The “Increased Risk of Cancer” Claim: When Does Toxic Exposure Become Compensable?

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The battleground of toxic-tort litigation is shifting to the molecular level, as more and more claims for “increased risk of cancer” are filed by plaintiffs alleging that they have been exposed to toxic chemicals. These claims are based on the theory that, while the plaintiff is not currently suffering any measurable health effects associated with chemical exposure, the plaintiff’s exposure to toxic chemicals has increased the risk that she will suffer an adverse health effect in the future.

Are these claims viable? Courts across the United States have wrestled with this question, with varying results. However, a majority of courts have found that claims for increased risk of cancer do not articulate a legally compensable harm for three primary reasons. First, fundamental principles of tort law require more than a mere change or impact to a person’s body before legal injury can be found. Second, a plaintiff must objectively know or have reason to know that he or she suffers a present harm before a cause of action will accrue for personal injury under the “discovery rule.” Third, public-policy considerations intersect with the common-law prohibition on speculative damages to counsel against recognizing claims for increased risk. To fully understand these conclusions, the components of an “increased risk of cancer” claim must first be unpacked.

Reframing the “Increased Risk of Cancer” Claim

Claims for increased risk of future cancer often are pled imprecisely, as if “increased risk” is the plaintiff’s alleged injury. But in actuality, an increased risk of disease is an element of damages—the consequence of some action by the defendant. Subclinical impact caused by the plaintiff’s toxic exposure—i.e., an impact that does not result in a clinically diagnosable condition—is the alleged “injury” on which claims for increased risk of cancer are based. This impact is also sometimes called subcellular, cellular, DNA, or genetic impact.

In short, a claim for increased risk of cancer is based on the idea that damage to the plaintiff’s cellular material, caused by the defendant’s toxic chemicals, has increased that plaintiff’s likelihood of developing disease.

To prove subclinical impact, a plaintiff may present expert evidence that toxic chemicals bond to DNA, creating “DNA-adducts,” or potentially mutagenic alterations to the plaintiff’s genetic material. To quantify the degree to which a plaintiff’s risk of future cancer has “increased” as a result of this alleged impact, the plaintiff’s causation expert borrows the risk-assessment methodologies used by governmental regulators to establish maximum contaminant levels or maximum contaminant goals for chemicals in public drinking water or the air.

Relying on regulatory methodologies to establish that chemical exposure caused an “increased risk” of cancer has not been widely accepted for a variety of reasons that are outside the scope of this article. However, the assumption at the cornerstone of these claims—that subclinical impact is a legally compensable injury—is equally problematic.

Subclinical Impact Versus Legally Compensable Harm

Tort law protects against physical injuries and other personal harm. But every impact on the human body does not result in a physical injury, in the sense of impairment or disease. As summarized by the Restatement (Third) of Torts § 4 (2010): “‘Physical harm’ means the physical impairment of the human body (‘bodily harm’). . . . Bodily harm includes physical injury, illness, disease, and death.” Comment b to that section states, “bodily harm usually provides objective evidence of its existence and extent.” To be legally compensable, the condition of the plaintiff’s body must do more than merely change as a result of the plaintiff’s exposure to a toxic substance. Rather, “that change must be detrimental.” Reporters Note, Restatement (Third) of Torts § 4 cmt. c.

The Minority View


Subclinical changes are given wider support as evidence of the “impact” frequently required for proving negligent infliction of emotional distress due to toxic exposure, particularly in jurisdictions that provide for medical monitoring. Yet even then, these states generally decline to recognize subclinical impact as a physical injury in itself. They further require that future disease be more likely than not to occur, before allowing recovery even for emotional distress based on a fear of future disease, or for medical monitoring.
**The Majority Position**

Conversely, a majority of courts have found that subclinical impact from toxic exposure is not necessarily detrimental, and therefore not a legally compensable harm. Rather, some courts say that a plaintiff must have a manifest, clinically diagnosable condition that is consistent with the chemical’s toxic action before he or she may recover for the alleged increased risk of future disease. This concept initially was articulated in the context of asbestos litigation, but has since been applied to other toxic torts. For example, the Supreme Court of Kentucky has stated that increased risk of future disease allegedly resulting from drug ingestion is not a present compensable harm, and that such claims are indistinguishable from asbestos cases. See *Wood v. Wyeth-Ayerst Labs*, 82 S.W.3d 849, 851–54 (Ky. 2002). Other courts have followed suit, applying this rationale to cases involving exposure to radiation (Illinois, Missouri, and Massachusetts), polychlorinated biphenyls (PCBs) and trichloroethene (TCE) (West Virginia, Virginia, and Pennsylvania), and beryllium, insecticides, and lead (Georgia). See, e.g., *Parker v. Wellman*, 230 Fed. Appx. 878, 881–84 (11th Cir. 2007); *Sabra v. Waechter*, 2008 WL 4889681, at *2 (N.D. Ga. Nov. 10, 2008); *Ball v. Joy Mfg Co.*, 755 F. Supp. 1344, 1360-68 (S.D. W. Va. 1990); *Williams v. Manchester*, 888 N.E.2d 1, 13–14 (Ill. 2008); *Adams v. Westinghouse Elec. Corp.*, 1993 WL 1156112, at *7–9 (Pa. Com. Pl. July 30, 1993); *Caputo v. Boston Edison Co.*, 1990 WL 98694, at *1–4 (D. Mass. July 9, 1990); *Boyd v. Orkin Exterminating Co.*, Inc. 381 S.E.2d 295, 298 (Ga. App. 1989); *Bennett v. Mallinckrodt*, Inc., 698 S.W.2d 854, 866 (Mo. App. 1985).

Other courts in the majority draw a finer circle around the scope of compensable harm, permitting plaintiffs to proceed with claims for increased risk of cancer if the plaintiff can prove that such future disease is reasonably probable, or more likely than not, to occur in the future. Courts in at least Arizona and New Jersey, as well as the Southern District of West Virginia and the Fifth and Ninth Circuit Courts of Appeals have followed this approach, largely because of public-policy concerns regarding the speculative nature of damages for a future harm that is not likely to occur. See *Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 333–34 (9th Cir. 1993); *Hagerty v. L&L Marine Serv., Inc.*, 788 F.2d 315, 319–20 (5th Cir. 1986); *Rhodes v. E.I. DuPont De Nemours & Co.*, 657 F. Supp.2d 751, 762–66 (S.D.W. Va. 2009); *Mauro v. Raymark Indus.*, 571 A.2d 257, 258–67 (N.J. 1989); *DeStories v. City of Phoenix*, 744 P.2d 705, 706–09 (Ariz. App. 1987); *Ayers v. Twp. of Jackson*, 461 A.2d 184, 186–87 (N.J. Super. Law. Div. 1983). Even the Minnesota Court of Appeals, while following the minority view that subclinical impact presents a question of fact, granted summary judgment because the plaintiff still failed to prove that the subclinical impact would more likely than not result in a cancer. See *Bryson*, 573 N.W.2d at 721. Finally, as mentioned above, the requirement that a plaintiff prove future disease is reasonably likely to occur, is also common in states that permit negligent infliction of emotional-distress claims based on a fear of cancer due to chemical exposure.

The underlying reasoning for these courts’ limitation on claims for increased risk of cancer appears to be that chemical exposure is merely the defendant’s negligent act. It is not an “injury,” and any subclinical impact associated with chemical exposure may never become a manifest disease or other tangible impairment. This is because the body routinely deals with assaults from hazardous or potentially cancer-causing agents, generally without incident or alarm. Thus, a subclinical impact only transforms into a legally actionable harm when the impact results in the manifestation, or likely manifestation, of a disease.

**A Brief Word on Loss of Chance**

Some plaintiffs, particularly in states that have not squarely issued decisions on the viability of increased-risk claims outside of asbestos litigation, have turned to the medical malpractice “loss of chance” doctrine to support their claims for increased risk of cancer. This doctrine generally permits a patient to recover damages for his or her incrementally worsened chance of survival as a result of a doctor’s failure to timely or properly treat his or her medical condition.

However, the loss-of-chance doctrine is distinguishable from the concept of increased risk, as it arises in toxic tort cases, in at least two critical ways. First, medical-malpractice cases involve the diagnosis or treatment of a manifest physical condition or disease—unlike an increased-risk case, where no manifest harm has yet occurred, and may never occur. As a result, the plaintiff has suffered some objective injury already. Second, causation is therefore not an issue in a medical-malpractice case involving the loss-of-chance doctrine. If the doctor is determined to have been negligent in his care, then causation is proven. The medical-malpractice plaintiff must only quantify his or her damages, of which loss of chance is a measure. By contrast, the toxic-tort plaintiff must first prove that the defendant’s chemicals caused a physical harm that makes future disease more likely than not to occur. For at least these reasons, loss-of-chance law cannot be incorporated into the toxic-tort analysis.

**Subclinical Impact and the Discovery Rule**

The discovery rule provides the second basis on which courts have rejected claims for increased risk of future disease. Under the discovery rule, the statute of limitations begins to run on a claim at the time the plaintiff knew, or should have reasonably known, that he or she suffered a present harm. Some
states have a “toxic tort” version of this rule. For example, in Indiana, the statute of limitations on injuries “to a plaintiff caused by a disease which may have been contracted as a result of protracted exposure to a foreign substance” begins “to run from the date the plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another.” *Barnes v. A.H. Robins Co., Inc.*, 476 N.E.2d 84, 87–88 (Ind. 1985).

**Reversal of the Discovery Rule**

The discovery rule bars claims for “increased risk” of future disease because to hold otherwise would reverse the rule. In other words, if subclinical impact were a present “harm,” then the applicable statute of limitations would begin to run at the moment of exposure, i.e., the first subclinical impact, rather than at the moment that a reasonable person would have known they suffered an injury. This consequence was first rejected in asbestos cases, where courts have found that plaintiffs’ claims for asbestos-related disease were timely, notwithstanding the many years that had passed since plaintiffs were last exposed to asbestos fibers.

Applying these principles to toxic torts, courts such as the Southern District of West Virginia have found that an alleged increased risk of cancer from exposure to TCE and PCBs was insufficient to start the statute of limitations running. *See, e.g., Ball*, 755 F. Supp. at 1364–68. Instead, the plaintiff needed to demonstrate an affirmative “injury” or “hurt” arising from that exposure. Similarly, Kansas and Kentucky courts have concluded that subclinical impact is not sufficient physical injury for a cause of action to accrue for increased risk of future disease allegedly resulting from drug exposure. *See, e.g., Colby v. E.R. Squibb & Sons, Inc.*, 589 F. Supp. 714, 717–18 (D. Kan. 1985); *Wood*, 82 S.W.3d at 853–54.

**Mooting the Discovery Rule**

More fundamentally, the theory that subclinical impact is a present harm potentially guts the discovery rule. If subclinical impact were sufficient “injury” to start the statute of limitations running, the only circumstance spurring a plaintiff to reasonably suspect that he or she had been injured could be the discovery of contamination (the wrong), not the manifestation of a harm (the injury). At that point, the plaintiff would then “discover” that he or she had been injured by the defendant at a microscopic level. Such a result would mean no horizon for a defendant’s liability, as the plaintiff’s cause of action would accrue as soon as he or she found an expert to inform him or her of the alleged subclinical harm, no matter whether disease will ever manifest. Conversely, the defendant could claim that the statute of limitations expired two years after the plaintiff first suffered from subclinical impact, which began occurring immediately upon chemical exposure. This was precisely the harsh result that courts sought to avoid in applying the discovery rule to toxic-tort litigation. *See Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31 (Ariz. App. 1987).

To balance these concerns, many courts have concluded that the plaintiff must have some manifest physical symptom of a diagnosable condition associated with the defendant’s chemical, which would then lead a reasonable person to suspect that he or she had been injured.

**Subclinical Impact and Public Policy**

Public policy is the third significant basis on which most courts have either declined to recognize subclinical harm as a legally compensable harm, or required that the “increased risk” plaintiff prove that future disease is more likely than not to occur. Though described in a variety of ways, these public-policy concerns generally lead back to the common-law distaste for permitting speculative claims or awarding speculative damages.

First, many courts express concern that basing damages upon subclinical impact would provide a windfall to some plaintiffs, while precluding others from the full damages to which they would be entitled. Specifically, a plaintiff who never contracts cancer gets the windfall of damages for cancer. By contrast, the plaintiff who does contract cancer may be inadequately compensated by the fact finder, who is making a decision based on merely the possibility that such cancer might occur.

Second, toxins are present throughout the industrialized world, and human exposure to such chemicals occurs on a routine, if not daily, basis. Allowing claims for increased risk of cancer based on nothing more than a subclinical impact—particularly when that impact may never result in any manifest physical condition or disease—may open the floodgates of litigation, with no reasonable or rational limit on the scope of compensable physical harm. The economically viable nature of aggregating such benign or insubstantial “impact” claims in the context of asbestos litigation led to many courts requiring that a plaintiff prove he or she has a manifest disease or condition related to the asbestos exposure. *See Reporter’s Note, Restatement (Third) of Torts § 4 cmt. c.*

The third major public-policy reason courts have limited the viability of increased-risk claims is the problem of calculating damages with any measure of certainty. Because a subclinical impact may never result in future disease, quantification of the plaintiff’s damages becomes speculative. This is particularly true in “increased risk of cancer” claims, where the duration and/or dose of the plaintiff’s toxic exposure are often estimated, and the plaintiff’s exposure is often below the parameters known to cause any measurable health effect.

For an excellent summary of these public policy concerns, see *Ranier v. Union Carbide Corp.*, 402 F.3d 608, 618–22 (6th Cir. 2005), and *Potter*, 863 P.2d at 807–816 (Cal. 1993) (in the context of negligent infliction of emotional distress).

**Conclusion**

At what point, in the evolution of a toxic-tort physical-injury claim, does the claim present a viable, legally compensable harm? Most courts have answered this question by either requiring proof of more than subclinical impact to state a claim on which relief can be granted, or requiring that the plaintiff present evidence that his or her “increased risk” will more likely than not result in cancer. Beyond these requirements and the public-policy concerns behind them, “increased risk of cancer” claims present unique problems in pleading and proving causation not addressed here. Both the toxic-tort plaintiff and defendant must be aware of all these hurdles in approaching litigation of such claims.

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