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# Perfect Together: Ayers v. Jackson Township and Presymptom Medical Surveillance Awards in Toxic Torts

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# PERFECT TOGETHER: *AYERS V. JACKSON TOWNSHIP* AND PRESYMPTOM MEDICAL SURVEILLANCE AWARDS IN TOXIC TORTS

The Environmental Protection Agency (EPA) has estimated that, as of 1980, up to 90,000 hazardous waste[1] dumps existed in the United States.[2] Some 260 million metric tons, or 70 billion gallons of waste have been dumped into these sites.[3] The tragic fact is that ninety percent of that waste has been disposed of improperly.[4] In response to the reckless manner in which American industry has treated the environment, Congress, spurred by the increased awareness and burgeoning indignation of its constituents, enacted a number of laws to combat the growing threat to the environment

1. Hazardous waste is a broad term that encompasses both solid and liquid industrial waste, from whatever source derived. There are numerous federal and state statutory and regulatory definitions of hazardous waste. The Resource Conservation and Recovery Act [hereinafter RCRA], 42 U.S.C. §§ 6901-07, 6911-16, 6921-34, 6941-49, 6951-56, 6961-64, 6971-79, 6981-87 (1982) defines hazardous waste as "solid waste, or combination of solid wastes which because of its quantity, concentration, or physical, chemical, or infectious characteristics may . . . cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or, . . . pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903. *See also* Comprehensive Environmental Response, Compensation, and Liability Act [hereinafter CERCLA], 42 U.S.C. §§ 9601-9615, 9631-33, 9641, 9651-57 (West Supp. 1986); Solid Waste Disposal Act § 3001, 42 U.S.C. § 6921 (1982); Clean Air Act § 112, 42 U.S.C. § 7412 (1982).

The bulk of the regulatory definitions promulgated pursuant to the statutory provisions, *e.g.*, CERCLA, 42 U.S.C. § 9601; Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1266, 1281-1299, 1311-1328, 1341-1345, 1361-1376 (as amended by Clean Water Act of 1977), are found in 40 C.F.R. § 261 Subpart A. The Environmental Protection Agency can list a solid waste as hazardous if it has specific constituents that are deemed toxic. 40 C.F.R. § 261.11 (1987) and 40 C.F.R. § 302.4 (1987). Furthermore, if a waste exhibits one or more of the following characteristics—ignitability, corrosivity, reactivity or toxicity, it will be subject to RCRA's hazardous waste provisions. 42 U.S.C. § 6921(a). The EPA provides a list of wastes from non-specific sources, 40 C.F.R. § 261.31 (1987) [hereinafter the "F" list]. *See generally* R. FORTUNA AND D. LENNETT, HAZARDOUS WASTE REGULATION: THE NEW ERA 29-44 (1987).

New Jersey adopted the federal definitions of hazardous substances in the Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11b (West Supp. 1988).

2. S. EPSTEIN, L. BROWN & A. POPE, HAZARDOUS WASTE IN AMERICA 303 (1982).

3. Note, *The Applicability of Civil RICO to Toxic Waste Polluters*, 62 IND. L.J. 451 (1986-87).

4. Senate Comm. on Environmental and Public Works, S. REP. NO. 848, 96th Cong., 2d Sess. 3 (1980).

posed by hazardous waste.[5]

The pillars of Congress' legislative efforts in this area have been the Resource Conservation and Recovery Act of 1976 (RCRA)[6] (and subsequent amendments in 1984) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[7] CERCLA is more commonly known as the Superfund legislation. Whereas RCRA's stated purpose was to monitor hazardous wastes from "cradle-to-grave,"[8] CERCLA was designed as a "comprehensive" package aimed at "removing—or at least containing—the hazardous remnants of past practices."[9]

Despite its self-assumed comprehensiveness, CERCLA was silent on the issue of a private remedy for those afflicted by the hazardous remnants of industrial waste disposal practice.[10] "Without a comprehensive governmental response to the problem of compensating victims of toxic exposure, the only available remedy lies within the legal system."[11] New Jersey is a state that has initiated such judicial intervention.

Litigation surrounding the improper disposal of hazardous and toxic waste has proven exceedingly irksome to the judicial system. Courts have struggled to accommodate common law tort doctrines with the realities of mass toxic exposure claims.[12] The nature of toxic tort claims, premised on

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5. *E.g.*, Clean Air Act (42 U.S.C. §§ 7401-7428, 7450-7459, 7470-79, 7481, 7501-7508, 7521-7525, 7541-7552, 7601, 7626, 7641-7642 (1982); Federal Water Pollution Control Act (33 U.S.C. §§ 1251-66, 1281-1299, 1311-1328, 1341-1345, 1361-1376 (1982); Safe Water Drinking Act of 1976, Pub. L. No. 93-523, 88 Stat. 1660.

6. RCRA, 42 U.S.C. §§ 6901-07, 6911-17, 6921-34, 6941-49, 6951-56, 6961-64, 6971-79, 6981-87 (1982).

7. CERCLA, 42 U.S.C. §§ 9601-15, 9631-33, 9641, 9651-57 (West Supp. 1986).

8. 45 Fed. Reg. 33066 (1980)(to be codified at 40 C.F.R. § 260).

9. Ayers v. Jackson Tp., 106 N.J. 557, 580, 525 A.2d 287, 298 (1987).

10. *Id.* (citing Zazzalli and Grad, *Hazardous Wastes: New Rights and Remedies? The Report and Recommendations of the Superfund Study Group,* 13 SETON HALL L. REV. 446 (1983)). No private right of action has been established for a CERCLA violation, pursuant to the test of Cort v. Ash, 422 U.S. 66 (1975). Presumably, none will be adopted as the legislative intent is fairly dispositive of the exclusive scope of the legislation on this issue. *Hearings on Hazardous Waste Contamination of Waste Resources: Compensation of Victims to Hazardous Waste before Subcomm. on Investigation and Oversight of the House Comm. on Public Works and Transportation,* 98th Cong., 1st Sess. (1986).

11. *Ayers,* 106 N.J. at 581, 525 A.2d at 287.

12. The literature is voluminous. "Because courts have long recognized their obligation to do corrective justice by compensating innocent victims and more recently, to deter wrongdoing by compelling those who create harms to bear the cost of such injury, the courts must adapt the common law to the realities of toxic tort litigation." *Developments in the Law—Toxic Waste Litigation,* 99 HARV L. REV. 1458, 1603 (1986) [hereinafter *Developments—Toxic Waste*]. For a brief list of relevant articles, see generally Dworkin, *Fear of Disease and Manifestation Injuries: A Solution or Pandora's Box,* 53 FORDHAM L. REV. 527 (1984); Farber, *Toxic Causation,* 71 MINN. L. REV. 1219 (1987); Rabin, *Environmental Liability and the Tort System,* 24 HOUS. L. REV. 27 (1987); Ginsberg & Weiss, *Common Law Liability for Toxic*

the improper handling of poisonous waste, forces the potential plaintiff to grapple with an array of problems that find their genesis in traditional common law negligence theory. This theory requires a plaintiff to prove that the defendant's breach of a legal duty of care and the defendant's failure to meet this duty was the actual and proximate cause of any resultant injury to the plaintiff.[13]

This Note will examine the novel private remedy crafted in response to these problems by the New Jersey Supreme Court in *Ayers v. Jackson Tp.*[14] In this case, for the first time, a state high court upheld a jury verdict awarding postexposure, presymptom annual medical surveillance costs. This Note will then analyze the incompatibility of traditional tort theory with the realities of toxic tort litigation which necessitated formulation of new legal remedies. Furthermore, this Note will examine the New Jersey Supreme Court's adoption of medical surveillance as a proper item of damages. The New Jersey court based its determination on public health policy. At the same time, however, it rejected an enhanced risk of disease cause of action as irreconcilable with these same public health concerns. This Note will conclude that the policy rationale of public health is the proper fulcrum upon which to balance the competing interests and dangers unique to toxic torts.

## I. TRADITIONAL NEGLIGENCE THEORY AND TOXIC TORTS: BAD REACTIONS

Under the traditional common law doctrines of negligence, any plaintiff who suspects he has been subjected to toxic contamination must overcome a number of obstacles before he can be compensated for his injuries. These obstacles are further exacerbated where groundwater contamination is the focal point of the litigation. Toxic contaminants can be introduced into an underground water system decades before the toxins' discovery.[15] Such a time lapse makes it difficult to identify the parties responsible for the con-

*Torts: A Phantom Remedy,* 9 HOFSTRA L. REV. 859 (1981); Trauberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim,* 7 HARV. ENVTL. L. REV. 177 (1983).

13. W. KEETON, PROSSER AND KEETON ON TORTS § 130, at 164-65 (1984).

14. Ayers v. Jackson Tp., 106 N.J. 557, 525 A.2d 287 (1987).

15. The infamous dumping at Love Canal, New York was not discovered until approximately 35 years after the initial dumping. *See generally* A. LEVINE, LOVE CANAL: SCIENCE, POLITICS AND PEOPLE (1982). Another well-publicized dumping incident in Woburn, Massachusetts was not discovered for approximately 20 years. Anderson v. W.R. Grace, 628 F.2d 1219, 1230-31 (D. Mass. 1986). *Cf.* The dumping in Jackson Township was discovered in a relatively short time of six years. Ayers v. Jackson Tp., 106 N.J. 557, 567-69, 525 A.2d 287, 292-93 (1987).

tamination.[16] Moreover, the long timespans between the introduction of the contaminants and the first knowledge of their presence can lead to situations where the statute of limitations is tolled before the mass exposure claim can be established.[17] Another major obstacle is cost. The litigation expenses incurred are usually greater in a toxic tort context as it invariably involves complex issues, multiple parties and extensive investigation efforts and discovery.[18] A plaintiff, who has been subjected to a harm as a result of toxic contamination, must overcome these obstacles in addition to the burden of proving causation.[19] As a result, the tort system often fails to address the vital public health concerns that toxic exposure threaten.[20]

Once it has been established that a plaintiff was exposed to toxic chemicals, the courts have required a plaintiff to prove with a reasonable certainty that his toxic exposure will result in the contraction of a future disease.[21] Various commentators have catalogued the problems that this onerous burden of causation has fostered.[22] From a medical standpoint, it is initially uncertain if any disease will develop at all. While science has made progress in diagnosis, it is not yet able to explain, much less quantify, the probability

16. The existence of "midnight dumping," clandestine and intentional illegal dumping, makes plaintiff's task no easier. *See* A. BLOCK AND F. SCARPITTI, POISONING FOR PROFIT: THE MAFIA AND TOXIC WASTE IN AMERICA (1985).

17. Joseph v. Hess Oil Virgin Islands Corp., 671 F. Supp 1043 (D. V.I. 1987). Typical state statute of limitations for tort claims range from one to two years. *See generally* TENN. CODE ANN. § 28-3-104 (one year); N.M. STAT. ANN. § 41-4-15 (1978) (two years). New Jersey's statute does not toll for two years. N.J. STAT. ANN § 2A: 14-2 (West Supp. 1984).

The federal rule for tolling statute of limitations for exposure cases states the time period does not begin running until the injury is discovered. Urie v. Thompson, 337 U.S. 163 (1949). The rule in New Jersey, however, is much more liberal as the statute does not toll until the party discovers both the injury and the facts suggesting third party involvement. Lynch v. Rubacky, 85 N.J. 65, 424 A.2d 1169 (1982). Furthermore, the New Jersey Supreme Court has stated "to have the requisite state of knowledge that would trigger the running of the statute of limitations . . . [plaintiff's] impression of the nature of the injury and of its cause of action must have some reasonable medical support. . . ." Vispisiano v. Ashland Chemical, 107 N.J. 416, 437, 527 A.2d 66, 77 (1987).

18. *Ayers*, 106 N.J. at 582, 525 A.2d at 299.

19. *Id.* at 585. *See also* Rosenberg, *Public Law? Vision in the Tort System*, 97 HARV. L. REV. 849, 858 (1984) ("Yet the tort system cannot realize the aspiration to do individualized justice in mass exposure cases under the conventional approach to causality."); Note, *The Inapplicability of Traditional Tort Analysis to the Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 583-84 (1983) [hereinafter Note, *Traditional Tort Analysis*]; Ginsberg & Weiss, *supra* note 12, at 924-28; *Developments—Toxic Waste*, *supra* note 12, at 1617-30.

20. *See* 42 U.S.C. § 6901 (Congressional findings).

21. Coll v. Sherry, 29 N.J. 166, 175, 148 A.2d 481, 486 (1959).

22. *See Ayers*, 106 N.J. at 585, 525 A.2d at 299. *See also* Rosenberg, *supra* note 19, at 858; Note, *Traditional Tort Analysis*, *supra* note 19, at 583-84; Ginsberg & Weiss, *supra* note 12, at 924-28; *Developments—Toxic Waste*, *supra* note 12, at 1617-30.

that cancer will develop from exposure to a toxic agent.[23] If a disease should manifest that is traceable to a suspected toxin, the deliberate manner in which the toxic disease manifests itself makes the task of proving a nexus between the toxin and the disease "invariably . . . more complex."[24] This latency period[25] also gives rise to numerous "intervening causes,"[26] which makes a cause-in-fact determination almost prohibitive.[27]

Once suspected, proof of toxic infiltration of groundwater is easily obtained by testing the water. The plaintiff is then faced with the reality that medical diagnostic techniques may be sufficient to warn the plaintiff about the future dangers posed by his exposure to the toxins, but such techniques are insufficient to single out a specific cause. Therefore, a plaintiff who knows that his body has been subjected to a potentially lethal harm may not be able to prove cognizable legal injury.[28] A Hobson's choice[29] may result for the plaintiff. He can accept quick settlement for a sum less than he may have been entitled to or he can attempt to surmount the causal problems and risk emerging from a court battle with no compensation. Consequently, if the plaintiff loses in court, he may be forced to forego medical treatment due to medical expenses. Neither scenario results in an abatement of the health risks of toxic contamination. It is, in fact, contrary to public policy health concerns.

To rectify these perceived inequities, a number of commentators have called for reforms which generally include the recognition of a cause of action for enhanced risk of future disease.[30] These commentators argue that reform would further the goal of providing toxic tort victims with an easier

23. *Ayers*, 106 N.J. at 589 n.8, 525 A.2d at 287 n.8.

24. *Id.* at 585, 525 A.2d at 301.

25. A latent period is defined as "the interval in the course of a disease between the time of the infection and the first appearance of the symptoms. . . ." WEBSTER'S NEW WORLD DICTIONARY 796 (2d ed. 1984).

26. "An intervening cause is one which comes into active operation in producing the results after the negligence of the defendant." W. KEETON, PROSSER AND KEETON ON TORTS, § 44, at 301 (5th ed.1984).

27. Allen v. United States, 588 F. Supp. 247 (D. Utah 1984), *rev'd on other grounds* 816 F.2d 1417 (10th Cir. 1987). *Cf.* Hazlewood v. Hodge, 357 S.W.2d 711 (1939).

28. RESTATEMENT (SECOND) OF TORTS § 7: "[Injury is] the invasion of any legally protected interest of another."

29. Hobson's choice in legal parlance denotes a situation where one party is forced to choose between or abandon legal rights, Minnesota Bd. for Community Colleges v. Knight, 465 U.S. 271, 299 (1983) (Brennan, J., dissenting); Morgan v. American University, 534 A.2d 323, 327-28 n.9 (D.C. App. 1983).

30. *See* Gale & Goyer, *Recovery for Cancerphobia and Increased Risk of Cancer,* 15 CUMB. L. REV. 723 (1985); Note, *Increased Risk of Disease from Hazardous Waste: A Proposal for Judicial Relief,* 60 WASH. L. REV. 635 (1985); Note, *Personal Injury Hazardous Waste Litigation: A Proposal for Tort Reform,* 10 B.C. ENVTL. L. REV. 797 (1983); Note, *Increased Risk of Cancer as an Actionable Injury,* 18 GA. L. REV. 563 (1984); Ginsberg & Weiss, *Com-*

means of redress. The Anglo-American tort system, as it has evolved through subsequent doctrinal development, does not compensate a victim in every instance where a party may be responsible for the detriment caused to another. The tort system does not provide a forum for those instances in which competing societal interests would be infringed.

For example, the manner in which the cause of action for the negligent infliction of emotional distress[31] has evolved. The action would be subject to great abuse if the underlying reasoning of the claim was carried to its logical extreme. In this instance, claims would be actionable based solely on the subjective claim of the plaintiff's own state of mind—a condition which is obviously known only to the individual making the claim. The potential burdens of specious claims, such as subjecting businesses to the defense of, and the courts to the administration of frivolous claims, have resulted in the law adopting the requirement, that in most instances, the emotional distress must be demonstrated through some physical manifestation.[32] Because of the analogous subjective and speculative quality of an enhanced risk cause of action, it may be rife for this type of frivolous abuse.[33] There results then a collision of competing policy concerns—an injured individual's right to an adequate remedy, the community's need for an effective tort system and the state's overall concern for the public health and welfare.

When the New Jersey Supreme Court was confronted with this dilemma in *Ayers v. Jackson Tp.*,[34] the New Jersey high court again asserted itself as a bench able to craft innovative remedies to safeguard the rights of individuals.[35] *Ayers* is the first instance where a state's highest court has upheld a jury verdict awarding the plaintiff annual medical surveillance[36] costs as a compensable item of damages for toxic exposure, even if the plaintiff's risk of

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*mon Law Liability for Toxic Torts: A Phantom Remedy, supra* note 12, at 859; Note, *Traditional Tort Analysis, supra* note 19; Trauberman, *supra* note 12.

31. *See* W. Keeton, Prosser and Keeton on Torts, § 54.

32. Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912 (1968); Portee v. Jaffe, 84 N.J. 88, 417 A.2d 521 (1984); *But cf.* Strachan v. John F. Kennedy Memorial Hospital, 109 N.J. 523, 538 A.2d 346 (1988).

33. *Strachan*, 109 N.J at 537, 538 A.2d at 353. *See generally* Smith, *Rhetoric and Rationalization in the Law of Negligence,* 69 MINN. L. REV. 277 (1984); Symposium, *Issues in Tort Reform,* 48 OHIO ST. L. REV. 317; Note, *Proper Application of Judicial Decisions Overruling Established Tort Doctrines,* 65 B.U.L. REV. 315 (1985).

34. Ayers v. Jackson Tp., 106 N.J. 557, 525 A.2d 287 (1987).

35. *In Re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied* 429 U.S. 922 (1976); Henningsen v. Bloomfield Motors Inc., 32 N.J. 358, 161 A.2d 69 (1960).

36. Medical surveillance is used to describe annual medical examinations conducted to diagnose early manifestation of disease resulting from exposure to certain agents. The term is used in a number of federal regulations, 29 C.F.R. §§ 1910.1001, 1910.1003-.1004, 1910.1006-.1008 (1987). Some statutes call for programs to educate doctors on the significance of medical

disease is unquantifiable.[37] Recognizing that the ultimate concern was the exposed victim's well-being, the majority stated that "the public health interest may justify judicial intervention"[38] in such a manner. That public policy was dispositive in this opinion is evident from the court's refusal to recognize an enhanced risk cause of action for an unquantified future injury.[39] The court also buttressed these policy objectives by its further ruling that a judicial fund mechanism[40] would be implemented to disburse the cost of the examination in future litigation.[41]

## II. TOXIC WASTE AND NEW JERSEY: IMPERFECT TOGETHER

One author has surmised that "New Jersey probably has the largest volume of dangerous chemical wastes."[42] The EPA concurs. Three hundred and forty-five New Jersey locations are listed by the EPA as requiring priority cleanup pursuant to the Superfund legislation.[43] New Jersey also has the dubious distinction of leading the states in the Union in both the toxicity of chemicals present in the state and the percentage of population endangered by the inadequately disposed chemicals present.[44] New Jersey, however, is far from being alone in facing the dangers of improper waste disposal. Residential exposure to lethal toxins is a staple of media reports. Whether the contamination occurs in a small parish in Louisiana,[45] a hamlet in New Hampshire,[46] an industrial suburb in Ohio,[47] or an affluent shore community in New Jersey, one fact is clear: the resultant dangers of toxic exposure to human health know no boundaries—social, economic, regional, political or otherwise. Toxic waste is a national problem. Congress' national concern

surveillance, CERCLA, 42 U.S.C. § 9604; 42 U.S.C. § 11043 (West Supp. 1986); 15 U.S.C. § 2646 (West Supp. 1986).

37. *Ayers*, 106 N.J. at 606, 525 A.2d at 312.

38. *Id.* at 605, 525 A.2d at 312.

39. *Id.* at 598, 525 A.2d at 308. The decision specifically left open the question of whether enhanced risk would be cognizable with a quantified risk.

40. *Id.* at 610, 525 A.2d at 314.

41. Since the fund argument was raised for the first time at the appellate level, the Court declined to upset the jury verdict. The fund mechanism would be applied prospectively.

42. S. EPSTEIN, L. BROWN & A. POPE, *supra* note 2, at 11.

43. R. FORTUNA AND D. LENNETT, *supra* note 1, at 494-98.

44. *Id.* at Appendix III.

45. Rollins Environmental Services of Louisiana v. Iberville Parish Police Jury, 371 So.2d 1127 (La. 1986)(Court held that federal and state legislation had preempted municipal ordinance proscribing hazardous waste.).

46. Stablex Corp v. Town of Hooksett, 456 A.2d 94 (N.H. 1984)(Court held state legislative enactments preempted municipal ordinances defining hazardous wastes.).

47. Fondessy Enterprises, Inc. v. City of Oregon, 23 Ohio St.3d 213, 492 N.E.2d 797 (1987) (Court held that city and state had concurrent authority over monitoring of hazardous landfill facilities.).

with the problem is embodied in CERCLA and its forerunners. A number of states, however, have found federal actions to be too limited to effectively deal with the problem. A few states have enacted their own versions of Superfund, including Ohio,[48] South Carolina,[49] Illinois[50] and Massachusetts.[51] The New Jersey legislature has also passed legislation to regulate toxic exposure.

Although New Jersey had enacted its own legislative scheme to combat toxic waste,[52] an inordinate number of residents were still subject to the grave dangers of toxic waste exposure. Legislative effort alone was insufficient to provide the residents of New Jersey adequate protection against the improperly disposed waste which had been dumped in the decades prior to legislative action. This waste continued to work its insidious effects upon unsuspecting people. Thus, the residue of toxic dumping had continued to burden the New Jersey court system.[53] These dual realities provided the analytic boundaries for the *Ayers* opinion. As previously mentioned, the majority upheld the award of damages for annual medical costs for postexposure, presymptom and unquantified injuries due to toxic exposure.

Basing its opinion on the recognition that early diagnosis of disease fostered public health, *Ayers* formulated the test that a victim exposed to contaminants as a result of the negligent handling of toxic waste is entitled to surveillance cost for annual checkups.[54] The evidence adduced must show there was a *significant risk* that a disease will result from exposure. Secondly, the plaintiff must present expert medical testimony which sufficiently proves that medical testing and evaluation was reasonable and necessary for diagnosis of those exposed and their possible medical treatment. The actual risk of the disease does not have to be quantified.[55] The significant risk standard represents the easing of traditional analysis which generally required the risk of disease to be a "reasonable probability."[56] Absent the importance to the public health that early medical testing embodies, the court declined

48. OHIO REV. CODE ANN. § 3734 (Baldwin 1987 Supp.).

49. S.C. CODE ANN. § 48-1-90 (Law Co-op Supp. 1987).

50. ILL. REV. STAT. ch. 111 1/2, para. 951-62 (Smith-Hurd Supp. 1987).

51. MASS. GEN. L. ANN. ch. 111, § 150B (West Supp. 1987).

52. N.J. STAT. ANN. § 58: 10-23.11. A portion of the legislation was ruled to have been preempted by Section 9614 of CERCLA in Exxon Corp. v. Hunt, 475 U.S. 355, 358 (1986). Upon remand, the New Jersey Supreme Court ruled the preempted portions of the legislation were severable. Exxon Corp. v. Hunt, 109 N.J. 110, 534 A.2d 1 (1987).

53. *Ayers*, 106 N.J. at 597, 525 A.2d at 307.

54. *Ayers*, 106 N.J. at 606, 525 A.2d at 312.

55. *Id.*

56. *See* Zazzalli and Grad, *supra* note 10.

to recognize an enhanced risk cause of action.[57]

## III. AYERS RATIONALE: PUBLIC HEALTH AS PARAMOUNT

*Ayers* is indicative of the problems "endemic to mass exposure litigation"[58] which required an adaptation of the law. Although this Note only examines the facts of this particular toxic contamination, these facts are representative of the nationwide danger that improperly disposed chemicals and agents pose to the public. The problem is decidedly national in scope, but the situation in Jackson Township, New Jersey is a perfect microcosm of the problem of toxic wastes and its subsequent effects on society.

In 1972, Jackson Township opened up the Legler landfill.[59] The New Jersey Department of Environmental Protection (DEP) issued a conditional permit to govern the landfill's operations. The permit limited the types of waste that the Township could transport to Legler.[60] It also limited the working depth of the landfill.[61] The landfill, however, operated in direct violation of the permits. By November 1978, the leaching of toxic agents into the Cohansey Aquifer, which fed the plaintiffs' water wells, was initially discovered. After the discovery, three hundred and thirty nine Township residents were informed by the Board of Health not to drink water drawn from their wells, and to use it only sparingly for other limited purposes.[62] A jury eventually found the Township's shipping wastes proscribed by the permit to a landfill that was excavated contiguous to the town water supply was "palpably unreasonable"[63] conduct.

At least twelve chemicals recognized by the EPA as hazardous were discovered to have leached from the landfill into the aquifer.[64] The aquifer's

57. Allen v. United States, 588 F. Supp. 247 (D. Utah), *rev'd on other grounds* 816 F.2d 1417 (10th Cir. 1987).

58. *Ayers*, 106 N.J. at 581, 525 A.2d at 299.

59. *Id.* at 567, 525 A.2d at 292.

60. *Ayers*, 106 N.J. at 597, 525 A.2d at 307.

61. *Id.*

62. *Ayers*, 106 N.J. at 569, 525 A.2d at 293. Plaintiffs were forced to use water drawn from forty gallon barrels which were delivered to their homes. The New Jersey Supreme Court noted the effect that this had on the residents' quality of life in terms of the inconvenience and aggravation it fostered. *Id.* at 569-72, 525 A.2d at 292-93. This inconvenience would eventually result in an award of five million dollars. *Id.* at 570, 525 A.2d at 293.

63. Since Jackson Township is a municipal corporation, it was subject to the New Jersey Tort Claims Act. N.J. STAT. ANN. §§ 59: 1-1 TO 59: 12-3 (West 1982). The Act requires proof of "palpably unreasonable" conduct to sustain a claim of negligence against a municipality or its agents. *Id.* at § 59: 4-2.

64. The chemicals were: acetone; benzene; chlorobenzene; chloroform; dichloroflouromethane; ethylbenzene; methylene chloride; methyl isobutyl ketone; 1,1,2,2-tetrachloroethane; tetrahydrofudran; 1,1,1-trichloroethane; and trichloroethylene (TCE). Eight of these were on the "F" list. 40 C.F.R. § 261.31 (1987).

atmosphere provided an excellent incubator for the toxins to develop and mutate.[65] The toxins deleterious health effects ranged from cancer to kidney disease to defective fetal development.[66] Subsequently, the residents, including some acting as guardian *ad litem* for unborn children, brought suit against Jackson Township and sought damages for nuisance,[67] emotional distress,[68] future medical surveillance[69] and enhanced risk for future disease.

Testimony adduced at trial demonstrated the substantial obstacles toxic tort litigation present to plaintiffs. Although a toxicologist testified that some of the chemicals that had leached into the aquifer were known carcinogens,[70] he could not quantify the exact risk of exposure involved because of the exigencies of the situation. One of the variables affecting any forecast was the contrasting manner in which the chemicals would affect each unique individual, as a result of natural differences in human immunological systems.[71] Another exigency was the indeterminate manner in which the chemicals would interact with each other. A tandem effect of the chemicals could foreseeably result in a greater, unforeseen health risk.[72] A geohydrologist's expert testimony exhibited a further complication.[73] Although he testified the migration of the chemicals to the aquifer was ascertainable through the analysis of flow data, he also stated he was unable to quantify exact concentration levels of the toxins in the wells.[74] Thus, personal exposure levels could not be quantified. Upon this foundation, a medical doctor testified that based on current medical knowledge, she could reasonably testify that the plaintiffs' were subject to an increased risk to their health because of the exposure, but she "could not quantify the extent of the enhanced risk."[75]

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65. "The cool, dark, abiotic nature of aquifiers allows contaminants to be stored virtually undisturbed for 'hundreds of thousands of years, if not for geologic time.' " R. FORTUNA & D. LENNETT, *supra* note 1, at 301 (quoting House Comm. on Government Operations, Interim Report on Groundwater Contamination: Environmental Protection Agency Oversight, H. REP. NO. 96-1440, 96th Cong., 2d Sess., at 4).

66. *Ayers*, 106 N.J. at 568, 525 A.2d at 292.

67. Private nuisance actions will lie if there is an interference with the use of the property itself, as well as the right to the reasonable comfort and convenience of its occupation. W. KEETON, PROSSER AND KEETON ON TORTS, § 87, at 619 (5th ed. 1984).

68. *See* W. KEETON, PROSSER AND KEETON ON TORTS, § 54 (5th ed. 1984).

69. *See supra* note 36.

70. Ayers v. Jackson Tp., 189 N.J. Super. 561, 461 A.2d 184 (Law Div. 1983). The enhanced risk claim was initially dismissed on defendant's summary judgment motion at trial.

71. *Ayers*, 106 N.J. at 589 n.8, 525 A.2d at 303 n.8.

72. *Ayers*, 106 N.J. at 588, 525 A.2d at 303. *See also* S. EPSTEIN, L. BROWN & A. POPE, *supra* note 2, at 301.

73. Geohydrology is the study of the occurrence, flow, behavior and production of underground waters. *Ayers*, 106 N.J. at 588 n.6, 525 A.2d at 303 n.6.

74. *Ayers*, 106 N.J. at 588, 525 A.2d at 303.

75. *Id.*

After an extensive trial, the jury returned their verdict and provided compensation for three distinct claims, including an $8,204,500 award for annual medical surveillance.[76] The Township appealed the award, and the plaintiffs filed a cross-appeal seeking reversal of the trial court's dismissal of the enhanced risk of future disease claim. The New Jersey Superior Court, Appellate Division, affirmed the Township's summary judgment, and reversed the medical surveillance award.[77] The Appellate Division reasoned there was no " 'reasonable probability' that any of the plaintiffs will develop cancer so as to justify imposing upon defendant the financial burden of lifetime medical surveillance for early clinical signs of cancer."[78] The court further concluded that as a matter of law neither the enhanced risk of future disease cause of action nor the medical surveillance claim could survive independently without a demonstrated quantifiable risk.[79]

The New Jersey Supreme Court, however, disagreed on the basis that medical surveillance would not fail as a matter of law. Their reasoning was that the circumstances demanded that "tort law [should] intercede by requiring the responsible party to pay damages . . . ."[80] Not only was it inequitable for a victim exposed to potentially lethal toxins to forego prompt medical attention because of the costs involved, it was contrary to the judicial system's concern for the public health. The centerpiece of the court's analysis is "early possible diagnosis of illnesses . . . could lead to improved prospects for cure, prolongation of life, relief of pain, and minimization of disability."[81] Furthermore, "[a]n application of tort law that allows post-injury, pre-symptom recovery in toxic tort litigation for reasonable medical surveillance costs is manifestly consistent with the public interest in early detection and treatment of disease."[82]

The court unanimously rejected the Appellate Division's rationale as too limiting because the "reasonable probability" standard failed to adequately reconcile "the emerging complexities of industrialized society and the conse-

76. *Id.* at 565, 525 A.2d at 291.

77. The jury also returned verdicts in favor of the plaintiffs on the two other claims, awarding $5,396,940 for nuisance, and $2,056,480 for emotional distress. The majority eventually upheld the former, and reversed the latter, finding the meaning of injury in construing the Tort Claims Act, N.J. Stat. Ann. § 59: 1-1 to 59: 12-3, dispositive. *Ayers*, 106 N.J. at 571, 525 A.2d at 294.

78. Ayers v. Jackson Tp., 202 N.J. Super. 106, 122, 493 A.2d 1314, 1323 (App. Div. 1985).

79. *Id.*

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

81. *Id.* at 590, 525 A.2d at 304. The opinion also stated the value of early diagnosis was well-documented. *Id.* at 603-04, 525 A.2d at 311. *See also* Evars v. Dollinger, 95 N.J. 424, 471 A.2d 405 (1984).

82. *Ayers*, 106 N.J. at 604, 525 A.2d at 311.

quent implications for human health."[83] Rather, the significant risk test formulated by the *Ayers* court establishes a flexible standard that plaintiffs can achieve with a legitimate claim. The *Ayers* court expressed deference to medical science and concluded that medical science may necessarily and properly intervene where there is significant but unquantified risk of serious disease.[84]

Four factors are set up by the *Ayers* majority to govern whether medical surveillance is a proper remedy. They are (i) the extent of the exposure, (ii) the toxicity of the chemicals, (iii) the seriousness of the disease for which individuals are at risk, and (iv) the value of early diagnosis to combat the onset and extent of the disease. Although *Ayers* sets out this test, due to the nature of toxic tort claims, most claims should invariably result in the provision of surveillance damages as most chemical exposures will satisfy these four prerequisites. This fact presents some practical problems of scope.

The unresolved question is whether a plaintiff who has been exposed to a chemical as a result of the defendant's action will be entitled to all the medical surveillance claims that the plaintiff's expert witnesses regard as essential. For example, can a defendant who negligently dumps benzene into a town's water supply be held financially responsible for subsequent psychiatric examinations that residents need because of their severe anxiety about contracting cancer. Strictly applying the *Ayers* test, a plaintiff would be eligible for such treatment at the expense of the defendant even if the plaintiff would be unable to sustain the independent cause of action for emotional distress. *Ayers* is silent on the relationship between the nature of the plaintiff's medical visit and the exposure.

The *Ayers* decision focuses solely on the nature of the toxic exposure. This focus is inconsistent with the other competing policy goals of the tort system. Defendants could be subjected to increased liability for frivolous claims, couched in terms of plaintiff's subjective belief of medical necessity. To combat this possibility, the *Ayers* test should be interpreted as to require a nexus between the disease type proximately caused by the exposure and the treatment sought by the victim.

This approach would be entirely consistent with the health concerns paramount to the court. Each toxic exposure necessarily results in threats to health. By potentially imposing surveillance costs for every toxic tort, the resultant increase in monetary damages may have a deterrent effect on dumpers. The increased economic cost of dumping that would be created by

83. *Id.* at 579, 525 A.2d at 308-09.

84. *Id.* at 605, 525 A.2d at 312 (citing Reserve Mining Corp. v. EPA, 514 F.2d 492 (8th Cir. 1975)).

the risk of increased liability may act as an disincentive to the hazardous waste user or creator. This further safeguards societal health interests.

While the majority expressed deference to medical opinion, they did not abdicate judicial control. Rather, the Court balanced the public health risks of toxic exposure and its cost to the individual victim with the resultant systemic cost. This balancing led to the majority to conclude that an unquantified risk of future disease was sufficient to uphold medical surveillance as a compensable item of damages. But unquantified risk was fatal to enhanced risk causes of actions. Specifically, the court disagreed with the lower court holding that the two causes of action were inextricably linked. Distinguishing the two actions, the court observed surveillance compensation is for "specific dollar costs of periodic examinations."[85] Enhanced risk, however, was compensation for general damages which may or may not manifest themselves in the future.[86]

*Ayers* represents a new approach to toxic tort cases because of its focus on public welfare. This new approach is amplified by the majority's rejection of the enhanced risk cause of action for an unquantified injury. Only one justice dissented from this holding.[87] Balancing competing policies, the court decided it would "expose[ ] the tort system, and the public it serves, to the task of litigating vast numbers of claims for compensation based on threats of injuries that may never occur."[88] Although most commentators have endorsed such an action,[89] New Jersey joined a number of jurisdictions which have also rejected the enhanced risk action as too nebulous.[90] The only dis-

85. *Ayers*, 106 N.J. at 606, 525 A.2d at 312.

86. *Id.* at 599, 525 A.2d at 308-09.

87. *Id.* at 612, 525 A.2d at 312 (Handler, J., dissenting in part). Justice Handler criticized the majority's concern with the elusive complexities of unquantified risk as misplaced. He noted the judiciary's historic recognition of injuries whose extent are unquantifiable such as "assault, trespass, emotional distress, invasion of privacy or damage to reputation." *Id.* at 617-18, 525 A.2d at 318. The majority distinguished these causes of actions from that of unquantified risk by noting they were based on "events that have occurred and can be proven at trial. In contrast, the compensability of an enhanced risk claim depends upon the likelihood of an event that has not yet occurred and may never occur." *Id.* at 597, 525 A.2d at 308.

88. *Id.* at 597, 525 A.2d at 307.

89. *See generally* Dworkin, *supra* note 12, at 527; Farber, *supra* note 12, at 1219; Ginsberg and Weiss, *supra* note 12, at 859; Trauberman, *supra* note 12, at 177; Rosenberg, *supra* note 19, at 849; Note, *Traditional Tort Analysis*, *supra* note 19, at 575.

90. *See* Burns v. Jaquays Mining Corp., 156 Ariz. 375, 752 P.2d 28 (1987); Anderson v. W.R. Grace Co., 628 F. Supp. 1219 (D. Mass. 1986); Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir.), *cert. denied* 474 U.S. 864 (1985); Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982), *cert. denied* 459 U.S. 1210; Mink v. University of Chicago, 460 F. Supp. 713 (N.D. Ill. 1978); Morrissey v. Eli Lilly & Co., 76 Ill.App.3d 753, 394 N.E.2d 1369 (1979); Askey v. Occidental Chemical Corp., 477 N.Y.S.2d 242, 102 A.D.2d 130 (1984).

*Cf.* Some jurisdictions require proof that the disease is reasonably certain to occur in order to maintain enhanced risk. Hagerty v. L & L Marine Services, 788 F.2d 315, 319 (5th Cir.

cernible difference in aiding toxic tort plaintiffs who have suffered an unquantified injury is the prophylatic role of medical surveillance. This preventive function of surveillance, which combats the threat toxic waste poses to the victims' health overrides the judicial concern with uncertainty.

The severity of the toxic waste problem has forced New Jersey courts to encroach upon the traditional role of the "Legislature, as the foremost exponent of the public policy. . . ."[91] While the court in *Ayers* initially recognized the possible danger to separation of powers, it nonetheless saw their decision as a part of their judicial duty to safeguard public welfare in light of the slow response of the legislature in the past.[92] To avoid any future problems, whether political or judicial, the court expressly invited the legislature to intervene and to alleviate the causation problems they had described in their opinion.[93]

The concept that the protection of the public good was paramount is best shown, however, by the majority's self-described novel remedy which established a fund mechanism to disburse any future medical surveillance cost awards. Although acknowledging the fund was a departure from traditional tort remedies, the fund was empowered as a "highly appropriate exercise of the Court's equitable powers."[94] Additionally, the court expressed its concern that an enhanced risk claim would provide an inequitable windfall for some victims at the expense of other similarly situated victims who would be unable to secure judgments against insolvent tortfeasors.[95] The fund, on the other hand, would be administered by the court to cover actual incurred medical expenses. The court in *Ayers* surmised this would deter use of the funds for purposes other than the goal of controlling potential disease. This rationale is fully consistent with the theoretic policy concerns expressed by the court,[96] but it may, in fact, ignore the financial reality of the plaintiffs' bar.

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1986); Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 116-19 (D.C. Cir. 1982); Sterling v. Velsicol Chemical Corp., 647 F. Supp. 303 (W.D. Tenn. 1986); *but see* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 412-13 (5th Cir. 1985), *cert. denied* 478 U.S. 1022 (1986); Brafford v. Susquehanna Corp., 586 F. Supp. 14, 17 (D. Colo. 1984).

91. Morss v. Forbes, 24 N.J. 341, 363, 132 A.2d 1, 13 (1957).

92. *Ayers*, 106 N.J. at 581, 525 A.2d at 308.

93. *Id.* at 598, 525 A.2d at 308.

94. *Id.* at 608, 525 A.2d at 314.

95. *Id.* at 608-610, 525 A.2d at 314-316.

96. "Although conventional damage awards do not restrict plaintiffs in the use of money paid as compensatory damages, mass exposure toxic-tort cases involve public interests not present in conventional tort litigation. The public health interest is served by a fund mechanism that encourages regular medical monitoring of toxic exposure." *Id.* at 609, 525 A.2d at 314. The court further noted that such a fund is also consistent with the policy concern of mitigating final expenditures that may arise in the long term. *Id.*

The question remains open whether plaintiff attorney contingent fees will be included in the surveillance award. If the fund is to be utilized as a proper means of addressing health concerns, the ciphoning off of plaintiff attorney's fees may countermand the policy concerns expressed by the *Ayers* court. Yet, if the fees are not included, the incentive for plaintiff attorneys to seek medical surveillance costs as a redress will be significantly reduced, and thereby, further frustrate the policy goal. The answer lies in a legislative response similar to the one the United States Congress has fashioned in the area of civil rights.[97]

## IV. PRESYMPTOM MEDICAL SURVEILLANCE AND SIGNIFICANT RISK OF UNQUANTIFIED RISK OF DISEASE: AN EQUITABLE ACCOMMODATION

Medical surveillance as a compensable item of damages for unquantified injury is a rational adaptation of the common law to meet the needs of toxic tort victims. Medical surveillance damages are commensurate with sound public policy concerns and are a fair and equitable response to the growing health concerns that unsafe toxic waste disposal practices present to the populace. While the *Ayers* case is inextricably linked with the peculiar characteristics of toxic tort litigation, its impact will be felt beyond the boundaries of the dumpsite. The *Ayers* majority's policy rationale has been extended to private tortfeasors in asbestos litigation,[98] and could easily be applied in any mass exposure claims that present significant threats to health but the risk cannot be quantified.

If judicial restraint is properly exercised, medical surveillance is a limited and rational means to stem the cost of toxic injury. The courts must provide guidance and a well-ordered growth in the cause of action's evolution. Stability in this new area of the law can best be accomplished by limiting any potential award to medical expenses that are reasonably related to the victim's alleged exposure. The proper first step has been taken by the *Ayers* court. Recognizing the inability of traditional tort doctrine to assuage the damage done by toxic waste, a novel remedy was required to compensate the

97. *See* Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, as amended 42 U.S.C. § 1988. *Cf.* Equal Access to Justice Act [hereinafter EAJA], Pub. L. 96-481, 94 Stat. § 2328, 28 U.S.C. § 2412(d) which provides a fee of $75 an hour for attorneys who are successful in litigating cases against the federal government, unless the District Court finds "special factors." In Pierce v. Underwood, 108 S.Ct 2541 (1988), the United States Supreme Court recently ruled the findings concerning EAJA special factors should not include the consideration of the novelty and difficulty of the issues, the relative undesirability of the case, the work and ability of counsel or the contingent nature of the fee. *Pierce*, 108 S.Ct at 2552-55.

98. Mauro v. Owens-Corning Fiberglass Corp., 225 N.J. Super 196, 542 A.2d 16 (App.Div. 1988), *cert. granted and cross-cert. denied* 113 N.J. 341, 550 A.2d 455 (1988).

victims. This novel judicial remedy should now be tempered by traditional judicial restraint.

Through the formulation of the significant risk standard, New Jersey and the other jurisdictions which have adapted its rationale[99] have taken a well-intentioned first step in combatting the spectra of hazardous waste effects. Public health is the proper fulcrum to balance orthodox tort doctrine guarantees with the unorthodox truth of our ever-growing toxic waste reality. By providing for annual medical surveillance, *Ayers* furthers the goal of a healthy populace and avoids greater long-term costs. New Jersey's judiciary has consistently demonstrated they are at "the forefront of jurisdictions to recognize and to protect those injured by the wrongful acts of others."[100] *Ayers v. Jackson Tp.* continues that tradition.

*John K. McNamara, Jr.*

99. *See, e.g.* Burns v. Jaquays Mining Corp., 752 P.2d 28, 156 Ariz. 375 (1987).

100. Shackil v. Lederle Laboratories, 219 N.J. Super. 601, 622, 530 A.2d 1287, 1298 (App. Div. 1987).