NEGLIGENCE—MEDICAL MALPRACTICE—SHOULD LACK OF DILIGENCE IN DIAGNOSIS RESULTING IN LOSS OF CHANCE TO LIVE BE A COMPENSABLE INJURY?—*Cooper v. Sisters of Charity of Cincinnati, Inc.*, 27 Ohio St. 2d 242, 272 N.E.2d 97 (1971).

In the early afternoon of July 22, 1965, 16-year-old Theodore Cooper, was struck by a truck while bicycle riding. Later that day, complaining of head and back injuries and having vomited, he was taken by his mother to the defendant hospital's emergency room where he was examined by co-defendant Dr. Hansen, who conducted a visual examination, tested the boy's reflexes and grip, and ordered head x-rays which proved negative. Although advised of his patient's vomiting and the injury to the back of his head, Dr. Hansen did not visually examine the back of his head. Advising Cooper's mother to monitor the boy's condition and return him to the hospital if his condition changed, Dr. Hansen sent the boy home where, early the next morning, he died of a basal skull fracture resulting in intracranial pressure and hemorrhage due to a swelling of the tissues in the back of his head.

Decedent's mother, as administratrix of his estate, sued Dr. Hansen, the Emergency Professional Service Group of Good Samaritan Hospital, and the Sisters of Charity of Cincinnati, Inc., doing business as the Good Samaritan Hospital,[1] alleging that Dr. Hansen was negligent in his examination and diagnosis of decedent's injuries, and that such negligence was "directly and proximately" the cause of his death.[2] The idea behind plaintiff's theory was that Dr. Hansen's failure to properly diagnose decedent's injury and subsequently sending him home, deprived decedent of the chance for surgery necessary to save his life. Evidence was submitted which showed that decedent's "vital signs" —blood pressure, pulse, temperature and respiration—were never inspected, although, according to plaintiff's expert, this procedure was required. There was additional expert testimony which supported plaintiff's contention that Dr. Hansen's examination " 'was not complete.' "[3] The trial court's findings of fact were in accord with this testimony.[4]

On the issue of whether Dr. Hansen's alleged negligence was the "proximate cause" of Cooper's death, one of plaintiff's experts testified

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1 Cooper v. Sisters of Charity of Cincinnati, Inc., 27 Ohio St. 2d 242, 272 N.E.2d 97 (1971).

2 *Id.* at 246-47, 272 N.E.2d at 101.

3 *Id.* at 247-48, 272 N.E.2d at 101.

4 *Id.* at 249-50, 272 N.E.2d at 101-02.

that, while there is practically a 100 percent mortality rate without surgery for patients with injuries similar to decedent's, " *'there certainly is a chance and I can't say exactly what—maybe some place around 50% —that he would survive with surgery.'* "[5] Another of plaintiff's experts testified that it was impossible to determine " 'with any degree of certainty' " whether decedent would have survived with the proper medical treatment.[6] This was the sole evidence of causation produced by plaintiff and the trial court concluded as a matter of law that " 'the evidence of proximate cause was insufficient to make a prima facie case for submission to the jury,' "[7] and a verdict was directed for defendants.

The verdict was affirmed by the court of appeals and, pursuant to an allowance of a motion to certify the record, the case went to the Ohio Supreme Court which also affirmed. As to the question of negligence, the court found that "there [was] sufficient evidence for the submission of that issue to the jury."[8] However, on the issue of proximate causation, the court said that "to comport with the standard of proof of proximate cause, plaintiff . . . must prove that defendant's negligence, *in probability*, proximately caused the death,"[9] and took note of the fact that there was no evidence to the effect that decedent *probably* would have lived with proper surgery. Thus, the court refused to equate a chance of survival of *"maybe some place around 50%"* with a probability of surviving, and was unpersuaded by the theory that the negligent destruction of a *substantial possibility* of survival would satisfy the proximate cause requirement, or alternatively, that a loss of "chance of recovery" would constitute a compensable injury.

> A rule, which would permit a plaintiff to establish a jury question on the issue of proximate cause upon a showing of a "substantial possibility" of survival, in our judgment, suffers the same infirmity as a rule which would permit proof of a "chance of recovery" to be sufficient.[10]

Rejecting these causal concepts, the court pointed out the infirmity in plaintiff's proof under the traditional standards:

> "Maybe * * * around 50%," in our judgment does not provide a basis from which probability can reasonably be inferred. The use of the words, "maybe" and "around," does not connote that there is probability; those words, in the context used, could mean either

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5 *Id.* at 247, 272 N.E.2d at 101.
6 *Id.*
7 *Id.* at 249, 272 N.E.2d at 102.
8 *Id.*
9 *Id.* at 252, 272 N.E.2d at 103.
10 *Id.* at 251, 272 N.E.2d at 103.

more than 50%, or less than 50%. Probable is more than 50% of actual.[11]

Although the *Cooper* court spoke of the plaintiff's burden in terms of "proximate cause," it is important to note that the problem, more fundamentally, was that of proving "causation-in-fact." This latter inquiry basically involves one factual question: "Has the conduct of the defendant caused the plaintiff's harm?"[12] Proximate causation, on the other hand, is more a question of policy: it is "merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct."[13] Perhaps the most often applied label to this court-imposed limitation is "foreseeability."[14] Therefore, proximate cause issues will deal with the question of whether the consequences of defendant's negligent act were foreseeable,[15] or, even more difficult, was the party injured a "foreseeable plaintiff"?[16]

Although causation is basically a fact question, it necessarily involves some conjecture on the part of the trier of fact. It has been observed that proof of a cause-effect relationship is nothing more than " 'the projection of our habit of expecting certain consequents to follow certain antecedents merely because we had observed these sequences on previous occasions.' "[17] However, courts have long recognized that the fact that *A* precedes *B* does not mean that *A* caused *B*.[18] Consequently, the *Restatement (Second) of Torts* has established a minimum criterion requiring that, in order to find a defendant's negligent conduct to be a legal cause of an injury, the trier of fact must find that "his conduct is

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11 *Id.* at 253, 272 N.E.2d at 104.

12 W. PROSSER, THE LAW OF TORTS § 41, at 237 (4th ed. 1971); *see* Cole, *Windfall and Probability: A Study of "Cause" in Negligence Law*, 52 CALIF. L. REV. 459 (1964); Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962); Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956); Probert, *Causation in the Negligence Jargon: A Plea for Balanced "Realism,"* 18 U. FLA. L. REV. 369 (1965).

13 W. PROSSER, *supra* note 12, § 41, at 236. Works on proximate cause are bountiful, *see Id.* at n.1.

14 *See, e.g.*, Fuerst, *Foreseeability in American and English Law*, 14 CLEV.-MAR. L. REV. 552 (1965); Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961); Annot., 155 A.L.R. 157 (1945).

15 *See, e.g.*, W. PROSSER, *supra* note 12, § 43, at 250-70; Payne, *Foresight and Remoteness of Damage in Negligence*, 25 MOD. L. REV. 1 (1962); Note, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920).

16 The most famous case in this field, if not in all of tort law, is Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). *See* W. PROSSER, *supra* note 12, § 43, at 254-60 for a discussion of this case with accompanying citation of the numerous articles in point.

17 W. PROSSER, *supra* note 12, § 41, at 242 (quoting from 5 ENCYCLOPEDIA BRITANNICA *Causality* 61, 62 (14th ed. 1929)).

18 *See, e.g.*, Ballenger v. Southern Worsted Corp., 209 S.C. 463, 466, 40 S.E.2d 681, 682 (1946).

a substantial factor in bringing about the harm."[19] This criterion has been further qualified by the *Restatement* so as to indicate the minimal relationship between negligent conduct and harm that must necessarily be established to deem such conduct a "substantial factor":

> §432. Negligent Conduct as Necessary Antecedent of Harm
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> (1) . . . [T]he actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.

Section 432(1) is popularly referred to as the "but for" test,[20] which courts have found to be most useful in situations where the defendant has failed to provide some safeguard for the protection of the injured party. Some illustrations of this application are provided by Professor Prosser:[21] defendant's negligent failure to fence off a hole in the ice is found not to be causal in the drowning of runaway horses upon a showing that the fence would not have restrained them anyway;[22] defendant's negligent failure to have a lifeboat ready is found not to be the cause of the drowning of a man who sinks immediately upon falling into the ocean.[23]

A canvasing of malpractice suits in which causation is an issue reveals that, in the majority of cases, the inquiry concerns itself with whether defendant's negligent conduct has *set in motion* some instrumentality which has injured the victim as opposed to injury from some instrumentality for which the defendant was not responsible.[24] However, the "but for" test has its "greatest play" in malpractice cases which involve failure on the part of a defendant doctor to "arrest" or "pre-

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19 RESTATEMENT (SECOND) OF TORTS § 431(a) (1965).

20 W. PROSSER, *supra* note 12, § 41, at 238-41; Malone, *supra* note 12, at 64-68; Note, *Medical Malpractice—Rejection of the "But for" Test*, 45 N.C.L. REV. 799 (1967).

21 W. PROSSER, *supra* note 12, § 41, at 238-41.

22 Stacy v. Knickerbocker Ice Co., 84 Wis. 614, 54 N.W. 1091 (1893).

23 Ford v. Trident Fisheries Co., 232 Mass. 400, 122 N.E. 389 (1919); *see* Probert, *supra* note 12, at 372-74.

24 *See, e.g.*, Thompson v. Lillehei, 164 F. Supp. 716 (D. Minn. 1958), *aff'd*, 273 F.2d 376 (8th Cir. 1959) (allegation that defendant doctor's negligent administration of mixture of glucose and water allowed air embolism into bloodstream and was the cause of brain damage); Orange v. Shannon, 284 Ala. 202, 224 So. 2d 236 (1969) (allegation that defendant doctor's negligent administration of oxygen during operation was the cause of brain damage); Germann v. Matriss, 55 N.J. 193, 260 A.2d 825 (1970) (allegation that defendant dentist's negligent procedures in tooth extraction were the cause of patient's tetanus infection and eventual death); Lenger v. Physician's General Hosp., Inc., 438 S.W.2d 408 (Tex. Civ. App. 1969), *aff'd*, 455 S.W.2d 703 (1970) (allegation that separation of colon was due to negligent feeding of solid food after surgery); Rose v. Friddell, 423 S.W.2d 658 (Tex. Civ. App. 1967) (allegation that defendant doctor's negligent setting of fractured arm caused Volkmann's contracture); Glazer v. Adams, 64 Wash. 2d 144, 391 P.2d 195 (1964) (allegation that defendant doctor's negligent use of diagnostic tool was cause of perforated esophagus and eventual death).

vent" some instrumentality before the injury occurs.[25] Thus, the plaintiff in *Cooper* tried to demonstrate a causal relationship by attempting to prove that, had the doctor properly diagnosed decedent's injury and the surgery been performed, the death would not have occurred.

Perhaps the most difficult, as well as the most criticized,[26] aspect of the "but for" test is that it requires the trier of fact to speculate as to what would have happened in the absence of defendant's conduct.

> The permissible range for conjecture is unlimited. We can never be absolutely certain that our estimate is correct. The point at which we might be satisfied can be expressed in many ways, such as "barely possible," "possible," "not unlikely," "as possible as not," "probable," "highly probable" or "virtually certain."[27]

The jury's ability to theorize is limited to a certain extent by the courts' general agreement as to what the law requires:

> He [plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough . . . .
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> . . . [I]t is enough that he introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not.[28]

Note that "probable" was the criterion of proof required by the *Cooper* court in its application of the "but for" test; it would not allow the case to go to the jury unless there was "sufficient evidence showing that with proper diagnosis, treatment and surgery the patient *probably* would have survived."[29]

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25 Green, *supra* note 12, at 559. *See, e.g.*, Bender v. Dingwerth, 425 F.2d 378 (5th Cir. 1970) (allegation that defendant doctor's failure to diagnose seriousness of decedent's heart condition was the cause of heart attack and ensuing death); Huffman v. Lindquist, 37 Cal. 2d 465, 234 P.2d 34 (1951) (allegation that defendant doctor's failure to properly diagnose and treat decedent's brain injuries was a proximate cause of death); Ramberg v. Morgan, 209 Iowa 474, 218 N.W. 492 (1928) (allegation that defendant doctor's failure to properly diagnose decedent's brain injuries resulted in delay in treatment and eventual death); Walden v. Jones, 439 S.W.2d 571 (Ky. 1968) (allegation that defendant doctor's failure to properly diagnose patient's condition deprived him of proper treatment and led to eventual paralysis); Harvey v. Silber, 300 Mich. 510, 2 N.W.2d 483 (1942) (allegation that defendant doctor's failure to properly diagnose nature and extent of gunshot wound was a proximate cause of death). *See also* Annot., 13 A.L.R.2d 11 (1950).

26 *See* Green, *supra* note 12, at 556.

27 Malone, *supra* note 12, at 67.

28 W. PROSSER, *supra* note 12, § 41, at 241-42; *see* 32A C.J.S. *Evidence* § 1042 (1964).

29 27 Ohio St. 2d at 253-54, 272 N.E.2d at 104 (emphasis added); *see, e.g.*, cases cited note 25 *supra*.

The difficulty presented for the plaintiff by coupling the "but for" test with the "probability" standard of proof is apparent. Basically, in a situation such as the *Cooper* case, the plaintiff is trying to demonstrate that the decedent would have lived in the absence of defendant's negligence, thus establishing defendant's negligence as "the cause" of death. On the other hand, defendant is trying to show that the decedent probably would have died anyway, thus establishing the seriousness of the ailment (brain injury) as "the cause." Thus in *Cooper*, where the "probabilities" were pretty well balanced, the plaintiff's problem becomes evident:

> When the defendant can argue the existence of a competing cause, he is in a position to avail himself of a powerful forensic weapon. . . . [W]here the chances are in even mathematical balance and there are only two plausible causal alternatives—either *A* or *B*—we are likely to insist on some positive assurance that *A*, not *B*, was the cause. In such cases our reaction is sharply tempered by our sense of contrast. The probabilities formula stares us boldly in the face, and there is no means of escape through resort to the subtle shades of factual likelihood. . . . [W]e must either submit to the probabilities formula or else flout it openly.[30]

Professor Leon Green, a noted authority on causation,[31] also acknowledged the problem confronting plaintiffs when the "but for" and "probabilities" criteria are utilized in labeling either *A* or *B* as *the* cause, and proposed a more "orthodox" approach:

> [The probabilities rule] has the same vice as the "but-for" test . . . it takes the focus off the defendant's conduct and goes abroad for other causes. . . . The issue is whether defendant's conduct *contributed* to the victim's injury. To turn the issue into whether the defendant's conduct *caused* the injury is a different issue, and then to require that defendant's conduct must be found to be *more probable than not* the cause of the injury completely perverts the original issue.[32]

While Professor Green's approach does not derogate the axiom that defendant's conduct must be a "necessary antecedent" to the harm for it to be causal, its importance lies in the fact that there is implicit in his use of the term "contributed" the idea that there is, as in virtually any

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30 Malone, *supra* note 12, at 82.

31 Other works on causation by Professor Green include: *The Wagon Mound No. 2—Foreseeability Revised*, 1967 UTAH L. REV. 197; *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42 (1962).

32 Green, *supra* note 12, at 557 (emphasis added). Note that the "contribution" approach still does not do away with the "necessary antecedent" requirement. It merely emphasizes the fact that there can be two or more necessary antecedents. *See* Connellan v. Coffey, 122 Conn. 136, 142, 187 A. 901, 903 (1936).

occurrence, more than one force or instrumentality at work.[33] Accordingly, the concept of contribution does not require the court or jury to think of cause in terms of "solely *A*" or "solely *B*," and somewhat alleviates plaintiff's burden of showing, in a borderline case, it was probably *A*. The underlying basis for this contention is that if the trier of fact thinks of cause in terms of "solely *A*" or "solely *B*," it is implicit in this thinking that, if the instrumentality alleged to be causal (such as the doctor's negligence) never occurred, no harm would have come about at all. It is submitted that the jury will find this difficult to accept when the "other" instrumentality (such as a severe brain injury) is of serious consequence.[34] Professor Green puts special emphasis on situations similar to the one that confronted the plaintiff in *Cooper*:

> The causal relation issue does not change its character; it is still, did defendant's conduct in failing to provide safety facilities contribute to the victim's injury? To ask whether he would have escaped unscathed had the facilities been provided may present a false issue heavily weighted against the victim and one that can seldom, if ever, be answered.[35]

Essentially this same idea is advanced by Professor Malone who advocates the use of the "substantial factor" formula in such cases.[36] Even though, as evidenced by the *Restatement*, the "necessary antecedent" criterion is elemental in labeling conduct a "substantial factor," use of this term offers the same advantages as using the term "contribution"—it does not require the court or jury to think in terms of cause

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[33] It is axiomatic that any given event is the product of a multitude of causes. *See* W. PROSSER, *supra* note 12, § 41, at 239.

[34] For an excellent example of a court unduly influenced by this type of thinking, *see* Ramberg v. Morgan, 209 Iowa 474, 218 N.W. 492 (1928) (plaintiff alleged defendant doctor's failure to properly diagnose decedent's brain injury resulted in delay in treatment and eventual death).

[35] Green, *supra* note 12, at 559.

[36] Malone, *supra* note 12, at 94-97. Though, as evidenced by § 431(a) of the RESTATEMENT (SECOND) OF TORTS (1965), the "substantial factor" test is designed for general application and incorporates the "necessary antecedent" requirement for proving causation, it originally received its primary application in situations wherein the harm was brought about by two or more concurrent causes, each sufficient by itself to cause the harm. In such situations the "but for" rule was inapplicable since none of the causes was a necessary antecedent to the harm; thus, use of the rule would exempt all wrongdoers from liability. *See, e.g.*, Corey v. Havener, 182 Mass. 250, 65 N.E. 69 (1902) (two motorcycles simultaneously passing plaintiff's horse frightened it and caused it to run away); Anderson v. Minneapolis, St. P. & S. Ste. M. Ry., 146 Minn. 430, 179 N.W. 45 (1920) (defendant's train set fire which combined with fire of unknown origin to burn plaintiff's property). This special application of the "substantial factor" test is provided for in RESTATEMENT (SECOND) OF TORTS § 432(2) (1965).

as "solely *A*" or "solely *B*," with the aforementioned hardships on plaintiff.

> Sometimes it [the substantial factor formula] is used in conjunction with the but-for rule, and in these cases it seems fairly clear that the term "substantial factor" serves to soften the edge of the probabilities formula considerably and permits a large range of speculation concerning the factual likelihoods involved.[37]

It would certainly appear that if the *Cooper* court had altered its policy and adopted a "substantial factor" or "contribution" approach to causation, as opposed to the "but for" *A* or *B* approach, the case would have at least reached the jury, possibly with a different outcome.

While courts appear to be in general agreement as to the burden of proof required to prove causation and, consequently, the point at which plaintiff has adduced sufficient evidence to raise the causation issue for jury consideration, it has been observed that the court's power to determine whether plaintiff has reached this point "is seldom given the importance to which it is entitled."[38] Examination of a few cases indicates that the use of words like "possible," "probable," "reasonable," and "likelihood" afford a judge a wide range of discretion capable of being exercised for or against a plaintiff when he feels that a particular case so requires.

In the case of *Houston v. Republican Athletic Association*,[39] plaintiff alleged that defendant's negligent maintenance of a stairway caused the fall and ensuing death of her husband. She claimed that, " 'if a jury could draw *a* reasonable inference' " from the evidence that defendant's negligent maintenance of the stairway was the proximate cause of the accident, the case should be submitted to the jury.[40] The court rejected this contention, stating:

> In the absence of any direct proof as to the manner in which the accident occurred, the burden was on [plaintiff] to produce evidence of circumstances "so strong as to preclude the possibility of injury in any other way and provide as the *only* reasonable inference the conclusion" that her husband's death was caused by the negligence of [defendants] in the manner alleged.[41]

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37 Malone, *supra* note 12, at 94-95. *See, e.g.*, Graham v. Roberts, 441 F.2d 995 (D.C. Cir. 1970) (dentist's delay in referring patient to specialist found to be a substantial factor in bringing about injury without regard to probabilities).

38 Green, *supra* note 12, at 553; *see* Malone, *supra* note 12, at 68-72.

39 343 Pa. 218, 22 A.2d 715 (1941).

40 *Id.* at 220, 22 A.2d at 716.

41 *Id.*

In the aforementioned case, as in others,[42] the court, in evaluating the sufficiency of plaintiff's evidence, has used a very stringent standard when compared to the "reasonable probability" standard usually encountered in most cases, including malpractice.[43] However, when the courts have felt justice so required, they have, as a matter of policy, somewhat "relaxed" the "sufficiency" criterion in order to allow the case to go to the jury. The particular situations where this has been done have varied, and the malpractice area has not been excepted from the vicissitudes of policy. In the case of *Garfield Memorial Hospital v. Marshall*,[44] plaintiff claimed that the defendant hospital's negligent conduct during the birth of her baby, allowing the baby to strike its head on the delivery table, was the proximate cause of the brain injury and spastic condition suffered by the child.[45] Although no witness could testify that such was the case, the court was not very demanding in allowing the case to go to the jury:

> [T]he jury had before it the undisputed fact that the baby's soft skull struck the mat-covered metal table, the expert opinion that such an incident *could* injure the brain so as to produce spasticity, and the conceded fact that subsequently spasticity developed. In those circumstances the inference that the blow on the head caused the child's present condition cannot be said to be unsupported by probative facts or to be *so unreasonable* as to warrant taking the case from the jury.[46]

While the aforementioned policy considerations are employed on a case-by-case basis, apparently determined by the particular factual situations and judicial sympathy, the breach of certain limited duties designed to protect a limited class of persons has resulted in broad-based policies which are at considerable variance with traditional causation

42 For cases where courts have not been satisfied by "mere probability," see Lanier v. Trammell, 207 Ark. 372, 180 S.W.2d 818 (1944) (court required that "strong probability" of causation be proved to find surgeon's negligence responsible for plaintiff's eye infection); Mayes v. McKeithen, 213 So. 2d 340 (La. App.), *cert. denied*, 252 La. 965, 215 So. 2d 130 (1968), *cert. denied*, 396 U.S. 868 (1969) (court not satisfied that probability-of-causation link between defendant's intoxication and auto accident satisfied burden of proof).

43 Cases cited note 24 *supra*.

44 204 F.2d 721 (D.C. Cir. 1953).

45 *Id.* at 722-24.

46 *Id.* at 728 (emphasis added). Other courts have used the broad language available to skirt the "probabilities" approach, allowing plaintiff to establish his claim when the evidence "reasonably tends" to establish essential facts, directly, indirectly, or inferentially. *See, e.g.*, Sisler v. Jackson, 460 P.2d 903 (Okla. 1969) (claim that defendant doctor's improper hip surgery was proximate cause of leg disability upheld on evidence reasonably tending to support allegations).

standards. A prime example is the breach of the statutory duty to provide fire escapes in buildings of a certain height,[47] with the resulting death of guests during a fire. Although in many cases it would be difficult, if not impossible, for the plaintiff to show that absent defendant's negligence the decedent probably would have lived, courts will allow the case to go to the jury if it is not shown conclusively that the decedent would have had no chance to avail himself of the safeguard had it been provided.[48]

Another example is the duty of the master of a ship to make an attempt to rescue a seaman who has fallen overboard.[49] It is virtually impossible for a plaintiff to show that the decedent seaman probably would have lived if the master of the ship had made a rescue attempt, but the case of *Gardner v. National Bulk Carriers, Inc.*[50] is illustrative of the attitude of the courts:

> Proximate cause, the ship urges, has not been proved. . . . But this view ignores the underlying character of the duty. It was less than a duty to rescue him, but it was a positive duty to make a sincere attempt at rescue. The duty is of such nature that its omission will *contribute* to cause the seaman's death. The duty arises when there is a *reasonable possibility* of rescue. Proximate cause is tested by the same standard, i.e., causation is proved if the master's omission destroys the reasonable possibility of rescue.[51]

Other examples, such as the failure to provide a lifeguard at a public swimming pool where a swimmer drowns,[52] defendant's serving of intoxicants to minors and intoxicated persons with resultant injuries to third persons,[53] failure of a housing authority to provide safety facili-

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47 *See, e.g.*, N.J. STAT. ANN. § 55:13A-7 (1971); PA. STAT. ANN. tit. 35, § 1221 (1964).

48 *See* Louisville Trust Co. v. Morgan, 180 Ky. 609, 203 S.W. 555 (1918); Lee v. Carwile, 168 So. 2d 469 (La. App. 1964); Friedman v. Shindler's Prairie House, Inc., 224 App. Div. 232, 230 N.Y.S. 44 (1928), *aff'd*, 250 N.Y. 574, 166 N.E. 329 (1929).

49 *See, e.g.*, Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 377 (1932); Barrios v. Waterman S.S. Corp., 290 F.2d 310 (5th Cir. 1961); Smith v. Reinauer Oil Transp., Inc., 256 F.2d 646 (1st Cir.), *cert. denied*, 358 U.S. 889 (1958); Kirincich v. Standard Dredging Co., 112 F.2d 163 (3d Cir. 1940); Harris v. Pennsylvania R.R., 50 F.2d 866 (4th Cir. 1931); Tweedy v. Esso Standard Oil Co., 190 F. Supp. 437 (S.D.N.Y. 1960), *aff'd*, 290 F.2d 921 (2nd Cir. 1961).

50 310 F.2d 284 (4th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963); *see* Annot., 91 A.L.R. 2d 1032 (1963).

51 310 F.2d at 287 (emphasis added).

52 *See* Rovegno v. San Jose Knights of Columbus Hall Ass'n, 108 Cal. App. 591, 291 P. 848 (1930); YMCA v. Bailey, 107 Ga. App. 417, 130 S.E.2d 242 (1963).

53 *E.g.*, Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959):

> [A] tortfeasor is generally held answerable for the injuries which result in the ordinary course of events from his negligence and it is generally sufficient if his negligent conduct was a substantial factor in bringing about the injuries. . . . The fact that there were also intervening causes which were foreseeable or were normal incidents of the risk created would not relieve the tortfeasor of liability.

ties in an apartment complex having a high crime rate,[54] and an employer's liability under the Federal Employers Liability Act[55] are illustrative of courts being satisfied with far less than the "but for" and "probabilities" approach to causation.

Judicial policy towards cases of this type, although resulting in a departure from the "standard" rules as to the sufficiency of causation evidence, appears to be founded on principles of elemental fairness and has strong support in legal logic.

> Some rules of conduct, particularly those that are extracted from the broad notion we call negligence, cover a vague, indefinite area of risk that escapes all efforts of advance charting. Other rules of conduct were designed for fairly narrow and definite purposes. The precise reasons for their existence can be fathomed without too much difficulty. Whenever it can be said with fair certainty that the rule of conduct relied upon by the plaintiff was designed to protect against the very type of risk to which the plaintiff was exposed, courts have shown very little patience with the efforts of defendant to question the sufficiency of the proof on cause.[56]

Rules demanding the provision of fire escapes, the searching for lost seamen, the stationing of lifeguards and other safeguards are all designed to give a certain class of persons, subject to a limited and defined risk, the chance to escape the particular injury. The fact that defendant deprived plaintiff of the very chance to escape injury that he was under

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Id. at 203, 156 A.2d at 9. *See* Note, *Liability of Tavern Keepers for Injurious Consequences of Illegal Sales of Intoxicating Liquors*, 20 LA. L. REV. 800 (1960); Note, *Increasing the Liability of New Jersey Taverns: Where to Draw the Line?*, 3 SETON HALL L. REV. 233 (1971); Note, *Common Law Liability of the Liquor Vendor*, 18 W. RES. L. REV. 251 (1966); Annot., 75 A.L.R.2d 833 (1961).

[54] Bass v. City of New York, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (Sup. Ct. 1969) (defendant held responsible for rape and murder of a 9-year-old girl due to failure to provide adequate police facilities that could have saved her life):

> When the Bass girl broke loose . . . and ran around the roof of her building, there was *a gambling chance* that her attacker would have been frightened away had she reached and activated such a phone and signal light. But, there was not any on that roof and therefore we will never know.

Id. at 473, 305 N.Y.S.2d at 809 (emphasis added).

[55] Albergo v. Reading Co., 372 F.2d 83 (3d Cir. 1966), *cert. denied*, 386 U.S. 983 (1967) is an excellent example of judicial standards as to sufficiency of evidence under F.E.L.A.:

> The test of a jury case "is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury * * * for which damages are sought."

Id. at 85 (quoting from Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506 (1957)); Daniel v. Pittsburgh & L.E.R.R., 389 F.2d 922 (3d Cir. 1968); Shea v. New York, N.H. & H.R.R., 316 F.2d 838 (1st Cir. 1963); Annot., 98 A.L.R.2d 653 (1964).

[56] Malone, *supra* note 12, at 73.

a duty to provide, and the fact that the "but for" and "probabilities" criteria would provide an almost insurmountable burden for plaintiff, account for the relaxation of the traditional standards.

However this may be in the outlined situations, such a policy has not found appreciable support in malpractice cases, and the reasons for such an outlook are plain:

> In view of the protective attitude of the law toward the medical profession we should not expect that courts will manifest any eagerness to permit the jury to find that the physician's carelessness was a cause-in-fact of the patient's harm or his worsened condition. . . .
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> . . . It is not enough that different treatment would have increased the likelihood that the victim would have fared better. This would throw the physician open to more claims than it is felt would be proper. It is not enough that an expert is willing to estimate that better treatment would have increased the patient's chance from . . . twenty to forty percent. The gambler's chance which we found the court willing to protect in the fire cases has no place in the malpractice suit.[57]

Despite the strong policy considerations favoring defendant doctors with respect to the causation issue, the Fourth Circuit, by way of dictum, in the 1966 case of *Hicks v. United States*,[58] substantially departed from the traditionally required standards of proof. Plaintiff brought an action under the Federal Tort Claims Act to recover damages for the death of the wife of a naval enlisted man, alleging that the negligence of a naval doctor in failing to correctly diagnose and treat the decedent was a cause-in-fact of her death.[59] The district court found the evidence on both the negligence and causation issues was insufficient and dismissed the complaint. The court of appeals held that the doctor was negligent in failing to observe the requisite standard of care in diagnosing decedent's ailment.[60] The factual pattern was similar to *Cooper*. In both cases the physician, failing to observe the requisite standard of care in diagnosing the decedent's ailment, determined the ailment to be something less serious than it actually was and sent the patient home with death resulting. It is important to note the particular conduct of the physician that was subject to inquiry when comparing

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57 *Id.* at 86-87 (footnote omitted).

58 368 F.2d 626 (4th Cir. 1966); *see* Note, *supra* note 20.

59 368 F.2d at 628.

60 *Id.* at 630. Though the district court found that negligence was not established, the court of appeals found that finding to be "clearly erroneous" and upset it pursuant to FED. R. CIV. P. 52(a).

the *Hicks* case with the previously mentioned safeguard situations. The *Hicks* court made special mention of the defendant doctor's duty and his conduct with respect to that duty:

> It would seem . . . that where the symptoms are consistent with either of two possible conditions, one lethal if not attended to promptly, due care *demands* that a doctor do more than make a cursory examination and then release the patient.[61]

The court made this statement in distinguishing a mere error in judgment from a breach of duty, and on that basis imputed negligence.

On the issue of causation, plaintiff's experts testified categorically that, if operated on promptly, the decedent would have lived.[62] This, by itself, would have established a jury question, but the court went a step further:

> 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.* . . . The law does not in the existing circumstances require the plaintiff to show to a *certainty* that the patient would have lived . . . .[63]

The court then went on to analogize between the *Hicks* situation and the rescue-of-seamen doctrine, citing *Gardner* as an example in point.[64] However, in concluding its opinion, the court pointed out that "[s]ince the uncontradicted testimony was that with prompt surgery she would have survived," the doctor's negligence was the proximate cause of death.[65]

The same court, in *Clark v. United States*,[66] made the *Hicks* case even more difficult to analyze, stating that "[c]ertainly *Hicks* laid down no new rule of law with respect to either negligence or proximate cause."[67] Judge Boreman, dissenting on other grounds, agreed with the court's interpretation of *Hicks*, and, remarking on the reference that *Hicks* made to the rescue of seamen, he posited that it was "used as an analogy . . . [and] was not intended to lay down a principle of tort law supplanting long-established . . . rules."[68]

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61 368 F.2d at 629 (emphasis added).

62 *Id.* at 632.

63 *Id.* (emphasis added).

64 *Id.* at 632-33.

65 *Id.* at 633.

66 402 F.2d 950 (4th Cir. 1968).

67 *Id.* at 953 n.4.

68 *Id.* at 955-56.

Despite the uncertainty involved in the *Hicks* decision, the case received more than cursory treatment in later decisions. In the case of *Schuler v. Berger*,[69] plaintiff claimed that defendant's failure to administer certain therapeutic measures was negligence and the proximate cause of decedent's death. Plaintiff's expert witness, responding to a hypothetical question, testified that, had certain enumerated steps been taken, the decedent "would have lived."[70] The defendant claimed that the enumeration of various conditions in the hypothetical inquiry put to the witness made his answer conjectural in nature and thus insufficient to raise the causation issue. The court rejected this contention, citing the *Hicks* reference to the "substantial possibility" test.[71] As in the *Hicks* case, however, the testimony, as construed by the court, indicated that the deceased "would have lived"; therefore, the decision did not rest on the *Hicks* dictum.

In the case of *Brown v. United States*,[72] plaintiff, in an action brought under the Federal Tort Claims Act, claimed that the negligent failure of a doctor to inform the decedent's regular physician of decedent's condition resulted in a failure to hospitalize the decedent and, consequently, his eventual death. The court pointed out that it was difficult to assess to what extent decedent's chances would have been increased with proper treatment and, noting plaintiff's reliance on *Hicks'* "substantial possibility" language, the court stated:

> We accept the principle stated in *Hicks* for the purpose of this appeal but think more elaboration on this principle would be called for if proximate cause were a controlling issue in this case.[73]

Jeanes v. Milner,[74] decided by the Eighth Circuit, dealt squarely with the *Hicks* decision. Plaintiff claimed, *inter alia*, that the defendant doctors' delay in forwarding decedent's biopsies for further evaluation was a proximate cause of decedent's death due to cancer. The theory underlying plaintiff's contention was that, had the slides been promptly forwarded to other experts, the cancer would have been discovered at a much earlier date, at which time treatment might have saved the decedent's life. The only expert testimony introduced on plaintiff's behalf was to the effect that, if the cancer had been treated at stage one in its development, decedent would have had a 35 percent chance of

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69 275 F. Supp. 120 (E.D. Pa. 1967), *aff'd*, 395 F.2d 212 (3d Cir. 1968).

70 *Id.* at 123.

71 *Id.* at 123-24.

72 419 F.2d 337 (8th Cir. 1969).

73 *Id.* at 339 n.2.

74 428 F.2d 598 (8th Cir. 1970).

living, while if the disease was already in stage two at the time of discovery, the chance of survival was only 24 percent.[75] The evidence indicated that, due to the delay, the disease progressed from stage one to stage two before detection. The district court found that such evidence was sufficient for a jury determination on the negligence question, but would not suffice to present the proximate cause issue for determination. The court of appeals disagreed, stating that "[w]e also find Hicks v. United States . . . to be persuasive here," and cited the relevant portion of the *Hicks* decision espousing the "substantial possibility" criterion.[76]

The question of the sufficiency of evidence needed to present the causation issue to the jury is one intertwined with judicial policy considerations and certainly policy can be viewed differently by different courts. If, in fact, one were to view the *Hicks* case as espousing the "substantial possibility" doctrine and the one to be adopted in certain instances of malpractice, which is apparently what some courts have done, the similarity between the "diligence in diagnosis" situation and the "fire escape," "seaman," "lifeguard" and other situations discussed, supports such a viewpoint. The duty to use diligence in diagnosing an ailment is a limited duty. It has a limited and a specifically defined purpose. The persons who come within its range of protection are a limited class and it is designed to protect them against the very risk to which they are exposed by its breach.

However valid the analogy may be, it was never considered by the *Cooper* court, which measured plaintiff's argument alongside the traditional standards for proving causation:

> Although the words "substantial possibility" are employed as articulating a standard of proof, the facts in *Hicks* reveal that plaintiffs' [*sic*] evidence satisfied a much higher standard of proof. . . .
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> . . . .
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> . . . The strong intuitive sense of humanity tends to emotionally direct us toward a conclusion that in an action for wrongful death an injured person should be compensated for the loss of any chance for survival, regardless of its remoteness. However, we have trepidations that such a rule would be so loose that it would produce more injustice than justice.[77]

The contrasting results achieved in two factually similar cases offer a final example of the necessity for the law to reconsider whether its attitude towards the medical profession, its cloak of protectiveness,

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[75] *Id.* at 604; *see* Annot., 55 A.L.R.2d 461 (1957).

[76] 428 F.2d at 605.

[77] 27 Ohio St. 2d at 251-52, 272 N.E.2d at 103.

should be so general in application. In the case of *Dunham v. Village of Canisteo*,[78] plaintiff's intestate, suffering from the cold, was found on the floor of the village fire station. Village authorities took the man to jail and, believing him to be merely intoxicated, put him in a cell to recover. He awoke during the night and, complaining of pain, requested a doctor who was not summoned. Six hours later, the jail authorities, realizing he was in pain, sent him to the hospital where, seven days later, he died of pneumonia. Plaintiff claimed that defendant's delay in procuring medical assistance was a proximate cause of decedent's death. One of plaintiff's expert witnesses testified that early treatment is an "important factor" in effecting a cure and, in his opinion, the defendant's delay *contributed* to the death.[79] He also testified that, even if decedent had received the best and most timely medical treatment, he might have developed pneumonia and died anyway.[80] The court, determining the question to be whether the defendant's acts or omissions "substantially contributed" to the death, applied the "substantial factor" formula and left the "necessary antecedent" implications for the jury to resolve:

> We cannot say as a matter of law . . . that the delay in this case of eighteen hours commencing shortly after serious injury to a man seventy-six years of age was not a substantial factor for the jury to consider in determining the cause of his death.[81]

The *Dunham* case stands in strong contrast to the case of *Ramberg v. Morgan*.[82] In *Ramberg*, plaintiff's intestate was struck by a car and hurled thirty-five feet to the pavement. The driver of the car brought him to jail and a doctor was summoned. The defendant doctor, after making a visual examination of the still unconscious man and diagnosing the problem as intoxication, left the decedent on the cement floor of the jail. Thirty-six hours later, decedent was finally taken home and, a full five days later, he died of brain injuries received in the accident. Plaintiff brought an action against the doctor claiming that the doctor's negligent diagnosis of decedent's condition resulted in an unnecessary delay in securing proper treatment, and thus was a proximate cause of death. The trial court refused to direct a verdict for defendant and,

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78 303 N.Y. 498, 104 N.E.2d 872 (1952). This case is discussed in Malone, *supra* note 12, at 95.

79 303 N.Y. at 504, 104 N.E.2d at 876.

80 *Id.*

81 *Id.* at 506, 104 N.E.2d at 877.

82 209 Iowa 474, 218 N.W. 492 (1928).

upon appeal, the court found a sufficient question of negligence for the jury and declared its criterion for allowing the jury to pass upon the causation question:

> [I]t was necessary for the jury to find, upon proper evidence, that the death of the decedent would not have occurred . . . *but for* the alleged negligence charged against the defendant.[83]

On the causation issue, none of plaintiff's witnesses could testify with any degree of certainty that the decedent would have lived but for the delay in treatment, though they agreed that the fact that decedent was still alive 48 hours after the accident indicated that he had "a better chance of life" than that usually associated with serious brain injuries.[84] The court was not satisfied with this evidence and sustained defendant's motion for a directed verdict, stating:

> The record in the case at bar emphasizes the fact that any conclusion with reference to the cause of death as being referable to the defendant's negligence is mere conjecture, and falls far short of that reasonable certainty which the law requires . . . .[85]

Although it is not suggested that the court used the strict "but for" approach merely because the defendant was a doctor, the contrast between the viewpoints of the courts in *Dunham* and *Ramberg* serves to underscore the difference that judicial policy can make when dealing with virtually the same factual situation.

From the foregoing discussion, one may conclude that, in the interest of justice, there are two ways a court may modify policy in order to alleviate somewhat plaintiff's burden in certain malpractice cases. The first method would be to use a straight "substantial factor" approach, as advocated by the *Dunham* court and section 431(a) of the *Restatement*, thereby taking the emphasis off the "but for" rule and leaving the "necessary antecedent" criterion, still an essential ingredient of the causal relationship, for the jury to ponder without forcing them to think solely in those terms. The second method, certainly more radical, would be to recognize that the physician's duty to use reasonable diligence in forming a diagnosis encompasses the "risk" interest within its range of protection, and thus allows the jury to find defendant's conduct a substantial factor (and impliedly a necessary antecedent) merely upon a showing of a "substantial possibility" of recovery. It

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83 *Id.* at 483, 218 N.W. at 497 (emphasis added).

84 *Id.* at 486, 218 N.W. at 498.

85 *Id.* at 484, 218 N.W. at 497.

does not appear unreasonable for the law to require that the physician at least avail himself of the necessary and readily available diagnostic tools when confronted with a potentially serious ailment, and, in view of the decision in *Cooper*, a change is warranted.

Stephen Horn