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# NOTES

## Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims

### INTRODUCTION

Individuals exposed to toxic substances[1] encounter almost insurmountable legal and practical barriers in recovering for injuries resulting from their exposure. Under traditional tort law principles, an individual exposed to a toxic substance has suffered no legally recognized injury entitling her to compensation until she manifests a detectable disease.[2] Courts have rejected toxic tort[3] plaintiffs' attempts to circumvent the present injury requirement by seeking compensation for either an increased risk of developing a future disease or the mental anguish resulting from the fear of developing a future ailment, such as cancer. Requiring toxic tort plaintiffs to postpone litigation until a latent disease actually manifests itself is not a viable alternative. The barriers presented by statutes of limitation, statutes of repose, the difficulty of proving causation, or a variety of other practical problems make a future recovery unlikely. Furthermore, even if toxic tort victims could recover in future actions, delaying the litigation undermines the tort system's deterrence

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1. Toxic substances are any chemical, biological, biochemical or radioactive materials that cause an immediate or long-term harm to people, animals or the environment. Examples of toxic substances include: Asbestos, Agent Orange, Benzene, Diethyestibestrol (DES), Dioxin, Formaldehyde, Radiation, and Vinyl Chloride. *See* McGovern, *Toxic Substances Litigation in the Fourth Circuit,* 16 U. RICH. L. REV. 247, 247 n.1 (1982); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System,* 97 HARV. L. REV. 851, 851 n.2 (1984).

2. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 165 (5th ed. 1984) [hereinafter PROSSER AND KEETON] ("The threat of future harm, not yet realized, is not enough."). Ordinarily, exposure to a toxic substance does not result in detectable physical injuries. Most diseases caused by toxic substances, cancer for example, are insidious and have long latency periods before manifestation. *See* Rosenberg, *supra* note 1, at 852 n.3; Comment, *Occupational Carcinogenesis and Statutes of Limitation: Resolving Relevant Policy Goals,* 10 ENVTL. L. 113, 115 n.7 (1979). *See also* SUPERFUND SECTION 301(e) STUDY GROUP, 97TH CONG., 2D SESS., INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES 43 (Comm. Print 1982) [hereinafter SUPERFUND STUDY GROUP] (primary authors Frank P. Grad and Patricia A. Porter).

3. *See* M. DORE, LAW OF TOXIC TORTS: LITIGATION/DEFENSE/INSURANCE § 2.02 (1987) (listing ten major characteristics of toxic torts).

and compensation objectives.[4] The recognition of a pre-manifestation cause of action is therefore imperative.

To remove these recovery barriers, solutions which include major changes in the tort system, alternative compensation systems, administrative programs, and legislative action have been proposed.[5] While these proposals have been commanding the attention of commentators and legislators, the common law, with its ability to continually adapt to changing circumstances, has taken the first step toward resolving the problem. The judicial solution is to award toxic tort victims the cost of the medical testing necessary to facilitate the early detection of diseases caused by toxic substances.[6] Early detection enhances the prospects for cure and treatment of toxic-substance-exposure illnesses, as well as enhancing the victim's chances for a prolonged life and minimized pain and suffering.[7] Permitting recovery of medical surveillance damages satisfies the tort system's compensation objective by providing toxic tort victims with a remedy for their injuries.[8] Medical surveillance damages also fulfill the tort system's deterrence function by compelling toxic substance manufacturers and disposers to internalize the costs of their actions.

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4. *See* PROSSER AND KEETON, *supra* note 2, § 4, at 20, 25-26; S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS §§ 1.3, 1.32 (1983). *See also* Seavey, *Principles of Torts,* 56 HARV. L. REV. 72, 72 (1942).

5. *See, e.g.,* Faber, *Toxic Causation,* 71 MINN. L. REV. 1219 (1987); Ginsberg & Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy,* 9 HOFSTRA L. REV. 859 (1981); Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts,* 85 COLUM. L. REV. 277 (1985); Mihollin, *Long-Term Liability for Environmental Harm,* 41 U. PITT. L. REV. 1 (1979); Prince, *Compensation for Victims of Hazardous Substance Exposure,* 11 WM. MITCHELL L. REV. 657 (1985); Rea, *Hazardous Waste Pollution: The Need for a Different Statutory Approach,* 12 ENVTL. L. 443 (1982); Schwartz & Means, *The Need for Federal Product Liability and Toxic Tort Legislation: A Current Assessment,* 28 VILL. L. REV. 1088 (1983); Soble, *A Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution: A Model Act,* 14 HARV. J. ON LEGIS. 683 (1977); Trauberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim,* 7 HARV. ENVTL. L. REV. 177 (1983); Zazzali & Grad, *Hazardous Wastes: New Rights and Remedies? The Report and Recommendations of the Superfund Study Group,* 13 SETON HALL L. REV. 446 (1983); Note, *Personal Injury Hazardous Waste Litigation: A Proposal For Tort Reform,* 10 B.C. ENVTL. AFF. L. REV. 797 (1983); Comment, *Hazardous Waste Liability and Compensation: Old Solutions, New Solutions, No Solutions,* 14 CONN. L. REV. 307 (1982).

6. *See, e.g.,* Hagerty v. L. & L. Marine Servs., Inc., 788 F.2d 315, *reh'g denied,* 797 F.2d 256 (5th Cir. 1986); Herber v. Johns-Manville Corp., 785 F.2d 79 (3d Cir. 1986); Friends for All Children, Inc., v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984) (awarding medical surveillance damages in a non-toxic tort case); Villari v. Terminix Int'l, Inc., 663 F. Supp. 727 (E.D. Pa. 1987); Johnson v. Armstrong Cork Co., 645 F. Supp. 764 (W.D. La. 1986); Ayers v. Township of Jackson, 106 N.J. 557, 525 A.2d 287 (1987); Askey v. Occidental Chem. Corp., 102 A.D.2d 130, 477 N.Y.S.2d 242 (1984).

7. *Ayers,* 106 N.J. at 591, 525 A.2d at 304.

8. The terms "medical surveillance," "diagnostic testing" and "preventive monitoring" are used interchangeably by the courts and commentators. They all represent the general process through which the early detection of latent diseases resulting from toxic exposures is accomplished. This Note uses the term medical surveillance.

This Note evaluates the utility of awarding medical surveillance damages as a method of adequately compensating toxic tort victims. It begins with an overview of the unique characteristics of toxic torts and the barriers to recovery encountered by toxic tort victims who have manifested a toxic-exposure ailment. In light of the barriers to a future recovery, the Note recommends the recognition of a pre-manifestation cause of action. The Note then examines the novel pre-manifestation damage theories toxic tort victims have advanced. After reviewing these other novel damage theories, the Note examines the legal, medical, and public policy foundations for medical surveillance damages, and assesses the allowance of medical surveillance damages as a remedy for toxic tort victims. It concludes medical surveillance damages are a pragmatic and manageable solution to the dilemma of toxic tort victim compensation. The Note further recommends expansion of medical surveillance damages to include treatment costs in addition to detection costs. Finally, the Note delineates the specific elements courts should require a toxic tort plaintiff to prove in order to recover medical surveillance damages.

## I. THE UNIQUE CHARACTERISTICS OF TOXIC TORTS AND THE OBSTACLES TO TOXIC TORT VICTIM COMPENSATION THEY CREATE

### *A. The Unique Character of Toxic Torts*

The genesis of toxic tort victims' recovery difficulties is the common law tort system's fundamental rules.[9] The common law tort system's rules were developed to address the conflicts raised by simple, straightforward traumatic injuries.[10] Common law courts did not confront injuries with decade-long latency periods,[11] or substances causing diseases which raised complex and uncertain scientific issues.[12] In a typical tort case, such as an automobile

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9. *See* Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation,* 35 STAN. L. REV. 575, 576-78 (1983).

10. *Id.* at 576-77.

11. Latency period is the interval of time between a person's exposure to the toxic substance responsible for the manifestation of a disease, and the first signs of the disease by definitive symptoms or actual detection. *See* F. HOMBURGER, J. HAYES & E. PELIKAN, A GUIDE TO GENERAL TOXICOLOGY 203 (1983) [hereinafter F. HOMBURGER].

12. In addressing the difficulty of applying traditional tort rules in toxic tort cases, one court aptly summed up the problem when it stated: "[t]he simple fact is that rules developed against the relatively unsophisticated backdrops of barroom brawls, intersection collisions and slips and falls lose some of their relevance in these days of miracle drugs with their wondrous, unintended, unanticipated and frequently long-delayed side effects." Martinez-Ferrer v. Richardson-Merrell, Inc., 105 Cal. App. 3d 316, 324, 164 Cal. Rptr. 591, 595 (1980) (the case concerned a lawsuit for the latent manifestation of cataracts from ingestion of MER/29, an anti-cholesterol drug).

accident, the tort victim's injuries are immediately detectable.[13] In a toxic tort case the significant personal injuries often are not detectable simultaneously upon exposure to the toxic substance, but rather are latent.[14] In fact, most toxic injuries do not manifest themselves as clinically detectable ailments until years after exposure occurs.[15]

Additionally, unlike the injuries suffered in a conventional tort case, the manner through which toxic substances cause cancer and other maladies is complex, and to a large extent unknown.[16] While proving how an individual's leg was broken in an automobile accident is accomplished through simple medical procedures, establishing the cause of diseases associated with toxic substances, primarily cancer, is a complicated and difficult process.[17] The scientific uncertainty about cancer etiology presents toxic tort victims with problems of proving causation that were unknown to, and not provided for, by the common law in its traditional rules.[18]

### *B. Barriers to Recovery*

The unique characteristics of toxic harms have caused toxic tort victims to encounter a number of almost insurmountable legal and practical barriers in recovering for their injuries. These barriers do not stem from any deliberate judicial or legislative decision, but instead arise from the failure of toxic torts to conform with the common law conception of an injury.[19]

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13. *See* Note, *Tort Actions for Cancer: Deterrence, Compensation, and Environmental Carcinogenesis,* 90 YALE L.J. 840, 851 (1981). *See also* Allen v. United States, 588 F. Supp. 247, 405 (D. Utah 1984), *rev'd on other grounds,* 816 F.2d 1417 (10th Cir. 1987), *cert. denied,* 108 S. Ct. 694 (1988).

14. Not all toxic tort injuries are latent. There may be some acute effects of exposure. "Acute effects usually occur shortly after high-level exposure and range in severity from temporary rashes to death." Trauberman, *supra* note 5, at 180. An extreme example of serious acute effects was the Bhopal, India disaster. In the Bhopal accident, a Union Carbide plant released methyl isocyanate which injured more than 200,000 people and killed over 2,000. N.Y. Times, Jan. 30, 1985, at 6, col. 2. In many toxic tort cases, however, the significant personal injuries are latent. For example, exposure to asbestos, even in large amounts, does not ordinarily cause any contemporaneous injury. The exposure may, however, cause asbestosis or cancer to manifest years later. *See Special Project, An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation,* 36 VAND. L. REV. 573, 579 (1983) [hereinafter *Special Project*]. *See generally* B. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 37-103 (1984) (discussing the cancer threat posed by asbestos).

15. For example, the average latency period for hazardous substances causing occupational cancers are: arsenic, 25 years; tar, 20-24 years; radiation, 20-30 years; asbestos, 18 years; chromates, 15 years. 5B LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES § 38.46h (3d ed. 1986) [hereinafter LAWYERS' MEDICAL CYCLOPEDIA].

16. *See* Note, *supra* note 13, at 851. *See also* Trauberman, *supra* note 5, at 198-99.

17. *See* Note, *supra* note 13, at 847-51; Trauberman, *supra* note 5, at 197-201; *Developments in the Law—Toxic Waste Litigation,* 99 HARV. L. REV. 1458, 1617-24 (1986) [hereinafter *Developments in the Law*]. *See also Allen,* 588 F. Supp. at 404-06.

18. *See Developments in the Law, supra* note 17, at 1618-20.

19. Note, *supra* note 9, at 580.

A brief examination of some of these barriers is essential to appreciating the necessity of recognizing a pre-manifestation cause of action.[20] The unlikelihood of a toxic tort victim's recovering in a future action enhances the need to recognize a pre-manifestation action.

In tort cases the plaintiff has the burden of proving the causal nexus between the defendant's actions or omissions and the damage the plaintiff has suffered.[21] Proving causation is often the toxic tort plaintiff's most formidable task.[22] Scientific uncertainty about the etiology of cancer and other latent toxic-exposure maladies makes it virtually impossible for a toxic tort plaintiff to establish a cause-in-fact, or a substantial relationship between her injury and her exposure to a particular toxic substance.[23] The plaintiff cannot establish this nexus because a gap exists between the probabilistic evidence available to prove medical causation and the particularistic proof of causation demanded by tort law.[24] The uncertain etiology of toxic-substance-exposure diseases limits scientific testimony to statistical relationships correlating disease incidence and exposure to suspected carcinogens.[25] In most cases, an expert is unable to testify that the plaintiff's

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20. For articles giving more extensive analysis of these and other barriers, see Ginsberg & Weiss, *supra* note 5, at 874-928 (discussing compensation barrier encountered by Love Canal plaintiffs); Rosenberg, *supra* note 1, at 861-905 (discussing recovery barriers in mass toxic tort cases); *Developments in the Law, supra* note 17, at 1602-31 (discussing these barriers in the context of hazardous waste litigation); *Special Project, supra* note 14, at 582-626, 646-59 (discussing the barriers encountered by asbestos plaintiffs). *See also* SUPERFUND STUDY GROUP, *supra* note 2, at 43-132; CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, 96TH CONG., 2D SESS., SIX CASE STUDIES OF COMPENSATION FOR TOXIC SUBSTANCE POLLUTION: ALABAMA, CALIFORNIA, MICHIGAN, MISSOURI, NEW JERSEY, AND TEXAS, REPORT TO THE SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS 475-98 (Comm. Print 1980) [hereinafter SIX CASE STUDIES]; Trauberman, *supra* note 5 at 184-206; Note, *supra* note 5, at 809-33; Comment, *supra* note 5, at 317-25.

21. PROSSER AND KEETON, *supra* note 2, § 41, at 263.

22. 1 M. SEARCY, A GUIDE TO TOXIC TORTS § 10.01, at 10-3 (1987). Some commentators contend that proving causation is so burdensome it leads many potential plaintiffs to abandon the option of litigation and rely on other compensation alternatives such as medical insurance, workers compensation or social security. *See* Rudlin, *Burdens of Proof,* in TOXIC TORTS: LITIGATION OF HAZARDOUS SUBSTANCE CASES 449, 450 (G. Nothstein ed. 1984). *See also* 1 M. SEARCY, *supra,* § 10.02 (listing eight causation problems encountered by toxic tort plaintiffs).

23. *See* Note, *supra* note 13, at 853-55. *See also* Rosenberg, *supra* note 1, at 855-56; Trauberman, *supra* note 5, at 198-99.

24. *Developments in the Law, supra* note 17, at 1619-20. *See also* 1 M. SEARCY, *supra* note 22, § 10.01[2][b] (comparing legal and scientific standards of causation); Note, *supra* note 5, at 815-16 (listing six requirements for establishing medical causation which rely on the probability or likelihood of disease development). *See generally* Dannen & Sagall, *Medicolegal Causation: A Source of Professional Misunderstanding,* 3 AM. J.L. & MED. 303 (1977).

25. Trauberman, *supra* note 5, at 198; Note, *supra* note 13, at 848; McElveen & Eddy, *Cancer and Toxic Substances: The Problem of Causation and the Use of Epidemiology,* 33 CLEV. ST. L. REV. 29, 39-40 (1984). A carcinogen is "[a] substance capable of producing a cancer. It is frequently specific in its action, e.g., it may cause a cancer to develop in rats but not in man. It is generally used to refer to agents producing all kinds of malignant tumors, carcinomas, sarcomas, and leukemias." 5B LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 15, § 38.1b, at 266.

injuries were more likely than not caused by the defendant.[26] Thus, the plaintiff cannot meet her legal burden of proving causation because she cannot demonstrate a cause-in-fact, or a substantial relationship between her injuries and the toxic substance.

Due to the long latency period of toxic substance exposure diseases, even if a toxic tort plaintiff can overcome the difficulties in proving causation, a statutory time limitation may still bar her recovery.[27] There are two types of statutory time limitations: statutes of limitation and statutes of repose. Statutes of limitation prescribe the time period in which a lawsuit must be filed after the cause of action has accrued.[28] Statutes of repose run independent of any manifestation of injury and place an absolute time limit during which the plaintiff may bring an action.[29]

To prevent the inequities of a literal application of statutes of limitation, a majority of jurisdictions apply a discovery rule.[30] The discovery rule holds "a cause of action accrues when the plaintiff knows or through the exercise of due diligence should know of the injury."[31] In a jurisdiction which applies a discovery rule, a toxic tort plaintiff's action is less likely to be statutorily precluded. Statutes of limitation, however, remain a substantial barrier to recovery in those states which do not follow the discovery rule.[32]

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26. Note, *supra* note 13, at 854-55. A plaintiff's expert witness may be able to testify that exposure to a particular amount of substance X is capable of causing an increased amount of cancer in the exposed population. The expert witness, however, can rarely testify that the individual plaintiff's disease was caused by the defendant's toxic substance. Trauberman, *supra* note 5, at 200.

27. For those individuals exposed to "any hazardous substance, or pollutant or contaminant, released into the environment from a facility" Congress has pre-empted state statutes of limitations and has enacted a discovery rule. 42 U.S.C. § 9658 (Supp. 1987). This federal legislation relieves the statute of limitation obstacle only for those individuals exposed to toxic substances through hazardous waste dumps. *See* 42 U.S.C. § 9601 (1983) (defining facility as not including consumer products in consumer use). Therefore, statutes of limitation remain a substantial obstacle for those exposed to toxic substances other than hazardous waste.

28. *See, e.g.,* IND. CODE ANN. § 33-1-1.5-5 (West 1983) (requiring products liability actions to be brought within two years of the accrual of the cause of action); N.Y. CIV. PRAC. L. & R. 214(5) (McKinney Supp. 1988) (limiting actions to recover damages for personal injury to three years).

29. *See, e.g.,* IND. CODE ANN. § 33-1-1.5-5 (West 1983) (requiring lawsuits to be brought within ten years after delivery of the product to the initial user or consumer); OR. REV. STAT. § 12.115(1) (1985) (barring "any action for negligent injury to person or property of another commenced more than 10 years from the date of the act or omission complained of").

30. At least thirty-nine states have adopted a "discovery rule" in some form. SUPERFUND STUDY GROUP, *supra* note 2, at 43, 133-34 n.4. *See also Developments in the Law, supra* note 17, at 1606 n.20; McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future,* 16 FORUM 416, 438-48 (1981) (charting each state's position on the discovery rule).

31. Borel v. Fibreboard, 493 F.2d 1076, 1102 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974). *See* Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits,* 96 HARV. L. REV. 1683, 1684-86 (1983) (discussing the application of statutes of limitation in toxic tort cases in light of the statutes' purposes).

32. Primarily three other accrual times are used, time of exposure, medical evidence rule

Even in jurisdictions applying a discovery rule, a statute of limitation may expire before the plaintiff identifies the causal link between the toxic substance and her injury.[33]

If a jurisdiction's statute of limitations does not preclude a toxic tort plaintiff's claim, the state's repose statute may still bar the claim.[34] While the event triggering the running of repose statutes varies from jurisdiction to jurisdiction,[35] most toxic-substance diseases do not manifest themselves within the statutorily allowed time period.[36] Thus, in any jurisdiction having an applicable repose statute, a toxic tort victim will probably be unable to recover in a lawsuit brought upon manifestation of a latent toxic substance disease.[37]

In addition to these barriers, a toxic tort victim may encounter practical obstacles to recovery. First, she must be able to locate a defendant who is not insolvent or defunct by the time the latent disease manifests itself and litigation commences.[38] Even if the toxic tort plaintiff can locate a viable defendant, because of the large potential liability it is possible the defendant will not have the financial wherewithal, or insurance coverage, to pay the toxic victim's damages.[39] Due to the complexity of toxic tort cases, another significant barrier is the cost of litigation.[40] The plaintiff must bear the

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and last employment related exposure. *See* SUPERFUND STUDY GROUP, *supra* note 2, at 29-30 & 134 n.10; McGovern, *supra* note 30, at 422. *See also Special Project, supra* note 14, at 641-51.

33. Note, *supra* note 9, at 581. Due to this possibility some jurisdictions have adopted a rule which starts the running of the statute of limitation only when the injured party realizes the causal connection. *See* SUPERFUND STUDY GROUP, *supra* note 2, at 43-44; *Developments in the Law, supra* note 17, at 1606-07.

34. Statutes of repose may place additional time restrictions upon the institution of lawsuits by beginning to run at a different time than statute of limitations, or by placing an outer limit on a discovery rule statute of limitations. McGovern, *supra* note 30, at 419-20. Over forty states have enacted repose statutes. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose,* 30 AM. U. L. REV. 579, 587-88 (1981). The majority of repose statutes bar actions not brought within ten years of a triggering event. *See, e.g.,* statutes cited *supra* note 29.

35. *See* McGovern, *supra* note 30, at 425 (listing the various triggering events).

36. *See supra* note 15.

37. *See Special Project, supra* note 14, at 656; McGovern, *supra* note 30, at 425.

38. Note, *supra* note 9, at 584. For example, with regard to toxic waste dumps, site owners and operators frequently are judgment proof before any litigation is filed. *See* Ginsberg & Weiss, *supra* note 5, at 926-27.

39. Ginsberg & Weiss, *supra* note 5, at 926. If the toxic substance manufacturer or disposer is a small enterprise or if there are a large number of plaintiffs, the damage claims may exceed the assets of the defendant and force it into bankruptcy. By entering into bankruptcy, the defendant may preclude the plaintiff's full recovery on current claims and any recovery on future claims. *See* Roe, *Bankruptcy and Mass Tort,* 84 COLUM. L. REV. 846 (1984); Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings,* 96 HARV. L. REV. 1121 (1983); Note, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims,* 38 VAND. L. REV. 1369 (1985).

40. SUPERFUND STUDY GROUP, *supra* note 2, at 67-68; Ginsberg & Weiss, *supra* note 5, at 924-25; Note, *supra* note 9, at 586. Contingent fee arrangements do not solve the cost dilemma because they merely shift the burden of the risk-benefit calculation to the attorney. SIX CASE STUDIES, *supra* note 20, at 495.

enormous cost of providing both the scientific testing and expert testimony necessary to prove her case.[41] Although the class action procedure offers a method to reduce these costs, courts are reluctant to certify class actions in toxic tort cases.[42] If class certification is not granted, the cost of litigation may be so overwhelming as to prevent recovery by plaintiffs with substantial claims, and will surely discourage litigation by plaintiffs with relatively smaller claims.[43]

### *C. The Consequences of the Barriers to Toxic Tort Victim Compensation*

Theoretically, when toxic tort victims manifest a latent ailment they possess a remedy for their injuries. Nevertheless, the difficulty in overcoming the legal and practical barriers to recovery makes it unlikely that an innocent individual injured by exposure to a toxic substance will recover from the tortfeasor. The uncertainty of recovery produces several significant consequences. It discourages toxic tort victims from pursuing legal action,[44] and it encourages the victims who do litigate to settle for inadequate amounts.[45] The uncertainty of recovery also undermines the tort system's deterrence objective.[46] At present, toxic substance manufacturers and disposers realize that traditional tort law bars, or at least discourages, most lawsuits.[47] Thus, since it is unlikely that they will be subject to liability, they have no

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41. *See* Comment, *"Close Encounters of the Toxic Kind"—Toward an Amelioration of Substantive and Procedural Barriers for Latent Toxic Injury Plaintiffs,* 54 TEMP. L.Q. 822, 853 (1983) (concluding it is so expensive to prove proximate cause in toxic tort cases that only government entities can afford to do so). *See also* SIX CASE STUDIES, *supra* note 20, at 494-96; Note, *Allocating the Costs of Hazardous Waste Disposal,* 94 HARV. L. REV. 584, 591-93 (1981).

42. *See, e.g., In re* Northern Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied,* 459 U.S. 1171 (1983); *In re* Agent Orange Prod. Liab. Litig., 635 F.2d 987, 995 (2d Cir. 1980), *cert. denied,* 454 U.S. 1128 (1981); McElhaney v. Eli Lilly & Co., 93 F.R.D. 875 (D. S.D. 1982). *But see In re* Three Mile Island Litig., 87 F.R.D. 433 (M.D. Pa. 1980). Certification is difficult because injuries resulting from toxic substances ordinarily manifest themselves at varying times and with varying degrees of severity in the potential class members. Therefore, questions of law or fact common to the members of the class rarely predominate over questions affecting only individual class members. *See* FED. R. CIV. P. 23(b)(3). *See also* Note, *supra* note 41, at 592.

43. SUPERFUND STUDY GROUP, *supra* note 2, at 131.

44. Toxic tort victims fail to sue because they simply do not wish to become involved in burdensome litigation when they believe their injuries are trivial or will be compensated in other ways, i.e., insurance, worker's compensation and social security. SIX CASE STUDIES, *supra* note 20, at 494-97.

45. SIX CASE STUDIES, *supra* note 20, at 494-95. "Although settlement *per se* is not undesirable, a settlement between a typical personal plaintiff and a corporate defendant may disproportionately reflect the relative bargaining resources of the parties rather than the merits of the plaintiff's claim." Note, *supra* note 9, at 586.

46. *Developments in the Law, supra* note 17, at 1630.

47. *Id.*

economic incentive to prevent or control exposure to toxic substances.[48]

The barriers to compensation encountered by toxic tort victims, and the inadequate deterrence of the hazardous activities of toxic substance manufacturers and disposers, present our society with serious legal and public policy problems. Most commentators who have examined the problem contend that common law doctrines and the judicial system are ill-suited to solve the problems raised by latent toxic injuries.[49] They believe the only appropriate resolution is a statutory response.[50] While these commentators may be correct, calls for legislative action have fallen upon deaf ears.[51] Therefore, whether or not the courts are the appropriate institution, the legislative inaction has left the resolution of the problem of toxic tort victim's compensation to the judicial system.

Recognizing the judicial system will have to resolve the problem of toxic tort victim compensation requires the adoption of a different perspective as to possible solutions. The courts, unlike legislatures, ordinarily alter tort law incrementally, and only adjudicate the rights of the parties before them.[52] Many of the solutions proposed by commentators are therefore inappropriate as judicial acts.[53] Even disregarding these institutional con-

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48. Of course, this presupposes the toxic substance manufacturer or disposer feels no moral or ethical obligation to control the risk of exposure. A frequent reason for imposing liability upon a defendant is to provide an incentive to the defendant to prevent the reoccurrence of the harm. PROSSER AND KEETON, *supra* note 2, § 4, at 25. The present system provides no incentive to toxic substance producers to consider the external costs of their actions. *See Developments in the Law, supra* note 17, at 1630. While the mere existence of external costs does not justify the imposition of liability upon toxic substance producers, the toxic substance producers and disposers are the parties best able to prevent the harm at the lowest cost. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 62 (3d ed. 1986); *Developments in the Law, supra* note 17, at 1630 & n.150; Trauberman, *supra* note 5, at 206-15.

49. *See* commentators cited *supra* note 5. *See also* SUPERFUND STUDY GROUP, *supra* note 2, at 130-32; SIX CASE STUDIES, *supra* note 20, at 520-21; *Developments in the Law, supra* note 17, at 1630-31; Note, *supra* note 9, at 587.

50. *See* commentators cited *supra* note 5. *See also* SUPERFUND STUDY GROUP, *supra* note 2, at 193-271; *Developments in the Law, supra* note 17, at 1630-31; Note, *supra* note 9, at 612-16.

51. *See* Comment, *supra* note 41, at 833 (private remedies for the victims of toxic waste are conspicuously absent from federal environmental statutes). Only four states, Alaska, North Carolina, North Dakota, and Rhode Island have enacted statutory private remedies. *See* SUPERFUND STUDY GROUP, *supra* note 2, at 75, 141 n.96. *See also* Grad, *Injuries From Exposure to Hazardous Waste: Can the Victim Recover?,* 2 J. PROD. L. 133, 136 (1983) (finding that state remedies for toxic substance exposure are virtually nonexistent). In enacting the Comprehensive Environmental Response, Compensation and Liability Act (Superfund), Congress included no provision for compensation of personal injuries. *See* Zazzali & Grad, *supra* note 5, at 446. Instead, Congress created a study group to address the problem. *Id.* at 447. Congress, however, has not adopted the Study Group's recommendations. *See* Ayers v. Township of Jackson, 106 N.J. 557, 581, 525 A.2d 287, 299 n.5 (1987).

52. *See* PROSSER AND KEETON, *supra* note 2, § 3, at 17-20. *See also* Keeton, *Creative Continuity in the Law of Torts,* 75 HARV. L. REV. 463, 463-72 (discussing the creativity and continuity in judicial reform of tort law).

53. For example, the establishment of a general toxic tort victim's compensation fund financed by industry and government cannot be implemented by the courts. *See* Trauberman, *supra* note 5, at 250. Such a broad ruling is simply beyond the judiciary's power.

straints, some proposals for victim compensation are troublesome because of their undesirable consequences. Some proposed resolutions require sweeping changes in the tort system which would have a detrimental impact on new product development, and create serious insurance industry implications.[54] The appropriate solution must balance the need to compensate the innocent victims of toxic torts, with society's interest in benefiting from technological advancement.[55] Achievement of the judicial solution will occur through a gradual process of doctrinal evolution with the goal of modifying the tort system's current rules to provide for the compensation of toxic tort victims.[56] Courts are currently considering the possibility of a pre-manifestation recovery for the unique injuries caused by toxic substances. The next section addresses these novel damage theories.

## II. Toxic Tort Damage Theories

As a general proposition, the damages recoverable for personal injuries are well established. Such certainty, however, does not extend to toxic injuries. Although the traditional concepts of pain and suffering, lost wages and the like apply in toxic tort cases, the special circumstances and novel injuries produced by toxic substances have prompted courts to consider recognizing innovative remedies. Medical surveillance damages are one of the innovative remedies being contemplated. Before examining medical surveillance damages, an overview of some of the other innovative damage theories is presented.[57] The new damage theories presented most often by

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54. *See* Corash, *Evaluating the Effects of Alternative Compensation Systems,* 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,121 (Mar. 1984); Cheek, *Why Current Victim Compensation Proposals Are Unfair and Ineffective,* 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,124 (Mar. 1984). Furthermore, many proposals disregard "the delicate balance in tort law between objectives and rules for recovery. . . . Traditional objectives may not be furthered by indiscriminately allowing recovery in [the] unique context [of toxic torts]." Note, *supra* note 9, at 587.

55. Many of the conveniences and medical advances of today's society are a result of technological innovation. A solution to toxic tort victim compensation must not create a disincentive for continued technological innovation. *See* Corash, *supra* note 54, at 10,122-23; Cheek, *supra* note 54, at 10,124.

56. The prototypical example of an extension of common law rules to address the problems raised by toxic torts is the California Supreme Court's decision in Sindell v. Abbott Labs., 26 Cal. 3d 588, 163 Cal. Rptr. 132, *cert. denied,* 449 U.S. 912 (1980). Contrary to other commentators, this author believes the judicial system can resolve the problem if it is given time. While during this period many toxic tort victims may go uncompensated, it is not the fault of the judicial system but rather federal and state legislatures. Legislatures are the institution designed to respond quickly, not the courts.

57. For a more extensive discussion of these other damage theories, particularly fear of disease and increased risk of disease, see M. Dore, *supra* note 2, at Ch. 6; G. Whitehead & R. Ponessa, *Emerging Damage Theories in Toxic Tort Litigation,* in Preparation and Trial of a Complex Toxic Chemical or Hazardous Waste Case 1986 351-69 (S. Birnbaum & M. Pope eds. 1986) [hereinafter Complex Toxic Chemical Case]; Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?,* 53 Fordham L. Rev. 527

toxic tort plaintiffs are claims for the emotional harm suffered because of the fear of developing a toxic exposure disease, and the increased risk of developing a latent, toxic exposure disease. Other, less commonly asserted damage theories, such as impaired quality-of-life and loss-of-chance, are also examined.

### *A. Fear and Increased Risk of Future Disease Damages*

The primary legal barrier encountered by toxic tort plaintiffs prior to manifestation of a latent disease is proving the existence of a compensable harm. Courts have generally refused to recognize mere exposure to a toxic substance as an injury unless the exposure victim manifests a detectable physical injury.[58] Under common law principles, the mere possibility of a future harm is an insufficient basis for a present recovery.[59] "This requirement is premised in the principle of tort law that the plaintiff must establish an injury that is not speculative in order to recover damages."[60] In an attempt to circumvent the injury requirement, toxic tort plaintiffs have characterized their injuries either as mental anguish from the fear of manifesting a future disease,[61] or the increased risk of developing a latent disease.[62] While some plaintiffs have succeeded in convincing a few courts to recognize fear-of-disease claims,[63] courts have uniformly rejected the increased risk claims.[64]

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(1984); Faulkner & Woods, *Fear of Future Disability—An Element of Damages in a Personal Injury Action,* 7 W. NEW ENG. L. REV. 865 (1985); Gale & Goyer, *Recovery for Cancerphobia and Increased Risk of Cancer,* 15 CUMB. L. REV. 723 (1985); Note, *Increased Risk of Cancer as an Actionable Injury,* 18 GA. L. REV. 563 (1984); Note, *Increased Risk of Disease From Hazardous Waste: A Proposal for Judicial Relief,* 60 WASH. L. REV. 635 (1985) [hereinafter *Increased Risk of Disease*]; Comment, *Emotional Distress Damages for Cancerphobia: A Case for the DES Daughter,* 14 PAC. L.J. 1215 (1983). *See also* Annotation, *Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery,* 50 A.L.R.4th 13 (1986).

58. *See, e.g.,* Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 528 (Fla. Dist. Ct. App. 1985), *review denied,* 492 So. 2d 1331 (Fla. 1986); Payton v. Abbott Labs., 386 Mass. 540, 545, 437 N.E.2d 171, 174 (1982);. For a good review of the recent cases discussing the present injury requirement, see COMPLEX TOXIC CHEMICAL CASE, *supra* note 57, at 354-69.

59. PROSSER AND KEETON, *supra* note 2, § 30, at 165.

60. Brafford v. Susquehanna Corp., 586 F. Supp. 14, 17 (D. Colo. 1984).

61. *See, e.g.,* Anderson v. W.R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986); *Payton,* 386 Mass. at 540, 437 N.E.2d at 171; Laxton v. Orkin Exterminating Co., 639 S.W.2d 431 (Tenn. 1982)..

62. *See, e.g.,* Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985); *Brafford,* 586 F. Supp. at 14; Plummer v. Abbott Labs., 568 F. Supp. 920, 921 (D. R.I. 1983).

63. *See, e.g.,* Wetherhill v. University of Chicago, 565 F. Supp. 1553 (N.D. Ill. 1983); *Laxton,* 639 S.W.2d at 431.

64. *See, e.g., Anderson,* 628 F. Supp. at 1219; *Plummer,* 568 F. Supp. at 920. One of the best reasoned opinions discussing fear and increased risk of disease claims is an unpublished decision, Arnett v. Dow Chem. Co., S.F. Master File No. 729586, *reprinted in* COMPLEX TOXIC CHEMICAL CASE, *supra* note 57, at 377.

Although it is acknowledged that an increased risk of disease exists upon exposure to a toxic substance,[65] this increased risk corresponds to a general population exposed to the toxic substance and often cannot be particularized to the individual plaintiff.[66] Thus, the toxic tort plaintiff ordinarily cannot prove with reasonable medical certainty that she will eventually manifest cancer or some other exposure related disease.[67] Without proof that it is reasonably certain the plaintiff will manifest a latent disease, courts have refused to allow juries to speculate about what may happen in the future.[68] Courts have instead advised plaintiffs to bring an action when a disease manifests itself.[69] Only in those cases in which plaintiffs have met the jurisdiction's burden of proof as to the future consequences of an injury have plaintiffs recovered for an increased risk of disease.[70]

Actions for fear of disease have met with greater judicial acceptance. This acceptance is based on common law emotional distress theory, and a judicial willingness to allow recovery for fear of a future harm.[71] Nevertheless, a toxic tort plaintiff's chances for recovery remain scant. Most jurisdictions require a physical injury or disease as a prerequisite to recovery for emotional distress damages.[72] In toxic tort cases where the plaintiff has not manifested an exposure related ailment, or suffered physical harm as a result of emotional distress, the lack of a physical injury has prevented recovery.[73] Even where the plaintiff can satisfy the physical injury require-

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65. *See* Hagerty v. L. & L. Marine Servs., Inc., 788 F.2d 315, 319, *reh'g denied,* 797 F.2d 256 (5th Cir. 1986); Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303, 321-22 (W.D. Tenn. 1986). *See also Increased Risk of Disease, supra* note 57, at 636.

66. For example, studies may uncontrovertibly establish that 20 out of every 100 persons exposed to a certain quantity of chemical X will develop cancer. Using this statistic, a plaintiff exposed to chemical X can establish that he has a 20% increased chance of developing cancer. The courts have refused to compensate for this increased chance because the plaintiff cannot show that he is one of the 20 individuals who will develop cancer because of his exposure to chemical X. *See* Note, *supra* note 9, at 582.

67. *See, e.g., Anderson,* 628 F. Supp. at 1219; *Plummer,* 568 F. Supp. at 920. *See also* Annotation, *Admissibility of Expert Medical Testimony as to Future Consequences of Injury as Affected by Expression in Terms of Probability or Possibility,* 75 A.L.R.3d 9 (1977).

68. *See Anderson,* 628 F. Supp. at 1219; Ayers v. Township of Jackson, 106 N.J. 575, 577, 525 A.2d 287, 297 (1987).

69. *See, e.g.,* Delvin v. Johns-Manville Corp., 202 N.J. Super. 556, 569, 495 A.2d 495, 502 (1985); *Eagle-Picher,* 481 So. 2d at 520.

70. *See, e.g.,* Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984), *on reh'g en banc,* 750 F.2d 1314 (5th Cir. 1985), *questions certified en banc,* 757 F.2d 614 (5th Cir. 1985), *certification declined,* 469 So. 2d 99 (Miss. 1985), *on reh'g en banc,* 781 F.2d 394 (5th Cir. 1986); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985).

71. Gale & Goyer, *supra* note 57, at 729-30. *See also* PROSSER AND KEETON, *supra* note 2, § 30, at 168; Faulkner & Woods, *supra* note 57, at 872-77.

72. PROSSER AND KEETON, *supra* note 2, § 54, at 361. Traditionally, claims for emotional distress have been disfavored because they are easily simulated and abused. Accordingly, courts have required either an impact or a physical injury as a guarantee of reliability. *See* Dworkin, *supra* note 57, at 528-36; PROSSER AND KEETON, *supra* note 2, § 54, at 359-66.

73. *See, e.g., Plummer,* 568 F. Supp. at 925; Mink v. University of Chicago, 460 F. Supp. 713, 719 (N.D. Ill. 1978); *Payton,* 386 Mass. at 548, 437 N.E.2d at 176.

ment, she has the difficult task of persuading the jury to compensate her for her anxiety. The prevalent nature of toxic substances and the risk of cancer inherent in every person's life makes it difficult to convince a jury to compensate a plaintiff for her fear.[74] Jury verdicts in fear of cancer cases illustrate this difficulty.[75]

### *B. Other Novel Damage Theories*

Toxic tort incidents often cause significant disruptions in the everyday life of individuals.[76] In general, life after the incident may be dramatically less enjoyable than it was before. Consequently, plaintiffs using nuisance theory have sought to recover damages for the inconvenience, aggravation, unnecessary expenditure of time and effort—in essence, a decreased quality of life—resulting from the toxic incident.[77] Courts have been generally receptive to these claims.[78] Decreased quality-of-life damages, however, are available only to toxic tort victims injured as a result of a nuisance.[79]

Toxic tort plaintiffs have also attempted to recover under the lost chance doctrine.[80] Under this doctrine "a plaintiff can recover for damages suffered as the result of nonfeasance that reduced the possibility of avoiding an injury actually sustained."[81] A few courts have recognized the lost chance theory in cases involving a physician's delay in diagnosing a patient's disease, thereby decreasing the patient's chance of survival or recovery.[82] The courts, however, have declined to apply the doctrine to toxic tort injuries.[83]

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74. *See* Herber v. Johns-Manville Corp., 785 F.2d 79, 88-89 (3d Cir. 1986); Dworkin, *supra* note 57, at 576.

75. *See Herber,* 785 F.2d at 88-89 (the jury found the defendant negligent but it nevertheless awarded the plaintiffs "zero" dollars as damages for their emotional distress due to fear of cancer).

76. For example, drinking water supplies may be contaminated requiring bottled water be used for drinking, cooking, washing and bathing. *See, e.g., Ayers,* 106 N.J. at 569-70, 525 A.2d at 293.

77. *Id. See also* Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303, 321 (W.D. Tenn. 1986).

78. *See Ayers,* 106 N.J. at 570-72, 525 A.2d at 293-94; *Sterling,* 647 F. Supp. at 321. *But see* COMPLEX TOXIC CHEMICAL CASE, *supra* note 57, at 375-76 (citing *Westron v. Kerr-Mcgee Corp.,* an unreported U.S. District Court case in the eastern district of Illinois, rejecting decreased quality-of-life damages).

79. *See* D. DOBBS, REMEDIES: DAMAGES—EQUITY—RESTITUTION § 5.3, at 334 (1973).

80. *See Herber,* 785 F.2d at 82-83.

81. *Id.* at 82. *See also* Branch, *Misdiagnosis of Cancer and Loss of Chance,* 30 AM. JUR. TRIALS 237 (1983); Wolfstone & Wolfstone, *Recovery of Damages for the Loss of Chance,* 28 MED. TRIAL TECH. Q. 121 (1981); Comment, *Playing the Percentages: A Re-examination of Recovery for Loss of Chance,* 26 SANTA CLARA L. REV. 429 (1986).

82. *See* Jones v. Montefiore Hosp., 494 Pa. 410, 431 A.2d 920 (1981); Gradel v. Inouye, 491 Pa. 534, 421 A.2d 674 (1980); Herskovits v. Group Health Coop. of Puget Sound, 99 Wash. 2d 609, 664 P.2d 474 (1983). *Compare* Cooper v. Sisters of Charity, 27 Ohio St. 2d 242, 272 N.E.2d 97 (1971); Hiser v. Randolph, 126 Ariz. 608, 617 P.2d 774 (Ariz. Ct. App. 1980).

83. *See Herber,* 785 F.2d at 82-83.

### C. *The Problem of Claim Preclusion*

A concern universal to all pre-manifestation damage theories is whether the doctrine of claim preclusion bars any future action if a latent disease manifests itself.[84] That is, if a toxic tort plaintiff brings a pre-manifestation action to recover, for example, medical surveillance damages, will claim preclusion bar any future litigation if a latent disease manifests itself? Most courts addressing this issue have held that pre-manifestation actions would not preclude a latter action if a latent disease manifests.[85] A few jurisdictions, however, have strictly applied the prohibition against claim splitting and denied toxic tort victims a recovery in a second action for damages for latent manifested injuries.[86] In jurisdictions strictly applying the prohibition against claim splitting toxic tort victims must carefully evaluate whether a pre-manifestation or post-manifestation action is their most viable alternative.

## III. THE LEGAL, MEDICAL AND PUBLIC POLICY JUSTIFICATIONS FOR MEDICAL SURVEILLANCE DAMAGES

Prior to manifestation of a latent disease, the courts should recognize toxic tort victims' rights to recover the expenses incurred in monitoring their health for the development of exposure related ailments. Recently, some courts have recognized medical surveillance expenses as an independent element of damages.[87] The recognition of medical surveillance damages is predicated upon an extension of common law damage doctrines, medical knowledge, and public policy considerations.

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84. Under the transactional definition of causes of action, a plaintiff has only one cause of action for all present and future injuries caused by a single tort regardless of the various harms which result. RESTATEMENT (SECOND) OF JUDGMENTS § 25 comment c (1982). A plaintiff is not permitted to split her cause of action and seek damages for some injuries in one lawsuit and later-manifesting injuries in another lawsuit. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.9, at 601-02 (3d ed. 1985).

85. *See, e.g., Hagerty,* 788 F.2d at 315; *Ayers,* 106 N.J. at 557, 525 A.2d at 287; *Delvin,* 202 N.J. Super. at 556, 495 A.2d at 495; *Eagle-Picher,* 481 So. 2d at 517.

86. *See, e.g.,* Graffagnino v. Fibreboard Corp., 776 F.2d 1307, 1309 (5th Cir. 1985), *reh'g denied,* 781 F.2d 1111 (5th Cir. 1986); Carbonaro v. Johns-Manville Corp., 526 F. Supp. 260, 262-64 (E.D. Pa. 1981), *aff'd without opinion,* 688 F.2d 819 (3d Cir. 1982).

87. *See* Herber v. Johns-Manville Corp., 785 F.2d 79, 83 (3d Cir. 1986) (stating "New Jersey recognizes the cost of preventative monitoring occasioned by a tort as an independent element of damages."); Askey v. Occidental Chem. Corp., 102 A.D.2d 130, 135, 477 N.Y.S.2d 242 (1984) (holding "there is a basis in law to sustain a claim for medical monitoring as an element of consequential damage"). *See also* Hagerty v. L. & L. Marine Servs., Inc., 788 F.2d 315, *reh'g denied,* 797 F.2d 256 (5th Cir. 1986); Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984); Johnson v. Armstrong Cork Co., 645 F. Supp. 764 (W.D. La. 1986); Ayers v. Township of Jackson, 106 N.J. 557, 525 A.2d 287 (1987).

### A. Legal Justification

Recognizing the right of pre-manifestation toxic tort plaintiffs to recover the costs of medical surveillance testing from a tortfeasor is a logical extension of common law doctrine. The principles of two common law concepts provide the foundation for permitting the recovery of medical surveillance damages: the allowance of prospective medical expense damages, and the avoidable consequences rule.[88]

#### 1. Prospective Medical Expenses

Every court recognizing medical surveillance expenses as an independent element of damages has relied upon—at least in part—the generally accepted principle of allowing tort victims to recover future medical expenses.[89] It is well established that a tort victim is entitled to recover from the tortfeasor those medical expenses, resulting from the injury, that are reasonably certain to be necessarily incurred in the future.[90] In awarding medical surveillance damages courts have slightly altered the reasonable probability standard.[91] The test for the compensability of medical surveillance expenses is whether future testing is necessary to detect the early warning signs of latent ailments.[92]

The modification of the reasonable probability standard reflects the unique injuries suffered by toxic tort victims. In the typical personal injury case,

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88. These rules are mutually exclusive. A court can rely on either one, or both, as the legal basis for awarding medical surveillance damages.

89. *See Ayers,* 106 N.J. at 599-606, 525 A.2d at 308-12; *Friends,* 746 F.2d at 824-27; *Hagerty,* 788 F.2d at 319; *Herber,* 785 F.2d at 83; *Askey,* 102 A.D.2d at 137, 477 N.Y.S.2d at 247.

90. *See* F. HARPER, F. JAMES & O. GRAY, 4 THE LAW OF TORTS, § 25.9, at 557-58 (2d ed. 1986). *See also* C. MCCORMICK, DAMAGES § 90 (1935); J. STEIN, DAMAGES AND RECOVERY: PERSONAL INJURY AND DEATH ACTIONS § 95 (1972); Annotation, *Requisite Proof to Permit Recovery for Future Medical Expenses as Item of Damages in Personal Injury Action,* 69 A.L.R.2d 1261 (1960).

91. *See* Note, *Future Medical Surveillance: An Award for Toxic Tort Victims,* 38 RUTGERS L. REV. 795, 802-03 (1986). *See also Friends,* 746 F.2d at 825-26; *Ayers,* 106 N.J. at 603-06, 525 A.2d at 311-12.

92. *Friends,* 746 F.2d at 826; *Ayers,* 106 N.J. at 603-06, 525 A.2d at 311-12. *See also* Note, *supra* note 91, at 803. The trial court in *Ayers* explained:

> It is not the reasonable probability of whether plaintiffs will suffer cancer in the future that should determine whether medical surveillance is necessary. Rather, it is whether it is necessary, based on medical judgment, that a plaintiff who has been exposed to known carcinogens at various levels should undergo annual medical testing in order to properly diagnose the warning signs of the development of the disease. If it is necessary, then the probability of the need for that medical surveillance is cognizable as part of plaintiff's claim.

189 N.J. Super. 561, 572-73, 461 A.2d 184, 190 (1983), *rev'd in part, aff'd in part,* 202 N.J. Super. 106, 493 A.2d 1314 (1985), *rev'd in part, aff'd in part,* 106 N.J. 557, 525 A.2d 287 (1987).

the tort victim requesting prospective medical expenses has suffered a currently manifested physical injury. In a toxic tort case the plaintiff is attempting to recover the medical expenses necessary to detect an injury which does not currently exist, nor may ever manifest itself. Because the courts are unwilling to recognize mere exposure to a toxic substance as an injury,[93] and because in every tort action the plaintiff must prove she has suffered a compensable harm,[94] toxic tort plaintiffs must prove they have suffered a legally recognized injury in order to recover medical surveillance damages.

In medical surveillance actions, the requisite injury is the invasion of an individual's interest in avoiding medical surveillance examinations.[95] In other words, because of the tortfeasor's actions the plaintiff must undergo medical tests which she would not have undergone *but for* her exposure to the toxic substance.[96] While this injury is not an actual physical injury, it is no less an invasion of a legally protected interest justifying compensation.[97] In *Friends for All Children, Inc. v. Lockheed Corp.,* the court in allowing medical surveillance damages provided the following persuasive rationale

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93. *See supra* note 58 and accompanying text.

94. *See supra* notes 59-60 and accompanying text.

95. *See Friends,* 746 F.2d at 826. The *Friends* case was an action on the behalf of Vietnamese orphans aboard a plane which crashed allegedly due to Lockheed's faulty design. The plaintiffs sought a partial summary judgment motion holding Lockheed liable for the cost of diagnostic examinations to determine if the children were suffering from a neurological development disease resulting from the crash. *Id.* at 819-23. While this case did not involve a toxic substance the legal analysis is still applicable. *Compare* Villari v. Terminix Int'l, Inc., 663 F. Supp. 727 (E.D. Pa. 1987). In *Villari* the court held that Pennsylvania law requires a plaintiff seeking to recover medical surveillance damages to prove she has suffered a physical injury. The court, however, found in the plaintiff's suffering of headaches, nausea, dizziness and general malaise were sufficient physical injuries to award medical surveillance damages. *Id.* at 735.

96. *See Friends,* 746 F.2d at 826; *Ayers,* 106 N.J. at 601-03, 525 A.2d at 310-11.

97. *Friends,* 746 F.2d at 826. The Court relied upon the definition of an injury found in § 7 of the Second Restatement of Torts. The Restatement defines an injury as "the invasion of any legally protected interest of another." RESTATEMENT (SECOND) OF TORTS § 7(1) (1965). The court also posed the following hypothetical in support of its conclusion:

> To aid our analysis of whether tort law should encompass a cause of action for diagnostic examinations without proof of actual injury, it is useful to step back . . . and hypothesize a simple, everyday accident involving two individuals, whom we shall identify simply as Smith and Jones:
>
> Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.
>
> From our example, it is clear that even in the absence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith's negligent action.

*Friends,* 746 F.2d at 825.

for the recognition of medical surveillance claims in the absence of a manifested physical injury:

> It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.[98]

### 2. Avoidable Consequences Rule

The other legal principle relied upon in allowing medical surveillance damages is the avoidable consequences rule.[99] This rule holds that an individual "injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of a tort."[100] As a necessary corollary to this rule, the tort victim who incurs an expense in attempting to minimize her damages can recover the expenses incurred.[101] Accordingly, in a toxic tort case the avoidable consequences rule requires a toxic tort victim to undergo whatever medical surveillance testing is necessary for the diagnosis or treatment of an exposure related ailment.[102] A toxic tort plaintiff's failure to submit to such tests may limit her future recovery for a condition she could have avoided by undergoing the prescribed tests. Therefore, since application of the avoidable consequences rule requires the toxic tort victim to incur the expense of medical surveillance testing, the tortfeasor should be required to reimburse the plaintiff for the cost of the testing.[103] In essence, the rule requires the plaintiff to undergo medical surveillance testing or possibly forgo future damages, and also provides a legal justification for toxic tort victims to recover surveillance expenses.

While the avoidable consequences rule has not received the same judicial scrutiny as the prospective damages rule, it provides a justification for the recovery of medical surveillance damages upon which plaintiffs and courts

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98. *Friends,* 746 F.2d at 826.

99. *See Hagerty,* 788 F.2d at 315. *See also Ayers,* 106 N.J. at 601-03, 525 A.2d at 310-11 (quoting extensively from *Hagerty*). The avoidable consequences rule is often described as the tort victim's duty to mitigate damages. While this expression is convenient, a tort victim in fact owes no duty to the person who injures him. C. McCORMICK, *supra* note 90, § 33, at 128. The correct principle is that a tort victim cannot recover damages which could have been avoided. Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1139 (5th Cir. 1985).

100. RESTATEMENT (SECOND) TORTS § 918(1) (1977). *See also* C. McCORMICK, *supra* note 90, § 33; J. STEIN, *supra* note 90, §§ 124-26.

101. J. STEIN, *supra* note 90, § 128, at 223. *See also* A. ROECA, *Damages* in TOXIC TORTS, *supra* note 22, § 17.03, at 497-98.

102. *See Hagerty,* 788 F.2d at 319.

103. *See id.*

should place greater reliance. The only problems with the rule's application stem from the physical injury requirement, and the problem of requiring tort victims to undergo burdensome, and possibly dangerous, medical procedures.

In response to the avoidable consequences rationale for medical surveillance damages, plaintiffs should expect defendants to raise the present injury issue.[104] Here, defendants will argue that the medical surveillance expenses incurred by plaintiffs are not recoverable because there is no injury from which to avoid the consequences. Ordinarily, defendants should lose this argument. The injuries plaintiffs are attempting to mitigate result from the manifestation of latent toxic exposure diseases. To mitigate the injuries resulting from the manifestation of these diseases, the plaintiff should undergo medical surveillance testing in order to facilitate early detection. Therefore, the defendant should bear the cost of the plaintiff's medical testing because the defendant exposed the plaintiff to the toxic substance, thereby causing the need for testing and early detection.[105]

The other potential problem with the application of the avoidable consequences rule is its general limitation that a tort victim is not required to undergo medical treatment which might be painful or dangerous.[106] Since medical surveillance testing may involve pain or danger,[107] defendants could argue this exception applies, and therefore damages should not be awarded. Nevertheless, this argument should normally fail. By seeking to recover medical surveillance damages, the plaintiffs are conceding their willingness, in fact their desire, to undergo the testing. The exception for medical procedures involving pain or danger is designed to prevent tort victims from being coerced to undergo such procedures.[108] The exception is not designed to allow defendants to escape liability. Plaintiffs should note, however, that judicial acceptance of medical surveillance damages in actions for manifested diseases will necessitate that they prove they underwent the prescribed medical tests. Otherwise, the defendant can invoke the avoidable consequences rule and have the plaintiff's damages reduced accordingly.

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104. *See supra* notes 58-59 and accompanying text.

105. Concededly, while the underlying injury in a medical surveillance case—the increased risk of disease—is not itself compensable, this does not mean that the testing necessitated by the increased risk is non-compensable. *See Ayers,* 106 N.J. at 604-05, 525 A.2d at 312. The court cited the example of "wrongful birth" as another context where the underlying disease was not compensable, but medical expenses incurred were compensable. *Id.* The court also stated "that the public health interest may justify judicial intervention even when the risk of disease is problematic." *Id.*

106. *See* RESTATEMENT (SECOND) OF TORTS § 918 comment d. (1979) *See also* C. MCCORMICK, *supra* note 90, § 36; J. STEIN, *supra* note 90, §§ 129, 133-35, 137-41.

107. *See* Ashford, Spadafor & Caldart, *Human Monitoring: Scientific, Legal and Ethical Concerns,* 8 HARV. ENVTL. L. REV. 263, 287 (1984) [hereinafter Ashford].

108. *See* C. MCCORMICK, *supra* note 90, § 36, at 137. *See also* RESTATEMENT (SECOND) OF TORTS, § 918 comment (1979).

### B. Medical Justification

The legal basis for the recovery of medical surveillance damages is predicated upon medical surveillance testing's facilitation of the early detection of latent diseases. Toxic tort plaintiffs argue the early detection of toxic-substance-exposure diseases improves their "prospects for cure, treatment, prolongation of life, and minimization of pain and disability."[109] To appreciate the plaintiffs' legal argument, an overview of medical surveillance's function in disease control is essential, as is a review of the benefits achieved from early detection.[110]

Medical surveillance testing is part of the secondary prevention of carcinogenic diseases.[111] Secondary disease prevention encompasses those methods which seek to detect carcinogenic diseases early enough to undertake an effective treatment program.[112] Early detection is accomplished through the periodic testing and screening of individuals exposed to carcinogenic substances,[113] and through informational programs designed to educate those exposed to the early warning signs of exposure diseases.[114]

The vast majority of medical authorities consider the early detection of carcinogenic exposure diseases to be beneficial in the disease's treatment, and to the exposure victim's chances of survival.[115] The benefits of early detection of cancer have been so extensively promoted that the courts assume early detection is indispensable for the successful treatment of carcinogenic diseases.[116] Due to the medical uncertainty about the etiology

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109. *Ayers*, 106 N.J. at 590, 525 A.2d at 304. *See also Hagerty*, 788 F.2d at 319; *Askey*, 102 A.D.2d at 137, 477 N.Y.S.2d at 247.

110. This discussion is meant merely as an overview. Any extensive discussion of technical medical issues is beyond the scope of this note. The primary disease sought to be detected from exposure to toxic substances is cancer. The focus here, therefore, is on medical surveillance testing and early detection of cancer.

111. M. ALDERSON, OCCUPATIONAL CANCER 182 (1986). *See also* Ashford, *supra* note 107, at 265-67. For the definition of a carcinogen, see *supra* note 25.

112. M. ALDERSON, *supra* note 111, at 182. Secondary prevention is one of three methods of achieving disease control. The other two methods are primary and tertiary prevention. Primary prevention aims to remove the disease causing substance, tertiary prevention concerns the alleviation of the problems associated with the disease. *Id.*

113. *See id.* In *Ayers*, the plaintiff's expert described the screening process as being a two-stage procedure. *Ayers*, 106 N.J. at 599 n.12, 525 A.2d at 309 n.12. The first stage occurs one to three years after exposure. At that time the toxic tort victim undergoes medical surveillance testing for the purpose of establishing baseline data. The second stage of medical surveillance testing is commenced at the onset of the risk of disease and continued annually thereafter. *Id.* In *Ayers*, it was estimated that the second stage of testing would begin ten years after exposure. *Id.*

114. M. ALDERSON, *supra* note 111, at 182.

115. *See* Evers v. Dollinger, 95 N.J. 399, 424 & n.2, 471 A.2d 405, 419 & n.2 (1984) (Handler, J., concurring). "Common to most cancers is the need for early diagnosis which in some cases greatly increases the chances of cure by conventional methods of surgery and radiation." F. HOMBURGER, *supra* note 11, at 201.

116. *See Ayers*, 106 N.J. at 603-04, 525 A.2d at 311; *Evers*, 95 N.J. at 426-27 & nn.3-5, 471 A.2d at 419-20 & nn.3-5.

of cancer, however, some medical authorities believe early detection does not necessarily improve the treatment,[117] or survival chances, of a patient.[118] These authorities argue "early diagnosis merely lengthens the time over which a person knows he suffers from the disease, but does nothing to alter the natural history of the condition, or the ultimate fatality."[119]

Due to divergent medical views concerning the benefits of early detection, defendants in a lawsuit in which the plaintiff requests medical surveillance damages should consider contesting the value of early detection, and thereby the need for awarding medical surveillance damages. Nevertheless, unless medical research unequivocally demonstrates that early detection of carcinogenic diseases is ineffective in their treatment, courts will probably continue to assume that early detection is beneficial.[120] Defendants, therefore, need to present to judges and juries the most convincing case they can that early detection is not beneficial. Defendants in medical surveillance cases, however, have not yet challenged the presumed benefits of early detection.[121] Prior to claims for medical surveillance damages, the issue of early detection arose primarily in the context of a doctor's delayed diagnosis of cancer. Such delays often decreased the patient's chance of recovering.[122] In those cases the courts were normally unwilling to accept the premise that early detection was inconsequential. Thus, the doctor was held liable for his delayed diagnosis.[123] Since courts were unwilling to accept the argument that early detection was worthless in other cases, it is unlikely a defendant in a medical surveillance case will prevail on this issue. Nevertheless,

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117. Under the biological predetermination theory, the genes of the cancer victim supposedly determine whether she will manifest signs or symptoms of cancer, and whether the cancer is amenable to treatment. 5B LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 15, § 38.41, at 340-41.

118. Parver, *Defense of Delayed Diagnosis and Treatment of Breast Cancer,* 30 MED. TRIAL Q. 34, 52-56 (1983). These medical authorities argue that because of the manner in which cancer cells grow and metastasize, by the time a tumor is detectable it has spread to other parts of the person's body thereby establishing her chances of survival. They contend, therefore, that early detection does not alter the chances of the person's survival. *Id.*

119. M. ALDERSON, *supra* note 111, at 182. This view is supported by research demonstrating that survival rates of cancer patients has not increased appreciably in "the past 40 years despite improvements in both diagnostic acumen and therapeutic skills." Parver, *supra* note 118, at 36-37.

120. *See Ayers,* 106 N.J. at 603-04, 525 A.2d at 311 ("the value of early diagnosis and treatment for cancer patients is well-documented").

121. The reported decisions in medical surveillance cases indicate that the defendants have relied almost exclusively upon the argument that the plaintiff cannot recover medical surveillance damages without a present physical injury. *See, e.g., Friends,* 746 F.2d at 824. Defendants have not challenged plaintiffs' need for medical surveillance testing or the benefits of early detection. While defendants may be unsuccessful in convincing a jury that early detection is ineffective, defendants at least should attempt to challenge these assertions.

122. *See* 5B LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 15, §§ 38.40, 38.43.

123. *See, e.g., Evers,* 95 N.J. at 399, 471 A.2d at 405; Jones v. Montefiore Hosp., 494 Pa. 410, 431 A.2d 920 (1981); Gradel v. Inouye, 491 Pa. 534, 421 A.2d 674 (1980); Herskovits v. Group Health Coop. of Puget Sound, 99 Wash. 2d 609, 664 P.2d 474 (1983).

defendants should at least consider presenting their own expert witnesses to counter the plaintiff's experts.

### C. Public Policy Justification

In addition to the legal and medical justifications for awarding medical surveillance damages, courts have relied upon public policy considerations. The most significant public policy attribute of medical surveillance damages is that toxic tort victims must not suffer the consequences of a serious, and possibly fatal, illness before the defendant's tortious conduct is actionable.[124] Allowing medical surveillance damages prevents the gross injustice of having an individual who, because he lacks the financial wherewithal, must forego diagnostic testing.[125] Accordingly, the courts have held that requiring a toxic tort victim to manifest a latent disease before she can maintain an action for medical surveillance damages is simply unreasonable, and contrary to public policy.[126]

Awarding medical surveillance damages not only provides just compensation to toxic tort victims, but also fulfills the tort system's deterrence function.[127] The toxic tort victim's difficulty in recovering damages when a disease manifests itself diminishes, if not totally abrogates, any tort-law deterrence to irresponsible action.[128] Consequently, finding toxic substance manufacturers and disposers liable for medical surveillance damages provides an incentive for them to minimize the risks and costs resulting from possible toxic exposures.[129]

### D. Medical Surveillance Damages as a Solution to Toxic Tort Victim Compensation

Medical surveillance damages are a manageable and pragmatic solution to the compensation problems resulting from toxic injuries. Recognizing the

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124. Ayers v. Township of Jackson, 189 N.J. Super. 561, 572-73, 461 A.2d 184, 190 (1983), *rev'd in part, aff'd in part,* 202 N.J. Super. 106, 493 A.2d 1314 (1985), *rev'd in part, aff'd in part,* 106 N.J. 557, 525 A.2d. 287, 312 (1987).

125. *See Ayers,* 189 N.J. Super. at 572-73, 461 A.2d at 190; *Ayers,* 106 N.J. at 604-06, 525 A.2d. at 312. While some toxic tort victims can afford medical surveillance testing regardless of whether their expenses are reimbursed "the lack of reimbursement will undoubtedly deter others from undergoing medical surveillance." *Ayers,* 106 N.J. at 604, 525 A.2d at 311. Medical surveillance testing can be quite expensive. *See* 106 N.J. at 607 n.13, 525 A.2d at 313 n.13 (average medical surveillance expense for plaintiffs predicted to be approximately $1000 annually).

126. *Ayers,* 106 N.J. at 604-06, 525 A.2d at 312; *Ayers,* 189 N.J. Super. at 572-73, 461 A.2d at 190; *Askey,* 102 A.D.2d at 137, 477 N.Y.S.2d at 247.

127. *See Friends,* 746 F.2d at 825; *Ayers,* 106 N.J. at 604-06, 525 A.2d at 311-12.

128. *See supra* notes 46-48 and accompanying text.

129. For example, in *Ayers,* medical surveillance damages for the 339 plaintiffs totaled $8,204,500. *Ayers,* 106 N.J. at 565, 525 A.2d at 291. *See also* Note, *supra* note 91, at 800-01 n.37 (the average plaintiff in *Ayers* received $24,921, the highest award was $37,500, and the lowest was $3,500).

invasion of an individual's interest in avoiding medical surveillance tests as a compensable injury provides toxic tort victims with a recovery where increased risk and fear of disease actions are unavailing. Judicial unwillingness to recognize mere exposure to toxic substances as an injury is predicated on concerns about the uncertainty of toxic disease manifestation and plaintiffs' ability to fabricate their emotional distress. Medical surveillance claims do not raise these concerns. Where increased risk actions endeavor to recover damages for the possibility of a future injury, medical surveillance damages seek to recover for the invasion of an individual's interest in avoiding medical surveillance testing. Where fear of cancer actions raise the specter of fraudulent recoveries, medical surveillance claims are predicated on objectively determinable matters of medical necessity.

Awarding medical surveillance damages also benefits the plaintiff, defendant and all of society by mitigating the toxic tort victim's future injuries. If a toxic tort victim undergoes medical surveillance testing which results in the early detection of a latent disease, the overall damages she suffers is reduced.[130] Thus, medical surveillance damages benefit toxic tort victims by mitigating the personal injuries they suffer, defendants by reducing their future liability, and society by decreasing the total resources expended.[131]

Allowing medical surveillance damages also reduces the cost of the litigation barrier to plaintiffs. A toxic tort victim will rationally initiate legal action only if she calculates that the damage award would probably exceed the time, effort and actual expense of bringing a lawsuit.[132] Due to the complexities of proving toxic tort claims, however, such litigation is usually extremely expensive.[133] Medical surveillance actions reduce the expense of litigation by decreasing the amount of scientific and expert testimony needed to prove liability. Therefore, allowing medical surveillance damages permits the individual plaintiff, or the plaintiff with a small dollar claim, to maintain an action.[134]

Recognizing medical surveillance damages also has advantages in mass toxic tort cases. In such cases, creation of a medical surveillance fund may be appropriate.[135] Such a fund would allow the medical authorities moni-

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130. *See Ayers,* 106 N.J. at 604-06, 525 A.2d at 312; M. DORE, *supra* note 3, § 7.05, at 7-10 (advising defendants in cases where the need for medical surveillance is conceded to offer to pay for the necessary testing regardless of whether the plaintiff has requested medical surveillance damages in order to reduce the defendant's possible future damages).

131. *See Ayers,* 106 N.J. at 604-06, 525 A.2d at 312; M. DORE, *supra* note 3, § 7.06, at 7-10.

132. SIX CASE STUDIES, *supra* note 20, at 494-96.

133. *See supra* note 41 and accompanying text.

134. *See Hagerty,* 788 F.2d at 319; *Herber,* 785 F.2d at 79; *Johnson,* 645 F. Supp. at 764; *Villari,* 663 F. Supp. at 727.

135. In *Ayers,* the court held that in future mass toxic tort exposure cases medical surveillance damages should be awarded by using court-supervised funds to pay medical surveillance

toring the exposure victims' health to correlate data on the disease incidence from exposure to the toxic substance.[136] Creating medical surveillance funds also assures that changes in medical technology which increase the toxic tort victim's cost of medical surveillance testing are provided for. Furthermore, in the mass tort context, some courts have shown a willingness to certify class actions for claims for medical monitoring.[137] Class action certification in medical surveillance cases will help to further reduce the toxic tort victims' costs.

Medical surveillance damages, however, are not without their drawbacks. Most significantly the allowance of such claims only provides for toxic tort victims' medical needs until the disease manifests itself. Thereafter, the victim is on her own. As has been shown, the barriers to recovery when a latent disease manifests itself are very substantial.[138] This creates the anomaly that while the victim has the funds for the early detection of a latent disease, she may not have the funds to treat the disease when it manifests itself. Therefore, medical surveillance damages should include treatment costs to make them a more complete remedy.

The other drawback of medical surveillance damages is that they are an incomplete remedy. They are incomplete in the sense that the victims of toxic torts have suffered more harm than incurring the expense of medical surveillance testing. Nevertheless, until science understands cancer etiology, medical surveillance damages provides the best solution for balancing the toxic tort victim's right to compensation and the societal benefits of modern technology.[139]

## IV. CRITERIA FOR RECOVERY OF MEDICAL SURVEILLANCE DAMAGES

Because allowance of medical surveillance damages is a recent innovation, courts have not articulated a clear set of requirements for their recovery.[140]

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expenses as they accrued. *Ayers,* 106 N.J. at 607-11, 525 A.2d at 313-15. For a discussion of the utility of court-supervised funds to pay medical expenses of toxic tort victims see Rosenberg, *supra* note 1, at 919-24; Trauberman, *supra* note 5, at 237-46; *Increased Risk of Disease, supra* note 57, at 648-52.

136. *See* Rosenberg, *supra* note 1, at 922-24.

137. *See In Re* Three Mile Island Litig., 87 F.R.D. 433 (M.D. Pa. 1980). *But see Askey,* 102 A.D.2d at 134, 477 N.Y.S.2d at 245-46 (holding class certification inappropriate under New York class action rules).

138. *See supra* notes 19-43 and accompanying text.

139. *See supra* notes 54-55 and accompanying text.

140. In Ayers v. Township of Jackson, 106 N.J. 557, 606, 525 A.2d 287, 312 (1987), the court set out five "critical factors" for evaluating the compensability of medical surveillance claims. The court did not, however, explain the criteria, their interrelationship, or the weight given each factor. The court's five factors were: (1) the significance and extent of exposure to the toxic substance; (2) the toxicity of the substance; (3) the seriousness of the diseases for which individuals are at risk; (4) the relative increase in the chance of onset of disease in

The foregoing examination of the legal, medical, and public policy justifications for medical surveillance damages supports the establishment of three specific criteria for their recovery.[141] In order to recover medical surveillance damages, the plaintiff must prove to the trier of fact:

> 1. Actual exposure to a hazardous substance through the negligent actions of the defendant.
> 2. As a proximate result of exposure an increased risk of manifesting a serious latent disease requiring her to undergo medical surveillance examinations.
> 3. The existence of a medical test which makes early detection of the latent diseases possible and a treatment which can alter the natural history of the disease.

Each of these elements must be established through expert testimony.[142] A plaintiff's failure to prove any of these elements should lead to the denial of medical surveillance damages.[143]

### *A. Actual Exposure to a Hazardous Substance Through the Negligent Actions of the Defendant*

This first element requires the plaintiff to prove three things: first, exposure to the substance in question; second, that the substance is hazardous; and, finally, that her exposure was the result of the defendant's

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those exposed; (5) the value of early diagnosis. 106 N.J. at 606, 525 A.2d at 312. The three part test set forth here incorporates most of these factors, but also sets specific requirements and burdens for their proof and does not rely on an amorphous balancing of factors. *See also* Jones, *Increased Risk of Disease,* in PREPARATION AND TRIAL OF A COMPLEX TOXIC CHEMICAL OR HAZARDOUS WASTE CASE 299 (S. Birnbaum & R. Phelan eds. 1984) (discussing threshold questions in medical surveillance cases).

141. A plaintiff, of course, must clearly seek medical surveillance damages in her pleadings. *See* Destories v. City of Phoenix, 744 P.2d 705, 711-12 (Ariz. Ct. App. 1987) (affirming the grant of summary judgment in action for medical surveillance damages because of insufficient pleading).

142. *See* Herber v. Johns-Manville Corp., 785 F.2d 79, 83 (1986); Friends for All Children, Inc. v. Lockheed, 746 F.2d 816, 826 n.15 (D.C. Cir. 1984); *Ayers,* 106 N.J. at 604-06, 525 A.2d at 312; Askey v. Occidental Chem. Corp., 102 A.D.2d 130, 137, 477 N.Y.S.2d 242 (1984). Of course, some elements will not always require expert testimony. For example, in *Hagerty v. L. & L. Marine Servs., Inc.,* the plaintiff was twice drenched with dripolene, a chemical containing known toxins benzene, toluene and xylene. 788 F.2d 315, 317, *reh'g denied,* 797 F.2d 256 (5th Cir. 1986). In such a case expert testimony is not needed to prove plaintiff's exposure to the toxic substance. *Compare Ayers,* 106 N.J. at 605, 525 A.2d at 292 (expert testimony necessary to prove that plaintiff's wells had been contaminated by defendant's improper operation of landfill).

143. *See* Hendrix v. Raybestos-Manhattan, Inc. 776 F.2d 1492, 1506-07 (11th Cir. 1985) (holding it was an error to award medical surveillance damages when, during a 16-day trial, only one item of evidence was introduced concerning the plaintiff's future medical expenses). *See also* Mergunthaler v. Asbestos Corp. of Am., 480 A.2d 647, 651 (Del. 1984) (asbestos workers' wives who failed to prove their asbestos exposure were not entitled to recover for medical surveillance damages as a result of their alleged contact with asbestos fibers in laundering their spouses' work clothes).

negligence. The first part of this requirement—exposure—is necessary in order for the plaintiff to establish that she has suffered a compensable harm.[144] Without proof of exposure to the hazardous substance there is no need for medical surveillance testing. Proving exposure will often be the plaintiff's easiest obligation.[145] Problems in proving exposure may arise, however, in cases involving an indirect or distant exposure.[146]

To establish a *prima facie* case that a substance is harmful, the plaintiff has the threshold burden of providing some evidence that the substance is hazardous.[147] Once the plaintiff makes out a *prima facie* case, the burden should shift to the defendant to prove the substance is in fact harmless and, therefore, the plaintiff should not receive medical surveillance damages. The uncertain etiology of cancer and other toxic substance exposure ailments necessitates shifting the burden of proof. Requiring the toxic tort plaintiff to carry the burden of proving a substance's harmful nature would cause the same difficulties as currently exist under the common law causation requirement.[148] It would, therefore, make medical surveillance damages a

144. Under the *Ayers* court's first factor, the plaintiff would seemingly need to establish not merely exposure to the toxic substance, but a "significant" exposure. *See supra* note 140. The court's probable concern was preventing plaintiffs with insignificant exposures from receiving medical surveillance damages. The requirement that the plaintiff have an increased risk of disease addresses this concern. *See infra* notes 148-49 and accompanying text. The correct place to address this concern is under this aspect of the test, not the exposure aspect. The exposure aspect is created to deny those individuals who have no exposure at all, not those with trivial exposures. If an exposure is insignificant, the plaintiff will not have an increased risk of disease and will be denied any recovery by that aspect of the test.

145. *See Hagerty,* 788 F.2d at 315; Villari v. Terminix Int'l, Inc., 663 F. Supp. 727, 728-29 (E.D. Pa. 1987).

146. *See Mergunthaler,* 480 A.2d at 651. The court, while correctly dismissing the action because the plaintiffs failed to show exposure to the asbestos, also based its decision on the plaintiffs' lack of direct contact with the asbestos. The rejection of medical surveillance actions simply on the basis of indirect contact misunderstands the nature of the injury suffered in a medical surveillance case. The issue in a medical surveillance case is not direct contact, but the need for medical surveillance testing. If the plaintiff can prove that because of the defendants' exposing her to a toxic substance she needs to undergo medical surveillance testing, she should be allowed to recover damages. The portion of the *Mergunthaler* decision concerning indirect contact also ignored the fact that the threat to life from breathing asbestos extends in some degree to any individual exposed to the asbestos dust. B. CASTLEMAN, *supra* note 14, at 363-67. *See also Askey,* 102 A.D.2d 130, 477 N.Y.S.2d 242. The court affirmed the denial of class certification for the purpose of determining the class' right to recover medical surveillance damages. The court rejected class certification because the plaintiffs could not show which members of the class had actually been exposed to a toxic substance emanating from the landfill. 102 A.D.2d at 138, 477 N.Y.S.2d at 248.

147. *See* Ginsberg & Weiss, *supra* note 5, at 865 n.17 (on the difficulties of definition). For a useful definition of hazardous, see the Solid Waste Disposal Act, 42 U.S.C. § 6903(5) (1983). The statute defines hazardous waste as a substance "which because of its quantity, concentration, or physical, chemical, or infectious characteristic may . . . cause, or significantly contribute to an increase in serious irreversible, or incapacitating reversible illness. . . ." *Id.* § 6903(5)(a). This requirement encompasses the *Ayers* court's second factor. *See supra* note 140. For an example of a plaintiff successfully establishing the hazardous nature of the substance to which he was exposed, see *Ayers,* 106 N.J. at 588-89, 525 A.2d at 303.

148. *See supra* notes 21-26 and accompanying text.

pyrrhic remedy for toxic tort victims. Finally, the plaintiff must show that her exposure was caused by the defendant's negligent actions.[149]

### *B. As a Proximate Result of Exposure the Plaintiff Has an Increased Risk of Manifesting a Serious Latent Disease Requiring Her to Undergo Medical Surveillance Examinations*

This aspect of a medical surveillance case consists of two issues: first, whether the plaintiff has an increased risk of disease; and, second, whether the potential future disease is serious.[150] Proving the existence of an increased risk of disease is essential to a medical surveillance case. The plaintiff must prove that her exposure to the hazardous substance has increased her risk of disease, and that detection of any future ailment requires medical surveillance testing. If there is no possibility of an exposure related ailment developing in the future, the plaintiff should only be entitled to damages for testing that was performed for the purpose of determining whether she is suffering from any current ailment.[151]

A question arises about the quantum of increased risk of disease necessary for the plaintiff to recover. The court in *Ayers v. Township of Jackson* suggested that any increased risk is sufficient to justify medical surveillance damages.[152] This suggestion should be adopted. The injury of incurring medical surveillance expenses exists whenever a plaintiff has an increased risk of future disease, even if the increased risk is marginal. Furthermore, because it is scientifically impossible to quantify the amount of increased risk suffered by toxic tort victims, requiring toxic tort plaintiffs to show a specific quantifiable increased risk of disease would, in effect, prevent toxic tort victims from recovering medical surveillance damages.[153] Therefore, if medical surveillance damages are to be a viable recovery for toxic tort victims, any increased risk of disease is sufficient basis for recovery.

The second part of this element is proof of a serious disease. This requirement prevents the recovery of medical surveillance damages when the anticipated injury is trivial. The recovery of medical surveillance damages should be predicated upon the increased risk of a serious injury, most often

149. *See, e.g., Hagerty,* 788 F.2d at 317 (defendant's conduct was negligent); *Ayers,* 106 N.J. at 565, 525 A.2d at 291 (defendant's conduct was palpably unreasonable).

150. These requirements are similar to the *Ayers* court's factors three and four. *See supra* note 140.

151. *See* Laxton v. Orkin Exterminating Co., 639 S.W.2d 431, 434 (Tenn. 1982) (allowing recovery of the cost of medical tests notwithstanding that the tests results were negative).

152. *Ayers,* 106 N.J. at 604-06, 525 A.2d at 312. The New Jersey Supreme Court in *Ayers* rejected the Appellate Court's holding which required a plaintiff seeking to recover medical surveillance damages plaintiff needed to quantify the amount of his increased risk of disease. 106 N.J. at 599, 525 A.2d at 309.

153. *See* Note, *supra* note 91, at 802-03.

cancer. This requirement, in essence, parallels the one requiring the substance to be hazardous.[154] That is, if the substance is harmless then it probably will not cause the future manifestation of a serious injury. As a check on awards of medical surveillance damages, and because of the still unknown effect of many toxic substances on humans, the plaintiff should prove the seriousness of the latent ailments for which early detection is sought.

### *C. The Existence of a Medical Test Which Makes Early Detection of the Latent Diseases Possible and a Treatment Which Can Alter the Natural History of the Disease*

Unless a sufficiently sensitive and specific medical test exists to detect the future ailment, no future medical surveillance testing should be performed and no damages awarded.[155] The standard for acceptance of such a test should be whether a "respectable minority" of physicians recognize the test as beneficial in the early detection of latent toxic substance diseases.[156] This standard is appropriate since the defendant should not be required to provide the plaintiff with untried tests of speculative value. The mere existence of a test which could possibly assist in the early detection of a latent disease is an inadequate basis for awarding medical surveillance damages. If early detection is not possible, no damages should be awarded. Additionally, the plaintiff must establish that the tests she needs to undergo are required because of her exposure. That is, but for the defendant's exposing her to the hazardous substance she would not have undergone these tests.[157] Defendants should not have to pay for tests which the plaintiff would have undergone regardless of her exposure.[158]

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154. *See supra* notes 147-49 and accompanying text.

155. *See* M. ALDERSON, *supra* note 111, at 182; Ashford, *supra* note 107, at 277-82.

156. This is the general test courts have adopted in determining whether treatment undertaken by a physician meets the medical profession's standard of care. *See, e.g.*, Sprowl v. Ward, 441 So. 2d 898, 900 (Ala. 1983); Downer v. Veilleux, 322 A.2d 82, 84 (Me. 1974); In *Ayers*, the court apparently adopted a standard that testing must be "consistent with contemporary scientific principles." 106 N.J. at 599, 525 A.2d at 309. It is uncertain if this was the standard the court was adopting or merely its characterization of the proof provided by the plaintiffs.

157. *See* M. DORE, *supra* note 3, § 7.05[2], at 7-9-10. In *Ayers*, the defendant did not object to the trial court's allowing the jury to consider the cost of both conventional and nonconventional tests. 106 N.J. at 607 n.13, 525 A.2d at 313 n.13. On appeal the defendants raised the issue but the New Jersey Supreme Court refused to find that the trial court had committed plain error in permitting the jury to consider both costs. *Id.* This serves as a warning to defendants to bring the issue up at trial since they are unlikely to win it on appeal.

158. For example, it is recommended that all women over age 40 have a yearly mammogram to detect breast cancer. *See* 5B LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 15, § 38.43, at 345. Defendants should not have to pay for these types of tests since the plaintiff's exposure to the toxic substance did not cause them to undergo these tests. *See Friends*, 746 F.2d at 826-27 (rejecting Lockheed's contention that the plaintiff's need for diagnostic testing would have existed regardless of Lockheed's negligence).

The existence of a workable treatment is another prerequisite to the recovery of medical surveillance damages.[159] A damage award is appropriate only if early detection allows for a treatment that can ultimately alleviate the ailment. However, as to diseases which cannot adequately be treated, medical surveillance testing is useless and an award of medical surveillance damages unwarranted.

## CONCLUSION

Toxic tort injuries, because of their unique attributes, do not fit into the common-law model of injuries. The inability of toxic torts to fit within the common law model produces substantial barriers for toxic tort victims to receive adequate compensation for their injuries. The solutions so far proposed for solving the problem of inadequate compensation call for radical surgery on the tort system. Instead of making these changes, adoption of the common law's solution of medical surveillance damages is preferable.

Medical surveillance damages provide the victims of toxic torts with a pre-manifestation recovery for their injuries. The courts have rejected other pre-manifestation recoveries because of the uncertainty of their occurrence and the ease with which they can be fabricated. Medical surveillance claims do not pose either of these problems. Medical surveillance damages are predicated on objectively determinable matters of medical necessity. Sound legal, medical and public policy considerations support awards of medical surveillance damages. These considerations justify allowing toxic tort victims to recover the medical testing expenses they will incur to facilitate the early detection of toxic exposure ailments.

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159. *See* M. ALDERSON, *supra* note 111, at 182.