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## Damages for an Increased Risk of Developing Cancer Caused by Asbestos Exposure Are Only Recoverable If It Is More Likely Than Not That Cancer Will Develop

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# DAMAGES FOR AN INCREASED RISK OF DEVELOPING CANCER CAUSED BY ASBESTOS EXPOSURE ARE ONLY RECOVERABLE IF IT IS MORE LIKELY THAN NOT THAT CANCER WILL DEVELOP

*Gideon v. Johns-Manville Sales Corp.*<sup>1</sup>

Some 9,000 people will die from asbestos related cancer each year for the next three decades.<sup>2</sup> Over seven million workers currently run the risk of developing asbestos related diseases.<sup>3</sup> Other products such as DES, toxic waste, and radiation also have been found to significantly increase the chances of developing cancer in the future.<sup>4</sup> The protracted latency period before the manifestation of the cancer<sup>5</sup> has given rise to thousands of lawsuits seeking damages for cancer that has not manifested itself in any way at the time of trial. *Gideon v. Johns-Manville Sales Corp.*<sup>6</sup> is one such lawsuit. This Note will discuss the cancer related damages requested by these victims of toxicity and how the *Gideon* court and other courts handle this problematic area.

Howard Gideon worked for an insulation company as a warehouseman, handling defective asbestos daily from 1944 to 1969. Gideon claimed, in this products liability action against seventeen asbestos manufacturers, that because of the inhalation of asbestos fibers he suffers from asbestosis and is likely to develop mesothelioma or some other form of cancer as a result of asbestos

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1. 761 F.2d 1129 (5th Cir. 1985).

2. Wall St. J., Oct. 4, 1983, at 3, col. 2 (midwest ed.).

3. Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 580 n.13 (1983).

Very similar to asbestos is Diethylstilbestrol (DES), another disease-causing product to which great numbers of our population have been exposed. Pregnant women took DES to prevent miscarriages. Adenocarcinoma, a fast spreading cancer that affects approximately .14 to 1.4 per 1,000 of the daughters whose mothers took DES, is almost unique to DES ingestion. Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 FORD. L. REV. 527, 563 n.267 (1984).

4. Dworkin, *supra* note 3, at 563.

5. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 517 (5th Cir.) (mesothelioma, an asbestos-related malignancy, has a latency period from twenty to forty years), *vacated in part and question certified on reh'g*, 750 F.2d 1314 (5th Cir. 1984) (en banc), *certificate for question dismissed*, 469 So. 2d 99 (Miss. 1985) (en banc), *rev'd on second reh'g*, 781 F.2d 394 (5th Cir.), *cert. denied*, 106 S. Ct. 3339 (1986).

6. 761 F.2d 1129.

fibers being within his body.<sup>7</sup> Asbestosis is a scarring of the lungs which can cause progressive deterioration of pulmonary functions. It is not a cancer. Mesothelioma, on the other hand, is a rare cancer of the lungs and abdomen.<sup>8</sup>

In *Gideon*, the plaintiff produced expert testimony confirming the existence of asbestosis as well as establishing, within reasonable medical probability, that he would develop and die from an asbestos-induced cancer.<sup>9</sup> The jury awarded Howard Gideon over \$500,000.00 and the defendants appealed. Defendants' appeal focused on the issue of whether the plaintiff could recover for a risk of contracting cancer in the future.<sup>10</sup> The Fifth Circuit Court of Appeals held that he could.<sup>11</sup>

The *Gideon* court, interpreting Texas law, held that the plaintiff had but one cause of action for all present and future damages caused by the asbestos manufacturers' breach of a legal duty.<sup>12</sup> According to Texas law, the plaintiff could not recover for asbestosis and then later sue for damages caused by cancer if cancer develops.<sup>13</sup> The court then reasoned that the future damages are only recoverable if proved by a preponderance of the evidence, which requires a medical expert's opinion based on reasonable medical certainty. Possibility alone is not enough; at the time of trial, the cancer must be more likely than not to later occur.<sup>14</sup> Because the plaintiff produced expert testimony satisfying this standard, he was allowed to recover for the risk of contracting cancer in the future.<sup>15</sup>

The "more probable than not" standard that the *Gideon* court required before future damages could be recovered is by far the predominant approach in American courts.<sup>16</sup> Many commentators, however, feel that an increased

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7. *Id.* at 1134.

8. *Jackson*, 727 F.2d at 517.

9. 761 F.2d at 1138 ("within reasonable medical probability" interpreted as a greater than fifty percent risk).

10. *Id.* at 1134.

11. *Id.* at 1138.

12. *Id.* at 1137.

13. *Id.* This is the common law rule forbidding the splitting of a single claim, as stated in the RESTATEMENT (SECOND) OF JUDGMENTS §§ 24-26 (1982).

14. *Gideon*, 761 F.2d at 1137-38.

15. *Id.* at 1138.

16. *See, e.g.*, *Martin v. Pacific Gas & Elec. Co.*, 203 Cal. 291, 302, 264 P. 246, 250-51 (1928) (damages may be awarded only for injury or suffering reasonably certain to result in the future); *Hahn v. McDowell*, 349 S.W.2d 479, 482 (Mo. Ct. App. 1961) (testimony inadmissible because it did not show that cancer was reasonably certain to result from the injury); *Devlin v. Johns-Manville Sales Corp.*, 202 N.J. Super. 556, —, 495 A.2d 495, 500 (Ct. Law Div. 1985) (asbestos exposure case requiring reasonable medical probability before recovery for future cancer is recoverable); *City of Waco v. Teague*, 168 S.W.2d 521, 527 (Tex. Ct. App. 1943) (testimony inadmissible because expert testified "there was more of a possibility than a probability that appellee's injury might result in a malignant tumor"); *Coffman v. McFadden*, 68 Wash. 2d 954, 961, 416 P.2d 99, 103 (1966) (testimony on possibility of cancer "does not

risk of cancer which amounts to something less than fifty percent should not go completely uncompensated.<sup>17</sup> However, all such cases have failed to even get to the jury.<sup>18</sup> However, the widely accepted approach that the *Gideon* court adopted, when combined with the rest of the *Gideon* holding, will result in such injustice to future plaintiffs that the English Rule allowing recovery for a "simple probability" may have to be reconsidered.<sup>19</sup>

The *Gideon* court held that once a plaintiff shows it is more likely than not he will get cancer, the plaintiff can recover damages now to compensate him for this future harm.<sup>20</sup> It has been argued, however, that even after the fifty percent barrier is met by a potential cancer victim, he still should not be allowed to recover today for a disease he may or may not contract in the future.<sup>21</sup>

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meet the test of *reasonable probability* that such conditions will occur as a result of the accident") (emphasis in original).

17. J. STEIN, DAMAGES AND RECOVERY § 106 (1972); Cooper, *Assessing Possibilities in Damage Awards-The Loss of a Chance or the Chance of a Loss*, 37 SASK. L. REV. 193, 196-97 (1972-73); Note, *Increased Risk of Cancer as an Actionable Injury*, 18 GA. L. REV. 563 (1984); see *infra* notes 64-83 and accompanying text; see also King, *Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1381-87 (1981) (for a discussion of how to value risks less than 50%).

18. Note, *supra* note 17, at 587. The following complaints have all been unsuccessful because they failed to surpass the "more likely than not" barrier. See *Laswell v. Brown*, 683 F.2d 261, 269 (8th Cir. 1982) (increased risk to children through father's close proximity to three nuclear bomb tests), *cert. denied*, 459 U.S. 1210 (1983); *Plummer v. Abbott Labs.*, 568 F. Supp. 920, 921 (D.R.I. 1983) (exposure to DES increased risk of cancer); *Mink v. University of Chicago*, 460 F. Supp. 713, 715 (N.D. Ill. 1978) (DES); *Payton v. Abbott Labs.*, 386 Mass. 540, 543, 437 N.E.2d 171, 173 (1982) (DES); *Devlin v. Johns-Manville Sales Corp.*, 202 N.J. Super. 556, —, 495 A.2d 495, 500 (Ct. Law Div. 1985) (asbestos case dismissing plaintiff's claim for relief because of an enhanced risk of cancer which fell below "reasonable medical probability"); *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 564-65, 461 A.2d 184, 186 (Ct. Law Div. 1983) (town exposed to increased risk from carcinogens leaked into drinking water). *But see* *Davies v. Taylor*, 3 W.L.R. 801, 804, 811, 814, 3 All E.R. 836, 838-39, 844-45, 847 (1972) (supporting a simple probability approach which requires a "substantial" risk, but less than a fifty percent likelihood, to allow a partial recovery). At least one American judge has agreed with this approach. See *Jordan v. Bero*, 158 W. Va. 28, 62-65, 210 S.E.2d 618, 640 (1974) (Neely, J., concurring) (endorsing a pro rata approach in situations where it is extremely difficult to comply with the "more likely than not" standard, such as brain damage cases).

19. See Cooper, *supra* note 17, at 197-209 (discussing the English Rule allowing a partial recovery in certain cases where the risk of a loss is less than fifty percent).

20. 761 F.2d at 1138. The court never elaborated on exactly of what these cancer-related damages consisted.

21. *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir.), *vacated in part and question certified on reh'g*, 750 F.2d 1314 (5th Cir. 1984) (en banc), *certificate for question dismissed*, 469 So. 2d 99 (Miss. 1985) (en banc), *rev'd on second reh'g*, 781 F.2d 394 (5th Cir.), *cert. denied*, 106 S. Ct. 3339 (1986); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 120 n.45 (D.C. Cir. 1982) (persons who contract asbestosis without later developing cancer receive a windfall).

The same court that decided *Gideon* had earlier been presented with an identical fact situation in *Jackson v. Johns-Manville Sales Corp.*<sup>22</sup> (which the Fifth Circuit later reversed on its own rehearing). In *Jackson*, the plaintiff suffered from asbestosis and requested damages for this as well as for the future onset of cancer.<sup>23</sup> This plaintiff, like the plaintiff in *Gideon*, established by expert testimony that there was a greater than fifty percent chance that he would develop cancer.<sup>24</sup> The Fifth Circuit held that the plaintiff must split his cause of action and that the plaintiff could be immediately compensated only for the currently manifested disease of asbestosis. If and when cancer developed in the future, however, the plaintiff "would not be barred from bringing a subsequent suit based on claims for separate and distinct injuries within the applicable limitation period following the materialization of the later disease."<sup>25</sup>

In support of this "wait and see" approach, the *Jackson* court explained that the quality of the evidence as to the existence of cancer, its proximate cause, and the subsequent damages would be much improved if the evidence was brought after the cancer manifested itself.<sup>26</sup> This approach would not only allow a plaintiff to more accurately estimate the extent of the injury, but it would also help prevent defendants from overpaying.<sup>27</sup> Finally, by not requiring a plaintiff to sue for future cancer as soon as a non-cancer related injury like asbestosis is diagnosed, the *Jackson* court's approach discourages plaintiffs

22. 727 F.2d 506 (5th Cir. 1984).

In *Jackson*, a diversity action applying Mississippi law, the federal court initially disallowed a cause of action for future risk of cancer even after the fifty percent hurdle was met by the plaintiff. Shortly thereafter, however, the Fifth Circuit vacated their holding and instead certified the issue for resolution by the Mississippi Supreme Court. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1327-28 (5th Cir. 1985) (en banc). The Mississippi Supreme Court then declined the certification and left the questions unanswered. *Jackson v. Johns-Manville Sales Corp.*, 469 So. 2d 99 (Miss. 1985).

With no assistance from the Mississippi Supreme Court, the Fifth Circuit, on its own rehearing, held that Mississippi law would allow recovery for future injuries with a "more likely than not" probability of occurring. *Jackson*, 781 F.2d 394 (5th Cir. 1986) (i.e. it held the same as it did in *Gideon*). See *infra* note 104 for a further discussion of exactly what the Fifth Circuit finally decided in *Jackson*.

The reasoning followed by the initial *Jackson* decision, as discussed in this Note, is still very useful and arguably sound. See *infra* notes 51-62 and accompanying text.

23. 727 F.2d at 515-17.

24. *Id.* at 516.

25. *Id.* at 520, 521. The court acknowledged the general rule against claim-splitting, then cited the RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b), (f) which allows the court expressly to reserve a plaintiff's right to maintain a second action or allow claim-splitting if extraordinary circumstances exist.

26. *Jackson*, 727 F.2d at 519.

27. *Id.* at 519-20. Persons who contract asbestosis and are allowed to recover for the future probability of developing cancer, but do not actually develop cancer, will receive a windfall, and the aggregate effect will be an overpayment by the defendants. *Id.* at 520 (citing *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 120 n.45 (D.C. Cir. 1982)).

from prematurely rushing to court.<sup>28</sup> With the *Gideon* court's approach, as soon as any insignificant injury manifests itself, potential victims will sue for the future risk of cancer, rather than risk losing all claims for future injuries if they waited.<sup>29</sup>

Using a causation analysis, the *Jackson* court felt that "until and unless the plaintiff develops cancer . . . the causation of cancer has not occurred." Regardless of the sufficiency of the evidence as to contracting cancer, there can be no recovery for a defendant's wrong, according to the *Jackson* court, until the effect of that wrong is seen.<sup>30</sup>

A necessary consequence of the "wait and see" approach is the adoption of the "discovery rule" regarding the statute of limitations.<sup>31</sup> The "discovery rule" prevents the limitations clock from starting until the future injury manifests itself.<sup>32</sup> With latency periods as long as forty years, it is apparent that the "wait and see" approach cannot work with a limitations period that begins

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28. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 120 (D.C. Cir. 1982). This depends on the severity of the pre-cancer injury. A common asbestos injury is asbestos callouses which is not sufficiently severe to warrant a lawsuit in and of itself. A severe case of asbestosis may cause a victim to rush to court even though he could lose his potential cancer claim.

The judicial efficiency of the *Jackson* court's "wait and see" approach and the *Gideon* court's approach are further discussed *infra* note 54-60 and accompanying text.

29. *Jackson*, 727 F.2d at 519 (citing *Wilson*, 684 F.2d at 120).

30. *Id.* at 520.

31. *Id.* at 518, 521. Courts adopting the discovery rule in similar cases include: *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151, 1158 (6th Cir. 1981) (an asbestos case adopting the discovery rule while applying Ohio law); *Williams v. Borden, Inc.*, 637 F.2d 731, 735 (9th Cir. 1980) (applying Oklahoma law in a suit against a plastic manufacturer, the cause of action was held to begin when the plaintiff should have known of the existence and cause of her condition); *McDaniel v. Johns-Manville Sales Corp.*, 542 F. Supp. 716, 718-19 (N.D. Ill. 1982) (construing Illinois law, statute of limitations held to begin when the plaintiffs discover they were injured by asbestos); *Pauley v. Combustion Eng'g*, 528 F. Supp. 759, 763-64 (S.D. W. Va. 1981) (applying West Virginia law, court adopted the discovery rule in an asbestos case); *Insurance Co. of N. Am. v. Forty Eight Insulations, Inc.*, 451 F. Supp. 1230, 1240 (E.D. Mich. 1978) (an asbestos case holding that the statute of limitations begins to run when an asbestos-caused disease manifests itself); *Velasquez v. Fibreboard Paper Prod.*, 97 Cal. App. 3d 881, 887, 159 Cal. Rptr. 113, 117 (1979) (an asbestos case); *Anderson v. Sybron Corp.*, 165 Ga. App. 566, 567, 299 S.E.2d 160, 161 (1983) (plaintiff's cataracts cause of action not barred even though he had previous illnesses he should have known were caused by defendant's negligently leaking gas, because the limitations clock does not begin until he should have known that the cataracts were caused by the leaking gas); *Olsen v. Bell Tel. Labs.*, 388 Mass. 171, 175, 445 N.E.2d 609, 612 (1983) (cause of action accrues when the employee discovers that he contracted the disease because of the employer's conduct).

32. *Jackson*, 727 F.2d at 518; *see also Urie v. Thompson*, 337 U.S. 163, 170 (1949) (the afflicted employee can be held to be injured only when the effects of the substance manifest themselves).

at the date of the wrongful act<sup>33</sup> or the date of the initial injury.<sup>34</sup>

If the Fifth Circuit approved the "wait and see" approach in 1984 in *Jackson*, why then did the same court decide a substantially identical case, *Gideon*, in 1985 without even discussing this alternative approach?<sup>35</sup> The answer lies in Texas law. The *Gideon* suit was a diversity case applying Texas law, and according to the *Gideon* court Texas law will not allow a plaintiff to "split his cause of action by seeking damages for some of his injuries in one suit and for later-developing injuries in another."<sup>36</sup> In light of this, even though Texas does use the "discovery rule" in asbestos type cases,<sup>37</sup> the "wait and see" approach cannot work. As the *Gideon* court explained, the cause of action is inherent in the wrongful act itself, not in the various types of injuries that may result.<sup>38</sup> Therefore, when a plaintiff discovers an injury caused by the defendant's breach of a legal duty (usually asbestosis is diagnosed first) he must, in one lawsuit, sue for all present and future injuries and cannot "wait and see" if cancer actually develops.

Upon initial reading, *Gideon* seems pro-plaintiff regarding asbestos injuries and other latent disease cases. The *Gideon* court allowed a plaintiff to recover for future damages he might not even incur, so long as he could show it was "more likely than not" that this disease would develop.<sup>39</sup> However, the

33. See *Barksdale v. Silica Prod.*, 200 Ark. 32, 35, 137 S.W.2d 901, 902 (1940) (statute of limitations begins the date of the wrongful act).

34. See, e.g., *Braswell v. Flintkote Mines*, 723 F.2d 527, 532 (7th Cir. 1983) (applying Indiana law, court used the date of the injury, which was interpreted to mean the date of the most recent exposure, as the beginning of the limitations period in an asbestos case), cert. denied, 467 U.S. 1231 (1984). See generally Note, *Preserving Causes of Action in Latent Disease Cases: the Locke v. Johns-Manville Sales Corp. Date-of-the-Injury Accrual Rule*, 68 VA. L. REV. 615, 620-22 (1982); Annotation, *When Statute of Limitations Begins to Run as to Cause of Action for Development of Latent Industrial or Occupational Disease*, 1 A.L.R.4TH 117 (1980).

35. In both *Jackson* and *Gideon*, the plaintiffs were inflicted with asbestosis. The plaintiffs sued to recover for the future risk of cancer and expert testimony established a greater than fifty percent likelihood each would develop asbestos related cancer.

36. 761 F.2d at 1136; see *infra* note 104 (discussion of whether the Fifth Circuit was bound by this law).

37. *Castorina v. Lykes Bros. S.S. Co.*, 578 F. Supp. 1153, 1157 (S.D. Tex. 1984) (discovery rule used in asbestos case), *aff'd*, 758 F.2d 1025 (5th Cir.), cert. denied, 106 S. Ct. 137 (1985).

38. 761 F.2d at 1137.

39. *Id.* at 1138. It can be assumed that the *Gideon* court also required a present physical harm to exist, for it stated, "Gideon did not seek to recover only for the risk of future harm. He now suffers from a diagnosed disease of asbestosis." *Id.* The general approach is that an increased risk of cancer without an accompanying present physical injury is insufficient to state a claim. See, e.g., *Brafford v. Susquehanna Corp.*, 586 F. Supp. 14, 17 (D. Colo. 1984) (radiation exposure); *Westrom v. Kerr-McGee Chem. Corp.*, No. 82-C-2034 (N.D. Ill. Oct. 4, 1983) (available on LEXIS, Genfed library, Dist. file); *Laswell v. Brown*, 524 F. Supp. 847, 850 (W.D. Mo. 1981) (children suing for increased risk of cancer because their father was exposed to radiation from

*Gideon* court's approach will result in extreme hardship and injustice for the vast majority of latent disease victims.

The court in *Gideon* apparently ignored the nature of asbestos related diseases. These cases are typically characterized by an early diagnosis as a non-fatal, non-cancerous disease such as asbestos callouses or asbestosis with no signs of any cancer.<sup>40</sup> The possibility of a person developing cancer upon the discovery of asbestosis is far less than fifty percent.<sup>41</sup> There currently is no medical link between the development of malignant diseases such as mesothelioma and the onset of asbestosis, except of course that both are caused by the inhalation of asbestos fibers.<sup>42</sup> One does not cause the other.

The *Gideon* decision will force a plaintiff who has discovered he has asbestosis to sue immediately for any future development of cancer, but because of the nature of asbestos related diseases, this plaintiff will almost always fall short of the "more likely than not" standard the *Gideon* court requires.<sup>43</sup>

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atomic bomb tests), *aff'd*, 683 F.2d 261 (8th Cir. 1982), *cert. denied*, 459 U.S. 1210 (1983); *Mink v. University of Chicago*, 460 F. Supp. 713, 719 (N.D. Ill. 1978) (DES case involving claims by exposed mothers and their daughters). *But see* Note, *supra* note 17, at 588 (arguing no physical injury should be required).

The physical injury requirement is founded on the tort principle that mere speculative injuries will not give rise to a cause of action. *Brafford*, 586 F. Supp. at 17; *see id.* for a discussion of whether a mere chromosomal change is a sufficient physical injury.

40. *Jackson v Johns-Manville Sales Corp.*, 781 F.2d 394, 412 (5th Cir.), *cert. denied*, 106 S. Ct. 3339 (1986); *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 522 (Fla. Dist. Ct. App. 1985).

*Eagle-Picher* emphasized the unique nature of asbestos diseases in holding that the equitable approach would be to allow an exception to Florida's rule against splitting claims. *Id.* at 520.

41. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 120 n.45 (D.C. Cir. 1982) (citing study which estimated 15% of asbestosis sufferers later contract pleural mesothelioma and 12% contract peritoneal mesothelioma); Selikoff, Churg & Hammond, *Relation Between Exposure to Asbestos and Mesothelioma*, 272 NEW ENG. J. MED. 560, 562 (1965).

42. *Devlin v. Johns-Manville Sales Corp.*, 202 N.J. Super. 556, \_\_\_ n.3, 495 A.2d 495, 501 n.3 (Ct. Law Div. 1985) (citing *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 660-61 n.4, 464 A.2d 1020, 1023 n.4 (1983)).

43. *Wilson*, 684 F.2d at 120; *see Devlin*, 202 N.J. Super. at \_\_\_, 495 A.2d at 500. *Devlin* was an asbestos case where the plaintiff was suffering from asbestosis, but admittedly could not meet the fifty percent standard for the future development of cancer. The court allowed the cause of action to be split so as to allow recovery if and when cancer develops. The *Devlin* situation is the exact scenario the *Gideon* approach cannot satisfy.

*Johns-Manville* has defended successfully claims for prospective lung cancer when plaintiff was currently suffering only from asbestosis, on the ground that the future onset of cancer was too speculative. *Schmidt v. Johns-Manville Sales Corp.*, No. H-80-3339 (D. Md. 1983); *Wright v. Johns-Manville Sales Corp.*, No. H-90-3358 (D. Md. 1983).



He is therefore left without a remedy as to later developing cancer.<sup>44</sup> Defendants such as Johns-Manville are strong proponents of this approach because it really is pro-defendant.<sup>45</sup>

The *Gideon* court's approach puts plaintiffs in a "catch 22" situation.<sup>46</sup> First, if a plaintiff brings suit within the statute of limitations period after discovering an asbestos related disease, and cannot prove that future malignancy is "more likely than not" to develop, then the *Gideon* court's rule forbidding claim-splitting for later developing diseases will prevent any recovery for this cancer, ever.<sup>47</sup> Alternatively, if the plaintiff foresees the above, he may decide to not bring suit when the first pre-cancerous injury is diagnosed and instead wait until a malignancy develops before making his claim.<sup>48</sup> The *Gideon* court's approach, however, will also block this avenue of recovery because the statute of limitations as to the defendant's breach of a legal duty begins once an injury caused by this breach is discovered.<sup>49</sup> Because cancer or mesothelioma usually has a twenty to forty year latency period,<sup>50</sup> the limitations period will

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44. Several jurisdictions allow a subsequent suit because of their desire to avoid this injustice. *E.g.*, *Wilson*, 684 F.2d at 120-21; *Colby v. E.R. Squibb & Sons*, 589 F. Supp. 714, 716-17 (D. Kan. 1984); *Eagle-Picher*, 481 So. 2d at 522-24; *Smith v. Bethlehem Steel Corp.*, 303 Md. 213, 234, 492 A.2d 1286, 1296 (1984); *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 667-68, 464 A.2d 1020, 1027 (1983) (*Pierce* added a qualification that the later suit for cancer could only be brought if no earlier asbestosis claim was brought, but *Smith* one year later allowed claim-splitting despite an earlier asbestosis suit); *Devlin v. Johns-Manville Sales Corp.*, 202 N.J. Super. 556, —, 495 A.2d 495, 500 (Ct. Law Div. 1985). *But see* *Matthews v. Celotex Corp.*, 569 F. Supp. 1539, 1542 (D.N.D. 1983) (a single cause of action cannot be split although there may be different kinds of damages; the plaintiff failed to act when asbestosis was diagnosed in 1969 and therefore was barred from a later suit when cancer set in).

In *Colby v. E.R. Squibb & Sons*, 589 F. Supp. 714 (D. Kan. 1984), a DES victim realized very early the development of adenosis, a vaginal and cervical growth that affects 30% to 90% of the DES daughters. Upon diagnosis of adenosis, however, there was only a 1% chance the victim would eventually develop adenocarcinoma, a fatal cancer also caused by DES. If forced to bring all future claims upon the discovery of adenosis, this victim would surely lose the risk of cancer claim. The *Colby* court noted this injustice and ruled the discovery of adenosis did not start the limitations clock running on the claim for cancer. *Id.* at 716-17.

45. *See, e.g.*, *Devlin v. Johns-Manville Sales Corp.*, 202 N.J. Super. 556, —, 495 A.2d 495, 502 (Ct. Law Div. 1985).

46. *Id.* at —, 495 A.2d at 502.

47. *Id.*; *Gideon*, 761 F.2d at 1137 ("plaintiff could not split his cause of action and recover damages for asbestosis, then later . . . sue for cancer should cancer appear").

48. *Devlin*, 202 N.J. Super. at —, 495 A.2d at 502.

49. 761 F.2d at 1137; *Castorina v. Lykes Bros. S.S. Co.*, 578 F. Supp. 1153, 1157 (S.D. Tex. 1984), *aff'd*, 758 F.2d 1025 (5th Cir.), *cert. denied*, 106 S. Ct. 137 (1985) (generally adopting the discovery rule in asbestos cases); *see supra* note 31 for a list of jurisdictions adopting the discovery rule.

50. *See supra* note 5.

invariably have expired if the clock starts ticking upon discovery of the initial injury.

There are at least three variations that would soften the hardship the *Gideon* court would impose on latent disease victims. The most widely adopted solution, as discussed above, would be to allow the plaintiff to split his claim between an immediate suit for presently diagnosed diseases and a later claim if cancer should develop.<sup>51</sup> In addition to its fair resolution of the “catch 22” problem, this approach, as used in the *Jackson* decision, provides for the passage of time to allow for increased evidentiary availability of key issues such as causation, damages, and the speculation as to the existence of the disease.<sup>52</sup> Allowing this claim-splitting also promotes the public policy in support of accurate awards for injured parties—sufficient relief but not excessive—which will be severely undermined if an injured party is forced to sue today for injuries which may never come to fruition.<sup>53</sup>

Despite its promotion of two separate trials, the “wait and see” approach of the *Jackson* court is arguably more judicially efficient than the *Gideon* court’s single trial approach. To begin with, a plaintiff in a jurisdiction that follows *Gideon* would rush to court to file a claim as soon as any pre-cancerous injury arose because he feared if he did not sue now he would forego any chance to recover if he did get cancer.<sup>54</sup> In addition, once suit is filed, the plaintiff will be encouraged to delay the trial date as long as possible so that the full story of his condition would be known before the case is set for trial.<sup>55</sup>

The apparent inefficiency of the *Jackson* court’s two trial proposal is exaggerated for other reasons as well. Two trials would rarely be necessary. To begin with, a pre-cancer trial would arise only if the plaintiff suffered a sufficiently serious injury to warrant a lawsuit.<sup>56</sup> Next, the low probability of

51. See *supra* note 44.

52. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982). But see Rosenberg, *The Causal Connection In Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849, 923 (1984) (stating that a delay will reduce the quality of available evidence); Note, *supra* note 17, at 574-76 (delay in bringing suit in latent disease cases results in losing evidence which proves defendant’s negligence and his identity, and risks nonrecovery due to insolvency or disappearance).

53. See, e.g., *Wilson*, 684 F.2d at 119; *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 521 (Fla. Dist. Ct. App. 1985). The *Eagle-Picher* court believed several inequities would result from claim-splitting: first, the plaintiff who does not get cancer will receive a windfall; second, a plaintiff who gets cancer but could not hurdle the fifty percent barrier is grossly undercompensated; third, even if a plaintiff is awarded damages they will be inadequate because the jury will likely award less than one hundred percent; and finally, predicting future damages is more susceptible to inequitable awards because of the uncertainty. *Id.* at 524.

54. *Wilson*, 684 F.2d at 120; *Eagle-Picher*, 481 So. 2d at 523; *Gore v. Daniel O’Connell’s Sons, Inc.*, 17 Mass. App. 645, —, 461 N.E.2d 256, 259 (1984).

55. *Wilson*, 684 F.2d at 120; *Eagle-Picher*, 481 So. 2d at 523.

56. See *supra* note 28 and accompanying text.

actually contracting one of these rare asbestos or DES cancers must be overcome before any second trial is needed.<sup>57</sup> Two trials will only be necessary in the unlikely event that both these steps are satisfied. In this light, the "wait and see" approach is not as judicially inefficient as it first appears.

One final reason why the *Jackson* court's approach can lighten the judicial burden (as compared to the *Gideon* court's approach) turns on the complexity of the issues being contested in the first trial. In *Gideon* jurisdictions, the trial would be inundated with experts predicting the probability of developing cancer as well as debating whether the asbestos would be the cause of that cancer.<sup>58</sup> None of this would exist in a *Jackson* jurisdiction's first trial. The first trial would be for some pre-cancer asbestos injury such as asbestosis or asbestos callouses. Litigating whether asbestos caused these injuries is a relatively simple issue and would not consume an inordinate amount of the court's time.<sup>59</sup> The complicated causation issues connecting asbestos to the development of cancer in the plaintiff would only be litigated in those relatively few cases when the cancer actually develops.<sup>60</sup>

In light of the above, it appears the Fifth Circuit was on the right track in its *Jackson* decision, which it later vacated on its own accord.<sup>61</sup> The *Jackson* decision suggested courts deny recovery today for the future risk of cancer even if the fifty percent barrier was satisfied, and instead define the cause of

57. See *supra* note 41.

58. See Note, *supra* note 17, at 574-75.

59. In all asbestos products liability suits a crucial and complex issue exists as to whether the defendant is the manufacturer of the injury-causing asbestos. This is so even in an asbestosis suit. The argument being made above deals with a separate issue, namely, is it *asbestos* (regardless of who manufactured it) that caused the future development of cancer, or was it a multitude of other possible carcinogens in the environment. *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 517 (5th Cir.), *vacated in part and question certified on reh'g*, 750 F.2d 1314 (5th Cir. 1984) (en banc), *certificate for question dismissed*, 469 So. 2d 99 (Miss. 1985) (en banc), *rev'd on second reh'g*, 781 F.2d 394 (5th Cir.), *cert. denied*, 106 S. Ct. 3339 (1986). With the *Jackson* court's approach this question is easily answered in the first trial because the injury will not involve potential cancer, but rather a disease which is clearly caused by asbestos, such as asbestosis.

60. This issue will be even simpler if the disease which eventually develops is mesothelioma because this is an extremely unique malignancy which is not easily triggered by environmental carcinogens (such as cigarette smoking) other than asbestos. *Id.*: at 517.

Though the percentage of asbestos workers who actually get cancer, when compared to those who get asbestosis, is relatively low (see *supra* note 41), the absolute number of these victims is large enough to warrant judicial concern. See *supra* notes 2-3 and accompanying text.

61. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1327-28 (5th Cir. 1984), *certificate for question dismissed*, 469 So. 2d 99 (Miss. 1985) (en banc), *rev'd on second reh'g*, 781 F.2d 394 (5th Cir.), *cert. denied*, 106 S. Ct. 3339 (1986); see *supra* note 22 (discussing the subsequent disposition of the controversial issues certified to the Mississippi Supreme Court by the Fifth Circuit in *Jackson*).

action as two separate claims, one today for asbestosis and one later if the cancer developed.<sup>62</sup> Fairness dictates that if claims are allowed to be split, then *Gideon's* holding allowing recovery today for a greater than fifty percent chance of developing cancer in the future should be reversed. By allowing all claimants who eventually contract cancer to recover, (the claim-splitting approach) an unfair hardship would be put on defendants who also have to pay, today, plaintiffs who showed a statistical probability of developing cancer later, but never actually contracted it. The net effect would be defendants paying all claimants who deserve compensation because they currently have cancer, as well as paying additional claimants who at trial could surpass the "more likely than not" barrier (as the plaintiff in *Gideon* did) but later never contracted the disease for which they were compensated.

The *Gideon* court's decision, without any alterations, is unfairly harsh on the great majority of latent disease victims who contract, relatively early, a non-cancerous disease and can not surmount the "more likely than not" barrier.<sup>63</sup> Allowing claim-splitting will eliminate this injustice to plaintiffs but at the same time create an unfair hardship on defendants who will be forced to overpay if the *Gideon* court's "more likely than not" approach is still applied. The *Jackson* court's approach, however, presents a well-reasoned and fair middle ground. Failing to presently meet the fifty percent standard will not forever bar a plaintiff if he later develops cancer. At the same time, defendants will not be forced to pay both actual cancer victims and "probable" cancer victims. Only those who actually get cancer will be compensated for their injury.

There are some serious practical difficulties with the *Jackson* court's "wait and see" approach. First, the cancer may not show itself for up to forty years after the exposure,<sup>64</sup> long after evidence of the defendant's negligence has been lost or destroyed.<sup>65</sup> Particularly troublesome would be proving the dose of the carcinogen to which the plaintiff was exposed and proving the identity of the defendant who actually exposed the plaintiff.<sup>66</sup> Of increasing significance is

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62. *Jackson*, 727 F.2d at 520; see *supra* notes 22-34 and accompanying text.

63. See *supra* notes 39-50 and accompanying text.

64. See *supra* note 5 and accompanying text.

65. Note, *supra* note 17, at 574.

66. See, e.g., *Gray v. United States*, 445 F. Supp. 337, 338 (S.D. Tex. 1978) (granting summary judgment to the defendant because plaintiff could not show that the DES her mother ingested was manufactured by this defendant); Note, *supra* note 17, at 574.

This problem would be mitigated with the "wait and see" approach if the plaintiff brought suit for the earlier asbestosis injury. Some evidence of the defendant's negligence would be presented at this time and preserved for use at a later trial. The problems mentioned persist when suits on these relatively minor injuries never go to trial either because of a settlement, workmen's compensation, or private insurance. See *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 120 (D.C. Cir. 1982). Without a trial, the evidence needed up to forty years later would not be preserved.

the potential insolvency or disappearance of the defendant.<sup>67</sup> A final problem is that the "wait and see" approach lacks any deterrent effect because American companies are not likely to alter their activities in anticipation of indefinite costs which will not occur, if at all, for another twenty to forty years when cancer develops in the exposed persons.<sup>68</sup>

Obviously, if the above problems are to be circumvented, it is preferable to bring the entire cause of action as soon as possible. Though not stated explicitly, it is the practical problems just mentioned that justify the *Gideon* approach forbidding a claimant to split his cause of action.<sup>69</sup> Yet the sooner latent disease victims are required to bring suit for future risks of cancer, the more often these victims will be permanently and unfairly left remediless because they could not meet the "more likely than not" standard that the *Gideon* court and other jurisdictions require.<sup>70</sup> Allowing some partial compensation to those plaintiffs who show only a possibility of future injury, something short of fifty percent, would solve the practical problems caused by extended delays in litigation, as well as maintaining an avenue of recovery for the plaintiff for future injuries.

As discussed earlier, no court has found a cause of action based on an increased risk of a person developing cancer that falls short of fifty percent.<sup>71</sup> English courts and many American commentators, however, feel some compensation is appropriate in these cases.<sup>72</sup> The denial of this cause of action is

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67. *E.g.*, *Jackson v. Johns-Manville*, 781 F.2d 394, 411 n.21 (5th Cir.) (the court was hesitant to consider allowing suit for cancer injury to be split because there may well be no money later on), *cert. denied*, 106 S. Ct. 3339 (1986). *See generally* Comment, *Will Financially Sound Corporate Debtors Succeed in Using Chapter 11 of the Bankruptcy Act as a Shield Against Massive Tort Liability?*, 56 TEMP. L.Q. 539, 539-43 (1983) (describing corporate reorganizations filed by financially sound corporations because of outstanding asbestos claims).

68. Note, *supra* note 17, at 585. *But see supra* notes 52-55 and accompanying text (discussing why waiting until the cancer has manifested itself improves the quality of the judicial proceeding).

It is possible that the company will be forcibly deterred by federal agency regulations. Once the agency discovers a dangerous condition in a product, it may demand that the company cease production or eliminate the dangerous condition. Regardless of this possibility, an ever-present objective of tort law is to deter misconduct. *Friends For All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825 (D.C. Cir. 1984). The possibility that a federal agency may step in should not obviate this goal.

69. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 24-26 (1982) (discussing the law preventing claim-splitting).

70. *See supra* note 16 and accompanying text (discussing the popularity of the "more likely than not" approach); *see supra* notes 46-50 and accompanying text (a discussion of plaintiff's "catch 22" dilemma in latent disease cases).

71. *See supra* note 18.

72. *Davis v. Taylor*, 3 W.L.R. 801, 804, 811, 814, 3 All E.R. 836, 838-39, 844-45, 847 (1972) (supporting a probability approach which does not require fifty percent probability before partial recovery is allowed); *Jordan v. Bero*, 158 W. Va. 28, 62-65, 210 S.E.2d 618, 640 (1974) (Neely, J., concurring); *see supra* note 17 (list of American commentators discussing increased risks as a cause of action).

usually justified by characterizing the claim as mere speculation, and as such, it cannot be the basis of a claim of injury.<sup>73</sup>

An injury, however, is defined in the Restatement (Second) of Torts not as a physical injury but rather "an invasion of an interest of another if . . . the interest invaded is protected."<sup>74</sup> The question then becomes whether a negligently induced increased risk of cancer is an invasion of a protected interest.<sup>75</sup> The injury is the increased risk itself and not the resultant disease or the fear of contracting this disease.<sup>76</sup> If a court decides that individuals have a protected interest in maintaining their cancer risk level,<sup>77</sup> then quantitatively determining the actual probability of contracting cancer due to the defendant's negligence becomes a damage calculation and not a prerequisite to the existence of the cause of action.<sup>78</sup>

There is an element of unfairness, however, with this approach. Consider a case where because of a defendant's negligence a plaintiff swallows contam-

73. *Ayers v. Township of Jackson*, 189 N.J. Super. 561, \_\_\_, 461 A.2d 184, 187 (Ct. Law Div. 1983); *Rheingold v. E. R. Squibb & Sons*, No. 74-3420 (S.D.N.Y. Oct. 14, 1975).

74. RESTATEMENT (SECOND) OF TORTS § 281(a) (1965); Note, *supra* note 17, at 588.

75. Consider the following example: If a defendant's negligent action increases the chance a certain plaintiff will get bone cancer from one in ten thousand to one in ten, has this defendant invaded a protected interest of the plaintiff? It is clear that if the original odds were one in three and the defendant's negligence increased this to two in three, almost every jurisdiction would allow this cause of action. See *Gideon*, 761 F.2d at 1138; Note, *supra* note 17, at 589 n.101.

76. Note, *supra* note 17, at 589.

77. In many increased risk actions, the real issue is not whether the plaintiff suffered a tangible physical harm, but whether the plaintiff's interest in being free from a tortiously inflicted increased risk of cancer is, or should be, protected by civil law. Note, *supra* note 17, at 588.

It could be argued that, if courts recognize an increased risk of future injury as an injury itself, all activities involving an element of risk could be subject to liability. For example, delaying one day before having the faulty brakes on one's car fixed will increase the risk to everyone around that they will be hit by this car. This is not the kind of activity deserving of litigation. *Id.* at 589.

This argument, however, fails to distinguish between two different types of tort risks. The more traditional tort risk involving the faulty brakes example is not compensable because, when the risk creating activity ceases, no harm has resulted and the person subjected to the risk is in the same position as he was before the risk-creating activity. *Id.* at 590. For this person, it is as if the activity never occurred. In addition, these types of risks are capable of being reduced or eliminated by the risk-creator.

The rather "nontraditional" risk of an increased chance of getting cancer is significantly different. Unlike the traditional risk, this risk does alter the position of the person exposed to the risk. Even though the risk-creating activity may cease, the exposed person remains subject to a risk of contracting cancer. The risk-creator cannot eliminate or reduce this "nontraditional" risk that he has inflicted upon the other. The position of this person has been permanently altered. *Id.*

78. *Id.*

inated water which contains carcinogens.<sup>79</sup> Before the exposure, the plaintiff's risk of contracting a particular kind of cancer was one in twenty, but because of the defendant's negligence it is now one in ten. Assume also that other townspeople experienced the same thing. The negligence has increased each person's chance of contracting this cancer by one-twentieth. If the amount of damages for a person who gets this cancer is \$1,000,000.00, then under this theory each plaintiff should recover \$50,000.00. The net result as to the defendant in the long run will be an accurate payout of exactly the amount of damage caused by his negligence, assuming the estimates are right.<sup>80</sup> As to the plaintiffs, however, none of those who contract cancer were fully compensated and all of those who escaped the disease were overcompensated.<sup>81</sup> No single plaintiff is accurately awarded if viewed from the time cancer sets in.<sup>82</sup> The undercompensated plaintiffs will be barred by *res judicata* from bringing another claim arising from the same wrong.<sup>83</sup>

It is theoretically possible to combine this latest alternative with the *Jackson* court's claim-splitting approach, though no court or commentator has adopted it. The Restatement (Second) of Torts' definition of injury supports the proposition that the increased risk is a separate cause of action recoverable immediately.<sup>84</sup> Combine with this the *Jackson* court's claim—splitting approach and plaintiffs could sue two times for two separate injuries—when the increased risk is acquired and if and when the cancer develops.

Companies like Johns-Manville would be quick to argue that this last suggestion results in an aggregate overpayment by defendants. First, they pay

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79. Example taken from Note, *supra* note 17, at 577-79.

80. *Id.* at 578. It can be argued that as a practical matter defendants would still overpay because jury awards are so hard to control. *But see* *Jordan v. Bero*, 158 W. Va. 28, 65, 210 S.E.2d 618, 640 (1974) (Neely, J., concurring) (juries are capable of making accurate awards based on a mere possibility of future injury).

81. The damages being considered in this analysis, and throughout this Note, do not include any mental distress, fear of cancer, or cancerphobia claims. Stripped of any mental distress type claim, it becomes clear that a plaintiff who is compensated \$50,000, but never contracts any cancer and lives an otherwise normal life, was overcompensated.

The recoverability of damages such as fear of cancer or cancerphobia is an area of the law with its own complexities and is beyond the scope of this Note. For discussions on these controversial causes of actions, see generally Dworkin, *supra* note 3, at 545-56 (specifically addressing latent disease fears from toxic substances); Note, *Emotional Distress Damages for Cancerphobia: A Case for the DES Daughter*, 14 PAC. L.J. 1215 (1983) (discussing recovery for fear of cancer with emphasis on California law).

82. Note, *supra* note 17, at 579.

83. *Id.* Another consideration which cuts against this alternative is the excessive legal fees and court expenses incurred to carry out 20,000 lawsuits. A class action, of course would mitigate this if allowed.

84. RESTATEMENT (SECOND) OF TORTS § 281(a) (1965); see *supra* notes 74-78 and accompanying text (explaining that a physical harm is not necessary).

a percentage of the total cancer damages based on the increased risk injury, then they pay all those who later develop cancer.<sup>85</sup> In essence, these companies would be paying exactly twice the amount of damages the cancer actually caused.<sup>86</sup>

Despite this contention the suggestion is theoretically sound. The defendant company has caused two injuries and the harm caused by these injuries exceeds the damages resulting from acquiring cancer.<sup>87</sup> Because this approach gives the appearance of a double compensation for a single injury, it is unlikely a court would adopt this extremely pro-plaintiff approach.

There is yet another alternative to the problems created by latent disease cases. Plaintiffs who fail to meet a particular jurisdiction's requirements to recover for future injury, such as the *Gideon* court's "more likely than not" standard,<sup>88</sup> may still be able to recover the expenses incurred for diagnostic tests to determine if cancer has developed.<sup>89</sup> The rationale for these actions is sound. First, forcing defendants to pay damages immediately will help deter

85. Compare this to the *Gideon* court's single cause of action approach. If all damages must be recovered at one trial, defendants either pay for cancer injuries or they do not. If they do, they only pay for all cancer-related damages once. The *Jackson* court's "wait and see" approach also limits the defendants' payout to only the amount of damages caused by the actual onset of cancer.

86. In the contaminated water example, the defendants would have to pay one-twentieth of the estimated cancer damages to each exposed person in the community. In the aggregate, this equals the total amount of damages cancer actually would cause in the community. Note, *supra* 17, at 577; see *supra* notes 79-83 and accompanying text. Defendants then would also have to pay all the actual cancer damages that occur years later, which, if the earlier estimates were accurate, would exactly match the amount paid earlier.

87. This is true without considering any mental anxiety claim due to the increased risk. The first injury occurs when an individual's legally protected interest in maintaining his current risk-level regarding cancer is invaded by the defendant negligently increasing this level. It then becomes a question of how to measure these damages. Logic would dictate that this calculation should be tied to the actual disease of cancer. Just because the damage calculation uses the cancer injury as a starting point, however, is not to say that the plaintiff is recovering twice for a single injury. The second injury, cancer, is a separate injury requiring separate compensation. It just so happens that these damages are calculated from the same starting point as the increased risk damages were calculated, namely, the costliness of a cancer injury.

88. Another such limitation often barring latent disease victims is the rule requiring physical injury to exist. See *supra* note 39.

89. This is an increasingly popular remedy. See, e.g., *Friends For All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 824-28 (D.C. Cir. 1984) (children who were diagnosed as potentially developing brain damage because of defendant's negligence were allowed to recover for diagnostic evaluations, even without any physical injury); *Jackson v. Johns-Manville*, 727 F.2d 506, 521-22 (5th Cir.), *vacated in part and question certified on reh'g*, 750 F.2d 1314 (5th Cir. 1984) (en banc), *certificate for question dismissed*, 469 So. 2d 99 (Miss. 1985) (en banc), *rev'd on second reh'g*, 781 F.2d 394 (5th Cir.), *cert. denied*, 106 S. Ct. 3339 (1986); *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 572-73, 461 A.2d 184, 190 (Ct. Law Div. 1983).



misconduct.<sup>90</sup> Second, these damages justly compensate some of the victims of wrong-doing. It is more fair for defendants to pay the costs of diagnostic exams than for the victims to bear the risk of receiving damages too late to be of any use. Deterring misconduct and providing compensation to victims of misconduct are the two basic aims of tort law.<sup>91</sup>

In addition, as discussed earlier, the Restatement (Second) of Torts lends support to this theory with its definition of "injury" as the "invasion of any legally protected interest of another."<sup>92</sup> Clearly, everyone has a protected interest in avoiding expensive diagnostic testing just as much as he has an interest in avoiding physical injury.<sup>93</sup> Requiring proper medical testimony to justify the necessity for these evaluations would eliminate the potential problem of claim fabrication.<sup>94</sup>

Allowing a cause of action for a mere possibility of contracting cancer, which falls below the "more likely than not" standard, has not been adopted in the United States, where the "all or nothing" approach is used.<sup>95</sup> In latent disease cases, however, it does solve some very difficult problems the other approaches cannot.<sup>96</sup> As always seems to be the case, however, this alternative has its own fair share of drawbacks.<sup>97</sup> Even though no single plaintiff is accurately compensated, all victims would prefer this relief over nothing, as the result would be with the *Gideon* standard.

An extremely pro-plaintiff approach would allow two cancer related recoveries for these claimants: one when the risk of cancer was increased, a second when the cancer sets in. No court or commentator has adopted this

90. *Friends For All Children*, 746 F.2d at 825. It has been suggested that allowing corporations to wait several years after the wrongful act before requiring them to pay damages will not bring about the desired change in behavior by the corporation. See *supra* note 68 and accompanying text. Whether deterrence is actually achieved by these relatively small damage awards is unknown. It has been suggested, however, that it is more of a deterrence than allowing a corporation to go twenty to forty years without paying any damages. *Friends For All Children*, 746 F.2d at 825.

91. *Friends For All Children*, 746 F.2d at 825.

92. *Id.* at 826; RESTATEMENT (SECOND) OF TORTS § 7(1) (1965).

93. *Friends For All Children*, 746 F.2d at 826.

94. *Id.*

95. See King, *supra* note 17, and Cooper, *supra* note 17, for discussions critiquing the American "all or nothing" approach.

96. See *supra* notes 64-70 and accompanying text.

97. In *Ayers v. Township of Jackson*, 189 N.J. Super. 561, \_\_\_, 461 A.2d 184, 187 (Ct. Law Div. 1983), the court stated:

To permit recovery for possible risk of injury or sickness raises the spectre of potential claims arising out of tortious conduct increasing in boundless proportion. Without minimizing plaintiffs' claim, the court cannot ignore the fact that much of what we do and make part of our daily diet exposes us to potential, albeit remote, harm. As long as the risk exposure remains within the realm of speculation, it cannot be the basis of a claim of injury against the creator of that harm.

approach.<sup>98</sup> An increasingly popular middle ground approach allows compensatory damages for future medical examinations to keep on top of the potential time bomb within these victims.<sup>99</sup>

In *Gideon*, the Fifth Circuit Court of Appeals held that the plaintiff could presently recover for cancer that is likely to develop years later.<sup>100</sup> In helping this one victim, the *Gideon* court has struck a blow to multitudes of other asbestos victims. Combining two well recognized rules of law,<sup>101</sup> the court in *Gideon* concluded that the plaintiff must sue for any possible future development of cancer at the same time relief for present injuries was requested, but these future damages were only recoverable if they were "more likely than not" to occur.<sup>102</sup>

It is a rare case when the fifty percent hurdle can be cleared upon the first diagnosis of an asbestos disease.<sup>103</sup> Therefore, though the plaintiff in *Gideon* recovered, in the great majority of cases the plaintiff will be denied recovery for the increased risk and/or actual development of cancer.

Because of the apparent justice done in *Gideon* for this plaintiff, the Fifth Circuit apparently overlooked the injustice its holding would work on numerous other equally deserving plaintiffs. The Fifth Circuit had other available alternatives.<sup>104</sup> Although each alternative has its own problems, none carry the one-sided hardship of the *Gideon* approach.

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98. See *supra* notes 84-87 and accompanying text.

99. See *supra* notes 88-94 and accompanying text.

100. 761 F.2d at 1138.

101. The two rules are: The rule requiring one cause of action for all injuries resulting from a single wrong, and the rule requiring a "more likely than not" probability that a future injury will occur. *Id.* at 1137-38.

102. *Id.*

103. See *supra* notes 39-45 and accompanying text.

104. In defense of the Fifth Circuit, it can be said that their hands were tied by the laws of Texas in this diversity action. Texas law, according to the *Gideon* court, would not permit the plaintiff to split his cause of action between present and future injuries. In support of this it cites *Texaco Country Club v. Wade*, 163 S.W.2d 219, 223 (Tex. Ct. App. 1942). In *Wade*, however, no request to split the cause of action between present and future injuries was made. The *Wade* court only held that it was proper for the plaintiff to recover for probable future consequences of the present injury if the evidence showed a reasonable probability the future injury would occur. *Id.*

Additionally, those courts that have allowed this claim-splitting in latent disease cases also had to deal with a common law rule forbidding the splitting of one cause of action. See *Jackson v. Johns-Manville*, 727 F.2d 506, 520 (5th Cir.), *vacated in part and question certified on reh'g*, 750 F.2d 1314 (5th Cir. 1984) (en banc), *certificated for question dismissed*, 469 So. 2d 99 (Miss. 1985) (en banc), *rev'd on second reh'g*, 781 F.2d 394 (5th Cir.), *cert. denied*, 106 S. Ct. 3339 (1986); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 117-18 nn.35-36 (D.C. Cir. 1982); *Martinez-Ferrer v. Richardson-Merrel, Inc.*, 105 Cal. App. 3d 316, 322-23, 325-26, 164 Cal. Rptr. 591, 594, 596 (1980); *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 519-20 (Fla. Dist. Ct. App.

1985); *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 668 n.9, 464 A.2d 1020, 1027 n.9 (1983); *Devlin v. Johns-Manville Sales Corp.*, 202 N.J. Super. 556, —, 495 A.2d 495, 502 (Ct. Law Div. 1985). These courts, unlike the court in *Gideon*, were presented with facts that brought to light the unfairness of not allowing claim-splitting in these cases.

To support an aberration from the rule they were otherwise bound by, some of these courts relied on the RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) and (f) (1982) which allow the court to expressly reserve a plaintiff's right to maintain the second action or allow claim-splitting if extraordinary circumstances exist. *Jackson*, 727 F.2d at 521; *Eagle-Picher*, 481 So. 2d at 520; *Devlin*, 202 N.J. Super. at —, 495 A.2d at 502; *see also Wilson*, 684 F.2d at 120 (though not citing the Restatement, it recognized that traditional rules were not appropriate in latent disease cases); *Martinez-Ferrer*, 105 Cal. App. 3d at 323, 326, 164 Cal. Rptr. at 595-96 (though the Restatement was not cited, the court made an exception because of the extraordinary circumstances, as the RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(f) provides).

Other courts resolved this problem by redefining the cause of action in such a way that a separate cause of action accrued when the latent disease manifested itself. *See Wilson*, 684 F.2d at 117-21; *Colby v. E.R. Squibb & Sons*, 589 F. Supp. 714, 716-17 (D. Kan. 1984); *Pierce*, 296 Md. at 667-68, 464 A.2d at 1027. These courts were no less bound by the law of their jurisdiction than the Fifth Circuit was in *Gideon*.

The Fifth Circuit, on the second rehearing of *Jackson*, intimated that there are occasions when the "wait and see" approach could be used. *Jackson*, 781 F.2d at 411. While applying Mississippi law, it did not allow claim-splitting in that case either because it did not have to. The plaintiff had satisfied the "more likely than not" standard and was compensated for the future probability of developing cancer. In this case, the Fifth Circuit did leave a potential opening for the "wait and see" approach when it stated: "a plaintiff who later develops cancer may be able to recover at that time if an earlier jury, dealing with some other manifestation of asbestos exposure, concludes that the plaintiff does not presently have a reasonable probability of developing cancer." *Id.*