Recovery for Increased Risk of Disease in Louisiana

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I. INTRODUCTION

Within the last two years, two massive accidents involving the release of hazardous chemicals have occurred in Louisiana. The first occurred on October 23, 1995, when a tank car “implosion,” sent a massive pinkish-yellow cloud of poisonous gas into the sky, forcing the evacuation of Bogalusa. The gas that wafted through the community was nitrogen tetroxide, and was “really, really bad stuff,” according to a state trooper.

The second accident occurred on March 18, 1997, when a barge collided with a bridge on the swollen Mississippi River. Hazardous chemicals, including benzene, loomed over North Baton Rouge forcing the Mayor to declare an emergency situation. This release also caused several evacuations, including the evacuation of 1,200 Southern University students.

The effects of both accidents are likely to be felt not only in the communities affected, but also throughout courts in Louisiana in the years to come. This is because victims of the releases are likely to bring traditional tort claims against the allegedly responsible parties along with not so traditional claims, such as cancerphobia, medical monitoring, and increased risk of disease. These emerging claims are the subject of this comment.

In spite of the fact that increased risk claims are not new to Louisiana, the courts have yet to enunciate any definite standards for their application. This comment will attempt to rectify this situation by identifying and explaining these claims, as well as analyze the purposes and policies for and against implementing these causes of action. Sections II and III will attempt to define increased risk, determine the problems in awarding damages for these injuries, and present potential solutions from other jurisdictions to these problems. Sections V and VI will examine cases applying Louisiana law that have dealt with increased risk and determine what potential solutions might apply in this State.

II. WHAT IS INCREASED RISK?

In a traditional negligence analysis, a tortfeasor who fails to exercise reasonable care and causes damage to another person is typically liable in tort.
For example, a knife juggler enjoys practicing his skill in crowded rooms. On an unfortunate occasion the juggler misses a knife, injuring a bystander. Applying a traditional negligence analysis, the knife juggler is liable for failing to exercise reasonable care by not keeping a reasonable distance between himself and the bystander or not being skilled in his practice. However, if the juggler did not cause injury to anyone during his act, he will not be liable. Even though the juggler increased the risk of everyone in the room of being cut during his act, the juggler will not be liable as long as he did not cut anyone. Therefore, in a traditional tort analysis, when the risk-creating behavior ceases, so does the possibility of committing a tort.

A latent injury or increased risk case reveals some limitations of the traditional tort analysis. Increased risk is a claim for damages resulting from negligent conduct that is proven likely to lead to future damage that has not yet manifested. Using the hypothetical above, suppose the knife juggler misses and the knife sticks into a bystander, and upon removal, the tip of the knife breaks off in such a way that it is positioned near a crucial nerve and cannot be removed. Furthermore, it is proved that the bystander has a “chance” to become paralyzed if the knife tip happens to shift, even though the original wound will completely heal. In a lawsuit, the bystander will probably seek damages not only for the original “stick,” but also for the “chance” that he will become paralyzed. This “chance” of becoming paralyzed is the increased risk of future damage. Although the risk-creating behavior has ceased, the potential for damage has not.

III. PROBLEMS ASSOCIATED WITH ALLOWING RECOVERY FOR AN INCREASED RISK

Courts have problems with allowing recovery for an increased risk in a traditional tort analysis. For example, in the second knife juggler hypothetical, should the bystander be allowed to recover for the possibility or probability that he may become paralyzed? If recovery is allowed, how much should be awarded—full recovery for paralysis—or a reduced amount? If recovery is not allowed, must the plaintiff wait until the paralysis occurs? Then what about prescription?

In the toxic tort arena, the usual complications are compounded because the risk-creating thing is not a knife tip that can be seen in x-rays; instead, it is invisible carcinogenic material that has entered the human body. Moreover,
some experts agree that even though the carcinogenic material is not visible to
the naked eye, the risk can be just as real as a knife tip.12

Taking all of these difficulties into account, one may ask why allow
recovery for an increased risk. The answer is that allowing recovery for
increased risk satisfies more of the basic policies in tort law than waiting until
the disease develops. For instance, in a typical increased risk case, damages do
not manifest themselves for several years after the original exposure or injury.
This lapse between the initial exposure and damage causes the following
problems in trying to promote traditional tort policies.13

First, "the 'prophylactic' factor of preventing future harm" will not occur if
a plaintiff waits to sue.14 Those who have not experienced harm may not
receive a warning of the potential danger. Moreover, a tortfeasor could mitigate
future damages by being responsible for the costs of monitoring the plaintiff's
medical status.15

Second, the policy of admonishing the wrongdoer or deterring the wrongful
behavior cannot always be achieved if a plaintiff must wait until the damage
develops.16 Because of the great lapse in time, defendants may become
bankrupt, die, or disappear. In addition, the break in time allows the wrongdoer
to continue the culpable conduct without recourse.

Finally, the overriding policy in tort law of compensating the injured is not
always achieved if the cause of action accrues only when the disease develops.17
As above, defendants may become insolvent during the lapse, leaving unwary
plaintiffs to discover insidious diseases years later.

Claims for damage due to an increased risk have the potential to solve all
of these problems because they allow the plaintiff to sue shortly after exposure,
decreasing the lapse of time between the initial wrongdoing and the suit.

Although the application of increased risk may help solve policy problems
associated with tort law, fitting the cause of action into the defined parameters
of common-law tort law is an extraordinary feat. Nevertheless, because
traditional tort law is typically the only current avenue for these claims, courts
adjudicating these claims encounter three major problems when facing increased
risk cases: causation, claim preclusion, and prescription.18

12. See Peter G. Shields & Curtis C. Harris, Molecular Epidemiology and the Genetics of
13. The major purposes of tort law are to: (1) provide a peaceful means for adjusting the rights
of parties who might otherwise “take the law into their own hands”; (2) deter wrongful conduct; (3)
encourage socially responsible behavior; and (4) compensate injured parties. David P. C. Ashton,
Comment, Decreasing the Risks Inherent in Claims for Increased Risk of Future Disease, 43 U.
Miami L. Rev. 1081, 1092 (1989) (citing William L. Prosser et al., Cases and Materials on Torts 1
(8th ed. 1988)).
15. See infra notes 101-121 and accompanying text.
17. Id. at 20.
18. See John C. Cummings, How Far Should Increased Risk Recovery Be Carried in the
A. Causation

The Restatement (Second) of Torts states that a plaintiff must establish the existence of an injury, along with other elements by a preponderance of the evidence. In a toxic tort increased risk case, proving that exposure to a toxic substance will proximately cause a disease by a preponderance of the evidence is almost impossible.

The traditional proximate cause inquiry is generally a two-step analysis. First, is the cause-in-fact or "but for" determination. The general hypothetical question, "but for the 'cause,' would the 'effect' have occurred," is usually asked to determine if the alleged cause is connected to the alleged effect. If this question is answered in the negative or if it is determined that the accident would have happened regardless of the alleged cause, then the entire analysis should terminate. This is because this question is a necessary predicate to our next determination, legal or proximate cause.

If the alleged cause is found to be a cause-in-fact, then a determination must be made to see if society ought to attribute liability to that particular cause-in-fact. This is the legal cause question, and is usually based on policy. An illustration of the differences between legal cause and cause-in-fact is the "chain of causal links" metaphor. A cause-in-fact is any link in the causal chain, and the legal cause is a link located close enough to the effect for legal purposes.

The primary difficulty in determining causation in toxic torts is the cause-in-fact analysis. Plaintiffs must prove that "but for" exposure to a particular hazardous substance, their particular disease would not have developed. Due to the current inchoate understanding of diseases and the lack of precise evidence,
"but for" causation is difficult to prove in toxic exposure cases. Nevertheless, plaintiffs attempt to draw the causal link by using epidemiological studies, and other scientific tools. For example, the rate of a certain type of cancer in a population not exposed to a hazardous substance generated by the defendant is 10 cases per 100,000. In addition, an epidemiological study shows that the population of which the plaintiff is a member has a cancer rate of 15 cases per 100,000 of the certain cancer, which is caused by the hazardous substance. Because the epidemiological evidence only shows an increase of 5 cases of cancer per 100,000, the plaintiff will have a difficult time in proving that the hazardous substance was a "but for" cause of his cancer. Needless to say, such an extension of the cause-in-fact analysis would severely attenuate the causal chain.

The reason courts use the "but for" standard of causation is to minimize the possibility of over or under-compensation. If a lesser standard is used, the

27. Ashton, supra note 13, at 1083-84. In toxic tort cases, plaintiffs and defendants can "rarely introduce 'particularistic' evidence which directly addresses the issue of causation in the individual case." Steve Gold, Note, Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence, 96 Yale L.J. 376, 384 (1986).

28. The purpose of an epidemiological study is to establish associations between alleged causes and effects by one of two methods: "either comparing the incidence of disease across exposed and unexposed populations, or comparing the incidence of exposure across sick and healthy populations." Gold, supra note 27, at 380. Other tools that scientists use to prove cause-in-fact are animal studies and tissue samples. Although animal studies are useful, they usually involve much higher doses of the substance over a shorter period of time, causing difficulties in extrapolating to low doses over prolonged periods. The question of extrapolation between species is also a problem. Daniel A. Farber, Toxic Causation, 71 Minn. L. Rev. 1219, 1228 (1987).


30. This particular epidemiological study only establishes a one-third probability that any given individual's cancer was caused by exposure to the defendant's hazardous substance. Id. at 754.

31. In an individual case, such as this example, "epidemiology cannot conclusively prove causation" for the future damage. It can only establish "a certain probability that a randomly selected case of disease was one that would not have occurred absent exposure." Gold, supra note 27, at 380. Furthermore, even in a class action, it is still difficult to prove that a particular substance caused a particular disease in a particular plaintiff by only using statistical evidence. Farber, supra note 28, at 1128.

32. Some courts in determining cause-in-fact have misused the "substantial factor" test. Black, supra note 22, at 9. For example, in Elam v. Alcolac, Inc., 765 S.W.2d 42 (Mo. Ct. App. 1988), cert. denied, 493 U.S. 817, 110 S. Ct. 69 (1989), the court used a "substantial factor" as the standard for cause-in-fact. In Elam, the plaintiffs were suffering a variety of ailments. Id. at 47. They sued for damages reportedly resulting from emissions from a plant. Id. In a misapplication of the law, the court of appeals, in affirming the trial court, said:

[A]lthough our law requires proof of cause to recover in tort, it does not require proof of a single cause. The substantial factor standard—which ascribes liability to a cause which has played an important part in the production of the harm, even though the harm may have occurred absent that cause—is particularly suited to injury from chronic exposure to toxic chemicals where the [subsequent manifestation of biological disease may be the result of a confluence of causes.
chances will increase that courts will hold defendants responsible who were not a cause of the damage, as well as award damages for injuries that may never develop. Furthermore, a lower standard has the potential to "open the floodgates" of litigation. As it now stands in almost all jurisdictions, if the "but for" standard of causation is not met in an increased risk of disease case, recovery will be denied. On the contrary, some commentators advocate that applying the "but for" standard to determine cause-in-fact in toxic tort cases is arbitrary because the evidence is merely based on scientific probabilities.

Id. at 174 (emphasis added). The court is partially correct in saying that a single cause does not need to be proved in a case; however, the correct standard of causation is "but for" not "substantial factor." See Black, supra note 22, at 9. The "substantial factor" test, as described in the Restatement, is usually only applied in situations where there are two causes, "either of which could have caused the event alone, and it cannot be determined which was the actual cause." Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474, 489 (Wa. 1983) (Brachtenbach, J., dissenting). See also Restatement (Second) of Torts § 323(a) (1965). For example, suppose two hunters fire their rifles simultaneously and negligently, and both bullets strike another person in the heart, each hunter could claim his shot caused no harm because the victim would have died anyway. Black, supra note 22, at 4. However, the Restatement guides us to ask, would either hunter's shot been fatal by itself; and, if the answer is "yes" then it could be said that either hunter was a cause-in-fact because his shot was a substantial factor in killing the person. Black, supra note 22, at 4-5. Therefore, the "but for" determination should not be abandoned, only modified to ask, "but for" the alleged cause itself, would the effect have occurred. Id. at 6. In the Elam case, the court skipped the "but for" determination, and jumped directly into the proximate cause question. The court should have applied a "but for" analysis to determine if the alleged causes were the cause-in-fact of the ailments, then determine if the single cause (i.e., the emissions from the plant) proximately caused the ailments. Nevertheless, another explanation for what the Elam court may have been doing is that it was making a policy determination of who should pay for the damages rather than determining liability. Black, supra note 22, at 10.

Some commentators have noted that the traditional standard of causation has been collapsed into the preponderance-of-the-evidence standard of persuasion in toxic tort cases. Gold, supra note 27, at 378. This new test of causation can be expressed by the question: "Does the factual probability of causation exceed 50%?" Id. The collapse of the cause-in-fact and burden of persuasion results in a loss of distinction between the two. Id.

33. Some commentators have noted that the traditional standard of causation has been collapsed into the preponderance-of-the-evidence standard of persuasion in toxic tort cases. Gold, supra note 27, at 378. This new test of causation can be expressed by the question: "Does the factual probability of causation exceed 50%?" Id. The collapse of the cause-in-fact and burden of persuasion results in a loss of distinction between the two. Id.

34. Ayers, 525 A.2d at 307-08.

35. There are several different standards of causation that jurisdictions currently use: reasonably certain, e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir.), reh'g and reh'g en banc denied, (1988) (applying Tenn. law); reasonably probable, e.g., Adams v. Johns-Manville Sales Corp., 783 F.2d 589 (5th Cir. 1986) (applying La. law); more probable than not, e.g., Hagerty v. L & L Marine Serv., Inc., 788 F.2d 315 (5th Cir.), modified on denial of reh'g en banc, 797 F.2d 256 (1986) (Jones Act); and others. See David C. Minneman, Annotation, Future Disease or Condition or Anxiety Relating Thereto, as Element of Recovery, 50 ALR 4th 13, §§ 43-48 (1986). Although the standards seem to differ, the majority appears to require that the plaintiff prove an increased risk greater than fifty percent. Ashton, supra note 13, at 1103. Because of the harshness of the "but for" test, some alternative tests have been established to prove cause-in-fact: substantial factor (see supra note 32), alternative liability (see Summers v. Tice, 199 P.2d 1 (Ca. 1948)), and market share liability (see Sindell v. Abbott Labs., 607 P.2d 924 (Ca.), cert. denied, 449 U.S. 912, 101 S. Ct. 285 (1980)).

36. Legum, supra note 8, at 568. "It is as if courts are finding that 40% of all tickets in a lottery are absolutely worthless while 60% of the tickets are worth the entire prize." Id. This shows the problem with the all-or-nothing rule of damages. If the plaintiff proves the alleged future damage
Two of the best known cases displaying the problems with causation are *Sterling v. Velsicol Chemical Corp.* and *Ayers v. Township of Jackson.* In *Sterling,* Velsicol deposited 300,000 fifty-five-gallon drums over the course of ten years, "containing ultrahazardous liquid chemical waste and hundreds of fiberboard cartons containing ultrahazardous dry chemical waste" in a landfill near the plaintiff's aquifer. This activity led to the pollution of the plaintiff's drinking wells. In the suit, the plaintiffs sought to recover, among other things, damages for the increased risk of developing cancer in the future as a result of consuming the polluted water.

The district court found that some of the plaintiffs had an increased risk of twenty-five to thirty percent that they would develop a disease. The court held the increased risk was enough to award damages. Nevertheless, the court of appeals stated that a twenty-five to thirty percent chance "does not constitute a reasonable medical certainty, but rather a mere possibility or speculation." Because Tennessee law requires that future harm must be proved by a reasonable medical certainty, recovery for the disease and the increased risk of the disease was denied, and the Sixth Circuit thus reversed on this issue.

In *Ayers,* the defendant was a township that owned and operated a landfill that polluted the plaintiff's aquifer. Increased risk of disease was one of the many causes of action averred by the plaintiffs. The testimony established that chemicals from the landfill posed potential harms to the plaintiffs. Furthermore, the defendant did not dispute the causal relationship between the plaintiffs' exposure and their increased risk. The township did contend, however, that "the probability that plaintiffs will actually become ill from their exposure to chemicals is too remote to warrant compensation under the principles of tort law." The court agreed with the defendant and did not allow recovery for future diseases.

In both *Sterling* and *Ayers,* it was undisputed that the plaintiffs had an increased risk of developing cancer in the future, but the courts denied recovery by the jurisdiction's standard of proof, then the damage will be treated as nonexistent. Ashton, supra note 13, at 1088. However, if the plaintiff fails to meet this standard, then the damage will be treated as nonexistent. *Id.* "Hence, depending upon whether one can satisfy the standard of proof, one recovers all or nothing." *Id.*

37. 855 F.2d 1188 (6th Cir.), reh'g and reh'g en banc denied, (1988).
40. The water was proven to contain carbon tetrachloride and chloroform; both known carcinogens. *Id.* at 1198.
42. *Id.* at 322.
43. *Sterling,* 855 F.2d at 1205.
44. See *Maryland Cas. Co. v. Young,* 362 S.W.2d 241 (Tenn. 1962).
46. The court did allow recovery for medical monitoring. *Id.* at 310. *See also infra* notes 101-121 and accompanying text.
because the causal links were too attenuated between the negligent conduct and the future disease.

B. Claim Preclusion and Prescription

In a traditional tort case, a plaintiff may only sue once for injuries arising from the same event. Thus, the plaintiff must sue for all of past, present, and future damages arising out of the same transaction or occurrence. If the plaintiff brings a second action arising out of the same transaction or occurrence as the first, the doctrine of res judicata will bar the second action because all of his rights against that defendant were merged into the first action.

In a latent injury case, several theories for recovery may be alleged, but the plaintiff must aver them all in one suit. For example, in the knife juggler hypothetical, suppose the bystander sues for the injuries arising out of the original injury, the initial "stick." After obtaining a judgment against the negligent juggler, the bystander continues to live without complications from the knife tip for several years. However, on an unfortunate day, the knife tip shifts, severing the bystander's spinal cord—causing paralysis. In this example, the single cause of action rule will preclude any claim the bystander has against the juggler for the paralysis, since both injuries (the "stick" and paralysis) arose out of the same transaction or occurrence.

The problems of the single-cause-of-action rule in a latent injury case are compounded with the application of prescriptive periods. For instance, in Albertson v. T.J. Stevenson & Co., the plaintiff was exposed to a toxic substance. When the exposure occurred, the plaintiff lost "consciousness, and experience[d] severe headaches." The exposure led to other severe mental damage years later. Because the plaintiff did not sue within the prescriptive period triggered by the loss of consciousness and headaches, his claim was barred. Furthermore, if the plaintiff in Albertson sued to recover for the headaches and loss of consciousness within the prescriptive period, then res judicata would bar a subsequent claim for damage arising out of the exposures, as in the knife juggler hypothetical above. Nonetheless, if the plaintiff sues for the increased risk within the prescriptive period, as well as the incidental claims, then he will encounter the causation problems in proving the increased risk beyond a preponderance of the evidence.

47. Restatement (Second) of Judgments § 24 (1982). See also Albertson v. T.J. Stevenson & Co., 749 F.2d 223 (5th Cir. 1984).
48. "One injured by the tort of another is entitled to recover damages from the other for all harm, past, present, and prospective, legally caused by the tort." Restatement (Second) of Torts § 910 (1977). This is known as the "single controversy rule" or the "rule of merger." See Ayers, 525 A.2d at 300; Restatement (Second) of Torts § 910 (1977).
50. 749 F.2d 223 (5th Cir. 1984).
51. Id. at 227.
The previous example is a great illustration of the "Catch 22" situation plaintiffs find themselves in when confronted with a latent disease or increased risk case. If a plaintiff waits until he develops a disease to sue, he or she may lose all of his or her causes of action because a traumatic event or other injury may have occurred during exposure that triggered prescription. However, because the plaintiff may only sue once for the same transaction or occurrence, if he or she sues within the prescriptive period for the incidental damages due to exposure, res judicata will bar a subsequent suit for a disease. Even an incidental nonphysical injury, such as cancerphobia, may be enough to trigger prescription. Thus, potential plaintiffs may lose their cause of action to prescription if they wait for the latent disease to develop.

III. JURISPRUDENTIAL ATTEMPTS TO SOLVE THE PROBLEMS WITH INCREASED RISK CASES

During the last decade, commentators, courts, and legislatures have attempted to develop solutions to the problems associated with applying increased risk in a traditional tort system using basic notions of cause-in-fact. In searching for solutions, two approaches have generally been followed. The first approach is a simple "tinkering" with the traditional tort rules, and the concession of certain specific exceptions for victims of latent injuries. These exceptions are known as the discovery rule and splitting the cause of action.

The second approach consists of redefining the injuries suffered by the victims of latent injuries. Although some commentators deem this approach to be radical in design, it attempts to solve the most difficult problem: causation. While they may have different labels, these theories can be generally categorized as the fear of future disease, medical monitoring, and increased risk as the harm itself. In some jurisdictions these approaches are combined.

A. The Discovery Rule

The discovery rule delays the commencement of prescriptive periods until the plaintiff discovers or should discover an injury. Due to the insidious

52. See infra note 79.
54. Ashton, supra note 13, at 1085.
nature of diseases resulting from exposure to hazardous substances, the discovery rule seems to be a solution to the uncertainty of whether or not the plaintiff will develop cancer. Ideally, the discovery rule will suspend the prescriptive period until the plaintiff knows or should know of the existence of a disease. Only then will the plaintiff be able to aver a cause of action.

In practice, the main problem with the discovery rule is determining when the plaintiff knew or should have known when an injury occurs to "trigger" prescription. If the injury is sub-cellular damage of chromosomes or DNA, and the plaintiff has knowledge of the exposure, then prescription begins to run at exposure; and the discovery rule will not suspend prescription. Moreover, if the exposure is accompanied by physical damage, once again, the discovery rule will not help to suspend prescription. If the "injury" occurs when the plaintiff develops the latent disease, then the discovery rule will work as intended.

There are, however, other problems with applying the discovery rule. Even though waiting for the disease to develop takes away the uncertainty of whether or not it will occur, it also creates a gap in time. This lapse in time may cause problems. First, not only are people surrounded by potential cancer-causing substances every day, but certain individuals may also have a genetic propensity toward developing disease. These facts, may "muddy the waters" of causation over time, leaving factfinders to guess whether it was the exposure to the toxic substance that caused the disease or something else. Second, evidence, such as witnesses' testimony and documents may be harder or impossible to obtain after a lengthy gap in time. Witnesses may either become unavailable, or when available may not remember. Last, many things could have occurred in this gap in time, including the possibility that a tortfeasor may have become bankrupt or died, leaving the plaintiff uncompensated.

59. Congress seemed to think so as well when it passed the Comprehensive Environmental Response, Compensation, and Liability Act. The act included a provision that tolled all state prescriptive periods whenever a victim is exposed to "any hazardous substance, or pollutant or contaminant, released into the environment from a facility" until "the plaintiff knew (or reasonably should have known)" of the injury. 42 U.S.C. § 9658 (1995).
60. See Brafford v. Susquehanna Corp., 586 F. Supp. 14 (D. Colo. 1984). In Brafford, the court discusses the difficulty in determining if sub-cellular injury is a present injury. Id. at 17-18.
61. As in Albertson v. T.J. Stevenson & Co., 749 F.2d 223 (5th Cir. 1984). See also Hagerty v. L & L Marine Serv., Inc., 788 F.2d 315 (5th Cir. 1986).
62. See Love, supra note 56, at 802-03.
64. See, e.g., Graham A. Colditz et. al., Risk Factors For Breast Cancer According to Family History of Breast Cancer, 88 J. Nat'l Cancer Inst. 365-71 (1996) (This study evinces a consistent increase in risk of breast cancer among women with a mother or sister history of the disease that was further exacerbated by first pregnancy.).
65. Love, supra note 56, at 803-04.
66. Id.
B. Splitting the Cause of Action

Many courts and legislatures have proposed or actually allowed a relaxation of the merger rule. This relaxation allows a plaintiff to have two independent actions arising out of the same transaction or occurrence, "one for the present injury and one that does not accrue until the latent disease occurs." The purpose of splitting the cause of action is simply to circumvent the problem of claim preclusion in latent disease cases in jurisdictions with the discovery rule. Courts allowing a plaintiff to split a cause of action have generally stated the "onset of cancer, its extent and the amount of damages are too speculative to be decided" in an increased risk case. Splitting a cause of action, in these courts' opinions, will allow a sense of certainty in calculating damages. Thus, splitting 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. The result is that the plaintiff would be able to recover fully for not only his past and present damages, but also future damages if and when they develop. For example, using the knife juggling hypothetical, the bystander will be able to sue for his current damages from the knife "stick" right away. Later, if the knife tip causes him any other problems, he can sue again, even though it arose out of the original incident.

Two cases that have used the split cause of action are Devlin v. Johns-Manville Corp. and Wilson v. Johns-Manville Corp. Because they were suffering from asbestosis, the plaintiffs in Devlin sought to recover damages for increased risk, fear of cancer, as well as other claims. Acknowledging that their experts could not state that they would develop cancer in the future by a reasonable medical probability, the plaintiffs conceded that they could not prevail on a claim for prospective cancer at this time. However, when discussing whether or not any subsequent claims for cancer would be precluded, the court, citing the Restatement (Second) of Judgments,73 reserved the right to allow the
plaintiff to sue for cancer at a later date, and noted, "[t]he simple fact is that at this time there is no cause of action presently existing either for the increased risk of cancer or for cancer itself."

Wilson involved a wrongful death action brought by a widow of an employee of an asbestos manufacturer. As an insulation worker for many years, Wilson was exposed to asbestos and asbestos products during his employment. In 1973, he was diagnosed with asbestosis. After this diagnosis, his health deteriorated due to his disease, which in turn ultimately lead to cancer and his subsequent death in 1978. The issue was whether an asbestos-related disease triggered prescription for all causes of action arising out of exposure. The defendants argued that the initial diagnosis of asbestosis triggered prescription on all potential diseases caused by the exposure to asbestos. Consequently, the defendants claimed that because the three-year prescriptive period had run, the survival action and wrongful death claims were prescribed. In an opinion written by then-Judge Ginsburg, the court held that prescription was not triggered for all causes of action arising out of the exposure. In brief, the court treated each distinct illness as a separate cause of action, allowing their potential actions caused by the same occurrence to be split. The court held, "[o]ur consideration of this appeal persuades us that a model or rule acceptable for more common personal injury actions may not be appropriate in latent disease cases."

Both the Devlin and Wilson courts looked at the policies of double recovery and judicial efficiency behind the single-cause-of-action rule in making their decision. The courts then balanced these policies with the plaintiff's right to compensation and the fact that causation in an increased risk claim is difficult to prove, and concluded that the policies behind the single-cause-of-action rule do not apply in latent disease cases.

There are, however, some problems with allowing a split cause of action. As with the discovery rule, the delay caused by the latent period of the disease would cause a gap in time. This gap, as with the discovery rule, will cause problems in proving causation, finding evidence, as well as the possibility that a defendant may have become judgment-proof.

C. Fear of Future Disease

The fear of future disease and cancerphobia are simply specific types of emotional distress or mental anguish actions arising out of exposure to toxic

Id. § 26.

74. Devlin, 495 A.2d at 502.
76. Id.
77. Devlin, 495 A.2d at 502; Wilson, 684 F.2d at 120.
78. See supra text accompanying notes 62-66.
Consequently, the development of fear of disease is similar to that of emotional distress. For example, with emotional distress claims, courts initially feared a flood of litigation because of the difficulty in determining if claims were genuine. Therefore, a physical impact or injury rule was adopted in order to curb fraudulent claims. Similarly, some courts recognizing fear of disease claims have also adopted a physical impact or injury rule as a prerequisite to recovery. However, like traditional emotional distress claims, courts are expanding the scope of impact or injury in fear of disease cases to the point of doing away with the prerequisite altogether or only requiring a de minimis showing.

Although the test for recovery of cancerphobia differs from jurisdiction to jurisdiction, the general elements are as follows: (1) the defendant's culpable conduct exposes the plaintiff to a disease-causing substance; (2) the plaintiff, in turn, suffers mental or emotional distress in the form of fear of disease; and (3) the plaintiff's distress is caused by the exposure to the disease-causing substance.

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79. Hagerty v. L & L Marine Serv., Inc., 788 F.2d 315, 318 (5th Cir. 1986). See also Wisner v. Illinois Cent. Gulf R.R., 537 So. 2d 740 (La. App. 1st Cir 1989). Although the elements needed to prove these actions are similar, there are distinctions between these two causes of action. Cancerphobia is a recognized illness, and expert medical testimony is needed to diagnose and prove its "existence, cause, and extent." Edward J. Schoen et al., Could Cancerphobia Become a New Plaintiffs' Medical Malpractice Gold Mine?, 12 No. 1 Health Span 8 at 9 (1995). On the other hand, fear of future disease is mental anguish that results from the increased risk that an injury may lead to disease in the future, and does not require expert testimony to establish. Id. "[T]he 'fear' aspect is not something beyond the common knowledge of jurors." Id. (citing Brian R. Graves, Emotional Distress Caused by Fear of Future Disease, 24 Am. Jur. Proof of Facts 3d § 3, at 285). Although the distinction is hazy, an illustration can be seen in the following cases. In Ferrara v. Galluchia, 5 N.Y.2d 16 (1958), the plaintiff succeeded by introducing expert testimony that she was suffering from a "phobic apprehension" that she would develop cancer from an exposure to radiation. In contrast, the plaintiff in Anderson v. Welding Testing Lab., Inc., 304 So. 2d 351 (La. 1974), also suffered radiation burns. However, the expert only confirmed the plaintiff had an increased risk of cancer, not that he had a fear of cancer. See also infra notes 123-149 and accompanying text. Despite the distinction, these terms will be treated as the same throughout this comment.


81. The seminal decision of the physical impact rule, Victorian Railways Comm'rs v. Coultas, 13 A.C. 222 (1888), denied alleged damage to the plaintiff's nervous system because there was not a physical injury claim as well.


83. See Fournier J. Gale & James L. Goyer, III, Recovery for Cancerphobia and Increased Risk of Cancer, 15 Cumb. L. Rev. 723 (1984). Fewer than 10 jurisdictions retain the physical impact rule as such. Id. at 725 n.20.

the plaintiff's fear is reasonable. Some jurisdictions include a physical impact requirement as the fourth element.

In the notable case of Potter v. Firestone Tire and Rubber Co., the California Supreme Court replaced the definition of "reasonableness" with a more-likely-than-not standard, which one commentator calls "balanced and workable." In Potter, Firestone deposited toxic waste at a landfill near the plaintiffs, which in turn exposed the plaintiffs to carcinogens for a long period of time. Although the plaintiffs did not have any physical effects from the exposure, each faced an unquantified increased risk of future disease. The test, as established by the court, is as follows:

[The plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not the plaintiff will develop cancer in the future due to the toxic exposure. Under this rule, a plaintiff must do more than simply establish a significant increased risk of cancer. The plaintiff must further show that based upon reliable medical or scientific opinion, the plaintiff harbors a serious fear.

In essence, the court did not look at the existence of a physical injury or impact to curb claims, it looked at whether the plaintiffs could prove they would actually develop cancer. This approach manages to strip all benefits from recognizing fear of cancer as an injury. Now a plaintiff in California must still face the difficult task of proving the defendant's conduct caused the latent disease, and cannot be afforded the opportunity to merely prove causation for the fear.

In support of the heightened criteria, the Potter majority set out several policy arguments in favor of the more-likely-than-not standard. First, the heightened criteria will curb the potential flood of litigation. Second, it will provide adequate compensation for those plaintiffs who actually develop cancer, thus lowering the chances of overcompensation. Third, it establishes a sufficient and definite threshold for recovery. Last, it will "limit the class of potential plaintiffs if emotional injury absent physical harm is to continue to be

85. Schoen, supra note 79, at 10.
86. Id.
88. Fisher, supra note 84, at 1072.
89. Potter, 863 P.2d at 801.
90. Id. at 816.
91. Love, supra note 56, at 808.
92. The major benefit of fear of cancer is that a plaintiff must only prove causation between the defendant's negligent conduct and the plaintiff's fear, not the probability of future disease—as in a traditional tort claim. See supra notes 19-46 and accompanying text.
94. Id.
95. Id. at 813.
a recoverable item of damages in a negligence action.\textsuperscript{96} Although the court has listed the reasons for a heightened standard for fear of cancer, forcing plaintiffs to prove something other than their fear to be allowed damages for the fear is illogical. It is as if the court is saying that a person must show the snake bite in order to prove they were afraid of the snake.

Even though the \textit{Potter} court's apprehension is justified, forcing plaintiffs into an impossible standard is not a reasonable way to curb fraudulent claims.\textsuperscript{97} As in other jurisdictions, the court should have implemented a physical impact or injury requirement\textsuperscript{98} and/or required an unquantified increased risk of disease\textsuperscript{99} to impede a potential flood of claims.\textsuperscript{100}

\section*{D. Medical Monitoring}

Medical monitoring as a cause of action in a toxic tort case is a claim for damages based on the cost of periodic medical examinations to detect latent diseases caused by exposure to toxic substances.\textsuperscript{101} The main purposes of the tort\textsuperscript{102} are to allow early detection of disease and to mitigate future damage.\textsuperscript{103} To succeed in a medical monitoring action, plaintiffs must prove by the

\begin{itemize}
\item \textsuperscript{96} Id.
\item \textsuperscript{97} In the recent case of \textit{Metro-North Commuter R.R. Co. v. Buckley}, 117 S. Ct. 2113 (1997), the Supreme Court denied damages for negligent infliction of emotional distress in an asbestos exposure case under the Federal Employers' Liability Act (FELA). While employed as a pipefitter by the railroad, Buckley was exposed to insulation dust containing asbestos for over three years. After attending an asbestos "awareness class," Buckley feared he would develop cancer as a result of his exposure. Furthermore, experts testified that Buckley had an increased risk of 1\% to 5\% that he would develop cancer. \textit{Id.} at 2116.
\item In an opinion written by Justice Breyer, the Court denied recovery holding that the physical impact requirement was not satisfied by the mere exposure to a "substance that might cause a disease at a substantially later time." \textit{Id.} at 2117. Relying on policy reasons similar to the \textit{Potter} court, the Court declined to expand the definition of "physical impact" without an accompanying injury. \textit{Id.} at 2119.
\item In a separate opinion by Justice Ginsburg, she said that Buckley's negligent infliction claim should have failed because he "did not present objective evidence of severe emotional distress." \textit{Id.} at 2124.
\item Essentially, she disagreed with the majority's blanket dismissal of negligent infliction damages for asbestos exposure claims by excluding exposure from the definition of physical impact.
\item \textsuperscript{98} See supra notes 81-84 and accompanying text.
\item Love, supra note 56, at 808.
\item \textsuperscript{100} See supra note 56, at 808.
\item \textsuperscript{101} See Miranda v. Shell Oil Co., 15 Cal. Rptr. 2d 569 (Cal. App. 5th 1993).
\item \textsuperscript{102} Most jurisdictions that recognize medical monitoring in toxic tort cases treat it as independent harm. Allen T. Slagel, Note, \textit{Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims}, 63 Ind. L.J. 849, 863 (1988). Other courts, however, have allowed damages for future medical expenses and/or monitoring as an element of damages. See, e.g., Hagerty v. L & L Marine Serv., Inc., 788 F.2d 315, 319 (5th Cir. 1986).
\end{itemize}
jurisdiction's standard of causation\textsuperscript{104} that the exposure to toxic substances caused the need for medical monitoring.\textsuperscript{105}

Although it varies from case to case, courts look at the following elements to determine whether or not to award medical monitoring damages: (1) the significance of the plaintiff's exposure; (2) whether the exposure was to a proven hazardous substance; (3) whether the plaintiff has an increased risk of a disease; (4) the seriousness of the disease; and (5) the value of early detection and treatment of the disease.\textsuperscript{106} Although courts may apply similar elements, the standards used in applying them fluctuate. For example, in Ayers, the court held that an "unquantified" increased risk of disease was enough to award damages,\textsuperscript{107} but in Hansen, the standard for an increased risk of a disease was a "probability of actually" developing the disease.\textsuperscript{108}

Furthermore, as in fear of cancer cases, some courts have rejected the notion that the plaintiff must suffer from an actual present physical injury as a prerequisite to recover for medical monitoring.\textsuperscript{109} One reason why these courts do not require a present physical injury is because they view the injury as an invasion of the right not to undergo medical monitoring.\textsuperscript{110} To illustrate, in Friends for All Children v. Lockheed Aircraft Corp.,\textsuperscript{111} the court posed the following hypothetical to explain the medical monitoring tort:

Jones is knocked down by a motorbike when Smith is riding through a red light. Jones lands on his head with some force. . . . Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith . . . for . . . the substantial cost of the diagnostic examinations. . . . The motorbike rider, through his negligence, caused the plaintiff, in the opinion of medical experts, to need specific medical services . . . .\textsuperscript{112}

\textsuperscript{104} Several standards have been used. See, e.g., In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 850 (3rd Cir. 1990) ("probably necessary"); Ayers v. Township of Jackson, 525 A.2d 287, 312 (N.J. 1987) ("medically necessary"); and Miranda, 15 Cal. Rptr. 2d at 573 ("reasonable medical certainty").

\textsuperscript{105} In re Paoli R.R., 916 F.2d at 850.

\textsuperscript{106} See Miranda, 15 Cal. Rptr. 2d at 572; In re Paoli R.R., 916 F.2d at 850; Ayers, 525 A.2d at 312; and Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993).

\textsuperscript{107} Ayers, 525 A.2d at 313.

\textsuperscript{108} Hansen, 858 P.2d at 979.

\textsuperscript{109} See In re Paoli R.R., 916 F.2d at 851; Ayers, 525 A.2d at 312-13; Redland Soccer Club, Inc. v. Department of the Army, 55 F.3d 827, 846 (3d Cir. 1995); and Day v. NLO, 851 F. Supp. 869, 880 (W.D. Ohio 1994).

\textsuperscript{110} Other reasons why courts do not require a present injury are varied. For example, in Burns v. Jaquays Mining Corp., 752 F.2d 28, 31 (Ariz. Ct. App. 1987), the court simply followed a medical expert's advice to award medical monitoring damages.

\textsuperscript{111} 746 F.2d 816 (D.C. Cir. 1984).

\textsuperscript{112} Id. at 825.
In other words, “but for” the defendant’s negligent conduct, the plaintiff would not have incurred these medical expenses. 113

There are, nevertheless, jurisdictions that still require a present physical injury before a plaintiff may recover for medical monitoring. For example, in Ball v. Joy Technologies, Inc., 114 a federal court applying West Virginia and Virginia state law rejected a claim for medical monitoring damages because the plaintiffs did not prove that they were suffering from a present injury, and the court held that toxic exposure alone is not a physical injury. 115

Despite the variations on the different tests or standards between the jurisdictions used to determine if medical monitoring damages are required, the medical monitoring tort has become increasingly common in toxic tort cases. 116 This method of compensation has become popular because it “does not require courts to speculate about the probability of future injury.” 117 Courts must only determine the probability of the need for medical supervision. 118

Another benefit of medical monitoring is that it satisfies a number of public policy considerations. First, because this theory may provide a substantial remedy to the consequences of the plaintiffs’ exposure, it will have the “beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to the responsible parties.” 119 Second, due to the difficulty of proving liability since the disease does not manifest until years after exposure, medical monitoring damages will serve a badly-needed deterrence to polluters. 120 Third, compensation for reasonable medical expenses is “consistent with the important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease.” 121

E. Increased Risk as the Harm

Another alternative for recovery of an increased risk of disease is to allow recovery for the increased risk itself. By treating the increased risk as an independent legal harm, damages are based on the notion that the defendant has

114. 958 F.2d 36 (4th Cir. 1991).
115. In another case, Thomas v. FAG Berings Corp., 846 F. Supp. 1400 (W.D. Mo. 1994), the federal district court applying Missouri state law also rejected a medical monitoring claim due to a lack of present injury. Citing Ball v. Joy Technologies, Inc., 958 F.2d 36 (4th Cir. 1991), the court held that a prerequisite for recovery of future damages is an actual present physical injury. Id. at 1410.
118. Id.
120. Id. at 311.
121. Id.
injured the plaintiff by merely increasing his or her risk to develop a disease.\textsuperscript{122} Therefore, the plaintiff must only prove that the exposure increased his or her risk of disease, not that a disease will more likely than not develop in the future.

In practice, courts have not allowed recovery for increased risk as such in the toxic tort arena. Instead, the courts that have recognized an increased risk of disease have done so only as an element of damages when applying the traditional standard, and not recognized it as an independent harm.\textsuperscript{123} For example, in \textit{Gideon v. Johns-Manville},\textsuperscript{124} the court allowed recovery for an increased risk; however, this award was predicated on the facts that the plaintiff suffered from asbestosis and an expert stated "[the plaintiff] will die of asbestos disease, there's no doubt about it."\textsuperscript{125} Thus, the plaintiff proved beyond the jurisdiction's standard on the burden of persuasion that the ultimate harm, "asbestos disease," will occur. As in \textit{Gideon}, most jurisdictions that recognize increased risk damages require the victim to prove that he has suffered a physical injury and the future disease is "reasonably certain" or "reasonably probable" to occur.\textsuperscript{126} Nonetheless, as noted previously,\textsuperscript{127} the application of traditional tort principles to increased risk of disease cases is "nothing but a phantom remedy," due to the "current inchoate understanding of cancer and other . . . diseases."\textsuperscript{128}

A line of cases in which the courts have begun to allow recovery for increased risk is the "lost chance of survival" medical malpractice cases.\textsuperscript{129} In a lost chance case, the defendant, usually a doctor or hospital, is held liable if his or her negligence contributed to the death of a patient; i.e., increased the risk of death.\textsuperscript{130} The reasons behind awarding these types of damages in malpractice cases results from the fact that negligent physicians were being absolved from liability when a patient's original chance of survival was less than fifty percent,\textsuperscript{131} and the difficulty in proving what actually caused the plaintiff's injury, death, by a preponderance of the evidence.\textsuperscript{132}

\begin{footnotes}
\item 122. Legum, \textit{supra} note 8, at 576.
\item 123. These increased risk cases are usually accompanied by a physical injury. See Petriello \textit{v. Kalman}, 576 A.2d 474 (Conn. 1990); DeBurkarte \textit{v. Louvar}, 393 N.W.2d 131 (Iowa 1986); and Wollen \textit{v. DePaul Health Ctr.}, 828 S.W.2d 681 (Mo. 1992).
\item 124. 761 F.2d 1129 (5th Cir. 1985).
\item 125. \textit{id.} at 1138.
\item 126. Ashton, \textit{supra} note 13, at 1083.
\item 127. \textit{See supra} text accompanying note 27.
\item 128. Ashton, \textit{supra} note 13, at 1084.
\item 131. \textit{See Wollen v. DePaul Health Ctr.}, 828 S.W.2d 681 (Mo. 1992).
\end{footnotes}
In both a lost chance of survival action and an increased risk of disease action, the damage is the chance that a future event will occur. In a lost chance claim, the event is survival; in an increased risk claim, the event is developing a disease. Therefore, the damages should be based on how much the chance has increased or decreased, not the ultimate harm that might be caused by the negligence. This is because the interest that is being protected in both cases is the freedom from the increased or decreased risk or chance.

Even though these actions are basically the same, there are some justifications why lost chance should not be extended to increased risk of disease. One reason is that plaintiffs can typically only recover for a lost chance when the damage has occurred; i.e., he or she has died. Additionally, courts have argued that there are added public policy arguments for recognizing lost chance in medical malpractice cases. First, is the protection of the sanctity of the doctor/patient relationship. Second, if doctors are allowed to escape claims due to a “statistically irrefutable loss,” then the deterrence function will be reduced. Last, the difficulty in proving causation in medical malpractice cases allows negligent health care providers to evade liability. Because of these policy reasons, some courts have limited the recovery of increased risk to only medical malpractice cases, thus refusing to expand the theory to toxic torts or other negligence actions.

Nevertheless, there are similar public policy arguments in favor of extending the logic of the “lost chance” cause of action to increased risk of disease actions. First, due to the fact that federal and state regulation alone cannot adequately deter companies from polluting or exposing the public to hazardous substances, an added tort liability will work in favor of deterring polluters. Second, allowing a recovery before the disease manifests itself will aid victims in jurisdictions without a discovery rule, as well as those victims in a jurisdiction with a discovery rule but the prescription period has begun due to a triggering event, by allowing recovery for damages before the prescriptive period has run. Third, if the plaintiff’s increased risk of disease is proven to the extent that he should be awarded medical monitoring damages, he should also be compensated for this increase. Last, as noted previously, it is very difficult to prove “but for” causation in a latent disease case, even if polluters were clearly negligent.

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133. In other words, lost chance of survival is the same as increased risk of death.
134. This is not always the case. In Claudet v. Weyrich, 662 So. 2d 131 (La. App. 4th Cir. 1995), the plaintiff was allowed to recover for a lost chance even though she did not die. See infra notes 222-224 and accompanying text.
136. Id.
137. Id. at 1028.
139. Id.
140. Love, supra note 56, at 801.
141. See supra text accompanying notes 19-46.
Recognizing the increased risk as the injury will alleviate many of the causation difficulties.

There are, of course, problems with treating an increased risk of disease as an independent legal harm. Foremost, is the uncertainty of damages. In Ayers, Justice Handler addresses the uncertainty of damages issue in his dissenting opinion. He said:

There are relatively few injuries that can be easily or logically quantified. It is not merely the relatively new tort claims like "pain and suffering" and "emotional distress" that are difficult to quantify. What is the logical method of evaluation for compensating a claim of trespass on land, the battery of unconsented-to surgery, a violation of personal privacy, or an insult to character?1

The majority points out, however, that although what Handler said is true, "such damages are awarded on the basis of events that have occurred and can be proved at the time of trial.... [An] enhanced risk claim depends upon the likelihood of an event that has not yet occurred." Nevertheless, the majority is incorrect when it states that the "event... has not yet occurred." The event has occurred. The plaintiff's increased risk began at the initial exposure to the toxic substance and continues throughout his or her life. Therefore, the fact that the disease may or may not actually occur in the future is relatively unimportant; the important fact is whether the plaintiff has an increased risk to develop a disease in the future.

Another argument against allowing recovery for an increased risk of disease is that it will open the "floodgates" of litigation. Because of the costs associated with expert testimony, which is needed to prove causation, increased risk cases are expensive to litigate. Thus, the expense of litigation may be enough to curb fallacious claims. Besides, a defendant whose risk was not significantly increased would have little incentive to bear the costs of litigation when recovery would be modest at best. At any rate, courts "should not allow speculative fears or undifferentiated anxiety over a possible rush of litigation to defeat a sound and fair cause of action."1

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143. Id. at 320.
144. Id. at 308.
145. Id.
146. Id. at 307.
148. Schmauder, supra note 147, at 930.
IV. THE PREVALENCE OF DISEASE IN LOUISIANA

In Louisiana, approximately thirty percent of the population will develop cancer at some time in their lives. This rate exceeds not only the southern averages, but also the national averages. Although the origins of the disease may vary from person to person, there is evidence that shows that certain chemicals, such as chlorinated compounds, may be the source of these and other health effects in humans. Taking this into account, the companies that produce these chemicals should have the duty to exercise due care when using or producing these toxic substances.

As mentioned before, one way to ensure companies exercise due care in handling these chemicals is to allow recovery to plaintiffs harmed by exposure to these chemicals. Whether it be for medical costs to detect diseases early or some other potential liability, the effect will encourage companies to exercise the appropriate levels of care.

V. LOUISIANA’S ATTEMPTS AT SOLVING THE PROBLEMS WITH INCREASED RISK

A. The Discovery Rule

In Louisiana, prescription in tort cases is governed by Louisiana Civil Code article 3492. The article states that prescription in delictual actions “commences to run from the day injury or damage is sustained.” Although a clear reading of the article may not seem to allow for a discovery rule, the doctrine of contra non valentem agere nulla currit praescriptio was jurisprudentially adopted by the Louisiana Supreme Court. Roughly translated, contra non means that prescription does not run against a party who is unable to act.

There are several different categories of contra non that will suspend the running of prescription. The category that is similar to the discovery rule is that prescription is suspended because the cause of action is not “known or reasonably knowable” by the plaintiff. However, this category of the doctrine will not suspend prescription if the plaintiff’s ignorance is “attributable to his own
willfulness or neglect." Thus, the application of this doctrine leads to the same results as the discovery rule would.

B. Splitting the Split Cause of Action

In 1990, the Louisiana Legislature passed Senate Bill 639 that provided not only for the expansion of the general res judicata rules, but also for some limited exceptions. The act added Louisiana Code of Civil Procedure article 425 and amended Louisiana Revised Statutes 13:4231 to provide that when a "second action asserts a cause of action which arises out of the transaction or occurrence which is the subject matter of the first action," the second action will be barred. Before the changes, "a second action would be barred by the defense of res judicata only when the plaintiff seeks the same relief based on the same cause or grounds." The reasoning behind the change was to promote "judicial economy and fairness."

The act also added Louisiana Revised Statutes 13:4232 which allows for some exceptions to the general rules found in Louisiana Code of Civil Procedure article 425 and Louisiana Revised Statutes 13:4231. Louisiana Revised Statutes 13:4232 states:

A judgment does not bar another action by the plaintiff:

1. When exceptional circumstances justify relief from the res judicata effect of the judgment;
2. When the judgment dismissed the first action without prejudice; or
3. When the judgment reserved the right of the plaintiff to bring another action.

156. Id.
158. La. R.S. 13:4231 (1991) states:

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

1. If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged into the judgment;
2. If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action;
3. A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

160. Id.
161. Id.
The comment to the act states:

[The act] gives the court the authority to reserve in the judgment the right of the plaintiff to bring a subsequent action. . . . It could . . . be useful in cases where the plaintiff may be unsure whether he will suffer future injuries from the event which he is presently litigating, e.g., risk of contracting cancer from exposure to asbestos. 162

This comment evinces the legislature’s intent to allow plaintiffs to split a cause of action in an increased risk case with authority from the court.

C. Fear of Future Disease

The seminal case for recognizing fear of cancer or disease in Louisiana is Anderson v. Welding Testing Laboratory, Inc. 163 In the case, Mr. Anderson suffered radiation burns from handling a radioactive “pill” negligently left on his premises by the defendant. 164 Included in his litany of claims was a prayer for “anxiety and mental anguish” for the possibility of cancer. 165 A doctor testified that cancer may result from this occurrence, but this was not too “probable because plaintiff did not have repeated exposures.” 166 In allowing damages for anxiety and mental anguish, the court stated:

While to a scientist in his ivory tower the possibility of cancerous growth may be so minimal as to be untroubling, we are not prepared to hold that the trier of fact erred in finding compensable this real possibility to this worrying workman, faced every minute of his life with a disabled and sometimes painful hand to remind him of his fear. 167

Although the Anderson court recognized the cause of action, it did not establish any workable standard for allowing recovery for fear of disease or cancer. A workable standard for allowing recovery was not established until Hagerty v. L & L Marine Service, Inc. 168 Despite that this was a Jones Act case, several cases applying Louisiana law have cited Hagerty with approval. 169 In Hagerty, the plaintiff was “completely drenched with dripoline, a chemical containing benzene . . .” on one occasion and “sprayed again” on another. 170 “[H]e suffered a brief period of dizziness, followed by leg cramps until he

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162. Id.
163. 304 So. 2d 351 (La. 1974).
164. Id. at 352.
165. Id. at 353.
166. Id.
167. Id.
168. 788 F.2d 315 (5th Cir. 1986).
169. See cases cited in infra note 175.
170. Hagerty, 788 F.2d at 317.
obtained his shower."\footnote{Id.} Hagerty sued for increased risk of cancer, fear of cancer, as well as other causes of action.

In setting out the elements for fear of cancer, the court thoroughly discussed the physical injury requirement. Even though the court recognized that the purpose of the physical injury rule is to curb fraudulent claims, it said that the notion was "unrealistic," and that a plaintiff can recover for fear of cancer with or without a physical injury.\footnote{Id. at 256.} This portion of the opinion, however, was modified on rehearing to require an actionable injury before averring a fear of cancer claim.\footnote{Id. at 318. See also Easson v. Velsicol Chem. Corp., No. 89-0188, 1991 WL 168640 (E.D. La. July 16, 1991).} Therefore, the elements as established by Hagerty are: (1) a fear that is causally related to the defendant's negligence; (2) a fear that is reasonable; and (3) an actionable injury.\footnote{652 So. 2d 859, 853 (5th Cir. 1988) (citing Hagerty v. L & L Marine Serv., Inc., 788 F.2d 315 (5th Cir. 1986) with approval); Coffin v. Board of Supervisors of LSU, 620 So. 2d 1354, 1364 (La. App. 2d Cir. 1993) (citing Hagerty with approval); Johnson v. Armstrong Cork Co., 645 F. Supp. 746, 749 (W.D. La. 1986) (citing Hagerty with approval); Wisner v. Illinois Cent. Gulf R.R., 537 So. 2d 740 (La. App. 1st Cir. 1988) (citing Anderson and allowed increased risk testimony to prove reasonableness of fear); Adams v. Johns-Manville Sales Corp., 783 F.2d 588, 593 (5th Cir. 1986) (citing Anderson and requiring a physical injury); and Harper v. Illinois Cent. Gulf R.R., 808 F.2d 1139, 1141 (5th Cir. 1987) (citing Adams as requiring a physical injury).} Since Hagerty, it seems that these elements are what courts follow in toxic tort medical monitoring cases in Louisiana today.\footnote{Id. at 1023.}

\section*{D. Medical Monitoring}

Unlike fear of cancer, the Louisiana Supreme Court has been silent on the issue of medical monitoring. Moreover, even though there are few lower court opinions discussing the issue, these opinions merely gloss over the topic. In Jeffery v. Thibaut Oil Co.,\footnote{Id. at 318.} the plaintiff sued for damages after being doused with gasoline. While pumping gas, the hose broke spraying it into the plaintiff's eyes.\footnote{Id. at 256.} The trial court ruled in favor of the plaintiff, and the defendants appealed the court's award of future medical expenses and loss of future earnings.

In allowing the trial verdict to stand, the court of appeal stated that the plaintiff "has a high probability of developing a serious physical disease in the future . . . [which] will require medical treatment."\footnote{Id. at 1022.} The court based its finding on the testimony of the plaintiff's experts that stated "gasoline exposure creates a greater risk of cancer since Benzene is one of its components and has been linked to leukemia."\footnote{Id. at 1023.} Thus, the court allowed recovery for future medical expenses based on the expert testimony on the increased risk of cancer.

\footnotesize

\begin{itemize}
  \item \footnote{Id. at 318. See also Easson v. Velsicol Chem. Corp., No. 89-0188, 1991 WL 168640 (E.D. La. July 16, 1991).}
  \item \footnote{Id. at 256.}
  \item \footnote{Id. at 318. See also Easson v. Velsicol Chem. Corp., No. 89-0188, 1991 WL 168640 (E.D. La. July 16, 1991).}
  \item \footnote{Id. at 318.
  \item \footnote{Id. at 256.}
  \item \footnote{Id. at 318. See also Easson v. Velsicol Chem. Corp., No. 89-0188, 1991 WL 168640 (E.D. La. July 16, 1991).}
  \item \footnote{Id. at 256.}
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  \item \footnote{Id. at 256.}
  \item \footnote{Id. at 318. See also Easson v. Velsicol Chem. Corp., No. 89-0188, 1991 WL 168640 (E.D. La. July 16, 1991).}
  \item \footnote{Id. at 256.}
  \item \footnote{Id. at 318. See also Easson v. Velsicol Chem. Corp., No. 89-0188, 1991 WL 168640 (E.D. La. July 16, 1991).}
  \item \footnote{Id. at 256.}
  \item \footnote{Id. at 318. See also Easson v. Velsicol Chem. Corp., No. 89-0188, 1991 WL 168640 (E.D. La. July 16, 1991).}
  \item \footnote{Id. at 256.}
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  \item \footnote{Id. at 256.}
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  \item \footnote{Id. at 256.}
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  \item \footnote{Id. at 256.}
  \item \footnote{Id. at 318. See also Easson v. Velsicol Chem. Corp., No. 89-0188, 1991 WL 168640 (E.D. La. July 16, 1991).}
Another case, Manuel v. Shell Oil Co.,\textsuperscript{180} is similar to Jeffery with a similar result. The plaintiff in Manuel was also exposed to a substance with benzene, and the trial court allowed recovery for "Future Medical Monitoring."\textsuperscript{181} The court of appeal found "that the trial judge was not manifestly erroneous in relying on the testimony of plaintiff's experts"\textsuperscript{182} who testified to the effect that the "plaintiff must be monitored regularly"\textsuperscript{183} for cancer.

Even though these cases recognize that medical monitoring damages can be awarded, it is unclear if they stand for the fact that medical monitoring is an independent legal harm or merely an element of damages. In both cases, it seems that the courts only followed the experts' testimonial advice in allowing the damages.

Like the state courts, Hagerty also allowed future medical expenses without much of an analysis. The court stated, "[a] plaintiff ordinarily may recover reasonable medical expenses, past and future, which he incurs as a result of a demonstrated injury."\textsuperscript{184} The injury in this case was dizziness and leg cramps. In Johnson v. Armstrong Cork Co.,\textsuperscript{185} the federal district court said that medical monitoring damages are recoverable, but once again, did not articulate any definite standard for recovery. Quoting Hagerty, the court stated if the damages are "medically advisable," then they can be recovered.\textsuperscript{186}

Although the case law on this issue is unclear, the courts apparently allow recovery if the plaintiff can sufficiently prove that he or she has an increased risk of cancer along with a present physical injury, as done in the Hagerty court.\textsuperscript{187} Therefore, as long as a plaintiff has a physical injury and can prove an increased risk—not that the disease will develop in the future—then some type of medical monitoring damages should be awarded.

\textbf{E. Increased Risk as the Harm}

Unfortunately, as with medical monitoring, the Louisiana Supreme Court has been silent on the issue of increased risk of disease. Even when confronted with a certification of the issue from the United States Fifth Circuit,\textsuperscript{188} the supreme court denied certification.\textsuperscript{189}

\begin{itemize}
\item \textsuperscript{180} 664 So. 2d 470 (La. App. 5th Cir. 1995).
\item \textsuperscript{181} Id. at 473.
\item \textsuperscript{182} Id. at 483.
\item \textsuperscript{183} Id. at 479.
\item \textsuperscript{184} Hagerty v. L & I. Marine Serv., Inc., 788 F.2d 315, 319 (5th Cir. 1986).
\item \textsuperscript{185} 645 F. Supp. 764 (W.D. La. 1986).
\item \textsuperscript{186} Id. at 769.
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Adams v. Johns-Manville Sales Corp., 756 F.2d 1068, 1069 (5th Cir. 1985). The question certified was: "Whether Louisiana law permits a plaintiff in a products liability action to recover damages for an increased risk of contracting cancer in the future in the absence of any evidence that the plaintiff currently has cancer or, within reasonable medical probability, will contract cancer in the future."
\item \textsuperscript{189} Adams v. Johns-Manville Sales Corp., 467 So. 2d 529 (La. 1985).
\end{itemize}
One of the first Louisiana cases dealing with increased risk of damage is Bartholomew v. Impastato. In the case, a child fell due to a damaged balustrade, suffering severe injuries to the head. Two doctors testified that the child "might develop" convulsions in the future. The court stated that the future injuries were too speculative to warrant damages for future injuries.

Afeman v. Insurance Co. of North America, is another case in which a plaintiff was trying to prove his increased risk would lead to damage. In Afeman, the plaintiff fell through a ceiling and broke his wrists. A portion of his claim for damages was the possibility that he may develop arthritis due to the damage to his wrists. The court denied the claim stating, "[a]wards should not be given based upon speculation that a fifty-one year old man may develop arthritis in later years."

In Berry v. City of Monroe, the plaintiff was injured while running through a nocturnal exhibit at the zoo when she collided with a support column damaging her left eye and surrounding soft tissue. Months after the incident, she suffered epileptic seizures caused by the collision, which were treated by medication. Although she did not suffer any more seizures after beginning the medication treatment, she prayed for recovery based on the possibility of future seizures. The court said, "mere speculation of such an event cannot provide the basis for an award."

These decisions evince the basic principle that recovery for future damage in Louisiana will not be allowed unless the future damage is proved by a preponderance of the evidence.

Horton v. Valley Electric Membership Corp. was one of the first cases in which the plaintiff attempted to stretch the theory from increased risk of damage from disease. When Horton was lifting his metal deer stand out of his truck, it came into contact with the defendant's power lines, causing damages which included a third degree burn on the plaintiff's left foot. The court stated, "plaintiff has some increased risk of skin cancer at the graft site." Although the opinion is unclear on the issue, the court apparently included the increased risk of cancer when calculating the general damages.

In Wisner v. Illinois Central Gulf Railroad, the first circuit was confronted with the issue of whether to allow recovery for the increased risk of cancer. In Wisner, the defendant complained that the trial court erred in
allowing testimony of increased risk of cancer. The court of appeal stated, "the evidence of increased risk of cancer is relevant to the issue of ... fear of cancer." The court went on to explain:

The defendant further complains that the prejudicial effect of allowing the testimony could have been reduced by the following jury instruction: "Louisiana law does not allow recovery for an increased risk of cancer. Should plaintiff contract cancer at a later date he will be able to recover at that time if he can prove that cancer was caused by the defendant's conduct." • • •

The instruction given by the trial court is as follows: "[I]ike other parts of the plaintiff's case, these damages must be established by a preponderance of the evidence. This means, on the one hand, that you're not entitled to award speculative damages for the injuries which you think the plaintiff might have suffered, or might suffer in the future."

This court is of the opinion the instruction given by the trial court adequately reflects the law. However, even were this court to conclude the defendant's instruction should have been given, we do not believe the error would justify a trial de novo . . .

Many inferences can be made from the court's language. One could conclude that: (1) Louisiana does not allow recovery for an increased risk; (2) Louisiana is identical to many other jurisdictions that do not allow future damages unless they can be proved by a preponderance of the evidence; or (3) Louisiana allows splitting a cause of action.

The United States Court of Appeals for the Fifth Circuit has also encountered cases dealing with increased risk of disease in which Louisiana law was to be applied. In Adams v. Johns-Manville Sales Corp., the plaintiff sought to recover for increased risk of cancer and fear of developing cancer due to the exposure to asbestos manufactured by the defendant. On rehearing, the court denied recovery because Adams did not present sufficient evidence that he had cancer or would develop cancer within a reasonable probability. In excluding Adams’ expert testimony on his increased risk, the trial court stated:

Plaintiff Adams does not now have cancer and by whatever definition plaintiff wishes to use, any reference that he may or might have cancer in the future is only a possibility. There can be no causal link with an injury when that injury hasn't yet occurred so . . . I stand by the ruling

200. Id. at 748. An increased risk of cancer tends to show the reasonableness of the plaintiff's fear of cancer.
201. Id. at 749.
202. 727 F.2d 533 (5th Cir. 1984).
I made at the pretrial conference that no evidence regarding cancer will be submitted to this jury... 204

On appeal Adams' proffer consisted of "abstract statistics and generalizations," which the court of appeals held to be insufficient "to demonstrate that the decision of the trial court to exclude evidence of cancer was an abuse of discretion," as well as insufficient in proving that "he suffered any percentage of disablement from inhalation of asbestos fibers which would establish the probable risk of cancer." 205

In addressing the issue of increased risk in Hagerty, the Fifth Circuit held: "[w]e conclude that a plaintiff can recover only where he can show that the toxic exposure more probably than not will lead to cancer." 206 Because he did not allege that he will probably develop cancer in the future, the court denied the claim for recovery for an increased risk.

Smith v. A. C. & S. Inc. 207 was an asbestos case in which the plaintiff was seeking recovery for cancerphobia. In discussing the burden of proof of establishing a cancerphobia cause of action, the court said:

It is important to note that a plaintiff, to recover for fear of cancer, need not prove that his toxic exposure will more probably than not lead to cancer. This is the burden of proof which a plaintiff must satisfy to recover for the increased risk of cancer. 208

These federal court cases seem to agree with the state courts' ruling on the questions of proof—the plaintiff must prove the chance of the future ailment by a preponderance of the evidence.

As opposed to increased risk of disease, a line of cases that the Louisiana Supreme Court has developed is the "lost chance" of survival cases. 209 Louisiana is one of many jurisdictions that has allowed recovery for "lost chance." 210 The seminal case that allowed recovery is Hastings v. Baton Rouge General Hospital. 211 In the case, the surviving parents of Cedric Paul Hastings brought a malpractice suit against the defendants. Cedric had several stab wounds and weak vital signs when admitted for care at Baton Rouge General.

204. Id. at 591.

205. Id. at 592.


207. 843 F.2d 854 (5th Cir. 1988).

208. Id. at 859. See also Johnson v. Armstrong Co., 645 F. Supp. 764 (W.D. La. 1986). The court set out the following rules to determine if evidence is to be allowed in increased risk of disease cases: "[E]vidence concerning the increased risk of contracting cancer in the future will be admissible where the plaintiff 'can show that the toxic exposure more probably than not will lead to cancer.'" Id. at 769 (quoting Hagerty, 788 F.2d at 319).


210. See Hodson, supra note 130.

211. 498 So. 2d 713 (La. 1986).
After the doctors stabilized him, they then prepared to move him to another hospital due to his lack of medical insurance. When the defendants attempted to transport him, his condition deteriorated dramatically and proved to be fatal. When evaluating the cause of Cedric’s death, the Supreme Court stated:

Despite the fact that the wounds were one cause in fact of Cedric’s death, there can be more than one cause in fact making both wrongdoers liable. . . . Once a breach of duty constituting malpractice is established, the question of whether the malpractice contributed to the death, i.e., lessened the chance of survival is a question of fact for the jury. . . . A substantial factor need not be the only causative factor; it need only increase the risk of harm.212

Thus, the court allowed recovery for the lost chance of survival (increased risk of death) even though this chance did not necessarily prove to be greater than fifty percent. Thus, recovery will be allowed as long as the doctor’s malpractice increased the risk of harm.

After Hastings, the issue of “lost chance” came before the supreme court several times, almost always within the confines of medical malpractice actions.213 In the most recent case on “lost chance,” Smith v. State Hospitals,214 the Louisiana Supreme Court set out to address the method of valuation of the damages recoverable for the lost chance of survival. In answering the question, however, the court may have implied that it will limit the application of “lost chance” to medical malpractice cases, and not expand the analysis to an ordinary negligence action. In footnote 7, the court stated: “This decision only addresses damages in a medical malpractice case and does not consider damages for loss of a chance of survival in cases against other types of tortfeasors. See Hardy v. Southwestern Bell Tel. Co.215 . . . That decision is left for another day.”216 In the Hardy case cited by the court, the United States District Court for the Northern District of Oklahoma certified the following question to the Oklahoma Supreme Court: “Does the lost chance of survival doctrine . . . apply in an ordinary negligence case that is not brought against a medical practitioner or hospital?”217 The Oklahoma Supreme Court answered the question in the negative. The court set out the public policy behind allowing recovery for lost chance in medical malpractice actions by stating:

212. Id. at 720 (emphasis added).
214. 676 So. 2d 543 (La. 1996).
216. Smith, 676 So. 2d at 547 n.7.
The public policy considerations which are reflected in the judicial decisions creating this remarkable exception to the traditional rule of the standard of proof of causation focus on the special relationship of the physician and patient and the expression of apprehension that failure to adopt the loss of chance doctrine in medical malpractice suits would place patients with preexisting conditions in peril.\footnote{218}

The court then went on to state that allowing the extension of lost chance to mere negligence cases "would cause a fundamental redefinition of the meaning of causation in tort law."\footnote{219} Thus, the distinction drawn by the Oklahoma Supreme Court between medical malpractice and mere negligence actions is one of policy.

By citing *Hardy* in footnote 7, the Louisiana Supreme Court may be hinting that it agrees with the Oklahoma Supreme Court that the lost chance of survival is limited to medical malpractice. On the other hand, it is possible that the supreme court may allow another exception to the traditional rule of the standard of proof for increased risk of disease. As noted previously, some of the public policy arguments in favor of recognizing "lost chance" also apply to increased risk of disease. For instance, the lack of deterrence and problems with causation are the two policies that apply to both increased risk of disease cases and "lost chance" cases.\footnote{220}

There are problems with extending "lost chance" to increased risk. The first problem is that "lost chance" cases are usually only actionable when the patient has died. In *Claudet v. Weyrich*,\footnote{222} however, the fourth circuit court of appeal allowed recovery for a lost chance when the plaintiff survived. In *Claudet*, the plaintiff visited Dr. Weyrich on a number of occasions. On a particular occasion, the doctor detected a lump in the plaintiff's breast, which the doctor did not believe was cancer. Although Ms. Claudet expressed concern about the lump on several occasions, Dr. Weyrich "felt there was no cause for alarm." Ultimately, the lump was diagnosed as cancer.

At trial, expert medical testimony focused on the increased risk of death resulting from the late diagnosis. According to the experts, because the cancer was not treated at the time Dr. Weyrich found the lump, the delay caused Ms. Claudet a thirty-three percent increased chance of dying.\footnote{223} Based on the

\footnote{218}{Id. at 1028.}
\footnote{219}{Id. at 1030.}
\footnote{220}{The need for deterring negligent handling of hazardous chemicals has been amplified due to the legislature's repeal of La. Civ. Code art. 2315.3.}
\footnote{221}{See *supra* notes 129-141 and accompanying text.}
\footnote{222}{662 So. 2d 131 (La. App. 4th Cir. 1995).}
\footnote{223}{When Dr. Weyrich discovered the lump, the cancer was in Stage I. However, the cancer was subsequently diagnosed and removed at Stage II. The survival rate of cancer at Stage I is 75%, and at Stage II is 42%, with a difference of 33%. *Id.* at 132.}
testimony, the court allowed the jury to compensate the plaintiff for her increased risk of death.

In discussing the point that Ms. Claudet had survived the experience, the court said, "[t]he fact that Ms. Claudet's present chances of survival are improved . . . does not reduce her past suffering." Therefore, even though the increased risk did not ultimately lead to death, recovery was still allowed. Extending the court's logic in Claudet to an increased risk of disease action, recovery should be allowed because the risk itself should be considered the damage, even though the ultimate harm has not appeared; i.e., the disease has not developed.

The second problem with extending lost chance to increased risk is that it will result in an overhaul in the causation analysis. In other words, instead of having to prove actual damage, the plaintiff will only have to prove that his or her chances for damage were increased. By citing Hardy in Smith v. State Department of Health and Hospitals, the Louisiana Supreme Court seemed to imply that it may agree with this argument and limit lost chance to medical malpractice.

Nevertheless, the supreme court has recently expanded lost chance to the wrongful death action against an employer in Weber v. State. Weber suffered from an occupational disease which required a heart transplant. His employer, the State of Louisiana, refused to authorize the transplant. Weber subsequently brought the matter to the Office of Workers Compensation, and it recommended that the state pay all expenses. Once again, the state refused to authorize payment. Mr. Weber died before his attorney could seek judicial intervention.

The state argued that the remedy for refusing to provide necessary medical treatment is provided in the Worker's Compensation Act, and suits based on non-intentional conduct of the employer are thereby barred. The plaintiffs, on the other hand, argued that the intentional refusal to provide medical treatment allowed suit under the statute because it increased the chance of Mr. Weber's death.

In what the court called "a narrow exception to the general rule that penalties and attorney's fees are the exclusive remedy for the employers misconduct in handling compensation claims," the court specifically held:

[T]he State's alleged conduct in intentionally and arbitrarily denying necessary medical expenses, . . . may result in liability beyond the remedies provided in the Workers Compensation Act, when the . . . employer knew to a substantial certainty that denial would cause death that would not otherwise have occurred.

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224.  Id. at 133.
226.  See supra note 216.
227.  635 So. 2d 188 (La. 1994).
228.  Id. at 192.
229.  Id. at 193.
In essence, the court allowed the plaintiffs to recover for the "lost chance" resulting from the state's denial of medical treatment. Weber is evidence that the court is willing to extend the "lost chance" theory.

VI. FUTURE COURSE OF ACTION

As seen, there are many possible routes a plaintiff can take to recover for an increased risk case in Louisiana. The plaintiff can wait to sue for disease by splitting the cause of action and using the discovery rule, or recover for some type of medical monitoring damages. The unanswered questions, however, are whether a plaintiff can recover for medical monitoring or an increased risk of disease as independent legal harms, as is currently done in "lost chance" cases. Although the "lost chance" cases can potentially be extended to award damages for an increased risk of disease, this will not occur until the courts agree with the policy reasons behind recognizing recovery for these claims.

The recognition of "new" causes of action is not foreign to Louisiana. The same phenomenon occurred when the courts recognized recovery for bystander negligent infliction of emotional distress. Like increased risk, bystander negligent infliction was initially met with the arguments that mental disturbance cannot be measured monetarily, its physical consequences are too remote, and recognition will cause a vast increase in litigation. Nevertheless, the courts began to allow recovery for this action. Initially, bystander negligent infliction damages were allowed only when accompanied by a physical injury or if the claimant was in the zone of danger. Next, the courts began to allow negligent infliction damages to bystanders for certain types of situations, which included the mishandling of corpses and viewing an injury of someone to which the claimant was closely related.

A similar evolution is now occurring with increased risk cases. Presently, a plaintiff in Louisiana can recover for increased risk of death (lost chance) and possibly for increased risk of disease and medical monitoring when accompanied with an injury. The next step may be to allow recovery for these claims in other situations, as done with bystander negligent infliction.

Ultimately, these questions will remain unanswered until the Louisiana courts begin addressing these difficult issues rather than evading them.

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230. They are not proximately caused.
231. Keeton et al., supra note 14, at 360.