Emotional Distress Damages in Toxic Tort Litigation: The Move towards Foreseeability

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Comments

EMOTIONAL DISTRESS DAMAGES IN TOXIC TORT LITIGATION: THE MOVE TOWARDS FORESEEABILITY

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I. INTRODUCTION

The toxic effects of decades of twentieth century industrial growth have begun to arrive at our doorsteps recently, disrupting both our physical and mental well-being.1 The incidents at Love

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1. The psychic impact of large scale environmental stressors is becoming increasingly well documented in the practice and research of mental health ex-
Canal, Three Mile Island and Times Beach, Missouri are only the most famous of hundreds of industry-related fiascos that intrude upon the lives of unsuspecting neighbors or employees of dangerous facilities every year in the United States.\(^2\)

Although Congress has enacted several bills aimed at limiting the likelihood of environmental disasters and providing for clean-up of hazardous sites,\(^3\) American courts have continued to limit tort liability of industry giants who handle hazardous materials in

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perts. See, e.g., Robert J. Gatchel et al., *A Psychological Field Study of Stress at Three Mile Island*, 22 PSYCHOPHYSIOLOGY 175 (1985). Additionally, "large numbers of Americans claim that they themselves personally worry a great deal about environmental problems which could affect them directly." George Gallup, Jr. and Frank Newport, *Americans Strongly in Tune with the Purpose of Earth Day*, GALLUP FOLL MONTHLY, Apr. 1990, at 5. See also *Government's Report on Radon Prompts Public Concern, Action*, GALLUP REPORT, Feb. 1989, at 33 (hereinafter *Government's Report on Radon*). The more Americans learn about the dangers and abundance of industrial toxins, the more justifiable, and thus compensable, is the distress they feel. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 414 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986) (explaining that where plaintiff's fear of cancer was exacerbated each time he learned of another asbestos related death, court cannot gainsay that plaintiff's anguish is not genuine or reasonable).

2. The Environmental Protection Agency has counted in excess of 32,000 hazardous waste sites around the United States, while some agencies contend that the number is closer to 51,000 and claim that up to 34,000 pose "significant problems." Michael H. Brown, *Love Canal and the Poisoning of America*, ATLANTIC, Dec. 14, 1979, at 33, 38 (hereinafter Brown, *Poisoning of America*).

The opportunities mental health experts have had to assess the emotional sequela to disasters is augmented by the surprising frequency of natural disasters, including floods, typhoons, hurricanes, cyclones, tornadoes and earthquakes. From 1947 to 1973, one study found that the number of natural disasters worldwide killing more than 100 people or causing more than $1,000,000 in damages totalled 836, an average of 81 per year. Judith Dworkin, *Nat. Hazards Res: Global Trends in Natural Disasters 1947-1973* (University of Toronto No. 26, 1973); Kenneth Hewitt & Lesley Sheehan, *A Pilot Survey of Global Natural Disasters of the Past Twenty Years*, NAT. HAZARDS RES. (University of Toronto No. 11, 1969).

The potential danger in the United States due to industrial toxins remains high. Brown, *Poisoning of America*, supra at 33. As of 1979, approximately 35 million tons of hazardous wastes were generated by the United States each year, and federal figures estimated that upwards of 90 percent was disposed of improperly. *Id.* See also *S. Rep. No. 848, 96th Cong., 2d Sess. 3* (1980) (citing EPA estimates supporting 90 percent figure).

a negligent manner. These protectionist policies remain as artifacts of the Industrial Revolution, when, as a matter of national policy, individual safety was commonly subordinated to the ends of commercial growth.

The courts of the Industrial Revolution, however, did not and could not foresee the magnitude of modern industry and the ways in which it would encroach upon the safety and serenity of millions of lives. Consequently, although limitations on liability may have appeared justifiable in that era, the growing evidence of the hazards of modern industrial practices calls for greater accountability of those responsible for handling today’s ultra toxic substances.

A primary example of courts’ anachronistic protectionism in these matters is in the limits that are set on recovery for emotional distress damages in toxic tort litigation. Although there is no more common or reasonable phenomenon in toxic tort cases than the extreme emotional upset attendant to a plaintiff’s discovering that she has been exposed to life-threatening doses of industrial carcinogens, courts continue to require that the plaintiff prove physical injury in order to recover for emotional distress.

4. For a discussion of the history of recovery limitations, see infra notes 17-54 and accompanying text.


6. See, e.g., Lexington & O.R.R. Applegate, 8 Dana 289 (Ky. 1839) (recognizing inevitability of “private injury and personal damage . . . from . . . agents of transportation in a populous and prospering country”). See also Bohrer, Fear and Trembling, supra note 5, at 110-11 (discussing differences between present and gilded age which justifies ascription of liability now that we would not have wanted to burden industry with at that time).

7. During the Industrial Revolution, American courts were actually concerned with finding ways to minimize corporate liability. Cornelius J. Peck, Negligence and Liability Without Fault in Tort Law, 46 Wash L. Rev. 225 (1971). “Society as a whole stood to benefit from the working of an industrial economy, and as a general proposition it could not afford to burden itself with compensating those individuals who were so unfortunate as to be injured accidentally by an instrument of progress.” Id. at 231.

8. See Bohrer, Fear and Trembling, supra note 5, at 86-92 (describing differences between nineteenth and twentieth century America in terms of differential importance of industrial growth and magnitude of hazards posed by industry). For further discussion of the differences between modern conditions and those of the industrial revolution, see infra notes 60-62 and accompanying text.

9. For a discussion of the present and changing law regarding emotional distress recovery in toxic tort litigation, see infra notes 87-141 and accompanying text.

10. See, e.g., Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.),
The harm worked by these draconian limitations is most evident when one realizes that, due to the latency of many disease processes, the carcinogenic and/or lethal physical manifestations of toxin-induced disease may take years to emerge. Thus, where a plaintiff can sue for psychic harm only after a physical injury develops, extreme emotional upset suffered prior to the onset of the physical disease process, often years in the future, may go entirely without remedy.

This Comment explores the historical treatment of emotional distress tort damages, with particular focus on the various limitations to which they have been subject. Although there has been a gradual movement in the direction of liberalizing recovery for

11. For a discussion of the latency of diseases caused by many of today's toxins, see infra notes 65-74 and accompanying text.

12. Bohrer, Fear and Trembling, supra note 5, at 87 n.9 (citing COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY - 1980 at 190, 193 (1980)) (latency period between exposure to carcinogen and appearance of tumor may be as long as forty years).

13. Bohrer, Fear and Trembling supra note 5, at 87. The most likely explanation for such limitations is the judicial, as well as public, skepticism about the seriousness or genuineness of emotional distress incurred in such cases. Id. at 94. Authorities have often commented on the fear of a floodgate of fraudulent claims, or the preference for toughening the public hide rather than encouraging oversensitivity to the realities of life in a technological society. Tobin v. Grossman, 24 N.Y.2d 609, 617 (1969) (discussing need to keep liability "within tolerable limits required by public policy"), overruled by Wolfe v. Sibley, 36 N.Y.2d 505 (1975) (finding psychic trauma compensable to same extent as physical injury).


14. For a discussion of the conditions that have been placed on recovery for emotional distress historically, see infra notes 17-54 and accompanying text.
emotional distress damages in toxic tort litigation, this Comment will assert that anything short of an unqualified foreseeability analysis fails to provide both just redress for plaintiffs' injuries and the necessary deterrent to negligent management of toxic hazards.

II. **A Historical Perspective on Emotional Distress Recovery**

American courts traditionally have been wary about permitting recovery for emotional distress. The predominant reasons cited for this caution have been the fear of a floodgate of fraudulent and/or frivolous litigation and a fear of a chilling effect on industrial innovation. As a result, courts have typically permitted emotional distress recovery only if accompanied by physical

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15. For a discussion of cases which have liberalized recovery for emotional distress damages, see infra notes 96-141 and accompanying text.

16. It is submitted that one of the goals of our tort system should be to deter the foreseeable harm, including distress, caused by negligent industry actions that lead to uninvited exposure of citizens to hazardous substances. Given the eradication of such foreseeable distress as a goal, it is thus appropriate to ascribe liability thereto. JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, THE TORTS PROCESS 39 (3d ed. 1988) (deterrence of negligent conduct one of goals of tort liability).

17. See Spade v. Lynn & Bos. R.R., 47 N.E. 88, 89 (1897) (requiring persons merely negligent to "guard against fright and the consequences of fright . . . would open a wide door for unjust claims").

The first English case to allow recovery for intentional infliction of emotional distress without resulting physical harm was at the turn of the century. See Wilkinson v. Downton, 2 Q.B. 57 (1897). The first American court to allow recovery for emotional distress without a concomitant showing of physical harm was in 1952. See State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282 (Cal. 1952) (upholding claim for intentional infliction of emotional distress).

18. PAGE KEETON AND WILLIAM LLOYD PROSSEER, PROSSER AND KEETON ON THE LAW OF TORTS 356 (5th ed. 1984) [hereinafter PROSSER & KEETON]. See also Bohrer, Fear and Trembling, supra note 5, at 95. As Professor Bohrer points out: [a]t each stage in the development of the emotional distress doctrine, it has been necessary to rebut both objections. As for the first objection, it is often quite clear from the surrounding circumstances that the emotional distress claim is genuine. . . . As for the second objection, the courts have never expanded recovery for emotional distress without having initially reached the conclusion that the activity of the defendant either does not need or does not merit protection.


Moreover, submits Professor Bohrer, in a highly developed society where new risks to the environment and human health continue to appear, courts
injury, which, because of its supposedly more verifiable nature, was deemed to ensure the genuineness of the emotional distress claim.19 This so-called "parasitic recovery" limitation was generally seen as effectuating a balance between the need to compensate clearly injured plaintiffs and the goal of not unduly burdening courts or defendants with frivolous claims.20 Although the "parasitic recovery" rule carried the day for much of the twentieth century,21 it also received substantial criticism as an arbitrary and overly restrictive limitation.22 Presently, the rule has been modified or replaced in almost all United States jurisdictions.23

The primary modification to the physical impact/injury rule has been the combined "zone of danger" and "physical manifestation" rule.24 Although a plaintiff would not have to demonstrate physical impact or injury under this newer model, he would

should have little difficulty concluding that such activities "do . . . not need [and] do . . . not merit protection." Bohrer, Fear and Trembling, supra note 5, at 95.
20. Id. The Payton court recognized the difficult balance involved in "compensating plaintiffs with clearly recognizable serious injuries, while not burdening either the judicial system or individual defendants [with injuries that were] . . . trivial, evanescent, feigned or imagined." Id.
21. PROSSER & KEETON, supra note 18, at 923.

Prior to this abrogation, exceptions to the physical impact requirement were permitted where defendant's conduct could be shown to be extreme, intentional or outrageous. Alcorn v. Anbro Eng'g, Inc., 468 P.2d 216, 218 (Cal. 1970). The rationale there was that the genuineness of the claim could also be insured by focus on the nature of the defendant's act rather than on the consequences for plaintiff. See, e.g., Am. Rd. Serv. Co. v. Inmon, 394 So. 2d 361 (Ala. 1980) (concerns of fraudulent claim less where defendant's conduct reckless or intentional).
24. The first case to espouse this rule was Waube v. Warrington, 258 N.W. 497 (Wis. 1935). In Waube, a mother looking out a window of her house to watch her daughter cross the highway witnessed a negligent driver strike and kill her daughter. Id. at 497. As a result of the fright and shock from witnessing this horror, the mother herself died. Id. While not denying the severity of the shock or the negligence of the driver, the Waube court nonetheless denied recovery for the mother's death, reasoning that the defendant's duty extended only to those within the zone of foreseeable physical injury. Id. at 500-01.

Of particular interest for the present discussion is the Waube court's ration-
have to show that he had been in the zone of potential physical harm from a tortious act and that the resulting emotional distress was sufficiently serious to cause a physical manifestation of some kind.\textsuperscript{25} Although the zone of danger/physical manifestation model is presently favored in a substantial number of jurisdictions,\textsuperscript{26} it too has come under fire as an inexact identifier of meritorious claims.\textsuperscript{27} Several jurisdictions have now replaced the zone of danger requirement with a more direct assessment of the foreseeability of emotional distress by adopting, in whole or in part, the three-pronged foreseeability analysis set forth in the famous California case of \textit{Dillon v. Legg}.\textsuperscript{28}

In \textit{Dillon}, although the plaintiff was not within the zone of physical danger when she witnessed defendant’s negligently driven automobile strike and kill her infant daughter, recovery for the mother’s resulting emotional distress was permitted.\textsuperscript{29} The \textit{Dillon} court disparaged the then prevailing view that no duty, and thus no liability, extended to the witnesses of traumatic incidents.

\textit{Id.} at 501 (emphasis added). For a discussion of the claim that the unprecedented degree of toxicity inherent in modern industrial chemicals represents a social interest justifying liability for both the physical and nervous upset caused by their mishandling, see \textit{infra} notes 146-177 and accompanying text.

Some combination of the zone of danger/physical manifestation requirement is still adhered to in the following jurisdictions: Arizona, Colorado, Delaware, Idaho, Illinois, Maryland, Minnesota, Mississippi, North Carolina, Oklahoma, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. Marlowe, \textit{Jurisdictional Survey}, \textit{supra} note 23, at 796-97 n.91.

\textsuperscript{25} \textit{Waube}, 258 N.W. at 498. \textit{See also} Dulieu v. White \& Sons, 2 K.B. 669 (1901) (liability supported where pregnant woman in zone of physical danger was sent into labor prematurely due to shock when horse-drawn van crashed through wall of her tavern).

\textsuperscript{26} For a list of jurisdictions which remain committed to the zone of danger/physical manifestation limitation, see \textit{supra} note 24.

\textsuperscript{27} The physical manifestation requirement has been criticized as overinclusive because it would permit recovery even for insignificant emotional distress provided the plaintiff made only a token showing of some trivial physical symptom. \textit{See} James v. Lieb, 375 N.W.2d 109, 116 (Neb. 1985) (physical manifestation requirement criticized as both over and under-inclusive). The requirement has been viewed as underinclusive because otherwise substantial psychic distress would have no remedy unless it happened to be accompanied by some physical symptom. \textit{Id.}

\textsuperscript{28} 441 P.2d 912 (Cal. 1968) (en banc).

\textsuperscript{29} \textit{Id.} at 914.
“Duty” according to Dillon, “is not sacrosanct in itself, but only an expression of the sum total of [policy] considerations.”\textsuperscript{30} The Dillon court concluded that concerns of fraudulent claims and unlimited liability could be sufficiently addressed through traditional adversarial means.\textsuperscript{31} The Dillon court set aside the artificial physical injury/impact hurdles, and stated simply that “foreseeability of the risk . . . will be the prime [focus] in every case.”\textsuperscript{32}

Perhaps to allay fears of unlimited liability and fraudulent claims,\textsuperscript{33} however, the Dillon court chose not to leave the foreseeability determination entirely up to the discretion of subsequent fact finders.\textsuperscript{34} Instead, the court established the following three

\begin{enumerate}
\item Id. at 918.
\item Id. As to the concern for fraudulent claims, the court rejected the argument that “[courts] should deny recovery upon a legitimate claim because other fraudulent ones may be urged.” Emphasizing that the fact finder is appropriate barrier to false claims, the Dillon court stated:

Indubitably juries and trial courts, constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, reach some erroneous results. But such fallibility, inherent in the judicial process, offers no reason for . . . an artificial and indefensible barrier.

Id. Moreover, the Dillon court doubted that cases of this kind presented any more pronounced problem of fraudulent claims than in other areas of torts. 441 P.2d 912, 918 (Cal. 1968).
\item Id. at 920. After dispelling the notion that concerns for fraudulent claims or unlimited liability were any more acute in the present case than in other contexts, the court stated:

In the absence of ‘overriding policy considerations, foreseeability of risk is of primary importance in establishing the element of duty.’ As the classic opinion states: ‘The risk reasonably to be perceived defines the duty to be obeyed.’ Defendant owes a duty, in the sense of a potential liability for damages, only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent, in the first instance.

Id. at 919-20 (quoting Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928) (citations omitted)). Although foreseeability became the cornerstone of the duty analysis in Dillon, the court set down guidelines for determining foreseeability of injury in cases where the plaintiff was merely a witness to a traumatic incident. Id. at 920. For an enumeration of these guidelines and a discussion of their relative utility or lack of utility, see infra notes 35-46 and accompanying text.

\item See Stephen B. Presser & Jamil S. Zainaldin, Law and American History 821 (1980) (asserting guidelines used because Justice Tobriner sensed that break from traditional limitations represented “difficult and uncertain ... undertaking”).
\item Dillon, 441 P.2d at 919. The Dillon court struck a compromise between what it considered the injustice of denying recovery for foreseeable distress merely because the “zone of danger” requirement was not met and, on the other hand, the specter of unlimited liability. Pure “foreseeability” analyses, without factors, had traditionally been applied only in “direct duty” cases, where the defendant’s tortious acts had a direct effect on plaintiff. Id. at 916. The fear of unlimited liability was naturally greater where recovery would be extended not
factors to “aid” courts in the determination of foreseeability:35

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with the learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.36

These now famous “Dillon factors” — 1) proximity, 2) contemporaneous observation, and 3) closeness of relation — initiated a revolution in the recovery permitted in emotional distress cases. Many jurisdictions adopted the Dillon foreseeability factors nearly verbatim, while many more have indicated a willingness to do so in a suitable case.37 This return to foreseeability as the cornerstone of duty determinations represented a clear break from nineteenth century protectionism.38 The Dillon court recognized the break with tradition its decision represented, but referred to the former limitations as “an indefensible orthodoxy” to which adherence could no longer be justified.39

only to the person maimed or killed, but also to onlookers. As a result of the desire to limit the scope of potential bystander plaintiffs, the Dillon court sought to limit recovery to family members present and observing the incident. Id. at 920.

35. Id.
36. Id.
37. See Entex, Inc. v. McQuire, 414 So. 2d 437 (Miss. 1982) (recovery available for nervous condition following gas explosion in plaintiff’s presence which destroyed home and injured wife; dicta that recovery available to bystander not within zone of danger); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978) (father who learned of serious injuries to daughter after accident failed to state cause of action; dicta that recovery available to close relative if contemporaneous observation requirement were met). For a discussion of the adoption of the Dillon criteria, see Marlowe, Jurisdictional Survey, supra note 23, at 806-07 n.139. Jurisdictions accepting the Dillon criteria include: Florida, Maine, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, Ohio, Pennsylvania, Rhode Island, Tennessee and Texas. Id.
38. For a discussion of the protectionism courts displayed towards corporate defendants in the nineteenth century, see supra notes 5-10 and accompanying text.
39. Dillon, 441 P.2d at 925. Justifying its abandonment of the traditional limitations in favor of its three factored foreseeability analysis, the California Supreme Court explained: “[t]o deny recovery would be to chain this state to an outmoded rule of the 19th century which can claim no current credence. No good reason compels our captivity to an indefensible orthodoxy.” Id. Moreover,
Although sound in theory, application of the Dillon factors nonetheless yielded mixed results. Some courts rejected the factors entirely. Other courts adopted all three of them, but placed disproportionate emphasis on one or another of them. Much like the traditional recovery limitations, the Dillon factors were also criticized as both under- and over-inclusive, denying recovery for serious and foreseeable distress, while permitting recovery for mild stresses. The California court itself, in Molien v. Kaiser Foundation Hospital, subsequently limited Dillon exclusively

the court stated, “the 19th century concept of a duty... ‘[that] a man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them,’ has led courts to deny liability. [T]his negation of duty emanates from the twin fears... [of] (1) fraudulent and (2) indefinable claims... [neither of which is] justified.” Id. at 917.

The standard proposed by Dillon “contemplates that courts, on a case-by-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected.” Id. at 922.


42. See, e.g., James v. Lieb, 375 N.W.2d 109, 115 (1985) (relationship factor most important); Oberreuter v. Orion Indus., 342 N.W.2d 492, 494 (Iowa 1984) (proximity and contemporaneous observation most important to assure “horror” and “visceral participation”).

43. See Ochoa v. Superior Court, 703 P.2d 1, 17 (Cal. 1985) (Bird, J., concurring and dissenting) (mechanical application of Dillon factors has led to arbitrary and inequitable results antithetical to foreseeability principles enunciated in Dillon).

One example of the harsh results possible within such a framework came in Hathaway v. Superior Court, 169 Cal. Rptr. 435 (1980). In Hathaway, a six-year-old boy was electrocuted while playing outside by touching an evaporative cooler. His parents who came outside when their son’s playmate told them something was wrong, found their son lying in a puddle of water by the cooler in a “dying state,” gagging and spitting up. Efforts to revive him failed. Id. at 437.

In upholding the trial court’s grant of summary judgment on the emotional distress claim, the Court of Appeals held that the parents’ claim failed because it did not satisfy the “contemporaneous observation” prong of Dillon. Although the parents had observed their son gagging and dying, the court reasoned that Dillon required that the parents have sensorily perceived the actual contact between the electrically charged water cooler and the child. Id. at 435. See also Drew v. Drake, 168 Cal. Rptr. 65 (Cal. Ct. App. 1980) (distress recovery denied for failure to satisfy Dillon “closeness of relation” prong where plaintiff witnessed death of her de facto husband in automobile collision). Compare Austin v. Regents of University of California, 152 Cal. Rptr. 420 (1979) (permitted father in delivery room to recover for emotional distress where he witnessed baby’s death due to defendant-hospital’s negligence) with Justus v. Atchison, 565 P.2d 122 (Cal. 1977) (relief denied for failure to meet “contemporaneous observation” factor where father also in delivery room witnessed prolapse of umbilical cord, anxiety of nurses trying to save baby, but learned of actual death of child seconds later because view of child was blocked at moment of death).

44. 616 P.2d 813 (Cal. 1980).
to "bystander" actions,45 leaving a direct, non-factor-based foreseeability analysis for cases not involving a third-party bystander.46

In *Molien*,47 the staff of a defendant-hospital mistakenly diagnosed plaintiff's wife as having syphilis and urged her to tell her husband.48 As a result of the misdiagnosis, plaintiff's wife suspected plaintiff of infidelity, and the resultant tension and hostility led to the break-up of their marriage.49 Defendant argued that application of the *Dillon* factors required denial of relief because plaintiff-husband was not present when the doctors told Mrs. Molien that she had syphilis, thus failing the contemporaneous observation prong.50 Finding it foreseeable that a diagnosis of syphilis would cause suspicion of infidelity and consequent marital discord and emotional distress,51 however, the court rejected defendant's argument that mere failure to satisfy each of the *Dillon* factors barred recovery. The California court held *Dillon* to be limited to those cases where plaintiff was a "percipient witness to the injury of a third person,"52 and justified recovery for Mr. Molien on the grounds of the foreseeability of his distress. Citing the *Dillon* court's insistence that foreseeability must be adjudicated on a case-by-case basis, the court noted that "no immutable rule can establish the extent of [duty] for every circumstance."53

With the holding in *Molien*, California had brought the recoverability of emotional distress damages to parity with other tort damages, with no physical injury requirement, no zone of danger requirement and no surrogate foreseeability factors to obfuscate the determination of a duty. Finally, at least in California, a plaintiff could recover for foreseeable psychic harm without

45. *Id.* "Bystander" actions are those where the plaintiff's distress results from concern for injury to another, rather than out of fear for one's own safety. *Id.* *Molien* was not deemed a bystander action because, although the defendant-physician's actions were directed at plaintiff's wife, the plaintiff's distress did not result solely from concern for his wife's well-being, but also for his own well-being and his marriage. *Id.* at 817. Additionally, defendants instructed plaintiff's wife to tell her husband that she had tested positive for venereal disease and thereafter tested him for the disease. *Id.* at 814. As a result, the court reasoned, defendants' actions could be said to have been "directed at" the husband as well as the wife. 616 P.2d at 817.

46. *Id.* at 815.
47. *Id.* at 813.
48. *Id.* at 814-15.
49. *Id.*
50. 616 P.2d at 815.
51. *Id.* at 817.
52. *Id.* at 816.
53. *Id.*
having to meet arbitrary prerequisites of other harms or contacts.\textsuperscript{54}

III. MASS TOXIN EXPOSURE: A UNIQUE TORT CALLING FOR A UNIQUE REMEDY

Not all American jurisdictions have adopted the \textit{Molien} approach to emotional distress foreseeability analyses. Courts have been particularly reluctant to abandon emotional distress limitations in toxic tort cases.\textsuperscript{55} This section will explore the unique characteristics of toxins that make emotional distress without

\textsuperscript{54} Id. This rationale has been echoed by many of the courts who have adopted the \textit{Molien} approach. \textit{See}, e.g., Hunsley v. Giard, 553 P.2d 1096 (Wash. 1976).

In \textit{Hunsley}, for example, the Supreme Court of Washington concluded that the boundaries of liability would be adequately limited by the traditional method, that of limiting liability to foreseeable plaintiffs. \textit{Id.} at 1103. In \textit{Hunsley}, plaintiff was sitting in her house when she heard a loud crash. \textit{Id.} at 1097. She rushed to the back porch utility room and discovered a Lincoln Continental in the middle of the room. \textit{Id.} Within an hour she began experiencing bodily numbing sensations, and was later found to have suffered stress to the heart with probable microscopic damage. \textit{Id.} at 1097-98. Holding for the plaintiff, the court stated:

[T]he application of the various rules, their exceptions and aberrations, has led the courts to reach absurd results and created numerous artificial boundaries . . . . Rather than add to the already existing confusion with the formulation of a new rule, we conclude that the wisest approach is to return to the traditional principles, theories and standards of tort law. Thus we test the plaintiff's negligence claim against the established concepts of duty, breach, proximate cause and damage or injury.

\textit{Hunsley}, 553 P.2d at 1102. Acknowledging the aversiveness of acts that cause undue emotional suffering with or without concomitant physical injuries, several jurisdictions have now adopted the direct foreseeability approach proposed in \textit{Molien}. \textit{See}, e.g., Montinieri v. S. New England Tel. Co., 398 A.2d 1180 (Conn. 1978) (emotional harm foreseeable in hostage taking); Hoard v. Shawnee Mission Medical Ctr., 662 P.2d 1214 (Kan. 1983) (distress foreseeable where parents mistakenly informed that child had died); Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1985) (emotional distress foreseeable and thus compensable where woman trapped in elevator due to defendant's negligence). For a list of jurisdictions adopting this rule, see Marlowe, \textit{Jurisdictional Survey}, supra note 25, at 815 n.186 (listing Alaska, Connecticut, Hawaii, Kansas, Louisiana, Missouri and Washington).

\textsuperscript{55} Although \textit{Molien} was decided in 1980, the first case to apply the straightforward foreseeability analysis in a toxic tort case was decided in 1990. \textit{See} Potter v. Firestone Tire & Rubber Co., 274 Cal. Rptr. 885 (1990), \textit{review granted} 806 P.2d 508 (Cal. 1991). For further discussion of \textit{Potter}, see infra notes 125-139 and accompanying text.

\textit{Molien} was also cited in the 1984 California Supreme Court case of Mitchell v. Superior Court, 691 P.2d 642, 649 (Cal. 1984). The \textit{Mitchell} court, however, did not conduct a thorough analysis of the impact of \textit{Molien} in the toxic tort arena, as it dealt only with the narrow question of whether an attorney's communications with his client about the hazards of toxic waste were discoverable. \textit{Id.} at 642. The \textit{Mitchell} court cited \textit{Molien} merely to support the claim that what plain-
physical injury even more foreseeable in toxic tort cases than in other areas.56 Section IV will survey the present and changing caselaw regarding recovery for emotional distress in toxic tort cases.57 Section V will discuss why permitting recovery for foreseeable emotional distress in this area will serve both social justice and social utility.58

A. Magnitude of the Problem

In addition to the emphasis on industrial growth rather than safety during the Industrial Revolution,59 another reason that courts of that era limited tort recovery was that the hazards themselves were relatively small, localized and predictable.60 In contrast, modern industry involves dangers on a much grander scale. Whereas dozens of people might have been killed in a typical nineteenth century hazard, such as a train collision or a factory fire,61 these numbers pale by comparison to the thousands of people that may be killed, maimed or lethally intoxicated in a single modern-day toxic disaster.62

tiff knew about the hazards of the toxin could serve to substantiate the "genuineness and reasonableness of her claim [for emotional distress]." Id. at 648-49.

56. For a general discussion of the unique aspects of toxic tort recovery in the twentieth century, see Bohrer, Fear and Trembling, supra note 5, at 86 (explaining that absence of large scale technological risk during formation of common law makes it ill-suited to deal with problems presented by twentieth century technology).

57. See infra notes 87-141 and accompanying text.

58. See infra notes 146-177 and accompanying text. See also, Allan Kanner, Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation, 18 RUTG. L.J. 343 (1988) [hereinafter Kanner, Emerging Conceptions].

59. See Bohrer, Fear and Trembling, supra note 5, at 86.

60. Id.

61. Id. at 86-87.

62. The Russian nuclear reactor accident at Chernobyl is predicted to result in at least 5,000 to 20,000 deaths over the next fifty years. Nova: Suicide Mission to Chernobyl (PBS television broadcast, October 22, 1991) (transcript on file at Villanova Environmental Law Journal offices). Additionally, over 600,000 workers were exposed to some radiation in the clean-up after the incident and the radioactive debris from the explosion is estimated to have touched down on some three billion people in the northern hemisphere. Id. at 5-6. At Bhopal, the leaking of methyl isocyanate into the atmosphere killed 2000 people immediately and injured 200,000 more. In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 844 (S.D.N.Y. 1986). In 1976, at Seveso, Italy release of only two kilograms of dioxin fumigated a community of over 350,000 people. Beat Meyer, Indoor Air Quality 156 (1984).

Nor are these incidents limited to foreign lands. In 1985, in Kanawha Valley, West Virginia, 150 people were injured when a Union Carbide plant released aldicarb oxime and dichloromethane into the atmosphere. Carl B. Meyer, The Environmental Fate of Toxic Wastes, The Certainty of Harm, Toxic Torts, and Toxic Regulation, 19 ENVTL. L. 321, 333 n.58 (1988) [hereinafter Meyer, Fate of Toxic
To the extent that our willingness to extend tort immunity to hazardous industrial activities turns on a cost-benefit analysis, the enormous number of casualties per incident, as well as the increased frequency of such incidents, calls for a reappraisal of our desire to shield the handlers of hazardous substances from liability.

B. Latency and Uncertainty

Damages from nineteenth century industrial accidents were typically immediate and discernible. After a fire, collision or poisoning, a party typically knew what his losses were and could turn his attention to dealing with it, medically, psychologically or otherwise. In the legal arena, this knowledge and certainty of damages allowed a party to easily sue for compensation. This is rarely the case in modern toxin cases.

Injuries from modern toxin cases may involve years of exposure, before awareness of exposure and often several more years before the physical damage emerges. This latency problem


63. See United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). In Carroll Towing, Judge Hand articulated the now well-known “Learned Hand formula” for determining whether liability will attach to a certain activity. Id. at 173. Using an algebraic model, Judge Hand proposed: “if the probability be called P, the injury L; and the burden [of imposing liability] B; liability depends upon whether B is less than L multiplied by P, i.e., whether B < PL.” Id.

64. In terms of the Learned Hand formula, this increase in injury per accident would be represented by a larger “L” value. Id. at 173. The increased frequency of environmental hazards would be represented by a larger “P” value. Id. Thus, the product of multiplying “P” times “L” would be proportionately greater compared to “B,” thereby strengthening the argument for ascribing liability to these activities. Id.

65. Bohrer, Fear and Trembling, supra note 5, at 86.

66. Id.

67. Id.

68. The paradigmatic case of the latency of the pathogenic effects of exposure is that of asbestos exposure. Barry I. Castleman, Asbestos: Medical and Legal Aspects (3d ed. 1984). Asbestos was commonly inhaled by naval shipyard workers who used asbestos-laden materials to insulate pipe-fittings. Id. Such exposure commonly occurred for 20-30 years, all while the workers, but not the manufacturers of asbestos, were completely naive as to the hazards involved. See id. at 266-67. Only ten or twenty years hence, a worker may learn that asbestos causes deadly respiratory dysfunction and even cancer in a high percentage of those exposed. Whether it would happen to him, however, although probable, would not be known for certain for another 10-40 years. Id.
presents a formidable challenge to the traditional common-law tort framework, which permits recovery only upon a showing of current, legally cognizable injury. Several creative attempts at solving this dilemma, including actions for the increased risk itself and claims for the costs of medical monitoring, have been attempted, but have proven to be less than perfect solutions. An intellectually honest approach, as well the approach move consistent with the tradition of compensating plaintiffs for presently cognizable injuries, would be to compensate the victims of negligent management of toxic waste for the serious emotional distress they reasonably suffer, whether or not physical injury has

The required exposure and typical progression, as described by Castleman, is as follows:

[T]he disease process would not become evident for the first few years of exposure no matter how intense the exposure was. Yet slowly but surely, the lung scarring would develop as the mineral fibers accumulated in the lungs and had time to provoke the characteristic response. Moreover, by the time the disease became evident, cessation of exposure could not halt the inexorable progress of the disease caused by the durable fibers already trapped in the lung tissues. . . . [E]ven a moderate degree of asbestosis is a threat to life, because of the enhanced risk that an ordinary chest cold could lead to pneumonia and death.

CASTLEMAN, supra at 33.


70. Kanner, Emerging Conceptions, supra note 58, at 359-60. Although permitting recovery for increased risk of disease was initially considered a promising solution, see, e.g., Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984) (relief granted where permanent skull fracture from motorcycle accident created risk of future infection and meningitis), this theory of liability has since fallen into relative obscurity. See Sterling v. Velsicol Chem. Co., 855 F.2d 1188 (6th Cir. 1988) (increased risk not compensable unless medically reasonably certain to occur but fear of increased risk, if reasonable, is compensable); Ayers v. Twp. of Jackson, 525 A.2d 287 (N.J. 1987) (denied claim for increased risk but permitted claim for costs of medical monitoring). See also Dev. in the Law — Toxic Waste Litig., 99 HARV. L. REV. 1458, 1624 (1986).


72. Paying for the costs of medical checkups, for example, does not even purport to compensate plaintiffs for the mental anguish involved in awaiting the diagnosis of cancer. See Paoli R.R. Yard PCB Litigation, 916 F.2d at 850 (distinguishing recovery for emotional distress from that for increased risk and medical monitoring).

yet to appear. 74

This may actually be the only tenable approach in a field fraught with latency and scientific uncertainty for compensating victims of incursions on their sense of safety. 75 Since lawyers cannot prove in the courtroom what scientists have yet to prove in the laboratory, scientific uncertainty about the dangers of a toxin has traditionally worked against plaintiffs trying to prove injury from exposure. 76 Under the traditional rules, the scientific uncertainty made it more difficult for plaintiffs to prove causation and they have been left in the peculiar position of having to "earn" recovery for their current emotional distress by subsequently becoming physically ill. 77

The implications of this state of affairs was recently made evident in the discovery, in Chester, Pennsylvania, that radioactive sand had been mixed into cement that had been used to build several occupied homes. 78 Homes ordered to be evacuated by


76. Id. As Professor Robert Bohrer points out, the effect of the magnitude of modern hazards, the inherent uncertainty in their effect and the latency of their manifestations:

[t]aken together . . . place tremendous burdens on the traditional common law framework . . . Any demand for . . . relief . . . faces monumen-
tal problems with respect to proof of causation. To prove that a given leukemia victim's disease was caused twenty or more years before by a particular exposure to a substance which causes leukemia in only five cases out of 10,000, and to discount any other cause or exposure, is a crushing burden for the victim-plaintiff.

Id. at 87.

Professor Bohrer argues that forcing plaintiffs to delay suit until physical disease processes begin works an unjust deprivation of redress for real suffering. Moreover, because of the difficulty of proving causation, that deprivation may never be redressed. Id. at 88.

77. Sterling v. Velsicol Chem. Co., 855 F.2d 1188 (6th Cir. 1988) (causal link between exposure and injuries must be proven to reasonable medical certainty based on theories which have found acceptance in the scientific community).

78. Nathan Gorenstein et al., 5 Homes in Borough Contaminated, PHILADELPHIA INQUIRER, Nov. 24, 1991 [hereinafter Gorenstein, 5 Homes Contaminated] From 1915 to 1922, a radium processing plant in a nearby community produced the sand as a by-product and the material was used to make cement, stucco and plaster. Cynthia J. McGroarty & Nathan Gorenstein, EPA Broadens Search for Radiation in Area Buildings, PHILADELPHIA INQUIRER, Nov. 23, 1991 [hereinafter McGroarty & Gorenstein, EPA Broadens Search].
the Environmental Protection Agency carried radiation levels as much as twenty-three times above the recommended standards for residences.79 One of the several evacuated families had been exposed to radiation in their home for over eighteen years.80 Although the ultimate resolution led to a conclusion that only a limited number of families were in danger, the discovery caused fear and shock to persons who had developed absolutely no physical symptoms. Moreover, such emotional reactions were suffered by those who could not even be sure that they had been exposed at all.81 It became clear that the negligent disposal of the radioactive waste caused cognizable emotional distress, even to those who could not prove exposure.82

As noted by many prominent commentators, courts and regulatory agencies have been needlessly "paralyzed by insufficient data and irreducible uncertainty."83 This paralysis could be remedied by viewing uncertainty itself, and the attendant emotional angst, as a cost itself in the balancing of social interests.84 "By accepting uncertainty about safety as an outcome with cognizable consequences [e.g. emotional distress]," Professor Robert Bohrer argues that "the legal system may anticipate and deter unjustifiable risks without waiting until the technological crisis is no longer soluble."85 As will be seen below, courts have only recently begun to appreciate this perspective.86

79. Although thousands of tons of the material was generated and thousands of homes were being searched by a single mobile radiation van, only four homes were evacuated. Gorenstein, 5 Homes Contaminated, supra note 78.
80. McGroarty & Gorenstein, EPA Broadens Search, supra note 78. One expert estimated that exposure levels found could cause a person's cancer risk to jump to one in 20 after 50 years of exposure. Gorenstein, 5 homes contaminated, supra note 78. Although the most radioactive house found had only been occupied by its residents for the previous 18 years, many more long-standing residents could not be sure that they were not exposed. Id.
81. McGroarty & Gorenstein, EPA Broadens Search, supra note 78. One person living a block from the radiation plant noted that her grandfather had lived in a badly contaminated home and had died of cancer. Her father died of leukemia. Even though not knowing for sure whether she had herself been exposed, the woman was anxious about the health effects from which she may have already been suffering. Gorenstein, 5 Homes Contaminated, supra note 78.
82. Although the Chester incident has not yet involved lawsuits of any kind, it is used merely as an illustration of the myriad of ways in which real, justifiable emotional distress may arise due to mishandling of hazardous substances even in the absence of physical harm or even proof of exposure.
83. See, e.g., Bohrer, Fear and Trembling, supra note 5, at 83.
84. Id. at 123.
85. Id. at 83.
86. See, e.g., Potter v. Firestone Tire & Rubber Co., 274 Cal. Rptr. 885 (1990), review granted, 806 P.2d 308 (Cal. 1991) (granted recovery in toxic tort
IV. Modifications in the Treatment of Emotional Distress Damages in Toxic Tort Cases

The last ten years of toxic tort litigation have been influenced by the general trend in tort law to deemphasize the physical impact/injury requirement. As described in the section below, however, this liberalization has occurred much slower in the toxic tort context than in the tort arena at large. 87

A. Adherence to the Old Order: Payton v. Abbott Labs

In the 1982 case of Payton v. Abbott Labs, 88 plaintiffs' mother had ingested diethylstilbestrol (DES) during pregnancy. 89 In reviewing the daughters' claims for fear of future cancer and reproductive organ abnormalities as a result of exposure while in the mother's womb, the court held that recovery for such distress as a "reasonable person" would have suffered was proper, but only after showings of negligence, causation and physical harm. 90 The Payton court exhibited the traditional disdain for emotional distress damages, concluding that:

[W]hen recovery is sought for negligent . . . infliction of emotional distress, evidence must be introduced that the plaintiff has suffered physical harm . . . . This requirement . . . will serve to limit frivolous suits and those in which only bad manners or hurt feelings are involved. . . . 91

Even though the California Supreme Court had already decided Molien, articulating a straightforward foreseeability analysis, courts in other jurisdictions dealing with emotional distress dam-

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87. See, e.g., State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282 (Cal. 1952) (first American case to allow recovery for emotional distress without concomitant showing of physical harm).
88. 437 N.E.2d 171 (Mass. 1982).
89. Id. at 173. DES was used widely from the mid-1940s to 1970 in the United States to prevent miscarriages. MARY O. AMDUR ET AL., CASARETT AND DOULL'S TOXICOLOGY: THE BASIC SCIENCE OF POISONS 229 (4th ed. 1991) [hereinafter AMDUR, SCIENCE OF POISINS]. Beginning in the mid-1960s a correlation began to appear between vaginal and cervical abnormalities, including cancer, and women who had been exposed to DES in utero. Although the absolute risk for developing vaginal or cervical cancer was low (1.4 chances in 1,000 through age 24), approximately 75 percent of DES-exposed females developed some form of vaginal abnormality. Id.
90. 437 N.E.2d at 181 (emphasis added).
91. Id. at 180.
ages in toxic tort cases ignored its reasoning. In Peterman v. Techalloy Co., for example, plaintiffs had ingested well water polluted with trichloroethylene, a highly toxic substance. Dismissing the claim for emotional distress, the court adhered to traditional limitations, finding recovery permissible in only three narrowly circumscribed situations. As stated by the court, those situations included: 1) where the distress is the result of an actual physical injury; 2) where plaintiff witnesses a violent and traumatizing event, such as an accident endangering a close relative; or 3) where plaintiff suffers physical injuries as a result of emotional distress caused by the tortfeasor’s threat to plaintiff’s physical well-being and is accompanied by some form of physical impact.

B. Winds of Change: Trivializing the Physical Injury Requirement

In Anderson v. W.R. Grace & Co., twenty-five plaintiffs alleged that they were exposed to trichloroethylene and tetrachloroethylene through the use of contaminated ground water from their wells, causing them to suffer a variety of illnesses. Recovery was sought also for emotional distress relating to their increased risk of leukemia and other cancers caused to their immune systems. Defendant argued that the emotional distress of those plaintiffs who had not yet contracted leukemia was not compensable because they lacked the requisite showing of physical injury. Taking a less stringent view of what constitutes physical

94. Trichloroethylene (TCE) is used in large quantities for degreasing fabricated metal parts, dry-cleaning of fabrics and as a solvent for a variety of other purposes. It has been found to cause lung and kidney cancer in mice, although whether these effects generalize to humans is still under investigation. AMDUR, SCIENCE OF POISINS, supra note 89, at 887.
97. Id. at 1222.
98. Id.
99. Id. at 1226.
injury, however, the court rejected defendant's assertion, holding that harm to the immune system, with or without subsequent illness, satisfied the physical injury requirement for purposes of an emotional distress claim.100

The physical injury/impact requirement was virtually reduced to a triviality in the late 1980's in several cases permitting emotional distress recovery upon a mere showing that the plaintiffs had been exposed to a toxin, even in the absence of a showing of any physical effects whatsoever.101 In Hagerty v. L & L Marine,102 a seaman loading a barge was drenched with a highly toxic chemical due to a breakdown in the barge loading equipment.103 In a later mishap, he was again sprayed with the same chemical.104 In reviewing his claim for mental anguish due to his fear of developing cancer, the Fifth Circuit concluded that the current absence of any evidence of cancer did not bar plaintiff's claim for "cancerphobia,"105 as the fear was nonetheless reasonable and causally related to the defendant's negligence in ensuring the integrity of the barge loading equipment.106

Rejecting the defendant's argument that only a physical injury requirement would insure against unworthy claims, the Hagerty court concluded that courts have better devices with which to choose between worthy and unworthy claims, stating:

The physical injury requirement, like its counter-

100. Id. Citing Payton, defendants had argued that plaintiff's emotional distress claim should have been barred because plaintiff's alleged physical harm was merely "subcellular," thus not meeting the physical harm requirement. 628 F. Supp. at 1226. The court rejected this argument, emphasizing that the important factor was the medical verifiability of the harm, not the gross or subtle nature of it. Even under Payton, concluded the court, as long as the harm could be "substantiated by expert medical testimony," it would be sufficient to support a claim for related emotional distress. Id. at 1227. See also Barth v. Firestone Tire & Rubber Co., 661 F. Supp. 193 (N.D. Cal. 1987) (immune system injury satisfies physical injury requirement).


102. 788 F.2d 315 (5th Cir. 1986).

103. Id. at 317.

104. Id.

105. "Cancerphobia" is merely a term describing a specific type of mental anguish, that is, the fear of developing cancer. See Fournier J. Gayle & James L. Goyer III, Recovery for Cancerphobia and Increased Risk of Cancer, 15 CUMB. L. REV. 723, 725 (1985).

106. Hagerty, 788 F.2d at 318-19.
part, the physical impact requirement, was developed to provide courts with an objective means of ensuring that the alleged mental injury is not feigned. We believe that notion to be unrealistic. It is doubtful that the trier of fact is any less able to decide the fact or extent of mental suffering in the event of physical injury or impact. With or without physical injury or impact, a plaintiff is entitled to recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable and causally related to the defendant's negligence. 107

Similarly, in Ayers v. Township of Jackson, 108 three-hundred and thirty-nine municipal residents brought suit against the township for its negligent operation of a landfill. 109 Through noncompliance with various permit requirements, the township permitted highly toxic chemicals to leach into local water supplies. 110 The toxic effects of these chemicals released were known to include liver and kidney damage, mutations in genetic material and damage to blood and reproductive systems. 111 Although residents were eventually warned not to use the water and the township eventually provided alternative sources, this occurred only after up to six years of consumption of the poisonous water. 112

The jury returned an aggregate verdict for emotional distress of $2,056,480, with individual awards ranging from $40 to $14,000. On appeal, the township argued that proof of related physical symptoms was a prerequisite to recovery for emotional distress. 113 The New Jersey Supreme Court explicitly rejected this argument, stating that "mental and emotional distress is just

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107. Id. at 318. The court concluded that the surrounding circumstances provided more than adequate indicia of the genuineness of the emotional distress. Id. at 318-19. The plaintiff testified that he had studied the effects of the chemicals he dealt with and thus knew before the exposure that diphrene was carcinogenic. Id. Moreover, having previously watched benzene absorb into his fingers, he suffered substantial anxiety because now his entire body had absorbed the chemical. The plaintiff also testified that a doctor had advised him to obtain periodic medical examinations for cancer and that he had left his job on the docks out of concern for future accidents. Id. at 319.


109. Id. at 291.

110. Id. Four of the twelve chemicals in the water were well-known carcinogens. Id. at 292.

111. Id.

112. 525 A.2d at 292-93.

113. 525 A.2d at 295.
as ‘real’ as physical pain,”114 and that New Jersey “no longer require[s] proof of causally-related physical impact to sustain a recovery for emotional distress.”115 According to the Ayers court, it was enough that “anxiety, stress, fear, and depression . . . were directly and causally related to the knowledge that [plaintiffs] had ingested and been exposed to contaminated water for a substantial time period.”116

In Sterling v. Velsicol,117 a chemical corporation deposited over 300,000 containers of ultrahazardous chemical waste in a landfill without conducting preliminary studies to determine the soil composition or the effect the landfill would have on local residents’ water supply.118 Knowing of the landfill, but relying on reports that it had not affected the water supply, area residents ingested the contaminated water for a period of several years prior to being informed that their water was actually contaminated.119 The United States District Court for the Western District of Tennessee allowed recoveries for emotional distress damages ranging from $50,000 to $250,000.120

On appeal, the Sixth Circuit concluded that, although damages for mental distress are not recoverable where the connection between the anxiety and the existing injury is either too “remote

114. Id. at 297 (quoting Berman v. Allan, 404 A.2d 8, 15 (N.J. 1979)).
115. Id. at 295. Recovery for the emotional distress damages were nonetheless denied because such a claim was barred against a municipality under the New Jersey Tort Claims Act. Id. The New Jersey Tort Claims Act precludes tort recovery for “pain and suffering” from local governments. N.J. STAT. ANN. § 59:1-2 (West 1982).
116. 525 A.2d at 295. Although precluded from imposing liability on the defendant municipality due to statutory immunity, see supra note 115, the New Jersey Supreme Court discussed at length the difficulties courts have in applying common-law principles to the toxic tort context, concluding:

[C]ourts have struggled to accommodate common-law tort doctrines to the peculiar characteristics of toxic tort litigation. The overwhelming conclusion of the commentators who have evaluated the result is that the accommodation has failed, that common-law tort doctrines are ill-suited to the resolution of such injury claims.

Id. at 299.
117. 855 F.2d 1188 (6th Cir. 1988).
118. Id. at 1192.
119. Id. at 1192-93. Even after the United States Geological Survey (USGS) expressed concern to Velsicol over risk to the local water sources, Velsicol continued to expand its disposal operation. Such disposals continued until the state ordered that Velsicol cease its landfill operations. Id. at 1193. Three years after the closing of the site, the USGS discovered that local aquifer had in fact become highly contaminated and users of all wells within 1,000 acres of the landfill were advised to stop using them. Id.
120. 855 F.2d at 1194.
121. *Id.* at 1206.

122. *Id.* (emphasis added). Although the *Velsicol* court sustained the lower court's award of damages for emotional distress, it characterized the amount of damages awarded as excessive, and reduced them to amounts proportional to the amount of time of alleged exposure. *Id.* at 1207.

The court's reasoning in the damage reduction analysis is highly suspect. The court relied on the earlier Tennessee decision in *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982), for the proposition that damage awards for emotional distress should be limited to only that period of time that the plaintiff could entertain reasonable fear. 855 F.2d at 1207.

In *Laxton*, plaintiff's family had been informed that they had been drinking water contaminated with chlordane, which the plaintiff knew to be highly toxic. 639 S.W.2d at 432. Plaintiff was extremely disturbed about the potential health consequences for herself and her family. She was relieved of this distress only eight months later, when her physician determined that the exposure was insufficient to cause harm. *Id.* at 433. The *Laxton* court reasoned that plaintiff could have entertained reasonable and thus compensable distress only up until the time at which her physician dispelled her fears. *Id.* at 434. Accordingly, for the eight months of "reasonable" fear, each plaintiff was awarded $6,000. *Id.* at 431.

Reasoning that the *Laxton* approach of awarding recovery only for the period of reasonable distress was a worthy one, the *Velsicol* court proceeded to calculate what it deemed appropriate damages for the plaintiff based on the "annual rate" of $9,000 per year of suffering that the *Laxton* award represented. 855 F.2d 1207. Thus stated the Sixth Circuit, "[u]sing *Laxton* as a guidepost, we . . . vacate the district court's award and award each of the five representative plaintiffs damages based upon the duration of their exposure to the contaminated water." *Id.* Accordingly, "[p]laintiff Johnson, who was exposed to the chemicals for a period of approximately two years, is awarded $18,000 versus the district court's award of $250,000; . . . plaintiff Wilbanks, who was exposed for approximately six years, is awarded $54,000 versus the district court's award of $100,000." *Id.*

The Sixth Circuit's reliance on the *Laxton* damage award to prorate damages for the plaintiffs in *Velsicol* does not hold up under even casual scrutiny. First of all, the use of an award in one case as a proportional basis for damages in another presumes identical facts, or at least identical injury. The court, however, presented nothing to support the equality of the emotional distress in *Laxton* with that in *Velsicol*; quite to the contrary, the district court, as fact finder, had obviously deemed the injury much more severe. 855 F.2d at 1202. Secondly, although the court may have approved of the *Laxton* method of limiting emotional distress to that period prior to the dispelling of the plaintiffs' fears by their physician, no such dispelling of fears was reported in the facts of *Velsicol*. *Id.* at 1192-94. Failing to acknowledge this distinction, the *Velsicol* court instead prorated the award according to the plaintiffs' *time of exposure* to the chemical, even though the alleged emotional distress persisted beyond the end of the exposure. *Id.* at 1207. In most cases, in fact, the emotional distress did not begin until some time *after* the exposure ceased, when plaintiffs' were first told of the water's toxicity. *Id.* at 1192-94.
C. Reasonable Fear of Cancer Justifiable Even Where High Risk Cannot be Proven

The *Sterling* court noted that an emotional distress claim could survive even when it cannot be established that it is more likely than not that the feared disease will actually materialize.\(^{123}\) In this regard, the court stated:

While there must be a reasonable connection between the injured plaintiff's mental anguish and the prediction of future disease, the central focus of a court's inquiry is not on the underlying odds that the future disease will in fact materialize. To this extent, mental anguish resulting from the chance . . . of a future disease [is compensable] even though the underlying future prospect for susceptibility to a future disease is not . . . compensable inasmuch as it is not sufficiently likely to occur.\(^{124}\)

\(^{123}\) *Velsicol*, 855 F.2d 1188.

\(^{124}\) 855 F.2d at 1206 (emphasis added). Although emotional distress damages were awarded in *Velsicol*, the court's treatment of plaintiffs' claims that they suffered from Post Traumatic Stress Disorder (PTSD) represented an unprecedented and unjustifiable extension into the field of psychiatry. PTSD is a psychiatric disorder that may develop after exposure to a psychologically traumatic event "generally outside of the range of usual human experience." *American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders* 236 (3d ed. 1980) [hereinafter DSM-III]. For an in-depth discussion of the role of PTSD in toxic exposure cases, see Esther A. Berezofsky, *Post-traumatic Stress Disorder and the Technological Disaster*, 18 RUTG. L.J. 623 (1987), reprinted in 2 TOX. L. REP. 301 (Aug. 12, 1987).

According to the version of psychiatric criteria in effect at the time of the *Velsicol* trial, PTSD was to be diagnosed where the four following criteria were satisfied:

A. Existence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone.

B. Reexperiencing of the trauma as evidenced by at least one of the following:

1. recurrent and intrusive recollections of the event.
2. recurrent dreams of the event
3. sudden acting or feeling as if the traumatic event were reoccurring, because of an association with an environmental or ideational stimulus.

C. Numbing or responsiveness to or reduced involvement with the external world, beginning some time after the trauma, as shown by at least one of the following:

1. markedly diminished interest in one or more significant activities
2. feeling of detachment or estrangement from others
3. constricted affect

D. At least two of the following symptoms that were not present before the trauma:

1. hyperalertness or exaggerated startle response
2. sleep disturbance
This sentiment was reinforced in the recent California case of *Potter v. Firestone Tire and Rubber Co.* Potter involved the familiar scenario of disposal of known carcinogens at a waste-site not suited to hold such chemicals. Plaintiffs discovered that their domestic water wells had been contaminated with several toxins from the landfill, including the known carcinogens benzene and vinyl chloride. Upholding the trial court’s award for plaintiffs’ fear of contracting cancer, the California District Court of Appeals echoed the view of the Sixth Circuit in *Sterling* regarding the distinction between actual chance of cancer and the reasonable fear thereof. In this regard, the court stated:

The fear of cancer damages were awarded for respondents’ fear that they will develop the disease, not for the

(3) guilt about surviving when others have not, or about behavior required for survival
(4) memory impairment or trouble concentrating
(5) avoidance of activities that arouse recollection of the traumatic event
(6) intensification of symptoms by exposure to events that symbolize or resemble the traumatic event.

DSM-III, *supra*, at 238.

The *Velsicol* court, in reversing the trial court’s finding that plaintiffs suffered from PTSD, stated:

[P]laintiffs’ drinking or otherwise using contaminated water, even over an extended period of time, does not constitute the type of recognizable stressor identified either by professional medical organizations or courts. Examples of stressors upon which courts have based awards for PTSD include rape, assault, military combat, fires, floods, earthquakes, car and airplane crashes, torture, and even internment in concentration camps . . . . Whereas consumption of contaminated water may be an unnerving occurrence, it does not rise to the level of the type of psychologically traumatic event that is a universal stressor.

855 F.2d at 1210.

The standard for overturning on appeal a trial court’s finding of fact is that the trial court’s findings were “clearly erroneous.” Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985). It is clear in *Velsicol*, however, that the Sixth Circuit merely substituted its judgment of what constitutes a “recognizable stressor.” In so doing the Sixth Circuit attempted to decide as a matter of law the scope of what is a psychiatric, not a legal, term of art. See DSM-III, *supra*, at 12 (cautioning that purpose of DSM-III is to enable only trained “clinicians and investigators” to diagnose).


126. *Id.* at 887. Respondent had been warned not to send these chemicals to the site and for a period complied with the request. When waste production exceeded expected levels, however, and alternative disposal proved too expensive, a cost-conscious manager directed that disposal at the site resume. *Id.*

127. *Id.* at 888. Exposure to benzene has long been known to cause leukemia. AMDUR, *SCIENCE OF POISINS*, *supra* note 89, at 191-92. Vinyl chloride has been strongly implicated in the production of liver cancer. Its role in exacerbating the risk of lung cancer, although suspected, is still uncertain. *Id.*
chance that they will . . . . Respondents fear cancer now. Their fear is certain, definite and real . . . . [W]e conclude that a plaintiff need not establish that cancer is reasonably certain to occur in order to recover for fear of cancer. 128

D. Molien Revisited: Direct Foreseeability Analysis Applied to Emotional Distress Damages in the Toxic Tort Arena

In addition to validating the distinction between the chances of cancer and the reasonable fear thereof, the seminal impact of the Potter decision, and its appeal, is the application of the Molien foreseeability analysis in the toxic tort context. 129 In Potter, respondents had argued that even a showing of increased risk of developing cancer would not constitute the physical injury necessary to support recovery for emotional distress. 130 Plaintiffs countered that, under Molien, it made no difference whether a physical injury could be shown. 131 Recognizing that “Molien established that a plaintiff could recover for . . . [emotional distress] even in the absence of physical injury, the Potter court also agreed that ‘the circumstances of the case, expert . . . testimony, and the jurors’ own experience could provide sufficient guarantees of genuineness to corroborate a claim of emotional distress.’ ” 132

V. Analysis

The Potter court’s application of Molien in the toxic tort arena represents the culmination of a decade of change in this area. During this time, courts have gradually deserted the anachronistic physical injury/impact requirements and have focused more directly on the foreseeability of the emotional harm suffered by the plaintiff. 133 Molien’s explicit requirement of “foreseeably elicited serious emotional distress” 134 eliminates the role of the arbitrary injury requirements and permits fact-finders to judge foreseeability directly from all the circumstances, not just those dictated by

128. Potter, 274 Cal. Rptr. at 891-92 (emphasis added).
129. Id. at 890. For a discussion of an earlier case that cited Molien tangentially in a toxic tort context, see supra note 55.
130. Potter, 274 Cal. Rptr. at 891.
131. Id.
132. Id. at 890.
133. See, e.g., Sterling, 855 F.2d 1188 (6th Cir. 1988); Hagerty, 788 F.2d 315 (5th Cir. 1986); Ayers, 525 A.2d 287 (N.J. 1987).
certain constricting "factors." If the application of *Molien* in this area is upheld by the California Supreme Court in its review of *Potter*, a welcome death knell may be sounded for the physical injury requirement in toxic tort cases.

Although *Sterling*, *Potter*, and *Hagerty* clearly support recovery for emotional distress without a showing of physical manifestations of the distress, those decisions may conceivably be read as adhering to the old physical "impact" rule, since exposure was alleged in each case. However, proper application of *Molien* would not require a showing of actual physical impact. *Molien*, after all, involved no physical impact whatsoever, but merely the communication of information, albeit false, that plaintiff's wife had contracted syphilis. Moreover, the *Molien* court explicitly stated that "legal protection should extend to emotional tranquility."

This rule is particularly important in the toxic tort arena due to the uncertainty involved in proving exposure. In many cases, an entire class of plaintiffs may entertain serious and reasonable distress about exposure to a lethal toxin even though they will not be certain that they have been exposed for years. Adoption of a pure *Molien* analysis in such cases would permit recovery not only for the traditional plaintiff, who can definitively prove exposure, but also for the plaintiff who, because of the nature of the circumstances or the relative infancy of the relevant science, can establish only a probability that exposure has occurred. This model...
would theoretically permit recovery whenever the overall chance of disease, is sufficiently great to justify reasonable distress.\footnote{141}

Although a jury would ultimately assess what percentage risk of disease justifies reasonable distress, it is important to note that reasonable distress could exist not only in situations where contact with a toxic substance has been definitively proven, but also in situations where there is only a likelihood that exposure has occurred.\footnote{142} Where exposure cannot be proven definitively, the reasonableness of distress would depend not only on the toxicity of the substance, but also on the odds that the plaintiff has actually been exposed to it.\footnote{143} Under this reasoning, reasonable distress could occur even where exposure cannot be definitively proven, as long as the feared substance is sufficiently toxic to make a reasonable person fearful of even a possibility of exposure. Under the traditional rules, however, which require actual physical impact or injury, plaintiffs alleging a mere possibility of expo-

\textit{Governor \& Legislature} (1981). Although definitive determination of the presence of dioxin had yet to be determined, the distress of the community about this possibility was acute. Brown captured the emotional tone of the community as follows:

The Love Canal people chanted and cursed at meetings with state officials, cried on the telephone, burned an effigy of the health commissioner, traveled to Albany with a makeshift child's coffin, threatened to hold officials hostage, sent letters and telegrams to the White House, held days of mourning and nights of prayer. . . . All of them watched with anxiety as each newborn came to the neighborhood, and they looked at their bodies for signs of cancer. . . . The psychological scars are bound to remain among them and their children, along with the knowledge that, because they have already been exposed [although to what was still uncertain], they may never fully escape the Love Canal's insidious grasp.

\textit{Brown, Poisoning of America, supra} note 1, at 47. As the above excerpt attests to, substantial distress is possible even where no definitive proof of the presence of the feared toxin is available. \textit{Id.}


\footnote{142} At Love Canal, for example, residents near the landfill suffered substantial fear of exposure to dioxin, the most lethal man-made carcinogen, when it was predicted, based on discovery of related compounds, that tons of dioxin would eventually be found. \textit{See, Brown, Poisoning of America, supra} note 2, at 47.

\footnote{143} A mathematical model should assist the reader in appreciating this concept. Table I illustrates various ways in which a 30\% chance of cancer could develop given different toxins and different risks of exposure.
### Probabilities and Emotional Distress Damages

<table>
<thead>
<tr>
<th>Toxin</th>
<th>Probability of Disease Given Exposure (Toxicity)</th>
<th>Probability of Exposure</th>
<th>Overall Resultant Probability of Disease</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>30%</td>
<td>100%</td>
<td>30%</td>
</tr>
<tr>
<td>B</td>
<td>100%</td>
<td>30%</td>
<td>30%</td>
</tr>
<tr>
<td>C</td>
<td>50%</td>
<td>30%</td>
<td>15%</td>
</tr>
<tr>
<td>D</td>
<td>30%</td>
<td>50%</td>
<td>15%</td>
</tr>
<tr>
<td>E</td>
<td>50%</td>
<td>90%</td>
<td>45%</td>
</tr>
<tr>
<td>F</td>
<td>90%</td>
<td>40%</td>
<td>36%</td>
</tr>
</tbody>
</table>

**Table I:** Depicts relationship between degree of toxicity of various toxins and the probability of exposure as determining the overall chance of disease.

Assume a theoretical jury has determined that a 30% chance of contracting cancer from a toxin is sufficient to justify compensable emotional distress. See, e.g., Potter, 274 Cal. Rptr. at 891 (emotional distress may be reasonable even where chance of disease is less than 50%). The traditional way this 30% chance would be demonstrated would be to obtain expert testimony attesting to the finding that the toxin in question causes cancer in 30% of individuals who come in contact with it. The critical issue here is to realize that, although the toxin may cause cancer in 30% of people who are exposed to it, plaintiff cannot be said to be running a 30% risk of cancer until it is definitively proven that he was in fact exposed to the toxin. If the evidence could only show that plaintiff had a 50-50 chance of being exposed to the toxin, his resultant chance of getting cancer would actually be only 15%, which would not meet the jury’s justifiable distress threshold.

Given two hypothetical toxins, Toxin A and Toxin B, one which causes cancer in 30% of persons exposed to it (Toxin A in Table I) and one which causes disease in 100% of persons exposed to it (Toxin B in Table I), it is important to note that the 30% overall risk of disease can be met with either toxin, depending on the proven likelihood that one has been exposed to it. The overall probability of disease is equal to the probability of cancer given exposure (30% for Toxin A, 100% for Toxin B) multiplied by the probability that exposure has in fact occurred. See 12 INT'L ENCYCLOPEDIA OF THE SOCIAL SCIENCES 490 (1968) ("the probability of event AB is equal to the product of the probability of A and the conditional probability of 'B given A'"). Thus, for a case involving Toxin A (causes cancer in 30% of persons exposed to it), a plaintiff seeking to justify emotional distress to a jury by proving a 30% chance of disease would have to make a definitive showing of exposure (i.e. 100%). Then the equation would be

\[
\text{chance of cancer given exposure to Toxin A} = (30\%) \times (100\%) = 30\%.
\]

In a case dealing with Toxin B, however (causes cancer in 100% of persons exposed to it), a definitive showing of exposure (100%) would yield a 100% chance of cancer, ((chance of exposure given exposure to Toxin B) \times (chance of exposure to Toxin B) = (100\%) \times (100\%) = 100\%), a literal certainty. Clearly, then, in a case involving Toxin B, the plaintiff would not have to definitively prove exposure (100%) to justify reasonable distress. He could actually show a 30% chance of disease by showing that the odds that he was exposed to the toxin were as low as 30%. ((chance of cancer given exposure to Toxin B) \times (chance of exposure to Toxin B) = (100\%) \times (30\%) = 30\%).

As Table I illustrates, a 30% chance of cancer may be achieved in several ways, given a particular toxin and a particular risk of exposure. The table illustrates three toxins (B, E, and F) for which definitive exposure could not be shown but which nonetheless, given their extreme carcinogenic qualities, create...
sure to a highly toxic substance would be denied recovery. As will be discussed below, this result is not only unjust, but also is an inefficient allocation of the burden of risk-minimization.

VI. Policy Considerations

As information about the health effects of toxic pollutants continues to proliferate in the media, public pressure on courts and legislatures to widen the availability for recovery from the consequences of toxic pollution will surely increase. Moreover, in those cases where recovery is permitted for emotional distress, the amount of distress persons reasonably suffer is naturally increased as the public becomes better informed about the potential harms of environmental toxins. While such changes in public knowledge will naturally have an impact on those cases where damages for merely foreseeable emotional distress damages are already permitted, it remains unclear whether the removal of all physical injury/impact requirements

a 30% or greater risk of disease. Since, according to our hypothetical jury, a 30% chance of disease justifies compensable emotional distress, plaintiffs in the cases involving Toxins B, E and F suffer compensable distress, even though they cannot definitively prove exposure. If the physical impact requirement were adhered to, however, only persons exposed to Toxin A could recover. See Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982) (traditional common-law limitations require affirmative showing of physical injury/impact to support recovery for emotional distress). Note too that, for toxins B and F, justifiable distress could be suffered even though the chances of exposure fall below 50%, the traditional preponderance of the evidence standard that would be used if proof of actual exposure were required.


145. For a discussion of the policy considerations that militate for removal of the physical injury/impact limitations on emotional distress recovery in the toxic tort context, see infra notes 146-77 and accompanying text.

146. See, e.g., George Gallup, supra note 1, at 5 (reporting 66% of persons sampled worry "a great deal" about two environmental concerns that could affect them directly: pollution of drinking water and contamination of soil by toxic wastes); Government's Report on Radon, supra note 1, at 33 (reporting 81% of Americans sampled knew of government's report about dangers of radon in homes).

147. See, e.g., George Gallup, supra note 1, at 5 (large number of Americans feel that immediate and drastic actions are necessary to avoid major environmental disruptions and are willing to pay economic price to solve problem).

148. Attempts have been made to fashion distinctions between reasonable and unreasonable emotional distress. See, e.g., Marlowe, Jurisdictional Survey, supra note 23, at 824-33.

149. The more a person knows about the dangers of a situation the more reasonable is a given amount of distress upon exposure to that situation. See Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 414 (5th Cir. 1985) (plaintiff's fear of cancer reasonably exacerbated each time he learned of another asbestos-related death).

150. For a list of jurisdictions no longer requiring a showing of physical
EMOTIONAL DISTRESS DAMAGES

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typified by decisions such as Molien151 will become the standard in toxic tort cases.152

The arguments for removing the physical injury/impact requirements in this area, in favor of a more straightforward analysis of foreseeability of emotional distress, may be divided into two types; an argument of social justice and an argument of social utility.153 The social justice view supports an unlimited right to recover for reasonable emotional distress by focusing on the right to be fairly compensated for all injuries caused by the tortious acts of another and the entitlement to psychic well being.154 The social utility view supports recovery for emotional distress damages as the best way to affect the desired balance between technological innovation and safety.155

A. The Social Justice Argument

Supporters of the "Justice" view would loosen restrictions on recovery for emotional distress in the context of all tort actions, not just environmental hazard cases.156 Justice proponents argue that emotional distress is a real and deleterious consequence of certain tortious acts and should be compensated to no less an extent than any other tort injury.157 Concerns over unlimited liability and overtaxing valuable activities, often cited in support of limitations on liability, are rebutted by the Justice proponents with two arguments. First, they argue, floodgate fears in other contexts have not materialized and probably will not in this con-

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151. 616 P.2d 813 (Cal. 1980). For a discussion of Molien, see supra notes 44-54, 129-141 and accompanying text.
152. Recovery for the costs of medical monitoring, however, is gaining rapidly increasing acceptance in toxic tort cases. In re Paoli R.R. Yard P.C.B. Litigation, 916 F.2d 829 (3d Cir. 1990). For a discussion of reasons for redressing foreseeable emotional distress from the standpoints of both justice and efficiency, see infra notes 153-77 and accompanying text.
153. See, e.g., Peter A. Bell, The Bell Tolls for Thee: Towards Full Recovery for Psychic Injury, 36 U. FLA. L. REV., 333, 341 (1984) [hereinafter Bell, Full Recovery]. Professor Bell calls these the "original" and "instrumental" approaches respectively. The "instrumental" approach "begins with envisioning the desirable society and then awarding entitlements most likely to create that society." Id. The "original" approach "begins with some preexisting authority and awards entitlements that that authority would have awarded . . . then." Id.
154. See id. at 341; see generally Bohrer, Fear and Trembling, supra note 5.
155. Bohrer, Fear and Trembling, supra note 5, at 122.
156. See, e.g., Bell, supra note 153, at 339-41.
157. Bell, supra note 153. See also Bohrer, Fear and Trembling, supra note 5.
text.158 Second, they argue, even if there were a great increase in claims for emotional distress upon plaintiffs' learning that it is compensable, this would represent an appropriate increase in recovery for a problem out of control.159 Thus, argues the Justice proponent, to deny emotional distress recovery in tort is to unjustifiably deny recovery for the real, long-standing and verifiable results of a tortious injury, a result contrary to the goal of putting plaintiff back in the position he was in prior to the tortious injury.160

Justice proponents also have concerns that inhere specifically to the toxic tort context.161 The concerns here are founded in the complexity of modern technologies, the latencies of many of the

158. Bell, Full Recovery, supra note 153, at 351 (arguing that advanced nature of psychological/psychiatric examining techniques will help juries weed out false claims and thus dissuade potential plaintiffs from bringing frivolous claims).

Experts in the mental health sciences have developed several innovative means to help identify malingerers and individuals exaggerating their psychic symptomatology. Submitting the plaintiff for a thorough battery of psychological tests and psychodiagnostic interview can often yield information to assist the fact-finder in making a judgment about the veracity of the plaintiff's claims. See Gary B. Melton, ET AL., Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers (1987) (describing interview techniques used to assess veracity); R. Keith Green & Arlene B. Schaefer, Forensic Psychology: A Primer for Legal and Mental Health Professionals 84 (1984) (describes methods designed to detect faking on objective test commonly used in forensic evaluations); see also Stephen D. Husband, MMPI Characteristics of Litigious versus Non-litigious Female Motor Vehicle Accident Victims (1989) (unpublished dissertation, Hahnemann University) (identifying detectable personality differences between litigious and non-litigious accident victims). Marlowe provides a conceptual model for differentiating between objectively reasonable distress attributable to the tortious conduct and that distress attributable rather to the idiosyncrasies of the "thin-skulled" plaintiff. Marlowe, Jurisdictional Survey, supra note 23, at 826 n.240. This model is suggested as a device to differentiate between that distress that is "reasonable" and thus compensable and that distress that is "unreasonable" and therefore non-compensable. Id. at 826.

159. Id. "[I]n an age when psychiatry has shown the profound and disastrous effects of mental anguish, even in the absence of apparent physical injury, a refusal to allow recovery for mental anguish would be untenable." See Val John Christensen, Refining the Traditional Theories of Recovery for Consumer Mental Anguish, 1979 B.Y.U. L. Rev. 81, 86-87 (cited in Brown v. Fifth Ave. Coach Lines, Inc., 185 N.Y.S.2d 923, 926 (1959)).

160. For a discussion of the goals of the tort system, see Prosser & Keeton, supra note 18, at 17-23.

161. Justice proponents here claim that the practical realities of the toxic tort context (e.g. the latencies and the uncertainty), make emotional distress all the more acute. Second, where physical harm will not manifest for years, emotional distress may serve as the only present compensable injury, and thus to deny him remedy for this would leave him without any redress for his injuries until he actually contracts the fatal disease that he fears. See Bohrer, Fear and Trembling, supra note 5, at 87-88.
illnesses that result from toxic exposure, and the number of people that may be affected by one negligent act in this context.\textsuperscript{162} According to this view, the unfettered proliferation of technology, particularly that involving hazardous processes or substances, has introduced an angst into our daily lives with which the law has failed to keep pace.\textsuperscript{163} The uncertainty inherent in many of these technologies has largely been ignored as a source of additional anxiety. Previously, where a plaintiff alleged fear of increased risk, for example, he was faced with the impossible task of proving the hazard of a practice whose dangers are still under research.\textsuperscript{164} Numerous examples are offered where, although a substance was once regarded as undoubtedly safe, research has later conclusively shown its deleterious effects on health.\textsuperscript{165} The Justice proponents argue that where some evidence has already established the hazardous nature of a substance or process, emotional distress is a reasonable response to exposure, even if the full extent of the danger is not yet known.\textsuperscript{166} To this extent, argues the Justice proponent, the uncertainty and the anxiety are as menacing as the factory sludge itself, and treated as an equally real product of the industrial practice.\textsuperscript{167}

B. The Social Utility Argument

The "Utility" proponents argue for emotional distress recov-

\begin{itemize}
\item \textsuperscript{162} Perhaps one of the most convincing arguments for the proposition that loosening the restriction on emotional distress damages in toxic tort litigation would result in an overtaxing of valued social activities with tort liability is the fact that toxic cases, unlike typical tort actions, frequently involve dozens or hundreds of plaintiffs. \textit{See, e.g.}, Brown, \textit{Poisoning of America}, supra note 2 (over 1,000 plaintiffs and over $40 million settlement). The counter to this argument, of course, is that the very magnitude of the hazards dealt with in toxic tort litigation is an indication of the need for greater control exactly because of the number of persons affected. If a hazard threatens to impair the quality of life in an entire township, that hazard should be subject to greater strictures and liability, not less. \textit{See generally} Bohrer, \textit{Fear and Trembling}, supra note 5. For further discussion of the magnitude of the hazards presented by modern toxins, see supra notes 59-64 and accompanying text.
\item \textsuperscript{164} Bohrer, \textit{Fear and Trembling}, supra note 5, at 124-25.
\item \textsuperscript{165} \textit{Id.} at 126-27.
\item \textsuperscript{166} \textit{See} Bell, \textit{Full Recovery}, supra note 153 (arguing for recovery for all reasonably foreseeable tort injuries, including emotional distress). \textit{See also} Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986) (finding plaintiff's fear of cancer reasonable where plaintiff continued to hear new evidence of deaths from asbestos exposure).
\item \textsuperscript{167} Bohrer, \textit{Fear and Trembling}, supra note 5, at 122-28.
\end{itemize}
ery from a different perspective.\textsuperscript{168} Regardless of whether it is "just" to rescind emotional distress damages, they argue that such an arrangement would bring about an optimal balance between innovation and safety.\textsuperscript{169} According to this view, it runs counter to social utility to have technologies of uncertain risks encroaching upon the psychic well-being of citizens.\textsuperscript{170} By extending liability to foreseeable plaintiffs who suffer foreseeable and reasonable emotional distress, they argue, courts will put industry on notice to account for the social distress their practices create. Such companies would then take pains to make their practices less hazardous to the physical and psychic well-being of surrounding communities.\textsuperscript{171}

Some risk and some distress are inevitable in a technological society, and the "Utility" proponents recognize that to eliminate all risk would be to eliminate all progress, a result that itself would detract from social utility.\textsuperscript{172} The question for them, therefore, is where the cost of that progress should be borne: by the citizenry alone, or by industry as well.\textsuperscript{173} Where tort liability does not attach for the reasonable distress created by potentially hazardous activities, it is the citizen that bears that cost.\textsuperscript{174} Social utility proponents argue that by making industry liable for the reasonable distress created by their negligent acts, the cost would be shared by the party who not only has the economic clout to pay for the consequences,\textsuperscript{175} but who is also in the better position to find remedial answers.\textsuperscript{176} Any other approach, they argue, provides incentive for industry to transgress the bounds of societal comfort, presumably the very goal that technology is intended to promote.\textsuperscript{177}

\begin{itemize}
\item \textsuperscript{168} See Bell, Full Recovery, \textit{supra} note 153, at 341.
\item \textsuperscript{169} Bohrer, \textit{Fear and Trembling}, \textit{supra} note 5, at 128.
\item \textsuperscript{170} Bell, Full Recovery, \textit{supra} note 153, at 342. See also Bohrer, \textit{Fear and Trembling}, \textit{supra} note 5 at 122-28.
\item \textsuperscript{171} Bohrer, \textit{Fear and Trembling}, \textit{supra} note 5, at 122-28.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id. at 123.
\item \textsuperscript{175} The top fifty United States chemical producers have sales ranging from $666 million to $12 billion per year. Profits range from $80 million to $1.7 billion per year. \textit{Factors and Figures}, \textit{CHEM. & ENG'G NEWS}, June 8, 1987, at 24, 36-37 cited in Meyer, \textit{Fate of Toxic Wastes}, \textit{supra} note 62, at 335.
\item \textsuperscript{176} Bohrer, \textit{Fear and Trembling}, \textit{supra} note 5, at 125. See also Meyer, \textit{Fate of Toxic Wastes}, \textit{supra} note 62, at 335 ("chemical industry employs over 100,000 professional chemists and chemical engineers, including Nobel Prize winners and other internationally recognized scientists, medical doctors, and engineers").
\item \textsuperscript{177} Bohrer, \textit{Fear and Trembling}, \textit{supra} note 5, at 125.
\end{itemize}
VII. Conclusion

The founding principles of this nation stemmed out of concern for the psychic state of each individual. Liberty, autonomy, and privacy are essentially means to ensure the psychic integrity of each of our citizens. Accordingly, we seek to deter those acts which cause not only physical harms, but also those that offend individual dignity. For example, we proscribe assault, false imprisonment and defamation. We value the serenity of private life, the so-called "blessings of liberty," and we scorn their uninvited intrusion by others.

In our tort system, we aim not only to redress such encroachments upon our dignity, but also to deter their future occurrence. Ascription of tort liability to negligent industrial behavior that violates human dignity would put corporations on notice to curb their actions that cause not only physical injuries, but also the equally real challenges to human dignity entailed in emotional distress.

It remains to be seen whether the delimitation of emotional distress damages does in fact result in a flood of litigation and an overtaxing of valuable industrial activities. Such fears are overstated. Quite contrary to impeding the mission of industry in our society, the ascription of liability to industry's negligent and reckless incursions upon our emotional serenity will actually further the purported purpose of industrialization — that of reducing duress and hardship, not merely transferring it to those who happen to live near our industrial facilities.

Adam P. Rosen


183. For a discussion of the encroachment on dignitary interests entailed in toxic exposure, see supra notes 59-86 and accompanying text.