TOXIC TORTS AND EMOTIONAL DISTRESS: THE CASE FOR AN INDEPENDENT CAUSE OF ACTION FOR FEAR OF FUTURE HARM

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The liability to cancer must necessarily have a most depressing effect upon the injured person. Like the sword of Damocles, he knows not when it will fall.[1]

I. INTRODUCTION

Ever since Rachel Carson penned her seminal work *Silent Spring*,[2] our society has grown increasingly aware of the dangers pesticides, herbicides, and a host of other chemicals have on our air, water, food, and ultimately, our health. The irony is that technological advances, while making life easier or safer, have concomitantly created vast health problems. The pesticide DDT, once hailed as a miraculous cure for insect-infested crops, is now banned from use in the United States because of its toxicity to humans. Trichloroethylene, a powerful cleaning solvent, is a known carcinogen. Asbestos, widely touted for its insulating and fire preventing properties, is linked to a variety of cancers. The list goes on.

As the link between such substances and human disease becomes clearer, individuals understandably have come to fear exposure to these substances. The law, however, has been slow to adapt to the growing threat to human health. Toxic exposure[3] cases present unique difficulties that do not neatly fit the traditional tort

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1. F.W. Alley v. Charlotte Pipe & Foundry Co., 74 S.E. 885, 889 (N.C. 1912).
2. RACHEL CARSON, SILENT SPRING (1962).
3. For the purposes of this Note, a scientific definition of "toxic exposure" will not be employed. Rather, toxic exposure is generally any physical contact with a toxic agent that puts the individual at a higher risk of developing cancer or other disease related to the toxin. This physical contact commonly includes inhalation of contaminated air or ingestion through food, water, or drugs. Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 FORDHAM L. REV. 527, 528 (1984); *see also*, Scott D. Marrs, *Mind over Body: Trends Regarding the Physical*

paradigm.[4] Litigants in toxic exposure cases are faced with, inter alia, the prospect of long disease latency periods,[5] complex causation issues,[6] statutes of limitation or repose,[7] and plaintiff mortality.[8] When the aforementioned complexities are coupled with the general judicial resistance against "speculative" emotional distress harms,[9] otherwise deserving plaintiffs are often left without a remedy. Individuals and corporations who negligently expose others to toxic substances are often shielded from liability.

In 1983, a New Jersey citizen's group representing ninety-seven individuals and estates of individuals filed suit against Diamond Shamrock Chemical Company for the release of dioxin and other toxic chemicals at a neighborhood plant.[10]

For thirteen years, from 1957 to 1970, Diamond Shamrock operated an agricultural chemicals manufacturing facility in New Jersey. The facility manufactured herbicides that, as a byproduct of the manufacturing, produced several types of tetrachlodibenzo-p-dioxin ("dioxin"). The plant also manufactured the herbicide Agent Orange for two years. Both dioxin and Agent Orange are highly toxic to humans. During this time period, the plant was rocked by several major explosions.

Injury Requirement in Negligent Infliction of Emotional Distress and 'Fear of Disease' Cases, 28 TORT & INS. L.J. 1 (1992); *cf.* Mergenthaler v. Asbestos Corp. of Am., 480 A.2d 647 (Del. 1984) (barring recovery for wives of asbestos workers who came into contact with asbestos fibers while laundering husbands' clothes but were unable to prove they inhaled the fibers).

4. The paradigmatic tort contains the following basic elements: 1) a duty owed the plaintiff by the defendant; 2) a breach of that duty; 3) resultant harm or damage to the plaintiff; and 4) the breach of duty is the proximate cause of the harm. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984).

5. Dworkin, *supra* note 3, at 556.

6. *See* Ayers v. Township of Jackson, 525 A.2d 287, 301 (N.J. 1987); Tamsen Douglass Love, *Deterring Irresponsible Use and Disposal of Toxic Substances: The Case for Legislative Recognition of Increased Risk Causes of Action*, 49 VAND. L. REV. 789, 803 (1996); *see also* Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (Cal. 1993) (arguing that intervening potential causes of fear of cancer—in this case the plaintiff's smoking—should allow for comparative fault reduction and should raise the issue of the reasonableness of plaintiff's fear); Terry Christovich Gay & Paige Freeman Rosato, *Combating Fear of Future Injury and Medical Monitoring Claims*, 61 DEF. COUNS. J. 554, 562 (1994) ("Defense counsel should be armed with as much evidence as possible regarding substances, other than the one at issue, to which a plaintiff may have been voluntarily exposed—for example, smoking, alcohol, diet drinks, and caffeine.").

7. Dworkin, *supra* note 3, at 566–68.

8. *Id.*

9. *See* Marrs, *supra* note 3. (indicating that 37 state jurisdictions and the District of Columbia require some form of physical injury in order to obtain damages for negligent infliction of emotional distress).

10. *See* IHRAC v. Diamond Shamrock Chem. Co., 523 A.2d 250 (N.J. Super. Ct. App. Div. 1987); IHRAC v. Diamond Shamrock Chem. Co., 578 A.2d 1248 (N.J. Super. Ct. App. Div. 1990).

In 1983, several years after Diamond Shamrock sold the plant and the plant had ceased operation, the United States Environmental Protection Agency ("EPA") conducted tests of the surrounding residential and business areas that showed the level of dioxin to be 1000 times greater than the level the EPA established as an "unacceptable risk to human health."[11] Worse still, the concentration of dioxin at the site itself was 51,000 times greater than the unacceptable risk level. The New Jersey governor declared a state of emergency for the site and surrounding areas.

The plaintiffs, upon hearing the EPA's report, filed suit against Diamond Shamrock claiming, inter alia, that Diamond Shamrock's negligent manufacturing and disposal techniques exposed the plaintiffs to dioxin and other toxic substances. This negligent exposure, while not creating a present injury, enormously increased the plaintiffs' risk of contracting cancer or other toxin-induced diseases, causing them severe emotional distress in the form of fear of future harm.

The avenues of exposure to the substances were varied. Some plaintiffs were exposed by washing or otherwise coming into contact with their Diamond Shamrock employee spouses' clothing. Other plaintiffs were exposed by consuming fruits and vegetables grown in backyards near the plant, or by purchasing them at local farmers' markets. Still others were exposed as children playing in or around the plant site. One plaintiff presented evidence that the EPA discovered high levels of dioxin in his home. Most poignant was the son of a factory worker who was exposed because he repeatedly ministered to the chloracne sores on the body of his father. Chloracne is a series of skin eruptions similar to acne that occur after intense exposure to dioxin or other toxic substances.[12]

All told, the plant and the surrounding homes and businesses were awash in toxic materials. The explosions at the plant spewed dioxin into the air, the workers were unwitting transporters of toxic material into their homes and community, locally grown fruits and vegetables were poisoned, and Diamond Shamrock's disposal of the manufacturing byproducts saturated the soil in childrens' play areas.

The realization that the plaintiffs had been exposed to these toxins over many years—in some instances as many as thirty years—led them to complain that "as a direct...result of defendant Diamond's activities, the individual plaintiffs have suffered extreme emotional distress proximately caused by the...inhalation and absorption of [dioxin] and other toxics...."[13]

Sadly, the court held that the plaintiffs had not stated a valid claim. Despite the fact that Diamond Shamrock had essentially drenched the community in toxic materials and left the citizens with a real fear of developing cancer

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11. *IHRAC*, 523 A.2d at 252.
12. *IHRAC*, 578 A.2d at 1249.
13. *Id.*

because of the toxins, the court held that any emotional damage suffered on the part of the plaintiffs was not actionable because they could not show a present physical injury.[14]

All too often, courts reach similarly unjust results in other toxic tort cases. Corporate polluters expose their workers, their workers' families, and neighbors to toxic materials such as asbestos,[15] trichloroethylene,[16] and dioxin. Yet, these polluters are protected from civil liability.

The culprit behind these unjust results is an outdated holdover from tort law of old, the physical injury rule. This Note takes the position that for a variety of compelling public policy and jurisprudential reasons, Arizona should join the growing number of jurisdictions that have abolished the physical injury rule and adopt an independent cause of action for fear of future harm that does not require a physical injury, impact, or manifestation. Toxic tort cases, such as the New Jersey example, provide the most compelling reasons for the rejection of the physical injury rule. Part II examines Arizona's approach to negligent infliction of emotional distress in traditional tort arenas as well as in toxic tort cases. Part III distinguishes the typical toxic tort from the traditional notion of emotional harm and suggests that traditional tort jurisprudence did not contemplate the development of toxic tort issues. Part III then reviews the arguments generally offered in support of the physical injury rule and reexamines the legitimacy of those arguments in light of the unique nature of toxic tort claims. It also reveals the emerging judicial trend that, at least in some part, limits the requirements of the physical injury rule. Finally, Part IV synthesizes the most practical aspects of the emerging trend and proposes an independent cause of action for fear of future harm.

II. REDRESS FOR EMOTIONAL DISTRESS

Emotional distress is a mental injury that could include pain such as anxiety, fright, or deep grief.[17] The term "emotional distress" has been used interchangeably with "mental suffering, mental anguish, nervous shock, and includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, embarrassment, anger, chagrin, disappointment, and worry."[18] A particular type of emotional distress common to toxic exposure cases is the anxiety or worry over contracting a disease in the future, or fear of future harm.[19] Fear of future harm, then, is a subset of emotional distress. The concepts and jurisprudence of emotional distress cases will necessarily apply to fear-of-future-harm cases.

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14. *Id.* at 1249–50.
15. Deleski v. Raymark Indus., Inc., 819 F.2d 377 (3d Cir. 1987).
16. Minnesota v. Tonka Corp., 420 N.W.2d 624 (Minn. Ct. App. 1988).
17. See definition of "mental anguish," BLACK'S LAW DICTIONARY 889 (5th ed. 1979).
18. Roberts v. Saylor, 637 P.2d 1175, 1180 (Kan. 1981).
19. *See* Dworkin, *supra* note 3, at 545–56; Marrs, *supra* note 3, at 4.

The law has long recognized a right to emotional harm damages when accompanying an intentional tort.[20] However, the award of damages resulting from negligent infliction of emotional distress is a much more recent phenomenon.[21] Where negligent conduct is involved, courts generally have required a plaintiff to show some sort of physical injury, impact, or manifestation from the negligent infliction of emotional distress before allowing a cause of action to be carried forward. This is called the "physical injury rule."[22]

A. Emotional Distress and Traditional Torts in Arizona

The Arizona Supreme Court adopted the physical injury rule in *Keck v. Jackson*.[23] In *Keck*, the plaintiff witnessed a negligently caused automobile accident in which her mother was fatally wounded. The plaintiff sued for negligent infliction of emotional distress, arguing that under certain circumstances, for instance when witnessing an injury to a related third party, a plaintiff should be able to collect emotional distress damages. The Arizona Supreme Court agreed but held that the plaintiff could recover for the negligent infliction of emotional distress only if the shock or mental anguish of witnessing an injury to a person with whom the plaintiff has a close personal relationship manifested itself as a physical injury.[24] Significantly, the court adopted the *Restatement (Second) of Torts* section 436A interpretation, which reads, "[i]f the actor's conduct is negligent as creating an unreasonable risk of causi ng either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance."[25]

The physical injury rule, as adopted in *Keck*, is alive and well in Arizona as evidenced by the recent court of appeals decision in *Gau v. Smitty's Super Valu Inc.*[26] In *Gau*, the plaintiffs, a mother and her four year old son, were detained by the defendant store when the mother was erroneously suspected of shoplifting.[27] The plaintiffs demanded damages for the emotional distress suffered by the child following the incident. The child experienced transitory nightmares and sleep disorders but was not physically injured. The trial court granted damages to the plaintiffs and the store appealed. The court of appeals reversed, citing the physical injury rule: "[i]n Arizona, a plaintiff may not recover for negligent infliction of

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20. *See* Dworkin, *supra* note 3; Marrs, *supra* note 3.

21. *See* Dworkin, *supra* note 3, at 529.

22. *See* W. PAGE KEETON ET AL., *supra* note 4, § 54, at 361, 363; *see also* RESTATEMENT (SECOND) OF TORTS § 436A (1965).

23. Keck v. Jackson, 122 Ariz. 114, 593 P.2d 668 (1979).

24. *Id.* at 115–16, 593 P.2d at 669–70 (holding that "[d]amages for emotional disturbance alone are too speculative").

25. RESTATEMENT (SECOND) OF TORTS § 436A (1965).

26. 183 Ariz. 107, 901 P.2d 455 (Ct. App. 1995).

27. *Id.* at 108, 901 P.2d at 456.

emotional distress unless the shock of mental anguish is accompanied by or manifested as a physical injury."[28]

B. Arizona's Approach to Fear of Future Harm and Toxic Torts

In part due to its staunch allegiance to the physical injury rule, Arizona does not recognize fear of future harm as a a form of emotional distress deserving of compensation. This was made clear in *Wilkie v. State*,[29] in which a former prisoner sued because the state failed to treat his medical condition while he was incarcerated. The plaintiff claimed that because of the nontreatment, he was at a higher risk for cancer and suffered mental distress due to the increased risk. The trial court granted summary judgment in favor of the State. The court of appeals affirmed, stating, "Arizona tort law provides that an increased risk of cancer and its attendant mental anguish are not compensable injuries absent some accompanying physical deterioration."[30]

Toxic exposure cases are factually analogous to *Wilkie* in that both they and *Wilkie* allege an increased risk of cancer or other disease. Unfortunately, toxic tort victims also lose under current Arizona law. Typical of Arizona's approach to toxic exposure cases is *DeStories v. City of Phoenix*.[31] The plaintiffs, construction workers at Sky Harbor International Airport in Phoenix, were exposed to, and inhaled, airborne asbestos particles, which are known to increase an individual's risk of developing asbestosis or lung cancer.[32] The plaintiffs demanded, inter alia, damages for the mental anguish they suffered because of their increased risk of developing cancer. The defendants, the City of Phoenix and the construction company that employed the workers, filed a motion for summary judgment on the grounds that, although the plaintiffs were exposed to asbestos during construction, an increased risk of future physical illness or harm cannot constitute a compensable injury.[33] The trial court granted the defendants' motion.

On appeal in *DeStories*, the plaintiffs argued that negligent exposure to asbestos and the concomitant increase in the risk of developing cancer are legally cognizable injuries for which the plaintiffs may recover damages.[34] The plaintiffs also argued that the mental anguish over the fear of developing cancer was compensable.[35] The court of appeals disagreed, stating: "[t]he nexus thus suggested between exposure...and the possibility of developing cancer or other injurious conditions in the future is an insufficient basis on which to recognize a present injury.... [P]ossible future damages in a personal injury action are not

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28. *Id.* at 109, 901 P.2d at 457.
29. 161 Ariz. 541, 779 P.2d 1280 (Ct. App. 1989).
30. *Id.* at 544, 779 P.2d at 1283.
31. 154 Ariz. 604, 744 P.2d 705 (Ct. App. 1987).
32. *Id.* at 605, 744 P.2d at 706.
33. *Id.* at 606, 744 P.2d at 707.
34. *Id.*
35. *Id.*

compensable unless reasonably certain to occur."[36] The court further elaborated: "the great majority of courts hold that there can be no recovery for mental disturbance unless physical injury, illness or other physical consequence accompany it, or physical harm develops as a result of the plaintiff's emotional distress."[37] Finally, it concluded "the mere ingestion of a toxic substance [does not] constitute sufficient physical harm on which to base a claim for damages for mental anguish...."[38]

Similarly, in *Burns v. Jaquays Mining Corp.*,[39] residents of a trailer park adjacent to a mill that produced asbestos filed suit against the mill demanding damages for fear of contracting asbestosis and other asbestos-related diseases. Over the course of twelve years, asbestos fibers were blown from the mill and a tailings pile at the mill into the trailer park.

The court found that the plaintiffs all had asbestos fibers in their lungs and that those fibers were causing changes in the lung tissue.[40] The plaintiffs also presented expert medical testimony that they suffered severe and clinically significant mental distress that affected "normal sleep patterns, normal gastrointestinal functions, alterations in the ability to cope with other life stress, manifestations of anger, headaches, personality disorders, sexual dysfunction, and other adverse health effects...."[41] However, the court of appeals held that the harms alleged were not the type of bodily harms that could sustain an action for emotional distress.[42] First, the court noted that the alleged harms were not linked to specific residents of the trailer park.[43] Second, the court relied on comment c to the *Restatement (Second) of Torts* section 436(A) in holding that the harms were merely transitory in nature:

> The rule [preventing recovery for emotional disturbance alone] applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage, and humiliation. The fact that these are accompanied by transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm;

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36. *Id.* at 607, 744 P.2d at 708 (quoting Morrissy v. Eli Lilly & Co., 394 N.E.2d 1369 (Ill. App. Ct. 1979)).

37. *Id.* at 608, 744 P.2d at 709 (citing W. PAGE KEETON ET AL., *supra* note 4 § 54, at 361, 363 (5th ed. 1984).

38. *Id.* at 610, 744 P.2d at 711.

39. 156 Ariz. 375, 752 P.2d 28 (Ct. App. 1979).

40. *Id.* at 377, 752 P.2d at 30.

41. *Id.* at 378, 752 P.2d at 31.

42. *Id.* at 379, 752 P.2d at 32.

43. *Id.* This appears to be a problem of imprecise pleading or lawyering rather than a more fundamental jurisprudential approach to fear of future harm actions.

> and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character....[44]

Because none of the plaintiffs had been diagnosed as having an asbestos-related disease, no competent evidence of any physical impairment or harm caused by the exposure was found. Therefore, the court reasoned, "[t]here can be no claim for damages for the fear of contracting asbestos-related diseases in the future without the manifestation of a bodily injury."[45]

C. Summary

Arizona's approach to the negligent infliction of emotional distress and, necessarily, to the fear-of-future-harm damages strictly follows traditional tort jurisprudence that disallows a claim unless a showing of physical injury, impact, or manifestation of emotional distress is made.

III. RETHINKING EMOTIONAL DISTRESS CLAIMS IN TOXIC TORT CASES

A. Traditional Versus Toxic Torts: Conceptualizing the Distinctions

Illustration 1 accompanying the *Restatement's* section 436A is the typical emotional distress scenario envisioned by the common law:

> A negligently manufactures and places upon the market cottage cheese containing broken glass. B purchases a package of the cheese, and upon eating it finds her mouth full of glass. She is not cut or otherwise physically injured, and she succeeds in removing the glass without bodily harm; but she is frightened at the possibility that she may have swallowed some of the glass. Her fright results in nausea and nervousness lasting for one day, and in inability to sleep that night, but in no other harm. A is not liable to B.[46]

Compare the *Restatement's* illustration, however, with the facts in *Potter v. Firestone Tire and Rubber Co.*,[47] a typical toxic exposure case. In *Potter*, the defendant negligently disposed hazardous, carcinogenic waste in a landfill adjacent to the plaintiffs' homes.[48] The negligent disposal of the carcinogens

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44. *Id.* (alterations in original). Apparently, the court found the plaintiff's expert testimony that the harms suffered "in no fashion could be termed trivial, insignificant, or of only minor or temporary inconvenience" to be unpersuasive. *Id.*

45. *Id.* at 378, 752 P.2d at 31.

46. RESTATEMENT (SECOND) OF TORTS § 436A illus. 1 (1965).

47. 863 P.2d 795 (Cal. 1993).

48. *Id.* at 801.

resulted in contamination of the plaintiffs' drinking water.[49] Although the plaintiffs suffered no immediate physical harm, they faced "an enhanced but unquantified risk of developing cancer in the future due to the exposure."[50]

The two scenarios are distinguishable on several grounds. First, the type of harm to which the plaintiffs were put at risk is significantly different. In the *Restatement's* illustration, the risk was that the plaintiff's mouth or tongue would be cut, or that the plaintiff might ingest the glass. Though the plaintiff would be put at risk of serious harm, the risk is vastly different than the risk to which the *Potter* plaintiffs were exposed—the risk of developing cancer. Likewise, the anguish associated with nearly cutting one's mouth by chewing broken glass can reasonably be seen as less distressful in the long run than the knowledge of having been exposed to a cancer-causing agent.

The two scenarios are also distinguished by the length of time the plaintiffs are at risk. Whereas in the *Restatement's* illustration the risk for harm ended when the plaintiff discovered the problem and removed the glass from her mouth, the *Potter* plaintiffs will remain at risk indefinitely. Long after the *Potter* plaintiffs ceased drinking the contaminated water, they faced, and continue to face, an increased risk of contracting cancer due to the negligent behavior of the defendants.

Finally, in the *Restatement's* scenario, the plaintiff is able to remove the risk of harm. The *Potter* plaintiffs, unfortunately, are helpless to remove the risk they face. Rather, the risk remains constant and unknown until the cancer manifests or the plaintiffs die. Such inability to control the risks facing an individual has been identified as an "outrage factor," which increases the worry individuals direct toward a risk.[51]

The duration of the risk and the injured party's helplessness to remove the risk provide the most compelling argument for a change in traditional emotional distress jurisprudence. Traditional common law did not and could not contemplate that long after a negligent actor ceased the negligent activity the plaintiff would suffer from the fear of eventually being harmed by the actor's negligence. Likewise, the traditional common law could not foresee the reality that a plaintiff could remove herself from the negligent activity and yet still be at risk because of it.

Under the strictest, and possibly least just, interpretation of the physical injury rule, the quintessential toxic tort plaintiff is one, similar to the New Jersey plaintiffs previously mentioned,[52] who has been negligently exposed to a known toxin at a level quantitatively and qualitatively sufficient to significantly increase

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49. *Id.*

50. *Id.*

51. Peter M. Sandman, *Risk Communication: Facing Public Outrage*, EPA J., Nov. 1987, at 21, 21–22.

52. *See supra* notes 10–11 and accompanying text.

the plaintiff's chance of contracting cancer or some other disease such that the plaintiff reasonably fears contracting cancer due to the negligent toxic exposure. Yet, if the plaintiff manifests no physical symptoms of the fear and was not physically harmed or physically impacted by the exposure, she is left without a remedy until such time that the feared disease manifests itself in her. The plaintiff is left to contemplate whether or not a cancer will develop. Sadly, if the feared cancer eventually manifests, the plaintiff may be denied any recovery at all.[53] In sum, the distinctions between traditional torts and toxic torts justify new approaches to the tort of negligent infliction of emotional distress.

B. Rethinking the Physical Injury Rule in Toxic Torts

Not only are the emotional consequences of toxic torts conceptually different than those of traditional torts,[54] the physical injury rule, which stands in the way of redress for emotional damages in toxic torts, should not be applicable in this context. Many rationales are offered in support of the rule. First, a flood of litigation would result if the physical injury rule were eliminated.[55] Second, the physical injury rule is a bastion inhibiting fictitious and fraudulent emotional distress claims.[56] Under this second rationale, the physical injury rule is seen as insuring the genuineness of the emotional distress claims.[57] Finally, the single controversy rule is viewed as a procedural impediment to doing away with the physical injury rule.[58] These arguments are challenged in the following sections.

1. Flood of Litigation

Proponents of the physical injury rule fear a flood of litigation would follow the abolition of the rule.[59] They argue that, in the absence of the physical injury rule, plaintiffs have strong incentives to bring fear-of-future-harm claims, because (1) defendants may not be solvent by the time a disease manifests, and/or (2) if no disease manifests, no recovery will be had.[60] "These incentives, when combined with wide publicity about product-caused delayed manifestation injuries and an increasingly aggressive and organized toxic tort plaintiffs bar"[61] appear to make inundation a feasible result.

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53. *See supra* notes 5–9 and accompanying text.

54. *See supra* Part III.A.

55. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1358 (1995).

56. *See* Dworkin, *supra* note 3, at 552–56.

57. *See id.*; Marrs, *supra* note 3, at 17–39 (discussing various jurisdictions' holdings in cases maintaining the physical injury rule).

58. *See* Dworkin, *supra* note 3, at 561–62.

59. *Id.*; Virginia E. Nolan & Edmund Urson, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 605 (1982).

60. Dworkin, *supra* note 3, at 563.

61. *Id.* at 568–69.

The dreaded flood of litigation is proposed to have several detrimental results, including bankrupting defendants, increasing the costs of insurance to all, and impacting the health care industry.[62] Yet, the predictions about a flood of litigation have been unpersuasive to many jurists and commentators:

> It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation"; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do.[63]

The New Jersey Supreme Court pointed out that the proper remedy for a potential flood of litigation in the toxic tort context is "an expansion of the judicial machinery, not a decrease in the availability of justice."[64]

In any case, the flood has not materialized. Nebraska's Supreme Court echoed other courts' dismissal of the flood-of-litigation argument by pointing out that states that have abolished the requirement are not being "flooded."[65] This is so, perhaps, because as the California Supreme Court recognized, "if physical injury, however slight, provides the ticket for admission to the courthouse, it is difficult for advocates of the 'floodgates' premonition to deny that the doors are already wide open...."[66]

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62. As a federal court pointed out, "defendants' pockets or bank accounts do not contain infinite resources." Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D.W. Va. 1990). Along the same lines, abolition of the physical injury rule is opposed because of the effect it might have on the affordability and availability of insurance. As insurers are forced to cover the risks for toxic liability, "there inevitably will be a concomitant rise in insurance premiums, the effects of which will touch every household." Gay & Rosato, *supra* note 6, at 563.

More generally, supporters of the physical injury rule fear that abolition of the rule would impact the entire health care industry:

> Access to existing prescription drugs and the availability of new, beneficial drugs are likely to be curtailed in the face of the threat of large monetary awards to persons with no present symptoms but who claim the fear of unknown effects from drugs on the market. The availability and cost of medical malpractice insurance will become more restricted, a situation that might result in reduced quality of care rendered to patients, as well as an increase in the practice of defensive medicines.

Id.

63. Schultz v. Barberton Glass Co., 447 N.E.2d 109, 111 (Ohio 1983) (quoting William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874, 877 (1939)).

64. *Id.* (quoting Battalla v. State, 176 N.E.2d 729, 731 (N.Y. 1961)).

65. James v. Lieb, 375 N.W.2d 109, 117 (Neb. 1985); *see also* Ramirez v. Armstrong, 673 P.2d 822 (N.M. 1983) (indicating that jurisdictions eliminating the physical injury rule have not experienced the feared flood).

66. Molien v. Kaiser Found. Hosps., 616 P.2d 813, 820 (Cal. 1980).

2. Genuineness

The physical injury rule is also argued to be a device to screen out fictitious and fraudulent claims.[67] Proponents claim that an accompanying physical injury or manifestation insures the genuineness of the claimed mental distress. "Allowing...recover[y for emotional distress without physical injury] is likely to promote fraudulent and artful pleading and will encourage asymptomatic plaintiffs to seek damages based on a purely subjective fear of disease."[68] The *Restatement* echoes this argument in comment b to section 436A:

> [I]n the absence of the guarantee of genuineness provided by resulting bodily harm,...emotional disturbance may be too easily feigned, depending, as it must, very largely upon the subjective testimony of the plaintiff; and...to allow recovery for it might open too wide a door for false claimants who have suffered no real harm at all.[69]

The fear of fraudulent claims is a wholly insufficient reason to deny claims of emotional distress absent a physical injury.[70] Courts have noted that the possibility of fraud or frivolity is equally likely in physical injury cases, especially if the claimed physical injury is slight.[71] The California Supreme Court in *Molien v. Kaiser Foundation Hospitals* made the point particularly well, noting that the physical injury rule creates an incentive "for the victim to exaggerate symptoms of sick headaches, nausea, insomnia, etc., to make out a technical basis of bodily injury, upon which to predicate a parasitic recovery for the more grievous disturbance, the mental and emotional distress she endured."[72] The court then reasoned that the requirement "encourages extravagant pleading and distorted testimony."[73] Indeed, the ingenuity of plaintiff's counsel in pleading a physical injury may in many respects be determinative of whether a physical injury is found.[74]

The unqualified requirement of a physical injury "supposedly serves to satisfy the cynic that the claim of emotional distress is genuine."[75] Yet, this bright-line rule is both over- and underinclusive.[76] The rule permits the recovery of emotional distress damages when accompanied by any physical injury, regardless

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67. Dworkin, *supra* note 3, at 552–56.
68. Gay & Rosato, *supra* note 6, at 563.
69. RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965).
70. *James*, 375 N.W.2d at 117.
71. Schultz v. Barberton Glass Co., 447 N.E.2d 109, 111 (Ohio 1983).
72. Molien v. Kaiser Found. Hosps., 616 P.2d 813, 820 (Cal. 1980) (citing Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936)).
73. *Id.*
74. Paul R. Lees-Haley & Eric H. Marcus, *Litigating Cancerphobia and Toxic Allergy Claims*, 57 DEF. COUNS. J. 377 (1990).
75. *Molien*, 616 P.2d at 820.
76. *Id.*

of its severity. Thus, even the most minimal of physical injuries will give rise to claims for emotional distress. On the other hand, and perhaps more significantly, the rule systematically denies access to a judicial remedy for all claims of serious emotional distress without a simultaneous showing of physical injury or manifestation of the distress.

Prosser points out the fundamental flaw with the fictitious and fraudulent claim argument: "[t]he problem is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false."[77] Courts have agreed, holding that the genuineness of a claim is best determined by the trier of fact.[78] Because the judicial process is well suited to act as a screening device for nongenuine claims, "[f]actual, legal and medical charlatans are unlikely to emerge from a trial unmasked."[79] Rather than relying upon an artificial mechanism, like the physical injury rule, to turn away claims that may in fact be genuine, considerable authority suggests that the system itself is best suited for determining whether or not a claim has merit. As the California Supreme Court noted:

> [T]he physical injury requirement is a hopelessly imprecise screening device—it would allow recovery for fear of cancer whenever such distress accompanies or results in any physical injury, no matter how trivial, yet would disallow recovery in all cases where the fear is both serious and genuine yet no physical injury has yet manifested itself. While we agree...that meaningful limits on the class of potential plaintiffs and clear guidelines for resolving disputes in advance of trial are necessary, imposing a physical injury requirement represents an inherently flawed and inferior means of attempting to achieve these goals.[80]

Indeed, while the physical injury rule as a filter against frivolous claims may have been reasonable a century ago, the current state of medical science and technology, as well as the modern advances in human psychology make the physical injury rule unnecessary as a screen for genuineness.[81] The *Molien* court points out "there will doubtless be circumstances in which the alleged emotional injury is susceptible of objective ascertainment by expert medical testimony."[82]

The realization that medical science and psychology are capable of effectively insuring the genuineness of a mental distress claim did not occur only recently. Over seventy years ago, Roscoe Pound argued that the physical injury rule was "a practical rule" having its source in "the difficulty of proof in cases of

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77. WILLIAM L. PROSSER, LAW OF TORTS 327–28 (4th ed. 1971).

78. Schultz v. Barberton Glass Co., 447 N.E.2d 109, 112 (Ohio 1983).

79. *Id.* at 111 (citing Niederman v. Brodsky, 261 A.2d 84, 88 (Pa. 1970)) (alteration in original).

80. Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 810 (Cal. 1993).

81. *See* James v. Lieb, 375 N.W.2d 109, 116 (Neb. 1985).

82. Molien v. Kaiser Found. Hosps., 616 P.2d 813, 821 (Cal. 1980) (quoting Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1248–51(1971)).

injuries manifest subjectively only and in the backwardness of our knowledge with respect to the relations of mind and body."[83] Pound observed that the need for the physical injury rule was eliminated.[84] In short, claims of mental distress, perhaps once thought to be purely subjective injuries, currently are, and have been for decades, subject to objective, expert verification.

Because mental distress is subject to objective verification, the question of mental injury is one of proof.[85] And, as the court in *Rodrigues v. State* indicated, "the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case."[86] Proof of the mental injury then becomes a question of fact, and questions of fact are traditionally decided by the jury. *Molien* held that to artificially screen claims by imposing the physical injury rule in mental distress cases was "a usurpation of the jury's function."[87] Indeed, that court also noted "jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience."[88]

3. The Single Controversy Rule

A criticism that has been leveled against abolition of the physical injury rule is that the single controversy rule will deny plaintiffs recovery when the feared disease actually manifests.[89] "The single controversy rule 'requires that a party include in the action all related claims against an adversary and its failure to do so precludes the maintenance of a second action.'"[90] The rule might bar recovery where suit is brought to recover damages for the initial consequences of toxic exposure—fear of future harm—but the possibility of future litigation rests solely upon whether the feared disease manifests.[91]

However, as the New Jersey Supreme Court explained, "the single controversy doctrine...will [not] preclude a timely filed cause of action for damages prompted by the future 'discovery' of a disease or injury related to the tortious conduct at issue...."[92] The court reasoned that since the purpose of the single controversy doctrine is to avoid the logistical nightmare and needless expense of splitting a controversy, the doctrine "cannot sensibly be applied to a

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83. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 120 (Peter Smith 1967) (1923).
84. *Id.* at 120–21.
85. *Molien*, 616 P.2d at 821.
86. Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970).
87. *Molien*, 616 P.2d at 821.
88. *Id.*
89. *See* Dworkin, *supra* note 3, at 562.
90. Ayers v. Township of Jackson 525 A.2d 287, 300 (N.J. 1987) (quoting Aetna Ins. Co. v. Gilchrist Bros., 428 A.2d 1254 (N.J. 1981)).
91. *See id.*
92. *Id.*

toxic-tort claim filed when disease is manifested years after the exposure, merely because the same plaintiff sued previously to recover...for other injuries."[93]

Significantly, an Arizona court of appeals has endorsed the approach taken by New Jersey. In *Burns v. Jaquays Mining Corp.*,[94] the court agreed that the single controversy rule would not be a bar to a timely filed cause of action for future discovered diseases "even though there ha[d] been prior litigation between the parties on different claims based on the same tortious conduct."[95] Thus, a plaintiff is not barred from recovery in the event she discovers a disease in the future even though she has previously litigated the same set of facts for a different injury. The critical themes are first, fear of future harm is a distinct, separate injury from the disease itself; and second, the single controversy rule is a doctrine of expediency and efficiency. The single controversy rule does not work to prevent causes of action that are not knowable at the time of the first litigation.

4. The Emerging Judicial Trend

Courts throughout the United States have recognized the flaws in the physical injury rule and have abolished it in both the traditional and toxic tort arenas. In 1970, Hawaii began the judicial trend by abolishing the physical injury requirement. In *Rodrigues v. State*,[96] owners of a subdivision house lot located in a floodplain suffered damage to their home when a culvert owned by the state became clogged, causing rainwater to back up and flood the owner's house lot. Approximately six inches of water flooded the home causing damage to the house and furnishings. The owners sued the state and testified to being "heartbroken" and "shocked" at having their possessions destroyed.[97] The damage was found by the trial court to have been the result of the state's negligence in maintaining the culvert and the owners were awarded damages for, inter alia, "mental anguish and suffering."[98]

The state appealed the award of mental anguish damages,[99] relying on the traditional rule that there should not be recovery for emotional distress absent a physical injury.[100] The Hawaii Supreme Court responded by noting the inconsistent scheme by which persons are protected from the negligent infliction of mental distress.[101] The Hawaii court pointed out that many exceptions to the rule of no recovery for mental distress exist, including an accompanying host tort,

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93. *Id.*
94. 156 Ariz. 375, 752 P.2d 28 (Ct. App. 1988).
95. *Id.* at 378, 752 P.2d at 31.
96. 472 P.2d 509 (Haw. 1970).
97. *Id.* at 513.
98. *Id.* at 514.
99. *Id.*
100. *Id.* at 518–19; *see also* RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965).
101. *Rodrigues*, 472 P.2d at 519.

a physical injury or impact, an intentional tort, or a special fact pattern such as the negligent handling of a corpse or the negligent transmission of a telegraphic message.[102] Continuing, the court noted:

> [T]he principle to be extracted from the exceptions is that they involve circumstances which guarantee the genuineness and seriousness of the claim. The better view is to treat such exceptions as examples of trustworthy claims deserving of legal redress and not as restrictions on the plaintiff's right to recover. We believe that the preferable approach is to adopt general standards to test the genuineness and seriousness of mental distress in any particular case.[103]

The court pointed out that the two prevalent rationales for maintaining the traditional physical injury rule—the prevention of frivolous or fraudulent claims and the protection against unlimited liability on the part of defendants—were no longer persuasive.[104]

Although Hawaii's Supreme Court acknowledged that protecting defendants against unlimited liability is a legitimate concern, it argued that strict application of the reasonable person standard is sufficient protection against unlimited defendant liability.[105] The trier of fact should carefully consider the potential for unlimited liability along with "the particular facts of each case in applying the 'reasonable man' standard...."[106] Rather than legal limitations to a claim, the concerns of unlimited liability are to be taken into account by the judge or jury when assessing the reasonableness of a claim.

When Hawaii established the precedent for an independent cause of action, other states began to eliminate the physical injury rule in emotional distress cases.[107] For instance, in *Molien*, the California Supreme Court heard a case in which the plaintiff's wife was negligently diagnosed as having syphilis.[108] The

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102. *Id; see also* Note and Comment, 17 MICH L. REV. 407 (1919) (discussing host torts, negligent handling of corpses, and negligent transmission of telegraphic messages).

103. *Rodrigues*, 472 P.2d at 519.

104. *Id.*

105. *Id.*

106. *Id.*

107. Taylor v. Baptist Med. Ctr., Inc., 400 So. 2d 369 (Ala. 1981); Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980); Montinieri v. Southern New England Tel. Co., 398 A.2d 1180 (Conn. 1978); *In re* Moorenovich, 634 F. Supp. 634 (D. Me. 1986); Culbert v. Sampson's Supermkts., Inc., 444 A.2d 433 (Me. 1982); Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983); Johnson v. Supersave Mkts., Inc., 686 P.2d 209 (Mont. 1984); James v. Lieb, 375 N.W.2d 109 (Neb. 1985); Ayers v. Township of Jackson, 525 A.2d 287 (N.J. 1987); Johnson v. Ruark Obstetrics and Gynecology Assocs., 395 S.E.2d 85 (N.C. 1990); Schultz v. Barberton Glass Co., 447 N.E.2d 109 (Ohio 1983); Harris v. Kissling, 721 P.2d 838 (Or. App. 1986); St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649 (Tex. 1987); Wilson v. Key Tronic Corp., 701 P.2d 518 (Wash. App. 1985).

108. *Molien*, 616 P.2d 813.

plaintiff sued on the grounds of negligently inflicted emotional distress resulting from his wife having suffered emotional injury after the negligent (and erroneous) diagnosis of syphilis. Subsequent to her diagnosis, the plaintiff's wife became suspicious that the plaintiff had committed adultery, and, as a result of the suspicions, the marriage broke up and dissolution proceedings were initiated.[109] The plaintiff argued that the defendants knew or should have known that the diagnosis of syphilis in his wife would cause him emotional distress.[110] The trial court dismissed the action on the grounds that the plaintiff did not suffer a physical injury, and the plaintiff appealed.[111]

On appeal, the California Supreme Court noted that the physical injury rule "serves as a screening device to minimize a perceived risk of feigned injuries and false claims."[112] However, the court also noted that while insuring against fraudulent claims is a legitimate goal, "we are not persuaded that the presently existing artificial lines of demarcation are the only appropriate means of attaining this goal."[113] The court concluded by holding that an independent cause of action for the negligent infliction of serious emotional distress was justified.[114]

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109. *Id.* at 814–15.
110. *Id.* at 815.
111. *Id.* at 814.
112. *Id.* at 818.
113. *Id.* at 819.
114. *Id.* at 821. Yet, in the landmark case of *Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795 (Cal. 1993), the Supreme Court of California added a new and problematic twist to the elimination of the physical injury rule. The California court heard the complaint of landowners who lived next to a landfill in which the defendant's hazardous wastes were being disposed. The court held that in the absence of present physical injury or illness, recovery of damages for fear of cancer in a negligence action should be allowed only if plaintiff pleads and proves that the fear stems from a knowledge, which is corroborated by reasonable medical and scientific opinion, that it is more likely than not that cancer will develop in the future due to the toxic exposure. *Id.* at 811–13. The critical element of this approach to fear-of-future-harm damages is the use of the "more likely than not" threshold. Under the *Potter* approach, a plaintiff negligently exposed to a toxic substance that was known to increase his or her risk of cancer such that the plaintiff had a scientifically corroborated 49% chance of developing cancer in the future would not be entitled to a claim for fear-of-future-harm damages while a plaintiff similarly situated in all respects except that his or her scientifically corroborated chance of developing cancer in the future was 51% would be entitled to a claim for fear of future harm.

The California court attempted to justify this apparently incongruous result on five policy grounds. First, the *Potter* court pointed out that since virtually everyone in society is conscious of the fact that they are exposed to potential health hazards, the size of the class of potential plaintiffs is overwhelming. Because this is so, the *Potter* court argued that there exists a real need to place limits on the class. *Id.* at 812. The court made the traditional "cost of insurance" argument: "Proliferation of fear of cancer claims in California in the absence of meaningful restrictions might compromise the availability and affordability of liability insurance for toxic liability risks." *Id.* Second, the court reasoned that unrestricted fear of liability would have a serious detrimental impact within the state's

The Supreme Court of Texas, in *St. Elizabeth Hospital v. Garrard*,[115] held that proof of physical injury would no longer be required in order to recover for the negligent infliction of emotional distress. However, since the case dealt with the negligent disposal of a corpse, it is unclear whether the Texas court was establishing a new trend or following the majority of courts in carving out a narrow niche for emotional distress claims. Yet, language in the opinion suggests that Texas courts would look favorably upon other categories of emotional distress claims absent physical injury: "courts and legal scholars have condemned the physical manifestation requirement as an artificial device, the sole purpose of which is to guarantee the genuineness of claims for mental injury."[116] Thus, it appears that Texas has adopted the more progressive rule and has eliminated the physical injury requirement.

5. Summary

In short, the arguments generally made in support of the physical injury rule appear unpersuasive. Blindly adhering to the physical injury rule not only

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health care field. The medical profession apparently fears that if liability for fear of disease were unlimited, tens of thousands of patients currently being treated with drugs whose effects are currently unknown would have claims immediately upon the scientific discovery that the drug they are being treated with has some risk of causing disease. *Id.* at 812–13. Once again, the court made a "cost of insurance" argument. This time, the court opined, "fear of cancer liability in the context of physicians prescribing drugs will surely exacerbate the medical malpractice crisis.... [T]he additional expense of insuring against fear lawsuits and fear liability under these circumstances [will] add to the cost of physician services...." *Id.* at 813. Third, allowing compensation to all plaintiffs who reasonably fear cancer even when the development of cancer is not probable, the court posited, raises the potential that defendants will be unable to provide adequate compensation for the victims who actually develop cancer or other physical injuries. *Id.* "It would be a regrettable irony if in the rush to compensate the physically injured we make it impossible to compensate those suffering of permanent and serious physical injuries." *Id.* (citing Robert L. Willmore, *In Fear of Cancerphobia,* 3 TOXICS L. RPTR. 559, 563 (1988)). Fourth, a bright-line threshold is inherently valuable, claimed the *Potter* court. Without a consistent guideline, the chances of inconsistent results increases. Achieving cross-jury consistency in assessing the reasonableness of fear would be problematic absent a strict threshold. *Id.* at 813–14. And finally, the *Potter* court seemed resigned to deny some legitimate claims for the greater good: "it is sometimes necessary to 'limit the class of potential plaintiffs if emotional injury absent physical harm is to continue to be a recoverable item of damages in a negligence action.'" *Id.* at 814 (citing Thing v. LaChusa, 771 P.2d 814, 828 (Cal. 1989)).

The *Potter* court apparently missed the point of doing away with the physical injury rule. In *Molien*, the same court argued that the unqualified requirement of physical injury was no longer justifiable because it was at once over- and underinclusive. *Molien*, 616 P.2d at 820. Yet, an arbitrary more probable than not rule is overinclusive, albeit not to the same degree as the physical injury rule, and underinclusive: the more probable than not threshold automatically rejects any claim for fear of future harm if that fear is not corroborated by scientific evidence showing that the chance of developing a disease because of the toxic exposure is greater than one in two.

115. 730 S.W.2d 649 (Tex. 1987).

116. *Id.* at 652.

creates injustice by denying legitimate plaintiffs access to the courtroom, but strict allegiance to the traditional rule, ironically, permits illegitimate claims of emotional distress based on the slightest physical injury. Further, the genuineness of a claim is better determined by the trier of fact rather than an artificial bright-line rule. "[I]n the light of contemporary knowledge...the refusal to recognize a cause of action for negligently inflicted injury in the absence of some physical consequence is...an anachronism."[117]

C. Legitimacy of Emotional Distress as an Independent Claim

There exists a view, long held in the common law, that purely mental harms are not serious enough to warrant defendant liability. The *Restatement* exemplifies this view: "where the defendant has been merely negligent, without any element of intent to do harm, his fault is not so great that he should be required to make good a purely mental disturbance."[118] The underlying premise is that mental harms are secondary or trivial compared to physical injuries, and the law will not provide a remedy to one who is, in effect, merely scared.

However, the characterization of mental harm as "mere fright" or as "just a personal offense" is a troubling aspect of the arguments offered in support of the physical injury rule. While the tactic of downplaying all mental distress as mere offenses may appeal to the ruthless, it is analogous to, and equally erroneous as, downplaying all physical injuries as a "mere scratch." As early as 1906, the North Carolina Supreme Court noted:

> The nerves are as much a part of the physical system as the limbs, and in some persons are very delicately adjusted, and when "out of tune" cause excruciating agony. We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether willful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs.[119]

The North Carolina Supreme Court cogently noted that rather than attempting to draw a distinction between mental and physical injury, a better approach was to distinguish between minor mental disturbances (analogous to a paper cut) and serious mental distress (analogous, perhaps, to a broken limb).[120] In this view, mental distress is an equally legitimate injury as physical injury and the question becomes one of the severity of the injury.

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117. *Molien*, 616 P.2d at 814.

118. RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965).

119. Kimberly v. Howland, 55 S.E. 778, 780 (N.C. 1906) (holding that negligent blasting with dynamite that resulted in a twenty pound rock being thrown through plaintiff's window and "greatly shock[ing] her nervous system" stated a valid claim even absent an actual physical injury, *id.* at 779–80).

120. *See* Dickens v. Puryear, 276 S.E.2d 325, 334 n.10 (N.C. 1981).

Echoing the North Carolina court's view was the New Jersey court in *Devlin v. Johns–Manville Corp.*,[121] which held that a manufacturer of asbestos was liable for the fear of cancer suffered by workers negligently exposed to the asbestos. The *Devlin* court noted that "mental and emotional distress is just as 'real' as physical pain, and that its valuation is no more difficult."[122]

Attempting to draw a distinction between mental and physical injuries at all is probably inappropriate:

> The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected.[123]

Since the ultimate question is one of proof, "the attempted distinction between physical and psychological injury merely clouds the issue."[124] The "artificial and often arbitrary classification" between physical injuries and mental injuries should be condemned when the ultimate finding to be made is "whether the plaintiff has suffered a serious and compensable injury."[125] The patent unfairness of a rule disavowing a claim in the absence of a physical injury is evident when one understands that it rewards plaintiffs who manifest serious physical symptoms of mental stress but punishes those who internalize and hide stress. The issue can be posed in a slightly different manner: since a rational person would not make a decision to be exposed, an exposed but symptomless individual cannot really be said to be no worse off than a nonexposed individual. For example, an individual would not choose to drink contaminated water or breathe contaminated air for an extended period.

The crux of the matter is that mental distress is a legitimate injury, and justice calls for a remedy when mental distress is wrongly inflicted, regardless of the existence of a contemporaneous physical injury. Courts have stated that "it is faulty pathology to assume that nervous disorders of serious proportions may not

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121. *See* Devlin v. Johns–Manville Corp., 495 A.2d 495 (N.J. 1985).

122. *Id.* at 497 (quoting Berman v. Allan, 404 A.2d 8, 15 (N.J. 1979)).

123. Molien v. Kaiser Found. Hosps., 616 P.2d 813, 817 (Cal. 1980) (citing Sloane v. Southern Cal. Ry. Co. 44 P. 320, 322 (Cal. 1896)).

124. *Id.* at 821

125. *Id.*

flow from fear or fright."[126] The Ohio Supreme Court summarized succinctly, stating that "[e]motional injury can be as severe and debilitating as physical harm and is deserving of redress."[127]

As the Hawaii Supreme Court articulated in *Rodrigues*, and as other courts have likewise argued, it is fairly common knowledge that living in modern day society brings with it concomitant pressures and stresses heretofore unknown.[128] Society now generally recognizes as legitimate illnesses, emotional stresses that were once thought of as somewhat suspicious.[129] Just the very nature of living in a fast-paced society linked by facsimile machines, cellular phones, and electronic transfers of messages and funds gives rise to new species of mental stresses unheard of half a century ago. Likewise, as science is able to ascertain the toxicity of substances prevalent in our environment, reasonable people are increasingly worried about health prognostications.

D. Deterrence

While the main purpose of tort law is to provide a remedy for individuals wrongly harmed by others, a secondary effect of tort law is to deter wrongful behavior.[130] Absent an adequate and predictable system of liability, potential wrongdoers can act with impunity. One commentator has argued that "without potential tort liability, profit driven entities may find it cost-effective to engage in behaviors that pose unreasonable threats to human society."[131]

Current American law contains large loopholes for defendants negligently exposing individuals to toxic substances. The physical injury rule allows the negligent actor to escape liability until a physical symptom of the exposure manifests. The latency period of many diseases is twenty or thirty years.[132] When the disease finally manifests, liability is hardly assured because the defendant can offer a multitude of legal obstacles to liability. This system hardly establishes an atmosphere of deterrence.

IV. PROPOSED CAUSE OF ACTION FOR ARIZONA

An independent cause of action for fear of future harm resulting from the negligent exposure to toxic materials can be established such that it mitigates against the potential for frivolous or fraudulent lawsuits, ensures the genuineness

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126. Dickens v. Puryear, 276 S.E.2d 325, 335 n.10 (N.C. 1981) (quoting Kirby v. Jules Chain Stores Corp., 188 S.E. 625, 627 (N.C. 1936).

127. Schultz v. Barberton Glass Co., 447 N.E.2d 109, 113 (Ohio 1983).

128. Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970).

129. *See generally* Judith M. Dworkin & Janet E. Kornblatt, *Plaintiffs' Expanding Concepts of Compensation and the Courts' Responses,* 30 GONZ. L. REV. 487 (1994–1995).

130. *See* Love, *supra* note 6.

131. *Id.* at 793.

132. *See* Dworkin, *supra* note 3.

of the alleged injury, and erects a viable screening mechanism to assuage the fears of those who believe a "flood of litigation" will ensue once the physical injury rule is dismantled.

In *Lavelle v. Owens–Corning Fiberglas Corp.*,[133] an Ohio trial court developed a sensible and workable approach to fear-of-future-harm damages. In *Lavelle*, an asbestosis-afflicted plaintiff brought a products liability action against an asbestos manufacturer. The plaintiff claimed an increased fear of cancer due to the defendant's negligence. The court articulated three elements that must be met for the claim to be valid. First, the plaintiff must be aware that she has an increased statistical likelihood of developing cancer. Second, flowing from this knowledge, the plaintiff develops a reasonable apprehension. Third, the apprehension results in, or manifests itself in, mental distress.[134] The *Lavelle* court emphasized that reasonableness was a question for the trier of fact, not a question of probability or certainty of developing the feared disease.[135]

A New Jersey court articulated a similar approach to fear-of-cancer claims.[136] The court required plaintiffs to prove:

> 1. Plaintiff is currently suffering from serious fear or emotional distress or a clinically diagnosed phobia of cancer.
>
> 2. The fear was proximately caused by exposure to [a cancer causing agent].
>
> 3. Plaintiff's fear of getting cancer due to their [sic] exposure to the agent is reasonable.
>
> 4. Defendants are legally responsible for plaintiff's exposure to [the agent].[137]

If the plaintiff can prove each element, then the reasonableness and legitimacy of the claim is assured.[138]

Emerging from the Ohio and New Jersey courts' decisions is a rational approach to fear of future harm that Arizona courts should adopt. Recovery for fear of future harm should be predicated upon the plaintiff showing the traditional elements of a negligence action. Thus, a plaintiff must show that the defendant owed the plaintiff a duty, that the defendant's behavior breached that duty, and that the breach proximately and in fact caused the alleged harm. Moreover, the plaintiff should bear the burden of establishing the elements of the claim by a preponderance of the evidence. In other words, any claim for fear of future harm should adhere to traditional tort elements.

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133. 507 N.E.2d 476 (Ohio C.P. 1987).
134. *Id.* at 481.
135. *Id.*
136. Devlin v. Johns–Manville Corp., 495 A.2d 495 (N.J. 1985).
137. *Id.* at 499.
138. *Id.*

The physical injury rule, however, should be replaced with a set of elements that would ensure the genuineness of the claim without arbitrarily denying relief to injured plaintiffs. Plaintiffs in Arizona should be required to prove the following elements: 1) exposure to the toxic substance; 2) an awareness of an increased risk of disease; 3) fear resulting from the awareness; and 4) the reasonableness of the fear. Each of the four elements will be discussed in order.

A. Exposure

First, the plaintiff must be able to prove exposure to the harmful substance. The type of exposure required to state a cause of action will vary on a case-by-case basis and will often depend upon the substance in question. For instance, in *Potter v. Firestone Tire and Rubber Co.*,[139] the plaintiffs were able to show exposure to a variety of chemicals because the plaintiffs' domestic water wells had been contaminated.[140] In *Potter*, then, exposure was shown by proving the ingestion of the chemicals through drinking water. Similarly, in *Ayers v. Township of Jackson*,[141] plaintiffs were able to show exposure from the contamination of their water supply by toxic pollutants that leaked into an aquifer from the township landfill.[142]

Exposure can also occur by inhaling airborne particles. For instance, the plaintiffs in *DeStories v. City of Phoenix*[143] were construction workers who proved exposure to asbestos by showing that they inhaled asbestos dust during a construction project.[144] Likewise, in *Burns v. Jaquays Mining Corp.*,[145] plaintiffs were able to show exposure through inhalation of asbestos dust particles blown into a residential area from an adjacent mine tailings pile.[146] Indirect exposure to dangerous chemicals can even occur through mere contact with the clothes and body of one directly exposed.[147]

Thus, proof of exposure would vary on a case-by-case basis. Moreover, the plaintiff would have the burden of showing that the type of exposure the plaintiff suffered was sufficient to trigger an increased risk of future disease. In other words, a defendant could successfully bar a claim by showing that the plaintiff's exposure was not the type of exposure required (for example, plaintiff breathed but did not ingest the substance) or that the exposure was not of a sufficient magnitude (for example, plaintiff breathed the substance for only a few

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139. 863 P.2d 795 (Cal. 1993).
140. *Id.* at 801–02.
141. 525 A.2d 287 (N.J. 1987).
142. *Id.* at 289.
143. 154 Ariz. 604, 744 P.2d 705 (Ct. App. 1987).
144. *Id.* at 605, 744 P.2d at 706 Although the plaintiffs proved exposure to asbestos, plaintiffs were denied recovery.
145. 156 Ariz. 375, 752 P.2d 28 (Ct. App. 1979).
146. *Id.* at 376, 752 P.2d at 29.
147. *See* Dworkin, *supra* note 3, at 562 n.265.

minutes rather than continuously for an extended period). Here, then, expert testimony will be required for the plaintiff to show that the exposure was dangerous.

Issues of comparative negligence are also pertinent. Defendants could reduce or eliminate their liability by showing the plaintiff's voluntary exposure to similar disease-causing agents.[148] The approach to be taken by defendants here is that although the plaintiff may have been negligently exposed to a dangerous substance by the defendant, the plaintiff also was exposed to similar agents through the plaintiff's own negligent behavior. If the plaintiff routinely engaged in activities that resulted in exposure to a dangerous substance (for example, cigarette smoking), then defendants could argue for a reduction in liability.

B. Awareness

The second showing that a plaintiff should be required to make before collecting damages for the fear of future harm is an awareness of the statistically increased chance of contracting a disease. The element of awareness serves several important functions. First, establishing the moment when the plaintiff became aware of the increased risk of disease provides a starting point for quantifying the fear the plaintiff has suffered. Justice would not be served if the plaintiff could collect damages for fear of future harm before the plaintiff became aware of the risk. Thus, if the exposure to the agent took place several years before the plaintiff became aware of the risk, damages would be computed (assuming the plaintiff successfully proved all other elements) from the time of awareness. The key concept here is that the fear is the injury, while the exposure is merely the negligent action.

The element of awareness also provides evidence of the reasonableness of the fear. While a plaintiff could become aware of an increased risk of disease through various media including medical doctors, press reports, or friends and family,[149] the mode of awareness and the steps taken by the plaintiff to corroborate the information could be probative. In other words, a plaintiff who became aware of an increased risk of disease through a magazine story, without more, would have a less reasonable claim for fear than a plaintiff who, after becoming aware of the increased risk, sought the advice of a doctor. This is not to say that awareness through a magazine article, standing alone, is insufficient to prove the element of awareness. Rather, the point is that the elements of awareness and reasonableness of fear, discussed *infra*, are related. While not dispositive, then, an important issue to be explored under this element is the credibility of the source. Generally, the element of awareness should be a low threshold requirement.

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148. *See, e.g.*, Gay & Rosato, *supra* note 6, at 562.

149. *See* Dworkin *supra* note 3, at 562–63 nn.264–65 & 267–69 (discussing studies and news reports about exposure).

C. Fear in Fact

The plaintiff should prove by a preponderance of the evidence the seriousness of the fear. Testimony about the plaintiff's fear could come from the plaintiff, from third parties in a position to know the plaintiff's behavior since becoming aware of the increased chance of disease, and from medical experts. Here again, no particular type of evidence would be dispositive. Yet, a more persuasive case could be made by the plaintiff through multiple sources of testimony. The element of seriousness of the fear is necessary to prevent the plaintiff from being awarded damages for fear that is transitory, trivial, or evanescent.[150]

D. Reasonableness

Finally, perhaps the most critical element of the plaintiff's case is showing the reasonableness of the fear. Here, the reasonable person test applies. Would a reasonable person, having been exposed to the same substance as the plaintiff, and having become aware of an increased risk of disease because of the exposure, reasonably fear contracting the disease? Evidence of the likelihood of actually contracting the disease and the severity of the feared disease would be probative, but not controlling.

The use of the reasonable person standard avoids the imposition of an arbitrary "more probable than not" standard. Imposition of the more probable than not requirement ignores the fact that the fear of the disease is a distinct injury from the disease itself. Thus, although the likelihood of the disease developing speaks to the reasonableness of the fear, a plaintiff can nevertheless reasonably fear a disease even when the chance of contracting the disease in the future is less than fifty percent. The distinction is critical: whether or not the plaintiff actually contracts the disease, the plaintiff has been injured.[151] A plaintiff, negligently exposed to a substance known to increase the plaintiff's chance of developing a dangerous disease, must live with that knowledge. Only the most callous would deny that a genuine injury has occurred.

Reasonableness of the fear, then, should be the province of the trier of fact rather than subject to a bright-line rule such as espoused in *Potter*. A fear stemming from an awareness of an increased risk of disease from one chance in a billion to two chances in a billion is clearly not reasonable. On the other hand, the

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150. For a general discussion of the common law reluctance to award damages for insignificant emotional distress see, for example, W. PAGE KEETON ET AL., *supra* note 4, § 54, at 361, 363; RESTATEMENT (SECOND) OF TORTS § 436A & cmts. (1965).

151. *See supra* notes 2, 13 and accompanying text. Earlier, this Note argued that the fear of future harm, a subset of emotional distress, is a legitimate independent injury. That the fear of a future disease is an injury deserving of redress can be understood when one considers living with the dread of contracting a disease even while remaining symptomless for ten or twenty years or more.

trier of fact could find that a plaintiff reasonably fears a disease that has a forty-nine percent chance of manifesting during the plaintiff's lifetime.

The reasonableness of the fear also depends, in part, on the severity of the possible disease. Thus, a disease that is life threatening or extremely debilitating clearly would be more reasonable to fear than a disease that manifests in transitory or innocuous symptoms. Plaintiffs and defendants alike will likely offer expert testimony as to the severity of the feared disease; the plaintiffs emphasizing the severity, the defendants underscoring more benign or mitigating factors.

E. Applying the Cause of Action in Burns v. Jaquays Mining Corp. [152]

The facts in *Burns* provide an excellent backdrop for the application of the proposed cause of action. Under the proposed cause of action, the *Burns* defendants would not have been awarded summary judgment for the plaintiffs' failure to show a concomitant physical injury. Rather, the plaintiffs would have had the opportunity to show at trial that they were exposed to asbestos, that they became aware of an increased risk of asbestosis or other asbestos-related disease, that they feared contracting asbestosis, and that their fear was reasonable. Significantly, the proposed cause of action would not guarantee the *Burns* plaintiffs a recovery; the proposed cause of action merely gives the opportunity for the plaintiffs to show by a preponderance of the evidence that they were injured by the defendant's negligent activity.

In retrospect, however, the *Burns* plaintiffs probably had a very persuasive case for recovery. The exposure to asbestos occurred over an extended period. Beginning in 1973, asbestos fibers from a tailings pile and a mine were blown into the plaintiffs' adjacent residential area.[153] The hazard was not contained until twelve years afterwards, on September 16, 1985.[154] The residents became aware of the threat of future disease in 1979.[155] Indeed, the seriousness of the situation was emphasized when the governor declared the trailer park a disaster area in late 1979,[156] and the state made efforts to relocate the residents.[157]

The *Burns* plaintiffs also provided expert testimony in support of the fact that they "suffered severe and clinically significant mental distress as a consequence of the asbestos situation."[158] But, because of Arizona's adherence to the physical injury rule, the plaintiffs were prevented from showing that their fear was a reasonable result of the situation. Considering the facts that the plaintiffs had been exposed to asbestos for up to twelve years, that they discovered their increased risk of asbestos six years after the exposure commenced, that their

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152. 156 Ariz. 375, 752 P.2d 28 (Ct. App. 1987).
153. *Id.* at 376, 752 P.2d at 29.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 378, 752 P.2d at 31.

residences were considered a disaster area and they were relocated by the state, and that a medical expert attested to the seriousness of their fear, it seems incredibly unjust to deny them the opportunity to show the reasonableness of the injury claimed. Under the proposed cause of action, the plaintiffs would have had the opportunity to be compensated for their fear of future harm. The plaintiffs' fear was, in light of the facts, certainly reasonable. And, sadly, the fear the plaintiffs faced at the time the *Burns* decision was handed down is probably a fear many of them still face.

V. CONCLUSION

The physical injury rule—the rule that a valid claim for negligent infliction of emotional distress must show an accompanying physical injury, impact, or manifestation—is an unnecessary and arbitrary bar to claims for mental distress. The injustice of the rule is especially apparent in the arena of toxic torts where plaintiffs, negligently exposed to toxic substances, are helpless to remove the risk imposed by the exposure and must face ten to twenty years or more with the dread of contracting a disease.

Moreover, the rationales offered in support of the physical injury rule are unpersuasive. The fear of a flood of litigation is never a sound rationale for preventing otherwise valid claims. And, importantly, the feared flood has just not materialized in jurisdictions eliminating the physical injury rule. The physical injury rule is also an inadequate mechanism for ensuring the genuineness of mental distress claims. Mental distress can be a serious injury even absent an accompanying physical injury. More importantly, the reasonable person standard is a completely adequate and workable standard to employ in order to ensure the genuineness of emotional distress claims.

The rationales supporting the abolition of the physical injury rule are sound. Emotional distress, especially fear of developing cancer, is a cognizable injury capable of ascertainment by the law. And increasingly, society is recognizing the debilitating nature of a host of emotional distresses even absent a concomitant physical injury. The physical injury rule can unjustly deny an injured plaintiff recovery in the arena of toxic tort claims due to the long latency period of many diseases, the problem of defendant mortality, and complex causation issues. Further, the elimination of the physical injury rule could deter toxic actors from negligent behavior.

If the goal of tort law is to compensate the injured party, then Arizona should join the growing number of states abolishing the physical injury rule and adopt an independent cause of action for fear of future harm.