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Deirdre A. McDonnell

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INCREASED RISK OF DISEASE DAMAGES: PROPORTIONAL RECOVERY AS AN ALTERNATIVE TO THE ALL OR NOTHING SYSTEM EXEMPLIFIED BY ASBESTOS CASES

Deirdre A. McDonnell*

I. INTRODUCTION

Traditional common law tort rules are often inadequate for handling the unique problems that arise when exposure to a hazardous substance allegedly causes an injury.¹ Unlike conventional injury claims, toxic tort² claims often involve an increased risk that persists even after the tortious conduct has ceased.³ For example, in a traditional case, a driver might create an increased risk by driving a car with brakes that he or she knows are not functioning. Although the act of driving recklessly creates a risk to other drivers and pedestrians, the driver will be liable only if he or she actually causes damage to another.⁴ In other words, the conduct only becomes tortious when it results in immediate injury to others; once the risk created by the carelessness ends, the possibility of liability in tort ceases. If the driver reaches his or her destination safely, the level of risk returns to normal and there is no liability.⁵ In contrast, when a chemical

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² Toxic torts can be defined as civil actions alleging a right of recovery for damages that arose from exposure to a chemical substance, emission, or product, where that exposure allegedly caused physical and/or psychological harm. JAMES T. O'REILLY, TOXIC TORTS PRACTICE GUIDE § 2.01 (2d ed. 1992).
⁴ See DAN B. DOBBS, TORTS AND COMPENSATION § 4.1, at 107 (2d ed. 1993).
⁵ See Legum, supra note 3, at 564–65.
company mishandles a toxic substance, exposing neighbors to the
toxin, it creates an increased risk that continues long after the com-
pany has stopped acting carelessly.6

A victim of an involuntary toxic exposure often will have present
injuries in the form of adverse health consequences or property dam-
age, but also may have an increased risk of serious disease, such as
cancer.7 Plaintiffs in toxic tort cases frequently include claims for
increased risk of future disease.8 In fact, if plaintiffs wait to see if a
disease actually develops, they may lose the right to bring a claim at
all.9 In many jurisdictions, legal rules, such as statutes of limitations,
statutes of repose, and the single cause of action rule, preclude a
second suit for damages caused by a later developing disease.10

The legal standard that most courts apply to claims for increased
risk of disease makes recovering damages for increased risk nearly
impossible when the plaintiff is a victim of a toxic exposure.11 Most
courts allow recovery for increased risk of disease only when a plain-
tiff has both a present injury and an increased risk which makes the
plaintiff more likely than not to develop the latent disease eventual-
ly.12 If the plaintiff meets the requirements of the standard, courts
allow that plaintiff to recover full damages as though he or she cur-
rently was afflicted with the disease.13 Thus, the plaintiff is allowed to
recover present damages for all probable future consequences.

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6 See, e.g., Paul Brodeur, The Asbestos Hazard 19 (1980) (mesothelioma usually occurs
twenty to fifty years after exposure).

7 See, e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1192, 1205 (6th Cir. 1988); Jackson
v. Johns-Manville Sales Corp., 781 F.2d 394, 410–11 (5th Cir.), cert. denied, 478 U.S. 1022 (1986);
Ayers v. Jackson Tp., 525 A.2d 287, 291 (N.J. 1987); Kosmacek v. Farm Service Co-op of Persia,

8 See Jackson, 781 F.2d at 410 (seeking damages for increased risk of cancer); Gideon v.
Johns-Manville Sales Corp., 761 F.2d 1129, 1134 (5th Cir. 1985) (seeking damages for increased
risk of cancer).

9 See Jackson, 781 F.2d at 411; Gideon, 761 F.2d at 1137.

10 See Jackson, 781 F.2d at 411; Gideon, 761 F.2d at 1137.

11 See, e.g., Herber v. Johns-Manville Sales Corp., 785 F.2d 79, 81 (3d Cir. 1986); Dartez v.
Fibreboard Corp., 765 F.2d 456, 466 (5th Cir. 1985), appeal after remand, 910 F.2d 1291 (5th Cir.

12 See, e.g., Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315, 319, recons. denied, en banc,
797 F.2d 256 (5th Cir. 1986) (plaintiff must show cancer more likely than not); Gideon, 761 F.2d
at 1137 (likelihood of developing cancer must be proven by preponderance of evidence); Ande-
v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986), later proceeding, 862 F.2d 910 (1st Cir. 1988), aff'd sub
nom, Anderson v. Beatrice Foods Co., 900 F.2d 388 (1st Cir.), and cert. denied, 498 U.S. 891
(1990) (plaintiffs must show reasonable probability that future illness will occur).

13 Jackson, 781 F.2d at 412; Elam v. Alcolac, Inc., 765 S.W.2d 42, 208 (Mo. Ct. App. 1988), cert.
Although toxic tort plaintiffs often face an increased risk of disease, they usually are not compensated for their increased risk because they are unable to meet the requirements of the current standard.\textsuperscript{14} The only reported cases where victims of toxic exposures successfully have recovered damages for increased risk of disease involved occupational exposure to asbestos.\textsuperscript{15} Limiting recovery for increased risk of disease caused by toxic exposure to asbestos highlights both the unique etiology of asbestos-related diseases and the atypical history of asbestos litigation. Moreover, the asbestos cases illustrate the uneasy fit between the traditional legal standard and the problems presented by environmental exposures.\textsuperscript{16}

Although most toxic tort plaintiffs are undercompensated because they do not receive damages for their increased risk, asbestos plaintiffs have been overcompensated because they have been compensated fully for diseases they may never develop. The anomalous results created when courts apply the increased risk standard to toxic tort cases fail to further the goals of the tort system. Awarding full damages to plaintiffs who are more likely than not to suffer from a disease in the future, while denying damages to plaintiffs who have a significantly increased risk that falls below fifty percent, does not provide appropriate compensation or an appropriate level of deterrence because the current system invariably overcompensates or undercompensates plaintiffs.

Courts have designed the present standard to prevent plaintiffs from recovering based on speculative claims.\textsuperscript{17} Courts have concluded that allowing damages for increased risks that are not probable would lead to a flood of speculative suits.\textsuperscript{18}

Although the current standard furthers the goal of discouraging speculative suits, it is not necessarily consistent with the goals of the tort system. The twin goals of the tort system are to compensate victims and to deter careless or reckless behavior.\textsuperscript{19} To achieve these goals, compensation must be sufficient to make the victim whole with-

\textsuperscript{14} See, e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1205 (6th Cir. 1988); Hagerty, 788 F.2d at 320.

\textsuperscript{15} Jackson, 781 F.2d at 413; Gideon, 761 F.2d at 1138.


\textsuperscript{17} See, e.g., Mauro v. Raymark Indus., 561 A.2d 257, 266 (N.J. 1989).

\textsuperscript{18} See Ayers, 525 A.2d at 307; Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 522 (Fla. Dist. Ct. App. 1985), review denied, 492 So. 2d 1331 (Fla. 1986).

out forcing the defendant to pay for damages that his or her behavior did not cause.

The unique nature of asbestos injuries and asbestos litigation creates an irony. Although in many toxic tort cases there is no recovery, and therefore no deterrent effect, in asbestos cases plaintiffs have been particularly successful. Overcompensating asbestos plaintiffs by allowing full recovery for increased risk of disease is particularly unjust because these awards come on the heels of numerous awards of compensatory and punitive damages that already have depleted the resources of asbestos manufacturers. Forcing asbestos manufacturers to pay for more damages than they actually have caused undermines the goals of the tort system because it may make damages unavailable for future plaintiffs injured through asbestos exposure.

In addition to depleting the funds available to future plaintiffs, allowing full compensation for increased risk of disease caused by asbestos exposure does not provide the correct level of deterrence because it forces defendants to pay for more than the damage for which they are actually responsible.

The goals of the tort system are not met in any increased risk of disease case. Because the current standard allows full recovery when the plaintiff shows a greater than fifty percent chance that the future disease will occur, the current standard may overcompensate plaintiffs who do recover. Plaintiffs who recover increased risk of disease damages are compensated as though they have the actual disease, when, in reality, there may be a forty-nine percent chance that they will never develop the disease. In the asbestos cases, the plaintiffs were overcompensated because they collected damages for diseases they may never get. However, in most cases involving toxic exposures there is no compensation for increased risk and therefore no deterrent.

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21 See Asbestos Litigation Crisis in Federal and State Courts: Hearings before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102d Cong., 1st and 2d Sessions 8 (1991–92) [hereinafter Asbestos Litigation Crisis].

22 Id.

23 Allowing plaintiffs who have a 51% chance of getting cancer to recover as though they already have cancer means that some plaintiffs will receive full compensation but will never actually get the disease.

24 See Jackson, 781 F.2d at 413; Gideon, 761 F.2d at 1138.

25 See, e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1205 (6th Cir. 1988); Hagerty v. L
Courts could resolve the problems of overcompensation and undercompensation by adopting a system of proportional recovery.\textsuperscript{26} Allowing plaintiffs with present injuries and significantly increased risk of future disease to recover damages proportional to their increase in risk would eliminate the problems inherent in the current approach. In asbestos cases this solution would avoid depleting the limited funds available by not overcompensating claimants with an increased risk of disease. In cases involving other toxic substances, proportional recovery could be available for plaintiffs who have a significantly increased risk of disease, but whose chances of getting the disease are less than fifty percent.

This Comment explores the reasons for the different treatment of asbestos cases. It also uses the asbestos cases to highlight some problems with the present approach to increased risk of disease damages and suggests an alternative that would mitigate some of these problems. Section II examines the development of the present standard for increased risk of disease damages and how courts have applied the standard to toxic tort claims. Section III compares the different results achieved by asbestos plaintiffs to results obtained by other toxic tort plaintiffs. Section IV concludes by suggesting a proportional system to ameliorate the problems of overcompensation and undercompensation inherent in the current system.

II. DAMAGES FOR INCREASED RISK

A. Traditional Standard

Damages for increased risk of disease or injury are not new.\textsuperscript{27} Courts have recognized claims for increased risk in traditional tort suits

\textsuperscript{26} See WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 263–69 (1987). In many jurisdictions courts have fashioned a proportional system of recovery in the area of medical malpractice. See, e.g., Perez v. Las Vegas Med. Ctr., 805 P.2d 589, 592 (Nev. 1991). These courts allow recovery in cases where a patient was treated negligently by a health care provider but had a preexisting condition that likely would have caused the patient’s death even absent the malpractice. \textit{Id}. In these so-called “loss of chance” cases many courts have allowed plaintiffs to recover proportional damages based on the chance of survival that they had. \textit{Id}. This type of recovery, however, has been rejected explicitly in the toxic tort context. Rabb v. Orkin Exterminating Co., 677 F. Supp. 424, 427 (D.S.C. 1987).

involving traumatic injuries since the nineteenth century.28 Cases involving both a present injury and an increased likelihood of a future disease or injury present a problem for the plaintiff because the rules of res judicata usually limit an injured party to one recovery.29 Many courts have responded to this situation by allowing recovery for future consequences if a plaintiff can show that the future condition is sufficiently likely to occur.30

In traditional tort cases, increased risk damages are claimed when the plaintiff has a catastrophic injury that also makes a future condition more likely to occur.31 For instance, in Feist v. Sears Roebuck & Co., a falling cash register fractured a child's skull.32 The plaintiff’s expert testified that, due to the skull fracture, the child would be susceptible to contracting meningitis in the future.33 The Feist court held that it was proper for the jury in this case “to consider the evidence that plaintiff has a susceptibility for such future problem.”34 Thus, courts traditionally have held that “[a] plaintiff is entitled to compensation for all damages that reasonably are to be expected to follow . . . the injury.”35

However, to prevent plaintiffs from recovering based on speculative damages, courts impose a threshold standard for increased risk recovery.36 Courts often describe the level of increased risk necessary as a prerequisite to recovery as “reasonable medical certainty” or “reasonable probability.”37 Courts employ these standards to prevent plaintiffs from recovering based on speculative claims.38

28 See, e.g., Strohm, 96 N.Y. at 306.
31 See, e.g., Feist, 517 P.2d at 675; Strohm, 96 N.Y. at 306.
32 Feist, 516 P.2d at 675.
33 Id. at 680.
34 Id.
Despite the apparent difference between "certainty" and "probability," many courts use the terms interchangeably to allow recovery where the chances of contracting a disease are greater than fifty percent or more likely than not. A plaintiff recovers damages as though he or she were afflicted with the disease if the plaintiff can establish that he or she has a greater than fifty percent chance of developing the disease. This is an "all or nothing" approach, since the plaintiff either receives full compensation for the future disease or is barred from any recovery.

While claims for increased risk of future consequences are uncommon in traditional tort cases, in toxic tort cases, plaintiffs often face an increased risk of disease.

B. Toxic Torts and Increased Risk

Claims arising from environmental exposures often differ from traditional negligence claims in that the negligent behavior and the injury are not contemporaneous in toxic tort cases. Traditional tort rules assume that the defendant's act and the injury usually take place simultaneously. Statutes of limitations and rules prohibiting splitting causes of action do not adequately take into account injuries that induce diseases with long latency periods. For these reasons, toxic tort plaintiffs often include claims for increased risk of disease with their other tort claims.

1. Statutes of Limitations

Statutes of limitations, which bar all suits for personal injuries after a specified period of time—typically two to three years—pose a
potential block to suits involving diseases that develop long after a tortious act occurs.\textsuperscript{47} Traditionally, statutes of limitations began to run at the time of the careless or reckless action, or the breach of duty of care.\textsuperscript{48} In a toxic tort case this event occurs when the defendant mishandles a toxic substance, allowing someone to be exposed to a toxin.

Many jurisdictions have ameliorated the harsh effect of their statutes of limitations by adopting the discovery rule.\textsuperscript{49} The discovery rule provides that a cause of action does not accrue until the plaintiff is able to discover his or her injury.\textsuperscript{50} In a jurisdiction that uses the discovery rule, a plaintiff who discovers that he or she has cancer twenty years after working with hazardous chemicals still has two or three years (the amount of time provided in the applicable statute of limitations) to bring suit.\textsuperscript{51} However, because some jurisdictions have not adopted the discovery rule, statutes of limitation still may bar recovery for diseases with long latency periods.\textsuperscript{52} Even in jurisdictions that adopt the discovery rule, a plaintiff with a present injury and a latent disease may face a choice between bringing a cause of action for the present injury, or waiting to bring a claim for the future disease and thereby finding the claim for the original injury barred.

2. Single Cause of Action Rule

Grounded in the doctrine of \textit{res judicata},\textsuperscript{53} the single cause of action rule, also called claim preclusion, provides that a single wrongful act can give rise to only one action.\textsuperscript{54} When a plaintiff fails to include an item of damage or a ground of recovery in a single cause of action, he or she may not claim the omitted element later.\textsuperscript{55} If a plaintiff prevails

\textsuperscript{47} Cummings, \textit{supra} note 41, at 464.
\textsuperscript{48} See id.
\textsuperscript{50} Cummings, \textit{supra} note 41, at 464.
\textsuperscript{51} See id.
\textsuperscript{53} \textit{Res judicata} is a common law doctrine that provides that an existing final judgment on the merits is conclusive of rights and facts in issue. \textit{Res judicata} stands for claim or cause of action preclusion. \textit{Warren Freedman, Res Judicata and Collateral Estoppel: Tools For Plaintiffs and Defendants} 1 (1988).
\textsuperscript{55} \textit{Fleming James, Jr. & Geoffrey C. Hazard, Jr., Civil Procedure} § 1.7, at 541 (2d ed. 1977).
on a cause of action, any other potential claims merge into that judgment.\textsuperscript{56} The claim preclusion rule, which requires a plaintiff to include all claims in a single suit, prevents the plaintiff from harassing the defendant with multiple suits, promotes finality, and avoids inconsistent judgments.\textsuperscript{57} Claim preclusion creates a dilemma for plaintiffs with a present injury and an increased risk of disease because, if the plaintiff brings an action for the existing injury, the claim preclusion rule will bar a later claim if the disease does develop.\textsuperscript{58}

Some courts\textsuperscript{59} have created an exception to the claim preclusion rule to allow second suits for a separate disease that was not present at the time of the initial action.\textsuperscript{60} In \textit{Ayers v. Jackson Township}, for example, the New Jersey Supreme Court held that the plaintiffs, whom the defendant had exposed to contaminated drinking water, could not recover for their increased risk of disease, but would be allowed to bring another cause of action for the contamination if they later developed a disease, such as cancer.\textsuperscript{61}

Many jurisdictions, however, still preclude second suits arising from the same exposure.\textsuperscript{62} In these states, plaintiffs may not sue for their present injuries and then bring a second suit if a disease later strikes.\textsuperscript{63} Although some federal courts have expressed dissatisfaction with the single cause of action rule, they feel bound to apply it.\textsuperscript{64} In \textit{Hagerty v. L & L Marine Services}, for instance, the United States Court of Appeals for the Fifth Circuit expressed its dissatisfaction with the single cause of action rule stating: “The victim of exposure to toxic substances which cause present harm and which may at some future

\textsuperscript{56} Id. at 539-40.

\textsuperscript{57} See Frier v. City of Vandalia, 770 F.2d 699, 702-03 (7th Cir. 1985); Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 520 (Fla. Dist. Ct. App. 1985).


\textsuperscript{59} Currently, fourteen jurisdictions allow second suits for later developing diseases. See \textit{Asbestos Litigation Crisis, supra} note 21, at 460-61.


\textsuperscript{61} Ayers, 525 A.2d at 300.

\textsuperscript{62} See, e.g., \textit{Hagerty}, 788 F.2d at 316 (applying Texas law); \textit{Jackson}, 781 F.2d at 411 (applying Mississippi law); \textit{Gideon}, 761 F.2d at 1136 (applying Texas law); \textit{Brafford}, 586 F. Supp. at 18 (applying Colorado law). In his testimony to the House Committee on the Judiciary, Professor Lester Brickman reported that fourteen jurisdictions allow second suits while seven do not. \textit{Asbestos Litigation Crisis, supra} note 21, at 460-61 (letter from Professor Brickman). There are twenty-four jurisdictions in which the issue is unclear or unresolved. \textit{Id.}

\textsuperscript{63} See \textit{Hagerty}, 788 F.2d at 320; \textit{Jackson}, 781 F.2d at 411; \textit{Gideon}, 761 F.2d at 1136.

\textsuperscript{64} See \textit{Hagerty}, 788 F.2d at 317.
time cause cancer or other serious disease is further victimized by the single cause of action rule."\textsuperscript{65}

3. Application of the Increased Risk of Disease Standard to Toxic Tort Plaintiffs

Although awarding damages for increased risk of disease seems appropriate compensation for victims of toxic torts who have a present injury and an increased risk of future disease, plaintiffs generally have not been successful with claims for increased risk.\textsuperscript{66} The "more likely than not" standard has precluded nearly all claims for increased risk of disease caused by toxic exposures.\textsuperscript{67} Most toxic tort plaintiffs are precluded from recovery under the "more likely than not" standard because, although they have a significantly increased risk of acquiring a disease such as cancer, the probability of the plaintiff actually developing the disease usually is less than fifty percent.\textsuperscript{68} For instance, if a particular disease could normally be expected to occur in four out of every 10,000 people, and an individual, as a result of a toxic exposure had his or her risk increased 100 times, that individual would, nonetheless, be unable to recover under the "more likely than not" standard because that plaintiff's risk of getting the disease would be only forty percent. Thus, the plaintiff in \textit{Dartez v. Fibreboard Corp.} could not recover damages for increased risk of disease because his expert witness testified that his risk of lung cancer "was only 'approaching fifty percent.'"\textsuperscript{69}

Moreover, plaintiffs typically have great difficulty meeting the burden of proof in tort actions based on exposures to hazardous substances.\textsuperscript{70} This problem arises from the relationship between environmental exposures and disease and the difficulty of using scientific evidence.\textsuperscript{71} Although courts often require that plaintiffs quantify a risk to meet the requisite standard, expert witnesses are often not able or willing to assign a precise number to the plaintiff's increased risk of disease.\textsuperscript{72} Even when the plaintiff's increased risk is quan-

\textsuperscript{65} See id. at 320.

\textsuperscript{66} See, e.g., Dartez v. Fibreboard Corp., 765 F.2d 458, 466 (5th Cir. 1985); Anderson, 628 F. Supp. at 1232; Ayers, 525 A.2d at 308.

\textsuperscript{67} See Dartez, 765 F.2d at 466; Anderson, 628 F. Supp. at 1232; Ayers, 525 A.2d at 308.

\textsuperscript{68} See, e.g., Dartez, 765 F.2d at 466; Anderson, 628 F. Supp. at 1232; Ayers, 525 A.2d at 308.

\textsuperscript{69} Dartez, 765 F.2d at 466.

\textsuperscript{70} O'REILLY, supra note 2, § 15.01.

\textsuperscript{71} See id.

tifiable, the likelihood that the plaintiff actually will develop the dis-
ease often falls short of the fifty percent threshold, causing courts to
deny most claims for increased risk of disease caused by toxic expo-
sure.73

Recovering damages for increased risk of disease is so difficult, in
fact, that there are only two reported toxic tort cases in which the
plaintiffs successfully recovered damages based on increased risk of
disease.74 Both of these cases arose because the plaintiffs claimed
damages based on their exposure to asbestos.75 Thus, asbestos expo-
sure is unique among toxic torts. The following section discusses the
particular aspects of asbestos that have enabled asbestos plaintiffs to
recover successfully for increased risk of disease.

III. ASBESTOS—THE EXCEPTION TO INSUFFICIENT RECOVERY
FOR INCREASED RISK IN TOXIC TORT CASES

The fact that the only plaintiffs to recover increased risk of disease
damages were individuals who worked with asbestos suggests the
profound differences between asbestos litigation and litigation based
on other toxic exposures.76 Asbestos litigation is highly unusual both
because plaintiffs have been successful and because scientific evidence
has linked unique diseases to asbestos exposure. The unusual histo-
ries of asbestos and asbestos litigation in the United States help
explain why asbestos plaintiffs have successfully recovered damages
for increased risk of disease while victims of other toxic exposures
have not.

A. Histories of Asbestos and Asbestos Litigation

Asbestos is a generic term for a number of fibrous minerals that
have been widely prized for their versatility and non-combustibility.77
Although people have used asbestos since prehistoric times, the mod-
ern asbestos industry started in the 1870s, and use of asbestos grew

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73 See, e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1205 (6th Cir. 1988) (increased risk
of 25–30% not sufficient to meet standard); Anderson v. W.R. Grace & Co., 628 F. Supp. 1219,
1231 (D. Mass. 1986) (plaintiffs did not quantify increased risk); Ayers v. Jackson Tp., 525 A.2d
74 See Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 411 (5th Cir. 1986), cert. denied, 478
75 See Jackson, 781 F.2d at 369; Gideon, 761 F.2d at 1134.
76 See Jackson, 781 F.2d at 369; Gideon, 761 F.2d at 1134.
77 Brodeur, supra note 6, at 5.
rapidly after that time.\textsuperscript{78} By the 1970s, Americans were using an average of 800,000 tons of asbestos per year.\textsuperscript{79}

Asbestos fibers easily break down and become airborne, allowing workers to inhale the fibers.\textsuperscript{80} Once inhaled, asbestos becomes imbedded in the lungs where it can remain for a lifetime and potentially can lead to a variety of diseases including cancer.\textsuperscript{81} As many as thirty to forty percent of workers heavily exposed to asbestos will die of cancer eventually.\textsuperscript{82}

The dangers of asbestos exposure were not just recently discovered. People were aware of the dangers of asbestos centuries ago.\textsuperscript{83} The ancient Roman historian Pliny documented the use of bladder skins as respirators to protect slaves who wove asbestos.\textsuperscript{84} Modern investigators began to accumulate knowledge about the dangers of asbestos as asbestos use rapidly increased in the late nineteenth and early twentieth centuries.\textsuperscript{85} In 1897, a Vienna physician wrote of asbestos workers who suffered pulmonary problems as a result of breathing asbestos dust.\textsuperscript{86} During this period, a British pathologist, W. E. Cooke, published a detailed case report of a thirty-three year old patient who had died after working in an asbestos factory for twenty years.\textsuperscript{87} In his paper, Dr. Cooke named the disease that afflicted the young woman "pulmonary asbestosis."\textsuperscript{88}

Although English scientists conducted much of the earliest research on asbestos-related disease, scientists in the United States began to explore asbestos-related disease in the 1930s.\textsuperscript{89} The Journal of the American Medical Association published case reports and reviews of literature on asbestosis in 1930.\textsuperscript{90} After 1930, the medical

\begin{thebibliography}{99}
\item \textsuperscript{78} Barry I. Castleman, Asbestos: Medical and Legal Aspects 2 (1984).
\item \textsuperscript{79} Brodeur, supra note 6, at 5.
\item \textsuperscript{80} Id. at 8.
\item \textsuperscript{81} Id.; Piero Mustacchi, Lung Cancer Latency and Asbestos Liability, 17 J. Legal Med. 277, 286 (1996).
\item \textsuperscript{82} Brodeur, supra note 6, at 1.
\item \textsuperscript{83} Note, Predicting the Future: Present Mental Anguish for Fear of Developing Cancer in the Future as a Result of Past Asbestos Exposure, 23 Mem. St. U. L. Rev. 337, 341 (1993).
\item \textsuperscript{84} Castleman, supra note 78, at 1.
\item \textsuperscript{85} Id. at 2-7.
\item \textsuperscript{86} Id. at 2.
\item \textsuperscript{87} Id. at 7.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Castleman, supra note 78, at 16-17.
\item \textsuperscript{90} Id. at 16.
\end{thebibliography}
literature on asbestosis began to grow.\textsuperscript{91} By 1935, experts in the United States widely recognized asbestosis as a serious threat.\textsuperscript{92}

Not long after the medical community identified asbestosis, the carcinogenicity of asbestos began to be uncovered.\textsuperscript{93} During the 1940s, experts noted the link between asbestos and cancer in reviews in the fields of industrial medicine and cancer research.\textsuperscript{94}

Although people in the asbestos industry were aware of the risks of asbestos, corporate leaders took affirmative steps to suppress information about the health effects of asbestos.\textsuperscript{95} This practice eventually culminated in large awards of compensatory and punitive damages to exposed workers based on claims that asbestos was a defective product because manufacturers failed to warn workers of the dangers.\textsuperscript{96}

Between eleven and twenty million American workers have asbestos exposures at levels sufficient to lead to asbestos-related health problems.\textsuperscript{97} Exposed workers have brought tens of thousands of cases against asbestos companies prompting at least fourteen large corporations to file for bankruptcy protection.\textsuperscript{98} In 1990, more than 33,000 cases were pending in federal courts and an estimated 60,000 more cases were pending in state courts.\textsuperscript{99}

There are several physical manifestations of asbestos exposure. For example, scarring of the lung's lining called pleural plaques is a common occurrence in individuals who have been exposed to asbestos.\textsuperscript{100} Pleural plaques can be identified by x-ray and are often the first physical change apparent when someone has been exposed to asbestos.\textsuperscript{101} Although pleural plaques suggest heavy asbestos exposure, they do not cause impairment of lung capacity or function.\textsuperscript{102}

\textsuperscript{91} Id. at 22.
\textsuperscript{92} Id. at 31.
\textsuperscript{93} Id. at 37.
\textsuperscript{94} CASTLEMAN, supra note 78, at 37.
\textsuperscript{95} PAUL BRODEUR, OUTRAGEOUS MISCONDUCT 16 (1985).
\textsuperscript{96} See id. at 183.
\textsuperscript{97} See Asbestos Litigation Crisis, supra note 21, at 2; Jerry J. Phillips, Asbestos Litigation: The Test of the Tort System, 36 ARK. L. REV. 343, 343 (1982).
\textsuperscript{98} Asbestos Litigation Crisis, supra note 21, at 47; Peter H. Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 HARV. J.L. & PUB. POL'Y 541, 555 (1992).
\textsuperscript{99} Asbestos Litigation Crisis, supra note 21, at 7.
\textsuperscript{100} Id. at 99.
\textsuperscript{101} See id. at 99–100.
\textsuperscript{102} Id.
Individuals who have been exposed to asbestos also frequently contract asbestosis. Asbestosis, as the name suggests, is associated exclusively with asbestos. It is a chronic disease characterized by scarring of the lungs. Unlike pleural plaques, which do not affect lung capacity, asbestosis interferes with breathing and is insidious and progressive, often leading to heart failure. However, as dust levels in factories have declined, the rate of severe asbestosis has declined. Asbestosis usually occurs at least ten years after the initial exposure to asbestos.

Asbestos exposure also is associated with lung cancer and gastrointestinal cancer. Lung cancer is the most common cause of death among asbestos workers. Moreover, the combination of asbestos inhalation and cigarette smoke creates an increased risk of lung cancer sixty to ninety times greater than that of the unexposed.

The most deadly disease associated with asbestos exposure is mesothelioma, a rapidly progressing cancer that is almost inevitably fatal. Mesothelioma is a cancer of the pleura, which is the tissue that encases the lungs. This devastating disease can occur in individuals with only a slight exposure to asbestos and does not occur until somewhere between twenty and fifty years after exposure to asbestos. Mesothelioma is associated almost exclusively with asbestos exposure—the incidence of mesothelioma among people with occupational exposure to asbestos is one to two orders of magnitude greater than the mesothelioma incidence rate of the general population.

B. Asbestos Cases and Increased Risk of Disease

The history of asbestos and asbestos-related disease allows asbestos plaintiffs to succeed where other toxic tort plaintiffs have failed.

103 BRODEUR, supra note 6, at 9.
104 Id.
105 Id.
106 Id.
107 Id.
108 BRODEUR, supra note 6, at 9.
109 Id.
110 Id. at 10.
111 Id. at 11.
112 Id.
113 BRODEUR, supra note 6, at 10.
114 Id.; Mustacchi, supra note 81, at 280–81 n.12.
The only two reported toxic tort cases in which the plaintiffs successfully have recovered damages for increased risk of disease both involve occupational exposures to asbestos.\textsuperscript{116}

In \textit{Gideon v. Johns-Manville}, the plaintiff worked as an insulation warehouseman from 1944 until 1969.\textsuperscript{117} At the time of trial Gideon had asbestosis.\textsuperscript{118} Although he did not have any form of cancer, Gideon claimed that he was likely to develop mesothelioma.\textsuperscript{119} During the trial, Gideon introduced evidence that he had a greater than fifty percent probability of developing cancer.\textsuperscript{120} The jury found for Gideon and awarded him approximately $500,000 in damages.\textsuperscript{121}

On appeal, the defendant contended that the court should have excluded evidence of Gideon's increased risk of cancer.\textsuperscript{122} The United States Court of Appeals for the Fifth Circuit upheld the admission of evidence of increased risk.\textsuperscript{123} The court found that because Gideon had a present injury—asbestosis—and had introduced expert testimony evidence that he was more likely than not to develop cancer, the jury could award him compensation for his increased risk.\textsuperscript{124} Because asbestos caused his injury, Gideon was able to satisfy the requirements of the increased risk of disease standard that the vast majority of toxic tort plaintiffs are unable to meet.\textsuperscript{125}

The other reported case where a plaintiff successfully collected damages for increased risk, \textit{Jackson v. Johns-Manville}, involved facts similar to those in Gideon.\textsuperscript{126} The plaintiff Jackson inhaled asbestos while employed as a shipyard worker.\textsuperscript{127} When Jackson brought suit, he sought damages both for his present disease, asbestosis, and for his increased risk of developing cancer.\textsuperscript{128} At the time of the trial

\begin{footnotesize}
116 \textit{Jackson}, 781 F.2d at 396; \textit{Gideon}, 761 F.2d at 1134.
117 \textit{Gideon}, 761 F.2d at 1134.
118 \textit{Id}.
119 \textit{Id}.
120 \textit{Id.} at 1138.
121 \textit{Id.} at 1133.
122 \textit{Gideon}, 761 F.2d at 1134.
123 \textit{Id.} at 1138.
124 \textit{Id}.
127 \textit{Jackson}, 781 F.2d at 369.
128 \textit{Id.} at 410.}
\end{footnotesize}
Jackson did not have cancer, but he did have asbestosis.\textsuperscript{129} The United States Court of Appeals for the Fifth Circuit upheld his recovery of damages based on increased risk of disease.\textsuperscript{130} The court emphasized that the plaintiff had only one opportunity to recover for all of his damages because the principle of claim preclusion would prevent him from splitting his claims.\textsuperscript{131} The court added that, regardless of whether Jackson could bring a second suit, Mississippi law clearly allowed recovery for probable future consequences.\textsuperscript{132} Because Jackson could show that he had an injury and that his chance of getting cancer was greater than fifty percent, the court held that recovery for his increased risk was appropriate.\textsuperscript{133}

Beyond the reported cases,\textsuperscript{134} many plaintiffs with relatively mild injuries or without current injuries are not waiting to see if they develop more serious diseases, but are filing claims now for compensation.\textsuperscript{135} Data compiled from the Manville personal injury trust\textsuperscript{136} reveals that, as injured workers have filed an increasing number of claims against the trust, claims by individuals with pleural plaques or with no present injuries have increased as a proportion of total claims.\textsuperscript{137} Judges have noted a similar trend in claims filed in federal courts by plaintiffs seeking to avoid being barred by statutes of limitations.\textsuperscript{138} Some jurisdictions have responded to the large number of claims by plaintiffs whose only injuries are the presence of pleural plaques by

\textsuperscript{129} Id.
\textsuperscript{130} Id. at 413.
\textsuperscript{131} Id. at 411.
\textsuperscript{132} Jackson, 781 F.2d at 411.
\textsuperscript{133} Id. at 413.
\textsuperscript{134} In an unpublished decision, the United States District Court for the District of New Jersey held that a plaintiff who had been exposed to asbestos could proceed with a claim for increased risk of disease. See Valori v. Johns-Manville Sales Corp., No. 82-2886 (D.N.J. Dec. 11, 1985). In that case, the court held that New Jersey law would allow the plaintiff to claim increased risk of disease damages although the plaintiff's expert testified that the plaintiff's risk of contracting cancer was 43%. Id. The court's conclusion that the reasonable probability test was satisfied by an increased risk of 43% is a dubious reading of New Jersey law. See Mauro v. Raymark Indus., 561 A.2d 257, 266 (N.J. 1989). The District Court's liberal reading of the law may be explained partially by courts' more liberal attitudes towards asbestos plaintiffs. See infra notes 158–91 and accompanying text.
\textsuperscript{135} See Asbestos Litigation Crisis, supra note 21, at 73.
\textsuperscript{136} The Manville Corporation (the successor to Johns-Manville), the largest asbestos company in the United States, filed for bankruptcy under Chapter 11 in 1982. Under the reorganization, the company set up a trust to compensate victims of asbestos. See Brodeur, supra note 95, at 283–320.
\textsuperscript{137} Asbestos Litigation Crisis, supra note 21, at 73.
\textsuperscript{138} Id. at 18–19 (statement of Rya Zobel, United States District Judge for the District of Massachusetts).
creating pleural registries. These pleural registries allow plaintiffs to record their claims before the statute of limitations expires, but defer those claims until the plaintiffs develop significant injuries.\textsuperscript{139}

The success of plaintiffs in asbestos cases stands in stark contrast to the failure of other toxic tort plaintiffs. Commentators have recognized asbestos litigation as unique in the field of toxic torts, and in the history of litigation generally.\textsuperscript{140} The unique nature of asbestos as a substance, combined with the peculiar history of asbestos litigation in this country, accounts for the unusual success of asbestos plaintiffs in recovering for increased risk of disease.\textsuperscript{141} The remainder of this Section identifies the unique factors that have allowed asbestos plaintiffs to succeed in collecting damages for increased risk of disease.

C. Magnitude of Increased Risk

The uniqueness of asbestos-related diseases as compared with other diseases that plaintiffs may link to toxic exposures, has helped asbestos plaintiffs successfully win recovery for increased risk of disease.\textsuperscript{142} Unlike other toxic exposures, asbestos has a strong and widely recognized association with the lung diseases asbestosis and mesothelioma, as well as other lung cancers.\textsuperscript{143} Moreover, the combination of asbestos exposure and cigarette smoking produces a synergistic effect that creates an extremely high chance of lung cancer.\textsuperscript{144}

Asbestosis and mesothelioma differ significantly from other diseases that may be caused by toxic exposures in that asbestos is their only known cause. This exclusive association strengthens the widespread recognition of the link between asbestos and lung disease.\textsuperscript{145} Unlike other toxic tort plaintiffs, claimants with asbestosis or mesothelioma do not face obstacles to proving causation.\textsuperscript{146} While many toxic exposures can cause diseases such as cancer, the diseases they cause occur frequently in the general population even without exposure to

\textsuperscript{139} Id. at 12.
\textsuperscript{141} See Gideon v. Johns-Manville Sales Corp., 781 F.2d 1129, 1135 (5th Cir. 1985).
\textsuperscript{142} See, e.g., Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 411 (5th Cir.), cert. denied, 478 U.S. 1022 (1986); Gideon, 761 F.2d at 1137.
\textsuperscript{143} See Brodeur, supra note 6, at 9–11.
\textsuperscript{144} Id. at 9–10.
\textsuperscript{145} Lawyers' Medical Cyclopedia of Personal Injuries and Allied Specialties § 33.54, at 67–73 (3d ed. 1986) [hereinafter Lawyers' Medical Cyclopedia].
\textsuperscript{146} See Jackson, 781 F.2d at 411; Gideon, 761 F.2d at 1137.
a hazardous chemical.\textsuperscript{147} In most of these cases, proving causation is impossible for plaintiffs because they cannot exclude intervening causes.\textsuperscript{148}

Because the plaintiff in \textit{Gideon v. Johns-Manville} was suffering from asbestosis he clearly had significant exposure to asbestos.\textsuperscript{149} Gideon based his claim for increased risk of disease on the contention that he was likely to develop mesothelioma, another disease with an exclusive link to asbestos.\textsuperscript{150} Gideon's medical expert testified that there was a reasonable medical probability Gideon would die of an asbestos-related cancer.\textsuperscript{151} The expert testimony satisfied the court that Gideon met the standard of reasonable medical probability and therefore should be permitted to recover damages for his increased risk of disease.\textsuperscript{152}

In contrast, most plaintiffs in toxic tort cases that do not involve asbestos exposure are unable to meet the "more likely than not" threshold.\textsuperscript{153} \textit{Sterling v. Velsicol Chemical Corp.} provides an example of the problems that toxic tort plaintiffs face when claiming damages for increased risk of disease.\textsuperscript{154} In \textit{Sterling}, the defendant had disposed of 300,000 fifty-five gallon drums of ultrahazardous waste and hundreds of fiber board cartons containing ultrahazardous dry chemical waste on a tract of rural land that the defendant had acquired to use as a landfill.\textsuperscript{155} As a result of the defendant's disposal practices, twelve to fifteen adjacent drinking water wells were contaminated with high levels of chlorinated hydrocarbons.\textsuperscript{156} The United States Court of Appeals for the Sixth Circuit found that, although the defendant's conduct had exposed the plaintiffs to the contaminated water for a number of years and the district court found an increased risk of disease of twenty-five to thirty percent, this increased risk was not great enough to warrant recovery because it did not reach a reasonable medical certainty.\textsuperscript{157}

\textsuperscript{148} See id.
\textsuperscript{149} See \textit{Gideon}, 761 F.2d at 1137.
\textsuperscript{150} See id. at 1134.
\textsuperscript{151} Id. at 1138.
\textsuperscript{152} Id.
\textsuperscript{154} \textit{Sterling}, 855 F.2d at 1205.
\textsuperscript{155} Id. at 1192.
\textsuperscript{156} Id. at 1193.
\textsuperscript{157} See id. at 1205.
Thus, the difference in the magnitude of increased risk created by asbestos exposure compared with the increased risk associated with other toxic exposures can be outcome determinative in a claim for increased risk of disease. The uphill battle that all toxic tort plaintiffs face also is made easier for the asbestos plaintiff because courts are familiar with asbestos-related diseases.

D. Judicial Familiarity

Plaintiffs bringing claims for increased risk of disease due to asbestos exposure have an easier time convincing courts of the relationship between their exposure and their increased risk of disease because courts are already familiar with asbestos-related diseases.158 Because a judge hearing an asbestos case has most likely heard asbestos cases before and is familiar with the diseases caused by asbestos, he or she is apt to be less skeptical of plaintiffs' claims and therefore more lenient in allowing expert testimony and evidence of increased risk.159

Plaintiffs have filed as many as 100,000 asbestos cases in federal and state courts throughout the country.160 This unprecedented flood of litigation assures that most courts are quite familiar with asbestos.161 The United States Court of Appeals for the Fifth Circuit emphasized how familiar the court was with asbestos cases when it stated in Gideon:

The history of litigation concerning asbestos-related diseases, the nature and cause of asbestosis, mesothelioma, and other lung diseases that may be caused by inhalation of asbestos fibers, . . . have been discussed by us many times in the more than 25 cases in which we have considered such matters.162

William Schwarzer, a Senior United States District Judge, has characterized the epidemiological and medical evidence relating asbestos to disease as "irrefutable."163 Because courts are comfortable with the idea that asbestos exposure causes serious illness, they are less skeptical of claims for increased risk of disease based on asbestos exposure.164

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158 See Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1135 (5th Cir. 1985).
159 See Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 411 (5th Cir.), cert. denied, 478 U.S. 1022 (1986); Gideon, 761 F.2d at 1135.
160 Edley & Weiter, supra note 140, at 383.
161 See Gideon, 761 F.2d at 1135 (5th Cir. 1985).
162 Id.
163 Asbestos Litigation Crisis, supra note 21, at 122 (prepared statement of William W. Schwarzer).
164 See Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 412 (5th Cir.), cert. denied, 478 U.S. 1022 (1986); Gideon, 761 F.2d at 1137.
In contrast to courts' acceptance of the link between asbestos and increased risk of disease, courts seem to view claims of increased risk based on other hazardous exposures as implausible.\(^\text{166}\) For instance, in *Elam v. Alcola*, the Missouri Court of Appeals held that the trial court erred by allowing the plaintiffs' expert witness to testify that the plaintiffs had increased risk of cancer.\(^\text{167}\) The *Elam* court rejected a doctor's testimony because he failed to quantify the increased risk faced by each of the plaintiffs.\(^\text{168}\) In rejecting the expert's opinion, the court expressed suspicion of the doctor's testimony.\(^\text{169}\)

In addition to reducing courts' skepticism towards plaintiffs seeking to prove increased risk, judicial familiarity with asbestos cases also eases plaintiffs' task of showing the requisite physical injury.\(^\text{170}\) Asbestos plaintiffs easily satisfy the physical injury prerequisite to increased risk recovery because courts are willing to view changes in the plaintiffs' lungs caused by inhalation of asbestos as an injury.\(^\text{171}\) In *Gideon v. Johns-Manville*, the court stated that Gideon's injury was the inhalation of fibers and the invasion of his body by those fibers, thus causing him physical damage.\(^\text{172}\) The *Gideon* court did not express any reservation in characterizing the mere presence of asbestos in the plaintiff's lungs as an injury.\(^\text{173}\) In contrast, plaintiffs exposed to other toxins often have difficulty convincing the court that their injuries are real.\(^\text{174}\) Some courts have held that the mere presence of toxic chemicals in a plaintiff's body is not a legally cognizable injury.\(^\text{175}\)

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\(^{166}\) See id.

\(^{167}\) See id.

\(^{168}\) See id. The court criticized the doctor's testimony because it hovered between *certain cancer* and *risk of cancer*. *Id.* The opinion quotes from the transcript at length which reveals that the doctor testified that the plaintiffs had a very high increased risk of cancer and that if they lived long enough, the plaintiffs eventually would develop the disease. *Id.* at 206-07.


\(^{170}\) See *Jackson*, 781 F.2d at 412; *Gideon*, 761 F.2d at 1137.

\(^{171}\) *Gideon*, 761 F.2d at 1137.

\(^{172}\) *Id.*


Asbestos differs from other toxins in that asbestos fibers are large enough to be perceptible.\textsuperscript{175} Tangible asbestos fibers become embedded in workers' lungs, causing changes that can be seen on x-ray.\textsuperscript{176} The \textit{Gideon} and \textit{Jackson} opinions evince both an awareness of the physical process by which asbestos enters the lungs and becomes embedded in the tissue and a judicial willingness to recognize the presence of asbestos in a plaintiff's lungs as a physical injury.\textsuperscript{177} In contrast, other toxins typically cause imperceptible changes on a subcellular level.\textsuperscript{178}

The number of asbestos plaintiffs who already have recovered damages may have helped pave the way for plaintiffs currently seeking damages for increased risk of disease. Plaintiffs who bring claims for increased risk of disease based on exposure to asbestos do not have to establish the existence of a disease of which judges have never heard. The volume of asbestos litigation that has already passed through the courts also may contribute to the courts' proclivity to allow increased risk of disease claims in asbestos cases because it is too late for the courts to prevent a flood of litigation.

E. The Floodgates Are Already Open

The reason for judicial familiarity—the number of suits already filed—is the same reason that hope of preventing a flood of litigation is forlorn. Most courts that refuse to allow toxic tort plaintiffs to proceed with increased risk claims cite the possibility that allowing an action for increased risk will precipitate a flood of dubious claims.\textsuperscript{179} Apparently, those courts fear that an unlimited number of potential plaintiffs could file suit if increased risk of disease leads to recovery in one case.\textsuperscript{180} In \textit{Ayers v. Jackson Township}, the New Jersey Supreme Court was concerned that:

A holding that recognizes a cause of action for unquantified enhanced risk claims exposes the tort system, and the public it serves, to the task of litigating vast numbers of claims for compensation based on threats of injuries that may never occur.\textsuperscript{181}

\textsuperscript{175} \textit{CASTLEMAN}, supra note 78, at 5.
\textsuperscript{176} See id.
\textsuperscript{178} See, \textit{e.g.}, \textit{Brafford}, 586 F. Supp. at 17.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
The fear of a flood of litigation is less of a factor in asbestos cases because the flood gates are already open.\textsuperscript{182} Asbestos litigation is highly unusual in that plaintiffs have been successful, a factor that undoubtedly contributed to the other remarkable characteristic of asbestos litigation—its great volume.\textsuperscript{183}

Implicit in the decisions allowing compensation for increased risk of asbestos-related disease was a concern that the asbestos manufacturers' assets would be depleted quickly.\textsuperscript{184} The plaintiffs may have never recovered damages if the courts had not allowed the plaintiffs to recover in their original suits, because the number of successful damage awards and the number of companies that have filed for bankruptcy have depleted the available pool for recovery.\textsuperscript{185}

\section*{F. Limited Class of Asbestos Plaintiffs}

Although there have been a significant number of asbestos claims, the universe of asbestos plaintiffs is not limitless.\textsuperscript{186} Most claimants in asbestos cases received their asbestos exposure at work.\textsuperscript{187} Although many industries used asbestos for a variety of purposes, significant exposures are associated with occupational handling of asbestos.\textsuperscript{188}

In contrast, many other toxic exposures are caused by contamination of the soil and groundwater.\textsuperscript{189} These cases differ from asbestos cases in that the plaintiff class is much more indeterminate.\textsuperscript{190} The number of people who have been exposed to diffuse chemical contaminants through the water supply or atmosphere is potentially limitless. This fact contributes to courts' reluctance to allow increased risk claims in most cases of toxic exposure.\textsuperscript{191}

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\textsuperscript{182} See Hensler, supra note 140, at 3.
\textsuperscript{183} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Plaintiffs with occupational exposure to asbestos file the majority of asbestos cases. Of claims pending against the Johns-Manville Corporation at the time of bankruptcy 40\% of the claimants were shipyard workers, eight percent were insulation workers, and seven percent were asbestos producers. Hensler, supra note 140, at 12–13.
\textsuperscript{187} See, e.g., Jackson, 781 F.2d at 369 (shipyard worker); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1134 (5th Cir. 1985) (insulation warehouseman).
\textsuperscript{188} See Lawyers' Medical Cyclopeda, supra note 145, § 33.54, at 67 (classifying asbestos-related diseases as "occupational").
\textsuperscript{190} See, e.g., Sterling, 855 F.2d at 1192; Anderson, 628 F. Supp. at 1222; Ayers, 525 A.2d at 291.
\textsuperscript{191} See, e.g., Anderson, 628 F. Supp. at 1232; Ayers, 525 A.2d at 307.
\end{small}
Asbestos's unique history helps explain why asbestos plaintiffs have successfully recovered damages for increased risk of disease while other toxic tort plaintiffs have been unsuccessful. The following Section suggests that this outcome is undesirable because asbestos plaintiffs may be overcompensated and other toxic tort plaintiffs left undercompensated. Part B of the following Section proposes a proportional recovery scheme as a solution to the inequity of the current standard.

IV. OVERCOMPENSATION AND UNDERCOMPENSATION

A. The Problem

The fact that the only toxic tort plaintiffs successfully to recover damages for increased risk of disease were exposed to asbestos illustrates the shortcomings of the current legal standard permitting full recovery when the plaintiff can prove that his or her risk of disease is greater than fifty percent. In the majority of cases the current standard precludes plaintiffs from recovering when they are exposed involuntarily to dangerous substances because of another's negligent conduct. In *Gideon v. Johns-Mansville* and *Jackson v. Johns-Manville*, the present standard allowed the plaintiffs, who did not currently have cancer, to recover damages as though they did. Allowing full recovery when a disease may not occur unnecessarily depletes the shrinking resources available to individuals actually injured by asbestos exposure.

The most serious problem with the present standard is that it views increased risk claims as present claims for future injury and approaches compensation as an all or nothing proposition. This approach allows plaintiffs with a fifty-one percent chance of developing cancer to recover as though they will definitely get the disease, while precluding plaintiffs with an increased susceptibility below the threshold level from recovering anything.
Most victims of toxic exposure cannot meet the "more likely than not" threshold because harmful environmental exposures are unlikely to create a greater than fifty percent chance of contracting a disease. The fifty percent threshold means that plaintiffs will go uncompensated even in cases where the defendant's behavior was clearly reckless and the plaintiffs face an increased risk of serious disease caused by the defendant's recklessness.

The present state of the law does not fulfill one of the central goals of the tort system because it fails to provide a deterrent to the creation of excessive environmental risks. Up to eighty percent of all cancers are caused by environmental factors and therefore potentially are preventable. Despite this fact, the present all or nothing approach to compensation does not provide enough incentive for users and manufactures of carcinogens to reduce the risks to others, because exposure to most substances creates an increased risk of less than fifty percent.

On the other hand, the current standard overcompensates plaintiffs who are able to establish an increased risk of greater than fifty percent, because these plaintiffs recover damages as though they actually had the disease. This danger is particularly problematic in the asbestos context because so many plaintiffs are vying for a share of a limited and dwindling pool of available funds.

With fourteen former asbestos manufacturers already bankrupt, awarding full compensation to plaintiffs who may never develop the anticipated disease makes little sense. Awarding full damages to this class of plaintiffs is not only unfair to defendants, but such awards could quickly exhaust the available resources, leaving later plaintiffs with no chance of compensation.

198 See Dobbs, supra note 4, at 850.
202 See Schuck, supra note 98, at 555.
203 See id.
204 See Asbestos Litigation Crisis, supra note 21, at 8.
B. Proportional Recovery Solution

One viable alternative to the present standard would be to allow plaintiffs with substantially increased risk of disease to recover, but to make the recovery proportional based on the increment by which the exposure has increased their risk. This approach would provide a deterrent to negligent behavior that creates an increased risk of disease, but would avoid over-compensating plaintiffs as a class.

Maintaining the requirement of a present injury while allowing proportional recovery to plaintiffs who have a significantly increased risk of disease that is less than fifty-one percent would prevent illegitimate claims from being brought. Allowing claims for significantly increased risk of disease also would provide compensation to wrongfully exposed plaintiffs and create an incentive for users and producers of hazardous substances to handle them more carefully. The present injury requirement would weed out excessively speculative claims because only individuals who could prove that they had a tangible injury would recover. Making the recovery proportional also would discourage suits based on very low exposures or highly unlikely claims because the recovery for a slight increase in risk of disease would not provide a sufficient incentive to bring a suit.

Allowing proportional recovery is preferable to the option many courts have adopted—permitting plaintiffs to split causes of action by bringing a second suit when and if a disease does develop. Plaintiffs in toxic tort cases face an uphill battle proving the elements necessary to prevail in court. The task is even greater for plaintiffs forced to wait decades before bringing a claim to court. Because most cancers caused by toxic exposures may have many potential contributing factors, plaintiffs probably will not be able to rule out the possibility of intervening causes if they bring a suit twenty years or more after exposure to the chemical.

The task of proving causation also is made more difficult by the fact that witnesses may not be available and evidence may be gone by the time the future action is undertaken. The passage of time creates

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205 See Legum, supra note 3, at 582–83.
207 See Ayers, 525 A.2d 287, 308 (acknowledging that plaintiffs may not obtain compensation in future).
208 See id. at 301.
practical burdens for the judicial system as well as for plaintiffs.\textsuperscript{210} Although courts reject claims for increased risk of disease out of a fear of a flood of litigation, allowing two suits instead of hearing all potential claims in one suit has a greater potential for increasing the burden on the legal system.\textsuperscript{211}

In addition to reducing burdens on the judicial system and litigants, allowing present compensation furthers the goal of deterrence.\textsuperscript{212} Allowing plaintiffs to bring a prompt action when they have been wrongfully exposed to toxins is likely to provide an effective deterrent because the individuals in control of decisions about the handling of toxic chemicals when plaintiffs were exposed probably also will be in control when the case is decided.\textsuperscript{213}

Furthermore, despite the fact that courts decry increased risk damages as speculative, allowing proportional recovery for increased risk of disease is consistent with current tort rules which do not require damages to be easily quantifiable.\textsuperscript{214} Dissenting in \textit{Ayers v. Jackson Township}, New Jersey Supreme Court Justice Handler pointed out that difficulty in quantifying damages does not prevent courts from awarding compensation for assault, trespass, emotional distress, invasion of privacy, or damage to reputation.\textsuperscript{215} Allowing compensation for increased risk of disease recognizes that involuntary exposure to toxic chemicals entails an invasion of individual autonomy as offensive as many traditionally recognized torts such as trespass, assault, and invasion of privacy.\textsuperscript{216} Most individuals would not expose themselves intentionally to toxic substances.\textsuperscript{217} Allowing recovery for increased risk recognizes that exposure to toxic chemicals is an injury that no one would subject themselves to willingly.

\textbf{V. CONCLUSION}

The current approach to increased risk of disease damages is ill-suited to the problems presented by toxic tort cases. The all or noth-

\textsuperscript{210} See id. (Handler, J., dissenting).
\textsuperscript{211} See id. at 270 (Handler, J., dissenting).
\textsuperscript{212} See Legum, \textit{supra} note 3, at 584.
\textsuperscript{213} See id. at 585.
\textsuperscript{214} See Mauro, 561 A.2d at 270 (Handler, J., dissenting).
\textsuperscript{217} See Ayers, 525 A.2d at 320 (Handler, J., concurring in part, dissenting in part) ("No person in her right mind would trade places with any one of these plaintiffs.").
ing approach is unjust because it inevitably overcompensates or undercompensates plaintiffs as a class. The disparate results achieved by asbestos plaintiffs highlights the inappropriateness of the current approach.

The fact that asbestos victims are the only toxic tort plaintiffs to recover damages for increased risk of disease is ironic. While asbestos manufacturers were filing for bankruptcy, plaintiffs who did not currently have cancer were being compensated as though they had cancer. In other cases, plaintiffs who have been exposed involuntarily to hazardous substances are denied recovery.

Allowing plaintiffs in asbestos and other toxic tort cases to recover proportional damages for increased risk of disease would produce a more just result. This approach would reduce the amount of compensation received by asbestos plaintiffs without cancer, while facilitating recovery for others who do not meet the fifty-one percent threshold.