, and alternative theories to, the loss-of-chance doctrine. Part III presents the facts, procedural history, holding, and reasoning of the case. Part IV scrutinizes and assesses the court’s holding, the various public policy implications, and the future effect on medical malpractice claims. Finally, Part V concludes the

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<sup>1</sup> Valdez v. Lyman-Roberts Hosp., Inc., 638 S.W.2d 111, 116 (Tex. Ct. App. 1982).

paper. Essentially, the question is whether the loss-of-chance doctrine will apply when a plaintiff proves a direct causal connection between the injury and the defendant's negligent act.<sup>2</sup>

## II. BACKGROUND

### A. Medical Malpractice

#### 1. Origin of Claim

Today's medical malpractice claim is an extension of the common-law negligence action.<sup>3</sup> This new basis for liability arose during the Industrial Revolution and was most likely premised upon the increasing number of injuries caused by industrial machinery.<sup>4</sup> The case of *Cross v. Guthery*<sup>5</sup> is the origin of medical malpractice in the United States.<sup>6</sup> Under common-law negligence principles, a plaintiff must prove four elements in order to prevail upon the claim.<sup>7</sup>

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<sup>2</sup> McMullen v. Ohio State Univ. Hosp., 725 N.E.2d 1117, 1121 (Ohio 2000).

<sup>3</sup> Weimer v. Hetrick, 525 A.2d 643, 651 (Md. 1987). Negligence was merely a way of committing another tort and had no independent legal significance. See also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 28, at 160 (5th ed. 1984); Percy H. Winfield, *The History of Negligence in the Law of Torts* 42 L.Q. REV. 184, 184 (1926) (stating that there was very little evidence of liability attaching to negligence in the Royal Courts). The earliest appearance of what would be considered negligence today involved those professed to be "skilled" in public callings. *Id.* at 186. These public callings included the professions of a carrier, innkeeper, blacksmith, surgeon, and an attorney. *Id.* Liability was placed upon these persons based upon a custom that no loss must ever occur *pro defectu custodiae* of the goods. *Id.*

<sup>4</sup> Winfield, *supra* note 3, at 195. Winfield states that early railway trains were not known for their speed or their safety. *Id.* Trains were responsible for the killing of anything from a Minister of State to a cow. *Id.*

<sup>5</sup> *Cross v. Guthery*, 2 Root 90 (Conn. Super. Ct. 1794).

<sup>6</sup> The plaintiff's wife had a scrofulous humor on her breast, which required surgery. *Id.* The "skilled doctor" cut off the plaintiff wife's breast in a manner that caused her to be in severe pain for three hours at which time she passed away. *Id.* The court found the doctor cut off the patient's breast in the most "unskillful and cruel" manner, contrary to known rules and practices. *Id.* The court held that the defendant had wholly broken and violated his promise to the plaintiff to perform surgery on his wife in a manner of the utmost safety and skill. *Id.* See also Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 550 (1959) (stating that medical malpractice for doctors was indeed born with *Cross*).

<sup>7</sup> KEETON ET AL., *supra* note 3, § 30, at 164-65. These elements include: (1) the defendant owed the plaintiff a recognized duty under the law, (2) the defendant breached his duty to the plaintiff, (3) the defendant's breach was the legal cause in fact and the proximate cause of the injury, and (4) the plaintiff suffered an actual injury. *Id.* See

The plaintiff must establish a duty of care by showing that some special relationship exists between the defendant and the injured plaintiff.<sup>8</sup> The courts have held that such a duty exists between a physician and a patient.<sup>9</sup> There is a breach of this duty when a physician fails to conform to the required standard of conduct, which is based upon an objective reasonable person.<sup>10</sup>

Proximate cause continues to be the most difficult element for an aggrieved plaintiff to satisfy.<sup>11</sup> The courts divide causation into two separate issues: cause-in-fact and proximate

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*also* Patrick L. Evatt, Note, *A Closer Look at Loss of Chance Under Nebraska Medical Malpractice Law: Steineke v. Share Health Plan, Inc.*, 246 Neb. 374, 518 N.W.2d 904 (1994), 76 NEB. L. REV. 979, 981 (1997); Frank J. Cavico & Nancy M. Cavico, *The Nursing Profession in the 1990's: Negligence and Malpractice Liability*, 43 CLEV. ST. L. REV. 557, 560 (1995).

<sup>8</sup> Cavico & Cavico, *supra* note 7, at 561.

<sup>9</sup> *McKinney v. Schlatter*, 692 N.E.2d 1045, 1047-48 (Ohio Ct. App. 1997). The court held that a “physician-patient” relationship arises out of a consensual contract of employment, express or implied, under which the patient seeks medical assistance and the physician agrees to render treatment.

<sup>10</sup> KEETON ET AL., *supra* note 3, § 30, at 164. *Fossett v. Board of Regents of Univ. of Neb.*, 605 N.W.2d 465, 468 (Neb. 2000) (establishing a breach of this duty requires the admittance of expert testimony). However, it is not necessary for expert testimony to be presented when circumstances are such that the recognition of the alleged negligence is within the contemplation of laymen. *Id.* The most common situation is when the doctor or someone under his control leaves a foreign object inside the body of the patient. *Id.* at 468-69. *See especially* A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW 12-13 (1930). The author states:

He is an ideal, a standard, the embodiment of all those qualities, which we demand of the good citizen . . . He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bounds who neither star-gazes nor is lost in meditation when approaching trapdoors or the margin of a dock . . . who never swears, gambles or loses his temper, who uses nothing except in moderation, and even while he flogs his child is mediating only on the golden mean.

*Id.* *See also* Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the Reasonable Man*, 8 RUT.-CAM. L. J. 311, 318-19 (Cavico 1977) (arguing that there is no mention of women, and women certainly are rational people). *See generally* Cavico, *supra* note 7, at 563-64 (stating that the standard that the courts apply is a bare minimum and if a person has knowledge, skill and intelligence superior to that of an ordinary layperson the law requires the person to act accordingly); McCoid, *supra* note 6, at 558 (noting that the standard of care is one that is “commonly exercised and possessed by reasonable physicians . . . in same or similar cases”). Also, this standard has been around for thousands of years starting with the Oath of Hippocrates which states: “I swear by Apollo . . . that according to my judgment and ability . . . I will give no deadly medicine to anyone if asked . . . and will abstain from . . . mischief and corruption.” *Id.* at 549. The question is whether the defendant acted as a reasonably prudent person would have in the same or similar circumstances.

<sup>11</sup> KEETON ET AL., *supra* note 3, § 41, at 263. The authors agreed that there is nothing located within the profession of law that causes more confusion among the practitioners. *Id.* However, no other alternative has proven workable. *Id.*

cause.<sup>12</sup> The plaintiff's burden of proof requires him or her to introduce evidence in order to show that it is more likely that the conduct of the defendant was the cause-in-fact of the injurious result.<sup>13</sup>

The second part of the causation analysis is proximate, or "legal," causation.<sup>14</sup> An injury is proximately caused by an act when that act played a substantial part in bringing about the harm, and when the injury was either a direct result or a reasonably probable consequence of an act.<sup>15</sup> A determination of what constitutes proximate cause involves notions of philosophy, public policy, convenience, and justice to the parties.<sup>16</sup>

## 2. Ohio's Medical Malpractice Law

In order to maintain a medical malpractice<sup>17</sup> action, based upon either a wrongful death or a survivorship action statute,<sup>18</sup> the plaintiff must prove several elements. These elements

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<sup>12</sup> Jennifer P. Keller, *Torts -- Medical Malpractice -- Loss of Chance Not a Cognizable Cause of Action in Tennessee*; Kilpatrick v. Bryant, 868 S.W.2d 594 (Tenn. 1993), 62 TENN. L. REV. 375, 375 (1995); Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 60 (1956). Compare David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1769-73 (1997) (giving a five step analysis on how to approach a *but-for* question), with Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 85 (1975) (arguing that the *but for* test is "virtually universal"). See also KEETON ET AL., *supra* note 3, § 41, at 266 (saying that the defendant's actions are not a cause of the event if the event would have occurred without it).

<sup>13</sup> KEETON ET AL., *supra* note 3, § 41, at 269. The preponderance of the evidence standard prevents a party from showing only a mere possibility of causation, or one of pure speculation. *Id.* However, the plaintiff is not required to prove his case beyond a reasonable doubt. *Id.* It is enough to introduce evidence that would allow reasonable people to conclude it was more probable that the defendant caused the result than it was not. *Id.*

<sup>14</sup> *Id.* at 273. The question is whether the defendant should be held legally responsible for his actions. *Id.* The term "proximate cause" means little more than "immediate." *Id.*

<sup>15</sup> Keller, *supra* note 12, at 376. Courts have found that the act need not be the only cause, nor must it be the last or nearest cause. See, e.g., McDonnell v. McPartlin, 736 N.E.2d 1074, 1083 (Ill. 2000), *aff'g* 708 N.E.2d 412 (Ill. App. Ct. 1999).

<sup>16</sup> Palsgraf v. Long Island R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting). Any philosophical doctrine of causation does not help. *Id.* Justice Andrews stated that any action has an eternal effect. *Id.* However, this effect will be altered by other causes. *Id.* Each one will have some effect on the result. *Id.* The act has changed history forever and placing liability upon such remote acts will do nothing but increase litigation significantly. *Id.* See also KEETON ET AL., *supra* note 3, § 42 at 273.

include: (1) the existence of a duty owed to the plaintiff's or the plaintiff's decedent; (2) a breach of that duty; (3) proximate cause between the breach and injury; and (4) injury to the plaintiff.<sup>19</sup>

### B. *Loss-of-chance Doctrine*<sup>20</sup>

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<sup>17</sup> *Cramer v. Price*, 82 N.E.2d 874, 874 (Ohio Ct. App. 1948) (defining medical malpractice as negligent and unlawful willful acts committed by a physician in treating his patient by which patient's death or injury occurs).

<sup>18</sup> The Ohio Revised Code provides:

(a)(1) When the death of a person is caused by a 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 occurred . . . shall be liable for damages, notwithstanding the death of the person injured.

OHIO REV. CODE ANN. § 2125.01 (West 2000). Additionally, § 2305.21 provides:

In addition to the causes of action that survived at common law, causes of actions for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

OHIO REV. CODE ANN. § 2305.21 (West 2000).

<sup>19</sup> *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 529 N.E.2d 449, 454 (Ohio 1988). *See also Wheeler v. Wise*, 729 N.E. 2d 413, 415 (Ohio Ct. App. 1999), *appeal denied*, 716 N.E.2d 723 (Ohio 1999); *Hubbard v. Laurelwood Hosp.*, 620 N.E.2d 895, 899 (Ohio Ct. App. 1993); *Wells v. Miami Valley Hosp.*, 631 N.E.2d 642, 648 (Ohio Ct. App. 1993); *Paul v. MetroHealth St. Luke's Hosp.*, No. 71195, 1998 WL 742173, at \*5 (Ohio Ct. App. Oct. 22, 1998); *Ulmer v. Ackerman*, 621 N.E.2d 1315 (Ohio Ct. App. 1993); *Avondet v. Blankstein*, 692 N.E.2d 1063 (Ohio Ct. App. 1993). *See generally Menifee v. Ohio Welding Prods. Inc.*, 472 N.E.2d 707, 710 (Ohio 1984) (holding that duty is based upon the foreseeability of the injury); *Randall v. Mihm*, 616 N.E.2d 1171, 1174 (Ohio Ct. App. 1992) (holding that proximate cause is defined in Ohio as a happening or event, which as a natural and continuous sequence produces an injury without which the result would not have occurred), *Mannion v. Sandel*, No. CA.19433, 2000 WL 327224, at \*4 (Ohio Ct. App. Mar. 29, 2000) (establishing causation through medical expert testimony in terms of probability, that is, "more probable than not"). Several other jurisdictions have adopted the same requirements as the common law, just as Ohio has done. *See generally Mitchell v. United States*, 141 F.3d 8 (1st Cir. 1998); *Zuchowicz v. United States*, 140 F.3d 381 (2nd Cir. 1998); *Deasy v. United States*, 99 F.3d 354 (10th Cir. 1996); *Vance v. United States*, 90 F.3d 1145 (6th Cir. 1996); *In re Sealed Case*, 67 F.3d 965 (D.C. Cir. 1995); *Boody v. United States*, 706 F.Supp 1458 (D. Kan. 1989); *Zehr v. Haugen*, 871 P.2d 1006 (Or. 1994); *Kaiser- Bauer v. Mullan*, 609 N.W.2d 905 (Minn. Ct. App. 2000).

<sup>20</sup> Jim M. Perdue, *Recovery for Loss of Chance of Survival: When the Doctor Gambles, Who Puts Up the Stakes?*, 28 S. TEX. L. REV. 37, 37 (1987). The phrases "loss of chance," "lost chance," and "loss of a chance" all refer to the same theory. Throughout the years, the loss of chance doctrine has expanded to include cases that do not involve a claim of negligent diagnosis or one of medical malpractice. *Wendland v. Sparks*, 574 N.W.2d 327, 332 (Iowa 1998). A general example of a loss-of-chance case is when a doctor's conduct causes a patient to lose a chance of recovering or avoiding some injury or disease. Margaret T. Mangan, *The Loss of Chance Doctrine: A Small Price to Pay for Human Life*, 42 S.D. L. REV. 279, 280 (1997). *See also Darrell L. Keith, Loss of Chance: A Modern Proportional Approach Theory to Damages in Texas*, 44 BAYLOR L. REV. 759, 760 (1992); Lori R. Ellis, *Loss of Chance as Technique: Toeing the Line at Fifty Percent*, 72 TEX. L. REV. 369, 369 (1993) (stating that loss-of-chance cases usually involve the negligent misdiagnosis of a patient, who had less than a 51-percent chance of survival). The court places the emphasis, not on the actual death of the patient, but upon the idea that the injury is the diminished opportunity for a better result. Wayne Barnes, *Texas Bucks the Trend- No Cause of Action for Lost Chance of Survival in the Medical Malpractice Context: Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397 (Tex. 1993), 25 TEX. TECH. L. REV. 219, 220 (1993). Several courts and commentators have stated that the loss-of-chance doctrine is not the normally-applied rule, but as an exception where there is a negative showing of proximate cause. Perdue, *supra*, at 60; *Carrington v. Cleveland Bd. of Educ.*, No. 74624, 1999 WL 1129072, at \*6 (Ohio Ct.

## 1. Background of the Doctrine

Many courts and commentators have stated numerous reasons for the development of the loss-of-chance doctrine. First, it is difficult to prove the requisite standard of causation needed in medical malpractice claims.<sup>21</sup> Second, there is a patent inequality in denying a plaintiff recovery for injuries when the negligence of a physician has reduced the patient's chance of recovery.<sup>22</sup> Finally, allowing a doctor to escape liability will promote sloppiness and carelessness when doctors are treating patients who have less than an even chance of survival.<sup>23</sup>

The exact point of creation for the loss-of-chance doctrine remains a topic of significant debate. Several courts rely upon *Hicks v. United States*.<sup>24</sup> However, the *Hicks* Court endorsed

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App. Dec. 9, 1999). In *Roberts v. Ohio Permanente Med. Group, Inc.*, the Ohio Supreme Court recognized that the loss-of-chance exception to the strict standard that the plaintiff must satisfy in order to prove causation in medical malpractice actions. The court went on to state, with emphasis, that *Roberts* did not alter the common law principles in areas of tort law. *Id.* See also Todd S. Aagaard, *Identifying And Valuing The Injury In Lost Chance Cases*, 96 MICH. L. REV. 1335, 1335 (1998); Ellis, *supra*, at 372 (arguing that it is inappropriate to use this theory to limit the plaintiff's damages when that party can show by a preponderance of the evidence that the defendant caused the injury).

<sup>21</sup> *Shively v. Klein*, 551 A.2d 41, 43 (Del. 1988). See also Keith, *supra* note 20, at 760. A plaintiff must show by a reasonable medical probability that the actions performed by the defendant proximately caused the patient's resulting injury. *Id.* at 761. The circumstances proved must lead to the conclusions with reasonable certainty and probability. *Id.*

<sup>22</sup> *Shively*, 551 A.2d at 43.

<sup>23</sup> *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 409 (Tex. 1993) (Hightower, J., dissenting). Justice Hightower noted four reasons why courts should apply the loss-of-chance theory: (1) The adoption of the loss-of-chance doctrine will not lead to any wholesale changes in the law; (2) the harm to be redressed is the lost chance of survival, not the ultimate death of the patient; (3) the all-or-nothing approach undermines the deterrence of loss allocation functions of tort law; and (4) the all-or-nothing approach is contrary to the concept that a chance of a future benefit is a legally compensable interest. *Id.*

<sup>24</sup> *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966). The decedent complained about abdominal pain and went to the dispensary of the United States Naval Base. *Id.* at 628. The physician diagnosed her pain as gastroenteritis and released her after prescribing some medicine. *Id.* Decedent went home, began to vomit and fell into an unconscious state. *Id.* at 629. She was taken to the dispensary but was dead upon arrival. *Id.* The district court dismissed the action because there was no evidence to show the defendant was negligent. *Id.* at 628. However, the Fourth Circuit found that the doctor breached his duty of care. *Id.* at 630. The court held that the law does not require the plaintiff to "show a certainty that the patient would have lived had she been hospitalized and operated on promptly." *Id.* at 632. See also Patricia L. Andel, *Medical Malpractice: The Right to Recover for the Loss of a Chance of Survival*, 12 PEPP. L. REV. 973, 987 (1985).

the doctrine only in dicta.<sup>25</sup> Other courts rely heavily upon *Kallenberg v. Beth Israel Hospital*.<sup>26</sup> Further, some courts look to the decision in *Hamil v. Bashline*.<sup>27</sup> Finally, the Court in *Herskovits v. Group Health Cooperative of Puget Sound*<sup>28</sup> expressly authorized the use of the doctrine in cases in which the patient had less than an even chance of survival.<sup>29</sup>

## 2. Approaches to the Loss-of-chance Doctrine

### a. Traditional, “All-or-nothing” Approach<sup>30</sup>

Several courts adhere to the traditional, “all-or-nothing” approach, which is parallel to traditional tort law requirements.<sup>31</sup> Under this approach, a plaintiff must prove that the

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<sup>25</sup> 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).

<sup>26</sup> *Kallenberg v. Beth Israel Hosp.*, 357 N.Y.S.2d 508 (N.Y. App. Div. 1974), *aff’d* 337 N.E.2d 128 (N.Y. 1975). The patient’s family brought a wrongful death action based upon negligence and medical malpractice because, according to medical experts, the decedent would have had a 20- to 40-percent chance of survival. *Id.* at 510. The court found for the patient’s family, holding that if the correct procedure had been performed, she might have improved. *Id.* at 511. *See also* Keith, *supra* note 20, at 765; Mangan, *supra* note 20, at 278-88 (stating that this case has the recognition as being the first case to “expressly” authorize the use of the doctrine).

<sup>27</sup> *Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1980). *Hamil* was admitted to the hospital experiencing chest pains, but after he was admitted the physician left. *Id.* at 1282. Subsequently, he was transferred to another hospital where he died. *Id.* The court found that once it is shown that the acts of the physician increased the risk of harm to the patient, the case could go to the jury. *Id.* at 1288. The testimony established evidence that *Hamil* had a 75-percent chance of survival if treated properly. *Id.* at 1283. *See also* Beth Clemens Boggs, *Lost Chance of Survival Doctrine: Should The Courts Ever Tinker With Chance?*, 16 S. ILL. U. L.J. 421, 433 (1992).

<sup>28</sup> *Herskovits v. Group Health Coop.*, 664 P.2d 474 (Wash. 1983). Decedent was treated at the hospital with cough medicine but was diagnosed one year later with cancer, which ultimately killed him. *Id.* at 475. The court held that the fourteen percent reduction in his chance of survival was enough to allow the jury to determine whether the physician’s negligent diagnosis was the proximate cause of death. *Id.* at 476-77.

<sup>29</sup> Mangan, *supra* note 20, at 288.

<sup>30</sup> However, this doctrine has been the target of extremely harsh criticism. *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467, 474 (Okla. 1987). The court noted:

Health care providers should not have the luxury of having the uncertainty created by their negligent conduct. To allow otherwise would allow care providers to evade liability for their negligent actions or inactions in situations in which patients would not necessarily have survived or recovered, but still would have a significant chance of survival or recovery.

*Id.* *See also* King, *supra* note 25, at 1378 (arguing that a chance of survival has an inherent worth in itself and the plaintiff should be compensated for the destruction of that chance); *Wollen v. DePaul Health Ctr.*, 828 S.W.2d 681, 683 (Mo. 1992) (arguing that the inflexible rule does not match the “maybe” in today’s society – there is no practical difference between 49.99 percent and 50.01 percent, except for recovery under the doctrine).

defendant's conduct was the proximate cause of his or her injury.<sup>32</sup> The plaintiff must prove that the patient probably would have recovered or survived if the patient had received proper medical treatment.<sup>33</sup> If the plaintiff does not satisfy this burden, he is completely barred. However, if he can satisfy the required proof, he receives an undiscounted award.<sup>34</sup>

Courts and commentators cite several reasons why the courts should follow this approach. First, the emotional nature of human beings drives juries to find for the injured plaintiff, even if the doctor's actions are too remote for liability.<sup>35</sup> Second, the courts will alter or construe the requirements of proximate cause to compensate the plaintiff for his loss.<sup>36</sup>

#### b. The "Substantial" Chance Approach<sup>37</sup>

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<sup>31</sup> Boggs, *supra* note 27, at 425-26. *See generally* Abille v. United States, 482 F. Supp. 703 (N.D. Cal. 1980) (applying Alaska law); Murdoch v. Thomas, 404 So.2d 580 (Ala. 1981); Dumas v. Cooney, 1 Cal. Rptr. 2d 584 (1991); Gooding v. University Hosp. Bldg., Inc., 445 So.2d 1015 (Fla. 1984); Blondel v. Hays, 403 S.E.2d 340 (Va. 1991).

<sup>32</sup> KEETON ET AL., *supra* note 3, § 30, at 165.

<sup>33</sup> Wells v. Miami Valley Hosp., 631 N.E.2d 642, 647 (Ohio Ct. App. 1993) (holding that the issue of proximate cause can go to the jury only if there is sufficient evidence to show that with proper diagnosis, treatment and surgery the patient probably would have survived).

<sup>34</sup> King, *supra* note 25, at 1365.

<sup>35</sup> Gooding, 445 So.2d at 1019-20. The court stated:

Lesser standards of proof are understandably attractive in medical malpractice cases, where the physical well being, and life itself, is 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 a chance for survival, regardless of its remoteness. However, we have trepidations that such a rule would be so loose it would produce more injustice than justice.

*Id.* at 1020.

<sup>36</sup> Keith, *supra* note 20, at 790. (expressing concern that this doctrine will produce substantial amounts of injustice).

<sup>37</sup> *See generally* Borkowski v. Sacheti, 686 A.2d 120 (Conn. 1996); Cahoon v. Cummings, 715 N.E.2d 1 (Ind. Ct. App. 1999) *opinion vacated by*, Cahoon v. Cummings, 734 N.E.2d 535 (Ind. 2000); Dickey *ex rel.* Dickey v. Daugherty, 917 P.2d 889 (Kan. 1996); Delaney v. Kade, 873 P.2d 175 (Kan. 1994); Perez v. Las Vegas Med. Ctr., 805 P.2d 589 (Nev. 1991); Jorgensen v. Vener, 613 N.W.2d 50 (S.D. 2000) *opinion to be republished*, 616 N.W.2d 366 (S.D. 2000).

The “substantial” chance doctrine allows for recovery when the plaintiff proves that the defendant’s irresponsible behavior resulted in a substantial loss of a patient’s chance of survival.<sup>38</sup> Some courts have interpreted “substantial” to mean anything exceeding 50 percent, while others include anything exceeding five percent.<sup>39</sup>

There are a number of criticisms that have precluded courts from applying this doctrine. First, defining “substantial” is an extremely difficult task.<sup>40</sup> In addition, allowing the jury to weigh the patient’s chances may produce erratic results and allow full damages even if the defendant only caused partial harm.<sup>41</sup> Despite all the criticisms, the “substantial” chance doctrine does not allow the doctor who has “negligently expedited” a patient’s demise to be immune from liability.<sup>42</sup>

#### c. Restatement (Second) of Torts Approach<sup>43</sup>

Section 323(a)<sup>44</sup> of the Restatement of Torts, [hereinafter “the Restatement”] creates liability if one person’s actions increase the risk of harm to another person.<sup>45</sup> Courts that have

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<sup>38</sup> Mangan, *supra* note 20, at 307. *See also* Keith, *supra* note 20, at 792-93 (discussing how courts have used both the term “substantial” and “significant” to refer to this doctrine).

<sup>39</sup> Allen E. Shoenberger, *Medical Malpractice Injury: Causation and Valuation of the Loss of Chance to Survive*, 6 J. LEGAL MED. 51, 58-59 (1985). *But see* Perez, 805 P.2d at 592 (stating that “we need to state exactly how high the chances of survival one must have to be substantial . . . there are limits and we doubt a 10% chance is actionable”).

<sup>40</sup> Boggs, *supra* note 27, at 431.

<sup>41</sup> Perdue, *supra* note 20, at 50.

<sup>42</sup> *Id.* Under this doctrine, the doctor is liable if the plaintiff proves that the doctor’s actions caused a substantial deprivation in the patient’s chance of survival. *See also* McKellips v. Saint Francis Hosp. Inc., 741 P.2d 467, 477 (Okla. 1987). The court held that in medical malpractice cases involving the loss of less than an even chance of recovery or survival where the plaintiff shows that the defendant’s conduct caused a substantial reduction of the patient’s chance of recovery or survival, irrespective of statistical evidence, the question of proximate cause is for the jury. *Id.* If a jury determines that the defendant’s negligence is the proximate cause of the patient’s injury, the defendant is liable only for those damages proximately caused by his negligence which aggravated a pre-existing condition. *Id.* Consequently, a total recovery for all damages attributable to death is not allowed and damages should be limited in accordance with the prescribed method of valuation. *Id.*

adopted the Restatement approach to the loss-of-chance doctrine allow a plaintiff to receive compensation for the increased risk of harm, not merely for the loss of chance.<sup>46</sup> The application of the Restatement allows an injured plaintiff to submit his claim to a jury without meeting the usual burden of proof.<sup>47</sup> The first medical malpractice case to apply this theory was *Hamil v. Bashline*.<sup>48</sup> However, this doctrine does not come without criticism; specifically, that this approach will increase litigation<sup>49</sup> because the relaxed causation standard will allow cases to go to the jury not based upon legal principles, but based on human emotion.<sup>50</sup>

#### d. The “King Approach”<sup>51</sup>

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<sup>43</sup> See generally *McBride v. United States*, 462 F.2d 72 (9th Cir. 1972); *DeBurkate v. Louvar*, 393 N.W.2d 131 (Iowa 1986); *Aasheim v. Humberger*, 695 P.2d 824 (Mont. 1985); *Roberts v. Ohio Permanente Med. Group Inc.*, 668 N.E.2d 480 (Ohio 1996); *Lay v. Dworman*, 732 P.2d 455 (Okla. 1986); *McKellips*, 741 P.2d at 467.

<sup>44</sup> RESTATEMENT (SECOND) OF TORTS § 323 (1990). § 323 states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: (a) his failure to exercise such care increases the risk of such harm.

<sup>45</sup> *Boggs*, *supra* note 27, at 432. See also *Keith*, *supra* note 20, at 795. This approach only requires the plaintiff to show: (1) the defendant undertook services to provide protection, (2) the defendant’s tortious conduct increased the risk of harm, and (3) the defendant’s tortious conduct proximately caused the increase risk of harm. *Id.*

<sup>46</sup> Michelle L. Truckor, *The Loss of Chance Doctrine: Legal Recovery for Patients on the Edge of Survival*, 24 U. DAYTON L. REV. 349, 356 (1999).

<sup>47</sup> *Id.* at 356-57. This method allows a plaintiff to have a jury consider the claim without showing the doctor’s actions were the proximate cause of the harm. *Id.* at 356. All that is required of the plaintiff is to show the doctor or medical practitioner increased the chance of harm to the patient. *Id.*

<sup>48</sup> *Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1980). The court reasoned that “in order for a doctor not to be completely insulated because of the uncertainties as to the consequences of his negligent conduct, Section 323(a) acknowledges this difficulty and permits the issue to go to the jury upon a less than normal threshold of proof. *Id.* at 1287-88. See also *Herskovits v. Group Health Coop.*, 664 P.2d 474 (Wash. 1983). The court determined that a loss of 14 percent allowed the case to be sent to the jury. *Id.* at 467-77.

<sup>49</sup> *Boggs*, *supra* note 27, at 435.

<sup>50</sup> *Truckor*, *supra* note 46, at 364. See also Diane Schmauder, *An Analysis of New Jersey’s Increased Risk Doctrine*, 25 RUTGERS L.J. 893, 917 (1994).

<sup>51</sup> See, e.g., *Thompson v. Sun City Community Hosp.*, 688 P.2d 605 (Ariz. 1985) (adopted in part); *Petriello v. Kalman*, 576 A.2d 474 (Conn. 1990); *Sanders v. Ghrist*, 421 N.W.2d 520 (Iowa 1988); *Hastings v. Baton Rouge*

The “King Approach” is the final variation of the loss-of-chance doctrine.<sup>52</sup> This approach compensates the plaintiff for the loss of a chance to survive.<sup>53</sup> This standard requires no alteration of the causation requirement, because the plaintiff must prove that the defendant’s actions proximately caused his loss of chance.<sup>54</sup> Under this doctrine, the defendant is not liable for injuries for which he may have been liable under more relaxed standards, such as the substantial chance<sup>55</sup> approach and the Restatement’s increased-risk-of-harm<sup>56</sup> doctrine.<sup>57</sup> However, many commentators and medical practitioners believe that the implementation of the “King approach” will ultimately lead to increased medical costs.<sup>58</sup> Finally, the complexity of

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Gen. Hosp., 498 So.2d 713 (La. 1986); *Falcon v. Memorial Hosp.*, 462 N.W.2d 44 (Mich. 1990), *judgement rev’d in part*, 467 N.W. 2d 25 (Mich. 1991).

<sup>52</sup> King, *supra* note 25, at 1353.

<sup>53</sup> *Id.* at 1382. Professor King uses the example of a patient who suffered a heart attack and died, after the doctor misdiagnosed the condition. *Id.* Even with the correct treatment, the patient only had a 40-percent chance of survival. *Id.* Under this species of the theory, the defendant should be liable for the 40-percent loss of chance. *Id.* The compensation should be forty percent of what the value of the victim’s life. *Id.*

<sup>54</sup> *Id.* at 1395. *See also* *Lambie v. Schneider*, 713 N.E.2d 603 (Ill. App. Ct. 1999), *appeal denied*, 720 N.E.2d 1094 (Ill. 1999); *Boggs, supra* note 27, at 438; *King, supra* note 25, at 1360. The method of valuation measures the compensable chance as the “percentage probability” by which the tortious actions of the defendant medical practitioner eliminated the chance of achieving a more favorable outcome. *Id.* at 1382. There are guidelines that the trier of fact must follow in making this determination. *Id.* The award is based upon the value of the patient’s life reduced in proportion to the lost chance. *Id.* Professor King lists several factors that determine the value of the patient’s life. *Id.* These factors include: (1) age; (2) health; and (3) earning potential. *Id.* Professor King labels this “probability formula” as predictable and finely tuned. *Id.* He premised the valuation and compensation formula on the fact that the defendant should be liable only to the extent that (1) he tortiously contributed to the harm by allowing a preexisting condition to progress; (2) aggravated its harmful effects; or (3) caused harm in excess of that which is solely attributed to the preexisting conditions. *Id.* The defendant is not liable for the entire loss because the preexisting condition has reduced some chance of the patient’s survival. *King, supra* note 25, at 1360.

<sup>55</sup> *See supra* note 37 (cases).

<sup>56</sup> *See supra* note 43 (cases).

<sup>57</sup> Ellen M. Foran, *Medical Malpractice: A Lost Chance Is a Compensable Interest*, 12 BRIDGEPORT L. REV. 471, 495-96 (1992). In fact, the King analysis does not foreclose the recovery of the injured patient when his chance of survival is less than 50 percent. *Id.*

<sup>58</sup> *Boggs, supra* note 27, at 438.

King's mathematical formula can lead to confusion and an additional burden upon the finder of fact.<sup>59</sup>

### C. History of Loss of Chance in Ohio

In *Cooper v. Sisters of Charity of Cincinnati, Inc.*,<sup>60</sup> the Ohio Supreme Court rejected the loss-of-chance theory and applied the traditional causation requirements, which require the plaintiff to show that the defendant's conduct was the proximate cause of the plaintiff's injury.<sup>61</sup> The Court was primarily concerned with the possibility that the jury might be persuaded by human emotion and not by the facts.<sup>62</sup>

However, in 1996, the Ohio Supreme Court decided *Roberts v. Ohio Permanente Medical Group, Inc.*<sup>63</sup> The Court expressed its great displeasure at the harsh rule laid down in *Cooper*, and completely changed the foundation of this doctrine as it would apply in Ohio by adhering to the increased-risk-of-harm theory set out in the Restatement.<sup>64</sup>

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<sup>59</sup> Dionne R. Carney, *Smith v. State of Louisiana, Department of Health and Hospitals: Loss of Chance of Survival: The Valuation Debate*, 58 LA. L. REV. 339, 359-60 (1997). Carney stated that one problem with this approach and its percentage probability valuation method is that it involves the use of an inflexible formula. *Id.* at 360. She states that "the damages awarded to the plaintiff are based on imprecise percentage chance estimates applied to general damages that never occurred, and both of which cannot be calculated with mathematical precision. When these two imprecise figures are multiplied, the uncertainty progresses geometrically." *Id.*

<sup>60</sup> *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 272 N.E.2d 97 (Ohio 1971), *overruled by* *Roberts v. Ohio Permanente Med. Group, Inc.*, 668 N.E.2d 480 (Ohio 1996).

<sup>61</sup> *Id.* at 103. "The jury may consider the issue of proximate cause only if there is sufficient evidence that with proper treatment . . . the patient probably would have survived." *Id.*

<sup>62</sup> *Id.* The court stated that "while lesser standards of proof are more desirable in medical malpractice cases . . . humanity emotionally directs us to the conclusion that . . . an injured person should be compensated for any loss of chance of survival regardless of its remoteness." *Id.*

<sup>63</sup> *Roberts v. Ohio Permanente Med. Group, Inc.*, 668 N.E.2d 480 (Ohio 1996). The executor of the decedent's estate filed a wrongful death claim against the defendants based upon the theory of negligence for allowing a 17-month delay in diagnosing decedent's lung cancer. *Id.* at 481. The court discarded the harsh formalistic rule of *Cooper* and adopted the "increased harm" theory. *Id.* at 483-84. The court found for the plaintiff, holding that to allow the case to be heard by the jury, the plaintiff must show that the negligent act of the doctor increased the risk of harm to the plaintiff. *Id.* at 484.

### III. STATEMENT OF THE CASE

#### A. Statement of Facts

In late 1989, doctors diagnosed Georgia Gibson McMullen (the decedent) with acute myelogenous leukemia.<sup>65</sup> Two months after receiving an allogenic bone marrow transplant, McMullen was readmitted to the Ohio State University Hospital (OSUH) because of an infection and high fever.<sup>66</sup> After doctors consulted with Ms. McMullen, she elected to have an endotracheal tube inserted and was placed on a ventilator.<sup>67</sup> The nurse on duty testified that, on the morning of October 14<sup>th</sup>, she heard a “squawking” sound coming out of the mask and that Ms. McMullen’s physical appearance and facial expression changed significantly.<sup>68</sup> The nurses

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<sup>64</sup> *Id.* at 484. Justice Sweeney expressed his frustration over the *Cooper* rule and stated that “it has come time to discard the traditionally harsh view we previously followed and join the majority of court that have adopted the loss-of-chance theory.” *Id.* The court said “in order to maintain an action of the loss than even chance recovery of survival, the plaintiff must present expert testimony that the health care provider’s act or omission increased the risk of harm to the plaintiff.” *Id.* at 481. The court also decided that the best way to compensate for damages is to follow the proportion approach advocated by King. *Id.* at 484. *But see* Truckor, *supra* note 46, at 367 (stating the court in *Roberts* created a hybrid by combining the “increased risk” theory with a proportional damage calculation method). Truckor goes on to say that Ohio has adopted a “pure loss-of-chance theory because the proportional damages calculation compensated the plaintiff for the loss chance at recovery, not the increased risk of harm.” *Id.* at 368.

<sup>65</sup> McMullen v. Ohio State Univ. Hosp., 725 N.E.2d 1117, 1119 (Ohio 2000). This type of leukemia is a cancer of the blood in which too many granulocytes, a type of white blood cells, are produced in the bone marrow. Methodist Health Care System, Houston, Texas, *Acute Myelogenous Leukemia* (visited June 18, 2000) <http://www.methodisthealth.com/cancer/leukemia/acumye.htm> It affects the young blood cells (blasts) that develop into white blood cells called granulocytes. *Id.*

<sup>66</sup> Brief for Appellant at 1, McMullen v. Ohio State Univ. Hosp., 725 N.E. 2d 1117 (Ohio 2000) (No. 98-2358). An allogenic transplant takes the transplanted marrow from a related person.

<sup>67</sup> McMullen, 725 N.E.2d at 1119. The hospital administered an 80-percent concentration of oxygen through an oxygen mask; however, she continued to experience shortness of breath. *Id.*

<sup>68</sup> *Id.* Nurse Tina DeRossa was assigned the duty of watching over Ms. McMullen during the period from late night October 13th to early morning October 14th. Brief for Appellant at 1, McMullen (No. 98-2358). During this time, DeRossa called for additional help while Ms. McMullen’s oxygen level dropped to a critical level. McMullen, 725 N.E.2d at 1119. With the help of expert testimony, the court found that an oxygen saturation level of 29 percent is inconsistent with life. *Id.* This low level caused irreversible damage to her brains, heart and lungs. *Id.*

disconnected the ventilator and used an ambu-bag to force 100-percent concentration of oxygen through her endotracheal tube.<sup>69</sup>

Because Ms. McMullen was cyanotic and dyspneic,<sup>70</sup> the nurses decided to remove the endotracheal tube and utilize a “stat page” for assistance instead of a “Code Blue,” which is used for life-threatening situations.<sup>71</sup> Dr. Wilmer and Dr. Campbell, resident physicians, responded to the “stat page” and prepared to reintubate McMullen.<sup>72</sup> It took the doctors several attempts, and over 20 minutes to successfully reintubate her.<sup>73</sup> Although her heartbeat improved, the delay in reintubating Ms. McMullen rendered her irreversibly comatose. She passed away on October 21, 1990.<sup>74</sup>

### *B. Procedural History*

On October 20, 1992, the plaintiffs filed a wrongful death action against OSU Hospital on behalf of the estate of Georgia McMullen.<sup>75</sup> After hearing expert testimony from both sides

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* WEBSTER’S INTERNATIONAL DICTIONARY 563 (3d ed. 1986). A person is cyanotic when there is a dusky or purplish discoloration of her skin due to a deficient oxygen level in the blood, either locally or systemically. WEBSTER’S INTERNATIONAL DICTIONARY 712 (3d ed. 1986). A person is dyspneic when she experiences labored breathing, or has difficulty in breathing.

<sup>71</sup> *McMullen v. Ohio State Univ. Hosp.*, 725 N.E.2d 1117, 1119 (Ohio 2000).

<sup>72</sup> *Id.*

<sup>73</sup> *McMullen v. Ohio State Univ. Hosp.*, No. 97API10-1301, 1998 WL 655023, at \*1 (Ohio Ct. App. Sept. 22, 1998), *rev’d*, 725 N.E.2d 1117 (Ohio 2000). Dr. Wilmer made at least one attempt and Dr. Campbell made at least five unsuccessful attempts to reintubate McMullen. *McMullen*, 725 N.E.2d at 1119. Dr. Penn testified that due to the failure to timely reintubate McMullen, her direct cause of death was a combination of diffuse alveolar damage of the lungs associated with a mass of Ischemic damage to the heart, pancreas, adrenals, brain and the gastrointestinal tract. *Id.* at 1120.

<sup>74</sup> *McMullen*, 1998 WL 665032, at \*1.

<sup>75</sup> *McMullen*, 725 N.E.2d at 1117. The Court of Claims concluded that the nurses and doctors were negligent in both the removal of the endotracheal tube and the attempted reintubation of McMullen. *Id.* at 1119. The court also found that the anesthesiologist was negligent when it took six or more attempts to reintubate McMullen. *Id.*

regarding proximate cause,<sup>76</sup> the Court of Claims found that the plaintiff had proven \$1,000,000 in damages.<sup>77</sup>

The Court applied the mathematical formula used in *Roberts* and determined that the decedent had a 25-percent chance of survival.<sup>78</sup> After the defendant's actions, her chance of survival was zero percent.<sup>79</sup> The court awarded the plaintiff \$250,000, and both parties appealed.<sup>80</sup>

The Court of Appeals agreed that the loss-of-chance doctrine was applicable in this case, but remanded the case to the Court of Claims to determine the actual lost chance of survival.<sup>81</sup> Plaintiff subsequently filed a Notice of Appeal, which the Supreme Court of Ohio granted.<sup>82</sup>

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<sup>76</sup> *Id.* at 1120. Plaintiff's experts concluded that the direct cause of death was the hypoxic episode, which resulted in diffuse alveolar damage to her lungs. *Id.* The defendant's expert opined that McMullen would have died within thirty days notwithstanding the incident. *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *McMullen v. Ohio State Univ. Hosp.*, 725 N.E.2d 1117, 1120 (Ohio 2000).

<sup>79</sup> *Id.*

<sup>80</sup> *Roberts v. Ohio Permanente Med. Group, Inc.*, 668 N.E.2d 480, 484-85 (Ohio 1996). The court stated that the amount of damages recoverable by a plaintiff in a loss-of-chance case equals the total sum of damages for the underlying injury or death assessed from the date of the negligent act or omission multiplied by the percentage of the lost chance. *Id.* at 484. The Court of Claims found that the plaintiff's damages were \$1,000,000 and since there was a 25-percent chance of survival, Ms. McMullen was entitled to \$250,000. *McMullen v. Ohio State Univ. Hosp.*, No. 97API10-1301, 1998 WL 655023, at \*3 (Ohio Ct. App. Sept 22, 1998). The plaintiff's assignment of error was that the "trial court erred in applying the law regarding the loss of chance of survival as set forth by the Supreme Court in *Roberts* to the present case after the defendant's negligence was the direct and proximate cause of McMullen's death." *Id.* at \*3. The majority of the defendant's assignments of errors are outside the scope of this article.

<sup>81</sup> *Id.* at \*7. The court stated "given the lack of evidence to support a judgment that decedent lost a 25-percent chance of survival, the judgment must be reversed as against the manifest weight of the evidence. *C.E. Morris v. Foley Const. Co.*, 376 N.E.2d 578, 579 (Ohio 1978) (holding that the rule in Ohio is that judgments supported by some kind of credible evidence going to all essential elements of the case will not be reversed by a reviewing court as being against the "manifest weight of the evidence"). *But see McMullen*, 1998 WL 655023, at \*16 (Bryant, J., dissenting) (arguing that this case should be reversed on the grounds that it is a case of traditional medical malpractice).

<sup>82</sup> *McMullen*, 725 N.E.2d at 1121.

### C. Ohio Supreme Court Decision

The Court, in an opinion written by Justice Resnick, held that the loss-of-chance doctrine does not apply when there is a finding of a direct causal connection between the negligent act and the patient's death.<sup>83</sup> The Court found that the negligence of the defendant did not combine with any pre-existing harm, because this negligence was the sole cause of the decedent's harm.<sup>84</sup> The Court concluded, agreeing with Justice Bryant,<sup>85</sup> that this case is a straightforward medical malpractice case because the actions of the hospital employees did not hasten or aggravate a pre-existing condition.<sup>86</sup>

In a strong dissenting opinion, Chief Justice Moyer emphasized that this decision will subject doctors to full damages despite the fact that there was only a 25 percent chance of survival.<sup>87</sup> In his opinion, this case is analogous to a typical loss-of-chance claim because McMullen's disease had progressed to a level where her respiratory system did not function naturally.<sup>88</sup> The Chief Justice gave no reason for distinguishing this case from a case that applied the *Roberts* analysis. In the case at bar, there was a pre-existing condition affecting Ms.

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<sup>83</sup> *Id.* at 1123. The court reasoned that the loss-of-chance doctrine does not apply to a person who could ultimately satisfy the causation requirement. *Id.* at 1122.

<sup>84</sup> *Id.* at 1124. *See also* Anderson v. Picciotti, 676 A.2d 127 (N.J. 1996) (stating that the defendant was not entitled to a loss-of-chance instruction absent sufficient evidence proving that the defendant's negligent conduct combined with a pre-existing condition to cause the harm to the patient).

<sup>85</sup> *McMullen*, 1998 WL 655023, at \*15 (Bryant, J., dissenting).

<sup>86</sup> *McMullen v. Ohio State Univ. Hosp.*, 725 N.E.2d 1117, 1125 (Ohio 2000).

<sup>87</sup> *Id.* at 1129 (Moyer, C.J., dissenting). Chief Justice Moyer stated several reasons why the lower court correctly determined this was a loss-of-chance case. *Id.* at 1130. First, the trial court never stated that the removal of the tube or the failure to reintubate was the cause of death. *Id.* Second, the trial court found that an oxygen level of 69 percent was inconsistent with life, not the negligence of the doctors. *Id.*

<sup>88</sup> *Id.*

McMullen and the Court of Claims found it three times as likely that Ms. McMullen would not have recovered, even with correct medical treatment.<sup>89</sup>

#### IV. ANALYSIS

##### A. *The Ohio Supreme Court's Application of Traditional Medical Malpractice Requirements*

Ohio has adhered to the same requirements established as common law many years ago.<sup>90</sup> The concept of allowing an injured party to recover an unmitigated damage award flowing from her injuries, if she can show that the defendant proximately caused the harm, has a long history of acceptance in our court system.<sup>91</sup>

##### B. *Present Decision by the Ohio Supreme Court*

Based upon substantive legal principles and notions of public policy, this decision is consistent with the decisions of earlier courts.<sup>92</sup> First, the Court acknowledged the existence of the loss-of-chance doctrine, but refused to apply it to these particular circumstances.<sup>93</sup> The Court

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<sup>89</sup> *Id.* at 1129. *See also* Joseph H. King Jr., *Reduction of Likelihood: Reformulation and Other Retrofitting of the Loss-of-Chance Doctrine*, 28 U. MEM. L. REV. 491, 495 (1998). Professor King listed a number of factors to determine whether lost chance principles or traditional causation principles apply. *Id.* King suggested that the loss-of-chance doctrine should apply when one of the four is present. *Id.* Chief Justice Moyer stated in his opinion that *McMullen* possessed the attributes of 2(b): “the only question was how to reflect the presence of a preexisting condition in calculating the damages for a materialized injury that the defendant is proven to have probably actively, tortiously caused.” *McMullen*, 725 N.E.2d at 1129.

<sup>90</sup> *See supra* note 7. *See also* Littleton v. Good Samaritan Hosp. & Health Ctr., 529 N.E.2d 449, 454 (Ohio 1988) (listing the requirements the plaintiff must prove). The traditional common law rule has resulted in many cases of an uncompensated but deserving plaintiff. *Id.*; *Perdue*, *supra* note 20, at 43-44. *Perdue* illustrates a number of ways that a plaintiff may fail to establish causation. *Id.* First, the required expert may not want to testify in terms of “reasonable medical certainty.” *Id.* Second, there is also a theory referred to as the “conspiracy of silence.” *Id.* Here the expert refuses to testify against other doctors he is associated with or practices in the same field. *Id.* Third, the court may just reject the plaintiff offering of proof that the actions of the defendant were indeed the proximate cause of the harm, and accept that defendant’s contention that he only “eliminated” a chance of survival. *Id.* at 44 n.41. However, causation works to the advantage of the plaintiff in many other cases. *Id.* at 45. If the injured plaintiff can satisfy the preponderance of the evidence burden with respect to causation, he receives an award, which cannot be discounted by the percentage of his chance of survival. *Id.*

<sup>91</sup> Robert S. Bruer, *Loss of Chance As A Cause of Action in Medical Malpractice Cases*, 59 MO. L. REV. 969, 986 (1994).

<sup>92</sup> *See infra* notes 106-17 and accompanying text.

relied upon the decision in *Anderson v. Picciotti*,<sup>94</sup> which stated that, in order for a defendant “to benefit from the loss-of-chance doctrine, he must prove that the plaintiff’s injury was caused by concurrent causes and one of which must be unrelated to the defendant’s negligence.”<sup>95</sup>

In this case, there was only one cause of death: the hypoxic state brought on by the doctors and the nurses who attempted to reintubate Ms. McMullen.<sup>96</sup> The failure to reintubate caused her oxygen level to drop to 29 percent, which expert testimony on both sides concluded was “inconsistent with life.”<sup>97</sup> The hospital admitted Ms. McMullen originally to receive a bone marrow transplant and, subsequent to her death, the doctors found that no malignancy remained in her body.<sup>98</sup> In light of this information, this case differs from the cases controlled by *Roberts*.<sup>99</sup> Ms. McMullen died from a single tortious event that was under the defendant’s control.<sup>100</sup> It would be unconscionable to apply the award-reduction rule from *Roberts* to a case in which the incompetence or the inability of the presiding doctor injured the patient.

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<sup>93</sup> *McMullen v. Ohio State Univ. Hosp.*, 725 N.E.2d 1117, 1123 (Ohio 2000). However, the court’s language indicated that the plaintiff should not be involuntarily confined within the limits of an increased risk or loss-of-chance theory where her efforts to prove a direct causal relationship between the defendant’s negligence and the decedent’s death are successful. *Id.*

<sup>94</sup> *Anderson v. Picciotti*, 676 A.2d 127, 134 (N.J. 1996).

<sup>95</sup> *McMullen*, 725 N.E.2d at 1124; *Anderson*, 676 A.2d. at 134.

<sup>96</sup> *McMullen*, 725 N.E.2d at 1124-25. Justice Resnick stated “. . . that the negligence of the hospital did not combine with a condition that McMullen was already experiencing. *Id.* The actions of the employees of the hospital caused the direct harm . . . they made ‘it certain that she would not survive.’” *Id.* Brief for Appellant at 10, *McMullen* (No. 98-2358). The postmortem examination discovered that there was no malignancy present in the bone marrow. *Id.*

<sup>97</sup> *McMullen v. Ohio State Univ. Hosp.*, No. 97API10-1301, 1998 WL 655023, at \*7 (Ohio Ct. App. Sept. 22, 1998), *rev’d*, 725 N.E.2d 1117 (Ohio 2000). Dr. Meyer’s report concluded that the doctor’s delay in reintubating her caused the deprivation of oxygen to McMullen. *Id.* An oxygen saturation of this level caused irreversible damages to her heart, lungs and brain. *Id.* The only thing inconsistent with life is death. *Id.*

<sup>98</sup> Amicus Curiae Brief on Behalf of Trial Lawyers of America for Appellant at i, *McMullen* (No. 98-2358).

<sup>99</sup> *See supra* notes 63-64.

<sup>100</sup> *McMullen v. Ohio State Univ. Hosp.*, 725 N.E.2d 1117, 1124-25 (Ohio 2000).

Second, both of the dissenting justices in *McMullen*, as well as the majority in the appellate court decision, misconstrued the limited holding in *Roberts*.<sup>101</sup> *Roberts* plainly states that although the court is adopting the loss-of-chance doctrine, it does not alter traditional causation principles and it does not overrule *Cooper*.<sup>102</sup>

The decisions in numerous cases in Ohio and in other jurisdictions lend credence to the aforementioned analysis and conclusion.<sup>103</sup> These cases demonstrate certain factual situations in which *Cooper* was applied and in which the causation requirement was satisfied.<sup>104</sup> There are also several cases in which the plaintiff failed to meet his burden of proof.<sup>105</sup>

For example, in *Ulmer v. Ackerman*,<sup>106</sup> which is factually similar to *McMullen*, the Court stated that when a “qualified expert testifies that the departure from the standard of care causes

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<sup>101</sup> *Roberts v. Ohio Permanente Med. Group, Inc.*, 668 N.E.2d 480, 485 (Ohio 1996).

<sup>102</sup> *Id.* The court stated that:

We stress that our decision today is limited in its scope and does not alter traditional principles of causation in other areas of the law. Instead of overruling *Cooper*, we join the majority of the states that have adopted the loss of chance theory and recognize the importance of compensating plaintiffs in an amount consistent . . . with acts or omissions.

*Id.*

<sup>103</sup> *See infra* notes 106, 109, 114 and accompanying text. *See also* *Dixon v. Taylor*, 431 S.E.2d 778 (N.C. Ct. App. 1993). Mrs. Dixon arrived at the hospital and was put under the care of Dr. Sykes. *Id.* at 779. Her condition worsened to a point where a decision was made to intubate her to provide respiratory support. *Id.* Dr. Taylor decided to slowly take Dixon off the tube, but before they could do so Dixon had to be in the proper position in her bed. *Id.* at 780. Blackham, a respiratory therapist, removed the tube; however, Dixon was not breathing properly. *Id.* It was decided to reintubate her, but Blackham could not get the tube back into her. *Id.* Successful reintubation was accomplished eighteen minutes later, but Dixon never regained consciousness. *Id.* A neurological evaluation indicated that Dixon was brain dead due to suffocation. *Id.* The court held that the trial court was correct in denying directed verdicts for the defendants because reasonable minds “could accept from the testimony at trial that the hospital’s breach of duty was a cause of Dixon’s death . . . and the failure to stock the cart with proper instruments for reintubation was a proximate cause of death.” *Id.* at 782.

<sup>104</sup> *See infra* notes 106, 109 and accompanying text.

<sup>105</sup> *See infra* notes 114-16 and accompanying text.

<sup>106</sup> *Ulmer v. Ackerman*, 621 N.E.2d 1315 (Ohio Ct. App. 1993). While Ulmer was in surgery, an anesthesiologist administered anesthesia using an endotracheal tube. *Id.* He was taken from surgery to the recovery room where the endotracheal tube was still in place. *Id.* at 1317-18. The patient’s breathing was recorded and found choppy, requiring assistance to continue breathing. *Id.* at 1318. The doctor subsequently removed the tube. *Id.* The plaintiff brought a medical malpractice claim based upon the allegation that the anesthesiologist prematurely

the death of the patient . . . it imports that the patient would have survived absent the departure.”<sup>107</sup> Ms. McMullen’s medical experts testified that the cause of her death was the hypoxic condition that resulted from the doctors’ failure to reintubate her in a timely manner.<sup>108</sup>

In another case, *Safranic v. Belamy*,<sup>109</sup> the hospital admitted the decedent because she was experiencing breathing difficulties.<sup>110</sup> The Court held that, although the plaintiff must produce evidence that the defendant’s act probably caused the injury, an injured plaintiff does not need to show that the negligence resulted in a greater than 50-percent loss of chance for survival.<sup>111</sup> The Court only required that an expert testify to a reasonable degree of medical certainty that the defendant’s actions caused the injury.<sup>112</sup> *McMullen* is analogous to *Safranic* because the court determined that the doctor’s negligence caused a 25-percent reduction in Ms. McMullen’s chance of survival.<sup>113</sup>

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removed the tube. *Id.* at 1315. The plaintiff’s expert, Doctor de Rosayro, testified that the tube was removed prematurely because Ulmer was not shown to be breathing adequately on his own. *Id.* The court stated where “no other alternative save decedent’s death may be inferred from the defendant’s conduct according to expert medical testimony, no occasion arose for disproof of other alternatives. *Id.* at 1319. The court found that *Cooper* did not require a plaintiff to show that the decedent would have survived but for the negligence of the anesthesiologist. *Id.* The court noted “where no other alternative save decedent’s death may be inferred from the defendant’s conduct according to expert medical testimony, no occasion arose for disproof of other alternatives.” *Id.*

<sup>107</sup> *Id.* The court went on to say that no more than this is required for a plaintiff to establish proximate cause in a prima facie medical malpractice case. *Id.*

<sup>108</sup> *McMullen v. Ohio State Univ. Hosp.*, No. 97API10-1301, 1998 WL 655023, at \*3 (Ohio Ct. App. Sept. 22, 1998), *rev’d*, 725 N.E.2d 1117 (Ohio 2000).

<sup>109</sup> *Safranic v. Belamy*, 623 N.E.2d 611 (Ohio Ct. App. 1993).

<sup>110</sup> *Id.* Dr. Brower, the plaintiff’s expert, testified that the staff of the hospital did not exercise the required standard of care. *Id.* The basis of the plaintiff’s medical malpractice claim was the hospital’s failure to detect her myocardial infarction and failing to properly monitor her after removal from the ventilator. *Id.*

<sup>111</sup> *Id.* at 613.

<sup>112</sup> *Id.*

<sup>113</sup> *See supra* notes 80-81. The Court of Claims took all of the expert’s testimony in the aggregate and concluded that McMullen had less than a 50-percent chance of survival, and more specifically, a 25-percent chance of survival. *McMullen*, 1998 WL 655023, at \*7.

However, in *Moore v. University of Cincinnati Hospital*, the plaintiff was unable to satisfy the *Cooper* standard.<sup>114</sup> In this case, the decedent had a comparatively minor form of sickle-cell anemia.<sup>115</sup> Dr. Castro, the plaintiff's expert, testified that a transfusion would have allowed the decedent a chance to survive; however, the expert could not say whether it was more probable than not that the patient would have survived.<sup>116</sup>

Examining all of these cases demonstrates that, if the plaintiff can prove that the defendant's act caused the injury to the patient by a reasonable degree of probability, the plaintiff can recover.<sup>117</sup> This also shows that the loss-of-chance claim, as the one upheld in *Roberts*, is applicable only when the plaintiff cannot meet her burden of proof.<sup>118</sup> The rationale set forth in *McMullen* is neither a novel approach, nor one that branches off from the accepted principles of substantive law.<sup>119</sup> The *McMullen* Court maintained the traditional requirements of tort law by imposing a strict standard upon the plaintiff before it would find the defendant liable.

### C. Public Policy Justifications

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<sup>114</sup> *Moore v. University of Cincinnati Hosp.*, 639 N.E.2d 798 (Ohio Ct. App. 1994).

<sup>115</sup> *Id.* at 798. The patient's condition improved when she was admitted to the hospital but she later passed away due to a sickle-cell "crisis," complicated by a bone marrow infection. *Id.*

<sup>116</sup> *Id.* at 800. In fact, only a third of Castro's patients who received blood transfusions and who suffered from the same condition as the decedent actually survived. *Id.*

<sup>117</sup> KEETON ET AL., *supra* note 3, § 41, at 269.

<sup>118</sup> *See supra* notes 106, 109. It is well settled that the loss-of-chance doctrine is an exception to the common law medical malpractice rule. This doctrine applies when the plaintiff cannot satisfy his standard of proof with respect to causation or any of the other elements of the cause of action. *See Safranic v. Belany*, 623 N.E. 2d 611 (Ohio Ct. App. 1993). Cases evince that when the plaintiff can satisfy the requirement of proximate cause, regardless of the percentage chance of survival, he or she is entitled to full compensation. *Id.* at 613.

<sup>119</sup> *See supra* note 7. McMullen satisfied each of the required elements. *McMullen v. Ohio State Univ. Hosp.*, 725 N.E.2d 1117, 1127 (Ohio 2000). A duty was established between the doctor and McMullen, and the court accepted expert testimony that the doctor breached that standard of care. *Id.* McMullen satisfied the "but-for" causation as well as the proximate cause requirement. *Id.* The defendant's actions were established as the direct cause of her demise. *See also Cavico & Cavico, supra* note 7, at 599 (allowing damages that compensate the plaintiff in whole or in part).

The decision in *McMullen* solidifies various public policy concerns related to medical malpractice cases.<sup>120</sup> Ohio cases, especially those that stem from *Roberts* and the “increased harm” doctrine, should not be extended in scope to allow a diminution in the award to an individual who is harmed by the negligent acts of the defendant.<sup>121</sup> If the court had allowed a reduction in the award because the patient had a less than an even chance of survival, the court in essence would have allowed future patients to become “wild game” and would have allowed for “open season” for other doctors in similar situations.<sup>122</sup>

Second, an injured party should not be restricted in deciding what claims are permissible to assert when all the elements of the underlying tort are satisfied.<sup>123</sup> By allowing *Roberts* to govern and forcing Ms. McMullen to use the “loss-of-chance” doctrine, the freedom and independence of our judicial system disappears, and the defendant ultimately controls the direction of the litigation.

Finally, the loss-of-chance doctrine is a policy that attempts to benefit both the injured party and the negligent doctor.<sup>124</sup> Allowing a case to be heard by a jury that, under traditional

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<sup>120</sup> See *infra* notes 121-27.

<sup>121</sup> See *supra* notes 106, 109. For centuries, traditional medical malpractice law has required the plaintiff to prove four demanding elements. Denying the plaintiff full recovery when she satisfies all the requirements of the cause of action would take hundreds of years of case law and effectively overrule every decision.

<sup>122</sup> Cf. *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 409 (Tex. 1993) (Hightower, J., dissenting). While the language in the case is advocating the allowance of the loss-of-chance doctrine, its reasoning and theory can be extended to the situation in *McMullen*. By allowing doctors to cap their liability in relation to the percentage chance of survival of the patient it would “declare open season on critically ill or injured persons . . . a segment of society often least able to exercise independent judgment would be at the mercy of those professionals on whom it must rely for life saving health care.” *Id.*

<sup>123</sup> *McMullen v. Ohio State Univ. Hosp.*, 725 N.E.2d 1117, 1123 (Ohio 2000). The court emphasized that: a plaintiff should not, however, be involuntarily confined within the limits of an increased risk or loss of chance theory where her efforts to prove a causal relationship between the defendant’s negligence and the decedent’s death are successful. The loss of chance issue must be conditioned upon a negative finding of proximate cause. *Id.* at 1123-24.

causation principles, would be barred from jury consideration benefits the plaintiff, and ultimately results in more plaintiffs receiving just compensation.<sup>125</sup>

Conversely, this doctrine benefits the defendant by limiting the patient's damages to the extent of the eliminated chance of survival.<sup>126</sup> However, it would be untenable to allow a defendant to use the loss-of-chance doctrine as a protective shield. Where it is determined that the actions of the defendant directly caused the patient's harm, "it does not lie in the defendant's mouth to raise conjectures as to the measure of chances that he has put beyond the possibility of realization."<sup>127</sup>

#### *D. Future Effects in Ohio*

The decision handed down in *McMullen* signals a significant victory for injured patients who have less than a 50-percent chance of survival.<sup>128</sup> Courts can interpret *McMullen* as giving

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<sup>124</sup> Mangan, *supra* note 20, at 324. The loss-of-chance doctrine now allows an opportunity for an injured patient to recover damages for the result that the defendant has negligently caused, whether it be death or injury. *Id.* See also King, *supra* note 25, at 1360. Professor King argues that this doctrine will benefit the negligent doctor:

Holding the defendant liable for the entire harm without any consideration of the preexisting condition is . . . unsound . . . . The defendant should be subject to liability only to the extent that he tortiously contributed to the harm by allowing a preexisting condition to progress or by aggravating or accelerating its harmful effects.

*Id.* at 1359-60.

<sup>125</sup> Mangan, *supra* note 20, at 285. The unfairness of denying recovery to an injured patient was the catalyst for the evolution of the loss-of-chance doctrine. See Howard Ross Feldman, *Chances as Protected Interests: Recovery for the Loss of A Chance and Increased Risk*, 17 U. BALT. L. REV. 139, 148 (1987). Feldman argues that because tort law allows for recovery for any protected interest that the loss of a chance of survival should be classified in the same manner. *Id.*

<sup>126</sup> King, *supra* note 25, at 1360. Although the defendant caused part of the injury, it is inequitable and patently unfair to allow full recovery against the defendant when the normal course of human existence has invaded the patient's body and permitted the present disease to spread throughout the patient's body. *Id.* See also *supra* note 124.

<sup>127</sup> *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966).

<sup>128</sup> *McMullen v. Ohio State Univ. Hosp.*, No. 97API10-1301, 1998 WL 655023, at \*7 (Ohio Ct. App. Sept. 22, 1998), *rev'd*, 725 N.E.2d 1117 (Ohio 2000). The Court of Claims concluded that the decedent had less than a 50-percent chance of surviving before the actions of the defendant. *Id.* Dr. Carl Meyer testified, on behalf of the plaintiff that McMullen had up to a 60-percent chance of survival. *Id.* However, Dr. Neena Kapoor testified that McMullen had less than a 50-percent chance of survival. *Id.* Dr. Skeel testified that McMullen had less than a 20-percent chance of survival, whereas Dr. Crawford testified that McMullen had a zero percent chance of survival. *Id.*

notice or warning to all doctors because plaintiffs may be able to recover an appropriate amount of damages for their injuries, despite a low percentage of survival.<sup>129</sup> Before *McMullen*, however, a patient could not recover damages without some type of reduction if he or she had less than a 51-percent chance of survival.<sup>130</sup> Now, there is a significant likelihood that patients will prevail under similar circumstances.

However, this decision will ultimately harm the defendant medical practitioner for several reasons.<sup>131</sup> First, there will be not only a vast expansion of liability, but also added societal costs, which will raise both doctors' fees and medical insurance premiums for most people.<sup>132</sup> Second, by allowing this new theory, the courtroom doors are open to engulf the masses.<sup>133</sup> Lastly, some commentators have expressed concern that the increase in litigation may prevent numerous inventions and advancements within the medical field.<sup>134</sup>

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The court stated that it is clear from the Court of Claims' discussion of causation that the court chose not to adopt Dr. Meyer's testimony that the decedent had a better than 50-percent chance of surviving at the time of the University Hospital's breach of its duty of care. *Id.* at \*7. On a general level, this decision allows the traditional requirements of proximate cause to remain in effect.

<sup>129</sup> Ellis, *supra* note 20, at 372. Doctors should now be aware that they will be legally and "perhaps" morally responsible for the entire award amount if their negligent act is found to be the proximate cause of the patient's injury.

<sup>130</sup> See *supra* notes 32-34. If the chance of survival was below 51 percent, the patient could not mathematically show it was more probable than not that the defendant caused the resulting injury.

<sup>131</sup> See *infra* notes 132-34 and accompanying text.

<sup>132</sup> Cf. Boggs, *supra* note 27, at 439 (claiming that people in the medical field fear that insurance premiums will rise significantly). But see Feldman, *supra* note 125, at 150. (arguing that insurance costs will actually decrease because of the added quality and efficiency within the medical field (the reasoning and policy concerns listed were originally listed as a criticism of the loss-of-chance doctrine; however, they can be equally and as successfully applied to the decision in *McMullen*)).

<sup>133</sup> Feldman, *supra* note 125, at 151. However, this concern is minimized by two factors: (1) The court system can weed out frivolous claims by invoking the use of arbitration or "medical malpractice tribunals" and, (2) the courts may refuse to allow claims praying for *de minimis* relief. *Id.*

<sup>134</sup> Cf. Mangan, *supra* note 20, at 324. The reasoning listed originally applied to the loss-of-chance doctrine. However this logic can be extended to the situation in *McMullen*. Both situations involve "a new theory" and along with a "new theory" comes an abundance of new claims and increased costs, not only to everyone involved, but also to the general population as a whole.

## V. CONCLUSION

The Court in *McMullen* had the opportunity to confront the issue of whether the loss-of-chance doctrine applies to a patient who has less than a 50-percent chance of survival and who establishes a direct causal connection between the injury and the defendant's act.<sup>135</sup> The Court correctly decided that no rational basis exists, either in law or policy, for restricting a patient's recovery when the applicable standards of proof are satisfied, and it correctly held that the loss-of-chance doctrine is not applicable in this type of situation.<sup>136</sup>

*McMullen* falls outside the reach of the loss-of-chance doctrine because the plaintiff did not have a preexisting condition present at the time of the defendant's wrongful actions.<sup>137</sup> The defendant made it 100-percent certain that McMullen would not survive.<sup>138</sup> The injured party must always have an opportunity to recover damages; otherwise, doctors will have more incentive to engage in sloppy or careless treatment. Doctors should not be able to escape the appropriate standard of care that all patients deserve, regardless of the patient's state of health or illness. Human life is valuable and we must protect it throughout all its stages, from birth to death.<sup>139</sup> Trying to make this case fit into a loss-of-chance analysis would be like trying to "force a square peg into a round hole."<sup>140</sup>

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<sup>135</sup> *McMullen v. Ohio State Univ. Hosp.*, 725 N.E.2d 1117, 1122 (Ohio 2000).

<sup>136</sup> *Id.* at 1124-25.

<sup>137</sup> *Id.* at 1124.

<sup>138</sup> *Id.* at 1125.

<sup>139</sup> *Mangan*, *supra* note 20, at 325. *Mangan* expressed a concern that some people may place the value of a person's life behind the "possible" added costs that these theories may levy upon a medical practitioner. *Id.* She stressed that no matter what the costs incurred by the doctor's for their conduct, the courts cannot diminish the value of human life. *Id.*

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<sup>140</sup> Anderson v. Picciotti, 676 A.2d 127, 131 (N.J. 1996).