DAMAGES FOR INCREASED RISK OF FUTURE INJURY: CAN ILLINOIS COURTS SEE INTO THE FUTURE? *DILLON V. EVANSTON HOSPITAL*, 771 N.E.2d 357 (Ill. 2002)*

J. Brian Manion**

I. INTRODUCTION

Illinoisans, the cost of health care has just gone up. The Illinois Supreme Court has recently expanded the liability of tort defendants to include damages for an increased risk of future injury not reasonably certain to occur. In the "good old days," a doctor who botched a cancer diagnosis, causing a delay in treatment and an increased risk of recurrence, could defend a suit based on increased risk of recurrence with no liability at all by proving the chance of recurrence was less than fifty percent (50%). However, this hypothetical doctor's negligence will no longer go unpunished in Illinois. The courts will now attempt to predict the likelihood of the possible future injury and what the amount of damages would be if the injury did, in fact, occur.

The thesis of this casenote is that damages for an increased risk of future injury must always reflect the probability of the injury actually occurring, and the most equitable answer to increased risk cases is allowing a separate action to be brought when the feared future injury actually occurs. Section II will examine the background of awarding damages in enhanced risk cases by looking at the approaches taken by other jurisdictions and then by looking at how Illinois law has evolved on this issue. Section III will summarize the facts, procedural history, and opinion of the *Dillon* court. Section IV will examine the implications of *Dillon* and the possibility of splitting actions to allow plaintiffs leave to file suit when a feared injury occurs.

II. BACKGROUND

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*. Best Casenote Award 2003, *Southern Illinois University Law Journal*.

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A. Approaches To Damages For Enhanced Risk

1. Traditional Rule: All-or-Nothing

Justice Ginsburg[1] explained the traditional rule, which is also the majority view, on damages for future injuries in *Wilson v. Johns-Manville Corp.*:[2]

> The traditional American rule . . . is that recovery for damages based on future consequences may be had only if such consequences are "reasonably certain." Recovery of damages for speculative or conjectural future consequences is not permitted. To meet the "reasonably certain" standard, courts have generally required plaintiffs to prove that it is more likely than not (a greater than 50% chance) that the projected consequence will occur. If such proof is made, the alleged future effect may be treated as certain to happen and the injured party may be awarded full compensation for it. If the proof does not establish a greater than 50% chance, the injured party's award must be limited to damages for harm already manifest.[3]

In *Wilson*, the plaintiff began working in the insulation trade in 1941 and was regularly exposed to asbestos as a part of his employment.[4] Later in 1973, the plaintiff's union provided a routine x-ray, which revealed that he suffered from mild asbestosis.[5] The plaintiff's health rapidly deteriorated and five years later he was diagnosed with mesothelioma, a form of cancer.[6] He died a few months later.[7] The plaintiff's wife filed a complaint for wrongful death, which was dismissed with prejudice following a motion for summary judgment by the defendant.[8] The defendant argued the cause of action accrued in 1973, when the plaintiff became aware he was suffering from an asbestos-related disease, and that the three year statute of limitations barred the survival action brought in 1979.[9]

The *Wilson* court noted the traditional all-or-nothing approach, when

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1. Then Circuit Justice for United States Court of Appeals, District of Columbia Circuit.
2. 684 F.2d 111 (D.C. Cir. 1982).
3. Dillon v. Evanston Hosp., 771 N.E.2d 357, 367 (Ill. 2002) (quoting *Wilson*, 684 F.2d at 119).
4. *Wilson*, 684 F.2d at 112–13.
5. *Id.* Asbestosis is a "fibrous induration of the lungs due to the irritation caused by the inhalation of (asbestos) dust." STEDMAN'S MEDICAL DICTIONARY 116, 990 (3d unabr. law. ed. 1972).
6. *Wilson*, 684 F.2d at 113.
7. *Id.*
8. *Id.* at 114.
9. *Id.*

combined with a restrictive statute of limitations, would effectively bar the plaintiff from being able to recover any damages for cancer, unless the cancer becomes manifest during a timely filed lawsuit.[10] The general policies behind statutes of limitation are that the search for the truth is impaired by the loss of evidence due to death, disappearance of witnesses, fading of memories, protecting defendants from stale claims, and allowing defendants to plan for the future without endless potential liability.[11] However, these policy considerations are at odds in latent disease cases, where an injury may not surface until several years after the exposure to the disease-causing agent.[12]

The *Wilson* court held that the diagnosis of the plaintiff's "mild asbestosis" in 1973 did not start the clock running on his right to sue for the separate and distinct disease, mesothelioma, which arose from the same asbestos exposure, but did not manifest itself until 1978.[13] The defendant's interest in repose from potential liability was outweighed by evidentiary considerations, necessity of providing compensation for latent injuries, and deterrence of uneconomical anticipatory lawsuits.[14] Several jurisdictions follow this "separate disease" or "two disease" rule for latent diseases arising out of exposure to toxic substances.[15]

2. Increased Risk of Future Injury

Courts have been very reluctant to recognize an increased chance of an adverse result as a compensable interest. However, the traditional American rule has been attacked for many reasons. One of the first departures from the traditional all-or-nothing approach was in the 1967 Pennsylvania case

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10. *Id.* at 120.
11. *Id.* at 118–19.
12. *Id.* at 119.
13. *Id.* at 120–21.
14. *Id.* at 120.
15. *See* Dempsey v. Pacor, Inc., 632 A.2d 919 (Pa. Super. Ct. 1993) (workers who had been exposed to asbestos and developed pleural thickening, asbestosis, or both, brought actions seeking damages for fear of and increased risk of contracting cancer or mesothelioma); Mauro v. Raymark Industries, Inc., 561 A.2d 257 (N.J. 1989) (employee suffering from pleural thickening instituted personal injury action against manufacturers of asbestos-containing products to which employee was exposed during his employment); Eagle-Picher Indust., Inc. v. Cox, 481 So. 2d 517 (Fla. App. Ct. 1985) (action was brought to recover for asbestosis, fear of cancer, and negligent infliction of emotional distress plaintiff allegedly suffered as a result of exposure to asbestos products); Devlin v. Johns-Manville Corp., 495 A.2d 495 (N.J. Super. Ct. Law Div. 1985) (workers exposed to asbestos brought action against manufacturers and distributors of asbestos related products for asbestosis, increased risk of cancer, and fear of cancer).

Schwegel v. Goldberg.[16] In *Schwegel*, a child was hit by a car and suffered a skull fracture.[17] The court held that since an action must be brought within fixed time limitations and all damages, past, present, and future, must be determined in that one action, it would be unfair to exclude damages for a five percent (5%) chance of future epilepsy.[18]

Similarly, the 1973 Oregon Supreme Court case *Feist v. Sears, Roebuck & Company*[19] also involved a minor who suffered a basal skull fracture.[20] Medical expert testimony at trial stated it was not probable that meningitis would develop, but the plaintiff was susceptible to such future complication.[21] The *Feist* court ruled the medical testimony was properly received and the trial court acted properly in instructing the jury that it could consider susceptibility of meningitis in its award of damages.[22]

The 1984 Kentucky Supreme Court case *Davis v. Graviss*[23] also involved a plaintiff with a basal skull fracture who was facing future episodes of cerebral spinal fluid leakage of an indeterminate frequency.[24] This gave rise to the potential for certain complications, including meningitis and other neurological problems.[25] The *Davis* court held that where there was substantial evidence to support it, the jury could consider and compensate for the increased likelihood of future complications.[26]

One of the leading cases on damages for increased risk of future injury is the 1990 Connecticut Supreme Court case *Petriello v. Kalman*.[27] In *Petriello*, the defendant physician was performing a surgical procedure known as a dilation and curettage to remove a dead fetus from the plaintiff's womb.[28] During the course of the procedure, the defendant, while using a suction device, perforated the plaintiff's uterus and drew portions of her small intestine through the perforation, through her uterus and into her vagina.[29] To correct this surgical error, a bowel resection was performed, removing approximately

16. 228 A.2d 405 (Pa. Super. Ct. 1967).
17. *Id.* at 406–08.
18. *Id.* at 409.
19. 517 P.2d 675 (Or. 1973).
20. *Id.* at 675.
21. *Id.* at 676–77.
22. *Id.* at 679.
23. 672 S.W.2d 928 (Ky. 1984).
24. *Id.* at 929.
25. *Id.*
26. *Id.* at 932.
27. 576 A.2d 474 (Conn. 1990).
28. *Id.* at 476.
29. *Id.*

one foot of the intestine and connecting the two ends of the remaining intestine.[30] At trial, the surgeon performing the resection testified adhesions had probably formed in the plaintiff's abdomen due to the resection and, as a result, she had an eight percent (8%) to sixteen percent (16%) chance of developing a bowel obstruction.[31]

In *Petriello*, the Supreme Court of Connecticut held that in a tort action, a plaintiff who has established a breach of duty, which proves to be a substantial factor in causing a present injury, and also increases the risk of future harm, is entitled to compensation to the extent the future harm is likely to occur.[32] The *Petriello* court reasoned that the traditional all-or-nothing approach, which denies any compensation unless a plaintiff proves a future consequence is more likely than not to occur, has created a system in which a significant number of persons receive compensation for future consequences that never occur, and at the same time, a significant number of persons receive no compensation at all for consequences which later develop.[33]

The all-or-nothing approach is inconsistent with the goal of compensating tort victims fairly for all the consequences of the injuries they have sustained, while avoiding windfall awards for consequences which never occur.[34] Plaintiffs in negligence cases are confronted by the requirements that they must claim all applicable damages in a single cause of action.[35] Therefore, a plaintiff would be effectively barred from recovery for future consequences of an injury when the evidence at trial does not satisfy the "more probable than not" criterion.[36] On the other hand, a defendant cannot seek reimbursement from a plaintiff who has recovered for a future consequence, which appeared likely at the time of trial, on the ground that subsequent events have made the likelihood of the consequence occurring remote or impossible.[37] Most jurisdictions provide no opportunity for a second look at a damage award so that it may be revised with the benefit of hindsight.[38]

The *Petriello* court viewed the matter as an attempt to establish the plaintiff's present injuries, rather than an attempt to claim damages for a future event.[39] The court also noted there was no question that such a degree of

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30. *Id.*
31. *Id.* at 477.
32. *Id.* at 484.
33. *Id.* at 482–83.
34. *Id.* at 483.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

probability of the occurrence of future injury would not support an award of damages to the same extent as if that injury had actually occurred.[40] The court concluded it would be fairer to instruct the jury to compensate the plaintiff for the increased risk of a bowel obstruction based upon the likelihood of its occurrence rather than to ignore the risk entirely.[41]

Damages for the future consequences of an injury can never be forecast with certainty.[42] Actuarial tables of average life expectancy are commonly used to assist the trier of fact in measuring the loss a plaintiff is likely to sustain from the future effects of a permanent injury.[43] Such statistical evidence does, of course, satisfy the "more likely than not" standard as to the duration of a permanent injury.[44] Similar evidence, based upon medical statistics of the average incidence of a particular future consequence from an injury, may be said to establish with the same degree of certitude the likelihood of the occurrence of the future harm to which a tort victim is exposed as a result of a present injury.[45] "Such evidence provides an adequate basis for measuring damages for the risk to which the victim has been exposed because of a wrongful act."[46]

B. History of Damages for Increased Risk in Illinois Prior to *Dillon*

Illinois has historically rejected assessing damages for future injuries.[47] In the 1909 case *Amann v. Chicago Consolidated Traction Co.*,[48] the Supreme Court of Illinois held, "[a] mere possibility, or even a reasonable probability, that future pain or suffering may be caused by an injury, or that some disability may result therefrom, is not sufficient to warrant an [award] of damages."[49] It would be unjust to require a defendant to pay damages for results that may or may not occur.[50] To justify a recovery for future damages, the law requires proof of reasonable certainty the injury will actually occur in the future.[51] Expert witnesses can only testify or give their opinion as to future

40. *Id.* at 482.
41. *Id.* at 483.
42. *Id.* at 484.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. Dillon v. Evanston Hosp., 771 N.E.2d 357, 366 (Ill. 2002).
48. 90 N.E. 673 (Ill. 1909)
49. *Id.* at 674.
50. *Id.*
51. *Id.*

consequences shown to be reasonably certain to follow.[52] It is impossible to determine with absolute certainty what the result of such an injury might be in the future, but something more than mere conjecture or mere probabilities should appear to warrant an award of damages for future disabilities which may never be realized.[53]

The First District of the Appellate Court of Illinois had followed the traditional rule as recently as 1979, denying recovery for future injuries not reasonably certain to occur. In *Morrissy v. Eli Lilly & Co.*,[54] the plaintiff alleged that exposure to diethylstilbestrol (DES) in utero created a mere possibility of developing cancer and other future injuries.[55] The *Morrissy* court held that in Illinois possible future damages in a personal injury action are not compensable unless reasonably certain to occur.[56]

Similarly, the 1991 Fourth District case of *Wehmeier v. UNR Industries, Inc.*[57] followed the traditional rule. In *Wehmeier*, the plaintiff introduced evidence of his increased risk of contracting cancer because of his exposure to asbestos.[58] However, the court held that the evidence presented on the increased risk of contracting cancer should not have been admitted, since damages may not be awarded on the basis of conjecture or speculation and must be proved to be the proximate result of the complained of wrong.[59]

However, the Fifth District had previously carved out an exception to the traditional rule in the 1977 case *Harp v. Illinois Central Gulf Railroad Co.*[60] The *Harp* court held that as a general rule, possible future damages are not compensable unless they are reasonably certain to occur.[61] In *Harp*, a physician testified that a rupture of a disc in the plaintiff's back was reasonably certain to occur if sufficient force or trauma was exerted upon it.[62] Under the general rule, the plaintiff was required to bear the risk of the occurrence of the force and avoid those activities which could result in trauma or force upon the disc.[63] The court found an exception to the general rule, holding that the risk

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52. Stevens v. Ill. Cent. R.R. Co., 137 N.E. 859 (Ill. 1922).
53. Lauth v. Chi. Union Traction Co., 91 N.E. 431, 434 (Ill. 1910).
54. 394 N.E.2d 1369 (Ill. App. Ct. 1979).
55. *Id.* at 1376.
56. *Id.* (citing *Stevens*, 137 N.E. at 863; *Lauth*, 91 N.E. at 434; Harp v. Ill. Cent. Gulf R.R. Co., 370 N.E.2d 826, 829 (Ill. App. Ct. 1977)).
57. 572 N.E.2d 320 (Ill. App. Ct. 1991).
58. *Id.* at 338.
59. *Id.* at 339.
60. 370 N.E.2d 826 (Ill. App. Ct. 1977).
61. *Id.* at 829.
62. *Id.* at 830.
63. *Id.*

of injury is properly compensable as comprising part of the pain and suffering recovery and can be considered in its effect on the earning capacity of the plaintiff, since pain and suffering and impairment of the ability to labor are proper elements of damage in a personal injury suit.[64]

The Second District also allowed a plaintiff to present evidence of an increased risk of future injury in the 1980 case *Lindsay v. Appleby*.[65] The *Lindsay* court allowed medical testimony that the injuries sustained in a collision caused a plaintiff to develop a potential for seizures.[66] The *Lindsay* court held that the testimony presented evidence tending to show an increased risk of further injury caused by the defendant's conduct, and as such, was admissible as tending to show plaintiff's future damages.[67] The court cited to *Harp*[68] in support of its holding, but gave no rationale for its departure from precedent.

The 1985 Third District case *Jeffers v. Weinger*[69] also broke from precedent without giving any rationale or citing case law in support of its decision.[70] *Jeffers* involved a medical malpractice claim where the defendant's alleged negligence caused the plaintiff to develop a neurological ulcer on her foot.[71] A medical expert testified on cross-examination that the possibility of the plaintiff losing her foot was less than one percent (1%).[72] Nevertheless, the court found that whether there is a one percent (1%) possibility or a ninety-nine percent (99%) possibility, each is an element of damages which should be considered by the jury.[73]

The Third District revisited the issue in the 1996 case of *Anderson v. Golden*.[74] *Anderson* involved a medical malpractice claim where the defendant physician removed a growth from the plaintiff's shoulder, but failed to have it tested by a pathologist.[75] The growth recurred in 1992 and was diagnosed as dermatofibrosarcoma protuberans, a cancerous condition

64. *Id.* (citing Haizen v. Yellow Cab Co., 190 N.E.2d 514, 516 (Ill. App. Ct. 1963); Chi. & Milwaukee Elec. Ry. Co. v. Ullrich, 72 N.E. 815, 816 (Ill. 1904)).
65. 414 N.E.2d 885 (Ill. App. Ct. 1980).
66. *Id.* at 890.
67. *Id.*
68. *Harp*, 370 N.E.2d at 826.
69. 477 N.E.2d 1270 (Ill. App. Ct. 1985).
70. *Id.* at 1276.
71. *Id.* at 1272–73.
72. *Id.* at 1276.
73. *Id.*
74. 664 N.E.2d 1137 (Ill. App. Ct. 1996).
75. *Id.* at 1138.

necessitating further surgery.[76] The plaintiff's expert witnesses were prepared to testify that if the defendant had properly treated her, the plaintiff would have had a five percent (5%) chance of recurrence and a five percent (5%) chance of metastasis.[77] Due to the delay in proper treatment, the plaintiff had a thirty percent (30%) to forty percent (40%) chance of recurrence and a twenty percent (20%) chance of metastasis.[78] The question presented on interlocutory appeal was:

> Assuming that a plaintiff in a medical negligence action has established that the negligence of the defendant has to a reasonable degree of certainty caused injury to the plaintiff, may the plaintiff present evidence to a reasonable degree of certainty that the plaintiff is at an increased risk of future harm as a result of the injury she has sustained, even if the increased risk of future harm is less than fifty percent (50%) likely to occur?[79]

The *Anderson* court followed the new trend of cases allowing compensation for increased risk of future injury as long as it could be shown to a reasonable degree of certainty that the defendant's wrongdoing created the increased risk.[80] However, the court still attempted to harmonize its holding with the existing precedent stating, "[t]he treatment of an increased risk of future injury as a present injury does not run afoul of the general rule that possible future damages are not compensable absent evidence that such damages are reasonably certain to occur. This rule stems from the principle that damages may not be awarded on the basis of speculation or conjecture."[81] If it can be shown to a reasonable degree of certainty that the risk was proximately caused by the defendant's negligence, then there is no element of speculation or conjecture.[82]

III. EXPOSITION OF THE CASE

A. Statement of Facts

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76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 1139.
80. *Id. See* Petriello v. Kalman, 576 A.2d 474 (Conn. 1990); Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984); Feist v. Sears, Roebuck & Co., 517 P.2d 675 (Or. 1973); Schwegel v. Goldberg, 228 A.2d 405 (Pa. Super. Ct. 1967).
81. *Id.*
82. *Id.*

Diane Dillon ("Dillon") was being treated for breast cancer.[83] On April 20, 1989, Dr. Stephen Sener ("Sener") surgically inserted a catheter into a vein in Dillon's upper chest under the clavicle.[84] The purpose of the catheter was to provide a means to administer chemotherapy and to draw blood without repeatedly inserting needles into Dillon's veins.[85] The catheter used on Dillon was approximately sixteen centimeters long.[86]

After Dillon completed chemotherapy, the catheter was no longer necessary.[87] On July 13, 1990, Sener removed the catheter.[88] However, unbeknownst to both Dillon and himself, Sener had only removed a seven-centimeter portion of the catheter, while a nine-centimeter fragment remained in Dillon's chest.[89] Dillon had a chest x-ray taken at the hospital in December 1990, but was not informed of any abnormalities at that time.[90]

In December 1991, Dillon had a routine chest x-ray taken at a different hospital.[91] The x-ray revealed that the catheter fragment had migrated to Dillon's heart and the tip of the fragment was embedded in the wall of either the right atrium or right ventricle.[92] The rest of the fragment was floating free in Dillon's heart.[93]

Dillon met with Sener after she learned the fragment was embedded in her heart.[94] Sener could not specifically recall removing the catheter from Dillon, but acknowledged the fragment was in her heart.[95] Based on the length of time the fragment had been in her heart, Sener recommended that Dillon not attempt to have the fragment removed.[96] There were several risks attendant to removal: all or part of the fragment could escape and travel further into the heart, making retrieval more difficult, or removal could tear the heart wall.[97] Sener believed it would be more dangerous to attempt to remove the catheter fragment than it would be to leave it in place.[98]

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83. Dillon v. Evanston Hosp., 771 N.E.2d 357, 361 (Ill. 2002).
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id*
96. *Id*
97. *Id.*
98. *Id.*

Dillon sought opinions from other physicians, and all but one agreed with Sener that it would be safer to leave the fragment in her heart.[99] Based on these opinions, Dillon decided to leave the catheter fragment in her heart.[100]

B. Procedural History

The plaintiff, Dillon, filed her original complaint on July 1, 1992.[101] Notably, the original complaint contained no allegations against Sener or Evanston Hospital ("the hospital") that the insertion of the catheter was negligent, but only alleged negligent removal.[102] The original complaint was amended several times throughout the pretrial proceedings as discovery was being conducted.[103]

On November 17, 1997, Dillon moved to file her fifth amended complaint adding allegations that the catheter was improperly inserted.[104] The trial court allowed Dillon leave to file because the removal of the catheter was, according to the court, "a completion of the same process" as the insertion.[105] Counts I and II alleged that Sener and the hospital negligently inspected, inserted, and removed the catheter; failed to ascertain that the catheter fragment remained in plaintiff; and failed to advise plaintiff that the fragment remained in her body.[106] Count III alleged that Sener's actions should be considered negligent under the theory of *res ipsa loquitur*.[107]

There was evidence presented at trial which established a causal connection between the actions of Sener and the hospital and the catheter fragment becoming embedded in Dillon's heart.[108] The risks of the catheter remaining in Dillon's heart were infection, perforation of the heart, arrhythmia, embolization, and further migration of the fragment.[109] Several physicians testified about the risk of infection, with the lowest estimated risk being close to zero and the highest being twenty percent (20%), while the risk of arrhythmia was less than five percent (5%), the risk of perforation and

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99. *Id.*
100. *Id.*
101. *Id.* at 362.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 362–63.
106. *Id.* at 363.
107. *Id.* The presence of the catheter fragment in Dillon's heart could not have occurred but for negligence on the part of Sener and/or the hospital.
108. *Id.* at 366.
109. *Id.*

migration were also small, and the risk of embolization was low to nonexistent.[110]

At the close of the trial, the jury found in favor of Dillon and against Sener and the hospital.[111] Sener and the hospital did not present the jury with any special interrogatories to determine on which basis the jury found defendants to have been negligent.[112] The jury awarded Dillon $1.5 million for past pain and suffering, $1.5 million for future pain and suffering, and $500,000 for the increased risk of future injuries.[113] Dillon had not sought compensation for past or future medical expenses.[114]

Sener and the hospital appealed and the First District Appellate Court affirmed, with one judge dissenting.[115] However, the Supreme Court of Illinois reversed Dillon's damages award for the increased risk of future injury and remanded the cause to the trial court for a new trial solely on the issue of damages, since the jury was inadequately instructed.[116] The instruction failed to instruct the jury that the increased risk must be based on evidence and not speculation, and more importantly, the size of the award must reflect the probability of occurrence.[117] The Illinois Supreme Court affirmed the trial court and appellate court on all other issues.[118]

C. Majority Opinion

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110. *Id.*
111. *Id.* at 361.
112. *Id.*
113. *Id.* at 361–62.
114. *Id.* at 362.
115. *Id.* *See* Dillon v. Evanston Hosp., No. 1–98–2893 (Ill. App. Ct. 2001) (unpublished order under Illinois Supreme Court Rule 23).
116. Dillon v. Evanston Hosp., 771 N.E.2d 357, 372 (Ill. 2002). The jury instruction addressing compensation for plaintiff's increased risks stated in relevant part:

> If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate her for any of the following elements of damages proved by the evidence to have the pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries. This instruction was a modified combination of Illinois Pattern Jury Instructions, Civil, No. 30.01 and No. 30.05 (3d ed.1995). The modification was the addition of the italicized sentence on the increased risk of future injuries. There is no Illinois pattern jury instruction for that element of damages.

Id. at 366.
117. *Id.* at 371.
118. *Id.* at 372.

The main issue addressed by the Supreme Court of Illinois was whether the trial court erred in instructing the jury that it could award the plaintiff damages for the increased risk of future injuries.[119] The court adopted the reasoning of *Petriello*[120] and *Anderson*.[121] The majority agreed with the rationale that the increased risk is itself a present injury, which should be as compensable as any other present injury.[122]

Further, the court noted that based on the principle of single recovery, our legal system provides no opportunity for a second look at a damage award so it may be revisited with the benefit of hindsight.[123] A plaintiff cannot bring successive actions for a single tort as he suffers damages in the future.[124] Rather, his one action must include prospective as well as accrued damages.[125] "This in turn faces the tribunal with the difficult and uncertain task of prophecy, with no chance for second-guessing where the prophecy turns out to be mistaken, or where the parties have failed to present all items of their claims."[126]

The majority also recognized the similarity between the concept of damages for increased risk of future injury and the concept of awarding damages for loss of a chance of recovery or survival:

> To the extent a plaintiff's chance of recovery or survival is lessened by the malpractice, he or she should be able to present evidence to a jury that the defendant's malpractice, to a reasonable degree of medical certainty, proximately caused the increased risk of harm or lost chance of recovery. We therefore reject the reasoning of cases which hold, as a matter of law, that plaintiffs may not recover for medical malpractice injuries if they are unable to prove that they would have enjoyed a greater than 50% chance of survival or recovery absent the alleged malpractice of the defendant.[127]

The majority noted that its prior holdings in *Stevens*[128] and *Amann*[129] were over eighty years old, and scientific advances now enable the medical community to more accurately determine the probability of future injuries than

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119. *Id.* at 366.
120. Petriello v. Kalman, 576 A.2d 474 (Conn. 1990).
121. *Id.* at 368–70. *See* Anderson v. Golden, 664 N.E.2d 1137 (Ill. App. Ct. 1996).
122. *Dillon*, 771 N.E.2d at 367 (quoting *Anderson*, 664 N.E.2d at 1139.
123. *Id.* at 368. (quoting *Petriello*, 576 A.2d at 483).
124. *Id.* at 369.
125. *Id.* at 369 (citing Mason v. Parker, 695 N.E.2d 70, 72 (Ill. App. Ct. 1998)); *see also* Radosta v. Chrysler Corp., 443 N.E.2d 670, 672 (Ill. App. Ct. 1982).
126. *Id.* at 369 (quoting 4 F. HARPER, F. JAMES, & O. GRAY, TORTS § 25.2, at 498 (2d ed.1986)).
127. *Id.* at 369–70 (quoting Holton v. Memorial Hosp., 679 N.E.2d 1202, 1213 (Ill. 1997)).
128. Stevens v. Ill. Cent. R.R. Co., 137 N.E. 859 (Ill. 1922).
129. Amann v. Chi. Consol. Traction Co., 90 N.E. 673 (Ill. 1909).

in the past.[130] Thus, the court reasoned there was less risk of undue speculation in determining damages for increased risk of future injury.[131]

Finally, the court approved the jury instruction promulgated following the *Petriello* case,[132] stating, "this instruction fairly and correctly states the law on this element of damages."[133]

D. Chief Justice Harrison: Concurring in Part, Dissenting in Part

Chief Justice Harrison wrote separately to express his opinion that the jury instruction given by the trial court was adequate.[134] He reasoned that all juries are instructed that their verdict "must be based on evidence and not upon speculation, guess, or conjecture."[135] Chief Justice Harrison further noted that the use of the term "risk" in the jury instruction by the trial court adequately informed the jury that the size of the award should reflect the probability of future injury occurring.[136] He would have affirmed the judgment of the circuit court and appellate court without any qualification.[137]

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130. *Id.* at 370.

131. *Id.*

132. *Id.* at 372. Connecticut Civil Jury Instruction No. 2–40(c) provides:

> Damages)Compensation for Increased Risk of Injury * * * The plaintiff claims that he/she has suffered an increased risk of [alleged future complication] as a result of the defendant's negligence. The plaintiff is entitled to recover damages for physical harm resulting from a failure to exercise reasonable care. If the failure to exercise reasonable care increases the risk that such harm will occur in the future, the plaintiff is entitled to compensation for the increased risk. In order to award this element of damages, you must find a breach of duty that was a substantial factor in causing a present injury which has resulted in an increased risk of future harm. The increased risk must have a basis in the evidence. Your verdict must not be based on speculation. *The plaintiff is entitled to compensation to the extent that the future harm is likely to occur as measured by multiplying the total compensation to which the plaintiff would be entitled if the harm in question were certain to occur by the proven probability that the harm in question will in fact occur*.

Id. at 371–72.

133. *Id.* at 372.

134. *Id.* at 373 (Harrison, J., concurring in part and dissenting in part).

135. *Id.* (quoting ILLINOIS PATTERN JURY INSTRUCTIONS, Civil, No. 1.01(3) (1995)).

136. *Id.*

137. *Id.*

IV. ANALYSIS

The majority opinion in *Dillon* provides several convincing policy arguments in favor of awarding damages for an increased risk of future injury as a present injury and against the traditional all-or-nothing approach. First, the all-or-nothing approach is inconsistent with the goal of compensating tort victims fairly for all the injuries they have sustained, while avoiding, so far as possible, windfall awards for consequences that never happen.[138] Second, the principle of single recovery requires a plaintiff to present all of her damages in a single action.[139] Third, damages for increased risk of future injury are similar to damages for loss of a chance.[140] Lastly, damage awards are less prone to being based on speculation, since medical advances allow for more accurate determinations of the probability of future injuries occurring.[141]

However, the majority opinion failed to address what damages a plaintiff is entitled to for an increased risk of future injury that is *more likely than not* to occur (greater than a 50% chance of occurrence) and limited its holding to cases where future injury is not reasonably certain to occur. Awarding damages for an increased risk of future injury creates windfalls in favor of plaintiffs when the award is not reduced to reflect the probability of the injury actually occurring. The *Dillon* court also failed to consider the possibility of splitting the action to allow the plaintiff to bring a separate action if a future injury were to occur. The most equitable answer to damages for increased risk of future injuries is to allow a separate action to be brought if the feared future injury actually occurs.

A. Damages For Increased Risk of Future Injuries Should Always Reflect the Probability of the Future Injury Occurring

The majority opinion in *Dillon* makes much of the disparate impact occurring under the traditional all-or-nothing approach which allows a plaintiff to receive full compensation if she shows a greater than fifty percent (50%) chance of the injury occurring, while completely denying recovery if a plaintiff shows less than a fifty percent (50%) chance that the injury will result.[142]

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138. *Id.* at 368.
139. *Id.* at 369.
140. *Id.* at 369–70.
141. *Id.* at 370.
142. *Id.* at 368.

However, by awarding damages based on the probability that the future injury will occur, the court is effectively guaranteeing that no claim for increased risk of future injury will ever be accurately compensated. Every damage award will amount to a windfall for the plaintiff or the defendant. For example, if the future injury did actually occur to the plaintiff, he would be under-compensated, since the plaintiff's damages would have been reduced to reflect the low probability of the injury occurring at the time of trial. On the other hand, if the injury never occurs, the plaintiff receives a windfall in the form of damages for an injury that will never be suffered.

A careful reading of the *Dillon* case indicates the opinion only addressed the precise issue of whether a plaintiff may recover damages for an increased risk not reasonably certain to occur or, in other words, a less than a fifty percent (50%) chance of occurrence. First, the language of the opinion clearly and plainly limits the holding to cases where the future injury is not reasonably certain to occur.[143] The majority states, "we hold . . . a plaintiff can obtain compensation for a future injury *that is not reasonably certain to occur*, but the compensation would reflect the low probability of occurrence."[144] If it were the intention of the *Dillon* court to extend its holding to all claims for increased risk of future injury, including situations where the future injury is more likely than not to occur, the court could have easily deleted the words "that is not reasonably certain to occur" to extend the holding to all increased risk cases. Secondly, the facts of the *Dillon* case are distinguishable from any case where an increased risk of future injury is more than fifty percent (50%), since *Dillon* involved future injuries which were not reasonably certain to occur.[145] Therefore, the traditional all-or-nothing approach would still apply when a plaintiff proves that his future injury is more likely than not to occur, allowing a plaintiff full recovery as if the future injury had actually occurred.

The law regarding damages for future injuries has been definitively tipped in favor of plaintiffs. For example, if a plaintiff can show a sixty percent (60%) increased chance of a future injury due to the defendant's negligence and shows he will have damages of $100,000 if the injury occurs, then he will be awarded the full $100,000. His recovery will not be reduced to $60,000 to reflect the less than certain chance of the future injury ever occurring. Plaintiffs will get the benefit of doubt in these "more likely than not" cases because courts will treat something that is "more likely than not" as though it is a certainty for the purpose of awarding damages. The *Dillon* court has

143. *Id.* at 370.

144. *Id.* (emphasis added).

145. *See supra* part III.B.

essentially robbed defendants of a similar benefit of the doubt where a defendant shows that it is "more likely than not" that the future injury will not occur. Under the traditional all-or-nothing approach, courts would treat a showing of less than a fifty percent (50%) increased risk of future injury as certain that the future injury would not occur. Damages must always be reduced to reflect the less than certain probability of the feared injury actually happening, even when an injury is more likely than not to occur.

A pure pro-rata approach[146] would strike a more equitable balance between plaintiffs and defendants than the current damages regime of Illinois ("the Illinois approach"), which awards full damages when future injuries are more likely than not to occur and awards discounted damages[147] when the future injuries are not reasonably certain to occur. Consider the following hypothetical: a doctor treats one hundred patients negligently and through his negligence causes each patient to have a one percent (1%) increased risk of a $100,000 future injury. Under both the pure pro-rata approach and the Illinois approach, he would be liable to each of the one hundred patients for $1,000 for a total of $100,000. Theoretically, only one of the patients would actually experience the future injury. This unfortunate patient would be grossly under-compensated for his injury by $99,000, while his fellow ninety-nine patients would each pocket their $1,000 without suffering the feared future injury. The deterrent effect on the defendant doctor would be the same as if the court could see into the future and know for certain which patient would develop the injury in the future. The doctor has caused a single future injury in the amount of $100,000 and he has been required to pay damages in that amount. Under the traditional all-or-nothing approach, none of these patients would have been able to recover any damages, since none of the patients would be able to show their future injury was "more likely than not" to occur. The doctor would escape liability for a $100,000 injury resulting from his negligence.[148]

Consider a similar hypothetical situation: a doctor negligently treats one hundred patients again, but instead causes each patient a ninety-nine percent (99%) increased chance of a $100,000 future injury. Now, under the pure pro-rata approach, the doctor would have to pay $99,000 to each of the one

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146. A pure pro-rata approach would always adjust the amount of damages to reflect the likelihood of the injury actually occurring, even if the increased chance of future injury was greater than fifty percent (50%).

147. Discounted damages would take into account the likelihood of the future injury occurring.

148. *See* Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1376–81 (1981) (criticizing the traditional all-or-nothing approach).

hundred patients to reflect the probability that one of the one hundred patients will not experience the future injury. However, in this situation, the Illinois approach reaches the same result as the traditional all-or-nothing approach. The doctor would be required to pay $100,000 to each of the one hundred patients, even though only ninety-nine of the patients will actually experience the future injury. The doctor would be over-deterred, since one lucky patient would receive a $100,000 windfall for the increased risk of a future injury which will never occur. The plaintiffs, as a whole, are over-compensated for their actual injuries.

When the traditional all-or-nothing approach is applied to all increased risk cases, regardless of whether the future injury is more or less likely than not to occur, the injustice to defendants is minimized. While a defendant is over-deterred if his negligence causes a future injury to be more likely than not to occur, the defendant is also under-deterred when his negligence causes a risk of a future injury that is not reasonably certain to occur. The combination of over-deterrence and under-deterrence tend to balance each other out, which would theoretically provide the same overall deterrent effect as the pure pro-rata approach.

To summarize, the traditional rule under-compensates and under-deters negligence when there is less than a fifty percent (50%) chance of the injury occurring, while over-compensating and over-deterring negligence when there is more than a fifty percent (50%) chance of the injury occurring. The Illinois approach provides ideal deterrence and compensation in the first instance when a future injury is not reasonably certain to occur, but also provides the same over-compensation and over-deterrence as the traditional all-or-nothing rule in cases where the future injury is more likely than not to occur. Only a pure pro-rata approach would strike an ideal balance between plaintiffs and defendants in any situation. The bottom line, as presented by the *Dillon* holding, is that the amount of damages paid by defendants for future injuries will, in aggregate, exceed the amount that plaintiffs would have actually been awarded had the full extent of their injuries been known at the time of trial.

B. Single Controversy vs. Splitting of Action

Trial courts cannot see into the future. All they can do is make a prediction based on evidence and testimony presented by the parties at trial. However, if the trial court could wait to award damages until after the injury actually occurs, the court could make a much more accurate determination of

a plaintiff's true damages.[149] The generally accepted rationale for permitting recovery for future damages is that the injured party may usually only bring one action for the recovery of all damages resulting from a single incident, irrespective of whether such damages may be present or prospective.[150] If the plaintiff fails to pursue recovery for future damages he will ordinarily be unable to institute another action when the damages actually accrue.[151] The single controversy doctrine[152] has been developed to prevent delay, expense, and waste created when litigation is fragmented.[153]

Allowing a separate action to be brought for a future injury by relaxing the single controversy rule is not a novel concept. It is common to split actions in toxic tort litigation, where damages for increased risk of future injury are usually barred.[154] Many analogies can be drawn between the fact pattern in *Dillon* and the typical asbestos case. For example, in *Simmons v. Pacor, Inc.*,[155] the plaintiffs brought an action for damages resulting from occupational exposure to asbestos.[156] As an element of those damages, plaintiffs sought relief for increased risk of cancer, even though none of the plaintiffs had contracted mesothelioma or cancer at the time the suits were filed.[157] Instead they were all diagnosed with asbestos-related pleural thickening, which is the formation of calcified tissue on the membranes surrounding the lungs.[158] Although the condition is normally detectable by x-ray, pleural thickening did not cause any lung impairment.[159] The *Simmons* court held that the injury was not compensable since there was no physical injury necessitating the awarding of damages.[160] Also, due to the two-disease rule, plaintiffs were not precluded from bringing another action for an asbestos-related injury if symptoms developed.[161]

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149. Zieber v. Bogert, 773 A.2d 758, 762 (Pa. 2001).
150. Eagle-Pitcher Indus., Inc. v. Cox, 481 So. 2d 517, 519–20 (Fla. App. Ct. 1985).
151. *Id.* at 520.
152. The entire controversy or single controversy doctrine provides, "[a]n entire claim arising from a single tort cannot be divided and be the subject of several actions, regardless of whether or not the plaintiff has recovered all that he or she might have recovered." Dillon v. Evanston Hosp., 771 N.E.2d 357, 369 (Ill. 2002).
153. Devlin v. Johns-Manville Corp., 495 A.2d 495, 502 (N.J. Super. Ct. 1985).
154. *See* cases cited *supra* note 15.
155. 674 A.2d 232 (Pa. 1996).
156. *Id.* at 233.
157. *Id.* at 233–34.
158. *Id.* at 236.
159. *Id.*
160. *Id.* at 237.
161. *Id.*

In *Dillon*, the catheter fragment lodged in the plaintiff's heart was detectible by x-ray.[162] Dillon had no disabling consequences as a result of the fragment in her heart,[163] but because of the statute of limitations[164] and the single controversy rule, she had no choice but to bring suit before the full extent of her injuries could possibly be known. Both *Dillon* and *Simmons* essentially involve a non-removable foreign object becoming imbedded in the vital organs of the plaintiffs due to the defendants' negligence, which in turn puts the plaintiffs at risk of a latent disease or injury that may or may not appear in the future. The key difference between these suits lies in the applicable statute of limitation. In Illinois, a medical malpractice suit usually must be brought within four years of the event leading to the suit,[165] while a

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162. Dillon v. Evanston Hosp., 771 N.E.2d 357, 361 (Ill. 2002).

163. *Id.*

164. The Illinois statute of limitations for personal actions against physicians and hospitals provides:

> (a) Except as provided in Section 13–215 of this Act, no action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.
>
> (b) Except as provided in Section 13–215 of this Act, no action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 8 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death where the person entitled to bring the action was, at the time the cause of action accrued, under the age of 18 years; provided, however, that in no event may the cause of action be brought after the person's 22nd birthday. If the person was under the age of 18 years when the cause of action accrued and, as a result of this amendatory Act of 1987, the action is either barred or there remains less than 3 years to bring such action, then he or she may bring the action within 3 years of July 20, 1987.
>
> (c) If the person entitled to bring an action described in this Section is, at the time the cause of action accrued, under a legal disability other than being under the age of 18 years, then the period of limitations does not begin to run until the disability is removed.

735 ILL. COMP. STAT. 5/13–212 (2002).

165. *Id.*

products liability suit against a manufacturer, producer, or distributor may be brought up to twelve years after the initial sale or use of the defective product.[166] For a "separate disease" rule to be workable in Illinois, the state legislature would need to extend the statute of limitations to allow an adequate amount of time for the latent disease or injury to occur.

The rule against splitting causes of action is founded on the policy that finality in litigation promotes greater stability in the law, avoids vexatious and multiple lawsuits arising out of a single tort incident, and is consistent with the absolute necessity of bringing litigation to an end.[167] In a medical malpractice action, it is clear that the defendant health care provider would much rather rid itself of liability after a single trial, rather than defend multiple actions every time a plaintiff develops a new condition which may arguably be connected to its prior negligence.

However, "the fear of an expansion of litigation should not deter courts from granting relief in meritorious litigation; the proper remedy is an expansion of the judicial machinery, not a decrease in the availability of justice."[168] There is ample authority for the proposition that a court deciding an issue in a first action may decide that a plaintiff's right to maintain a later action is reserved.[169] While the idea of unresolved liability for future injuries is unattractive to the medical community, it may be better than having to defend a full trial and pay damages in cases involving only a slight increased risk of future injury. Some courts have found that splitting causes of actions can

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166. The Illinois statute of limitations for products liability actions provides in pertinent part:

> (b) Subject to the provisions of subsections (c) and (d) no product liability action based on any theory or doctrine shall be commenced except within the applicable limitations period and, in any event, within 12 years from the date of first sale, lease or delivery of possession by a seller or 10 years from the date of first sale, lease or delivery of possession to its initial user, consumer, or other non-seller, whichever period expires earlier, of any product unit that is claimed to have injured or damaged the plaintiff, unless the defendant expressly has warranted or promised the product for a longer period and the action is brought within that period.

735 ILL. COMP. STAT. 5/13–213 (2002).

167. Eagle-Picher Indust., Inc. v. Cox, 481 So. 2d 517, 520 (Fla. App. Ct. 1985).

168. Devlin v. Johns-Manville Corp., 495 A.2d 495, 503 (N.J. Super. Ct. Law Div. 1985) (quoting Falzone v. Busch, 214 A.2d 12, 16 (N.J. 1965)).

169. *See Eagle-Picher Indust., Inc.*, 481 So. 2d at 520; Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 117 (D.C. Cir. 1982). The Restatement (Second) of Judgments, Section 26, provides that the general rules against claim splitting are rendered inapplicable when: "(b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action or; . . . (f) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason." RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982).

actually promote judicial economy.[170] Splitting actions discourages anticipatory lawsuits and the protraction of pending lawsuits to allow potential injuries to surface.[171] In *Dillon*, the highest estimate of the chance of any future injury to the plaintiff was twenty percent (20%),[172] so it is likely that litigation on these issues would never be necessary. By allowing Dillon to bring a separate action if any of the feared diseases or injuries should arise, Dillon would have peace of mind knowing she could still file suit if any of the potential injuries should occur in the future. She would be able to present real and accurate evidence of the full extent of her injuries, rather than speculative guesses. Furthermore, she would be fully compensated for her injuries, rather than receiving a mere fraction of her damages at a time when it was unknown whether the feared injuries would ever actually come to pass.

V. CONCLUSION

A plaintiff in Illinois may now obtain compensation for an increased risk of future injury not reasonably certain to occur, but the compensation must reflect the low probability of the occurrence.[173] The *Dillon* court did not appear to extend its holding to cases where the feared future injury is more likely than not to occur. The *Dillon* decision has created a win-win situation for plaintiffs: a plaintiff will be fully compensated, as though the injury were certain to occur, if he can show that a feared future injury is more likely than not to occur; and if the plaintiff fails to meet the more likely than not standard, he will still receive damages which reflect the likelihood of the feared injury occurring. Damages for increased risk of future injury must always reflect the probability that the injury will occur. However, the best solution would be to allow plaintiffs to bring a separate action if the feared future injury ever actually materializes. This is the only way to award damages accurately and without undue speculation.

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170. *Eagle-Picher Indust., Inc.*, 481 So. 2d at 521.

171. *Id.*

172. *See supra* part III.B.

173. Dillon v. Evanston Hosp., 771 N.E.2d 357, 370 (Ill. 2002).