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Cancerphobia and Increased Risk of Developing Cancer Due to Toxic Exposure: Will It Spread to Missouri

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“CANCERPHOBIA” AND INCREASED RISK OF DEVELOPING CANCER DUE TO TOXIC EXPOSURE: WILL IT SPREAD TO MISSOURI?

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I. INTRODUCTION

It is 8:00 A.M. on any given week day in a small Missouri town. Adults are going to work and kids are on their way to school. The train whistle blows as it has everyday for as long as most can remember. Suddenly there is a horrible crash. Dust, smoke and debris fill the air. When the dust settles the train can be seen as a twisted heap of wreckage. When the spectators arrive — well before the emergency vehicles and crews — they find twenty tank cars laying at various attitudes of repose. Most seem intact, but two are leaking a thick, oily substance. Eventually firetrucks, police and paramedics arrive. They push the crowd back somewhat, but not too far since the engineer has said that the tank cars didn't contain anything other than waste lubricant from a factory in Kansas City. Eventually, the wreckage and lubricant are cleaned up. A little of the stuff did get down into a culvert which carried run-off to a

nearby lake, but no one thought it was enough to do any damage. In the ensuing weeks, however, it is discovered that the lubricant contained TDD, a highly toxic (and quite hypothetical) byproduct of certain manufacturing processes. TDD has been linked to cancer in laboratory rats. Fear begins to spread about the possible results of exposure to the contaminated lubricant. Soon complaints begin to be heard. Ulcers, rashes, unexplained aches and pains, headaches, peculiar behavior — even impotence. A lawyer appears in town saying that she thinks that the citizens have a claim and can sue if they want. Eventually she does file an action on behalf of 103 of the town's residents. The suits include the normal damages for injuries sustained, medical bills, loss of income, loss of consortium and the like. Several of the claims, however, request damages for the fear of developing and the increased risk of contracting cancer caused by the exposure. The defendants eventually move for dismissal of these "cancerphobia" and increased risk claims, asserting that they fail to state a claim for which relief can be granted.¹ What should a judge sitting in Missouri or who must interpret Missouri law decide? Due to the increased incidence of exposure to toxic substances which has occurred in Missouri both as a result of accidents² and intentional acts³ it would not be surprising to see an increase in the number of such claims being brought in the Missouri Courts. This Article will explore whether or not a plaintiff will be able to recover on any of these claims. Initially it should be noted that, as in the above hypothetical, there are two possible theories to pursue when one is exposed to a known or suspected carcinogen. The first is to attempt to recover for the present fear of developing cancer sometime in the future. The second is to attempt to recover for the additional risk (as opposed to the norm) of developing cancer which is caused by the exposure to carcinogens.⁴

1. The events described are hypothetical and are not intended to represent an actual event or person, living or dead.

2. For example, the train derailment in Sturgeon, Missouri, resulted in alleged exposure to a toxic level of dioxin.

3. *E.g.*, the spreading of dioxin contaminated oil on the roads of Times Beach, Missouri or the presence of chlordane in the Missouri River, apparently as a result of insecticide use. The intent referred to here should *not* be construed as intentionally exposing people to toxins. Rather, it refers to the act of spreading the oil or of dumping the batteries. The author expresses no opinion as to whether anyone knew that the oil contained dioxin or that the insecticide would contaminate the river.

4. *Bennet v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 866-67 (Mo. Ct. App. 1985), *cert. denied*, 476 U.S. 1176 (1986); *see also* *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 11, —, 507 N.E.2d 476, 480 (Ohio Ct. C.P. 1987); Gale & Goyer, *Recovery for Cancerphobia and Increased Risk of Cancer*, 15 CUM. L. REV. 723, 723-24 (1985). Any given person in the population has a one in four chance of developing a form of cancer. Any exposure to carcinogens will increase this possibility. A. FRANK, *Cancer*, in 13 COURTROOM MEDICINE § 3.20, at 3-14 (1980).

II. FEAR OF CANCER AND TOXIC EXPOSURE

A. *Availability of a Parasitic Claim*

The fear of contracting a disease sometime in the future has long been considered to be a type of damage for which a plaintiff may receive compensation.⁵ Early in their history, these damage claims were considered to be parasitic to a claim for bodily injury and akin to more traditional pain and suffering awards.⁶ The injury could take a variety of forms. For example, many early cases allowed plaintiffs to recover for hydrophobia when bitten by a dog.⁷ Recovery for fear of developing "lockjaw" (tetanus)⁸ and blood poisoning⁹ have also been allowed in dogbite cases. Recovery for blood poisoning and the like has been allowed when there has been traumatic injury such as the mangleing of a foot.¹⁰

Two criteria must be met to recover for parasitic fear of future disease claims have been recognized: first, there must be a pre-existing injury;¹¹ second, the apprehension must be reasonable.¹² By "reasonable", courts mean that there must be some medical basis for the fear; for example, being told about the possibility of the disease by a doctor.¹³ In contrast, if there is a time limitation inherent in the disease, such as an incubation period, beyond that period the plaintiff's fears will no longer be deemed reasonable.¹⁴

Legal concerns about fictitious and spurious claims (which are prevalent) are dispelled by these requirements. Apparently, this is because if a doctor is concerned about the disease, a patient should not be deemed unreasonable for

5. Dworkin, *Fear of Future Disease and Delayed Manifestation Injuries: A Solution of a Pandora's Box*, 53 *FORD. L. REV.* 527, 542 (1984); Gale & Goyer, *supra* note 4, at 529.

6. Dworkin, *supra* note 5, at 542.

7. *See, e.g.*, *Buck v. Brady*, 110 Md. 568, 569, 73 A. 277, 279 (1909); *Heintz v. Caldwell*, 16 Ohio C. C. 630, 632, 9 Ohio Cir. Dec. 412, _____, (1898); *see also* Dworkin, *supra* note 5, at 542.

8. *See, e.g.*, *Heintz v. Caldwell*, 16 Ohio C.C. 630, 632, 9 Ohio Cir. Dec. 412, (1898).

9. *See, e.g.*, *Camer v. Winchester*, 110 S.W.2d 1190 (Tex. Civ. App. 1937).

10. *See, e.g.*, *Southern Kansas Ry. v. McSwain*, 55 Tex. Civ. App. 317, 118 S.W. 874 (1909).

11. *Butts v. National Exch. Bank*, 99 Mo. App. 168, 173, 72 S.W. 1083, 1084 (1903) (As an element of damages, plaintiff should have been able to show that he was in reasonable apprehension of blood poisoning due to being struck on the foot with an iron guard rail. "Mental Suffering . . . is a proper element of the damage sustained as the actual physical injury accompanying and causing it.").

12. *Id.*; *see also* *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 11, _____, 507 N.E.2d 476, 480 (Ohio Ct. C.P. 1987) (general policy of Ohio is to allow recovery for reasonable apprehension caused by present injury); *Banter v. Jensen*, 121 Wis. 2d 658, _____, 360 N.W.2d 529, 533 (1985) (anxiety about a fictitious, imagined, or highly unlikely consequence is not recoverable).

13. Dworkin, *supra* note 5, at 545 & n.148.

14. *Id.* at 542-43 & nn.117-21.

echoing that concern. The incubation period automatically limits the claims that can be brought to those for which there is still a chance that the disease will develop.¹⁵ It should be noted, however, that although the time limitation began as a virtual prerequisite to recovery,¹⁶ it has been abandoned in subsequent cases.¹⁷ This leaves only the reasonable fear and a preexisting injury requirements for parasitic fear of future disease claims. In addition, due to the presence of a physical injury, the likelihood of developing the disease need not be probable (i.e. more likely than not).¹⁸ Thus, it is the existing injury and not the probability of future disease that is determinative.¹⁹ This is in sharp contrast to the claims for increased risk which require a "more probable than not" showing before recovery is allowed.²⁰

Unfortunately for those who are exposed to toxic substances, the requirement of a physical injury bars recovery under this theory. There is no injury — in the sense of physical injury — as a result of exposure to toxic substances until some disease²¹ or other physical damage manifests itself.²² This is due to the fact that, because toxic intrusion into the body occurs at the molecular level, no one can examine the plaintiff and see evidence of the intrusion. Unless injury is redefined to include intrusion at the cellular or molecular level,²³ a parasitic claim for fear of cancer cannot be pursued. As a result, those courts which have allowed claims for cancerphobia and related fears have relied on the independent tort of infliction of emotional distress.²⁴ Of course, if the fear of developing cancer does spring from an existing injury the parasitic claim will be allowed.²⁵

15. *Id.* at 543.

16. *Id.*

17. *See, e.g.,* *Alley v. Charlotte Pipe & Foundry Co.*, 159 N.C. 327, 74 S.E. 885 (1912); *see also* *Dworkin*, *supra* note 5, at 543 & n.124.

18. *Dworkin*, *supra* note 5, at 544-45 & nn.142-45.

19. *Id.* at 544.

20. *See infra* notes 126-30 and accompanying text.

21. *E.g.,* *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982) (plaintiff had developed asbestosis at the time his cancerphobia claim was brought).

22. *E.g.,* *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958) (burns resulting from exposure to radiation).

23. This has been done by some courts. *See, e.g.,* *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982). That case held that ingestion of water contaminated with chlordane was sufficient to satisfy the physical consequences requirement under a negligent infliction of emotional distress theory. If, however, mere ingestion satisfies that requirement, it should satisfy the physical injury requirement for a parasitic claim. The key to both is that there has been an injury to the plaintiff's person. Furthermore, they function in the same way, namely, as an external limit on causes of action to insure that plaintiffs bring legitimate claims.

24. *Dworkin*, *supra* note 5, at 545.

25. *See, e.g.,* *Cover v. Painless Parker Dentist*, 105 Cal. App. 110, 286 P. 1048 (1930); *Flood v. Smith*, 126 Conn. 64, 12 A.2d 677 (1940); *Anderson v. Welding Testing Laboratory, Inc.*, 304 So. 2d 351 (La. 1974); *Lorenc v. Chemirad Corp.*, 37 N.J. 56, 179 A.2d 401 (1962); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958); *Alley v. Charlotte Pipe & Foundry Co.*, 159 N.C. 327, 74 S.E.

B. *History and Availability of Intentional and Negligent Infliction of Emotional Distress*

The emotional distress tort comes in two varieties: intentional and negligent.²⁶ The traditional requirements, as set out in the RESTATEMENT, for recovery under intentional infliction of emotional distress are:

- 1) Defendant must act in an extreme and outrageous way; and
- 2) Such acts result in emotional upset which must itself produce physical consequences such as illness unless defendant's conduct is so outrageous as to be evidence of the distress in and of itself.²⁷

A defendant's action will be deemed outrageous if it either offends the sensibilities of a reasonable person²⁸ or if it abuses a special position²⁹ or knowledge³⁰. Mere insults or annoying behavior are not sufficient for recovery.³¹

To recover under the traditional rules for negligent infliction of emotional distress, a plaintiff not only had to show physical manifestations resulting from the alleged distress,³² but also had to allege and prove a physical impact with his or her body which was proximately caused by defendant's negligent conduct.³³ If either of these was missing a plaintiff could not recover.³⁴ These were required because of the continuing concern with fraudulent claims.³⁵

These strict requirements, however, have been significantly relaxed in recent years. The impact rule has been abandoned in favor of other limitations which maintain control over potentially frivolous claims while expanding the availability of recovery. For example, the Restatement (Second) of Torts advocates the adoption of a "zone of danger" rule which would impose liability on a defendant if he should have foreseen that his conduct might cause distress, that the distress might result in illness or other bodily harm, and the distress causes such illness or injury without regard to whether defendant's conduct directly resulted in other independent physical injuries.³⁶ A majority of jurisdictions have adopted this rule or a variation of it.³⁷

885 (1912); *Murphy v. Penn Fruit Co.*, 274 Pa. Super. 427, 418 A.2d 480 (1980); *Howard v. Mount Sinai Hosp.*, 63 Wis. 2d 515, 217 N.W.2d 383 (1974) (claims allowed, but recovery denied in this case due to likelihood of developing cancer outweighed by defendant's innocence).

26. RESTATEMENT (SECOND) OF TORTS §§ 46, 312, 313, 436, 436A (1965).

27. RESTATEMENT (SECOND) OF TORTS §46(1) & comment k (1965).

28. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

29. RESTATEMENT (SECOND) OF TORTS § 48 (1965).

30. RESTATEMENT (SECOND) OF TORTS § 46 comment f (1965).

31. RESTATEMENT (SECOND) OF TORTS § 46 comments d, e (1965).

32. For example, an illness of some sort.

33. *See, e.g., Weissman v. Wells*, 306 Mo. 82, 90, 267 S.W. 400, 406 (1924).

34. *Id.* (by implication); *see also Dworkin, supra* note 5, at 531.

35. *E.g., W. PROSSER, LAW OF TORTS* § 54 (4th ed. 1971); *see also Dworkin, supra* note 5, at 531 & n.28-29.

36. RESTATEMENT (SECOND) OF TORTS §§ 313, 436, 436A (1965).

37. *Gale & Goyer, supra* note 4, at 728.

A few courts have gone even further by removing the physical injury requirement of the Restatement and replacing it with a "seriousness" test.³⁸ Under this test the severity of the emotional injury is tested rather than the physical consequences thereof. If the distress can be categorized as "serious" and proximately caused by defendant's negligence, a plaintiff can recover without ever developing physical consequences.³⁹

The largest expansion of liability for negligent infliction is in the area of third party recovery. With the case of *Dillon v. Legg*,⁴⁰ California again led the way to recovery for emotional distress suffered by a bystander who witnesses defendant's negligent act. As long as the bystander is in close proximity to the accident, contemporaneously observes a negligent act which results in bodily injury to another, and has a sufficiently close relationship to the injured person, recovery will be allowed.⁴¹ This theory will probably be of little or no use in the toxic exposure area. The "contemporaneously sensing" requirement is impossible to fulfill in the toxic exposure context, since the exposure — in the sense of impact with a third persons body — occurs on a molecular level. In addition, it is at least arguable that no bodily injury (as the California court seems to define the term) has occurred. In other words, there is no traumatic injury as was present in *Dillon*.⁴²

The other theories of negligent infliction have been and will continue to be used in toxic exposure cases due to the difficulty of proving a pre-existing injury and the arguable obsolescence of the parasitic claim.⁴³ In addition, the tort of intentional infliction of emotional distress should be available since it is possible that defendants know about the toxic nature of the substances they produce, transport and/or dispose, but have failed to act to protect people from exposure or have concealed the toxicity.⁴⁴ Intentional or reckless endangering of public health and safety seems to fall within the ambit of outrageous conduct.⁴⁵

38. *E.g.*, *Molien v. Kaiser Found. Hosp.*, 27 Cal. 3d 916, 616 P. 2d 813, 167 Cal. Rptr. 831 (1980).

39. *Id.* at 929, 616 P.2d at 821, 167 Cal. Rptr. at 839.

40. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

41. *Id.* at 741, 441 P.2d at 920, 69 Cal. Rptr. at 80. In *Dillon*, the plaintiff claiming emotional distress was the mother of an injured child. *Id.* at 742, 441 P.2d at 921, 69 Cal. Rptr. at 81.

42. Dworkin, *supra* note 5, at 533-34 & nn.47-54.

43. As stated earlier, there is no pre-existing physical injury claim to which the claim for fear of cancer can be parasitic. *See supra* notes 22-24 and accompanying text. In addition, the parasitic damages are arguably obsolete since pre-existing injury is no longer needed to recover by virtue of infliction of emotional distress being an independent tort. This is especially true in light of the abrogation of the impact rule.

44. *See, e.g.*, *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 594, 607 P.2d 924, 925-26, 163 Cal. Rptr. 132, 133, *cert. denied*, 449 U.S. 912 (1980).

45. *See generally* Dworkin, *supra* note 5, at 556-58.

C. *Recovery for Fear of Cancer*

1. Generally

There seems to be a consensus among the courts that a claim for present fear of developing cancer is available so long as the elements of the tort of intentional or negligent infliction of emotional distress are met.⁴⁶ If impact is required it must be plead and proved. But this is not difficult to do. For example, there are several cases which hold that any contact of toxic substances with the body is sufficient to satisfy the impact requirement⁴⁷ even if this contact is at the cellular level.⁴⁸

The essence of impact, then, is that the outside force or substance, no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious, touch or enter the plaintiff's body.⁴⁹

Likewise, if physical consequences are required before recovery is allowed, failure to provide evidence thereof will subject plaintiff's claim to a motion for dismissal. This requirement has, however, been relaxed to the point of non-existence in some jurisdictions.⁵⁰ Recovery is allowed under this view even where no illness or injury resulted from the exposure, where the distress produced no symptoms and where it was not severe enough to require medical attention.⁵¹ Clearly, if any illness or other physical injury is produced either by the exposure itself or by the resulting emotional distress, recovery will be allowed under the physical consequences rule just as in other emotional distress claims.

In addition to those in impact and/or physical manifestations, many courts base a claim for fear of developing cancer on a reasonableness standard derived from the earlier parasitic fear of disease cases, reasoning that the impact and/or physical consequences justify the fear.⁵² This requirement of reasonable fear has led some courts to distinguish between the simple "fear of cancer" claim and actions seeking recovery for "cancerphobia".⁵³ According to

46. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1985); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982); *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985); *Devlin v. Johns-Manville Corp.*, 202 N.J. Super. 556, 495 A.2d 495 (1985); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982).

47. See, e.g., *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 564-65, 461 A.2d 184, 186 (Law Div. 1983); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 434 (Tenn. 1982).

48. E.g., *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985).

49. *Id.* at 527.

50. See, e.g., *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982) (ingestion of water adulterated with chlordane is sufficient manifestation to meet rule).

51. *Id.* at 433, 435.

52. See, e.g., *Laxton*, 639 S.W.2d at 434; *Eagle-Picher Indus.*, 481 So. 2d at 527; *Devlin*, 202 N.J. Super. at 561, 495 A.2d at 498.

53. *Eagle-Picher Indus.*, 481 So. 2d at 527 n.13; *Devlin*, 202 N.J. Super. at 562, 495 A.2d at 499.

these courts, "fear of cancer" is a non-idiosyncratic response to the exposure. "Cancerphobia", on the other hand, is an exaggerated, persistent, often irrational fear recognized as a psychiatric illness.⁵⁴ The distinction, therefore, is between a simple fear which any person might develop and a "phobia" which is considered a mental illness.⁵⁵ This gives a court which is especially hostile to such claims a means to deny recovery if their jurisdiction imposes no duty to foresee idiosyncratic emotional responses to a defendant's allegedly negligent conduct.⁵⁶

A more probable use of the distinction, however, will be determining how plaintiff must prove that his or her fears have a reasonable basis. If it is simply a "fear of" claim, a lay person (i.e. the plaintiff) can testify as to the fear and its basis. If the claim is one for "cancerphobia", an expert is needed for this purpose.⁵⁷ The latter view is bolstered by the factors required to prove the claim. In *Devlin v. Johns-Manville Sales Corporation*⁵⁸ for example, the courts required a plaintiff to prove:

- 1) Plaintiff currently suffers from serious fear, emotional distress, or *diagnosed phobia*;
- 2) Such condition was caused by the exposure;
- 3) Fear due to the exposure is reasonable;
- 4) Defendant(s) are legally responsible for the exposure.⁵⁹

The inclusion of "diagnosed phobias" in the elements necessary for recovery suggests that even idiosyncratic responses by individual plaintiffs will be compensable as long as a breach of duty and proximate cause are established. If an expert testifies that a normally constituted person might develop such fears, compensation will follow more easily. This lends further support to the notion that the resolution of the apparent contraction (between idiosyncratic responses and reasonable fears) is found in that "reasonable" applies to a medical basis for the fear rather than to the character of the fear itself.

In jurisdictions which only require the defendant to foresee that distress would result from his conduct and that such distress is "serious"⁶⁰ a whole different range of problems arise.⁶¹ This test is analogous to Missouri's posi-

54. *Eagle-Picher Indus.*, 481 So. 2d at 526 n.13; *Devlin*, 202 N.J. Super. at 562, 495 A.2d at 499.

55. *Devlin*, 202 N.J. Super. at 562, 495 A.2d at 499.

56. *See, e.g., Devlin*, 202 N.J. Super. at 562, 495 A.2d at 500.

57. *Eagle-Picher Indus.*, 481 So. 2d at 526 n.13; *Devlin*, 202 N.J. Super. at 562, 495 A.2d at 499.

58. 202 N.J. Super. 556, 495 A.2d 495 (1985).

59. *Id.* _____, 495 A.2d at 499 (emphasis added).

60. *E.g., Molién v. Kaiser Found. Hosp.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); *Bass v. Nooney*, 646 S.W.2d 765 (Mo. 1983) (en banc).

61. Namely questions relating to duty, foreseeability of the distress and the gravity of the harm. It should be noted that these problems do not arise in cases where impact and physical consequences arise since these admittedly arbitrary parameters establish the fact that the fears are genuine. Thus, the foreseeability issue shifts from the fear itself to whether the defendant had a duty to foresee a possibility of physical

tion, and thus these problems are discussed in more detail in the ensuing sections.⁶²

2. Missouri Law

For many years Missouri followed the mainstream with regard to both intentional and negligent infliction of emotional distress. For intentional infliction, both the requisite conduct (i.e. outrageous or intentional) and physical manifestations were required.⁶³ In negligent infliction cases, both impact and physical manifestations were required.⁶⁴ But the case of *Bass v. Nooney*⁶⁵ changed this position with respect to negligent infliction. *Bass* involved a plaintiff who sued two defendants for negligent infliction of emotional distress. Ms. Bass claimed to have suffered a variety of psychiatric symptoms as a result of being trapped in an elevator for approximately one half hour. She relied on the doctrine of *res ipsa loquitur* and alleged no impact.⁶⁶ Because plaintiff suffered no "contemporaneous traumatic physical injury"⁶⁷ the trial court entered a directed verdict for the defendants.⁶⁸ The Missouri Supreme Court reversed and, in so doing, changed over one hundred years of Missouri law.⁶⁹ Citing numerous cases, commentaries and the RESTATEMENT (SECOND) OF TORTS §436A the court elected to abolish the impact rule.⁷⁰ Further, pointing to the difficulty in distinguishing between physical injury and emotional injury, the court abandoned the "physical consequence rule" of prior case law and the RESTATEMENT.⁷¹ Instead, the Court in *Bass* held that to recover for negligent

injury. The difficulty in proving the foreseeability of the distress has led one commentator to suggest that many plaintiffs who can satisfy the liberalized impact and physical consequence rules would not be able to satisfy the even more "liberal" tests. Dworkin, *supra* note 5, at 546.

62. See *infra* notes 76-77, 87 and accompanying text for a discussion of some potential problems faced. A comprehensive discussion is beyond the scope of this Comment due to the complexity of the issue noted by the court in *Bennett v. Mallinckrodt*, 698 S.W.2d 854 (Mo. Ct. App. 1985), *cert. denied*, 476 U.S. 1176 (1986). For a more comprehensive analysis, see G. NOTHSTEIN, TOXIC TORTS §§ 16.05 -11 (1984).

63. *Warren v. Parish*, 436 S.W.2d 670 (Mo. 1969); *Young v. Stensrude*, 664 S.W.2d 263 (Mo. Ct. App. 1984); *La Brier v. Anheuser Food, Inc.*, 612 S.W.2d 790, 793 (Mo. Ct. App. 1981).

64. *Bass v. Nooney*, 646 S.W.2d 765 (Mo. 1983) (en banc) (abolishing the impact and physical consequences rules); *Williams v. School Dist. of Springfield*, 447 S.W.2d 256 (Mo. 1969); *Gambill v. White*, 303 S.W.2d 41 (Mo. 1957); *Weisman v. Wells*, 306 Mo. 82, 267 S.W. 400 (1924); *Trigg v. St. Louis, K.C. & N. Ry.*, 74 Mo. 147 (1881).

65. 646 S.W.2d 765 (Mo. 1983) (en banc).

66. *Id.* at 766.

67. *Id.* at 768.

68. *Id.*

69. *Id.* at 772 (abolishing the impact rule and overruling *e.g.*, *Williams v. School Dist. of Springfield*, 447 S.W.2d 256 (Mo. 1969); *Trigg v. St. Louis, K.C. & N. Ry.*, 74 Mo. 174 (1881)).

70. *Bass v. Nooney*, 646 S.W.2d 765, 769-72 (Mo. 1983) (en banc).

71. *Id.* at 772.

infliction of emotional distress a plaintiff must prove that:

- 1) The defendant should have realized that his conduct involve and unreasonable risk of causing the distress; and
- 2) The emotional distress or mental injury is medically diagnosable and of sufficient severity as to be medically significant.⁷²

Since the physical consequences rule applied to both negligent and intentional infliction of emotional distress under pre-Bass law, the second facet of the *Bass* holding should be applied to intentional infliction cases as well.⁷³

As stated earlier, it is clear that a cause of action exists for present fear of developing cancer as long as the individual jurisdiction's requirements for the tort of intentional or negligent infliction of emotional distress are met.⁷⁴ This is apparently the case in Missouri as well.⁷⁵ In applying *Bass* to fear of developing cancer two things become evident. The first is the difficulty in proving foreseeability of causing distress.⁷⁶ The second is how are "diagnosable" and "medically significant" to be defined.

Apart from the difficulty in pleading sufficient facts to support foreseeability, proof at trial could pose some interesting problems. At the outset it should be noted that foreseeability goes to the existence of a duty and to the issue of proximate cause.⁷⁷ Thus, if plaintiff's fears were not foreseeable then the defendant can be exonerated either because he or she had no duty or that plaintiff's injuries were not proximately caused by defendant's actions. It is unlikely, however, that these cases would be decided on a duty analysis. Duty has to do with whether or not the subject matter involved creates a substantial enough relationship between plaintiff and defendant to give rise to an obligation on the part of defendant to protect plaintiff from any adverse consequences of defendant's actions.⁷⁸ The very nature of the substances involved gives rise to the fact that not only is there a possibility of distress but also of physical damage (both in injury resulting from the accident and the potential development of disease). This creates a situation in which a duty arises.⁷⁹ Indeed, it seems tautological that a defendant involved in the production, transportation and disposal of toxic materials owes a duty to conduct his affairs in a

72. *Id.* at 772-73; see also *Young v. Stensrude*, 664 S.W.2d 263, 265 (Mo. Ct. App. 1984).

73. *Young v. Stensrude*, 664 S.W.2d 263, 265 (Mo. Ct. App. 1984).

74. See *supra* notes 26-45 and accompanying text.

75. *Bennett v. Mallinckrodt*, 698 S.W.2d 854, 866-67 (Mo. Ct. App. 1985), *cert. denied*, 476 U.S. 1176 (1986) (holding that plaintiff's claim was properly dismissed due to failure to plead foreseeability of distress as required by *Bass v. Nooney*, 646 S.W.2d 765 (Mo. 1983) (en banc)).

76. *Id.*

77. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 54, at 297-98 (5th ed. 1984).

78. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 12-13 (1953).

79. Note, *Young v. Stensrude: Fishing Through Bass for the Boundaries of Negligent Infliction of Mental Distress*, 51 MO. L. REV. 579, 593 (1986); see also *Bass v. Nooney*, 646 S.W.2d 765, 774 (Mo. 1983) (en banc).

way which limits or prevents exposure to such materials.⁸⁰ In addition, there is the practical observation that in the overwhelming number of tort cases a duty is assumed without comment.⁸¹

At first glance, the analysis of duty in negligent infliction of emotional distress cases which require a physical injury establish a standard as arbitrary as the impact rule. This approach, however, seems to be supported by the Missouri Supreme Court's decision in *Bass*.⁸² It must be noted, however, that the vague language⁸³ of the *Bass* holding allows for other methods of establishing duty. For example, the social utility of defendant's conduct could be vastly outweighed by a foreseeable risk of mental distress.⁸⁴ In the area of toxic exposure duty could be imposed in this way if, for example, the defendant was guilty of illegal dumping or had not followed proper procedures for disposing of the substances. One author commenting on the *Bass* holding seemed to think that inclusion of physical factors was somehow inappropriate.⁸⁵ One must remember, however, that the movement toward an independent tort for emotional distress has been an *expansion* of the law. It cannot be doubted that the more novel elements of the emotional distress tort include cases which involve facts fitting the elements of previous law. For example, allowing a claim based on purely emotional harm will not preclude claims which involve an impact or physical consequences. Likewise, the inclusion of physical injury as a criteria for finding duty does not preclude protection based on purely emotional harms. Rather, it allows a judge to escape the vagaries involved in the peripheral, purely emotional claims in that it allows reference to a more concrete source of duty. In other words, if physical damage is threatened, any distress resulting from that danger clearly would fall within the protection afforded by the independent tort, since the tort protects emotional tranquility by itself. If the law can establish a duty based on purely emotional consequences then surely a duty exists if one's physical integrity is threatened.⁸⁶ Because duty usually exists, the main foreseeability issue involved in fear of developing cancer cases will be aimed at proximate cause — a jury issue which presents several proof problems.

There are at least three factual questions which are potential problems with regard to exposure to toxic substances and the subsequent fear of can-

80. See *infra* notes 82-86 and accompanying text.

81. Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 13.

82. Note, *supra* note 79, at 593 & n.115.

83. The language in question says that a plaintiff can recover if defendant should have realized that his conduct involved any risk of causing the distress. *Bass v. Nooney*, 646 S.W.2d 765, 772-73 (Mo. 1983) (en banc).

84. Note, *supra* note 79, at 594.

85. *Id.* at 593 (stating that referring to physical risk was arbitrary and primarily protected plaintiff from physical harm).

86. The sphere of claims for emotional injury alone is obviously larger than (and as a result encompasses) the sphere of claims created by physical and emotional injuries.

cer.⁸⁷ All three are the proper subject of expert testimony.⁸⁸ To begin with, the very nature of connecting certain chemicals with cancer is speculative. Even though there are "known" carcinogens,⁸⁹ exposure to these does not definitively establish that one will develop cancer. At best, exposure increases the risk and such an increase seem to suggest a causal connection.

For example, exposure to tobacco smoke and asbestos increases one's chances of getting cancer by a factor of ninety,⁹⁰ but exposure does not *guarantee* that a person who smokes and has breathed asbestos will develop lung cancer. Lung cancer occurs approximately 4 in 100,000 people — or approximately .0004 percent of the population. A person exposed to asbestos and tobacco smoke combined is ninety times more likely to develop cancer.⁹¹ Thus, their risk has been increased to a .0036 percent chance when compared to the normal population. Even taken as a distinct group, those who are exposed to asbestos fibers still have a significant chance of *not* contracting cancer. One study cited in *Wilson v. Johns-Manville Sales Corp.*⁹² found that even after development of asbestosis there is only a 12% chance of (or an 88% chance of *not*) developing peritoneal mesothelioma and a 15% chance of (or an 85% chance of *not*) developing pleural mesothelioma.⁹³ In any event, the issue here is not whether or not certain chemicals cause or do not cause cancer. The likelihood of developing cancer does, however, impinge on the issue of foreseeability. If the likelihood is sufficiently small the plaintiff's fear would become

87. This should by no means be considered an exhaustive list. It simply presents a few potential problems recognized by the author.

88. When jurors are incapable of reaching intelligent opinions due to a lack of knowledge or experience about the subject under inquiry without outside assistance, expert testimony is appropriate. *Sampson v. Missouri Pac. R.R.*, 560 S.W.2d 573 (Mo. 1978). Due to the complex knowledge of chemistry and its effects on the human body needed to evaluate the toxicity and cancer causing potential of substances, these are proper subjects of expert testimony.

89. Some known carcinogens and some cancers they cause are:

Asbestos — Lung, mesothelioma	Contraceptives — Liver
Arsenic — Skin, Lung	Coal Tar — Skin
Androgens — Liver	DES — Vagina
Aflatoxin — Liver	Estrogen — Uterus
4-Alminobiphenal — Bladder	Mustard Gas — Lung
Alkylating Agents — Leukemia	Nickel — Lung Larynx
Benzidine — Leukemia	Beta-Naphthylamine — Bladder
Benzene — Leukemia	Schistosomiasis — Bladder
Betel Nut — Mouth	Tobacco Smoking — Lung/Mouth
Bis-chloromethyl Ether — Lung	Thorotrast — Hemangiosarcoma
Chromates — Lung	Vinyl Chloride — Hemangiosarcoma
Chlornapheine — Bladder	Wood Smoke — Nasal sinus
Cadmium — Prostate	

A. FRANK, *Cancer*, in 13 *COURTROOM MEDICINE* § 3.02, at 3-3, table 1 (1980).

90. *Id.* § 3.11.

91. *Id.*

92. 684 F.2d 111 (D.C. Cir. 1982).

93. *Id.* at 111, 120 n.45.

unreasonable. If that is the case then it follows that a reasonable defendant would *not* foresee causing the distress.⁹⁴ Thus, a plaintiff must at least provide evidence⁹⁵ indicating that the increased risk provides a reasonable basis for his or her fear.⁹⁶ The speculative nature of the risk (i.e. that there is no guarantee that plaintiff will ever develop cancer) leaves an opening for defense counsel which plaintiff's attorneys cannot close.

Additionally, one must consider the quantity of the alleged carcinogen to which the plaintiff was allegedly exposed. There is the potential issue of whether or not the chemical in question is toxic in the concentrations at which plaintiff was exposed. If such an issue is presented there obviously must be evidence in the record to the effect that the chemical is toxic in that concentration. For example, in the hypothetical set out in the INTRODUCTION above, there was sufficient TDD in the tank car to make a concentration of one part per trillion. Suppose also that there are no studies which show that TDD exposure increases the risk of developing cancer when the concentration is less than one part per billion. However, certain experts suspect it to be toxic in concentrations as minute as one in ten trillion. The basic question becomes whether a reasonable defendant would transport such quantities of TDD by tank car despite the possibility of derailment and leakage given that the extent of scientific knowledge shows that the chemical is safe in the concentrations in which it is transported.⁹⁷ If such a defendant would, then a reasonable plaintiff would

94. Missouri law does require that the anxiety be reasonable. *Pandjiris v. Oliver Cadillac Co.*, 339 Mo. 771, 98 S.W.2d 969 (1936) (apparently adopting rule); *Butts v. National Exch. Bank*, 99 Mo. App. 168, 72 S.W. 1083 (1903). These cases are of the parasitic variety. However, the expansion from only parasitic recovery for emotional distress to an independent tort should not be read as to eliminating this rule.

95. This will most likely have to take the form of expert testimony. To establish medical causation scientific or medical evidence establishing the cause/effect relationship between the complained of condition (i.e., cancer and/or fear of cancer) and the alleged cause (i.e., the substance the plaintiff was exposed to) is required. *Reed v. Labor & Indus. Relations Comm'n*, 664 S.W.2d 650 (Mo. Ct. App. 1984) (citing *Clevenger v. Labor & Indus. Relations Comm'n*, 600 S.W.2d 675 (Mo. Ct. App. 1980)); see also *Harrison v. Weller*, 423 S.W.2d 226 (Mo. Ct. App. 1967); *Northern Kansas City Memorial Hosp. v. Wiley*, 385 S.W.2d 218 (Mo. Ct. App. 1964).

96. It should be noted that the reasonable basis test does go to the foreseeability of the distress and not the medically diagnosable/significant prong of the *Bass* test. The last prong deals with the severity of the distress and *not* the source of those fears. Thus, it appears possible that even though a plaintiff has a reasonable basis for his fears (i.e., there is a body of evidence regarding the substance's toxicity and linkage to cancer sufficient enough to find that an ordinary person would suffer from fear) if those fears are not diagnosable and significant, plaintiff cannot recover. Likewise, even if plaintiff's fears do result in a diagnosable illness, if an ordinary person would have been able to emotionally handle the exposure the plaintiff should not recover since the defendant could not foresee the distress.

97. It should be noted that this does seem to implicate what has been called the "state of the art" defense, i.e., that the defendant could not foresee a risk unknown under present technology and knowledge. What the precise interrelation is between toxic torts and the state of the art will not be discussed.

not develop reasonable fears as a result of such exposure. Since the lay person generally could not be deemed to have adequate knowledge with regard to toxic chemicals to decide this question, it is almost certain that experts must be employed to prove whether or not the defendant should foresee the distress after considering the evidence available. In the hypothetical stated above, the plaintiff will attempt to produce experts who would emphasize the suspicions about TDD and, as a consequence of those suspicions, testify that the defendant should have anticipated the plaintiff's fears. The defendant, on the other hand, will produce experts saying that TDD is not toxic in the levels at which plaintiff was exposed, and thus plaintiff has no reasonable basis for his fears. As a result, the defendant could not foresee the emotional distress.

Third, there could be an issue over whether the chemical is toxic at all. For example, in the hypothetical, suppose that there is a study or two linking TDD to cancer, but that for some reason there is a substantial debate over the studies' conclusiveness. The plaintiff will again have to try to introduce evidence that the chemical is toxic and that evidence is sufficient to make his fears reasonable. The defendant will also produce experts who insist that the chemical is not toxic.

This potential swearing match between experts as to the reasonable basis issue, the issue of trying to discover safe levels of exposure, and the third issue regarding the preliminary matter of whether a chemical is toxic at all, all have a horrendous potential for long, expensive trials which may not even result in a favorable verdict for the plaintiff.⁹⁸ The opinions of the experts will be based on complex studies and statistics whose methodology and results must be explained. Thus the jury will be left with volumes of complex statistical data which can be both conflicting and beyond their understanding. Even if we assume that most juries *will* understand the data, they are nonetheless left with no real guidance as to the determinative question: which group of experts is correct?⁹⁹

The need for expert testimony is further exacerbated by the *Bass* Court's insistence that a plaintiff's fears be medically diagnosable and medically significant. Testimony as to medical issues requires an expert witness, especially where mental disturbance is at issue.¹⁰⁰ Thus, the "fear of"/"Cancerphobia"

98. *E.g.*, *Kemner v. Monsanto, Inc.*, involved claims for damages by several residents of Sturgeon, Missouri resulting from exposure to dioxin and soon became the longest jury trial in U.S. history. Although a sum in the area of \$100,000 was awarded to certain landowners for damages resulting from the spill and subsequent clean up, the damages for exposure to the dioxin was only \$62 — one dollar for every plaintiff. Sixteen million was awarded in punitive damages, but there is a serious question as to whether this is appropriate since punitive damages must bear a reasonable relation to actual damages. As a result, the case is currently on appeal.

99. *See Robin, The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

100. When mental condition is at issue expert testimony is permissible. *Bedenk v. St. Louis Pub. Serv. Co.*, 285 S.W.2d 609 (Mo. 1955). Questions involving emotional disturbance are complex, particularly appropriate for science and one which no jury

distinction of cases such as *Devlin v. Johns-Manville Sales Corp.*¹⁰¹ is unavailable in Missouri as far as the rule's substance is concerned. Missouri requires expert medical testimony for recovery under *Bass* and thus a lay witness cannot testify as to simple "fear of" claims.

Another issue raised by the second prong of the *Bass* test is the standard by which "diagnosable" and "significant" distress is to be decided.¹⁰² Both have yet to be defined.¹⁰³ Although it has been suggested that the judge will decide the "medically diagnosable" portion of the severity test,¹⁰⁴ it is equally arguable, in light of the need for expert testimony, that both "medically significant" and "medically diagnosable" can be determined by the jury after competent witnesses present evidence that plaintiff's fears meet (or don't meet) the requirements of the *Bass* test.¹⁰⁵ Since this test is arguably within the jury's province, perhaps it is better that the terms remain undefined yet subject to the same standards as other medical testimony. It has been noted, however, that when there is competing expert testimony the jury is left with no real guidance to help it decide between the experts. Thus, the cost of expert testimony when combined with the uncertainty surrounding the jury decisions gives trivial claims a potentially high settlement value. Whether or not this result is prudent in light of the court's traditional concern with frivolous suits in the area is a question which remains to be answered.¹⁰⁶

Despite the complexity and somewhat speculative nature of the proof, the cost of the expert testimony, and the vague standards applied to defining the terms, a claim for negligent infliction of emotional distress should not be foreclosed.¹⁰⁷ As a result, it would be a safe conclusion that claims for fear of cancer and cancerphobia are available under Missouri law.

III. STRICT LIABILITY

One author has noted the possibility of pursuing a strict liability theory to recover in toxic exposure cases. But he notes that no courts have allowed such

should be permitted to resolve without expert testimony. *Harrison v. Weller*, 423 S.W.2d 226 (Mo. Ct. App. 1967).

101. 202 N.J. Super. 556, 495 A.2d 495 (N.J. Super. 1985).

102. A plaintiff must apparently satisfy both due to the *Bass* court's use of the conjunctive. See *Bass*, 646 S.W.2d at 772-73; see also Note, *supra* note 79, at 597. Interestingly, while a plaintiff must plead that his distress is both medically diagnosable and medically significant he or she is not required to seek medical attention. *Beasley v. Affiliated Hosp. Prod.*, 713 S.W.2d 557 (Mo. Ct. App. 1986).

103. Note, *supra* note 79, at 597.

104. *Id.* at 597 n.153.

105. For example, the plaintiff's medical expert can give his or her opinion that the plaintiff's emotional distress is medically diagnosable and medically significant. Defense counsel can also present evidence rebutting that testimony. This would give the jury ample evidence on both issues to properly decide the question.

106. See Robin, *supra* note 99; Note, *supra* note 79, at 598 n.160.

107. *Bennett v. Mallinckrodt*, 698 S.W.2d 854, 866-67 (Mo. Ct. App. 1985), *cert. denied*, 476 U.S. 1176 (1986).

claims.¹⁰⁸ This may no longer be the case. *Bennett v. Mallinckrodt*¹⁰⁹ has opened up the possibility that such a theory can be used, at least in cases of radiation exposure.¹¹⁰ The avenue followed is strict liability for "ultrahazardous"¹¹¹ or "abnormally dangerous"¹¹² activities.¹¹³ Missouri adheres to the "true rule" of strict liability as set down in the landmark case of *Rylands v. Fletcher*.¹¹⁴ That rule states that a person is strictly liable for damages created by non-natural uses of land.¹¹⁵ Before *Bennett*, the rule had limited application in Missouri. In fact, it was restricted to blasting cases.¹¹⁶ Noting that the dangers inherent in the nuclear industry were as great as those involved in blasting, the Eastern District Court of Appeals in *Bennett* held that the plaintiff could attempt to prove a strict liability claim.¹¹⁷ Observing that no Missouri cases had specifically adopted either version of the American Law Institute's RESTATEMENT (SECOND) OF TORTS § 519 and that there was no prohibition against doing so,¹¹⁸ the *Bennett* court decided to adopt §§ 519-520 regarding this facet of strict liability.¹¹⁹ The court then instructed the trial court to develop a record on remand which would enable it to evaluate the plaintiff's claim in light of the factors set out in §520.¹²⁰ The factors are as follows:

- 1) existence of a high degree of risk to the person, land or chattels of others;
- 2) the likelihood that harm would be great;
- 3) inability to eliminate risk by exercise of reasonable care;
- 4) extent that the activity is not a matter of common usage;
- 5) the inappropriateness of the activity in the place where it is carried on;
- 6) the extent that the activity's value is outweighed by its

108. Dworkin, *supra* note 5, at 560-61.

109. *Bennett*, 698 S.W.2d at 866-67.

110. *Id.* at 867, 869.

111. RESTATEMENT OF TORTS § 519 (1938).

112. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

113. *Id.*

114. 1 L.R.-Ex. 265 (1866), *aff'd as modified*, 3 L.R.-Ex. 330 (1868).

115. *Rylands v. Fletcher*, 3 L.R.-Ex. 330, 338 (1868). There has been some confusion concerning the rule. The Exchequer Chamber said that if a defendant brought *anything* onto his land that is likely to "do mischief if it escapes", and it does escape, the landowner is strictly liable. On appeal, the House of Lords narrowed that holding to non-natural land use. In the United States, however, it has wrongly been held that the "true rule" was that developed by the Exchequer Chamber and, as such, has been soundly rejected. In fact the "true rule" is the modified version of the House of Lords. *Bennett v. Mallinckrodt*, 698 S.W.2d 854, 867-68 (Mo. Ct. App. 1985), *cert. denied*, 476 U.S. 1176 (1986); *see also* W. PROSSER, LAW OF TORTS § 78, at 505-06 (4th ed. 1971).

116. *Bennett*, 698 S.W.2d at 868 and cases cited therein.

117. *Bennett*, 698 S.W.2d at 867-69.

118. *Id.* at 867.

119. *Id.* at 869.

120. *Id.*

dangerousness.¹²¹

Evaluating a claim under the "abnormally dangerous" theory of strict liability involves a balancing of risks and benefits similar to that involved in nuisance actions.¹²² When applied to toxic exposure, it is clear that some cases can be brought under the "abnormally dangerous" doctrine. First, exposure to toxic substances often results in the same harm created by radiation; cancer. Since this result was sufficiently analogous to the danger of blasting in *Bennett* to allow a claim in strict liability for radiation exposure, it should also be sufficient to allow a court to say that the dangers inherent in toxic substances are as great as those involved in blasting. This similarity alone might be enough to prompt a court to allow a strict liability claim. Even if it is not, however, one can certainly imagine cases where the risks of the defendant's activities outweigh the benefits. For example, illegal dumping serves no benefits at all and creates a very substantial risk. Even when defendant's conduct is non-culpable or non-negligent, the factors of § 520 may weigh in favor of strict liability. In toxic exposure there is clearly a threat of harm to persons in both their physical conditions and emotional well being. Further, that the harm is potentially great is also clear in that the potential physical injury is a life threatening disease¹²³ and the emotional damage can reach the extent of a phobia. Even using reasonable care will not avoid the risk. A potential defendant cannot remove the toxic nature of some chemicals and there is always some risk of exposure resulting from even non-negligent occurrences. In addition, the production and/or disposal of toxic substances is hardly a common activity. With four of § 520's six factors apparently satisfied, the only hope for those involved in the production, transportation and disposal of toxic substances is that the benefit to society of their activity outweighs the risks involved or that the activity occurs in an appropriate area. These factors, however, must be considered on an ad hoc basis. It is likely that certain activities will fail these factors as well. Since a defendant is liable for all damages resulting from his "abnormally dangerous" activity, there appears to be no bar to recovering for emotional distress or latent diseases under strict liability so long as proximate cause is shown. If strict liability is applicable in toxic exposure cases, the boundaries of liability will be expanded greatly. Those plaintiffs unable to prove negligence will still be able to recover under *Restatement* § 519 and § 520.

121. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

122. *Bennett*, 698 S.W.2d at 869.

123. Cancer, like other exposure related diseases, does have a long latency period. This could prove problematic in those jurisdictions which have a statute of limitations running from the date of negligence. Thus, even a strict liability theory would be barred in such jurisdictions since the disease manifests itself long after the statute has run. As will be seen, however, Missouri's statute of limitations runs from when the damage is ascertainable (*i.e.*, discovered). As a result, a strict liability theory will be available to a plaintiff many years after the exposure occurs, provided that he had not made a claim for fear of cancer soon after the exposure. *See infra* notes 163-90 and accompanying text.

IV. RECOVERY FOR INCREASED RISK

A. *Availability in General*

Most courts that have held that a plaintiff may not recover for increased risk of developing cancer unless he or she can prove that it is more probable than not that he or she will develop cancer in the future.¹²⁴ This is based on the long held notion that damages which are contingent, speculative, or merely possible are not recoverable. In other words, a threat of future harm which has not yet materialized is insufficient to produce a damage award.¹²⁵ "More probable than not" has been interpreted to mean that if there is a "reasonable certainty" or "reasonable probability," a plaintiff could recover.¹²⁶ Usually this requires a likelihood of greater than fifty percent.¹²⁷ A standard this rigorous is unlikely to be met in that the likelihood of developing cancer often remains below fifty percent.¹²⁸ Thus, unlike the cases of parasitic increased risk of developing diseases (i.e. increased risk coupled with pre-existing injury), where a simple possibility is included in damages,¹²⁹ a plaintiff in a toxic exposure case will not be allowed to recover for increased risk under present law or unless other theories are developed to allow a different method of recovery.¹³⁰

B. *Missouri Law*

Missouri follows the majority view with regard to increased risk as a fu-

124. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986) (applying Mississippi law after Mississippi Supreme Court refused to certify certain questions); *Gideon v. Johns-Manville Sales Corp.* 761 F.2d 1129, 1138 (5th Cir. 1985) (applying Texas law); *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 520 (Fla. Dist. Ct. App. 1985); *Devlin v. Johns-Manville Corp.*, 202 N.J. Super. 556, 495 A.2d 485 (1985); *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 11, 507 N.E.2d 476 (Ohio Ct. C.P. 1987). See generally Note, *Damages for an Increased Risk of Developing Cancer Caused by Asbestos Exposure Are Only Recoverable if it is More Likely Than Not that Cancer Will Develop*, 51 MO. L. REV. 847 (1986)

125. See, e.g., *Stuart v. State Farm Mut. Auto. Ins. Co.*, 699 S.W.2d 450 (Mo. Ct. App. 1985); W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 30, at 165 (5th ed. 1984).

126. *Gideon*, 761 F.2d at 1138; *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982); *Morissy v. Eli Lilly & Co.*, 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1979); *Devlin*, 202 N.J. Super. at —, 495 A.2d at 500 (citing *Coll v. Sherry*, 29 N.J. 166, 148 A.2d 481 (1959)). A majority of jurisdictions take this approach. 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, 17-18 (1977).

127. *Gideon*, 761 F.2d at 1129; *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 464 A.2d 1020 (1983); *Devlin*, 202 N.J. Super. at 556, 495 A.2d at 495; see Note, *supra* note 124, at 848 n.9.

128. See *supra* notes 90-96 and accompanying text.

129. See *supra* note 18 and accompanying text; see also *Gale & Goyer, supra* note 4, at 737.

130. Four of these theories will be discussed *infra* at 142-97.

ture damage traceable to exposure. With little discussion, the Eastern District Court of Appeals affirmed the dismissal as too speculative of an increased risk claim arising out of alleged exposure to radiation.¹³¹ This result seems to be dictated by Missouri law. In Missouri, damages that are contingent and merely possible are not recoverable.¹³² Thus, only those damages which are probable are recoverable.¹³³ Despite that the standard for the question of future consequences is dubious in Missouri,¹³⁴ it is evident from case law that a plaintiff must establish that future consequences are more likely than not before he or she can recover for those consequences.¹³⁵ The source of this confusion is that an expert's opinion as to the possibility of future consequences is admissible to aid the jury in evaluating other evidence regarding those consequences but does not constitute a submissible case on those consequences standing on its own.¹³⁶ Thus, as the holding in *Bennett v. Mallinckrodt*¹³⁷ indicates, if all a plaintiff can do is produce an expert who testifies that it is only possible that cancer will develop, his or her case will be dismissed. This will be the only result possible in increased risk of cancer cases. The evidence of possibility of getting cancer cannot be used to evaluate other evidence since only expert testimony is available with regard to the increased risk. This is because the scientific and medical knowledge needed to evaluate and quantify that increased risk is beyond the jury's knowledge. In addition, most experts will not

131. *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 866 (Mo. Ct. App. 1985), *cert. denied*, 476 U.S. 1176 (1986) (citing *Morissy v. Eli Lilly & Co.*, 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1979)); *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 461 A.2d 184 (Law Div. 1983); and *Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 (1984).

132. *Hoffman v. St. Louis Pub. Serv. Co.*, 255 S.W.2d 736 (Mo. 1953); *Pandjiris v. Oliver Cadillac Co.*, 339 Mo. 711, 98 S.W.2d 969 (1936); *Harrison v. Weller*, 423 S.W.2d 226 (Mo. Ct. App. 1967); *Hahn v. McDowell*, 349 S.W.2d 479 (Mo. Ct. App. 1961).

133. *Turner v. Yellow Cab Co.*, 361 S.W.2d 149, 154-55 (Mo. Ct. App. 1962).

134. Annotation, *Admissibility of Expert Medical Testimony as to Future Consequences of Injury as Affected by Expression in Terms of Probability*, 75 A.L.R.3d 9, 33-35 (1977).

135. The following cases required a reasonable probability: *Hill v. St. Louis Pub. Serv. Co.*, 359 Mo. 220, 221 S.W.2d 130 (1949); *Meily v. St. Louis & S.F. R.R.*, 215 Mo. 567, 114 S.W. 1013 (1908) (by implication); *Barr v. City of Kansas*, 121 Mo. 22, 25 S.W. 562 (1894); *Oliver v. City of Vandalia*, 28 S.W.2d 1044 (Mo. Ct. App. 1930); *Gorman v. A.R. Jackson Kansas City Showcase Works Co.*, 19 S.W.2d 559 (Mo. Ct. App. 1929).

The following cases required a reasonable certainty: *Mahany v. Kansas City R.R.*, 286 Mo. 601, 228 S.W. 821 (1921); *Garard v. Manufacturers' Coal & Coke Co.*, 207 Mo. 242, 105 S.W. 767 (1907); *Stuart v. State Farm Mut. Auto. Ins. Co.*, 699 S.W.2d 450 (Mo. Ct. App. 1985); *Hahn v. McDowell*, 349 S.W.2d 479 (Mo. Ct. App. 1961).

But see *Stephens v. Guffey*, 409 S.W.2d 62 (Mo. 1966) (stating that a question asking whether or not "something might, could or would produce a certain result" held not improper because experts opinion regarding possibility and probability is often of aid to the jury); *McPherson v. Premier Serv. Co.*, 38 S.W.2d 277 (Mo. Ct. App. 1931).

136. *Lands v. Boyster*, 417 S.W.2d 942, 946 (Mo. 1967).

137. 698 S.W.2d 854 (Mo. Ct. App. 1985), *cert. denied*, 476 U.S. 1176 (1986).

be able to push plaintiff's case above the 50% probability threshold.¹³⁸ Thus under Missouri law damages for increased risk are not recoverable.

C. *Policy and Possible Alternative Theories*

The result reached under the "more likely than not approach" gives rise to a serious problem. A plaintiff who is exposed and tries to bring a claim for increased risk will be denied recovery. As a result, if he or she *does* eventually develop cancer the injury will go uncompensated.¹³⁹ On the other hand, if the plaintiff waits to sue until after cancer has developed the statute of limitations may well have run.¹⁴⁰ This no-win situation has led many courts and commentators to develop theories which allow a plaintiff to recover for at least a portion of his increased risk.¹⁴¹

1. Proportional Recovery

One of the most common ideas in this area, but one which has yet to be adopted by any court is "Proportional Recovery".¹⁴² Under this approach, the percentage increase in risk is multiplied by the cost of treating cancer.¹⁴³ For example, say the citizens of our small Missouri town have had their risk of developing cancer increase from 5% to 10%, increasing the risk by 5%. Also assume that currently it costs one million dollars to treat cancer. Under proportional recovery the plaintiff could recover 5% of \$1,000,000 or \$50,000.

While on its face this approach seems to balance the competing interests involved (plaintiff's right to recover if he does develop cancer and the defendant's right not to pay for unmanifested damages), when fully analyzed it falls short of justice on either side. First, unless a way can be found to characterize the increased risk as a present injury, the approach requires that an award be based on possibility or on an expansion of present injury so that the increased risk can fall under the relaxed standards of parasitic claims.¹⁴⁴ Even if this is a wise choice, the courts show little indication of adopting it.¹⁴⁵ This is due to a

138. See *supra* notes 90-96, 128 and accompanying text.

139. Note, *supra* note 124, at 854.

140. *Id.*

141. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 520-21 (5th Cir. 1984); *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 520-21 (Fla. Dist. Ct. App. 1985); *Devlin v. Johns-Manville Sales Corp.*, 202 N.J. Super. 556, —, 495 A.2d 495, 502 (1985); Cooper, *Assessing Possibilities in Damage Awards — The Loss of a Chance or the Chance of a Loss*, 37 SASK. L. REV. 193, 196-97 (1972-73); Dworkin, *supra* note 5, at 570-72; Gale & Goyer, *supra* note 4, at 742-43; Note, *supra* note 124, at 860-61; Note, *Increased Risk of Cancer as an Actionable Injury*, 18 GA. L. REV. 563, 577-78 (1984).

142. See Cooper, *supra* note 141, at 196-97; Gale & Goyer, *supra* note 4, at 741-43; Note, *supra* note 124, at 860-61; Note, *supra* note 141, at 577-78.

143. Note, *supra* note 124, at 860.

144. See generally Gale & Goyer, *supra* note 4, at 737-43.

145. *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985); Ea-

number of difficult problems. Allowing current recovery for a plaintiff who does not develop cancer is a windfall.¹⁴⁶

On the other hand, a plaintiff who *does* develop cancer in the future, while having more money than a plaintiff denied recovery under the "more likely than not" approach, still does not receive a full recovery since the jury bases its award on a less than one hundred percent chance of developing cancer. In addition, a plaintiff who does not recover any proportional increased risk damages and does develop cancer is left with the disease and no money, the same result achieved under the majority approach.¹⁴⁷

All these results are possible under proportional recovery because the action for increased risk is based on speculative testimony and not sound probabilities,¹⁴⁸ a fact which also violates the notion that a case should be decided on the best quality evidence available.¹⁴⁹

But another theory has been proposed which characterizes increased risk as a current element of damages. Under this view a person has a legal interest in maintaining his or her current risk level. Exposure and subsequent increased risk, it is argued, constitute a compensable invasion of that interest.¹⁵⁰ The compensation for the invasion is not based upon academic evaluation of risks prior to and after defendants negligent conduct, but is given for in three types of claims which are all potentially compensable. First, the invasion will probably result in an increased apprehension of developing cancer. This result is, as seen in the section on fear of cancer, compensable under the tort of infliction of emotional distress. But if this were the only response to the existence of an increased risk, the counter would be, of course, that the increased risk may also manifest itself in actually developing cancer. This issue, however, can be addressed by allowing a claim in the future if cancer ever develops. Such an approach, however, has problems as will be seen below.¹⁵¹ In addition, the invasion of this risk interest will give rise to expenses incurred for increased medical surveillance aimed at discovering if the person exposed has developed cancer. This, however, is also compensable.¹⁵² But regardless of the merits of a claim that a person has a legal interest in maintaining his or her current risk level, such a claim does not circumvent the other problems in-

gle-Picher Indus. v. Cox, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985); Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 464 A.2d 1020 (1983); Devlin v. Johns-Manville Sales Corp., 202 N.J. Super. 556, 495 A.2d 495 (1985).

146. Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 119 (D.C. Cir. 1982); *Eagle-Picher Indus.*, 481 So. 2d at 523-24.

147. Wilson, 684 F.2d at 119; *Eagle-Picher Indus.*, 481 So. 2d at 523-24 (Fla. Dist. Ct. App. 1985).

148. See *supra* notes 142-47 and accompanying text; see also *Eagle-Picher Indus.*, 481 So. 2d at 521 (Fla. Dist. Ct. App. 1985).

149. See, e.g., Wilson, 684 F.2d at 119; *Eagle-Picher Indus.*, 481 So. 2d at 521.

150. See, Note, *supra* note 124, at 861 & n.87.

151. See *infra* notes 160-90 and accompanying text.

152. See *infra* notes 154-56 and accompanying text.

volved in allowing current recovery for increased risk.¹⁵³

2. Cost of Increased Medical Surveillance

A more viable approach to this problem of increased risk is that a plaintiff should be compensated for the costs of increased medical surveillance.¹⁵⁴ This is an award for those medical expenses which will be incurred for the increased medical scrutiny the plaintiff must undergo to discover whether the disease is, in fact, developing.¹⁵⁵ This approach has been approved of in a few cases.¹⁵⁶ The problem remains, however, that a plaintiff who does develop cancer will be vastly under compensated since he or she will have received medical bills only for the tests leading up to eventual diagnosis and not for the actual expenses of treating the disease.

Overpayment does not appear to be a problem in this instance, at least on the surface. It is conceivable, however, that after such an award a plaintiff might not go to the doctor either because she fears the results of the tests or because she doesn't believe she'll get cancer after all. In the former, the defendant has clearly overpaid. The response to this is, however, that the plaintiff is entitled to those damages regardless of his future conduct. Just because one is entitled to do something doesn't mean they must or that the law should force them to do it. In the latter case, however, not only does plaintiff's post-award conduct result in over-payment, but it also calls into question the validity of the claim upon which the award was based. The defendant could assert that the original suit was fraudulent or malicious and, as a result, should be set aside. The possibility of a later suit to set aside such awards comes from the fact that the damages for increased medical surveillance are based on the assumption that the plaintiff will seek medical attention. Future medical bills in the normal personal injury claim are distinguishable simply because they are based on an existing injury — a fact not present in most toxic exposure cases. Thus, it is at least possible that this approach will cause problems to substitute for those it solves.

3. "Wait and See" Approach

a. The Approach in General

By far the most appealing approach to fear of cancer for toxic exposure

153. See *supra* notes 76-77, 87 and accompanying text.

154. Dworkin, *supra* note 5, at 570-72.

155. *Id.*

156. *Devlin v. Johns-Manville Sales Corp.*, 202 N.J. Super. 556, —, 495 A.2d 495, 500 (1985); *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 572-73, 461 A.2d 184, 190 (Law Div. 1983); see also *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir 1984) (diagnostic damages awarded in plane crash case on policy grounds similar to those enunciated in *Ayers*).

cases has been dubbed the "wait and see" approach.¹⁵⁷ It has been proposed and adopted in several cases.¹⁵⁸ Under this view a plaintiff can sue for current injuries resulting from the exposure¹⁵⁹ and still preserve a future cause of action if cancer develops.¹⁶⁰ The approach manages to solve all the problems attendant with recovery for increased risk before cancer develops. Namely, the evidence will no longer be speculative — the plaintiff *will* have cancer by the time he's allowed to recover for cancer.¹⁶¹ In addition, the plaintiff will receive full compensation while being disabled from receiving a windfall.¹⁶²

Despite its advantages, the "wait and see" approach does have drawbacks where one attempts to apply it in certain jurisdictions. To begin with, it requires the adoption of the discovery rule (i.e. that the statute of limitations does not begin to run until the damage caused by defendant's breach of duty is, or reasonably should have been, discovered by the plaintiff).¹⁶³ This is because the statute of limitations must be tolled until cancer develops. If it is not, the "wait and see" approach becomes empty because cancer has a long latency period.¹⁶⁴ Statutes of limitation which begin to run at the breach of duty clearly would have run before most cases of cancer caused by exposure develop.¹⁶⁵ It follows that a jurisdiction which has not previously adopted a discovery rule will be unable to utilize the "wait and see" approach.¹⁶⁶

The discovery rule is necessary not only to circumvent the statute of limitations problem, but is also utilized to avoid the second problem with the "wait and see" approach. This is the common law prohibition of splitting a cause of action. Traditionally, a plaintiff has only one cause of action for a single breach of duty. Thus, he or she must seek recovery for all present and future damages at one time.¹⁶⁷ Without an exception or a finessing of the rule, a plaintiff is faced with a difficult choice. He or she can either sue when the

157. Note, *supra* note 124, at 850.

158. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1984); *Devlin v. Johns-Manville Sales Corp.*, 202 N.J. Super. 556, 495 A.2d 495 (1985); *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985).

159. For example, asbestosis, emotional distress and medical surveillance.

160. See *supra* note 158.

161. *Eagle-Picher Indus.*, 481 So. 2d at 521 (Fla. Ct. App. 1985). It should be noted, however, that the issue of linkage between the exposure and the cancer may be difficult to prove. See *supra* notes 87-96 and accompanying text.

162. *Eagle-Picher Indus.*, 481 So. 2d at 521.

163. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982); *Jackson*, 727 F.2d at 518, 521; *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 663-64, 464 A.2d 1020, 1025 (1983); *Devlin*, 202 N.J. Super. at _____, 495 A.2d at 501 (1985); Note, *supra* note 124, at 851.

164. See, e.g., *Jackson*, 727 F.2d at 517 (latency period for mesothelioma ranges from twenty to forty years).

165. *Devlin*, 202 N.J. Super. 556, _____, 495 A.2d 495, 501-03 (1985); Note, *supra* note 124, at 854-55.

166. See generally Note, *supra* note 124, at 851-52.

167. See, e.g., *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1137 (construing Texas law); RESTATEMENT (SECOND) OF JUDGMENTS §§ 24-26 (1982).

cancer develops and run the substantial risk that the statute of limitations will run; or sue now for the increased risk of cancer and be subject to a strict "more likely than not" standard as to the development of cancer.¹⁶⁸ Thus, a plaintiff who is exposed and does develop cancer is again left without recovery.

It is this problem, as well as the inequities involved in allowing a present claim for increased risk, which has led many courts to fashion exceptions to the rule against claim splitting. They have done so both by a number of legal theories¹⁶⁹ and on policy grounds.¹⁷⁰ The result is that a plaintiff can sue a second time when (and only if)¹⁷¹ cancer develops, assuring that his or her claim is not frivolous, that it won't result in defendant paying a windfall, and that the case will be decided on the best evidence available. Even so, unless the jurisdiction allows recovery for reasonable expenses of increased medical surveillance and diagnosis either at the first or second trial, a plaintiff who does develop cancer remains under-compensated.

However, some courts are not willing to adopt this approach. For example, in *Gideon v. Johns-Manville Sales Corp.*,¹⁷² the court found that a plaintiff could not sue a second time at a later date for cancer developed in the interim,¹⁷³ despite the fact Texas had apparently adopted the discovery rule in asbestos cases.¹⁷⁴ The reason stated in *Gideon* was that Texas law permitted

168. Note, *supra* note 124, at 854-55.

169. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1985) (using a causal analysis, i.e., that until cancer has developed causation of cancer has not occurred); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982) (asbestosis and mesothelioma are separate and distinct diseases and the statute of limitations on mesothelioma does not begin to run when asbestosis develops); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566 (3d Cir. 1976), *cert. denied*, 429 U.S. 1035 (1977) (applying N.J. law and stating that asbestosis and cancer proceed along two separate causal chains thus constituting two separate causes of action); *Martinez-Ferrer v. Richardson-Merrel, Inc.*, 105 Cal. App. 3d 316, 164 Cal. Rptr. 591 (1980) (holding that later developed cancer would be an independent and non-simultaneous injury when compared to the present injuries); *Devlin v. Johns-Manville Corp.*, 202 N.J. Super. 556, 495 A.2d 495 (1985) (holding that rule against claim splitting not violated due to the separate and distinct nature of the injuries).

170. *Jackson*, 727 F.2d at 519 (evidence better when cancer has developed); *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 521-24 (Fla. Dist. Ct. App. 1985) (implied from policies and equities cited as reasons for denying present recovery for increased risk); *Devlin*, 202 N.J. Super. at —, 495 A.2d at 502-03 (1985) (citing *Martinez-Ferrer v. Richardson-Merrel, Inc.*, 105 Cal. 3d 316, 164 Cal. Rptr. 591 (1980)) (need to fashion relief as situations previously unanticipated by such rigid rules develop).

171. It should be noted that since a plaintiff can sue for cancer only if cancer develops, the possible judicial efficiency argument against this approach is ameliorated. Two trials may be required, but since the incidence of cancer is low when compared to the potential number of present increased risk cases, judicial efficiency is arguably improved. In addition one avoids the delay tactics a plaintiff would be encouraged to use under the traditional system to insure as many injuries as possible manifested themselves before the case goes to trial. See Note, *supra* note 124, at 855-56.

172. 761 F.2d 1129 (5th Cir. 1985) (applying Texas law).

173. *Id.* at 1137.

174. *Id.*; *Castorina v. Lykes Bros. S.S. Co.*, 578 F. Supp. 1153, 1157 (S.D. Tex.

only one cause of action for one breach of duty.¹⁷⁶ Since the claims cannot be split, the statute of limitations begins to run as soon as any injury resulting from defendant's breach becomes apparent. Thus, when any injury resulting from a breach manifests itself, the plaintiff must sue for all present and future damages. He is confronted with the impossible task of proving that his exposure resulted in a greater than fifty percent chance that he will develop cancer.¹⁷⁸

b. Availability of "Wait and See" in Missouri

Missouri law is remarkably similar to that of Texas on these issues. Even though no cases can be found specifically stating that the Missouri statute of limitations is tolled until the discovery of a latent disease,¹⁷⁷ Missouri's general statute of limitations¹⁷⁸ is clearly discovery oriented. The statute states:

Civil actions . . . can only be commenced . . . after the cause of action shall have accrued; provided that . . . the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of . . . duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and if more than one item of damage, then the last item so that all resulting damage may be recovered, and full an complete relief obtained.¹⁷⁹

When combined with the period allotted to personal injury actions¹⁸⁰ it is clear that a plaintiff has five years from the point at which he ascertains, or reasonably should have ascertained, the injury. The only exception to this is for medical malpractice.¹⁸¹ In the area of toxic exposure, the application of the

1984), *aff'd*, 758 F.2d 1025 (5th Cir. 1984), *cert. denied*, 106 S. Ct. 137 (1985).

175. *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1137 (5th Cir. 1985).

176. *See Note, supra* note 124, at 854-55.

177. The only line of cases found was one discussing the development of silicosis in the context of the Federal Employers Liability Act. The statute of limitations in that context was three years from the time the cause of action accrued. 45 U.S.C.A. § 56 (West 1986). In the case of *Farrar v. Saint Louis & S.F. Ry.*, 361 Mo. 408, 235 S.W.2d 391 (1950), it was held that failure to provide an employee with an adequate respirator while he painted railroad cars was a continuing tort. *Id.* at 393. In that context it was held that the statute of limitations began to run from the time that the unsafe conditions are removed or from the termination of the employment, which ever occurs first. *Id. Accord Rowe v. Gatke Corp.*, 126 F.2d 61 (7th Cir. 1942) (asbestosis); *Minyard v. Woodward Iron Co.*, 81 F. Supp. 414 (N.D. Ala. 1948); *Plazak v. Allegheny Steel Co.*, 324 Pa. 422, 188 A. 130 (1936) (statute runs from last tortious act); *Tennessee Eastman Corp. v. Newman*, 22 Tenn. App. 270, 121 S.W.2d 130 (1938) (continuing tort statute of limitations runs from cessation of employment).

178. MO. REV. STAT. § 516.100 (1986).

179. *Id.*

180. MO. REV. STAT. § 516.120 (1986).

181. *See MO. REV. STAT. § 516.105* (1986) which generally provides that the statute runs from the date of the negligent act except in instances where foreign objects are left in the body after surgery. Missouri courts have consistently refused to adopt the discovery rule in medical malpractice despite the inconsistency with MO. REV. STAT. § 516.100 (1986). This is true under the postulate of statutory construction

statute allows a plaintiff to file an action up to five years after he discovers that cancer has developed.¹⁸² The statute begins to run after a right to prosecute the claim has accrued or, to put it another way, when the damages become recoverably certain.¹⁸³ Practically, since damages for increased risk are *not* "recoverably certain" under Missouri's "more likely than not" standard, a plaintiff cannot successfully prosecute a claim for increased risk until cancer develops. Thus, the statute of limitations would be tolled until that time.

This, however, does not solve the problem. Missouri allows only one cause of action for a single breach of duty.¹⁸⁴ This means that when any damage (i.e. cancerphobia) manifests itself after an exposure has occurred, the plaintiff must either sue now for this fear and, at the same time attempt to bring an action for increased risk (which will be nearly impossible due to the "more likely than not" standard) or to wait until cancer develops. By that time, however, the statute will almost certainly have run on the "cancerphobia" claim.¹⁸⁵ Thus, under current Missouri law the "wait and see" approach will not be available; leaving plaintiffs compensated for their fears but not the disease or compensated for the disease and not their fears.

There are two ways to circumvent this harsh result. The first is the view that the exposure operates as a continuing tort. The numerous claims resulting from a continuing tort need not be brought at the same time.¹⁸⁶ This is echoed in MO. REV. STAT. § 516.100 (1986) which provides that the statute will run from the discovery of the *last* item of damage.¹⁸⁷ It follows that if exposure to toxic chemicals can be considered as a continuing tort a plaintiff could sue

which states that where general and specific statutes conflict the specific one controls. *See, e.g.,* Young v. Medrano, 713 S.W.2d 553 (Mo. Ct. App. 1986); Miller v. Duhart, 637 S.W.2d 183 (Mo. Ct. App. 1982). The medical malpractice statute of limitations, however, has been held void as applied to minors under Article I, § 14 of the Missouri Constitution. Strahler v. Saint Luke's Hosp., 706 S.W.2d 7 (Mo. 1986) (en banc); *see also* Note, *Will Missouri's "Open Courts" Guarantee Open the Door to Adoption of the "Discovery Rule" in Medical Malpractice Cases?*, 52 Mo. L. REV. 977 (1987).

182. The statute of limitations runs from the date the suit can be maintained. Baron v. Kurn, 349 Mo. 1202, 164 S.W.2d 310 (1942); *State ex. rel. Sisters of St. Mary v. Campbell*, 511 S.W.2d 141 (Mo. Ct. App. 1974).

183. *Davis v. Laclede Gas Co.*, 603 S.W.2d 554 (Mo. 1980) (en banc) (quoting with approval Comment, *Developments in the Law — Statutes of Limitation*, 63 HARV. L. REV. 1177, 1205 (1950)); *Stafford v. Muster*, 582 S.W.2d 670 (Mo. 1979) (en banc); *DePaul Hosp. School of Nursing v. Southwestern Bell Tel. Co.*, 539 S.W.2d 542 (Mo. Ct. App. 1976).

184. *Chamberlain v. Missouri-Arkansas Coach Lines, Inc.*, 354 Mo. 461, 189 S.W.2d 538 (1945).

185. This is because of the long latency of cancer. *See supra* note 164 and accompanying text. The fear of claim will accrue shortly after the plaintiff learns that he or she has been exposed to a known or suspected carcinogen. Since cancer may not develop for as long as decades after the exposure, the five year period will have run.

186. *Kelly v. City of Cape Girardeau*, 338 Mo. 103, 89 S.W.2d 41 (1936), *overruled on other grounds*, 423 S.W.2d 814 (Mo. 1968).

187. "and if more than one item of damage, then the last item. . ." MO. REV. STAT. § 516.100 (1986).

now for emotional distress or already developed disease and years later could collect for cancer should it develop. This argument could prove problematic for courts since, on the one hand, it can be argued that the exposure ends when the toxic substance is removed from the plaintiff's environment or when the plaintiff leaves the proximity of the substance.¹⁸⁸ On the other hand, if it is found that the chemicals remain in, and thus in contact with, the human body for long periods of time, it could be argued that the exposure is continuous.

The second way to find a solution to the problem is to fashion an exception to the rule against claim splitting, or to find that the rule is not violated. Many courts have done so already.¹⁸⁹ Regardless of the approach taken, the plaintiff is given all the damages to which he or she is entitled — a policy codified in Missouri's general statute of limitations.¹⁹⁰

4. Combined Approach

One author suggests that a combination of the "wait and see" approach and the proportional recovery approach could be utilized.¹⁹¹ He notes, however, that no courts nor commentators have supported the notion.¹⁹² In addition, he acknowledges that the theory seems to allow double recovery.¹⁹³ Yet, he argues that the theory is logically and legally permissible because a plaintiff who is exposed to toxic substances has suffered the invasion of two interests (i.e. the interest in maintaining his risk level and damages for developed cancer).¹⁹⁴

But this combined approach is not sound. Even if the risk maintenance interest is valid, it would be fully compensated by damages for fear of cancer, by compensation for increased medical surveillance and by the later cause of action for developed cancer allowed by the "wait and see" approach.¹⁹⁵ The "wait and see" approach does not preclude recovery for damages that appear immediately after defendant's breach of duty. It allows a present claim for present damages (which includes fear of cancer and increased surveillance¹⁹⁶) and preserves one for future damages should cancer develop.¹⁹⁷ In that it com-

188. For example, when the spill in the hypothetical is cleaned up or the plaintiff leaves the scene of the accident. Essentially, this is the position of the court in *Farrar v. Saint Louis & S.F. Ry.*, 361 Mo. 408, 235 S.W.2d 391 (1950) which discussed when a cause of action accrued for continuing torts under the statute of limitations under the Federal Employers Liability Act and held that it ran from the termination of employment or when the unsafe condition was removed. *Id.* at 393.

189. *See supra* notes 169-71 and accompanying text.

190. "so that *all* resulting damage may be recovered, and *full and complete* relief obtained." MO. REV. STAT. § 516.100 (1986) (emphasis added).

191. Note, *supra* note 124, at 860-61.

192. *Id.*

193. *Id.*

194. *Id.*

195. *See supra* notes 157-62 and accompanying text.

196. *See supra* notes 154-56 and accompanying text.

197. *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1985); *Dev-*

pensates something already provided for under the "wait and see" approach, it is clear that this combined approach allows impermissible double recovery.

5. A Suggested Solution

None of the approaches yet developed are completely satisfactory. Proportional recovery may result in windfall, under-compensation, and unnecessary suits.¹⁹⁸ Recovery for increased surveillance could leave a plaintiff under compensated and allow a potential basis for further law suits.¹⁹⁹ The "wait and see" approach also does not fully compensate a plaintiff who develops cancer unless costs for increased surveillance are included.²⁰⁰ Combined recovery is simply out of the question because it allows double recovery.²⁰¹ It appears, then, that another solution must be found. *Devlin v. Johns-Manville Corp.*²⁰² may provide the answer.

In *Devlin*, emotional distress claims for a current fear of cancer were allowed,²⁰³ as were damages for increased medical surveillance.²⁰⁴ In addition, a later cause of action for developed cancer was preserved.²⁰⁵ The result of this view is that plaintiff can recover for all her damages arising from the exposure. Both present injuries and the injuries resulting from increased risk are compensable should the plaintiff meet her burden of proof. In addition, the defendant is protected from the possibilities of overpayment, policing the plaintiff's future conduct, frivolous suits and recoveries based on speculative evidence, all of which are present in the other approaches. The concerns of both plaintiffs and defendants are met. This result is not achieved by any of the approaches taken singly. Due to the current condition of Missouri law, however, the approach is unavailable since the "wait and see" facet cannot be accomplished without modification of law dealing with claim splitting.²⁰⁶

The "wait and see" approach, which is a vital part of the *Devlin* scheme, has raised several concerns. Specifically, it has been suggested that evidence of the defendant's negligence has been lost or destroyed.²⁰⁷ This, however, ignores the fact that there will often be a previous "fear of" claim between the parties

lin v. Johns-Manville Corp., 202 N.J. Super. 556, 495 A.2d 495 (1985).

198. See *supra* notes 146-53 and accompanying text.

199. See *supra* notes 154-56 and accompanying text.

200. See *supra* notes 154-76 and accompanying text.

201. See *supra* notes 191-97 and accompanying text.

202. 202 N.J. Super. 556, 495 A.2d 495 (1985).

203. *Id.* at 499.

204. *Id.* at 500.

205. *Id.* at 500-01. It should be noted that allowing a distinct claim for later developed cancer avoids the need of proportional recovery. If plaintiff does develop cancer and can meet his burden at trial, he will recover 100% of his damages. If he does not or cannot prove his case, then he cannot recover and should not be able to recover a proportion of the potential costs.

206. See *supra* notes 177-90 and accompanying text.

207. Note, *supra* note 124, at 857.

which must satisfy either the tort of negligent or of intentional infliction of emotional distress; or (at least in Missouri) the elements of strict liability.²⁰⁸ The decision of the issue of the defendant's liability would be fixed by res judicata and specific facts of the claims²⁰⁹ would be subject to the rules of collateral estoppel.

Another concern is that the "wait and see" approach lacks deterrent effect since so much time passes between the exposure and the imposition of liability.²¹⁰ But, this ignores the deterrent effect of the "cancerphobia" claims, which often are included with claims for increased risk.²¹¹ Further, there is the problem of the bankruptcy or disappearance of the defendant.²¹² This concern, however, is one which plaintiffs face in all cases. It does not prevent granting relief in other instances and should not do so here.

V. CONCLUSION

Under Missouri's abrogation of the impact and physical consequences rules, a claim for a present fear of developing cancer is available for victims of toxic exposure. The issues and proof could become quite complex and expensive, but this does not constitute a legal bar to recovery. In addition, it might be possible to bring an action sounding in strict products liability for certain exposures — a theory apparently unavailable in any other jurisdiction.²¹³

Recovery for increased risk, however, seems unlikely since a plaintiff cannot split his or her causes of action and must meet a virtually insurmountable standard of proof.²¹⁴ Thus, it appears that the Missouri plaintiff who is exposed and does develop cancer (and can meet the proof requirements of causation) is vastly under-compensated, if he is compensated at all.

Of the approaches discussed, a combination of an emotional distress claim coupled with cost of increased surveillance and allowing a later claim for cancer will come the closest to fully compensating the plaintiff while protecting the rights of defendants. But under Missouri law this option is currently unavailable.²¹⁵ As a result, this inequity will not be addressed without a change to Missouri law which fashions an exception to the rule against claim splitting

208. See *supra* notes 26-45, 108-23 and accompanying text.

209. For example, the dose of the carcinogen to which the plaintiff was exposed. Note, *supra* note 124, at 857.

210. See Note, *supra* note 141, at 585.

211. See, e.g., *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854 (Mo. Ct. App. 1985), *cert. denied*, 476 U.S. 1176 (1986).

212. E.g., *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 411 n.21 (5th Cir. 1986); see also, Note, *supra* note 124, at 858 & n.68.

213. See *supra* notes 108-23 and accompanying text.

214. See *supra* notes 167-71 and accompanying text.

215. See *supra* notes 177-90 and accompanying text.

based on law and/or policy or decides that the anti-claim splitting rule is not violated by a later claim for developed cancer.

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