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Ayers v. Township of Jackson: Damages for the Enhanced Risk of Future Disease

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Ayers v. Township of Jackson: Damages for the Enhanced Risk of Future Disease

I. Introduction

The law regarding the recovery of damages for the enhanced risk of future disease is quickly becoming an important area of tort law. However, because of the speculative nature of this type of claim, courts have been reluctant to award damages absent some present manifestation of disease or upon the plaintiffs showing a certain probability that disease will occur.[1]

In the case of *Ayers v. Township of Jackson*,[2] the New Jersey Supreme Court was called upon to decide whether township residents could recover damages for the unquantified enhanced risk of disease arising out of the "palpably unreasonable"[3] operation of a municipal landfill. The court held that they could not.[4] This decision affirmed the holdings of the appellate division[5] and the trial court.[6]

All background facts and information regarding *Ayers* will be examined in Section II of this note. Section III will explore the law of recovery for the enhanced risk of disease in various jurisdictions under different circumstances. The trial court's decision will be discussed in Section IV, and the appellate division's decision will be analyzed in Section V. Section

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1. Siegel & Salvesen, *Sterling v. Velsicol: The Case for a New Increased Risk Rule*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10155, 10156 (1987).

2. 106 N.J. 557, 525 A.2d 287 (1987).

3. Plaintiff-Respondent's Memorandum of Law In Support of Motion for Certification at 1, *Ayers v. Township of Jackson*, 106 N.J. 557, 525 A.2d 287 (1987)(No. 24-248) [hereinafter Plaintiff's Memorandum].

4. *Ayers*, 106 N.J. at 579, 525 A.2d at 298.

5. Ayers v. Township of Jackson, 202 N.J. Super. 106, 493 A.2d 1314 (N.J. Super. Ct. App. Div. 1985), *aff'd as modified in part and rev'd in part*, 106 N.J. 557, 525 A.2d 287 (1987).

6. Ayers v. Township of Jackson, 189 N.J. Super. 561, 461 A.2d 184 (N.J. Super. Ct. Law Div. 1983), *aff'd as modified*, 202 N.J. Super. 106, 493 A.2d 1314 (N.J. Super. Ct. App. Div. 1985), *aff'd in part and rev'd in part*, 106 N.J. 557, 525 A.2d 287 (1987).

VI will analyze the New Jersey Supreme Court's decision, as well as the dissenting opinion. Section VII will contain a final analysis, and Section VIII will conclude that the New Jersey Supreme Court would have made a fairer and more feasible decision had they allowed the plaintiffs damages for their enhanced risk claims.

II. Facts

From 1972 until 1978, residents of the Legler area of Jackson Township, New Jersey had their well water contaminated by toxic chemicals leaching into the Cohansey Aquifer from a landfill operated by Jackson Township.[7] In December 1978, a health emergency was declared and area residents were instructed to stop using their well water. From then until July 1980, household water was provided in various ways. First, residents carried water from tanks placed in various locations throughout the township. Later the township delivered water to the residents homes in plastic-lined containers. By July 1980, the township had constructed a water supply system. Residents were charged a $610 hookup fee and normal service resumed.[8]

Over three hundred residents initiated a suit against the Township in the Superior Court of New Jersey, claiming to have been harmed by the Township's negligent operation of the landfill. The plaintiffs sought damages for: emotional distress from learning that they had been drinking contaminated water for six years; diminished quality of life from having no running water for twenty months; costs of future medical surveillance; enhanced risk of future diseases such as cancer, liver and kidney disease, and civil rights violations.[9] This note will concentrate on the damages sought for the enhanced risk of future diseases.

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7. The following chemicals were found in varying concentrations: acetone, benzene, chlorobenzene, chloroform, dichlorofluoromethane, ethylbenzene, methylene, chloride, methyl isobutyl ketone, 1,1,2,2-tetrachloroethane, tetrahydrofuran, 1,1,1-trichloroethane and trichlorethylene. *Ayers*, 106 N.J. at 568, 525 A.2d at 292.

8. *Ayers*, 202 N.J. Super. at 112, 493 A.2d at 1317.

9. 42 U.S.C. § 1983 (1982).

At trial, it was determined that for six years the Township had operated its landfill in such a manner as to contaminate underlying groundwater with highly toxic chemicals. These chemicals then migrated to the plaintiffs' wells, exposing them for years to the harmful effects of the toxins.[10]

III. The Law of Recovery for the Enhanced Risk of Disease

The law regarding damages for the enhanced risk of future disease is a rapidly evolving area of tort law.[11] Exposure to hazardous substances at home and in the workplace has created a tremendous volume of toxic tort litigation which appears to be creating new trends in tort law. Historically, courts have considered "whether such damages are too remote or too speculative to be awarded."[12] The courts usually require the plaintiff to show a present manifestation of disease, or a certain probability that it will occur in the future.[13] Most claims for enhanced risk involve diethyestilbestrol (DES) or asbestos which will be the focus of this analysis, as well as cases involving exposure to other hazardous materials.

A. *DES Cases*

In *Morrissey v. Eli Lilly & Co.*,[14] the plaintiff, on behalf of two classes of "DES daughters," brought an action against the manufacturers and sellers of DES and the hospital to recover damages for the increased risk of cancer. In denying the

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10. Plaintiff's Memorandum, *supra* note 3, at 1.

11. Siegel & Salvesen, *supra* note 1, at 1056.

12. *Id.*

13. *Id. See also*, Adams v. Johns-Manville Sales Corp., 783 F.2d 589 (5th Cir. 1986) (probability of developing cancer is necessary to recover damages); Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982), *cert. denied*, 459 U.S. 1210 (1983) (mere possibility of developing illness is not sufficient); Sarzynski v. Stern, 13 Mich. App. 158, 163 N.W.2d 641 (Mich. Ct. App. 1968) (future injury must be reasonably certain to occur for damages to be awarded); and Askey v. Occidental Chemical Corp., 102 A.D.2d 130, 477 N.Y.S.2d 242 (4th Dep't 1984) (no damages allowed for enhanced risk of disease).

14. 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1st Dist. 1979).

plaintiff's class certification,[15] the court stated:

> [p]laintiff . . . is essentially alleging the existence of latent disease as a present injury to herself and the proposed classes. The nexus thus suggested between exposure to DES *in utero* and the possibility of developing cancer or other injurious conditions in the future is an insufficient basis upon which to recognize a present injury. In Illinois, possible future damages in a personal injury action are not compensable unless reasonably certain to occur.[16]

Similarly, in *Mink v. University of Chicago*,[17] several women who had taken DES brought causes of action based on products liability, battery and failure to notify.[18] After finding no evidence that any plaintiff suffered from any abnormality claimed, the court dismissed the enhanced risk claim and noted:

> [c]learly, one of the essential elements in a claim for strict liability is physical injury to the plaintiff. The closest the complaint comes to alleging physical injury is the allegation of a "risk" of cancer. The mere fact of risk without any accompanying physical injury is insufficient.[19]

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15. *Id.* at 761, 394 N.E.2d at 1376.

16. *Id.* The court failed to find a reasonable certainty despite the fact that it noted:

> As a proximate result of the nature and conditions of DES, all members of the proposed class have developed cancerous lesions, adenocarcinoma, adenosis or certain tumors or cytological abnormalities which in time will generate adenocarcinoma or other cancerous conditions.

Id. at 756, 394 N.E.2d at 1372.

17. 460 F. Supp. 713 (N.D. Ill. 1978).

18. *Id.* at 715-16. The plaintiffs claimed that as a result of taking DES, their daughters developed abnormal cervical cellular formations and were at an increased risk of developing vaginal or cervical cancer. They also claimed they and their sons suffered reproductive tract and other abnormalities, and were at an increased risk of getting cancer. *Id.* at 715.

19. *Id.* at 719. *See also*, Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171 (1982) (holding no recovery unless "more likely than not to occur").

B. *Asbestos Cases*

In *Gideon v. Johns-Manville Sales Corp.*,[20] the plaintiff brought suit against seventeen asbestos manufacturers for his asbestosis and enhanced risk of developing mesothelioma or other cancer, due to his inhalation of asbestos fibers.[21] The plaintiff's theory, supported by testimony, was that as a result of working with asbestos, he inhaled asbestos fibers, which initiated a scarring process that damaged his lungs. Later, "other changes occurred as the fibers worked through his lung tissues and lodged in the membrane surrounding his lungs."[22] This caused "pleural thickening, plaques, calcifications and asbestosis as well as the likely future development of mesothelioma and cancer."[23] The plaintiff claimed that his injury was the inhalation of the fibers and their invasion of his body causing physical damage.[24] The plaintiff presented expert testimony that there was a reasonable medical probability that he would develop and die from cancer as a result of inhaling these fibers.[25]

In ruling on the plaintiff's enhanced risk claim, the Fifth Circuit Court of Appeals noted, "a plaintiff who seeks to recover for damages he is likely to sustain in the future must prove these future damages by a preponderance of the evidence. Certainty, however, is not required; the plaintiff need demonstrate only that the event is more likely to occur than not."[26] Since the plaintiff satisfied this standard, he was allowed to recover.[27]

In *Herber v. Johns-Manville Corp.*,[28] the plaintiff brought suit against the defendants after he was diagnosed as

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20. 761 F.2d 1129 (5th Cir. 1985).

21. *Id.* at 1134.

22. *Id.* at 1137.

23. *Id.*

24. *Id.* at 1137.

25. *Id.* at 1138.

26. *Id.* at 1137-38.

27. *Id. See generally*, Note, *Damages for an Increased Risk of Developing Cancer Caused By Asbestos Exposure Are Only Recoverable If It Is More Likely Than Not That Cancer Will Develop*, 51 Mo. L. Rev. 847 (1986).

28. 785 F.2d 79 (3d Cir. 1986).

having pleural thickening, a condition associated with exposure to asbestos.[29] In affirming the district court's decision dismissing the plaintiff's enhanced risk claim, the Third Circuit Court of Appeals stated the rule in New Jersey: "[i]f the prospective consequences may, in reasonable probability be expected to flow from the past harm, plaintiff is entitled to be indemnified for them."[30] Since the plaintiff could offer no evidence of a probable future cancer,[31] the court found his argument to be "fundamentally at odds with New Jersey's approach to compensable injury."[32]

C. *Other Hazardous Substances*

A recent case with facts similar to *Ayers* is *Sterling v. Velsicol Chemical Corp.*[33] In *Sterling*, the plaintiffs were exposed to hazardous chemicals that leached from Velsicol's chemical waste burial site into their water wells.[34] The plaintiffs alleged present injuries and an enhanced risk of cancer as a result of drinking, bathing and cooking in the contaminated water.[35] The court concluded that Velsicol's operation of the waste burial site was an ultrahazardous activity,[36] and Velsicol

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29. *Id.* at 81.

30. *Id.* (quoting Coll v. Sherry, 29 N.J. 166, 175, 148 A.2d 481, 486 (1959)).

31. *Id.* The district court record revealed that, had plaintiff's expert been allowed to testify, he could not have presented epidemiological data showing a risk in excess of fifty percent, nor could he offer an opinion that the plaintiff, "more likely than not would experience cancer." *Id.* at 81 n.1.

32. *Id.* at 82.

33. 647 F. Supp. 303 (W.D. Tenn. 1986).

34. *Id.* at 306. This class action was tried with five plaintiffs, chosen because their claims were generally representative of the claims of all class members. *Id.* at 307.

35. *Id.* at 308. At trial, the plaintiffs presented evidence of severe headaches, hearing and vision problems, kidney problems (including cancer), weight loss, nausea, optic neuritis, as well as other medical problems. *Id.* at 325-44. Evidence of the chemicals involved and the effects of the exposure to them was also in evidence. *Id.* at 430-38.

36. *Id.* at 315-16. *See also* Restatement (Second) Torts § 519-20 (1977).

§ 519. General Principle

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which

was strictly liable for all of the plaintiffs' injuries. The court treated the increased risk as an existing condition with recoverable damages.[37]

In *Hagerty v. L & L Marine Services, Inc.*,[38] the plaintiff sought damages for his increased risk of contracting cancer as a result of being accidentally soaked with toxic chemicals while working as a seaman.[39] After reviewing recent commentaries urging recognition of a claim for "enhanced risk," whether greater or less than fifty percent,[40] the court concluded, "a plaintiff can recover only where he can show that the toxic exposure more probably than not will lead to cancer."[41] Since the plaintiff failed to allege that he had cancer, or would probably develop it, no relief could be granted.[42]

In *Brafford v. Susquehanna Corp.*,[43] five plaintiffs filed an action alleging they were exposed to excessive levels of radiation as a result of the defendant's uranium processing op-

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makes the activity abnormally dangerous.

§ 520. Abnormally Dangerous Activities

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is out-weighed by its dangerous attributes.

Generally courts will apply strict liability to activities which are abnormally dangerous or ultrahazardous. *See generally*, Madden, *Liability for Abnormally Dangerous Activities*, 10 J. Prod. Liab. 1 (1987).

37. *Sterling*, 647 F. Supp. at 321-22.

38. 788 F.2d 315, *reh'g denied*, 797 F.2d 526 (5th Cir. 1986).

39. *Id.* at 319. Hagerty was drenched with dripolene, a carcinogenic chemical containing benzene, toluene and xyolene. *Id.* at 317.

40. *Id.* at 319.

41. *Id.* Although plaintiff failed to specify what his increased risk was, the court assumed it to be no more than fifty percent. *Id.*

42. *Id.* at 320. The only evidence of physical injury the plaintiff presented was that he suffered a brief period of dizziness, leg cramps, and stinging in his extremities after the dousing. *Id.* at 317.

43. 586 F. Supp. 14 (D. Colo. 1984).

eration.[44] They claimed this radiation caused chromosome damage and an increased risk of cancer.[45] Before trial, the defendant moved for summary judgment with respect to this claim.[46]

After reviewing Tenth Circuit law, the court noted that "in order to recover future damages for enhanced cancer risk, plaintiffs must have suffered a definite, present physical injury."[47] The court refused to grant summary judgment, noting that the defendant will have ample opportunity to question the extent of the plaintiffs' subcellular damage at trial.[48]

As the cases demonstrate, a plaintiff will not recover damages without a present physical injury, a probability of more than fifty percent that the disease or injury will occur, or unless the court views the enhanced risk as a present injury, rather than a speculative future one.

IV. The Trial Court's Decision

On April 15, 1983, the Superior Court of New Jersey decided the case of *Ayers v. Township of Jackson*.[49] The plaintiffs sought damages for the enhanced risk of cancer as well as

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44. *Id.* at 15. During uranium ore processing, certain radioactive waste materials known as "mill tailings" are produced. The plaintiffs alleged that prior to the purchase of their home, mill tailings were removed from the defendant's mill and placed in and around the foundation of their home. *Id.*

45. *Id.* at 16.

46. *Id.*

47. *Id.* at 17. The plaintiffs characterized their injuries as the present damage to their cellular and subcellular structures, incurred as a result of their exposure to radiation. *Id.* The court seemed to give great weight to the plaintiffs' expert witnesses who were scheduled to testify. It noted:

> [P]laintiffs have produced experts of national renown who express their opinion that the extent of subcellular damage resulting to plaintiffs because of their exposure to the radiation constitutes a present physical injury. Dr. Radford describes the injury as present in the sense that the "damage has been done" and the " 'trigger' of a cancer change has been cocked." Dr. Morgan characterizes the injury as present in the sense that the subcellular changes operate to deprive plaintiffs of a degree of immunity which they had enjoyed prior to their exposure to the mill tailings.

Id. at 18.

48. *Id.*

49. 189 N.J. Super. 561, 461 A.2d 184 (Ocean County 1983).

liver and kidney diseases.[50] The plaintiffs' experts claimed that the individual risks would vary "according to dose, duration and exposure and inherent susceptibility, with children and infants having the highest risk."[51] The plaintiffs characterized their risk of suffering a disease as "reasonably probable, therefore, compensable."[52]

In their argument, the plaintiffs relied upon *Schwegel v. Goldberg*,[53] and *Lindsay v. Appleby*.[54] In *Schwegel*, a five percent enhanced risk of epilepsy was held to be compensable,[55] and in *Lindsay*, the court held that an "increase in the risk of injury traceable to the conduct of a defendant is compensable."[56] Both cases involved severe head injuries with possible epilepsy or seizures in the future.

The *Ayers* court distinguished these cases because the plaintiffs' claim of enhanced risk was not caused by severe trauma or bodily injury,[57] nor could they establish a percentage increase.[58] The court could not find a New Jersey case in which a plaintiff was allowed to recover "for such speculative future consequences of a tortious act."[59] The plaintiffs could not quantify the risk, nor could any of their experts "attempt to advance an opinion that any of the 325 plaintiffs have or will probably contract any of the diseases."[60]

In reaching its decision, the court relied upon *Coll v.*

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50. *Id.* at 565, 461 A.2d at 186.

51. *Id.* at 566, 461 A.2d at 187.

52. *Id.* at 567, 461 A.2d at 187. Dr. Joseph Highland, an eminent toxicologist testified at trial for the plaintiffs. Translating groundwater data, he determined the amount of exposure to each plaintiff. He then compiled toxicity profiles of the chemicals involved. From this he was able to conclude that "virtually all plaintiffs were at a significant and substantial increased risk of developing cancer," as well as having "a high or very high likelihood of developing liver or renal disorders." Respondent-Appellant's Brief to the Superior Court at 24-25. *Ayers v. Township of Jackson*, 202 N.J. Super. 106, 493 A.2d 1314 (1985) (App. Div. No. A-2103-83T3)(citing various trial court transcripts).

53. 209 Pa. Super. 280, 228 A.2d 405 (1967).

54. 91 Ill. App. 3d 705, 414 N.E.2d 885 (1980).

55. *Schwegel*, 209 Pa. Super. at 288, 228 A.2d at 409.

56. *Lindsay*, 91 Ill. App. 3d at 714, 414 N.E.2d at 891.

57. *Ayers*, 189 N.J. Super. at 568, 461 A.2d at 187.

58. *Id.*

59. *Id.*

60. *Id.* at 567, 461 A.2d at 187.

Sherry,[61] and *Ciuba v. Irvington Varnish & Insulator Co.*[62] In *Coll*, damages were allowed for the prospective consequences of tortious conduct if the "prospective consequences may, in reasonable probability, be expected to flow from the past harm."[63] In *Ciuba*, the court held "reasonable probability" required "evidence in quality sufficient to generate belief that the tendered hypothesis is in all human likelihood the fact."[64]

In granting the defendants' partial summary judgment motion for the enhanced risk claims, Judge James Havey noted:

> (t)o 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 in the realm of speculation, it cannot be the basis of a claim of injury against the creator of the harm.[65]

However, Judge Havey noted that this ruling would not leave the plaintiffs without a remedy if the diseases occurred at a later time. He indicated that under the New Jersey's "discovery rule,"[66] the statute of limitations in a personal injury action does not begin to run until the plaintiff becomes aware of the injury, or when the plaintiff realizes that his injury was caused by the fault of another.[67]

V. The Appellate Court's Decision

The plaintiffs and the defendant both appealed to the Superior Court of New Jersey, Appellate Division.[68] The ap-

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61. 29 N.J. 166, 148 A.2d 481 (1959).
62. 27 N.J. 127, 141 A.2d 761 (1958).
63. *Coll*, 29 N.J. at 175, 148 A.2d at 486.
64. *Ciuba*, 27 N.J. at 139, 141 A.2d at 767.
65. *Ayers*, 189 N.J. Super. at 568, 461 A.2d at 187.
66. N.J. Stat. Ann. § 2A:14-2 (West 1983). *See infra* note 111.
67. *Ayers*, 189 N.J. Super. at 568, 461 A.2d at 187.
68. Ayers v. Township of Jackson, 202 N.J. Super. 106, 493 A.2d 1314 (N.J.

peal was decided 3-0 on June 4, 1985.[69] The plaintiffs argued that "virtually all plaintiffs were at a significant and substantial increased risk of developing cancer,"[70] and that they "had a high or a very high likelihood of developing liver or renal disorders."[71] The plaintiffs also claimed to have sustained sub-clinical cellular damage as a result of the defendants' activities.[72] These arguments were based upon the findings of Dr. Joseph Highland, a toxicologist who testified for the plaintiffs at trial.[73]

In dismissing the plaintiff's sub-clinical cellular damage theory, the court relied upon *Schweitzer v. Consolidated Rail Corp.*[74] There the court held "that the possible existence of subclinical asbestos-related injury prior to manifestation may be of interest to a histologist. [H]owever, that subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage . . . required to sustain a cause of action under generally applicable principles of tort law."[75]

The court also cited *Coll v. Sherry*,[76] in holding that "[w]hile it is true that damages are recoverable for the prospective consequences of a tortious injury, it must be demonstrated that the apprehended consequences are reasonably probable."[77] The court could find no way to award damages of

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Super. Ct. App. Div. 1985), *aff'd in part rev'd in part*, 106 N.J. 557, 525 A.2d 287 (1987). On appeal, the defendants challenged the trial court's awards for emotional distress, quality of life and future medical surveillance. *Id.* at 113, 493 A.2d at 1317. The plaintiffs appealed the *pro tanto* reduction of their award by the $850,000 settlement with a codefendant, the dismissal of their claims under 42 U.S.C. § 1983 and the refusal to allow damages for the enhanced risk of diseases. *Id.*

69. *Id.* at 129, 493 A.2d at 1326.

70. *Id.* at 121, 493 A.2d at 1322. *See supra* note 52.

71. *Id.*

72. *Id.*

73. *Id.*

74. 758 F.2d 936 (3d Cir. 1985)

75. *Id.* at 942 (quoted in *Ayers*, 202 N.J. Super at 121-22, 493 A.2d at 1322).

76. 29 N.J. 166, 148 A.2d 481 (1959).

77. *Ayers*, 202 N.J. Super. at 125, 493 A.2d at 1324. The court felt that the plaintiffs' sub-clinical cellular damage theory rested entirely upon Dr. Highland's opinion. It was unsupported by clinical evidence, and was unable to be quantified. *Id.* at 121-22, 493 A.2d at 1322-23.

this sort "without knowing in some way, the degree of enhancement."[78]

In reaching its decision, the court was also mindful of the legislative intent of the New Jersey Tort Claims Act,[79] where the legislature expressed hope that "the courts will exercise restraint in the acceptance of novel causes of action against public entities."[80]

The defendant also argued that the trial court erred in ruling that the discovery rule would apply to any future claims by the plaintiffs.[81] In reply to this, the appellate division said the trial court's ruling was dictum only and [had] no controlling significance to the future rights of the parties."[82]

VI. The New Jersey Supreme Court's Decision

A. *Majority Opinion*

As a result of the appellate division's decision, the plaintiffs petitioned and the defendant cross-petitioned the Supreme Court of New Jersey for certification. Certification was granted,[83] and in a 5-1 decision written by Justice Stein, the supreme court affirmed in part and reversed in part.[84]

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78. *Id.* at 125-26, 493 A.2d at 1324.

79. *Ayers*, 202 N.J. Super. at 122-23, 493 A.2d at 1323. N.J. Stat. Ann. § 59:1-1 to 12-3 (West 1982). Particularly important in this case was § 59:2-1 — Immunity of public entity generally:

> a. Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.
>
> b. Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person.

80. *Ayers*, 202 N.J. Super. at 122-23, 493 A.2d at 1323. (quoting comments to N.J. Stat. Ann. § 59:2-1 (West 1982)).

81. *Id.* at 124, 493 A.2d at 1324.

82. *Id.* at 125, 493 A.2d at 1324.

83. 106 N.J. 557, 525 A.2d 287 (1987). On appeal to the New Jersey Supreme Court, the plaintiffs sought review of all adverse portions of the appellate division's judgment (no damages for enhanced risk, the *pro tanto* reduction of the award, the denial of the Civil Rights claim, and the denial of damages for medical surveillance or emotional distress), and the defendant sought review of the award of damages for impairment of quality of life. *Id.* at 567, 525 A.2d 292.

84. *Id.* at 623, 525 A.2d at 321. For affirmance in part and reversal in part were

Again, the plaintiffs sought damages for the enhanced risk of future illnesses.[85] Citing *Feist v. Sears Roebuck & Co.*,[86] *Schwegel v. Goldberg*,[87] and other cases,[88] the plaintiffs argued that the increased risk was a presently existing condition in each plaintiff, and that they should be compensated for it.[89]

In *Feist*, the Oregon Supreme Court allowed an instruction to the jury that it could consider susceptibility to meningitis in its award of damages,[90] and in *Schwegel*, the Pennsylvania Superior Court held that compensation could be awarded for a five percent enhanced risk of epilepsy.[91] The plaintiffs argued that they were not seeking to recover for the ultimate disease because that would be speculative.[92] They emphasized that they were only pursuing, and were entitled to, damages for "the presently existing medical condition of enhanced susceptibility to disease".[93]

The defendants argued that the enhanced risk claim was actually a claim for pain and suffering which was barred by the New Jersey Tort Claims Act because it was against a public entity.[94] Citing *Lindsay v. Appleby*[95] and *Figlar v.*

Chief Justice Wilentz and Justices Clifford, Pollack, Garibaldi and Stein. Concurring in part and dissenting in part was Justice Handler. *Id.*

85. Supplemental Brief for Certification by Plaintiffs-Petitioners at 22, *Ayers v. Township of Jackson*, 106 N.J. 557, 525 A.2d 287 (1987) (No. 24-248) [hereinafter Plaintiff's Supplemental Brief].

86. 267 Or. 402, 517 P.2d 675 (1973).

87. 209 Pa. Super. 280, 228 A.2d 405 (1967).

88. Plaintiff's Supplemental Brief, *supra* note 85, at 28-29 (*citing* Starlings v. Ski Roundtop Corp., 493 F. Supp. 507, 510 (M.D. Pa. 1980) (allowing damages for an increased risk of arthritis); Lindsay v. Appleby, 91 Ill. App. 3d 705, 714, 414 N.E.2d 885, 891 (1980) (where such injuries are compensable as pain and suffering).

89. *Id.* at 25-26.

90. *Feist*, 267 Or. at 402, 517 P.2d at 679.

91. *Schwegel*, 209 Pa. Super. at 288, 228 A.2d at 408-09.

92. Plaintiffs Supplemental Brief, *supra* note 85, at 25-26.

93. *Id.*

94. Defendant's Brief in Opposition to Petition for Certification and In Support of Cross-Petition for Certification at 14-15. *Ayers v. Township of Jackson*, 106 N.J. 557, 525 A.2d 297 (1987) (No. 24-248) [hereinafter Defendant's Brief]. *See also supra* notes 79 & 80.

95. 91 Ill. App. 3d 705, 414 N.E.2d 885 (1980).

Gordon,[96] the defendant argued that other jurisdictions view such claims as claims for pain and suffering.[97] In *Lindsay*, the court stated that "[a]n increase in the risk of injury traceable to the conduct of a defendant is compensable as pain and suffering,"[98] and in *Figlar*, the court permitted compensation for the anxiety resulting from the possibility of disease.[99]

The defendant also argued that it would be unwise to recognize a claim for enhanced risk because it is by its nature unfair.[100] The defendant relied upon *Wilson v. Johns-Manville Sales Corp.*,[101] in which the court expressed fear that plaintiffs who eventually incur the harm are undercompensated and those who escape harm receive a windfall.[102]

Although the supreme court did find an enhanced risk caused by a significant exposure to toxic chemicals to be an injury under the New Jersey Tort Claims Act,[103] the court went on to note that "[e]xcept for a handful of cases involving traumatic torts causing presently discernable injuries in addition to an enhanced risk of future injuries, courts have generally been reluctant to recognize claims for potential but unrealized injury unless the proof that the injury will occur is substantial."[104]

The court cited *Anderson v. W.R. Grace & Co.*,[105] in which the plaintiffs' sought damages for enhanced risk due to contamination of their well water. The *Anderson* court held that "[a] plaintiff is entitled to compensation for all damages that reasonably are to be expected to follow, but not those that possibly may follow, the injury which he has suffered."[106]

The supreme court also noted that some courts require

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96. 133 Conn. 577, 53 A.2d 645 (1947).

97. Defendant's Brief, *supra* note 94, at 15.

98. *Lindsay*, 91 Ill. App. 3d at 714, 414 N.E.2d at 891.

99. *Figlar*, 133 Conn. at 585, 53 A.2d at 648.

100. Defendant's Brief, *supra* note 94, at 14-15.

101. 684 F.2d 111 (D.C. Cir. 1982).

102. *Id.* at 120-21 n.44 (cited in Defendant's Brief, *supra* note 94, at 14-15).

103. *Ayers*, 106 N.J. at 591-92, 525 A.2d at 304-05.

104. *Id.* at 592-93, 525 A.2d at 305 (citations omitted).

105. 628 F. Supp. 1219 (D. Mass. 1986) (cited in *Ayers*, 106 N.J. at 593, 525 A.2d at 306).

106. *Id.* at 1230.

the proof of future injury to be "reasonably certain,"[107] while others permit recovery only if some "present manifestation of disease" is exhibited.[108]

In summing up, the court stated:

> Our disposition of this difficult and important issue requires that we choose between two alternatives, each having a potential for imposing unfair and undesirable consequences on the affected interests. A holding that recognizes a cause of action for unquantified enhanced risk claims exposes the tort system . . . to the task of litigating vast numbers of claims . . . based on threats of injuries that may never occur. It imposes on judges and juries the burden of assessing damages for the risk of potential disease, without clear guidelines to determine what level of compensation may be appropriate. It would undoubtedly increase already escalating insurance rates. It is clear that the recognition of an "enhanced risk" cause of action, particularly when the risk is unquantified, would generate substantial litigation that would be difficult to manage and resolve . . . .
>
> On the other hand, denial of the enhanced-risk cause of action may mean that some of the plaintiffs will be unable to obtain compensation for their injury. Despite the collateral estoppel effect of the jury's finding that defendant's wrongful conduct caused the contamination of plaintiffs' wells, those who contract diseases in the future . . . may be unable to prove a causal relationship between such exposure and their disease.[109]

The court went on to note that because of its speculative nature, to deny the claim would most closely reflect the legislative intent of the New Jersey Tort Claims Act.[110] However,

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107. *Ayers* 106 N.J. at 595, 525 A.2d at 306.

108. *Id.* at 595, 525 A.2d at 307.

109. *Id.* at 597-98, 525 A.2d at 307-08.

110. *Id.* at 598, 525 A.2d at 308. *See supra* notes 79-80. However, the court noted, "[w]e need not and do not decide whether a claim based on enhanced risk . . . that is supported by testimony demonstrating that the onset of the disease is reasonably probable could be maintained under the Tort Claims Act." *Id.* at 599, 525 A.2d at 308 (citations omitted).

the court noted under New Jersey law "the cause of action does not accrue until the victim is aware of the injury or disease and the facts indicating that a third party is or may be responsible."[111]

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111. *Ayers*, 106 N.J. at 583, 525 A.2d at 300. The court also said that CERCLA now pre-empts state statutes of limitation where they provide that the limitations period for personal-injury or property-damage suits prompted by exposure to hazardous substances starts on a date earlier than the "federally required commencement date." That term is defined as "the date plaintiff knew (or reasonably should have known) that the personal injury or property damage . . . were caused or contributed to by the hazardous substance . . . concerned." *Id.* at 582-83, 525 A.2d at 300 (citing Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613, 1695-96 (1986) (to be codified at 42 U.S.C. § 9658). *See also* Hagerty v. L & L Marine Servs. Inc., 788 F.2d 315, *reh'g denied*, 797 F.2d 256 (5th Cir. 1986) and Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985). Both held that neither the statute of limitations nor the single controversy rule would bar timely claims in toxic tort cases, although there was prior litigation between the parties for different claims but the same tortious act.

See also, at N.Y. Civ. Prac. L. & R. § 214-b (McKinney Supp. 1988), which states:

> Notwithstanding any provision of law to the contrary, an action to recover damages for personal injury caused by contact with or exposure to phenoxy herbicides while serving as a member of the armed forces of the United States in Indo-China from January first, nineteen hundred sixty-two through May seventh, nineteen hundred seventy-five, may be commenced within two years from the date of discovery of such injury, or within two years from the date, when through the exercise of reasonable diligence the cause of such injury should have been discovered, whichever is later.

The commentary following the statute states: "in the interest of justice, the claims of veterans of the Vietnam era should not be prohibited by the holding that a cause of action accrues, and the statute of limitations commences to run from the "date of injury." The obstruction to the prosecution of legitimate claims by individuals who served in Indo-China should be remedied by a discovery statute of limitations." *Commentary*, N.Y. Civ. Prac. L. & R. § 214-b (McKinney Supp. 1988). This was the New York Legislature's response to the Agent Orange litigation.

See also, N.Y. Civ. Prac. L.& R. § 214-c-2 (McKinney Supp. 1988) which states:

> Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

In enacting these rules, the New York Legislature created a new discovery rule for virtually all toxic torts.

B. *Dissenting Opinion*

In his dissenting opinion, Justice Handler pointed out that the plaintiffs' risk of disease is higher than that of the general population,[112] and the only reason that this risk could not be quantified was because of scientific limitations and the number and variety of chemicals involved.[113]

In response to the majority's characterization of the plaintiffs' claims as "depend(ing) upon the likelihood of an event that has not yet occurred and may never occur,"[114] Justice Handler noted that the exposure to the chemicals is the event.[115] It has occurred.[116] It is not "a speculative or remote possible happening."[117] "(L)ike claims based on doctrines of trespass, assault, invasion of privacy, or defamation, the damages suffered are not solely actual consequential damages, but also the disvalue from being subjected to an intrinsically harmful event. The risk of dreaded disease resulting from toxic exposure and contamination is more frightening and palpable than any deficits we may feel or imagine from many other wrongful transgressions."[118]

In response to the majority's fear that these claims would lead to high volumes of litigation, the dissent suggested certain standards which would limit these claims and make them more manageable.[119] He also noted that the legislature could resolve potential problems with toxic tort litigation.[120]

In summing up, the dissent characterized the majority's limitations on damages as "inadequate and unfair."[121] He sug-

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112. *Ayers*, 106 N.J. at 613, 525 A.2d at 316 (Handler, J., concurring in part and dissenting in part).

113. *Id.* The dissent felt that the majority had wrongfully focused on the inability to quantify the risk, instead of the contamination itself. *Id.*

114. *Id.* at 597, 525 A.2d at 308.

115. *Id.* at 618, 525 A.2d at 319.

116. *Id.*

117. *Id.*

118. *Id.* at 618-19, 525 A.2d at 319.

119. *Id.* at 620, 525 A.2d at 319. The dissent suggested using presumptions, burdens of proof, and required minimal showings to reduce the volume of litigation. *Id.*

120. *Id.* at 620, 525 A.2d at 320.

121. *Id.* at 621, 525 A.2d at 320. It troubled the dissent that although the majority found that plaintiffs had proven they had a significantly enhanced risk of con-

gested that the majority opinion be read narrowly, as only applicable to claims against public entities.[122]

VII. Analysis

The court in *Ayers* would have reached a fairer and more just verdict had they compensated the plaintiffs for their enhanced risk of future diseases. At trial, Dr. Susan Daum testified that the plaintiffs had already suffered physical injury in the form of damage to the genetic material within their cells, and that the plaintiffs' exposure to toxic chemicals "had produced a reasonable likelihood that they have now and will develop health consequences from the exposure."[123] This combination of present injury and likelihood of future consequences should have been enough for the plaintiffs to recover, but the majority concluded that they should not be compensated.[124]

In *Brafford*,[125] the plaintiffs' claim was based on present damage to their cellular and sub-cellular structures.[126] In refusing the defendant's summary judgment motion, the court noted that the extent of the plaintiffs' injuries could be explored at trial, and the fact finder could determine whether damages were recoverable.[127]

In *Ayers*, Dr. Highland's testimony regarding the plaintiffs' cellular damage was quite similar to the evidence presented in *Brafford*. The court in *Ayers* could have denied the defendants' summary judgment motion, and allowed the enhanced risk claim to be decided at trial. This would have

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tracting serious diseases, this was not enough for recovery. The majority failed to explain why a risk which creates a "reasonable probability" is compensable, while one that "significantly enhances" is not. *Id.* at 617, 525 A.2d at 318. This "significantly enhanced risk" could have satisfied the requirements of *Morrissy*, *Gideon*, *Haggerty*, or *Herber*, and Dr. Highland's characterization of the cellular damage as a physical injury could have satisfied the requirement in *Mink*. *See supra* text and accompanying notes 14-42.

122. *Ayers*, 106 N.J. at 621 n.3, 525 A.2d at 320 n.3.

123. *Id.* at 590, 525 A.2d at 304.

124. *Ayers*, 106 N.J. at 579, 525 A.2d at 298.

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

126. *Id.* at 17.

127. *Id.* at 18. Under Tenth Circuit law, recovery for enhanced risk requires the plaintiff to have suffered definite, present physical injury. *Id.* at 17.

been a more equitable way of considering the question of enhanced risk damages.

The facts in *Ayers* are quite similar to those in *Sterling v. Velsicol.*[128] In both cases, numerous plaintiffs sought compensation as a result of toxic substances leaching into their well water. In *Sterling*, the court awarded the plaintiffs enhanced risk damages after determining that the enhanced risk was an existing condition, not a speculative future injury.[129]

This type of analysis could have been used by the *Ayers* court to compensate the plaintiffs. Instead, the court simply pointed to the "discovery rule" as the plaintiffs' means of obtaining compensation when the injuries do occur.[130] As the dissent recognized, "the tortious contamination is an event that has surely occurred; it is not a speculative or remote possible happening."[131]

Another way of avoiding injustice would have been to adopt a pro-rata approach to the damages for enhanced risk.[132] Under this approach, the factfinder determines the probability of the enhanced risk in light of all the evidence presented.[133]

> The fact that a person is confronted with a ten percent, fifteen percent, or twenty percent probability (in the mathematical sense) that he will suffer future injuries should be sufficient to permit him to recover for those future injuries at least in proportion to the probability of such injuries occurring. Therefore, in a hypothetical case, if a man can demonstrate that there is a twenty percent probability that he will have future injuries which would, if they occurred, result in damage to him in the amount

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128. 647 F. Supp. 303 (W.D. Tenn. 1986).

129. *Id.* at 321-22.

130. *Ayers*, 106 N.J. at 583, 525 A.2d at 300.

131. *Id.* at 618, 525 A.2d at 319.

132. *See*, Jordan v. Bero, 158 W. Va. 28, 62-63, 210 S.E.2d 618, 640-41 (1974) (Neely, J., concurring).

133. In *Ayers*, the jury could have been given the task of assigning a probability to the plaintiffs' claim of enhanced risk. Although the court found the risk to be unquantified, given the evidence, it is likely that the jury would have found some probability to exist.

> of a hundred thousand dollars, he should be able to recover twenty thousand dollars from the defendant, which recovery would represent the injury of incurring a twenty percent probability of suffering one hundred thousand dollars worth of damages.[134]

This approach would avoid the hardship of having to prove more than fifty percent probability, which most courts require.

VIII. Conclusion

In *Ayers*, the New Jersey Supreme Court passed up an ideal opportunity to follow a new trend in tort law. The analysis in Section VII presents three possible ways of achieving this: (1) characterizing the plaintiff's injury as present damage to their cellular structure; (2) characterizing plaintiffs' enhanced risk as an injury; and (3) allowing a pro-rata determination of the plaintiffs' injury. The New Jersey Supreme Court chose not to do so.

By rejecting the plaintiff's enhanced risk claims, the court failed to recognize a valid claim for damages, and exposed itself to a potentially high volume of future litigation.[135] In light of all the evidence presented, the court should have granted

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134. *Jordan*, 158 W. Va. at 64, 210 S.E.2d at 640-41.

135. By refusing to grant the 339 plaintiffs damages for enhanced risk, each plaintiff became the basis for a potential lawsuit. This means that the failure to recognize this claim in one lawsuit could, theoretically, lead to 339 separate lawsuits as the diseases manifest themselves in each plaintiff. These potential lawsuits may also present plaintiffs with problems in proving causation. Due to the latency period, there is the possible involvement of intervening causes, "sources of injury wholly apart from the defendant's activities." These "intervening causes" hinder plaintiffs chance of proving causation. *Ayers*, 106 N.J. at 585-86, 525 A.2d at 302.

With regard to the other damages, the supreme court allowed the plaintiffs' damages for diminished quality of life and medical surveillance; denied recovery for emotional distress and civil rights violations, and upheld the *pro tanto* reduction of the award.

the plaintiffs monetary damages thus avoiding this potentially voluminous and costly future litigation.[136]

James F. O'Brien

136. *See generally*; Comment, *Increased Risk of Disease from Hazardous Waste: A Proposal for Judicial Relief*, 60 Wash. L. Rev. 635 (1985) (proposing alternative means of compensating hazardous waste victims, while minimizing speculation and limiting liability).