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Note

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> A tortfeasor should not get off scot-free because instead of killing his victim outright he inflicts an injury that is likely though not certain to shorten the victim's life.
>
> ~Judge Posner in *DePass v. United States*[1]

I. INTRODUCTION

During Diane Dillon's treatment for breast cancer at a local hospital, her doctor implanted a sixteen centimeter-long catheter tube in her chest so that he could better administer chemotherapy.[2] When the treatment was completed, however, the doctor accidentally removed only seven centimeters of the catheter, leaving the rest in Dillon's chest.[3] A chest x-ray taken at a subsequent check-up failed to reveal the catheter fragment, and doctors did not discover it until one year later, when the

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1. DePass v. United States, 721 F.2d 203, 208 (7th Cir. 1983) (Posner, J., dissenting); *see also infra* notes 243–66 (discussing the *DePass* decision).

2. Dillon v. Evanston Hosp., 771 N.E.2d 357, 361 (Ill. 2002); *see also infra* Part III.A (discussing the facts of *Dillon*). A catheter is a "flexible tube inserted into a body cavity, duct, or vessel to allow fluids to pass." AM. HERITAGE COLL. DICTIONARY 222 (3d ed. 1997). In Dillon's case, the catheter provided doctors with a means of drawing blood and administering chemotherapy throughout the course of the breast cancer treatment in order to avoid repeatedly inserting needles into Dillon's veins. *Dillon*, 771 N.E.2d at 361.

3. *Dillon*, 771 N.E.2d at 361. Dillon sued the catheter's manufacturer, Davol, Inc., as an additional defendant in this case, but the jury found that Davol was not responsible for Dillon's injury. *Id.*

fragment had migrated, embedding itself in Dillon's heart.[4] Because it was too risky to remove the catheter fragment, Dillon was forced to leave it in place.[5] As a result, Dillon faced several possible medical risks, none of which were certain to occur, but which nevertheless caused her concern.[6]

When Dillon sued her doctor for medical malpractice, she sought compensation not only for pain and suffering, but also for the *increased risk* of future complications from the catheter fragment.[7] A jury awarded Dillon what she asked for: damages for her pain and suffering and for her increased risk of developing future injuries.[8]

The defendants in *Dillon v. Evanston Hospital*[9] appealed to the Illinois Supreme Court the issue of whether a plaintiff could be allowed to recover for the "increased risk"[10] of an injury, especially one that was not reasonably certain to occur.[11] The court unanimously decided that an increased risk, even one that is not likely to occur, is compensable.[12] The Illinois Supreme Court's decision overturned more than ninety years of precedent.[13]

This Note will focus on traditional and emerging standards used in evaluating damages for the increased risk of future injuries. Part II of this Note will explain what "increased risk" is and examine a typical

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4. *Id.* At the time of trial, the tip of the fragment was embedded in the wall of Dillon's right atrium, while the rest of the fragment was floating free inside her heart. *Id.*

5. *Id.*; *see also infra* note 279 and accompanying text (providing the doctors' rationale as to why it would be more dangerous to remove the fragment than to leave it in place).

6. *Dillon*, 771 N.E.2d at 366; *see also infra* notes 284–85 and accompanying text (discussing and defining the risks Dillon faced by leaving the fragment in her heart).

7. *Dillon*, 771 N.E.2d at 366.

8. *Id.* at 361–62; *see also infra* Part III.B (discussing the jury verdict).

9. Dillon v. Evanston Hosp., 771 N.E.2d 357, 361 (Ill. 2002).

10. "Increased risk" refers to the heightened chance of an injury occurring in the future because of a defendant's negligence. *See* United States v. Anderson, 669 A.2d 73, 75 (Del. 1995) ("As its name implies, the increased risk doctrine provides that a person may recover damages if the person's risk of suffering a negative medical condition is increased because of medical malpractice."); *see also infra* notes 22–24 and accompanying text (giving an example of a situation in which the plaintiff faces an increased risk).

11. *Dillon*, 771 N.E.2d at 366. The standard before the *Dillon* case was that an increased risk could not be compensated unless it was "reasonably certain" to occur. *Id.* at 366–67; *see also infra* notes 35–38 and accompanying text (discussing the traditional Illinois standard governing the recovery for increased risk); *infra* Part II.C.1 (discussing the cases that established this standard in Illinois). For the purposes of this Note, "reasonably certain" refers to a greater than 50% likelihood of a future injury occurring.

12. *Dillon*, 771 N.E.2d at 368–70. Although Chief Justice Harrison dissented in part, he agreed with the court that an increased risk should be compensated. *Id.* at 373 (Harrison, C.J., dissenting); *see also infra* Part III.D (discussing Chief Justice Harrison's dissent).

13. *Dillon*, 771 N.E.2d at 366–68; *see also infra* notes 36–37 and accompanying text (discussing the state of the law in Illinois prior to *Dillon*).

situation in which it is likely to occur.[14] Next, Part II will explore the traditional standard that Illinois, along with most other jurisdictions, applied to the recovery for increased risk.[15] Part II will further discuss the rationale behind this traditional standard, as well as some of the problems that it potentially creates.[16] Next, Part II will discuss the methods that Illinois courts and other jurisdictions have created in order to avoid some of these possible problems.[17] Finally, Part II will explore the division that existed among Illinois appellate courts over the issue of "increased risk."[18] Part III of this Note will discuss the holding in *Dillon v. Evanston Hospital*, which settled the division in the Illinois appellate courts by making a full retreat from the traditional standard applied to increased risk cases.[19] Part IV will explain why the *Dillon* decision to withdraw from the traditional rule was correct.[20] Finally, Part V will discuss the potential impact of the Illinois Supreme Court's decision on future increased risk cases.[21]

II. BACKGROUND

Imagine that a plaintiff is involved in an auto accident and his leg has to be amputated as a result of another driver's negligence.[22] At trial, medical doctors testify that, as a result of the amputation, the plaintiff has a 44% increased risk of dying from heart disease.[23] This plaintiff should certainly be able to recover for his medical expenses and past and future pain and suffering that results from the leg amputation, but

14. *See infra* notes 22–27 and accompanying text (describing a hypothetical example of an increased risk situation and the questions that it raises).

15. *See infra* Part II.A (explaining the traditional approach to the recovery of future damages, dubbed the "all-or-nothing" rule).

16. *See infra* Part II.A.1 (identifying the major reasons for the original adoption of the traditional all-or-nothing rule); Part II.A.2 (analyzing the potential problems caused by the all-or-nothing rule).

17. *See infra* Part II.B (describing the different methods courts have used in order to try to avoid the perceived inequities of the all-or-nothing rule).

18. *See infra* Part II.C (tracing the emergence of the increased risk doctrine in Illinois courts before *Dillon*).

19. *See infra* Part III; *see also infra* Part III.A (providing the facts of *Dillon*); *infra* Part III.B (providing a brief procedural history of the lower courts' findings); *infra* Part III.C (describing the decision of the majority of the Illinois Supreme Court); *infra* Part III.D (giving a synopsis of Chief Justice Harrison's partial dissent).

20. *See infra* Part IV (arguing that the increased risk doctrine is superior to the all-or-nothing rule).

21. *See infra* Part V (analyzing the impact of *Dillon* on increased risk cases, especially the potential effect on both loss of chance and toxic tort cases).

22. *See* DePass v. United States, 721 F.2d 203 (7th Cir. 1983). This hypothetical is based on the facts of *DePass*. *See id.* at 203–06.

23. *See id.* at 204.

should he also be allowed to recover for his increased risk of developing heart disease?[24] Should the analysis be any different if the risk of dying from heart disease is only 20%? What if the risk is 70%?[25] And if he is awarded damages for this increased risk, how should the damages be calculated?[26] These questions have divided courts across the country for several years.[27] In *Dillon v. Evanston Hospital*, the Illinois Supreme Court revisited the increased risk situation in order to reconcile divisions that had arisen in the Illinois appellate courts over these same questions.[28]

This Part explores the development of Illinois law regarding recovery for the increased risk of future damages.[29] Part II.A will explain the traditional view that Illinois, and most other jurisdictions, accepted until the decision in *Dillon*.[30] Part II.A will then discuss the implications of this traditional rule, explaining the rationale behind the original adoption of the rule and its possible limitations.[31] Part II.B will trace the development of different methods courts have used in order to deal

24. *See, e.g., id.* at 205–06. In *DePass*, the majority found that the plaintiff was not allowed to recover for the increased risk of heart disease. *Id.*; *see also infra* notes 243–66 and accompanying text (discussing the *DePass* decision).

25. *See infra* Part II.A (discussing the traditional all-or-nothing rule). Under the traditional Illinois rule, a plaintiff with less than a 50% chance of incurring the injury for which he has a risk is unable to recover for that risk. *See infra* Part II.A. *But cf. infra* Part II.B.2.c (discussing a new cause of action that some jurisdictions have adopted, called the increased risk doctrine). Under the increased risk doctrine, the plaintiff in the hypothetical would be able to partially recover for the risk of heart disease, so long as he can prove that the defendant proximately caused that risk. *See infra* Part II.B.2.c (explaining how to determine damages according to the increased risk doctrine).

26. *See infra* Part II.B.2.c (discussing the increased risk doctrine). According to the increased risk doctrine, a plaintiff will receive damages for a risk of future injury in proportion to how likely that future injury is to occur. *See infra* notes 162–65 and accompanying text (describing how to calculate damages under the increased risk doctrine). Thus, damages are calculated by multiplying the probability of occurrence by the full amount that the injury would be worth were it to occur. *See infra* notes 162–65 and accompanying text (describing how to calculate damages under the increased risk doctrine).

27. *See generally infra* Part II.A–B (discussing the traditional all-or-nothing rule to the recovery for increased risk and some of the solutions different courts have created in order to remedy the perceived inequities of this approach).

28. Dillon v. Evanston Hosp., 771 N.E.2d 357, 367 (Ill. 2002); *see also infra* Part III.C.1.a (describing the majority's discussion regarding the split among Illinois appellate courts).

29. *See infra* Part II.A–C (discussing the development of Illinois law regarding the recovery for the increased risk of future damages).

30. *See infra* Part II.A (analyzing the all-or-nothing rule and its impact on recovery for increased risk).

31. *See infra* Part II.A.1 (discussing the reasoning behind the traditional all-or-nothing rule and the fears that proponents have about retreating from it); *infra* Part II.A.2 (explaining the typical critiques of the traditional rule and the concerns opponents have about adhering to it).

with certain limitations of the traditional rule.[32] Finally, Part II.C will specifically discuss the application of one of these methods in Illinois courts before *Dillon*.[33]

A. The "All-or-Nothing" Rule

Before *Dillon v. Evanston Hospital*, Illinois courts applied the traditional rule, often called the "all-or-nothing rule,"[34] to the recovery for future injuries.[35] This rule, adopted in Illinois almost 100 years ago in *Amann v. Chicago Consolidated Traction Co.*,[36] mandates that a plaintiff cannot recover for a future injury unless he or she can demonstrate, to a reasonable certainty, that the injury will occur in the future.[37] Most courts agree that reasonable certainty requires a finding

32. *See infra* Part II.B (tracing the development of different methods and new doctrines created to counteract the perceived negative effects of the all-or-nothing rule).

33. *See infra* Part II.C (discussing the Illinois cases that established the traditional all-or-nothing rule and those Illinois cases that allowed the recovery for an increased risk even though it was not allowed under the traditional rule).

34. *See infra* note 42 and accompanying text (explaining why this traditional rule has been called the all-or-nothing rule).

35. Dillon v. Evanston Hosp., 771 N.E.2d 357, 367 (Ill. 2002). Dillon ultimately rejected the traditional, all-or-nothing rule. *See infra* notes 315–26 and accompanying text (describing the Illinois Supreme Court's rationale for rejecting the all-or-nothing rule). Almost all states, however, still adhere to this rule, at least with respect to recovery for future damages. John D. Hodson, Annotation, *Medical Malpractice: "Loss of Chance" Causality*, 54 A.L.R. 4th 10, §§ 2, 4 (1987).

36. Amann v. Chi. Consol. Traction Co., 90 N.E. 673 (Ill. 1909) (holding that a doctor's testimony that abrasions suffered by the plaintiff as a result of the defendant's negligence might worsen the plaintiff's pre-existing paralysis was not to be considered by the jury because it was mere speculation), *overruled by* Dillon v. Evanston Hosp., 771 N.E.2d 357 (Ill. 2002). In 1909, *Amann* established the all-or-nothing rule in Illinois, which governed the recovery for the risk of future injury until the *Dillon* decision in 2002.

37. *Amann*, 90 N.E. at 674 ("To justify a recovery for future damages the law requires proof of a reasonable certainty that they will be endured in the future."); *see also* DePass v. United States, 721 F.2d 203, 205–06 (7th Cir. 1983) (holding that damages should not be awarded for alleged increased risk of cardiovascular disease and loss of life expectancy because neither was reasonably certain to occur); Smith v. Eli Lilly & Co., 560 N.E.2d 324, 344 (Ill. 1990) (finding that daughters who were exposed to diethylstilbestrol ("DES") while in utero could not recover because the risks were too speculative); Stevens v. Ill. Cent. R.R., 137 N.E. 859, 862–63 (Ill. 1922) (finding error when the lower court allowed physicians to testify as to the possible injuries an x-ray of the plaintiff's head *might* show but did not show with reasonable certainty); Lauth v. Chi. Union Traction Co., 91 N.E. 431, 434–35 (Ill. 1910) (holding that a plaintiff could not recover for the possible recurrence of a hernia and the attending possibility of death, allegedly due to medical malpractice, because the possibility of recurrence was too speculative); Lake Shore & Mich. S. Ry. v. Conway, 48 N.E. 483, 484 (Ill. 1897) (holding that a plaintiff could recover for a permanent disability resulting from a railroad accident because the future injury was reasonably certain to result); Wehmeier v. UNR Indus., 572 N.E.2d 320, 339 (Ill. App. Ct. 4th Dist. 1991) (finding that evidence of a worker's increased risk of contracting cancer because of his exposure to asbestos was too speculative and, therefore, did not establish present, compensable injury); Russell v. Subbiah, 500 N.E.2d 138, 141 (Ill. App. Ct. 3d Dist. 1986)

that there is a greater than 50% chance that the injury will occur.[38] Thus, if a plaintiff proves that he has a greater than 50% chance of suffering from an injury at some point in the future, the injury is viewed as a certainty, and the plaintiff can recover full damages for that injury.[39] However, if the plaintiff proves only that there is a *possibility* that the injury will occur (that is, less than a 50% chance), he is unable to recover anything, even if that injury does in fact occur after the suit.[40]

(holding that a doctor's testimony that there was a 50/50 chance that an alleged misdiagnosis of a spinal cord tumor would cause increased injury to a patient's leg and prolong his recovery period did not meet the reasonable certainty standard and was, therefore, not compensable); Curry v. Summer, 483 N.E.2d 711, 718 (Ill. App. Ct. 4th Dist. 1985) (holding that the plaintiff could not recover in a wrongful death action due to negligent misdiagnosis of a severe heart attack because the decedent's resulting death could not be shown to be proximately related to the original negligence); Morrissy v. Eli Lilly & Co., 394 N.E.2d 1369, 1376 (Ill. App. Ct. 1st Dist. 1979) (holding that daughters of mothers given DES while pregnant could not recover for their heightened risk of contracting cancer or other diseases as a consequence of their exposure to DES). *But see* Harp v. Ill. Cent. Gulf R.R., 370 N.E.2d 826, 830 (Ill. App. Ct. 5th Dist. 1977) (holding that the plaintiff could recover for the increased risk of rupturing a vertebral disc as a result of the original injury because the possible rupture of the disc was reasonably certain to occur if sufficient force was exerted upon it).

38. *Dillon*, 771 N.E.2d at 367. Although jurisdictions use different standards for determining whether causation has been established (such as: "in all likelihood," "reasonably certain," "reasonably probable," "medically probable," "probable," "reasonable medical certainty," and "more probable than not"), most jurisdictions require that the plaintiff prove the increased risk is greater than 50%. David P.C. Ashton, Comment, *Decreasing the Risks Inherent in Claims for Increased Risk of Future Disease*, 43 U. MIAMI L. REV. 1081, 1103–05 (1989); *see also* Keith W. Lapeze, Comment, *Recovery for Increased Risk of Disease in Louisiana*, 58 LA. L. REV. 249, 254 n.35 (1997) (discussing how most jurisdictions use the "but for" test in an increased risk situation); David Carl Minneman, Annotation, *Future Disease or Condition or Anxiety Relating Thereto, as Element of Recovery*, 50 A.L.R. 4th 13, §§ 43–48 (1986) (discussing the confusion between different standards of proof used by different jurisdictions). "While some cases equate the term 'reasonably certain' with 'probable,' other cases explicitly distinguish the concept of 'reasonable probability' from the concept of 'reasonable certainty.' However, most cases and jurisdictions recognize and apply only one of these rules without reference to, or interchanging it with, the other." Minneman, *supra*, § 43.

39. *Dillon*, 771 N.E.2d at 367. Recovering full damages means that the plaintiff would recover as if that injury had actually occurred. *Id.*; *cf. infra* Parts II.B.2.b.i, II.B.2.c (analyzing the loss of chance doctrine and the increased risk doctrine where damages are not given in full but rather are measured by multiplying the probability of occurrence by the "full" amount the injury is worth).

40. *See* Joseph H. King, Jr., *"Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss of a Chance Doctrine*, 28 U. MEM. L. REV. 491, 499–500 (1998) [hereinafter King, *"Reduction of Likelihood"*]; Ashton, *supra* note 38, at 1095; Lapeze, *supra* note 38, at 252; *see also* Petriello v. Kalman, 576 A.2d 474, 482–83 (Conn. 1990) (discussing the all-or-nothing rule); *Dillon*, 771 N.E.2d at 367 (discussing the all-or-nothing rule); 2 DAN B. DOBBS, REMEDIES § 8.1(7), at 407 (2d ed.1993) (discussing the calculation of damages under the all-or-nothing rule); Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1370–73 (1981) (discussing damages under the all-or-nothing rule) [hereinafter King, *Causation, Valuation, and Chance*].

In the above car accident hypothetical, the plaintiff would be unable to recover for his claim of increased risk of heart disease because the probability of its occurrence is less than 50%.[41] Many courts and commentators refer to this traditional rule as the "all-or-nothing" rule because of its seemingly disparate results.[42]

1. Rationale Underlying the All-or-Nothing Rule

Because most jurisdictions still adhere to the all-or-nothing rule, it is necessary to examine the rationale behind this traditional rule.[43] The main reasons given for adherence to this standard generally fall into two categories: first, general causation principles deeply rooted in tort law, and second, policy concerns about the lessening of this traditional burden.[44]

a. Traditional Tort Causation Principles and the All-or-Nothing Rule

Supporters of the all-or-nothing rule point to traditional causation theory as the basis of the rule.[45] In a traditional suit for negligence, a plaintiff must prove that the defendant's breach of a duty caused the resulting injury.[46] In the case of an increased risk of injury, the jury must weigh the evidence presented at trial and determine whether the

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41. *See supra* notes 22–23 and accompanying text (providing an increased risk hypothetical wherein a plaintiff suffers a 44% increased risk of heart disease resulting from a defendant's negligence).

42. *Dillon*, 771 N.E.2d at 368. Critics often refer to the traditional rule as the "all-or-nothing" rule because a plaintiff will either recover fully for a future injury (if he or she can establish that the injury is more than 50% likely to occur) or the plaintiff will receive nothing (if there is less than 50% chance of the injury's occurrence). *Id.* Thus, many plaintiffs will recover nothing for an injury that later occurs, while others will be compensated fully for an injury that never occurs. *Id.*; *see, e.g.*, *Petriello*, 576 A.2d at 482–83 (criticizing the "all-or-nothing" rule).

43. *See supra* note 35 and accompanying text (showing that most states still use the all-or-nothing rule).

44. *See infra* Part II.A.1.a (analyzing the main reason proponents give for the adherence to the all-or-nothing rule: traditional rules of causation); *infra* Part II.A.1.b (listing some of the policy concerns behind the all-or-nothing rule).

45. *See, e.g.*, Amann v. Chi. Consol. Traction Co., 90 N.E. 673, 674 (Ill. 1909) ("To justify a recovery for future damages the law requires proof of a reasonable certainty that they will be endured in the future."), *overruled by* Dillon v. Evanston Hosp., 771 N.E.2d 357 (Ill. 2002); *see also* Wehmeier v. UNR Indus., 572 N.E.2d 320, 335 (Ill. App. Ct. 4th Dist. 1991) ("Under Illinois law, a plaintiff has the burden of proving by a preponderance of the evidence that the defendant caused the plaintiff harm or injury; mere conjecture or speculation is insufficient proof."). Some scholars seem to indicate that any uncertainty should render a future injury unrecoverable; "threat of future harm, not yet realized, is not enough." W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30, at 165 (5th ed. 1984).

46. RESTATEMENT (SECOND) OF TORTS § 328A (1965); *see also* Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1510–15 (1993) (describing the traditional negligence formula).

defendant *probably*[47] caused the future injury.[48] Thus, if there is less than a 50% chance of the injury actually occurring, the causation element cannot be met because there is less than a 50% chance that the defendant caused that injury.[49] Proponents of the all-or-nothing rule reason that a lesser standard of causation would invite speculation and conjecture, which are directly in conflict with traditional tort notions of fairness and justice.[50]

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47. Jurisdictions use different standards, but "probably" seems to connote that the risk is more than 50% likely to occur. *See supra* note 38 (describing the different terms of art that are used to describe "more than 50% likely to occur").

48. King, *"Reduction of Likelihood," supra* note 40, at 499–500. Under the all-or-nothing rule, a "victim's claim is viewed exclusively in terms of causation." *Id.* at 499; *see also* Shawn M. Nichols, Note, Jorgenson v. Vener*: The South Dakota Supreme Court Declares Loss-of-Chance Doctrine as Part of Our Common Law in Medical Malpractice Torts*, 46 S.D. L. REV. 618, 618–19 (2000–2001) (discussing the traditional burden of proving causation and how it relates to recovering for future injuries).

49. King, *"Reduction of Likelihood," supra* note 40, at 499–500; *see also* Nichols, *supra* note 48, at 618–19 (noting that a plaintiff must prove that a defendant doctor is "more likely than not" the cause of the plaintiff's injuries, and noting that "more likely than not" equals at least 51% in technical legal terms). Proof of causation is often extremely difficult in increased risk situations because plaintiffs are basically compelled to prove both that there is more than a 50% chance that the defendant caused the injury and that there is a greater than 50% chance that the injury will actually occur. *See* Ashton, *supra* note 38, at 1095.

50. *See* Budden v. Goldstein, 128 A.2d 730, 735 (N.J. Super. Ct. App. Div. 1957), *overruled by* Botta v. Brunner, 138 A.2d 713 (N.J. 1958). The *Budden* court reasoned:

> Basically, our view comes down to this: a consequence of an injury which is possible, which may possibly ensue, is a risk which the injured person must bear because the law cannot be administered so as to do reasonably efficient justice if conjecture and speculation are to be used as a measure of damages. On the other hand, a consequence which stands on the plane of reasonable probability, although it is not certain to occur, may be considered in the evaluation of the damage claim against the defendant. In this way, to the extent that men can achieve justice through general rules, a just balance of the warring interests is accomplished.

Id. at 734. *But see* Barton C. Legum, Note, *Increased Risk of Cancer as an Actionable Injury*, 18 GA. L. REV. 563, 568–69 (1984).

> Since they cannot show that their potential injuries will in "reasonable probability" or "reasonable certainty" occur, [those plaintiffs who cannot prove that their future injury is more than 50% likely to occur] go uncompensated for the risk that they must bear. Yet plaintiff *B* with a 40% chance of future damages seems no less deserving of compensation than plaintiff *A* with a 60% chance. It is irrational and arbitrary to award *A* full compensation for potential damages yet deny *B* compensation altogether. It is as if courts are finding that 40% of all tickets in a lottery are absolutely worthless while 60% of the tickets are worth the entire prize.

Id. at 569.

b. Policy Concerns Fundamental to the All-or-Nothing Rule

Several concerns have arisen over new judicial methods that lessen the burden of causation.[51] One concern is that a lessened standard of causation will lead to overcompensation of plaintiffs who face an increased risk of future injury.[52] For example, if courts lessen the requirements of causation, more defendants will be held responsible for an injury that they did not cause, and damages will be awarded for injuries that likely might not occur.[53] This award of damages, some argue, is a violation of traditional notions of corrective justice.[54] Fundamental to our system of justice is the notion that a defendant

51. In a traditional suit for negligence, there are four main elements that a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breached caused the plaintiff's injury; and (4) that the plaintiff was in fact injured. Galligan, *supra* note 46, at 1510–14 (describing in detail the elements necessary for a negligence action). In the increased risk situation, supporters of the all-or-nothing rule are primarily concerned that the element of causation is being compromised. *See supra* Part II.A.1.a (discussing why supporters of the all-or-nothing rule point to traditional theories of causation as the basis for the rule). Traditionally, in order to prove that a defendant's actions caused a plaintiff's injuries, the plaintiff must show that the injury would not have occurred "but for" the defendant's actions (known as legal causation) and that the injury was closely enough related to the defendant's actions that it would be justified to hold that defendant responsible (called proximate causation). *See Galligan*, *supra* note 46, at 1512–14 (discussing and giving examples of legal and proximate causations); *see also infra* Part II.B (discussing alternatives to the all-or-nothing rule of recovery).

52. Lapeze, *supra* note 38, at 253–54; *see, e.g.*, Hahn v. McDowell, 349 S.W.2d 479, 482 (Mo. Ct. App. 1961) ("[I]t would be plainly unjust to compel one to pay damages for results that may or may not ensue and which are merely problematical."); Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 405 (Tex. 1993) ("[L]egal responsibility [under the loss of chance doctrine] is in reality assigned based on the mere *possibility* that a tortfeasor's negligence was a cause of the ultimate harm.").

53. Lapeze, *supra* note 38, at 254 (providing reasons that courts require a higher standard of causation).

54. Andrew R. Klein, *A Model for Enhanced Risk Recovery in Tort*, 56 WASH. & LEE L. REV. 1173, 1187–94 (1999) (discussing the theory of proportional liability and why corrective justice theorists disagree with the notion of meting out damages in proportion to a plaintiff's risk).

> Such a result troubles corrective justice theorists because it imposes tort liability without proof of a nexus between the defendant's conduct and the plaintiff's harm. Indeed, corrective justice scholars have been outright hostile to the notion of violating this principle in the pursuit of the efficiency that proportional liability advocates hope to achieve.

Id. at 1190; *see also* Richard W. Wright, *The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics*, 63 CHI.-KENT L. REV. 553, 578 (1987) (arguing that new methods of proportional liability (namely, the "efficiency theory") are inferior to the traditional negligence theory because these new methods lack adequate causation principles). "The disappearance of the causation requirement from the efficiency theory and its replacement with mathematical functions . . . is neither scientific progress nor a cause for celebration." Wright, *supra*, at 578.

should right the wrongs that he causes a plaintiff to suffer.[55] However, a lower standard of causation will penalize a defendant unfairly by making him pay for a harm that the plaintiff cannot prove the defendant caused.[56]

Another policy concern is that if the causation standard is lessened, it could potentially "open the floodgates" to significantly more litigation.[57] The concern is that any plaintiff who proved even a miniscule risk of future injury could obtain a judgment.[58] This increased litigation, some argue, threatens a massive administrative strain on the judicial system.[59]

Some scholars are also concerned that, because many increased risk claims arise in the arena of medical malpractice, lessening the burden of causation would unfairly penalize those in the medical profession.[60] Indeed, increased malpractice litigation could lead to increased cost of medical care.[61] As some scholars point out, the cost of medical treatment has already increased over the past twenty years because of

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55. Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113, 125–26, 126 n.47 (1990). Kenneth Simons defines corrective justice as the "defendant's obligation to compensate for harm that she has caused wrongfully or in violation of the plaintiff's rights." *Id.* at 125–26.

56. *But see infra* Part II.A.2.b (discussing how, under the all-or-nothing rule, the defendant may still be made to compensate for an injury that never occurs).

57. *See* Lapeze, *supra* note 38, at 254; Beverly P. Spearman, Note, *Tort Law – The Supreme Court Provides a Remedy for Injured Plaintiffs Under the Theory of Loss of Chance* – Alberts v. Schultz, 30 N.M. L. REV. 387, 399 (2000) (arguing that more patients might seek recovery merely because they received ineffective treatment or undesirable results).

58. *See* Lapeze, *supra* note 38, at 254. This concern is especially prevalent in discussions of toxic tort cases. *Id.*; Klein, *supra* note 54, at 1193 ("[I]t would be nearly impossible in many instances to monitor each instance of risk creation in society and to extract ex ante payments accordingly.").

59. Klein, *supra* note 54, at 1192; Spearman, *supra* note 57, at 399–400 ("The potential increase in the number of claims could contribute to an explosion of medical malpractice litigation and result in an excess burden on court dockets.").

60. Jason Perkins, Note, McMullen v. Ohio State University Hospitals*: Legal Recovery for Terminally Ill and Injured Patients Without the Lost Chance Doctrine*, 32 U. TOL. L. REV. 451, 455 (2001); Hodson, *supra* note 35, at § 2 ("[Lessening the burden of causation would be] invit[ing] the jury to indulge in speculation and conjecture . . . . [A] less strict view . . . would be unfair to the medical profession . . . .").

> Health care providers could find themselves defending cases simply because a patient fails to improve or where serious disease processes are not arrested because another course of action could possibly bring a better result. No other professional malpractice defendant carries the burden of liability without the requirement that plaintiffs prove the alleged negligence probably rather than possibly caused the injury.

Gooding v. Univ. Hosp. Bldgs., 445 So. 2d 1015, 1019–21 (Fla. 1984), *quoted in* Perkins, *supra*, at 455.

61. Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 SAN DIEGO L. REV. 401, 412–13 (2000).

fears of malpractice litigation; doctors are already practicing "defensive medicine."[62]

2. Critiques

In the past twenty-five years, the all-or-nothing rule has received much criticism.[63] This Part explores some of these critiques.[64]

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62. Lisa Perrochet et al., *Lost Chance Recovery and the Folly of Expanding Medical Malpractice Liability*, 27 TORT & INS. L.J. 615, 625 (1992). Lisa Perrochet defines "defensive medicine" in the following way: "[Defensive medicine is w]hen a physician prescribes unnecessary tests, procedures, hospitalization, or prolonged hospitalization to avoid liability . . . . Defensive medicine includes keeping more detailed patient records, more patient referrals, prescribing additional diagnostic tests, spending more time with patients, and providing additional treatment procedures." *Id.*; *see also* Kessler, *supra* note 61, at 412–13 (discussing the link between medical personnel's fear of litigation and increased medical costs). Lawrence Kessler states:

> It is generally accepted that anxiety about potential tort liability has changed the way medicine is practiced. Doctors now order more tests and recommend more invasive treatments than in previous years . . . . [T]here is little doubt that the heightened concern over lawsuits has . . . played a substantial role in restructuring patient treatment.

Kessler, *supra* note 61, at 412. Kessler, however, suggests that perhaps a little defensive medicine is not all bad. *Id.* at 412 n.41. He states that perhaps it is the "dependency" relationship between patient and doctor that has made courts lessen the traditional burden and apply doctrines such as "burden switching" or loss of chance. *Id.* at 408–09. *But see* Stanley Joel Reiser, *Malpractice, Patient Safety, and the Ethical and Scientific Foundations of Medicine*, *in* THE LIABILITY MAZE, THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 227, 247 (Peter W. Huber & Robert E. Litan eds., 1991). Stanley Joel Reiser, after reviewing several studies dealing with the "question whether the tort system has prevented injury to patients by inducing better medical practices," concludes:

> [T]he liability ethos does not secure the safety of patients because it damages foundational aspects of medical practice . . . . This prerogative is undermined by the current way in which this country determines malpractice and compensates its victims. Harm caused to patients by malpracticing doctors must be redressed. But our society should find an alternative way of doing this, one that does not compromise the knowledge and values of health care and deprive patients of the best possible exercise of technique, humaneness, and judgment when they enter into a medical relationship.

Id. at 247.

63. *See supra* note 42 and accompanying text (citing *Dillon v. Evanston Hospital*, 771 N.E.2d 357, 361 (Ill. 2002), to explain the most common critiques of the all-or-nothing rule).

64. *See infra* Part II.A.2.a–e (analyzing several critiques of the all-or-nothing rule including the following: (a) the contention that causation can still be proven without the all-or-nothing rule; (b) the all-or-nothing rule works against the purposes of tort law; (c) the all-or-nothing rule unfairly under- and over-compensates plaintiffs; (d) the all-or-nothing rule, in conjunction with judicially imposed time limits, such as statutes of limitations, might prevent recovery for plaintiffs in an increased risk situation; and (e) the rule of res judicata, in conjunction with the all-or-nothing rule, might prevent a plaintiff from recovering for an increased risk, even if that risk does eventually occur).

a. Critics Argue Causation Still Can Be Proven

The primary objection to the all-or-nothing rule is that the risk itself should be considered an injury, and the possibility of its occurrence should be considered separately from causation.[65] As one court noted, it seems "a matter of common sense" that the risk of a future injury should be worth something.[66] Under this analysis, a court should focus upon whether a defendant caused an increased risk *itself*.[67] Instead of being used to determine causation, the probability of the injury occurring would only be considered in determining damages.[68] In the previously discussed car accident hypothetical, the court would

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65. *See* King, *"Reduction of Likelihood," supra* note 40, at 498–99. Professor Joseph King concludes that there are five elements to a traditional negligence suit: (1) duty; (2) failure to exercise reasonable care (breach); (3) but for causation; (4) proximate cause; and (5) the "victim must have suffered compensable harm." *Id.* at 497–99. This fifth element is where the analysis of risk should occur. *Id.* at 499. *But see* G. Edward White, *The Unexpected Persistence of Negligence, 1980–2000*, 54 VAND. L. REV. 1337, 1351 (2001) (arguing that this type of analysis is merely disguising the lessening of the "but for" requirement of causation). "Although these developments all result in the extension of liability where it would previously not have existed, their principle thrust is to tie accountability in the tort system more directly to negligence, since without a modification of the 'but for' requirement in those cases negligent defendants would remain unaccountable." *Id.*; *see also* Nichols, *supra* note 48, at 638 ("For all of its supporters and detractors, the fact remains that [this type of separate analysis] does, on its face, alter traditional causation standards.").

66. Feist v. Sears, Roebuck & Co., 517 P.2d 675, 680 (Or. 1973) (allowing the jury to consider medical testimony showing only a possibility of developing meningitis after a skull fracture). The court held:

> [A]s a matter of common sense, . . . a jury can properly make a larger award of damages in a case involving a skull fracture of such a nature as to result in a susceptibility to meningitis than in a case involving a skull fracture of such a nature as not to result in any such danger, risk, or susceptibility.

Id.

67. JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 9.16 (3d ed. 1997). Jacob Stein argues that "[h]ow much [a plaintiff] should be compensated, of course, depends upon what is fair compensation for what has actually been lost: in short, considering all the odds, what was the value of the lost chance to avoid the future injury." *Id.* This type of analysis is often attributed to Professor Joseph King, who advocated this approach in his original article on loss of chance. *See* Klein, *supra* note 54, at 1186; King, *Causation, Valuation, and Chance*, *supra* note 40, at 1353. King continues to argue that this approach provides the correct analysis in a subsequent article, *"Reduction of Likelihood," supra* note 40, at 509. *See* Legum, *supra* note 50, at 589 ("This quantum of increased risk is a calculation of damages, not a prerequisite in the determination of whether the plaintiff has been injured in the first-instance.").

68. Legum, *supra* note 50, at 589. In fact, once causation is proven to a "reasonable certainty," damages do not need to be proved with the same level of scrutiny:

> [C]ourts have stated that only reasonable certainty is required in proving the fact and cause of the injury, and that the amount of damages—once their cause and fact have been shown—need not be proved with the same degree of certainty. This would indicate that courts are more lenient in allowing the jury to speculate as to the amount of damages after their cause has been proved.

17A AM. JUR. 2D *Contracts* § 196 (2002).

determine whether the defendant more likely than not caused the plaintiff's increased risk of developing heart disease, and if so, would calculate damages by evaluating the chance that the heart disease would develop.[69]

b. Critics Argue that the All-or-Nothing Rule Works Against the Purposes of Tort Law

Scholars define the major purposes of tort law as: (1) providing a peaceful means for compensating parties who might otherwise "take the law into their own hands"; (2) deterring wrongful conduct; (3) encouraging socially responsible behavior; and (4) restoring injured parties to their original condition.[70] Opponents of the all-or-nothing rule argue that allowing recovery for increased risk itself satisfies more of these basic purposes than only allowing recovery if the increased risk is reasonably certain to occur.[71]

i. The All-or-Nothing Rule: Deterring Wrongful Conduct and Encouraging Socially Responsible Behavior

Much criticism of the all-or-nothing rule centers around the inability of a plaintiff to bring a claim for a future injury until that injury actually occurs.[72] This flaw, opponents urge, works against the notion that defendants should be held responsible for their tortious conduct.[73] First, under the all-or-nothing rule, a tortfeasor who merely exposes a person to risk of injury—so long as that risk is no greater than 50%—will not be held accountable and has little or no incentive to cease the tortious conduct.[74] Second, even if the plaintiff who has been exposed to that

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69. *See supra* notes 22–27 and accompanying text (providing a hypothetical increased risk situation).

70. WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 1 (10th ed. 2000); *see also* Ashton, *supra* note 38, at 1086 (describing the four major purposes of tort law).

71. Lapeze, *supra* note 38, at 251 (arguing that allowing recovery for increased risk satisfies basic tort purposes such as preventing future harm, deterring wrongful behavior, and compensating the injured party); *see also infra* Part II.A.2.b.i (analyzing the effect of the all-or-nothing rule on the tort goals of deterring wrongful conduct and encouraging responsible behavior); *infra* Part II.A.2.b.ii (discussing the possible effects of the all-or-nothing rule on the tort goal of returning a plaintiff to his or her original condition).

72. *See supra* notes 65–68 and accompanying text (explaining the argument that causation can still be proven when the risk itself is considered a separate injury).

73. Tamsen Douglass Love, *Deterring Irresponsible Use and Disposal of Toxic Substances: The Case for Legislative Recognition of Increased Risk*, 49 VAND. L. REV. 789, 802–04 (1996); Lapeze, *supra* note 38, at 251.

74. *See* Love, *supra* note 73, at 802; Lapeze, *supra* note 38, at 251. Tamsen Douglass Love further points out that in the case of toxic exposure by a corporation, the people operating the company at the time of the contamination may not be motivated to change their behavior merely for the sake of their successors. Love, *supra* note 73, at 803.

risk eventually develops an injury, during the lapse in time between the initial tortious conduct and the injury, the tortfeasor might die, become bankrupt, or disappear.[75] These problems are of special concern in toxic tort claims when latency periods for disease can be very long.[76] Tortfeasors in these situations can continue to expose people to toxic elements, well after they become aware of the possible negative effects, because they face no immediate consequences for their actions.[77]

ii. The All-or-Nothing Rule Does Not Restore the Plaintiff to His Original Condition

Although it is often impossible to truly restore an injured plaintiff to his or her original condition, tort law attempts to compensate victims as closely as possible for their injuries.[78] Proof of causation can be especially difficult when a plaintiff is trying to recover for an increased risk of a future injury.[79] Opponents of the all-or-nothing rule argue that the risk of a future injury, if in fact caused by the defendant, should be compensated, regardless of the probability of an injury actually occurring.[80] Moreover, if, because of difficulties in proving causation, a plaintiff is made to wait until that future injury actually occurs, he or

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75. Love, *supra* note 73, at 802–03 (discussing the problems with recovering for toxic exposure, especially when there is a long latency period before the illness manifests itself); Gregory L. Ash, Comment, *Toxic Torts and Latent Diseases: The Case for an Increased Risk Cause of Action*, 38 U. KAN. L. REV. 1087 (1990) ("Even if delayed manifestation disease claimants are never barred from suit, they still will suffer from the problems associated with being forced to sue years after the exposure occurs."); Lapeze, *supra* note 38, at 251 (noting that "because of the great lapse in time [in toxic exposure cases], defendants may become bankrupt, die, or disappear").

76. Love, *supra* note 73, at 803; Ash, *supra* note 75, at 1092–93 (discussing an example of when latency periods can pose a problem for tort victims). *See generally* William V. Dunlap & Michael E. Thomas, Note, *Tort Actions for Cancer: Deterrence, Compensation, and Environmental Carcinogenesis*, 90 YALE L.J. 840 (1981) (discussing the problems of long latency periods in toxic tort claims).

77. *See, e.g.*, Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1230 (Mass. Dist. Ct. 1986) (holding that parents of minors who died of leukemia allegedly caused by exposure to contaminated water could not recover for their increased susceptibility to future illness, in part because they could not prove that those injuries were reasonably certain to occur).

78. PROSSER ET AL., *supra* note 70, at 1.

79. *See* Hodson, *supra* note 35, at § 2. Especially in a loss of chance situation, discussed *infra* Part II.C.2.b, the plaintiff often does not originally have a greater than 50% chance of surviving the original harm. *Id.* Thus, it is often impossible to prove that the plaintiff's negligence "caused" the future injury. *See id.*

80. STEIN, *supra* note 67, at § 9.16. Jacob Stein reasons:

> Compensation should be given for the fact of increased susceptibility to the illness . . . even though a particular injury may increase the chances of the plaintiff's developing epilepsy or cancer by only three percent, the fact is that the chances are increased, and the plaintiff should be compensated for that injury.

Id.

she may be unable to recover because of statutory limitations,[81] practical difficulties resulting from a delay in litigation,[82] judgment-proof defendants,[83] or possibly his own death.[84]

c. Critics Argue that the All-or-Nothing Rule Results in Either Under-Compensation or Over-Compensation

Another possible limitation of the all-or-nothing rule is that it unfairly over- or under-compensates plaintiffs.[85] Inappropriate compensation occurs because the rule awards full damages, meaning that the plaintiff is compensated as if the injury has actually occurred, if the plaintiff can show a probability of occurrence exceeding 50%.[86] Conversely, under-compensation occurs because the plaintiff receives no damages if the injury is less than 50% likely to occur.[87] Thus, many plaintiffs who are able to recover in full never experience the compensated injury; in contrast, many plaintiffs who are denied any recovery develop the uncompensated injury.[88] In these cases, a plaintiff's recovery rests fully in the hands of expert witnesses who testify at trial as to the probability

81. *See infra* Part II.A.2.d (discussing the impact of jurisdictional statutes of limitations on claims for increased risk when the jurisdiction adheres to the all-or-nothing rule).

82. *See infra* note 108 (noting how these practical limitations include locating witnesses and recovering from an insolvent or missing defendant).

83. *See infra* note 108 (describing how a defendant might have become bankrupt or have gone missing).

84. KEETON ET AL., *supra* note 45, § 4, at 25; Lapeze, *supra* note 38, at 251. In loss of chance situations, discussed *infra* Part II.C.2.b, the death of the plaintiff is a real possibility if he or she is not able to recover before the future injury actually occurs.

85. *See* Ashton, *supra* note 38, at 1097 (providing an example of when a plaintiff could be overly compensated); *see also* Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 524 (Fla. Dist. Ct. App. 1985) (discussing, in dicta, the "perhaps worse" possibility that a plaintiff could be under-compensated for injuries sustained through exposure to toxins).

86. *See supra* note 42 and accompanying text (explaining the all-or-nothing rule).

87. *See supra* note 42 and accompanying text (explaining the all-or-nothing rule).

88. *See* Ashton, *supra* note 38, at 1097. Ashton gives a poignant example of how the all-or-nothing rule could overcompensate victims of toxic exposure. In his example, 100 shipyard workers are exposed to asbestos on the job. *Id.* One of these workers sues the defendant employer and presents at trial epidemiological studies that establish that he has a 51% chance of developing cancer due to his exposure to asbestos. *Id.* Under the all-or-nothing rule, he recovers in full. *Id.* When the other ninety-nine workers hear of his success, they in turn bring the defendant to court, relying upon the same epidemiological study. *Id.* Although statistically, only half will become sick, the first plaintiffs to successfully sue the defendant will recover in full; those that wait may discover that the defendant is no longer in a position to compensate them, even if they are part of the 50% who do get sick. *Id.*; *see also* Legum, *supra* note 50, at 568–69 (discussing how plaintiffs who can prove a greater than 50% chance that a future injury will occur can recover fully under the all-or-nothing rule, whereas plaintiffs with a risk of future injury that is less than 50% are denied any compensation).

of occurrence.[89] Under the all-or-nothing rule, recovery often depends solely on the statistical number that these witnesses give; is it a 51% chance or a 49% chance?[90] As a result, some commentators suggest that this demand for statistics will increase pressure on medical witnesses to produce precise figures as to a probability, even if they cannot do so with scientific certainty.[91]

d. The All-or-Nothing Rule and Jurisdictional Time Periods

If a plaintiff is unable to meet the probability standard under the all-or-nothing rule, he may be forced to delay litigation until the risk of future injury develops into an actual, tangible injury.[92] Unfortunately for many plaintiffs, delay is impossible because of restrictions such as jurisdictional statutes of limitation.[93] Delays are especially problematic in increased risk claims involving long latency time periods, where exposure or disease may lay dormant in the human body well past the jurisdictional statute of limitations.[94]

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89. *See* DePass v. United States, 721 F.2d 203, 207 (7th Cir. 1983) (Posner, J., dissenting) (arguing that all legal evidence is probabilistic, and the fact that something seems less likely to occur than any other doesn't mean that it shouldn't be recoverable).

90. Legum, *supra* note 50, at 568–69 (discussing how, under the all-or-nothing rule, a plaintiff who proves that there is a 60% chance of future injury recovers in full while a plaintiff who proves a 40% chance of future injury recovers nothing).

91. Spearman, *supra* note 57, at 401. This problem also arises in toxic tort litigation when plaintiffs are relying on epidemiological studies. *See* Legum, *supra* note 50, at n. 37. "Another limitation of epidemiological studies is that they can seldom follow the strict requirements of experimental science, such as the requirement that only one or two variables be different between the exposed and the unexposed group. Consequently, the available observations may be subject to more than one interpretation." *Id.* (citing Richard Doll & Sir Richard Peto, *The Causes of Cancer: Quantitative Estimates of Avoidable Risks of Cancer in the United States Today*, 66 J. NAT'L CANCER INST. 1191, 1218 (1981)).

92. Lisa Heinzerling & Cameron Powers Hoffman, *Tortious Toxics*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 67, 74 (2001); Spearman, *supra* note 57, at 399.

93. Heinzerling & Hoffman, *supra* note 92, at 74; Spearman, *supra* note 57, at 399. Some states, however, have extended the statutes of limitations, especially for toxic tort claims. *See infra* Part II.A.2.d (discussing the restrictions jurisdictional time limits place on recovering for an increased risk, especially in all-or-nothing rule jurisdictions).

94. *See, e.g.*, Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 233 (5th Cir. 1984) (holding that a statute of limitations barred plaintiff's claim for physical and psychological illness, due to exposure to a toxic chemical, when the plaintiff was not diagnosed until twelve years after initial exposure); Spearman, *supra* note 57, at 399 (noting that HIV, the virus that causes AIDS, can lie dormant in the human body for up to five years; thus, a plaintiff negligently exposed to the virus may be barred by a state's statute of limitations if he or she subsequently develops the disease).

Statute of limitations is defined as:

> Statutes of the federal government and various states setting maximum time periods during which certain actions can be brought or rights enforced. After the time period set out in the applicable statute of limitations has run, no legal action can be brought regardless of whether any cause of action ever existed.

BLACK'S LAW DICTIONARY 927 (6th ed. 1990).

e. Res Judicata in Combination with the All-or-Nothing Rule Unfairly Restricts Legitimate Claims

In a traditional suit for negligence, a plaintiff is barred from recovering more than once for injuries stemming from a single incident by the rule of res judicata.[95] Thus, a plaintiff must try to recover all past, present, and prospective damages in one suit.[96] Although this rule is meant to protect defendants from civil double jeopardy, it can cause problems for plaintiffs who have present, recoverable injuries, as well as future, unrecoverable injuries.[97] For example, in the car accident hypothetical, the plaintiff probably would want to sue immediately in order to recover for the cost of his present injury, the leg amputation.[98] Under the all-or-nothing rule, however, he is presently unable to recover for the increased risk of developing heart disease because the risk is less than 50%. Therefore, if he sues right away, he will be barred from recovering for the heart disease, even if it later develops.

Illinois courts have held fast to the rule of res judicata, even as they acknowledge the problems created for plaintiffs who are attempting to recover prospective damages.[99] The risk that a plaintiff might lose the

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95. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). The Restatement explains:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Id. Res judicata is defined as the "[r]ule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

96. RESTATEMENT (SECOND) OF TORTS § 910 cmt. d (1965) (recommending that plaintiffs "must bring their actions no more than three years from the date of the act or omission complained of"); *see also* Howell v. Goodrich, 69 Ill. 556, 559–60 (1873) (holding that a plaintiff may not bring successive suits for injuries arising out of one transaction); Mason v. Parker, 695 N.E.2d 70, 72 (Ill. App. Ct. 5th Dist. 1998) (holding that a plaintiff may not separate claims for personal injury and property damage all arising from one suit; both claims must be brought together or they will be precluded); Radosta v. Chrysler Corp., 443 N.E.2d 670, 672 (Ill. App. Ct. 1st Dist. 1982) (holding that a plaintiff may not sue for indemnity for injury after already recovering personal injury damages).

97. Heinzerling & Hoffman, *supra* note 92, at 73 (discussing the negative impact of res judicata on victims of toxic torts); Klein, *supra* note 54, at 1182; *see also* RESTATEMENT (SECOND) OF TORTS § 910 (1965) ("One injured by the tort of another is entitled to recover damages from the other for all harm, past, present and prospective, legally caused by the tort.").

98. *See supra* notes 22–27 and accompanying text (describing a hypothetical increased risk scenario).

99. *See Howell*, 69 Ill. at 559–60 (reiterating the rule that a plaintiff may only sue once for injuries, future and present, sustained from the same transaction or occurrence); *Mason*, 695 N.E.2d at 71 (discussing what is necessary to bar a claim under the doctrine of res judicata); *Radosta*, 443 N.E.2d at 672 (discussing Illinois law regarding the doctrine of res judicata).

ability to recover for future damages, courts reason, is far outweighed by the need to protect defendants from multiple attempts at litigation.[100]

B. Rejection of the All-or-Nothing Rule: Different Remedies

Most states have recognized at least some of the limitations to the all-or-nothing rule.[101] Two types of solutions were created in order to remedy the problems created by the rule. Some states made slight modifications to existing traditional tort rules, while others created new causes of action.[102]

1. "Tinkering" with the Traditional Tort Rules

Courts and legislative bodies developed three new methods in an attempt to remedy some of the problems created by the all-or-nothing rule, while at the same time maintaining traditional tort principles.[103] This Part briefly explains these three methods, exploring their strengths and their limitations.[104]

a. The Discovery Rule

The discovery rule delays the statute of limitations for recovery for a future injury until the plaintiff discovers or should have discovered the injury.[105] The discovery rule has the greatest impact on injuries with a long latency period, such as exposure to toxic chemicals.[106] In fact,

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100. *Radosta*, 443 N.E.2d at 72 ("This rule is founded upon the plainest and most substantial justice, that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of lawsuits."); *see also Mason*, 695 N.E.2d at 672 (discussing the rationale behind the rule of res judicata).

101. *See* Ashton, *supra* note 38, at 1085; *see also infra* Part II.B (listing several remedies certain jurisdictions have used in order to get around the perceived inequity of the all-or-nothing rule).

102. Lapeze, *supra* note 38, at 257. Lapeze calls this first approach, making modifications to traditional tort rules, "tinkering," and the second approach, creating new causes of action, "redefining the injuries." *Id.* In some jurisdictions, these two approaches are combined. *Id.*; *see also infra* notes 105–20 and accompanying text (describing the "tinkering" methods of the discovery rule, splitting causes of action, and lowering the standard of causation); *infra* notes 121–91 and accompanying text (describing new causes of action called fear of future disease, medical monitoring, loss of chance, and increased risk).

103. *See infra* Part II.B.1.a–c (analyzing these three methods of tinkering: the discovery rule, allowing the plaintiff to "split" her causes of action, and lessening the burden of causation).

104. *See infra* Part II.B.1.a (discussing the discovery rule); *infra* Part II.B.1.b (describing the method that allows a plaintiff to split his or her cause of action); *infra* Part II.B.1.c (describing the rare instance in which courts will lessen the burden of causation in order to allow a plaintiff to recover).

105. Ashton, *supra* note 38, at 1088; Lapeze, *supra* note 38, at 257.

106. *See, e.g.*, Urie v. Thompson, 337 U.S. 163, 169–70 (1949) (holding that it would be unjust to allow the statute of limitations to run on a toxic tort claim before the plaintiff realized that he was sick). The court in *Urie v. Thompson* stated:

Congress recently extended all state statutes of limitations for plaintiffs who have been exposed to toxic substances.[107]

The discovery rule, however, has limited applications in many increased risk situations.[108] If the plaintiff has already suffered a recoverable injury, as in the car accident hypothetical above,[109] the extension of time will be inconsequential because first, the plaintiff is most likely aware at the time of the original injury of other possible future consequences, and second, if the plaintiff attempts to recover for the original injury, the claim for future injuries will be barred under the theory of res judicata.[110]

b. Splitting the Cause of Action

Several jurisdictions allow plaintiffs to "split" a cause of action into two separate claims, even though both arise out of the same transaction or occurrence.[111] Thus, a plaintiff who has suffered both a present

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> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.

Id. at 170; *see* Lapeze, supra note 38, at 257–58 (discussing the impact of the discovery rule upon claims for injuries resulting from toxic exposure); *see also* Ashton, *supra* note 38, at 1088 (discussing how the discovery rule creates difficulties in establishing causation between a present injury and a tortious act occurring many years ago); Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683, 1685 (1983) ("Toxic tort victims do not become aware of their injuries until decades after the tortious act.").

107. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9658 (2000). According to the Comprehensive Environmental Response, Compensation, and Liability Act, "[i]n the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility," the state statute of limitations will not start to run until the plaintiff "knew (or reasonably should have known)" that the injury was caused by the toxic substance. *Id.*

108. Lapeze, *supra* note 38, at 258. Even in the case of toxic exposure, the discovery rule has several limitations. *Id.* First, it is often hard to determine at what point the plaintiff knew or should have known about the injury. *Id.* Second, the lapse in time will create problems for recovery such as locating witnesses and recovering from a possibly insolvent or missing defendant. *Id.*; *see also* Love, *supra* note 73, at 802–03 (discussing the barriers of traditional tort law); Legum, *supra* note 50, at 576–77 (discussing possible consequences of actions brought for increased risk of cancer).

109. *See supra* notes 22–27 and accompanying text (providing an increased risk hypothetical).

110. *See supra* Part II.A.2.e (discussing the theory of res judicata and how it could unfairly prevent legitimate claims).

111. Ashton, *supra* note 38, at 1092; Lapeze, *supra* note 38, at 259–60. These jurisdictions include the District of Columbia, California, Florida, Massachusetts, Michigan, New Jersey, and Pennsylvania. *See, e.g.*, Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 120 (D.C. Cir. 1982) (holding that the statue of limitations on asbestos claims does not run until the disease manifests itself); Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1231–32 (Mass. Dist. Ct.

injury and an increased risk of future injury has two separate tort actions, one for the present injury and one for any future injury, once it occurs.[112] Using the car accident scenario above, the plaintiff would be able to immediately bring suit for the present injury of losing his leg, but he would not be able to recover for his heightened chance of early death resulting from heart disease, until that death actually occurred.[113] Although this rule eliminates the concern about speculative damages,[114] some scholars express concern that splitting the cause of action subjects defendants to multiple litigation and does not remedy problems

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1986) (interpreting Massachusetts law and holding that the increased risk of cancer is a different claim than a claim regarding illnesses the plaintiff has actually suffered); Martinez-Ferrer v. Richardson-Merrell, Inc., 164 Cal. Rptr. 591 (Ct. App. 1980) (holding that earlier symptoms of a disease do not bar a later claim on the full disease); Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517, 521–26 (Fla. Dist. Ct. App. 1985) (holding that a plaintiff could not recover for an increased risk of cancer on top of a claim for injury by asbestos), *appeal denied*, 492 So. 2d 1331 (Fla. 1986); Larson v. Johns-Manville Sales Corp., 399 N.W.2d 1, 5 (Mich. 1986) (holding that it was unreasonable to bar a claim for asbestos-related illness based on the statute of limitations since the disease could not have developed before the statute ran); Mauro v. Raymark Indus., 561 A.2d 257, 264 (N.J. 1989) (holding that neither statute of limitations nor single controversy doctrine will bar a toxic tort plaintiff's timely damage claim after the discovery of a casually related disease); Simmons v. Pacor, Inc., 674 A.2d 232, 239 (Pa. 1996) (holding that medical monitoring should be allowed for plaintiffs who may later develop asbestos related diseases). Illinois has not allowed this type of claim splitting. *See supra* notes 99–100 (discussing res judicata in Illinois). But see section 26 of the *Second Restatement of Judgments*, advocating that in the following increased risk situations, splitting of claims should be allowed:

> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or . . . .
>
> . . . .
>
> (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982).

112. Ashton, *supra* note 38, at 1092 (describing the two causes of action possible under claim splitting as "one for the present injury and one that does not accrue until the latent disease [or injury] occurs"); *cf.* Carroll v. Owens-Corning Fiberglass Corp., 37 S.W.3d 699 (Ky. 2000). In *Carroll v. Owens-Corning Fiberglass Corp.*, the court allowed the plaintiff to bring a negligence action when he developed lung cancer due to asbestos exposure, even though the state statute of limitations had run on the original asbestos claim. *Id.* at 700. The court, however, allowed the plaintiff to bring the second action not on the theory of splitting a cause of action but rather on the theory that there were two distinct injuries, brought about by the same substance. *Id.*

113. *See supra* notes 22–27 and accompanying text (providing the car accident increased risk hypothetical). Obviously, in the hypothetical car accident situation, the plaintiff himself would never be able to recover for the risk of death due to heart disease because the death, as the increased risk, has to occur before he can recover.

114. *See supra* Part II.A.1 (discussing the rationale behind the all-or-nothing rule).

regarding important tort goals, such as deterrence and fair compensation.[115]

c. Lessening the Burden of Causation

Although rare, some jurisdictions have occasionally lessened traditional causation standards of proof in order to compensate a plaintiff who could not otherwise recover damages for a future injury.[116] One example of this modification of causation standards is the case of *Sindell v. Abbott Laboratories*.[117] In *Sindell*, a plaintiff was attempting to recover for future damages resulting from diethylstilbestrol ("DES")[118] exposure but was unable to determine which of the drug manufacturers actually distributed the drug that caused her injuries.[119] Rather than deny the plaintiff damages because she failed to prove causation, the court lowered the reasonable certainty standard and held the defendants liable, but only in proportion to the economic benefit the manufacturers had received from the industry as a whole.[120]

2. Creation of New Causes of Action

Other courts have gone beyond "tinkering" with traditional tort principles in an effort to remedy problems with the all-or-nothing rule,

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115. Ashton, *supra* note 38, at 1092, 1116 (discussing why tort goals are not served by splitting causes of action).

116. Love, *supra* note 73, at 817–18 (discussing instances where courts have modified causation principles, especially in the case of toxic tort litigation). *But see* King, *Causation, Valuation, and Chance*, *supra* note 40, at 1370.

> Attempts to deal with the problem posed by the destruction of a chance by tinkering with the standard of proof can only further confuse matters of loss assignment. If the law on this question is to be rationalized, a vehicle other than the standard of proof will have to be used. The appropriate vehicle is a reevaluation of the traditional ways of thinking about the interest for which relief is sought and the role of chance in valuing that interest.

Id.

117. Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980).

118. According to the *American Heritage College Dictionary*, DES is "[a] synthetic compound . . . having estrogenic properties and no longer prescribed during pregnancy because of the incidence of certain vaginal cancers in the daughters of women so treated." AM. HERITAGE C. DICTIONARY 375 (3d ed. 1997).

119. *Sindell*, 607 P.2d at 928–29.

120. *Id.* at 937; *see also* Procanik v. Cillo, 478 A.2d 755 (N.J. 1984) (holding a doctor liable for an injury resulting to a baby even though the plaintiff had not met the requisite standard of causation).

and have created entirely new causes of action.[121] This Part discusses four of these new emerging causes of action.[122]

a. Toxic Tort Claims: Fear of Future Disease and Medical Monitoring

Several new causes of action were created primarily to allow recovery for instances of latent illness, such as exposure to a toxic substance.[123] Although these new causes of action arise primarily in toxic tort cases, a brief description is warranted because they are relevant to any discussion of future illness.[124] Two of the most prominent claims are the fear of future disease and medical monitoring.[125]

i. Fear of Future Disease

The claim for "fear of future disease" is fundamentally a claim for emotional distress that arises out of a plaintiff's fear of developing a future illness as a result of a defendant's negligence.[126] In the most common scenario, this cause of action is brought based upon a plaintiff's fear of developing cancer or AIDS.[127] In a cause of action for fear of disease, a plaintiff must prove first that the defendant's

121. *See infra* Part II.B.2.a–c (discussing four new causes of action, including fear of future disease, medical monitoring, loss of chance, and increased risk, which were created to solve some of the inherent problems of the all-or-nothing rule).

122. *See infra* Part II.B.2.a (explaining the fear of future disease claim and the medical monitoring claim, both of which are used almost exclusively in toxic tort cases); *infra* Part II.B.2.b (describing the loss of chance doctrine); *infra* Part II.B.2.c (exploring the development of an increased risk doctrine).

123. *See* Lapeze, *supra* note 38, at 260–65. "Latent illness" refers to cases (often toxic tort cases) where the plaintiff's damages "do not manifest themselves for several years after the original exposure or injury." *Id.* at 251.

124. *See, e.g.*, Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (Cal. 1993) (allowing plaintiff exposed to contaminated water caused by defendant's negligence to recover for fear of cancer and medical monitoring costs). "Where a plaintiff can demonstrate a physical injury caused by the defendant's negligence, anxiety specifically due to a reasonable fear of a future harm attributable to the injury may also constitute a proper element of damages." *Id.* at 805.

125. *See* Lapeze, *supra* note 38, at 260–65 (examining causes of action for the fear of future disease and medical monitoring).

126. *Id.* at 260–61; *see* Love, *supra* note 73, at 804–05; Heinzerling & Hoffman, *supra* note 92, at 69. *See generally* Andrew R. Klein, *Fear of Disease and the Puzzle of Futures Cases in Tort*, 35 U.C. DAVIS L. REV. 965, 968 (2002) (discussing recovery for the fear of future disease); Janet Smith, *Increasing Fear of Future Injury Claims: Where Speculation Carries the Day*, 64 DEF. COUNS. J. 547 (1997) (discussing recovery allowed for the fear of future injury and some policy arguments against the cause of action).

127. Robert Michael Ey, *Cause of Action to Recover Damages for Fear of Future Contraction of Disease*, 8 CAUSES OF ACTION 2d § 1, at 157 (1995); *see* Herbert v. Regents of Univ. of Cal., 31 Cal. Rptr. 2d 709 (Ct. App. 1994) (allowing the expansion of fear of future disease to extend to AIDS as well as cancer).

conduct negligently exposed the plaintiff to the toxic substance, and then that the plaintiff suffered *reasonable* emotional distress due to the fear of that future illness.[128]

An example of a claim for fear of future disease is the case of *Potter v. Firestone Tire & Rubber Co.*[129] In *Potter*, four plaintiffs sued Firestone for fear of cancer, alleging that Firestone contaminated their drinking water by illegally dumping carcinogenic waste into a nearby landfill.[130] The California Supreme Court first addressed the issue of whether the plaintiffs could sustain a claim for fear of future disease without showing any present, tangible physical injury.[131] Although the court acknowledged that under California law, a plaintiff must prove the existence of a physical injury in order to recover damages for emotional distress, the court found that the physical injury requirement should not apply to the claim for fear of future injury.[132] Next, the California court turned to the issue of whether the plaintiffs' fears were "reasonable."[133] Although the court acknowledged that it may not be unreasonable for a person exposed to *any* cancerous agents to have a reasonable fear of cancer, the court determined, based on public policy reasons, that the plaintiff must show a "probable" likelihood of developing cancer, not

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128. Lapeze, *supra* note 38, at 261–62. Some jurisdictions add an additional element: that the plaintiff must show some physical manifestation of toxic exposure at the time of recovery. *Id.* at 262; *see also* Ey, *supra* note 127, at § 2 (discussing different jurisdictional standards for bringing a claim based upon fear of future disease).

129. Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (Cal. 1993).

130. *Id.* at 801–02. Among the chemicals allegedly dumped into the nearby landfill were benzene and vinyl chloride, both known to be human carcinogens. *Id.*

131. *Id.* at 804.

132. *Id.* at 809–10.

> This argument overlooks the reasons for our decision to discard the requirement of physical injury. As we observed more than a decade ago, "[t]he primary justification for the requirement of physical injury appears to be that it serves as a screening device to minimize a presumed risk of feigned injuries and false claims."

Id. at 809 (alteration in original) (quoting Molien v. Kaiser Found. Hosps., 616 P.2d 813, 818 (Cal. 1980)). The California Supreme Court also discussed the requirement that, under a suit for any kind of negligence, the plaintiff must show that the defendant had a duty to the plaintiff that the defendant breached. *Id.* at 807–08. In *Potter v. Firestone Tire & Rubber Co.*, the court found that Firestone did in fact owe a duty to the plaintiffs; that duty was imposed by law:

> Firestone did violate a duty imposed on it by law and regulation to dispose of toxic waste only in a class I landfill and to avoid contamination of underground water. The violation led directly to plaintiffs' ingestion of various known and suspected carcinogens, and thus to their fear of suffering the very harm which the Legislature sought by statute to avoid. Their fear of cancer was proximately caused by Firestone's unlawful conduct which threatened serious physical injury.

Id. at 808.

133. *Id.* at 810.

merely a possibility.[134] The court, however, added that if the plaintiff showed the defendant acted with oppression, fraud, or malice, the plaintiff need not meet the "probable" threshold.[135] In the *Potter* case, although the plaintiffs' exposure to cancerous agents increased their chances of developing cancer by only 20-30%, the California Supreme Court found that the defendants acted with malice and fraud.[136] Thus, the plaintiffs were allowed to recover for the fear of future disease.[137]

ii. Medical Monitoring

"Medical monitoring" is a claim that allows a plaintiff to seek recovery for the cost of periodic medical examinations meant to detect the emergence of a latent disease resulting from exposure to a toxic substance.[138] In order to recover for medical monitoring, the plaintiff

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134. *Id.* at 808.

> We cannot say that it would never be reasonable for a person who has ingested toxic substances to harbor a genuine and serious fear of cancer where reliable medical or scientific opinion indicates that such ingestion has significantly increased his or her risk of cancer, but not to a probable likelihood. Indeed, we would be very hard pressed to find that, as a matter of law, a plaintiff faced with a 20 percent or 30 percent chance of developing cancer cannot genuinely, seriously and reasonably fear the prospect of cancer. Nonetheless, we conclude, for the public policy reasons identified below, that emotional distress caused by the fear of a cancer that is not probable should generally not be compensable in a negligence action.

Id. The public policy reasons the court laid out were as follows: (1) fear of compromising the "availability and affordability of liability insurance for toxic liability risks"; (2) the possible detrimental impact on the health care field; (3) the detrimental affect of allowing fear of cancer recovery to those plaintiffs who actually develop cancer; and (4) the need to establish a rule that can be applied from case to case. *Id.* at 812–14.

"Probable" in this case seems to refer to the "reasonably certain" standard used by many jurisdictions in determining a plaintiff's ability to recover under the all-or-nothing rule. *See supra* note 38 (noting that, although the terminology may differ between jurisdictions, the basic test is whether the plaintiff has proved that the risk is more than 50% likely to occur).

135. *Potter*, 863 P.2d at 817 ("[F]ear of cancer damages may be recovered without demonstrating that cancer is probable where it is shown that the defendant is guilty of 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.'").

136. *Id.* at 818. The California Supreme Court held that Firestone acted with "oppression, fraud, or malice" because key Firestone officials had knowledge of the dangers of careless disposal of toxic chemicals and did not act to stop the disposal. *Id.*

137. *Id.*

138. Lapeze, *supra* note 38, at 263. For a leading case on medical monitoring, see *Ayers v. Jackson Township*, 525 A.2d 287, 312–13 (N.J. 1987) (holding that plaintiffs could recover for future medical surveillance to detect signs of cancer on the theory that the medical expenses could be construed as presently identifiable injuries); see also Love, *supra* note 73, at 805–06 (discussing generally a claim of medical monitoring); Kara L. McCall, Comment, *Medical Monitoring Plaintiffs and Subsequent Claims for Disease*, 66 U. CHI. L. REV. 969, 975–97 (1999) (exploring in detail the claim for medical monitoring).

must prove that the exposure to the toxic substance caused a need for medical monitoring.[139]

The California Supreme Court in *Potter v. Firestone Tire & Rubber Co.* also allowed the toxically exposed plaintiffs to recover for medical monitoring costs, despite the mere possibility that the plaintiffs would later develop cancer.[140] The court noted that, under California law, courts do not need to inquire into the probability of future injury in order to award medical monitoring costs.[141] This rule is based on public policy considerations such as: (1) the public health interest of early detection; (2) deterring wrongful behavior by pollutants; (3) reducing medical costs because of early detection; and (4) better serving societal notions of fairness and justice.[142] In light of these considerations, the plaintiffs in *Potter* were allowed to recover for "reasonable and necessary periodic examination" in order to monitor their possible development of cancer.[143]

b. Loss of Chance

This Part focuses on a popular new cause of action, the "loss of chance" doctrine, adopted by many jurisdictions over the past twenty years.[144]

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139. Lapeze, *supra* note 38, at 263–64 (discussing the burden of proof necessary to prove a medical monitoring claim).

140. *Potter*, 863 P.2d at 821–25; *see also supra* notes 129–37 and accompanying text (discussing the facts of *Potter* and the California Supreme Court's holding regarding fear of future disease).

141. *Potter*, 863 P.2d at 824. "It bears emphasizing that allowing compensation for medical monitoring costs 'does not require courts to speculate about the probability of future injury. It merely requires courts to ascertain the probability that the far less costly remedy of medical supervision is appropriate.'" *Id.* (quoting *In re* Paoli R.R. Yard PCB Litigation, 916 F.2d 829, 852 (3d Cir. 1990)).

142. *Id.*

143. *Id.* at 825.

144. *See infra* note 146 (listing the jurisdictions which have adopted the loss of chance doctrine). The foundations of the loss of chance doctrine are generally attributed to *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966) (holding that a physician was liable for negligence when his failure to act terminated a patient's chances of survival). Jason Perkins, Note, McMullen v. Ohio State University Hospitals*: Legal Recovery for Terminally Ill and Injured Patients Without the Lost Chance Doctrine*, 32 U. TOL. L. REV. 451, 453 (2001). The theoretical underpinnings of the doctrine of loss of chance, however, may be attributed to Professor Joseph H. King, Jr., and his article, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*. *Id.* at 460 (citing King, *Causation, Valuation, and Chance*, *supra* note 40, at 1372–84). Another possible source of the doctrine is the RESTATEMENT (SECOND) OF TORTS § 323 (1965). *Id.* at 460. The *Second Restatement of Torts* states:

> 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

i. The Doctrine of Loss of Chance

A typical loss of chance claim arises in a medical malpractice suit where a patient sues his or her doctor for negligently causing him or her to lose some chance of surviving an illness.[145] For example, a patient visits his or her doctor, who fails to immediately diagnose him or her with cancer. If the patient had been diagnosed immediately, then he or she would have had a 40% chance of survival; however, he or she has only a 20% chance of survival by the time he or she is correctly diagnosed. In many jurisdictions the patient can sue the doctor for the 20% reduction in his or her chance of survival.[146] Compensation for

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> things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 323 (1965); *see also infra* Part II.B.2.b.i (giving a general description of the loss of chance doctrine); *infra* Part II.B.2.b.ii (describing the development and application of the loss of chance doctrine in Illinois). *See generally* Nichols, *supra* note 48, at 626–28; Perkins, *supra*, at 453–54 (giving good synopses of the history and development of loss of chance).

145. Julie A. Braun & Maria Elyse Rabar, *Recent Developments in Medicine and Law*, 36 TORT & INS. L.J. 463, 484–85 (2001); Nichols, *supra* note 48, at 626–28; Perkins, *supra* note 144, at 453–54. States vary in their application of the loss of chance doctrine:

> [L]oss of chance has been applied to a number of situations, including where (1) an already ill patient suffers a complete elimination of an insubstantial or substantial probability of recovery from a life-threatening disease or condition; (2) a patient survives, but has suffered a reduced chance for a better result or for complete recovery; and (3) a person incurs an increased risk of future harm, but has no current illness or injury.

Id. Although most states allow a claim for loss of chance only when the ultimate injury is death, some allow for loss of chance for an injury. *See, e.g.*, Holton v. Mem'l Hosp., 679 N.E.2d 1202 (Ill. 1997) (allowing loss of chance recovery for a non-fatal injury); *see also* Hodson, *supra* note 35, § 7, at 10 (discussing the different standards that jurisdictions apply to a claim for loss of chance).

146. *See* Margaret T. Mangan, Comment, *Loss of Chance Doctrine: A Small Price to Pay for Human Life*, 42 S.D. L. REV. 279, 290 n.117 (1996–1997); Nichols, *supra* note 48, at 620 n.12. About half of the United States has adopted or considered some form of loss of chance. These states include: Alabama, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Montana, New Jersey, New York, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Washington, West Virginia, and Wisconsin. *See, e.g.*, McBride v. United States, 462 F.2d 72 (9th Cir. 1972) (applying Hawaii law); Schumacher v. United States, 714 F. Supp. 154 (M.D.N.C. 1988) (applying North Carolina law); James v. United States, 483 F. Supp. 581 (N.D. Cal. 1980) (applying California law); Murdoch v. Thomas, 404 So. 2d 580 (Ala. 1981); Thompson v. Sun City Cmty. Hosp., Inc., 688 P.2d 605 (Ariz. 1984); Blackmon v. Langley, 737 S.W.2d 455 (Ark. 1987); Sharp v. Kaiser Found. Health Plan of Colo., 710 P.2d 1153 (Colo. Ct. App. 1985); Richmond County Hosp. Auth. v. Dickerson, 356 S.E.2d 548 (Ga. Ct. App. 1987); Holton v. Mem'l Hosp., 679 N.E.2d 1202 (Ill. 1997); Mayhue v. Sparkman, 627 N.E.2d 1354 (Ind. Ct. App. 1994), *cert. granted*, 653 N.E.2d 1384 (Ind. 1995); Wendland v. Sparks, 574 N.W.2d 327 (Iowa 1998); Robertson v. Counselman, 686 P.2d 149 (Kan. 1984); Hastings v. Baton Rouge Gen. Hosp., 498 So. 2d 713 (La. 1986); Wollen v. DePaul

this reduction in chance is calculated by multiplying the lost chance (in this case 20%) by the full amount of the resulting injury (usually, this amount is the "worth" of the patient's life).[147] As an example, assume that the patient's life is "worth" $100,000 according to a jury.[148] The

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Health Ctr., 828 S.W.2d 681 (Mo. 1992); Perez v. Las Vegas Med. Ctr., 805 P.2d 589 (Nev. 1991); Aasheim v. Humberger, 695 P.2d 824 (Mont. 1985); Lanzet v. Greenburg, 594 A.2d 1309 (N.J. 1991); Kallenberg v. Beth Israel Hosp., 357 N.Y.S.2d 508 (1974); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467 (Okla. 1987); Harris v. Kissling, 721 P.2d 838 (Or. Ct. App. 1986); Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978); Herskovits v. Group Health Coop., 664 P.2d 474 (Wash. 1983); Catlett v. MacQueen, 375 S.E.2d 184 (W. Va. 1988); Ehlinger by Ehlinger v. Sipes, 454 N.W.2d 754 (Wis. 1990). *But see* Frank M. McClellan, *Tort Liability of Physicians, Hospitals, and Other Health Care Providers*, SGO95 A.L.I.-A.B.A. 29, 47–48 (2002) (citing Chudson v. Ratra, 548 A.2d 172 (Md. Ct. Spec. App. 1988)). "To date, Maryland has declined both to recognize 'loss of chance' as a discrete injury for which an independent tort action will lie or to allow recovery, even within the traditional framework of negligence/proximate cause for destruction of a chance that is less than 'better-than-even.'" *Id.*

147. *See* Darrell L. Keith, *Loss of Chance: A Modern Proportional Approach to Damages in Texas*, 44 BAYLOR L. REV. 759, 763–74 (1992) (explaining in detail the calculation for determining damages under loss of chance).

148. *See, e.g.*, Illinois Supreme Court Committee on Jury Instructions in Civil Cases, ILLINOIS PATTERN JURY INSTRUCTIONS: CIVIL, No. 31.04 (4th ed. 2000). The worth of a person's life is determined after the jury weighs several factors. For example, in an Illinois wrongful death suit brought by a surviving spouse, the jury is instructed to determine the "worth" of the decedent's life in the following way:

> If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the _____ of the decedent for the pecuniary loss proved by
> widow and/or lineal next of kin, e.g., son
> the evidence to have resulted to _____ from the death of the
> widow and/or lineal next of kin, e.g., son
> decedent. "Pecuniary loss" may include loss of money, benefits, goods, services, [and] society [and sexual relations]. Where a decedent leaves _____, the law recognizes a presumption that
> widow and/or lineal next of kin, e.g., son
> _____ has sustained some substantial pecuniary loss by
> widow and/or lineal next of kin, e.g., son
> reason of the death. The weight to be given this presumption is for you to decide from the evidence in this case. In determining pecuniary loss, you may consider what the evidence shows concerning the following:
>
> [1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]
>
> [2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]
>
> [3. Decedent's personal expenses (and other deductions);]
>
> [4. What instruction, moral training, and superinten-dence of education the decedent might reasonably have been expected to give his child had he lived;]
>
> [5. His age;]
>
> [6. His sex;]
>
> [7. His health;]
>
> [8. His habits of (industry,) (sobriety,) (and) (thrift);]
>
> [9. His occupational abilities;]

patient would receive 20% of $100,000, or $20,000, for his or her "lost chance" of surviving the illness.[149] Many jurisdictions apply a two-part test to lost chance cases: the patient must first prove that he or she lost a chance of a more favorable outcome, and second, that this lost chance was more than likely attributable to the defendant.[150] Typically, loss of chance only applies in cases where the patient's chance of surviving before the negligence was less than 50%.[151] In jurisdictions that still adopt the all-or-nothing rule but also allow for a loss of chance claim, the all-or-nothing rule applies if the chance of survival before negligence is greater than 50%, often allowing the patient to fully recover.[152]

ii. Loss of Chance in Illinois

After much uncertainty in the appellate courts,[153] the Illinois Supreme Court formally adopted the loss of chance doctrine in *Holton*

[10. The marital relationship that existed between _____ (widow) and _____ (decedent);]

[11. The relationship between _____ (lineal next of kin, e.g., son) and _____ (decedent).]

[_____ (widow) is not entitled to damages for loss of _____ (decedent)'s society and sexual relations after _____ (date of widow's remarriage).]

Id.

149. Nichols, *supra* note 48, at 626–28; Perkins, *supra* note 144, at 452. This valuation scheme is most often attributed to Professor Joseph H. King, Jr., and his article, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*. Perkins, *supra* note 144, at 460 (citing King, *Causation, Valuation, and Chance*, *supra* note 40, at 1372–84). King, however, relies in part on section 912(e) of the *Second Restatement of Torts*. *Id.* "When an injured person seeks to recover for harms that may result in the future, he is entitled to damages based upon the probability that harm of one sort or another will ensue and upon its probable seriousness if it should ensue." RESTATEMENT (SECOND) OF TORTS § 912(e) (1965).

150. *See, e.g.*, Jorgenson v. Vener, 616 N.W.2d 366, 370–71 (S.D. 2000) (discussing the two-part test and Professor King's commentary).

151. Perkins, *supra* note 144, at 451 (discussing the difficulty in proving medical malpractice when chance of recovery is already low before the negligent act). *See generally* King, *"Reduction of Likelihood," supra* note 40, at 538 (discussing a case where a lung cancer victim only had to show he had lost some chance of survival).

152. *See, e.g.*, Estate of Donnini v. Ouano, 810 P.2d 1163 (Kan. Ct. App. 1991) (holding that loss of chance could only be applied to less than 50% probability cases). If more than 50%, the all-or-nothing rule should be applied. *Id. See generally* William E. Westerbeke & Stephen R. McAllister, *Survey of Kansas Tort Law*, 49 U. KAN. L. REV. 1037, 1103 (2001) (discussing *Estate of Donnini* and the loss of chance doctrine).

153. *See* Holton v. Mem'l Hosp., 679 N.E.2d 1202, 1203–04 (Ill. 1997) ("In this appeal we are asked to resolve whether application of the 'loss of chance' doctrine in medical malpractice cases lessens the plaintiff's burden of proving proximate cause. This question has caused conflicting opinions among the Illinois appellate court panels."). *Borowski v. Von Solbrig*, 328

v. Memorial Hospital.[154] In *Holton*, the Illinois Supreme Court allowed the plaintiff to recover for her loss of chance of recovering from a spinal infection that led to her paralysis.[155] She alleged that due to the doctor's negligent failure to diagnose her condition right away, she lost any chance she might have had of fully recovering.[156] In its opinion, the *Holton* court applied the loss of chance doctrine despite the defendant's contention that loss of chance gives rise to a relaxed standard of proximate cause.[157] The court, relying on a controversial Illinois Supreme Court opinion, *Borowski v. Von Solbrig*,[158] reasoned that in order to prove loss of chance, the plaintiff need only prove regular negligence, not that a better result would have been achieved absent the alleged negligence.[159]

c. Increased Risk as the Injury Itself

The most recent cause of action created by courts in an attempt to avoid the all-or-nothing rule is the "increased risk" doctrine.[160] This

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N.E.2d 301 (Ill. 1975), caused much of this uncertainty. *See* Jennifer Deitchman, Note, Meck v. Paramedic Services of Illinois: *Proximate Cause and the Lost Chance Doctrine in Illinois*, 11 LOY. CONSUMER L. REV. 241, 242 & n.11 (1999). After restating the all-or-nothing rule, the court in *Borowski* stated that "[i]t is unnecessary to extend the burden-of-proof requirements of a medical malpractice case beyond those of an ordinary negligence case by adding the further requirement that the plaintiff prove a better result would have been achieved absent the alleged negligence of the doctor." *Borowski*, 328 N.E.2d at 305. *See generally* Hodson, *supra* note 35, at § 7b (discussing the history of loss of chance in Illinois before it was formally adopted).

154. *Holton*, 679 N.E.2d at 1203–04; *see also* Christopher White, *Survey of Illinois Law: Medical Malpractice Law*, 24 S. ILL. U. L.J. 935, 957–58 (2000) (discussing the adoption of the lost chance doctrine).

155. *Holton*, 679 N.E.2d at 1204–07, 1213.

156. *Id.* at 1204–07. It is interesting to note that Illinois allowed recovery under the loss of chance doctrine for an injury other than death. *See supra* note 145 (citing the Illinois case that adopted the loss of chance doctrine in Illinois).

157. *Holton*, 679 N.E.2d at 1207; *see also supra* note 51 (defining proximate causation).

158. Borowski v. Von Solbrig, 328 N.E.2d 301 (Ill. 1975); *see also supra* note 153 (discussing the *Borowski* decision and explaining why it was so controversial).

159. *Holton*, 679 N.E.2d at 1207.

160. *See, e.g.*, Dillon v. Evanston Hosp., 771 N.E.2d 357 (Ill. 2002). Because this doctrine is relatively new, there is not a consensus as to what it should be called. To avoid confusion, however, this Note will refer to it simply as "increased risk" because it was so called in *Dillon*. *Id.* at 361. For example, some scholars have proposed theories for the recovery of increased risk that are basically the same as the increased risk doctrine in *Dillon*, but those scholars have given their theories different names. *See, e.g.*, Klein, *supra* note 54, at 1184 (advocating an increased risk theory known as the "Proportional Liability Model"). Andrew Klein advocates for a "Proportional Liability Model," originally proposed by Glen O. Robinson in *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779, 787 (1985), which is fundamentally the same theory as increased risk. *Id.* at 1176 n.16. Many states have at some point allowed for the recovery for an increased risk when the probability of occurrence is less than 50%, though few have officially rejected the all-or-nothing rule in favor of the increased risk doctrine. The following jurisdictions have at some point allowed recovery for a less than 50%

doctrine represents the most drastic departure from the all-or-nothing rule; it is basically a full rejection of the old "more likely than not" theory of causation.[161] Under the increased risk cause of action, a plaintiff may recover for the risk of a future injury, *no matter what* the probability of its occurrence, because the increased risk itself is considered an injury.[162] This means that regardless of whether the risk is 5% or 70%, under the increased risk doctrine, a plaintiff can recover for the risk itself.[163] Of course, the plaintiff must still prove that the defendant caused that increased risk.[164] Like the loss of chance doctrine, the risk is considered only under the damages analysis, where the probability of the future injury occurring is multiplied by the full

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probable risk: California, Connecticut, Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Michigan, Missouri, New Jersey, Oregon, Pennsylvania, and Virginia. *See, e.g.*, Martin v. City of New Orleans, 678 F.2d 1321, 1324 (5th Cir. 1982); Valori v. Johns-Manville Sales Corp., No. CIV.A.82-2686, 1985 WL 6074 (D.N.J. Dec. 11, 1985); Starlings v. Ski Roundtop Corp., 493 F. Supp. 507, 510 (M.D. Pa. 1980); McCall v. United States, 206 F. Supp. 421, 426 (E.D. Va. 1962); Coover v. Painless Parker Dentist, 286 P. 1048 (Cal. Ct. App. 1930); Petriello v. Kalman, 576 A.2d 474 (Conn. 1990); United States v. Anderson, 669 A.2d 73 (Del. 1995); Swain v. Curry, 595 So. 2d 168, 172 (Fla. Dist. Ct. App. 1992); *Dillon*, 771 N.E.2d at 357; DeBurkarte v. Louvar, 393 N.W.2d 131 (Iowa 1986); Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984); Falcon v. Mem'l Hosp., 462 N.W.2d 44 (Mich. 1990); Wollen v. DePaul Health Ctr., 828 S.W.2d 681 (Mo. 1992); Feist v. Sears, Roebuck & Co., 517 P.2d 675 (Or. 1973); *see also* Legum, *supra* note 50, at 569–70 & 570 n.22 (listing some of the jurisdictions that have at some point allowed recovery despite a less than 50% chance of future injury occurring).

161. *See Dillon*, 771 N.E.2d at 370 (rejecting the all-or-nothing rule); *see also supra* notes 2–13 (discussing *Dillon* in further detail); *infra* Part III (same).

162. Love, *supra* note 73, at 809 ("[I]ncreased risk recovery is predicated on the idea that the defendant has inflicted a personal injury on the plaintiff by increasing her chances of contracting a disease."); Lapeze, *supra* note 38, at 265–66 ("By treating the increased risk as an independent legal harm, damages are based on the notion that the defendant has injured the plaintiff by merely increasing his or her risk to develop a disease."); *see also* Heinzerling & Hoffman, *supra* note 92, at 73 ("[C]ourts are, for the first time, recognizing the protected interest of being free from future harm, 'devoid of both certainty and existing physical harm.'" (quoting Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 157 (1992))).

163. United States v. Anderson, 669 A.2d 73, 75–76 (Del. 1995).

> The increased risk doctrine is considerably broader than the loss of chance doctrine since the former appears to apply even if the plaintiff has a greater than 50 percent chance of survival prior to the malpractice. Moreover, the increased risk doctrine might apply to situations not involving death as the potential outcome.

Id. at 75 (quoting United States v. Cumberbatch, 647 A.2d 1098, 1100 n.3 (Del. 1994)).

164. *See Dillon*, 771 N.E.2d at 370. The *Dillon* court repeatedly emphasized the need to still prove proximate causation. *Id.* Indeed, the proximate cause issue was so important that the supreme court remanded the case back to the trial court because the trial court's jury instructions were not explicit enough on this subject. *Id.* at 372; *see also infra* Part III.C.2 (discussing the court's decision to remand the case based on the lack of clarity in the jury instructions on the topic of causation).

amount that the injury would be worth were it actually to occur.[165] In fact, because the increased risk analysis is so similar to the loss of chance doctrine, some scholars see the former merely as an extension of the latter.[166]

There are, however, two major differences between increased risk and loss of chance.[167] First, loss of chance is only applied to cases where the risk of future injury is less than 50%.[168] If the risk is proven to be more than 50%, then the all-or-nothing rule applies and the patient will recover in full.[169] The increased risk doctrine, on the other hand, applies no matter how great the risk (5% or 95%, for example); the all-or-nothing rule never comes into play.[170] Second, loss of chance traditionally has been restricted to cases where the ultimate injury is death.[171] Conversely, the increased risk doctrine has not been so restricted, although it currently has not been determined how far it will be applied.[172]

One of the best examples of a court's adoption of the increased risk doctrine is the Connecticut Supreme Court's decision in *Petriello v. Kalman*.[173] In *Petriello*, the plaintiff sued her doctor for medical malpractice after he pierced her uterus during the removal of a stillborn fetus, resulting in the removal of one foot of the plaintiff's small intestine.[174] At trial, the plaintiff's expert witnesses testified that, as a

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165. *Dillon*, 771 N.E.2d at 370 ("A plaintiff can obtain compensation for a future injury that is not reasonably certain to occur, but the compensation would reflect the low probability of occurrence.").

166. *See, e.g.*, King, *"Reduction of Likelihood," supra* note 40, at 510 n.64 (noting that some courts have applied the loss of chance doctrine to future injuries (citing Petriello v. Kalman, 576 A.2d 474 (Conn. 1990); United States v. Anderson, 669 A.2d 73 (Del. 1995))); Lapeze, *supra* note 38, at 266 (seeing increased risk as an extension of loss of chance); Tammy J. Meyer & Kyle A. Lansberry, *Recent Development in Indiana Tort Law*, 34 IND. L. REV. 1075, 1084 (2001) (discussing how Indiana has adopted what Meyer and Lansberry call the "loss of chance" or "increased risk of harm" doctrine); *cf.* United States v. Anderson, 669 A.2d 73, 75–76 (Del. 1995) (discussing the differences between loss of chance and increased risk).

167. *See Anderson*, 669 A.2d at 75–76 (analyzing the differences between increased risk and loss of chance).

168. *Id.* at 75.

169. *See* note 152 and accompanying text (discussing and giving an example of the implications of the all-or-nothing rule on jurisdictions that have adopted loss of chance).

170. *Anderson*, 669 A.2d at 75; *see also supra* note 163 (providing analysis of the differences between loss of chance and increased risk).

171. *Anderson*, 669 A.2d at 75; *see also supra* note 145 (discussing how different jurisdictions apply the loss of chance doctrine).

172. *See infra* Part IV (analyzing the possible impact and scope of the increased risk doctrine).

173. Petriello v. Kalman, 576 A.2d 474 (Conn. 1990). The *Dillon* court relied heavily on the *Petriello* decision. *See* Dillon v. Evanston Hosp., 771 N.E.2d 357, 368–69 (Ill. 2002).

174. *Petriello*, 576 A.2d at 475–78.

result of the removal of a part of her small intestine, there was an 8-16% increased risk that the plaintiff would suffer a bowel obstruction in the future.[175] The plaintiff consequently requested damages for the increased risk of a future bowel obstruction in addition to other alleged damages.[176]

Explicitly overruling several previous Connecticut cases, the *Petriello* court held that the plaintiff was entitled to compensation for the increased risk of future bowel obstruction.[177] The court reasoned that the increased risk should be seen as a "present" injury for which the plaintiff should be compensated.[178] In terms of damages, the court determined that compensation should be given "to the extent that the future harm is likely to occur."[179]

The *Petriello* court began its analysis by discussing the all-or-nothing rule, which was the rule in Connecticut at that time.[180] In discussing that doctrine, the court noted that the all-or-nothing rule meant that a plaintiff who proved a 51% chance of a future injury could receive full compensation where a plaintiff who proved only a 49% chance of occurrence could not recover anything.[181] The court further observed that the all-or-nothing rule did not recognize that the increased risk of

175. *Id.* at 477. A bowel obstruction is "a blockage that completely stops or seriously impairs the passage of intestinal contents." THE MERCK MANUAL (HOME EDITION), § 9, ch. 112 (2002) (emphasis removed) (discussing gastrointestinal emergencies), *available at* http://www.merck.com/pubs/mmanual_home/sec9/112.htm (last visited Apr. 8, 2003). The obstruction can cause swelling of the intestine above the blockage, or, if the blood supply is cut off, the obstruction can cause gangrene to develop in the intestine within six hours. *Id.*

176. *Petriello*, 576 A.2d at 480.

177. *Id.* at 483. In so deciding, the *Petriello* court explicitly overruled other Connecticut cases that had applied the all-or-nothing rule to increased risk situations, including *Healy v. White*, 378 A.2d 540 (Conn. 1977), *Davis v. P. Gambardella & Son Cheese Corp.*, 161 A.2d 583 (Conn. 1960), *Sheiman v. Sheiman*, 121 A.2d 285 (Conn. 1956), and *Johnson v. Connecticut Co.*, 83 A. 530 (Conn. 1912). *Id.* at 484 n.11.

178. *Id.* at 483.

> When viewed in this manner, the plaintiff was attempting merely to establish the extent of her present injuries. She should not be burdened with proving that the occurrence of a future event is more likely than not, when it is a present risk, rather than a future event for which she claims damages.

Id.

179. *Id.* at 484; *see also supra* note 165 and accompanying text (explaining the method of measuring damages under the increased risk doctrine).

180. *Petriello*, 576 A.2d at 482–83. The all-or-nothing rule was reaffirmed by a 1977 Connecticut Supreme Court case, *Healy v. White*, 378 A.2d 540 (Conn. 1977) (allowing a boy to recover for future occurrence of epilepsy and brain damage because the epilepsy and brain damage were a probability, not a possibility).

181. *Petriello*, 576 A.2d at 482–83.

injury itself constituted a present injury for which a plaintiff could be compensated.[182]

The *Petriello* court abandoned the all-or-nothing rule,[183] citing four reasons for its decision.[184] First, the court recognized the potential over- and under-compensation consequence of the all-or-nothing rule.[185] The court stated that this consequence was inconsistent with tort law's goal of "compensating tort victims fairly" for *all* of the injuries they had sustained.[186] Conversely, the court recognized that it was also important to avoid "windfall awards" for injuries that would never actually happen.[187] Second, the court recognized that because a plaintiff may only recover once for all injuries stemming from a single incident, she should have the opportunity to recover, at least partially, for a present risk that might occur in the future.[188] Third, the court reasoned that it was simply *fairer* to compensate the plaintiff at least partially for her increased risk rather than to ignore the risk completely.[189] Fourth, the court noted that damages for future consequences are always uncertain, no matter what the "probability" of occurrence may be.[190] The court concluded that allowing the plaintiff partial recovery for the increased risk of a bowel obstruction, based upon the likelihood of occurrence, was the most equitable and sensible solution.[191]

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182. *Id.* at 482. Many courts, before officially adopting the increased risk doctrine, circumvented the all-or-nothing rule by describing the risk itself as a "present injury." *See, e.g.*, Davis v. Graviss, 672 S.W.2d 928, 931 (Ky. 1984) (upholding an award to a plaintiff for future complications relating to a car accident); Feist v. Sears, Roebuck & Co., 517 P.2d 675, 679 (Or. 1973) (sustaining an award to plaintiff when plaintiff's injury could increase her susceptibility to meningitis); Schwegel v. Goldberg, 228 A.2d 405, 409 (Pa. Super. Ct. 1967) (upholding award for increased risk of future epilepsy).

183. *Petriello*, 576 A.2d at 484.

184. *Id.* at 482–84.

185. *Id.* at 482; *see supra* Part II.A.2.c (discussing the potential problem of over- and under-compensation with the applications of the all-or-nothing rule).

186. *Petriello*, 576 A.2d at 483; *see supra* Part II.A.2.b (discussing the potential problems with the all-or-nothing rule as they relate to traditional tort principles).

187. *Petriello*, 576 A.2d at 483; *see also supra* note 88 (giving an example of how "windfall awards" could occur under the all-or-nothing rule).

188. *Petriello*, 576 A.2d at 483 ("Our legal system provides no opportunity for a second look at a damage award so that it may be revised with the benefit of hindsight."); *see also supra* Part II.A.2.e (discussing the problem of res judicata).

189. *Petriello*, 576 A.2d at 483; *see also supra* note 66 (quoting *Fiest v. Sears, Roebuck & Co.*, 517 P.2d 675, 680 (Or. 1973), where court held that it was just a "matter of common sense" to award a plaintiff damages for an increased risk).

190. *Petriello*, 576 A.2d at 484.

191. *See id.*

C. *Increased Risk in Illinois*

As noted previously, the general standard in Illinois prior to *Dillon v. Evanston Hospital* was the all-or-nothing rule.[192] Some Illinois appellate courts, however, deviated from this rule and allowed recovery under the doctrine of increased risk.[193] This Part first discusses the major cases that established the all-or-nothing rule as the standard in Illinois.[194] Next, this Part discusses the Illinois cases deviating from that standard, revealing a steady progression toward the full rejection of the all-or-nothing rule.[195]

1. Illinois Establishes the All-or-Nothing Rule

Most scholars recognize the 1909 Illinois Supreme Court case, *Amann v. Chicago Consolidated Traction Co.*,[196] as the first Illinois case to officially adopt the all-or-nothing rule.[197] While *Amann* is generally given credit for establishing the all-or-nothing rule, Illinois courts had established fully the rule's foundation, the reasonable certainty standard, by the end of the nineteenth century.[198] For instance, in the 1897 case, *Lake Shore & Michigan Southern Railway v. Conway*,[199] the Illinois Supreme Court refused to allow a plaintiff to recover for an alleged permanent disability unless he could show that the permanent disability was reasonably certain to result from the injury.[200] In *Conway*, a derailed boxcar seriously injured a railroad

192. *See supra* notes 34–42, and accompanying text (explaining the all-or-nothing rule).

193. *See, e.g.*, Anderson v. Golden, 664 N.E.2d 1137, 1138 (Ill. App. Ct. 3d Dist. 1996) (permitting the introduction of testimony concerning plaintiff's increased risk of future harm); Lindsay v. Appleby, 414 N.E.2d 885, 893 (Ill. App. Ct. 2d Dist. 1980) (affirming award to plaintiff for future pain and suffering related to a car accident); Harp v. Ill. Cent. Gulf R.R., 370 N.E.2d 826, 830 (Ill. App. Ct. 5th Dist. 1977) (allowing recovery for risk of future injury).

194. *See infra* Part II.C.1 (discussing the important Illinois cases that established the all-or-nothing rule).

195. *See infra* Part II.C.2 (tracing the emergence of the increased risk doctrine in Illinois courts).

196. Amann v. Chi. Consol. Traction Co., 90 N.E. 673 (Ill. 1909), *overruled by* Dillon v. Evanston Hosp., 771 N.E.2d 357 (Ill. 2002); *see also infra* notes 205–11 and accompanying text (discussing *Amann*).

197. *See Dillon*, 771 N.E.2d at 366–67 (noting that *Amann* is recognized as the first Illinois case to officially adopt the all-or-nothing rule); Jeff L. Lewin, *The Genesis and Evolution of Legal Uncertainty About "Reasonable Medical Certainty,"* 57 MD. L. REV. 380, 409–10 (1998).

198. Lewin, *supra* note 197, at 409.

199. Lake Shore & Mich. S. Ry. v. Conway, 48 N.E. 483, 484 (Ill. 1897) ("[P]ermanent disability, in order to be a ground for damages, must be one that is reasonably certain to result from the injury complained of.").

200. *Id.*

worker.[201] The plaintiff sought compensation for his resulting disabilities, such as loss of time and unemployment.[202] The Illinois Supreme Court held that showing a disability was only "reasonably likely" to result from the original injury was not enough.[203] Instead, the court held that a permanent disability, in order to be a ground for damages, must be an injury that is *reasonably certain* to result from the defendant's negligence.[204]

Twelve years later, in *Amann*, the Illinois Supreme Court used this reasonable certainty standard to establish the all-or-nothing rule.[205] In *Amann*, a passenger on a streetcar was injured when the streetcar's conductor allegedly threw him out of the car.[206] It appeared that the only physical injuries the plaintiff sustained from the fall were abrasions and a slightly sprained ankle.[207] However, the plaintiff in *Amann* had, previous to the streetcar accident, suffered a paralytic stroke that affected the whole left side of his body.[208] At trial, the plaintiff brought in a medical expert who testified that the abrasions and ankle sprain "might aggravate" the paralysis.[209] Upon review, the Illinois Supreme Court found that the medical expert's testimony should not have been

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201. *Id.* at 483. The plaintiff was an employee of the defendant railroad company, working from a tower house to operate the train gates. *Id.* The accident occurred when a boxcar derailed and struck the tower occupied by the plaintiff, turning it over and causing it to collapse with the plaintiff inside. *Id.*

202. *Id.* at 484.

203. *Id.* ("In a case of this character it may be laid down as a general rule that the alleged permanent disability, in order to be a ground for damages, must be one that is reasonably certain to result from the injury complained of.").

204. *Id.* In this case, the court found that the jury instructions were adequate to support a finding that the permanent injury was reasonably certain to be caused by the defendant, mainly because of this clause of the instruction: "'in the assessment of damages, [the jury] must take into consideration only such elements of claimed damages or injuries as they believe are established by the evidence in the case.'" *Id.* (citing instructions as provided to the jury); *see also supra* note 38 (discussing the confusing nature of the term "reasonable certainty").

205. Amann v. Chi. Consol. Traction Co., 90 N.E. 673, 674 (Ill. 1909), *overruled by* Dillon v. Evanston Hosp., 771 N.E.2d 357 (Ill. 2002). *Amann* was followed closely by another increased injury case, *Lauth v. Chicago Union Traction Co.*, 91 N.E. 431, 434 (Ill. 1910), which reaffirmed the *Amann* ruling. *Amann* and *Lauth* are often viewed together as establishing the all-or-nothing rule. *See* Lewin, *supra* note 197, at 409. In *Lauth*, the Illinois Supreme Court reversed a judgment for the plaintiff on the grounds that the lower court had incorrectly allowed a physician to answer a hypothetical question about the possibility that a strangulated hernia might cause death. *Lauth*, 91 N.E. at 434–35.

206. *Amann*, 90 N.E. at 673.

207. *Id.* at 674. The abrasions and ankle sprain occurred on the left side of the plaintiff's body, the same side as his paralysis. *Id.*

208. *Id.* at 673.

209. *Id.* at 674. This medical expert's testimony was allowed only after the defense objected several times. *Id.* In fact, in his testimony, the witness denied being an expert, stating that he was a physician who had treated the plaintiff several times. *Id.*

allowed because "[a] mere possibility, or even a reasonable probability, that future pain or suffering may be caused by an injury . . . is not sufficient to warrant an assessment of damages."[210] The court reasoned that it would be unjust to require a defendant to pay for future or speculative damages that were less than reasonably certain to occur.[211]

2. Illinois Slowly Deviates from the All-or-Nothing Rule

For years after *Amann*, the Illinois rule that a future injury could only be compensated if it was reasonably certain to occur was repeatedly reaffirmed.[212] In the late 1970s, however, some Illinois appellate courts started to slowly deviate from this long-time standard.[213] This Part discusses several of the major Illinois cases that deviated from the all-or-nothing rule.[214] These cases reject the all-or-nothing rule, often giving little or no rationale for doing so.[215] Although the reasoning of these cases is often unclear, taken together, these cases establish a trend

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210. *Id.* Although the court in *Amann* distinguished between "reasonable possibility," "reasonable probability," and "reasonable certainty," most jurisdictions, including Illinois, recognize that the test is whether the plaintiff has established a better than 50% chance that he will sustain the future injury). *Id.*; *see also supra* note 38 (discussing the complexity surrounding the terms of art used to connote "more than 50% likely").

211. *Amann*, 90 N.E. at 674. "It would be plainly unjust to require a defendant to pay damages for results that may or may not ensue, and that are merely problematical. To justify a recovery for future damages the law requires proof of a reasonable certainty that they will be endured in the future." *Id.*

212. *See, e.g.*, Stevens v. Ill. Cent. R.R., 137 N.E. 859, 863 (Ill. 1922) (saying that "[m]ere surmise or conjecture cannot be regarded as proof of an existing fact or of a future condition that will result"); Lauth v. Chi. Union Traction Co., 91 N.E. 431, 434 (Ill. 1910) (holding that "[t]o form a proper basis for recovery . . . it is necessary that the consequences relied on must be reasonably certain to result. They cannot be purely speculative."); Wehmeier v. UNR Ind., 572 N.E.2d 320, 335 (Ill. App. Ct. 4th Dist. 1991) (reasoning that "a plaintiff has the burden of proving by a preponderance of the evidence that the defendant caused the plaintiff harm or injury; mere conjecture or speculation is insufficient"); Morrissy v. Eli Lilly & Co., 394 N.E.2d 1369, 1376 (Ill. App. Ct. 1st Dist. 1979) (noting that "[i]n Illinois, possible future damages in a personal injury action are not compensable unless reasonably certain to occur").

213. *See infra* notes 217–66 and accompanying text (discussing the slow deviation from the all-or-nothing rule).

214. *See infra* notes 217–66 and accompanying text (describing, in the following order, the holdings in *Harp v. Illinois Central Gulf Railroad*, 370 N.E.2d 826 (Ill. App. Ct. 5th Dist. 1977), *Lindsay v. Appleby*, 414 N.E.2d 885 (Ill. App. Ct. 2d Dist. 1980), *Anderson v. Golden*, 664 N.E.2d 1137 (Ill. App. Ct. 3d Dist. 1996), and *DePass v. United States*, 721 F.2d 203 (7th Cir. 1983)).

215. *See, e.g.*, *Anderson*, 664 N.E.2d at 1139 ("Some courts have allowed compensation for such increased risks without explaining their rationale." (citing Jeffers v. Weinger, 477 N.E.2d 1270 (Ill. App. Ct. 3d Dist. 1985); *Lindsay*, 414 N.E.2d at 885; *Harp*, 370 N.E.2d at 826)); *see also infra* notes 224–31 and accompanying text (discussing the holding in *Lindsay*, where the court never mentioned the all-or-nothing rule even though it was applicable to the facts of the case).

that eventually leads to a complete rejection of the all-or-nothing rule in Illinois.[216]

The first sign of a deviation came in *Harp v. Illinois Central Gulf Railroad*,[217] where the Fifth District Appellate Court of Illinois acknowledged the all-or-nothing rule but then allowed the plaintiff to recover for a risk that was not reasonably certain to occur.[218] The plaintiff in *Harp* injured his back while within the scope of his employment with the defendant.[219] As a result of the accident, he suffered a bulging disc in his spine, which, a doctor testified, could rupture if sufficient force were to be exerted upon it.[220] Although the doctor could not testify that the rupture was reasonably certain to occur, the doctor did indicate that the disc was reasonably certain to rupture *if* sufficient force or trauma were to be exerted upon it.[221] The *Harp* court held that the plaintiff could recover for this possible rupture because it was likely to occur if force was exerted on it, and, moreover, the plaintiff had to avoid strenuous activities.[222] Without further explaining its deviation from the all-or-nothing rule, the court allowed the plaintiff to recover for the risk, saying that, among other things, it impaired the plaintiff's "ability to labor."[223]

Another Illinois court diverged from the all-or-nothing rule in *Lindsay v. Appleby*.[224] Unlike *Harp*, the *Lindsay* court did not

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216. *See infra* note 217–266 and accompanying text (discussing the cases which deviated from the all-or-nothing rule).

217. Harp v. Ill. Cent. Gulf R.R., 370 N.E.2d 826 (Ill. App. Ct. 5th Dist. 1977).

218. *Id.* at 829–30.

219. *Id.* at 827. The plaintiff in *Harp* hurt his back when he jumped off of a train, upon which he worked as a brakeman. *Id.* at 827. When he jumped, he landed on a loose ballast. *Id.* He subsequently lost his balance and threw himself away from the train; when he landed on the ground he felt a snap in his lower back. *Id.*

220. *Id.* at 830. *The Merck Manual* explains the process of how a vertebral disc can bulge and rupture: "When a disk in the spinal column ruptures, its soft inner material bulges out through a weak area in the hard outer layer. A ruptured disk causes pain and sometimes damages nerves." THE MERCK MANUAL (HOME EDITION), § 6, ch. 69 (2002), *available at* http://www.merck.com/mrkshared/mmanual_home/illus/69i2.jsp (last visited Apr. 8, 2003).

221. *Harp*, 370 N.E.2d at 830.

222. *Id.* "[The] plaintiff is required to bear the risk of the occurrence of the force and to avoid those activities which could result in trauma or force upon the disc." *Id.* Although the *Harp* court did not deviate directly from the all-or-nothing rule, subsequent Illinois courts have interpreted the decision to be at best a "loose interpretation" of the reasonable certainty standard. *See* DePass v. United States, 721 F.2d 203, 208 (7th Cir. 1983) (Posner, J., dissenting) (discussing the holding in *Harp* and saying that "where . . . the issue was extent of injury, the 'reasonable certainty' formula was invoked but then liberally interpreted to allow an accident victim to recover damages for the possible future rupture of a disc injured in the accident").

223. *Harp*, 370 N.E.2d at 830.

224. Lindsay v. Appleby, 414 N.E.2d 885 (Ill. App. Ct. 2d Dist. 1980).

acknowledge the all-or-nothing rule, even though it was relevant to the issue of damages.[225] Instead, the Second District Appellate Court of Illinois seemed to create its own standard for the recovery for increased risk.[226] In *Lindsay*, the plaintiff was involved in a car accident caused by the defendant.[227] Afterwards, she suffered from severe seizures and manic depression.[228] Although the plaintiff presented no conclusive evidence that the car accident was the primary cause of her seizures, the court allowed the plaintiff to recover for the pain and suffering associated with the seizures, as well as for the increased risk of future seizures.[229] The court, however, neither discussed the likelihood of those future seizures occurring, nor made any reference to the all-or-nothing rule.[230] It said merely that "[a]n increase in the risk of injury traceable to the conduct of a defendant is compensable as part of the recovery for future pain and suffering."[231]

Perhaps the most direct rejection of the all-or-nothing rule came from the Third District Appellate Court of Illinois in *Anderson v. Golden*.[232] In *Anderson*, the Third District acknowledged the all-or-nothing rule, explicitly deciding not to follow it.[233] The plaintiff in *Anderson* sued her doctor for medical malpractice after he failed to properly test a cancerous growth after removing it from her shoulder.[234] The trial

225. *Id.* at 891–920.

226. *See infra* notes 229–31 and accompanying text (discussing the test that the *Lindsay* court applied instead of the all-or-nothing rule).

227. *Lindsay*, 414 N.E.2d at 886–87.

228. *Id.* at 887–88. Actually, the plaintiff's manic-depression was unrelated to the car accident, but the manic-depression medicine caused difficulties in treatment for the seizures. *Id.* at 890.

229. *Id.* at 887–88, 891–92. In justifying its decision, the court focused on several other injuries that were more certain to occur: (1) scarring in the brain (from the car accident) would cause more extreme, convulsive seizures; (2) the plaintiff would be required, for some time, to remain under medical observation and on medication; (3) the treatment of seizures would be complicated by the medication for the plaintiff's manic-depressive condition; and (4) the accident caused complication of the plaintiff's treatment for manic-depression. *Id.* at 891.

230. *Id.* at 891–920.

231. *Id.* at 891.

232. Anderson v. Golden, 664 N.E.2d 1137 (Ill. App. Ct. 3d Dist. 1996).

233. *Id.* at 1139. The *Anderson* court first concluded that because of cases such as *Lindsay v. Appleby*, 414 N.E.2d 885 (Ill. App. Ct. 2d Dist. 1980), and *Harp v. Illinois Central Gulf Railroad*, 370 N.E.2d 826 (Ill. App. Ct. 5th Dist. 1977), discussed *supra*, Illinois law on the subject of increased risk was unclear. *Id.*; *see also supra* notes 217–31 (discussing *Lindsay* and *Harp*). It then noted that case law from other jurisdictions established a trend toward rejecting the all-or-nothing rule. *Anderson*, 664 N.E.2d at 1139. The Third District Appellate Court of Illinois then merely said that "Illinois should follow this trend." *Id.*

234. *Anderson*, 664 N.E.2d at 1138–39. Specifically, the complaint alleged that although the doctor had removed the original growth, he failed to have it tested by a pathologist, which would have revealed that there was an abnormal condition. *Id.* at 1138. The growth recurred two years

court refused to allow medical experts to testify to the heightened possibility that the plaintiff would have a recurrence of cancer due to the doctor's negligence.[235] Those experts were prepared to testify that if the plaintiff had received proper treated initially, then she would have had only a 5% risk of the recurrence of cancer.[236] Due to the doctor's negligence, however, the experts thought that her chance of recurrence had increased to 30-40%.[237] Despite the fact that the increased risk of developing cancer was less than 50%, the appellate court reversed the trial court's decision, holding that the plaintiff could recover for the increased risk of cancer by treating the increased risk as an element of present damages.[238]

The *Anderson* court noted that other jurisdictions had begun to recognize that the increased risk itself should be compensable as a present injury.[239] The court determined that Illinois should follow that trend, saying: "The treatment of an increased risk of future injury as a present injury does not run afoul of the general rule that possible future damages are not compensable absent evidence that such damages are reasonably certain to occur."[240] The court tried to reconcile its holding with the all-or-nothing rule, saying that the purpose of the all-or-nothing rule was to avoid awarding damages based upon speculation or conjecture.[241] The *Anderson* court reasoned that there was nothing

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later; it was at that time that Anderson was diagnosed with dermatofibrosarcoma protuberans, a cancerous condition that necessitated further surgery. *Id.*

235. *Id.* at 1138–39. The medical experts' testimonies were excluded based upon the defendant's motion in limine to bar the plaintiff from eliciting testimony regarding future conditions that were less than reasonably certain to occur. *Id.*

236. *Id.* at 1138.

237. *Id.* Although the trial court granted the defendant's motion to exclude the medical testimony, the court certified this question for review:

> Assuming that a plaintiff in a medical negligence action has established that the negligence of the defendant has to a reasonable degree of certainty caused injury to the plaintiff, may the plaintiff present evidence to a reasonable degree of certainty that the plaintiff is at an increased risk of future harm as a result of the injury she has sustained, even if the increased risk of future harm is less than fifty percent (50%) likely to occur?

Id. at 1139.

238. *Id.* at 1139.

239. *Id.* (citing Petriello v. Kalman, 576 A.2d 474 (Conn. 1990); Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984); Feist v. Sears, Roebuck & Co., 517 P.2d 675 (Or. 1973); Schwegel v. Goldberg, 228 A.2d 405 (Pa. Super. Ct. 1967)).

240. *Id.*

241. *Id.* The Third District Appellate Court reasoned:

> An award of damages for an increased risk of future injury is proper only if it can be shown to a reasonable degree of certainty that the risk was proximately caused by the defendant's negligence. Therefore, there is no element of speculation or conjecture in awarding damages for increased risks.

Id.

speculative about awarding a plaintiff damages for a "present" risk of future damages because the evidence showed that the increased risk was proximately caused by the defendant's negligence.[242]

The last important development in the Illinois trend toward rejection of the all-or-nothing rule is a strong dissent issued by Judge Posner in the Seventh Circuit decision of *DePass v. United States*.[243] The facts should be familiar to the reader, as the hypothetical at the beginning of this section is adopted from the facts of *DePass*.[244] The plaintiff in *DePass* suffered from a leg amputation as a result of an automobile accident caused by the defendant.[245] Doctors testified at trial that as a result of the amputation, the plaintiff faced a 44-58% *higher than normal* chance of dying from heart disease.[246] The Seventh Circuit affirmed the district court's decision barring recovery based upon the increased risk of heart disease.[247] The district court found that the medical testimony and other evidence was too speculative and did not establish that death from heart disease was reasonably certain to occur.[248] The Seventh Circuit majority affirmed this finding but qualified its decision by noting that appellate courts are not allowed to re-evaluate evidence, rather, they may only decide whether the district court's finding was clearly erroneous.[249] Therefore, the *DePass* majority did not reach the issue of whether a 44-58% higher than normal chance of dying from heart disease qualified as a reasonable

242. *Id.* The *Anderson* court reasoned that, despite the less than 50% chance that the cancer would return, proximate causation was still established:

> In the case at bar, Anderson has expert testimony to show that Golden's failure to test the growth removed from her shoulder proximately caused her to suffer an increased risk of a recurrence and metastasis. The jury should be allowed to hear this testimony and to decide whether and to what extent Anderson should be compensated for this increased risk.

Id. at 1139–40.

243. DePass v. United States, 721 F.2d 203 (7th Cir. 1983). Although a Seventh Circuit United States Court of Appeals dissent is not binding on the Illinois Supreme Court, the Illinois Supreme Court appeared to consider Judge Posner's dissent persuasive. *See* Dillon v. Evanston Hosp., 771 N.E.2d 357, 368 (Ill. 2002) (citing *DePass*, 721 F.2d at 208 (Posner, J., dissenting)).

244. *See supra* notes 22–27 and accompanying text (providing a hypothetical increased risk situation taken from the facts of *DePass*).

245. *DePass*, 721 F.2d at 203.

246. *Id.* at 209.

247. *Id.* at 205. The district court apparently thought that the testimony and other evidence about the increased risk of heart disease did not establish "the fact of injury by a preponderance." *Id.*

248. *Id.*

249. *Id.* (citing West v. Schwarz, 182 F.2d 721, 722 (7th Cir. 1950)).

certainty under the all-or-nothing rule.[250] Judge Posner, in a strong dissent, disagreed with the majority's decision not to allow recovery for the increased risk of heart disease.[251]

Judge Posner first chastised the district court judge for dismissing the medical expert witness' testimony too quickly.[252] He emphasized that courts must not be too quick to throw away evidence based upon probabilities since most legal evidence is comprised of probabilities.[253] Further, Judge Posner opined that the risk of dying early is a real injury and should be compensated.[254] In an oft quoted phrase, Judge Posner said that "[a] tortfeasor should not get off scot-free because instead of killing his victim outright he inflicts an injury that is likely though not certain to shorten the victim's life."[255] Judge Posner went on to distinguish between the burden of proof necessary for establishing that the defendant *proximately caused* the injury and the proof needed to establish *the extent* of his injuries.[256] Judge Posner emphasized that, in the case of increased risk, the plaintiff must show that the defendant proximately caused the increased risk.[257] Once the plaintiff has

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250. *Id.* at 205–06 ("[W]e do not reach the issue of whether merely placing plaintiff in a class of persons subject, on the average, to an increased risk of injury is sufficient to establish a compensable injury under Illinois law.").

251. *See id.* at 206–10 (Posner, J., dissenting).

252. *Id.* at 207 (Posner, J., dissenting). "I do not think the judge rejected DePass's medical evidence because he thought it false (how could he have?) or outweighed by other evidence (there was no contrary evidence). He appears to have rejected the entire class of evidence—statistical evidence—illustrated by the medical evidence in this case." *Id.* (Posner, J., dissenting).

253. *Id.* (Posner, J., dissenting). Posner rebuked the district court judge by saying:

> But it seems more likely from his remarks that the district judge thought that all probabilities are too uncertain to provide a basis for awarding damages. Yet most knowledge, and almost all legal evidence, is probabilistic. Even the proposition that DePass will die some day is merely empirical. It is of course highly probable that he will die but it is not certain in the way it is certain that 10^3 is 1000 or that I am my wife's husband—propositions that are true as a matter of definition rather than of observation. If Dr. Cohen had testified that DePass had heart disease and was therefore likely to die younger than most men in his age group, he would have been making a probabilistic statement; and the probabilities that are derived from statistical studies are no less reliable in general than the probabilities that are derived from direct observation, from intuition, or from case studies of a single person or event—all familiar sources of legal evidence.

Id. (Posner, J., dissenting).

254. *Id.* at 208 (Posner, J., dissenting).

255. *Id.* (Posner, J., dissenting).

256. *Id.* (Posner, J., dissenting); *see also infra* notes 259–66 and accompanying text (discussing how Judge Posner expands on what he sees as the difference between establishing proximate cause and establishing the extent of a plaintiff's injuries by contrasting two increased injury cases); *supra* Part II.A.2.a (discussing why opponents of the all-or-nothing rule argue that causation can still be proven under doctrines like increased risk).

257. *DePass*, 721 F.2d at 207 (Posner, J., dissenting).

established that the defendant caused the risk, however, he does not have a heavy burden in proving the *extent* of the injury.[258]

Finally, Judge Posner distinguished between different types of increased risk cases, arguing that in some situations, when there is no present physical injury, the plaintiff *should* be held to the reasonable certainty standard.[259] For example, Judge Posner agreed with a First District Appellate Court of Illinois decision in *Morrissy v. Eli Lilly & Co.*,[260] an increased risk case that reaffirmed the all-or-nothing rule.[261] In *Morrissy*, the First District refused to allow recovery for the increased risk of developing cancer due to DES[262] exposure because the development of cancer was merely possible, not probable.[263] At the time of the lawsuit, the plaintiff in *Morrissy* had no present physical injury, but was merely trying to recover for her increased risk of developing cancer.[264] Judge Posner distinguished *Morrissy* from *DePass*, stating that the plaintiff in *Morrissy* had not yet suffered a tangible injury but the plaintiff in *DePass* was already seriously injured.[265] This injury made a difference, Judge Posner argued, because the jury in *DePass* needed to ascertain only *the extent* of his injury, whereas the jury in the *Morrissy* situation needed to decide whether the defendant *proximately caused* the increased risk.[266]

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258. *Id.* at 209 (Posner, J., dissenting); *see also* RESTATEMENT (SECOND) OF TORTS § 912 cmt.a (1977) ("It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.").

259. *DePass*, 721 F.2d at 208 (Posner, J., dissenting).

260. Morrissy v. Eli Lilly & Co., 394 N.E.2d 1369 (Ill. App. Ct. 1st Dist. 1979).

261. *DePass*, 721 F.2d at 208 (Posner, J., dissenting). The majority recognized that the state of the law in Illinois was uncertain on the issue of whether or not increased risks of injury were compensable because of *Lindsay v. Appelby*, 414 N.E.2d 885 (Ill. App. Ct. 2d Dist. 1980). *Id.* at 206; *see also supra* notes 224–31 and accompanying text (discussing *Lindsay*).

262. *See supra* note 118 (defining "DES").

263. *Morrissy*, 394 N.E.2d at 1376.

> Plaintiff here . . . is essentially alleging the existence of latent disease as a present injury to herself and the proposed classes. The nexus thus suggested between exposure to DES In utero and the possibility of developing cancer or other injurious conditions in the future is an insufficient basis upon which to recognize a present injury. In Illinois, possible future damages in a personal injury action are not compensable unless reasonably certain to occur.

Id.

264. *Id.* at 1372.

265. *DePass*, 721 F.2d at 208 (Posner, J., dissenting).

266. *Id.* (Posner, J., dissenting). Judge Posner argued that in *DePass*, the only issue was the extent of the plaintiff's injury, "an issue on which courts traditionally do not impose a heavy burden of proof on plaintiffs." *Id.* This distinction between the increased risk of future injuries arising from present, tangible injuries and those arising from non-manifested, latent injuries is an interesting one. Most often, claims for increased risks of disease where there is no manifest

III. DISCUSSION

The Illinois Supreme Court decided *Dillon v. Evanston Hospital* on May 23, 2002.[267] In its holding, the court sided with lower courts, such as *Anderson*, in pulling away from the traditional all-or-nothing rule.[268] Part III of this Note first discusses the facts of the *Dillon* case.[269] This Part then looks at the lower courts' opinions in *Dillon* and the subsequent issues on appeal.[270] Next, this Part describes the Illinois Supreme Court's holding, first, on the issue of increased risk as a separate recoverable damage, then on the issue of the lower court's jury instruction.[271] Finally, this Part discusses Chief Justice Harrison's partial dissent as to the court's holding that the jury instruction was not explicit enough.[272]

A. The Facts

Diane Dillon began treatment for breast cancer in 1989 under the care of Dr. Stephen Sener at Evanston Hospital.[273] In April 1989, Dr. Sener inserted a sixteen-centimeter-long catheter into Dillon's chest, just under her clavicle, in order to aid in administering chemotherapy and drawing blood.[274] A year later, in July 1990, Dr. Sener removed seven centimeters of the catheter, inadvertently leaving nine centimeters of the catheter inside Dillon's chest.[275] Although doctors took an x-ray of Dillon's chest in December 1990, they never informed her that a portion of the catheter remained inside her.[276]

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injury arise in toxic exposure cases. *See* Lapeze, *supra* note 38, at 260–65 (discussing the particular problems that arise in toxic tort cases because of the latent injury); *supra* note 123 and accompanying text (defining latent illness and discussing what problems accompany toxic tort claims). Although there is no clear rule on the issue, courts have been extremely reticent to award damages in these cases. *See infra* Part V.A (discussing the uncertain impact of *Dillon* on toxic tort cases).

267. Dillon v. Evanston Hosp., 771 N.E.2d 357, 361 (Ill. 2002).

268. *Id.* at 369–70.

269. *See infra* Part III.A (discussing the facts of *Dillon*).

270. *See infra* Part III.B (describing the jury verdict of the trial court and the subsequent affirmation by the appellate court).

271. *See infra* Part III.C.1 (discussing the court's holding that increased risk is an injury that may be compensated, so long as the plaintiff can show proximate cause); Part III.C.2 (discussing the court's holding that the jury instruction was not explicit enough).

272. *See infra* Part III.D (summarizing Chief Justice Harrison's dissent).

273. *Dillon*, 771 N.E.2d at 361.

274. *Id.*; *see also supra* note 2 (defining "catheter").

275. *Dillon*, 771 N.E.2d at 361. After Dillon learned that part of the catheter was still inside her, she met with Dr. Sener. *Id.* Although he could not recall his specific actions in removing the catheter, he acknowledged that part of the catheter indeed remained inside her, embedded in her heart. *Id.*

276. *Id.*

In December 1991, a different hospital performed a chest x-ray on Dillon and discovered that the nine centimeter-long catheter fragment had migrated to her heart, embedding itself in the right atrium.[277] Dillon consulted several doctors after she learned of the catheter's existence, including Dr. Sener.[278] All but one of those doctors advised her that removing the catheter would be more dangerous than leaving it in place.[279] As the majority of physicians she consulted agreed with Dr. Sener, Dillon decided to leave the catheter fragment in her heart, rather than face the risk of removal.[280]

B. The Jury Verdict and the Defendants' Appeal

Dillon filed a medical malpractice suit against Evanston Hospital, Dr. Stephen Sener, and others who had a part in either the catheter's manufacture or its insertion.[281] At trial, the jury found for the plaintiff and against Dr. Sener and Evanston Hospital.[282] The jury awarded Dillon $1.5 million for past pain and suffering, $1.5 million for future pain and suffering, and $500,000 for the "increased risk of future injuries."[283]

At trial, the medical witnesses testified that the risks associated with leaving the catheter inside Dillon's chest were infection, perforation of the heart, arrhythmia, embolization, and further migration of the catheter fragment.[284] At the time of the trial, Dillon had not yet

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277. *Id.* The x-ray revealed that the tip of the catheter was embedded in the wall of the right atrium while the rest of the fragment was floating free in Dillon's heart. *Id.*

278. *Id.*

279. *Id.* Dr. Sener and other doctors advised Dillon against removing the catheter fragment because there were several risks involved in such a removal. *Id.* For instance, all or part of the fragment could "escape" and go further into her heart, or the removal might cause the heart wall to tear. *Id.*

280. *Id.*

281. *Id.* at 360–61. Dillon filed a complaint in the Circuit Court of Cook County against defendants Evanston Hospital, Dr. Stephen Sener (the doctor who had inserted and removed the catheter), Dr. David Lim (who assisted Dr. Sener in the catheter's insertion), Davol, Inc. (the manufacturer of the catheter), Dr. Ronald Port (radiologist), and Kathy Henderson (nurse). *Id.*

282. *Id.* at 361. After the completion of pre-trial proceedings, the trial court entered summary judgment in favor of Dr. Lim but allowed the case to proceed against all other defendants. *Id.* The other named defendants, except Dr. Sener, and Evanston Hospital, were relieved of liability at the end of the trial. *Id.*

283. *Id.* at 361–62. The court notes that Dillon did not seek "compensation for past or future medical expenses," but just for past and future pain and suffering and the increased risk of future injuries. *Id.* at 362.

284. *Id.* at 366. According to the *American Heritage College Dictionary*, "arrhythmia" is "[a]n irregularity in the force or rhythm of the heartbeat," and "embolism" is the "[o]bstruction or occlusion of a blood vessel by [a mass, such as a blood clot]." AM. HERITAGE C. DICTIONARY 76, 449 (3d ed. 1997).

suffered from any of these conditions, although she suffered anxiety because of the catheter's presence.[285] The medical witnesses made it clear that not one of these risks was reasonably certain to occur in the future.[286] The risk of infection, doctors estimated, ranged from approximately 0-20%.[287] The risk of arrhythmia was less than 5% and the risks of perforation, migration, and embolization were also low.[288]

Dr. Sener and Evanston Hospital appealed the jury verdict.[289] On appeal, the defendants primarily contended that the circuit court erred in giving jury instructions allowing recovery for the increased risk of future injuries when no evidence presented at trial showed that any future injury was "reasonably likely to occur."[290] The appellate court, in an unpublished opinion, affirmed the trial court's instructions and upheld the jury verdict.[291] The defendants then appealed to the Illinois Supreme Court, which granted certiorari.[292]

C. The Illinois Supreme Court Decision

In a monumental opinion written by Justice Freeman, the Illinois Supreme Court overturned more than ninety years of precedent and affirmed the appellate court's holding that a plaintiff could recover for the mere increased risk of future injuries, even if that risk was not substantial.[293] The Illinois Supreme Court held that a plaintiff should

285. *Dillon*, 771 N.E.2d at 366. Although the court notes that Dillon suffered anxiety, Dillon did not seek recovery for the fear of future injury, a separate cause of action in some states. *See id.* at 362, 366 (discussing Dillon's theories of recovery); *supra also* notes 123–28 and accompanying text (discussing the cause of action for the fear of future injury).

286. *Dillon*, 771 N.E.2d at 366; *see also supra* note 38 and accompanying text (providing a discussion of the "reasonable certainty" standard of proof).

287. *Dillon*, 771 N.E.2d at 366.

288. *Id.*

289. *Id.* at 362.

290. *Id.* at 366. "Reasonably certain to occur" refers to the standard a plaintiff must meet when discussing an increased risk for future injuries. *See supra* note 38 and accompanying text (setting out the reasonable certainty standard of causation).

291. *Dillon*, 771 N.E.2d at 362. The appellate court decision, *Dillon v. Evanston Hospital*, No. 1-98-2893 (2001), is unpublished under Illinois Supreme Court Rule 23. *Id.* at 362. *See generally* ILL. SUP. CT. R. 23 (2000) (permitting Illinois appellate courts to make a decision without authoring an opinion).

292. Dillon v. Evanston Hosp., 755 N.E.2d 476 (Ill. 2001) (granting certiorari).

293. *Dillon*, 771 N.E.2d at 370 (overturning, among others, Amann v. Chic. Consol. Traction Co., 90 N.E. 673 (Ill. 1909)); *see also supra* note 36 (listing other Illinois cases that adhered to the all-or-nothing rule, and were, thus, overturned by *Dillon*). The defendants actually raised five separate issues on appeal: (1) that the plaintiff's fifth amended complaint, which added an allegation that the catheter was inserted negligently, was untimely; (2) that the trial court erred in instructing the jury on the plaintiff's theory of res ipsa loquitur; (3) that the trial court erred in allowing the plaintiffs to show a videotape at trial that depicted a bacterial infection in the heart spreading to the brain; (4) that the trial court erred when it disallowed the defendant from

be allowed to recover for a risk, no matter how small, but that the amount awarded for that risk should reflect the probability of its occurrence.[294] But while it agreed with the trial court as to the proper standard for recovering for increased risk, the court found that the trial court's jury instruction did not adequately explain the method for determining damages.[295] Accordingly, the Illinois Supreme Court remanded the case back to the trial court solely on the issue of damages.[296]

1. Increased Risk of Future Damages

The court first addressed the issue of increased risk.[297] This Part explains the court's reasoning behind its decision to reject the all-or-nothing rule and to adopt the increased risk doctrine.[298]

a. A Split in the Appellate Courts

The Illinois Supreme Court began by noting that Illinois law has historically rejected the apportionment of future damages that are not reasonably certain to occur.[299] The court discussed at great length the ninety-year-old case establishing this rule, *Amann v. Chicago Consolidated Traction Co.*,[300] and that other cases followed it.[301] The

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presenting medical testimony it considered cumulative; and (5) that the trial court erred in instructing the jury that it could award the plaintiff damages for the increased risk of future injuries. *Dillon*, 771 N.E.2d at 362–66. The court dismissed the defendants' first four issues quickly and focused primarily upon the issue of increased risk. *Id.* at 362–70. In dismissing the defendants' first four issues on appeal, the court reasoned that even if there was an error in the trial court, the evidence supported the jury's verdict on other theories pled by the plaintiff and the issues raised on appeal were therefore inconsequential. *Id.* at 362–66.

294. *Dillon*, 771 N.E.2d at 370; *see also supra* note 165 and accompanying text (explaining how to measure damages according to the increased risk doctrine).

295. *Dillon*, 771 N.E.2d at 372.

296. *Id.* at 372; *see also infra* note 334 (noting the amount that Dillon actually received for the increased risk of injury after the case was settled).

297. *Dillon*, 771 N.E.2d at 366–70.

298. *See infra* Part III.C.1.a (discussing the split in the lower courts where some Illinois courts have firmly adhered to the all-or-nothing rule and others have deviated from it by allowing recovery for the risk of future injuries not reasonably certain to occur); *infra* Part III.C.1.b (summarizing the court's discussion of the all-or-nothing rule); *infra* Part III.C.1.c (giving the reasons that the court lists for adoption of the increased risk doctrine).

299. *Dillon*, 771 N.E.2d at 366–67. The court later explained that this standard, "reasonably certain to occur," has traditionally meant that the plaintiff must prove that a future injury is greater than 50% likely to occur in order to recover. *Id.* at 367; *see also supra* notes 36–40 and accompanying text (discussing further the reasonable certainty standard).

300. Amann v. Chi. Consol. Traction Co., 90 N.E. 673 (Ill. 1909), *overruled by Dillon*, 771 N.E.2d at 357; *see also supra* notes 205–11 and accompanying text (describing the holding in *Amann*).

court reiterated the reasoning behind this rule, saying that, when *Amann* was decided, it appeared unjust to require a defendant to pay damages for injuries that may not occur.[302]

The court, however, also noted that since the time of *Amann*, uncertainty had arisen in the appellate courts.[303] Some Illinois appellate courts followed the *Amann* rule[304] while others, like the Third District Appellate Court in *Anderson v. Golden*, have rejected it.[305] The appellate courts that have allowed recovery for the increased risk of future injuries circumvented the *Amann* rule by reasoning that the risk itself should be considered a present injury and thus, "compensable as any other present injury."[306]

The court concluded that, because of the split in authority among the appellate courts over this issue, it was compelled to revisit the issue after ninety years and reevaluate its holding in *Amann*.[307] It noted that allowing inconsistent rulings to continue would be unfair to the plaintiffs and the defendants alike.[308]

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301. *See Dillon*, 771 N.E.2d at 366–67. The court also cited *Stevens v. Illinois Central Railroad*, 137 N.E. 859 (Ill. 1922) (reiterating the *Amann* rule that future damages may only be awarded when proven that they will occur by a reasonable certainty). *See id.* at 367.

302. *Id.* at 366–67. "'It would be plainly unjust to require a defendant to pay damages for results that may or may not ensue and that are merely problematical. To justify a recovery for future damages the law requires proof of a reasonable certainty that they will be endured in the future.'" *Id.* (quoting *Amann*, 90 N.E. at 674); *see also supra* notes 205–11 and accompanying text (describing the holding and reasoning in *Amann*).

303. *Dillon*, 771 N.E.2d at 367.

304. *Id.* The court cited *Wehmeier v. UNR Industries, Inc.*, 572 N.E.2d 320 (Ill. App. Ct. 4th Dist. 1991), as an example of an Illinois court adhering to the *Amann* rule. *See id.*; *see also infra* notes 385–87 and accompanying text (discussing further the *Wehmeier* case and its possible impact).

305. *Dillon*, 771 N.E.2d at 367 (citing Anderson v. Golden, 664 N.E.2d 1137 (Ill. App. Ct. 3d Dist. 1996)); *see also supra* notes 232–42 (discussing *Anderson*). The court referred to two other Illinois cases that have rejected the *Amann* rule: *Jeffers v. Weinger*, 477 N.E.2d 1270 (Ill. App. Ct. 3d Dist. 1985), and *Harp v. Illinois Central Gulf Railroad*, 370 N.E.2d 826 (Ill. App. Ct. 5th Dist. 1977). *Id.*; *see also supra* notes 217–23 and accompanying text (discussing *Harp*).

306. *Dillon*, 771 N.E.2d at 367 (quoting Anderson v. Golden, 664 N.E.2d 1137, 1139 (Ill. App. Ct. 3d Dist. 1996)). For examples of cases that define the increased risk as the injury itself, see *Petriello v. Kalman*, 576 A.2d 474 (Conn. 1990); *Davis v. Graviss*, 672 S.W.2d 928 (Ky. 1984); *Feist v. Sears, Roebuck & Co.*, 517 P.2d 675 (Or. 1973); and *Schwegel v. Goldberg*, 228 A.2d 405 (Pa. Super. Ct. 1967). For a discussion of categorizing the risk of future injuries as present injuries, see *supra* note 182 and accompanying text.

307. *Dillon*, 771 N.E.2d at 368; *see also supra* notes 205–11 (discussing the holding in *Amann*).

308. *See Dillon*, 771 N.E.2d at 372 (stating that it was the court's responsibility to maintain a "sound-uniform body of precedent.")

b. Discussion of the *Amann* Rule

The Illinois Supreme Court began its discussion of future injuries by noting that the *Amann* rule is the majority view in the United States.[309] To meet the "reasonably certain" standard, courts require plaintiffs to prove that there is a greater than 50% chance that a future injury will occur.[310] The Illinois Supreme Court first examined the historical justifications for the majority rule, noting that the primary traditional justification is that courts of law should base their decisions upon reasonable possibilities, not mere conjecture and speculation.[311]

The court, however, also recognized that the majority view has been much criticized over the years.[312] Opponents call the majority view the "all-or-nothing" rule because if a plaintiff has a 51% chance of an injury occurring in the future, he or she may recover fully for it, but if there is only a 49% chance of its occurrence, the plaintiff will receive nothing.[313] Further, those critics suggested that this all-or-nothing rule is inconsistent with the goal of compensating tort victims fairly—a plaintiff with a 51% chance of a future injury might recover a windfall while the 49% chance plaintiff might be left without remedy.[314]

c. Rejection of the All-or-Nothing Rule

The Illinois Supreme Court then announced that these critiques indicate a trend toward rejecting the majority all-or-nothing rule.[315] Indeed, the court noted that even past Illinois Supreme Court cases had rejected the all-or-nothing rule in applying the loss of chance

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309. *Id.* at 367.

310. *Id.* (quoting Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 119 (D.C. Cir. 1982)). For a discussion of the "reasonably certain" standard, see *supra* notes 38–40 and accompanying text.

311. *Dillon*, 771 N.E.2d at 367. "'[A] consequence of an injury which is possible, which may possibly ensue, is a risk which the injured person must bear because the law cannot be administered so as to do reasonably efficient justice if conjecture and speculation are to be used as a measure of damages.'" *Id.* (alteration in original) (quoting Budden v. Goldstein, 128 A.2d 730, 734 (N.J. Super. Ct. 1957)).

312. *Id.* at 368.

313. *Id.* (citing Petriello v. Kalman, 576 A.2d 474, 482–83 (Conn. 1990)). The court also cited *DePass v. United States*, 721 F.2d 203, 208 (7th Cir. 1983) (Posner, J. dissenting), King, *Causation, Valuation, and Chance*, *supra* note 40, 1376–81, and 2 GERALD W. BOSTON, STEIN ON PERSONAL INJURY DAMAGES § 9:6, at 9-30 (3d ed. 1997). *See id.* (citing King and Stein as critics of the all-or-nothing rule); *see also supra* note 42 and accompanying text (discussing this criticism of the all-or-nothing rule in more depth).

314. *Dillon*, 771 N.E.2d at 368 (citing *Petriello*, 576 A.2d at 482–83 (Conn. 1990)). Whether a plaintiff recovers where the chance of future injury equals 50% is unclear.

315. *Id.*

doctrine.[316] The court thus overturned *Amann*, stating that so long as a plaintiff can show to a reasonable degree of certainty that a defendant's conduct created the increased risk, the plaintiff should be able to recover for that risk, no matter how likely it is to occur in the future.[317]

The court gave several justifications for the change in Illinois law.[318] First, it reasoned that because the primary motivation for awarding tort damages is fairness, Illinois should adopt a system other than the all-or-nothing rule, a system where compensation more clearly reflects the chance of a future injury occurring.[319] Second, the court recognized the problem of single recovery, or res judicata, where a plaintiff only has one chance to recover for injuries stemming from a single incident.[320] The plaintiff therefore has no remedy if complications arise out of past injuries that, at the time of the trial, appear unlikely to occur.[321]

The Illinois Supreme Court next addressed the defendants' argument that allowing Dillon to recover for her increased risk would be allowing recovery based upon pure conjecture.[322] The court diffused this argument, reasoning that because the plaintiff must still prove that the risk of injury was proximately caused by the defendant's actions, there was little speculation or conjecture involved.[323] Furthermore, the *Dillon* court reasoned that the *Amann* case was decided in a different era, and that scientific and medical advances now enable courts to

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316. *Id.* at 369–70; *see supra* Part II.B.2.b (explaining how applying the loss of chance doctrine is a rejection of the all-or-nothing rule).

> We therefore reject the reasoning of cases which hold, as a matter of law, that plaintiffs may not recover for medical malpractice injuries if they are unable to prove that they would have enjoyed a greater than 50% chance of survival or recovery absent the alleged malpractice of the defendant. To hold otherwise would free health care providers from legal responsibility for even the grossest acts of negligence . . . ."

Dillon, 771 N.E.2d at 370 (quoting Holton v. Mem'l Hosp., 679 N.E.2d 1202, 1213 (Ill. 1997)) (rejecting the all-or-nothing rule as it pertained to the "lost chance" doctrine); *see also supra* notes 154–59 and accompanying text (discussing the holding of *Holton*).

317. *Dillon*, 771 N.E.2d at 370. *But see supra* Part II.A.1 (discussing the concern over lowering the standard of causation).

318. *Dillon*, 771 N.E.2d at 368–70; *see also supra* Part II.A.2 (giving a critical analysis of the all-or-nothing rule and its possible limitations).

319. *Dillon*, 771 N.E.2d at 368. "[T]he primary motivation of the courts for permitting damages for such an injury is fairness." 2 JEROME H. NATES & ROBERT CONASON, DAMAGES IN TORT ACTIONS § 13.02, at 13-8 (2001), *quoted in Dillon*, 771 N.E.2d at 368.

320. *Dillon*, 771 N.E.2d at 368; *see supra* Part II.A.2.e (discussing res judicata as it relates to the all-or-nothing rule).

321. *See supra* Part II.A.2.e (discussing the problem of res judicata).

322. *See Dillon*, 771 N.E.2d at 369; *see also supra* Part II.A.1.a (discussing the importance of causation principles to the proponents of the all-or-nothing rule).

323. *Dillon*, 771 N.E.2d at 369; *see supra* Part II.A.2.a (describing the main concern with the all-or-nothing rule–that causation can still be proven in a situation where the increased risk is less than 50% likely to occur).

determine more accurately the probability of future injuries than was possible in the past.[324]

For these reasons, the court held that a plaintiff could receive compensation for a future injury, even if there was only a small chance that it would occur.[325] The court, however, stressed again that the compensation for that future risk should reflect the probability of its occurrence.[326]

2. The Jury Instruction Was Inadequate

The Illinois Supreme Court also held that the jury instruction given by the trial court on the increased risk of future injuries issue was inadequate, partly because the trial court had not stressed that "the compensation would reflect the [low] probability of occurrence."[327] At trial, the court instructed the jury as follows:

> If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate her for any of the following elements of damages proved by the evidence to have resulted from the negligence of one or more of the defendants, taking into consideration the nature, extent, and duration of that injury:
>
> *The increased risk of future injuries.* The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries.[328]

The Illinois Supreme Court found that the trial court failed to emphasize to the jury that (1) the increased risk must be proximately caused by the defendant and (2) most importantly, that the size of the award should reflect the probability of occurrence.[329] The Illinois Supreme Court then cited the *Connecticut Jury Instruction for the Compensation for Increased Risk of Injury*,[330] which states in part:

> The plaintiff claims that he/she has suffered an increased risk of [alleged future complication] as a result of the defendant's negligence. The plaintiff is entitled to recover damages for physical harm resulting from a failure to exercise reasonable care. If the failure to exercise

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324. *Dillon*, 771 N.E.2d at 370.

325. *Id.* at 370; *see also supra* notes 162–65 and accompanying text (discussing the method of determining damages under the increased risk doctrine).

326. *Dillon*, 771 N.E.2d at 370.

327. *Id.*

328. *Id.* at 366 (citing the lower court's modification of Illinois Supreme Court Committee on Jury Instructions in Civil Cases, ILLINOIS PATTERN JURY INSTRUCTIONS: CIVIL, Nos. 30.05 & 31.04 (3d ed. 1995)).

329. *Id.* at 371.

330. *Id.* at 371–72.

> reasonable care increases the risk that such harm will occur in the future, the plaintiff is entitled to compensation for the increased risk.
>
> In order to award this element of damages, you must find a breach of duty that was a substantial factor in causing a present injury which has resulted in an increased risk of future harm. The increased risk must have a basis in the evidence. Your verdict must not be based on speculation.
>
> The plaintiff is entitled to compensation to the extent that the future harm is likely to occur as measured by multiplying the total compensation to which the plaintiff would be entitled if the harm in question were certain to occur by the proven probability that the harm in question will in fact occur.[331]

Although the Illinois Supreme Court did not mandate that Illinois courts adopt this instruction verbatim, it concluded that the Connecticut instruction accurately depicted the law in Illinois.[332]

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331. CONNECTICUT CIVIL JURY INSTRUCTION FOR THE COMPENSATION FOR INCREASED RISK OF INJURY, No. 2-40(c) (1990).

332. *Dillon*, 771 N.E.2d at 372. After the *Dillon* decision, Thomas Fegan, one of the attorneys for a defendant in *Dillon*, writing for the *Chicago Daily Law Bulletin*, proposed the following jury instruction for this case:

> The plaintiff claims that she has suffered an increased risk of future injury due to the fact that a portion of the catheter remains in her body. The possible risks in the future are:
>
> (a) Infection;
>
> (b) Perforation of the heart;
>
> (c) Arrhythmia;
>
> (d) Embolization; and
>
> (e) Further migration of the fragment.
>
> In order to award damages, the increased risk must have a basis in the evidence. Your verdict must not be based on speculation. The plaintiff is entitled to compensation only to the extent that the "risk" can be given a value in damages as follows:
>
> (1) The total compensation to which the plaintiff would be entitled if the harm in question were certain to occur.
>
> (a) Infection $___;
>
> (b) Perforation of the heart $___;
>
> (c) Arrhythmia $___;
>
> (d) Embolization $___; and
>
> (e) Further migration of the fragment $___.
>
> Multiplied by
>
> (2) The proven probability that the harm in question will in fact occur.
>
> (a) Infection __ percent;
>
> (b) perforation of the heart __ percent;
>
> (c) arrhythmia __ percent;
>
> (d) embolization __ percent; and
>
> (e) further migration of the fragment __ percent;
>
> Equals:
>
> (3) The amount that will compensate plaintiff for the "risk" of future injury.

Accordingly, the Illinois Supreme Court reversed the trial court on the issue of the future damages award and remanded the case to the trial court.[333] There, a new trial was to be held solely on the element of future damages.[334]

D. Chief Justice Harrison's Partial Dissent

Chief Justice Harrison joined the court in the bulk of its decision but disagreed that the trial court's jury instructions were inadequate.[335] Chief Justice Harrison reasoned that juries are told at the outset of their deliberations that in order to award damages the injuries must be proximately caused by the defendant.[336] This requirement is true of all other damages, even though the court does not specifically repeat the proximate cause requirement before instructing the jury on other causes of action.[337] Also, as to the majority's contention that the jury instructions did not make clear that the damage amount should decrease as the risk of injury decreased, Chief Justice Harrison argued that this reasoning is implicit in the word "risk."[338] Therefore, although the

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(a) Infection $___;
(b) perforation $___;
(c) arrhythmia $___;
(d) embolization $___; and
(e) further migration of the fragment $___.

(4) Total risk of future injuries $___.

Thomas H. Fegan, *A Suggestion for 'Risk of Future Injury,'* CHI. DAILY L. BULL., July 26, 2002, at 5, *available at* Westlaw, 7/26/02 CHIDLB 5.

333. *Dillon*, 771 N.E.2d at 372.

334. *Id.*; *see In Circuit Court*, CHI. DAILY L. BULL., July 22, 2002, at 3, *available at* Westlaw, 7/22/02 CHIDLB 3 (discussing the outcome of Dillon). After the case was remanded, the parties agreed to settle the case for over $4.3 million. *In Circuit Court*, *supra*. This figure included the original $3.0 million for past and future pain and suffering plus interest, and $125,000 for the increased risk of future injuries. *Id.*

335. *See Dillon*, 771 N.E.2d at 373 (Harrison, C.J., dissenting). Chief Justice Harrison joined fully in the court's decision as to Parts I (Fifth Amended Complaint: Negligent Insertion), II (Res Ipsa Loquitur), III (Admission of Videotape), and IV (Exclusion of Cumulative Testimony) of the decision, but only in part as to Part V (Damages: Increased Risk of Future Injury). *Id.* Harrison agreed that Illinois should adopt the increased risk doctrine but disagreed with the majority's opinion that the jury instructions were inadequate. *Id.*

336. *Id.* (Harrison, C.J., dissenting). Chief Justice Harrison cited the ILLINOIS SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS: CIVIL, No. 1.01(3) (3d 1995), which tells the jury that its verdict "must be based on evidence and not upon speculation, guess or conjecture." *Id.* (Harrison, C.J., dissenting).

337. *Id.* (Harrison, C.J., dissenting).

338. *Id.* (Harrison, C.J., dissenting). "By definition, risk includes 'the product of the amount that may be lost and the probability of losing it.'" *Id.* (Harrison, C.J., dissenting) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1961 (1986)). The Majority disputed this argument in its opinion: "[I]t must be remembered that juries are composed of laypersons who are

dissent agreed with most of the court's opinion, Chief Justice Harrison disagreed that the case 'should be' retried on the issue of future damages.[339]

IV. ANALYSIS

The Illinois Supreme Court in *Dillon* correctly held that a plaintiff should be allowed to recover for her increased risk of future injuries, so long as she could properly show that the defendant caused that increased risk.[340] Furthermore, the court was correct in remanding the case to the trial court based upon the lack of clarity in the jury instructions.[341] This Part will discuss why the court's holding was correct in its rejection of the all-or-nothing rule.[342] Next, it will discuss why the court's decision to remand the case back to the lower court was proper.[343]

A. Increased Risk of Future Injury Should be Compensated

An article in the *Chicago Daily Law Bulletin*, written the day of the *Dillon* decision, captured both the plaintiff's and the defendants' reactions to the court's decision.[344] Surprisingly, attorneys on both sides expressed satisfaction with the ultimate result of *Dillon*.[345] The plaintiff's attorneys expressed delight that the Illinois Supreme Court had finally recognized that the increased risk of a future injury should be compensated "separate and apart from other elements of damages."[346] The defendants' attorney, Thomas Fegan, likewise expressed approval of the decision, saying that he was pleased because it "pulled back" from the trial court's decision, which placed no limit on the amount that a plaintiff could recover for a future injury.[347]

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not trained to separate issues and to disregard irrelevant matters. That is the purpose of jury instructions." *Id.* at 372 (Harrison, C.J., dissenting).

339. *Id.* at 373 (Harrison, C.J., dissenting).

340. *See supra* Part III.C.1.c (stating the majority's holding as to increased risk).

341. *See supra* Part III.C.2 (stating the majority's holding as to the jury instruction issue).

342. *See infra* Part IV.A (reasoning that the court was correct in rejecting the all-or-nothing rule in favor of increased risk).

343. *See infra* Part IV.B (reasoning that the court was justified in remanding the case back to the trial court in light of the lack of clarity in the lower court's jury instructions).

344. *See* John Flynn Rooney, *High Court Allows 'Future Injury' Damages*, CHI. DAILY L. BULL., May 23, 2002, at 1, *available at* Westlaw, 5/23/02 CHIDLB 1.

345. *See id.*

346. *Id.* (quoting Thomas A. Demetrio of Corboy & Demetrio, P.C., in Chicago). Thomas Demetrio was one of Diane Dillon's attorneys who represented her in the medical malpractice suit against Evanston Hospital. *Id.*

347. *Id.* (quoting Thomas H. Fegan of Johnson & Bell, P.C., in Chicago). Thomas Fegan was an attorney for the defendants in *Dillon*. *Id.*

These positive reactions, from two very opposite sides of the issue, demonstrate the fundamental reason why the Illinois court correctly decided to abandon the all-or-nothing rule.[348] At its core, the increased risk doctrine is more equitable for defendants and plaintiffs alike. As one court stated, it seems "a matter of common sense" that a plaintiff suffering both a present, tangible injury *and* an increased risk of future injury should be compensated more than another plaintiff who only suffers from that same present injury.[349]

Even beyond basic notions of fairness, rejection of the all-or-nothing rule makes legal sense as well. The all-or-nothing rule causes difficulty when applied in conjunction with long-standing legal principles, such as res judicata and statutes of limitations.[350] While the increased risk doctrine allows a plaintiff to recover at one time for all of her injuries caused by the defendant (including risks of future injuries), the all-or-nothing rule only allows that plaintiff to recover for those injuries that are reasonably certain to occur.[351] If a previously barred claim for future injury later becomes recoverable (for instance, if the plaintiff develops cancer from toxic exposure), it is very possible that the development of cancer will not be compensated due to established legal principles like res judicata or statutes of limitations.[352] Practically, even

348. *See* Dillon v. Evanston Hosp., 771 N.E.2d 357, 368 (Ill. 2002) (abandoning the all-or-nothing rule). "The primary motivation of the courts for permitting damages for such an [increased risk of] injury is fairness." *Id.* (quoting 2 NATES & CONASON, *supra* note 319, § 13.02, at 13-8); *see also supra* notes 346–47 and accompanying text (giving these two "positive reactions").

349. *See* Feist v. Sears, Roebuck & Co., 517 P.2d 675, 680 (Or. 1973); *see also supra* note 66 and accompanying text (discussing the holding in *Feist*).

350. *See* Heinzerling & Hoffman, *supra* note 92, at 73 (discussing the negative impact of res judicata on toxic tort victims if they are unable to recover for a less than probable increased risk); Spearman, *supra* note 57, at 401 (describing the problems faced by a plaintiff exposed to HIV when the jurisdictional statute of limitations will practically bar any claim the plaintiff could bring once the HIV manifests itself in his or her system); *see also supra* Part II.A.2.d (describing how judicially imposed time limits often prevent recovery for plaintiffs when the jurisdiction follows the all-or-nothing rule); *supra* Part II.A.2.e (describing how res judicata often bars good claims when the all-or-nothing rule is the standard for recovering for increased risks).

351. *See supra* Parts II.A, II.B.2.c (describing the all-or-nothing rule and the increased risk doctrine).

352. Heinzerling & Hoffman, *supra* note 92, at 73. Heinzerling & Hoffman note:

> [Toxic tort p]laintiffs pursuing this new course [trying to recover for increased risks under doctrines such as the all-or-nothing rule], however, still run into the same difficulties inherent in the more traditional causes of action; they must meet the unrealistically high numerical probability standard and they must time their claim so as not to run into preclusion and statutes of limitations. In order to limit recovery for increased risk, the courts fall back onto their traditional causation standards and require a pure probability, or more likely than not standard of proof. This rule has hugely arbitrary and inequitable results in the realm of increased risk as, medically speaking, "the probability of developing a future disease is unlikely to exceed fifty percent."

if a plaintiff is not legally barred from bringing a future claim, practically, he may never be able to sue because the defendant may be out of the jurisdiction, bankrupt, or deceased.[353]

It is true that other solutions exist to remedy some of the legal problems caused by the all-or-nothing rule, such as the discovery rule, which avoids statutes of limitations problems by allowing a plaintiff to sue once he or she "discovers" the injury.[354] All of these remedies, however, address only individual problems caused by the all-or-nothing rule; in order for these remedies to work in every case of increased risk, a jurisdiction must adopt all of them.[355] The increased risk doctrine is a cleaner, simpler, and more equitable way to address the issue of increased risk; under the doctrine, plaintiffs who face increased risk of injury may recover, at least partially, every time they can prove that the defendant proximately caused the complained of risk.[356]

Proponents of the all-or-nothing rule argue that the increased risk doctrine abandons important causation principles.[357] This claim is unfounded.[358] As Judge Posner recognized in his dissent in *DePass v.*

Id. (quoting Brent Carson, Comment, *Increased Risk of Disease from Hazardous Waste: A Proposal for Judicial Relief*, 60 WASH. L. REV. 635, 639 (1985)); *see also* Klein, *supra* note 54, at 1182 (noting that even if jurisdictional statutes of limitations aren't a bar on recovery, "because the plaintiff may only sue once for the same transaction or occurrence, if he or she sues within the prescriptive period for the incidental damages due to exposure, res judicata will bar a subsequent suit for a disease.").

353. *See* Lapeze, *supra* note 38, at 251 ("Because of the great lapse in time [between exposure and developing an actual injury], defendants may become bankrupt, die, or disappear."); *see also supra* Part II.A.2.b.ii (discussing the argument that the all-or-nothing rule works against basic tort principles by not restoring a plaintiff to his or her original condition).

354. *See supra* Part II.B.1–2 (discussing several new remedies courts have developed in order to avoid some of the problems with the all-or-nothing rule). Several jurisdictions have adopted the discovery rule, but more importantly, Congress recently authorized a discovery rule that applies to all toxic tort victims in every state. *See supra* note 107 (describing the Congressional adoption of a national discovery rule, called the Comprehensive Environmental Response, Compensation, and Liability Act).

355. *See, e.g.*, Klein, *supra* note 54, at 1181–82 (discussing how, even if a jurisdiction extends its statute of limitations, res judicata will still be a bar to recovery for plaintiffs who sue immediately for present damages even though they may later develop another injury).

356. *See supra* Part II.B.2.c (describing the doctrine of increased risk and the burden of proof that the plaintiff must bear).

357. *See supra* Part II.A.1.a (explaining the rationale behind the all-or-nothing rule and describing the fear that any deviation from the all-or-nothing rule will lead to lowered standards of causation); *see also* Wright, *supra* note 54, at 578 (arguing that the disappearance of causation standards from new methods of proportional liability such as the increased risk doctrine "is neither scientific progress nor a cause for celebration."); Nichols, *supra* note 48, at 638 ("For all of its supporters and detractors, the fact remains that [the increased risk doctrine] does, on its face, alter traditional causation standards.").

358. *See supra* Part II.A.2.a (arguing that causation can still be proven in the increased risk scenario); *see also* Legum, *supra* note 50, at 589 (theorizing that the increased risk doctrine "is a

United States, there is a difference between determining the *extent* of a plaintiff's injuries and determining whether or not the defendant proximately *caused* those injuries.[359] The increased risk doctrine respects traditional causation principles by requiring the plaintiff to prove that the defendant more likely than not caused the increased risk; only once the defendant is legally responsible is the increased risk viewed as an injury for which the plaintiff can be compensated.[360]

Although in some respects it seems unfair to hold defendants responsible for a future event that may never occur, it is important to recognize that this scenario arose under the all-or-nothing rule as well, except that under that rule, a plaintiff could recover *in full* for a future injury that might never happen.[361] In a claim for increased risk, damages are proportional to the risk that the defendant caused the plaintiff to suffer.[362] Some argue that, viewed as a purely economic theory, the doctrine of increased risk is like an insurance premium that protects against the risk of future harm.[363] Viewed on a larger scale,

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calculation of damages, not a prerequisite in the determination of whether the plaintiff has been injured in the first instance.").

359. DePass v. United States, 721 F.2d 203, 207 (7th Cir. 1983) (Posner, J., dissenting); *see also supra* notes 256, 259–66 (discussing Judge Posner's reasoning that there should be a difference between determining whether the defendant proximately caused the plaintiff's injuries and what the extent of those injuries actually were).

360. *See supra* Part II.A.2.a (discussing why critics of the all-or-nothing rule argue that causation can still be proven); *see also* King, *"Reduction of Likelihood," supra* note 40, at 498–99 (distinguishing proximate cause from causation). King breaks down the elements for a negligence suit into five categories: duty, breach, but for causation, proximate causation, and compensable harm. King, *"Reduction of Likelihood," supra* note 40, at 497–99. King argues that the increased risk analysis takes place in the last element, only after causation has been established. *Id.* at 499.

361. *See supra* Part II.A.2.c (showing the problems with the all-or-nothing rule in terms of over- and under-compensation of plaintiffs); *see also* Ashton, *supra* note 38, at 1097 (providing a distressing example of how the all-or-nothing rule could drastically over-compensate plaintiffs).

362. *See supra* note 165 and accompanying text (explaining the proportionality of damages in an increased risk claim).

363. *See* Klein, *supra* note 54, at 1187–94 (discussing the economic theory behind this type of recovery). Klein explains the economic good sense of proportional liability in the following way:

> One can deflect this criticism [that some plaintiffs who actually develop a disease will not recover as much as others who do not, merely because their probability was greater at the time of the lawsuit] . . . by viewing proportional recovery not as a partial payment of potential damages but as the equivalent of insurance premiums to protect against the risk of future harm. Economists, for example, define the value of an insurance premium as risk multiplied by expected loss. Following this logic, several commentators recently have proposed just that—compensating for enhanced risk by allowing those exposed to toxins to recover insurance premiums designed to cover the risk of future disease.

Id. at 1188.

more plaintiffs will accurately recover damages to the extent of their injury than would plaintiffs under the all-or-nothing rule.[364]

B. The Jury Instruction Was Unclear

The Illinois Supreme Court was right to remand *Dillon* because of an unclear jury instruction. The *Dillon* court expressed two concerns about the lower court's jury instruction: first, that it failed to reiterate the importance of causation and, second, that it did not explain that the size of the award for future risk should reflect the probability of occurrence.[365] These are both valid and important concerns and the court was right to address them. *Dillon* adopts an entirely new cause of action, and the Illinois Supreme Court correctly recognized that it has a duty to clearly lay out the standards for lower courts to follow.[366] Furthermore, despite the dissent's contention that both the causation and damage issues were "common sense," and a jury would understand them intuitively, the jury instruction given by the lower court did not clearly address either causation or the valuation of damages.[367]

Both of these components, causation and calculation of damages, are essential for a jury to understand before it applies the new doctrine of increased risk. First, as proponents of the all-or-nothing rule point out, proximate causation is one of the bedrocks of tort law.[368] Even if the jury is instructed at other times that the defendant must cause the plaintiff's injuries, it certainly does not harm the jury to be reminded of the importance of that principle. Especially because increased risk calculations can be confusing, the jury should be made aware that the

364. *See id.* at 1188.

365. Dillon v. Evanston Hosp., 771 N.E.2d 357, 371 (Ill. 2002); *see also supra* note 329 and accompanying text (discussing the Illinois Supreme Court's holding in *Dillon* regarding the jury instructions).

366. *See Dillon*, 771 N.E.2d at 372 ("Our responsibility to maintain a sound and uniform body of precedent likewise requires reversal on the issue [of the jury instruction].").

367. *See id.* at 373 (Harrison, C.J., dissenting); *supra* Part III.D (discussing Chief Justice Harrison's dissent in *Dillon*); *see also supra* note 332 (providing a proposed jury instruction on the element of increased risk that attempts to address these issues).

368. *See, e.g.*, Wehmeier v. UNR Indus., 572 N.E.2d 320, 335 (Ill. App. Ct. 4th Dist. 1991) ("Under Illinois law, a plaintiff has the burden of proving by a preponderance of the evidence that the defendant caused the plaintiff harm or injury; mere conjecture or speculation is insufficient."); Budden v. Goldstein, 128 A.2d 730, 734 (N.J. Super. Ct. 1957) ("[A] consequence of an injury which is possible, which may possibly ensue, is a risk which the injured person must bear because the law cannot be administered so as to do reasonably efficient justice if conjecture and speculation are to be used as a measure of damages."), *overruled by* Botta v. Brunner, 138 A.2d 713 (N.J. 1958).

plaintiff can recover only if he proves that the defendant actually caused the increased risk.[369]

Clear jury instructions on calculating damages for increased risk are also essential.[370] Because calculating damages under the increased risk doctrine can be confusing if the jury is improperly instructed, the jury should be clearly told that if it finds the defendant is responsible for the plaintiff's increased risk of injury, then it may award damages in the amount of the injury's value multiplied by the probability of its occurrence.[371] Both because the increased risk doctrine is relatively new and because it is relatively complex, the Illinois Supreme Court was warranted in remanding *Dillon* to the lower court on the issue of future damages.[372]

V. IMPACT

The most important ramification of the *Dillon* decision is that it represents a repudiation of the all-or-nothing rule for increased risk situations.[373] Therefore, in Illinois, future injuries that are less than certain to occur will not produce windfall compensation; conversely, increased risk will not be left uncompensated, as long as the plaintiff

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369. *See Dillon*, 771 N.E.2d at 371 ("This instruction fails to instruct the jury on several important legal requirements, *e.g.*, the increased risk must be based on evidence and not speculation . . . .").

370. *See id.* ("[M]ore importantly, [the instruction must direct that] the size of the award must reflect the probability of occurrence."). Because there was no Illinois pattern jury instruction for the doctrine of increased risk, the trial court in *Dillon* was required to give a non-pattern jury instruction. *Id.* According to Illinois Supreme Court Rule 239(a), a nonpattern instruction is permissible if it is simple, brief, impartial, and nonargumentative. *Id.*; ILL. SUP. CT. R. 239(a).

371. *See supra* note 332 (providing a jury instruction proposed by Thomas H. Fegan, one of the defendants' attorneys in the *Dillon* case). *But see* Ardwin E. Boyer, Editorial, 'Dillon' *is Too Complicated*, CHI. DAILY L. BULL., Aug. 5, 2002, at 1 (criticizing Fegan's jury instruction as being too complicated, saying that "the proposed math table is so convoluted, few juries will get it right."). Although there is currently no Illinois pattern jury instruction on the increased risk doctrine, Judge Varga, of the Circuit Court of Cook County Law Division, approved and used this jury instruction in a recent Illinois case tried after *Dillon*:

> If you find that the plaintiff is entitled to compensation for the increased risk [of] future harm, the plaintiff is then entitled to compensation to the extent that the future harm is likely to occur as measured by multiplying the total compensation to which the plaintiff would be entitled if the harm in question were certain to occur by the proven probability that the harm in question will in fact occur. The increased risk must have a basis in the evidence.

E-mail from Ardwin E. Boyer, Attorney, Newman & Boyer, Ltd. (Feb. 12, 2003) (on file with author).

372. *See supra* Part III.C.2 (discussing the court's rationale behind remanding the case back to the trial court based upon the jury instructions).

373. *See supra* Part III.C.1.c (discussing how the court overruled the *Amann* rule and adopted increased risk).

can prove proximate causation.[374] That is, no matter whether a plaintiff is claiming, for example, a 95% risk of a future injury or a 5% risk, his damages will always be compensated by multiplying the risk by the value of the injury if it were to actually occur.[375]

There are three other areas, however, where the impact of the increased risk doctrine is more uncertain. First is the impact on toxic tort recovery.[376] Second is the impact on the loss of chance doctrine.[377] Third is the practical application of the increased risk doctrine, and the possible confusion it will cause for juries.[378] This Part will briefly explore the possible implications of the increased risk doctrine on all three of these areas.[379]

A. The Impact of Increased Risk on Toxic Tort Recovery

A fundamental examination of the increased risk theory leads one to believe that it will impact profoundly the recovery of toxic tort victims. On its face, it appears that, as long as a plaintiff can prove that a defendant negligently exposed him or her to a toxic substance that consequently increased his or her chances of developing injury or

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374. *See supra* Part II.B.2.c (explaining the doctrine of increased risk). *But see infra* Part V.C (discussing how, in the practical application of the increased risk doctrine on individual bases, the doctrine relies on a fiction that increased risk itself is the harm).

375. *See supra* notes 163–65 and accompanying text (explaining how, under the increased risk doctrine, *any* risk will be evaluated under the doctrine and compensated accordingly). "The increased risk doctrine is considerably broader than the loss of chance doctrine since the former appears to apply even if the plaintiff has a greater than 50 percent chance of survival prior to the malpractice." United States v. Anderson, 669 A.2d 73, 75 (Del. 1995) (quoting United States v. Cumberbatch, 647 A.2d 1098, 1100 n.3 (Del. 1994)).

> The probability percentage for the occurrence of a particular harm, the risk of which has been created by the tortfeasor, can be applied to the damages that would be justified if that harm should be realized. We regard this system of compensation as preferable to our present practice of denying any recovery for substantial risks of future harm not satisfying the more likely than not standard. We also believe that such a system is fairer to a defendant, who should be required to pay damages for a future loss based upon the statistical probability that such a loss will be sustained rather than upon the assumption that the loss is a certainty because it is more likely than not. We hold, therefore, that in a tort action, a plaintiff who has established a breach of duty that was a substantial factor in causing a present injury which has resulted in an increased risk of future harm is entitled to compensation to the extent that the future harm is likely to occur.

Petriello v. Kalman, 576 A.2d 474, 484 (Conn. 1990).

376. *See supra* Parts II.B.1, II.B.2.a (discussing, in part, the special problems faced by toxic tort cases).

377. *See supra* Part II.B.2.c (describing the loss of chance doctrine).

378. *Infra* Part V.C (discussing potential problems with the application of the increased risk doctrine).

379. *Infra* Part V.A–C (discussing the impact of the increased risk doctrine on toxic tort cases, the loss of chance doctrine, and jury instructions).

disease, he or she will be able to recover for that increased risk.[380] Courts, however, have been extremely reluctant to award damages to a plaintiff who, at the time of trial, has no manifestation of injury at all.[381] Indeed, upon examination, it appears that no court in Illinois has ever awarded a toxic tort plaintiff damages for the risk of future injuries.[382] Recall Judge Posner's dissent in *DePass v. United States*, where he distinguished between the *DePass* plaintiff (suffering from a present injury as well as a future risk) and a plaintiff in a toxic exposure case (although suffering no present illness, he had a future risk of cancer).[383] Although Judge Posner advocated for the recognition of "risk" as a present injury, the plaintiff believed that there was a difference between pre-manifestation and post-manifestation plaintiffs.[384]

When the *Dillon* court discussed the split between those Illinois appellate courts adhering to the all-or-nothing rule and those disposing of it, however, the court referred to *Wehmeier v. UNR Industries Inc.*,[385] a toxic exposure case, as an example of a court that adhered to the all-

380. *See supra* Part II.B.2.c (discussing the theory of increased risk).

381. Ashton, *supra* note 38, at 1082; Lapeze, *supra* note 38, at 266 n.123; *see* DOBBS, *supra* note 40, § 30, at 165 (saying that the "threat of future harm, not yet realized, is not enough"); *see, e.g.*, Schweitzer v. Consol. Rail Corp., 758 F.2d 936, 942 (3d Cir. 1985) (refusing recovery for workers exposed to asbestos, saying that "subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law"); Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982) (holding that a plaintiff exposed to asbestos was unable to recover until there was a manifestation of injury); Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982) (refusing recovery by children whose father died of cancer after being exposed to radiation because allegations of exposure to high risk of disease cannot support a lawsuit for present injuries).

382. *See, e.g.*, Batko v. Ogilvie, No. 85 CV 7873, 1986 WL 5761, at *3 (N.D. Ill. May 9, 1986) (refusing to allow recovery to workers who were exposed to asbestos and had an increased risk of developing cancer, saying that "[u]ntil an injury is manifested, the plaintiffs have no basis for recovery" (citing *Schweitzer*, 758 F.2d at 936)); Smith v. Eli Lilly & Co., 560 N.E.2d 324 (Ill. 1990) (refusing to allow recovery to a daughter for her mother's exposure to DES, which increased the daughter's risk of developing cancer); Morrissy v. Eli Lilly & Co., 394 N.E.2d 1369 (Ill. App. Ct. 1st Dist. 1979) (refusing to award damages for the increased risk of developing cancer after DES exposure).

383. DePass v. United States, 721 F.2d 203, 206 (7th Cir. 1983); *see also supra* notes 261–66 and accompanying text (discussing the distinction that Justice Posner draws between the plaintiffs in *Wehmeier* and *DePass*).

384. *See supra* notes 261–66 and accompanying text (discussing Judge Posner's reasoning in *DePass* and *Morrissy*, supporting the difference between pre-manifestation and post-manifestation plaintiffs). It is interesting to note that in the *Dillon* decision, the court never made such a distinction. *See* Dillon v. Evanston Hosp., 771 N.E.2d 357, 367 (Ill. 2002).

385. Wehmeier v. UNR Indus. Inc., 572 N.E.2d 320 (Ill. App. Ct. 4th Dist. 1991) (holding in part that the court would continue to follow the all-or-nothing rule). In *Wehmeier*, the court refused to allow the jury to consider evidence of a worker's increased risk of contracting cancer because his exposure to asbestos was too speculative and therefore did not establish present, compensable injury. *Id.* at 332; *see also supra* note 45 (quoting language from *Wehmeier*).

or-nothing rule.[386] Now that *Dillon* has rejected the all-or-nothing rule, does this mean that the increased risk doctrine can be applied to toxic exposure cases in Illinois? Although it seems unlikely, theoretically, increased risk *should be* applied to toxic tort cases because it is a "risk of future injury" just like any other.[387] Despite the apparently broad nature of the increased risk doctrine, toxic tort is an area in which the impact of *Dillon* remains uncertain.

B. Impact of Increased Risk on the Loss of Chance Doctrine

Although Illinois officially adopted the loss of chance doctrine in *Holton v. Memorial Hospital*,[388] it is unclear whether this cause of action will remain after the adoption of increased risk.[389] As discussed earlier, some commentators suggest that increased risk is merely an extension of loss of chance.[390] Therefore, it is possible that loss of chance will be subsumed into the new increased risk analysis. This fusion is a likely result, especially because in loss of chance cases proportional damages are given only when the lost chance is less than 50% likely to occur; full recovery is given for any lost chance over that percentage.[391] Because the adoption of increased risk does away with the all-or-nothing rule, it is doubtful that courts will continue to allow

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386. *See supra* note 304 and accompanying text (discussing the *Dillon* court's comparison between Illinois courts that had adhered to the all-or-nothing rule and those that did not).

387. *See supra* Part II.B.2.c (explaining the doctrine of increased risk); *see also* Love, *supra* note 73, at 809–10 (discussing the increased risk situation with reference to toxic tort situations); Heinzerling & Hoffman, *supra* note 92, at 73 (same); Lapeze, *supra* note 38, at 265–66 (same).

388. Holton v. Mem'l Hosp., 679 N.E.2d 1202 (Ill. 1997).

389. *See supra* notes 167–72 and accompanying text (comparing loss of chance to increased risk); *see also* United States v. Anderson, 669 A.2d 73, 75–76 (Del. 1995) (comparing the loss of chance doctrine to the doctrine of increased risk). The *Anderson* court discussed the wisdom of adopting one or both of the theories of loss of chance and increased risk:

> Since loss of chance and increased risk of harm both rely on similar theoretical underpinnings, it is necessary to consider them together. For instance, it would not be coherent to adopt increased risk without also adopting loss of chance. Allowing a cause of action before the unfavorable result occurs would necessarily imply one after its occurrence. Loss of chance could be adopted, however, without also adopting increased risk. This would merely require plaintiffs to wait until the condition occurred and then sue for loss of chance.

Id.

390. *See supra* note 166 and accompanying text (listing those scholars who believe that increased risk is an extension of the loss of chance doctrine); *see also Anderson*, 669 A.2d at 75 ("[L]oss of chance and increased risk of harm both rely on similar theoretical underpinnings . . . .); Lapeze, *supra* note 38, at 267 (noting that the doctrines of increased risk and loss of chance are "basically the same").

391. *See supra* notes 167–72 (discussing the similarities and differences between increased risk and loss of chance); *see also Anderson*, 669 A.2d at 75–76 (discussing the differences between the two doctrines).

loss of chance claims when they could be analyzed under the increased risk doctrine.

C. The Practical Application of the Increased Risk Doctrine

One thing that must be recognized about the increased risk doctrine is that it is compensating plaintiffs for fictive harm, namely the "increased risk of future injury."[392] While it seems only fair to compensate a plaintiff who has both pain and suffering *and* an increased risk for cancer more than a plaintiff who just has pain and suffering with no chance of future injuries, the mechanism of allowing upfront compensation for the risk of a future harm is, on some level, problematic. When considering the potential for future injuries, the best litigants are able to do is to give some sort of statistical probability of the likelihood of harm materializing for any given individual.[393] This is to say that in the aggregate, when considering a defined subset of people, there is a chance that X% of them will endure future injuries.[394] With respect to any individual, however, one ultimately will or will not develop the future injury regardless of the chance of future risk presented at trial. Therefore, any recovery under the increased risk doctrine will necessarily either under-compensate or over-compensate everyone receiving compensation.[395]

It is, however, important to realize that the ultimate future injury itself is not what plaintiffs are being compensated for; plaintiffs, under the increased risk doctrine, are recovering for a *risk* of future injury.[396] This is to say that the generalized risk is itself the injury that is being compensated. In most situations, recovering for the risk of a future injury is better than not recovering at all. Practically, the increased risk

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392. *See supra* note 182 and accompanying text (discussing how the risk itself is viewed as an injury); *see also* Petriello v. Kalman, 576 A.2d 474 (Conn. 1990) (describing the increased risk as "the injury itself"); Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984) (same); Feist v. Sears, Roebuck & Co., 517 P.2d 675 (Or. 1973) (same); and Schwegel v. Goldberg, 228 A.2d 405 (Pa. 1967) (same).

393. *See* Part II.B.2.c (describing how to measure damages under the increased risk doctrine).

394. *See* STEIN, *supra* note 67, § 9.16, at 9-31 (discussing the determination of damages in such a situation and stating that "[h]ow much he or she should be compensated, of course, depends upon what is fair compensation for what has actually been lost: in short, considering all the odds, what was the value of the lost chance to avoid the future injury").

395. *See* Part II.B.2.c (describing how to measure damages under the increased risk doctrine). *But see* Klein, *supra* note 54, at 1187–94 (discussing the good sense of proportional liability under an economic theory).

396. *See supra* note 182 and accompanying text (discussing how the risk itself is viewed as an injury); *see also Petriello*, 576 A.2d 474 (Conn. 1990) (describing the increased risk as the injury); *Davis*, 672 S.W.2d 928 (Ky. 1984) (same); *Feist*, 517 P.2d 675 (Or. 1973) (same); *Schwegel*, 228 A.2d 405 (Pa. 1967) (same).

doctrine will still allow more plaintiffs to recover damages to the extent of their injury than the all-or-nothing approach.[397] Given the fact that Illinois does not allow claim-splitting, meaning that a plaintiff is forced to recover all at once for all injuries stemming from a particular event, the increased risk doctrine represents a "next-best" solution for those plaintiffs who have a risk of future injury.[398]

Another possible concern in adopting the increased risk doctrine is that the detailed mathematical equations necessary to determine damages will confuse juries.[399] The jury must go through three steps in order to reach an amount: (1) determine what the future injury would be worth if it actually occurred; (2) figure out the probability that the injury will actually occur; and (3) multiply the worth of the injury by the probability of its occurrence.[400] While this problem can most likely be addressed by a clear jury instruction,[401] some trial lawyers have already expressed concern that, from a policy standpoint, "we don't want jury instructions to become more complicated than tax returns."[402] However, despite the complexity of the computations, the benefits of the increased risk doctrine seem to far outweigh its possible inconvenience for juries. In the end, the increased risk doctrine will more fairly compensate a larger number of people than the all-or-nothing rule did.

VI. CONCLUSION

The Illinois Supreme Court in *Dillon* correctly decided that Illinois should reject the traditional all-or-nothing rule in favor of the increased risk doctrine of recovery. The all-or-nothing rule, although based upon valid principles of tort law, created an inequitable result for plaintiffs and defendants alike. Although jurisdictions have adopted different

397. *See* 17A AM. JUR. 2D *Contracts* § 486 (2002) ("[C]ourts have stated that only reasonable certainty is required in proving the fact and cause of an injury, and that the amount of damages—once their cause and fact have been shown—need not be proved with the same degree of certainty."); *see also supra* note 363 (explaining the rationale behind the economic theory of proportional liability).

398. *See supra* note 111 (listing those jurisdictions that allow claim splitting and noting that Illinois does not allow it).

399. *See supra* notes 162–72 and accompanying text (explaining the method by which damages are determined under the increased risk doctrine).

400. *See supra* notes 162–72 and accompanying text (explaining the method by which damages are determined under the increased risk doctrine).

401. *See supra* note 332 (providing a proposed jury instruction for the increased risk doctrine written by the plaintiff's attorney in *Dillon*); *see also supra* note 371 (providing a simpler example of a jury instruction that has actually been used by a court in Illinois).

402. Boyer, *supra* note 371.

remedies to fix some of the perceived inequalities of the all-or-nothing rule, the increased risk doctrine is the easiest way of insuring that a plaintiff be compensated for all of his or her injuries. Criticism that this new rule fails to embrace fundamental causation principles is unfounded; the basis for the increased risk doctrine is that causation must be proved before a plaintiff may recover for an increased risk. In sum, the increased risk doctrine is a more just, more realistic method of determining the worth of a future injury.