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CANCERPHOBIA DAMAGES IN MISSOURI: A COMPREHENSIVE DISCUSSION ON TOXIC TORTS AND FEAR OF DISEASE RECOVERY

by Thad R. Mulholland

INTRODUCTION

In *Bass v. Nooney*,[1] the Missouri Supreme Court eliminated the long-standing common law requirement that a plaintiff can only recover for emotional distress accompanied by physical injury or impact.[2] Essentially, *Bass* transformed the parasitic claim for emotional distress damages into an independent tort.[3] Though still a minority, many states have either preceded or followed Missouri in altering the traditional common law requirements for emotional distress recovery.[4] This development presents a wealth of implications and possibilities in the burgeoning field of toxic tort recovery.

Recently, courts have heard an increasing number of litigants in toxic tort cases argue that because of their exposure to the defendant's carcinogens, they experienced emotional distress in the form of fear of future disease or, more specifically, cancerphobia.[5] Often, the plaintiff has no present physical injury and attempts to recover for the anxiety alone.[6] The recent judicial trend has been to allow recovery for such claims, absent evidence of physical injury.[7] The plaintiffs assert that their fear of the future development of cancer constitutes a compensable present injury.[8] Under this theory, the plaintiff seeks recovery for the existing fear, not for the future likelihood that a disease will result. Most courts that have heard cancerphobia cases have allowed recovery.[9]

As technology enables scientists to identify new carcinogenic substances each year, cancerphobia claims will undoubtedly multiply.[10] Indeed, some experts predict that as many as 21 million persons could be positioned to bring a toxic tort injury action for exposure to asbestos.[11] Correspondingly, one study projects that 20 percent of all Americans may develop cancer.[12] A general fear of cancer has always been universal; only recently has that concern focused on specific substances.[13] The "new" regime of emotional distress recovery in Missouri and elsewhere offers many opportunities to capitalize on this new-found fear.

Many obstacles arise because cancer generally lies latent for a time following exposure to a carcinogen.[14] Consequently, determining whether one develops cancer as a direct result of a specific contact with a carcinogen is nearly impossible.[15] Further, plaintiffs rarely suffer from a traditionally compensable injury at the time they seek relief for cancerphobia.[16] These factors merge to make

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[1] 646 S.W.2d 765 (Mo. 1983).

[2] *Id.* at 772 (known as the "impact rule").

[3] *Id.* at 773 (*quoting* Comment, Negligently Inflicted Mental Distress: The Case for an Independent Tort, 59 Geo. L. J. 1237 (1971)). *Bass* required that the plaintiff demonstrate that "(1)The defendant should have realized that his conduct involved an unreasonable risk of causing the distress; and (2) the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant." *Id.* at 772.

[4] *See, e.g., Johnson v. Supersave Markets, Inc.*, 686 P.2d 209, 213 (Mont. 1984) (allowing recovery for emotional distress absent physical injury); *James v. Lieb*, 375 N.W.2d 109, 114 (Neb. 1985) (abandoning the zone of danger rule); *Molien v. Kaiser Foundation Hospitals*, 616 P.2d 813, 821 (Cal. 1980) (eliminating the physical injury requirement); *Rodrigues v. State*, 472 P.2d 509, 519 (Haw. 1970)(making the negligent infliction of emotional distress an independent cause of action).

[5] The term "cancerphobia" has been used interchangeably by many courts with the phrase "fear of cancer" to describe a plaintiff's "present anxiety over developing cancer in the future." *Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795, 804 & n.5 (Cal. 1993); Robert L. Willmore, *In Fear of Cancerphobia*, 56 DEF. COUNS. J. 50, 51 (1989). Technically, however, cancerphobia is a scientific term and constitutes mental illness, whereas fear of cancer is a lay term and a subcategory of emotional distress. *Potter*, 863 P.2d at 804 & n.5. Additionally, this theory can be applied to nearly any set of circumstances in which the plaintiff fears contracting a disease as a result of his exposure to defendant's toxins. Such fear may also be termed "hypochondria". Susan M. Knepel, *Recovery for Emotional Distress Resulting from the Fear of Future Injury or Disease*, 37 FED'N INS. & CORP. COUNS. Q. 273, 273 (1987). In the course of this Comment these terms will be used synonymously.

[6] Knepel, *supra* note 5, at 289.

[7] Scott D. Marrs, *Mind over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and "Fear of Disease" Cases*, 28 TORT & INS. L.J. 1, 4 (1992).

[8] Fournier J. Gale III & James L. Goyer III, *Recovery for Cancerphobia and Increased Risk of Cancer*, 15 CUMB. L. REV. 723, 724.

[9] *Id.* at 730.

[10] *See* Willmore, *supra* note 5, at 54.

[11] *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1323 (5th Cir. 1985).

[12] Terry M. Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 FORDHAM L. REV. 527, 563 (1984).

[13] Willmore, *supra* note 5, at 54. *See also* Robert J. Samuelson, *The Triumph of the Psycho-Fact*, NEWSWEEK, May 9, 1994, at 73.

[14] *Gale & Goyer*, *supra* note 8, at 723.

[15] *Willmore*, *supra* note 5, at 53-54.

[16] *Id.*

recovery at least partially dependent on the testimony of the complaining party,[17] thereby making the alleged injury unverifiable and susceptible to "eas[y] manipulat[ion]".[18]

Cancerphobia is essentially a subjective claim. Accordingly, the potential for abuse is great where courts allow recovery absent physical manifestations or impact. This concern is one source of the long-standing Restatement and common law requirement that emotional damages could only piggyback onto physical injury claims.[19] The physical injury served as the "only objective and readily verifiable check" on emotional distress claims.[20] Thus, the physical injury requirement served as more than a mere formality. Though many jurisdictions have discarded this well-reasoned safeguard, when confronted with cancerphobia claims the judiciary should be wary of unbridling an uncontainable beast.

II. Legal History

A. The Genesis of the Emotional Distress Claim

Traditionally, a person seeking to recover damages arising from the misconduct of another must ultimately prove that he has been legally injured.[21] Some courts characterize injury as a tangible harm "contemporaneous to some adverse impact."[22] Because emotional distress damages differed from property and economic damages in that the latter were capable of objective measurement, courts historically regarded emotional distress claims with suspicion.[23] Clearly, this conventional conception of injury severely impedes recovery for emotional distress based on fear of disease in most toxic tort cases.[24]

In conforming with this paradigm of injury, many common law courts hesitated to award damages for emotional distress[25] unaccompanied "by clearly recognizable serious injuries."[26] The potential for fraudulent claims justified this reluctance.[27] Courts feared that to rule otherwise would open the "wide door" to trivial and frivolous claims.[28] The physical harm threshold essentially acted as a sieve for frivolous claims,[29] keeping closed the "flood gates" of litigation.[30] Indeed, plaintiffs had to wait until the twentieth century before any courts recognized an independent cause of action for emotional distress.[31]

The tort of assault, though otherwise defying traditional tort doctrine, is sufficiently ingrained in the system to be the rule rather than the exception. In fact, assault has historically been the only vehicle of recovery for emotional injuries.[32] Under the Restatement, the plaintiff can recover upon a showing that the defendant caused the plaintiff to apprehend imminent bodily contact which is harmful or offensive.[33] No actual contact or corresponding physical injury is necessary.[34] The imminence prong of the test acted as a check against untrammeled liability by limiting the number of potentially valid claims

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[17] Stephen D. Mierop, Comment, *Cancerphobia: Should Texas Courts Recognized this Tort Claim?*, 29 Hous. L. R. 219, 237-38 & n.157 (1992) (*citing* Massey v. Massey, 807 S.W.2d 391, 399-400 (Tex. App. 1991) (allowing recovery for negligent infliction of mental anguish based on testimony by the plaintiff and her doctor) *reh'g denied*, 867 S.W.2d 766 (Tex. 1993); *City of Watagua v. Taylor*, 752 S.W.2d 199, 204 (Tex. App. 1988) (allowing recovery based solely on plaintiff's testimony of frustration, anger, stomach aches, headaches, and insomnia.) *But cf. In re* Hawaii Federal Asbestos Cases, 734 F.Supp. 1563, 1570 (D. Haw. 1990) (ruling that plaintiff's fear based solely on self-serving declarations is not a reasonable fear and therefore does not warrant recovery absent a showing of an underlying compensable harm.)

[18] *Willmore, supra* note 5, at 52.

[19] Restatement (Second) of Torts § 436A (1965) reads as follows: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." Comment (b) to § 436 details the reasons for the contemporaneous physical injury requirement: "(1) In the absence of physical consequences, emotional disturbances tend to be trivial or temporary. (2) There is a very real danger of exaggerated and even entirely fraudulent claims of mental distress . . . ." *See also Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982) ("It is in recognition of the tricks that the human mind can play upon itself, as much as of the deception that people are capable of perpetuating upon one another, that we continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually suffered emotional distress." *Id.* at 175.)

[20] *Willmore, supra* note 5, at 52. *See also Leaon v. Washington County*, 397 N.W.2d 867 (Minn. 1986).

[21] Allan Kanner, *Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation*, 18 Rutgers L.J. 343, 348 (1987).

[22] *Id.* at 352.

[23] *Dworkin, supra* note 12, at 529.

[24] *Id.*

[25] *Knepel, supra* note 5, at 273.

[26] *Payton v. Abbott Laboratories*, 437 N.E.2d 171, 179 (Mass. 1982). Many courts required that the emotional distress occur simultaneously with and because of the physical injury or that the physical injury occur as a result of the emotional distress. *Id.* at 181.

[27] *See Bass v. Nooney*, 646 S.W.2d 765 (Mo. banc 1983) ("The reasons generally given for adopting [the impact rule] were the following: (1) the difficulty in proving a causal connection between the damages claimed by the plaintiff and the act of the defendant which is claimed to have induced the mental and emotional distress; (2) permitting such suits would encourage imaginary and fraudulent claims; and (3)the probability that permitting recovery would release a flood of new litigation made up of such claims." *Id.* at 769). 28 *Spade v. Lynn & Bros. R.R.*, 47 N.E. 88, 89 (Mass. 1897).

[29] *See Payton*, 437 N.E.2d at 175.

[30] *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 529 (Fla. Dist. Ct. App. 1985), *reh'g denied*, 492 So.2d 1331 (Fla. 1986).

[31] *Dworkin, supra* note 12, at 529-30.

[32] *Id.* at 529.

[33] Restatement (Second) of Torts (1965) §§ 21, 29. The plaintiff must also prove that the defendant acted with intent to perpetrate such contact or apprehension of such contact. *Id.*

[34] *Id.*

through a small allowable window of apprehension.[35] Recognition of assault as a valid cause of action likely made emotional distress claims more palatable to judges.

A few prevalent exceptions undermined strict adherence to the conventional rules of recovery and enabled plaintiffs to recover for emotional distress without a "host" physical injury. One of these exceptions applied to certain entities having particularly sensitive dealing with the public - like undertakers and telegraph operators.[36] Notably, this exception did not forsake the underlying rationale of the common law insistence on contemporaneous physical injury. Rather, courts believed that incidents like the mishandling of a corpse or the misdirection of a telegraph message were sufficiently egregious to ensure genuine claims.[37]

Similarly, that rationale justified recovery for intentional infliction of emotional distress.[38] That is, the outrageousness of the tortfeasor's actions or the sensitivity of the tortfeasor's special knowledge or position with respect to the plaintiff, reasonably "contained" recovery.[39] This theory presumed that "outrageous" and intentional conduct necessarily spawned emotional distress.

1. *The Impact Rule*

The foundation of the common law dislike for emotional distress damages eroded further as courts added more exceptions. The institution of the impact rule increased the likelihood of recovery.[40] Under this regime, the plaintiff must show that the tortfeasor's conduct resulted in "contemporaneous traumatic" physical impact with the body of the plaintiff.[41] Again, the courts adhered to the traditional rationale. Courts viewed the physical impact requirement as a screen that would prevent "imaginary and fraudulent claims"[42] and generally ward off "a flood of new litigation."[43]

Judges applied the impact rule rigorously, resulting in what many considered to be harsh and arbitrary results.[44] Typical of such results is the holding that absent a physical impact or rape, the victim of an assault could not recover for emotional distress.[45] Conversely, demonstrating an impact became a mere formality in many cases, and accordingly the requirement did not present much of an obstacle to recovery.[46] Because of the perceived inequities and obsolescence of the impact rule, and in light of the courts' function as forums to remedy all wrongs,[47] the general trend has been to repudiate the physical impact rule.[48]

2. *The Zone of Danger Test*

In lieu of the safeguards provided by the impact rule, some courts implemented a foreseeability requirement and retained the traditional requirement of an attendant physical injury to insure the validity of claims.[49] Once again, this doctrine, known as the zone of danger test, did not vary significantly from the traditional screening devices employed by the common law.

The Restatement of Torts documents liability under this theory.[50] Essentially, under the zone of danger theory, a tortfeasor owed no duty to a person outside the zone of danger.[51] Rather, only "persons who are physically injured as a result of a fear for their own safety" can recover for emotional distress.[52] This theory contemplated a contemporaneous physical injury as a "primary screening device"[53] but shifted the focus to bodily injury caused by the emotional dis-

[35] *Dworkin, supra* note 12, at 529.

[36] *See, e.g., Western Union Tel. Co. v. Coffin*, 30 S.W. 896, 896 (Tex. 1895); *Wilson v. Ferguson*, 747 S.W.2d 499, 502-03 (Tex. Ct. App. 1988); *Rodrigues v. State* 472 P.2d 509, 519 (Haw. 1970).

[37] *Rodrigues*, 472 P.2d at 519.

[38] *Dworkin, supra* note 12, at 530. This Comment will focus on emotional distress actions premised on a theory of negligence and will not for the most part discuss those cases or authorities addressing intentional infliction of emotional distress as a vehicle of recovery for cancerphobia. *See Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795, 817-21 (Cal. 1993) for a thorough discussion of cancerphobia recovery and intentional conduct.

[39] *Dworkin, supra* note 12, at 530. *See also* RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

[40] *Gale & Goyer, supra* note 8, at 726. *See, e.g., Porter v. St. Joseph Ry., Light, Heat & Power Co.* 277 S.W. 913 (Mo. banc 1925), *overruled by Bass v. Nooney*, 646 S.W.2d 765 (Mo. banc 1983).

[41] *Bass v. Nooney Co.*, 646 S.W.2d 765, 768 (Mo. 1983).

[42] *Bass*, 646 S.W.2d at 769.

[43] *Id.*

[44] *Knepel, supra* note 5, at 275-76.

[45] *Id.* at 275 (*citing, Ford v. Schliessman*, 83 N.W. 761 (1900)).

[46] *Dworkin, supra* note 12, at 546 (*citing Sam Finley, Inc. v. Russell*, 42 S.E.2d 452, 456 (1947) (holding that inhaling dust was sufficient impact to sustain a cause of action where plaintiff suffered no physical injury).

[47] *Bass*, 646 S.W.2d at 770.

[48] *Kanner, supra* note 21, at 361 & n.96. *See also Bass v. Nooney*, 646 S.W.2d 765 (Mo. 1983); *Schultz v. Barberton Glass* Co., 447 N.E.2d 109 (1983). Note that less than ten states still adhere strictly to the impact rule in emotional distress cases. Susan J. Zook, Note, *Under What Circumstances Should Courts Allow Recovery for Emotional Distress Based Upon the Fear of Contracting AIDS?* 43 WASH. U. J. URB. & CONTEMP. L. 481, 485 (1993).

[49] *Bass*, 646 S.W.2d at 770 (The *Bass* court simultaneously considered and rejected the zone of danger rule as "arbitrary" and "artificial". *Id.* at 771). *See Gale & Goyer, supra* note 8, at 728.

[50] (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor (a) should have realized his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and (b) from the facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm. (2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other. RESTATEMENT (SECOND) of TORTS § 313 (1965).

[51] *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (N.D. 1972). *See also Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 100 (1928) (plaintiff's proximity to the area of danger placed her within "the orbit of the duty" imposed on the tortfeasor), *reh'g denied.* 164 N.E. 564 (N.Y. 1928).

[52] *See Waube v. Warrington*, 258 N.W. 497, 500 (Wis. 1935).

[53] *Dworkin, supra* note 12, at 532.

tress as different from physical injury coexistent with, but physiologically unrelated to, the emotional distress.[54]

However, some courts moved away from the zone of danger doctrine because they perceived it as yielding undesirable results.[55] These courts searched for a more appropriate vehicle of recovery.[56]

3. *The Foreseeability Rule*

In *Dillon v. Legg*,[57] the plaintiff mother witnessed the death of her child but did not occupy the zone of danger. The *Dillon* court granted recovery and set out a foreseeability test for application on an *ad hoc* basis.[58] The test gauged foreseeability based on the proximity of the plaintiff to the site of the defendant's conduct, the plaintiff's ability to simultaneously perceive the accident and the attendant shock, and the closeness of the relationship between the plaintiff and the victim.[59] Under this rule, the defendant's liability depended on the foreseeability of the injuries to the plaintiff.[60] The scope of the defendant's liability "exclud[ed] the remote and unexpected."[61] However, *Dillon* did not provide a means of recovery for a plaintiff suffering noncontemporaneous distress.[62]

In summary, courts hearing infliction of emotional distress cases generally allowed recovery not as an exception to the underlying policy rationale of preventing frivolous claims and barring the flood gates of litigation, but in furtherance of this objective. Clearly, this paradigm presents impediments to recovery in toxic tort cases in which the plaintiff only fears some future consequence. One development in particular signals the willingness of the courts to allow recovery for cancerphobia.

B. Emotional Distress as a Separate Cause of Action

The modern trend in emotional distress cases is to eliminate the physical manifestation requirement and to permit a general negligence cause of action regardless of the plaintiff's physical status.[63] In an attempt to guard against opening the flood gates of litigation, those courts that liberalized recovery for emotional distress reemphasized the foreseeability requirement.[64] Further, these courts sought to limit recovery in other ways. In *Molien v. Kaiser Foundation Hospitals*,[65] the California Supreme Court held that focusing on the seriousness of the resulting distress offset the need to screen for physical injury.[66] The sufficiency of proof became the operative issue.[67]

The intention of the trend-setting courts was not to compromise the traditional common law checks on recovery; rather, the common law exceptions cases[68] served as examples of genuine and serious claims worthy of recovery.[69] In this respect, any new recovery scheme should reflect a judicial policy of limiting claims.[70] The Missouri Supreme Court furthered these principles in liberating emotional distress from its parasitic status.[71]

Courts taking the liberalized approach viewed the physical injury requirement as an albatross. These courts reasoned that the requirement could no longer effectively guarantee the genuineness of claims.[72] Instead, it only "encouraged extravagant pleading and distorted testimony."[73] Overwhelmingly, these courts characterized the physical injury requirement as both over- and under-inclusive.[74] It was over-inclusive because a

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[54] *Gale & Goyer, supra* note 8, at 728. See also comments to RESTATEMENT (SECOND) OF TORTS § 313 in conjunction with the text of § 436A, supra note 19.

55 *Payton v. Abbott Labs*, 437 N.E.2d 171, 177 (1983). A strict reading of the zone of danger test often lead to inequitable results in that the difference of a few feet may preclude one plaintiff from recovery while supporting recovery for another plaintiff. *Dillon v. Legg*, 441 P.2d 912, 915 (Cal. 1968). Note that the majority of courts still consider the zone of danger test applicable for emotional distress claims. *Zook, supra* note 48, at 484-85.

[56] *See* Section II B, *supra*.

[57] 441 P.2d 912 (Cal. 1968).

[58] *Id.* at 921.

[59] *Id.* at 920.

[60] *Id.* at 919.

[61] *Id.* at 921.

[62] *See Knepel, supra* note 5, at 279.

[63] *Marrs, supra* note 7, at 4. *See, e.g., Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Taylor v. Baptist Medical Center*, 400 So.2d 369 (Ala. 1981).

[64] *Bass*, 646 S.W.2d at 773 ("With respect to foreseeability, there is considerable question whether these defendants could anticipate that an ordinary person normally constituted would succumb to serious emotional distress by reason of being trapped in a stalled elevator"). *See also Molien v. Kaiser Foundation Hospitals*, 616 P.2d 813, 817 (Cal. 1980) (holding that where the victim is reasonably foreseeable, the defendant owes the victim a duty of care).

[65] 616 P.2d 813 (Cal. 1980). Note that *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993), later clarified that *Molien* did not create a duty to refrain from negligently causing emotional distress; rather, to recover for emotional distress, the plaintiff must show that the defendant had breached some other legal duty owed to the plaintiff. *Id.* at 807. Thus, unless the defendant was in some way responsible for the plaintiff's emotional condition, the plaintiff in ordinary cases would need to show some threat of physical injury to establish the breach of legal duty and be entitled to recovery. *Id.* at 807-08.

[66] *Id.* at 821. The "seriousness" test has been adopted in California, Connecticut, Hawaii, Louisiana, Maine, Massachusetts, Missouri, New Jersey, Pennsylvania, and Washington. Michele A. Scott, Note, *Proving Beyond a Reasonable Doubt: The Negligent Infliction of Emotional Distress*, 11 CARDOZO L. REV. 235, 249 n.93 (1989).

[67] *Molien*, 616 P.2d at 813.

[68] *See supra* notes 36-37 and accompanying text.

[69] *Rodrigues v. State*, 472 P.2d 509, 519 (Haw. 1970). Legal writers regard the Supreme Court of Hawaii as the trend-setter in the rejection of the physical injury requirement. Marrs, *supra* note 7, at 7.

[70] *Rodrigues*, 472 P.2d at 519.

[71] *Bass v. Nooney*, 646 S.W.2d 765, 772-73 (Mo. banc 1983).

[72] *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649, 653 (Tex. 1987), *overruled by Boyles v. Kerr*, 855 S.W.2d 593, 595-96 (Tex. 1993) (to the extent that *St. Elizabeth* recognizes an independent right to recover for the negligent infliction of emotional distress).

[73] *Molien*, 616 P.2d at 820.

[74] *See St. Elizabeth*, 730 S.W.2d at 652; *James v. Lieb*, 375 N.W.2d 109, 116 (Neb. 1985); *Molien*, 616 P.2d at 820.

plaintiff could recover upon showing the most trivial and imperceptible physical injury and under-inclusive because it arbitrarily denied recovery to those with otherwise provable claims.[75]

Under this analysis, courts attempted to eliminate spurious claims while giving damages to the truly injured. Proof of emotional harm shown with objective medical symptomatology served as the analytical threshold.[76] The seriousness of the injury, as determined by the jury, determined the amount of the award.[77] Nevertheless, some courts still required evidence of a "compensable harm" in the form of a "functional impairment" to the plaintiff.[78] In this sense, the courts likened emotional distress to physical injury. One case epitomizes the transition between the physical injury requirement and the pure emotional distress claim particularly well, *Stanback v. Stanback*.[79] In *Stanback*, the North Carolina Supreme Court held that "the nerves are as much a part of the physical system as the limbs ...."[80] Clearly, the linking of emotional trauma to physiological damage precipitated the granting of independent tort status to emotional distress.

Similarly, the *Molien* court cited advancing medical technology that makes emotional injuries more amenable to attribution and simple classification as a primary reason for the liberalization.[81] Along the same lines, the *Bass* court felt that physical and emotional injury were indivisible.[82]

As a point of clarification, some jurisdictions explicitly incorporated an "objective" component into the "seriousness" test.[83] That is, the plaintiff must prove that the emotional injury was sufficiently severe that a reasonable person would be unable to cope with it given the circumstances.[84] Apparently, these courts intended to disable claims made only on the strength of the plaintiff's testimony.[85] Though a judicially created emotional distress test which implements seriousness, foreseeability, and objective prongs poses at least a somewhat formidable barrier to recovery, such a scheme may still inundate the courts with unmeritorious claims.[86]

The vital issue now becomes: have those courts liberalizing emotional distress recovery retained sufficient limitations on liability so that the courts still maintain control[87] over the cause of action? Certainly, mental distress has historically been a compensable injury.[88] However, the physical injury requirement has, for a longer time, acted as the "key restriction"[89] on liability. Before courts hastily compromise such a policy, they should first consider the implications of this jurisprudence in the context of toxic torts.

III. Recovery for Fear of Future Disease or Injury

A. Early Cases

In the past, courts have allowed recovery for emotional distress based on fear of future consequences arising from someone's negligence.[90] Generally though, this claim was parasitic and limited to ephemeral fears.[91] These two factors allayed the courts' otherwise strong interest in guarding against frivolous claims.[92] Where the fear lasted indefinitely, courts denied recovery. Thus, diseases or conditions with relatively short

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[75] *St. Elizabeth*, 730 S.W.2d at 652.

[76] *Bass*, 646 S.W.2d at 772-73 (quoting Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 Geo. L. J. 1237, 1254 (1971). "Under this approach, the plaintiff's threshold burden of proving legal damage would be satisfied upon demonstration of any medically provable mental distress or harm. The trier of fact would then apply the severity standard in order to determine if the harm is legally sufficient to warrant compensation." *Id.*)

[77] *Id.*

[78] *In re* Hawaii Federal Asbestos Cases, 734 F.Supp. 1563, 1570 (D. Haw. 1990).

[79] *Dworkin, supra* note 12, at 532 n.35 (*citing Stanback v. Stanback*, 254 S.E.2d 611 (N.C. 1979)).

[80] *Stanback*, 254 S.E.2d at 623.

[81] *Molien*, 616 P.2d at 820-21.

[82] *Bass*, 646 S.W.2d at 771, 772 (*quoting* W.E. Shipley, Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2d 100, 115 n.16 (1959)).

[83] *See, e.g., Bass*, 646 S.W.2d at 773; *Wetherill v. University of Chicago*, 565 F.Supp 1553, 1559 (N.D. Ill. 1983); *Devlin v. Johns-Manville*, 495 A.2d 495, 497 (N.J. 1985); *Brantner v. Jenson*, 360 N.W.2d 529, 534 (Wis. 1985); *Baylor v. Tyrrell*, 131 N.W.2d 393, 402 (Neb. 1964); *Rodrigues*, 472 P.2d at 520.

[84] *Rodrigues*, 472 P.2d at 520.

[85] *See In re* Hawaii Federal Asbestos Cases, 734 F.Supp 1563, 1570 (D. Haw. 1990) (clarifying *Rodrigues*, the court stated that fear based on self-serving declarations alone is per se unreasonable without a showing of an otherwise compensable harm).

[86] *See Dworkin, supra* note 12, at 561-62. (positing that: "[d]elayed manifestation injury cases . . . represent a clearer threat of inundation than any other previous expansions" of the common law policy disfavoring emotional damages).

[87] Control over the flood gate of litigation is the desired end of all courts for public policy reasons. *See, e.g., Bass*, 646 S.W.2d at 769 (reasoning that the physical injury rule was adopted in part to stem an overflow of new claims); *Eagle-Picher v. Cox*, 481 So. 2d 517, 529 (Fla. App. 1985) (reasoning that the physical injury requirement generally "comports with the trend of Florida courts which have kept a vigilant, often inflexible, watch over the flood gates"), *reh'g denied*, 492 So.2d 1331 (Fla 1986); *Dworkin, supra* note 12, at 553. "Public policy is the ultimate concern in the recovery for fear based upon future injury or disease." *Knepel, supra* note 5, at 298.

[88] *Willmore, supra* note 5, at 51.

[89] *Id.* at 52.

[90] *Gale & Goyer, supra* note 8, at 729.

[91] *See, e.g., Watson v. Agusta Brewing Co.*, 52 S.E. 152, 153 (Ga. 1905) (holding that plaintiff could not recover for a future fear of indefinite duration); *Serio v. American Brewing Co.*, 74 So. 998, 1001 (La. 1917) (holding that fear of hydrophobia following dog bite was reasonable for 100 days); *Butts v. National Exchange Bank*, 72 S.W. 1083, 1084 (Mo. 1903) (holding that fear of blood poisoning was reasonable).

[92] *Dworkin, supra* note 12, at 543.

incubation periods like rabies,[93] hydrophobia, miscarriages, or blood poisoning supported recovery.[94]

Typically, a limited, well-defined period of apprehension legitimately arose in these situations. The scrutiny the courts accorded fear of disease claims corresponded directly to the dormancy period of the disease.[95] In this regard, *Butts v. National Exchange Bank*[96] is instructive. In *Butts*, the court allowed the plaintiff to append to his damages "a reasonable apprehension" of future illness that was attendant to his physical injury.[97] Though the court does not discuss the duration of the fear, the facts indicate that the plaintiff's fear of blood poisoning as a result of an iron barb penetrating his foot was necessarily short-lived.[98]

The courts' insistence that the plaintiff's fear be of limited duration took root in the notion of reasonableness.[99] That is, the fear of future affliction was only reasonable within a specified window.[100] Medical probability also played a role in defining reasonableness according to some courts.[101] In *Pandjiris v. Oliver Cadillac Co.*, for example, the Missouri Supreme Court denied recovery for fear of epilepsy because no physician attested to the medical likelihood of the plaintiff developing epilepsy.[102] Similarly, in *Plank v. R.J. Brown Petroleum Co.*,[103] the court quantified the degree of probability necessary to recover for fear of future consequences as a "reasonable certainty" that the feared condition would eventually afflict the plaintiff.[104]

Conversely, some courts held that the reasonableness standard did not correspond with medical probability, and that plaintiff could recover on a showing of a mere possibility of developing the apprehended condition provided that the trier of fact considered such fear reasonable.[105] One commentator suggests that these cases merely stand for the proposition that the injury, not the probability, is the determinative factor in recovery.[106] Nevertheless, the reasonableness of the fear, regardless of semantics, was the *sine qua non* of recovery in early "fear of future disease" cases.

Courts gradually expanded recovery for emotional distress beyond those diseases having only short manifestation periods.[107] By the middle of this century, plaintiffs could recover for fear of diseases characterized by "unlimited" incubation periods ("unlimited disease").[108] Commentators widely recognize *Alley v. Charlotte Pipe & Foundry Co.*,[109] as the first case allowing recovery for an unlimited disease.[110] In *Alley*, the court allowed a doctor to substantiate the plaintiff's claim that his wound was likely to lead to cancer, a disease which carries no specific incubation period.[111] The doctor testified that the development of cancer was "liable", which the court construed as probable and accordingly granted recovery.[112] Notably in *Alley*, as in most of the early cases, the plaintiff suffered from an easily verifiable physical injury which enabled the court to look past the issue of genuineness.

Similarly, in *Kimbell v. Noel*,[113] the court awarded the plaintiff damages for emotional distress arising out of a fear of cancer where the plaintiff had suffered an injury to her breast.[114] Again, with the presence of an identifiable physical injury, the court seemed unconcerned with the other traditional screening devices like the reasonableness standard. *Dempsey v. Hartley*[115] illustrates this point. In *Dempsey*, the court awarded the plaintiff damages based on her fear of contracting breast cancer from a physical injury to her breast even though her physician was uncertain of the probability of cancer developing.[116] The court held that the fact of the injury itself warranted recovery for fear of

[93] One year is the window in which rabies can develop subsequent to being bitten. *Dworkin, supra* note 12, at 542.
[94] *Id.* at 542.
[95] *Id.* at 553.
[96] 72 S.W. 1083 (Mo. Ct. App. 1903).
[97] *Id.* at 1084.
[98] *Id.*
[99] *Dworkin, supra* note 12, at 542.
[100] *See* Watson, *supra* note 91, at 152 (holding that where a piece of glass lodged in plaintiff's stomach, plaintiff's fear of potential illness was reasonable until a doctor removed the glass, at which point the fear ceased to be compensable. *Id.* at 153).
[101] *See, e.g., Pandjiris v. Oliver Cadillac Co.*, 98 S.W.2d 969 (Mo. 1936).
[102] *Id.* at 977.
[103] 61 S.W.2d 328 (Mo. 1933). *See also Stahlberg v. Brandes*, 299 S.W. 836, 838 (Mo. Ct. App. 1927).
[104] *Plank*, 61 S.W.2d at 334.
[105] *Smith v. Boston & M.R.R.*, 177 A. 729, 738 (N.H. 1935); *Wetherill v. University of Chicago*, 565 F.Supp. 1553, 1559 (N.D. Ill. 1983).
[106] *Dworkin, supra* note 12, at 544.
[107] *See, e.g., Alley v. Charlotte Pipe & Foundry Co.*, 74 S.E. 885 (N.C. 1912).
[108] *Dworkin, supra* note 12, at 543.
[109] *Alley*, 74 S.E. 885.
[110] *See, e.g., Knepel, supra* note 5, at 280; *Dworkin, supra* note 12, at 543.
[111] *Alley*, 74 S.E. at 886.
[112] *Id.*
[113] 228 S.W.2d 980 (Tex. App. 1950).
[114] *Id.* at 982-83.
[115] 94 F.Supp. 918 (E.D. Pa. 1951).
[116] *Id.* at 920, 921.

cancer.[117]

Ferrarra v. Galluchio[118] is the landmark case in cancerphobia recovery.[119] In *Ferrarra*, the plaintiff received several x-ray treatments for a shoulder condition. Following this treatment her shoulder became irritable and blistered. A physician diagnosed the condition as chronic radiodermatitis and attributed it to excessive x-ray therapy.[120] Subsequently, the plaintiff's doctor advised her to undergo periodic examination of her shoulder because it was susceptible to developing cancer.[121] In an action for medical malpractice, the plaintiff sought to recover for emotional distress arising from cancerphobia.[122]

The New York Court of Appeals ruled that the plaintiff's testimony relating her conversation with the doctor validated the plaintiff's fear in the eyes of the jury.[123] The court found that the facts of this case guaranteed the genuineness of the claim.[124] Interestingly, the *Ferrarra* court purported to make a narrow holding while espousing a general regulatory principle of tort recovery: "[l]iability for damages caused by wrong ceases at a point dictated by public policy or common sense."[125] However, the court believed that the finding of liability did not offend public policy and therefore upheld the jury verdict.[126] Undoubtedly though, this reference to public policy evokes the reason, if not the substance, of the many impediments to recovery courts have historically imposed on plaintiffs.

B. Toxic Torts: Recovery for Cancerphobia

The concept of latent injuries is a relatively new legal issue.[127] The fact patterns in the earlier cases are much different than toxic tort cases. In contrast to cases like *Alley, Kimbell,* and *Dempsey*, which involved some trauma to the plaintiff's body, or *Ferrarra*, which involved physical manifestation of an injury, most modern cancerphobia claims involve the plaintiff's "contact" with carcinogenic substances via inhalation, consumption, or mere proximity. Generally, no host physical injury exists to which the emotional distress can attach.

The alleged injuries in a cancerphobia action defy the traditional common law categorization of injuries.[128] This rubric includes: concreteness, manifestness, immediacy or acuteness, distinctness, adverse impact causally connected to the complained-of injury, and a symptom-producing agent.[129] Accordingly, damages for the anxiety are not parasitic and proof of injury is speculative.[130] Additionally, cancerphobia claims do not clearly implicate the conventional definition of impact. Consequently, cancerphobia claimants who had been exposed to some toxic substance historically received nothing for their fear alone.[131]

The common law standard has not proven completely impenetrable. Courts and plaintiffs' attorneys devised ingenious strategies to circumvent the common law checks on emotional damages. These stratagems generally included: 1) minimizing the physical injury requirement to such a degree that any trivial injury passed muster; 2) equating the exposure to an "invasion" of the body and characterizing the invasion as an injury or impact; or 3) eliminating the physical injury requirement altogether or by imposing some other requirement, like the need to prove emotional distress with objective evidence.[132]

In the first two scenarios the presence of the common law limitations and rationale is only nominal, and in the third, the courts have abandoned the common law scheme completely. These decisions effectively liberalize plaintiffs' ability to procure cancerphobia damages without showing bodily injury or impact attributable to the exposure.[133]

1. *Minimization/Physical Injury*

Allowing recovery for cancerphobia necessarily requires acceptance of the proposi-

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[117] *Id.*

[118] 152 N.E.2d 249 (N.Y. 1958) *reh'g denied*, 154 N.E.2d 581 (N.Y. 1958).

[119] *See* 69 A.B.A. J. 725, 726 (1983).

[120] *Ferrarra*, 152 N.E.2d at 250.

[121] *Id.* at 251.

[122] *Id.* In *Ferrarra*, the plaintiff's expert witness, a neuro-psychiatrist, defined cancerphobia as "the phobic apprehension that she would ultimately develop cancer in the site of the radiation burn." *Id.*

[123] *Id.* at 253.

[124] *Id.* at 252.

[125] *Id.* at 253 (citing *Milks v. McIver*, 190 N.E. 487, 488 (N.Y. 1934)).

[126] *Id.*

[127] Kanner, *supra* note 21, at 346-47.

[128] *Id.* at 347.

[129] *Id.* at 347 & n.32.

[130] *Dworkin, supra* note 12, at 545.

[131] Note that in those jurisdictions that recognize emotional distress as an independent tort, this is not necessarily true.

[132] *Willmore, supra* note 5, at 52. Willmore suggests that the third policy is the most "forthright". *Id.* Regarding the third category, to the extent that the cases which have created an independent cause of action for emotional distress have already been discussed, they will not be discussed further in this context. The corresponding numerical section of this Comment will deal principally with the issue of reasonableness which often emerges as a dispositive issue in the cases falling in the groups numbered one and two above. *Potter v. Firestone Tire & Rubber Co.*, provides a somewhat different characterization of the dispositive issues. *See* 863 P.2d 795, 805 (Cal. 1993).

[133] *Willmore, supra* note 5, at 52.

tion that anxiety about a possible future consequence constitutes a present legal injury.[134] Since toxic torts typically do not involve a traditional injury, courts engineer new variations of the standard common law model of injury. This manipulation could be termed "minimization" because the courts recalibrate the scope through which they view claims so that the most imperceptible injury becomes the focus of the inquiry.

Some courts have ruled "that even under a [physical] manifestation test, bodily contact with a frightening or noxious substance is sufficient physical injury" to maintain a cause of action for emotional distress arising out of the contact.[135] This theory first materialized in *Laxton v. Orkin Exterminating Co.*[136]

In *Laxton*, the plaintiff family ingested chlordane which contaminated their drinking water.[137] Subsequently, they became worried about the future consequences of such ingestion on their health.[138] Though no physical injury accompanied the plaintiffs' consumption and their fear did not manifest itself in physical symptoms, the Tennessee Supreme Court upheld the lower court's instructions that ingestion constituted a physical injury.[139] The court analogized the instant case to prior cases in which Tennessee courts allowed recovery for the ingestion of adulterated food or beverages with a "minimum showing of physical injury."[140]

Additionally, much like the early cases allowing recovery for fear of future disease, the plaintiffs' fear was inherently limited because they had changed their water source and a doctor informed them that they were free of chlordane-related abnormalities.[141] For this reason, the effect of this decision on the traditional common law paradigm of injury is incremental at most.[142] Therefore, other cases may be more instructive of how courts have evaded the physical manifestation requirement using the "minimization" analysis.

Anderson v. W.R. Grace & Co.[143] parallels *Laxton.*[144] The plaintiffs in *Anderson* sought damages for emotional distress based on their exposure to toxin-contaminated water though they suffered from no recognizable physical injury. The court, relying on the Massachusetts Supreme Court holding in *Payton v. Abbott Laboratories*,[145] held that the plaintiffs must show not that they had been injured but that they were physically harmed. The court indicated that physical harm must be premised on a showing of actual physical damage.[146] The plaintiffs alleged that their contact with the defendant's carcinogens diminished their bodies' ability to fight disease and adversely affected their internal organs. This "subcellular" harm sufficed to maintain the emotional distress claims provided that medical experts could corroborate such damage and that the harm was evidenced by objective medical symptomatology.[147] The import of these cases is that plaintiffs could predicate their claims on a showing of acute physical harm as opposed to gross physical injury.

2. *Invasion/Impact*

In jurisdictions adhering to the impact requirement, the plaintiff's contact with a toxic substance must be deemed an impact to sustain recovery. *Eagle-Picher Industries, Inc. v. Cox*[148] discussed whether the plaintiff's inhalation of asbestos created an impact.[149] The court noted that under Florida law, the plaintiff need not show physical manifestation of the distress provided impact occurred.[150] The court held that when a foreign substance touched or entered the plaintiff's body an impact occurred regardless of the belatedness of its effects.[151] The *Cox* court cited *Plummer v. United States*[152] with approval.

Plummer merits a closer look because it expressively objectifies the invasion/impact theory. The *Plummer* court concluded that although "the impact of a tubercle bacillus does not entail the palpable physical shock of a highway collision . . . , the effects . . . are potentially no less lethal."[153] Much like the minimization cases, the court again reduced the analysis to the most microscopic level.

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[134] *Gale & Goyer, supra* note 8, at 724.
[135] *Dworkin, supra* note 12, at 550.
[136] 639 S.W.2d 431 (Tenn. 1982).
[137] *Id.* at 433.
[138] *Id.*
[139] *Id.* at 433-35.
[140] *Id.* at 433-34.
[141] *Id.* The court held that the plaintiffs recovery for fear was limited to the period between the point they became aware they had consumed a toxic substance and the time blood tests revealed that the chlordane had not caused damage. *Id.* at 434.
[142] *See Dworkin, supra* note 12, at 552-54 & n.211 (asserting that traditional impact cases differ from toxic torts in the length of time that occurs between impact and emotional injury and that this time lag is the crucial difference between the results reached in *Laxton, supra*, and *Plummer v. Abbott Labs*, 568 F.Supp. 920 (D.R.I. 1983) (*infra* notes 178-80 and accompanying text)(in which the use of DES was discontinued in 1971 while the suit was brought in 1980. *Id.*)).
[143] 628 F.Supp. 1219 (D. Mass. 1986).
[144] *See also Werlein v. United States*, 746 F.Supp. 887 (D. Minn. 1990), *vacated in part* on other grounds, 793 F.Supp. 898 (D. Minn. 1992).
[145] 437 N.E.2d 171 (Mass. 1982).
[146] *Anderson*, 628 F.Supp. at 1226.
[147] *Id.*
[148] 481 So.2d 517 (Fla. App. 1985), *reh'g denied*, 492 So.2d 1331 (Fla. 1986).
[149] *Id.* at 526.
[150] *Id.* at 527.
[151] *Id.*
[152] 580 F.2d 72 (3d Cir. 1978).
[153] *Id.* at 76.

Other opinions expanded the analysis. *Herber v. Johns-Manville Corporation*[154] details the hybrid theory of impact and injury and how it affects recovery. In *Herber*, the plaintiff sued asbestos manufacturers claiming that his exposure to their product caused him to fear that he would develop cancer.[155] The court conceded that the inhalation of asbestos involved minimal impact and the pleural thickening of the plaintiff's lungs constituted only "insubstantial injury".[156] Nevertheless, New Jersey law mandated that only a "slight impact and injury" enabled recovery for emotional distress induced by fear of a disease.[157]

In *Deutsch v. Shein*[158] the court held that the plaintiff's exposure to x-rays constituted sufficient physical contact under Kentucky law to sustain her claim for emotional distress.[159] The court elaborated: "[i]n line with the corroborating purpose of this 'contact' requirement, the amount of physical contact or injury that must be shown is minimal. Contact, however slight, trifling, or trivial, will support a cause of action."[160] Arguably, impact cases like *Herber* and *Deutsch* fall prey to the criticisms of the physical manifestation requirement enunciated in *St. Elizabeth Hospital v. Garrard*.[161] The *St. Elizabeth* court found the physical manifestation to be over-inclusive, because the most trivial physical injury supported recovery.[162]

Some courts, however, were not as easily persuaded that exposure to a toxic substance equates to an impact. In *Plummer v. Abbott Laboratories*[163] (hereinafter *Abbott*) the plaintiff premised her claim for cancerphobia on her prenatal exposure to diethylstilbestrol (DES).[164] The *Abbott* court held that because plaintiff suffered from no physical manifestations of her fear and because no impact occurred, plaintiff could not recover.[165] Implicit in this holding is that mere ingestion is not sufficient impact to support a cause of action for emotional distress.[166]

Following these cases, the question remains: do the new conceptions of injury and impact still adequately protect against spurious claims since all chemicals entering the body necessarily cause some cellular or subcellular change in the body structure? Essentially, once the inquiry shifts to the microscopic level, the traditional screens on recovery become so porous that they lose their effectiveness.[167]

3. *Reasonableness*

Once the plaintiff shows the "impact" or "physical injury," the next issue is the quantum of proof necessary for recovery.[168] The "reasonableness" of the plaintiff's fear is once again the foundation of recovery. Specifically though, courts ascribe different meanings to the term "reasonable" which substantially complicates matters. In many jurisdictions, the reasonableness of the fear determines the availability of damages for cancerphobia.[169] Semantics aside, the liberalizing courts seem to agree that the reasonableness test, in whatever form, embodies the common law screens to recovery. Thus, in enumerating the proper quantum of proof in these courts, the problem is one of degree: what amount of corroborating evidence is sufficient to overcome the common law reluctance to award emotional distress damages?

Though not involving a toxic tort, *Brantner v. Jenson*[170] provides a helpful initial discussion of the reasonableness requirement. The *Brantner* court held that in "fear of cancer" cases the plaintiff must authenticate his anxiety by showing that (1) the likelihood that the feared harm will afflict him increased as a result of the injury; and (2) his fear is reasonably grounded.[171] Thus, under *Brantner*, probability is a non-issue - the plaintiff need only prove that the possibility of contracting the feared-of condition in-

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[154] 785 F.2d 79 (3d Cir. 1986).
[155] *Id.* at 80-81.
[156] *Id.* at 85.
[157] *Id.*
[158] 597 S.W.2d 141 (Ky. Ct. App. 1980).
[159] *Id.* at 146.
[160] *Id.*
[161] 730 S.W.2d 649 (Tex. 1987), *overruled by Boyles v. Kerr*, 855 S.W.2d 593, 595-96 (Tex. 1993) (to the extent that *St. Elizabeth* recognizes an independent right to recover for the negligent infliction of emotional distress).
[162] *Id.* at 652.
[163] 568 F.Supp. 920 (D.R.I. 1983).
[164] *Id.* at 927. Doctors at one time prescribed Diethylstilbestrol (DES) as a miscarriage preventative. Knepel, *supra* note 5, at 289. Between 1947 and 1971 millions of women took DES until the FDA banned its use for preventing miscarriages in 1971. *Id.* at 289-90. The ban followed studies which documented a "statistically significant" link between in utero contact with DES and the occurrence of rare cancers in female offspring. *Id.* at 290.
[165] *Abbott*, 568 F.Supp. at 927.
[166] *See Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 526 (Fla. Dist. Ct. App. 1985), *reh'g denied*, 492 So.2d 1331 (Fla. 1986).
[167] The possible implication of these analyses was accurately pointed out by the court in *Eagle-Picher Industries, Inc. v. Cox* when it stated: "[T]he judicial system could not handle the potential mere exposure 'fear of' claims, and the task of discerning fraudulent 'fear of' claims from meritorious ones would be 'prodigious'." *Cox*, 481 So.2d 517, 529.
[168] Note that the reasonableness analysis appears in both the cases in which the negligent infliction of emotional distress is an independent tort (*see, e.g., Ironbound Health Rights Advisory Comm'n v. Diamond Shamrock Chemicals Co.*, 578 A.2d 1248 (N.J. Super. Ct. App. Div. 1990)) and in those cases adhering to the traditional injury or impact requirements (*see, e.g., Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982)).
[169] This includes those jurisdictions recognizing an independent action for emotional distress as well as those which still relegate emotional distress to parasitic status.
[170] 360 N.W.2d 529 (Wis. 1985).
[171] *Id.* at 534.

creased.[172] *Brantner* proposed that reasonableness was a function of expert medical testimony and nonexpert eyewitness testimony.[173]

Wetherill v. University of Chicago[174] comports with the analysis of *Brantner*.[175] In *Wetherill*, the plaintiffs sought cancerphobia damages because of their exposure to DES.[176] In order to recover the plaintiffs needed only to show that their fear was reasonable irrespective of the actual probability of their developing cancer.[177] The court remarked that to impose an evidentiary requirement of reasonable certainty would frustrate conventional notions of proximate cause.[178] Thus, plaintiffs could present the results of scientific studies establishing a causal connection between DES and cancer to establish the reasonableness of their fear.[179] Additionally, the *Wetherill* court factored a subjective element into the reasonableness equation. Under the court's reasoning, the plaintiffs' status as reasonable people must be qualified to include reasonable people who are "bombarded" with information about DES.[180]

The court in *Laxton v. Orkin Exterminating Co.*[181] utilized a similar reasonableness standard in determining whether the plaintiffs' fear of disease was compensable.[182] The *Laxton* court deemed that the plaintiffs' seeking of medical attention sufficiently corroborated their fear since they knew that the substance contaminating their water was possibly carcinogenic. However, this analysis may present problems. One writer observes that use of the *Laxton* "medically reasonable" standard would favor recovery for fear in nearly all toxic tort cases.[183] Dworkin posits that any person made aware of the fact that he has been exposed to toxins would reasonably seek a medical examination, thus supporting recovery in nearly every case.[184]

Murphy v. Penn Fruit Co.[185] apparently gives substance to this observation. Interestingly, the *Wetherill* court cited *Murphy*, a non-toxic tort case, with approval.[186] The *Murphy* court upheld an award of $450,000, a large portion of which compensated the plaintiff for her fear of cancer, fear of a heart attack, and fear of shortened life span.[187] The court found the award appropriate even though the plaintiff had no medical basis for her fears.[188] Consequently, under *Murphy*, a plaintiff can recover for subjective fear alone although no objective evidence corroborates this fear.

In re Hawaii Federal Asbestos Cases[189] sharply contrasts with *Murphy*. Here, the plaintiffs sought recovery for the fear of cancer arising out of their exposure to asbestos. The court held that the plaintiffs' subjective testimony of shortened breath and general fatigue was not sufficient to support recovery absent the plaintiff's knowledge of an objectively verifiable functional impairment, because without proof of functional impairment no compensable harm existed.[190] Furthermore, the court noted that the underlying harm of which the plaintiffs complained would not give rise to a fear of cancer in reasonable people.[191] Thus, the *Hawaii Federal Asbestos Cases* court charged the plaintiff with knowledge of statistical likelihood and assumed that low medical possibility would dispel the plaintiff's fears.

The result here is markedly different from the result envisioned by *Murphy*, and to some extent, *Laxton*. The crucial difference is that the *Hawaii Federal Asbestos Cases* apparently raises the threshold of recovery beyond the reasonableness of the plaintiff's uncorroborated fears, as enunciated in *Murphy*, to a point somewhere between the medical reasonableness of the fear, contemplated by *Laxton*, and the medical probability that the feared of condition will manifest

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[172] *Id.* The plaintiff could recover for cancerphobia though he could not recover for the increased prospects of developing cancer. For an explanation of the cause of action for increased likelihood of developing cancer, *see, Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1206 (6th Cir. 1988).

[173] *Brantner*, 360 N.W.2d at 530 (holding that plaintiff's surgeon could testify as to medical possibility and plaintiff's father, having undergone a similar type of back surgery, could corroborate plaintiff's state of mind about fear of this procedure).

[174] 565 F.Supp. 1553 (N.D. Ill. 1983).

[175] *See also Lorenc v. Chemirad Corp.*, 179 A.2d 401 (1962) (holding that plaintiff could recover for his fear of cancer though an expert testified that the development of cancer was highly unlikely and that plaintiff's susceptibility to cancer could be mitigated with a skin graft). It should be noted that Wetherill has not been cited by Illinois state courts and therefore may not accurately state Illinois law. *Potter v. Firestone Tire & Rubber*, Co., 863 P.2d 795 & n.18 (Cal. 1993). Nonetheless, the reasoning of the case remains pertinent to a complete discussion of the issues of cancerphobia recovery.

[176] *Wetherill*, 565 F.Supp. at 1553.

[177] *Id.* at 1559-60.

[178] *Id.* at 1559.

[179] *Id.* at 1560.

[180] *Id.*

[181] 639 S.W.2d 431 (Tenn. 1982).

[182] *Id.* at 434.

[183] *Dworkin, supra* note 12, at 551.

[184] *Id.* at 551-52.

[185] 418 A.2d 480 (Pa. Super. Ct. 1980).

[186] *Wetherill*, 565 F.Supp. at 1559.

[187] *Murphy*, 418 A.2d at 482, 485. Contrast the award to her pleaded out-of-pocket expenses of $5.758.15. *Id.* at 485.

[188] *Id.* at 482, 484-485.

[189] 734 F.Supp. 1563 (D. Haw. 1990).

[190] *Id.* at 1569-70.

[191] *Hawaii Asbestos Cases*, 734 F.Supp. at 1570. The court stated: "A reasonable person, exercising due diligence, should know that of those exposed to asbestos, only a small percentage suffer from asbestos-related physical impairment and that of the impairment group fewer still eventually develop lung cancer." *Id.*

itself.[192] Where the threshold is ultimately positioned may depend on the particular facts of the cases before the various courts.

IV. The Missouri Cases: What Standard Applies?

There are no definitive Missouri cases addressing the issue of cancerphobia recovery. Therefore, in order to ascertain any existing standard, it is necessary to synthesize one from existing precedent.

The first important case is *Butts v. National Exchange Bank*[193]. In *Butts* the Missouri Court of Appeals at St. Louis recognized that fear of blood poisoning arising out of the plaintiff's injury was a valid form of parasitic damages.[194] This case established the right of plaintiffs to recover for the fear of future consequences.

Pandjiris v. Oliver Cadillac Co.[195] and *Plank v. R.J. Brown Petroleum Co.*[196] are two crucial cases in "fear of disease" recovery in Missouri. First, recognize that *Pandjiris* and *Plank* do not yet cloak their language in terms of emotional distress or cancerphobia. That is, these courts do not acknowledge the fear of claim as a discrete theory of recovery, but rather as an element of damages.[197] Still, these two cases establish a threshold of recovery, thereby serving as the second analytical link. *Pandjiris* and *Plank* mandated that plaintiffs attempting to recover for apprehended future consequences show to a level of reasonable certainty that those consequences will ultimately occur.[198] However, it is important to remember that Missouri courts still adhered to the impact rule when *Pandjiris* and *Plank* were decided.[199]

Hahn v. McDowell[200] did not advance as much as it reinforced the evolution of emotional distress damages in Missouri. The court expressly adopted the reasonably certain standard of *Pandjiris* where a plaintiff is seeking recovery for emotional distress in the form of feared consequences.[201] The court argued that compensating plaintiffs for injuries which were "merely possible" would be unjust.[202] The analysis of the *Hahn* court also makes clear that fear of cancer damages have not yet been elevated to a separate theory of recovery.[203]

Bennett v. Mallinckrodt, Inc.[204] represents the next major link in the chain of emotional distress recovery in Missouri. *Bennett* needs to be prefaced with two comments. First, note that the case follows *Bass v. Nooney Co.*,[205] the watershed Missouri Supreme Court decision which granted independent status to the tort of negligent infliction of emotional distress.[206] Second, *Bennett* is one of the first Missouri cases dealing with fear of disease in a toxic tort context.

The plaintiffs in *Bennett* worked near a radiopharmaceutical processing plant operated by the defendant.[207] Because of their alleged exposure to radioactive emissions from the plant,[208] the plaintiffs filed a claim against the defendant for, *inter alia*, negligence.[209] Among their damages plaintiffs cited a general "apprehension [arising from a] severe psychotic trauma."[210] The court held that under the *Bass* test, the plaintiffs had properly pleaded the existence of medically diagnosable and medically significant emotional distress.[211] However, because the plaintiffs failed to plead that the defendant "should have realized its alleged conduct involved an unreasonable risk of causing" their emotional distress, their claim was fatally flawed.[212]

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[192] Under the *Hawaii Federal Asbestos Cases* the actual threshold probably lies much closer to the latter point of reference.
[193] 72 S.W. 1083 (Mo. Ct. App. 1903).
[194] *Id.* at 1084.
[195] 98 S.W.2d 969 (Mo. 1936).
[196] 61 S.W.2d 328 (Mo. 1933).
[197] *See Pandjiris*, 98 S.W.2d at 977; *Plank*, 61 S.W.2d at 334.
[198] *Pandjiris*, 98 S.W.2d at 977; *Plank*, 61 S.W.2d at 334. Also, to the extent that these two cases deny recovery for enhanced susceptibility to a particular condition, those holdings are premised on the notion that such damages are prospective only and therefore not presently compensable unless reasonably certain to occur. *Pandjiris*, 98 S.W.2d at 977; *Plank*, 61 S.W.2d at 334. Because courts now consider emotional distress to be a present injury (*see Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. banc 1983)), this particular rationale is inapplicable to a claim for emotional distress. *See also Hahn v. McDowell*, 349 S.W.2d 479, 482 (Mo. Ct. App. 1961), and *School District of Independence v. United States Gypsum Co.*, 750 S.W.2d 442, 454 (Mo. Ct. App. 1988), for more recent discussion of this cause of action.
[199] *See Chawkley v. Wabash Ry. Co.*, 297 S.W. 20 (Mo. banc 1927), *overruled by Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. banc 1983). The plaintiff in *Pandjiris* clearly suffered from a visible physical injury in that a falling brick hit her in the head. 98 S.W.2d at 971. However, in *Plank* it is not immediately apparent that the plaintiff suffered from any visible physical injury where he had inhaled noxious fumes. 61 S.W.2d at 329. Rather, the plaintiff in *Plank* founded his cause of action on Missouri occupational disease statutes that merely required that the plaintiff suffer disease or illness incident to employment. *Id. See* Mo. Rev. Stat. § 13252 (1929).
[200] 349 S.W.2d 479 (Mo. Ct. App. 1961).
[201] *Id.* at 482.
[202] *Id.*
[203] *Id.*
[204] 698 S.W.2d 854 (Mo. Ct. App. 1985) *cert denied*, 106 S.Ct. 2903 (1986).
[205] 646 S.W.2d 765 (Mo. banc 1983).
[206] *See Bennett*, 698 S.W.2d at 866 ("Plaintiffs no longer need to allege a contemporaneous physical injury to plead a tort action for emotional distress").
[207] *Id.* at 856.
[208] *Id.*
[209] *Id.* at 864.
[210] *Id.*
[211] *Id.* at 866. Specifically, the plaintiffs claimed that their exposure to the radiation caused and continues to cause "various health problems . . . as well as apprehension and fear," *id.* at 864, and that they "have suffered apprehension and will continue in the future under severe psychic trauma as a result of their exposure to and the increased risk to the [noted] illnesses," *id.* at 866. *Bass* contemplated that the threshold burden would be established on a showing of any "medically provable mental distress." *Bass*, 646 S.W.2d at 773 & n.4. Once the plaintiff reached this threshold, the trier of fact would determine if the harm was sufficiently severe to warrant recovery. *Id.*
[212] *Bennett*, 698 S.W.2d at 866.

Because the court disposed of the case on procedural grounds, it is necessary to more closely examine *Bass* for guidance concerning the level of the threshold in Missouri cancerphobia cases. Initially, the minimum procedural threshold is met on proof of a medically diagnosable harm.[213] Once this threshold is met, the plaintiff must surpass a higher barrier to recover.[214] First, the defendant must have foreseen that the plaintiff would be subject to an unreasonable risk of distress.[215] This element ensures the presence of legal duty and proximate cause.[216] Second, the anxiety must be "sufficient[ly] sever[e] so as to be medically significant."[217] Because the court delegated the determination of medical significance to the jury,[218] it may have intended to incorporate reasonableness into the notion of medical significance.[219]

Returning to *Bennett*, the court noted that "complex and formidable problems of proof" lay ahead for the plaintiffs in addition to potential difficulties in correctly pleading foreseeability.[220] *Bennett* established that plaintiffs could recover for cancerphobia in Missouri. However, because *Bennett* was not fully adjudicated on the issue of negligent infliction of emotional distress, whether potential cancerphobia plaintiffs have a legitimate chance for recovery remains uncertain.

More recently, the United States District Court for the Western District of Missouri heard a case in which the plaintiffs alleged that they had suffered mental anguish, including fear of cancer, as a result of their exposure to water contaminated by the defendant.[221] The court held that the *Bass* scheme for emotional distress applied to cancerphobia claims as well.[222] However, because none of the plaintiffs suffered from a medically diagnosable condition that was principally related to the fear of cancer, the summary judgment in favor of defendants was upheld.[223]

Moreover, the *Thomas* court concluded that plaintiffs' general mental anguish claim must fail because some of the plaintiffs relied only on their subjective complaints as proof of their anguish, and the others that had consulted doctors did so well into the litigation.[224] Thus, *Thomas* makes clear that the *Bass* test for negligent infliction of emotional distress, coupled with *Bennett*, provide the applicable analysis for cancerphobia claims.[225]

Because neither *Bennett* nor *Thomas* had a full trial on the merits of the cancerphobia claim, it is difficult to make any conclusions about the legitimacy of plaintiffs chances on such a claim. However, it seems nearly certain that Missouri plaintiffs will not be able to recover based on their subjective fears alone. Beyond that bright line, there is no case law that teaches how to apply the legal standards of "medically diagnosable" and "medically significant" to the facts of any given cancerphobia claim.

There is a dearth of post-*Bennett* Missouri case law dealing with the negligent infliction of emotional distress and specifically recovery for the fear of disease. A few non-toxic tort cases elaborate on *Bennett* and *Bass*.[226] Though these cases refine the applicable law, they are chiefly important because they suggest that *Bennett* still remains the definitive decision on cancerphobia recovery in

[213] *Bass*, 646 S.W.2d at 773 & n.4 (quoting Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1254 (1971)(hereinafter Comment, *The Case for an Independent Tort*)). Harm requires a showing of emotional distress serious enough to merit some minimum level of medical attention (quoting, Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512, 517 (1968) (hereinafter Comment, *A Reappraisal of the Nervous Shock Cases*)). *Id.* at 773 & n.4.

[214] *Id.* at 773 & n.4 (quoting Comment, *The Case for an Independent Tort*, *supra* note 223, at 1254).

[215] *Id.* at 772.

[216] *Id.* at 773. ("With respect to foreseeability, there is considerable question whether these defendants could anticipate that an ordinary person normally constituted would succumb to serious emotional distress by reason of being trapped in a stalled elevator." *Id.*). *Compare Boyles v. Kerr*, 855 S.W.2d 593, 596 (Tex. 1993) (holding that Texas law imposes no independent duty to refrain from causing emotional distress and that Plaintiff must plead that defendant should have known that he was causing an unreasonable risk of injury to the plaintiff, not that the defendant should have foreseen that the plaintiff would experience emotional distress. Note that Texas law imposes no duty to refrain from inflicting emotional distress.) *See also Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); RESTATEMENT (SECOND) OF TORTS § 435(2) ("The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm").

[217] *Bass*, 646 S.W.2d at 772-73.

[218] *Id.* at 773 & n.4 (quoting Comment, *The Case for an Independent Tort*, *supra* note 213, at 1254).

[219] The *Bass* medical significance test may be the counterpart to the *Molien* serious emotional distress test which incorporates reasonableness into its application. *See Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993) (discussed *infra*) ("Serious emotional distress is such that a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* at 811 & n.12) (quoting *Molien v. Kaiser Foundation Hospitals*, 616 P.2d 813, 821 (Cal. 1980)).

[220] *Bennett*, 698 S.W.2d at 867.

[221] *Thomas v. FAG Bearings Corp.*, 846 F.Supp. 1400 (W.D. Mo. 1994).

[222] *Id.* at 1408.

[223] *Id.*

[224] *Id.* at 1407. Thus, some of the injuries were not "medically diagnosable," some were not "medically significant," and some were neither.

[225] Note that the discussion of the increased risk of cancer in *Thomas* is not the subject of this Comment. *Id.* at 1408-09.

[226] *See, e.g., Ford v. Aldi, Inc.*, 832 S.W.2d 1, 2 (Mo. Ct. App. 1992) (holding that because plaintiff's alleged emotional distress did not cause her to see a physician, her distress was not medically diagnosable or medically significant); *Greco v. Robinson*, 747 S.W.2d 730, 735-36 (Mo. Ct. App. 1988) (upholding summary judgment for defendant in an action for the intentional infliction of emotional distress because the plaintiffs had not suffered medically diagnosable distress where they had not seen a doctor and planned to substantiate their distress solely by their own testimony).

Missouri.

V. Policy Analysis and Conclusion

A. *Potter v. Firestone Tire & Rubber Co.*: Potentially Instructive?

Recently, in *Potter v. Firestone Tire & Rubber Co.*,[227] the California Supreme Court ruled on the availability of cancerphobia damages in toxic torts. Recall that *Molien v. Kaiser Foundation Hospitals*[228] removed the physical injury limitation for negligence actions.[229] In this regard Missouri decisions are similar in law and reasoning,[230] thereby making *Potter* potentially helpful in piecing together the Missouri chain of recovery. The *Potter* plaintiffs sought, *inter alia*, damages for the negligent infliction of emotional distress; specifically, their fear of cancer.[231] They premised their claim on the presence of known and suspected carcinogens in their drinking water which had been deposited in a nearby landfill by defendants.[232]

As a preliminary matter, the court held that California law mandated no independent duty to avoid negligently inflicting emotional distress on another.[233] However, California law regulating the disposal of toxic waste imposed a duty of care on the defendant with reference to the plaintiffs.[234] Consequently, the defendant's conduct was actionable in negligence.

The *Potter* court discussed *Molien* and declared its rationale applicable to toxic torts.[235] As a precondition to recovery, the court held that the plaintiffs must establish the reasonableness of their fear.[236] The California Supreme Court dismissed the Court of Appeals' determination that reasonableness was a function of the exposure itself as not truly revelatory of reasonableness.[237] Rather, the *Potter* court limited reasonableness to a showing that the feared condition is a probable result of the exposure.[238]

The *Potter* court predicated the placement of the threshold on public policy. Specifically, the court articulated five major concerns. First, the pervasiveness of toxins in modern civilization and the corresponding enormity of the potential class of plaintiffs, compels courts to "meaningful[ly]" limit recovery.[239] Second, the absence of a heightened threshold may have a chilling affect on the health care field, particularly in the area of prescription drugs and medical malpractice.[240] Third, allowing recovery to all plaintiffs who reasonably fear some condition would adversely affect those actually sustaining a physical injury and those eventually developing the feared of condition by making insurance prohibitively expensive.[241] Fourth, a "more likely than not" threshold provides predictability which facilitates consistent case-to-case application.[242] Finally, as a means of protecting emotional distress as a non-derivative cause of action, the "intangible nature of the loss, the inadequacy of monetary damages to make whole the loss, the difficulty of measuring the damages, and the societal cost of attempting to compensate the plaintiff" warrant the application of the "more likely than not" threshold.[243]

B. Conclusion

Potter offers a prudent alternative to the cases allowing recovery for cancerphobia on a showing of less than probability. Certainly *Potter* raises some potent policy arguments that support a threshold of probability for cancerphobia claimants. That standard will likely aid the court in discerning meritorious claims from frivolous ones. However, the rationale of the *Potter* decision may militate just as strongly for retention or revival of the impact or physical manifestation requirements in the context of toxic torts as it does for the imposition of a heightened threshold.

Claims for the fear of future disease implicate public policy in many ways in addition to those addressed by the *Potter* court. In this vein, one commentator observed that a scheming plaintiff could, with a few well-

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[227] 863 P.2d 795 (Cal. 1993).
[228] 616 P.2d 813 (Cal. 1980).
[229] *See* notes 68-94 and accompanying text.
[230] *See Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983).
[231] *Potter*, 863 P.2d at 795-96.
[232] *Id.* at 801.
[233] *Id.* at 807-08. *See supra* note 70 for an explanation of the California Supreme Court's analysis of duty. For an analysis similar in result, *see Boyles v. Kerr*, 855 S.W.2d 593, 595-96 (Tex. 1993). Contrast the independent duty in Missouri to avoid inflicting emotional damages as imposed by *Bass*.
[234] *Id.* at 808.
[235] *Id.* at 810.
[236] *Id.*
[237] *Id.* at 810-11.
[238] *Id.* at 811, 816.
[239] *Id.* at 812. (The court feared that unrestricted liability would affect the availability and affordability of liability insurance for toxic risks and that the ultimate cost would be borne by the public in the form of substantially increased rates or the enhanced environmental dangers resulting from more persons and entities opting to go without liability insurance).
[240] *Id.* at 812-13. The court reasoned that a lower threshold would impede access to prescription drugs because the threat of huge damage awards would drive prices beyond affordability. *Id.* Additionally, physicians wary of runaway malpractice liability every time they prescribed a new drug or treatment would hesitate to prescribe new or innovative drugs. *Id.* Correspondingly, as physician liability proliferates, their insurance premiums would rise, thereby causing health care costs to spiral upwards. *Id.*
[241] *Id.* at 813.
[242] *Id.* at 813-14.
[243] *Id.* at 814.

timed statements to family members and a trip to the doctor to complain of generalized ailments, provide himself with the ammunition necessary to prevail on a subsequent cancerphobia claim.[244] Courts have apparently anticipated this potential for manipulation as evidenced by their use of the reasonable person standard to screen for legitimate injuries.[245] However, utilization of the reasonable person in this manner poses problems of its own.

Historically in a suit for negligence, courts employ the objective person test in situations in which the plaintiff's injury is uncontroverted but the defendant's responsibility for those injuries is in dispute. Simply put, courts use the fictional reasonable person to allocate liability, not ascertain injuries. The defendant's liability is determined by asking: what precautions would a reasonable person have taken?[246] However, in the fear of disease cases, the plaintiff's *injuries* are measured against the sensibilities of the reasonable person.

The application of the reasonable person standard to the fact of injury is intuitively illogical. Courts cannot objectify something that defies objectification and in fact is the essence of subjectivity--the human mind. Gauging injury to the human psyche is inherently a different task than attempting to establish standards of conduct through the use of the reasonable person. For this reason, tort law has traditionally subjectivized the plaintiff for the purpose of fixing damages.[247]

However, as the *Potter* court acknowledged, recovery for the fear of future consequences is not, for public policy reasons, particularly amenable to allowing the plaintiff to recover for his subjective fears alone.[248] Further, the objective threshold alone does little to keep frivolous claims out of court[249] in that the term itself intimates that a trier of fact must play the decisive role in determining liability much of the time.[250] In this regard, the *Potter* decision effectively relieves the trier of this duty in some cases by quantifying the reasonableness standard.[251]

Thus, neither the objective nor the subjective measurement is a completely forthright and effective gauge for detecting emotional distress and screening for spurious claims. This suggests that either abolishing the fear of future disease theory or severely limiting its invocation are the only prudent alternatives.

This is not to advocate that people exposed to toxic chemicals should have no recourse against those introducing these substances into the environment. Rather, alternative theories of recovery exist which are less threatening to the autonomy of the judicial system.

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[244] *See* Willmore, *supra* note 5, at 55. Note that under the standards proposed by *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 866 (Mo. Ct. App. 1985) (*see supra* notes 214-231 and accompanying text) and *Ford v. Aldi, Inc.*, 832 S.W.2d 1, 2 (Mo. Ct. App. 1992) (*see supra* note 231), a plaintiff could probably at least get to the jury on this evidence alone.

[245] *See, e.g., Potter*, 863 P.2d at 810; *Advisory Comm'n v. Diamond Shamrock*, 578 A.2d 1248, 1250 (N.J. Super. A.D. 1990); *Lavelle v. Owens-Corning Fiberglass Corp.*, 507 N.E.2d 476, 481 (Ohio Comm. Pl. 1987); *Smith v. A.C. & S., Inc.*, 843 F.2d 854, 859 (5th Cir. 1988).

[246] RESTATEMENT (SECOND) OF TORTS § 283 enunciates the standard of care in negligence cases: "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances". Comment c of § 283 states that "[t]he actor is required to do what this ideal individual would do in his place" by subjecting the defendant to "a community standard rather than an individual [standard] . . . ."

[247] RESTATEMENT (SECOND) OF TORTS § 435: "(1) If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." RESTATEMENT (SECOND) OF TORTS § 461: "The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct."

[248] *See Potter*, 863 P.2d at 811-814.

[249] It may keep frivolous claims from prevailing on the merits, but, for the discussed reason, the reasonableness standard will not keep claimants with spurious claims from having their day in court.

[250] The term "reasonable" connotes some level of fact dependency which, short of an easy case, probably necessitates a jury determination.

[251] The implication is that a plaintiff without adequate proof of probability would not withstand a motion for summary judgment because his proof would lack at least one of the requisite elements (i.e., proof that he will more likely than not develop cancer), whereas the application of a lower unquantified threshold would enable the plaintiff to more often withstand this motion.