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## The Law of Torts

Daniel W. Hayes

Bryson B. Moore

Stephen B. Samuels

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# THE LAW OF TORTS

## I. COURT OF APPEALS ADOPTS RESTATEMENT APPROACH TO DETERMINE AN ACCOUNTANT'S DUTY TO THIRD PARTY INVESTORS

In *ML-Lee Acquisition Fund v. Deloitte & Touche*<sup>1</sup> the South Carolina Court of Appeals adopted the Restatement (Second) of Torts<sup>2</sup> view on the scope of public accountants' duties to third persons who use and rely on their reports.<sup>3</sup> In issuing this opinion, South Carolina joins those states that subscribe to the majority view, including Georgia and North Carolina.<sup>4</sup> Section 552 of the Restatement provides that an accountant's duty is limited to the client and third parties upon whom the accountant or client intends to confer the benefit of compiled information. This duty necessarily extends beyond those in privity or near-privity with the accountant, but does not reach so far as to impose liability when the accountant only knows of a possibility of distribution with subsequent reliance on the report.<sup>5</sup> The scope of accountants' duties to third parties who use and rely on their information was a matter of first impression in South Carolina.<sup>6</sup>

The *ML-Lee* controversy centered around Emb-Tex Corporation (Emb-Tex), a heavily leveraged textile facility. Emb-Tex employed Deloitte & Touche (Deloitte) as its accounting firm from 1983 until the end of 1990. With an eye toward attracting outside investors, Emb-Tex hired the New York investment banking firm Kidder, Peabody (Kidder), which in turn contacted ML-Lee's investment advisor, Thomas H. Lee Company, Inc. (Lee Advisor). Kidder eventually developed an offering memorandum for Lee Advisor that incorporated the audited financial statements prepared by Deloitte for 1983 to 1986. On March 1, 1988, based on Lee Advisor's evaluation, the ML-Lee partners voted their approval of an Emb-Tex investment strategy.<sup>7</sup>

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1. \_\_\_ S.C. \_\_\_, 463 S.E.2d 618 (Ct. App. 1995), *cert. granted*, No. 2391, Davis Ad. Sh. No. 23 (S.C. Aug. 24, 1996).

2. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

3. *ML-Lee*, \_\_\_ S.C. at \_\_\_, 463 S.E.2d at 627.

4. See *Bily v. Arthur Young & Co.*, 834 P.2d 745 (Cal. 1992) (en banc); *Badische Corp. v. Caylor*, 356 S.E.2d 198 (Ga. 1987); *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 367 S.E.2d 609 (N.C. 1988); Daniel J. Barrison, Comment, *State Blue Sky Laws: An Alternative to the Federal Securities Laws and State Common Law in Third-Party Accountant Malpractice Cases*, 57 TEMP. L.Q. 601 (1984); Denise M. Orlinski, Note, *An Accountant's Liability to Third Parties: Bily v. Arthur Young & Co.*, 43 DEPAUL L. REV. 859 (1994). But see Jack W. Shaw, Jr., Annotation, *Liability of Public Accountant to Third Parties*, 46 A.L.R.3d 979 (1972) (concluding that the generally accepted view is the privity rule, but recognizing that as of 1972 a few courts were beginning to challenge this rule based primarily on the Restatement view).

5. *ML-Lee*, \_\_\_ S.C. at \_\_\_, 463 S.E.2d at 625.

6. *Id.* at \_\_\_, 463 S.E.2d at 625.

7. *Id.* at \_\_\_, 463 S.E.2d at 621-22.

Peat Marwick, hired by Lee Advisor to review Emb-Tex's records, discovered that the 1987 audit prepared by Deloitte contained some inventory overstatements and an unusual inventory valuation method. Following up on this discovery, Lee Advisor wrote a letter to Emb-Tex offering a commitment to invest, but expressly conditioned the offer on the fulfillment of several requirements, including a comfort letter.<sup>8</sup> Deloitte issued the comfort letter, subject to certain disclaimers.<sup>9</sup> The letter assured ML-Lee that nothing had come to its attention suggesting that the unaudited financial statements for the first four months of 1988 were prepared in nonconformance with generally accepted accounting principles. The comfort letter also confirmed that there was no evidence of any increase in long-term debt or decrease in stockholder's equity or total assets (as compared to the 1987 statement). The parties closed the transaction on May 24, 1988.<sup>10</sup>

On November 2, 1988, Lee Advisor recommended an additional \$2 million investment. Lee Advisor based this recommendation on the Deloitte audited financial statements for 1988 and draft financial statements for 1989. In late November 1990, a Deloitte auditor discovered that the Emb-Tex inventory had possibly been overvalued and reported this information to Deloitte partner David Sutton.<sup>11</sup>

Within a week, Sutton participated in a conference call with Warren Smith of Lee Advisor and learned of ML-Lee's proposed additional investment. Sutton opined to Smith that ML-Lee had become Deloitte's new client with respect to the audit work and that the inventory was problematic, but he failed to mention the overvaluation. Deloitte withdrew from its relationship with Emb-Tex on December 3, 1990. ML-Lee closed its additional investment on December 11, 1990. In February 1991, a former Emb-Tex controller sent letters to Deloitte and ML-Lee revealing the inventory overstatement.<sup>12</sup>

ML-Lee filed an action against Deloitte alleging professional negligence and negligent misrepresentation. In granting Deloitte's motion for summary judgment, the trial court applied the Restatement (Second) of Torts view on public accountants' duties to third persons. As a matter of law, the lower court

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8. Lee Advisor requested the comfort letter for assurance that the contemplated transactions would not be avoidable under any bankruptcy or fraudulent conveyance law. *Id.* at \_\_\_, 463 S.E.2d at 622.

9. The letter stated: "The foregoing procedures do not constitute an examination made in accordance with generally accepted auditing standards, and they would not necessarily reveal matters of significance with respect to the comments in the following paragraph. Accordingly, we make no representations as to the sufficiency of the foregoing procedures for [ML-Lee's] purposes." *Id.* at \_\_\_, 463 S.E.2d at 622.

10. *Id.* at \_\_\_, 463 S.E.2d at 622-23.

11. *Id.* at \_\_\_, 463 S.E.2d at 623.

12. Emb-Tex's president had overstated the inventory from December 1985 through September 1989 by \$2.5 million to \$4 million. *Id.* at \_\_\_, 463 S.E.2d at 624.

concluded that Deloitte did not owe a duty to ML-Lee and that ML-Lee did not rely on Deloitte's audit reports.<sup>13</sup>

Upon review, the court of appeals considered the three major approaches United States jurisdictions have developed on the issue of accountant liability to third parties.<sup>14</sup> The first, and most restrictive, is the approach originally applied by Judge Cardozo in *Ultramares Corp. v. Touche*,<sup>15</sup> which requires strict contractual privity before liability may be imposed. The New York Court of Appeals relaxed this rule somewhat in *Credit Alliance Corp. v. Aurthur Anderson & Co.*,<sup>16</sup> extending protection to a third party engaged with an accountant in a relationship sufficiently approaching privity. The relaxed standard has become known as the New York "near privity" rule.

The second approach recognized was the foreseeability approach, which holds accountants liable to any reasonably foreseeable third party who might obtain and rely on the accountant's information. This subjects accountants to liability on the same basis as other tort-feasors.<sup>17</sup>

The appellate court then considered and eventually settled upon a third approach, the majority view, as set forth in the Restatement (Second) of Torts section 552.<sup>18</sup> In short, the Restatement view extends accountants' liability

13. *Id.* at \_\_\_, 463 S.E.2d at 627-29.

14. The North Carolina Supreme Court enunciated four approaches in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 367 S.E.2d 609 (N.C. 1988), upon which the *ML-Lee* court heavily relied. See *ML-Lee*, \_\_\_ S.C. at \_\_\_, 463 S.E.2d at 625-28. The additional fourth approach requires the balancing of various factors. Such a "balancing" method was first introduced by the California Supreme Court in *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958). Some of the relevant factors considered by the *Biakanja* court included:

[T]he extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to [the plaintiff], the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

*Biakanja*, 320 P.2d at 19, quoted in *Raritan*, 367 S.E.2d at 615.

The Missouri Court of Appeals borrowed some of these factors to develop its own "four factor" test. *Aluma Kraft Mfg. Co. v. Elmer Fox & Co.*, 493 S.W.2d 378 (Mo. Ct. App. 1973); see also Barrison, *supra* note 4, at 609 (distinguishing the Missouri "four factor" test as a separate approach); 1 AM. JUR. 2D *Accountants* § 25 (1994) (discussing four general approaches and adding to the "factor" test various additional factors that some states consider, including the following: the proportion the injury bears to the culpability of the tort-feasor, unreasonableness of the burden that potential for fraudulent claims resulting from allowance of recovery would place on the tort-feasor, the allowance of recovery, and the likelihood that allowance of recovery would create a precedent that has no sensible or just stopping point).

15. 174 N.E. 441 (N.Y. 1931).

16. 483 N.E.2d 110 (N.Y. 1985).

17. *ML-Lee*, \_\_\_ S.C. at \_\_\_, 463 S.E.2d at 625.

18. The court quoted the following language:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the

to those third parties who are intended to rely on the information. The court balanced various public policy considerations before determining that the Restatement's expansive view on the scope of an accountant's liability is consistent with today's expansive uses for an accountant's work product. Imposing liability beyond parties in privity will force accountants to issue their information with greater caution. The court also noted that the Restatement view limits liability more than the foreseeability approach. Such a limitation is desirable because public policy opposes potentially expansive liability to unknown third parties.<sup>19</sup> Finally, the court concluded that, because the Restatement approach is in agreement with a previous supreme court decision<sup>20</sup> and because the court of appeals has relied on section 552 in other negligent misrepresentation cases,<sup>21</sup> the approach should be adopted by South Carolina.<sup>22</sup>

Although the court of appeals determined that the trial court correctly adopted the Restatement approach, it found that the trial court's application of section 552, which resulted in summary judgment for Deloitte on all issues, was not entirely correct. The reviewing court first addressed whether Deloitte owed ML-Lee a duty under the Restatement and then briefly discussed whether the evidence was sufficient to show genuine issues of material fact with regard to reliance by ML-Lee. The court analyzed separately each of the major

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guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

*Id.* at \_\_\_, 463 S.E.2d at 625 (quoting RESTATEMENT (SECOND) OF TORTS § 552 (1977)).

19. *Id.* at \_\_\_, 463 S.E.2d at 626-27.

20. South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 376-77, 346 S.E.2d 324, 325-26 (1986) (holding that a duty was owed if a party knew or should have known that information he conferred was intended to be used by a third party in a certain way, but no duty arose through foreseeability alone, and no duty is owed to those distantly affected), *cited with approval in ML-Lee*, \_\_\_ S.C. at \_\_\_, 463 S.E.2d at 627.

21. *See, e.g.*, First Fed. Sav. Bank v. Knauss, 296 S.C. 136, 140, 370 S.E.2d 906, 908 (Ct. App. 1988) (holding that, although the concept of negligent misrepresentation as described in the Restatement is not new to South Carolina, the facts of this case do not establish it); Winburn v. Insurance Co. of N. Am., 287 S.C. 435, 441-42, 339 S.E.2d 142, 146-47 (Ct. App. 1985) (discussing recovery for negligent misrepresentation, but holding that insurance adjuster had not negligently misrepresented mechanic's competence).

22. *ML-Lee*, \_\_\_ S.C. at \_\_\_, 463 S.E.2d at 627.

factual events: (1) the first investment of \$16 million and (2) the additional \$2 million investment. The \$16 million investment was subdivided into the following stages: (a) 1985 and 1986 audit reports, (b) 1987 audit report, and (c) the comfort letter.

The court found that because ML-Lee did not even exist until the end of 1987, Deloitte owed no duty to ML-Lee for the 1985 and 1986 reports. Neither Deloitte nor Emb-Tex could possibly have intended ML-Lee to benefit from the reports. The court further explained that ML-Lee could not step into the shoes of a previous creditor to take advantage of the "substantially similar transaction" provision of the Restatement.<sup>23</sup> Essentially, the court held that the provision "does not . . . expand the knowledge requirement to impose liability where the accountant's work is furnished to unknown third parties."<sup>24</sup> Though the transaction may change in character or degree, the parties must remain the same.

The court found that Deloitte did owe ML-Lee a duty with regard to the 1987 report and the comfort letter. Deloitte had knowledge at the time it issued the 1987 report that Emb-Tex was negotiating to replace and restructure a previous debt. Although Deloitte did not know the actual identity of the intended creditor, it had enough information to create a duty.<sup>25</sup> Furthermore, Deloitte addressed the comfort letter specifically to ML-Lee; therefore, a duty arose under the Restatement requiring that the information be free from negligent or intentional misrepresentations.<sup>26</sup>

Next discussing the \$2 million additional investment, the court decided that when Deloitte discovered the overvaluation of inventory, a duty arose for Deloitte to inform ML-Lee of the error. The court based this decision not on the Restatement, but on South Carolina common law. In particular, the court relied heavily on their decision in *Ardis v. Cox*,<sup>27</sup> which held that a duty to disclose may arise when one party "expressly reposes a trust and confidence" in another party regarding a particular transaction.<sup>28</sup>

As for the general question of reliance, the trial court had concluded that because Lee Advisor was the party who actually used the Deloitte reports, ML-Lee itself could not satisfy reliance elements, inherent in all its claims, based on a theory of imputed reliance from Lee Advisor.<sup>29</sup> In frank disagree-

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23. See *supra* note 18 for the exact language of the provision.

24. *ML-Lee*, \_\_\_ S.C. at \_\_\_, 463 S.E.2d at 628.

25. *Id.* at \_\_\_, 463 S.E.2d at 629-30.

26. The trial court did not discuss whether the information provided in the comfort letter was actually misrepresentative, so the question was remanded for resolution by a jury. *Id.* at \_\_\_, 463 S.E.2d at 630.

27. 314 S.C. 512, 431 S.E.2d 267 (Ct. App. 1993).

28. *Id.* at 517, 431 S.E.2d at 270 (quoting *Jacobson v. Yaschik*, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967)).

29. ML-Lee's inability to show reliance was found to be an independent ground for summary

ment, the court of appeals decided that Lee Advisor was an agent of ML-Lee; therefore, Lee Advisor's reliance could be imputed to the principal.<sup>30</sup> The court, however, found that genuine issues of material fact remained as to whether Lee Advisor, as an agent, had *actually* relied on Deloitte's information in the context of the 1987 report and the comfort letter.<sup>31</sup>

Recent decisions adopting Restatement section 552 have opened the door to potential liability for professionals other than accountants. One such possibility involves title abstractors.<sup>32</sup> In this context, use of section 552 allows a third party to maintain a cause of action based on the tort of negligent misrepresentation despite a lack of privity with the title abstractor.<sup>33</sup> North Carolina's *United Leasing Corp. v. Miller*<sup>34</sup> is a case exemplifying this point. In *Miller* the court allowed a lessor to maintain a cause of action against the lessor's lawyer and his law firm for the negligent preparation of a title abstract.<sup>35</sup> The court disavowed the privity requirement, concluding:

[B]y entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person.<sup>36</sup>

Holdings like that in *Miller* become more important when one considers the influence of North Carolina law in this general area.<sup>37</sup> Together, the expansionist trend of *Miller* and the approving tone of *ML-Lee* should raise

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judgment below. The trial court incorrectly applied *Learjet Corp. v. Spenlinhauer*, 901 F.2d 198 (1st Cir. 1990), which held that indirect reliance is permitted for fraudulent misrepresentation, but not negligent misrepresentation. *ML-Lee*, \_\_\_ S.C. at \_\_\_, 463 S.E.2d at 632-33.

30. "Where a fraud is worked upon an agent by a third person, either by misrepresentation or by silence, the fraud is considered as worked upon the principal, and the latter has a right of action against the third person." 3 AM. JUR. 2D *Agency* § 298 (1986), *quoted in ML-Lee*, \_\_\_ S.C. at \_\_\_, 463 S.E.2d at 632.

31. *ML-Lee*, \_\_\_ S.C. at \_\_\_, 463 S.E.2d at 633.

32. William B. Johnson, Annotation, *Negligence in Preparing Abstract of Title as Ground of Liability to One Other Than Person Ordering Abstract*, 50 A.L.R.4th 314 (1986).

33. *Id.* at 320.

34. 263 S.E.2d 313 (N.C. Ct. App. 1980).

35. *Id.* at 318. The lawyer prepared an abstract for the lessee but failed to discover the existence of a lien that was issued as collateral by the lessee for execution of a leasing agreement with the lessor. *Id.* at 315.

36. *Id.* at 317 (quoting *Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co.*, 257 S.E.2d 50, 58 (N.C. Ct. App. 1979) (quoting WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 93, at 622 (4th ed. 1971))).

37. *See supra* note 14.

some concern as to how attorneys will be affected by future applications of section 552.

Real estate appraisers are also susceptible to third party liability under the Restatement. The North Carolina Court of Appeals, following the reasoning set forth in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*,<sup>38</sup> held that section 552 is the appropriate standard under which to assess a real estate appraiser's liability.<sup>39</sup>

Most jurisdictions are leaving behind the "privity" or "near privity" approach in favor of the Restatement approach. By following North Carolina and the majority of states, South Carolina has made an important step in defining its position on the scope of an accountant's liability to third parties. The possibility of finding other professionals, including attorneys, liable to third parties under section 552 is also an important ramification of the *ML-Lee* decision. North Carolina case law seems especially relevant for South Carolina practitioners in predicting how cases will be adjudicated under the Restatement approach.

*Daniel W. Hayes*

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38. 367 S.E.2d 609 (N.C. 1988).

39. *Ballance v. Rinehart*, 412 S.E.2d 106, 109 (N.C. Ct. App. 1992) (holding that plaintiff's complaint failed to state a claim under section 552).



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## THE LAW OF TORTS

### II.

### SOUTH CAROLINA REJECTS THE LOST CHANCE DOCTRINE

#### A. INTRODUCTION

In *Jones v. Owings*<sup>1</sup> the South Carolina Supreme Court addressed the question of whether a medical malpractice plaintiff may recover damages when a delay in proper diagnosis or treatment results in a patient's being deprived of a less than an even chance of surviving or recovering. The court rejected the lost chance doctrine, which would allow such a patient to recover damages, and held that the plaintiff must show that the "defendant's negligence, *in probability*, proximately caused" the injuries alleged.<sup>2</sup> Thus, even when the defendant physician performs in a clearly negligent manner causing the patient to lose a fifty percent chance of survival, the patient may recover nothing in South Carolina.

#### B. BACKGROUND ON THE LOST CHANCE DOCTRINE

Although an exhaustive discussion of the lost chance doctrine is beyond the scope of this note, a brief overview of its theoretical origins and present status will provide a useful backdrop for an examination of South Carolina's position on the issue.

##### 1. *Causation in Medical Malpractice Actions*

The standard of causation in personal injury tort actions has traditionally adhered to the "more likely than not" rule.<sup>3</sup> In a medical malpractice action, this means that a plaintiff must produce evidence that more probably than not the defendant physician negligence caused the patient's injury.<sup>4</sup> Challenges to this standard have arisen in situations involving a patient with some pre-existing condition that the physician fails to treat with due care, thereby allowing the condition to worsen. A particularly common scenario begins with the physician's negligently failing to diagnose a tumor on the patient's first visit. Six months later, the physician discovers the tumor, which eventually

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1. \_\_\_ S.C. \_\_\_, 456 S.E.2d 371 (1995).

2. *Id.* at \_\_\_, 456 S.E.2d at 373.

3. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 41, at 269 (5th ed. 1984).

4. *See* *Hamil v. Bashline*, 392 A.2d 1280, 1285 (Pa. 1978) ("the preponderance of the evidence [must] show[] defendant's conduct to have been a substantial cause of the harm to the plaintiff").

leads to the patient's death. With proper diagnosis at the first visit, the patient would have had a forty percent chance of surviving. But by visit two, the cancer had spread, and the patient's chances diminished to five percent. Without doubt, the cancer causes the patient's death, but the physician's negligence causes a severe reduction in the patient's chance of surviving.

In such cases the traditional more-likely-than-not standard works a harsh result in the eyes of many courts. These courts believe that the traditional standard would result in "a blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence."<sup>5</sup> Such concerns have led these courts to endorse an alternative approach.

## 2. *Approaches to Lost Chance Situations*<sup>6</sup>

### a. *Proportional Approach*

The proportional approach, generally credited to Professor Joseph King,<sup>7</sup> allows recovery even if with proper care the plaintiff's chance of recovery would not have exceeded fifty percent. The plaintiff, however, cannot recover all of her damages; instead, recovery is limited to the proportion of the total amount of serious injury or death-related damages reflecting the reduced chance.<sup>8</sup> For example, if a patient had a forty percent chance of recovering from breast cancer and a negligent physician's misdiagnosis results in her chances dropping to ten percent, then the plaintiff can recover thirty percent of her total death-related injuries. Thus, if her damages totaled \$100,000, the plaintiff could recover \$30,000. Currently, eleven states follow this approach.<sup>9</sup>

Courts have used several theories to reach this proportional recovery result. Professor King defines the percentage decrease in the patient's chance

5. *Herskovits v. Group Health Coop. of Puget Sound*, 664 P.2d 474, 477 (Wash. 1983) (en banc).

6. Categorizing courts' responses to lost chance situations has proven to be a difficult task for commentators and courts alike. Confusion arises from differences among the jurisdictions in naming the approaches and because some courts fail to explain clearly which approach they are adopting. In addition, some courts adopt a hybrid of two of the approaches, making it difficult to pigeon-hole their response into any of the existing categories. For purposes of this discussion, the labels used by the South Carolina Supreme Court in *Jones v. Owings* will be used herein with attempts made throughout to alert the reader as to possible variations among other jurisdictions.

7. Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981).

8. *Id.* at 1360; *see also* *McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467, 476 (Okla. 1987) (holding that "[t]he amount of damages recoverable is equal to the percent of chance lost multiplied by the total amount of damages which are ordinarily allowed in a wrongful death action").

9. *See* Appendix A for state by state breakdown.

of recovery as a compensable injury.<sup>10</sup> To recover, the plaintiff must show that more likely than not the defendant's negligence caused the reduction in the patient's chance of recovery.<sup>11</sup>

Professor King explains that the distinction between causation and valuation justifies treating a lost chance as a compensable injury. "Causation refers to the cause and effect relationship that must be established between tortious conduct and a loss before liability for that loss may be imposed. . . . Valuation is the process of identifying and measuring the loss that was caused by the tortious conduct."<sup>12</sup> Thus, "[w]hat caused a loss, however, should be a separate question from what the *nature and extent* of the loss are."<sup>13</sup> When a negligent physician *causes* injury by reducing a patient's chance of survival, the percentage reduction is the *value* of that loss. Professor King points out that this theory is in keeping with the "thin skull" doctrine that a defendant takes his victim as he finds him.<sup>14</sup> He criticizes as arbitrary, unjust, and unfair the all-or-nothing approach, which compensates victims only when they lose a greater than fifty percent chance of survival. He claims that the rule "subverts the deterrence objectives of tort law by denying recovery for the effects of conduct that causes statistically demonstrable losses."<sup>15</sup> In addition, the rule is unfair because "[b]ut for the defendant's tortious conduct, it would not have been necessary to grapple with the imponderables of chance."<sup>16</sup> Several courts have adopted King's analysis, which is often referred to as the "pure lost chance" approach.<sup>17</sup>

Another version of the proportional approach, often referred to as the substantial possibility or substantial factor approach, relaxes the standard of causation and allows a case to reach the jury if the plaintiff can establish a substantial possibility that the defendant's negligence caused his or her injury.<sup>18</sup> The jury must then find by a preponderance of the evidence that the defendant's negligence caused the substantial loss, which need not be greater

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10. King, *supra* note 7, at 1354.

11. *Id.* at 1395. Note that as compared with the traditional more-probable-than-not approach, the definition of injury has changed, but the standard of causation (more likely than not) remains the same.

12. *Id.* at 1353-54.

13. *Id.* at 1363.

14. *Id.* at 1361.

15. *Id.* at 1377.

16. *Id.* at 1378.

17. *DeBurkarte v. Louvar*, 393 N.W.2d 131, 137 (Iowa 1986); *Wollen v. DePaul Health Ctr.*, 828 S.W.2d 681, 683-85 (Mo. 1992) (en banc); *Perez v. Las Vegas Med. Ctr.*, 805 P.2d 589, 591 (Nev. 1991).

18. *See Delaney v. Cade*, 873 P.2d 175, 185-86 (Kan. 1994); *Scafidi v. Seiler*, 574 A.2d 398, 402 (N.J. 1990); *McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467, 475 (Okla. 1987). Note that in contrast to Professor King's pure lost chance approach, the substantial possibility approach defines the injury as the patient's death, not the lost chance of survival.

than fifty percent. Courts often cite the following language of *Hicks v. United States*<sup>19</sup> as providing a basis for this approach:

When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable.<sup>20</sup>

Courts also often rely on the Restatement (Second) of Torts (hereinafter Restatement) section 323 which implies causation based on breach of the specified duty. The section reads as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.<sup>21</sup>

The Supreme Court of Pennsylvania endorsed the use of section 323 in *Hamil v. Bashline*.<sup>22</sup> The court held that the section operates "to relax the degree of certitude normally required of plaintiff's evidence in order to make a case for the jury as to whether a defendant may be held liable for the plaintiff's injuries."<sup>23</sup> When Mr. Hamil began suffering severe chest pains, his wife took him to the hospital emergency room. The hospital's EKG machine failed to operate because of a faulty electrical outlet, and a second machine could not be found. When the hospital staff offered no further aid or treatment, Mrs. Hamil took her husband to another doctor's office where he

19. 368 F.2d 626 (4th Cir. 1966).

20. *Id.* at 632. In *Hicks*, a Naval doctor negligently misdiagnosed an intestinal obstruction, which led to the patient's death. However, "[s]ince the uncontradicted testimony was that with prompt surgery she would have survived," *id.* at 633, the previously quoted language is only dicta. Nevertheless, numerous courts have cited *Hicks* as standing for the proposition that the causation standard should be relaxed in lost chance cases. See *Daniels v. Hadley Mem'l Hosp.*, 566 F.2d 749, 757 (D.C. Cir. 1977); *Jeanes v. Milner*, 428 F.2d 598, 605 (8th Cir. 1970); *James v. United States*, 483 F. Supp. 581, 585 (N.D. Cal. 1980); *McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467, 472 (Okla. 1987).

21. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

22. 392 A.2d 1280, 1286 (Pa. 1978).

23. *Id.* at 1286.

died.<sup>24</sup> Plaintiff complained that the hospital “failed to employ recognized and available methods of treating decedent’s malady.”<sup>25</sup>

The court explained why such a case should reach the jury:

Section 323(a) recognizes that a particular class of tort actions . . . differs from those cases normally sounding in tort. Whereas typically a plaintiff alleges that a defendant’s act or omission set in motion a force which resulted in harm, the theory of the present case is that the defendant’s act or omission failed in a duty to protect against harm from another source. . . . [A] fact-finder must consider not only what *did* occur, but also what *might* have occurred . . . .<sup>26</sup>

The court acknowledged that deciding cases in this manner fails to require “the degree of certainty one would prefer and upon which the law normally insists before a person may be held liable.”<sup>27</sup> In spite of this, the court believed the relaxed standard was necessary:

[I]n order that an actor is not completely insulated because of uncertainties as to the consequences of his negligent conduct, Section 323(a) tacitly acknowledges this difficulty and permits the issue to go to the jury upon a less than normal threshold of proof. . . . [Thus,] once a plaintiff has demonstrated that defendant’s acts or omissions, in a situation to which Section 323(a) applies, have increased the risk of harm to another, such evidence furnishes a basis for the fact-finder to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm.<sup>28</sup>

Two obvious questions arise: What level of increased risk constitutes a substantial factor, and what should be the extent of a successful plaintiff’s recovery? Many courts have adopted the reasoning in *Hicks* and *Hamil* and have used section 323 to allow the plaintiff’s case to reach the jury when the plaintiff had less than a fifty percent chance of survival.<sup>29</sup> Curiously, the patients in both *Hicks* and *Hamil* would have met the higher traditional

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24. *Id.* at 1283.

25. *Id.*

26. *Id.* at 1286-87.

27. *Id.* at 1287.

28. *Id.* at 1287-88 (footnotes omitted). Because the plaintiff’s expert testimony established that Mr. Hamil’s chance of survival would have been approximately seventy-five percent with proper treatment, the plaintiff’s case would have reached the jury under the traditional standard as well. *Id.* at 1283.

29. *See, e.g.,* *Herskovits v. Group Health Coop. of Puget Sound*, 664 P.2d 474, 476 (Wash. 1983) (en banc) (holding that a reduction in the chance of survival from thirty-nine percent to twenty-five percent constituted sufficient evidence of causation to reach the jury).

standard because their chances of survival prior to the physicians' negligent conduct exceeded fifty percent. Further, it appears the courts did not reduce their damages to reflect the possibility that the harm might have been suffered even if the physician had not been negligent. In contrast, courts using the substantial factor analysis coupled with a proportional approach explicitly require that damages be reduced so as to reflect only the percentage chance lost.<sup>30</sup>

For example, the Supreme Court of Oklahoma relied on both section 323 and *Hamil* to adopt a substantial factor type of analysis.<sup>31</sup> The court held that for a case to reach the jury, the plaintiff must show a "substantial decrease in the chance of survival."<sup>32</sup> To find the defendant liable, the jury must find that "the increase in risk under the circumstances was more likely than not a substantial factor in causing the harm."<sup>33</sup> In *McKellips* the emergency room physician negligently diagnosed the patient's condition as gastritis. Upon his release, the patient suffered a heart attack and died. Expert testimony established that with proper diagnosis the patient's chances would have been "significantly improved."<sup>34</sup> Under the substantial factor rule, the court determined this evidence was sufficient for plaintiff's case to reach the jury.<sup>35</sup> Underlying the court's decision was its belief that

the health care professional should not be allowed to come in after the fact and allege that the result was inevitable inasmuch as that person put the patient's chance beyond the possibility of realization. Health care providers should not be given the benefit of the uncertainty created by their own negligent conduct.<sup>36</sup>

The court did not want to allow physicians "to evade liability for their negligent actions or inactions"<sup>37</sup> simply because the patient had a less than even chance of recovering.

Although it may appear that the pure lost chance theory differs materially from the substantial factor approach, the differences are largely semantic. Whether the court lowers the standard of causation or redefines the injury as a lost chance, the result is the same in that a plaintiff receives compensation

30. *Delaney v. Cade*, 873 P.2d 175 (Kan. 1995); *Scafidi v. Seiler*, 574 A.2d 398 (N.J. 1990); *McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467 (Okla. 1987).

31. *McKellips*, 741 P.2d at 472-474. The court refers to its approach as the section 323 approach.

32. *Id.* at 475.

33. *Id.*

34. *Id.* at 470.

35. *Id.* at 475.

36. *Id.* at 474.

37. *Id.*

despite the greater probability that he or she would have suffered the injury even if the physician had used due care. Crucially, however, the amount of damages the plaintiff is allowed to recover accounts for the possibility of harm absent negligence.

*b. Relaxed Causation Approach*<sup>38</sup>

Similar to the substantial factor version of the proportional approach, the relaxed causation approach allows a plaintiff's case to reach the jury by relaxing the burden of proof. A plaintiff need only show that the physician's negligence led to a percentage increase, no matter how small, in the patient's risk of harm.<sup>39</sup> In contrast to the proportional approach, however, the plaintiff recovers full damages.<sup>40</sup> Courts following this approach often rely on much of the same authority as those applying the proportional substantial factor approach, including section 323 and the leading cases of *Hamil* and *Hicks*.<sup>41</sup> The problem with identifying courts that follow this approach is that few discuss explicitly that full, as opposed to proportional, damages will be awarded.<sup>42</sup> Currently five states appear to follow this approach.<sup>43</sup>

The Arizona Supreme Court adopted the relaxed causation approach in *Thompson v. Sun City Community Hospital, Inc.*<sup>44</sup> The *Thompson* court held that "[i]f the jury finds that defendant's failure to exercise reasonable care increased the risk of the harm he undertook to prevent, it may from this fact find a 'probability' that defendant's negligence was the cause of the damage."<sup>45</sup> A thirteen-year-old boy suffered a torn femoral artery in his left thigh. The emergency room physician who initially examined him determined that he needed surgery but was "medically transferable." During transport, the boy's condition worsened. He eventually stabilized, but surgery to repair the artery was not entirely successful and resulted in residual impairment of the

38. Courts most often refer to this as the increased-risk-of-harm approach.

39. See *Hamil v. Bashline*, 392 A.2d 1280, 1288-89 (Pa. 1978).

40. See *Delaney v. Cade*, 873 P.2d 175, 187 (Kan. 1994).

41. *Thompson v. Sun City Community Hosp., Inc.*, 688 P.2d 605 (Ariz. 1984) (en banc).

42. The lack of any discussion of damages means, at the very least, that the lower courts are not bound to discount the damages, and a reasonable inference would be that the deciding court does not intend for them to do so. Although not explicit, some courts will provide a breakdown of the damages calculation, which allows the reader to determine that full damages were awarded. See *Chambers v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 508 N.E.2d 426, 432-33 (Ill. App. Ct. 1987); *Tabor v. Doctors Mem'l Hosp.*, 563 So. 2d 233, 241 (La. 1990).

43. See Appendix A for state by state breakdown. Note that of the states in the unclear category of Appendix A.

44. 688 P.2d 605 (Ariz. 1984).

45. *Id.* at 616.



boy's leg.<sup>46</sup> The patient's mother alleged that the doctors were negligent in deciding to transfer her son to the county hospital for financial reasons.<sup>47</sup>

The court held that the plaintiff need only present evidence that the defendant increased the risk of harm to the patient for the case to reach the jury.<sup>48</sup> Once the initial burden is met, then, "[i]f the jury finds that defendant's failure to exercise reasonable care increased the risk of the harm he undertook to prevent, it may from this fact find a 'probability' that defendant's negligence was the cause of the damage."<sup>49</sup> The court based its decision on section 323, which "leaves to the jury, and not the medical expert, the task of balancing probabilities. . . ."<sup>50</sup> The court further explained that the traditional rule "puts a premium on each party's search for the willing witness . . . . [F]or every expert witness who evaluates the lost chance at 49% there is another who estimates it at closer to 51%."<sup>51</sup> Finally, the court noted that the traditional approach "tends to defeat one of the primary functions of the tort system--deterrence of negligent conduct."<sup>52</sup> The court did not require proportional damages, although it acknowledged that "juries often discount damages according to the statistical evidence in order to accurately evaluate the true loss."<sup>53</sup>

Courts and commentators have criticized this approach for allowing the plaintiff to recover all her damages even though the injury very likely would have occurred with proper diagnosis and treatment.<sup>54</sup> Many courts also believe that section 323 bears on a defendant's duty and "does not determine or suggest the appropriate standard of causation."<sup>55</sup>

### *c. Traditional Approach: All-or-Nothing*

The traditional approach declines to compensate plaintiffs for a lost chance unless that chance is greater than fifty percent. If it is, the plaintiff can recover all of the damages suffered. As one commentator phrased it, "a patient

46. *Id.* at 607-08.

47. *Id.* at 608.

48. *Id.* at 616.

49. *Id.*

50. *Id.* at 615 (quoting *Hamil v. Bashline*, 392 A.2d 1280, 1288 (Pa. 1978)).

51. *Id.*

52. *Id.*

53. *Id.* at 616.

54. *See* *Boody v. United States*, 706 F. Supp. 1458, 1465-66 (D. Kan. 1989).

55. *See* *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 405 (Tex. 1993); *Curry v. Summer*, 483 N.E.2d 711, 717 (Ill. App. Ct. 1985); *Ehlinger v. Sipes*, 454 N.W.2d 754, 758 (Wis. 1990) ("Section 323(a) is generally viewed as relating only to the duty element . . . . [It] does not . . . lessen a plaintiff's burden of production on the issue of causation."); Beth Clemens Boggs, *Lost Chance of Survival Doctrine: Should the Courts Ever Tinker with Chance?*, 16 S. ILL. U. L.J. 421, 436 (1992); Lisa Perrochet et al., *Lost Chance Recovery and the Folly of Expanding Medical Malpractice Liability*, 27 TORT & INS. L.J. 615, 617 (1992).

who probably would have suffered the same harm had he or she received the proper treatment is entitled to no compensation.”<sup>56</sup> Eighteen states currently follow this approach.<sup>57</sup>

The Ohio Supreme Court applied the traditional standard in *Cooper v. Sisters of Charity of Cincinnati, Inc.*<sup>58</sup>

[W]hen the plaintiff's evidence indicates that a failure to diagnose the injury prevented the patient from an opportunity to be operated on, which failure eliminated any chance of the patient's survival, the issue of proximate cause can be submitted to a jury only if there is sufficient evidence showing that with proper diagnosis, treatment and surgery the patient *probably would have survived*.<sup>59</sup>

*Cooper* involved a sixteen-year-old boy who was hit by a truck while riding his bike. The defendant physician allegedly conducted an inadequate examination and failed to discover that the patient had suffered a basal skull fracture from which he soon died.<sup>60</sup> The plaintiff's expert testimony indicated that with proper diagnosis and surgery, the decedent's chance of survival would have been approximately fifty percent.<sup>61</sup> The court explained that the proportional approach “derogate[s] well-established and valuable proximate cause considerations.”<sup>62</sup> A rule that compensates “for the loss of any chance for survival, regardless of its remoteness . . . , would be so loose that it would produce more injustice than justice.”<sup>63</sup>

Policy reasons given by various courts and commentators supporting this standard include achieving just results,<sup>64</sup> measuring physicians by the same standard as other professionals,<sup>65</sup> and containing health care costs.<sup>66</sup> In

56. Perrochet, *supra* note 55, at 615.

57. See Appendix A for state by state breakdown.

58. 272 N.E.2d 97 (Ohio 1971).

59. *Id.* at 104 (emphasis added).

60. *Id.* at 99.

61. *Id.* at 101.

62. *Id.* at 103.

63. *Id.*

64. See *Fennell v. Southern Md. Hosp. Ctr., Inc.*, 580 A.2d 206, 212-13 (Md. 1990) (examining the statistical probabilities of reaching a “just” result with proportional recovery under the lost chance doctrine and concluding that the traditional standard results in fewer mistakes).

65. “No other professional malpractice defendant carries this burden of liability without the requirement that plaintiffs prove the alleged negligence probably rather than possibly caused the injury.” *Gooding v. University Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1020 (Fla. 1984); *Falcon v. Memorial Hosp.*, 462 N.W.2d 44, 65 (Mich. 1990); *Kilpatrick v. Bryant*, 868 S.W.2d 594, 603 (Tenn. 1993).

66. See *Fennell*, 580 A.2d at 215 (predicting that “[r]ecognition of this new form of medical malpractice damages for loss of a chance would undoubtedly cause an increase in medical malpractice litigation, as well as result in an increase in medical malpractice insurance costs”);

addition, some courts believe that the legislature is better suited to make such comprehensive changes.<sup>67</sup>

*C. JONES V. OWINGS*<sup>68</sup>

Alice Jones fractured her left femur in October 1987. She consulted Dr. Ralph Owings, an orthopedic surgeon, for treatment of the injury. In connection with this treatment, a radiologist took a preoperative chest x-ray of Ms. Jones on October 27. In his report the radiologist noted an abnormality in Ms. Jones's left upper lung and recommended follow-up x-rays or a CT scan. When Ms. Jones returned a year later to have pins removed from her hip, the radiologist performed a second chest x-ray. His report noted "probable scarring left upper lobe," and he again recommended a CT scan. Plaintiff alleged that Dr. Owings took no action in response to these reports. In September 1989, Ms. Jones was diagnosed with lung cancer, from which she died on June 18, 1990. Plaintiff's expert testified that Ms. Jones's chance of survival at the time of the first x-ray would have been approximately fifty percent.<sup>69</sup> By the second x-ray, her chance had diminished to between twenty and twenty-five percent. When the cancer was finally diagnosed, she had only a fifteen to twenty percent chance of survival.<sup>70</sup>

Ms. Jones's husband brought a wrongful death suit against Dr. Owings alleging that Dr. Owings performed negligently in failing to inform Ms. Jones of the radiologist's reports, in failing to follow up on the radiologist's recommendations, and in failing to diagnose Ms. Jones's lung cancer. Dr. Owings moved for summary judgment on the issue of proximate cause arguing that the plaintiff's expert testimony failed to show that his negligence more probably than not caused Ms. Jones's death (*i.e.*, her chance of survival at the time of the first x-ray was not greater than fifty percent). The trial court agreed and granted the defendant's motion for summary judgment.<sup>71</sup> The plaintiff appealed this ruling arguing that the trial court erred in defining

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*see also* Perrochet, *supra* note 55, at 628 (concluding that the lost chance doctrine is "contrary to sound public policy because [it would] adversely impact the cost and quality of health care and exacerbate the problems of defensive medicine and cost containment").

67. *Dumas v. Cooney*, 1 Cal. Rptr. 2d 584, 594 (Cal. Ct. App. 1991) (explaining that "[s]weeping modifications of tort liability law fall more suitably within the domain of the Legislature, before which all affected interests can be heard and which can enact statutes providing uniform standards and guidelines for the future" (quoting *Rowland v. Christian*, 443 P.2d 561, 569 (Cal. 1968) (Burke, J., dissenting))).

68. \_\_\_ S.C. \_\_\_, 456 S.E.2d 371 (1995).

69. *Id.* at \_\_\_, 456 S.E.2d at 372.

70. *Id.* at \_\_\_, 456 S.E.2d at 372.

71. *Id.* at \_\_\_, 456 S.E.2d at 372.

decedent's disease and death, rather than her lost chance, as the injury.<sup>72</sup> In an opinion written by Justice Toal, the South Carolina Supreme Court agreed with the trial court's rejection of the lost chance doctrine and affirmed the summary judgment, thus denying the plaintiff any recovery.<sup>73</sup>

The court began its analysis by reaffirming the traditional standard of causation in a medical malpractice action (*i.e.*, that "the defendant's negligence *most probably* resulted in the injuries alleged"<sup>74</sup>). For this proposition, the court relied primarily on *Sherer v. James*,<sup>75</sup> an earlier South Carolina Supreme Court medical malpractice case involving negligent misdiagnosis.

In *Sherer* the court noted that the South Carolina Court of Appeals had endorsed the "increased risk of harm" theory in *Clark v. Ross*,<sup>76</sup> in which a jury charge of Restatement section 323<sup>77</sup> (nearly verbatim) was given for the standard of proof in a medical malpractice case. Neither party appealed *Clark*, and thus, *Sherer* marked the first opportunity for the South Carolina Supreme Court to address the propriety of such a charge.<sup>78</sup> The *Sherer* court rejected the increased risk of harm approach by interpreting section 323 as only defining the defendant's duty of care and not relating to causation:

Section 323(a) simply establishes a duty on one who undertakes to render services for the protection of another *to use due care* to avoid increasing the risk of harm. . . . [E]ven if Section 323(a) could be construed as relating to proximate cause, we are unwilling to relax the plaintiff's burden of proof in a medical malpractice case. A defendant physician is entitled to put the medical malpractice plaintiff to proof equally as stringent as that required of plaintiffs in other negligence actions.<sup>79</sup>

The *Jones* court then examined how other courts have handled the lost chance doctrine. The court recognized three basic approaches: (1) the traditional approach ("more probably than not" standard) (2) the relaxed

72. *Id.* at \_\_\_, 456 S.E.2d at 373.

73. *Id.* at \_\_\_, 456 S.E.2d at 374.

74. *Id.* at \_\_\_, 456 S.E.2d at 372 (citing *Sherer v. James*, 290 S.C. 404, 407, 351 S.E.2d 148, 150 (1986)).

75. 290 S.C. 404, 351 S.E.2d 148 (1986).

76. 284 S.C. 543, 328 S.E.2d 91 (Ct. App. 1985), *cited in Sherer*, 290 S.C. at 406 n.2, 351 S.E.2d 150 n.2.

77. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

78. *Sherer*, 290 S.C. at 406 n.2, 351 S.E.2d at 150 n.2.

79. *Id.* at 407-08, 351 S.E.2d at 150-151 (citation omitted) (quoting *Curry v. Summer*, 483 N.E.2d 711, 717 (Ill. App. Ct. 1985)).

causation approach,<sup>80</sup> and (3) the proportional approach.<sup>81</sup> In footnotes the court defined and cited cases approving of the latter two approaches.<sup>82</sup>

Finally, the court focused on the traditional approach that declines to compensate plaintiffs for a lost chance unless that chance is greater than fifty percent.<sup>83</sup> The court quoted the Ohio Supreme Court in its rejection of the loss of chance doctrine: “Lesser standards of proof are understandably attractive in malpractice cases where physical well being, and life itself, are the subject of litigation . . . . However we have trepidations that such a rule would be so loose that it would produce more injustice than justice.”<sup>84</sup> Justice Toal concluded with the following remarks:

We are persuaded that the “the loss of chance doctrine is fundamentally at odds with the requisite degree of medical certitude necessary to establish a causal link between the injury of a patient and the tortious conduct of a physician.” Legal responsibility in this approach is in reality assigned based on the mere *possibility* that a tortfeasor’s negligence was a cause of the ultimate harm. This formula is contrary to the most basic standards of proof which undergird the tort system.<sup>85</sup>

The South Carolina Supreme Court relied on South Carolina precedent that appears directly on point with the issues in *Jones*, as well as traditional standards of causation, to provide a consistent treatment of lost chance cases in South Carolina. However, a more detailed analysis of the approaches the court chose to reject would have provided valuable insight into the court’s position.

The court’s reliance on *Sherer*, which explains at some length its rejection of the relaxed causation theory, may have obviated the need for the court to rehash this issue. Many courts and commentators have agreed that section 323 pertains to duty and not to causation.<sup>86</sup> In addition, awarding full damages when the patient’s chance of survival falls below fifty percent strikes many as

80. Many courts and commentators refer to this approach as the increased risk of harm approach.

81. *Jones*, \_\_\_ S.C. at \_\_\_, 456 S.E.2d at 373.

82. *Id.* at \_\_\_ nn.1-2, 456 S.E.2d at 373 nn.1-2. The court mistakenly categorized *McKellips v. St. Francis Hosp., Inc.*, 741 P.2d 467 (Okla. 1987) as one of five states endorsing the relaxed causation approach that allows the plaintiff to recover full damages. The court in *McKellips* clearly required proportional damages. *McKellips*, 741 P.2d at 476; *see also supra* notes 8, 18, 20, 31-36 and accompanying text.

83. *Jones*, \_\_\_ S.C. at \_\_\_, 456 S.E.2d at 373.

84. *Id.* at \_\_\_, 456 S.E.2d at 373 (quoting *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 272 N.E.2d 97, 103 (Ohio 1971)).

85. *Id.* at \_\_\_, 456 S.E.2d at 374 (quoting *Kilpatrick v. Bryant*, 868 S.W.2d 594, 602 (Tenn. 1993) (citation omitted)).

86. *See supra* note 55 and accompanying text.

unreasonable. As one court explained, “[t]his approach is too onerous for defendants. They should not have to compensate a plaintiff for the percentage of the harm that they did not cause or that would have occurred naturally.”<sup>87</sup>

However, the reasons behind the court’s rejection of the proportional view of the lost chance doctrine are less clear. The court seemed to rely primarily on the idea that the lost chance doctrine is at odds with traditional tort law principles.<sup>88</sup> This explanation is not helpful because many new doctrines develop that appear inconsistent with traditional tort law but which the South Carolina Supreme Court nevertheless has adopted because the doctrines serve some underlying goals of tort law. For example, the court adopted the doctrine of comparative fault in all negligence actions in 1991.<sup>89</sup> What is missing from the court’s analysis is reference to a set of first principles that would help explain why the court chose to deny recovery to a class of plaintiffs who have been harmed by another’s negligence. In the footnote explaining the lost chance doctrine, the court recited Professor King’s thesis but failed to address with specificity the fundamental tort principles upon which the doctrine is founded.<sup>90</sup> The court surely had some notion of what goals tort law should serve, and which *Jones* presumably furthers, but the reader is left to wonder what these goals are. For example, Professor King’s theory is founded on goals of loss-spreading, compensating victims, and deterrence. Other courts rejecting King’s theory have attempted to address these goals or espouse goals of their own. One court responded to King’s deterrence argument as follows:

[W]e reject the notion that the enhanced deterrence of the loss of chance approach might be so valuable as to justify scrapping our traditional concepts of causation. If deterrence were the sole value to be served by tort law, we could dispense with the notion of causation altogether and award damages on the basis of negligence alone.<sup>91</sup>

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87. *Boody v. United States*, 706 F. Supp. 1458, 1465 (D. Kan. 1989).

88. *See Jones*, \_\_\_ S.C. at \_\_\_, 456 S.E.2d at 374.

89. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991).

90. Justice Toal’s description of Professor King’s thesis is as follows:

[T]he loss of a chance of achieving a favorable outcome or of avoiding an adverse consequence should be compensable and should be valued appropriately, rather than treated as an all-or-nothing proposition. Preexisting conditions must, of course, be taken into account in valuing the interest destroyed. When those preexisting conditions have not absolutely preordained an adverse outcome, however, the chance of avoiding it should be appropriately compensated even if that chance is not better than even.

*Jones*, \_\_\_ S.C. at \_\_\_ n.2, 456 S.E.2d at 373 n.2 (quoting King, *supra* note 7, at 1354).

91. *Kramer v. Lewisville Mem’l Hosp.*, 858 S.W.2d 397, 406 (Tex. 1993); *see also Kilpatrick v. Bryant*, 868 S.W.2d 594, 603 (Tenn. 1993) (“Rather than deterring undesirable conduct, the [lost chance doctrine] only penalizes the medical profession for inevitable

Although this point may be incorrect,<sup>92</sup> the court at least attempted to explain why it found the lost chance doctrine to fall short.

Many courts and commentators also espouse the goal of containing health care costs.<sup>93</sup> However, if courts apply the proportional approach to all lost chance cases (those with a greater than even chance of survival as well as those under fifty percent), then there should be no net increase in the total amount of damages awarded in medical malpractice actions.<sup>94</sup> As one court noted, this “serves an important societal interest in the context of medical-malpractice litigation. A rule of law that more precisely confines physicians’ liability for negligence to the value of the interest damaged should have a salutary effect on the cost and availability of medical care.”<sup>95</sup>

Some courts voice concerns that the doctrine would extend to other professionals,<sup>96</sup> perhaps with good reason, considering the Seventh Circuit recently recommended the application of the proportional approach to employment discrimination cases.<sup>97</sup> A major problem with extending the doctrine to other fields is the greater difficulty in ascertaining the percentage chance lost. This should concern courts desiring to apply the doctrine to these other fields but should not keep them from adopting the doctrine in medical malpractice cases in which experts *can* accurately calculate such percentages.

Many courts address some of these concerns by limiting the scope of the proportional approach. Methods used to confine the lost chance doctrine include limiting recovery to cases of serious injury or death<sup>98</sup> and requiring that the percentage chance lost be significant or substantial.<sup>99</sup> For example,

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unfavorable results.” (quoting *Falcon v. Mem’l Hosp.*, 462 N.W.2d 44, 68 (Mich. 1990))).

92. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 236 (1987).

93. See *supra* note 66 and accompanying text.

94. See *Scafidi v. Seiler*, 574 A.2d 398, 406 (N.J. 1990) (holding jury should have been instructed to reduce its award of damages to reflect the percentage chance lost, “even though plaintiffs’ proofs may have satisfied traditional standards of proximate causation”).

95. *Id.* at 408.

96. See *supra* note 65 and accompanying text; see also *Perez v. Las Vegas Med. Ctr.*, 805 P.2d 589, 599 n.3 (Nev. 1991) (Steffen, J., dissenting) (arguing:

if the majority’s loss of chance doctrine is just in the context of a medical malpractice action, it would be equally just and applicable in such actions involving other professions, including the legal profession. For example, if a disgruntled or unsuccessful litigant loses a case, and it could be shown through expert testimony that there was a forty percent chance of winning the case, but the lawyer’s negligent efforts reduced the chance of winning by some degree, the litigant would be able to pursue an action based upon the loss of chance doctrine);

*Kramer v. Lewisville Mem’l Hosp.*, 858 S.W.2d 397, 406 (Tex. 1993) (claiming “it is doubtful there is any principled way we could prevent its application to similar actions involving other professions” (footnote omitted)).

97. *Doll v. Brown*, 75 F.3d 1200, 1207 (7th Cir. 1996).

98. *Perez v. Las Vegas Med. Ctr.*, 805 P.2d 589 (Nev. 1991).

99. *Id.* at 592; see also *Falcon v. Memorial Hosp.*, 462 N.W.2d 44, 56 (Mich. 1990)

the Nevada Supreme Court endorsed the use of both these methods by requiring that the lost chance be substantial and that the patient suffer "death or debilitating injury."<sup>100</sup> Although the court declined to define "substantial," it emphasized that limits did exist and offered that the loss of a ten percent chance probably would not qualify.<sup>101</sup>

#### D. CONCLUSION

In *Jones* the South Carolina Supreme Court definitively rejected the lost chance doctrine.

3 in medical malpractice cases. Whether this decision will be challenged by the South Carolina legislature remains an open question. While eighteen other states have found the traditional approach persuasive, the majority status that the court conferred upon it may not be justified, as twenty-three states have chosen an alternative approach.<sup>102</sup> Although there is room for debate as to which approach better serves the goals of the tort system, the proportional approach probably deserves more consideration than the court afforded it.

*Bryson B. Moore\**

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(finding thirty-seven and one-half chance of survival substantial but not deciding what lesser chances would qualify); *Wollen v. DePaul Health Ctr.*, 828 S.W.2d 681, 685 n.3 (Mo. 1992) (en banc) (limiting recovery "to those cases in which the chance . . . lost was sizeable enough to be material . . . , [and when statistical evidence is used], the lost chance must be statistically significant within applicable statistical standards").

100. *Perez*, 805 P.2d at 592. The court explained that "the plaintiff or injured person cannot recover merely on the basis of a decreased chance of survival or of avoiding a debilitating illness or injury; the plaintiff must in fact suffer death or debilitating injury before there can be an award of damages." *Id.*

101. *Id.* Admittedly, the substantial/significant requirement interjects some uncertainty into the process as the definition of these terms could vary from court to court. However, one way to avoid this uncertainty would be for the court to specify a range of percentages, for example twenty-five to fifty percent, that qualify as substantial.

102. The twenty-two states in this alternative approach category include the eleven states following the proportional approach, the five states that have adopted the relaxed causation approach, and seven states, that while they are in the unclear category, fall into one of the above-mentioned categories. See Appendix A for a complete state by state breakdown.

\* The author would like to extend thanks to Professor John Lopatka for his invaluable advice and comments in reviewing the substance of this survey.



## APPENDIX A

State <sup>1</sup>	Prop. <sup>2</sup>	Relax <sup>3</sup>	Trad. <sup>4</sup>	U <sup>5</sup>	Open <sup>6</sup>
Alabama			X		
Alaska			X		
Arizona		X			
Arkansas			X		
California			X		
Colorado					X
Connecticut				X	
Delaware					X
District of Columbia				X*	
Florida			X		
Georgia				X*	
Hawaii				X*	
Idaho				X	
Illinois				X*	
Indiana	X				
Iowa	X				
Kansas	X				
Kentucky			X		
Louisiana		X			
Maine					X
Maryland			X		
Massachusetts			X		
Michigan	X				
Minnesota					X
Mississippi			X		
Missouri	X				
Montana	X				
Nebraska			X		
Nevada	X				

State <sup>1</sup>	Prop. <sup>2</sup>	Relax <sup>3</sup>	Trad. <sup>4</sup>	U <sup>5</sup>	Open <sup>6</sup>
New Hampshire			X		
New Jersey	X				
New Mexico			X		
New York				X*	
North Carolina				X	
North Dakota				X	
Ohio			X		
Oklahoma	X				
Oregon					X
Pennsylvania		X			
South Carolina			X		
South Dakota				X*	
Tennessee			X		
Texas			X		
Rhode Island			X		
Utah		X			
Vermont	X				
Virginia			X		
Washington	X				
West Virginia		X			
Wisconsin				X*	
Wyoming					X

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1. See Appendix B for representative cases for each state.

2. Proportional Damages. This category includes those states that have adopted either the substantial factor or pure form of the lost chance doctrine and have required proportional damages.

3. Relaxed Causation. This category includes those states which do not discount recoverable damages by the percent chance lost but rather allow a plaintiff to recover full damages.

4. Traditional. This category includes all states that require that the plaintiff prove that the defendant's negligence more probably than not caused the patient's injury and allow the plaintiff to recover full damages.

5. Unclear. This miscellaneous category includes the states that did not clearly fit into the other categories. Those states marked with an asterisk have adopted some version of the lost chance doctrine, but it is unclear which one (usually because the court has failed to address whether proportional or full damages are to be awarded or because the court cites cases and uses terminology from two different approaches). The unmarked states include states where it is unclear whether the court is adopting the lost chance doctrine at all, the state has only impliedly or in dicta adopted an approach, or there is division among the appellate courts.

6. Open. This category includes those states where the courts have never addressed the lost chance doctrine or have decided to leave the question of whether to adopt the doctrine open.

**APPENDIX B**

Alabama	Murdoch v. Thomas, 404 So. 2d 580 (Ala. 1981).
Alaska	Abille v. United States, 482 F. Supp. 703 (N.D. Cal. 1980) (applying Alaska law).
Arizona	Thompson v. Sun City Community Hosp., Inc., 688 P.2d 605 (Ariz. 1984) (en banc).
Arkansas	Blankenship v. Burnett, 803 S.W.2d 539 (Ark. 1991).
California	Dumas v. Cooney, 1 Cal. Rptr. 2d 584 (Cal. Ct. App. 1991); Simmons v. West Covina Med. Clinic, 260 Cal. Rptr. 772 (Cal. Ct. App. 1989); Morgenroth v. Pacific Med. Ctr., Inc., 126 Cal. Rptr. 681 (Cal. Ct. App. 1976).
Colorado	Kaiser Found. Health Plan v. Sharp, 741 P.2d 714, 718 n.5 (Colo. 1987) (explaining consideration of lost chance doctrine is not necessary to resolve this case and stating “we express no opinion on whether we would apply section 323(a) in a proper case”).
Connecticut	Petriello v. Kalman, 576 A.2d 474 (Conn. 1990) (adopting proportional approach in an analogous cause of action, increased risk of future harm); LaBieniec v. Baker, 526 A.2d 1341, 1345 (Conn. App. Ct. 1987) (implicitly recognizing that a decreased chance for successful treatment may be a compensable injury in itself by stating that “a plaintiff must show (1) that he has in fact been deprived of a chance for successful treatment and (2) that the decreased chance for successful treatment more likely than not resulted from the defendant’s negligence”; finding that plaintiff failed to show that his

chance of recovery had decreased at all; relying however, on cases supporting the traditional approach, so it is not clear whether the court misread the cited cases and would explicitly adopt the proportional approach in an appropriate case or whether the court is misstating the traditional approach and would choose to follow it). *But see* Grody v. Tulin, 365 A.2d 1076 (Conn. 1976) (applying traditional approach to lost chance case).

#### Delaware

United States v. Cumberbatch, 647 A.2d 1098 (Del. 1994) (holding lost chance doctrine not viable in actions brought under Delaware's wrongful death statute but leaving open whether doctrine would apply in a personal injury action brought by a victim or in a survival action brought by a victim's personal representative); Shively v. Klein, 551 A.2d 41 (Del. 1988) (affirming trial court's refusal to instruct jury on lost chance doctrine because plaintiffs did not plead that theory but not ruling out possibility of applying the doctrine in an appropriate case).

#### District of Columbia

Daniels v. Hadley Mem'l Hosp., 566 F.2d 749 (D.C. Cir. 1977) (holding that the plaintiff need only show that the defendant's negligence was a "substantial factor" in causing the plaintiff's injury but leaving the question of damages to be determined on remand); *see also* Snead v. United States, 595 F. Supp. 658 (D.D.C. 1984) (court must look at patient's chances of survival and extent defendant interfered with those chances).

#### Florida

Gooding v. University Hosp. Bldg., Inc., 445 So. 2d 1015 (Fla. 1984).

#### Georgia

Richmond County Hosp. Auth. Operating Univ. Hosp. v. Dickerson, 356 S.E.2d 548

(Ga. Ct. App. 1987) (holding that probable cause is not eliminated by merely establishing that the patient has less than a fifty percent chance of survival but failing to address whether proportional or full damages should be awarded).

## Hawaii

McBride v. United States, 462 F.2d 72, 75 (9th Cir. 1972) (applying Hawaii law) (holding that plaintiff established “the requisite reasonable medical probability” with expert testimony that absent the physician’s negligence, the patient’s chance of survival would have improved at least fifty percent and stating that “the absence of positive certainty should not bar recovery if negligent failure to provide treatment deprives a patient of a significant improvement in his chances for recovery”; failing to address whether proportional or full damages should be awarded).

## Idaho

Hilden v. Ball, 787 P.2d 1122, 1126 (Idaho 1989) (“adopting” traditional approach in dicta as issue not preserved for appeal; noting in concurring opinion that court is not rejecting lost chance doctrine as it may apply in an appropriate case).

## Illinois

Northern Trust Co. v. Louis A. Weiss Mem’l Hosp., 493 N.E.2d 6, 12 (Ill. App. Ct. 1986) (relying on section 323 to hold that “evidence which shows to a reasonable degree of certainty that negligent delay in diagnosis or treatment lessened the effectiveness of treatment . . . is sufficient to establish proximate cause”; failing to discuss, however, whether proportional or full damages should be awarded (quoting James v. United States, 483 F. Supp. 581, 585 (N.D. Cal. 1980))); *see also* Chambers v. Rush-Presbyterian-St. Luke’s Med. Ctr., 508 N.E.2d 426 (Ill. App. Ct. 1987). *But see* Borowski v. Von Solbrig, 328 N.E.2d 301

(Ill. 1975) (not specifically addressing the lost chance doctrine but holding plaintiff must show that physician's negligence more probably than not caused the injury); *Hare v. Foster G. McGaw Hosp.*, 549 N.E.2d 778 (Ill. App. Ct. 1989); *Russell v. Subbiah*, 500 N.E.2d 138 (Ill. App. Ct. 1986); *Curry v. Summer*, 483 N.E.2d 711 (Ill. App. Ct. 1985).

## Indiana

*Mayhue v. Sparkman*, 627 N.E.2d 1354 (Ind. Ct. App. 1994); *Watson v. Medical Emergency Servs. Corp.*, 532 N.E.2d 1191 (Ind. Ct. App. 1989).

## Iowa

*DeBurkarte v. Louvar*, 393 N.W.2d 131 (Iowa 1986).

## Kansas

*Roberson v. Counselman*, 686 P.2d 149 (Kan. 1984) (adopting proportional approach for lost chance of survival); *Delaney v. Cade*, 873 P.2d 175 (Kan. 1994) (certified question) (expanding *Roberson* to allow recovery for lost chance of recovery).

## Kentucky

*Walden v. Jones*, 439 S.W.2d 571 (Ky. Ct. App. 1968).

## Louisiana

*Hastings v. Baton Rouge Gen. Hosp.*, 498 So. 2d 713 (La. 1986); *see also Tabor v. Doctors Mem'l Hosp.*, 563 So. 2d 233 (La. 1990) (defendant's conduct need not be only cause of harm, merely the substantial factor); *Smith v. State*, 523 So. 2d 815 (La. 1988) (lost chance recognized but evidence only indicated possible determination and not whether earlier treatment would have increased chances).

## Maine

*Phillips v. East Maine Med. Ctr.*, 565 A.2d 306 (Me. 1989) (leaving question open whether court would adopt lost chance doctrine because plaintiff satisfied traditional standard).

1996]	THE LAW OF TORTS	223
Maryland	Fennell v. Southern Md. Hosp. Ctr., Inc., 580 A.2d 206 (Md. 1990).	
Massachusetts	Wright v. Clement, 190 N.E. 11 (Mass. 1934); Coughlin v. Bixon, 504 N.E.2d 1069 (Mass. App. Ct. 1987); Glicklich v. Spievack, 452 N.E.2d 287 (Mass. App. Ct. 1983).	
Michigan	Falcon v. Memorial Hosp., 462 N.W.2d 44 (Mich. 1990).	
Minnesota	Cornfeldt v. Tongen, 295 N.W.2d 638, 641 n.4 (Minn. 1980) (leaving question open by “adopting” traditional approach but then qualifying this by saying, “[w]e have not heretofore adopted the rule in <i>Hamil</i> and, in view of evidentiary differences between <i>Hamil</i> and the present case, we need not accept or reject the rule here”).	
Mississippi	Clayton v. Thompson, 475 So. 2d 439 (Miss. 1985).	
Missouri	Wollen v. DePaul Health Ctr., 828 S.W.2d 681 (Mo. 1992) (en banc) (adopting proportional approach but requiring chance of recovery lost be sizable enough to be material).	
Montana	Aasheim v. Humberger, 695 P.2d 824, 828 (Mont. 1985) (appearing to adopt proportional approach as court quoted extensively from Professor King’s discussion of proportional damages before specifically approving of lost chance doctrine).	
Nebraska	Pierce v. Shera, No. A-92-716, 1994 WL 72133 (Neb. Ct. App. Mar. 8, 1994).	
Nevada	Perez v. Las Vegas Med. Ctr., 805 P.2d 589 (Nev. 1991) (adopting lost chance doctrine when plaintiff suffers death or debilitating injury).	



- New Hampshire                      Pillsbury-Flood v. Portsmouth Hosp., 512 A.2d 1126 (N.H. 1986).
- New Jersey                              Scafidi v. Seiler, 574 A.2d 398 (N.J. 1990).
- New Mexico                              Alfonso v. Lund, 783 F.2d 958 (10th Cir. 1986) (applying New Mexico law).
- New York                                  Kallenberg v. Beth Israel Hosp., 357 N.Y.S.2d 508 (App. Div. 1974), *aff'd*, 337 N.E.2d 128 (N.Y. 1975) (holding that a question of fact was established when evidence showed patient would have had a twenty to forty percent chance of survival absent the physician's negligence but failing to discuss whether proportional or full damages should be awarded); Mortensen v. Memorial Hosp., 483 N.Y.S.2d 264, 269 (App. Div. 1984) (holding that *Kallenberg* does not mean that a plaintiff may recover for any lost chance of survival, but that there must be a "substantial possibility" that absent physician's negligence the plaintiff would have recovered; failing to address damages question); *see also* Hoffson v. Orentreich, 543 N.Y.S.2d 242 (App. Div. 1989), *modified*, 562 N.Y.S.2d 479 (App. Div. 1990).
- North Carolina                          Shumaker v. United States, 714 F. Supp. 154, 164 (M.D.N.C. 1988) (stating that "the court cannot say at this time that the current status of the law is such that the North Carolina Supreme Court would reject the [lost chance] theory" and holding that the plaintiff may pursue lost chance of recovery theory but declining to address at that time what type of damages may be recovered). *But see* Morrison v. Stallworth, 326 S.E.2d 387, 393 (N.C. Ct. App. 1985) (holding plaintiff can recover for shortened life expectancy and stating that general rule is that damages "must be shown to be

probable, not merely possible, consequences of the injury”).

#### North Dakota

VanVleet v. Pfeifle, 289 N.W.2d 781, 785 (N.D. 1980) (holding a question of fact as to causation was established when evidence indicated that absent the doctor’s negligence the plaintiff *possibly* could have been cured (“a significantly better” than five percent chance) or *probably* would have lived longer; failing to discuss whether proportional or full damages should be awarded).

#### Ohio

Cooper v. Sisters of Charity of Cincinnati, Inc., 272 N.E.2d 97 (Ohio 1971).

#### Oklahoma

McKellips v. St. Francis Hosp., 741 P.2d 467 (Okla. 1987).

#### Oregon

No cases found addressing the lost chance doctrine. *But see* Horn v. National Hosp. Ass’n, 131 P.2d 455 (Or. 1942) (affirming traditional standard of causation in medical malpractice cases in general).

#### Pennsylvania

Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978); Jones v. Montefiore Hosp., 431 A.2d 920 (Pa. 1981).

#### Rhode Island

Schenck v. Roger Williams Gen. Hosp., 382 A.2d 514 (R.I. 1977).

#### South Carolina

Jones v. Owings, \_\_\_ S.C. \_\_\_, 456 S.E.2d 371 (1995).

#### South Dakota

Voegeli v. Lewis, 568 F.2d 89, 94 (8th Cir. 1977) (applying South Dakota law) (holding that proximate cause is established when plaintiff shows “by a preponderance of the evidence that [the defendant’s] negligence operated substantially to reduce the chances” of the plaintiff’s recovery but failing to

address whether proportional or full damages should be awarded).

Tennessee Kilpatrick v. Bryant, 868 S.W.2d 594 (Tenn. 1993).

Texas Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397 (Tex. 1993).

Utah George v. LDS Hosp., 797 P.2d 1117 (Utah Ct. App. 1990).

Vermont Short v. United States, 908 F. Supp. 227 (D. Vt. 1995) (applying Vermont law) (finding Vermont would adopt the proportional approach in a negligent failure to diagnose case).

Virginia Blondel v. Hays, 403 S.E.2d 340 (Va. 1991).

Washington Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474 (Wash. 1983) (en banc).

West Virginia Thornton v. CAMC, Etc., 305 S.E.2d 316 (W. Va. 1983); *see also* Catlett v. McQueen, 375 S.E.2d 184 (W. Va. 1988) (defendant's acts must be substantial factor in increasing risk of harm to plaintiff).

Wisconsin Ehlinger v. Sipes, 454 N.W.2d 754 (Wis. 1990).

Wyoming No cases found addressing lost chance doctrine.

## III.

## COURT OF APPEALS HOLDS

NEGLIGENCE AND STRICT LIABILITY ARE SEPARATE AND  
INDEPENDENT CAUSES IN A PRODUCTS LIABILITY ACTION

In *Bragg v. Hi-Ranger, Inc.*<sup>1</sup> the South Carolina Court of Appeals held that a products liability cause of action may lie in negligence even when the defendant is not liable under a strict liability theory. The court went on to set out the distinctions between the two causes of action<sup>2</sup> and discussed the tests for defectiveness that have evolved under South Carolina law. Additionally, the court held that there is no post-sale duty to warn of defects and reaffirmed the viability of the sophisticated user defense.

James Robert Bragg<sup>3</sup> and his partner, Scott Rogers, were using an aerial bucket truck, manufactured by defendant Hi-Ranger, Inc., to perform a pole change-out procedure on energized power lines.<sup>4</sup> Bragg, aloft in the bucket, was using a hydraulic impact wrench fed by two hoses that ran from the truck up through the boom to the bucket. According to Rogers, there was a “pop or something,” and then Bragg yelled down for him to turn the truck off. The aerial bucket caught fire, and Bragg jumped out of it to escape the flames. Several days later he died of his injuries.<sup>5</sup>

Accident investigation revealed that the fire began when one of the hydraulic hoses contacted more than one energized power line. The aerial bucket was designed to be used with detachable hydraulic hoses made of material that would not conduct electricity and that would, therefore, prevent this type of accident. However, a short time before Bragg’s accident, a mechanic had replaced the correct, non-conductive hydraulic hose with a conductive hose.<sup>6</sup>

Bragg’s case proceeded sued on theories of defective design and failure to warn based on negligence, strict liability, and implied warranty.<sup>7</sup> Hi-Ranger pleaded a general denial and asserted affirmative defenses of “(1) contributory negligence, (2) assumption of the risk, (3) intervening negligence, (4) substantial change in condition of the product after its sale, (5) open and

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1. \_\_\_ S.C. \_\_\_, 462 S.E.2d 321 (Ct. App. 1995).

2. Negligence focuses on the conduct of the defendant while strict liability is concerned with the defectiveness of the product. See *infra* note 16 and accompanying text.

3. This action was brought by Betty Bragg, the personal representative of James Robert Bragg. *Bragg*, \_\_\_ S.C. at \_\_\_, 462 S.E.2d at 323.

4. *Id.* at \_\_\_, 462 S.E.2d at 323-24.

5. *Id.* at \_\_\_, 462 S.E.2d at 324.

6. *Id.* at \_\_\_, 462 S.E.2d at 324.

7. *Id.* at \_\_\_, 462 S.E.2d at 323.

obvious danger, and (6) misuse of the product pursuant to South Carolina Code Ann. [section] 15-73-20.”<sup>8</sup>

At trial Bragg presented expert testimony to prove that the aerial device was defective in both design and warnings. The first expert maintained that the failure to design the hose coupling in a manner that would have prevented conductive hoses from being attached rendered the aerial bucket defective.<sup>9</sup> Bragg’s second expert testified that the aerial bucket was defective because it did not have an adequate warning of the risk of using conductive hydraulic hoses.<sup>10</sup>

The trial court partially granted Hi-Ranger’s motion for a directed verdict, dismissing Bragg’s claims of strict liability and implied warranty.<sup>11</sup> The trial judge made several findings to support his decision to grant the directed verdict on the strict liability claim:

- (1) Bragg failed to introduce any evidence that the aerial device was defective or unreasonably dangerous because of a defect in the quick disconnect couplings in 1984 at the time the aerial device was sold;
- (2) Bragg failed to present evidence of a feasible design alternative for the quick disconnect couplings she claimed were defective due to inadequate design;<sup>12</sup>
- (3) the aerial device had been substantially changed between the time of its sale in 1984 and the 1990 accident;
- (4) the warnings on the aerial device at the time of the 1990 accident had been removed, painted over, or replaced and therefore were not substantially in the same condition as they were at the time the unit was sold in 1984; and
- (5) Bragg failed to establish the aerial device proximately caused her decedent’s injuries and death.<sup>13</sup>

Concluding that “[t]here is some evidence here which, if believed, could show some degree of negligence on the part of [Hi-Ranger] proximately resulting in injury to Mr. Bragg,”<sup>14</sup> the judge sent the remaining negligence claim to the jury. The jury returned a verdict for Hi-Ranger. Bragg appealed,

8. *Id.* at \_\_\_, 462 S.E.2d at 323. For the South Carolina defective products statute, see *infra* note 18.

9. *Id.* at \_\_\_, 462 S.E.2d at 324.

10. *Id.* at \_\_\_, 462 S.E.2d at 324.

11. *Id.* at \_\_\_, 462 S.E.2d at 323.

12. The court, in a footnote, remarked on the expert’s concession that “his special quick disconnect couplings were only for demonstration purposes and would not work because, among other things, they would leak hydraulic fluid.” *Id.* at \_\_\_ n.4, 462 S.E.2d at 324 n.4. The court could not have meant to suggest that plaintiffs have the impossible burden of manufacturing a fully functional example of their proposed alternative design. It is the design that is to be evaluated; not the workmanship of demonstrative evidence.

13. *Id.* at \_\_\_, 462 S.E.2d at 325.

14. *Id.* at \_\_\_, 462 S.E.2d at 325 (alteration in original).

contending *inter alia* that strict liability and negligence claims require virtually the same proof and that granting a motion for directed verdict on a strict liability claim while denying a similar motion on negligence is logically inconsistent and therefore reversible error.<sup>15</sup>

Not surprisingly, the court's analysis of the trial judge's ruling focused on distinguishing negligence from strict liability.<sup>16</sup> The court first noted that negligence is concerned with the reasonableness of the defendant's conduct, but under strict liability the focus is on the defectiveness of the product itself.<sup>17</sup>

Strict liability was adopted in South Carolina by statute in 1974 when the General Assembly codified Section 402A of the Second Restatement of Torts.<sup>18</sup> Not only does the statute track, for the most part, the language of section 402A, but it also incorporates by reference the reporter's comments.<sup>19</sup> The comments indicate that the operative language—"defective condition

15. *Id.* at \_\_\_, 462 S.E.2d at 325.

16. *Id.* at \_\_\_, 462 S.E.2d at 325-26 (citing John E. Montgomery & David G. Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 828-29 (1976)). *But see* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743 (1996) (arguing that courts which employ the risk-benefit test for strict liability in product design and defective warning cases are in reality using a negligence analysis and, therefore, should abandon strict liability except in the instance of manufacturing defect cases).

17. *Bragg*, \_\_\_ S.C. at \_\_\_, 462 S.E.2d at 326. *See, e.g.*, *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192, 1196 (4th Cir. 1982).

18. S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976). This code section reads:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if
  - (a) The seller is engaged in the business of selling such a product, and
  - (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in subsection (1) shall apply although
  - (a) The seller has exercised all possible care in the preparation and sale of his product, and
  - (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

The statute does not explicitly define "defective condition unreasonably dangerous." Courts have been struggling to find the best test since Section 402A was promulgated in 1964. As of February 1, 1996, ten states explicitly use the "consumer expectations test," and seven use a "risk-benefit" or "risk-utility analysis." John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 551, 951-955 (1996). Four states do not recognize strict products liability (Delaware, Michigan, North Carolina, and Virginia). *Id.* The remaining states use various other tests that combine elements of both the risk-benefit and consumer-expectations analyses. *Id.*

For discussion of the South Carolina test, see *infra* notes 35-43 and accompanying text.

19. S.C. CODE ANN. § 15-73-30 (Law. Co-op. 1976).

unreasonably dangerous”—is defined in terms of the expectations of the ordinary consumer.<sup>20</sup>

Interestingly, the *Bragg* court noted that under “any products liability theory”<sup>21</sup> three elements must be proven: “(1) [plaintiff] was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant.”<sup>22</sup> These are the basic elements of the strict liability claim, but, the court reasoned, to recover under negligence the plaintiff must prove the additional element of the defendant’s “fail[ure] to exercise due care in some respect.”<sup>23</sup> On its face this would seem to indicate that if, as *Bragg* argued, a plaintiff is able to plead sufficient facts to prove negligence, then he must have already pled sufficient facts to support a claim for strict liability. Conversely, because the trial court found that *Bragg* had failed to prove the elements of a strict liability claim, it would seem that as a matter of law *Hi-Ranger* should have been granted a directed verdict on the negligence claim.

The court recognized this inconsistency and proceeded to examine a circumstance in which a plaintiff had recovered under negligence but not under strict liability. In a Minnesota failure-to-warn case, *Bigham v. J.C. Penney Co.*,<sup>24</sup> the plaintiff sued a clothing retailer for burn injuries aggravated by the “melt and cling” effect of the polyester and cotton blend in his work clothes.<sup>25</sup> The Minnesota Supreme Court held that under Minnesota’s then extant “consumer expectations test,”<sup>26</sup> the plaintiff’s expectation that he would be exposed to the risk of burns from high voltage was different from the expectations of the “ordinary consumer.” In sum, the plaintiff’s profession subjected him to known fire hazards for which he could not recover under

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20. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965) (“in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him”); *Id.* cmt. i (“dangerous to an extent beyond that which would be contemplated by the ordinary consumer”).

21. *Bragg*, \_\_\_ S.C. at \_\_\_, 462 S.E.2d at 326 (emphasis added). The phrase indicates that products liability cases can be brought under negligence, warranty, or strict liability theories.

22. *Id.* at \_\_\_, 462 S.E.2d at 326.

23. *Id.* at \_\_\_, 462 S.E.2d at 326.

24. 268 N.W.2d 892 (Minn. 1978). Coincidentally, the plaintiff in *Bigham* was also a lineman and was injured by high voltage.

25. *Id.* at 895.

26. Minnesota rejected the consumer expectations test in favor of a “reasonable care balancing test” in *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207 (Minn. 1982). Minnesota later changed to the “Wade-Keeton test” (which imputes knowledge of the defective condition to the manufacturer) in *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984), cited in *Bragg*, \_\_\_ S.C. at \_\_\_, 462 S.E.2d at 326.

strict liability.<sup>27</sup> However, the jury's determination that J.C. Penney *negligently failed to warn* of the "melt and cling" hazard was upheld.<sup>28</sup>

There are some difficulties with applying the unique ruling of *Bigham* to the facts in *Bragg*. First, James Bragg was precisely the "ordinary consumer" who would foreseeably use a bucket truck. Indeed, the truck was specifically designed for linemen working on high voltage electrical lines. Second, the *Bigham* court's logic only works in a jurisdiction that uses the consumer-expectations test. It is unclear whether South Carolina has adopted the consumer-expectations test; the current trend is to rely more on a risk-benefit analysis.<sup>29</sup>

In contrast, *Halvorson v. American Hoist & Derrick Co.*,<sup>30</sup> distinguished by *Bigham*, supports the *Bragg* court's reasoning. The jury in *Halvorson* held that the defendant crane manufacturer was negligent even though the crane was not defective.<sup>31</sup> The Minnesota Supreme Court reversed, calling the result "inconsistent and irreconcilable."<sup>32</sup> Because the crane operator had disregarded an explicit warning, there was no failure-to-warn issue; thus, the only question for jury consideration was the design-defect issue, albeit on both strict liability and negligence theories. It was considered possible for the "questions of negligent design and manufacture [to] be subsumed in a jury's decision that a product is not defective, [although] failure to warn of potential hazards from the use of a product is a separate issue."<sup>33</sup> In *Bragg* the plaintiff presented evidence on both design defect and failure to warn.<sup>34</sup> It is conceivable that the court viewed the failure-to-warn issue as a separate theory apart from the defectiveness of the product, but there is no language in the case to support this contention nor to indicate what aspect of Hi-Ranger's conduct could have been negligent.

The key to understanding *Bragg* is discerning exactly what test South Carolina uses for determining if a product is in a "defective condition unreasonably dangerous."<sup>35</sup> The court attempted to do this in an extensive analysis of the historical development and current state of strict products liability in South Carolina. The court began by explaining that two tests have evolved to determine defectiveness. "The first test is whether the product is unreasonably dangerous to the ordinary consumer or user given the conditions

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27. *Bigham*, 268 N.W.2d at 897.

28. *Id.*

29. See *infra* notes 35-44 and accompanying text.

30. 240 N.W.2d 303 (Minn. 1976).

31. *Id.* at 306.

32. *Id.* at 307.

33. *Bigham*, 268 N.W.2d at 896 (construing *Halvorson*, 240 N.W.2d at 308).

34. *Bragg v. Hi-Ranger, Inc.*, \_\_\_ S.C. \_\_\_, \_\_\_, 462 S.E.2d 321, 324 (Ct. App. 1995).

35. S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976).



and circumstances that foreseeably attend the use of the product.”<sup>36</sup> The difficulty with using this phrase as a “test” is that one still must define “unreasonably dangerous.” In *Claytor v. General Motors Corp.*,<sup>37</sup> the South Carolina Supreme Court provided the needed definition: “In the final analysis, we have another of the law’s balancing acts[,] and numerous factors must be considered, including the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger.”<sup>38</sup>

This balancing language is conceptually similar to the second test outlined by the *Bragg* court: “[A] product is unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of the product.”<sup>39</sup> This is a typical formulation of the “risk-benefit” test, the test that *Claytor*, the leading South Carolina case, made abundantly clear is the appropriate mode of analysis.<sup>40</sup>

In *Bragg*, the actual test employed by the court of appeals is something of a hybrid taken from *Reed v. Tiffin Motor Homes, Inc.*<sup>41</sup> *Reed* was decided shortly after *Claytor* and has been widely followed. The *Reed* court synthesized the balancing approach of *Claytor* with the consumer expectations test of an earlier South Carolina decision,<sup>42</sup> to formulate a test under which “[t]his ‘balancing act’ necessarily is relevant to the determination that the product, as designed, is unreasonably dangerous in its failure to conform to the ordinary consumer’s expectations.”<sup>43</sup> The result of *Claytor* and *Reed* is a line of South Carolina jurisprudence that fails to distinguish clearly between risk-benefit and consumer-expectations tests.<sup>44</sup> It seems that the courts are constrained by the text of the defective products statute to include consumer expectations language in the test for defectiveness, but are wary of straying too far from reasonableness concerns as a matter of policy.<sup>45</sup>

In light of this mixed view of what is meant by “unreasonably dangerous,” recall the court’s use of *Bigham* as authority. It bears reiteration

36. *Bragg*, \_\_\_ S.C. at \_\_\_, 462 S.E.2d at 328.

37. 277 S.C. 259, 286 S.E.2d 129 (1982).

38. *Id.* at 265, 286 S.E.2d at 132.

39. *Bragg*, \_\_\_ S.C. at \_\_\_, 462 S.E.2d at 328.

40. Cf. F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 238 (1990) (“Given th[e] common emphasis on ‘reasonable’ design and warning, it may be that manufacturing defects are the only true instance of liability without respect to negligence; design and warning defects, even when phrased in terms of warranty or strict liability, may be simply a version of negligence liability specially adapted to products liability cases.”).

41. 697 F.2d 1192, 1196-97 (4th Cir. 1982) (interpreting South Carolina law).

42. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 471, 242 S.E.2d 671, 680 (1978).

43. *Reed*, 697 F.2d at 1197.

44. Cf. Vargo, *supra* note 18, at 884-88, 952 (classifying South Carolina’s test as a “Modified Consumer Expectation Test”).

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that *Bigham's* logic is undercut in a jurisdiction—like South Carolina—that recognizes a risk-utility analysis, even if only to a limited degree.<sup>46</sup> Accordingly, the court's analogy to *Bigham* may have little precedential value. This conclusion is bolstered by the statement of the *Claytor* court that when “the evidence [is] insufficient to sustain the action for strict tort liability, it naturally follows that the actions based on implied warranty and negligence must likewise fail.”<sup>47</sup>

Bragg's other contention of interest<sup>48</sup> was that the jury should have been charged that a manufacturer's “duty to warn is continuous and not interrupted by manufacture or sale of the product.”<sup>49</sup> The question of a manufacturer's post-sale duty to warn is an emerging issue on which the courts are split, and no previous South Carolina court had ruled on this important issue. The court upheld the trial ruling that a manufacturer has no duty to retrofit products or inform previous purchasers of newly developed safety devices.<sup>50</sup> This rule places South Carolina in line with the majority of jurisdictions.<sup>51</sup> The court further noted that this was an appropriate charge in light of the trial court's determination that Hi-Ranger had complied with the applicable 1984 safety standards.<sup>52</sup>

Bragg's final assignment of error concerned a charge of the sophisticated user defense. This defense maintains that there is “no duty to warn of potential risks or dangers inherent in a product if the product is distributed to . . . a sophisticated user who . . . [can] warn the ultimate user of any alleged inherent dangers.”<sup>53</sup> The court held that this was proper because Bragg's employer, the Y.C. Ballenger Company, was a large electrical contractor who

46. See *supra* text accompanying note 29.

47. *Claytor*, 277 S.C. at 265, 286 S.E.2d at 132. The court observed that the common element that must be proved in all three theories of recovery is that the product is not “reasonably fit or safe for its intended use.” *Id.* This language is drawn from the Uniform Commercial Code Section 2-314 and is the implied warranty analogue to the “defective condition unreasonably dangerous” terminology of Section 402A.

48. Bragg also contended that the jury instructions on the negligence claim were misleading and partially devoid of applicable law. He argued that the trial judge should have adopted Bragg's proposed jury charges on assumption of the risk, contributory negligence, and intervening or superseding negligence. The court found that, although the exact language desired by Bragg had not been used, the trial court had accurately charged the jury on all three concepts. *Bragg*, \_\_\_ S.C. at \_\_\_, 462 S.E.2d at 330.

49. *Id.* at \_\_\_, 462 S.E.2d at 330-31.

50. *Id.* at \_\_\_, 462 S.E.2d at 331.

51. *Id.* at \_\_\_, 462 S.E.2d at 331 (adopting a rule set out in *Romero v. International Harvester Co.*, 979 F.2d 1444, 1450 (10th Cir. 1992)). See generally DAVID G. OWEN ET AL., PRODUCTS LIABILITY AND SAFETY (3d ed. 1996) (comprehensive discussion of the issue).

52. *Bragg*, \_\_\_ S.C. at \_\_\_, 462 S.E.2d at 331.

53. *Id.* at \_\_\_, 462 S.E.2d at 331 (quoting the trial court's jury instructions).

owned a number of bucket trucks and was familiar with the dangers of using conductive hydraulic hoses.<sup>54</sup>

*Bragg* ultimately is most valuable for establishing that South Carolina imposes no post-sale duty to warn consumers of later developed safety devices. This aspect of the decision is a clear victory for defendants, as is the reaffirmation of the sophisticated-user defense. It should be noted, however, that these holdings were applied only to *Bragg*'s negligence claim; whether they may be extended to strict liability actions remains an open question.

Finally, the holding that negligence claims can go forward when strict liability claims cannot should be treated with care. It would seem to require an uncommon factual situation in which the negligence claim stands apart from the products liability action itself. Moreover, it appears quite plainly inconsistent with the supreme court's holding in *Claytor*.

*Stephen B. Samuels*

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54. *Id.* at \_\_\_, 462 S.E.2d at 332.