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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

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.
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. CONS. 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. Knebel, Recovery for Emotional Distress Resulting from the Fear of Future Injury or Disease, 37 Fiji Ins. & Corp. CONS. Q. 273, 273 (1987). In the course of this Comment these terms will be used synonymously. 6 Knebel, supra note 5, at 289.
9 Id. at 730.
10 See Willmore, supra note 5, at 54.
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, thereby making the alleged injury unverifiable and susceptible to "easily manipulation". 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. The physical injury served as the "only objective and readily verifiable check" on emotional distress claims. 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. 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 prong of the test acted as a check against untrammelled liability by limiting the number of potentially valid claims.
through a small allowable window of apprehension.\textsuperscript{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 injury. One of these exceptions applied to a corpse or the misdirection of a telegraph message were sufficiently egregious to ensure genuine claims.\textsuperscript{37}

Similarly, that rationale justified recovery for intentional infliction of emotional distress.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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”\textsuperscript{42} and generally ward off “a flood of new litigation.”\textsuperscript{43}

Judges applied the impact rule rigorously, resulting in what many considered to be harsh and arbitrary results.\textsuperscript{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.\textsuperscript{45} Conversely, demonstrating impact became a mere formality in many cases, and accordingly the requirement did not present much of an obstacle to recovery.\textsuperscript{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,\textsuperscript{47} the general trend has been to repudiate the physical impact rule.\textsuperscript{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.\textsuperscript{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.\textsuperscript{50} Essentially, under the zone of danger theory, a tortfeasor owed no duty to a person outside the zone of danger.\textsuperscript{51} Rather, only “persons who are physically injured as a result of a fear for their own safety” can recover for emotional distress.\textsuperscript{52} This theory contemplated a contemporaneous physical injury as a “primary screening device”\textsuperscript{53} but shifted the focus to bodily injury caused by the emotional dis-
tress as different from physical injury coexistence 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 "excluded 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, supra, at 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 Kneepk, supra note 5, at 279.
63 Marrs, supra note 7, at 4. See, e.g., Bammhi1 v. Davis, 300 N.W.2d 104 (Iowa 1981); Taylor v. Baptist Medical Center, 400 So.2d 369 (Ala. 1981).
64 Bass, 466 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 807-88.
67 Molien, 616 P.2d at 813.
68 See supra notes 36-37 and accompanying text.
70 Rodrigues, 472 P.2d at 519.
71 Bass v. Nooney, 466 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 1978, 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 Although 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 over the cause of action? Certainly, mental distress has historically been a compensable injury.87 However, the physical injury requirement has, for a longer time, acted as the "key restriction"88 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.89 Generally, though, this claim was parasitic and limited to ephemeral fears.90 These two factors alloyed the courts’ otherwise strong interest in guarding against frivolous claims.91 Where the fear lasted indefinitely, courts denied recovery. Thus, diseases or conditions with relatively short

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."
77 Id.
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)).
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"); see also 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." Kneipel, 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. Augusta Brewing Co., 52 S.E. 152, 153 (Ga. 1905) (holding that plaintiff could not recover for a future fear of indefinite duration); Senio 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, hydrophobia, miscarriages, or blood poisoning supported recovery.44

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.45 In this regard, Butts v. National Exchange Bank46 is instructive. In Butts, the court allowed the plaintiff to append to his damages "a reasonable apprehension" of future4

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. Hartley115 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

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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.
106 Dworkin, supra note 12, at 544.
108 Dworkin, supra note 12, at 543.
109 Alloy, 74 S.E. 885.
110 See, e.g., Knepel, supra note 5, at 280; Dworkin, supra note 12, at 543.
111 Alloy, 74 S.E. at 886.
112 Id.
113 228 S.W.2d 980 (Tex. App. 1950).
114 Id. at 982-83.
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 the plaintiff received several x-ray treatments for emotional distress arising from cancerphobia claims. The New York Court of Appeals ruled that the plaintiff’s testimony relating her 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: “[l]iability 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 proposi-
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 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. 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. 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.
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 corroboration 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. Garrison.\(^{161}\) 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 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-
increased. Brantner proposed that reasonableness was a function of expert medical testimony and nonexpert eyewitness testimony.

Wetherill v. University of Chicago
comports with the analysis of Brantner. In Wetherill, the plaintiffs sought cancerphobia damages because of their exposure to DES. In order to recover the plaintiffs needed only to show that their fear was reasonable irrespective of the actual probability of their developing cancer. The court remarked that to impose an evidentiary requirement of reasonable certainty would frustrate conventional notions of proximate cause. Thus, plaintiffs could present the results of scientific studies establishing a causal connection between DES and cancer to establish the reasonableness of their fear. 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.

The court in Laxton v. Orkin Exterminating Co. utilized a similar reasonableness standard in determining whether the plaintiffs’ fear of disease was compensable. 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.

Dwarkin 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.

Murphy v. Penn Fruit Co. apparently gives substance to this observation. Interestingly, the Wetherill court cited Murphy, a non-toxic tort case, with approval. 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. The court found the award appropriate even though the plaintiff had no medical basis for her fears. Consequently, under Murphy, a plaintiff can recover for subjective fear alone although no objective evidence corroborates this fear.

In re Hawaii Federal Asbestos Cases 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. 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. 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).
175 See also Lorenz 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 Dwarkin, supra note 12, at 551.
184 Id. at 551-52.
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.
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 few will eventually develop lung cancer.” Id.
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*.

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.

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.* 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.*, 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.
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 surmount 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 “sufficiently severe 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 Missouri.

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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 Palaegraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928). Dillon v. Legg, 441 P.2d 912 (Cal. 1968). N.E. 99 (N.Y. 1928).

217 Comment, A Reappraisal of the Nervous Shock Cases, supra note 213, at 1254. (2) ("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 755 (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)).

218 Bennett, 698 S.W.2d at 867.


220 Id. at 1408.

221 Id.

222 Id. at 1407. Thus, some of the injuries were not "medically diagnosable," some were not "medically significant," and some were neither.

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

224 See, e.g., Ford v. Addi, 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).
Cancerphobia Damages in 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 Hospitals228 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 “meaningfully[l]” 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-

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. 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 trial 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.

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.