Cancerphobia Damages in Missouri: A Comprehensive Discussion on Toxic Torts and Fear of Disease Recovery Comments and Casenotes

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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*, 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. Essentially, *Bass* transformed the parasitic claim for emotional distress damages into an independent tort. Though still a minority, many states have either preceded or followed Missouri in altering the traditional common law requirements for emotional distress recovery. 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. Often, the plaintiff has no present physical injury and attempts to recover for the anxiety alone. The recent judicial trend has been to allow recovery for such claims, absent evidence of physical injury. The plaintiffs assert that their fear of the future development of cancer constitutes a compensable present injury. 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.

As technology enables scientists to identify new carcinogenic substances each year, cancerphobia claims will undoubtedly multiply. 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. Correspondingly, one study projects that 20 percent of all Americans may develop cancer. A general fear of cancer has always been universal; only recently has that concern focused on specific substances. 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. Consequently, determining whether one develops cancer as a direct result of a specific contact with a carcinogen is nearly impossible. Further, plaintiffs rarely suffer from a traditionally compensable injury at the time they seek relief for cancerphobia. These factors meshes 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.
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 subclass 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. Kneipel, Recovery for Emotional Distress Resulting from the Fear of Future Injury or Disease*, 37 Fed’l Ins. & Corp. Couns. Q. 273, 273 (1987). In the course of this Comment these terms will be used synonymously.
9. Id. at 730.
10. *See Willmore, supra note 5, at 54*.
14. *Gale & Goyer, supra note 8*, at 723.
16. Id.
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. Some courts characterize injury as a tangible harm "contemporaneous to some adverse impact." 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. Clearly, this conventional conception of injury severely impedes recovery for emotional distress based on fear of disease in most toxic tort cases.

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

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. 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. No actual contact or corresponding physical injury is necessary. The imminence of the test acted as a check against untrammeled liability by limiting the number of potentially valid claims.

17 Stephen D. Mierop, Comment, Cancerphobia: Should Texas Courts Recognized this Tort Claim?, 29 Hous. L. Rev. 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 that the defendant is an unstable person)).
18 RuTGERS L.J. 175.
19 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 perpetrating 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 Id. at supra note 5, at 52.
22 Id. at 352.
23 Dworin, 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).
29 See Payton, 437 N.E.2d at 175.
31 Dworin, 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.
through a small allowable window of apprehension. Recognition of assault as a valid cause of action likely made emotional distress claims more palatable to judges.

A few prevalent exceptions undermined the traditional 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 interests with respect to the plaintiff, reasonably "contemplated" recovery. 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. Under this regime, the plaintiff must show that the tortfeasor's conduct resulted in "contemporaneous traumatic" physical impact with the body of the plaintiff. Again, the courts adhered to the traditional rationale. Courts viewed the physical impact requirement as a screen that would prevent "imaginary and fraudulent claims" and generally ward off "a flood of new litigation." Judges applied the impact rule rigorously, resulting in what many considered to be harsh and arbitrary results. 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. Conversely, demonstrating an impact became a mere formality in many cases, and accordingly the requirement did not present much of an obstacle to recovery. Because of the perceived inequities and obsolescence of the impact rule, and in light of the courts' function as forums to remedy all wrongs, the general trend has been to repudiate the physical impact rule.

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

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35 Dworkin, supra note 12, at 529.
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, 817-818 (Wash. 1993) for a thorough discussion of cancerphobia recovery and intentional conduct.
39 Dworkin, supra note 12, at 530. See also RESTATEMENT (SECOND) OF TORTS § 568 (1965).
41 Bass v. Nooney Co., 646 S.W.2d 765, 768 (Mo. 1983).
42 Bass, 646 S.W.2d at 769.
43 Id.
44 Gale, supra note 5, at 275-76.
45 Id. at 275 (citing Ford v. Schlessman, 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.
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 & Geyer, supra note 8, at 728.
50 (1) If the actor un-intentionally 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 § 518 (1965).
51 Utterham v. Bismark 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 coexis-

tent 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 appropri-
ate 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 re-
 mote and unexpected.”61 However, Dillon
did not provide a means of recovery for a
plaintiff suffering noncontemporaneous dis-


In summary, courts hearing infliction of
emotional distress cases generally allowed
recovery not as an exception to the underly-
ing policy rationale of preventing frivolous
claims and barring the flood gates of litiga-
tion, but in furthurance 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 manifes-
tation 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 recov-
ery for emotional distress reemphasized the
foreseeability requirement.64 Further, these
courts sought to limit recovery in other ways.

62 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 prejudice 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 Kneipel, supra note 5, at 279.
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.
68 Molien, 616 P.2d at 813.
69 See supra notes 36-37 and accompanying text.
71 Rodrigues, 472 P.2d at 519.
73 St. Elizabeth Hospital v. Garrard, 730 S.W.2d 649, 653 (Tex. 1987), overruled by Boyes 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).
74 Molien, 616 P.2d at 820.
75 See id., 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. 

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. The seriousness of the injury, as determined by the jury, determined the amount of the award. Nevertheless, some courts still required evidence of a “compensable harm” in the form of a “functional impairment” to the plaintiff. 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, *Stenback v. Stanback*. In *Stenback*, the North Carolina Supreme Court held that “the nerves are as much a part of the physical system as the limbs...” 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. Along the same lines, the *Bass* court felt that physical and emotional injury were indivisible.

As a point of clarification, some jurisdictions explicitly incorporated an “objective” component into the “seriousness” test. 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. Apparently, these courts intended to disable claims made only on the strength of the plaintiff’s testimony. 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.

The vital issue now becomes: have those courts liberalizing emotional distress recovery retained sufficient limitations on liability so that the courts still maintain control over the cause of action? Certainly, mental distress has historically been a compensable injury. However, the physical injury requirement has, for a longer time, acted as the “key restriction” 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. Generally though, this claim was parasitic and limited to ephemeral fears. These two factors alloyed the courts’ otherwise strong interest in guarding against frivolous claims. Where the fear lasted indefinitely, courts denied recovery. Thus, diseases or conditions with relatively short...
incubation periods like rabies,\textsuperscript{93} hydrophobia, miscarriages, or blood poisoning supported recovery.\textsuperscript{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.\textsuperscript{95} In this regard, \textit{Butts v. National Exchange Bank}\textsuperscript{96} is instructive. In \textit{Butts}, the court allowed the plaintiff to append to his damages "a reasonable apprehension" of future illness that was attendant to his physical injury.\textsuperscript{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.\textsuperscript{98}

The courts' insistence that the plaintiff's fear be of limited duration took root in the notion of reasonableness.\textsuperscript{99} That is, the fear of future affliction was only reasonable within a specified window.\textsuperscript{100} Medical probability also played a role in defining reasonableness according to some courts.\textsuperscript{101} In \textit{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.\textsuperscript{102} Similarly, in \textit{Plank v. R.J. Brown Petroleum Co.},\textsuperscript{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.\textsuperscript{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.\textsuperscript{105} One commentator suggests that these cases merely stand for the proposition that the injury, not the probability, is the determinative factor in recovery.\textsuperscript{106} Nevertheless, the reasonableness of the fear, regardless of semantics, was the \textit{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.\textsuperscript{107} By the middle of this century, plaintiffs could recover for fear of diseases characterized by "unlimited" incubation periods ("unlimited disease").\textsuperscript{108} Commentators widely recognized Alley v. Charlotte Pipe & Foundry Co.\textsuperscript{109} as the first case allowing recovery for an unlimited disease.\textsuperscript{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.\textsuperscript{111} The doctor testified that the development of cancer was "liable", which the court construed as probable and accordingly granted recovery.\textsuperscript{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 \textit{Kimbell v. Noel},\textsuperscript{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.\textsuperscript{114} Again, with the presence of an identifiable physical injury, the court seemed unconcerned with the other traditional screening devices like the reasonableness standard. \textit{Dempsey v. Hartley}\textsuperscript{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.\textsuperscript{116} The court held that the fact of the injury itself warranted recovery for fear of

\textsuperscript{93} One year is the window in which rabies can develop subsequent to being bitten. Dworkin, supra note 12, at 542.
\textsuperscript{94} Id. at 542.
\textsuperscript{95} Id. at 553.
\textsuperscript{96} 72 S.W. 1083 (Mo. Ct. App. 1903).
\textsuperscript{97} Id. at 1084.
\textsuperscript{98} Id.
\textsuperscript{99} Dworkin, supra note 12, at 542.
\textsuperscript{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).
\textsuperscript{101} See, e.g., Pandjiris v. Oliver Cadillac Co., 98 S.W. 2d 969 (Mo. 1936).
\textsuperscript{102} Id. at 977.
\textsuperscript{103} 61 S.W. 2d 328 (Mo. 1933). See also Stahlsberg v. Brandes, 299 S.W. 836, 838 (Mo. Ct. App. 1927).
\textsuperscript{104} Plank, 61 S.W. 2d at 334.
\textsuperscript{106} Dworkin, supra note 12, at 544.
\textsuperscript{107} See, e.g., Alley v. Charlotte Pipe & Foundry Co., 74 S.E. 885 (N.C. 1912).
\textsuperscript{108} Dworkin, supra note 12, at 543.
\textsuperscript{109} Alley, 74 S.E. 885.
\textsuperscript{110} See, e.g., Knepel, supra note 5, at 280; Dworkin, supra note 12, at 543.
\textsuperscript{111} Alley, 74 S.E. at 886.
\textsuperscript{112} Id.
\textsuperscript{113} 228 S.W. 2d 980 (Tex. App. 1950).
\textsuperscript{114} Id. at 982-83.
\textsuperscript{115} 94 F.Supp. 918 (E.D. Pa. 1951).
\textsuperscript{116} Id. at 920, 921.
attributed it to excessive x-ray condition as chronic radiodermatitis and blistered. This treatment her shoulder became irritable for a shoulder condition. Following a case in cancerphobia recovery."

Interestingly, the plaintiff's testimony relating her cancerphobia.

Subsequently, the plaintiff's doctor advised her to undergo periodic examination of her shoulder because it was susceptible to developing cancer. In an action for medical malpractice, the plaintiff sought to recover for emotional distress arising from cancerphobia.

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. The court found that the facts of this case guaranteed the genuineness of the claim. Interestingly, the Ferrarra court purported to make a narrow holding while espousing a general regulatory principle of tort recovery: "[liability for damages caused by wrong ceases at a point dictated by public policy or common sense."

However, the court believed that the finding of liability did not offend public policy and therefore upheld the jury verdict. 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. 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. This rubric includes: concreteness, manifestness, immediacy or acuteness, distinctness, adverse impact causally connected to the complained-of injury, and a symptom-producing agent. Accordingly, damages for the anxiety are not parasitic and proof of injury is speculative. 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.

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.

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.

1. Minimization/Physical Injury

Allowing recovery for cancerphobia necessarily requires acceptance of the propo-

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117 Id.
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 F.2d 795, 805 (Cal. 1993).
tion that anxiety about a possible future consequence constitutes a present legal injury. 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. This theory first materialized in *Laxton v. Orkin Exterminating Co.*

In *Laxton*, the plaintiff family ingested chlordane which contaminated their drinking water. Subsequently, they became worried about the future consequences of such ingestion on their health. Though no physical injury accompanied their fear, the courts did not manifest itself in physical symptoms, the Tennessee Supreme Court upheld the lower court's instructions that ingestion constituted a physical injury. 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." 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. For this reason, the effect of this decision on the traditional common law paradigm of injury is incremental at most. 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.* parallels *Laxton*. 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*, 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. 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. 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* discussed whether the plaintiff's inhalation of asbestos created an impact. The court noted that under Florida law, the plaintiff need not show physical manifestation of the distress provided impact occurred. 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. The *Cox* court cited *Plummer v. United States* 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." Much like the minimization cases, the court again reduced the analysis to the most microscopic level.

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154 Gale & Goyer, supra note 8, at 724.
155 Dworkin, supra note 12, at 550.
156 639 S.W.2d 431 (Tenn. 1982).
157 Id. at 433.
158 Id.
159 Id. at 433-35.
160 Id. at 433-34.
161 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.
162 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.)).
165 437 N.E.2d 171 (Mass. 1982).
166 481 So.2d 517 (Fla. App. 1985). reh'g denied, 492 So.2d 1331 (Fla. 1986).
167 481 So.2d 517 (Fla. App. 1985). id. at 526.
168 481 So.2d 517 (Fla. App. 1985). id.
169 Id. at 526.
170 Id. at 527.
171 Id.
172 580 F.2d 72 (3d Cir. 1978).
173 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 injury 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, 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-
increased. Brantner proposed that reason-
ableness was a function of expert medical
testimony and nonexpert eyewitness testi-
ymony.

Wetherill v. University of Chicago174 com-
ports with the analysis of Brantner.175 In
Wetherill, the plaintiffs sought cancerophobia
damages because of their exposure to DES.176
In order to recover the plaintiffs needed only
to show that their fear was reasonable irre-
spective of the actual probability of their
developing cancer.177 The court remarked
that to impose an evidentiary requirement of
reasonable certainty would frustrate conven-
tional notions of proximate cause.178 Thus,
plaintiffs could present the results of scien-
tific 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 quali-
fied to include reasonable people who are
“bombarded” with information about DES.180

The court in Laxton v. Orkin Extermi-
ating Co.181 utilized a similar reasonableness
standard in determining whether the plain-
tiffs’ fear of disease was compensable.182

The Laxton court deemed that the plaintiffs’
seeking of medical attention sufficiently cor-
robated their fear since they knew that the
substance contaminating their water was
possibly carcinogenic. However, this analy-
sis may present problems. One writer ob-
serves 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 examina-
tion, thus supporting recovery in nearly
every case.184

Murphy v. Penn Fruit Co.185 apparently
gives substance to this observation. Interest-
ingly, 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 cor-
robates this fear.

In re Hawaii Federal Asbestos Cases189

sharply contrasts with Murphy. Here, the
plaintiffs sought recovery for the fear of
cancer arising out of their exposure to asbes-
tos. The court held that the plaintiffs’ subject-
ive testimony of shortened breath and gen-
eral fatigue was not sufficient to support
recovery absent the plaintiff’s knowledge of
an objectively verifiable functional impair-
ment, because without proof of functional
impairment no compensable harm existed.190
Furthermore, the court noted that the under-
lying harm of which the plaintiffs com-
plained 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 likeli-
hood and assumed that low medical possibil-
ity 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, contem-
plated by Laxton, and the medical proba-
bility that the feared of condition will manifest

172 Id. The plaintiff could recover for cancerophobia 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).
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 cancerophobia recovery.
176 Id. at 1559-60.
177 Id. at 1559.
178 Id. at 1560.
179 Id.
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.
186 Wetherill, 565 F.Supp. at 1559.
187 Id. at 1559.
188 Id. at 482, 488-485.
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.
Cancerphobia Damages in Missouri

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 Plank v. National Exchange Bank. In Plank, 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 emotional distress. This case established the right of plaintiffs to recover for the fear of future consequences.

Pandjiris v. Oliver Cadillac Co. and Plank v. R.J. Brown Petroleum Co. 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. 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. However, it is important to remember that Missouri courts still adhered to the impact rule when Pandjiris and Plank were decided.

Hahn v. McDowell 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. The court argued that compensating plaintiffs for injuries which were "merely possible" would be unjust.

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. Bennett v. Mallinckrodt, Inc. presents 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., the watershed Missouri Supreme Court decision which granted independent status to the tort of negligent infliction of emotional distress. 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. Because of their alleged exposure to radioactive emissions from the plant, the plaintiffs filed a claim against the defendant for, inter alia, negligence. Among their damages plaintiffs cited a general "apprehension [arising from a] severe psychotic trauma." The court held that under the Bass test, the plaintiffs had properly pleaded the existence of medically diagnosable and medically significant emotional distress. 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.

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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.2d 20 (Mo. banc 1927), overruled by Bennett v. Nooney Co., 646 S.W.2d 765 (Mo. banc 1983). The plaintiff in Pandjiris clearly suffered from a visible physical injury and 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 nosious fumes. 61 S.W.2d at 329. Rather, the plaintiff in Plank founded his cause of action on Missouri occupational disease statutes that simply 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.


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. at 864.

211 Id. at 864. 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. Once this threshold is met, the plaintiff must surmount a higher barrier to recover. First, the defendant must have foreseen that the plaintiff would be subject to an unreasonable risk of distress. This element ensures the presence of legal duty and proximate cause. Second, the anxiety must be "sufficiently severe so as to be medically significant." Because the court delegated the determination of medical significance to the jury, it may have intended to incorporate reasonableness into the notion of medical significance.

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. 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. The court held that the Bass scheme for emotional distress applied to cancerphobia claims as well. 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.

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. Thus, Thomas makes clear that the Bass test for negligent infliction of emotional distress, coupled with Bennett, provide the applicable analysis for cancerphobia claims.

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. 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 Missouri.
V. Policy Analysis and Conclusion

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

Recently, in Potter v. Firestone Tire & Rubber Co., the California Supreme Court ruled on the availability of cancerphobia damages in toxic torts. Recall that Molien v. Kaiser Foundation Hospitals removed the physical injury limitation for negligence actions. In this regard Missouri decisions are similar in law and reasoning, 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. 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.

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

The Potter court discussed Molien and declared its rationale applicable to toxic torts. As a precondition to recovery, the court held that the plaintiffs must establish the reasonableness of their fear. 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. Rather, the Potter court limited reasonableness to a showing that the feared condition is a probable result of the exposure.

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 “meaningfully[ly]” limit recovery. Second, the absence of a heightened threshold may have a chilling effect on the health care field, particularly in the area of prescription drugs and medical malpractice. 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. Fourth, a “more likely than not” threshold provides predictability which facilitates consistent case-to-case application.

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.

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-
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. Courts have apparently anticipated this potential for manipulation as evidenced by their use of the reasonable person standard to screen for legitimate injuries. 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? 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.

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. Further, the objective threshold alone does little to keep frivolous claims out of court in that the term itself intimates that a trier of fact must play the decisive role in determining liability much of the time. In this regard, the Potter decision effectively relieves the trier of this duty in some cases by quantifying the reasonableness standard.

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.


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.