TORTS

HAGERTY V. L. & L. MARINE SERVICES, INC.: EQUITABLE COMPENSATION IN TOXIC TORTS

The victim of toxic torts has traditionally faced a number of hurdles in attempting to obtain full compensation for injuries resulting from exposure to hazardous chemicals.[1] A particularly difficult situation arises when the exposure causes immediate injuries as well as increasing the risk of developing cancer in the future. Because the immediate injuries are patent, the applicable statute of limitation begins to run and the victim must sue within the statutory period.[2] In order to recover for the increased risk of contracting cancer, the plaintiff must show that it is more probable than not that cancer will develop.[3] This is the only chance for recovery because courts applying the doctrine of res judicata strictly construe the claims for potential cancer and the claim for immediate injuries as one cause of action.[4] Thus, the plaintiff is precluded from bringing a subsequent suit if and when cancer actually does develop.

The Fifth Circuit Court of Appeals addressed this problem in *Hagerty v. L. & L. Marine Services, Inc.*[5] Plaintiff William Hagerty was soaked with toxic chemicals in the course of employment as a barge tankerman.[6] He brought suit against his employers and the barge charterer for injuries allegedly resulting from the exposure. The Fifth Circuit found the plaintiff's immediate injuries—dizziness, leg cramps, and stinging in his extremities—sufficient to give rise to an immediate cause of action.[7] As to his claim for the increased risk of developing cancer, the court reaffirmed the common

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1. Comment, *Increased Risk of Disease From Hazardous Waste: A Proposal for Judicial Relief*, 60 WASH. L. REV. 635, 635 n.4 (1985) (citing numerous studies detailing barriers involving statute of limitations, apportionment of liability among defendants, and proof of causation.) *See also* Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 120 n.45 (D.C. Cir. 1982) (citing medical study illustrating the difficulty of sufficiently proving cancer).

2. The majority of states have adopted the discovery rule which dictates that the statutory period begins to run when the victim discovers, or reasonably should discover, he has been injured. Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683 (1983). Thus, if a victim of toxic exposure suffers no immediate injuries, a suit for latent cancer will not be barred because the statute of limitations begins to run when the disease manifests. *Id.*

For a survey of Arizona's use of the discovery rule, see Kenyon v. Hammer, 142 Ariz. 69, 76 n.6, 688 P.2d 961, 968 n.6 (1984). The applicable statute is Ariz. Rev. Stat. Ann. § 12-542(1) (Supp. 1986).

3. *See infra* notes 13-15 and 24 and accompanying text for a discussion of the standard of causation required for recovery of future damages.

4. *See infra* notes 18-20 and 22-23 and accompanying text for a discussion of the res judicata doctrine.

5. 788 F.2d 315 (5th Cir. 1986), *reh'g denied*, 797 F.2d 256 (5th Cir. 1986).

6. The facts are as stated in *Hagerty*, 788 F.2d at 316.

7. *Hagerty*, 788 F.2d at 316-17.

law rule requiring the plaintiff to prove that it is more probable than not that cancer will develop in the future.[8] Since Hagerty had not alleged this was so, the court held he stated no claim for increased risk of cancer.[9]

The *Hagerty* opinion is most significant, however, for its suggestion that the claim for the present injuries and the claim for cancer should be two separate causes of action.[10] Under such a scheme, the statute of limitations on the cancer claim will begin to run when the cancer is discovered, and any previous recoveries for other injuries will not bar recovery on the cancer claim.[11] This Comment will examine the *Hagerty* court's innovative suggestions regarding increased risk of cancer claims.[12] It will also discuss the possible acceptance of such an approach in Arizona.

LEGAL SETTING

Two well-settled common law rules provide the background for the *Hagerty* opinion. First, when a plaintiff seeks recovery of future damages, speculation and conjecture as to causation are prohibited.[13] The plaintiff's evidence must establish with "reasonable certainty"—i.e., "more probable than not"—that the future injury will occur.[14] If it does, the plaintiff is permitted to recover full compensation for the injuries.[15] If, however, the evidence only establishes a "possibility" of these harms, the plaintiff will not recover for any future injuries.[16]

The second applicable common law doctrine is res judicata. This doctrine, referred to in *Hagerty* as the "single-cause-of-action rule,"[17] mandates that all injuries resulting from a given tort be treated as one cause of action.[18] A cause of action may not be split to allow the plaintiff to bring a later action to recover additional damages that may arise in the future.[19] It is generally considered immaterial that the plaintiff, at the time of the first

8. *Id.* at 319-20.
9. *Id.* at 320.
10. *Id.* at 320-21.
11. *Id.*
12. The court's holding requiring "reasonable certainty" for future damages disposed of Hagerty's claim for increased risk of cancer. Nonetheless, the court went on, in strongly worded dicta, to reject the single-cause-of-action rule and suggest instead a more equitable approach. Thus, the court's rejection of the single-cause-of-action rule is not binding precedent. The court notes, "[W]hen the proper case is presented, this panel hopes that the en banc court will consider this problem, if Congress has not acted upon it by that time." *Hagerty*, 788 F.2d at 321. The court's recommended solution is the primary focus of this Comment.

Other issues addressed by the court, but not discussed in this Comment, include whether the plaintiff can recover for the present fear of future cancer and for the continuing expense of his periodic medical checkups. *Id.* at 317, 319. The court held that recovery for both of these claims is available and thus summary judgment on these issues was improper. *Id.* at 319.
13. PROSSER AND KEETON ON THE LAW OF TORTS, § 41, at 269 (W. Keeton 5th ed. 1984).
14. *E.g.*, Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 119 (D.C. Cir. 1982); RESTATEMENT (SECOND) OF TORTS § 910 comment a (1979).
15. *E.g., Wilson*, 684 F.2d at 119; RESTATEMENT (SECOND) OF TORTS § 910 comment a (1979). Quantitatively, "reasonable certainty" and "more probable than not" are both interpreted to mean "a greater than 50 percent chance" that the future effect will occur. *Wilson*, 684 F.2d at 119.
16. PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 269 (W. Keeton 5th ed. 1984).
17. *Hagerty*, 788 F.2d at 317, 320.
18. *See* 22 AM. JUR. 2D *Damages* §§ 26, 27 (1965); Annot., 75 A.L.R. 3d §§ 9, 16 (1977).
19. *See* 22 AM. JUR. 2D *Damages* §§ 26, 27 (1965); Annot., 75 A.L.R. 3d §§ 9, 16 (1977).

action, had insufficient information about possible future damages.[20]

A number of courts have strictly adhered to these rules in the context of exposure to carcinogens.[21] Under this strict approach, the plaintiff's present injuries and any cancer that may later develop are treated as one claim which must be brought in the same action. Furthermore, the statute of limitations begins to run on this single cause of action when the immediate injuries are discovered. The plaintiff who attempts to recover for the cancer when it develops may find the suit barred either by the statute of limitations[22] or, if a suit was filed on the original injuries, by claim preclusion.[23] Thus, if damages for cancer are to be recovered, the plaintiff must prove, long before any symptoms exist, that cancer is "reasonably certain" to develop.[24]

A number of commentators, recognizing the potential for injustice to victims of toxic torts, have attacked the "reasonable certainty" standard for future damages.[25] They argue that recovery should be allowed for any in-

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20. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 24 comment c (1982).

21. Perusal of recent cases in this area yields no clear trend or majority rule. More courts appear to adhere strictly to the common law rules (*see infra* notes 22-24 for exemplary cases), but a substantial number of decisions have sought alternative solutions (*see infra* note 37 for exemplary cases).

It has been suggested that the disparate treatment of toxic tort claims be resolved by either congressional action or Supreme Court decree. *See* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 415-17 (5th Cir. 1986) (Clark, C.J., dissenting). The *Hagerty* court suggested legislative action may be appropriate. *Hagerty*, 788 F.2d at 321.

22. *See, e.g.*, Albertson v. T.J. Stevenson & Co., Inc., 749 F.2d 223 (5th Cir. 1984).

23. *See, e.g.*, Graffagnino v. Fibreboard Corp., 776 F.2d 1307 (5th Cir. 1985); Carbonaro v. Johns-Manville Corp., 526 F. Supp. 260 (E.D. Pa. 1981), *aff'd*, 688 F.2d 819 (3d Cir. 1982). *See also* Gideon v. Johns-Manville Sales Corp., 761 F. 2d 1129, 1136 (5th Cir. 1985) ("A plaintiff may not split [his] cause of action by seeking damages for some of his injuries in one suit and for later-developing injuries in another.")

24. *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986); Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985); *Gideon*, 761 F.2d 1129; Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982), *cert. denied*, 459 U.S. 1210 (1983); Plummer v. Abbott Laboratories, 568 F.Supp. 920 (D.R.I. 1983); Mink v. University of Chicago, 460 F.Supp. 713 (N.D. Ill. 1978). The decision in *Jackson* is unique among these cases in two respects. First, unlike the others, the *Jackson* court's strict adherence to the "reasonable certainty" standard did not result in dismissal. There, the plaintiff *had* established that cancer was more probable than not, and thus, according to the court, was entitled to recover under Mississippi law. *Jackson*, 781 F.2d at 411-12. Second, the decision's procedural history is somewhat unique. On appeal from a jury verdict for the plaintiff, a Fifth Circuit panel held that the plaintiff's claim for future cancer was a separate cause of action from his claim for immediate injuries (asbestosis); recovery for future cancer, regardless of its probability, was unavailable until manifestation. Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 516-22 (5th Cir. 1984). The en banc court vacated the panel opinion by granting rehearing and certified the issue of recovery for future cancer to the Mississippi Supreme Court. Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985) (en banc). The Mississippi Supreme Court declined certification without discussion. Jackson v. Johns-Manville Sales Corp., 469 So.2d 99 (Miss. 1985). The en banc court finally resolved the issue by holding that, under Mississippi law, a plaintiff can recover for any future damages shown to be more probable than not. Plaintiff Jackson had done so and was thus entitled to recovery. *Jackson*, 781 F.2d 394, 410-13 (5th Cir. 1986).

The "reasonable certainty" requirement (discussed *supra* at notes 13-16 and accompanying text) can be particularly onerous in the toxic torts context. *See* Comment, *Increased Risk of Disease From Hazardous Waste: A Proposal for Judicial Relief*, 60 WASH. L. REV. 635, 639 n.20 (1985) (authority cited establishing the risk of future disease development is almost always less than 50 percent); *see also* Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 120 n.45 (D.C. Cir. 1982). *But see* Jackson v. Johns-Manville Corp., 781 F.2d 394, 413 n.24 (5th Cir. 1986) (plaintiff met standard with evidence showing that of all persons who have developed asbestosis from exposure to asbestos, over 50 percent have subsequently developed cancer).

25. *See, e.g.*, Gale & Goyer, *Recovery for Cancerphobia and Increased Risk of Cancer*, 15 CUM.

creased risk of contracting cancer regardless of whether manifestation is "probable," with any damages being reduced in direct proportion to the degree of risk of acquiring the disease.[26] This proposed solution may solve a number of problems faced by the toxic tort victim, but it also raises a number of theoretical and practical difficulties.[27] As such, it has gained only limited acceptance by the courts.[28]

An alternative solution leaves the "reasonable certainty" requirement for future damages intact and instead shifts attention to the other common

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L. REV. 723, 736-43 (1985) (discussing increased risk of cancer as a distinct element of recoverable damage); Note, *Increased Risk of Cancer as an Actionable Injury*, 18 GA. L. REV. 563 (1984) (arguing that proportional recovery should be available for any increased risk of cancer); Comment, *Increased Risk of Disease From Hazardous Waste: A Proposal for Judicial Relief*, 60 WASH L. REV. 635 (1985) (advocating compensation for any increased risk of cancer as well as other proposals for relief for toxic tort victims).

The underlying theory for permitting compensation for increased risk of cancer is outlined in King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981). The author argues that the chance of achieving a desired outcome, or avoiding an adverse one, is a compensable interest in and of itself. If this chance is lost, or reduced due to the defendant's conduct, this loss should be proportionately valued and compensated for accordingly. *Id.* at 1354. This theory can be applied in two contexts: 1) where the defendant has increased the risk of future harm, and 2) where the harm has manifested but was partly a result of conditions existing prior to the defendant's conduct. In the first context, the "chance interest" is the chance of completely avoiding the future harm, usually close to 100 percent. If the defendant increases the risk of this future harm, he has reduced the chance of it never occurring. This loss, according to King, should be valued and compensated regardless of whether the reduction was greater or less than 50 percent. *Id.* In the second context, the "chance interest" is whatever chance there was of avoiding the harm despite the pre-existing conditions. Here the defendant has destroyed the chance interest (the harm did manifest) and should, under King's theory, pay appropriate compensation regardless of whether the chance of avoiding the harm was greater or less than 50 percent. *Id.*

26. For example, if the defendant has increased the plaintiff's risk of getting cancer by 40%, damages will be reduced by 60%.

27. While the overall statistical group of injured plaintiffs will receive the proper amount of damages, the individual plaintiffs are improperly compensated: those who do eventually develop cancer are undercompensated, and those who do not receive a windfall. Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 119 n.44 (D.C. Cir. 1982). Furthermore, the number of substances and activities that have been linked to an increased risk of cancer is nearly limitless. A rule of law establishing a cause of action for increased risk of cancer, regardless how small, would greatly burden the court system with increased litigation. In Ayers v. Jackson TP., 461 A.2d 184 (N.J. Super. 1983), the court noted,

> [t]o permit recovery for possible risk of injury or sickness raises the spectre of potential claims arising out of tortious conduct increasing in boundless proportion. . . . [T]he court cannot ignore the fact that much of what we do and make part of our daily diet exposes us to potential, albeit remote, harm. As long as the risk exposure remains within the realm of speculation, it cannot be the basis of a claim of injury against the creator of that harm.

Id. at 187.

28. Some courts have allowed recovery for increased risks of less than 50% in related contexts. Martin v. City of New Orleans, 678 F.2d 1321 (5th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983) (jury permitted to include in damage award the small risk that a bullet lodged in plaintiff's neck might someday sever the spinal cord); Thompson v. Sun City Community Hosp., Inc., 141 Ariz. 597, 688 P.2d 605 (1984) (plaintiff need not prove to a reasonable certainty that defendant's negligence caused permanent impairment of leg.) *See* discussion *infra* at notes 60-64 and accompanying text. *See also* Herskovits v. Group Health Corp., 99 Wash. 2d 609, 664 P.2d 474 (1983) (a 14% reduction in decedent's chance of survival due to defendant's failure to make early diagnosis of cancer was sufficient evidence of causation to go to jury); Feist v. Sears, Roebuck & Co., 267 Or. 402, 517 P.2d 675 (1973) (jury's award permitted to reflect an added susceptibility to meningitis); Coover v. Painless Parker, 105 Cal.App. 110, 115, 286 P. 1048, 1050 (1930) (jury allowed to consider the "possibility" of the plaintiff developing cancer in the future. "[T]his predisposition in itself is some damage.").

law rule at issue, the single-cause-of-action rule. This is the solution proposed by the *Hagerty* court.

EXPLANATION OF THE *HAGERTY* OPINION

The *Hagerty* court attempted to provide an equitable compensation scheme for the toxic tort victim by addressing two issues in turn: first, whether to maintain the "reasonable certainty" standard;[29] and second, whether to apply the single-cause-of-action rule in this context.[30] The court resolved the first issue by summarily following the common law rule that recovery is prohibited unless the plaintiff can show that the toxic exposure more probably than not will lead to cancer.[31] No extensive support or explanation is offered for this conclusion. Rather than deal with the criticism this approach has engendered in the toxic torts context,[32] the court summarily bases its holding on stare decisis.[33] Furthermore, the court cited cases upholding the common law rule,[34] yet also noted, but left unrefuted, cases rejecting this rule and allowing recovery for the "possibility" of future harm.[35]

A more persuasive analysis supports the court's conclusion regarding the single-cause-of-action rule. In addressing this issue, the court broke with the traditional doctrine and recommended rejection of the single-cause-of-action rule in the toxic chemical or asbestos context.[36] A better rule, the court concluded, would be for the plaintiff's claim for present injuries and

29. *See infra* note 31 and accompanying text. The "reasonable certainty" standard is explained *supra* at notes 14-17 and accompanying text.

30. *See infra* notes 36-38 and accompanying text. The "single-cause-of-action" rule is explained *supra* at notes 18-20 and accompanying text.

31. *Hagerty*, 788 F.2d at 319.

32. *See supra* note 25 and accompanying text.

33. *Hagerty*, 788 F.2d at 319. Chief Judge Clark, dissenting from a similar holding in Jackson v. Johns-Manville Corp., 781 F.2d 394 (5th Cir. 1986) (discussed *supra* at note 25), noted the inadequacy of such reasoning in the toxic torts context: "looking backwards to the signposts of *stare decisis* has turned the court away from the road to justice because this case exceeds the limits of ordinary case and controversy litigation in our complex, interrelated society." *Id.* at 415.

The *Hagerty* court also noted that its first holding is reached in order "[t]o be consistent with our position [regarding the single-cause-of-action rule] below. . . ." This statement is misleading, however. In the instant case, where no showing that future cancer is more probable than not had been made, both the court's holding and its position regarding the single-cause-of-action rule result in dismissal of Hagerty's claim for cancer. In the run of cases, however, the two positions taken by the *Hagerty* court can yield *inconsistent* results. This inconsistency is illustrated *infra* at note 36.

34. *Hagerty*, 788 F.2d at 319.

35. *Hagerty*, 788 F.2d at 319-20. Cited cases rejecting the common law include Martin v. City of New Orleans, 678 F.2d 1321 (5th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983), and Brafford v. Susquehanna Corp., 586 F.Supp. 14 (D.Colo. 1984).

36. *Hagerty*, 788 F.2d at 320-321. The court's holding requiring "reasonable certainty" for future damages disposed of Hagerty's claim for increased risk of cancer. By resolving the future damages issue first, the court created internal inconsistency in its opinion and left its conclusion regarding the single-cause-of-action rule as dicta. *See supra* note 12. To illustrate the inconsistency, consider the application of the court's opinion if Hagerty alleged and offered evidence to show that cancer was "reasonably certain." Under the court's holding, Hagerty would be entitled to recovery for the cancer. Under the court's second conclusion in dicta, however, Hagerty would not be able to recover—the cancer claim is separate and must be brought when it manifests: "[D]amages for [cancer should not] be recoverable unless and until [the disease is diagnosed]." *Id.* at 320.

This deficiency could have been avoided by basing the dismissal of Hagerty's claim solely on the court's second conclusion rejecting the "single-cause-of-action" rule. Furthermore, such an approach would have established the second conclusion as binding precedent rather than as a mere guideline for future cases and a challenge to the legislature to take action.

any future claim for cancer to be treated as two separate causes of action.[37] The statute of limitations on the cancer claim would begin to run when that disease was discovered, and any earlier recovery for immediate injuries would not preclude recovery for cancer if and when it developed.[38]

In reaching this conclusion, the court relied primarily on fairness considerations rather than on precedent.[39] The court noted the injustice caused to the plaintiff by the single-cause-of-action rule.[40] If the plaintiff is unable to meet the substantial burden of proving the probability of future cancer at the time of trial, and subsequently does develop cancer, he suffers considerable damages without compensation. Moreover, even if the plaintiff could show a greater than fifty percent chance of contracting cancer, the actual amount of damages would be highly speculative and the opportunity for improper compensation would be high.[41] Finally, the court illustrated the inequitable effect of the single-cause-of-action rule upon the defendant in toxic tort cases.[42] For example, if evidence shows that sixty percent of all persons exposed to asbestos develop cancer, under traditional rules, each plaintiff who brought suit would recover full damages for cancer even though forty percent of them would never contract the disease.

Based on these reasons, the *Hagerty* court concluded that the latent cancer claim should be a separate cause of action.[43] The court did not address the conflict with the traditional rules of res judicata. A close examination of the rationale of res judicata, however, reveals that the *Hagerty* rule is not irreconcilable with that doctrine.

HAGERTY AND THE RES JUDICATA DOCTRINE

The doctrine of res judicata seeks an equitable balance between the concerns of repose and judicial efficiency on the one hand, and allowing a fair opportunity to recover just compensation on the other.[44] This balancing ap-

37. *Id.* A number of other courts have reached this same conclusion. *See* Adams v. Johns-Manville Corp., 727 F.2d 533 (5th Cir. 1984) (claim for cancer is separate from claim for asbestosis, thus evidence of increased risk of cancer not admissible in suit for asbestosis damages); Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982) (wrongful death claim not barred by statute of limitations as cancer and asbestosis are two separate causes of action); Goodman v. Mead Johnson & Co., 534 F.2d 566 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) (reversed district court holding cancer claim was same cause of action as previously discovered thrombophlebitis claim and thus barred by statute of limitations); Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 464 A.2d 1020 (1983) (statute of limitations on cancer claim did not begin to run upon discovery of asbestosis); Martinez-Ferrer v. Richardson-Merrel, Inc., 105 Cal. App. 3d 316, 164 Cal. Rptr. 591 (1980) (dermititus and cateracts caused by defendant's anticholestorol drug are separate causes of action for statute of limitations purposes).

38. *Hagerty*, 788 F.2d at 320-21. The court added that issue preclusion would still be available for common issues in the two actions. *Id.* at 320 n.3.

39. *Hagerty*, 788 F.2d at 320. The court stated that the "vast majority" of latent disease cases have upheld the single-cause-of-action rule. *See supra* note 22-23. *But see supra* note 37 for a list of authorities supporting the *Hagerty* court's rejection of the rule.

40. *Hagerty*, 788 F.2d at 320.

41. *Id.* The court reasoned that damages are speculative at this point because, although cancer is probable, it still may not occur, and even if it does, the resulting damages may be limited or they may be enormous. Until the disease develops the extent of the injury cannot be known.

42. *Id.*

43. *Id.* at 320-21. *See also supra* note 12.

44. C. WRIGHT, A. MILLER, E. COOPER, FEDERAL PRACTICE AND PROCEDURE, §§4407, 4415 (1981).

proach manifests itself primarily in defining the scope of a cause of action. In most tort lawsuits, requiring a plaintiff to assert all grounds of recovery arising out of a single tort does not impair his opportunity to obtain just compensation. Thus, the goals of repose and judicial economy dictate that a single cause of action exist for all injuries arising from the defendant's actions.[45]

In cases involving immediate injuries as well as the possibility of latent cancer, however, the balance weighs differently. As the *Hagerty* court outlined, the goal of fair compensation is substantially hindered by denominating the cancer claim and the claim for immediate injuries as one cause of action.[46] Furthermore, the aim of judicial efficiency is, in many ways, better served in this instance by splitting the cause of action; the single-cause-of-action rule provides strong incentive for plaintiffs to bring suits on injuries that could best be compensated by other means or even ignored.[47] Evidentiary considerations also weigh in favor of splitting the plaintiff's claim. Evidence of the injury, its cause, and the amount of damages will be more reliable if the suit for cancer is postponed until the disease manifests itself.[48] Thus, the interests of fair compensation, judicial economy, and reliable evidence outweigh the goal of repose in the present situation, dictating that a separate cause of action exist for the latent cancer.

Courts seeking to create equitable compensation schemes for the victims of toxic exposure by separating the cancer claim need not be inhibited by res judicata concerns. The res judicata doctrine, if functionally applied, does not prohibit such an approach.[49]

WILL ARIZONA FOLLOW *HAGERTY*'S PROPOSAL AND REJECT THE ONE-CAUSE-OF-ACTION RULE FOR TOXIC TORTS?

The issues presented in *Hagerty* have yet to be addressed by the Arizona courts. Nonetheless, prior decisions, and the Arizona Supreme Court's perception of public policy in this area, provide clues as to whether the approach recommended by the *Hagerty* court will be adopted in Arizona.

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45. *Id.*

46. *See supra* notes 22-24 and 40 and accompanying text.

47. *Wilson*, 684 F.2d at 120. The court noted that other sources, such as workers' compensation or insurance, may adequately compensate the party for the initial injuries. If no other diseases develop, the matter will be settled without litigation. If, however, the victim is aware that a judicial remedy for any cancer that may develop will be barred unless it is filed immediately, the victim will have strong incentive to go to court. *Id.*

48. Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 521 (5th Cir. 1984), *on reh'g en banc*, 750 F.2d 1314 (5th Cir. 1985), *question certified en banc*, 757 F.2d 614 (5th Cir. 1985), *certification denied*, 469 So.2d 99 (Miss. 1985), *on reh'g en banc*, 781 F.2d 394 (5th Cir. 1986); *Wilson*, 684 F.2d at 119 (in latent disease situations, unlike most tort suits, evidentiary considerations support splitting the claim).

49. This reasoning is consistent with the stated exceptions to the Restatement rule against claim splitting. RESTATEMENT (SECOND) OF JUDGMENTS §26 (1982), entitled "Exceptions to General Rule Concerning Splitting," states that the general rule does not apply when ". . . (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action, or . . . (f) It is clear and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason. . . ." *See also Jackson*, 727 F.2d at 521, where the court noted the above and added, "'principles of res judicata are not ironclad,' but must be applied to accomplish justice in the light of public policy." (quoting Bogard v. Cook, 586 F.2d 399, 408 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979).).

Although the applicable common law rules are well-settled in Arizona,[50] it is doubtful that Arizona courts will strictly adhere to these doctrines in the situation presented by *Hagerty*. Arizona has a long-established public policy of upholding the right of a wronged individual to recover full compensation for injuries. This policy is expressed in constitutional provisions adopted at statehood.[51] The constitutional magnitude of this policy was recognized most recently by the Arizona Supreme Court in *Kenyon v. Hammer*.[52] In that case, the Court, without dissent, held that a plaintiff's cause of action is a fundamental right.[53] The statute at issue was held to infringe unconstitutionally upon this right by barring claims before they could reasonably be brought.[54] As outlined above,[55] strict application of the common law rules concerning future damages and the res judicata doctrine often has an equally adverse effect on a plaintiff's cause of action for cancer when immediate injuries arise from toxic exposure. Because of this effect, it is probable that the Arizona Supreme Court will not strictly adhere to these common law rules, opting instead for an alternative which furthers the policy set forth in *Kenyon* by preserving the victim's right to recover compensation for cancer.[56]

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50. *See, e.g.,* Continental Life & Acc. Co. v. Songer, 124 Ariz. 294, 603 P.2d 921 (Ct.App. 1979) (plaintiff must establish damages to a reasonable certainty); Allen v. Devereaux, 5 Ariz. App. 323, 426 P.2d 659 (1967) (future damages must be reasonably certain and cannot be predicated upon conjecture and speculation); Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 119, 259 P.2d 554, 557 (1953) ("A plaintiff is not permitted to split his claim and harrass an adversary with more than one action for one wrong."); Jenkins v. Skelton, 21 Ariz. 663, 192 P. 249 (1920) (all injuries resulting from the same tort constitute one cause of action).

51. Article 2, §31 of the Arizona Constitution states, "No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person." ARIZ. CONST. art 2, § 16. Article 18, §6 states, "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." ARIZ. CONST. art. 18, § 6. For a comprehensive look at the origin, evolution and intent of these constitutional provisions and the public policy they represent, see Kenyon v. Hammer, 142 Ariz. 69, 79-83 and n.9, 688 P.2d 961, 971-975 and n.9 (1984).

52. 142 Ariz. 69, 688 P.2d 961 (1984).

53. *Id.* at 83, 688 P.2d at 975.

54. *Id.* at 87, 688 P.2d at 979. The *Kenyon* court addressed the constitutionality of Ariz. Rev. Stat. Ann. §12-564 (A) (1982) (repealed 1985), which required certain malpractice claims asserted against a licensed health care provider, and arising from the provision of health care services, to be brought within three years of the date of injury rather than the date of discovery. The court, using an equal protection analysis, first concluded that, in Arizona, the right to bring an action for damages is a fundamental right guaranteed by the Arizona Constitution. *Id.* at 83, 688 P.2d at 975. Because the statute infringed upon this right, by barring legitimate claims before they could be brought, the court applied a strict scrutiny standard of review. *Id.* The court then declared the statute unconstitutional because the defendants failed to show that the disparate treatment of those claimants with medical malpractice claims covered by the statute, versus all other malpractice claimants, was necessary to achieve the state interest of reducing the cost and increasing the availability of medical care. *Id.* at 87, 688 P.2d at 979.

The concurring opinion of Justice Cameron stated: "A statute of limitations or repose which abrogates an action for damages even before the action arises or can reasonably be discovered is unconstitutional." *Id.* at 88, 688 P.2d at 980. Justice Feldman, author of the majority opinion, noted in footnote 8 that he agreed with this view. *Id.* at 78 n.8, 688 P.2d at 970 n.8.

55. *See supra* notes 25 and 42 and accompanying text.

56. *See* Ross v. International Bhd. of Elec. Workers, 634 F.2d 453, 459 (9th Cir. 1980) (quoting Smith v. Pinner, 68 Ariz. 115, 121, 201 P.2d 741, 745 (1948)) ("Arizona courts and this court have held that res judicata should not be applied 'so rigidly as to defeat the ends of justice.'"); *cf.* City of Tucson v. Apache Motors, 74 Ariz. 98, 245 P.2d 255 (1952) (due to impossibility of predicting future flood damages, a new cause of action arises upon the occurrence of each successive injury).

As previously discussed,[57] courts and commentators have suggested two alternatives for preserving this right: 1) allowing recovery for any increased risk of developing cancer regardless of whether the plaintiff has shown that its eventual manifestation is more probable than not[58] and, 2) the *Hagerty* approach, which separates the cancer claim from the immediate injury cause of action.[59] The 1984 case of *Thompson v. Sun City Community Hospitals, Inc.*[60] suggests that Arizona may choose to deal with future cancer claims by allowing recovery on a lesser causation showing rather than by abandoning the single-cause-of-action rule.

In *Thompson*, the plaintiff was originally taken to the defendant's private hospital for treatment of leg injuries but was transferred to a public hospital due to plaintiff's inadequate insurance coverage.[61] Plaintiff sued the defendant hospital alleging the defendant was negligent in transferring him and that this negligence caused permanent impairment of the leg.[62] At trial, the plaintiff established the defendant's negligence increased the risk of the injuries for which he sought recovery, but he could not establish that the defendant, "more probably than not," caused the permanent injuries.[63] The court held that causation need not be shown to be "probable" to survive a directed verdict.[64] Rather, the plaintiff need only establish that the defendant increased the risk of the harm ultimately suffered.[65] An Arizona court, when faced with a situation similar to that in *Hagerty*, may choose to extend *Thompson* to allow recovery for the increased risk of getting cancer regardless of whether the plaintiff has shown that, more probably than not, cancer will develop.[66]

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57. *See supra* notes 25 and 37-38 and accompanying text.

58. *See supra* note 25 and accompanying text.

59. *See supra* notes 37-38 and accompanying text.

60. 141 Ariz. 597, 688 P.2d 605 (1984). *See also*, Casenote, *The Increased Risk Rule: Establishing "Probable" Causation Through Mere Possibility*, 27 ARIZ. L. REV. 257 (1985), discussed *infra* at note 65.

61. The facts are as stated in *Thompson*, 141 Ariz. at 599, 688 P.2d at 607.

62. *Id.* at 600, 688 P.2d at 608.

63. *Id.* at 607, 688 P.2d at 615.

64. *Id.* at 608, 688 P.2d at 616.

65. The court held that the jury should still be instructed that they must find a probability of causation. *Id.* The *Thompson* rule is for the judge: a plaintiff who has shown that the defendant increased the risk of getting cancer will survive a directed verdict even though the evidence has not shown that it is more probable than not that cancer will develop. *Id.*

This result was criticized in Casenote, *The Increased Risk Rule: Establishing "Probable" Causation Through Mere Possibility*, 27 ARIZ. L. REV. 257 (1985). The author pointed out that a rule allowing probability to be established through a showing of mere possibility is inherently illogical. He cited as an example a situation in which the expert witnesses can only establish a 1% chance that the defendant caused the harm suffered. Under the *Thompson* rule, a jury would be permitted to find a probability of causation. This, the author suggested, would allow jury verdicts based upon sympathy for the plaintiff rather than on an objective evaluation of the evidence. *Id.* at 262.

The author also noted a statistical unfairness to defendants. In a given group, all defendants will be held liable even though statistically most have caused no harm. *Id.*

66. The *Thompson* rule and the increased risk rule, proposed by many commentators and outlined *supra* at noted 26-27 and accompanying text, are similar in that both allow recovery on a less than probable showing of causation, but they differ with respect to damages. Under the *Thompson* rule, damages are not reduced in indirect proportion to the degree of risk; rather, full recovery is available. Thus, should the Arizona courts choose to extend the *Thompson* rationale rather than follow *Hagerty* in the instant context, the question will remain whether or not they will allow full recovery or reduce damages proportionately.

This result would be unfortunate as *Thompson* need not, and should not, be extended to allow recovery for the increased risk of developing cancer. The *Thompson* court took care to restrict its holding to a limited set of facts.[67] Furthermore, the concerns motivating the *Thompson* decision do not exist in the latent cancer context. In *Thompson*, the injury had occurred and the defendant's role in causing that injury was speculative and would forever remain so.[68] The court was thus forced either to allow the case to go to the jury on a less than probable showing of causation or to dismiss the plaintiff's claim outright.

In the *Hagerty* context, however, where the claim is for the possibility of developing cancer in the future, this dilemma is not present. Because the speculative element of the plaintiff's case is whether the injury itself will ever occur, an answer will manifest with the passage of time; either cancer will develop or it will not. The benefits of the *Hagerty* separate causes of action rule thus become evident: recovery will be available for deserving plaintiffs, while the inherent problems of allowing recovery on less than probable causation are avoided.[69] Thus, the Arizona courts would not need to extend *Thompson's* "increased risk" rule beyond its immediate context. The plaintiff's right to recover for cancer is best preserved by adopting the *Hagerty* proposal which construes the claim for immediate injuries and the claim for cancer as separate causes of action.[70]

CONCLUSION

Traditional rules of res judicata and future damages, when strictly applied, work together to create an inequitable dilemma for toxic tort victims who suffer immediate injuries as well as an increased risk of cancer. The Fifth Circuit decision in *Hagerty v. L. & L. Marine Services, Inc.*, recognized this and proposed that, in the context of toxic exposure, the claim for immediate injuries and the claim for future cancer be construed as two separate causes of action.

Solid reasoning supports this proposal. By allowing recovery on the cancer claim if and when that disease manifests, plaintiffs will be assured of full recompense and defendants will pay damages only to those plaintiffs who actually develop cancer. Although strict application of the single-cause-of-action rule is rejected, the *Hagerty* approach is not offensive to the policy concerns motivating the res judicata doctrine. Finally, such a recovery scheme would not run contrary to existing Arizona case law; rather, it

67. Thompson v. Sun City Community Hospitals, Inc., 141 Ariz. 597, 608, 688 P.2d 605, 616 (1984). The court restricted its holding to " . . . the limited class of cases in which defendant undertook to protect plaintiff from a particular harm and negligently interrupted the chain of events, thus increasing the risk of that harm." *Id.*

68. *Id.* The court's language illustrates the dilemma presented: "Defendant's negligent act or ommission made it impossible to find with certainty what would have happened and thus forced the court to look at the proverbial crystal ball in order to decide what might have been." *Id.*

69. *See supra* notes 27 and 65.

70. *Hagerty*, 788 F.2d at 320, 321.

would further an established policy of safeguarding a tort victim's right to recover full damages.

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