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Two Immediate Causes of Action for West Virginians Exposed to Toxic Substances: Medical Surveillance and Emotional Distress Damages

Andrew J. Katz
West Virginia University College of Law

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TWO IMMEDIATE CAUSES OF ACTION FOR WEST VIRGINIANS EXPOSED TO TOXIC SUBSTANCES: MEDICAL SURVEILLANCE AND EMOTIONAL DISTRESS DAMAGES

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I. INTRODUCTION

West Virginia, like the rest of the country, is facing growing problems with the release of toxic substances into the environment. Recent studies have shown high levels of toxicity in the state's air, on its land surface, and in its groundwater. These toxic agents cause serious health problems. Those who are injured from exposure to toxic substances due to the negligence of others deserve to have their injuries compensated through the judicial system.

The difficulty of applying common-law remedies in toxic tort cases is well documented. Common-law remedies were developed in

1. A "toxic" substance is one that is capable of acute or chronic injury to humans or the environment. KATHLEEN A. TOUBY ET AL., THE ENVIRONMENTAL LITIGATION DESKBOOK 265 (1989).

2. NATIONAL INSTITUTE FOR CHEMICAL STUDIES AND THE ENVIRONMENTAL PROTECTION AGENCY, AIR POLLUTION AND RESPIRATORY HEALTH IN THE KANAWHA VALLEY OF WEST VIRGINIA: A SUMMARY OF PHASE III FINDINGS AND AN UPDATE OF THE PHASE II RESULTS (on file with author). This study shows a high rate of respiratory problems for children in the third to fifth grades from Kanawha County due to their exposure to 19 volatile organic compounds commonly found in the Kanawha County atmosphere.

3. West Virginia has four hazardous waste sites on the National Priorities List created by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, commonly known as "CERCLA" or "Superfund" Act. A site is placed on the list by virtue of the EPA developed Hazard Ranking System. See ENVIRONMENTAL PROTECTION AGENCY, NATIONAL PRIORITIES LIST SITES: WEST VIRGINIA (1990) [hereinafter WEST VIRGINIA NPL SITES]. West Virginia also has approximately another 500 sights in which the EPA is monitoring for possible severe toxic risks. Telephone Interview with Lew Baker, Site Inspector and geologist with the West Virginia Division of Environmental Protection, Office of Waste Management (Sept. 14, 1992).

4. The toxic substances at three of West Virginia's superfund sites have contaminated the groundwater. WEST VIRGINIA NPL SITES, supra note 3, at 3-9.

5. Even a low level of exposure can cause, among other problems, dimness of sight, slowing of healing from cuts, hearing and speech impairment, impaired memory, lethargy, and abdominal pain. See David W. Schnare, The Pale Light of Science: Examining the Toxicology of Low-level Exposures, in CHEMICAL CONTAMINATION AND ITS VICTIMS 22, 29 (David W. Schnare & Martin T. Katzman eds., 1989).

order to allow plaintiffs to recover for injuries that were immediately apparent and easily understood.7 For example, if one person injures another while driving drunk, the elements of negligence, namely, duty, breach of duty, causation, and injury, are easily satisfied.8 In toxic tort cases, however, the injuries usually have long latency periods and scientific understanding of how these injuries occur is limited.9 These characteristics of toxic exposure injuries cause the plaintiff great difficulty in recovering damages.10

The exposed party's primary difficulty is showing causation.11 Because of long latency periods and the complexity of the cancer developing process, plaintiffs have difficulty showing that certain chemicals were the legal cause of specific subsequent injuries.12 Often a plaintiff must rely upon statistical relationships which show what percentage of times a person similarly exposed will be similarly injured, and this is not always enough for recovery.13

Even when the plaintiff can show causation, other difficulties remain. The long latency period between exposure and injury increases the probability that the negligent actor or actors may be missing, bankrupt, or without the financial resources to pay the claim.14 Additionally, the complex nature of proving a toxic injury often makes the cost of litigation prohibitive.15 The difficulties for plaintiffs in showing

7. For a discussion tracing tort law from ancient common-law claims arising from "trespass" and "action on the case" to intentional acts and negligence, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 28-30 (5th ed. 1984).
8. Id. at 164-65.
9. Latency periods are the length of time between contact with a chemical and a body reaction. For example, the time between exposure to radiation and the detection of internal organ cancers is often twenty years. TOUBY ET AL., supra note 1, at 261; see also PLATERET ET AL., supra note 6, at 182, 184-85; Slayel, supra note 6, at 850-52.
10. See Slayel, supra note 6, at 852-53; Note, supra note 6, at 580.
11. TOUBY ET AL., supra note 1, at 105; PLATER ET AL., supra note 6, at 182, 185.
12. PLATER ET AL., supra note 6, at 185-89; Slayel, supra note 6, at 852-54.
13. PLATER ET AL., supra note 6, at 190-92; Slayel, supra note 6, at 853-54.
14. Slayel, supra note 6, at 855.
15. Id. at 856-57.
causation, and in recovering once causation is shown, create serious social problems.

The first problem caused by these difficulties is the failure to compensate people who are injured through no fault of their own. This inequity is exacerbated in West Virginia because so many people cannot afford the necessary treatment. The lack of legal remedy and the inability of the injured persons to afford medical treatment often accelerates the victim's health problems. This situation, courts have noted, violates fundamental justice.

The difficulty of recovery for victims of toxic exposure also harms society as a whole. If manufacturers and users of toxic substances do not have to pay for their negligence and the harm they inflict, they are less likely to change their actions. Negligent unlawful polluters of toxic substances should be made to suffer an economic loss for their behavior which will deter future harm. The West Virginia court system should fashion sufficient legal remedies to protect the interests of the individual and the society.

16. Approximately 250,000 West Virginians do not have any health insurance at all. There has never been a study to show how many West Virginians are underinsured, but it is probably at least as many as have no coverage at all. Interview with Pat White, Chairperson of the Health and Human Services Committee of the House of Delegates and member of the Governor's Task Force on Health Insurance (Sept. 22, 1992).

17. See infra notes 67-77 and accompanying text (discussion of whether early detection helps cancer victims).


19. For a discussion on the use of tort law as a disincetive for wrongful behavior, see Richard Posner, Economic Analysis of the Law 122-25 (discussing Judge L. Hand's negligence formula); id. at 125-26 (the economic impact of allowing the defense of "customary practice"); id. at 142-43 (the economic impact of punitive vs. compensatory damages) (1977); see also Keeton et al., supra note 7, at 25-26.

20. There will be a "Toxic Use Reduction" bill presented in the House of Delegates and Senate of the West Virginia Legislature in the 1994 session. The primary purpose of the bill is to reduce the use of toxic substances, not to increase the rights of those who have been exposed to toxic substances. However, plaintiffs' legal rights will be aided by the passage of the bill because toxic exposure will be made a strict liability tort. Passage of the bill is unlikely unless it is greatly "watered down." Interview with David Grubb, Executive Director of the Citizens' Action Group, member of the West Virginia State Senate representing Kanawha County (May 16, 1993).
This need for change is real. For example, in March of 1990, the Army Corps of Engineers took possession of an industrial site in Eleanor, West Virginia, that was filled with toxic waste. Fortunately, the Corps was able to discover and contain the problem before it became a health hazard to the community. Consider what would have happened if no one had purchased or investigated the site. The toxic materials would not have been contained. If the town’s water supply were contaminated, consumers would have ingested the toxins in their drinking water. Given sufficient exposure, the citizens of Eleanor could have reasonably expected an increased incidence of cancer in their community. Residents would face years of fear and mental suffering as they waited to see if their loved ones developed fatal diseases. They would face years of extra medical expenses undergoing tests to detect potential illnesses as soon as possible. None, however, would have an adequate remedy for their injuries.

The problem of providing a judicial remedy for those injured by toxic exposure is not unique to West Virginia. A growing number of jurisdictions are meeting this problem by providing two immediate causes of action for those exposed to toxic substances: the costs of medical surveillance and the infliction of emotional distress. These two causes of action allow injured people an immediate remedy, without having to wait through the long latency period to see if a disease develops.

This Note urges the Supreme Court of Appeals of West Virginia to join the increasing number of jurisdictions that recognize these causes of action for those who are exposed to toxic substances. It will discuss the origin of recovery for medical surveillance costs as an independent cause of action, demonstrate that this cause of action meets all the elements needed to recover for negligence, show that it

22. *Id.* at 12-18.
23. The issue of whether toxic exposure victims should be allowed to reopen their case if a disease subsequently develops is beyond the scope of this Note. *See* Note, Claim Preclusion in Modern Latent Disease Cases: A Proposal for Allowing Second Suits, 103 Harv. L. Rev. 1989 (1990).
is consistent with decisions previously reached by the court, and discuss the usefulness of early detection. Then this Note will discuss the development and the reasoning of the national and West Virginia courts regarding recovery for the negligent infliction of emotional distress and show how allowing recovery for exposure to toxins is consistent with prior case law.

II. MEDICAL SURVEILLANCE DAMAGES

Individuals exposed to toxic substances run a much higher risk of developing health problems than the general population. Recognizing this fact, physicians often advise people so exposed to undergo periodic diagnostic testing in order to detect the first signs of illness. Since these tests are often expensive, exposed individuals should be able to recover the costs of the medical surveillance.

A. The Origin of Medical Surveillance as an Independent Cause of Action

The concept of allowing recovery for medical surveillance as an independent cause of action has two common-law precedents: the "avoidable consequences rule," and recovery for future medical costs to treat a present physical injury. Courts have, at times, based recovery for medical surveillance on the former, on the latter, or on both.

The "avoidable consequences rule" is a basic principle of damages. It imposes an active duty on the injured person to take whatever

24. The term medical surveillance, medical monitoring, and medical screening have been used interchangeably in court opinions and commentaries. The terms mean the process of medical examinations and testing to determine if a person has developed a disease. Norman J. Landau & Douglas K. Landau, Claims For Non-Physical and Non-Present Injuries: Emotional Distress and Medical Monitoring Damages, in PREPARATION AND TRIAL OF A TOXIC TORT CASE 327, 341 (Policy Law Institute ed., 1990).
25. See supra note 5.
27. Id.
28. See CHARLES T. MCCORMICK, HORNBOOK ON THE LAW OF DAMAGES 127-30
reasonable action is necessary to minimize damages.\textsuperscript{29} Specifically, an injured person is required to select a competent doctor and submit to medical care and treatment.\textsuperscript{30} Failure to do so results in a loss of any recovery for suffering or disability that could have been avoided by undergoing treatment.\textsuperscript{31} Since the plaintiff is under a duty to seek medical care and the defendant’s actions caused that duty to arise, the plaintiff should be able to receive medical surveillance damages inflicted by the defendant.

Recovery for the future costs of medical treatment for a present physical injury is also a well-established principle of damages.\textsuperscript{32} An injured person may recover the reasonable and necessary future medical costs that are both reasonably certain to occur and are proximately related to the defendant’s negligence.\textsuperscript{33} Under this theory, the costs of medical surveillance should be considered an injury and the injured party should be compensated.

The infliction of medical surveillance costs was first recognized as an independent cause of action in \textit{Friends For All Children, Inc. v. Lockheed Aircraft Corp.}\textsuperscript{34} \textit{Friends} involved an action by a group of parents of adopted Vietnamese orphans whose airplane crashed while leaving Vietnam.\textsuperscript{35} The plaintiffs sued the airplane’s manufacturer for the future expense of medical surveillance, even though some of the children had no present physical injury.\textsuperscript{36} The United States Court of Appeals for the District of Columbia upheld the district court’s granting of partial summary judgment on the issue of medical treatment and other fees and the issuance of an order requiring the defendant to set up a fund to pay for these future expenses.\textsuperscript{37}

\textsuperscript{29} Id. at 128.
\textsuperscript{30} Id. at 136.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 324.
\textsuperscript{33} Id.
\textsuperscript{34} 746 F.2d 816 (D.C. Cir. 1984).
\textsuperscript{35} Id. at 818.
\textsuperscript{36} Id. at 825.
\textsuperscript{37} Id. at 816.
In recognizing a cause of action for medical surveillance, the *Friends* court demonstrated the presence all of the elements required for recovery in a negligence claim.\(^{38}\) The court noted that an individual has an interest in avoiding the cost of expensive medical procedures.\(^{39}\) If an actor's negligence is the proximate cause of a person's need to seek expensive diagnostic or other medical treatment, that actor has violated that person's interest, thereby creating an injury.\(^{40}\) The actor should thus be held liable for the damages inflicted—future cost of medical treatment.\(^{41}\)

Medical surveillance damages were first discussed in the context of a toxic tort in *Ayers v. Jackson Township*.\(^{42}\) In *Ayers*, the citizen plaintiffs sued Jackson Township for damages caused by its negligent operation of the city landfill.\(^{43}\) As a result of the negligence, toxic chemicals contaminated the water supply for approximately six years before being discovered.\(^{44}\) The trial court gave the plaintiffs medical surveillance damages that were made necessary by the defendant's negligence.\(^{45}\)

The intermediate appellate court disagreed with the trial court's holding on medical surveillance.\(^{46}\) This court held that the plaintiffs could not recover for future medical costs without proving a present physical injury or that a future injury was reasonably likely to oc-

\(\text{\footnotesize 38. Id. at 825-27.}\)
\(\text{\footnotesize 39. Id. at 826.}\)
\(\text{\footnotesize 40. Id. The court noted that there is nothing “speculative” about this injury. Id. Expert medical testimony can be used to prove the plaintiff's need for medical examinations.}\)
\(\text{\footnotesize 41. Id. at 825.}\)
\(\text{\footnotesize 43. Ayers, 461 A.2d at 186.}\)
\(\text{\footnotesize 44. Id.}\)
\(\text{\footnotesize 45. Id.}\)
Since the plaintiffs could not make this showing, the court did not allow recovery. 48

On appeal, the Supreme Court of New Jersey reversed the intermediate court's decision. 49 The court recognized that victims of toxic exposure will sometimes suffer significant but unquantifiable risk of future disease which makes medical surveillance necessary and proper. 50 The court also noted that requiring polluters to pay for the exposure victim's medical surveillance costs is good social policy: 51 the requirement avoids the inequity of forcing a wrongfully exposed individual to pay for necessary medical expenses when she is unable to prove that a future illness or disease is likely; 52 it encourages early detection and treatment, which is likely to lessen the physical harm to the injured person; 53 and it acts as a deterrent by subjecting polluters to liability when proof of the causal connection is likely to be the most readily available. 54 For these reasons, the New Jersey Supreme Court reinstated the trial court's award for future medical surveillance costs. 55

B. Medical Surveillance in West Virginia

The only case in West Virginia discussing medical surveillance payments as an independent cause of action is Ball v. Joy Technologies, Inc. 56 In Ball, the plaintiffs tried to recover for the future medical expenses made necessary by their exposure while at work. 57 The

47. 493 A.2d at 1323.
48. Id.
50. Id. at 309.
51. Id. at 311.
52. Id.
53. Id.
54. Id.
56. 958 F.2d 36 (4th Cir. 1991).
57. Id. at 38.
Fourth Circuit Court of Appeals upheld the district court’s summary judgment in favor of the defendants, stating that West Virginia law only recognized the payment of future medical payments if there was a present physical injury.\textsuperscript{58} The Fourth Circuit refused to recognize medical surveillance as a cause of action, in part, because the issue has never been squarely presented to the Supreme Court of Appeals of West Virginia.\textsuperscript{59} However the West Virginia Supreme Court has recognized the same common-law principles that have led other courts to recognize medical surveillance as an independent cause of action—payment for future injuries and the “avoidable consequences rule.”

The case that best explains West Virginia’s rule on the avoidable consequences theory is \textit{Kaiser v. Hensley}.\textsuperscript{60} In \textit{Kaiser}, the Supreme Court of Appeals of West Virginia affirmed a circuit court’s award of $9,000 to an injured motorist as not inadequate.\textsuperscript{61} The court held that a jury could reasonably find that the plaintiff caused some of his own injuries by taking too much aspirin (which caused a hernia) and that this damage would have been averted if he had sought proper medical treatment.\textsuperscript{62} The court further noted that the test to determine whether a plaintiff should have obtained medical care is based on what the reasonable person would have done under the same circumstances.\textsuperscript{63}

The rule in West Virginia regarding recovery of future medical payments for a present physical injury is explained in \textit{Ellard v. Harvey}.\textsuperscript{64} West Virginia follows the national norm of allowing a plaintiff to recover the reasonable and necessary costs of future medical treatment where the evidence shows that such expenses are both

\begin{thebibliography}{9}
\bibitem{58} Id. at 39.
\bibitem{59} Id.
\bibitem{60} 318 S.E.2d 598 (W. Va. 1983); \textit{see also} Abdulla v. Pittsburgh & Weirton Bus Co., 213 S.E.2d 810 (W. Va. 1975) (admissibility of hospital bill as an item of special damages, which is minimally tainted by extraneous charges, is within the sound discretion of the trial court); Ellard v. Harvey, 231 S.E.2d 810 (W. Va. 1975) (avoidable consequences principle includes psychiatric complications); Jordan v. Bero, 210 S.E.2d 810 (W. Va. 1974) (future medical damages must be reasonably necessary).
\bibitem{61} \textit{Kaiser}, 318 S.E.2d at 603.
\bibitem{62} Id. at 600.
\bibitem{63} Id.
\bibitem{64} 231 S.E.2d 339 (W. Va 1976).
\end{thebibliography}
reasonably certain to occur and that they are proximately related to the negligent acts of the defendant.65

These two common-law principles provide the basis for recognizing medical surveillance damages as an independent cause of action. As the Friends court noted, the infliction of medical surveillance payments is itself a present injury that is both reasonably certain to occur and is proximately related to the negligent acts of the defendant.66 Therefore, the future costs of medical payments should be allowed under Ellard. Further, as the West Virginia court held in Kaiser, failure to undergo medical treatment that could prevent or mitigate the disease would bar future recovery. Requiring injured parties to seek costly medical care to protect their rights and not compensating them for the expense of doing so is inequitable.

C. Whether Medical Surveillance is Reasonably Necessary

The issue of medical surveillance hinges on whether early diagnosis and treatment helps those who have been exposed to toxic substances. If early detection of cancer or other latent diseases does not benefit the exposed person, then the medical surveillance would not be reasonably necessary. The answer to this question is not clear, but most courts recognize the value of early detection.67 For example, in Ayers, the court noted that, "[h]arm in the form of increased risk of future cancer attributable to delay in diagnosis and treatment has been so widely accepted in the medical community that the existence of such harm could be reasonably inferred from this professional common knowledge."68 This position is supported by the National Cancer Institute.69 The Institute notes that estimates of the number of cancer-causing deaths can be reduced anywhere from three to thirty-five percent due to early detection.70

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65. Id. at 342.
66. See supra notes 40-44 and accompanying text.
67. Slayel, supra note 6, at 867.
68. 525 A.2d at 311.
69. NATIONAL CANCER INSTITUTE, THE USEFULNESS OF MEDICAL SCREENING (pamphlet) (on file with author).
70. Id.
A cancer patient's life expectancy depends on the size and location of the malignant tumors within the body.\textsuperscript{71} The smaller the tumor and the more local the diseased area, the greater the chances of recovery.\textsuperscript{72} Once the tumor has grown large or the disease has spread throughout the body, medical treatment is less likely to be successful.\textsuperscript{73} Thus, early detection is crucial when the cancer has attacked one particular part of the body, but makes little difference in cancers like leukemia that have no localized area.\textsuperscript{74}

However, disagreement over the usefulness of early detection does exist.\textsuperscript{75} Some medical experts have written that cancer spreads so quickly, by the time it is detected, treatment will not help the patient.\textsuperscript{76} This question is ultimately one that should be decided by the trier of fact. A plaintiff must show that there is a need for the treatment and a jury must agree.\textsuperscript{77} The Supreme Court of Appeals of West Virginia should continue its tradition of prompt protection of the rights of injured parties and recognize medical surveillance costs as a cause of action.\textsuperscript{78} This cause of action contains all the necessary elements of a negligence claim and is based on common-law precedent.

\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} See Slayel, supra note 6, at 867-68; see also John A. McDougall, McDougall's Medicine: A CHALLENGING SECOND OPINION 27-28, 30, 41-42, 47-49 (1985).
\textsuperscript{76} McDougall, supra note 75, at 27-30, 41-42, 47-49. McDougall advocates spending the money on prevention and general wellness rather than on early detection and treatment.
\textsuperscript{78} See, e.g., James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985) (recognizing causes of action for wrongful birth and wrongful pregnancy); Bond v. City of Huntington, 276 S.E.2d 539 (W. Va. 1981) (allowing the recovery of prejudgment interest in wrongful death cases); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979) (adopting doctrine of comparative negligence); Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666 (W. Va. 1979) (adopting doctrine of strict liability in product cases); Lee v. Comer, 224 S.E.2d 711 (W. Va. 1976) (abolishing doctrine of parental immunity); Adkins v. St. Francis Hosp., 143 S.E.2d 154 (W. Va. 1965) (abolishing charitable immunity for hospitals). In many of these landmark decisions, the court overruled precedents which had been law in West Virginia for many decades, while in others, it decided important questions of first impression without waiting for the legislature to act.
long recognized in West Virginia. Finally, recognizing the cause of action is good social policy. The great weight of medical evidence is that early detection saves lives and reduces pain and suffering. Furthermore, requiring negligent polluters to pay for the harm they inflict will place the loss on the party at fault.

III. EMOTIONAL DISTRESS DAMAGES

Allowing individuals exposed to toxins to recover only for the cost of medical surveillance does not make them whole. Exposed individuals worry about developing cancer from the time they understand the effects of their exposure until they die. These individuals can only receive full compensation for their injuries if they are allowed to recover for their resulting emotional distress.

Prosser and Keeton define emotional distress as “all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.”\(^7^9\) Furthermore, to recover, the emotional distress must be “extreme” or “so severe that no reasonable person could be expected to endure it.”\(^8^0\) Finally, the distress must be “reasonable and justified under the circumstances.”\(^8^1\) The remainder of this Note will discuss the cause of action for negligent infliction of emotional distress. It will review the common-law development of this cause of action, describe its development in West Virginia, present the theories adopted by other states to allow recovery for this tort in toxic exposure cases, and finally, propose a rule for West Virginia based on its common law and the reasoning of other state courts.

A. The Common-Law Development of Negligent Infliction of Emotional Distress

The leading American authority that developed the first rule for recovery for mental anguish was *Mitchell v. Rochester Ry. Co.*\(^8^2\) In

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79. KEETON ET AL., supra note 7, at 362.
80. RESTATEMENT (SECOND) OF TORTS § 46 (1964).
81. KEETON ET AL., supra note 7, at 362.
82. 45 N.E. 354 (N.Y. 1896). The court was following a precedent from England,
Mitchell, the court held that injuries caused by mental anguish were recoverable only if accompanied by a physical impact. It held that injuries caused by emotional distress alone were too remote, and to recognize them would allow a flood of litigation. Many courts followed Mitchell, usually basing their holdings on the need to guarantee that the claim was genuine.

Throughout the twentieth century, tort law has moved steadily towards allowing greater protection to an individual’s mental tranquility. In the century’s first few decades, the physical impact requirement was criticized as being unfair and illogical. Courts strained to avoid the rigidity of the impact requirement by allowing recovery for emotional distress based on trivial impacts such as a “slight blow,” “electric shock,” or “dust in the eyes.” Increasingly, courts have dropped the physical impact requirement. Instead, they have allowed recovery for emotional distress if it was a result of, or resulted in, physical injury or a physical manifestation of the mental injury.

The change in tort law did not stop there. The physical injury or manifestation requirement has also been criticized as too rigid. Recovery is sometimes allowed for people with obvious physical injuries but feigned mental distress, but no recovery is allowed for those with real mental injury but no physical one. As a result of this rigidity, as well as advances in medical science that allow experts to distinguish between genuine and feigned mental illness, several states have also eliminated the physical injury or manifestation requirement. These states allow recovery for mental anguish alone.

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84. Id.

85. KEETON ET AL., supra note 7, at 363.

86. Id. at 55.


88. KEETON ET AL., supra note 7, at 363-64.

89. Id.


91. Id. at 820.

B. Theories of Recovery for Emotional Distress From a Toxic Injury

The evolving standards for recovery of emotional distress damages provide the toxic tort plaintiff with three potential theories of recovery: first, some of the states that retain the impact requirement have found the toxic exposure to be an impact, thereby allowing the plaintiffs to recover; second, some states that still have the physical injury or manifestation requirement have defined injury or manifestation so broadly as to allow many exposed individuals to meet that requirement; and third, the states that permit recovery for emotional distress without an injury, manifestation, or impact allow recovery if the emotional distress is foreseeable and serious.

1. Recovery for Plaintiffs Based on the Impact of the Toxic Substance

A few states retain the physical impact requirement as an indication of the genuineness of the emotional distress claim. Courts have allowed recovery for emotional distress after finding an impact from drinking contaminated water, exposure to asbestos, and being doused with a toxic liquid. After reviewing the previous impact cases, the Florida District Court of Appeal stated that "the essence of impact . . . is that the outside force or substance, no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious, touch[es] or enter[s] into the plaintiff's body."

One example of recovery based on impact, albeit in a slightly different context is Plummer v. United States. In Plummer, the plaintiffs were prisoners held in a cell with another prisoner who had

93. See discussion infra part III.B.1.
94. See discussion infra part III.B.2.
95. See discussion infra part III.B.3.
96. KEETON ET AL., supra note 7, at 331.
97. E.g., Laxton v. Orkin Exterminating Inc., 639 S.W.2d 431 (Tenn. 1982).
98. E.g., Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 217 (Fla. 1985).
100. Eagle-Picher, 481 So. 2d at 526.
101. 580 F.2d 72 (3d Cir. 1978).
tuberculosis. They sued for emotional distress damages based on their fear of getting the disease. The Third Circuit reversed the trial court's holding that Pennsylvania law had rejected recovery on the basis of a physical impact when it adopted the "physical injury rule." The higher court found that physical impact was still available as an alternate showing in addition to the physical injury requirement.

2. Plaintiffs Who Show Physical Injury or a Physical Manifestation of their Emotional Distress

Most jurisdictions still require a plaintiff to show a physical injury in order to collect for emotional distress. Physical injury in this context is a similar concept to physical impact, and is also used as a guarantee of genuineness. However, there is no universally accepted definition of a physical injury. Formulating a definition in this area of the law is difficult because medical science has advanced to the point where it has become harder to distinguish what is clearly a "physical" injury from one that is strictly "mental" or "emotional." The difficulty of finding an appropriate definition of physical injury is even more pronounced when the emotional distress has been caused by exposure to toxic substances because exposed plaintiffs rarely have the lacerations and contusions associated with the term "physical injury." However, toxic exposure victims often can show

102. Id. at 73.
103. Id. at 74.
104. Id.
105. Id. at 74-77.
106. KEETON ET AL., supra note 7, at 364.
108. KEETON ET AL., supra note 7, at 364.
109. See, e.g., Restatement (Second) of Torts § 7 (1964) (defining injury as "the invasion of any legally protected interest of another"). Kimberly v. Howland, 55 S.E. 778, 780 (N.C. 1906) (equating a "wrecked nervous system" with physical injury); Wilkie v. State, 779 P.2d 1280 (Ariz. Ct. App. 1989) (defining physical injury as any "physical deterioration").
111. See supra notes 6-12 and accompanying text (discussing the difficulty in tracing
two types of physical injuries in toxic tort cases, and a few courts have recognized the exposure itself as a "physical injury."

The first type of physical injury that toxic tort plaintiffs can demonstrate is a physical manifestation of their emotional fear. Some examples of the type of manifestations that courts have allowed to satisfy the physical injury requirement are "sleeplessness" and "loss of appetite," "prolonged depression," and "state of shock." If toxic tort plaintiffs can make similar showings of physical manifestations they will be able to recover for emotional distress.

The second type of physical injury plaintiffs may be able to show is a genetic or "subcellular" injury. While the link between exposure to toxic chemicals and disease is not completely understood, medical science is discovering a connection between toxic exposure and damage to a person's immune system, chromosomes, and genes. This damage causes an enhanced susceptibility to disease. As a federal district court held in Werlein v. United States, subcellular injuries are no less "real" than other injuries. It is for the trier of fact, guided by expert testimony, to determine the genuineness of the physical injury.

Finally, some courts have considered the exposure to the toxic substances itself a physical injury for the purposes of permitting a recovery for emotional distress. In Laxton v. Orkin Exterminating Inc., the Supreme Court of Tennessee held that a trier of fact...
could conclude that the plaintiffs suffered a physical injury when they drank water with toxic contaminants for seven months, even though no other physical injury or manifestation resulted. The court upheld the trial court’s finding that the plaintiff’s visit to a hospital was reasonably necessary; this fact was enough to show physical injury and to indicate that the emotional distress was genuine.

3. Recovery for Plaintiffs Based on the Reasonableness of Their Mental Distress Due to the Circumstances of Their Toxic Exposure

Several states are now allowing recovery for emotional distress based on its reasonableness in light of the circumstances that caused it. This rational was used by the Fifth Circuit to allow recovery for emotional distress in the case of *Hagerty v. L&L Marine Services, Inc.* In *Hagerty*, a Jones Act seaman was drenched by liquid chemicals including benzene and other toxins due to a faulty crane lift. The plaintiff, with the help of a fellow employee, showered, changed clothes and returned to work, only to be drenched a second time. Recovery for emotional distress was permitted even though the plaintiff showed no prolonged physical manifestations of physical or mental injury. The court found that the circumstances alone were sufficient to guarantee genuineness.

C. Recovery for Emotional Distress in West Virginia

West Virginia has followed the national trend toward liberalizing the rules for recovery for emotional distress. The trend was first estab-

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121. *Id.* at 434.
122. *Id.; see also Hagerty v. L&L Marine Servs., Inc.,* 788 F.2d 315, 318 n.1 (5th Cir. 1986) (holding, without explanation, that a man soaked with liquid toxic chemicals had suffered “physical injury” even though he suffered only very brief manifestations of injury).
123. 788 F.2d 315 (5th Cir. 1986). Note also that the *Laxton* court, cited *Hagerty* as similar to the Tennessee cases in which plaintiffs were able to recover for negligently inflicted emotional distress without a physical injury. *Laxton*, 639 S.W.2d at 433-34.
124. *Hagerty*, 788 F.2d at 316.
125. *Id.*
126. *Id.* at 318.
127. *Id.*
lished in *Lambert v. Brewster*. In *Lambert*, the plaintiff suffered a miscarriage caused by the stress she felt seeing her father being beaten. The jury verdict of $500 for her emotional distress was set aside by the circuit court, apparently because the defendant’s actions did not result in a physical impact with the plaintiff. The Supreme Court reversed the lower court and reinstated the verdict, holding that an impact was not required for recovery for emotional distress in West Virginia. The court held that recovery would be allowed for a physical injury which resulted from worry caused by the defendant’s wrongs. The court acknowledged that mental stress could be feigned, but valued the principle “that for every wrong there was a remedy” more than it was concerned about a flood of fraudulent litigation.

The court further discussed the rule for recovery for emotional distress in *Monteleone v. Co-operative Transit Co.* In *Monteleone*, the trial court granted a judgment of $5,000 for the plaintiff’s emotional distress caused when a snapped trolley cable hit her car and shattered the windshield. The court reversed and held that a plaintiff could only recover for emotional distress if it was the result of a physical injury, or resulted in a physical manifestation of the mental injury, or was brought about by a defendant’s intentional act.

After the *Monteleone* decision, the West Virginia Supreme Court expanded the ability of plaintiffs to recover for emotional distress. It recognized recovery for emotional distress resulting from the tort of outrage, retaliatory discharge, and employment discrimination. In these cases, the court allowed recovery without any phys-

128. 125 S.E. 244 (W. Va. 1924).
129. See id. at 249-50.
130. Id.
131. Id.
132. Id. at 249
133. 36 S.E.2d 475 (W. Va. 1945).
134. Id. at 476.
135. Id. at 478-81.
137. Id.
ional injury. These causes of action fit within the *Monteleone* framework because the act causing the emotional distress is intentional rather than negligent. ¹³⁹

Within the last few years, the Supreme Court has gone beyond *Monteleone*, allowing for recovery for the negligent infliction of mental distress without a physical injury or a physical manifestation of a mental injury. The court allowed recovery for emotional distress caused by negligent or intentional mishandling of a dead body,¹⁴⁰ and for negligent grave desecration.¹⁴¹ The circumstances surrounding the negligent act, the court held, ensure the genuineness of these claims.¹⁴² The court held, in these two cases, that it was making exceptions to, rather than abandoning, the physical injury or manifestation requirement. Finally, in *Ricottilli v. Summersville Memorial Hospital*,¹⁴³ the Supreme Court of Appeals of West Virginia completely abandoned the rule in favor of the exception. It held that West Virginia courts no longer need to require a physical injury or physical manifestation before allowing recovery for emotional distress.¹⁴⁴ Now, persons suffering from mental anguish can recover based on the reasonableness of their condition in light of the circumstances which caused it.¹⁴⁵

*Ricottilli* was an appeal by the plaintiff from the lower court’s dismissal of her complaint for failure to state a claim.¹⁴⁶ The lower court so held because the plaintiff alleged that she suffered emotional distress, but she did not allege a physical injury or physical manifestation of her mental injury.¹⁴⁷ The Supreme Court based its decision to reverse the lower court on its previous holding in *Whitehair v. Highland Memory Gardens, Inc.*¹⁴⁸ In *Whitehair*, the plaintiff recov-

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¹³⁹. E.g., Harless, 289 S.E.2d at 703.
¹⁴². Id. at 393.
¹⁴⁴. Id. at 635.
¹⁴⁵. Id.
¹⁴⁶. Id. at 630.
¹⁴⁷. Id.
¹⁴⁸. Id.
ered for emotional distress caused by the defendant’s mishandling of the dead bodies of several of her relatives, even though she had no physical injury of manifestation of her emotional injury. In these so-called “dead body” cases, recovery is allowed when the facts indicate a high probability that the emotional distress is genuine. The court held that this rule will be applied to any case where the facts are “sufficient to show that the emotional damage claim is not spurious.”

D. Applying the Ricottilli Principle to Toxic Exposure Cases

The Supreme Court of Appeals of West Virginia has not yet considered recovery for the fear of cancer or other latent diseases due to toxic exposure. However, in the case of Johnson v. West Virginia University Hospitals, Inc., the court allowed recovery for a plaintiff who had been exposed to the HIV virus. In Johnson, the plaintiff, a security guard at West Virginia University Hospital, was exposed to the virus when he was bitten while trying to subdue an AIDS patient. Since AIDS is a latent disease, this case offers insight on how the court will hold regarding recovery for emotional distress for other “latent disease” cases.

The Johnson court still required a physical injury, but it foreshadowed the approach the Ricottilli court was to follow by its emphasis on whether the plaintiff’s fear was reasonable. The court affirmed the lower court’s jury instructions which said that “the plaintiff must prove by a preponderance of the evidence that his fear of contracting the AIDS disease is reasonable under all the facts and circumstanc-

150. Id.
151. Ricottilli, 425 S.E.2d at 639.
154. Id. at 893.
155. Id.
The Supreme Court further noted that "[the court] pointed out to the jury that the appellee could not recover emotional distress damages merely because he was bitten, but that his fear must be reasonable. The fact that the appellee in this case was actually exposed to the AIDS virus goes to the reasonableness of his fear." The court was apparently moving toward the reasonableness standard in Johnson that it would adopt in Ricottilli.

Together, Ricottilli and Johnson show that a person exposed to toxins or any substance that may cause a latent disease will be able to recover for their emotional distress if their fear is reasonable under the particular facts and circumstances of the case. In toxic exposure cases, the court should balance the different factors that it has traditionally used to indicate the genuineness of a claim—the circumstances surrounding the negligent act and the nature of the injury—to determine whether a toxic emotional distress claim is genuine. Specifically, in situations like Hagerty and Ayers, where the impact from the chemicals is direct and severe and the toxicity of the chemicals is high, recovery for emotional distress is reasonable. A thorough review of the circumstances surrounding the event plus the requirement for a clear relationship between the impact and the emotional distress will prevent fraudulent claims.

IV. CONCLUSION

A fundamental theory of our common law is that there should be a remedy for every injury. Plaintiffs who have been exposed to toxic substances and live in fear of cancer or another disease have been injured. That the same plaintiffs also need medical diagnostic treatment which they may not be able to afford compounds the injury: they feel greater emotional distress and also have less chance to fight the disease once it is manifested. They should be compensated.

156. See id. at 894.
157. Id.
158. See supra notes 122-126 and accompanying text.
159. See supra notes 42-45 and accompanying text.
Compensation is difficult through the court system because of the complex etiology of toxic exposure illness and their associated latency, but these factors cannot be used as an excuse for inaction. As our society becomes more complicated, our common law must become more sophisticated as well.

There are two causes of action that the Supreme Court of Appeals of West Virginia can make available to toxic exposure victims that will allow prompt and fair redress of their injuries. The first is to allow recovery for medical surveillance damages. This cause of action is based on well-established common-law principles of damages and satisfies all of the elements of a negligent tort. Its recognition would benefit exposed individuals by making available medical screening which would discover latent injuries at their first physical manifestation thus increasing the life expectancy of the affected individuals. Further, it would also benefit society as a whole by deterring polluters who might otherwise suffer no penalty for the harm they inflict.

The second cause of action, emotional distress damages, is one that the courts already recognize. The court should make this cause of action available to victims of toxic exposure when the facts of the case substantiate the genuineness of the claim. This cause of action would compensate victims for real injuries while acting as encouragement for toxic substance handlers to be mindful of their standard of care.

Andrew J. Katz