

1984

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Recommended Citation

Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation of Injuries: A Solution or a Pandora's Box?*, 53 Fordham L. Rev. 527 (1984).

Available at: <https://ir.lawnet.fordham.edu/flr/vol53/iss3/5>

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FEAR OF DISEASE AND DELAYED MANIFESTATION INJURIES: A SOLUTION OR A PANDORA'S BOX?*

TERRY MOREHEAD DWORKIN**

INTRODUCTION

THE fear of disease, sometimes called hypochondria, has long been recognized as a medical problem, but seldom as a legal one. Its costs, therefore, have been borne by its victims and their insurance companies. Although such fears have traditionally been dismissed as groundless,¹ the great strides made recently in the medical profession's ability to connect environmental exposure with disease are beginning to change this view. They are also causing a shift in the view of who should bear the costs of such fears. Increasingly plaintiffs are claiming that the entities responsible for their exposure to disease-causing agents should compensate them for their concern about the possibility of developing the disease.² Courts have so far been unwilling to recognize suits for the increased chance of developing a delayed-manifestation disease.³ An increasing number, however, are recognizing the right to sue for the fear of disease development due to that increased chance and for medical moni-

* Common usage ascribes the container of the world's evils given by Zeus to Pandora to be a box. Apparently, however, Zeus gave them to her in a jar. When Pandora opened the jar, she unleashed the torments on humanity. See *Plummer v. Abbott Laboratories*, 568 F. Supp. 920, 925 n.4 (D.R.I. 1983); R. Warner, *Encyclopedia of World Mythology* 29-31 (1975).

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1. See *Stoleson v. United States*, 708 F.2d 1217, 1222 (7th Cir. 1983) (little is known about the cause, nature or effective treatment of hypochondria, and claims regarding it must therefore be viewed with healthy skepticism). Disease phobia has been the primary term used in law suits. See, e.g., *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 568, 461 A.2d 184, 188 (Law Div. 1983); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958). Anxiety is considered to be a normal response to threats. Comment, *Emotional Distress Damages for Cancerphobia: A Case for the DES Daughter*, 14 Pac. L.J. 1215, 1215 n.1 (1983). Phobia is a recurring sense of dread without objective danger. *Id.*

2. See, e.g., *Adams v. Johns-Manville Sales Corp.*, 727 F.2d 533, 540 (5th Cir. 1984); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 522-23 (5th Cir. 1984); *Plummer v. Abbott Laboratories*, 568 F. Supp. 920, 921 (D.R.I. 1983); *Mink v. University of Chicago*, 460 F. Supp. 713, 720 (N.D. Ill. 1978); *Payton v. Abbott Labs*, 386 Mass. 540, 546, 437 N.E.2d 171, 174-75 (1982); *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 565, 461 A.2d 184, 186 (Law Div. 1983); *Cummings v. Fondak*, 122 Misc. 2d 913, 915, 474 N.Y.S.2d 356, 358-59 (Sup. Ct. 1983); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 434 (Tenn. 1982).

3. See, e.g., *Adams v. Johns-Manville Sales Corp.*, 727 F.2d 533, 536-37 (5th Cir. 1984); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 516 (5th Cir. 1984); *Plummer v. Abbott Laboratories*, 568 F. Supp. 920, 925 (D.R.I. 1983); *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 564, 461 A.2d 184, 187 (Law Div. 1983).

toring necessary to check for that development.⁴ The recent expansion of emotional distress theories and the concomitant easing of restrictions is likely to facilitate this trend. Compensation for delayed disease-caused emotional distress may even provide the only recovery possible for thousands of people who have been exposed to toxic substances but whose diseases will not become manifest until after statutory limitations have run.⁵ Such recovery may also provide one way to ease the future claims problems raised by bankruptcy and reorganization filings,⁶ and post-insurance coverage of liabilities.⁷ Societal costs of open recognition of such claims, however, are likely to outweigh these benefits. This Article discusses the history of disease phobia recovery, the recent expansions of emotional distress theories, and how they are likely to be combined in the toxic tort area.

I. EMOTIONAL DISTRESS CLAIMS

Common law has long recognized a right to recover for emotional distress. The tort of assault, which developed as a form of trespass, was recognized as early as the thirteenth century.⁸ This cause of action was probably originally created to deal with actions that could lead to a breach of the peace,⁹ rather than to compensate for the emotional distress that was caused by the defendant's act. Nevertheless, compensation went to the victim primarily for the emotional harm suffered.¹⁰ In the early courts the amount of that compensation was determined by reference to a predetermined schedule of payments based on the kind of injury that was inflicted.¹¹

4. See, e.g., *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 566-67, 461 A.2d 184, 188-90 (Law Div. 1983); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 434 (Tenn. 1982); cf. *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 521-22 (5th Cir. 1984) (evidence regarding fear of developing cancer admissible if not too prejudicial).

5. See *infra* notes 279-92 and accompanying text. It would also allow recovery to those whose diseases never become manifest because they die for some other reason or they do not develop the diseases.

6. See Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 Harv. L. Rev. 1121, 1121 n.6, 1122 (1983) [hereinafter cited as *Manville Bankruptcy*]; Nat'l L.J., Apr. 4, 1983, at 1, col. 1. See *infra* notes 320-26 and accompanying text.

7. See Hedges, *Back-Dated Coverage as Insurance*, Chartered Prop. & Casualty Underwriters J., Dec. 1981, at 181-82; Bus. Ins., Mar. 21, 1983, at 1, col. 2. See *infra* Pt. IV.B.

8. W. Prosser, *Handbook of the Law of Torts* § 10 (4th ed. 1971). Defamation was also recognized early in the common law. S. Milsom, *Historical Foundations of the Common Law* 332 (1969). It had both civil and criminal overtones for which the victim could be compensated or the wrongdoer punished. The punishment aspect was to deter the threat to order inherent in insult or sedition. W. Prosser, *supra*, § 54, at 333. In these suits compensation went to the victim only if the suit were in lay jurisdiction; the church, in which defamation could also be heard, could not order compensation in money. S. Milsom, *supra*, at 335.

9. W. Prosser, *supra* note 8, § 10, at 38.

10. *Id.*

11. C. McCormick, *Handbook on the Law of Damages* 21-22 (1935). The fixed pay-

Compensation for emotional distress was also awarded early in the common law when that distress arose from an action such as battery or other nonemotional injury.¹² These damages were parasitic, and could not be recovered without a finding that the defendant was liable to the plaintiff for the primary injury to which the emotional claim was attached.¹³

The practice of having unscheduled damages determined by the tribunal grew along with the development of the common law of trespass.¹⁴ The jury was eventually allowed to set the amount of compensation because it was familiar with local economic values.¹⁵ Inclusion of damages for pain and suffering naturally accompanying the plaintiff's injury became part of the jury's assessment of damages.¹⁶

Unlike property damage or other types of injuries which could be measured by recognized economic yardsticks, emotional injuries had no reference to any market value scale. They were highly subjective and speculative, and as such were not truly compensatory.¹⁷ As a result they were viewed with suspicion, and control of such damages became a judicial concern. The judge served as a check on the jury's discretion, with the power to change awards when he deemed the amount to be out of line.¹⁸ Thus judicial concern with control of emotional injury awards has a long history.

Additional checks helped control tort recovery for emotional suffering. In assault, for example, the requirement that the threat be imminent limits the number of suits that can be based on apprehension of threatened harm, and severely limits the time period for which the distress can be claimed.¹⁹ Even stricter controls were built into the primary emotional injury torts which developed later.

No cause of action for emotional distress independent of assault or

ments were designed to reduce dispute over the amount to be paid, and thereby, to reduce blood feuds. *Id.*

12. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1049 (1936).

13. C. McCormick, *supra* note 11, at 1048 & n.64.

14. *Id.* at 23-25.

15. *Id.* at 53.

16. See D. Dobbs, *Handbook on the Law of Remedies* § 8.1, at 545 (1973).

17. *Id.*

18. The jury was allowed to assess the value of the damages because it was from the area and therefore knew the value of the thing damaged. C. McCormick, *supra* note 11, at 25. In certain kinds of injuries, however, such as those caused by mayhem or debt, the judge was equally capable of assessing value because it did not depend on local circumstances. *Id.* Thus the judges in these kinds of cases began to exert their influence regarding what they perceived as uncalled for local largess. *Id.* This role grew into a general power to declare awards unsuitable.

19. W. Prosser, *supra* note 8, § 10, at 39-40. The fact that words alone, no matter how threatening or frightening, are not grounds for assault also demonstrates the reluctance of courts to compensate for this tort. See, e.g., *Hixson v. Slocum*, 156 Ky. 487, 488, 161 S.W. 522, 523 (1913); *State v. Daniel*, 136 N.C. 571, 572, 48 S.E. 544, 545 (1904).

another tort was recognized until this century.²⁰ Part of the reluctance to grant such an action was based on the lack of guidelines for the jury to follow in assessing damages for an injury that had no inherent monetary value, was not overt, and was subject to great individual variation.²¹ Probably the biggest obstacle, however, was the fear of fraudulent claims and frivolous lawsuits.²² In response to these reservations, the courts that allowed actions for emotional distress severely restricted the kinds of actions that could support such claims as well as the persons who could claim injury.

Intentional infliction of emotional distress as an independent cause of action was contained by requiring proof of extreme and outrageous conduct resulting in serious emotional distress, which usually had to manifest itself in a physical illness.²³ Mere insults or other annoying behavior were not to be compensated.²⁴ The outrageousness could arise from either the nature of the conduct itself,²⁵ or abuse of a special position or knowledge.²⁶ If the defendant's action was truly outrageous, the certainty of resulting emotional distress was assumed to be sufficiently clear to allow recovery. In addition, such actions were clearly worthy of legal deterrence. The allowance of such claims also reflected the scientific and legal communities' growing understanding of emotional injury.

Recognition of the tort of negligent infliction of emotional distress has occurred more slowly.²⁷ Voicing the same objections about fraudulent

20. See, e.g., *Spearman v. McCary*, 4 Ala. 473, 476, 58 So. 927, 929 (1912) (recovery allowed when emotional distress causes physical injury); *Cohn v. Ansonia Realty Co.*, 162 A.D. 791, 792, 148 N.Y.S. 39, 40 (1914) (same).

21. See, e.g., *Kalen v. Terre Haute & I.R. Co.*, 18 Ind. 202, 206-07, 47 N.E. 694, 697-98 (1897); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 436 (Me. 1982).

22. See, e.g., *Payton v. Abbott Labs*, 386 Mass. 540, 546, 437 N.E.2d 171, 175 (1982); *Huston v. Freemansburg Borough*, 212 Pa. 548, 550-51, 61 A. 1022, 1022-23 (1905), *overruled*, *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970). See generally *Magruder*, *supra* note 12 (reviewing cases on mental disturbance).

23. See *Restatement (Second) of Torts* § 46(1) (1965); see, e.g., *M.B.M. Co. v. Counce*, 597 S.W.2d 92, 94 (Ark. 1980); *George v. Jordan Marsh Co.*, 359 Mass. 244, 253, 268 N.E.2d 915, 921 (1971).

24. See, e.g., *Wallace v. Shoreham Hotel Corp.*, 49 A.2d 81, 84 (D.C. 1946); *Brooker v. Silverthorne*, 111 S.C. 533, 534, 99 S.E. 350, 351 (1919).

25. England, in the leading case of *Wilkinson v. Downton*, 2 Q.B. 57 (1897), was the first to recognize that outrageous conduct could lead to recovery for emotional distress. In *Wilkinson*, a practical joker told plaintiff that her husband had been smashed up in an accident and was lying in the street and that she had to go to him at once. *Id.* at 57; see *Savage v. Bores*, 77 Ariz. 355, 358, 272 P.2d 349, 351-52 (1954); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 336, 240 P.2d 282, 286 (1952).

26. Recognition of an action for emotional injury first arose in the special circumstances of a carrier's duty to its passengers. *W. Prosser*, *supra* note 8, § 12, at 52-53; see *Texas & Pac. Ry. Co. v. Jones*, 39 S.W. 124, 125 (Tex. Civ. App. 1897). Businesses with a special relationship to the public were the first to be held liable. See *Richardson v. Pridmore*, 97 Cal. App. 2d 124, 132, 217 P.2d 113, 118 (1950) (apartment building owner); *American Sec. Co. v. Cook*, 49 Ga. App. 723, 725, 176 S.E. 798, 799-800 (1934) (money lender).

27. Quite early, a sizeable minority of states allowed recovery for emotional distress alone against telegraph companies for the mishandling of messages. See, e.g., *Western*

and frivolous suits and a flood of litigation, the courts have been even more reluctant to recognize this cause of action.²⁸ Defendant's actions, being merely unreasonable, are not as good an indicator of the certainty and severity of resulting distress as are intentional acts. Thus, in order to maintain control, courts usually refused to grant recovery in negligent infliction of emotional distress cases unless the plaintiffs could demonstrate some physical impact from the tort and a physical manifestation of the emotional distress.²⁹ When third parties were later allowed to sue for emotional distress resulting from witnessing the defendant injuring another person, the impact and physical manifestation requirements, as well as the requirement of close familial relationship, served the same screening purposes.³⁰

A. *Recent Developments in Infliction of Emotional Distress*

Although some courts still cling to these early restrictions,³¹ the trend has been toward liberality in construction, or elimination of these limitations to allow wider recovery in emotional distress cases. In intentional infliction cases, for example, the class of actions that are considered to be outrageous has been expanded. As in punitive damages cases,³² judges and juries in emotional injury cases now find it relatively easy to be out-

Union Tel. Co. v. Crumpton, 138 Ala. 632, 637, 36 So. 517, 520 (1903) (failure to deliver telegram relating to death of plaintiff's mother); So Relle v. Western Union Tel. Co., 55 Tex. 308, 313 (1881) (telegraph company unreasonably late in delivering message of plaintiff's mother's death and funeral). Many states also allowed recovery for pure emotional distress to individuals whose relatives' bodies had been mishandled. W. Prosser, *supra* note 8, § 54, at 329-30; *see, e.g.*, Brown Funeral Homes & Ins. Co. v. Baughn, 226 Ala. 661, 662, 148 So. 154, 155 (1933) (negligent embalming required burial of body prior to funeral); Louisville & N. Ry. Co. v. Wilson, 123 Ga. 62, 68, 51 S.E. 24, 28 (1905) (railroad negligently left body exposed to the elements while shipping); Sworski v. Simons, 208 Minn. 201, 205, 293 N.W. 309, 311-12 (1940) (coroner and undertaker embalmed body without family's permission).

28. *See, e.g.*, Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 318, 73 So. 205, 207 (1916); Ward v. West Jersey & S. R.R. Co., 65 N.J.L. 383, 384, 47 A. 561, 562 (1900).

29. *See, e.g.*, Gilliam v. Steward, 291 So. 2d 593, 595 (Fla. 1974); Weissman v. Wells, 306 Mo. 82, 90, 267 S.W. 400, 406 (1924).

30. *See* Payton v. Abbott Labs, 386 Mass. 540, 550, 437 N.E.2d 171, 177 (1982); Restatement (Second) of Torts § 436(3) (1965).

31. *See, e.g.*, Champion v. Gray, 420 So. 2d 348, 349 (Fla. 1982); Indiana Motorcycle Ass'n v. Hudson, 399 N.E.2d 775, 779 (Ind. App. 1980).

32. *See, e.g.*, Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979) (punitive damages awarded to claimant who accidentally shot himself in leg with defective gun despite manufacturer's warning and obviousness of the danger; \$2,895,000 award remanded as excessive); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn.) (\$1,000,000 punitive damage award against a manufacturer despite its compliance with the federal Flammable Fabrics Act of 1953), *cert. denied*, 449 U.S. 921 (1981); Wells v. Smith, 297 S.E.2d 872, 880 (W. Va. 1982) (jury allowed to award punitive damages even though it did not return verdict for compensatory damages); *cf.* Smith v. Wade, 103 S. Ct. 1625, 1637 (1983) (punitive damages may be awarded under 42 U.S.C. § 1983 for violation of constitutional rights without showing of actual ill will, spite, or intent to injure).

raged by defendant's actions.³³

Another trend has been to abandon the requirement of contemporaneous physical injury or impact in both intentional and negligent infliction cases.³⁴ In these cases, physical manifestation of the emotional distress has become the primary screening device.³⁵ Some courts have gone even further by abandoning the physical manifestation requirement and using the seriousness of the distress as the screen.³⁶ These trends have been well documented in both cases and law review articles.³⁷ In substituting these requirements, courts recognize the progress in knowledge about mental distress and its etiology, diagnosis and proof.³⁸ Even in these

33. See, e.g., *Sypert v. United States*, 559 F. Supp. 546, 548 (D.D.C. 1983) ("[p]hysical injury is not a prerequisite . . . for recovery of damages for mental anguish if defendants' actions were 'willful, wanton, and vindictive'"); *Morgan v. American Family Life Assurance Co.*, 559 F. Supp. 477, 482 (W.D. Va. 1983) (suit allowed for bad faith refusal to pay insurance benefits); *Hubbard v. UPI*, 330 N.W.2d 428, 438-39 (Minn. 1983) (tort of intentional infliction of emotional distress recognized without need to show independent underlying tort or physical injury); *Bodewig v. K-Mart, Inc.*, 54 Or. App. 480, 488, 635 P.2d 657, 662 (1981) (privately conducted strip search of checker who was accused of stealing \$20 by customer); *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 289, 669 P.2d 451, 460 (1983) (couple allowed to sue for emotional distress resulting from police failure to respond to emergency call for 1.5 hours despite assurances that help was coming).

34. Soon after adoption, courts began to replace the impact rule with a zone of danger rule, which allowed recovery if plaintiff was within the physical danger area created by defendant's acts. See *Waube v. Warrington*, 216 Wisc. 603, 609, 258 N.W. 497, 501 (1935). This trend has accelerated in the last few years. See, e.g., *M.B.M. Co. v. Counce*, 597 S.W.2d 92, 94 (Ark. Ct. App. 1980); *Hubbard v. UPI*, 330 N.W.2d 428, 438-39 (Minn. 1983).

35. See, e.g., *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 437 (Me. 1982); *Dickens v. Puryear*, 302 N.C. 437, 448-49, 276 S.E.2d 325, 332-33 (1981). The *Dickens* case clarified dicta in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), which was intended to bridge the gap between "pure" emotional distress and emotional distress with physical manifestations by finding that

[t]he 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.

Id. at 199 n.1, 254 S.E.2d at 623 n.1 (quoting *Kimberly v. Howland*, 143 N.C. 398, 403-04, 55 S.E. 778, 780 (1906)). *Dickens* held that in intentional infliction cases, physical injury is no longer necessary. 302 N.C. at 448-49, 276 S.E.2d at 332-33.

36. See, e.g., *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 930, 616 P.2d 813, 821, 167 Cal. Rptr. 831, 839 (1980); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 77, 451 N.E.2d 759, 765 (1983).

37. See, e.g., *Payton v. Abbott Labs*, 386 Mass. 540, 547, 437 N.E.2d 171, 175-76 (1982); *Sinn v. Burd*, 486 Pa. 146, 151, 404 A.2d 672, 676 (1979); Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 Hastings L.J. 583 (1982); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 Geo. L.J. 1237 (1971).

38. See, e.g., *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 928-30, 616 P.2d 813, 820-21, 167 Cal. Rptr. 831, 838-39 (1980); *Dickens v. Puryear*, 302 N.C. 437, 448-49, 276 S.E.2d 325, 332-33 (1981).

later cases, however, control of emotional distress suits continues to be a concern.

In *Molien v. Kaiser Foundation Hospitals*,³⁹ for example, the California Supreme Court broke with precedent and found that physical manifestation of the emotional distress was no longer necessary in a negligent infliction case.⁴⁰ Plaintiff Molien's wife was misdiagnosed by her doctor as having syphilis, and Molien was emotionally injured by this news and the resultant marital discord.⁴¹ The court found the touchstone to be the severity of emotional injury, not physical manifestation, because the state of the art was such that emotional injury could be established with medical certainty and causally linked to the shocking experience.⁴² The requirement that the emotional injury be serious was found to be a sufficient screen against fraudulent claims, unlimited liability and a flood of litigation.⁴³ The court found that the former screening device of physical injury, which had ensured authenticity and seriousness, was both over- and under-inclusive, and could lead to extravagant pleading and distorted testimony.⁴⁴ Other courts have followed California's lead in substituting seriousness for physical manifestation as the screening device.⁴⁵

Suits by third parties who witness harm to another and thereby suffer emotional distress have probably shown the most change and growth in recent years. The case that firmly established the right of a bystander to recover for emotional harm resulting from negligent injury to another⁴⁶ was the 1968 California case *Dillon v. Legg*.⁴⁷ In that case a mother was allowed to sue for the emotional distress resulting from seeing her child injured, despite the fact that she was not in the zone of danger and was not physically injured.⁴⁸ In order to control subsequent third-party cases,

39. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

40. *Id.* at 928-30, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39.

41. *Id.* at 919-20, 616 P.2d at 814, 167 Cal. Rptr. at 832-33.

42. *Id.* at 928-30, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39. The court further found that emotional injury could be as severe and debilitating as physical harm, and was equally deserving of redress. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832; *accord* *Leong v. Takasaki*, 55 Hawaii 398, 411-13, 520 P.2d 758, 766-67 (1974); *Hassing v. Wortman*, 214 Neb. 154, 156, 333 N.W.2d 765, 767 (1983).

43. *Molien*, 27 Cal. 3d at 929, 616 P.2d at 821, 167 Cal. Rptr. at 839.

44. *Id.* at 928-29, 616 P.2d at 820, 167 Cal. Rptr. at 838.

45. *See, e.g.*, *Campbell v. Animal Quarantine Station*, 63 Hawaii 557, 564, 632 P.2d 1066, 1070-71 (1981); *Barnhill v. Davis*, 300 N.W.2d 104, 106-08 (Iowa 1981); *Versland v. Caron Transp.*, 671 P.2d 583, 588 (Mont. 1983); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 76-78, 451 N.E.2d 759, 764-65 (1983).

46. *New York, in Cohn v. Ansonia Realty Co.*, 162 A.D. 791, 148 N.Y.S. 39 (1914), allowed third-party recovery, *id.* at 792, 148 N.Y.S. at 40, but in 1969 the New York Court of Appeals found that there was no cause of action under such circumstances, *Tobin v. Grossman*, 24 N.Y.2d 609, 618-19, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969). Likewise, the Alabama Supreme Court in 1978 effectively overruled a 1912 decision that had allowed third-party claims. *See Slovensky v. Birmingham News Co.*, 358 So. 2d 474, 477 (Ala. 1978).

47. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

48. *Id.* at 742, 441 P.2d at 921, 69 Cal. Rptr. at 81.

the court stressed that proximity, contemporaneous observance and close relationship must be shown if the plaintiff is to recover.⁴⁹ Again, other states followed California's lead in allowing such suits.⁵⁰ The three screening factors, which were meant to be guidelines to foreseeability in determining who should be allowed to sue,⁵¹ became rigid requirements in an effort to keep such cases under control.⁵² Such rigidity led to fine hairsplitting and denial of recovery in some compelling cases.⁵³ This in turn has led to the liberalization of these requirements in some of the subsequent cases.⁵⁴

49. *Id.* at 741, 441 P.2d at 920, 69 Cal. Rptr. at 80. These factors were to be used in assessing the foreseeability that a third party would be injured by defendant's negligence.

50. See Winter, *A Tort in Transition: Negligent Infliction of Mental Distress*, 70 A.B.A. J. 62, 64 (Mar. 1984); see, e.g., *Beanland v. Chicago, R.I. & P. Ry.*, 480 F.2d 109, 113 (8th Cir. 1973); *Gnirk v. Ford Motor Co.*, [1983-84 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 9945, at 25,369 (D.S.D. Oct. 14, 1983); *D'Amicol v. Alvarez Shipping Co.*, 31 Conn. Supp. 164, 167, 326 A.2d 129, 131 (Conn. Super. Ct. 1973); *Rodrigues v. State*, 52 Hawaii 156, 170, 472 P.2d 509, 520 (1970); *Barnhill v. Davis*, 300 N.W.2d 104, 107 (Iowa 1981); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 435 (Me. 1982); *Dzikonski v. Babineau*, 375 Mass. 555, 560, 380 N.E.2d 1295, 1299 (1978); *Toms v. McConnell*, 45 Mich. App. 647, 651, 207 N.W.2d 140, 143 (1973); *Versland v. Caron Transp.*, 671 P.2d 583, 588 (Mont. 1983); *Corso v. Merrill*, 119 N.H. 647, 652, 406 A.2d 300, 304 (1979); *Porter v. Jaffee*, 84 N.J. 88, 94, 417 A.2d 521, 526 (1980); *Sinn v. Burd*, 468 Pa. 146, 151, 404 A.2d 672, 676 (1970); *D'Ambra v. United States*, 144 R.I. 643, 653, 338 A.2d 524, 531 (1975); *Landreth v. Reed*, 570 S.W.2d 486, 489 (Tex. Civ. App. 1978).

51. *Nolan & Ursin*, *supra* note 37, at 589.

52. *Compare* *Accounts Adjustment Bureau v. Cooperman*, 158 Cal. App. 3d 844, 850, 204 Cal. Rptr. 881, 884 (1984) (parents of child who was misdiagnosed as having brain damage were considered to be direct victims of the misdiagnosis because distress was foreseeable) and *Nevels v. Yeager*, 152 Cal. App. 3d 162, 169, 199 Cal. Rptr. 300, 305 (1984) (mother who arrived at scene of accident shortly after it occurred allowed recovery) and *Portee v. Jaffee*, 84 N.J. 88, 97, 417 A.2d 521, 528 (1980) (allowing recovery to mother who watched futile efforts to save life of seven year old son trapped between an elevator door and the shaft, but did not see the actual injury occur) with *Justus v. Atchison*, 19 Cal. 3d 564, 585, 565 P.2d 122, 136, 139 Cal. Rptr. 97, 110-11 (1977) (en banc) (father who witnessed negligent delivery of stillborn son denied recovery because shock occurred when father told that fetus dead and not during delivery) and *Hathaway v. Superior Court*, 112 Cal. App. 3d 728, 736, 169 Cal. Rptr. 435, 440 (1980) (denying recovery to parents who watched son die by electrocution but who did not see him actually touch electrified cooler) and *Cohen v. McDonnell Douglas Corp.*, 389 Mass. 327, 341-42, 450 N.E.2d 581, 589-90 (1983) (mother denied recovery for emotional distress resulting from learning that her son was killed in a plane crash, because she had no sensory perception of the crash).

53. See *supra* note 52.

54. The *Molien* case discussed above involves such a liberalization. *Molien* was allowed to sue despite the fact that he was not at the scene of the misdiagnosis, because the court found he was a direct victim of the asserted negligence. 27 Cal. 3d at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834; accord *Campbell v. Animal Quarantine Station*, 63 Hawaii 557, 564, 632 P.2d 1066, 1071 (1981) (emotional distress suit allowed for wrongful death of dog); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 437 (Me. 1982) (liberal adoption in dicta, not on case facts); *Eyrich v. Dam*, 193 N.J. Super. 244, 255, 473 A.2d 539, 545 (App. Div. 1984) (neighbor who saw child killed was considered 'surrogate father' and allowed to sue); *General Motors Corp. v. Grizzle*, 642 S.W.2d 837, 844 (Tex. Ct. App. 1982) (mother who arrived at scene shortly after accident occurred allowed recovery).

In *Haught v. Maceluch*,⁵⁵ for example, plaintiff's daughter was injured during birth by the negligence of the obstetrician.⁵⁶ Plaintiff successfully sued for the mental suffering she incurred because of her daughter's condition, but the award was deleted by the district court because the mother did not meet one of the three bystander criteria: She was under anesthesia during the birth and therefore did not witness the accident.⁵⁷ The Fifth Circuit reversed, finding that Texas law would allow recovery.⁵⁸ The court found that the mother was not only at the scene of the accident, but that in some sense she was the scene; because the accident happened before parturition, the relationship could not have been closer.⁵⁹ The strength of these two factors was sufficient for recovery because the court found that Texas law did not require all three *Dillon* elements.⁶⁰ However, the court went on to find that although plaintiff did not perceive the injury, she did have an experiential perception⁶¹ of the accident because of the protracted and difficult labor experienced

55. 681 F.2d 291 (5th Cir. 1982).

56. *Id.* at 295.

57. *Id.* The mother sued for her daughter's impaired condition, medical expenses and future care, loss of the child's future earning capacity, and her mental suffering. She was awarded \$1,160,000 for medical expenses and \$175,000 for lost future earnings. The jury award of \$118,000 for mental distress was deleted.

58. *Id.* at 301-03. Because the Texas Supreme Court had not directly ruled on the issue, the circuit court found the most relevant case to be *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Civ. App. 1978), which allowed recovery to a girl who witnessed futile efforts to resuscitate her drowned sister even though it was not clear she had seen the accident. *See id.* at 489.

59. *Haught*, 681 F.2d at 299.

60. *Id.* at 300. The court relied heavily on a 1967 Texas Supreme Court case that denied recovery to a man who suffered a conversion reaction neurosis because of his fear for the safety of a person who had driven her car into his truck. *Id.* In that case the court said: "[W]e would be reluctant to hold at this time that any one of the enumerated factors would of and by itself be sufficient to require a judgment denying liability. . . . [Instead, we should deal with] cases of this type on a case by case basis." *Kaufman v. Miller*, 414 S.W.2d 164, 171 (Tex. 1967). Because all three were not required, the two strongly met factors were sufficient to establish foreseeability for the *Haught* court.

In *Garland v. Herrin*, 554 F. Supp. 308 (S.D.N.Y.), *rev'd*, 724 F.2d 16 (2d Cir. 1983), strength in two categories also convinced the district court to allow suit to the parents of a girl who was bludgeoned to death by her boyfriend in the parents' home. Suit was allowed despite the fact that there was no contemporaneous observance because they were asleep in the next room. *See id.* at 314. The invasion of the privacy of their home at night by the boyfriend, who took advantage of their sleep to carry out his murder just a few feet from where they were, when combined with the "incredible savagery" of the act, convinced the court to allow suit. *See id.* at 314. The boyfriend was not to be permitted to take advantage of his stealth to avoid suit. The Second Circuit reversed, however, finding that New York does not allow recovery for either reckless infliction of emotional distress or emotional distress to bystanders. *See* 724 F.2d at 19. Subsequent to the Second Circuit opinion the New York Court of Appeals allowed recovery to bystanders who were within the zone of danger. *See Bovsun v. Sanperi*, 61 N.Y.2d 219, 231-32, 461 N.E.2d 843, 848, 473 N.Y.S.2d 357, 362 (1984). *See supra* note 46.

61. The court found the crucial question to be whether she had experiential perception of the accident, as opposed to seeing the injury or learning of the accident after it happened. *Haught*, 681 F.2d at 300.

before she was anesthetized.⁶²

Many courts that have followed the *Dillon* precedent have adopted an additional screening device. These courts, like the *Molien* court, require the mental distress to be serious.⁶³ Serious mental distress is that which "a reasonable [person] normally constituted, would be unable to adequately cope with" in light of the circumstances of the event.⁶⁴ Thus, a standard reminiscent of the outrageousness requirement in intentional infliction cases is used to keep control over negligent emotional distress suits.⁶⁵ The especially sensitive person is still not to be accorded recovery for his or her pure mental distress.⁶⁶

B. Recent Developments in Other Distress Claims

The broader acceptance of emotional distress as a legitimate injury, and the willingness of courts to accept proof of it unrelated to physical injury or impact, is demonstrated by the awards for parasitic emotional distress which are being made in a wide variety of cases in which they were previously denied or only infrequently given. In *Simon v. Solomon*,⁶⁷ for example, a tenant was awarded \$35,000 for the emotional distress of having her apartment flooded with sewage thirty times.⁶⁸ This case marked the first time that a state supreme court upheld emotional distress damages against a landlord.⁶⁹ Emotional damages were also

62. Plaintiff was in labor for eleven hours. During that time she knew that something was wrong, that the doctor had been called several times but failed to appear, and that the doctor had "over-administer[ed] a powerful drug which caused distress to herself and to her child." *Id.* at 301.

The *Haught* case is in sharp contrast to a California case that denied recovery under similar circumstances. In *Justus v. Atchinson*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977), a father who witnessed the negligent delivery of his stillborn son was denied suit because his anxiety during the delivery did not become a disabling shock until he was told by the doctor that the fetus was dead. *Id.* at 582, 565 P.2d at 136, 139 Cal. Rptr. at 111. Because he did not know the exact injury, he lacked the appropriate contemporaneous observance. *Id.*, 565 P.2d at 136, 139 Cal. Rptr. at 111.

The *Haught* court was careful to point out that plaintiff's lack of knowledge of the actual existence or extent of her child's injuries was not conclusive. It found that foreseeability of emotional distress did not turn on such a single fact, which is often absent even in the typical 'uninjured bystander' case. 681 F.2d at 301.

63. See, e.g., *Leong v. Takasaki*, 55 Hawaii 398, 406, 520 P.2d 758, 764 (1974); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 437 (Me. 1982); *Payton v. Abbott Labs*, 386 Mass. 540, 547, 437 N.E.2d 171, 175-76 (1982); *Sinn v. Burd*, 486 Pa. 146, 151, 404 A.2d 672, 676 (1979).

64. *Rodrigues v. State*, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970).

65. Outrageousness set a standard against which the reasonableness as well as the authenticity of plaintiff's emotional distress could be judged. A reasonable person standard in negligence cases does the same thing.

66. See *Barnes v. Geiger*, 15 Mass. App. 365, 369, 446 N.E.2d 78, 81 (1983) (denying recovery to plaintiff who suffered emotional distress leading to her death because she mistakenly believed her child was an accident victim).

67. 385 Mass. 91, 431 N.E.2d 556 (1982).

68. *Id.* at 98, 431 N.E.2d at 561.

69. See *infra* note 114 for a discussion of emotional distress in nuisance cases.

awarded for the first time in a first amendent case⁷⁰ in *Abramson v. Anderson*.⁷¹ Abramson, a high school teacher, was awarded \$300 for the mental distress he suffered from being exposed to prayers in two school holiday assemblies.⁷²

Another area in which emotional distress claims have recently been recognized is in suits for the "wrongful birth" of a child. An increasing number of courts are allowing parents to recover against physicians for the mental anguish of having a healthy but unwanted child because sterilization procedures were negligently performed,⁷³ or for the anguish of having a defective child because genetic counseling was faulty or absent.⁷⁴ Although courts usually do not allow the child to recover for its own wrongful life⁷⁵ because of the difficulties in determining the value of being born with handicaps versus not being born at all,⁷⁶ they are no longer deterred from allowing parental recovery for the intangible emotional distress.⁷⁷

Courts are also increasingly interpreting statutes to encompass damages for emotional distress. The Fifth Circuit incorporated emotional damages into the Texas Deceptive Trade Practices Act in a case in which a sixty year old woman was traumatized by a burglar when her home security system failed.⁷⁸ The woman recovered for her past and future mental anguish which resulted from the defendant home security company's misleading representations about its system.⁷⁹ The Deceptive Trade Practices Act under which she sued provided for recovery of ac-

70. Nat'l. L.J., Feb. 8, 1982, at 3, col. 2.

71. See *id.* (discussing *Abramson v. Anderson*, No. 81-27W (D. Iowa 1982)).

72. The award was only for \$300 because the prayers, led by the school's principal at Easter and Christmas assemblies, were of short duration, and Mr. Abramson's distress was assumed to be similarly short-lived. *Id.*

73. See, e.g., *University of Ariz. Health Sciences Center v. Superior Court*, 667 P.2d 1294, 1296 (Ariz. 1983); *Berger v. Weber*, 411 Mich. 1, 3, 303 N.W.2d 424, 425 (1981); *Speck v. Finegold*, 497 Pa. 77, 80, 439 A.2d 110, 112 (1981).

74. See, e.g., *Strohmaier v. Associates in Obstetrics and Gynecology, P.C.*, 9 Fam. L. Rep. (BNA) 2470, 2470 (Mich. Ct. App. Dec. 20, 1982); *Berman v. Allan*, 80 N.J. 421, 425, 404 A.2d 208, 212 (1979).

75. A few courts have allowed such suits. See, e.g., *Tirpin v. Sortini*, 31 Cal. 3d 220, 226, 643 P.2d 954, 958, 182 Cal. Rptr. 337, 343 (1982); *Harberson v. Parke Davis, Inc.*, 98 Wash. 2d 460, 466, 656 P.2d 438, 442 (1983).

76. *Strohmaier v. Associates in Obstetrics and Gynecology, P.C.*, 9 Fam. L. Rep. (BNA) 2470, 2470 (Mich. Ct. App. Dec. 20, 1982).

77. Many other examples of such expansion to encompass emotional distress claims exist. See, e.g., *MacDonald v. Time, Inc.*, 554 F. Supp. 1053, 1054 (D.N.J. 1983) (family allowed to continue libel suit of deceased because they had suffered untold humiliation, anguish and mental suffering); *Nogueira v. Nogueira*, 388 Mass. 79, 84, 444 N.E.2d 940, 943 (1983) (husband allowed to sue wife for intentional infliction of emotional distress for acts committed four days after divorce granted); cf. *Butcher v. Superior Court*, 139 Cal. App. 3d 58, 64, 188 Cal. Rptr. 503, 507 (1983) (unmarried woman who lived with man as his wife for 12 years allowed to sue for loss of consortium).

78. See *Pope v. Rollins Protective Servs. Co.*, 703 F.2d 197, 199 (5th Cir. 1983).

79. See *id.* at 204. The elderly widow suffered a post-trauma stress syndrome as a result of the burglary. *Id.* at 200.

tual damages,⁸⁰ the court interpreted this to mean common law damages.⁸¹ Because the woman's emotional injury had manifested itself in physical symptoms,⁸² she met the Texas common law requirement for a mental anguish award and therefore could recover under the statute.⁸³

In *Young v. Bank of America National Trust & Savings Association*⁸⁴ the California Court of Appeal allowed a consumer to recover treble damages under the Song-Beverly Credit Card Act⁸⁵ for the emotional distress she suffered after the bank refused to remove charges from her account.⁸⁶ Plaintiff had loaned her BankAmericard Visa to a friend so that he could buy a one-way ticket to Hawaii.⁸⁷ He did not return the card, and two days after lending it she reported it stolen.⁸⁸ When the bank recovered the card four months later, there were \$2,200 in charges, which the bank continued to charge to plaintiff.⁸⁹ Despite the fact that the charges were disputed, the bank informed a credit reporting service that plaintiff's account was over its limit and past due.⁹⁰ She was subsequently denied credit.⁹¹ The court found that plaintiff's feelings of distress and frustration over several months justified the jury's award of \$50,000⁹² against the bank's "computer-hearted insensitivity."⁹³ Again, these cases present just a few examples of the emotional recovery expansion in the statutory area.⁹⁴ That expansion has even longer roots in the

80. See Tex. Bus. & Com. Code Ann. § 17.5 (Vernon 1968).

81. *Pope*, 703 F.2d at 202.

82. *Id.* at 200. Plaintiff's anxiety caused severe weakness in her legs, bordering on paralysis, which required hospitalization. *Id.*

83. *Id.* at 204.

84. 141 Cal. App. 3d 108, 190 Cal. Rptr. 122 (1983).

85. The Act, which is designed to impose fair business standards for the protection of consumers, limits a cardholder's liability to \$50.00 after it is reported stolen. Cal. Civ. Code § 1747.20 (West 1973) (repealed 1982).

86. *Young*, 141 Cal. App. 3d at 117, 190 Cal. Rptr. at 127.

87. *Id.* at 112, 190 Cal. Rptr. at 124. The court found that the friend's taking of the card was under false pretenses because he never intended to return it, and that therefore it was stolen for purposes of the Act. *Id.* at 114, 190 Cal. Rptr. at 125.

88. *Id.*, 190 Cal. Rptr. at 124. Plaintiff had loaned it to him on the condition that he only buy the ticket, that he call her every day and that he return the card when he returned. When he failed to call the next two days, she reported the card stolen. *Id.*, 190 Cal. Rptr. at 124.

89. *Id.* at 113, 190 Cal. Rptr. at 124.

90. *Id.*, 190 Cal. Rptr. at 124.

91. *Id.*, 190 Cal. Rptr. at 125.

92. *Id.* at 116, 190 Cal. Rptr. at 127. The \$50,000 award was automatically trebled under the Act. See Cal. Civ. Code §§ 1747.50, 1747.70 (West Supp. 1985).

93. 141 Cal. App. 3d at 116, 190 Cal. Rptr. at 127.

94. In *Johnson v. Department of Treasury*, 700 F.2d 971 (5th Cir. 1983), an Internal Revenue Service (IRS) revenue officer suffered emotional distress and accompanying physical injury when the Internal Security Division of the IRS investigated him for 2.5 years before interviewing him. *Id.* at 973. This was found to be a deliberate violation of the Privacy Act, 5 U.S.C. § 552a(e)(2) (1982), which requires to the greatest extent practicable that information be collected directly from the target of the investigation. The Privacy Act provides for "actual damages" for an agency's intentional or wilful failure to comply with its provisions. The Fifth Circuit found that "actual damages" includes damages for mental distress. 700 F.2d at 986; see Note, *Damages Under The Privacy Act of*

liberal interpretations of the state workers' compensation statutes.⁹⁵

Last term, however, the United States Supreme Court refused to allow emotional impact to play a determinative role in interpreting an environmental impact statute.⁹⁶ The decision reversed the ruling of the District of Columbia Circuit Court, which had held that under the National Environmental Policy Act (NEPA), which requires federal agencies to consider the environmental impact of major federal actions that have a significant effect on the human environment, the agency must consider the degree to which the proposed action affects public health and safety.⁹⁷ Plaintiffs⁹⁸ alleged that the start-up of the Three Mile Island reactor would create the risk of an accident, which caused them to fear that risk.⁹⁹ The circuit court found that the psychological effect of this fear, or the impact on the psychological health of nearby residents, was part of the public's health and safety, and had to be considered by the Nuclear Regulatory Commission before deciding whether to permit resumption of operation of the nuclear power plant.¹⁰⁰ Although mere dissatisfaction engendered by political disagreements or economic or social concerns were not to be considered, the inquiry was to include genuine post-traumatic fears that engendered fears of recurring catastrophe and

1975: *Compensation and Deterrence*, 52 Fordham L. Rev. 611, 630 (1984); see also *Jenty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1121 (5th Cir. 1974) (Fair Housing Act's provision for actual damages includes damages for emotional distress and humiliation); *Sanchez v. Schindler*, 651 S.W.2d 249, 253 (Tex. 1983) (parents allowed to sue for mental anguish and loss of society under Texas wrongful death statute); cf. *Nearing v. Weaver*, 295 Or. 702, 706, 670 P.2d 137, 140 (1983) (wife allowed to sue police officers who knowingly failed to enforce court order issued under Abuse Prevention Act).

95. See, e.g., *Martinez v. University of California*, 93 N.M. 455, 459, 601 P.2d 425, 428 (1979) (recovery allowed for phobia that continued exposure to radioactive material would result in death); *Schechter v. State Ins. Fund*, 6 N.Y.2d 506, 508, 160 N.E.2d 901, 904 (1959) (recovery for excessive job-related mental strain); *Hall v. State Workmen's Compensation Comm'r*, 303 S.E.2d 726, 730 (W. Va. 1983) (despite specific language in statute forbidding recovery for self-inflicted injury, widow permitted to bring workers' compensation claim if she could show that husband's suicide arose because he sustained an injury in the course of employment which resulted in serious mental disorder and that he would not have committed suicide without the disorder).

96. See *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 779 (1983).

97. 678 F.2d 222, 235 (1982).

98. Plaintiff, *People Against Nuclear Energy (PANE)*, was composed primarily of neighbors of the Three Mile Island power plant. 460 U.S. at 774.

99. *Id.* at 769. The Nuclear Regulatory Commission (NRC) had decided to allow reactor number 1, which was not damaged in the Three Mile Island accident on March 28, 1979, to reopen. *Id.* It had been in cold shutdown since the accident. Metropolitan Edison Company, a subsidiary of General Public Utilities Corporation, the owners, sought start-up permission from the NRC. In arriving at its start-up decision, the NRC had consistently refused to consider neighboring residents' claims that psychological distress would accompany start-up. *Id.*

100. "The government must not proceed to make decisions that might have a momentous effect on the psychological health and community well-being of its citizens without first giving careful, responsible consideration to the consequences its actions might have." 678 F.2d at 235.

that were accompanied by physical effects.¹⁰¹

The Supreme Court, in an unanimous opinion, held that the Commission was only required to assess the impact on the physical environment.¹⁰² Although recognizing that psychological health could be considered under NEPA, it found that such consideration was not warranted in this case because there was too tenuous a connection between the change in the environment and the alleged psychological harm.¹⁰³ In rejecting the emotional impact claim, the Court cited reasons reminiscent of earlier courts' objections to emotional distress claims: the fear of fraudulent or frivolous claims and the potential impact on decisionmaking resources if such considerations were allowed.¹⁰⁴ The Court warned that if the circuit court's ruling were upheld, agencies could be forced "to expend considerable resources developing psychiatric expertise"¹⁰⁵ and that their resources may be spread so thin the agency could not do its job.¹⁰⁶ In addition, it would be difficult for the agency to differentiate between genuine psychological claims and other objections based on political differences.¹⁰⁷ Thus, with somewhat tortured logic the Court found that although NEPA "was enacted to require agencies to assess the future effects of future actions,"¹⁰⁸ the effects of the risk of accident could only be considered in regard to the physical environment.¹⁰⁹

The Court recognized that a risk, which "is a pervasive element of

101. In allowing consideration of emotional impact, the court echoed the containment concerns of other courts dealing with emotional distress suits, and limited consideration to genuine (reasonable, serious) fears that manifested themselves by physical effects. *See id.* at 234. In addition, the court pointed out that reactor number 2 (TMI-2) was a unique case because considerable stress had already been created by the accident at that reactor. Therefore the considerations used for TMI-2 would not necessarily be applicable to other nuclear regulatory decisions. *Id.* at 229-30.

102. 460 U.S. at 774.

103. *Id.* The Court concluded that two factors lay between the change in the environment (the start-up of the reactor) and the emotional distress: the risk of an accident that would not affect the physical environment, and perception of the risk by PANE members. These two factors made the connection too tenuous to be considered. *Id.* at 775.

104. 460 U.S. at 776. *See supra* notes 22-30 and accompanying text.

105. 460 U.S. at 776.

106. *Id.*

107. *Id.*

108. 460 U.S. at 779. The business community supported the NRC and Metropolitan Edison in its appeal. Wall St. J., Apr. 20, 1983, at 4, col. 2. The United States Chamber of Commerce's National Litigation Center said that requiring psychological studies would provide a very effective means for delaying federal action. *Id.* This view was also expressed by the National Association of Manufacturers. *Id.*

The Court also ruled against political objections to nuclear use in *Baltimore Gas & Elec. Co. v. National Resources Defense Council*, 103 S. Ct. 2246 (1983). It upheld the NRC decision that licensing boards, when considering the environmental impact of a nuclear plant under § 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(c) (1982), should assume that permanent storage of nuclear waste would have no significant impact on the environment. *See* 103 S. Ct. at 2251, 2258. The decision means that the environmental effects of nuclear waste do not have to be considered each time a new plant is given clearance.

109. 460 U.S. at 778.

modern life"¹¹⁰ often created by modern technology, can generate stress which in turn can cause serious health damage.¹¹¹ Although stating that the balance to be struck between the risks of technology and its gain is an important policy issue, it was not one the Court chose to tackle in this politically charged context.¹¹² Allowing anxiety about future risks in the context of agency decisionmaking apparently was viewed by the Court as opening a Pandora's box of emotional impact claims.¹¹³

In refusing to recognize fear of future risks in the environmental context, the Court overlooked a long line of precedent that allowed fear of risks to be considered in civil damage suits.¹¹⁴ The result, however, does coincide with several recent decisions by lower courts in fear of disease cases. Unlike emotional distress damages in general, recovery for distress caused by the fear of disease has been approached with extreme caution in recent toxic tort cases.

110. *Id.* at 775.

111. *Id.*

112. *Id.* at 776.

113. The Court specifically referred to the relatives of people living near Three Mile Island, whose fears may cause them to suffer psychological health problems with physical manifestations if the reactor were put into operation. Although these fears would be caused by a change in the environment, they would be too attenuated to merit recovery. *Id.* at 774.

The Court also recognized that psychological health damage to residents could actually occur. "Nonetheless, it is difficult for us to see the differences between someone who dislikes a government decision so much that he suffers anxiety and stress, someone who fears the effects of that decision so much that he suffers similar anxiety and stress, and someone who suffers anxiety and stress that 'flow directly' . . . from the risks associated with the same decision." *Id.* at 777-78.

114. Fear of consequences in an environmentally related context has long been recognized in the law of nuisance. Because nuisance involves interference in the use and enjoyment of land, emotional damages are easily included within this tort. *See* W. Prosser, *supra* note 8, § 87, at 574. For example, fear of the spread of disease, if it is common within the community, is cognizable even though the fear is without scientific foundation. *Id.* at 579. Emotional damages, which have generally been tied to a physical invasion of the property, *see* Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. Legal Stud. 49, 55 (1979); *see, e.g.,* Moore v. Allied Chem. Corp., 48 F. Supp. 364, 366 (E.D. Va. 1979) (emotional distress caused by sickness of plaintiff's former employees due to toxic fumes and dust from kepone); Britt v. Superior Court, 20 Cal. 3d 844, 847, 574 P.2d 766, 768, 143 Cal. Rptr. 695, 697 (1978) (emotional distress caused by noise, vibrations, air pollution and smoke from new runway), are increasingly being sought for environmental pollution, *see* Lunda v. Matthews, 46 Or. App. 701, 704, 613 P.2d 63, 66 (1980) (landowners allowed to sue for fear they would develop health problems from breathing dust-laden air).

For a different line of cases see, for example, Dempsey v. Hartley, 94 F. Supp. 918, 920 (D. Pa. 1951) (fear of breast cancer from blow to chest); Serio v. American Brewing Co., 141 La. 290, 292, 74 So. 998, 999 (1917) (fear of rabies from dogbite); Gamer v. Winchester, 110 S.W.2d 1190, 1193 (Tex. Civ. App. 1937) (fear of lockjaw and blood poisoning from dogbite).

The Court also ignored the precedent of Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972), which held that an expectation of an increase in crime in the area resulting from the construction of a jail was part of the urban environment impact which had to be considered.

II. DAMAGES FOR FEAR OF DISEASE

Fear of disease that arises from an injury caused by defendant's wrongful act was traditionally considered to be part of or akin to pain and suffering damages commonly awarded. By the 1920's several states had recognized parasitic damages for fear of disease or injury arising from, but different than, the original bodily injury.¹¹⁵ The overwhelming majority of these early cases involved fears that were necessarily short-lived. The most prevalent claim, for example, involved fear of hydrophobia or rabies from dog bites.¹¹⁶ Because the period during which rabies can develop after being bitten is no longer than a year, plaintiff's fears about its development could not realistically last longer than this period.¹¹⁷ As in other emotional distress cases, courts denied recovery to plaintiffs whose fears of future disease were not grounded on sound probability; therefore, fears lasting longer than the incubation period were not compensated.¹¹⁸

Other common claims were for fear of lockjaw, blood poisoning and miscarriage.¹¹⁹ Realistic fears of these diseases would also be of limited duration.¹²⁰ Although some of the later cases were based on fears of

115. See, e.g., *Jones v. United R.R.*, 54 Cal. App. 744, 749, 202 P. 919, 922-23 (1921); *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 123, 52 S.E. 152, 153 (1905); *Serio v. American Brewing Co.*, 141 La. 290, 294, 74 So. 998, 1001 (1917); *Buck v. Brady*, 110 Md. 568, 569, 73 A. 277, 279 (1909); *Butts v. National Exch. Bank*, 99 Mo. App. 168, 173, 72 S.W. 1083, 1084 (1903); *Walker v. Boston & Me. R.R.*, 71 N.H. 251, 252, 51 A. 918, 919 (1902); *Alley v. Charlotte Pipe & Foundry Co.*, 159 N.C. 327, 331, 74 S.E. 885, 886 (1912); *Heintz v. Caldwell*, 16 Ohio C.C. 630, 632 (1898); *Ayers v. Macoughtry*, 29 Okla. 399, 404-05, 117 P. 1088, 1090 (1911); *Southern Kan. Ry. v. McSwain*, 55 Tex. Civ. App. 317, 318, 118 S.W. 874, 875 (1909); *Godeau v. Blood*, 52 Vt. 251, 254-55 (1880); *Elliott v. Arrowsmith*, 149 Wash. 631, 633, 272 P. 32, 32-33 (1928).

116. See, e.g., *Friedman v. McGowan*, 17 Del. 436, 437, 42 A. 723, 724 (1898); *Serio v. American Brewing Co.*, 141 La. 290, 294, 74 So. 998, 1001 (1917); *Buck v. Brady*, 110 Md. 568, 569, 73 A. 277, 279 (1909); *Heintz v. Caldwell*, 16 Ohio C.C. 630, 632 (1898); *Godeau v. Blood*, 52 Vt. 251, 252 (1880).

117. Although the incubation period for rabies ranges from ten days to more than a year, the average is 30 to 50 days. Several bites, or a bite near the head, accelerate the time. *Merck Manual of Diagnosis and Therapy* 69 (D. Hovey 12th ed. 1972); see *Serio v. American Brewing Co.*, 141 La. 290, 294, 74 So. 998, 1001 (1917) (fear of hydrophobia reasonable until 100 days after the dogbite).

118. See, e.g., *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 122, 52 S.E. 152, 153 (1905) (After glass is removed from plaintiff's stomach, and he is "restored to his former condition of health and vigor, his fears, so far as a damage suit are concerned, should cease."); *Elliott v. Arrowsmith*, 149 Wash. 631, 633, 272 P. 32, 32-33 (1928) (recovery appropriate for mental anguish caused by reasonable dread of future illness or death as a result of injury, but not for such dread as may be vague or fanciful or that may continue after the conditions that might result in such future illness or death have been removed); cf. *Pandjiris v. Oliver Cadillac Co.*, 339 Mo. 711, 724-25, 98 S.W.2d 969, 977 (1936) (fear of paralysis or epilepsy developing from head injury caused by defendant not compensable because no evidence that those conditions are likely to develop).

119. See, e.g., *Butts v. Nat'l Exch. Bank*, 99 Mo. App. 168, 173, 72 S.W. 1083, 1084 (1903); *Heintz v. Caldwell*, 16 Ohio C.C. 630, 632 (1898); *Southern Kan. Ry. v. McSwain*, 55 Tex. Civ. App. 317, 318, 118 S.W. 874, 875 (1909).

120. See *Gamer v. Winchester*, 110 S.W.2d 1190, 1193 (Tex. Civ. App. 1937) (fear of rabies, lockjaw and blood poisoning from dogbite).

different diseases or injuries, most of them also contained inherent time limitations.¹²¹ The courts were not particularly concerned with control of this form of emotional damage. The fear arose from physical injury, which was easily verified and, the plaintiff was not compensated for it unless the fear was deemed to be founded on sound probability and of limited duration. Thus, worry about fraudulent and spurious claims and a flood of litigation was not an important issue.

This is in sharp contrast to the law regarding claims for emotional distress unaccompanied by serious physical injury, which was developing at the same time. As discussed previously,¹²² concern about fraudulent and frivolous suits was pre-eminent, and recovery could be had only in the most egregious or clear cut cases.

Although a few early decisions recognized the right to recover for fear of an injury that did not contain inherent time limitations,¹²³ it was not until the middle of this century that suits for fear of diseases such as cancer, which have no specific development or termination date, became more commonplace.¹²⁴ One of the earliest cases to allow recovery for a fear of an "unlimited" disease was the 1912 case of *Alley v. Charlotte Pipe & Foundry Co.*¹²⁵ Plaintiff Alley was seriously burned when a negligently made core exploded.¹²⁶ A physician was allowed to testify that the resulting wound was "liable" to lead to an "eating cancer" or sarcoma.¹²⁷ The court equated "liable" with "probable," and held that the testimony was adequate to corroborate plaintiff's mental suffering.¹²⁸ It found that the probability of cancer "must necessarily have a most depressing ef-

121. A fear of paralysis, for example, would presumably abate with time as the plaintiff realized that it was not happening or regained use of the injured area. See *Smith v. Boston & Me. R.R.*, 87 N.H. 246, 259, 177 A. 729, 738-39 (1935); *Dulaney Inv. Co. v. Wood*, 142 S.W.2d 379, 384 (Tex. Civ. App. 1940); cf. *Halloran v. New Eng. Tel. & Tel. Co.*, 95 Vt. 273, 274, 115 A. 143, 144 (1921) (plaintiff allowed to recover for distress caused by knowledge that accident had damaged her heart, thereby preventing her from having operation for a pre-existing malignancy). But cf. *Walker v. Boston & Me. R.R.*, 71 N.H. 251, 252, 51 A. 918, 919 (1902) (plaintiff recovered for apprehension that she would become insane).

122. See *supra* notes 22-30 and accompanying text.

123. See, e.g., *Walker v. Boston & Me. R.R.*, 71 N.H. 251, 252, 51 A. 918, 919 (1902) (fear of insanity); *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 479, 161 N.E. 557, 560 (1928) (fear of consequences of needle in body); cf. *Gray v. Washington Water Power Co.*, 30 Wash. 665, 673-75, 71 P. 206, 209 (1903) (anxiety about pity and abhorrence others likely to feel towards plaintiff because of disfigurement).

124. See, e.g., *Dempsey v. Hartley*, 94 F. Supp. 918, 920-21 (E.D. Pa. 1951) (fear of breast cancer); *Figlar v. Gordon*, 133 Conn. 577, 585, 53 A.2d 645, 648 (1947) (fear of epilepsy); *Flood v. Smith*, 126 Conn. 644, 646-47, 13 A.2d 677, 678-79 (1940) (plaintiff feared cancer might recur when hit in area where breast had been removed); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 22, 152 N.E.2d 249, 252-53, 176 N.Y.S.2d 996, 1000 (1958) (cancerphobia); *Kimbell v. Noel*, 228 S.W.2d 980, 982-83 (Tex. Civ. App. 1950) (fear of breast cancer).

125. 159 N.C. 327, 74 S.E. 885 (1912).

126. *Id.* at 329, 74 S.E. at 885-86.

127. *Id.* at 330, 74 S.E. at 886.

128. *Id.* at 330-31, 74 S.E. at 886.

fect" because, "[l]ike the sword of Damocles, [plaintiff] knows not when it will fall."¹²⁹ The practice of having a physician's testimony corroborate the possibility of development of the feared disease to prove the reasonableness of the fear was followed in later cases.¹³⁰ Fear of unlikely developments, especially in this kind of case, was not compensated.¹³¹

Although the *Alley* court expressed some sympathy for Alley's apprehensions, thirty years elapsed before appellate courts again dealt with a similar issue.¹³² The 1958 case of *Ferrara v. Galluchio*,¹³³ which is often cited as a landmark decision,¹³⁴ also involved a wound that a doctor advised might become cancerous.¹³⁵ In this suit against her physician for x-ray burns, plaintiff was allowed to testify that her dermatologist had advised her to get six-month check-ups for cancer.¹³⁶ This advice caused plaintiff to develop a neurosis about cancer.¹³⁷ The testimony regarding the dermatologist's advice legitimized plaintiff's fears as realistic, and she recovered for them.¹³⁸ This case, as well as other similar cases decided around this time, have in common with the earlier fear of disease cases the fact that the feared disease would arise from an existing injury inflicted by defendant.¹³⁹ No recovery was granted for fear of disease unaccompanied by pre-existing injury.¹⁴⁰

Fear of disease cases since *Ferrara* have also allowed recovery so long as there was a pre-existing injury.¹⁴¹ The existing injury, rather than the degree of probability that the disease may actually develop, is determinative. Thus, in *Heider v. Employers Mutual Liability Insurance Co.*,¹⁴² the plaintiff, who received a cerebral concussion in a car accident, recovered for his fear of developing epilepsy even though there was only a two to five percent chance of its developing.¹⁴³ The plaintiff in *Lorenc v.*

129. *Id.* at 331, 74 S.E. at 886.

130. See *infra* notes 160-68.

131. See *infra* note 148.

132. See *supra* note 124.

133. 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

134. See 69 A.B.A. J. 725, 726 (1983).

135. *Ferrara*, 5 N.Y.2d at 19, 152 N.E.2d at 251, 176 N.Y.S.2d at 997.

136. *Id.*, 152 N.E.2d at 251-52, 176 N.Y.S.2d at 998.

137. *Id.*, 152 N.E.2d at 251, 176 N.Y.S.2d at 998.

138. *Id.* at 21-22, 152 N.E.2d at 252-53, 176 N.Y.S.2d at 999-1000. The decision has been criticized because it established precedent for suits against physicians by patients whose fears were caused by complete disclosure of possible effects. See McCoid, *The Care Required of Medical Practitioners*, 12 Vand. L. Rev. 549, 590-91 (1959). Such suits, however, have failed to materialize. In fact, just the opposite has occurred. Doctors are increasingly being sued for failing to give patients sufficient information. See, e.g., *Shetter v. Rochelle*, 2 Ariz. App. 358, 373, 409 P.2d 74, 86 (1965), *modified*, 2 Ariz. App. 607, 411 P.2d 45 (1966); *Trogon v. Fruchtmann*, 58 Wis. 2d 569, 599-604, 207 N.W.2d 297, 313-15 (1973).

139. See *supra* notes 116-21 and accompanying text.

140. See *infra* note 148.

141. See *infra* notes 142-48 and accompanying text.

142. 231 So. 2d 438 (La. Ct. App. 1970).

143. *Id.* at 441-42.

*Chemirad Corp.*¹⁴⁴ recovered for his fear of developing cancer from a chemical burn on his hand despite the fact that cancer was highly unlikely and preventable.¹⁴⁵ The plaintiff, a doctor, refused a skin graft that would have cured the hand ulceration from which he feared cancer would arise.¹⁴⁶ In addition, the plaintiff had had only a single exposure to the chemical; repeated exposure was necessary to cause cancer in rats.¹⁴⁷ As long as there is some reasonable medical basis for the fears, and a pre-existing injury, recovery is allowed.¹⁴⁸ In recent toxic tort cases, in which the typical pre-existing injury is arguably absent, courts have been reluctant to allow recovery despite the clear medical probability that the disease could develop.¹⁴⁹

III. FEAR OF DISEASE FROM TOXIC SUBSTANCES

The recent product liability suits based on fear of disease differ from the earlier cases in several ways. One of the most important differences is that there is generally no diagnosable pre-existing injury from which the feared disease will come. The lack of such injury distinguishes these cases in two regards: Damages for the fears are not parasitic, and proof of injury is likely to be considered more speculative. Because of these differences courts are looking to traditional emotional distress limitations to determine the viability of claims and proceeding very cautiously. Toxic tort claimants, however, should be able to recover even under the more restrictive emotional distress requirements.

A. *Negligent Infliction in Toxic Tort Cases*

The original screening device in negligent infliction of emotional distress was the requirement that plaintiff suffer some contemporaneous physical injury or impact.¹⁵⁰ As was discussed above, physical manifes-

144. 37 N.J. 56, 179 A.2d 401 (1962).

145. *Id.* at 74, 80-81, 179 A.2d at 410, 414.

146. *Id.* at 79, 179 A.2d at 413.

147. *Id.*, 179 A.2d at 413. The court stated:

Although Dr. Lorenc's testimony as to the reasons for his failure to accept a skin graft is not very impressive, and although his reasons reflect adversely upon his assertion of fear of malignancy, and even upon the present need for such surgery, . . . the circumstances in their totality warranted submi[ssion] to the jury.

Id. at 79, 179 A.2d at 413.

148. *See, e.g.*, *Birchhill v. Todd*, 20 Mich. App. 356, 366-67, 174 N.W.2d 56, 61 (1969) (no recovery for anxiety about a fictitious, vague, fanciful or imagined consequence); *Baylor v. Tyrrell*, 177 Neb. 812, 825-26, 131 N.W.2d 393, 402 (1964) (reasonable certainty that anxiety resulted from injury required); *cf. Howard v. Mt. Sinai Hosp., Inc.*, 63 Wis. 2d 515, 519, 217 N.W.2d 383, 385 (1974) (Catheter broke in plaintiff's shoulder leaving two pieces that could not be found. Although it was uncontested that he genuinely feared cancer, the possibility of it developing was so remote, and so out of proportion to the culpability that recovery was denied on public policy grounds.).

149. *See infra* notes 169-78, 197-201.

150. *See, e.g.*, *Payton v. Abbott Labs*, 386 Mass. 540, 548, 437 N.E.2d 171, 176 (1982); *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 290, 47 N.E. 88, 89 (1897).

tation of the emotional distress was substituted for the impact rule when that rule was perceived to be too limiting.¹⁵¹ Some courts have further liberalized recovery by requiring only that the emotional distress be serious.¹⁵² Ironically, toxic tort plaintiffs, who can meet the physical injury/impact requirement, are generally barred because they do not meet the more liberal screening devices.

1. Impact in Toxic Tort Cases

Toxic tort plaintiffs have a fear of disease because they have in some manner come in physical contact with a harmful substance.¹⁵³ Plaintiffs come in contact with that harmful substance due to defendant's alleged negligence, and that impact leads to their emotional distress. It is foreseeable that negligently causing someone to come into contact with a harmful substance, which can cause serious or deadly disease, could lead to emotional distress. Thus toxic tort claimants should be able to recover under the traditional impact rule.¹⁵⁴

Long before the physical manifestation rule became common, impact had become quite easy to show as courts¹⁵⁵ joined legal commentators¹⁵⁶ in the view that this screening device was not crucial. Thus a man who inhaled oily and smoky dust showed sufficient impact without any physical damage to bring suit for his mental anxiety,¹⁵⁷ and a plaintiff who felt a shock wave from an explosion but was not injured by it likewise showed sufficient impact.¹⁵⁸ The ingestion of a harmful substance is certainly sufficient impact under this more relaxed standard.

Adulterated food cases provide a close analogy. Plaintiffs who ingest a noxious substance in adulterated food but who suffer no physical injury find no barriers to bringing suit for emotional distress.¹⁵⁹ A few courts

151. See *supra* notes 34-35 and accompanying text.

152. See *supra* notes 36-38 and accompanying text.

153. Generally, plaintiffs have ingested a harmful substance in their drinking water, see, e.g., *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 564-65, 461 A.2d 184, 186 (Law Div. 1983); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 434 (Tenn. 1982), or in drugs, see, e.g., *Mink v. University of Chicago*, 460 F. Supp. 713, 715 (N.D. Ill. 1978); *Payton v. Abbott Labs*, 386 Mass. 540, 544, 437 N.E.2d 171, 173 (1982), or they have inhaled it. See *infra* notes 264-65.

154. See *Plummer v. United States*, 580 F.2d 72, 76 (3d Cir. 1978) (impact of tubercle bacilli entering body sufficient to sustain claim for negligent infliction of emotional distress under Federal Tort Claims Act, 28 U.S.C. § 1346 (1982)).

155. See, e.g., *Morton v. Stack*, 122 Ohio St. 115, 116, 170 N.E. 869, 869 (1930) (per curiam); *Potere v. City of Philadelphia*, 380 Pa. 581, 589, 112 A.2d 100, 104 (1955), *overruled*, *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970).

156. See, e.g., *W. Prosser, supra* note 8, §54, at 330-32; Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497, 504 (1922).

157. See *Sam Finley, Inc. v. Russell*, 75 Ga. App. 112, 117, 42 S.E.2d 452, 456 (1947).

158. See *Kasey v. Suburban Gas Heat of Kennewick, Inc.*, 60 Wash. 2d 468, 476, 374 P.2d 549, 553-54 (1962).

159. See, e.g., *Greer v. Ouachita Coca-Cola Bottling Co.*, [1982-83 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 9521, at 23,296 (La. Ct. App. Sept. 20, 1982) (woman who did not suffer any permanent injury, disability, or extreme pain and suffering awarded \$2,500 for drinking from a bottle that contained dirt and glass slivers); *Paul v. Hardware Mut.*

have recognized that ingestion of a toxic substance may be sufficient simultaneous impact or injury to sustain an award for fear of disease. They have taken different approaches, however, in arriving at this conclusion.

An example of one approach is the toxic tort case of *Ayers v. Township of Jackson*.¹⁶⁰ In *Ayers*, residents of the New Jersey township sued for cancerphobia arising from their enhanced risk of cancer due to ingestion of toxic waste that leaked from the municipal landfill into their well water.¹⁶¹ Plaintiffs alleged that the ingestion caused a negligible change to their bodies, which constituted sufficient impact or injury to sustain their cause of action.¹⁶² The New Jersey court, citing an early impact case in which a woman was allowed to sue when some debris hit her in the neck and dust got into her eyes,¹⁶³ denied defendant's motion for summary judgment because further findings as to the nature of the impact were necessary.¹⁶⁴ The court sought to determine whether the ingestion of the chemicals caused a change in plaintiffs' bodies, even though currently negligible, and thereby caused plaintiffs physical injury.¹⁶⁵ The question is presumably one of degree, because all chemicals that enter the body cause some change. Presumably, a purely transitory change with no discernible effects would not be sufficient, or the question would not have been put to the jury. A slight change with potential for future harm may be.¹⁶⁶ A jury ultimately found in favor of *Ayers* plaintiffs.¹⁶⁷ If such a change is adequate, most toxic tort claimants can show

Ins. Co., 254 So. 2d 690, 691 (La. Ct. App. 1971) (plaintiff's consumption of contaminated beverage establishes prima facie case against manufacturer); Coca-Cola Bottling Co. v. White, 545 S.W.2d 279, 280 (Tex. Civ. App. 1976) (plaintiffs awarded \$2500 for mental anguish despite lack of medical proof that illness resulted from consumption of soft drink containing a mouse).

160. 189 N.J. Super. 561, 461 A.2d 184 (Law Div. 1983).

161. *Id.* at 564-65, 461 A.2d at 186.

162. *Id.* at 671, 461 A.2d at 189. Plaintiffs had two alternative theories for their cancerphobia claim: that it was a cognizable negligence claim without the need to show physical injury from the emotional distress, or that the ingestion was sufficient injury or impact to sustain the claim. On the former claim, the court found that plaintiffs would have to show physical injury from their emotional distress because otherwise the task of controlling such contamination cases "would become prodigious." *Id.*, 461 A.2d at 189.

163. *Porter v. Delaware, L. & W. R.R. Co.*, 73 N.J.L. 405, 406, 63 A. 860, 860 (1906).

164. *Ayers*, 189 N.J. Super. at 572, 461 A.2d at 189. The court found that unlike the case of the plaintiff in *Porter*, there was no "immediate and direct physical impact and injury" to these plaintiffs. Therefore, it remanded the case to the trial court to decide "whether there was an 'impact' sufficient to support a claim of emotional distress." *Id.* at 571, 461 A.2d at 189.

165. *Id.* at 571, 461 A.2d at 189.

166. *See Plummer v. United States*, 580 F.2d 72, 76 (3d Cir. 1978) ("Admittedly, the 'impact' of a tubercle bacillus does not entail the palpable physical shock of a highway collision. But . . . the effects of a concededly minute tubercle bacillus are potentially no less lethal . . ." Tests had shown that the prisoners had the bacilli, but they did not get the disease.)

167. The jury awarded *Ayers* plaintiffs \$18 million: \$8 million for monitoring and \$10 million to compensate for emotional distress, decline in the quality of life and the expense of hooking up to an uncontaminated water supply. Nat'l L.J., Jan. 9, 1984, at 7, col. 1.

sufficient injury to support an emotional distress claim.¹⁶⁸

Not all courts, however, have taken such a liberal approach to impact. The court in *Payton v. Abbott Labs*¹⁶⁹ stated that impact can be a sufficient basis for a fear of disease case as long as the emotional distress is a reasonably foreseeable outcome of the impact.¹⁷⁰ It is foreseeable that the ingestion of a toxic substance would reasonably cause an individual to fear the possible adverse consequences. Nevertheless, the court did not discuss whether plaintiffs—women who were exposed to the drug diethylstilbestrol (DES) in utero—had experienced impact.¹⁷¹ This may be because the court was answering a certified question that assumed that plaintiffs had suffered no physical harm.¹⁷² The Massachusetts court merely held that plaintiffs must suffer physical harm which “must either cause or be caused by the emotional distress alleged,” and that the harm “must be manifested by objective symptomatology and substantiated by expert medical testimony.”¹⁷³

In a later DES case, the United States District Court for the District of

168. The Tennessee Supreme Court in *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982), allowed recovery to a family for their mental anguish caused by learning that they had ingested chlordane, a possible carcinogen, due to the defendant's negligence. *See id.* at 432. The family suffered no physical injury from the ingestion and the mental anxiety did not produce physical symptoms. Nevertheless, the court, citing deleterious-food-and-beverage decisions as well as early telegraph and mishandling-of-body cases, allowed recovery. *See id.* at 433-34. Ingestion of the toxic substance was found to be sufficient physical injury to support the award for their anxiety about the possible harmful effects to their health. *See id.*

The court cited with approval the lower court's jury instructions, which stated:

“If [the plaintiffs] ingested any amount of the toxic substance, it is the judgment of the Court that that is at least a technical physical injury. But it is not an injury from which they are entitled to substantial damages under the facts of this case, that is from a physical injury. But, where there is any physical injury at all—any attendant mental pain and suffering is compensable.”

Id. at 434. (alteration in original).

A similar ruling was made by the Third Circuit in a nontoxic tort context. The court found that prisoners who allegedly were negligently exposed to the active tuberculosis of a fellow prisoner had sustained impact when the tubercle bacilli infected their bodies, and that they could therefore sue for their anxiety about getting the disease. *See Plummer v. United States*, 580 F.2d 72, 76 (3d Cir. 1978).

169. 386 Mass. 540, 437 N.E.2d 171 (1982).

170. *Id.* at 553, 437 N.E.2d at 180-81.

171. The court does conclude that if plaintiffs can prove that they were injured by defendant, they can sue even though the injury occurred in utero. *Id.*, 437 N.E.2d at 180-81. Thus they implicitly conclude that whatever impact occurred, it occurred in utero.

172. *Id.* at 544, 437 N.E.2d at 174.

173. *Id.* at 552, 437 N.E.2d at 181. Causing plaintiffs to ingest the drug diethylstilbestrol (DES) was sufficient impact or touching to support a claim for emotional distress resulting from battery in *Mink v. University of Chicago*, 460 F. Supp. 713 (N.D. Ill. 1978). *Mink* plaintiffs were given DES allegedly without their knowledge or consent, as part of a medical experiment conducted by the University of Chicago and Eli Lilly & Co. *Id.* at 716. In a footnote the court indicated that if the emotional distress claims had been based on negligence rather than battery, they would have been dismissed because no physical damage was alleged. *See id.* at 716 n.2. Plaintiffs alleged that they suffered reproductive tract and other abnormalities, *id.* at 715, but the court found the allegation

Rhode Island implied that ingestion was not sufficient impact and that therefore a physical manifestation of the emotional harm was necessary. The plaintiffs in *Plummer v. Abbott Laboratories*,¹⁷⁴ who allegedly suffered emotional distress due to their increased risk of developing cancer,¹⁷⁵ based their claims on negligent infliction but did not allege physical manifestations of the distress.¹⁷⁶ The court found that, in the interest of control and screening of false claims, Rhode Island would not allow recovery when "both impact and physical manifestations of the asserted emotional harm are absent."¹⁷⁷ The court, without discussing it, assumed that ingestion was not sufficient impact.¹⁷⁸ This focus on physical injury rather than on impact or emotional harm is likely to continue as courts become increasingly aware of the need to control toxic tort

insufficient because there was no indication that any of the plaintiffs had actually suffered any of the abnormalities, *see id.* at 719.

At the time of *Mink*, Illinois had not yet rejected the requirement of physical impact to sustain an action for negligent infliction, *see Rickey v. Chicago Transit Auth.*, 101 Ill. App. 3d 439, 440-43, 428 N.E.2d 596, 597-99 (1981) (rejecting the impact rule), therefore physical damage need not have been determinative. However, although not discussing the point, the court did imply that ingestion alone was not sufficient under the *Mink* facts. *See id.* Apparently the fact that the fear of disease claim was parasitic to the intentional tort of battery, as opposed to standing on its own as a negligence claim, was determinative.

Of course, the great majority of toxic tort plaintiffs will not be able to rely on such an intentional tort theory. Most people exposed to products that cause delayed-manifestation injuries know that they are being exposed to the product; they are just unaware of its harmful properties. Such people could posit a cause of action based on lack of informed consent and rely on the medical malpractice cases for precedent. The *Mink* court, however, found such cases to be negligence cases; battery was only for those cases in which there was no consent. *Id.* at 716-17. Other courts are likely to reach this same conclusion. *See, e.g.,* Cobbs v. Grant, 8 Cal. 3d 229, 233, 502 P.2d 1, 3, 104 Cal. Rptr. 505, 508 (1972); Ayers v. Township of Jackson, 189 N.J. Super. 561, 572, 461 A.2d 184, 189 (Law Div. 1983); Trogon v. Fruchtmann, 58 Wis. 2d 569, 570, 207 N.W.2d 297, 299 (1973).

Property owners who are exposed to toxic substances, with or without their knowledge, are increasingly relying on the torts of trespass or nuisance, as well as negligence. *See supra* note 114. Plaintiffs in *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 461 A.2d 184 (Law Div. 1983), for example, who unknowingly ingested contaminated water, based their claims on trespass and nuisance as well as battery, strict liability and negligence. The court discussed plaintiffs' fear of disease claims only in terms of negligence. However, the court also found that there was no merit in plaintiffs' claims of inverse condemnation under 42 U.S.C. § 1983 (1982), or a violation of their due process rights under the fourteenth amendment. 189 N.J. Super. at 660-62, 461 A.2d at 191-92.

174. 568 F. Supp. 920 (D.R.I. 1983).

175. *Id.* at 927.

176. *Id.* at 921.

177. *Id.* at 927.

178. *See id.* In *Payton v. Abbott Labs*, 386 Mass. 540, 552, 437 N.E.2d 171, 180 (1982), a DES case brought by daughters who may develop cancer, the court recognized that impact would be a sufficient basis for suit because it is a sufficient indicator of foreseeability. It apparently assumed, without discussion, that the daughters had suffered no impact even though the drug had obviously come in contact with their bodies while they were in utero. *See supra* notes 138-41 and accompanying text. A large number of daughters could also show some physical damage by showing that they had developed adenosis. *See infra* note 267.

cases. It will result in the denial of recovery to many toxic tort claimants because they typically do not allege or show physical injury.

2. Physical Manifestation in Toxic Tort Cases

The great majority of states, as they abandoned impact as a requisite for negligent infliction of emotional distress claims, required that physical harm result from the emotional distress.¹⁷⁹ It was assumed that if the distress were sufficient to cause physical injuries, the suits would not be frivolous or fraudulent and could be contained.¹⁸⁰ This screening device will continue to be a primary focus of courts dealing with toxic tort fear of disease cases, despite the fact that the emotional distress clearly results from plaintiff's exposure to a very real harm, and the recognition that genuine emotional injury can occur without significant physical harm.¹⁸¹

Not all courts will interpret the manifestation requirement as a bar to recovery when the injury is limited to emotional distress. Many courts have held that even under a manifestation test, bodily contact with a frightening or noxious substance is sufficient physical injury to sustain an award for emotional distress that ensues from this contact.¹⁸² In *Laxton v. Orkin Exterminating Co.*¹⁸³ the Tennessee Supreme Court held that contact with adulterated water containing chlordane, a possible carcino-

179. See *supra* note 35. Fewer than ten states follow only the impact rule. Winter, *supra* note 50, at 63.

180. See, e.g., *Dillon v. Legg*, 68 Cal. 2d 728, 736, 441 P.2d 912, 918-19, 69 Cal. Rptr. 72, 78-79 (1968); *Towns v. Anderson*, 195 Colo. 517, 520, 579 P.2d 1163, 1165 (1978); *Robb v. Pennsylvania R.R. Co.*, 58 Del. 454, 464, 210 A.2d 709, 714-15 (1965); *Leong v. Takasaki*, 55 Hawaii 398, 403, 520 P.2d 758, 762 (1974); *Barnhill v. Davis*, 300 N.W.2d 104, 106 (Iowa 1981); *Whitsel v. Watts*, 98 Kan. 508, 509, 159 P. 401, 401-02 (1916); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 436-37 (Me. 1982); *Green v. T. A. Shoemaker & Co.*, 111 Md. 69, 81, 73 A. 688, 692 (1909); *Daley v. LaCroix*, 384 Mich. 4, 12-13, 179 N.W.2d 390, 395 (1970); *Okrina v. Midwestern Corp.*, 282 Minn. 400, 403-04, 165 N.W.2d 259, 262 (1969); *First Nat'l Bank v. Langley*, 314 So. 2d 324, 338-39 (Miss. 1975); *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983); *Kelly v. Lowney & Williams, Inc.*, 113 Mont. 385, 388, 126 P.2d 486, 488 (1942); *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 687, 305 N.W.2d 605, 606-07 (1981); *Corso v. Merrill*, 119 N.H. 647, 654-56, 406 A.2d 300, 305-06 (1979); *Portee v. Jaffee*, 84 N.J. 88, 96, 417 A.2d 521, 525 (1980); *Haight v. McEwen*, 43 Misc. 2d 582, 583, 251 N.Y.S.2d 839, 840 (Sup. Ct. 1964); *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 684 (N.D. 1972); *Melton v. Allen*, 282 Or. 731, 736, 580 P.2d 1019, 1022 (1978); *Sinn v. Burd*, 486 Pa. 146, 160, 404 A.2d 672, 679 (1979); *Mack v. South Bound R.R.*, 52 S.C. 323, 332-33, 29 S.E. 905, 908-10 (1897); *Sternhagen v. Kozel*, 40 S.D. 378, 379, 167 N.W. 398, 399 (1918); *Trent v. Barrows*, 55 Tenn. App. 182, 184, 397 S.W.2d 409, 410-11 (1965); *Landreth v. Reed*, 570 S.W.2d 486, 489 (Tex. Civ. App. 1978); *Savard v. Cody Chevrolet, Inc.*, 126 Vt. 405, 410, 234 A.2d 656, 659-60 (1967); *Hughes v. Moore*, 214 Va. 27, 31-32, 197 S.E.2d 214, 217 (1973); *Hunsley v. Giard*, 87 Wash. 2d 424, 433, 553 P.2d 1096, 1101-02 (1976); *Monteleone v. Co-operative Transit Co.*, 128 W. Va. 340, 346, 36 S.E.2d 475, 479 (1945); *Ver Hagen v. Gibbons*, 47 Wis. 2d 220, 227, 177 N.W.2d 83, 86 (1970).

181. See *supra* notes 160-67, *infra* notes 182-93 and accompanying text.

182. See, e.g., *Plummer v. United States*, 580 F.2d 72, 76 (3d Cir. 1978); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 434 (Tenn. 1982).

183. 639 S.W.2d 431 (Tenn. 1982).

gen, is sufficient physical manifestation to meet the rule.¹⁸⁴ The court allowed recovery despite the facts that the family suffered no physical injury from ingestion, the mental anxiety did not produce symptoms, and it was not severe enough to require medical treatment.¹⁸⁵ At most, Mrs. Laxton was "very worried" and would "call her husband at work, and cry and express concern about the future health of her children."¹⁸⁶

The court found persuasive the fact that the plaintiffs had reasonably obtained medical services because of their exposure.¹⁸⁷ This medical treatment was sufficiently close to physical injury to fit the case within the requirement.¹⁸⁸ Plaintiffs, however, did not seek treatment for any physical manifestation of their mental anxiety or for the mental anxiety itself.¹⁸⁹ When the children in the family exhibited a general malaise, they were taken to their doctor, who, knowing of their ingestion of contaminated water, took blood tests of the family.¹⁹⁰ The blood tests showed that the family had a mild sub-acute reaction to a viral infection, and that there were no chlordane-related abnormalities.¹⁹¹ The family was advised that they needed no more tests because they had changed water sources and the chlordane was not presently a problem.¹⁹²

As in the earlier fear of disease cases, the court only allowed the award after finding the family's fears and their seeking of medical tests to be reasonable.¹⁹³ In addition, as in those earlier cases,¹⁹⁴ the time for which damages could be recovered was severely limited: Plaintiffs could recover only for the time between the discovery that the ingestion could be harmful and the time blood tests showed that the chlordane had not caused abnormalities—a period of one month.¹⁹⁵ It was during this period that there was sound reason to be concerned.¹⁹⁶

The result of other courts' focusing on this "medically reasonable" precedent from earlier fear of disease cases would be to enable virtually all fearful toxic tort plaintiffs to bring suit. Presumably anyone who discovers that he or she has been exposed to a toxic product and who is sufficiently worried to suffer mental distress will seek a medical examination to determine if he or she shows any symptoms of the feared disease. Because there has been exposure to a toxic substance, seeking such exam-

184. *Id.* at 434.

185. *Id.* at 433, 435.

186. *Id.* at 433.

187. *Id.* at 434; *cf.* *Hassing v. Wortman*, 214 Neb. 154, 165, 333 N.W.2d 765, 771 (1983) (plaintiff denied recovery when emotional distress did not cause her to seek continuous medical treatment).

188. *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 434 (Tenn. 1982).

189. *Id.* at 433.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 434. See *supra* notes 125-38 and accompanying text.

194. See *supra* notes 116-21 and accompanying text.

195. See 639 S.W.2d at 432-34.

196. See *id.* at 434.

inations is reasonable and therefore, under the *Laxton* precedent, satisfies the physical manifestation requirement.

In the *Payton* case, however, the plaintiffs' allegation that they had sought periodic medical exams for cancer on the advice of their physicians was not a sufficient demonstration of manifestation for the Massachusetts court.¹⁹⁷ After reviewing the history of emotional distress suits, the court chose to require objective symptomatology of the physical manifestation and corroboration by expert medical testimony.¹⁹⁸ The fact that the fears themselves are reasonable and are based on objective evidence that can be substantiated by expert medical testimony is not enough. The court concluded that unless anxiety produces physical manifestations or flows from a physical injury, it is not sufficiently serious to merit recovery or to ensure the genuineness of the emotional distress claim.¹⁹⁹

Because DES produces adenosis in up to ninety percent of women exposed in utero to the drug, most of the DES plaintiffs would be able to meet the *Payton* physical injury requirement.²⁰⁰ Such a showing, however, bears no necessary relationship to the genuineness of plaintiff's fears about developing DES-related cancer, and would leave some of the DES daughters with no remedy. By following prior fear of disease decisions and requiring expert medical substantiation that the fears are based on sound probability, a more equitable result would have been achieved.²⁰¹ The court, however, opted for the screening devices of other emotional distress cases, choosing control over the comprehensiveness exhibited by the *Ayers* and *Laxton* decisions.

Strict adherence to the manifestation screening device will result in the denial of meritorious claims. From the standpoint of avoiding such harsh consequences, the *Laxton* approach is preferable. Fear of frivolous claims, however, appears to be the dominant consideration in these cases, and perhaps rightly so.

3. Judicial Concern with Frivolous Claims

The main difference between traditional impact cases and many toxic tort claims is the time lag between impact and emotional injury. In the

197. See *Payton v. Abbott Labs*, 386 Mass. 540, 545, 437 N.E.2d 171, 173-74 (1982). Although only .14 to 1.4 per 1,000 DES daughters develop adenocarcinoma, a fast-spreading cancer, 30-90% of DES daughters develop adenosis, precancerous vaginal and cervical growths that can spread to other areas. The latter condition requires close monitoring and treatment. Close monitoring is also required if adenocarcinoma is to be diagnosed at an early enough stage to make treatment effective. See Physician's Desk Reference 1126, 1127 (38th ed. 1984). But see Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 Fordham L. Rev. 963, 965 n.7 (1978) (close monitoring may not reveal DES exposure) [hereinafter cited as *Enterprise Liability*].

198. *Payton*, 386 Mass. at 552, 437 N.E.2d at 181.

199. See *id.* at 551, 437 N.E.2d at 180.

200. See *supra* note 166.

201. See, e.g., *Plummer v. United States*, 580 F.2d 72, 76 (3d Cir. 1978); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 434 (Tenn. 1982).

former, mental distress occurs almost instantly; in the latter, it often occurs more than a decade later.²⁰² This may also account for the difference in result between *Ayers* and *Laxton*, and decisions such as *Payton* and *Plummer*. The crucial difference may be one of degree rather than one of simultaneousness per se. Although there may be no logical or causative reason for the phenomenon, the long standing concern with control and containment of frivolous claims seems to get stronger as the time period gets longer. In *Laxton* and *Ayers*, for example, plaintiffs drank water containing toxic substances for a period of time before discovering the harmful properties in the water. In both cases, however, the last ingestion was close in time to discovery of the potential harm.²⁰³ After discovery, plaintiffs suffered emotional distress from concerns about developing diseases from these toxic substances. The *Laxton* court allowed suit without discussing the time issue, noting only that the distress followed soon after plaintiffs learned of the water's harmful properties, and that the distress was very short-lived.²⁰⁴ The *Ayers* court, however, specifically stated that the issue was foreseeability, not immediacy. Plaintiffs need not show that their fright resulted from fear of immediate personal injury, as long as defendants could foresee that allowing carcinogens to get into the drinking water would cause fear of cancer.²⁰⁵ If the harm is foreseeable and the plaintiff's fears are reasonable and sufficiently severe, suit can be brought.²⁰⁶

The fact that the fear and ingestion were not simultaneous, however, seems to have caused the *Plummer* court to state that there was not suffi-

202. DES, for example, does not produce physical symptoms until the daughter of the mother who took the drug is at least 10-12 years old. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 594, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, cert. denied, 449 U.S. 912 (1980). Asbestos injuries can take up to 20 years to become manifest. *Wall St. J.*, June 14, 1982, at 1, col. 6.

203. The Laxtons used water that was contaminated with chlordane and heptachlor for approximately eight months before learning of its toxic nature. A foul odor and bad taste in the water caused them to have it tested. They discontinued use at the time of testing, and soon thereafter the test results indicated the water's contamination. *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 432-33 (Tenn. 1982). In *Ayers*, township residents used contaminated water from 1972 to 1978. In November 1978 the State of New Jersey advised them to stop drinking their well water. *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 565-66, 461 A.2d 184, 186 (Law Div. 1983).

204. See 639 S.W.2d at 434.

205. 189 N.J. Super. at 570, 461 A.2d at 188-89; cf. *Plummer v. United States*, 580 F.2d 72, 76 (3d Cir. 1978) (negligently failing to diagnose a prisoner's tuberculosis created foreseeable risk that plaintiff would be potential victim).

206. *Ayers*, 189 N.J. Super. at 570, 461 A.2d at 188-89. The court found that if the claim rested only on emotional injury, plaintiffs would have to show both physical injury from the emotional distress and foreseeability. *Id.* at 570, 461 A.2d at 189. For a claim based on impact and resultant emotional injury, the court required the following questions to be answered:

- (1) Was it reasonably foreseeable on the part of the township that their negligence in permitting contaminants to escape would cause the type of fear experienced by plaintiffs?
- (2) What is the nature of the impact to plaintiffs' body caused by the ingestion of these contaminants?

cient impact or physical manifestation to sustain a claim for the mothers' fears of developing cancer.²⁰⁷ The court discussed the time lag in the context of the mothers' claims for damages based on fears that their daughters would develop cancer, a third-party emotional distress claim for which simultaneity has traditionally been crucial.²⁰⁸ The court concluded, however, that "prudential jurisprudence" would bar the mothers' recovery for worrying about potential medical problems of their own or their daughters, because "the trauma of the moment is dissipated by space and time to such an extent that tort law should not permit recovery."²⁰⁹ Thus, the court incorporated simultaneity into the impact and manifestation requirements to narrow recovery in toxic tort fear of disease cases.²¹⁰

In *Plummer*, the time lag between ingestion and the development of the fears was years, not days.²¹¹ If it is foreseeable that causing someone to ingest a carcinogen will cause emotional distress due to fears of devel-

(3) Are the emotional injuries complained of by plaintiffs sufficiently severe to be compensable under present case law? . . .

Additionally, it will initially be for the court to determine whether the response and resulting mental illness was idiosyncratic and not foreseeable, or of a type readily expected from defendant's conduct.

Id. at 571-72, 461 A.2d at 189.

207. See *Plummer v. Abbott Laboratories*, 568 F. Supp. 920, 924-25 (D.R.I. 1983).

208. See *Winter*, *supra* note 50, at 64; see, e.g., *Beanland v. Chicago, Rock I. & Pac. R.R.*, 480 F.2d 109, 113-14 (8th Cir. 1973); *Gnirk v. Ford Motor Co.*, [1983-84 Transfer Binder] *Prod. Liab. Rep.* (CCH) ¶ 9945, at 25,369 (D.S.D. Oct. 14, 1983); *Dillon v. Legg*, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920-21, 69 Cal. Rptr. 72, 80-81 (1968) (en banc); *D'Amico v. Alvarez Shipping Co.*, 31 Conn. Supp. 164, 167, 326 A.2d 129, 131 (Conn. Super. Ct. 1973); *Rodrigues v. State*, 52 Hawaii 156, 170-71, 472 P.2d 509, 519-20 (1970); *Barnhill v. Davis*, 300 N.W.2d 104, 107 (Iowa 1981); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 435 (Me. 1982); *Dziokonski v. Babineau*, 375 Mass. 555, 568, 380 N.E.2d 1295, 1302 (1978); *Versland v. Caron Transp.*, 671 P.2d 583, 586-87 (Mont. 1983); *Corso v. Merrill*, 119 N.H. 647, 657, 406 A.2d 300, 307 (1979); *Portee v. Jaffee*, 84 N.J. 88, 99, 417 A.2d 521, 527 (1980); *Sinn v. Burd*, 486 Pa. 146, 170-71, 404 A.2d 672, 685 (1970); *Landreth v. Reed*, 570 S.W.2d 486, 489 (Tex. Civ. App. 1978); *Hughes v. Moore*, 214 Va. 27, 29, 197 S.E.2d 214, 215 (1973).

209. *Plummer*, 568 F. Supp. at 925.

210. In the case at bar, there was no episodic single incident to be witnessed; there was merely the insidious development—or, as to many of the targeted plaintiffs, only the threatened development—of a disease process. . . . Whereas [other cases have] dealt with on-the-spot observation of a finite moment in time, the instant claims deal with psychic trauma arising from entropic events of indefinite duration and infinite expanse. The policy considerations—social, economic and administrative—are largely dissimilar. If the targeted plaintiffs are permitted to pursue their causes of action, then the lid is lifted from Pandora's jar and there will be few—if any—cases in which a relative (or a sweetheart or close friend, for that matter) will be barred from prosecuting a claim for emotional distress arising out of injuries to another.

Id. at 924-25 (footnote omitted).

211. The specific time lag is not set out in *Plummer*, but the manufacture of DES for antimiscearriage purposes was discontinued in 1971 and suit was brought in 1980. See *Berns & Lykos, Sindell v. Abbott Labs—The Heir of the Citadel*, 15 Forum 1031, 1031 (1980). Plaintiffs, therefore, must have ingested it several years before learning of its harmful properties and suing.

oping cancer, it should be irrelevant that the fear develops several years after ingestion, as long as the fear develops close in time to the gaining of knowledge of the carcinogenic properties.²¹² In adulterated food cases, for example, the emotional distress arises from discovering that there was something noxious in the food ingested.²¹³ In toxic substance cases the same is true: Emotional distress arises from discovery that the substance that has entered the body is potentially disease-causing. If the causal connection is clear, the fact that the emotional distress does not coincide with impact should not bar suit. Indeed, the early mishandling-of-body cases, in which recovery for emotional distress was first allowed, did not necessarily require congruence between the negligent act of mishandling and the emotional distress,²¹⁴ which often arose later when knowledge of the mishandling was obtained. More recently the California Supreme Court, in its landmark *Molien* decision, found that simultaneity should not be determinative.²¹⁵ The plaintiff husband recovered in that case even though he was emotionally injured only when he learned of the negligent diagnosis given to his wife, not when the actual diagnosis was given.²¹⁶ Some courts may, however, be uncomfortable with a long time lag even though the knowledge just as clearly causes the emotional distress, and significant time lags may provide a convenient, though not necessarily logical, way to limit fear of disease cases.

212. In *Hoard v. Shawnee Mission Medical Center*, 233 Kan. 267, 662 P.2d 1214 (1983), the time lag between defendants' negligence and plaintiffs' injuries in part led to a denial of recovery. See *id.* at 279, 662 P.2d at 1222. Plaintiffs' daughter was critically injured in an automobile accident. *Id.* at 268, 662 P.2d at 1216. They were told that she was dead when in fact she was being treated at a different hospital. *Id.* at 269-70, 662 P.2d at 1217. Plaintiffs, who suffered from substantial health problems prior to the accident, see *id.* at 271, 662 P.2d at 1218, filed suit for the emotional harm and additional physical problems caused by the misinformation, *id.* at 273, 662 P.2d at 1219. The court found that plaintiffs' illnesses developed six weeks to two years after the accident, *id.* at 277, 662 P.2d at 1221; there was, therefore, no evidence that the hospital's negligence was the direct, proximate, or even major cause of their illnesses, *id.* at 279, 662 P.2d at 1222. The court found that the stress caused by caring for the injured child was probably the cause of plaintiffs' problems. See *id.*, 662 P.2d at 1222.

213. See, e.g., *Obieli v. Campbell Soup Co.*, 623 F.2d 668, 668-69 (10th Cir. 1980) (emotional distress from sight of cockroach in can of soup); *Medeiros v. Coca-Cola Bottling Co.*, 57 Cal. App. 2d 707, 712, 135 P.2d 676, 680 (1943) (mental shock from seeing cleaning brush in bottle).

214. See, e.g., *Brown Funeral Home & Ins. Co. v. Baughn*, 226 Ala. 661, 662, 148 So. 154, 155 (1933) (faulty embalming of body); *Louisville & Nash. R.R. v. Wilson*, 123 Ga. 62, 67, 51 S.E. 24, 28 (1905) (negligent shipping of body); *Renihan v. Wright*, 125 Ind. 536, 545, 25 N.E. 822, 825 (1890) (misdelivery of body).

215. *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 922-23, 616 P.2d 813, 816, 167 Cal. Rptr. 831, 834 (1980). See *supra* notes 39-45 and accompanying text.

216. *Molien*, 27 Cal. 3d at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835; accord *Clark v. Taylor*, 710 F.2d 4, 14 (1st Cir. 1983) (sustaining plaintiff's award for physical and emotional distress due to application to his skin of benzidine, which he later learned was a carcinogen); *Plummer v. United States*, 580 F.2d 72, 73 (3d Cir. 1978) (plaintiffs were exposed to tubercle bacilli several months before learning of the nature of their exposure). Some courts have recently found that simultaneity is not crucial in third party suits, in which it has traditionally been a key element. See *infra* note 247.

An additional factor in most toxic tort cases which did not exist in *Laxton* and most early fear of disease cases is the duration of the fears.²¹⁷ When the victims have been exposed to substances like asbestos, DES and radiation, they cannot remove themselves from the hazard and thereby stop the risk as the Laxtons were able to do. The potentially harmful substance remains in the body waiting "[l]ike the sword of Damocles"²¹⁸ to strike at some indeterminate future date.²¹⁹ Thus, the fear of disease is likely to last much longer than has been true in most fear of disease cases. Although this is likely to lead to higher jury awards, it does not change the substantive merits of the case. It may, however, make courts more reluctant to allow suits that do not have this inherent limitation. Courts faced with such situations may follow the lead of *Plummer* and *Payton* and ensure that the controls from emotional distress suits remain in toxic tort fear of disease cases.

B. *Intentional Infliction of Emotional Distress in Toxic Tort Cases*

The requirement of physical manifestation has generally been abandoned in cases in which the emotional distress has been recklessly or intentionally inflicted.²²⁰ Thus, toxic tort plaintiffs who do not suffer physical injuries may be able to proceed under the tort of intentional infliction of emotional distress.²²¹ Intentional infliction is particularly amenable to toxic tort suits because virtually all such suits allege that defendants knew of the harmful properties of their products but concealed or failed to act on this knowledge for a substantial period of time.²²²

There is increasing evidence of manufacturers distorting, hiding or ignoring information concerning the toxic effects of their products.²²³

217. Plaintiffs' fears in *Plummer v. United States* were found to be of limited duration because they had "immunity to outside infection." 580 F.2d 72, 74 (3d Cir. 1978).

218. *Alley v. Charlotte Pipe & Foundry Co.*, 159 N.C. 327, 331, 74 S.E. 885, 886 (1912).

219. Asbestos fibers, which can enter the body from a variety of sources, remain in the body and can cause several diseases that may not become manifest until more than 20 to 40 years after exposure. Wall St. J., Aug. 27, 1982, at 1, col. 6.

220. See, e.g., *Sypert v. United States*, 559 F. Supp. 546, 548 (1983); *Hubbard v. UPI*, 330 N.W.2d 428, 438 (Minn. 1983).

221. This issue was raised in *Mink v. University of Chicago*, 460 F. Supp. 713, 718 n.5 (N.D. Ill. 1978), but the court did not deal with it. Similarly, the court did not deal with a claim based on misrepresentation.

222. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 594, 607 P.2d 924, 925-26, 163 Cal. Rptr. 132, 133, cert. denied, 449 U.S. 912 (1980); *Johns-Manville Prods. Corp. v. Contra Costa Superior Court*, 27 Cal. 3d 465, 469, 612 P.2d 948, 950, 165 Cal. Rptr. 858, 860 (1980).

223. Such allegations are routinely made in asbestos cases. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 510 (5th Cir. 1984) (failure to warn of hazards of asbestos exposure); *Moran v. Johns-Manville Sales Corp.*, [1982-83 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 9408, at 22,756 (6th Cir. Oct. 26, 1982) (plaintiff submitted sufficient evidence to show that defendant knew of the connection between asbestos and cancer but failed to warn of the dangers); *Neal v. Carey Canadian Mines, Ltd.*, [1982-83 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 9424, at 22,826 (E.D. Pa. Aug. 31, 1982)

Such evidence is likely to meet the intentional infliction requirement that defendant's actions be outrageous or reckless.²²⁴ From the inception of this tort, businesses have been held to a higher standard than have individuals.²²⁵ Recent outrageous business examples include the high-pressure tactics of collection agencies²²⁶ and employer treatment of employees.²²⁷ The intentional or reckless endangering of the public by manufacturers fits easily into the category of the outrageous, especially in these times of consumerism and expanding liability for manufacturers.²²⁸

(asbestos manufacturers failed to provide adequate warnings of foreseeable dangers of asbestos exposure).

A 1975 deposition of an employee of Cape Asbestos reportedly shows that he warned Pittsburgh Corning of the asbestos hazard when he helped Pittsburgh Corning buy an asbestos company in the early 1960's. This deposition is being shared with plaintiff's lawyers in several asbestos cases. *Legal Times*, July 4, 1983, at 5, col. 1.

In *Barrett v. Whitehead Bros.*, No. 83-0111-L (Bankr. D. Va. filed July 29, 1983), it is alleged that manufacturers and distributors of silica products failed to warn workers of known hazards and failed to provide them with protective clothing and appliances. *See Nat'l L.J.*, Aug. 29, 1983, at 8, col. 3. The DES cases contain allegations that defendants ignored dangers and sold a product that was ineffective for the purpose prescribed. *See, e.g., Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 603-05, 607 P.2d 924, 931-33, 163 Cal. Rptr. 132, 139-41, *cert. denied*, 449 U.S. 912 (1980); *Payton v. Abbott Labs*, 386 Mass. 540, 544, 437 N.E.2d 171, 173-74 (1982).

Recent allegations that one of the nation's major independent laboratories submitted fraudulent test results to clients, who then turned them over to the EPA, has called into question approved use of many chemicals. Agent White, carbaryl and paraquat are some of the products challenged. *See Nat'l L.J.*, Sept. 19, 1983, at 5, col. 1. There are numerous reports of problems at nuclear plants. Commonwealth Edison Co. was denied a license to operate its Byron nuclear power plant because of failure in quality control. *See Wall St. J.*, Jan. 16, 1984, at 2, col. 5 (midwest ed.).

Allegations were recently made that welders at nuclear plant construction sites are often unqualified, and that test results are routinely falsified to enable them to work. *See Wall St. J.*, Sept. 7, 1983, at 1, col. 6. In addition, an official of the NRC has accused General Public Utilities Corp., operator of Three Mile Island, of falsifying records concerning leaks in the cooling system before the 1979 accident. *Wall St. J.*, May 25, 1983, at 6, col. 3 (midwest ed.). A federal grand jury has charged the company with criminal misconduct. *Wall St. J.*, Nov. 8, 1983, at 7, col. 2 (midwest ed.).

224. *See* Restatement (Second) of Torts § 46(1) (1965); *see, e.g., M.B.M. Co. v. Counce*, 268 Ark. 269, 279-80, 596 S.W.2d 681, 687 (1980); *Payton v. Abbott Labs*, 386 Mass. 540, 552, 437 N.E.2d 171, 179-80 (1982).

225. *See supra* notes 26-27.

226. *See, e.g., American Fin. & Loan Corp. v. Coots*, 105 Ga. App. 849, 853, 125 S.E.2d 689, 691 (1962) (collection at gunpoint); *Booty v. American Fin. Corp.*, 224 So. 2d 512, 513-14 (La. Ct. App. 1969) (letters sent to debtor's employer).

227. *See, e.g., M.B.M. Co., v. Counce*, 268 Ark. 269, 272, 596 S.W.2d 681, 683 (1980) (unfavorable report to unemployment authorities); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 141, 355 N.E.2d 315, 317 (1976) (firing of waitress without cause); *Bodewig v. K-Mart, Inc.*, 54 Or. App. 480, 483, 635 P.2d 657, 659-60 (1981) (employer strip searched employee in presence of customer).

228. *See, e.g., Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 611-12, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145 (market share liability), *cert. denied*, 449 U.S. 912 (1980); *Owens v. Allis-Chalmers Corp.*, 414 Mich. 413, 423-25, 326 N.W.2d 372, 376-77 (1982) (abrogation of patent danger defense); *Holm v. Sponco Mfg.*, 324 N.W.2d 207, 213 (Minn. 1982) (same); *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 204, 447 A.2d 539, 546 (1982) (state-of-the-art evidence irrelevant in strict liability failure-to-warn case).

The large number of awards of punitive damages in toxic tort product liability cases lends credence to the fact that such actions are likely to be considered outrageous.²²⁹

If the defendant's actions are outrageous, courts are more likely to compensate for emotional distress even though there is no physical impact or manifestation.²³⁰ The outrageousness is considered a sufficient screening device in itself so that the other screening mechanisms can be eliminated²³¹ without raising fears of frivolous claims and a flood of litigation. Individuals who fear a disease to which they have been exposed by defendant's outrageous or reckless actions should have an easier time recovering for those fears. If the manufacturer's actions are particularly irresponsible, that may even be sufficient to allow recovery for fear of another's safety.

C. *Third-Party Recovery in Toxic Tort Cases*

Negligence recovery for fears that close relatives will develop a delayed-manifestation disease from toxic exposure is least likely. In this situation the time lag problem discussed above²³² will probably be determinative. Virtually all courts that allow third-party emotional distress damages keep recovery within reasonable bounds by relying on the requirements of proximity to and contemporaneous observance of a traumatic event.²³³ These factors are used as predictors of foreseeability, and

229. See, e.g., *Moran v. Johns-Manville Sales Corp.*, [1982-83 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 9408, at 22,757 (6th Cir. Oct. 26, 1982) (failure to label product regarding health hazards); *Alley v. Gubser Dev. Co.*, 569 F. Supp. 36, 39-40 (D. Colo. 1983) (mobile home manufacturers knew of problems with urea-formaldehyde but did nothing to correct them); *Neal v. Carey Canadian Mines, Ltd.*, [1982-83 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 9424, at 22,833-34, 22,836 (D. Pa. Aug. 31, 1982) (asbestos suppliers held liable for \$1.78 billion in punitive and compensatory damages because high corporate officials knew of the dangers of asbestos but failed to warn workers). *But see* *Koller v. Richardson-Merrell, Inc.*, [1983-84 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 9583, at 23,567 (D.D.C. Feb. 24, 1983) (allegations that defendant marketed drug without adequate testing, committed errors in epidemiological studies, and violated Food, Drug and Cosmetic Act reporting requirements, were deemed by court to be little more than ad hominem attacks possibly sufficient to prove negligence and strict liability but legally insufficient to show fraud or support a punitive damage award).

230. See *Payton v. Abbott Labs*, 386 Mass. 540, 547-48, 437 N.E.2d 171, 176-77 (1982); *Magruder, supra* note 12, at 1058; Restatement (Second) of Torts § 46 (1965).

231. [W]here physical harm is lacking the courts will properly tend to look for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious; but that if the enormity of the outrage itself carries conviction that there has in fact been severe and serious mental distress, which is neither feigned nor trivial, bodily harm is not required.

W. Prosser, supra note 8, § 12, at 60; see, e.g., *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 1308, 242 N.W. 25, 28 (1932); *Payton v. Abbott Labs*, 386 Mass. 540, 547, 437 N.E.2d 171, 175-76 (1982); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144-45, 355 N.E.2d 315, 318-19 (1976).

232. See *infra* Pt. III.A.3.

233. See, e.g., *Dillon v. Legg*, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968) (en banc) (plaintiff present when daughter struck and killed by defendant's automobile); *Barnhill v. Davis*, 300 N.W.2d 104, 108 (Iowa 1981) (en banc) (son's obser-

work so that liability for defendant's negligence to someone else ceases at some point.²³⁴ Plaintiffs in third-party toxic tort suits are unable to point to any sudden traumatic event to their close relatives from which springs their emotional distress about those relatives' developing the feared diseases.²³⁵ Rather, the distress comes long after defendant's negligent action, and generally without proximity or contemporaneous observance. In virtually all emotional distress cases courts hold that distress from such after-acquired knowledge is not compensable.²³⁶ Indeed, the Supreme Court in *Metropolitan Edison v. People Against Nuclear Energy*²³⁷ specifically cited relatives' fears as one reason not to recognize plaintiffs' emotional impact claims.²³⁸ The Court recognized that relatives of residents in the Three Mile Island area may suffer emotional distress due to the risks that the start-up of the reactor presents to their relatives.²³⁹ The Court, however, held these fears to be too attenuated to merit cognizance.²⁴⁰ Underlying this decision were the fear of fraudulent or frivolous claims²⁴¹ and concern for the potential impact on decision-making resources if such considerations were allowed.²⁴² In a toxic tort context, the *Plummer* court denied the third-party claims of plaintiffs, DES mothers, partially on the grounds of lack of simultaneity.²⁴³

Despite the strong third-party emotional distress precedent, the parents in *Laxton*²⁴⁴ were allowed to recover for their fears about their children's health as well as their own.²⁴⁵ The court did not discuss the point, but it found that there was "sufficient 'injury' to [the] plaintiffs to justify a recovery for their natural concern and anxiety for the welfare of them-

vance of auto accident involving mother may be sufficient for emotional distress recovery); *Corso v. Merrill*, 119 N.H. 647, 656-59, 406 A.2d 300, 306-08 (1979) (parents who did not witness accident involving daughter but who observed her immediately thereafter may have mental distress claim); *D'Ambra v. United States*, 114 R.I. 643, 656-58, 338 A.2d 524, 530-31 (1975) (mother who witnessed death of son in auto accident may recover although she was not in danger).

234. See *supra* notes 49-52 and accompanying text.

235. Plaintiffs would argue that their distress arose immediately upon learning of the potential dangers to their relatives. Most can allege that some of the delay between the time of exposure and the gaining of such knowledge was the fault of defendants who knew of the dangers but did not disclose them because they foresaw that the knowledge would have adverse effects. See *supra* notes 222-23 and accompanying text. Plaintiffs would argue that defendants should not be able to hide behind their misleading actions. See *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 923, 616 P.2d 813, 816-17, 167 Cal. Rptr. 831, 834-35 (1980) (en banc) (husband allowed to sue for emotional distress caused by doctor's misdiagnosis of wife's condition).

236. See *supra* notes 50-52 and accompanying text.

237. 460 U.S. 766 (1983).

238. See *id.* at 774.

239. See *id.*

240. See *id.*

241. See *id.* at 778.

242. See *id.* at 776-78.

243. See 568 F. Supp. at 914-15.

244. 639 S.W.2d 431 (Tenn. 1982).

245. See *id.* at 434.

selves and of their infant children."²⁴⁶

In addition to the *Laxton* precedent, there is also some indication that the simultaneity requirement is beginning to weaken in traditional emotional distress cases, especially when the other two requirements are especially strong.²⁴⁷ DES mothers, who are the primary third-party claimants, could present a good case in this regard. Because their children were exposed to the DES in utero, the relationship could not be closer and, as in *Haught*, they were in some sense the scene of the accident.²⁴⁸ Although their fear did not arise at the time of ingestion, it did coincide with their knowledge of the harm, and that fear on the acquisition of knowledge was foreseeable. So far, however, DES mothers have failed to recover for fears concerning their daughters.²⁴⁹ Few courts are soon likely to follow the *Laxton* or *Haught* precedents. Courts will most strongly express their traditional limitation and control concerns through strict adherence to *Dillon*. Expansion is likely to come last to this area.

The court in *Mink v. University of Chicago*,²⁵⁰ although denying such concerns were sufficient for a negligence action, did leave open the possibility of the mothers recovering for their fears about their daughters under a battery theory.²⁵¹ Those toxic tort plaintiffs who can prosecute their claims under an intentional tort theory may have an easier route to recovery for their fears about others. Traditionally, courts have been more lenient regarding recovery in intentional infliction cases in which defendants' actions are outrageous.²⁵² If, as discussed above, defendants' actions are found to be sufficient to support intentional infliction claims, fearful parents are more likely to recover.²⁵³

D. *Strict Products Liability*

A few plaintiffs have attempted to sue for fears about others as well as themselves under the theory of strict products liability.²⁵⁴ So far, how-

246. *Id.* The court also approved the trial court's jury instruction, which stated that the jury should fairly " 'compensate the plaintiffs for mental suffering as a result of reasonable apprehension of harmful effects to their own health and the health of their children due to the ingestion of the toxic substances.' " *Id.*

247. *See, e.g., Haught v. Maceluch*, 681 F.2d 291 299-302 (5th Cir. 1982) (mother under anesthesia during negligent delivery of baby); *General Motors Corp. v. Grizzle*, 642 S.W.2d 837, 844 (Tex. App. 1982) (mother who did not perceive son's death in auto accident may recover because she perceived consequences of accident).

248. *Haught v. Maceluch*, 681 F.2d 291, 299 (5th Cir. 1982).

249. Even if plaintiffs overcome the third-party simultaneity difficulty, they may still run into problems if they cannot show physical injury. *See, e.g., Plummer v. Abbott Laboratories*, 568 F. Supp. 920, 925-27 (D.R.I. 1983); *Mink v. University of Chicago*, 460 F. Supp. 713, 716 n.2 (N.D. Ill. 1978).

250. 460 F. Supp. 713 (N.D. Ill. 1978).

251. *See id.* at 716 n.2, 718.

252. *See supra* notes 230-31 and accompanying text.

253. *See supra* notes 220-31 and accompanying text.

254. *See, e.g., Mink v. University of Chicago*, 460 F. Supp. 713, 719 (N.D. Ill. 1978); *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 565, 461 A.2d 184, 186 (Law Div. 1983).

ever, such claims have been unsuccessful. As in the negligent infliction cases, physical injury seems to be a problem. The *Mink* court denied strict liability recovery on these grounds.²⁵⁵ The court cited²⁵⁶ the Restatement (Second) of Torts, which states that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer."²⁵⁷ The court found that because plaintiffs had not alleged physical injury, they did not fit within this tort.²⁵⁸ Yet it is clear that sellers of adulterated food can be held strictly liable for injuries flowing to consumers even when the consumers' injuries are purely emotional.²⁵⁹ Contact with a frightening or potentially dangerous product is physically damaging enough to merit the imposition of strict liability in these cases. A few states have even allowed recovery for purely emotional distress under a theory of strict liability in bystander cases.²⁶⁰ Following these precedents in fear of disease cases could create the danger of wide recovery for toxic tort claimants because such claims would be parasitic to the claim of strict liability.

E. Containment and Control

As the foregoing discussion illustrates, toxic tort plaintiffs who sue for fear of disease have met with mixed success. Although precedent clearly exists for allowing recovery, many courts have opted to focus on requirements, such as physical injury, which may bar claimants. In so doing, these courts hope to put limits on a defendant's liability and screen out frivolous claims. Limitation and screening have traditionally been concerns of courts recognizing suits for emotional distress. Another traditional concern, so far largely ignored but which may ultimately prove conclusive, is the fear of a flood of litigation.²⁶¹ Modern courts, in expanding recovery under emotional distress, have cited this fear, but they have generally dismissed it as either unrealistic based on past experience, or as an insufficient reason to deny meritorious claims.²⁶² Delayed mani-

255. See 460 F. Supp. at 719.

256. See *id.*

257. Restatement (Second) of Torts § 402A (1965).

258. See *Mink*, 460 F. Supp. at 719.

259. See *supra* note 159.

260. See *Shepard v. Superior Court*, 76 Cal. App. 3d 16, 20, 142 Cal. Rptr. 612, 614-15 (1977); *Walker v. Clark Equip. Co.*, 320 N.W.2d 561, 563 (Iowa 1982).

261. See, e.g., *Simone v. Rhode Island Co.*, 28 R.I. 186, 190, 66 A. 202, 204-05 (1907) (flood of litigation limited by requirement of physical injury accompanying emotional distress); *Nolan & Ursin, supra* note 37, at 605 (requirements of physical injury and foreseeability of risk serve to avoid flood of litigation and unlimited liability).

262. See, e.g., *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 928-29, 616 P.2d 813, 820, 167 Cal. Rptr. 831, 838 (1980) (en banc) (floodgate argument irrelevant); *Tobin v. Grossman*, 24 N.Y.2d 609, 615-19, 249 N.E.2d 419, 422-24, 301 N.Y.S.2d 554, 558-61 (1969) (court denied claim but held that proliferation of claims insufficient reason to deny meritorious action); *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 133, 447 N.E.2d 109, 111 (1983) (even if caseload increases, flood of litigation is an unacceptable reason for denying justice); *Sinn v. Burd*, 486 Pa. 146, 162-63, 404 A.2d 672, 680-81

festation injury cases, however, represent a clearer threat of inundation than any other of the previous expansions.

The number of potential suits for work-related asbestos exposure alone is in the millions.²⁶³ One study estimates there are 14.1 million workers who have had significant exposure to this cancer-causing product since 1940.²⁶⁴ Millions of others have been exposed outside the workplace.²⁶⁵

(1979) (bystanders may recover for injuries resulting from mental distress despite possible flood of litigation); Lambert, *Tort Liability for Psychic Injuries*, 41 B.U.L. Rev. 584, 592 (1961) ("The truth of the matter is that the feared flood tide of litigation has simply not appeared in states following the majority rule allowing recovery of psychic injuries without impact.").

263. Wall St. J., June 14, 1982, at 1, col. 6.

264. The study, by Dr. Irving Selikoff of the Environmental Sciences Laboratory of the Mount Sinai School of Medicine, estimated that 18.8 million workers had significant exposure to asbestos since 1940, of which 14.1 million are still living. It was estimated that 200,000 of these workers will die from asbestos-related cancers by the end of the century. Nat'l L.J., July 26, 1982, at 14, col. 2. In addition, seven million living workers had less exposure, but were at some risk. Although estimates have been as low as eight million, see Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 580 n.13 (1983) (citing National Cancer Institute and National Institute of Environmental Health Sciences, Estimates of the Fraction of Cancer Incidence in the United States Attributable to Occupational Factors 1-2 (draft summary Sept. 11, 1978)), the number of persons developing asbestos related diseases each year is not expected to level off until the 1990's, *id.* at 580 n.16. The two main asbestos-related diseases are asbestosis, which causes scarring of the lungs, similar to emphysema, and mesothelioma, a type of lung cancer. Wall St. J., Mar. 16, 1981, at 10, col. 2. Approximately one out of four or five exposed to asbestos will eventually die of lung cancer, but only one out of fifteen die from mesothelioma, a disease caused only by asbestos. *Id.*

To curb the dangers, the Occupational Safety and Health Administration (OSHA) promulgated a six month emergency rule that severely restricted asbestos exposure levels. See OSHA Emergency Temporary Standard, 48 Fed. Reg. 51,086 (1983) (to be codified at 29 C.F.R. § 1910). The asbestos industry, however, succeeded in getting a stay of the standard. See Wall St. J., Nov. 25, 1983, at 4, col. 5 (midwest ed.).

265. Indirect work-related exposure can also cause asbestos-related diseases. The worker's family is exposed through contact with the workers clothes and body. See Chicago Tribune, Oct. 4, 1981, § 2, at 9, col. 1 (citing study released by American Lung Ass'n); N.Y. Times, Oct. 5, 1981, at D11, col. 6 (same). Exposure can come from a variety of other nonworkplace environments, such as the home and school, in which asbestos building materials were used. There are estimated to be 14,000 schools with potential asbestos hazards. Wall St. J., June 14, 1982, at 18, col. 2. An asbestos inspection survey reported that up to 3.2 million children may be exposed to dangerous levels of asbestos in their schools. Wall St. J., July 1, 1983, at 1, col. 3 (midwest ed.). Recent studies conducted by the Consumer Product Safety Commission showed that exposure to clothes washers can be dangerous. See 10 Prod. Safety & Liab. Rep. (BNA) 49 (Jan. 22, 1982). Even walking past an old building that is being razed or renovated creates a risk of contracting asbestosis. 68 A.B.A. J. 1075 (1982).

A person who continuously inhales an airborne asbestos fiber concentration of one fiber per milliliter for one year has a lifetime cancer risk of 2,100 to 37,000 per million. 9 Prod. Safety & Liab. Rep. (BNA) 554 (Aug. 20, 1982) (citing Consumer Product Safety Comm'n, *General Risk Assessment for Asbestos—Consumer Exposure From Products* (draft report)). It has been estimated that 9,000 people will die from asbestos related cancer each year for the next three decades. The EPA intends to propose a ban or phase-out of almost all asbestos use. It estimates that 280 million pounds of asbestos are still used each year and that such use creates an unreasonable public health hazard. Wall St. J., Oct. 4, 1983, at 3, col. 2 (midwest ed.).

Another study estimates that one in five Americans runs a risk of developing cancer.²⁶⁶ The number of DES-exposed offspring, whose exposure was not work-related, is also in the millions.²⁶⁷ Asbestos and DES are but two of the many disease-causing products to which the current population has been exposed. Toxic waste,²⁶⁸ radiation,²⁶⁹ formaldehyde,²⁷⁰

266. Wall St. J. & Dow Jones News Wire, No. 080821-0263, at 1-3 (Aug. 20, 1980) (available in files of *Fordham Law Review*).

267. It is estimated that three million women were exposed to DES in utero. Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 Harv. L. Rev. 668, 668 n.7 (1981). More than 1,000 of these women have already filed suit. 67 A.B.A. J. 139, 139-40 (1980). Adenocarcinoma, a fast-spreading cancer that affects approximately .14 to 1.4 per 1,000 of the daughters whose mothers took DES, is almost unique to DES ingestion. Adenosis, or pre-cancerous vaginal and cervical growths, affect 30 to 90% of the DES daughters. Treatment ranges from hysterectomy and removal of the vagina for adenocarcinoma victims to biopsy, cauterization, and surgery for the sufferers of adenosis. See Physician's Desk Reference, *supra* note 197, at 1126; *Enterprise Liability*, *supra* note 197, at 964-65. Report of a study by the National Collaborative Diethylstilbestrol-adenosis Project published in the Journal of the American Medical Association showed that DES daughters are twice as likely to develop dysplasia of the cervix than are nonexposed women. Wall St. J., Dec. 7, 1984, at 43, col. 4 (midwest ed.). In addition, there is growing evidence that DES is linked with reduced fertility and genital abnormalities in the sons of women who took the drug. See *Mink v. University of Chicago*, 460 F. Supp. 713, 715 (N.D. Ill. 1978); *Enterprise Liability*, *supra* note 197, at 964 n.5; Nat'l NOW Times, Sept. 1982, at 6, col. 4. A recently published study in the New England Journal of Medicine reported that women who took DES while pregnant run a 50% higher risk of developing breast cancer than those who were not exposed to the drug. Wall St. J., Dec. 7, 1984, at 43, col. 4.

268. The 419 sites identified by the Environmental Protection Agency as national priorities because of their high level of toxicity from wastes such as dioxin, benzene, chlordane, arsenic, and lead have received wide publicity. See Wall St. J., Nov. 25, 1983, at 4, col. 5; *id.*, July 26, 1983, at 1, col. 4 (midwest ed.). There are reported to be 28 cities in 20 states that have sites contaminated by dioxin. Nat'l L.J., July 4, 1983, at 47, col. 1. The discovery of high levels of dioxin in Times Beach, Missouri and the EPA's subsequent purchase of the town received widespread national media coverage. See Wall St. J., June 17, 1983, at 20, col. 4 (midwest ed.). Exposure to toxic waste, such as that at Love Canal, is expected to generate the next large round of product liability suits. Want, *The Caseload Monster in the Federal Courts*, 69 A.B.A. J. 612, 614 (1983). One suit for \$684 million was recently filed by 57 people exposed to the chemical. See *Bloomington Herald-Telephone*, Nov. 29, 1983, at 3, col. 4. More than 1,300 current and former residents of Love Canal settled their suit against Hooker Chemical Co. for \$20 million. *Bloomington-Herald Telephone*, Jan. 2, 1985, at 3, col. 5.

269. An estimated 650,000 workers are exposed to low levels of job-related radiation. The Center for Human Radiobiology studied women who painted watch dials with radiation-emitting paints in the 1920's and 1930's and found some evidence that even low-level exposure can lead to cancer. Wall St. J., Sept. 19, 1983, at 1, col. 1. This study supports the findings of a study of Japanese survivors of the 1945 atomic bomb blast, which showed that risks from low-level radiation were 10 times greater than previously believed. *Id.* Claims involving radiation illness have risen since the well publicized Three Mile Island accident. Claims averaged two or three per year prior to the accident, but now average 14 or more per year. Nat'l. L.J., Jan. 3, 1983, at 9, col. 2.

Suits have been filed by servicemen and their families based on exposure to radiation from testing at such sites as the Bikini and Eniwetok atolls and the Nevada desert. See, e.g., *Mondelli v. United States*, 711 F.2d 567, 568 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1272 (1984). Because the doctrine of sovereign immunity prohibits members of the armed forces from suing the government for service-related injuries, see *Feres v. United States*, 340 U.S. 135, 146 (1950), exposed servicemen have sued the contractors who de-

and Agent Orange²⁷¹ are other toxic products which have received much

veloped the weapons used in the tests, *see* *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 667-68 (1977).

Another source of recent filings has been microwaves. Although microwaves are now commonly used in the home in ovens, garage door openers and other devices, suits so far have been based on long term exposure in the workplace. *See* *Yannon v. New York Tel. Co.*, 86 A.D.2d 241, 244, 450 N.Y.S.2d 893, 895 (upholding Worker's Compensation award to widow of microwave transmission unit repairman), *appeal denied*, 57 N.Y.2d 726, 440 N.E.2d 797, 454 N.Y.S.2d 712 (1982); Nat'l L.J., Sept. 14, 1981, at 24, cols. 1-3 (settlement to radar technician for 13-year exposure at a Nike missile site). Other work-related suits have involved claims by flight controllers for cataract damage, and cafeteria workers for skin damage and cataracts. *See* Nat'l L.J., Sept. 14, 1981, at 25, col. 1. Microwaves are commonly used outside the home in radar and surveillance equipment, satellite communication, diathermy machines and many other devices. *Id.* at 24, col. 1. They are alleged to cause injuries ranging from genetic damage, *id.* at 25, col. 1, to cancer, impotence, disorientation, deafness, diabetes and cataracts, *id.* at 24, cols. 1-3. The relationship between long term exposure and many of these diseases is just becoming known. It has been predicted that microwave-related suits will become the broadest-based product liability litigation ever. *See id.* at 24, col. 1.

270. The Consumer Products Safety Commission's ban on urea-formaldehyde insulation focused national attention on the dangers of formaldehyde. *See* 10 Prod. Safety & Liab. Rep. (BNA) 234 (Apr. 9, 1982). The Fifth Circuit, ruling that the Commission acted without sufficient evidence that the foam is dangerous, overturned the ban several months later. *See* *Gulf S. Insulation v. Consumer Prod. Safety Comm'n*, 701 F.2d 1137, 1150 (5th Cir. 1983). The Commission, however, is continuing its investigation into formaldehyde, and may take action on other products. *Wall St. J.*, Aug. 26, 1983, at 4, col. 2 (midwest ed.). Consumer groups and unions are also putting pressure on other agencies to regulate or ban the use of formaldehyde. *Wall St. J.*, Mar. 15, 1983, at 1, col. 5 (midwest ed.). Several states and cities have banned the foam insulation. *Wall St. J.*, Nov. 1, 1983, at 7, col. 2 (midwest ed.).

Formaldehyde is used in the workplace in a wide variety of ways. For example, the AFL-CIO cited formaldehyde as a health hazard to workers in beauty salons and barber shops where it is used as a sterilizer and an ingredient in some beauty products. *Wall St. J.*, Feb. 8, 1983, at 1, col. 5 (midwest ed.). Use has been especially heavy in the forest products industry, which uses one-half of the formaldehyde produced, and in the textile industry, which uses one-quarter. *Wall St. J.*, May 21, 1982, at 23, col. 1 (midwest ed.). In all, about 1.4 million people come into contact with formaldehyde solutions in the workplace. *Wall St. J.*, May 21, 1982, at 1, col. 6 (midwest ed.). The United Auto Workers, which along with 14 other unions sued OSHA to set stricter exposure standards in factories, claims that as many as one per cent of workers exposed at current levels may die of formaldehyde-related cancers. *Wall St. J.*, Mar. 15, 1983, at 1, col. 5 (midwest ed.).

There is also wide exposure to formaldehyde outside of the workplace. It is used in such common products as toothpaste and wash-and-wear clothing. It is also used to build such products as cabinets, partition walls, decking, paneling, subflooring, millwork, ceilings, and some plastics and carpeting. *See* 10 Prod. Safety & Liab. Rep. (BNA) 568 (Aug. 27, 1982). The highest concentrations have been found in mobile homes, which accounted for 15% of housing starts in 1980. 10 Prod. Safety & Liab. Rep. (BNA) 458 (July 7, 1983). Because people typically spend 80 to 90% of their time indoors, exposure can be extensive. *Id.* at 459.

271. The controversy surrounding Agent Orange has caused widespread publicity. It has recently been revealed that the Joint Chiefs of Staff continued to use the spray for two and one-half years after receiving a report from the Rand Corporation stating that the herbicide was poisoning peasants. *See* *Wall St. J.*, July 6, 1983, at 2, col. 3. Because veterans cannot sue the military, *see* *Feres v. United States*, 340 U.S. 135, 146 (1950), they sued the Agent Orange manufacturers, *see, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); *In re "Agent Orange" Product Liab. Litig.*, 534 F. Supp. 1046 (E.D.N.Y. 1982), *cert. denied*, 104 S. Ct.

publicity, partly due to their wide dissemination. Many other products in wide use have potentially toxic effects,²⁷² and new relationships are being discovered monthly.²⁷³

Little is known about the long term mental or physical effects of working or living under the threat of cancer or other disease. Effects of such stress, however, are beginning to be reported. It was recently discovered that wood model makers are at much higher risk of developing colon and rectal cancer than is the general population.²⁷⁴ Workers reported higher use of alcohol since learning of this danger, and a psychologist predicts more ulcers, drinking and wife abuse will occur as a result of this occupational disease threat.²⁷⁵ The plaintiffs in *Ayers* alleged that, in addition to conditions ranging from mild depression to severe psychosis, the families suffered from stress, outbursts of rage and hostility, loss of sleep, and

1417 (1984). This case was recently settled for \$180 million, see Wall St. J., Mar. 8, 1984, at 3, col. 1 (midwest ed.), with Monsanto Company providing almost half the settlement, see *id.*, May 14, 1984, at 4, col. 2.

Although most Agent Orange litigation involves Vietnam veterans, in a recent case railroad workers successfully sued the Norfolk & Western Railway for injuries resulting from a chemical spill involving the same chemical found in Agent Orange. Nat'l L.J., Aug. 30, 1982, at 3, cols. 2, 3. Alleging that the railroad failed to protect them adequately when they cleaned up the spill, 19 workers each received compensatory damages of \$1 million or more. *Id.* Suits against the manufacturer were settled. *Id.* The primary harmful agent in Agent Orange is dioxin, the same chemical that was found at many toxic waste sites. See *supra* note 268.

Agent White has also recently come into controversy. It was used in Vietnam until 1971 when the military discontinued its use because, of all defoliants in use, it had the highest potential for causing long term ecological damage. These suits are being brought by United States civilians who were exposed to the chemical when the federal government, public utilities, timber companies and others applied it to control unwanted vegetation. Nat'l. L.J., July 26, 1982, at 16, col. 1.

272. Exposure to products such as lead, Benedictin, silica, benzene, vinylchloride, arsenic, the pesticide dibromochloropropane (DBCP), beryllium, and polychlorinated biphenyls (PCBs) are generating or are expected to generate large numbers of claims. Legal Times, June 13, 1983, at 17, col. 4; *id.* at 30, col. 1. An estimated 500,000 workers, for example, are annually exposed to Benzene. Newsweek, Sept. 6, 1982, at 57, col. 1.

273. Potential carcinogens generally receive the most publicity. A connection between cancer and exposure to butadine, a common chemical used to make synthetic rubber, is causing increased concern to rubber workers. At least three unions are urging OSHA to adopt a stricter exposure standard. Wall St. J., Aug. 30, 1983, at 1, col. 5. According to the National Institute for Occupational Safety and Health, asphalt fumes may pose a job-related cancer risk. Wall St. J., Apr. 27, 1983, at 1, col. 5 (midwest ed.). The National Foundation for Cancer Research reported in September 1983 that snuff and chewing tobacco contain carcinogens so strong that they could cause malignancies almost immediately. This is ironic because many substituted these products as a safe alternative to smoking. Bloomington Herald-Telephone, Sept. 21, 1983, at 3, col. 4. A possible link between fluorescent lights and skin cancer is causing a medical debate. Wall St. J., Apr. 12, 1983, at 31, col. 3 (midwest ed.). Even chicken kidneys recently became suspect because they collect high levels of cadmium, a carcinogen. Cadmium, a naturally occurring substance that is used in batteries, television tubes, ink, glass and paper, settles in the kidneys of mature chickens and turkeys. The Department of Agriculture has proposed a rule requiring removal of the kidneys before sale. Wall St. J., May 16, 1983, at 25, col. 1 (midwest ed.).

274. Wall St. J., Jan. 3, 1983, at 25, col. 3 (midwest ed.).

275. *Id.* (citing GERALD SELF, a psychologist who has counseled the workers).

other disturbances.²⁷⁶ Similar conditions have been reported by other plaintiffs suffering under the threat of developing a disease.²⁷⁷ In general, physical or emotional illness grows with the stress of the threat of cancer or other disease.²⁷⁸ Eventually a threat-of-illness etiology may develop which will make it easier for plaintiffs to recover.

Almost one-half of the states have enacted statutes of repose, which commonly set a limit from time of purchase, often ten years, after which suit for physical injuries cannot be brought.²⁷⁹ Similarly, many state worker compensation statutes impose strict time limitations,²⁸⁰ barring

276. *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 568, 461 A.2d 184, 188 (Law Div. 1983).

277. See Nat'l L.J., Nov. 23, 1981, at 10, col. 1.

278. *Wall St. J.*, Jan. 3, 1983, at 25, col. 3 (midwest ed.) (citing Kenneth Axelrod, chief psychologist at Harper-Grace Hospitals in Detroit).

279. See, e.g., Ala. Code § 6-5-502(c) (Supp. 1984) (ten years); Ariz. Rev. Stat. Ann. § 12-551 (1982) (twelve years); Colo. Rev. Stat. § 13-21-403(3) (Supp. 1983) (after ten years rebuttable presumption of no negligence); Conn. Gen. Stat. Ann. § 52-577a (West 1984) (ten years); Fla. Stat. Ann. § 95.031(2) (West 1982) (twelve years); Ga. Code Ann. § 51-1-11(b)(2) (1982) (ten years); Idaho Code § 6-1403(2) (Supp. 1984) (after ten years rebuttable presumption of no negligence); Ind. Code Ann. § 34-4-20A-5 (Burns 1984) (ten years); Kan. Stat. Ann. § 60-513(b) (1983) (ten years); Ky. Rev. Stat. Ann. § 411.310(1) (Bobbs-Merrill Supp. 1984) (presumption of no negligence five years from sale or eight years from manufacture); Neb. Rev. Stat. § 25-224 (1979) (ten years); N.H. Rev. Stat. Ann. § 507-D:2 (1983) (twelve years); N.C. Gen. Stat. § 1-50(6) (Supp. 1981) (six years); N.D. Cent. Code § 28-01.1-02 (Supp. 1983) (ten years from purchase or eleven years from manufacture); Or. Rev. Stat. § 30.905 (1981) (eight years); R.I. Gen. Laws § 9-1-13 (Supp. 1984) (ten years); S.D. Codified Laws Ann. § 15-2-12.1 (1984) (six years); Utah Code Ann. § 78-15-3(1) (1977) (six years from purchase or ten years from manufacture); Wash. Rev. Code Ann. § 7.72.060(2) (Supp. 1985) (after twelve years rebuttable presumption of no negligence).

Several courts have held that their states' repose statutes violate the state constitution. See, e.g., *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1001 (Ala. 1982); *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874, 874 (Fla. 1980); *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 595, 284 S.E.2d 188, 192 (1981), *modified*, 306 N.C. 364, 293 S.E.2d 415 (1982); *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 523-27, 464 A.2d 288, 294-97 (1983); *Kennedy v. Cumberland Eng'g Co.*, [1983-84 Transfer Binder] *Prod. Liab. Rep. (CCH) ¶ 9895*, at 25,138 (R.I. Jan. 19, 1984). In *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982), the North Carolina Supreme Court backed away from the court of appeals' decision declaring the statute of repose unconstitutional. It modified the appellate court's opinion by holding that the repose statute was not to be applied to plaintiff's case because such application would have been retroactive. The North Carolina Supreme Court concluded that the legislature did not intend such retroactive application. See *id.* at 370, 293 S.E.2d at 420. Other courts are upholding state statutes of repose. See, e.g., *Philpott v. A.H. Robbins Co.*, 710 F.2d 1422, 1425 (9th Cir. 1983) (Oregon); *Dague v. Piper Aircraft Corp.*, 513 F. Supp. 19, 21 (N.D. Ind. 1980) (Indiana); *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 724, 425 N.E.2d 522, 523 (1981).

280. See, e.g., Ala. Code § 25-5-147 (1975); Ark. Stat. Ann. § 81-1318(a)(2) (1976 & Supp. 1983); Ga. Code Ann. § 34-9-82 (1982); Idaho Code § 72-439 (1973); Ill. Ann. Stat. ch. 48, § 172.36(1)(f) (Smith-Hurd Supp. 1984-85); Ind. Code § 22-3-7-9(e) (Burns Supp. 1984); Iowa Code Ann. § 85A.12 (West 1984); Mont. Code Ann. § 39-72-403 (1983); N.C. Gen. Stat. § 97-58 (1979 & Supp. 1983); S.C. Code Ann. § 42-11-70 (Lawyers Co-op 1976); Utah Code Ann. § 35-2-13 (1974); Vt. Stat. Ann. tit. 21, § 1006 (1978). State statutes of limitations for strict liability and tort actions also restrict plaintiffs' claims. A 1981 Labor Department study showed that nearly 2 million workers were

recovery after a relatively short period. Because a large number of victims will not develop a diagnosable disease until after the running of the statutory time period, they will not be able to claim compensation for their injuries.²⁸¹ A recent New Jersey decision, which will significantly add to the number of suits barred, is yet another illustration of the time problem faced by potential plaintiffs. The case, *Coons v. American Honda Motor Co.*,²⁸² does not directly involve toxic substances; it interprets the constitutionality of a New Jersey statute of limitations.²⁸³ Although Honda was the company involved in the suit, the case was primarily argued by an asbestos mining company as amicus curiae.²⁸⁴ The statute, which benefits New Jersey citizens without harming in-state corporations, tolls the running of the two year statute of limitations in cases involving suit against a foreign corporation not represented in New Jersey. The United States Supreme Court, in *G.D. Searle Co. v. Cohn*,²⁸⁵ held that the statute did not violate the equal protection or due process clauses.²⁸⁶ The Court did not resolve a commerce clause challenge to the statute, however.²⁸⁷ The *Coons* case resolves this issue.

severely or partially disabled from an occupational disease, yet only 5% of the severely disabled received workers' compensation. Wall St. J., Dec. 20, 1982, at 1, col. 6 (midwest ed.).

Most states have a short period of limitation for tort and strict liability claims. The period is usually one or two years, although it can range up to six. McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 Forum 416, 438-40 (1980). Most states have adopted a discovery rule that does not begin accrual of the limitations period until discovery of the injury. See, e.g., *Williams v. Borden, Inc.*, 637 F.2d 731, 732 (10th Cir. 1980); *Frederick v. Calbio Pharmaceuticals*, 89 Cal. App. 3d 49, 53, 152 Cal. Rptr. 292, 295 (1979); *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497, 500-01 (Ky. 1979).

Six states, however, have not adopted a discovery rule, so that accrual begins at the time of exposure to the product. Legal Times, June 13, 1983, at 30, col. 4. Even in states that have discovery rules, differing interpretations make the rules more or less restrictive. Compare *Neubauer v. Owens-Corning Fiberglass, Inc.*, 686 F.2d 570, 577 (7th Cir. 1982) (cause of action accrues when disease diagnosable and not when actually diagnosed), *cert. denied*, 459 U.S. 1226 (1983) and *Staiano v. Johns-Manville Corp.*, [1982-83 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 9419, at 22,803 (Pa. Super. Ct. Sept. 3, 1982) (denying 1977 suit of plaintiff who was aware of asbestos-related disease in 1972 but who was not then a proper party to sue) with *Dawson v. Eli Lilly & Co.*, 543 F. Supp. 1330, 1334 (D.D.C. 1982) (woman who knew in 1973 that her cervical adenosis was connected to DES allowed to bring suit in 1980 after learning that injury may have resulted from defendant's wrongdoing).

281. See *supra* notes 217-19 and accompanying text. Some products, like DES, injure on initial exposure but take years for injuries to become manifest. Other products injure only after prolonged exposure.

282. 94 N.J. 307, 463 A.2d 921 (1983), *modified*, 96 N.J. 419, 476 A.2d 763 (1984).

283. N.J. Stat. Ann. § 2A:14-22 (West Supp. 1983).

284. The company, Brinco Mining Ltd., is a Canadian asbestos manufacturer. G.D. Searle & Co. also filed an amicus curiae brief. 94 N.J. at 307, 463 A.2d at 922.

285. 455 U.S. 404 (1982).

286. *Id.* at 412.

287. The Court in *Searle* found that the commerce clause issue was "clouded" by an ambiguity in the state law regarding whether an out-of-state corporation could qualify under the statute by merely designating an agent for service of process within the state. *Id.* at 413-14.

The New Jersey Supreme Court found that the statute unconstitutionally burdened interstate commerce by effectively requiring foreign corporations that engage solely in interstate commerce to register to do business in New Jersey in order to gain the statute's two-year protection.²⁸⁸ Although the ruling is to be prospectively applied,²⁸⁹ its effect is that all corporations can now take advantage of the two year bar.²⁹⁰ Asbestos litigation is especially heavy in New Jersey because of ship building there, and hundreds of cases will be affected.

Thus, for a large percentage of the millions exposed to toxic substances, fear of development of the disease provides the only avenue to recovery.²⁹¹ An additional spur to sue for fear of disease exists if potential defendants appear to be in danger of running out of assets before the claimants develop the feared disease.²⁹² These incentives, when com-

288. 94 N.J. at 315, 463 A.2d at 927.

289. 96 N.J. at 435, 476 A.2d at 773. Before the court's original decision was modified to make the ruling apply prospectively only, Manville Corp. estimated that 60 to 80% of the cases filed against it in federal court in New Jersey could have been dismissed because of the ruling, as well as over 50% of the state cases. *Legal Times*, Aug. 8, 1983, at 7, col. 3.

290. The court reiterated the Supreme Court's statement in *Searle* that a statute of limitations is a matter of public policy about the right to litigate, not a fundamental right. It is, therefore, particularly subject to legislative control. *Coons*, 94 N.J. at 315, 463 A.2d at 927.

291. See *infra* notes 313-18 and accompanying text.

292. As the asbestos litigation has illustrated, this is an increasing threat. Potential asbestos-related liability was cited by Manville Corporation as its reason for filing for reorganization. See *Manville Bankruptcy*, *supra* note 6, at 1122 n.7. Although not in current financial difficulty, Manville apparently decided that protection under Chapter 11 was necessary because a study showed its potential liability from asbestos-related suits could reach \$2 billion, and its net worth was only \$1.1 billion. *Wall St. J.*, Aug. 27, 1982, at 1, col. 6. Some claim, however, that the filing was motivated by the desire to put pressure on the federal government to shoulder some of the liability arising from exposure to asbestos during World War II shipbuilding activity. *Id.* At least two other firms, U.N.R. Industries and Amatex Corporation, have filed for bankruptcy due to asbestos-related litigation. See *Manville Bankruptcy*, *supra* note 6, at 1121 n.6.

Other companies have taken measures outside of the Bankruptcy Code because of the potential liability. Forty-Eight Insulations, Inc., for example, has, instead of declaring bankruptcy, moved its employees and manufacturing operations to another company. Forty-Eight was left to handle the more than 13,000 asbestos-related lawsuits against it. See 68 A.B.A. J. 1559 (1982). Raybestos-Manhattan, Inc. changed its name to Raymark Corp. and reorganized, in an effort to improve its image and shield itself from some asbestos-related liabilities. See *Wall St. J.*, June 18, 1982, at 16, col. 3 (midwest ed.). Raymark paid out \$10.9 million in asbestos-related expenses in 1982, and claimed that these expenses made the difference between a profitable year and a losing one. *Legal Times*, July 18, 1983, at 1, col. 1.

It has been estimated that the insurance industry may be liable for \$38.2 to \$90 billion over the next 35 years due to asbestos-related diseases. See *Wall St. J.*, June 14, 1982, at 1, col. 6. At present, the largest class of product liability suits at both the state and federal level is composed of asbestos-related litigation. *Want*, *supra* note 268, at 613.

Similar bankruptcies hit the urea-formaldehyde business. Rapco Foam, Inc., the major urea-formaldehyde manufacturer, filed for bankruptcy, 10 *Prod. Safety & Liab. Rep.* (BNA) 325 (May 21, 1982), and most of the industry is out of business despite the lifting of the Consumer Products Safety Commission ban, see *Wall St. J.*, May 21, 1982, at 23, col. 1 (midwest ed.). See *supra* note 270.

bined with the wide publicity about product-caused delayed manifestation injuries and an increasingly aggressive and organized toxic tort plaintiffs bar,²⁹³ make fear of inundation of the court system quite realistic.

In some states, courts are already inundated by asbestos-related disease suits alone.²⁹⁴ These courts are especially likely to view the addition of hundreds of fear of disease cases as unmanageable.²⁹⁵ Many courts, however, may be unpersuaded by this threat. Courts that have expanded theories²⁹⁶ and developed new ones²⁹⁷ in order to facilitate plaintiffs'

293. The first plaintiffs' group formed to share information on extensive tort litigation was made up of attorneys handling Dalkon Shield suits. *Legal Times*, June 13, 1983, at 30, col. 3. An asbestos plaintiff's group was begun in 1976 to reduce mutual discovery costs and help avoid losing suits. *Id.* The group has grown to include 150 members. *Id.* Plaintiffs groups have also been organized around DES litigation and DBCP suits. *Id.* Lawyers involved in silica dust litigation are hoping to organize a nationwide network to facilitate silica suits. *Nat'l. L.J.*, Aug. 29, 1983, at 8, cols. 3, 4.

A recent addition is the dioxin task force, formed by the plaintiffs' bar to share information and coordinate the hundreds of cases based on dioxin exposure. *Nat'l. L.J.*, July 4, 1983, at 3, cols. 1, 2. Dioxin, the primary harmful ingredient in Agent Orange, has caused the contamination of land in several areas of the United States, in addition to allegedly injuring hundreds of servicemen in Vietnam. See *supra* notes 268, 271.

294. In Philadelphia, for example, up to a dozen new asbestos cases are being filed for each one settled. See *Legal Times*, Apr. 18, 1983, at 1, col. 1. In an attempt to handle the volume, one court has ordered that cases be tried by a judge without a jury, with a subsequent right to jury trial. *Id.* Although this procedure has led to more settlements, it is still doubtful that asbestos cases can be adequately handled. See *id.* The Committee for Equitable Compensation, a coalition of companies, which has been sued for asbestos-related disease, estimates that 16,000 to 18,000 cases against 260 manufacturers or installers of asbestos have been filed. *Legal Times*, June 13, 1983, at 17, col. 3.

Other management techniques have included using collateral estoppel to avoid relitigating asbestos issues, see, e.g., *Amader v. Johns-Manville Corp.*, 541 F. Supp. 1384, 1387 (E.D. Pa. 1982); *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1361 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982), permitting a simultaneous trial of liability in five asbestos cases before five different juries, *Legal Times*, June 13, 1983, at 32, cols. 1-2, organizing discovery in phases, *id.* at col. 2, consolidating cases at pretrial proceedings, *id.*, placing a 480 day limit on pre-trial proceedings, *Legal Times*, Oct. 24, 1983, at 1, col. 2, and resolving several cases at one time, *id.*

Insurers and asbestos producers have proposed an agreement that may relieve some of the burden. Under the agreement, a claims facility would be established which would try to settle claims against the companies and defend suits if claimants insist on going to court. No claims settlement would include punitive damages. Companies would fund the plan under a formula based on average claims paid in the past and claims still pending. *Legal Times*, May 21, 1984, at 1, col. 2.

295. The inundation includes suits involving products other than asbestos. One judge faced with 119 Dalkon Shield cases is devising ways to expedite them. See *Nat'l. L.J.*, July 11, 1983, at 9, col. 1. The American Bar Association, fearing that toxic tort litigation will overwhelm the court system, has asked that most toxic tort claims be handled under an administrative forum established by Congress. Want, *supra* note 268, at 614.

296. Examples of such expansion are the cases that have held that plaintiffs who discover a product-related injury years after developing a different injury caused by the same product are not barred from suit. These courts hold that the limitations period begins running at the time the later injury is discovered. See, e.g., *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 112 (D.C. Cir. 1982); *Fearson v. Johns-Manville Sales Corp.*, 525 F. Supp. 671, 674 (D.D.C. 1981); *Martinez-Ferrer v. Richardson-Merrell, Inc.*, 105 Cal. App. 3d 316, 325-27, 164 Cal. Rptr. 591, 596-97 (1980). Another example is the

product liability suits and overcome time-related problems may be reluctant to deny compensation to thousands of victims of toxic torts. They have overlooked inundation fears in the past and may do so in these cases. This real threat, however, when coupled with the traditional reluctance of most courts to interpret emotional distress claims broadly, should lead to limited recognition of toxic tort fear of disease claims.

IV. COMPROMISE SOLUTIONS

A. *Recovery of Medical Monitoring Costs*

Plaintiffs who are unable to recover under the current restrictive requirements may still be able to recover the medical costs incurred in determining whether the feared disease has developed. The court in *Ayers v. Township of Jackson*²⁹⁸ so held on the basis of public policy.²⁹⁹ Although plaintiffs could not recover for the enhanced risk of developing cancer,³⁰⁰ and possibly not for the fear of developing it,³⁰¹ medical surveillance to monitor for its development, if necessary, was compensable.³⁰² Of course, allowance of such a claim implicitly recognizes that the fears are reasonable and that there is a clear causal connection between the exposure and the emotional distress. It is a short step from *Ayers*, in which costs of medical monitoring were recovered, to *Laxton v. Orkin Exterminating Co.*,³⁰³ in which reasonably seeking medical monitoring was sufficient to support the emotional distress claim.³⁰⁴ This middle ground between recovery and denial may, however, be appealing to courts that

finding by some courts that the statute of limitations does not begin to run until plaintiff learns that he or she has been injured, the cause of the injury, and that the injury was wrongfully inflicted by the defendant. *See, e.g.*, *Exnicious v. United States*, 563 F.2d 418, 420-21 (10th Cir. 1977); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 574-75 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155, 160-61 (8th Cir. 1975).

297. *See, e.g.*, *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 376-78 (E.D.N.Y. 1972) (enterprise liability); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 611-13, 607 P.2d 924, 936-38, 163 Cal. Rptr. 132, 144-46 (market share liability), *cert. denied*, 449 U.S. 912 (1980).

298. 189 N.J. Super. 561, 572-73, 461 A.2d 184, 190 (Law Div. 1983).

299. If plaintiffs are deprived of any necessary diagnostic services in the future because they have no source of funds available to pay for the testing, the consequences may result in serious, if not fatal illness. Public policy thus supports a conclusion that if such illness could be prevented by surveillance, then the tortfeasor should bear the costs. Is it reasonable to compel a plaintiff to suffer the consequence of a serious if not fatal illness before defendant's tortious conduct is actionable, when reasonable surveillance might prevent the sickness?

Id. at 573, 461 A.2d at 190.

300. *Id.* at 567, 461 A.2d at 187.

301. *See supra* notes 160-67 and accompanying text.

302. *Ayers*, 189 N.J. Super. at 572-73, 461 A.2d at 190. The necessity is to be determined by the doctor who is to determine whether exposure at various levels to a known carcinogen requires "annual medical testing in order to properly diagnose the warning signs of the development of the disease." *Id.* at 572, 461 A.2d at 190.

303. 639 S.W.2d 431 (Tenn. 1982).

304. *See supra* notes 188-93 and accompanying text.

recognize the real dangers plaintiffs face but that want to hold a tight rein on emotional distress suits.³⁰⁵

In the recently decided case of *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*³⁰⁶ the District of Columbia Circuit affirmed an award of diagnostic damages. Although the *Friends* plaintiffs faced possible injury from the explosive depressurization of a crashing plane³⁰⁷ rather than from exposure to a toxic product, the court granted the diagnostic award on public policy grounds similar to those stated in *Ayers*.³⁰⁸ The court determined that it was fairer for defendant to pay for diagnostic exams than for plaintiff to bear the risk of receiving damages too late to be of any use.³⁰⁹ In addition, it found that such an award served the two principal aims of tort law: deterrence of misconduct and just compensation to the victims of wrongdoing.³¹⁰ In so finding, the court rejected plaintiff's arguments that the jurisdiction did not recognize a cause of action for diagnostic examination without proof of actual injury, and that the common law of tort does not encompass an action for being put "at risk."³¹¹ Finally, the court rejected the argument that undergoing diagnostic exams does not constitute injury.³¹²

The award of screening costs, and treatment expenses if the disease develops, comprises an appealing settlement for many plaintiffs. Often the people who experience heaviest exposure to toxic substances are

305. The court in *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1984), prohibited evidence that would show the probability that a worker who was suffering from asbestosis might develop cancer. *See id.* at 521-22. Because he did not have cancer, he was only suing for the increased risk, which was not compensable. *Id.* at 520. The court found, however, that such evidence may be admissible to substantiate the workers' claim for compensation for future medical examinations required to determine if any cancer had appeared. *See id.* at 522. It cautioned, however, that such evidence may be too prejudicial. *See id.* The court further found that such evidence might also be used to substantiate a claim for emotional distress if such a claim were allowed. *See id.* at 522-23.

306. 53 U.S.L.W. 2227 (D.C. Cir. Oct. 12, 1984). Defendants appealed the granting of partial summary judgment for the cost of comprehensive diagnostic examinations, and a preliminary injunction ordering it to establish a \$450,000 fund to pay the reasonable expenses of diagnostic examinations. *Id.* at 2228.

307. Plaintiffs are Vietnamese orphans who were passengers on defendant's aircraft, which was used in the rescue effort Operation Babylift. Nat'l L.J., Dec. 3, 1984, at 6, col. 3. The plane crashed outside of Saigon in 1975, killing 75 of the 200 children and 59 of the 75 adults aboard. *Id.* Plaintiffs are survivors who were adopted by Canadian and European families. *Id.* The 59 surviving children adopted by United States families settled their lawsuit for roughly \$17.6 million. *Id.*

308. *Friends*, 53 U.S.L.W. at 2228.

309. *Id.* Defendants had objected to the district court awarding interim injunctive relief of \$450,000 in a suit in which money damages were sought. *Id.* The appellate court found the interim award appropriate because the district court had already found defendant liable for the damages, and the only issue remaining to be determined was the amount of damages. *Id.* In addition, the court found that delay caused by trying to compute the amount of liability would result in irreparable injury. *Id.*

310. *See id.*

311. *See id.*

312. *See id.*

those who can least afford medical care.³¹³ In the town of Triana, Alabama, for example, a dichloro-diphenyl-trichloro-ethane (DDT) manufacturer that closed its plant in 1971 left 837 tons of insecticide at the bottom of a waterway a few miles upriver from the town.³¹⁴ Several years later it was discovered that citizens had high levels of DDT in their bodies, some having the highest levels ever reported in medical history.³¹⁵ The town had a cancer death rate of almost four times the national average, yet most residents had not sought medical help because they could not afford to do so.³¹⁶ At least two suits were filed against the manufacturer seeking recovery for plaintiffs' mental anguish from knowing that high levels of DDT existed in their bodies.³¹⁷ The Triana cases resulted in a settlement that provided funds for medical screening and treatment of the feared diseases.³¹⁸ The *Mink* case was similarly settled.³¹⁹ Such a settlement strikes an appropriate balance between the desire to compensate meritorious claims and the need to avoid a flood of litigation.

B. *Future Claims Problems in Bankruptcy and Reorganization*

Recognition of fear of disease claims may also help lead to other compromise settlements. Future claims problems have plagued attempts at settlement or management of current delayed manifestation litigation. Notable examples are the Unarco (UNR) and Manville filings for reorganization, which have affected large numbers of asbestos-related injury suits.³²⁰ UNR's appeal to have a special representative appointed to rep-

313. For example, consumers who experience the highest exposure to formaldehyde are generally those who live in trailers. See *supra* note 270.

314. Nat'l L.J., Nov. 23, 1981, at 10, col. 1.

315. *Id.* One resident had DDT levels twice as high as any reported in medical literature, and 11 had levels comparable to the most heavily exposed DDT workers. *Id.*

316. *Id.*

317. *Id.*

318. The manufacturer, Olin Corp., reached a settlement in the several Triana cases that were filed. Suits were brought by the Environmental Protection Agency, Alabama, and three groups of local residents and fishermen. The settlement provided for payment of \$24 million over 5 years. Of that amount, \$5 million was to set up a fund to provide primary health care and monitoring. Olin also agreed to pay cleanup costs of the area. Wall St. J., Apr. 22, 1983, at 4, col. 2. Olin claims that the 1983 settlement has spawned suits by approximately 9,000 people who claim injuries from the DDT contamination but who live further from the plant than the residents of Triana. Legal Times, Aug. 13, 1984, at 1, col. 2. The claims have been consolidated into a suit in the federal district court in Birmingham, Alabama. *Id.* The suit, which is currently in discovery, encompasses claims for physiological and financial damages as well as for emotional harm. *Id.* Claims for the last are made by a large number of minors who have as yet suffered no illness but who run a higher chance of developing diseases from the exposure. *Id.*

319. See *supra* note 251 and accompanying text. The settlement of claims by Three Mile Island residents provided for a fund for monitoring their health. Nat'l. L.J., Jan. 3, 1983, at 8, col. 3.

320. See *Manville Bankruptcy*, *supra* note 6, at 1122. Amatex Corporation, another asbestos manufacturer, filed for bankruptcy after Johns-Manville, but without much publicity. See *id.* at 1121 n.6. See *supra* note 292.

Manville is the largest manufacturer of asbestos in the United States, as well as the most financially solvent. N.Y. Times, Aug. 27, 1982, at A1, col. 6. Courts have held that

resent future claimants in its bankruptcy proceeding was rejected by the district court because it found that future claimants could not be creditors under the Bankruptcy Code.³²¹ Because the claims of asbestos victims do not arise under state law until these victims know or should know of their injury, there is no claim until their disease is diagnosable.³²² Without a claim, victims cannot be included in a settlement plan.³²³ Without the ability to settle future claims problems, companies may be forced into bankruptcy, leaving future claimants with nothing.³²⁴ Representing future claimants in the reorganization plan, however, raises questions of due process and jury trial rights of these future litigants.³²⁵

The recognition that future disease litigants have a present claim for emotional distress means that people who have knowledge of their exposure and are concerned could be included in the reorganization plan.³²⁶ If included, all present litigants would receive less than if they were the only claimants, and the emotional distress claimants would receive less

the Manville bankruptcy stay did not preclude maintenance of claims against codefendants for asbestos-related injuries. *See Williford v. Armstrong World Indus.*, 715 F.2d 124, 128 (4th Cir. 1983); 11 *Prod. Safety & Liab. Rep. (BNA)* 251 (Apr. 8, 1983).

321. *See In re UNR Indus.*, 29 *Bankr.* 741, 745 (N.D. Ill. 1983).

322. *Id.*

323. *Id.* at 746. The UNR court found that it lacked jurisdiction to intervene in future cases. *See id.* at 748. It also said that if it granted UNR's plan and took jurisdiction over future claims, it would open the way for a wave of Chapter 11 filings by other makers of hazardous products. *See id.* at 746. The job of dealing with future asbestos claims, it found, lies with Congress, not the courts. *See id.* at 748. Although it did not have jurisdiction in the matter, the court also stated that unknown claimants could not be included in a general class represented by a court-appointed overseer. *See id.* at 747. It found that there would be too many conflicting positions in the group, and that the representative would be unable to determine who to ask what the group wanted. *See id.*

324. *See supra* note 320 and accompanying text.

325. It would be difficult to get the future litigants certified as a class under Federal Rules of Civil Procedure 23, which has been incorporated into the Bankruptcy Rules. *See Bankr. R. P.* 723, 11 U.S.C. at 238 app. (1982). The class would contain a mix of wrongful death and personal injury claims, and not all members of the class would be known. Courts have been reluctant to certify classes with a mixture of claims, and have preferred individual actions when personal injuries or death are involved. *See Manville Bankruptcy, supra* note 6, at 1135; *see, e.g., Daye v. Pennsylvania*, 344 F. Supp. 1337, 1342-43 (E.D. Pa. 1972), *aff'd*, 483 F.2d 294 (3d Cir. 1973), *cert. denied*, 416 U.S. 946 (1974); *Hobbs v. Northeast Airlines*, 50 F.R.D. 76, 79 (E.D. Pa. 1970).

Because the class action rule contains an opt-out provision, *see Fed. R. Civ. P.* 23(c)(2), anyone who did not receive notice or was not given an opportunity to opt out would not be included in the class. Thus the possibility remains that unknown future litigants will have a right to sue, thereby defeating the purpose of a company filing for bankruptcy in order to have a definite ceiling put on its liability. This possibility could also upset the settlement of contingent claims necessary for discharge under the Bankruptcy Code. *See* 11 U.S.C. § 502(c) (1982).

326. Such recognition would not entirely solve the problem of future unknown claimants who do not know that they have been exposed. It would considerably reduce the uncertainty, however, and make the establishment of a fund for unknown litigants more feasible in a reorganization plan. It would also allow a fairer allocation of resources in a discharge plan.

than if they sued later when they developed the feared disease. All are better protected, however, by giving a reduced amount to each.

An additional advantage of recognizing such claims is that it would be easier to determine a settled amount for retroactive insurance purposes.³²⁷ Retroactive insurance, which is purchased after liabilities have been incurred, has been used recently in mass disaster situations such as the MGM Grand Hotel and Casino fire, which killed eighty-five people and injured hundreds more.³²⁸ Manville has suggested the purchase of such insurance to guarantee payment of claims under its reorganization plan.³²⁹ Because the harmful properties of many products were not known or appreciated during the many years that they were in use, many companies have inadequate insurance (or no insurance at all) covering injuries arising from those products. Retroactive insurance is thus a very attractive alternative. Insurance companies, however, are unwilling to extend such insurance for an indeterminate amount.³³⁰ Recognition of future disease claims as current emotional injury claims would facilitate the determination of a definite figure for insurance purposes.

CONCLUSION

Recognizing the claims of toxic tort plaintiffs who are symptomless but fear development of a delayed-manifestation disease would at best

327. Such coverage, which is relatively new, is also called back-dated insurance. Under a retroactive insurance plan, the insured pays a very large premium (sometimes as much as 100 times the usual premium) for coverage. Because payment from this coverage will not occur until the policy holder's regular liability policy is exhausted, the insurer can reap large amounts through investment. The coverage is attractive to the insured because the premium is deductible as a business expense. If the insured had to amass cash reserves against losses, it could not deduct losses until claims were paid many years later. See Hedges, *supra* note 7, at 181.

328. The fire, which occurred in November, 1980, led to the filing of more than 3,000 claims. Nat'l L.J., May 23, 1983, at 7, col. 1. The policy obtained by MGM Grand for \$39 million had four layers of retroactive insurance of \$170 million. See Bus. Ins., Mar. 21, 1983, at 1, col. 1. Although initially hailed as an innovative solution, the plan is now the subject of a dispute between MGM and its insurers. See Wall St. J., Mar. 15, 1983, at 4, col. 3 (midwest ed.). The insurers are refusing to pay settlements reached by MGM Grand and injured claimants because the insurers claim that the settlements are so high that they include punitive damages. *Id.* Punitive damages are not covered under the policies. *Id.* MGM filed suit asking for a declaratory judgment that its settlements are covered. See Nat'l. L.J., May 23, 1983, at 7, col. 4.

329. Wall St. J., Jan. 27, 1983, at 31, col. 6. This is one of several alternatives proposed by Manville. Another is to pay a fixed percentage of future earnings to asbestos claimants. *Id.* Under either plan, Manville wants individual amounts of compensation to be determined by binding arbitration. *Id.* at col. 5.

330. See *id.* at col. 6. As a result of the MGM-Grand Hall dispute, insurers are likely to set tougher conditions on acquiring the insurance, such as strict time limitations on payouts. Wall St. J., Nov. 25, 1983, at 11, col. 3 (midwest ed.). One commentator has urged companies to take advantage of the availability of retroactive insurance while they can. It is available because of the competition among insurers for premiums and high interest rates, and may not be readily available if conditions change. Bus. Ins., May 9, 1983, at 28, col. 1.

produce mixed results.³³¹ It would allow suit to thousands of plaintiffs who might otherwise be denied recovery when they later develop the feared disease. In addition, it could help lead to solutions to mass disaster toxic tort problems that some manufacturers are facing. Precedent clearly exists for the allowance of such suits, but allowing them in the context of an unlimited time frame would be a dangerous break with that precedent. It is likely that such recognition would overwhelm the judicial system³³² as well as some defendants already struggling under injury claims.³³³

Courts have long feared that recognizing and expanding emotional distress claims would open the proverbial Pandora's box. In the case of fear of a latent disease, these fears are well grounded. The tort system simply cannot afford to encompass such pervasive fear. Even if courts

331. See Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 Stan. L. Rev. 575, 618 (1983).

Early warning of the dangers of exposure to toxic substances both to limit exposure and to encourage monitoring is desired. However, manufacturers and others who provide these early warnings are also notifying those who have already been exposed that they face the possibility of developing a harmful disease. The earlier the warning, the longer the period of emotional distress and possibly the greater the severity. From the point of view of those who would be held liable, ignorance is bliss. Of course, having knowledge without providing warnings increases the chance of punitive damage awards, see *supra* notes 223, 229 and accompanying text, as well as the total number of those exposed, so that the possibility of creating or increasing emotional distress claims may not be determinative. However, it would definitely be a consideration of potential defendants.

332. In some areas, asbestos cases alone are already threatening to overwhelm the courts. As a result these courts are instituting changes. See *supra* notes 294-95. A 1981 settlement of 680 asbestos claims in New Jersey was praised as a way to speed processing of massive asbestos-related suits. If the cases had gone to trial, it was estimated that they would have taken 10 years to be resolved. Wall St. J., Mar. 16, 1981, at 10, cols. 1, 2.

Allowing fear-of-disease suits would not only add to the overcrowding earlier, it could also add in terms of total number of litigants, because people who never develop the disease could sue.

333. Although allowing these earlier claims may raise the specter of double liability, such a result seems unlikely. Some courts have allowed individuals to sue for a later-developing disease despite the fact that they had earlier developed a different injury from the same exposure. The decisions have primarily resulted from the court's desire to avoid barring a meritorious claim on statute of limitations grounds. See, e.g., *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 115-17 (D.C. Cir. 1982); *Lundy v. Union Carbide Corp.*, [1982-83 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 9478, at 23,097 (9th Cir. Dec. 28, 1982); *Fearson v. Johns-Manville Sales Corp.*, 525 F. Supp. 671, 674 (D.D.C. 1981); *Martinez-Ferrer v. Richardson-Merrell, Inc.*, 105 Cal. App. 3d 316, 325-27, 164 Cal. Rptr. 591, 596-97 (1980); *Anderson v. Sybron Corp.*, [1982-83 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 9507, at 23,218-19 (Ga. Ct. App. Jan. 1, 1983); cf. *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 520-21 (5th Cir. 1984) (plaintiff with asbestosis can sue later if he develops asbestos-related cancer). However, in none of these suits did plaintiffs sue for the earlier disease. The courts would probably view compensation for fear of disease as barring a later suit if the disease develops. See *Payton v. Abbott Labs*, 386 Mass. 540, 542 n.8, 437 N.E.2d 171, 181 n.8 (1982); cf. *Bernstein v. Kapneck*, 290 Md. 452, 460, 430 A.2d 602, 607 (1981) (discovery of unanticipated injuries after release of all claims does not entitle injured to repudiate release and sue for additional injury).

generally recognize such claims, plaintiffs still face a very practical but difficult problem: convincing the jury to compensate them for their fears. It is difficult to go a week without news of toxic exposure. Virtually everyone in society is conscious of the fact that the air they breathe,³³⁴ water, food and drugs they ingest,³³⁵ land on which they live,³³⁶ or products to which they are exposed³³⁷ are potential health hazards. Although few are exposed to all, few also can escape exposure to any.³³⁸ A member of our society faces a one in five chance of developing cancer or other debilitating disease.³³⁹ Probably most are concerned at some level about the implications of such exposure. Because such risks are inherent in everyone's lives, it may be difficult to convince a jury that the plaintiff should be specially compensated for his or her fears. In the DES cases that have gone to trial, plaintiffs with cancer have collected sizeable awards,³⁴⁰ but those without have been denied recovery by the jury.³⁴¹

334. "Yellow Rain" has been the topic of much recent publicity. See Bloomington Herald-Telephone, June 21, 1984, at 3, col. 1 (citing a report to Congress by the Congressional Office of Technology Assessment).

335. A recent well-publicized example is the antiarthritis drug Oralflex, marketed by Eli Lilly & Co. Announced with a high level of publicity, the drug soon was taken off the market after it was linked to several deaths in the United States and Europe. Nat'l. L.J., May 23, 1983, at 3, col. 2; Wall St. J., Aug. 31, 1983, at 21, col. 4. Other drugs that have recently received publicity because of their link to injuries are Lomax, a pain reliever, see Wall St. J., May 24, 1983, at 35, col. 4, and Bendectin, sold for nausea during pregnancy, see Nat'l. L.J., June 13, 1983, at 3, col. 1.

One of the most publicized adverse drug reactions was the Guillain-Barre syndrome developed by some who were inoculated with Swine Flu vaccine. Suits over this development are still in the courts. Nat'l. L.J., Apr. 6, 1981, at 32, col. 3.

336. The Environmental Protection Agency (EPA), which has identified 419 priority sites of high toxic waste, has a list of 16,000 potentially hazardous sites; it is in the process of testing the sites, and the list is growing. Wall St. J., July 7, 1983, at 1, col. 4. The EPA is planning to investigate and clean up as many as 200 Dioxin-contaminated sites. The process may take 12 years and cost \$100 million a year. Wall St. J., Oct. 10, 1983, at 1, col. 3. See *supra* note 268.

337. Two products that were widely used but caused illness or death as well as much publicity are Dalkon Shields and Rely Tampons. The latter had a short-lived but highly visible product existence, as buyers were warned of the dangers of use and the product was recalled. Not only have the dangers of the Dalkon Shield been well publicized, but further publicity has been generated by lawyer's ads seeking clients injured by the product. Louisville Courier Journal, Jan. 1, 1982, at B1, col. 5.

338. A United States-Canadian study, for example, suggests that many people may have traceable levels of dioxin in their bodies even though they have not experienced a known exposure. Wall St. J., Aug. 30, 1983, at 1, col. 3.

In *Ayers v. Township of Jackson*, 189 N.J. Super. 561, 461 A.2d 184 (Law Div. 1983), the court, in denying recovery for the increased risk of disease, recognized these pervasive risks: "[T]he court cannot ignore the fact that much of what we do and make part of our daily diet exposes us to potential, albeit remote, harm." *Id.* at 566, 461 A.2d at 187. See *supra* note 111 and accompanying text.

339. See *supra* note 266.

340. See, e.g., *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 572, 436 N.E.2d 182, 183, 450 N.Y.S.2d 776, 777 (1982) (\$500,000 awarded); *Axler v. E.R. Squibb & Sons*, 10 Prod. Safety & Liab. Rep. (BNA) 298, 300 (Pa. Common Pleas Ct. Philadelphia County Mar. 24, 1982) (\$1.75 million). Eli Lilly & Co., one of the major DES manufacturers, has approximately 300 cases pending against it. Of those, only about 60 involve plaintiffs who have cancer. 69 A.B.A. J. 725 (1983).

341. Three noncancer DES cases have gone to trial. One of these was a case brought

Courts that have liberalized the law of negligent infliction of emotional distress by not requiring impact have maintained control by requiring that the plaintiff prove that a reasonable person would have suffered severe emotional distress from the defendant's actions. Courts that have gone further and substituted seriousness for manifestation likewise require plaintiff to prove serious mental distress by showing that a "normally constituted [person] would be unable to adequately cope with the mental stress engendered by the circumstances."³⁴² Toxic tort plaintiffs may discover that courts³⁴³ and juries view fear of disease to be a normal condition of everyone's life.

by Gwendolyn Mink, daughter of former congresswoman Patsy Mink, named plaintiff in *Mink v. University of Chicago*, 460 F. Supp. 713 (1978). Gwendolyn Mink, who had developed a DES-related cervical ridge, and extreme mental suffering and fear that she might someday develop cancer, sued for \$1 million. See 69 A.B.A. J. 725 (1983). She had not seen a psychiatrist about her fears. There was speculation that the lack of such substantiation regarding her fears was an important factor in her loss. See *id.*; cf. *Hassig v. Wortman*, 214 Neb. 154, 157, 333 N.W.2d 765, 767 (1983) (plaintiff denied recovery when her emotional distress did not cause her to seek medical treatment or affect her job performance). But see *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 435 (Tenn. 1982) (jury award for plaintiffs' fear of disease upheld).

Plaintiff's chances for recovery without disease development may be enhanced by new immunological discoveries. Recent advances make it possible to reveal damage to the immune system in some instances even though no disease is overtly manifest. See *Legal Times*, June 13, 1983, at 22, col. 1. Such evidence would mean plaintiff's fears are quite realistic; alternatively, such damage might be compensable in itself, and support an award for emotional distress. See *supra* notes 160-67 and accompanying text.

342. *Rodrigues v. State*, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970); accord *Sloss v. Industrial Comm'n*, 588 P.2d 303, 306 (Ariz. 1978) (highway patrolman not entitled to workers' compensation unless his stress was unexpected, unusual or extraordinary); *Alevizos v. Metropolitan Airports Comm'n*, 216 N.W.2d 651, 662 (Minn. 1974) (land-owners must bear those trials "reasonably anticipated by any average member of a vibrant and progressive society").

343. See *Ayers v. Jackson Township*, 189 N.J. Super. 561, 569, 461 A.2d 184, 189 (Law Div. 1983). Foreseeability, and requiring that a normal person would suffer severe emotional distress, are, of course, two sides of the same coin, both serving to limit suits. The *Laxton* court, in allowing recovery, found the obtaining of medical services was reasonable and necessary. *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 434 (Tenn. 1982).

