Fear of Disease and the Puzzle of Futures Cases in Tort

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INTRODUCTION

The judicial system faces a challenge from an increasing number of toxic tort claims.[1] In part, this stems from a rising number of toxins in the environment.[2] But the challenge also relates to the length of time that typically precedes exposure-related disease. Such "latency periods" make it difficult for plaintiffs to establish a connection between an illness and any particular exposure.[3] They also increase the odds that procedural rules will bar a plaintiff's claim.[4]

As time reduces the possibility of recovery, tort law fails to achieve its primary goals of deterrence and compensation.[5] The deterrence concern

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[1] Toxic tort cases involve injuries caused by exposure to environmental toxins. The term "toxic tort" is broad enough to encompass cases involving injuries caused either by the toxicity of products or by manufacturing processes. GERALD W. BOSTON & M. STUART MADDEN, LAW OF ENVIRONMENTAL AND TOXIC TORTS 1 (2d ed. 2001) ("Environmental and toxic torts comprise harms to persons, to property, or to the environment due to the toxicity of a product, a substance, or a process"); *see* Troyen A. Brennan, *Environmental Torts*, 46 VAND. L. REV. 1 (1993) (referring generally to such claims as "environmental torts").

[2] *See* Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 434 (1996) (citing Nicholson, Perkel & Selikoff, *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality – 1980-2030*, 3 AM. J. INDUS. MED. 259, 259 (1982) (estimating that "21 million Americans have been exposed to work-related asbestos")); U.S. Dept. of Health and Human Services, 1 Seventh Annual Report on Carcinogens 71 (1994) (3 million workers have been exposed to benzene, a majority of Americans have been exposed outside the workplace); Paul J. Komyatte, *Medical Monitoring Damages: An Evolution of Environmental Tort Law*, 23 COLO. LAW. 1533, 1533 (1994) (citing U.S. General Accounting Office, *Air Pollution: EPA's Strategy and Resources May Be Inadequate to Control Air Toxins* (Washington, D.C. GAO/RCED-91-143, at 9 (1991)); (stating that companies emit billions of pounds of hazardous substances into air every year and nearly 20% of U.S. population lives within four miles of hazardous waste site); Pirkle, et al., *Exposure of the U S Population to Environmental Tobacco Smoke*, 275 J. AM. MED. ASS'N 1233, 1237 (1996) (finding that 43% of U.S. children lived in homes with at least one smoker, and 37% of adult nonsmokers lived in homes with at least one smoker or reported workplace environmental tobacco smoke); *see also* Arvin Maskin, et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?*, 27 WM. MITCHELL L. REV. 521, 528-29 (2000) (citing Environmental Protection Agency statistics on abundance of chemical pollution released in United States annually).

[3] For example, over time, evidence relating to exposure will become stale as memories fade and documents become lost. In addition, time might even reduce the odds that a culpable entity will be in existence to defend an action or compensate a plaintiff. *See, e.g.*, Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 118 (D.C. Cir. 1982) ("Search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise").

[4] Procedural mechanisms, such as the statute of limitations and the single action rule, sometimes bar plaintiffs' claims if their diseases lie dormant for many years. *See infra* note 133-38 and accompanying text.

[5] *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) ("Currently there are two major camps of tort scholars. One understands tort liability as an instrument aimed largely at the goal of

is straightforward. If tort law fails, those who placed toxins in the environment might not internalize the true costs of their activities.[6] The compensation problem also is clear. Plaintiffs who suffer harm at the hands of others might not receive adequate "correction," an unsatisfying result to many tort law scholars.[7]

The judicial system has not completely ignored these problems. Some courts have relaxed causation standards to overcome troubles associated with latency periods.[8] Others have liberalized limitation periods.[9] Most significantly, some courts have allowed plaintiffs to avoid the latency problem by filing suit *before* they become ill.

The latter approach is intriguing because it addresses the heart of the latency problem. This approach, however, is also radical, and courts understandably have resisted it.[10] Nonetheless, courts have recognized

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deterrence, commonly explained within the framework of economics. The other looks at tort law as a way of achieving corrective justice between the parties."); *see also* Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 193 (2000) ("Tort scholarship on the law of negligence has long been torn between two competing conceptions. One of these conceptions – the justice conception – holds that negligence law is (and should be) an articulation of our ordinary moral conceptions of agency and responsibility, carelessness and wrongdoing, harm and reparation. The other conception – the economic conception – holds that the law of negligence embodies an appropriate public morality, but it takes that morality to be at best a distant echo of the morality of responsibility and reparation found in ordinary life.").

[6] *See infra* notes 101, 155, 163-64 and accompanying text.

[7] *See infra* notes 102-08 and accompanying text.

[8] *See infra* notes 88 -94 and accompanying text.

[9] *See, e.g.*, Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 120-21 (D.C. Cir. 1982) (holding that statute of limitations applies to more common personal injury cases, but was not appropriate for latent disease cases); Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643, 653 (Tex. 2000) (holding that statute of limitations begins when symptoms manifest themselves in way that would alert reasonable person that she has injury); Sopha v. Owens-Corning Fiberglass Corp., 601 N.W.2d 627, 642 (Wis. 1999) (holding that statute of limitations for non-malignant asbestos condition begins when plaintiff discovered or should have discovered existence of injury); Sheppard v. A.C. & S. Co., 498 A.2d 1126, 1134 (Del. Super. Ct. 1985) (finding that nature of asbestos-related diseases justifies change in application of statute of limitations); *see also* Adams v. Johns-Manville Sales Corp., 727 F.2d 533, 537-38 (5th Cir. 1984); Richmond v. A.P. Green Indus., Inc., 66 Cal. App. 4th 878, 883, 78 Cal. Rptr. 2d 356, 359 (1998), *cert. dismissed & remanded*, 101 Cal. Rptr. 2d 196, 11 P.3d 953 (2000) ; Martinez-Ferrer v. Richardson-Merrell, Inc., 105 Cal. App. 3d 316, 326, 164 Cal. Rptr. 591, 596-97 (1980); Larson v. Johns-Manville Sales Corp., 399 N.W.2d 1, 9 (Mich. 1986); Devlin v. Johns-Manville Corp., 495 A.2d 495, 502 (N.J. Super. Ct. Law Div. 1985).

[10] The United States Supreme Court, for example, rejected a pre-manifestation medical monitoring claim because "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring .... And that fact, along with uncertainty as to the amount of liability, could threaten both a 'flood' of less important cases ... and the systemic harms that can accompany 'unlimited and unpredictable liability'." Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 442 (1997); *see* Amendola v. Kansas City S. Ry. Co., 699 F. Supp. 1401,

three categories of pre-manifestation (or "futures") claims during the past fifteen years.[11] First, a small number of courts permit plaintiffs to maintain direct actions for enhanced risk of disease, assigning a value to the increased risk without any assurance that a plaintiff's disease will manifest.[12] Second, several jurisdictions recognize claims for medical monitoring, in which plaintiffs seek recovery for the cost of surveillance to detect the onset of disease.[13] Third, a number of courts allow actions

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1407 (W.D. Mo. 1988):

> If mere exposure . . . were sufficient to give rise to [a tort action], countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.

(quoting *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985)); *see also* Dodge v. Cotter Corp., 203 F.3d 1190, 1201-02 (10th Cir. 2000) (denying plaintiff's emotional distress claim due to lack of evidence of "chronic objective condition" resulting from fear of increased risk of cancer); Burns v. Jaquays Mining Corp., 752 P.2d 28, 31 (Ariz. Ct. App. 1987) ("Justice would not be done either to the plaintiffs or the defendants by allowing a suit prior to manifestation of any physical injuries or disease.").

[11] Professor Geoffrey C. Hazard, Jr. recently described such actions as "futures" claims. *See* Geoffrey C. Hazard, *The Futures Problem*, 148 U. PA. L. REV. 1901, 1901 (2000). My previous work referred to these actions as "post-exposure, pre-symptom" claims. *See* Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOK. L. REV. 1, 2 (1998) [hereinafter Klein, *Medical Monitoring*]; *see also* Matthew D. Hamrick, Comment, *Theories of Injury and Recovery for Post-Exposure, Pre-Symptom Plaintiffs: The Supreme Court Takes a Critical Look*, 29 CUMB. L. REV. 461, 470-71 (1999). These terms will be used interchangeably throughout this Article.

[12] *See* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 415 (5th Cir. 1986), *cert. denied*, 478 U.S. 1022 (1986) (holding that plaintiff was entitled to punitive and compensatory damages for increased risk of developing cancer and for fear resulting from this increased risk); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1138 (5th Cir. 1985) (holding that plaintiff could recover for present mental anguish caused by fear of future illness resulting from current injuries); *see also* Tamsen Douglass Love, *Deterring Irresponsible Use and Disposal of Toxic Substances: The Case for Legislative Recognition of Increased Risk Causes of Action*, 49 VAND. L. REV. 789, 809 (1996) (arguing that "[i]ncreased risk is the most difficult [pre-manifestation] claim on which to succeed"); Bill Charles Wells, *The Grin Without the Cat: Claims for Damages From Toxic Exposure Without Present Injury*, 18 WM. & MARY J. ENVTL. L. 285, 349-50 (1994) ("The enhanced risk cause of action is at the top of the pyramid from the plaintiff's perspective because it involves the greatest amount of money. . . . But because the cause of action rests on the mere potential to develop the disease, a plaintiff seeking damages for increased risk also faces the highest barriers to recovery.").

[13] *See, e.g.*, Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 974, 863 P.2d 795, 800 (1993); Bourgeois v. A.P. Green Indus., Inc., 716 So.2d 355, 360 (La.1998); Ayers v. Township of Jackson, 525 A.2d 287, 312 (N.J. 1987); Redland Soccer Club, Inc. v. Dep't of the Army, 696 A.2d 137, 145 (Pa. 1997); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 982 (Utah 1993) (citing Ayers v. Township of Jackson, 525 A.2d 287, 314 (N.J. 1987); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 434 (W. Va. 1999). *But see* Hinton *ex rel.* Hinton

for fear of disease, in which plaintiffs seek compensation for emotional distress.[14]

In previous articles, I addressed claims for enhanced risk and medical monitoring damages.[15] Specifically, these articles argued that courts should permit recovery in such cases only when a plaintiff can prove that an exposure has at least doubled her risk of future disease. These articles defended this standard as logically consistent with the traditional rule of causation.[16] These articles also defended the standard as attuned to concerns of both major camps of tort theorists — those who view tort law's primary role as a deterrence mechanism, and those who view tort law as a vehicle for achieving corrective justice.[17] This Article continues the analysis by addressing fear of disease — the third type of pre-manifestation claim that courts have recognized.[18]

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v. Monsato Co., 2001 WL 1073699 at 2 (Ala. 2001). *See generally* Klein, *Medical Monitoring*, *supra* note, 11 at 4-17 (discussing development of medical monitoring); Victor E. Schwartz et al., *Medical Monitoring — Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1059 (1999) (arguing that issue of medical monitoring as cause of action should be left to legislature).

[14] *See, e.g.*, Watkins v. Fibreboard Corp., 994 F.2d 253, 257 (5th Cir. 1993) (holding that plaintiffs may recover for mental anguish arising from fear of developing diseases due to exposure to asbestos); Dartez v. Fibreboard Corp., 765 F.2d 456, 467-68 (5th Cir. 1985) (holding that plaintiff in products liability case may recover damages for mental anguish surrounding fear of developing related disease even though likelihood of developing disease is not medically probable); Carter v. Temple-Inland Forest Prods. Corp., 943 S.W.2d 221, 222 (Tex. App. 1997) (holding that recovery is possible for mental anguish caused by fear of cancer resulting from exposure to causative agent, even though plaintiff does not have, and probably will not develop, cancer); *see also* Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517, 529 (Fla. Dist. Ct. App. 1985) (holding that plaintiff could recover for mental distress caused by fear of developing cancer due to exposure to causative agent); Glen Donath, Comment, *Curing CancerPhobia Phobia: Reasonableness Redefined*, 62 U. CHI. L. REV. 1113, 1117-32 (1995) (discussing judicial treatment of "cancerphobia" claims).

[15] *See* Andrew R. Klein, *A Model for Enhanced Risk Recovery in Tort*, 56 WASH. & LEE L. REV. 1173 (1999) [hereinafter Klein, *Enhanced Risk*]; Klein, *Medical Monitoring*, *supra* note 11.

[16] The traditional rule of causation requires a plaintiff to connect her harm to a defendant's conduct by a preponderance of the evidence. *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS 41 at 265-66 (5th ed. 1984). For a discussion of why this rule is consistent with the doubling-of-the-risk standard, see *infra* notes 85-96 and accompanying text.

[17] *See* Klein, *Enhanced Risk*, *supra* note 15; Klein, *Medical Monitoring*, *supra* note 11.

[18] Indeed, fear of the consequences of exposure might ultimately be the most concrete and palpable cost associated with toxic exposure. *See, e.g.*, E. Donald Elliott, *The Future of Toxic Torts: Of Chemophobia, Risk as a Compensable Injury and Hybrid Compensation Systems*, 25 HOUS. L. REV. 781, 784 (1988) (arguing that toxic tort cases exacerbate public's misunderstanding regarding health effects of chemical contact) [hereinafter Elliott, *Future of Toxic Torts*]; *infra* notes 61-62, 117-19 and accompanying text (discussing emotional distress caused by fear of future disease and public fear of chemical exposure).

The Article begins in Part I by describing the framework on which courts have developed emotional distress doctrine in toxic tort cases. This description focuses on two cases — the United States Supreme Court's decision in *Metro-North Commuter Railroad Co.*,[19] and the California Supreme Court's decision in *Potter v. Firestone Tire & Rubber Co.*[20] These cases represent a doctrine that permits emotional distress recovery based on two factors: (1) whether a defendant's conduct has caused the plaintiff to suffer from a physical consequence; and (2) whether the plaintiff demonstrates that she is likely to manifest disease in the future. In Part II, the Article considers these factors in the pre-manifestation setting. Here, the Article suggests that the factors are too restrictive. Instead, the Article asserts that courts should permit futures plaintiffs to recover emotional distress damages whenever a fact finder deems fear of disease to be reasonable.

The foregoing suggestion may sound like a plaintiff's dream. It includes no "physical manifestation" rules to restrict the number of emotional distress claimants.[21] It imposes no "likelihood-of-manifestation" requirement to limit the number of claims.[22] Yet, ultimately, the proposal contains an important catch: when considering fear of disease cases in the pre-manifestation context, courts should vigorously apply the single action rule. In other words, courts should recognize futures actions, and they should liberally permit emotional distress damages in such claims. But once a court has resolved the claim, a plaintiff should have no further opportunity to seek damages related to the exposure — even if disease later manifests.[23] This proposal runs counter to much of the case law and literature that discusses the single action rule in toxic tort cases.[24] In the context of pre-manifestation

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[19] 521 U.S. 424 (1997).

[20] 6 Cal. 4th 965, 863 P.2d 795 (1993).

[21] *See infra* notes 34, 46-48 and accompanying text.

[22] *See infra* notes 72-73 and accompanying text.

[23] In this way, the proposal would replace artificial barriers to emotional distress claims with a barrier that is related to the plaintiff's actual view of her claim's strength.

[24] A number of commentators, for example, have suggested that courts should permit plaintiffs to split their cause of action, allowing them to sue for both pre-manifestation "injury" now and manifest disease later. *See* Keith W. Lapeze, Comment, *Recovery for Increased Risk of Disease in Louisiana*, 58 LA. L. REV. 249, 259 (1997) ("[S]plitting the cause of action will not force the plaintiff to choose between suing right away on incidental causes of action and losing the cancer claim due to claim preclusion, or waiting until the disease develops and most likely being barred due to prescription."); *see also* W. Neil Evans, *Providing Adequate Remedies to Toxic Tort Victims*, TRIAL, April 1, 1997, *available at* 1997 WL 9957757 (arguing that splitting a cause of action is preferable to claim preclusion); Melissa Moore Thompson, Comment, *Enhanced Risk of Disease Claims: Limiting Recovery to*

claims, however, the proposal would improve the judicial system's approach to toxic tort litigation.

I. EMOTIONAL DISTRESS FRAMEWORK

Emotional distress claims are not new to the law. In fact, one can trace their roots to assault actions dating back to the 13th century.[25] In cases where a defendant's conduct is not intentional, however, courts have been reluctant to award emotional distress damages. The reasons for this reluctance are straightforward. Courts worry that it is difficult, if not impossible, to separate valid from trivial claims.[26] Courts also fear a flood of litigation and the threat of unlimited (and unpredictable) liability.[27] Even today, therefore, one must look at recovery for emotional distress not as a rule, but as an exception.[28]

Nonetheless, courts long have encountered situations where denying emotional distress recovery would be unfair. The challenge, of course, is to decide exactly when to open courthouse doors in light of the policies

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Compensation for Loss, Not Chance, 72 N.C. L. REV. 453, 472 (1994) ("A growing minority of states allow the plaintiff to split the cause of action and sue for each successive disease as it develops."). This is certainly the case in situations where plaintiffs suffer from successive physical injuries. *See* Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643, 653 (Tex. 2000); Sopha v. Owens-Corning Fiberglas Corp., 601 N.W.2d 627, 632 (Wis. 1999); Richmond v. A.P. Green Indus., Inc., 66 Cal. App. 4th 878, 885-92, 78 Cal. Rptr. 2d 356, 360-64 (1998), *cert. dismissed & remanded*, 101 Cal. Rptr. 2d 196, 11 P.3d 953 (2000). As this Article argues, however, the same result is not necessarily correct in a pre-manifestation case.

[25] *See* Robert A. Bohrer, *Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty and Emotional Distress*, 1984 WIS. L. REV. 83, 92; Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 FORD. L. REV. 527, 527-29 (1984).

[26] *See* Mary Donovan, Comment, *Is the Injury Requirement Obsolete in a Claim for Fear of Future Consequences?*, 41 UCLA. L. REV. 1337, 1347 (1994); *see also* Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 557 (1994) (holding that court's use of common law limits on recovery for emotional distress damages constitutes good policy); Dworkin, *supra* note 25, at 531-32 (discussing trend towards allowing wider recovery in emotional distress cases).

[27] *See Gottshall*, 512 U.S. at 557; Lee v. State Farm Mut. Ins. Co., 533 S.E.2d 82, 86 (Ga. 2000); Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 991-95, 863 P.2d 795, 812-14 (1993); Shaumber v. Henderson, 579 N.E.2d 452, 455 (Ind. 1991); *see also* Bohrer, *supra* note 25, at 94-95 (stating that courts fear limited liability might hamper potential defendant's freedom to act); Janet H. Smith, *Increasing Fear of Future Injury Claims: Where Speculation Carries the Day*, 64 DEF. COUNS. J. 547, 548 (1997) (stating that physical injury requirement responds to threat of unlimited litigation and liability concerns); Kenneth W. Miller, Note, *Toxic Torts and Emotional Distress: The Case for an Independent Cause of Action for Fear of Future Harm*, 40 ARIZ. L. REV. 681, 690-91 (1998) (stating that courts are reluctant to abandon physical injury rule in toxic tort cases because they fear overwhelming amount of litigation would result against defendants who may no longer be solvent).

[28] Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 433-34 (1997) (citing *Gottshall*, 512 U.S. at 552).

that militate against recovery. Although it is hard to definitively describe categories in the toxic tort setting, one can view judicial approaches as focusing on two factors: (1) some courts require plaintiffs to show an underlying physical consequence related to emotional distress;[29] and, (2) other courts require that plaintiffs present proof that fear of the disease is "reasonable," apart from physical consequence.[30]

A. Physical Consequence

A number of courts limit negligent infliction of emotional distress claims based on the extent to which a plaintiff has incurred some physical consequence. At first, courts permitted recovery only when a defendant's conduct caused a physical impact to the plaintiff.[31] Gradually, however, many jurisdictions expanded the rule to situations where a defendant placed the plaintiff in the "zone of danger" of physical contact,[32] or where the plaintiff demonstrated some physical

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[29] Often courts relate reasonableness to the level of the plaintiff's increased risk of disease. *See, e.g., Metro-N.*, 54 U.S. at 435; Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1205 (6th Cir. 1988).

[30] *See* Arvin Maskin, *Trends in Toxic Torts Damages Theories: Fear of Disease and Medical Monitoring Claims and the Pending Supreme Court Decision in* Buckley v. Metro-N. Commuter R.R., SCO1 ALI-ABA 775, 779 (1997); Donath, *supra* note 14, at 1116 (stating that "courts must ask not only whether the fear is actual, but also 'whether a plaintiff's claimed distress is reasonable'"); *see also* Narbeh Bagdasarian, *A Prescription for Mental Distress: The Principles of Psychosomatic Medicine with the Physical Manifestation Requirement in N.I.E.D. Cases*, 26 AM. J.L. & MED. 401, 405-08 (2000) (describing "traditional rule" that requires proof of physical manifestation and "modern trend" that focuses on reasonableness). Although not apropos to the toxic tort setting, a number of courts permit bystanders to accidents to recover emotional distress damages in negligence cases, if the bystander had a close relationship to the accident victim. *See, e.g., Metro-N.*, 521 U.S. at 430 (observing that "[t]he law . . . often permits recovery for distress suffered by a close relative who witnesses the physical injury of a negligence victim"); Dworkin, *supra* note 25, at 533-34 (citing Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912 (1968)); *see also* Sinn v. Burd, 404 A.2d 672, 679 (Pa. 1979) (stating that modern psychiatry can establish, with reasonable certainty, "existence and severity of psychic harm"); D'Ambra v. United States, 338 A.2d 524, 529 (R.I. 1975) (finding that individual should be permitted to "enforce . . . claim to reasonable psychological tranquility").

[31] *See* Bagdasarian, *supra* note 30, at 403-06 (citing Ward v. W. Jersey & Seashore R.R. Co., 47 A. 561 (N.J. 1900)); Dworkin, *supra* note 25, at 545 (citing Spade v. Lynn & Boston R.R., 47 N.E. 88, 89 (Mass. 1897)).

[32] *See* Keck v. Jackson, 593 P.2d 668, 670 (Ariz. 1979); Robb v. Pa. R.R. Co., 210 A.2d 709, 715 (Del. 1965); Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 4 (Ill. 1983); Stadler v. Cross, 295 N.W.2d 552, 555 (Minn. 1980); Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595, 599 (Mo. 1990); Bovsun v. Sanperi, 461 N.E.2d 843, 849, (N.Y. 1984); Jobin v. McQuillen, 609 A.2d 990, 993 (Vt. 1992); Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible*, 67 WASH. L. REV. 1, 7-8 (1992).

manifestation of the emotional distress.[33]

The physical consequence standard, however, is tricky to apply in toxic tort cases. In such cases, the feared disease can remain latent for many years, and plaintiffs often do not suffer from any current physical symptom. Some courts have suggested that a plaintiff's contact with a carcinogenic substance alone is sufficient to satisfy the "impact" requirement. Most courts, however, have not.[34]

The Supreme Court's opinion in *Metro-North* provides a good example.[35] In *Metro-North*, the plaintiff worked as a pipe fitter for a railroad company.[36] During a three-year period, the plaintiff's employment required that he remove insulation from pipes — a task that often caused him to become covered with insulation dust containing asbestos.[37] The plaintiff later attended an asbestos awareness class and became fearful that he would contract cancer.[38] Although still healthy, the plaintiff sued his employer for costs associated with medical monitoring, as well as emotional distress damages.[39] The trial court dismissed the emotional distress claim, finding that the plaintiff suffered no physical impact.[40] The Second Circuit disagreed, concluding that contact with insulation dust sufficed.[41] The Supreme Court, however, reversed. Physical impact, the Court explained, does not include every form of physical contact.[42] In particular, the Court found that it did not include exposure "to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker

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[33] *See* Dworkin, *supra* note 25, at 550. For example, the Massachusetts Supreme Court has stated that "a plaintiff's physical harm must either cause or be caused by the emotional distress alleged, and . . . must be manifested by objective symptomatology and substantiated by expert medical testimony." Payton v. Abbott Lab., 437 N.E.2d 171, 181 (Mass. 1982); *see also* Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1226-27 (D. Mass. 1986) (holding that *Abbot Laboratories* decision distinguished between harm that can be proven through expert medical testimony based on objective evidence and mere speculation).

[34] *See* Dworkin, *supra* note 25, at 550-51. *Cf.* Laxton v. Orkin Exterminating Co., 639 S.W.2d 431, 4334 (Tenn. 1982) (holding that contact with contaminated water containing chlordane sufficient to satisfy physical manifestation rule).

[35] 521 U.S. 424 (1997).

[36] *Id.* at 427.

[37] *Id.*

[38] *Id.* The plaintiff's fear was substantiated by experts who estimated that the exposure to asbestos increased his chances of contracting cancer or other asbestos-related disease from 1% to between 3% and 5%. *Id.*

[39] The lawsuit was brought under the Federal Employers Liability Act (FELA). *Id.*

[40] *Id.* at 428.

[41] *Id.*

[42] *Id.* at 432.

learns that he may become ill after a substantial period of time."[43]

In reaching this conclusion, the Court was mindful that the physical consequence rule represents an exception to the general prohibition against emotional distress claims. Therefore, the Court suggested, judges should permit recovery only when facing scenarios that present fewer of the problems that led courts to disallow emotional distress actions in the first place.[44] Simply pointing to physical contact with asbestos dust, however, does not satisfy this criterion. The existence of exposure, the court explained, "does not seem to offer much help in separating valid from invalid emotional distress claims .... because contacts, even extensive contacts, with serious carcinogens are common."[45]

In truth, adherence to the physical consequence rule does not help courts separate valid from invalid emotional distress claims in almost any case. First, a plaintiff who experiences an impact (or has a physical manifestation)[46] can fake emotional distress as well as someone who does not.[47] Second, in an exposure case, the physical consequence rule ignores the actual chance that disease will manifest, which can lead to arbitrary results. Under such a rule, for example, a plaintiff with a low risk of disease could recover based on a rash. But a manifestation-free plaintiff with a 95% chance of actually contracting the disease could not. As one commentator noted, "the plaintiff's ability to collect for the fear of contracting cancer at a future date turns on the plaintiff's physiological idiosyncrasies, rather than on whether his distress is genuine or reasonable."[48] Because of these problems, it is not surprising that courts and commentators have searched for different ways to limit emotional distress claims in toxic exposure cases.

B. Reasonableness

As part of this search, some courts and commentators have sought criteria to establish the reasonableness of an emotional distress claim

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[43] *Id.*

[44] One such scenario is the problem of separating valid emotional distress claims from fraudulent claims and the subsequent risk of excessive litigation. *See supra* notes 27-29 and accompanying text.

[45] *Metro-N.*, 521 U.S. at 434; *see supra* note 2 and accompanying text.

[46] Physical manifestations for purposes of emotional distress claims can range from sleep disorders and gastrointestinal problems to mere headaches or signs of anxiety. *See* Bagdasarian, *supra* note 30, at 405-06.

[47] *See* Donath, *supra* note 14, at 1119-21.

[48] *Id.* at 1124.

apart from any physical invasion.[49] One frequently cited example in a toxic tort setting is the Sixth Circuit's decision in *Sterling v. Velsicol*.[50] In *Sterling*, the defendant negligently disposed hazardous substances into a landfill over a ten-year period.[51] Citizens who lived near the landfill filed a class action, seeking damages based on exposure to the toxins.[52] The trial court awarded damages to a representative group of plaintiffs, including recovery for emotional distress.[53] The Sixth Circuit affirmed the emotional distress award, stating that the plaintiffs needed to demonstrate only "a reasonable connection between the plaintiffs' distress and the possibility of future disease."[54] The court did not base its opinion on any physical impact or manifestation.[55] Nor did the court focus on the odds that the feared disease would manifest.[56] Rather, the

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[49] *See* Bagdasarian, *supra* note 30, at 406-08, 412-14 (citing Hawaii Supreme Court's decision in *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970), as pioneering modern trend of abolishing physical manifestation requirement in emotional distress cases). This is not to suggest that only modern "fear of disease" cases focus on the reasonableness of emotional distress. Older cases — even those that followed the impact rule — also considered the reasonableness of claimed emotional harm. *See* Dworkin, *supra* note 25, at 543-44 (discussing Alley v. Charlotte Pipe & Foundry Co., 74 S.E. 885 (N.C. 1912) and Ferrara v. Galluchio, 152 N.E.2d 249 (N.Y. 1958) as examples).

[50] 855 F.2d 1188 (6th Cir. 1988).

[51] *Id.* at 1192-93. The defendant's negligence was based, in part, on its failure to conduct any hydrogeological studies before using its land for the disposal of the hazardous waste. *Id.* at 1192. The defendant also expanded the size of its landfill site, even after a report from the United States Geological Survey indicated potential migration of toxins into the subsoil below the site. *Id.* at 1192-93.

[52] The plaintiffs based their claims on theories of strict liability, negligence, trespass, and nuisance. In addition to compensatory damages, the plaintiffs sought punitive damages based on the defendant's continued operation of the site, even after the government reports indicated potential health hazards. *Id.*

[53] *Id.* at 1202-03.

[54] *Id.* at 1206.

[55] The court did mention in a footnote, however, that the trial court had found that the defendant's conduct had "caused chemical contaminants to come into contact with or invade each particular plaintiff's body." *Id.* at 1205 n.23, 1206. Nowhere in the Sixth Circuit's opinion, however, does the court indicate that such contact is a predicate for the award of emotional distress damages.

[56] Earlier in the opinion, the court noted that the exposure increased the risk of future cancer from 25% to 30%. The court found this insufficient to support an award of damages for the enhanced risk. *Id.* at 1205 ("In the instant case, the district court found an increased risk for susceptibility to cancer and other diseases of only twenty-five to thirty percent. This does not constitute a reasonable medical certainty, but rather a mere possibility or speculation.") But the court ruled that it did not preclude the award for emotional distress damages: "While there must be a reasonable connection between the injured plaintiff's mental anguish and the prediction of a future disease, the central focus of a court's inquiry in such a case is not on the underlying odds that the future disease will in fact materialize." *Id.* at 1206.

court simply concluded that the plaintiffs's fear "clearly constitute[d] a present injury . . . [and] a reasonable fear of contracting cancer or some other disease in the future as a result of ingesting [the defendant's] chemicals."[57]

While using an open-ended "reasonableness" standard is understandable given the difficulties that courts face in toxic tort cases, it is not without problems.[58] Most notably, such an approach quickly returns one to the "flood of litigation" problem that caused courts to limit emotional distress actions in the first place.[59] As one commentator explained:

> [The reasonableness standard alone] would clearly wreak havoc in the cancerphobia context, precisely because it is so reasonable to fear cancer. Indeed, "[I]t is difficult to go a week without news of toxic exposure . . . [and a] member of our society faces a one in five chance of developing cancer." Potential plaintiffs' classes in cancerphobia actions could be enormous under any standard, and their size would certainly be augmented if courts adopted a traditional definition of reasonableness . . . .[60]

Some commentators, such as Professor E. Donald Elliott, have questioned whether such widespread fear is entirely rational.[61] But even Professor Elliott admits that the public's increasing focus on toxic and environmental tort cases heightens anxiety about the possibility of exposure-related cancer.[62] So, while the fear may be unfounded, it is not

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[57] *Id.*

[58] *See* Donath, *supra* note 14, at 1125:

> A few courts have applied a traditional reasonableness standard to cancerphobia actions, holding that a plaintiff can recover for cancerphobia if a "normally constituted person" would experience the fear. These courts generally focus on compensating genuine and reasonable cancerphobes, and are less concerned with screening the mass flood of claims than are courts that apply the physical injury/manifestation-of-the-distress standards.

[59] *See supra* notes 27-29 and accompanying text.

[60] Donath, *supra* note 14, at 1128-29 (quoting Dworkin, *supra* note 25, at 576).

[61] Elliott, *Future of Toxic Torts*, *supra* note 18, at 785 ("Americans have a widespread, irrational fear of chemicals, a phenomenon which I shall call chemophobia. Although what science knows about chemicals in the environment suggests that they are actually a relatively minor source of risks to our health, many Americans are nonetheless very concerned about toxic chemicals.").

[62] *See id.* ("While I have no firm evidence to back up this speculation, I believe that one factor stimulating our collective chemophobia is press coverage of toxic tort cases and precautionary government regulatory actions. Hardly a day goes by without headlines reporting either some new government action against a substance that supposedly causes

faked.

The California Supreme Court addressed this very problem in *Potter v. Firestone Tire & Rubber Co.*,[63] and worked to refine the "reasonableness" approach accordingly. In *Potter*, the defendant sent large quantities of liquid toxins to a landfill that prohibited such substances due to a risk of groundwater contamination.[64] The plaintiffs, who lived near the landfill, later discovered that these toxins had contaminated their water supply.[65] Although not presently ill, the plaintiffs filed an action seeking damages for medical monitoring and emotional distress.[66] In evaluating the emotional distress claim,[67] the court refused to impose a physical consequence standard to limit liability. Such a standard, the court asserted, was potentially over-inclusive ("it permits recovery whenever the suffering accompanies or results in physical injury, no matter how trivial"),[68] *and* potentially under-inclusive ("it mechanically denies court access to potentially valid claims that could be proved if the plaintiffs were permitted to go to trial").[69] The court further criticized the physical consequence standard because it "encourages extravagant pleading and distorted testimony."[70]

Yet, the court also refused to use an open-ended reasonableness standard, instead requiring some additional "'guarantee of genuineness

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cancer, or a multi-million dollar jury verdict in a toxic tort case. Is it any wonder, then, that much of our population is convinced that 'everything causes cancer'?").

[63] 6 Cal. 4th 965, 863 P.2d 795 (1993).

[64] 6 Cal. 4th at 975, 863 P.2d at 801.

[65] 6 Cal. 4th at 976, 863 P.2d at 801-02.

[66] *See* 6 Cal.4th at 976, 863 P.2d at 802.

[67] The court referred to the claims as "fear of cancer" claims, which it defined "as a form of emotional distress and not cancerphobia." 6 Cal.4th at 980 n.5, 863 P.2d at 805 n.5. The court noted that some "commentators and courts have referred to claims for 'fear of cancer' as 'cancerphobia' claims.... Strictly speaking, however, there is a distinction [in that cancerphobia is] a 'phobic reaction,'... a mental illness that is the recurrent experience of dread of a cancer in the absence of objective danger." *Id.* The distinction between cancerphobia and fear of disease is not important to the discussion in this Article.

[68] 6 Cal.4th at 987, 863 P.2d at 809.

[69] *Id.*

[70] *Id.* The court further explained:

> [T]he physical injury requirement... ought to be reconsidered because of the tendency of victims to exaggerate sick headaches, nausea, insomnia and other symptoms in order to make out a technical basis of bodily injury upon which to predicate a parasitic recovery for the more grievous disturbance, consisting of the mental and emotional distress endured.

Id. (citing Molien v. Kaiser Found. Hosps., 27 Cal.3d 916, 929, 616 P.2d 813, 820 (1980)).

in the circumstances of the case.'"[71] Ultimately, the court decided the proper indicia of genuineness must relate to the likelihood that the feared disease would manifest.[72] Specifically, the court held that a plaintiff must prove that the feared disease was more likely than not to ultimately occur. The court explained:

> [P]ermitting recovery for fear of cancer damages based solely upon a plaintiff's knowledge that his or her risk of cancer has been significantly increased by a toxic exposure, without requiring any further showing of the actual likelihood of the feared cancer due to the exposure, provides no protection against unreasonable claims based upon wholly speculative fears. . . . [T]he way to avoid damage awards for unreasonable fear, i.e., in those cases where the feared cancer is at best only remotely possible, is to require a showing of the actual likelihood of the feared cancer to establish its significance.[73]

The decision in *Potter*, therefore, is notable not for its outcome, but for the court's approach in reaching its decision. The approach is unusual in that it looks explicitly to the increase in the plaintiff's risk of contracting future disease when deciding the "reasonableness" of the claim. The court, therefore, links *present* mental harm with the possibility of *future* physical harm.

C. Summary

In sum, courts are hesitant to award emotional distress damages in toxic tort cases. One can loosely group restrictions on tort access around two factors: (1) the need for a plaintiff to show a physical consequence (including both physical impact and physical manifestation); and (2) the need for a plaintiff to show that the emotional distress is reasonable, based on the chance that disease will manifest. *Metro-North* and *Potter* stand as leading examples of these approaches.

These approaches, however, remain open to criticism for limiting claims in an arbitrary and unfair fashion. As discussed above, one can criticize the "physical consequence" limitation as having little to do with

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[71] 6 Cal.4th at 986, 863 P.2d at 808 (quoting Burgess v. Superior Court, 2 Cal.4th 1064, 1079, 831 P.2d 1197, 1205 (1992)).

[72] 6 Cal.4th at 990, 863 P.2d at 811 (finding that "emotional distress *caused by the fear of cancer that is not probable* should generally not be compensable in a negligence action") (emphasis added).

[73] *Id.* at 989-90.

the genuineness of an individual's emotional distress.[74] The requirement that a plaintiff show she is likely to become ill seems similarly arbitrary. Can we really tell the plaintiff whose risk increased from 1 to 49% that his claim is less "reasonable" than the plaintiff whose risk increases from 49% to 51%? Current doctrine should not stand as the last word on emotional distress in toxic tort cases. There is too much room for improvement.

II. CONNECTING EMOTIONAL DISTRESS TO INCREASED RISK IN FEAR OF DISEASE CASES

Despite the above criticism, recent emotional distress case law does contain some truth: fear of disease is inextricably intertwined with the increased risk of future disease. In other words, it is the risk that drives the fear, not the existence of any physical impact or manifestation. So *Potter*, in particular, represents a step in the right direction. But its "more-likely-than-not" standard is simply too restrictive. One commentator recently reached a similar conclusion and suggested that courts modify the *Potter* standard to permit fear of disease claims when plaintiffs can show a "substantial probability" that disease will manifest in the future.[75] The commentator argued (correctly) that this standard would limit claims while avoiding the arbitrariness of *Potter's* rule.[76] But this loosening of the *Potter* test only addresses the "futures" problem at its margin.[77] To truly address the problem, tort law must recognize that emotional distress is only one consequence of a toxic exposure. Plaintiffs who are exposed to toxins also may seek compensation for medical monitoring costs, as well as the monetary value of the enhanced risk itself.[78] A full solution must account for all three potential categories of damages.

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[74] *See supra* notes 46-48 and accompanying text.

[75] *See* Donath, *supra* note 14, at 1134-35; *see also* Bohrer, *supra* note 25, at 98 ("Once the plaintiff established that the magnitude of the risk generated cannot be precisely established, but that it includes a *significant possibility of unacceptable risk*, he or she has made a prima facie case [for emotional distress recovery].") (emphasis added).

[76] *See* Donath, *supra* note 14, at 1134-35; Bohrer, *supra* note 25, at 98.

[77] See Donath, *supra* note 14, at 1135. ("Because the marginal cases are not the voluminous ones that generate the pressing policy concerns, it seems inequitable to cut them off by adopting an overly harsh standard when a 'substantial probability' test would bring the screening benefits without harsh or unfair results.").

[78] *See supra* notes 10-13 and accompanying text.

A. Doubling of the Risk Standard

In previous work, I argued that access to medical monitoring and enhanced risk damages should relate to a plaintiff's level of increased risk. Unlike *Potter*, however, these proposals did not suggest that a plaintiff must prove that disease is more likely than not to occur. Instead, these proposals suggested that a plaintiff must prove that the defendant's conduct more than doubled her risk of disease.[79] These previous articles defended this line as logically consistent with tort law's causation standard, which would require plaintiffs to come forward with similar proof if they sued after disease developed.[80] They also argued that the line would help serve the tort law goal of deterrence and resolve disputes in a way that would help serve the goal of corrective justice.[81] The next section of the Article explains how I arrived at the doubling standard for purposes of enhanced risk and medical monitoring recovery. After that, the Article explores how tort law should incorporate emotional distress damages in compensating futures plaintiffs.

B. Enhanced Risk Recovery

Courts have been hostile to enhanced risk claims,[82] and, in many ways, this hostility is warranted: unlimited access to enhanced risk recovery could make nearly every citizen a potential tort plaintiff.[83] But completely closing the door to such claims cuts too far the other way, as many people who are tortiously exposed to toxins will otherwise never

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[79] *See* Klein, *Enhanced Risk*, *supra* note 15, at 1194-98; Klein, *Medical Monitoring*, *supra* note 11, at 16-18; *see also infra* notes 85-96 and accompanying text.

[80] *See* Klein, *Enhanced Risk*, *supra* note 15, at 1196-98; Klein, *Medical Monitoring*, *supra* note 11, at 18-23; *see also infra* notes 88-96 and accompanying text.

[81] *See* Klein, *Enhanced Risk*, *supra* note 15, at 1199-1200; Klein, *Medical Monitoring*, *supra* note 11, at 26-32.

[82] The few courts that have permitted plaintiffs to maintain such claims have raised hurdles similar to those raised in emotional distress cases — a plaintiff must demonstrate the existence of some present physical injury, and the plaintiff must demonstrate that she will likely develop future disease. Deirdre A. McDonnell, Comment, *Increased Risk of Future Disease Damages: Proportional Recovery as an Alternative to the All or Nothing System Exemplified by Asbestos Cases*, 24 B.C. ENVTL. AFF. L. REV. 623, 624, 628 (1997); *see, e.g.*, Amendola v. Kansas City S. Ry. Co., 699 F. Supp. 1401, 1406 (W.D. Mo. 1988) (finding that claim for increased susceptibility to asbestos-related diseases is not compensable under F.E.L.A. unless accompanied by allegations of manifestation of physical injury caused by exposure to asbestos). *See also* Klein, *Enhanced Risk*, *supra* note 15, at 1179-82 (describing two-part hurdle for plaintiffs).

[83] *See* Klein, *Enhanced Risk*, *supra* note 15, at 1194, 1201.

receive compensation for actual harm.[84]

In a previous article, I suggested a middle ground: courts should permit limited enhanced risk recovery,[85] but only when a plaintiff can prove that a toxic exposure has more than doubled her risk of contracting future disease.[86] Fundamentally, this standard is designed to correlate with the "more-likely-than-not" causation standard that courts apply in cases where disease exists. In other words, there should be no pre-manifestation recovery for the possibility of an illness that courts would not ultimately attribute to a defendant's conduct, using normal measures of actual causation.[87]

Proving causation in toxic tort cases, however, is complicated.[88] Normally, tort law requires a plaintiff to connect her injury to a defendant's tortious conduct by a preponderance of the evidence.[89] This may be easy in a run-of-the mill case. However, it is difficult to prove in a toxic exposure case, both because of the latency problem[90] and because the plaintiff may have been exposed to multiple toxins that could have caused her disease.[91] In response to these difficulties, courts have

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[84] This problem, of course, relates to the latency period that normally precedes the manifestation of disease after a toxic exposure. *See supra* notes 3-4 and accompanying text. From a theoretical standpoint, this raises a deterrence problem, as defendants are never forced to internalize the true costs of their activities.

[85] "Limited" in this context means proportional to the level of enhanced risk. *See* Klein, *Enhanced Risk*, *supra* note 15, at 1184-96; *infra* notes 97-101 and accompanying text.

[86] *See* Klein, *Enhanced Risk*, *supra* note 15, at 1194-98; Klein, *Medical Monitoring*, *supra* note 11, at 16-18.

[87] *See* Klein, *Enhanced Risk*, *supra* note 15, at 1196-98; *infra* notes 93-96 and accompanying text.

[88] *See* Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of* Agent Orange *and Bendectin Litigation*, 86 NW. U. L. REV. 643 (1992); Gerald W. Boston, *A Mass Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience*, 18 COLUM. J. ENVTL. L. 181 (1993); *see also* Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997) (explaining causation problem in toxic tort case and applying a doubling of the risk standard); Klein, *Medical Monitoring*, *supra* note 11, at 18-23 (explaining requirement to prove general causation and specific causation).

[89] *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS 41 at 265-66 (5th ed. 1984); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 37 (1921); *see also* Paul J. Zwier, *"Cause in Fact" in Tort Law — A Philosophical and Historical Examination*, 31 DEPAUL L. REV. 769, 785 (1982) (analyzing historical goals of cause-in-fact requirement within context of common law notions of justice).

[90] *See supra* notes 3-4 and accompanying text.

[91] In light of these difficulties, courts typically require toxic exposure plaintiffs to satisfy a two-step process to prove actual causation. First, plaintiffs must prove "general" causation (*i.e.*, that the substance to which they were exposed is capable of causing disease). *See Havner*, 953 S.W.2d at 714-15 (Tex. 1997) (citing Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 14 (1993)); BOSTON AND

permitted plaintiffs to establish causation through the use of scientific evidence designed to demonstrate that the exposure increased the risk of contracting disease.[92] Opinions vary on the type of proof necessary to satisfy this standard.[93] A number of courts, however, have coalesced around a standard that considers whether causation was "more than 50% probable." This means that the risk of disease in an exposed population would be more than double the risk of disease in a non-exposed

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MADDEN, *supra* note 1, at 425-28 (citing and quoting Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988)); *see also* Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 860 (1987) (referring to general and specific causation as "substance" and "source" causation). Second, they must prove "specific" causation (*i.e.*, that the substance at issue caused the particular plaintiff's disease). *Id.*

[92] *Havner*, 953 S.W.2d at 715:

> The finder of fact is asked to infer that because the risk is demonstrably greater in the general population due to exposure to the substance, the claimant's injury was more likely than not caused by that substance. Such a theory concedes that science cannot tell us what caused a particular plaintiff's injury. It is based on a policy determination that when the incidence of a disease or injury is sufficiently elevated due to exposure to a substance, someone who was exposed to that substance and exhibits the disease or injury can raise a fact question on causation.

[93] Some courts and commentators, for example, have proposed that courts apply a strong version of the preponderance rule, requiring scientific proof that exposure increased the chance of disease by more than fifty percent *and* "particularistic" evidence that the exposure led to disease in an individual plaintiff. *See Havner*, 953 S.W.2d at 715-24 (citing *In re* Agent Orange, 597 F. Supp. 740 (E.D.N.Y. 1984)); David Rosenberg, *The Causal Connection in Mass Exposure Cases: a 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849 (1984) [hereinafter Rosenberg, *Causal Connection*]. Others have advocated a weaker version of the preponderance rule that would permit verdicts to stand solely upon statistical evidence. *Id.* Still others have proposed that toxic tort law jettison the entire concept of using probabilities to prove general causation. Most notable in this regard is Professor Margaret A. Berger, who has advocated a cause of action premised on a defendant's duty to "develop and disseminate" information that could be used for risk assessment purposes. *See* Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2140 (1997); *see also id.* at 2134:

> If a corporation fails to exercise the appropriate level of due care, it should be held liable to those put at risk by its action, without regard to injuries that eventually ensue; it is culpable because it has acted without taking into account the interests of those who will be affected by its conduct.

Professor Berger, however, would permit defendants to exculpate themselves based on two factors: (1) an ability "to prove in general that certain adverse health reactions could not plausibly arise from exposure to defendant's product; or (2) to reduce damages by proof that a particular plaintiff's injury is attributable or partly attributable to another cause, such as smoking." *Id.* at 2144-45.

population.[94] That, of course, is exactly the standard that my proposal suggests courts use to determine whether to award pre-manifestation enhanced risk damages.[95] Again, this standard would preclude pre-manifestation recovery for the possibility of an illness that courts would not eventually link to a defendant's conduct using normal measures of actual causation.[96]

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[94] *See* Bartley v. Euclid, Inc., 158 F.3d 261, 273 (5th Cir. 1998); Ambrosini v. Labarraque, 101 F.3d 129, 135 (D.C. Cir. 1996); Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1320 (9th Cir. 1995); DeLuca v. Merrell Dow Pharm., Inc., 911 F.2d 941, 958 (3rd Cir. 1990); Cook v. United States, 545 F. Supp. 306, 308 (N.D. Cal. 1982); Marder v. G.D. Searle & Co., 630 F. Supp. 1087, 1092 (D. Md. 1986); Manko v. United States, 636 F. Supp. 1419, 1434 (W.D. Mo. 1986); Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1403 (D. Or. 1996); *Havner*, 953 S.W.2d at 716; *In re* Hanford Nuclear Reservation, 1998 WL 775340 (E.D. Wash. Aug. 21, 1998). The scientific discipline most often relied on for such proof is epidemiology. Epidemiology is the scientific discipline concerned with disease distribution and determinants among human populations. *See* Boston, *supra* note 88, at 231-34. In epidemiology, "relative risk" compares the risk of disease among an exposed population with the risk of disease among a non-exposed population. Relative risk can be defined mathematically by dividing the variable "R1" (the risk of disease among the exposed population) by the variable "R2" (the risk of disease in the non-exposed population). Boston, *supra* note 88, at 234-35; *see* Green, *supra* note 88, at 647. Relative risk may be interpreted through the resulting quotient:

> If the relative risk equals one (*i.e.*, the numerator is the same as the denominator), the risk in the exposed group is the same as the risk in the non-exposed group, and there is no suggestion of any association between the factor and the disease in question. If the relative risk is greater than one, the risk in the exposed group is greater than in the non-exposed group, and there is a positive association between the exposure and the disease.

Boston, *supra* note 88, at 235; *see also* Green *supra* note 88, at 647. To establish a doubling of the risk in epidemiological terms, a plaintiff would need to establish that his relative risk of disease based on exposure is greater than two. A recent law review article collected all of the cases that have used relative risk to establish causation in toxic tort cases. Russellyn S. Carruth & Bernard D. Goldstein, *Relative Risk Greater Than Two in Proof of Causation in Toxic Tort Litigation*, 41 JURIMETRICS J. 195 (2000). The authors found a split of opinion on whether a relative risk of greater than two was a causation threshold for toxic tort plaintiffs. *Id.* at 199. But, even in cases where courts did not *require* proof of a relative risk of greater than two, they frequently found it useful evidence and would not permit proof of causation without it, absent "particularistic" evidence of causation. *Id.* at 199-201.

[95] *See supra* notes 85-87 and accompanying text. As noted in my previous work, the "doubling standard" is not without its complications. *See* Klein, *Medical Monitoring*, *supra* note 11, at 20-23. Professor Green, in particular, argues that courts should not apply a burden of production that requires epidemiological evidence because, in many cases, such evidence simply does not exist. *See* Green, *supra* note 88, at 674-95. Instead, Professor Green argues that "plaintiffs should be required to prove causation by a preponderance of the *available evidence*, not by some predetermined standard that may require nonexistent studies." *Id.* at 680 (emphasis in original). This does not mean, however, that Professor Green rejects the doubling standard itself; rather he objects that courts have wrongly "created a veneer of infallibility and conclusiveness to epidemiology studies." *Id.* at 699.

[96] *See supra* notes 85-87 and accompanying text.

Of course, the possibility of pre-manifestation recovery is subject to criticism for being overinclusive. Even with doubling-of-the-risk as a gate-keeping mechanism, some plaintiffs will recover damages, but never manifest disease. From a theoretical standpoint, one could describe the concern as threatening overdeterrence: by paying damages to plaintiffs who will never manifest disease, defendants pay for costs that they will never create. In response to this problem, my previous proposal suggests that enhanced risk recovery should be proportional to the level of increased risk.

The theory of proportional liability is straightforward. The value of recovery in a particular case would be "equal to the present value of the future losses multiplied by the estimated probability of their occurrence."[97] In a previous article, I used the following example to explain how proportional liability would work:[98]

> [S]uppose that BigCo negligently has exposed one thousand persons to a toxin that has increased the risk of cancer for each population member from 10% to 30%. Under current doctrine, BigCo would not have to deal with the consequence of its conduct until someone actually contracts cancer and attempts to associate it with the exposure.[99] Under a system of proportional liability, however, each member of the population would have the right to sue immediately for 20% of the damages associated with a future cancer case.[100]

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[97] Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779, 786 (1985); *see* Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1372, 1387 (1981).

[98] Klein, *Enhanced Risk*, *supra* note 15, at 1185.

[99] This is no small feat in light of the difficulties that plaintiffs face in proving causation in toxic tort cases. *See* Klein, *Enhanced Risk*, *supra* note 15, at 1196-98; Klein, *Medical Monitoring*, *supra* note 11, at 19-23.

[100] Klein, *Enhanced Risk*, *supra* note 15, at 1185; *see* 2 A.L.I., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 369-75 (1991) (advocating proportionate compensation if the attributable fraction of disease at a particular level of exposure is between 20% and 80%). Professor Robinson is clear that this should be a plaintiff's choice, not his requirement:

> "It is enough in any case to say that I do not propose to *require* victims to pursue recovery for risk if they prefer to await the outcome and seek compensation for actual injury. The question is whether there is reason to deny an action to a risk victim who does not want to wait, say, a decade to find out whether injury ensues."

Robinson, *supra* note 97, at 788. Professor Robinson is also clear that he is not advocating a change in the rules for defining what activities are tortious; rather he is advocating a re-definition of what constitutes a compensable injury. *Id.* at 782-83. For a more detailed method for calculating damages using a proportional liability scheme, *see* King, *supra* note

This result should hearten those concerned with deterrence — defendants are forced to internalize the future costs of their behavior now, but will not be forced to overcompensate the exposed plaintiffs as a class.[101]

97, at 1383-85.

[101] *See* McDonnell, *supra* note 82, at 647 (proportional liability "would provide a deterrent to negligent behavior that creates an increased risk of disease, but would avoid over-compensating plaintiffs as a class"); David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 234 (1996) [hereinafter Rosenberg, *Individual Justice*] (proportional liability "may serve a special deterrence role in mass-exposure cases . . . by preventing firms from using latency periods to become judgment-proof or otherwise evade the bulk of claims."). On the other hand, proportional liability can be criticized as leading to underdeterrence if those who receive proportional liability damages are precluded from recovering further damages should they eventually become ill. *See* Klein, *Enhanced Risk*, *supra* note 15, at 1187-88 (citing John C. Cummings, Comment, *How Far Should Increased Risk Recovery Be Carried in the Context of Exposure to Hazardous Substances?*, 76 KY. L. J. 459, 473 (1987) and Brent Carson, Comment, *Increased Risk of Disease from Hazardous Waste: Proposal for Judicial Relief*, 60 WASH. L. REV. 635, 649-50 (1985)). A solution that would permit subsequent suits by the same plaintiff is unacceptable and at odds with this Article's thesis. However, the underdeterrence argument becomes less troubling if one views proportional liability for what it truly is — the equivalent of insurance premiums to protect against the risk of future harm. *See, e.g.*, Rosenberg, *Individual Justice*, *supra* at 219 (explaining that enhanced risk claims would "compel the tortfeasor to pay a mass-exposure plaintiff the premium that would purchase an insurance policy providing tort-type and tort-level damages in the event that the ultimate accrued harm occurs"); *see also* FRANK B. CROSS, ENVIRONMENTALLY INDUCED CANCER AND THE LAW: RISKS, REGULATION AND VICTIM COMPENSATION 199-215 (1989) (discussing proportional liability in context of environmentally induced cancers); *cf.* Troyen A. Brennan, Book Review, 30 JURIMETRICS J. 511, 515 (1990) (questioning the ability of insurers to write such policies). Economists, for example, define the value of an insurance premium as risk times expected loss. *See* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 192 (1987) ("This assumption implies that the insurer can be virtually sure of covering its costs by collecting from each insured the expected value of the amount it will have to pay him. If, for instance, each insured faces a 5% risk of losing 10,000 and will be paid that amount in the event of a loss under the insurance policy, the insurer can cover its costs by collecting premiums of 500."). Following this logic, several commentators have recently proposed just that — compensating for enhanced risk by allowing those exposed to toxins to recover insurance premiums designed to cover the risk of future disease. *See* Evans, *supra* note 24; David P.C. Ashton, Comment, *Decreasing the Risks Inherent in Claims for Increased Risk of Future Disease*, 43 U. MIAMI L. REV. 1081, 1119 (1989); Carson, Note, *Latent Harms and Risk-Based Damages*, 111 HARV. L. REV. 1505, 1520-22 (1998). If this form of proportional liability is the basis for a tort award, the over and under-compensation problem is resolved by precisely offering plaintiffs protection for the risk they face. *See* Carson, *supra* at 650-51. Of course, the reality of such a solution will depend on the availability of the type of information that is necessary for insurers to set useful premiums. *See* Ashton, *supra* at 1130. A recent note in the Harvard Law Review advocates the payment of the value of insurance premiums in latent harm cases, but only after an evaluation of four factors: (1) the expense of risk determination; (2) the availability and efficiency of insurance; (3) the defendant's prospective judgment-proof status; and (4) the availability of evidence. Note, *Latent Harms*, *supra* at 1513-16. Of course, a problem arises under such a process when the factors do not point toward proportional recovery. In such

In addition, the result will not be inconsistent with the views of corrective justice scholars — a group that is often at odds with those who focus on deterrence.[102] Scholars have described the contours of corrective justice in various ways.[103] In general, however, corrective justice may be viewed as a "defendant's obligation to compensate for harm that she has caused wrongfully or in violation of the plaintiff's rights."[104] Therefore, in a broad sense, corrective justice scholars assert that tort liability must relate to a nexus — a "transaction" — between the parties to a lawsuit.[105] As Professor Ernest Weinrib, a leading corrective justice scholar, has written: "[Corrective justice] considers the position of the parties anterior to the transaction as equal, and it restores this antecedent equality by transferring resources from defendant to plaintiff so that the gain realized by the former is used to make up the loss suffered by the latter."[106]

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a case traditional tort law options will be limited to the unsatisfying "all-or-nothing" regime. Others have suggested, however, that similar situations might be addressed outside of the tort system altogether. *See, e.g.*, E. Donald Elliott, *Why Courts? Comment on Robinson*, 14 J. LEGAL STUD. 799 (1985); Klein, *Enhanced Risk*, *supra* note 15, at 1206-08.

[102] *See* Keating, *supra* note 5, at 194 (discussing "deep conceptual divide [represented by] the clash of justice and economic tort conceptions" and mentioning work of scholars on both sides); *see also* Klein, *Enhanced Risk*, *supra* note 15, at 1190 (noting "chasm" that exists between scholars).

[103] *See* Keating, *supra* note 5, at 197 ("There is, for better or worse, no single agreed-upon account of corrective justice.") Professor Simons, however, has succinctly described the views of some of the academy's leading corrective justice scholars:

> Jules Coleman thinks that corrective justice involves undoing wrongful gains and wrongful losses, though he gives a nonobvious, technical meaning to 'wrongful.' Ernest Weinrib defines corrective justice as the obligation of a negligent 'doer' to respect the equality of the victimized 'sufferer.' Richard Epstein, prior to becoming a born-again utilitarian, defined corrective justice as one of several paradigmatic forms of causal liability. George Fletcher defines corrective justice as liability for imposing nonreciprocal risks. Catherine Wells argues that corrective justice entails providing a fair adjudicative process to determine whether the defendant is responsible for the plaintiff's loss. And Richard Posner, bless his heart, reaches the felicitous conclusion that 'correct injustice' is just another way of saying 'maximize social wealth.'

Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113, 126 & nn.47-53 (1990).

[104] Simons, *supra* note 103, at 125-26.

[105] *See, e.g.*, Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 L. & PHIL. 37, 38 (1983).

[106] *Id.* Corrective justice theorists contrast their views to "utilitarians," such as Holmes or Posner, who are said to view wealth maximization as the ultimate goal of tort law. *Id.* at 43-44. Weinrib, for example, argues that utilitarianism cannot provide a moral foundation for tort law because it fails to require a direct linkage between plaintiff and defendant. *Id.* at 46.

If one views "the positions of the parties anterior" to a toxic tort suit as including a plaintiff living without an enhanced risk of disease, then tort recovery based on the level of increased risk would seem to move in a direction acceptable to the goal of corrective justice.[107] Certainly, proportional recovery would be preferable to a situation where exposures will lead to certain harm, yet plaintiffs go uncompensated because of the latency period that precedes manifestation of disease.[108] Enhanced risk recovery, therefore, can be viewed as promoting the goals of both deterrence and corrective justice.

C. Medical Monitoring Recovery

Proportional enhanced risk recovery, however, is only part of the "futures" package. To ensure complete compensation, a court should simultaneously consider other potential measures of pre-manifestation

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[107] On the other hand, a corrective justice proponent might criticize this approach for being insufficiently attentive to the role of causation in tort law — after all, the plaintiff has not yet suffered a demonstrable injury *beyond* simply having his chance of disease increased. *Id.* at 38 ("The requirement of factual causation establishes the indispensable nexus between the parties by relating their rights to a transaction in which one has directly impinged upon the other."); *see, e.g.*, Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 429-30 (1987) (stating that "causation particularizes by singling out this plaintiff from the class of persons whom the defendant has endangered"); Richard W. Wright, *Actual Causation v. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435 (1985) (arguing that causation requirement functions best after injury has accrued); Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1004 (1988) (explaining that corrective justice theory of tort requires causal link between tortious conduct and injury); *cf.* Jules Coleman, *Moral Theories of Tort: Their Scope and Limits: Part II*, 2 J.L. & PHIL. 5, 6 (1983) (asserting that corrective justice involves annulling wrongful gains and losses, but does not necessarily involve equating liability with the exact harm caused); Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981) (disputing the need for a linkage between responsibility and bearing the costs of harm caused). However, as Professor Christopher Schroeder has argued, paying strict attention to actual causation requires a focus on the ex post, that is, an after the fact evaluation of whether the defendant's conduct led to the plaintiff's harm. At face value, corrective justice scholars should be more concerned with the ex ante — that is the choice that an actor makes "at the time he is confronted with the situation demanding a choice to be made." *See* Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 451 (1990). From this perspective, proportional liability might make sense. As Professor Schroeder states: "By translating expected harm to others into an immediate cost to the agent, the legal rules provide a built-in incentive to engage in just the deliberatively rational process that the ex ante theory contemplates." *Id.* at 466. For further debate on this topic, see Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143 (1990) and Simons, *supra* note 103, at 113.

[108] *See supra* notes 3-4 and accompanying text.

damages.[109] One additional component of damages in this context is the cost of medical surveillance to promptly detect and treat disease.[110] As my previous work explains, the baseline for permitting medical monitoring recovery should be the same as the standard for permitting enhanced risk recovery — the plaintiff should demonstrate that the toxic exposure has at least doubled her risk of disease.[111]

Therefore, assuming useful medical monitoring procedures exist,[112] a plaintiff who can prove a doubling of the risk generally should be able to recover the costs of such procedures in addition to proportional enhanced risk recovery under my proposal. Beyond the supporting arguments set forth above (i.e., the connection to the traditional causation standard, the improvement in deterrence, the concern with corrective justice),[113] permitting medical monitoring recovery under my standard will help mitigate future physical harm.[114] This, in turn, might even reduce the enhanced risk award itself, as medical surveillance reduces the chance of future disease.[115] The only exception to including

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[109] Indeed, the whole theme of this Article is an attempt to place the "separate" claims of enhanced risk, medical monitoring, and fear of disease under one pre-manifestation umbrella.

[110] Professor Hazard also characterizes medical monitoring as a "futures" action, and he seems to support the concept.

> A medical monitoring procedure thus is appropriate for a group that consists of people who are presently identifiable as having been exposed, even though it is uncertain whether some or any of them will eventually manifest the feared malady. In this respect the monitored group is similar to a set of present claimants in respects critical to administration of mass torts justice: specific persons with an exposure that is or appears plausibly to be causally related to a specific potentially liable actor.

See Hazard, *supra* note 11, at 1906.

[111] *See* Klein, *Medical Monitoring*, *supra* note 11, at 16. Again, the proper way to view medical monitoring recovery is as part of the compensation for enhanced risk itself, not as compensation for the "separate" cause of action. *Id.* at 15-16.

[112] *Id.* at 16-18. *See, e.g.*, *In re* Paoli R.R. Yard PCB, 35 F.3d 717, 787 (3d Cir. 1994) ("Paoli II") (quoting *In re* Paoli R.R. Yard PCB, 916 F.2d 829, 852 (3d Cir. 1990) ("Paoli I")). If a plaintiff could not prove that medical procedures exist that would make early detection and treatment of disease possible and beneficial, the plaintiff could not recover medical monitoring expenses. *Id.*

[113] *See supra* notes 87-96, 101-08 and accompanying text.

[114] *See* Klein, *Medical Monitoring*, *supra* note 11, at 31.

[115] The standard as applied to medical monitoring recovery, therefore, must incorporate some minimal level of enhanced risk as a threshold to recovery. This line could be drawn in any number of ways including, most obviously, an absolute numerical cutoff in terms of enhanced risk percentage. *See id.* Professor Brennan provides a more creative solution, suggesting that courts limit medical monitoring recovery to those who have been exposed to "significant concentrations of one of the . . . most toxic chemicals as

medical monitoring as part of futures compensation would involve a situation where the level of risk involved is extremely small. In such cases, it is feasible to allow a plaintiff to recover damages for enhanced risk (where the recovery would be proportional to the level of increased risk), but not for medical monitoring, where the damages would not in any sense be "proportional" to the level of risk.

III. ADDING EMOTIONAL DISTRESS TO THE STANDARD

The challenge now is to add emotional distress to the measure of damages in a pre-manifestation case. One possibility is to import my solution for medical monitoring and enhanced risk — only those plaintiffs who prove a doubling of the risk can recover emotional distress damages. Although this approach is tempting in its simplicity, it is not sensible. Damages for medical monitoring and enhanced risk inherently relate to future physical harm: medical monitoring is designed to detect future illness, while enhanced risk provides its present value. For these damages, the doubling standard allows courts to logically connect "futures" recovery to the causation standard used in post-manifestation cases. In other words, courts should not permit recovery for the possibility of an illness that the law would not later connect to a defendant's conduct.[116]

Emotional distress, however, is currently-existing harm that does not necessarily correlate to future physical injury.[117] In other words, a

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designated by the [Agency for Toxic Substances and Disease Registry ("AATSDR")]. Brennan, *supra* note 1, at 69. *See* Klein, *Medical Monitoring*, *supra* note 11, at 17. "Professor Brennan's suggestion has the benefit of clarity and rationality in that those who compile the ATSDR list are primarily concerned with the overall risk posed by each substance." A.L.I., *supra* note 100, at 379-80 n.60 ("[I]t would be inappropriate for a court to order a defendant to fund [medical monitoring] for all 100,000 people residing in an area of a toxic exposure where the exposure is projected to increase the incidence of [a particular disease] from 3% to 5%."); *id.* at 373-74 (asserting that compensation for slight increases in risk, "on the order of 2% or 3% ,"should fall primarily "within the purview of state and federal environmental regulation"). For a thorough discussion of how medical monitoring damages should be limited based on the level of a plaintiff's increased risk (including examples of applications), see Klein, *Medical Monitoring*, *supra* note 11, at 16-32.

[116] *See supra* notes 85-96 and accompanying text.

[117] *See* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1206 (6th Cir. 1988); *see also* Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 349 (1984) ("Psychic injuries are real and significant costs of accidents."); *see generally* Nicholas J. Mullany, *Fear for the Future: Liability for Infliction of Psychiatric Disorder*, *in* TORTS IN THE NINETIES 101 (Nicholas J. Mullany ed., 1997) (arguing that Australian common law needs to recognize liability for "fear for the future" actions); Harvey Teff, *Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries*, 57 CAMBRIDGE L.J. 91 (1998) (arguing that reasonable boundaries for nervous shock claims can be established within present tort

plaintiff may suffer genuine *fear* of disease, even if tort law would not connect subsequent illness to the toxic exposure. This means that establishing consistency with post-manifestation causation standards (a major justification for the doubling standard) is largely irrelevant in a fear of disease case.[118] Because of this, one can reasonably argue that tort law should compensate emotional distress victims regardless of physical consequence or any particular level of increased risk.[119]

Yet, providing such recovery brings us back to problems that have vexed courts for years. Courts worry that they will not be able to distinguish between valid distress and fear that is trivial;[120] they are

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system).

[118] This does not mean, however, that emotional distress is unrelated to increased risk of disease. In fact, the increased risk is what *causes* the emotional distress. This is exactly why this Article is attempting to look at increased risk and emotional distress recovery together. One must recognize, however, that legitimate emotional distress can exist without a connection to any particular level of risk, and a tort law regime that limits recovery solely on the likelihood of future harm may ignore very real damage caused by an exposure. Professor Elliott has explained this well:

> Previous legal authors who have advocated compensation for risk have tried to value risk solely by evaluating the likelihood of physical injury. Although the likelihood of physical harm is obviously a relevant factor, it is not the only factor that should be considered when determining fair compensation for involuntary exposure to risk. Persons who have been unreasonably exposed, without their consent, to chemicals that may be hazardous, are entitled to be compensated for the violation of their personal autonomy and dignity, and their justifiable fear and uncertainty, even if it later turns out that the risks to their physical health are trivial or nonexistent.

Elliott, *supra* note 18, at 789.

[119] This is true both for reasons of efficiency and justice. With regard to efficiency, see Bell, *supra* note 117, at 349 ("If tort law is to reduce efficiently the injury costs of accidents, all real costs that result from accidents, including psychic injury costs must be taken into account in assessing damages for defendants' culpable conduct. . . . If the full recovery rule governed, tort law would force defendants to more accurately weigh the costs and benefits of their behavior, thereby insuring a more cost-justified level of accidents."). *See also* Bohrer, *supra* note 25, at 111 (discussing how emotional distress recovery would force the internalization of the true costs of technology, leading to a "more socially desirable level of consumption of technological products"); Rosenberg, *supra* note 101, at 236 ("Optimal deterrence . . . requires risk-based mental distress claims to hold the defendant responsible for the total amount of loss attributable to its tortious conduct."). With respect to justice, see Adam P. Rosen, Comment, *Emotional Distress Damages in Toxic Tort Litigation: The Move Toward Foreseeability*, 3 VILL. ENVTL. L.J. 113, 143 (1992) ("Justice proponents argue that emotional distress is a real and deleterious consequence of certain tortious acts and should be compensated to no less an extent than other tort injury.") Denying such recovery would be "contrary to the goal of putting plaintiff back in the position he was prior to the tortious injury." *Id.* at 144; *see also* Bell, *supra* note 117, at 342 (discussing originalist approach to recognizing psychic well-being as an entitlement).

[120] *See* Smith, *supra* note 27, at 548; *supra* note 27 and accompanying text.

concerned about plaintiffs falsifying emotional distress;[121] and they worry about the costs of creating a potentially unrestricted class of plaintiffs.[122] These problems, of course, are what led courts to draw the unsatisfying lines that currently exist in emotional distress doctrine.[123] With respect to pre-manifestation cases, therefore, tort law must draw new lines. These lines must be sensitive to the systemic concerns that make courts wary of awarding emotional distress damages. Yet they also must recognize that fear of disease is currently-existing harm inextricably connected to increased risk of disease.[124]

My proposal is as follows. Assuming proof of some level of increased risk, courts should permit pre-manifestation plaintiffs to recover emotional distress damages whenever a trier of fact finds that the plaintiff's distress is reasonable.[125] In this setting, courts should abandon the illogical limitations that have restricted emotional distress claims in the past. For example, courts should not apply limitations based on a

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[121] *Id.*

[122] *See* Richmond v. A.P. Green Indus., Inc., 66 Cal. App. 4th 878, 889, 78 Cal. Rptr. 356, 363 (1998), *cert. dismissed & remanded*, 101 Cal. Rptr. 2d 196, 11 P.3d 953 (2000) (citing Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 991, 863 P.2d 795, 812 (1993)); *supra* note 28 and accompanying text.

[123] Certainly, some scholars have downplayed these administrative concerns. *See, e.g.*, Bell, *supra* note 117; Mullany, *supra* note 117; Teff, *supra* note 117. However, Professors Mullany and Teff are English scholars who deal with a legal system that provides significant protection against frivolous claims (such as "loser pays" rules). And Professor Bell wrote about this issue some 17 years ago, before the recent burst of "futures" claims. *See, e.g.*, Michael D. Hultquist, *Fear of Cancer as a Compensable Cause of Action*, 30 THE BRIEF 8, 8 (2001) (describing fear of disease lawsuits as the "last . . . ripple in the toxic tort/mass tort explosion"). Today, however, such concerns clearly drive restrictive court rulings and one must address the concerns to propose realistic reform in fear of disease doctrine.

[124] *See supra* notes 117-18 and accompanying text.

[125] The proposal envisions a broadly-defined reasonableness standard. *See* Rodrigues v. State, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970) ("mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances"). Under this standard, fact finders might consider whether the plaintiff has presented evidence that she suffers from a diagnosable mental disorder, *see* Johnson v. Ruark, 327 N.C. 283, 304, 395 S.E. 85, 97 (N.C. 1990); whether the trauma has impacted the plaintiff's normal life activities; or even whether the distress has led to severe humiliation, anger, or grief. *See* Sacco v. High Country Independent Press, Inc., 896 P.2d 411, 426 (Mont. 1995); *see also* Laxton v. Orkin Exterminating Co., 639 S.W.2d 431, 433 (Tenn. 1982) (mentioning stress, outbursts, crying, lack of sleep, and nervousness). Plaintiffs could further prove reasonableness in the fear of disease setting by pointing to information that they have learned about the potential consequences of future illnesses. *See* Devlin v. Johns-Manville Corp., 202 N.J. Super. 556, 560, 495 A.2d 495, 498 (1985) (mentioning information derived from medical opinions); Laxton, 639 S.W.2d at 433 (mentioning knowledge developed from personal research). *See also supra* notes 49-62 and accompanying text for a brief discussion of the open-ended "reasonableness" standard.

plaintiff's lack of physical manifestation of disease.[126] They should not restrict claims based on a lack of impact or an insufficient relation to a zone of danger.[127] And they should not limit access to tort recovery based on any particular level of increased risk.[128] The proposal, however, has a significant "catch" — a plaintiff who brings such a claim must simultaneously seek other pre-manifestation damages (i.e., medical monitoring and enhanced risk recovery). The plaintiff's ability to seek subsequent damages then becomes subject to the single action rule. In other words, courts should not permit post-manifestation recovery associated with a toxic exposure after a plaintiff has received pre-manifestation damages for the very same exposure.

Defending this standard requires some predicate. First, the proposal's scope is limited to asymptomatic plaintiffs who seek emotional distress damages after a defendant has tortiously exposed them to a toxin that has increased their risk of a serious disease.[129] As previously noted, the purpose of this Article is to unify the splintered nature of "futures" cases, not to attempt a revision of all emotional distress law.[130] Second, the proposal must be considered in conjunction with the standards described earlier in this Article for enhanced risk and medical monitoring recovery. If a jurisdiction has not adopted similar standards — or more likely, if other enhanced risk recovery is unavailable — then applying the single action rule may not make sense.[131] Finally, it is important to distinguish the single action rule from statutes of limitation. Statutes of limitation, under this proposal, should never bar a plaintiff who chooses to wait until a disease manifests before filing suit.[132]

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[126] *See supra* note 34 and accompanying text.

[127] *See supra* note 33 and accompanying text.

[128] *See supra* notes 63-73 and accompanying text.

[129] Conversely, this means that the proposal *does not* apply to cases where someone *is* ill. In such cases, a plaintiff might be able to maintain emotional distress claims under traditional standards (such as the manifestation rule). In addition, in such cases, emotional harm may already be compensable, if not directly, under the rubric of pain and suffering. Nor does the proposal apply to a situation where someone has been exposed to a potentially hazardous substance but provides *no* evidence that exposure to the defendant's substance has increased her risk of disease. In these cases, a plaintiff must await either manifestation or better evidence regarding the consequences of exposure before maintaining an action.

[130] *See supra* note 109 and accompanying text.

[131] *See infra* notes 139-51 and accompanying text.

[132] In fact, courts have followed this principle in toxic exposure cases even when the first claim relates to a physical manifestation of disease. In *Hamilton v. Asbestos Corp.*, 22 Cal. 4th 1127, 998 P.2d 403 (2000), for example, the California Supreme Court considered whether a plaintiff who was exposed to asbestos could sue for asbestosis (a non-fatal complication associated with asbestos exposure) and then later sue for damages associated

A. The Single Action Rule

The most controversial aspect of this proposal concerns the single action rule. The single action rule provides that a plaintiff must assert all claims arising from a wrongful act in the same cause of action.[133] At root, the rule is part of the doctrine of res judicata: it prevents defendants from facing successive actions for the same course of conduct; it discourages inconsistent judgments; and it conserves judicial resources.[134]

As one might imagine, the single action rule raises difficult issues in toxic tort cases where disease may be latent for a long period of time. In some cases (for example, where a plaintiff suffers from successive, yet distinct, physical illnesses), courts often waive the rule so that a plaintiff

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with mesothelioma (an often-fatal cancer associated with asbestosis exposure). In a concurring opinion, Justice Brown explained that the second complaint (relating to mesothelioma) was "*separate* and *distinct* from . . . the first complaint [relating to asbestosis], and [that] the filing of the first action did not trigger the one-year statute of limitations for the causes of action in the second action. As such, plaintiff's second lawsuit would not be time-barred . . . ." *Id.*, at 1150, 418 (Brown, J., concurring) (citing cases in accord). *See* Sopha v. Owens-Corning Fiberglas Corp., 601 N.W.2d 627, 632 (Wis. 1999); Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 976 (1988); *see also* Robinson, *supra* note 97, at 788 ("I do not propose to *require* victims to pursue recovery for risk if they prefer to await the outcome and seek compensation for actual injury. The question is whether there is reason to deny an action to a risk victim who does not want to wait, say, a decade to find out whether injury ensues."); *cf.* Daniel L. Martens, *Toxic Timeline*, 23 L.A. LAW. 37 (Jan. 2001) (arguing that holding of *Hamilton* should be limited to asbestos cases).

[133] *See* Richmond v. A.P. Green Indus., Inc., 66 Cal. App. 4th 878, 884, 78 Cal. Rptr. 2d 356, 359-60 (1998), *cert. dismissed & remanded*, 101 Cal. Rptr. 2d 196, 11 P.3d 953 (2000) (citing additional authority); Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643, 646 (Tex. 2000) ("The single action rule . . . provides a plaintiff one indivisible cause of action for all damages arising from a defendant's single breach of a legal duty."); *Sopha*, 601 N.W.2d at 633 ("According to the single cause of action rule, all injuries caused by a single transaction or series of transactions by a tort-feasor are part of a single cause of action . . . ."); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 24cmt. c (1982):

> A single transaction ordinarily gives rise to but one claim by one person against another. . . . In the more complicated case where one act causes a number of harms to, or invades a number of different interests of the same person, there is still but one transaction; a judgment based on the act usually prevents the person from maintaining another action for any of the harms not sued for in the first action.

[134] *See Richmond*, 66 Cal. App. 4th at 888, 78 Cal. Rptr. 2d at 362 (citing Allen v. McCurry, 449 U.S. 90 (1980)); *Pustejovsky*, 35 S.W.3d at 647 (citing Eastland County v. Davisson, 13 S.W.2d 673, 676 (Tex. Comm'n App. 1929) ("The reason for the rule lies in the necessity for preventing vexatious and oppressive litigation, and its purpose is accomplished by forbidding the division of a single cause of action so as to maintain several suits when a single suit will suffice.").

can receive compensation for both illnesses, even if they occur years apart.[135] Where a plaintiff demonstrates *no* manifestation of disease, however, the cases are harder. Obviously, this Article advocates *some* recovery in such cases. The proposal, however, does not do so without recognition that pre-manifestation recovery has the capacity to greatly expand tort law's boundaries.[136] To account for this concern, courts should deter subsequent claims by applying the single action rule after rendering pre-manifestation judgment. Doing so should limit claims in a way that encourages plaintiffs to file only the most serious and genuine pre-manifestation lawsuits.[137]

This section of the Article begins by explaining how courts have handled the single action rule in successive illness cases. The section then distinguishes these cases from futures cases in which a plaintiff is suffering only emotional harm. The section goes on to defend application of the single action rule in this setting, while connecting the defense to my previous proposals concerning enhanced risk and medical monitoring recovery.

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[135] *See Sopha*, 601 N.W.2d at 638 ("Wisconsin law does not treat res judicata as an ironclad rule which must be implacably applied whenever literal requirements are met, regardless of any countervailing considerations. While cases admitting exceptions to the rule are rare . . . [the court] would not turn a deaf ear to argument that in a particular sort of case the policy reasons for allowing an exception override the policy reason for applying the general rule.") (citing Patzer v. Board of Regents, 763 F.2d 851, 856 (7th Cir. 1985)); *see also Richmond*, 66 Cal. App. 4th at 888, 78 Cal. Rptr. 2d at 362 (stating that rule requiring joinder of all causes of action from single transaction does not contemplate injuries resulting from series of exposures to multiple products manufactured by multiple defendants). The Restatement of Judgments suggests a number of specific exceptions to the single action rule, including where "plaintiff [is] unable to . . . seek a certain . . . form of relief in the first action because of . . . restrictions on [a court's] authority to entertain . . . demands for . . . forms of relief in a single action"; where the "plaintiff desires in the second action to . . . seek that form . . . of relief"; or where it "is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason. . . ." RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c), (f).

[136] That is, in normal cases, the plaintiff must suffer from physical harm before recovering for damages associated with an exposure. It bears repeating here, however, that this Article strongly advocates that a statute of limitations should never bar a toxic tort plaintiff from recovering damages if he does not file suit until disease manifests. *See supra* note 132 and accompanying text.

[137] *See infra* notes 168, 171-74 and accompanying text.

1. Successive Illness Cases

Courts have waived the single action rule where an exposure has led to more than one physical injury.[138] *Pustejovsky v. Rapid-American Corp.*,[139] a recent Texas Supreme Court case, is illustrative. In *Pustejovsky*, a former metal worker sued Johns-Manville Corp. in 1982 for damages related to asbestosis.[140] He quickly settled the claim for $25,000.[141] Twelve years later, the plaintiff developed pleural mesothelioma, a malignant form of cancer associated with asbestos exposure.[142] He then sued three asbestos suppliers for damages associated with his disease.[143] The defendants moved for summary judgment, arguing that the single action rule barred the plaintiff's claim. The trial court granted the defendant's motion and an intermediate appellate court affirmed.[144] The Texas Supreme Court, however, reversed. The court noted that judges throughout the country have grappled with the problem of successive injuries in cases with latency periods. Most, according to the court, have recognized that "the single action rule is a catch-22 for victims of multiple latent diseases, if applied to them the same as traditionally applied to victims of traumatic injuries."[145]

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[138] The primary examples are in asbestos cases where an exposure led, first, to asbestosis and, later, to mesothelioma. *See infra* notes 140-51 and accompanying text.

[139] 35 S.W.3d 643 (Tex. 2000).

[140] Asbestosis is a non-malignant respiratory disease caused by inhaling asbestosis fibers. *Id.* at 646. *See* ATTORNEYS' TEXTBOOK OF MEDICINE § 205C.00 (3d ed. 2000) ("[Asbestosis is] a type of pneumoconiosis (chronic lung disease resulting from inhalation of dusts) characterized by fibrosis (formation of fibrous tissue) of the lung and surrounding pleura (lining of the chest wall).").

[141] 35 S.W.3d at 645.

[142] Mesothelioma, however, does not have a causal connection with asbestosis. *See id.* at 646.

[143] *Id.* at 645. Plaintiff died during the course of the litigation. His wife, as representative of his estate, replaced him as plaintiff in the lawsuit. *Id.* at 645 n.1.

[144] Pustejovsky v. Pittsburgh Corning Corp., 980 S.W.2d 828, 831-33 (Tex. App. 1998). The court also based its decision on statute of limitations grounds. *Id.*

[145] *Pustejovsky*, 35 S.W.3d at 648 (citations omitted). The California Court of Appeals recently made the same point in a case with nearly identical facts:

> [The plaintiff] can bring an action seeking compensation for his asbestosis, gambling that he will not contract a malignant disease in the future or, more morbidly, that if he does the malignancy will occur within the five years allowed to bring an action to trial.... Alternatively, he can forego an action for his certain and disabling present asbestosis injuries, even though compensation would alleviate attendant medical expenses and other related losses, out of fear that his need for such compensation will be greater if and when he develops one of the more disabling malignancies. [P] To remedy this dilemma, other jurisdictions, all of which have historically observed the principle of the primary right theory, are increasingly holding that each disease resulting from asbestos

The court further supported its decision by explaining that the plaintiff had limited ability to recover damages prior to the manifestation of disease under Texas law. The court first addressed "enhanced risk" recovery, noting:

> In the typical case involving progressive injuries, the single action rule may occasionally result in uncompensated damages, in order to vindicate competing interests. But in asbestos-related cases, . . . the rule would produce much more erratic results . . . . [N]o amount of due diligence would have allowed [plaintiff] to recover for mesothelioma when he brought his suit for asbestosis. It is our long-established rule that a plaintiff may recover damages for a disease that may develop in future years only if the person establishes . . . a greater than fifty percent chance of incurring future damages.[146]

This means that, under Texas law, a pre-manifestation plaintiff must prove a greater than 50% probability that he will actually become ill to recover enhanced risk recovery. In truth, this standard is so high that it operates as an absolute bar to enhanced risk claims.[147]

The *Pustejovsky* court also explained that Texas law would preclude a plaintiff from recovering for fear of future disease:

> We note[] that [even] the existence of a physical injury may not be sufficient for recovery of mental anguish damages when the injury has not produced disease despite a reasonable fear that such disease will develop . . . . [A]llowing recovery for fear of disease when the plaintiff has no symptoms results in the systematic under-compensation of those who actually contract the disease, and a windfall to those who do not.[148]

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exposure triggers a new statute of limitations and new cause of action.

Richmond v. A.P. Green Indus., Inc., 66 Cal. App. 4th 878, 885, 78 Cal. Rptr. 2d 356, 359 (1998), *cert. dismissed & remanded*, 101 Cal. Rptr. 2d 196, 11 P.3d 953 (2000) (citing additional authority); *see also* Sopha v. Owens-Corning Fiberglas Corp., 601 N.W.2d 627, 634-35, 638 (Wis. 1999) (stating that bar on recovery for conjectural damages requires that courts treat each new disease as new cause of action).

[146] *Pustejovsky*, 35 S.W.3d at 652 (citing Insurance Co. of N. Am. v. Myers, 411 S.W.2d 710, 713-14 (Tex. 1966); Fisher v. Coastal Transp. Co., 230 S.W.2d 522, 523-525 (Tex. 1950); Daretz v. Fibreboard Corp., 765 F.2d 456, 466 (5th Cir. 1985)).

[147] It is also a much higher bar than the standard that my previous work proposed for enhanced risk cases, which would allow proportional enhanced risk recovery whenever a plaintiff can prove that a defendant has doubled her risk of disease. *See supra* notes 85-96 and accompanying text.

[148] 35 S.W.3d at 650. (Citing Temple-Inland v. Carter, 993 S.W.2d 88, 89 (Tex. 1999)).

When one takes account of these circumstances, the *Pustejovsky* court's decision not to apply the single action rule makes sense. First, *Pustejovsky* does not open the door to an unlimited class of plaintiffs because it is not a true futures case. Rather, its holding is limited to plaintiffs who have suffered actual physical disease due to a toxic exposure — an obviously smaller number of people than the class of those exposed to the toxin.[149] Second, the *Pustejovsky* court waived the single action rule only after noting that the plaintiff could not recover "futures" damages under existing Texas doctrine.

This latter point raises an important question: what if courts changed the futures doctrine? More specifically, what if courts permitted pre-manifestation recovery for enhanced risk, medical monitoring, and emotional distress, as outlined in this Article?[150] Would it then be fair to apply the single action rule and resolve the plaintiff's claim in one action? The following section argues that the answer is yes.

2. Futures Cases

As discussed above, creating an exception to the single action rule makes sense in successive illness situations. But doing so does undermine some of the values that underlie the rule in the first place. For example, waiving the single action rule inevitably diminishes tort law's ability to achieve finality.[151] In addition, by tolerating piecemeal

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The court noted that it's decision in *Temple-Inland* was limited to cases in which the plaintiff had not yet manifested any disease; it expressly did not resolve the question of whether a plaintiff with one asbestos-related disease could recover for fear of developing subsequent disease. *Id.* Nonetheless, the Texas Supreme Court is not out on a limb in its rejection of fear of disease claims. For example, the American Law Institute Report on Enterprise Liability suggests that courts not permit cancerphobia claims under any circumstances. A.L.I., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, *supra* note 100, at 380 ("We do not advocate compensating individuals who are stricken by 'cancerphobia.' . . . It contrasts sharply with medical monitoring damages, which must be based on expert testimony, perhaps with input from court-appointed experts or science panels regarding the presence of an increased risk of disease. Consequently, we do not advocate reimbursement for emotional damages or for increased risk per se.")

[149] The plaintiff is currently suffering from asbestosis, and is now suing for damages associated with mesothelioma, a separate (and more deadly) disease. Such a plaintiff is not in the same position as a pre-manifestation plaintiff, who must try to convince a court that he suffers an injury based only on a future risk of disease. By restricting the holding of *Pustejovsky* to cases involving post-manifestation plaintiffs, few systemic problems are raised. In other words, there is far less concern about opening the door to a virtually unlimited number of claims in the pre-manifestation setting. *See supra* notes 28, 122 and accompanying text.

[150] *See supra* notes 82-114, 125-32 and accompanying text.

[151] *See supra* notes 133-34 and accompanying text.

litigation, courts resign themselves to the likelihood that defendants will fail to internalize the costs of their activity. In other words, by restricting futures cases and waiving the single action rule, courts increase the chance that latency periods will delay compensation — if compensation ever occurs at all.[152]

Instead, why not measure a plaintiff's harm before manifestation and at least provide the possibility for early compensation in compelling cases? The proposal set out in this Article makes that result possible. The proposal begins by allowing pre-manifestation plaintiffs to receive full compensation for currently-existing emotional harm. The proposal continues by considering the possibility of proportional enhanced risk and medical monitoring recovery — the latter being a component of damages that might actually diminish the number of serious illnesses down the road.[153] The proposal, therefore, addresses compensation considerations (i.e., defendants must pay for the actual damage caused).[154] It also serves deterrence goals by compelling defendants to internalize some actual costs that otherwise would go uncompensated.[155]

Equally important, the proposal addresses administrative concerns that courts have raised about liberalizing emotional distress standards.[156]

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[152] *See supra* notes 3-4, 90, 108 and accompanying text.

[153] *See supra* notes 113-15 and accompanying text.

[154] *See supra* note 119. Professor Peter Bell similarly has defended emotional distress recovery on "originalist" grounds, citing to the earlier work of Professor Richard Epstein:

> Some look first to what consensus a gathering of all persons forming a society would reach while still ignorant about their future status in society. These persons would be unlikely to agree to give others the right to cause them significant psychic injury. Psychic well-being is the core of what is important to human existence and is too important to the individual to surrender.... The same result would follow from [Professor Richard Epstein's] originalist position which regards ordinary language as evidence of entitlement. Assuming entitlement to one's physical integrity to be a given, one can infer that the psychically injured plaintiff's cry of 'you injured me' and the relative importance of psychic well-being discussed above would convince Epstein to acknowledge the entitlement to psychic well-being.

Bell, *supra* note 117, at 342-43 (footnote omitted).

[155] *See, e.g.*, Bohrer, *supra* note 25, at 92 ("Recognition of the relationship between uncertain risks and emotional distress . . . places on new technologies the burden of paying for one their most significant costs . . . ."); *see supra* notes 6, 101 and accompanying text. Compensation under this proposal, of course, would potentially extend beyond emotional distress damages to include the possibility of proportional enhanced risk damages and medical monitoring costs. *See supra* notes 82-115 and accompanying text.

[156] Two such administrative concerns are the inability to separate false from valid claims and the fear of excessive litigation. *See supra* notes 27-29, 59, 120-22 and accompanying text.

Specifically, the proposal does this by imposing a cost on plaintiffs who choose to seek pre-manifestation emotional distress damages. The cost, of course, is application of the single action rule — a principle that makes the pre-manifestation lawsuit the final opportunity for a plaintiff to seek damages associated with the toxic exposure. As discussed below, this cost will encourage plaintiffs to file pre-manifestation claims only where their damages are serious and legitimate, as demonstrated by evidence of severe emotional trauma and (likely) a high degree of increased risk.[157]

Certainly, some will react by saying, "that's too harsh!" Critics should recognize, however, that the proposal is much less harsh than current doctrine that simply prohibits pre-manifestation recovery.[158] In addition, the proposal would reduce the arbitrariness of recovery in emotional distress cases by drawing a line that is based on logic, rather than meaningless standards.[159] A description of two potential scenarios supports these points.

B. The New Standard Applied

1. The Emotional Distress Plaintiff with Strong Evidence of Increased Risk

First, consider a plaintiff who suffers from legitimate emotional distress due to a tortious exposure. Assume this plaintiff is able to provide strong evidence that the exposure has increased his risk of disease — say a doubling of the risk, but not evidence that the disease is actually likely to occur.[160] Under current doctrine, this plaintiff has little opportunity to recover in tort — his pre-manifestation status precludes emotional distress damage[161] and his increased risk evidence is insufficient to permit enhanced risk recovery.[162] This result, however, is

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[157] *See infra* notes 161-68 and accompanying text.

[158] *See, e.g., supra* note 149 (citing 2 A.L.I., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 380 (1991); Temple-Inland v. Carter, 933 S.W.2d 88, 89 (Tex. 1999)).

[159] *See infra* notes 168, 171-72 and accompanying text.

[160] As an example, consider the hypothetical set forth earlier in the Article where BigCo has exposed 500 citizens to a toxin that has increased the risk of disease to each individual from 10% to 30%. *See supra* note 100 and accompanying text.

[161] *See supra* notes 32-48, 149 and accompanying text.

[162] *See supra* note 82 and accompanying text. Medical monitoring may be available as a remedy, as most courts that permit medical monitoring damages do not require any particular level of increased risk as a prerequisite to recovery. Courts, however, do look for some level of increased risk as among the significant factors in allowing medical monitoring recovery. *See, e.g., In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 787 (3d Cir.

both inefficient and unfair. The efficiency problem stems from the increased risk evidence: the defendant has created a situation that will eventually cause illness to members of the exposed population, but the latency period between exposure and manifestation guarantees that the defendant will not internalize these costs until years later, if ever. The fairness problem is related. Because the plaintiff's risk level has doubled, he could connect any future illness to the defendant's conduct under traditional causation standards.[163] Yet, the plaintiff has no current access to the tort system. This puts the plaintiff in a particularly strong position to advocate for some pre-manifestation recovery.

Under this Article's proposal, the situation is improved. In addition to medical monitoring, the plaintiff could recover proportional enhanced risk damages.[164] This increases a plaintiff's incentive to file a pre-manifestation lawsuit in a "high risk" situation which, in turn, improves the tort system's ability to administer justice in an efficient manner.[165] This outcome appeals to common sense — as the plaintiff's level of increased risk reaches the point where tort law would associate future disease with the defendant's conduct, the plaintiff's ability to recover improves.[166]

The proposal also permits the plaintiff to recover emotional distress damages for fear of disease if the fact finder concludes that the fear is reasonable. But the proposal does *not* do so in a way that opens the door for unlimited emotional distress recovery. As with existing doctrine, the proposal uses a line-drawing mechanism to separate legitimate from dubious claims. However, the mechanism in this proposal is not

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1994) (plaintiff must suffer from "a significantly increased risk of contracting a serious latent disease"); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993) (increased risk which must be "significant"); Ayers v. Township of Jackson, 525 A.2d 287, 312 (N.J. 1987) ("relative increase in the chance of the onset of disease in those exposed").

[163] The plaintiff's level of increased risk, therefore, is significant both in an absolute sense as well as in a statistical sense in terms of associating future harm with the defendant's conduct. *See supra* notes 88-96 and accompanying text.

[164] *See* Klein, *Enhanced Risk, supra* note 15, at 1194-95, 1202-03; *supra* notes 97-108 and accompanying text.

[165] In addition, the clear threat of liability might also make defendants more likely to fund settlements. *See, e.g.*, Klein, *Medical Monitoring, supra* note 11, at 35.

[166] Continuing with the hypothetical used earlier in the paper (see notes 98-100 and accompanying text), assume that a citizen actually became ill. If that citizen sued BigCo for tortiously exposing her to "a toxin", she would be able to establish a legally significant connection between the exposure and harm. The increase in risk (from 10% to 30%) makes it "more likely than not" that the exposure caused the harm. Therefore, since we know that BigCo's conduct will ultimately cause damage that we would attribute to BigCo in tort, it is sensible to consider ways to make BigCo pay for such damages closer to the time of its conduct.

arbitrary. Instead, it requires the plaintiff to consider the cost of filing the futures claim. The cost, of course, is that the plaintiff cannot later return to court if she manifests disease. A high degree of legitimate emotional harm (and a high level of enhanced risk) likely would encourage a plaintiff to file a futures suit. A more questionable degree of emotional harm (which often would be associated with a lower absolute level of risk) would encourage a plaintiff to wait until manifestation to file suit, if manifestation ever occurs.[167]

2. The Emotional Distress Plaintiff with Little Evidence of Increased Risk

The proposal faces a much different situation where a plaintiff suffers emotional distress due to a tortious exposure, but has limited evidence regarding increased risk of disease. Suppose, for example, that a plaintiff has no quantifiable evidence of increased risk, or perhaps evidence that falls short of a doubling of risk.[168] Existing doctrine almost certainly bars this plaintiff from tort recovery.[169] This Article's proposal, however, opens the door to recovery for emotional distress damages if the plaintiff can convince a fact finder that her distress is nonetheless reasonable. The cost of filing such an action, however, is substantial. First, the plaintiff will not be able to recover for medical monitoring or enhanced risk damages because she does not have evidence that the exposure doubled her risk of disease. Second, the single action rule will preclude the plaintiff from returning to court should disease manifest or stronger causation evidence develop. The plaintiff, therefore, will have to seriously consider the extent of his emotional harm evidence before bringing it before a judge or jury.

Some may argue that even this small crack in the door will encourage vast numbers of frivolous emotional lawsuits by plaintiffs with little evidence of increased risk. The costs built into the proposal, however, will limit the number of claims by discouraging plaintiffs from entering

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[167] Once again, it is important to repeat that this proposal is premised on the idea that a statute of limitations would never run prior to the time of manifestation, if the plaintiff chose not to file a tort action before that time. *See supra* notes 132, 137 and accompanying text.

[168] Under these circumstances, a plaintiff will not satisfy the standard that I have proposed for either enhanced risk or medical monitoring recovery because the plaintiff will not have evidence that the defendant's conduct has doubled her risk of future disease. *See supra* notes 79-81, 85-87, 94-96, 110-14 and accompanying text.

[169] The reasons are the same as those mentioned in the previous section. *See supra* note 162 and accompanying text.

the tort system unless their emotional distress is serious and genuine.[170] As suggested above, the standard accomplishes this through the plaintiff's own cost-benefit calculation — a standard that is more logical than existing doctrines, such as the physical consequence rule.[171] In addition, the proposal — even in this "low-risk" setting — improves futures law from an efficiency perspective. Recall that under current doctrine pre-manifestation plaintiffs are effectively barred from emotional distress recovery, even if the distress is genuine.[172] This proposal, however, allows the most serious claims into the tort system, thereby compelling defendants to internalize more of the damages that they actually cause.[173]

It is worth emphasizing, however, that the proposal is not meant to encourage large numbers of claims, particularly in the low-risk setting. The proposal should encourage only the most powerful emotional distress claims to go forward. For others, a more appropriate time to file would be after disease manifests or where stronger evidence of increased risk is available.[174] Certainly, this concession to the reality of latency periods means that some people may never recover in tort for exposure-

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[170] Perhaps one concern here is that plaintiffs with little evidence of increased risk (and little genuine emotional distress) will "roll the dice" in a collective fashion and file a class action lawsuit to try and force a settlement. This concern seems minimal in light of the fact that each plaintiff's claim in an emotional distress action is likely to be distinct, if not unique. More broadly, Supreme Court precedent in the class action area casts doubt upon the possibility of any successful class action in "futures" cases. *See* Hazard, *supra* note 11, at 1913 ("The Supreme Court's decision in [Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)] seems to foredoom any use of Rule 23 to resolve futures claims in mass torts injury cases."). In the situation posited here, therefore, we are left with individual plaintiffs with low levels of increased risk, seeking emotional distress damages at the cost of precluding any further suit. It is hard to imagine anyone without very strong evidence of such distress going forward — a result that serves the goals of separating strong from dubious claims.

[171] *See supra* notes 160, 168 and accompanying text.

[172] In other words, the low-risk, pre-manifestation plaintiff will have neither the requisite "physical consequence" nor the requisite level of increased risk to clear the hurdles that courts have set for emotional distress recovery. *See supra* notes 32-48, 63-73 and accompanying text. These lines, however, do not do a good job of separating frivolous from genuine claims. *See supra* notes 46-48, 74 and accompanying text.

[173] But do we risk under-deterrence with respect to harm that manifests later, but goes uncompensated due to the application of the single action rule? Perhaps. Waiting for manifestation itself, however, risks under-deterrence, given that the latency period undoubtedly reduces the possibility of a plaintiff's recovery. Further, it is worth remembering that, without stronger evidence of increased risk, the tort system would not attribute exposure to subsequent disease in any event. *See supra* notes 88-94 and accompanying text.

[174] Again, this proposal would always toll the statutes of limitations until manifestation if a plaintiff chose not to file a futures case. *See supra* notes 132, 137 & 168 and accompanying text.

related harm. The tort system, however, is not the only place where society regulates risk. Policymakers in the legislative and administrative arenas also address risk creation, and, in many ways, are better suited to the task where evidence of risk is developing or unclear.[175] This is not to say that legislative responses to risk creation are always successful. But adhering to clear and consistent tort standards is one way to encourage policymakers to act where they have been reluctant to do so in the past.[176]

CONCLUSION

In the end, there may be no perfect solution to the "futures" dilemma.[177] Yet, attempting to solve the futures problem is important. As Professor Linda Mullenix recently wrote: "It is abundantly clear that neither the judicial system nor the legislature will ever solve the problems of mass tort litigation until we find a way to resolve the futures problem."[178]

To move in the right direction, tort law must establish clear and logical lines that delineate when futures compensation is proper. Current doctrine does not do this. Instead, it approaches futures claims piecemeal, setting non-related rules for medical monitoring, enhanced risk, and emotional distress recovery. This Article asserts that courts

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[175] Many commentators have argued that legislative solutions are superior to tort law solutions in mass tort situations or cases that involve future risk. *See, e.g.*, Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 329 (1985) (preferring expert administrative agencies to courts); Elliott, *Why Courts?*, *supra* note 101 at 801 (favoring statutory compensation system). For recent proposals specific to the futures situation, *see* Hazard, *supra* note 11, at 1916-18 (suggesting statute basing futures recovery on workers compensation statutes); Linda S. Mullenix, *Back to the Futures: Privatizing Future Claims Resolution*, 148 U. PA. L. REV. 1919, 1925-30 (2000) (arguing that futures claims should be administered by private system). *See also* Klein, *Medical Monitoring*, *supra* note 11, at 33-37; Klein, *Enhanced Risk*, *supra* note 15, at 1207-08.

[176] As Professor Hazard suggests, one frustration for those who advocate legislative solutions to mass torts cases is that once litigation has begun, "industries are powerful enough to block solutions that claimants might regard as fair and just, and the plaintiff's bar has become influential enough to block many solutions that industry would be willing to accept." Hazard, *supra* note 11, at 1916.

[177] Professor Hazard recently proposed a substantive legislative solution to the mass torts problem. *See* Hazard, *supra* note 11, at 1917-18. But he qualified his own proposal by stating that "[i]t seems highly improbable that Congress could bring itself to address a specific mass tort . . . [because] by the time a mass tort has become recognized as such, the interest alignments would have hardened enough to produce the usual legislative deadlocks we have learned to endure." *Id.* at 1916. *See also* Mullenix, *supra* note 175 (proposing private claims system to resolve futures problem).

[178] Mullenix, *supra* note 175, at 1919.

should approach futures claims as a single cause of action. Plaintiffs in such cases would have the ability to receive damages (upon certain types of proof) based on medical surveillance costs, the value of enhanced risk, and even emotional distress. But because the single action rule would preclude subsequent actions based on the same exposure, plaintiffs would be making a significant choice in filing before manifestation.

Applying the proposal set forth in this Article has several advantages. First, the standards would encourage (or discourage) litigation based on the relative strength of one's claim, rather than on arbitrary factors, such as whether the plaintiff has physical manifestations of emotional distress. Second, the proposal clearly informs policymakers about when the tort system has the ability to help toxic exposure victims. This, in turn, would encourage policymakers to respond, rather than waiting to see if the tort system will relieve them of a responsibility to resolve a problem.[179] Third, the proposal improves the tort system's ability to serve the goals of efficiency and justice. In the end, the proposal should open new avenues of recovery for those who have been threatened the most, while limiting options for those with less worthy causes of action.

Clearly, the number of toxic tort cases is not diminishing. Efforts to improve the ability of our legal system to deal with these cases can only help our ability to deal with the "futures."

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[179] *See supra* note 177 and accompanying text.