The Uninjured Plaintiff: New Frontiers of Liability

Defense counsel must prepare for tort claims based on theories that are not part of the traditional history and requirements of tort law

By Thomas E. Peisch and Johanna L. Matloff

IT HAS long been a fundamental tenet of American tort law that a cause of action requires an injury. In recent years, however, many courts have loosened this requirement significantly, so that a host of causes of action are recognized now in the absence of a quantifiable injury. Speculative or even phantom "harms" now can form the basis of protracted and expensive litigation. No manufacturer, insurer or professional service provider can ignore this unfortunate trend, which must be examined so as to alert defense practitioners as to possible defense theories.

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PRECEDENTS

A. Injury and Harm

The English word "tort" derives from the Latin word "tortus," meaning "twisted," and the French word "tort," meaning "injury or wrong." In essence, the purpose of tort law is to make an injured party whole. Thus, tort law imposes duties on individuals to prevent the injury of others.[1]

The Restatement (Second) of Torts defined the terms "injury," "harm" and "physical injury" in accordance with the common understanding of those terms. According to Sections 7(1), 7(2) and 7(3) of the Restatement (Second), "injury" denotes "the invasion of any legally protected interest of another." "Harm" is defined liberally as "the existence of loss or detriment in fact of any kind to a person resulting from any cause." "Physical harm" means then "physical impairment of the human body, or of land or chattels."

In 2001, the American Law Institute sought to clarify the definition of "physical harm" in Section 4 of Tentative Draft No. 1 of the Restatement (Third) of Torts, "Liability for Physical Harm," by adding the sentence, "The physical impairment of the human body includes physical illness, disease, and death." However, from Comment a to that section, it does not appear that the ALI intended any significant change in the traditional understanding of "physical harm" as set out in the Restatement (Second). It remains the case that an injury results from the infliction of some harm, even though an injury may result absent any harm.

A "harmless" injury, however, is actionable only because the law recognizes and permits a cause of action. For example, a plaintiff is "injured" under the common law when a defendant trespasses on the

1. JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 1 (9th ed. 1994); Restatement (Second) of Torts § 4 (1965). See Restatement (Third) of Torts: Liability for Physical Harm § 6 (Tentative Draft No. 2) (2002) ("An actor has a duty to exercise reasonable care when the actor's conduct poses a risk of physical harm.")

plaintiff's property. The law allows the plaintiff to recover, even if the defendant's intrusion is "beneficial, or so transitory that it constitutes no interference with or detriment to the land or its beneficial enjoyment," to quote Comment a to Section 7 of the Restatement (Second).[2] Conversely, a harm may exist without a legal injury or the invasion of a legally protected interest. For example, when a friend or family member dies of natural causes, there is no legally protected injury despite the loss.[3]

To maintain a cause of action in tort, a plaintiff usually must prove that a defendant invaded the plaintiff's legally protected interest, and that this resulted in harm to the plaintiff. According to Comment d to Section 7 of the Restatement (Second), emotional distress alone is not actionable unless there are physical consequences. Usually the plaintiff also must show that the resulting harm is not remote, speculative, hypothetical or uncertain.[4]

Nevertheless, recent trends have allowed plaintiffs to expand the Restatement (Second) definition of "harm" to cover injuries that are speculative or that exist only in the minds of those claiming them. Allowing plaintiffs to relax or eliminate the burden of proving actual injury and harm renders meaningless the singular purpose of tort law: to make whole a plaintiff who has sustained an actual injury.

B. Actual Injury Requirement

Traditionally, there was no cause of action in tort unless there was actual loss or damage resulting to the interests of another. For example, the Fifth Circuit has stated, "While the sale of a defective product creates a potential for liability, the law grants no cause of action for inchoate wrongs."[5] In addition, the majority of courts has required a showing of physical harm before allowing recovery for emotional distress, even when that distress results from an increased likelihood that the plaintiff will suffer serious future disease.[6] Historically, courts have held fast to the actual injury requirement, allowing plaintiffs to use the civil action to recover only for harm done.[7]

An actual injury requirement also has been embedded in most statutes of limitation, which generally do not begin to run until the plaintiff has sustained an actual injury or has become aware of an actual injury. Otherwise, plaintiffs would be required to file suit before knowledge that an injury has arisen. Without that injury requirement, defendants would not know whether a plaintiff has based a claim on real injury or has brought a pre-emptive suit to preserve the right to sue in the future.[8] Therefore, the actual injury requirement has prevented fraudulent, vexatious and pre-emptive lawsuits.[9]

The origin of the actual injury requirement also is rooted in the concept of standing. For example, in order to bring claims arising under the U.S. Constitution or federal law, a plaintiff must establish standing. To do that, according to the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*, a plaintiff first must show an "injury in fact," described as an "invasion of a legally protected interest, which is (a) concrete and particularized . . . and (b) actual or immi-

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2. *See also* Wade**,** *supra* note 1**,** at 4 (discussing history of trespass).

3. Restatement (Second) § 7 cmt. a and cmt. d.

4. *See, e.g.*, Bond Pharmacy Inc. v. City of Cambridge, 156 N.E.2d 34, 37-38 (Mass. 1959); Kitner v. CTW Transport Inc., 762 N.E.2d 867, 874 (Mass.App. (2002). *See also* Restatement (Second) § 7 cmt. b (harm should be particular and specified); Tory A. Weigand, *Loss of Chance in Medical Malpractice: The Need for Caution*, 87 MASS. L. REV. 1, 3 (Summer 2002), quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS (5th ed. 1984)).

5. Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1136 (5th Cir. 1985); *See also* In re StarLink Corn Prods. Liab. Litig., 212 F.Supp.2d 828, 839 (N.D. Ill. 2002); Restatement § 907 cmt. a (recognizing nominal damages in certain cases).

6. Payton v. Abbott Labs., 437 N.E.2d 171, 174-81 (Mass. 1982). *See also* Restatement (Third) § 4 cmt. b (Tentative Draft No. 1) (2001).

7. Wade, *supra* note 1, at 4.

8. *See* Donald L. DeVries & Ian Gallacher, *Medical Monitoring in Drug and Medical Device Cases: Taking the Temperature of a New Theory*, 68 DEF. COUNS. J. 163, 169 (April 2001) (discussing function of statutes of limitations).

9. Payton, 437 N.E.2d at 175, 178-80.

nent, not 'conjectural' or 'hypothetical.'" Second, there must be a "casual connection between the injury and the conduct complained of." That is, the injury has to be "fairly traceable" to the defendant's conduct. Third, it must be likely that the court will be able to redress the injury by a favorable decision.[10]

The actual injury requirement also is consistent with the definition of harm in Section 4 of the Tentative Draft No. 1 of the Restatement (Third). Comment b to that section observes that a physical change to a person's body or property must be "detrimental" for physical harm to result. For example, the Reporter's Note states, the fact that a person's skin color changes to bronze on exposure to the sun does not "in the absence of any detriment, count as physical harm."

Thus, the actual injury requirement has been firmly rooted in our jurisprudence and is based on traditional definitions of tort liability, limitations of action and legal standing.

C. Exceptions

While the common law precedent has held fast to the actual injury requirement, there have been a few notable exceptions.[11]

First, Section 907 of the Restatement (Second) recognizes so-called nominal causes of action, where the harm to the plaintiff is either nonexistent or insignificant, or where compensatory damages are speculative. In such cases, a court may award nominal damages or an insignificant sum of money. Second, a court may award nominal damages where harm is not a prerequisite, such as in actions for trespass, breach of duty by a public officer or interference with a right to vote or hold public office.

Trespass to land is another exception recognized in the common law's early precedents. The action in trespass was originally criminal in nature, and the king used the action to punish "forcible breaches of the king's peace." A guilty defendant was imprisoned or fined and held responsible for paying damages to the plaintiff. Although the criminal aspect of trespass disappeared at the end of the 17th century, the courts continued to allow the action, even though the plaintiff suffered no real injury. However, courts were "disinclined to extend the scope of trespass beyond the existing precedents perhaps because of the belief that . . . the civil action should be used only to compensate for harm done."

Other exceptions to the actual injury requirement include actions for assault, offensive but harmless battery, and false imprisonment.[12]

Although the general concept of "harm" centers on the physical, courts and the Restatement (Second) have recognized recovery for emotional and mental distress.[13] The majority of these courts, however, require the plaintiff to prove some type of physical harm is linked to the distress before allowing recovery.[14] Proof of physical harm provides a type of guarantee that the distress is genuine. Pure emotional harm, on the other hand, is not necessarily quantifiable.[15] Nevertheless, some courts have begun to accept the idea that fear of future harm or disease may be actionable despite the absence of an actual injury. They require a showing that the fear is reasonable or reliable.[16]

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10. 504 U.S. 555, 560 (1992).

11. *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 266 (1978) (recognizing action for deprivation of "absolute" rights without proof of actual injury; nominal damages appropriate for violation of due process rights in absence of actual injury).

12. Wade**,** *supra* note 1, at 3, 4.

13. *See* Restatement (Second) § 7 cmt. b and §§ 436-436A.

14. Simmons v. Murray, 674 A.2d 232, 238 (Pa. 1996) (asbestos-related pleural thickening is not sufficient physical injury to warrant recovery of emotional distress); Payton, 437 N.E.2d at 175 & n.5 (supporting majority of courts that requires physical harm before allowing recovery for emotional distress). *See also* Restatement (Second) § 436A (no recovery for emotional distress without physical harm).

15. Payton, 437 N.E.2d at 178-79 (discussing rationale for requiring proof of physical harm).

16. Day v. NLO, 851 F.Supp. 869, 878 (S.D. Ohio 1994) (recognizing recovery for emotional distress in form of fear of cancer, provided fear is reasonable); Potter v. Firestone Tire and Rubber Co.,

CRACKS IN THE DAM

A. Erosion of Present Physical Injury Requirement

The erosion of the actual injury requirement appears to have begun in the early 1900s as the United States became more industrialized. New and innovative products were entering the market, but along with innovation came new types of harm. New products and new harms ultimately gave rise to what has become known as products liability law.

One particular line of cases involved soft drink bottles that were contaminated with a foreign and unexpected object. In these precursors to modern-day products liability decisions, the plaintiffs recovered damages even though their actual injury was minimal. A paradigmatic case is *Boyd v. Coca-Cola Bottling Works*, a 1915 Tennessee Supreme Court case in which "a lady in delicate health" (to use the court's description) drank a portion of a Coca Cola from a bottle that was contaminated with a cigar stub and immediately became "intensely nauseated." The court held that the defendant, Coca-Cola Bottling Works, was liable, although the lady's injuries were minimal.[17]

As early as 1961, a New York court in *Battalla v. New York*[18] allowed a minor plaintiff to recover for mental distress and anxiety arising from the defendant's negligence, although the plaintiff could not demonstrate a present physical injury. A state employee had failed to secure the plaintiff properly in a state-run chair lift before allowing her to descend to the bottom of a mountain. The plaintiff rode the chair all the way to the base without any safety belt and with the guard rail wide open. As a result, she became frightened and hysterical but suffered no physical injuries. The court awarded damages, despite the absence of any proof of physical harm, because it was satisfied that the minor's alleged distress was genuine.

More recently, other courts have allowed plaintiffs to recover for mental distress or anxiety arising from exposure to toxic substances, although they could not demonstrate present physical injuries. In *Laxton v. Orkin Exterminating Co.*,[19] the defendant exterminating company contaminated the plaintiffs' household water supply, which was located 15 to 20 feet away from their home. About nine months later, notwithstanding Orkin's assurances that the water supply was safe, the plaintiffs discovered that the water was contaminated with a possible carcinogen. Blood tests, however, revealed no abnormalities or illnesses in any of the plaintiffs. Nevertheless, the Tennessee Supreme Court held that the ingestion of a harmful substance is a "sufficient physical injury to support an award for mental anguish even if subsequent medical diagnosis fails to reveal any other physical injury."

Some courts have permitted "uninjured" plaintiffs to recover for mental distress arising from a fear that they will develop cancer because of exposure to toxic or other contaminants.[20] They allow recovery for "cancerphobia" if plaintiffs prove their

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863 P.2d 1553 (Cal. 1993) (recovery for fear of cancer as long as fear is corroborated by reliable medical testimony).

17. 177 S.W. 80 (Tenn. 1915). Two later Tennessee cases are Roddy Mfg. Co. v. Cox, 7 Tenn.App. 147 (Tenn.App. 1927), available at 1927 WL 2265 (awarding damages to plaintiff who consumed soft drink contaminated with dead mouse), and Ford v. Roddy Mfg. Co., 448 S.W.2d 433 (Tenn.App. 1969) (awarding damages for nauseated plaintiff who drank Coca Cola contaminated with insects).

18. 200 N.Y.S.2d 852, 852-53 (App.Div. 3d Dep't 1960), *rev'd*, 176 N.E.2d 729, 730-32 (N.Y. 1961).

19. 639 S.W.2d 431, 434 (Tenn. 1982). *See also* Wetherill v. Univ. of Chicago, 565 F.Supp. 1553, 1560 (N.D. Ill. 1983).

20. *See, e.g.*, Hagerty v. L & L Marine Servs. Inc., 788 F.2d 315, 318-19 (5th Cir. 1986) (recovery for cancerphobia where plaintiff was doused with toxic chemicals and no physical injury was apparent); Day, 851 F.Supp. at 878 (exposure to radiation constituted physical injury for purposes of recovering for mental distress); Wetherill, 565 F.Supp. at 1559-560 (recovery for fear of cancer where plaintiffs were exposed to toxic drug prior to birth, although they could not demonstrate present physical injury); Potter, 863 P.2d at 808-10 (discarding physical injury requirement in favor of "guarantee of genuineness" of mental distress);. *See generally* Gregory G. Sarno, Annotation, *Infliction of Emotional Distress: Toxic Exposure*, 6 A.L.R.5th 162 (1992).

fear of developing cancer is reasonable. Some courts have awarded damages to persons suffering from asbestosis, a noncancerous scarring of the lungs caused by asbestos fibers, where medical evidence supported claims that cancer likely would develop in the future.[21] Under the Federal Employers' Liability Act, asbestosis is a sufficient injury to warrant recovery of damages for mental distress arising from the fear of developing cancer.[22] Other courts have refused damages to compensate plaintiffs for their fear of cancer unless they can show a sufficient physical injury.[23]

To complicate the issue further, fear-related recovery poses an issue with respect to the traditional rule against claim-splitting. Some courts, while denying claims by asbestos plaintiffs for damages based on the fear of developing cancer, have allowed these plaintiffs to bring claims once the cancer has developed.[24] Other courts have allowed plaintiffs to recover fear-related damages but have barred a subsequent action for the actual injury on grounds of claim splitting.[25]

B. Loss of Chance

Another troubling and recently developed theory of liability in the medical malpractice area is called "loss of chance." The loss of chance doctrine applies in cases of terminal illness and allows an award of damages to compensate for a negligence-caused reduction in the plaintiff's chance of survival.[26] In other words, under a loss of chance theory, plaintiffs can recover, even though they likely would not survive irrespective of the defendant's negligence.[27] The loss of chance theory relaxes and erodes established tort principles that require plaintiffs to prove that a defendant's alleged negligence more likely than not caused the plaintiff's injury.[28]

Loss of chance cases may be categorized into at least three rough groups. In the first, plaintiffs are permitted to recover for a reduction in the chance of survival where (1) there was a "substantial chance" that they would survive, and (2) the defendant's negligence was a "substantial factor" in the plaintiff's failure to survive.[29]

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21. Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 411-15 (5th Cir. 1986) (recovery where plaintiff established 50 percent chance that cancer would develop); In re Asbestos Litig., 679 F.Supp. 1096, 1100 (S.D. Fla.1987) (recovery for distress based on evidence of increased risk of cancer); Lilley v. Bd. of Supervisors of Louisiana State Univ., 735 So.2d 696, 702-03 (La.App. 1999) (recovery may be had for mental distress where distress is genuine); Peterson v. Owens-Corning Fiberglas Corp., 50 Cal.Rptr.2d 902, 910 (Cal.App. 1996) (recovery where there is reasonable degree of medical certainty that physiological change will result in cancer), *review granted and opinion superseded*, 918 P.2d 997 (Cal. 1996).

See also Stephen J. Carroll, Deborah Hensler et al., *Interim Report, Asbestos Litigation Costs and Compensation* 16-17 (Rand Institute for Civil Justice, 2002).

22. Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 141-42 (2003) (workers suffering from asbestosis may recover for "related negligently caused emotional distress"); Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424 (1997), *rev'g and remanding* 79 F.3d 1337 (2d Cir. 1996). *See also* Herber v. Johns-Manville Corp., 785 F.2d 79, 85 (3d Cir. 1986) (asbestosis or pleural thickening is sufficient physical injury to justify award for distress damages).

23. *See, e.g.*, Simmons v. Murray, 674 A.2d 232, 238 (Pa. 1996) (asbestos related pleural thickening or calcified tissue on the lung membranes not sufficient injury to give rise to fear-related distress damages); Burns v. Jaquays Mining Corp., 752 P.2d 28, 31-32 (Ariz.App. 1987) (psychosomatic injuries arising from asbestos exposure not sufficient to sustain cause of action for emotional distress); Busfield v. A.C. & S. Inc., 643 A.2d 1095, 1096-97 (Pa.Super. 1994) (damages based on fear of cancer not recoverable). *See generally* Restatement (Third) § 4, Reporter's Note to cmt. b (discussing cases involving recovery for physical and emotional injuries).

24. *See, e.g.*, Simmons v. Pacor Inc., 674 A.2d 232, 237-39 (Pa. 1996) (asbestosis plaintiff does not recover for distress damages, but may bring future claim should cancer develop).

25. *See, e.g.*, Gideon, 761 F.2d at 1136-137 (asbestosis plaintiff recovers distress damages but may not seek damages for later developing injuries in subsequent lawsuit).

26. *See* Weigand, *supra* note 4, at 3 (discussing loss of chance theory); Lisa Perrochet, Sandra Smith et al., *Lost Chance Recovery and the Folly of Expanding Medical Malpractice Liability*, 27 TORT & INS. L.J. 615 (1992) (same).

27. Roberts v. Ohio Permanente Med. Group Inc., 668 N.E.2d 480, 482-85 (Ohio 1996).

28. Crosby v. United States, 48 F.Supp.2d 924, 926 (D. Alaska 1999).

29. Crosby, 48 F.Supp.2d, at 926. *See* Hicks v. United States, 368 F.2d 626, 632 (4th Cir. 1966) (recovery for lost chance where chance of survival was substantial).

A second group of cases finds support in Section 323 of the Restatement (Second), entitled "Negligent Performance of Undertaking to Render Services," which provides in pertinent part:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
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> (a) his failure to exercise such care increases the risk of such harm. . . .

Under this formulation, a defendant may be liable to a plaintiff for physical harm resulting from the defendant's negligence if the defendant's services were necessary for the protection of the plaintiff and the defendant's negligence increased the risk of harm to the plaintiff. Courts that follow this theory have held that a jury, as opposed to a medical expert, may decide the issue of causation, once a plaintiff has shown that the defendant increased the risk of harm.[30]

The third group of cases recognizes what has been called a "pure loss of chance" theory of recovery,[31] under which a plaintiff may recover for the loss of chance itself, regardless of the cause of the plaintiff's ultimate injury. A claimant with less than an even chance of survival could recover damages only for the lost chance of survival, on a showing that the defendant's negligence reduced this chance of survival by any amount.[32]

The policy arguments in favor of recognizing a loss of chance action emphasize the precious nature of human life. Proponents make several arguments. First, that any measurable reduction in the plaintiff's chance of survival should be compensable. Second, that a loss of chance action should be recognized because acts of negligence that harm patients with poor prognoses should not go ignored. Third, that physicians and other health care providers should be encouraged to treat patients aggressively, even in difficult cases. Fourth, that permitting loss of chance recovery will eliminate the need for experts to parse survival statistics. Finally, that negligent health care providers should not be allowed to take advantage of clinical uncertainties.[33]

The defense bar has been rightly hostile to the loss of chance doctrine to the extent that it imposes liability on defendants for harm that more likely than not would occur anyway. Defense counsel also argue against recognition of a loss of chance cause of action on the ground that there are many correct clinical approaches to medical treatment, all of which may be clinically appropriate. Health care providers should not be subjected to lawsuits simply because they might have tried a different course of treatment, with possibly better results, and they should not be under pressure to practice medicine defensively at a substantially higher cost. The loss of chance doctrine conflicts with many comparative negligence statutes that bar recovery if a plaintiff is greater than 50 percent at fault, or has less than a 50 percent chance of survival in any event. Finally, opponents point out that the tort system was never intended to compensate for every injury, and that only the legislative branch of government should effect such a dramatic change in the system.[34]

In sum, the loss of chance doctrine significantly relaxes a plaintiff's burden of proof as to causation in medical malpractice cases. While traditional tort principles require the plaintiff to prove that the defendant's conduct more likely than not caused harm, loss of chance requires a plaintiff to show only that the defendant

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30. *See, e.g.*, Roberts, 668 N.E. 2d at 483-85; Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474, 476-79 (Wash. 1983); Hamil v. Bashline 392 A.2d 1280, 1288 (Pa. 1978).

31. Crosby, 48 F.Supp.2d at 927; DeBurkarte v. Louvar, 393 N.W. 131, 137 (Iowa 1986). *See* Joseph H. King Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1363-64 (1981).

32. DeBurkarte, 393 N.W. at 137.

33. These arguments are stated variously in Crosby, 48 F. Supp.2d at 928-29, and Weigand, *supra* note 4, at 15-16.

34. *Id.*

reduced the plaintiff's chances of recovery. In some cases, courts have gone as far as to award damages to plaintiffs for the loss of chance itself, without consideration of any actual harm. Thus, the loss of chance theory represents a departure from the purpose of traditional tort law: to make the plaintiff whole for actual harm done.

The loss of chance doctrine invites a troubling expansion of other types of claims against other professionals. If a physician can be held liable for reduced survival prospects, may an accountant be liable in analogous circumstances? May a lawyer who is unsuccessful in staving off a foreclosure be liable for a portion of his client's loss on the basis of a perceived reduction in the client's prospects? One would hope that these types of claims never are recognized.

C. Medical Monitoring

Medical monitoring is another cause of action that has eroded the traditional injury requirement. Medical monitoring is a common law equivalent to preventative medicine, and while it has some appeal to defendants, it must still be looked at warily.[35]

In some jurisdictions, plaintiffs may recover monitoring costs if they can show that (1) the defendant negligently caused them to be exposed to toxins; (2) as a result of the exposure, they have an increased risk of developing a latent disease; (3) a reasonable physician would prescribe monitoring treatments; and (4) monitoring treatments exist that make early detection of the latent disease possible.[36] At least three courts have allowed a class of "healthy" plaintiffs to recover medical monitoring costs against cigarette and pharmaceutical manufacturers.[37]

One rationale supporting recognition of the cause of action is that monitoring is a less costly remedy than a full tort recovery. Another is that the prevention and early detection of latent disease mitigate against serious future harm. And a third is that allowing plaintiffs to recover medical monitoring costs owing to exposure to toxic substances will deter irresponsible behavior.[38]

Nevertheless, medical monitoring, like loss of chance, has injected considerable uncertainty into the law of torts. For example, it is unclear whether defendants may be sued twice, once for monitoring costs and then again after the feared illness develops.[39] Recognition of a medical monitoring cause of action also exposes defendants to a flood of claims by those alleging to have been exposed to a toxin at some point in their lives. It also is difficult to determine the cost of medical monitoring because of uncertainty and disagreement about the necessary monitoring treatments.

The U.S. Supreme Court has held that plaintiffs suing under the Federal Employers' Liability Act plaintiffs cannot recover medical monitoring costs absent a showing of some type of disease.[40] Other courts have refused to recognize medical monitor-

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35. *See* DeVries & Gallacher, *supra* note 8 (describing development of medical monitoring cause of action).

36. Metro-North Commuter, 521 U.S. at 449-50 (Ginsburg, J., concurring in part and dissenting in part) (arguing for and summarizing elements of medical monitoring claim under the Federal Employers' Liability Act); Bower v. Westinghouse Electric Corp., 522 S.E.2d 424, 432-33 (W. Va. 1999).

37. *See* Petito v. A.H. Robins Co., 750 So.2d 103, 105-07 (Fla.App. 2000) (allowing "uninjured" class to recover medical monitoring costs from pharmaceutical manufacturers); In re Tobacco Litig. (Medical Monitoring Case), No. 00-C-6000 (W. Va. Cir.Ct., Ohio County, January 4, 2002) (order filed allowing class of "healthy" smokers to recover medical monitoring costs from tobacco manufacturers). *See also* Melissa Nann, *Three Baycol Plaintiff Classes Rejected, A Fourth Seeking Medical Monitoring Is Approved*, NAT'L L.J., March 29, 2004 at 6 (reporting that Pennsylvania state court judge allowed class action for medical monitoring to proceed against drug company).

38. These policy arguments are stated by Justice Ginsburg in Metro-North Communter, 521 U.S. at 443, 451.

39. *Compare* Petito, 750 So.2d at 106 (rule against claim splitting does not preclude medical monitoring plaintiff from bringing subsequent action for actual injury) *with* Wood v. Wyeth-Ayerst Labs., Div. of Am. Home Prods., 82 S.W.3d 849, 858 (Ky. 2002) (claim splitting rule precludes medical monitoring plaintiff from bringing subsequent claim once injury develops).

40. Metro-North Commuter, 521 U.S. 424 (1997).

ing, concluding that the viability of such an action should be left to legislatures, which more easily can acquire all relevant information, provide fair notice to potential tortfeasors, and consider claims involving collateral compensation.[41]

D. Birth-related Claims

1. Wrongful Life

Wrongful life claims also have extended the boundaries of the traditional injury requirement. They are brought on behalf of handicapped children against health care professionals for failing to provide the child's parents with information necessary for them to decide whether they should conceive a child or terminate a pregnancy.[42] The gravamen of this claim is that but for the defendant's negligence the plaintiff's parents would not have conceived or would have terminated the pregnancy. Therefore, the plaintiff child would not have had to suffer the impairments that the defendant could and should have foreseen. As a Maryland court stated in *Kassama v. Magat*, "The injury complained of in a wrongful-life lawsuit is life itself."[43]

Although the wrongful life cause of action has some conceptual appeal, at least 23 states have rejected it, according to *Kassama*. Those that have done so have cited the difficulty in assessing damages, posing the question of how a judge or jury can arrive at a figure that will compensate a handicapped child who might not have been given life at all in the absence of the defendant's negligence. One court answered this question by deciding that there is no compensable injury because natural processes, not the defendant's alleged negligence, caused the child's handicap.[44] Nevertheless, at least one other court has allowed a plaintiff child in a wrongful life action to recover specific damages, including the cost of special education and equipment resulting from the child's handicap.[45]

2. Wrongful Birth

Wrongful birth is similar to wrongful life in that both actions seek damages arising from the unwanted birth of a handicapped child. However, a wrongful birth claim differs in that it is brought by parents on behalf of themselves, whereas a claim for wrongful life is brought by the handicapped child. The gravamen of a wrongful birth claim is that but for the defendant's negligence the parents would not have given birth to a handicapped child and would not have had to incur the extraordinary cost of goods and services, beyond normal child-rearing costs, to care for the child. Unlike the damages sought in a wrongful life action, damages for extraordinary care do not rely on moral judgments regarding the value of an impaired life compared to the value of non-life.[46]

3. Birth-Related Claims Involving Healthy Children

More questionable are birth-related claims, such as wrongful pregnancy and wrongful conception, involving the unwanted birth of healthy children. Wrongful pregnancy and conception claims appear to involve "uninjured" plaintiffs in that it is difficult to imagine how a parent is harmed by the birth of a healthy child.[47]

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41. *See, e.g.*, Wood, 82 S.W.3d at 858; Badillo v. Am. Brands Inc., 16 P.d 435, 440 (Nev. 2001). *See also Kentucky Rejects Medical Monitoring as a Cause of Action*, 44 FOR THE DEFENSE, November 2002, page 4.

42. Alan J. Belsky, *Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?* 22 U. BALT. L. REV. 185, 189-91 & n. 15 (1993).

43. 767 A.2d 348, 364 (Md.App. 2001).

44. Ellis v. Sherman, 515 A.2d 1327, 1329 (Pa. 1986).

45. Turpin v. Sortini, 643 P.2d 954, 963 (Cal. 1982)

46. Schirmer v. Mt. Auburn Obstetrics & Gynecological Assocs., 802 N.E.2d 723, 729-32 (Ohio App. 2003); Belsky, *supra* note 41, at 190.

47. *See* Burke v. Rivo, 551 N.E.2d 1, 3-4 (Mass. 1990) (allowing parents to recover cost of unsuccessful sterilization procedure, cost of second sterilization procedure, wife's lost earning capacity, medical expense of delivering child, loss of consortium, and emotional distress); Szekeres v. Robinson, 715 P.2d 1076, 1078 (Nevada 1986) (no tort liability for any expenses incurred due to negligent sterilization procedure). *See also* Melissa K. Smith-Groff, *Wrongful Conception: When an Unplanned Child*

In a recent Massachusetts case, a plaintiff father brought a breach of contract claim against a fertility clinic for impregnating his estranged wife with a frozen embryo created with the plaintiff's sperm. The plaintiff alleged that the defendant clinic and its doctors performed the fertilization procedure without his knowledge or consent. A jury exonerated the doctors but returned an award of $98,000 for the cost of raising the healthy child and $10,000 for the father's emotional distress.[48]

Although liability was based on the contract between the plaintiff and the fertility clinic, the case presents interesting questions regarding the nature of harm, if any, arising from the unwanted or unexpected birth of a healthy child.

FEAR: SUBSTITUTE FOR INJURY?

A. Toshiba

In 1999, a number of subsidiaries of Toshiba Corp., one of the world's leading high technology companies, announced that it would pay more than $2.1 billion to settle claims involving alleged defective floppy disk controllers. This announcement caused a stir in light of Toshiba's previously announced intention to defend the claims vigorously and because none of the purported class members had yet suffered any harm.[49] Toshiba's decision appears to have been motivated by a fear of anti-corporate bias and by a desire to protect its reputation and avoid the risks of litigation. Unspoken, however, was a lack of confidence in the American judicial system's ability to turn away claims involving no injury.

The case began as *Shaw v. Toshiba America Information Systems Inc.* in the U.S. District Court for the District of Texas, Beaumont Division.[50] The action was brought under the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030, and it included causes of action for injunctive relief, breach of contract and breach of warranty. In order to recover under the CFAA, a plaintiff must establish that the defendant caused damage to the integrity or availability of data, a program, a system, or information of at least $5,000 in value.[51]

The *Toshiba* plaintiffs alleged that a flaw in the floppy disk controller theoretically could have resulted in undetected data loss or corruption. Toshiba denied liability and contended that damages were non-existent, as none of the plaintiffs suffered actual property loss.

The *Toshiba* settlement represented an "odd twist" in American product liability law by requiring only "proof of flaw" but not harm or damage. Critics argue that the settlement will result in higher product prices to the consumer. Bugs and flaws are endemic to the computer industry, so lawsuits will drain money from the industry without improving the technology, according to an article in *PC Magazine*.[52]

The settlement also raises questions about the importance of proving causation before establishing liability. It should be noted that Toshiba has not been able to recreate the problem alleged in the lawsuit under normal usage conditions.[53]

An article in *Electronic Engineering Times* states that some people believe this type of flaw surfaces only under the most unlikely circumstances. Duncan Walker, a

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Has a Birth Defect, Who Should Pay the Cost?, 61 MO. L. REV. 135, 138-40 (1996) ("unsettled and controversial area of wrongful conception" involves determination of damages).

48. Gladu v. Boston IVF Inc., Middlesex Super.Ct., No. 98-4189 (January 30, 2004). *See Sperm Used for In Vitro Fertilization Without Father's Permission*, 32 M.L.W. 1565 (March 22, 2004); Thanassis Cambanis, *Father Wins Case Against Fertility Clinic*, BOSTON GLOBE, January 31, 2004.

49. Lee L. Bennett, *Defense Community Issues: New Liabilities and How to Respond to the Plaintiffs' Bar*, 69 DEF. COUNS. J. 273, 278 and n.10 (July 2002). *See* www.consumeraffairs.com/small_defect.htm.

50. 91 F.Supp.2d 926 (E.D. Tex. 1999).

51. 18 U.S.C. §§ 1030(e)(8) and (a)(5)(B)(i).

52. Bill Machrone, *Hang the Lawyers—Again*, available at http://www.pcmag.com/article2/0,1759,30340,00.asp, January 16, 2001).

53. Adam Bisby, *Toshiba Sparks Legal Frenzy*, COMPUTER DEALER NEWS, November 12, 1999, Vol. 15, No. 43, available at http://www.plesman.com/index.asp?theaction=61&sid=39281.

member of the Computer Sciences Department at Texas A&M University believes "it would be very difficult to verify such a bug because of its rare and seemingly random nature, and the fact that it would be hidden by the noise of all those other system bugs." According to Shankar Hemmady, chief executive officer of PharmQuest.com, an Internet startup, "when a system fails two or three years after it is manufactured, it is hard to discover whether it was a chip or electromechanical subsystem, or what."[54]

Following the *Toshiba* settlement, copycat lawsuits were brought against computer companies under the CFAA in 2001. The focus of the plaintiffs' claims was an alleged defect in computer-related products or software. These claims generally were not successful because the plaintiffs failed to prove the requisite damage elements under the CFAA.[55] The irony of this outcome was presumably not lost on Toshiba.

B. Genetically-modified Corn

In the 1990s, a North American company called Aventis CropScience invented a technological method of creating a type of corn called StarLink and licensed the technology to the Garst Seed Co.. StarLink corn is genetically modified to poison small inchworm-like pests called corn borers. Regulators approved the use of StarLink corn for animal and industrial uses only.[56]

However, in September 2000, the genetically modified corn began appearing in human food products such as taco shells, corn chips and muffin mix. According to an article in the *Boston Globe*, more than 300 food products were recalled because of the fear of contamination and the possible adverse affects on human consumers. StarLink corn began showing up in Taco Bell brand taco shells and in grocery markets. Taco Bell restaurants experienced a dramatic drop in customers. Crop prices dropped dramatically. In mid October 2000, Aventis voluntarily withdrew its U.S. registration of StarLink corn.[57]

Although there was no evidence of serious harm resulting from human consumption of StarLink corn, several lawsuits were filed against Aventis and Garst for plaintiffs who suspected they had consumed the genetically modified corn or who had distributed it to consumers. In response, Aventis paid $9 million to settle a class action brought by consumers who had purchased the recalled corn products. Aventis also paid a settlement to a group of crop farmers, some of whom had grown StarLink corn and some of whom had not. The settlement compensated the farmers for the cost of diverting and separating contaminated crops for use as animal feed.

Despite the recalls and the lack of any evidence of serious harm resulting from contamination, many American food producers replaced domestic corn with imported corn that was free from any possible contamination. Some foreign countries, like South Korea and Japan, stopped importing corn from the United States, and transport providers mandated expensive testing on all corn shipments.

The StarLink corn litigation is an example of how fear can drive potentially ruinous lawsuits even though there is little or no evidence of any harm associated with the defendant's product. According to one defense lawyer involved in the case, there was little evidence of any economic injury to the crop farmers who had never used StarLink corn. This was because of an increased demand for non-contaminated corn in the wake of the recalls. Taco Bell's claim that its restaurants were stigmatized was belied by the fact that StarLink corn

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54. Stan Runyon, *Lawsuits Snowball over Flawed Disk Controllers*, ELECTRONIC ENGINEERING TIMES, November 9, 1999, available at http://www.eetimes.com/showArticle.jhtml? articleID=18303155.

55. Hayes v. Packard Bell NEC Inc., 193 F.Supp.2d 910, 912 (E.D. Tex. 2001); Thurmond v. Compaq Computer Corp., 171 F.Supp.2d 667, 675-82 (E.D. Tex. 2001); In re America Online Inc., 168 F.Supp.2d 1359, 1372-375 (S.D. Fla. 2001).

56. For information on StarLink corn, *see* StarLink Information Center at http://www.starlinkcorn.com/starlinkcorn.htm.

57. Naomi Aoki, *Biotech's Warrior: Lawyer of Fen-Phen Fame Defending Maker of Engineered Corn*, BOSTON GLOBE, October 16, 2002, at C1, C6.

was never found inside a Taco Bell restaurant. In addition, as defense counsel point out, the difficulties encountered by Aventis and Garst were a discouraging example to pharmaceutical companies looking to bring new products into the market.[58]

If fear of harm is a substitute for an actual injury, as the StarLink corn cases suggest, a host of lawsuits against pharmaceutical and other manufacturing companies are possible. For example, recent reports have surfaced regarding the possibility that certain everyday products containing a chemical called "phthalates" may cause harm to unborn babies. Plastic toy manufacturers, medical suppliers, and cosmetic and shampoo manufacturers could be the next target in a fear-driven litigation over whether chemical softeners found in these products may cause human birth defects.[59]

C. Irrigation

A recent Ninth Circuit decision may give comfort to those who advocate relaxing the actual injury requirement. In *Central Delta Water Agency v. United States*,[60] two farming corporations and two California state agencies sued the federal government over a plan to release water from a reservoir in order to sustain a fish habitat. The federal district court rejected most of the plaintiffs' claims, finding that no "injury in fact" had taken place given the federal government's assurances that the diversion would not deprive the plaintiffs of suitable water for irrigation purposes.

The Ninth Circuit reversed and reinstated all the plaintiffs' claims. It held that "threatened" harm was sufficient to confer standing on both groups of plaintiffs so that they could succeed, even in the absence of any quantifiable injury. The plaintiffs had not even demonstrated that the diversion was likely to reduce the amount of suitable water available to irrigate their crops. Nonetheless, because of an expansive view of standing requirements, the Ninth Circuit permitted the case to proceed. As the dissenting opinion observed, the majority had conferred standing on a group whose rights were not "affected at all" and whose antagonist insisted that it fully intended to respect those rights.

In addition to the Ninth Circuit, other courts have found that a mere increased risk of future harm is sufficient to satisfy standing requirements. Generally, these types of cases involve threats of harm to the environment or to the health and safety of individuals. For example, the Second Circuit recently has held that an increased risk of the transmission of "mad cow" disease constituted an "injury-in-fact" sufficient for standing purposes. In *Bauer v. Veneman*,[61] the individual plaintiff alleged that human consumption of "downed cattle" increased the risk of "mad cow" disease in humans. "Downed cattle" is an industry term used to describe animals that are too weak to walk or stand prior to slaughter. Under current U.S. Department of Agriculture regulations, meat from "downed cattle" is deemed safe for human consumption, provided a veterinary officer has approved the meat product following a post-mortem inspection.

The district court dismissed the complaint, finding that the alleged risk of disease transmission was too hypothetical and speculative to establish a cognizable injury for standing purposes. It noted that a fully progressed case of "mad cow" disease never had been detected either in a cow or in food products within the United States.

But the Second Circuit reversed, finding that "an enhanced risk of disease transmission may qualify as injury-in-fact in consumer food and drug safety suits." To support its decision, the court cited other cases allowing a threat of future harm to constitute an injury-in-fact. As the dissenting judge pointed out, a concern for changing

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58. *Id.* (noting Centers for Disease Control found no evidence of allergic reaction in human consumers who allegedly ate StarLink corn). *See* In re StarLink Corn Prods. Liab. Litig., 2002 WL 31236304 (N.D. Ill. 2002); 212 F.Supp 2d 828 (N.D. Ill. 2002); 211 F.Supp.2d 1060 (N.D. Ill. 2002).

59. Sally Jacobs, *Scent of Trouble Surrounds Cosmetics: Women Shun Products with Chemical Linked to Birth Defects*, BOSTON GLOBE, October 16, 2002, at D1, D7.

60. 306 F.3d 938 (9th Cir. 2002).

61. 352 F.3d 625, 633 (2d Cir. 2003)

what the plaintiff viewed as "misguided public health policy [should have] no bearing on the question of whether he has established injury in fact."

BEYOND THE FRONTIER: TOXICOGENOMICS

Although fear-related claims are increasing, science has offered new theories for defending against them. As the Restatement (Third) recognizes, tort cases often pose difficult problems of proof with respect to factual causation.[62] Toxicogenomics is a new scientific theory on how a particular toxin causes a gene's expression to change on both a cellular and molecular level. The science is based on DNA microarrays or chips, which simultaneously monitor the gene's expression. Toxicogenomics may be used to determine whether a particular gene sequence has changed in a way that is associated with cancer or disease. In theory, toxicogenomics could be used to prove or disprove causation in toxic tort cases.[63]

Defense practitioners may be able to use toxicogenomics to show that the absence of specific changes in a gene's expression disproves any connection between exposure to a particular toxin and harm. Genetic testing of a plaintiff also might negate causation by revealing that the plaintiff's gene expressions are consistent with other carcinogens, not just the defendant's product. Defense practitioners may be able to use toxicogenomics to show that a plaintiff is predisposed to a certain disease, thus negating causation. Finally, by comparing a plaintiff's DNA test results before and after exposure to a particular toxin, defense practitioners may determine whether the plaintiff's cancer or disease pre-dated a particular exposure.

While toxicogenomics may seem to be a promising tool, it still is a new scientific theory, and its reliability has not been established. Critics point out that narrow testing of one or two genes ignores environmental or additive factors that may contribute to the onset of cancer or disease. Stress and other external factors could affect gene expression, and many changes in gene expression have nothing to do with toxicity. For example, consumption of Brussels sprouts and exposure to the drug dioxin have the same effect on gene expression. In addition, Comment c to Section 28 of the Restatement (Third), referred to in footnote 63, cautions that "scientific standards for the sufficiency of evidence to establish a proposition may be inappropriate for the law."

In any event, toxicogenomic evidence requires expert testimony, and therefore it must satisfy the test for reliability of *Daubert v. Merrell Dow Pharmaceuticals Inc.*[64] before it may become a useful tool for proving causation and existence of an actual injury.

CONCLUSION

The dramatic loosening of the common law's requirement of an actual injury has changed the tort law landscape. Wholly speculative and unprovable "injuries" now form the basis of potentially ruinous claims. Manufacturers of the most advanced products and developers of the world's boldest technology face the uncertainties and distraction of litigating in situations never imagined before. Health care providers and their insurers must now expect and plan for claims unrelated to any actual loss or harm.

This is a trend that should concern all defense lawyers and their clients.

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62. § 28, cmt. c (Tentative Draft No. 3) (2003).

63. This discussion of toxicogenomics is based on John C. Childs, *Toxicogenomics: New Chapter in Causation and Exposure in Toxic Tort Litigation*, 69 DEF. COUNS. J. 441 (October 2002), and references therein.

64. 509 U.S. 579 (1993).