**The Medical Monitoring Remedy in Toxic Tort Cases**

 Ayers v. Township of Jackson

Supreme Court of New Jersey, 1987

106 N.J. 557, 525 A.2d 287

Stein, J. The litigation involves claims for damages sustained because plaintiffs’ well water was contaminated by toxic pollutants leaching...from a landfill established and operated by Jackson Township. After an extensive trial, the jury found that the township had created a “nuisance” and a “dangerous condition” by virtue of its operation of the landfill, that its conduct was “palpably unreasonable” [a prerequisite to recovery under N.J.’s sovereign immunity tort claims waiver], and that it was the proximate cause of the contamination of plaintiffs’ water supply. The jury verdict resulted in an aggregate judgment of $15,854,392.78, to be divided among the plaintiffs in varying amounts. The jury returned individual awards for each of the plaintiffs that varied in accordance with such factors as proximity to the landfill, duration and extent of the exposure to contaminants, and the age of the claimant.

The verdict provided compensation for three distinct claims of injury: $2,056,480 was awarded for emotional distress caused by the knowledge that they had ingested water contaminated by toxic chemicals for up to six years; $5,396,940 was awarded for the deterioration of their quality of life during the twenty months when they were deprived of running water; and $8,204,500 was awarded to cover the future cost of annual medical surveillance that plaintiffs’ expert testified would be necessary because of plaintiffs’ increased susceptibility to cancer and other diseases.

...The chemical contamination of their wells was caused by the township’s improper operation of the landfill [resulting in infiltration into the wells by] acetone; benzene; chlorobenzene; chloroform; dichlorofluoromethane; ethylbenzene; methylene chloride; methyl isobutyl ketone; 1,1,2,2-tetrachloroethane; tetrahydrofuran; 1,1,1-trichloroethane; and trichloroethylene....

An expert in the diagnosis and treatment of diseases caused by exposure to toxic substances testified that the plaintiffs required annual medical examinations to afford the earliest possible diagnosis of chemically induced illnesses. Her opinion was that a program of regular medical surveillance for plaintiffs would improve prospects for cure, treatment, prolongation of life, and minimization of pain and disability.

A substantial number – more than 150 – of the plaintiffs gave testimony with respect to damages, describing in detail the impairment of their quality of life during the period that they were without running water, and the emotional distress they suffered. With regard to the emotional distress claims, the plaintiffs’ testimony detailed their emotional reactions to the chemical contamination of their wells and the deprivation of their water supply, as well as their fears for the health of their family members. Expert psychological testimony was offered to document plaintiffs’ claims that they had sustained compensable psychological damage as a result of the contamination of their wells.

**Quality of Life...** Residents in need of water tied a white cloth on their mailbox and received a 40 gallon barrel containing a plastic liner filled with water. The filled barrels weighed in excess of 100 pounds.... One witness, who suffered from arthritis, testified to hauling her water for drinking, cooking and bathing up nine steps because, as she said, [t]here was no way that I could get the water upstairs except by hauling pot after pot out of the containers...which was a considerable amount of hauling everyday just to use for drinking and bathing the children and cooking.... Plaintiffs’ households...for nearly two years were compelled to obtain water in this primitive manner.

The trial court charged the jury that plaintiffs’ claim for “quality of life” damages encompassed “inconveniences, aggravation, and unnecessary expenditure of time and effort related to the use of the water hauled to their homes, as well as to other disruption in their lives, including disharmony in the family unit.”...

**Emotional Distress...** Many of the plaintiffs testified about their emotional reactions to the knowledge that their well-water was contaminated.... Typically, their testimony did not indicate that the emotional distress resulted in physical symptoms or required medical treatment.... Nevertheless, the consistent thrust of the testimony offered by numerous witnesses was that they suffered anxiety, stress, fear, and depression, and that these feelings were directly and causally related to the knowledge that they and members of their family had ingested and been exposed to contaminated water for a substantial time period.

Plaintiffs also presented testimony from an experienced clinical psychologist, Dr. Margaret Gibbs...[who] testified that the sample of 88 plaintiffs she tested manifested abnormally high levels of stress, depression, health concerns, and psychological problems.... The township contended that plaintiffs had not proved that the emotional distress experienced by them was manifested by any discernible physical symptoms or injuries, arguing that proof of related physical symptoms was a prerequisite to recovery.... Our cases no longer require proof of causally-related physical impact to sustain a recovery for emotional distress.... [The N.J. sovereign immunity statute, however, bars emotional injury recoveries.]

**Claims for Enhanced Risk, and Medical Surveillance...** We concur with the Appellate Division’s refusal to recognize plaintiffs’ damage claim based on enhanced risk... We disagree with its conclusion that an award for medical surveillance damages cannot be supported by this record.

Our evaluation of the enhanced risk and medical surveillance claims requires that we focus on a critical issue in the management of toxic tort litigation: at what stage in the evolution of a toxic injury should tort law intercede by requiring the responsible party to pay damages?... In the absence of statutory or administrative mechanisms for processing injury claims resulting from environmental contamination, courts have struggled to accommodate common-law tort doctrines to the peculiar characteristics of toxic-tort litigation....

Among the recent toxic tort cases rejecting liability for damages based on enhanced risk is Anderson v. W. R. Grace & Co.... We observe that the overwhelming weight of the scholarship on this issue favors a right of recovery for tortious conduct that causes a significantly enhanced risk of injury.... It is the highly contingent and speculative quality of an unquantified claim based on enhanced risk that renders it novel and difficult to manage and resolve.... On the other hand, denial of the enhanced-risk cause of action may mean that some of these plaintiffs will be unable to obtain compensation for their injury. Those who contract diseases in the future because of their exposure to chemicals in their well water may be unable to prove a causal relationship between such exposure and their disease...because of the difficulty of proving that injuries manifested in the future were not the product of intervening events or causes.... In our view, the speculative nature of an unquantified enhanced risk claim, the difficulties inherent in adjudicating such claims, and the policies underlying the Tort Claims Act argue persuasively against the recognition of this cause of action...for the unquantified enhanced risk of disease.

The claim for medical surveillance expenses stands on a different footing from the claim based on enhanced risk. It seeks to recover the cost of periodic medical examinations intended to monitor plaintiffs’ health and facilitate early diagnosis and treatment of disease caused by plaintiffs’ exposure to toxic chemicals.... An application of tort law that allows post-injury, pre-symptom recovery in toxic tort litigation for reasonable medical surveillance costs is manifestly consistent with the public interest in early detection and treatment of disease,...to deter polluters, [and] preventing or mitigating serious future illnesses [where an exposed person would otherwise be] unable to pay his own expenses when medical intervention is clearly reasonable and necessary....

Accordingly, we hold that the cost of medical surveillance is a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary...notwithstanding the fact that the extent of plaintiffs’ impaired health is unquantified....

COMMENTARY & QUESTIONS

1. **The medical surveillance remedy and latency compensation.** The relatively novel surveillance monitoring fund remedy sought by the attorneys in *Ayers* has been picked up in several other states as a response to the problems of long-term toxic torts’ latency. It seems like an appropriate and measured response to the feeling of vulnerability and burden felt by wrongfully exposed persons, who otherwise might not be able to provide themselves rigorous medical attention, while not breaking the bank. Subsequent courts, including New Jersey’s, have amended the medical surveillance remedy by setting up a fund rather than awarding a lump sum. “The indeterminate nature of damage claims in toxic-tort litigation suggests...the use of court-supervised funds to pay medical-surveillance claims as they accrue, rather than lump-sum verdicts.” *Ayers*, 525 A.2d at 313. Would the *Anderson* court have allowed medical surveillance, although it foreclosed recovery for risk?

2. **The medical monitoring remedy since *Ayers*.** The medical monitoring remedy has made great strides since *Ayers*. A recent comprehensive listing of medical monitoring cases can be found at Martens & Getto, Medical Monitoring and Class Actions, 17 Nat. Resources & Env’t 225, 226 (2003). In Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (1990), the Third Circuit set out a four-part test for medical monitoring: Courts should grant the medical monitoring remedy if plaintiffs demonstrate that (1) they were significantly exposed to hazardous materials as a result of the negligence of the defendant; (2) as a proximate result of their exposure, they suffer a significantly increased risk of contracting a serious latent disease; (3) the increased risk makes regular medical monitoring and treatment reasonably necessary; and (4) the monitoring and treatment make early detection and/or prevention of the disease possible. In several cases, courts, including the Supreme Court, have indicated a willingness to apply the remedy though declining to do so in the particular case at hand. In an asbestos exposure case, Metro-North Commuter R.R. v. Buckley, 521 U.S. 424 (1997), the Supreme Court declined to award medical monitoring under the Federal Employers’ Liability Act (FELA). Though the Court endorsed the *Paoli* tests in principle, it suggested that asymptomatic plaintiffs should be restricted to court-supervised monitoring funds rather than “full-blown lump sum recoveries” and clearly was worried that “tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring.” 521 U.S. at 442.

3. **Damages for increased risk of future illness.** It is undeniably true that certain exposures to toxics, by their effects (including damage to the immune system), increase the likelihood that a person will suffer serious future illness and earlier death. Can exposed persons sue against identifiable sources of the contamination prior to the onset of disease, not for the disease but for the increased risk? Such damages could be claimed by a very broad swath of plaintiffs, many of whom in statistical terms surely would never get the illnesses, and would presumably not foreclose future recoveries by those who later actually got sick. Pre-illness claims are inherently enigmatic. On one hand, compensation can mulct defendants of damages even in cases where illness never occurs. This results in a form of systematic overcompensation. On the other hand, to refuse compensation is to ignore the goal of complete compensation because defendant’s conduct has made plaintiffs less well off. Consider whether an individual would voluntarily choose to drink contaminated water for several years. See R. Posner, Economic Analysis of Law 149 (6th ed. 2003). Likewise, consider what a prudent insurer of health risks would do if it discovered that an applicant for insurance had suffered a major toxic exposure, as had the plaintiffs in *Ayers*. Are there persuasive rebuttals to these assertions of over- and undercompensation? Is there a further argument that compensation for enhanced risk systematically undercompensates those victims who actually contract the feared disease? To what extent is it necessary to know whether subsequent lawsuits (when diseases actually appear) will be barred by the statute of limitations or by doctrines of res judicata? As a policy matter, the majority in *Ayers* tried to indicate in dicta that New Jersey courts should be receptive to later suits. The court coupled that assurance with its perception that courts are facing only the beginning of a flood of toxic tort litigation, to justify its conservative wait-and-see, wait-and-sue approach to enhanced risk.

4. **Hedonic “quality of life” damages.** What items of damage seem to have been included in the *Ayers* “quality of life” recovery? Hedonic damages, noted in Chapter 3, are recent arrivals in toxic tort law and will require judicial elaboration. Is there any recognition of the stigma of living in a contaminated community? Is there any argument that separates toxic tort cases from ordinary tort cases when it comes to compensation for subjective intangibles? The mass exposure aspect of toxic tort cases implies that defendant’s financial exposure may be great. Under what circumstances will that justify modification of the ordinary substantive rules?

5. **Stigma and the new tort of “toxiprox.”** Owners of land situated in close proximity to hazardous materials sites frequently find that the market values of their land are adversely affected as a result of the nearby presence of the hazardous materials. This is particularly true in the case of sites at which toxic materials have been released into the environment, but it is also true to a lesser extent where a nearby facility is used for the proper treatment or disposal of hazardous materials, or even where the facility is simply one at which hazardous materials are known to be in use. Would-be buyers discount the value of the parcel in consequence of the proximity of the hazardous materials, often without reference to whether those materials pose even a scintilla of risk of harm to the parcel being offered for sale. Compensation increasingly is being sought for losses that are consequent upon toxic proximity alone. Consider the following situations:

* A New Jersey trial court judge certified a class action lawsuit brought by owners of parcels located in close proximity to an infamous Glouster Environmental Services (GEMS Landfill) hazardous waste site. The principal claim of the suit is that the affected homes are either unsaleable or seriously devalued by their proximity to the contaminated site.[[1]](#footnote-1)
* New York’s highest court, in determining how much compensation is due to owners of property condemned for its proximity to high voltage lines, has recognized a compensable interest in favor of property owners who can prove that fear of EMF (electromagnetic field) emissions from high voltage power lines will cause a reduction in the value of their real property, and contemporary cases involving parcel valuation for tax assessment purposes also are beginning to take toxic contamination and its effect on market price into account in valuing the subject parcel.[[2]](#footnote-2)
* In Strawn v. Incollingo, N.J. Super. Ct. App. Div., No. A-4764-91T3 (Feb. 22, 1994), purchasers of homes in a new development were held to have a cause of action against the builder and brokers who sold them houses without disclosing the proximity to a closed landfill suspected of containing toxic waste.

What is the legal theory supporting recovery in these cases? As these claims proliferate, it will be possible to determine whether these cases comprise a new unique toxic tort cause of action or are instead an additional element of damage (similar to fear of cancer claims) being asserted under existing rubrics of negligence, nuisance, and strict liability.

Under New York law, landowners who prove that a neighboring business contaminated their property with hazardous pollutants may be entitled to damages for “stigma” above and beyond the costs of cleaning up the property. In Scribner v. Summers, 138 F.3d 471 (2d Cir. 1998), plaintiffs brought suit under CERCLA and state nuisance laws when defendant’s steel treating operation contaminated plaintiffs’ property with barium. The district court granted plaintiffs’ claims but refused to award permanent damages on the state law claims on the grounds that the CERCLA cleanup would remedy any permanent injury to the property. In a per curiam opinion, the Second Circuit Court of Appeals reversed and remanded the district court decision as to the denial of permanent damages, holding that, while New York law is unsettled on this point, plaintiffs may be able to recover damages for any “stigma” that attaches to the property and depresses its value, even though a full cleanup has occurred. The court indicated that it would be inclined to certify the question to the New York Court of Appeals if it were presented on an adequate record.

Another remedy for these losses is a publicly administered fund established by a tax on landfill operators. See New Jersey Sanitary Landfill Facility Closure and Contingency Fund Act,N.J.S.A. §§13:1E‑100 to 13:1E‑116. But see also Citizens for Equity v. New Jersey Dep’t of Envtl. Protection, 599 A.2d 507 (1991), where the court upheld a change in administrative rules that cut off recoveries for landowners that previously had been defined by the agency to include: “(1) The cost of restoring, repairing or replacing any real or personal property damaged or destroyed, and *the diminution in fair market value of any real property.*” 599 A.2d at 509 (emphasis added by the court). Up until that point, the fund had paid over $5 million in compensation, with more than 95% of that amount going for decreased value in the absence of parcel contamination. Most payments under the law were made to landowners affected by the GEMS Landfill.

6. **Statutes of limitation — “I wasted time, and now doth time waste me.”**[[3]](#footnote-3) Toxic tort cases raise a number of difficult statute of limitations problems. As an initial matter, the discovery by plaintiffs that they are victims of a tort is seldom concurrent with the defendant’s tortious conduct. In both *Ayers* and *Anderson*, the groundwater contamination and plaintiffs’ exposure to it began long before plaintiffs learned that contamination had occurred and before plaintiffs suffered physical injury.

The courts have adopted two devices for dealing with statutes of limitations problems. The first doctrine, intended to protect courts from the burden of adjudicating unripe controversies, turns on the definition of when a cause of action accrues. Accrual occurs only when all of the elements necessary for successful prosecution of the claim have occurred. A lawsuit cannot be brought by a plaintiff before the basic facts required for a cause of action have happened, and a central element of any tort claim is the injury to the plaintiff. To hold otherwise defies logic, asking plaintiff to act on a legal right not yet in existence.

The second major concept in limitation of actions, offering particular protection to plaintiffs in toxic tort cases, is the so-called discovery rule. It, too, helps to define when a cause of action accrues. In a portion of the *Anderson* opinion addressing the effect of the statute of limitations on wrongful death claims, the court stated the general discovery rule:

The discovery rule is a method of defining when a cause of action accrues. The principle behind the rule is that “a plaintiff should be put on notice before his or her claim is barred by the passage of time.” The notice required by the rule includes knowledge of both the injury and its cause — that plaintiff “has been harmed as a result of defendant’s conduct.” 628 F. Supp. at 1224.

This particular form of the discovery rule, requiring that the plaintiff must be on actual or constructive notice of the fact of injury and who caused it before the statute starts running, is not a majority rule, although it appears to be gaining. Other states toll the statue of limitations in these toxic tort cases only until discovery of the injury. See Development in the Law — Toxic Waste Litigation, 99 Harv. L. Rev. 1458, 1906-1907 (1986).

“Statutes of repose” have been enacted in some states.[[4]](#footnote-4) Unlike statutes of limitations, statutes of repose expressly disallow the operation of the discovery rule. These statutes appear to be motivated by marketplace concerns for the burdens placed on present-day operators of businesses by large judgments for “ancient torts.” Unfortunately, many illnesses caused by wrongful exposures to environmental toxics lie latent for years before surfacing. Marketplace lobbyists argue that often the wrongful acts were committed by officers and employees who have no present relation to the defendant.

The discovery rule addresses the problem of long latency periods intervening between tortious exposure and the onset of disease. If the statute of limitations does not begin to run until the disease is manifest, then plaintiffs will have ample opportunity to bring suit after the onset of the disease. There may be some proof difficulties in reconstructing the events surrounding exposure, but these are the lesser of evils. The principal alternatives to the discovery rule are requiring defendants to compensate *all* exposure victims as if they have developed the disease or abandoning the discovery rule, thereby limiting tort recoveries to just those harms that became manifest within a short time after exposure. *Ayers* recognizes another potential discovery rule problem, the operation of the rules of res judicata (in particular, merger and bar) that the New Jersey court labels “the single controversy rule.” In most instances, in order to avoid duplicative and inefficient litigation of a case, all claims must be joined in a single suit. To the extent that claims have been omitted and not placed in issue, the single controversy rule deems them extinguished and “merged” into the original judgment. In cases like *Ayers*,the pitfall of the single controversy rule is that later-initiated claims for matured illness would be allowed by the discovery rule but barred by merger. The New Jersey answer to this problem is to recognize that the policies of the discovery rule would be set at naught if merger and bar were applied. The court pointed out that merger and bar apply only to claims that could have been brought at the time of the first suit, and here, technically speaking, the cause of action for bodily injury would not yet have come into existence.

7. **Sovereign immunity.** Most sovereigns in history have not encouraged their citizens (or anyone else, for that matter) to sue them in the sovereign’s own courts. The idea of sovereign immunity has long been a powerful part of the American law. In the nineteenth and twentieth centuries, however, numerous attacks on the unfairness and irrationality of immunity were mounted and, eventually, took their toll. In an era where government is acknowledged to have many similarities to other corporate entities, why, for example, should a pedestrian negligently run down by a government-owned vehicle find her suit barred by governmental immunity when no such bar would encumber a suit against a private company? In the *Ayers* case, for example, why should Jackson Township be any less responsible for harms caused by its dump operations than a private landfill operator?

Over time, the courts, and to a lesser extent legislatures, responded to arguments favoring a partial abolition of governmental immunity. On the common law front, a popular innovation is to distinguish between cases in which the governmental defendant is performing a governmental function, and those in which it is engaging in a mere proprietary function.[[5]](#footnote-5) For example, setting the standard for airborne lead pollution would be governmental in character and would be immune from suit even if the government did it negligently; running a hot dog stand at the public beach or emitting excess pollutants from a furnace at a state-owned office building would be proprietary in character and subject to suit. In between these two examples lie many gray areas. Another popular judicial device for limiting immunity is to grant official immunity for acts that are clothed with discretion (again, standard-setting is a good example), but to hold officials liable for negligence or intentional torts in the performance of mere “ministerial” functions.[[6]](#footnote-6) Some legislatures have taken similar initiatives, while a larger number have codified what the courts have done, sometimes modifying the scope of the judicial abrogation of immunity, other times not.

In recent years, with the advent of widely publicized tort recoveries and a manifold increase in governmental liability insurance costs, a reaction to the liberalized abrogation of immunity has taken place. The statute construed in *Ayers* had reasserted a broader concept of governmental immunity in that state, though creating an exception to that immunity under statutorily defined circumstances. Even in cases where the New Jersey statute allows governmental immunity, however, the statute expressly denies damages for pain and suffering and similar intangible items of damage.

1. 12. See In re GEMS Landfill Super. Ct. Litig., N.J. Super. Ct., Camden County, No. L-068199-85 (Feb. 2, 1994), as reported at 8 BNA Toxics L. Rep. 1035-1036 (1994). See also Exxon Corp. v. Yarema, 516 A.2d 990 (Md. 1986) (allowing recovery for decreased property value caused by groundwater contamination that did not reach the affected parcel); but see Adkins v. Thomas Solvent, 440 Mich. 293, 487 N.W.2d 715 (1992) (holding that diminished property values caused by negative publicity affecting parcels proximate to, but not themselves subject to, hazardous waste contamination, is a loss without legal injury). A California jury awarded $826,500 to a property owner for postcleanup stigmatization of the property and $400,000 in lost rents. Bixby Ranch Co. v. Spectrol Elec. Corp., Cal. Super. Ct., Los Angeles County, No. BC052566 (Dec. 13, 1993), as reported at 8 BNA Toxics L. Rep. 955-956 (1994). [↑](#footnote-ref-1)
2. 13. See Criscuola v. Power Auth. of the State of N.Y., 81 N.Y.2d 649, 621 N.E.2d 1195, 602 N.Y.S.2d 588 (1993); Westling v. County of Mille Lacs, 512 N.W.2d 863 (Minn. 1994) (assessment included a deduction for the claimed stigma attached to the property because of the pollution). [↑](#footnote-ref-2)
3. 14. William Shakespeare, Richard II, Act V, Scene V. [↑](#footnote-ref-3)
4. 15. See Mass. Gen. L. ch. 260, §2B (–6 years); 735 Ill. Comp. Stat. 5/13-213(b) (–12 years); Va. Code Ann. §8.01-250 (–5 years).

An action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property...shall be commenced only within three years next after the cause of action accrues; *provided, however,* that in no event such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner. Mass. Gen. L. ch. 260, §2B.

Courts have reached different conclusions about the defense’s applicability in long-term latency environmental contamination cases. Pitney-Bowes v. Baker Indus., 649 A.2d 1325 (N.J. Ct. App. 1994); Weymouth v. Welch Co., 18 Mass. L. Rptr. 6 (Mass. App. Ct. 1996); Norfolk v. U.S. Gypsum, 360 S.E.2d 325 (Va. 1987); Rowan County v. U.S. Gypsum, 418 S.E.2d 648 (N.C. 1992). [↑](#footnote-ref-4)
5. 16. *Proprietary* implies that there is no functional difference from a privately owned profit-making enterprise; *governmental* implies a function carried on in satisfaction of a public duty. [↑](#footnote-ref-5)
6. 17. *Ministerial* implies that the public employee is simply executing explicitly required governmental duties; *discretionary* acts are based on broader, less constrained grants of delegated authority to act. [↑](#footnote-ref-6)