Exposure to Hazardous Substances and the Mental Distress Tort: Trends, Applications, and a Proposed Reform

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INTRODUCTION

Courts have struggled in using common law tort theories to compensate victims of environmental pollution.[1] Studies of "toxic tort" victim compensation are virtually unanimous in concluding that existing statutory and common law remedies are unsatisfactory.[2] A particularly difficult issue is how to handle claims made by plaintiffs who, following exposure to a latent injury-inducing substance, fear developing a future injury or illness.

Persons who suffer from mental distress as a result of exposure to toxic substances are frequently able to obtain compensation, provided that the emotional harm is accompanied by an underlying tort or physical injury, or is caused by outrageous conduct of the defendant.[3] In contrast, most jurisdictions refuse to compen-

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1. *See, e.g.*, Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186, 198-201 (1966).

2. *See generally*, Pfennigstorf, *Environment, Damages and Compensation*, A.B.F. RES. J. 346 (1979); Mihollin, *Long-term Liability for Environmental Harm*, 41 U. PITT. L. REV. 1 (1979); Singer, *An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries*, 12 RUTGERS L. J. 117 (1980); Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683 (1983); Bartlett, *The Legal Development of a Viable Remedy for Toxic Pollution Victims*, BARRISTER, at 41 (Fall 1983). *See* HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, 96TH CONG., 1ST SESS., COMPENSATION FOR VICTIMS OF WATER POLLUTION, 3 (Comm. Print 1979). *See generally* INTERAGENCY TASK FORCE ON COMPENSATION AND LIABILITY FOR RELEASE OF HAZARDOUS SUBSTANCES, LAND AND NATURAL RESOURCES DIV., DEP'T OF JUSTICE, THE SUPERFUND CONCEPT (1979); SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 96TH CONG., 2D SESS., SIX CASE STUDIES OF COMPENSATION FOR TOXIC SUBSTANCES POLLUTION: ALABAMA, CALIFORNIA, MICHIGAN, MISSOURI, NEW JERSEY, AND TEXAS (Comm. Print 1980).

3. *See infra* notes 26-51 and accompanying text.

sate plaintiffs for mental distress caused only by a fear of latent disease resulting from negligent exposure to toxic substances.[4] Even in states which permit recovery for negligently incurred emotional damage without an accompanying physical impact or injury, such plaintiffs face almost insurmountably high evidentiary standards. Plaintiffs must show that they suffer emotional distress, manifested by objective symptoms, that the symptoms were caused by the mental distress, and that they could reasonably be expected to suffer emotional distress under the circumstances.[5]

This article argues that some of the obstacles to recovery for "mere" mental injury due to exposure to latent injury-inducing substances should be removed. Such injuries can be seriously debilitating.[6] Furthermore, plaintiffs are unable to protect themselves in advance from such injury. On the other hand, defendants can protect themselves from liability by containing the spread of toxins, and should be encouraged to do so. Thus, the current legal standards should be modified to parallel the modest requirements of the cases involving immediately apparent injury. This modification would permit plaintiffs to recover between the time of exposure and any physical manifestation of symptoms.[7]

Section I is a brief overview of the tort of mental distress. It identifies two models of compensation. Section II shows how mental injuries caused by environmental pollutants do and do not fit the models. It concludes that legitimate claims of mental injury are going uncompensated because the courts fear fraudulent claims. Section III analyzes the different evidentiary requirements for claims of mental injuries that do and do not fit the models. Section IV proposes a modification of the evidentiary requirements for the fear of latent injury cases.

4. *See, e.g.*, Payton v. Abbott Laboratories, 386 Mass. 540, 437 N.E.2d 171 (1982); RESTATEMENT (SECOND) OF TORTS § 438A and Comments (1965).

5. *See infra* notes 53-64 and accompanying text.

6. Recent studies considering such psychological factors as stress, depression, anxiety and bereavement have established an interrelationship between the nervous and immune systems. *See, e.g.*, Marx, *The Immune System Belongs in the Body*, 227 SCIENCE 1242 (1980). With regard to the psychological effects of hazardous substances, *see* Holden, *Love Canal Residents Under Stress*, 208 SCIENCE 1242 (1980).

7. Currently, plaintiffs bringing suit before the physical manifestation of symptoms face considerable evidentiary difficulty, while those attempting to bring suit after injuries become manifest face barriers such as the running of the statute of limitations. Best and Collins, *Legal Issues in Pollution-Engendered Torts*, 2 CATO J. 101, 122 (1982).

I. Compensating Mental Injuries

In the common law of torts, every wrong suffered through another's conduct is entitled to redress. While this general principle has been applied by the courts with some consistency in cases involving physical injuries, an individual's right to mental tranquility has historically received much less protection.[8] Courts perceive a greater potential for fraudulent claims of mental injury, and thus have concentrated on establishing the genuineness of the claims asserted.[9] Although a number of jurisdictions have concluded there is no merit in this concern for fraudulent claims,[10] courts have traditionally provided compensation for mental injuries only when there exists an underlying tort from which mental injuries can be inferred, or when certain special circumstances exist.[11]

A. *The "Parasitic Tort" Model*

Absent special circumstances, courts have been reluctant to compensate alleged mental injuries unless the plaintiff can establish the existence of a contemporaneous physical injury or impact.[12] The purpose of this requirement is essentially evidentiary,

8. W. Prosser, Law of Torts, § 54 (5th ed. 1984). For a general discussion of the mental distress tort, *see* Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 Va. L. Rev. 193 (1944); Smith and Soloman, *Traumatic Neuroses in Court*, 29 Va. L. Rev. 87 (1943); Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 Vill. L. Rev. 232 (1962); Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 Mich. L. Rev. 1355, 1386-1395 (1974); Note, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 Geo. L.J. 1237 (1971); Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Neurosis Shock Cases*, 35 U. Chi. L. Rev. 512 (1968); Winter, *A Tort in Transition: Negligent Infliction of Mental Distress*, 70 A.B.A. J. 62 (1984); Theis, *The Intentional Infliction of Emotional Distress: A Need for Limits on Liability*, 27 De Paul L. Rev. 275 (1977); Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. Fam. L. 163 (1976-77); Langhenry, *Personal Injury Law and Emotional Distress*, FIC Q. 259 (1981); Note, *Negligent Infliction of Emotional Distress: New Horizons After Molien v. Kaiser Foundation Hospitals*, 13 Pac. L.J. 179 (1981).

9. *See* W. Prosser, *supra* note 8, at 361.

10. For example, the Supreme Court of Pennsylvania stated that "[f]actual, legal, and medical charlatans are unlikely to emerge from a trial unmasked." Niederman v. Brodsky, 436 Pa. 401, 410, 261 A.2d 84, 88 (1970).

11. *See* W. Prosser, *supra* note 8, at 361-62.

12. *See, e.g.*, Richardson v. J.C. Penny Co., 649 P.2d 565 (Okla. App. 1982); Ver Hagen v. Gibbons, 47 Wis.2d 220; 177 N.W.2d 83 (1970); Fournell v. Usher Pest Control Co., 208 Neb. 684; 305 N.W.2d 605 (1981); Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983).

that is, to assure that the mental injury is genuine.[13] Thus, mental distress is a "parasitic tort": a tort compensable only upon proof of another tort.[14] In effect, the parasitic tort cases establish a rule of strict liablility for mental injuries: once the plaintiff proves the underlying tort, the defendant is liable for the mental injuries.

The contemporaneous physical injury or impact requirement has been relaxed to encompass many fact patterns.[15] A number of jurisdictions no longer require injury or impact, but instead have adopted a "zone of danger" rule.[16] This rule allows recovery for mental injuries absent actual impact if the plaintiff was so close to the defendant's wrongful conduct that he reasonably feared physical injury, and manifested the fear physically, such as by suffering weakness and hysterics and being unable to work for

13. According to Prosser, "the theory seems to be that the 'impact' affords the desired guarantee that the mental disturbance is genuine." W. PROSSER, LAW OF TORTS, § 54, at 331 (4th ed. 1971). Thus, if the plaintiff established that the defendant's conduct resulted in direct physical contact to himself — no matter how slight — the court would then allow incidental recovery for contemporaneous mental injuries. *See, e.g.*, Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958), *overruled*, Niederman v. Brodsky, 436 Pa. Super. 312, 175 A.2d 351 (Pa. Sup. Ct. 1961); Kasey v. Suburban Gas Heat of Kennewick, Inc., 60 Wash. 2d 468, 374 P.2d 549 (1962); McCardle v. George B. Peck Dry Goods Co., 191 Mo. App. 263, 177 S.W. 1095 (1915); Porter v. Delaware, L. & W.R. Co., 73 N.J.L. 405, 63 A. 860 (1906); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930).

14. For example, in those cases in which plaintiff's injuries were inflicted intentionally by defendant, recovery was traditionally based on the finding of another tort, for example, on trespass to person or real property, Sloane v. Southern Cal. R. Co., 111 Cal. 668, 44 P. 320 (1896); Sagar Sisters of Mercy, 81 Colo. 498, 256 P. 8, 56 A.L.R. 655 (1927); Daley v. Lacroix, 384 Mich. 4, 179 N.W.2d 390 (1980); Lindh v. Great Northern R. Co., 99 Minn. 408, 109 N.W. 823 (1906); Larson v. Chase, 47 Minn. 307, 50 N.W. 338 (1891); injury to reputation, Razzo v. Varni, 81 Cal. 289, 22 P. 848 (1899); Watson v. Dilts, 116 Iowa 249, 89 N.W. 1068 (1902); Ham v. Maine - New Hampshire Interstate Bridge Auth., 92 N.H. 268, 30 A.2d 1 (1943); libel and slander, Scott v. Times-Mirror Co., 181 Cal. 345, 184 P. 672 (1919); Davis v. Mohn, 145 Iowa 417, 124 N.W. 206 (1910); O'Malley v. Ill. Publishing & Printing Co., 194 Ill. App. 544 (1915); false imprisonment, Hepworth v. Covey Bros. Amusement Co., 97 Utah 205, 91 P.2d 507 (1939); Great Atl. & Pac. Tea Co. v. Smith, 281 Ky. 583, 136 S.W.2d 759 (1940); Boies v. Raynor, 89 Ariz. 257, 361 P.2d 1 (1961); invasion of privacy, Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); and assault and battery, Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1937); Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1933).

15. *See, e.g.*, Sawyer v. Dougherty, 286 A.D. 1061, 144 N.Y.S.2d 746 (1955) (blast of air filled with glass); Conley v. United Drug Co., 218 Mass. 238, 105 N.E. 975 (1914) (plaintiff bruised after falling to the floor in faint following an explosion).

16. *See, e.g.*, Jines v. City of Norman, 351 P.2d 1048 (Okla. 1960); Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). *See generally*, Brody, *supra* note 8, at 238-39.

several months while under medical treatment.[17] Again, the purpose of the requirement of physical symptoms seems to be evidentiary.[18]

B. *The "Special Circumstances" Model*

Historically, courts compensated plaintiffs for mental injuries upon the occurrence of certain circumstances, such as negligent handling of a corpse,[19] negligent handling of a death message,[20] or an insult to a passenger by the employee of a common carrier.[21] In such cases, once the plaintiff proved the occurrence of the special circumstances, the courts accepted the claim of mental injury, even absent physical effects.[22]

Over time, the set of special circumstances has grown to include mental injury caused by outrageous conduct.[23] In some jurisdictions, the test is whether the mental injury was foreseeable. For example, parents witnessing the death of their children through defendant's negligence have recovered for mental injuries on the theory that the defendants could reasonably have foreseen the parents' distress.[24]

17. *See* Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933) (there could be recovery for the consequences of nervous shock which resulted in some clearly apparent and substantial physical injury, as manifested by an external condition or by symptoms clearly indicative of a resulting pathological, physiological, or mental state).

18. *See* W. PROSSER, *supra* note 8, at 359-61.

19. *See, e.g.*, Louisville & N. R. Co. v. Wilson, 123 Ga. 62, 51 S.E. 24 (1905); Lamm v. Shingleton, 231 N.C. 10, 55 S.E. 2d 810 (1949).

20. *See, e.g.*, Western Union Tel. Co. v. Crumpton, 138 Ala. 632, 36 So. 517 (1903).

21. Courts confronted with such circumstances may find liability for an intentional infliction of mental distress. *See, e.g.*, Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899); Bleeker v. Colorado & So. R.R. Co., 50 Colo. 140, 114 P. 481 (1911).

22. Compensation was often provided even though plaintiff had no contemporaneous physical illness or injury. *See, e.g.*, Texas & Pac. R. Co. v. Jones, 39 S.W. 124 (Tex. Civ. App. 1897); Humphrey v. Michigan United R. Co., 166 Mich. 645, 132 N.W. 447 (1911).

23. The cases initially expanded to include others whose position toward the public was similar to that of common carriers. De Wolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908); Frewen v. Page, 238 Mass. 499, 131 N.E. 475 (1921); Emmke v. De Silva, 293 F. 17 (8th Cir. 1923); Dixon v. Hotel Tutwiler Operating Co., 214 Ala. 396, 108 So. 26 (1926); Milner Hotels v. Dougherty, 195 Miss. 718, 15 So. 2d 358 (1943). In the 1930's, mental injury caused by outrageous conduct began to be recognized as a cause of action in itself. W. PROSSER, LAW OF TORTS, § 122, at 901 (5th ed. 1984).

24. *See* D'Ambra v. United States, 114 R.I. 643, 388 A.2d 524 (1975); Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978). The reasoning in these opinions is based on the leading case Dillon v. Legg, 68 Cal. 2d 728, Cal. Rptr. 72, 441 P.2d 912 (1978).

II. MENTAL INJURIES CAUSED BY ENVIRONMENTAL POLLUTION

In general, courts have treated mental injuries caused by environmental pollutants no differently than other mental injury cases. Mental injuries accompanying an underlying tort such as nuisance or a contemporaneous physical injury by latent injury-causing chemicals fit into the parasitic tort model. Mental injuries caused by outrageous conduct by the defendant fit into the special circumstances model. However, one important type of environmentally caused mental injury has thus far gone uncompensated: fear of an increased risk of a future illness caused by past exposure unaccompanied by contemporaneous physical harm.[25]

A. *Mental Injuries Caused by Air and Water Pollution*

In cases involving mental injuries caused by air and water pollution, plaintiffs' claims are generally compensated once an underlying tort such as nuisance or trespass is established.[26] The underlying tort assures the court that the mental injury is genuine. Expert testimony is usually not required to establish the mental injuries; the plaintiff's testimony is sufficient.[27]

1. Air Pollution

The air pollution cases in which plaintiffs have been successful are usually based on theories of nuisance, trespass, or negligence, where consequential damages are awarded for mental injury. For example, the Oregon court in *Lunda v. Matthews*,[28] stated that "[d]istinct from or in addition to damages compensating plaintiffs for the diminution in property value as a result of a nuisance, it is proper to award consequential damages for discomfort, annoyance, inconvenience and personal injury."[29] The damages the court permitted were supported by evidence of dust, debris, fumes and noise that intruded on the plaintiff's retirement home

25. *See infra* notes 53-64 and accompanying text.

26. *See, e.g.*, Freeman v. Intalco Aluminum Corp., 15 Wash. App. 677, 552 P.2d 214 (1976) (air pollution); Moore v. Allied Chem. Corp., 480 F.Supp. 364 (E.D. Va. 1979) (air pollution); Lunda v. Matthews, 46 Or.App. 701, 613 P.2d 63 (1980) (air pollution); Branch v. W. Petroleum, 657 P.2d 267 (Utah 1982) (water pollution); Mitchell v. Superior Court of Fresno County, 37 Cal.3d 591, 208 Cal.Rptr. 886, 691 P.2d 642 (1984).

27. *See, e.g.*, Freeman, 552 P.2d 214 (1976).

28. Lunda, 613 P.2d 63 (1980).

29. *Id.* at 67.

from defendant's cement plant.[30] In *Nitram Chemicals, Inc. v. Parker,* the Florida court stated that upon establishing the tort of outrage, the plaintiff could recover "such special or incidental damages as he may be able to prove, e.g., annoyance, discomfort, inconvenience, or sickness."[31]

Annoyance, discomfort and inconvenience are probably adequately proven by the plaintiff's own testimony. For example, in *Freeman v. Intalco Aluminum Corp.,*[32] where plaintiff's property was polluted by fluoride emitted from the defendant's factory, the Washington court held that the plaintiff's testimony was sufficient to prove mental injuries.[33] The court held that there was no requirement of an award of damages for physical injuries before the plaintiffs could recover for mental injuries, and upheld the judgment of $120,000 for "annoyance, anguish, and irritation and mental suffering for the loss of enjoyment of the plaintiff's property."[34]

These cases illustrate the low standard of proof required to establish mental injuries in air pollution cases based on independent torts. Once the plaintiff establishes that defendant is liable for the pollution, the courts permit compensation for mental injury proved by plaintiff's testimony. Rather than require expert testimony and an extensive inquiry into the existence of plaintiff's mental injuries, courts accept the injuries as a reasonable consequence of the underlying tort.

2. Water Pollution

The pattern of recovery for mental injuries in water pollution cases is similar to that in air pollution cases. For example, in *Branch v. Western Petroleum, Inc.,*[35] a nuisance action where the plaintiff's culinary water wells were polluted by the defendant's oil well formation waters, the Supreme Court of Utah permitted damages for the plaintiff's mental suffering, discomfort and an-

30. *Id.* at 66.

31. Nitram Chem., Inc. v. Parker, 200 So. 2d 220, 225, *cert. denied,* 204 So. 2d 330 (Fla. Dist. Ct. App. 1967).

32. Freeman, 552 P.2d 214 (1976).

33. *Id.* at 217-18. *See also,* French v. Ralph E. Moore, Inc., 661 P.2d 844 (Mont. 1983) in which a Montana court allowed a plaintiff to recover $190,000 for pain and mental injuries suffered when gasoline contaminated the plaintiff's home and restaurant. The basis of liability was nuisance, trespass and negligence.

34. Freeman, 552 P.2d at 218-19.

35. Branch v. W. Petroleum, Inc., 657 P.2d 267 (Utah 1982).

noyance. The court held that an award of $10,000 for the mental injuries was substantiated by both the establishment of the nuisance and the fact that the plaintiff's mental injuries had "culminated in her leaving her husband for a period of three or four months."[36]

In *Laxton v. Orkin Exterminating Co.*,[37] where the defendant contaminated the plaintiff's household water supply with the toxic chemical chlorodane, the Tennessee court permitted the plaintiffs to recover for their anxiety over the welfare of themselves and their children when they ingested the polluted water. The court stated that the "finder of fact may conclude that plaintiff has suffered sufficient physical injury to support award for mental anguish even if subsequent medical diagnosis fails to reveal any physical injury."[38]

B. *Compensated Mental Injuries Caused by Risk of Latent Injury*

1. Where Contemporaneous Physical Injury Occurs

When a defendant's conduct causes plaintiff to fear latent injury, courts are sometimes willing to allow plaintiffs to recover for their fear of latent injury or illness.[39] However, in cases allowing recovery for this type of mental injury, the defendant has generally also caused some immediate physical injury to the plaintiff.[40] As in the other parasitic tort cases, it is this contemporaneous physical injury that substantiates the genuineness of the claim of mental injury. For example, in *Lorenc v. Chemical Corp.*,[41] the New Jersey court allowed a cancer researcher who spilled ethylene amine on his hand to recover for the mental injuries caused by his fear of contracting cancer in the future. The burns and subsequent ulceration of the hand provided the court with evidence of the genuineness of the mental injury claim. In *Dempsey v. Hartley*,[42] a federal district court allowed a plaintiff whose breasts were negligently injured by the defendant to recover for fear of con-

36. *Id.* at 279.

37. Laxton, 639 S.W.2d 431 (Tenn. 1982).

38. *Id.* at 434.

39. *See, e.g.*, Lorenc v. Chemrad Corp., 37 N.J. 56, 179 A.2d 401 (1962); Dempsey v. Hartley, 94 F. Supp. 918 (E.D. Pa. 1951); Ferrara v. Galluchio, 5 N.Y.2d 16, 176 N.Y.S.2d 966, 152 N.E.2d 249, *reh'g. denied*, 5 N.Y.2d 793 (1958).

40. Ferrara, 152 N.E.2d 249 (1958).

41. Lorenc, 179 A.2d 401 (1962).

42. Dempsey, 94 F. Supp. 918 (E.D. Pa. 1951).

tracting breast cancer. In *Ferrara v. Galluchio,*[43] a New York court allowed the plaintiff to recover for "cancerphobia" caused by defendant's negligent x-ray treatment.

Thus, courts use the same approach in fear of latent injury cases as they use in the air and water pollution cases — as long as the fear of latent injury is accompanied by contemporaneous physical injury, the plaintiff can obtain compensation on his or her own testimony.

2. Where Outrageous Conduct by Defendant Occurs

In cases where plaintiffs are exposed to an increased risk of latent injury, courts have recently asserted that compensation is available for consequential mental injuries, even absent an immediate physical injury, if the exposure was caused by defendant's outrageous conduct. As in other special circumstances cases, once such conduct is demonstrated, the court accepts the plaintiff's testimony as sufficient proof of mental injuries.

For example, in *Moore v. Allied Chemical Corp.,*[44] the plaintiff, a principal stockholder in Life Science Products, the company that produced the chemical Kepone for Allied Chemical Corporation, alleged that the defendant knew of the "devastating physiological effects" that Kepone could have upon workers, but deliberately failed to warn them of the risks. The plaintiff contended that many workers became chronically ill and permanently disabled, causing the plaintiff considerable "pain, mental anguish, and suffering." [45] According to the court,

> If plaintiff can prove his allegations, reasonable men could conclude that Allied showed a reckless disregard for the rights of the . . . employees of [Life Science Products], and should have known that its failure to warn would cause injury to workers and severe emotional distress to [the plaintiff]. Similarly, a reasonable fact finder could find that the failure to warn of Kepone's effects was "outrageous and intolerable" and caused severe emotional distress to [the plaintiff].[46]

Mitchell v. The Superior Court of Fresno County[47] involved two of more than one hundred plaintiffs who brought suit against a number of entities alleging contamination of their groundwater

43. Ferrara, 152 N.E.2d 249 (1958).
44. 480 F. Supp. 364 (E.D. Va. 1979).
45. *Id.* at 368.
46. *Id.* at 369-70.
47. Mitchell v. Superior Court of Fresno County, 37 Cal. 3d 591, 691 P.2d 642 (1984).

and air with dibromochloropropane (DBCP). The plaintiffs sought compensatory and punitive damages for personal injuries and property damage in seven causes of action including mental injury. Although the major issue on appeal was an evidentiary one, the Supreme Court of California stated in dictum that, even absent personal injury accompanying the mental injury claims, the court would permit damages for mental injuries in cases which involve extreme and outrageous conduct.[48] The court explained that the burden of producing evidence to substantiate the claim of mental injuries fell on the plaintiff, and that it considered outrageous conduct a guarantee that the claim was genuine.[49]

In *Klein v. Council of Chemical Assoc.*,[50] a printing industry worker sued a printing chemical manufacturer for bladder cancer allegedly caused by the worker's prolonged exposure to certain chemicals used in the printing industry. Because the worker could not name a specific product or products that caused his cancer, the court dismissed for failure to state a claim. The court hypothesized the circumstances under which it might find a cause of action: "Plaintiffs do not allege that defendants tested a certain, identified product, found it to be highly dangerous and carcinogenic and subsequently reported it completely safe to the public at large. Possibly this would have stated a cause of action."[51] However, this defendant's acts or inaction in not warning workers of some hazardous products was not the "extreme or outrageous conduct" sufficient to warrant recovery by the plaintiff.[52]

As these cases illustrate, when defendants behave recklessly or deliberately, courts are inclined to compensate mental injuries even in the absence of immediate physical injury to the plaintiffs.

C. *Failure to Compensate for "Mere" Fear of Latent Injury*

In many cases, a plaintiff is exposed to a latent injury-inducing substance through the defendant's negligence, but does not sustain immediately apparent physical injury.[53] In these cases, most

48. *Id.*
49. *Id.*
50. Klein v. Council of Chem. Ass'n., 587 F. Supp. 213 (E.D. Pa. 1984).
51. *Id.* at 226.
52. *Id.*
53. In addition to alleged mental injuries due to fear of latent chronic illness as a consequence of exposure to a hazardous substance, plaintiffs have also alleged mental injuries attributable to the *fear of such exposure.* Clearly such mental injuries will be without accompanying physical injury, making the probability of recovery very remote. In a recent U.S.

courts have been reluctant to grant relief, principally for fear of fraudulent claims.[54] In general, courts will permit recovery for fear of latent injury only when the plaintiff can establish that he suffers emotional distress manifested by objective symptoms, that his symptoms were caused by the mental distress, and that he could reasonable have been expected to suffer mental distress under the circumstances. [55] In contrast to parasitic tort and special circumstances cases, courts will not recognize the validity of

Supreme Court decision, the Court reviewed such a mental injury claim when it considered the psychological health of local residents prior to allowing the start up of a nuclear reactor at Three Mile Island in Pennsylvania. Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 103 S. Ct. 1556 (1983). The decision reversed the ruling of the federal appeals court, which had ordered the Nuclear Regulatory Commission to include in its hearing the psychological health and community well-being of residents of the surrounding area. People Against Nuclear Energy v. United States Nuclear Regulatory Commission, 678 F. 2d 222, 235 (1982). The reactor had been closed for repairs and refueling on March 28, 1979, when another reactor at Three Mile Island was damaged in an accident. Both reactors had subsequently remained closed. The Court stated that consideration of the psychological effect of restarting the reactor on the community would be required only if it had a close relationship with the physical environment. 460 U.S. at 774. The decision rested in part on the concern that:

> If contentions of psychological health damage caused by risk were cognizable under the NEPA [National Environmental Policy Act], agencies would, at then very least, be *obliged to expend considerable resources developing psychiatric expertise* that is not otherwise relevant to their congressionally assigned functions. The available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.

460 U.S. at 766, 103 S. Ct. at 1562 (emphasis added).

It appears that at least in cases involving nuclear facilities, the mere fear of accidental exposure will not be sufficient to require federal agencies to consider psychological health damage when allowing the installation or start up of those facilities, due largely to the expense of obtaining such evidence. Given the potential for fraudulent claims, there can be little doubt that courts will not permit individuals to recover for fear of exposure to a defendant's hazardous substance.

54. *See* W. PROSSER, LAW OF TORTS § 54 at 328-30 (5th ed.1984).

55. *See, e.g.,* Payton v. Abbott Laboratories, 386 Mass. 540, 437 N.E.2d. 171, 181 (1982); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 121 (Me. 1970).

Some courts have developed a rule permitting plaintiffs who have suffered mental distress to recover even in the absence of physical manifestations. Under these cases, the plaintiff must, however, show that he suffers serious emotional distress, that the risk of injury was reasonably foreseeable by the defendant and that the defendant's conduct caused the emotional distress complained of. *See* Molien v. Kaiser Foundation Hospitals, 616 P.2d 813, 815-21 (1980) (defendant doctor negligently represented that plaintiff's spouse had syphillis); Rodrigues v. State, 52 Haw. 156, 472 P.2d 509, 521 (1970) (mental distress caused by repeated flooding of plaintiff's property). The rule of these cases has not been applied in cases concerning negligent exposure to latent disease-inducing substances. Furthermore, the rule has not received acceptance in other jurisdictions, and even the courts that expounded the rule may be retreating from it. *See, e.g.*, Chedester v. Stecker, 64 Haw. 464, 468, 643 P.2d 532, 535 (1985).

the mental injury claim on the basis of proof of exposure, but will insist on an elaborate proof by expert testimony of the existence of mental injury with accompanying physical symptoms. [56]

For example, in *Ayers v. Township of Jackson,*[57] plaintiffs brought an action against the township and its engineer alleging that as a result of defendants' operations, toxic waste had leaked through a municipal landfill and contaminated plaintiffs' well water. The plaintiffs, who did not sustain immediately apparent physical injuries, sought damages for their increased risk of developing cancer and liver and kidney disease, and mental injuries including cancerphobia, stress, outbursts of hostility and rage, and loss of sleep. The court denied recovery for the plaintiffs' claim of increased risk because experts could not specify the probability that those diseases might occur due to plaintiffs' ingestion of the toxic wastes. However, it denied defendants' summary judgment motion as to the mental injury claims, finding the existence of material issues of fact. The court stated:

> Because of the unusual nature of plaintiffs' claims and the type of bodily injury complained of, a full record should be made before the court decides whether there was an "impact" sufficient to support a claim of emotional distress. Accordingly, the court finds the following questions exist: (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 the plaintiffs? (2) What is the nature of the impact to plaintiffs' body [sic] by the ingestion of these contaminants? (3) Are the emotional injuries complained of by plaintiffs sufficiently severe to be compensable under present case law?[58]

The court ruled that plaintiffs could recover only upon proof of "substantial bodily injury or sickness as a result of the emotional trauma."[59]

As the *Ayers* case illustrates, the standard of proof in fear cases is quite high. However, it should be noted that the rigor of proving the actual effects of the hazardous substances can sometimes be eased. For example, plaintiffs need not show a statistical cer-

56. Payton v. Abbott Laboratories, 437 N.E.2d at 181 (1982).

57. Ayers v. Township of Jackson, 189 N.J. Super. 561, 461 A.2d 184 (1983), *rev'd on other grounds*, 493 A.2d 1314 (1985).

58. *Id.* at 189.

59. *Id.*

tainty that the injury they fear will occur.[60] In *Heider v. Employer's Mutual Liability Ins. Co. of Wisconsin,*[61] the Louisiana court upheld the plaintiff's recovery for fear of developing epilepsy, even though doctors estimated that there was only a two to five percent chance of epilepsy actually occurring in the plaintiff.[62] In *Kroger v. Beck,*[63] the Indiana court decided that recovery for fear of a future adverse consequence depends only on the plaintiff's recognition of the possible future disability, not upon the probability that the consequence will develop. If the plaintiff's fear of the possible future effects causes mental injury, then the plaintiff's cause of action should not depend on the actual occurrence of those feared future effects.[64]

III. Mental Injuries and Evidentiary Burdens

In cases involving the pollutants that cause immediate injury, plaintiff's alleged mental injuries are accepted as a reasonable

60. The D.C. Court of Appeals recently considered the kind of evidence required of a plaintiff when the physical consequences of hazardous substances exposure are not known. In *Ferebee v. Chevron Chem. Co.*, 736 F. 2d 1529 (D.C. Cir. 1984), an agricultural worker sued a manufacturer of paraquat alleging that he contracted pulmonary fibrosis as a result of long-term skin exposure to the chemical. The Court of Appeals held that the jury could find that exposure to paraquat could be the cause of the plaintiff's chronic disease, even if the exposure was not substantial enough to produce acute symptoms and even if the findings of the dose-response relationship at low levels of exposure are either contested or under current medical debate. The court stated that the jury is permitted to draw its own conclusions as to the causal relationship between the exposure and the resulting harm, based on the medical evidence submitted. *Id.* at 1535. Although the case did not deal directly with a mental injury allegation, its ramifications could be far-reaching if courts allow juries to determine the causal relationships between exposure to a chemical and an alleged mental injury. *Id.* at 1536.

61. Heider v. Employer's Mut. Liab. Ins. Co. of Wisconsin, 231 So. 2d 438 (La. App. 1970).

62. *Id.* at 441-42.

63. Kroger v. Beck, 375 N.E.2d 640 (Ind. App. 1978).

64. Still, a number of courts require that the possibility of a chronic disease not be remote nor too indirectly connected with the exposure. For example, a Wisconsin court in a 1978 decision did not allow recovery by the plaintiff when the defendant left a broken catheter in the plaintiff's shoulder. The court stated the risk of cancer as a result of the injury was too low to allow a mental injury in the case. Howard v. Mt. Sinai Hosp., Inc., 217 N.W.2d 383 (Wis. 1978). The court stated that the fear of future cancer was "so remote and. . .out of proportion to the culpability of the tortfeasor that, as a matter of public policy,. . .the defendants are not to be held liable for this element of damages." *Id.* at 385. A concurring opinion narrowly limits the majority opinion to those cases in which "there is no reasonable basis established for the fear being entertained and no increased possibility of the consequence feared developing as a result of the injury sustained." *Id.* at 388.

consequence of exposure to the pollutant.[65] In contrast, mental injuries associated with exposure to latent injury-causing substances are likely to go uncompensated.[66] This section discusses the different standards of proof and the different evidence required of plaintiffs.

A. *Current Differences in Standards of Proof*

A plaintiff claiming fear of latent physical injury following exposure must establish that he suffers emotional distress manifested by objective symptoms, that the mental distress caused these symptoms, and that the mental injury could reasonably be expected to result from awareness of the exposure.[67] Latent injuries are those that appear only after periods of dormancy during which they are undetectable. These periods can span more than two decades following exposure,[68] and the causal link between the initial exposure and the ultimate injury is often uncertain.[69]

65. *See supra* notes 25-52 and accompanying text.

66. *See supra* notes 53-59 and accompanying text.

67. *See supra* notes 55-59 and accompanying text.

68. In cancer cases, the latency or incubation period varies depending on the type of cancer involved and according to an individual's response to that cancer. Although the average latency period may be twenty years, depending on an individual's susceptibility and other factors, it could manifest in as few as five or in as many as forty years. *See generally* Armenien and Lilienfeld, *The Distribution of Incubation Period of Neopolistic Diseases,* 99 AM. J. EPIDEMIOLOGY 92 (1974).

69. The legal system, like both science and medicine, seeks to determine the single event or combination of events that gives rise to a particular injury or illness. The most challenging area in that regard in all three fields is in determining the etiology of neoplastic and other diseases the causes of which are unknown. Cancer, for example, may have many different causes. It is generally believed that cancer is triggered by an "initiator," some carcinogenic substance. The spread of cancer is then believed to be fueled by "promoters," other substances which interact with the initiator to advance the growth of the cancer. Archer and Livingston, *Environmental Carcinogensis and Mutagensis,* in ENVIRONMENTAL AND OCCUPATIONAL MEDICINE, 64-5 (Rom. ed. 1983). Promoting agents include, among other things, genetic determinants, age and health status, route of administration, and such cultural influences as smoking and diet. *See generally* Selikoff and Hammond, *Multiple Factors in Environmental Cancer,* in PERSONS AT HIGH RISK OF CANCER: AN APPROACH TO CANCER ETIOLOGY AND CONTROL, 467-483 (Fraumeni ed. 1975); Bingham, Neimer and Reed, *Multiple Factors in Carcinogens,* 274 ANNALS N.Y. ACAD. SCI. 14 (1976).

As a consequence, the principal legal obstacle encountered by plaintiffs is causation. *See generally,* Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System,* 97 HARV. L. REV. 851 (1984); Soble, *A Proposal for the Administrative Compensation of Victims of Toxic Substances Pollution: A Model Act,* 14 HARV. J. LEGIS. 683 (1977) (labelling causation as the paramount legal issue in exposure cases); *Generic Carcinogenic Policy: Rulemaking Under Scientific and Legal Uncertainty,* in NYHART AND CARROW, LAW AND SCIENCE IN COLLABORATION, 69 (1983) (scientists often interpret the same scientific data differently). Proof of causation in such cases almost always requires the introduction of evi-

Absence of immediately apparent physical injury and uncertainty as to whether disease will eventually manifest itself has led courts to perceive a substantial potential for fabricated claims, and thus to require proof of mental injury beyond the mere testimony of plaintiffs.[70] In addition, courts may be skeptical of these claims of mental injury because, unlike claims of mental injury due to obvious physical injury, the exposure to chemical substances falls outside the courts' realms of experience.[71]

Judicial concern for fraudulent claims is valid. But judges must realize that the causal relationships in mental injury cases can never be established with the clarity appropriate to physical injury cases. Nor can the courts fairly "choose" appropriate cases by demanding some immediate physical injury or manifestation to provide asssurance of the claim's validity.[72] Courts recognize

dence on the "frontiers of science." *Industrial Union Dept. AFL-CIO v. Hodgson*, 499 F.2d 467 at 474 (D.C. Cir. 1974).

70. *See supra* notes 53-59 and accompanying text.

71. Best and Collins attribute the difference in standards of proof to differences in technologies. Best and Collins, *Legal Issues in Pollution-Engendered Torts*, 2 CATO J. 101 at 103-5 (1982). According to the authors, the issue of compensation in chronic injury cases arises directly from the kinds of injuries caused by earlier technologies as compared to more recent technologies. Accidents involving 18th and 19th century technologies usually caused an immediate injury—such as a crushed or severed limb. *Id.* at 104. The injury is well within the experience or expectation of the trier of fact, and their empathy is reflected in the compensation awarded to victims.

In contrast, modern technologies—in particular the production of exotic new chemicals—are suspected of causing physical and emotional injuries having etiologies little understood by either the scientific or medical communities. As a consequence, the uncertainty of the causes of such injury has led to the loss of the "stable state" by straining the abilities of the traditional conflict-resolving institutions. *Id.* at 101.

72. The physical injury might not even be caused by defendant's activities. Best and Collins illustrate this peculiarity with reference to Hagy v. Allied Chemical Co., 122 Cal. App. 2d 361, 265 P.2d 86 (1953):

> [In the Hagy case,] compensation was possible for Mrs. Hagy when her preexisting cancerous condition of the larynx was arguably aggravated when she was exposed to an unusual concentration of toxic fumes emitted from the plant of a large corporation. However, the railroad yard workers located nearby who were chronically exposed to the substantially lower, "normal" levels of the same fumes receive no compensation and neither do the residents of the neighborhood over which the fumes regularly waft. Yet these persons might be able to show a cumulative exposure far in excess of Mrs. Hagy's discrete event. They are, however, hard pressed to show "fault" in the "normal" levels of emissions, and they encounter serious "proof" problems in trying to link any minor, present debilitations directly to the low-dosage exposure to the fumes. In addition, their most serious difficulty with obtaining an award may be the lack of sympathetic commiseration of the court and the jury in the absence of any severe physical disability. Therefore, the individuals who probably receive the greatest injury from the pollution go uncompensated while a person to whom the fumes may in fact have made no difference at all receives a substantial [award]. [footnotes omitted]

these limits in the parasitic tort and special circumstances cases: there, the evidentiary focus is not on whether the defendant caused the plaintiff's mental injury, but rather on whether the defendant brought about plaintiff's exposure. Once it is shown that the defendant's activities were tortious as to the plaintiff, the mental injuries are treated as a question of consequential damages provable by plaintiff's testimony.[73] Thus, evidence on causation in such cases rarely involves inquiries into the actual capacity of the pollutant to cause plaintiff's alleged injuries; the occurrence of the pollution is sufficient for judges to accept the claims of mental injury.[74]

In contrast, a plaintiff who fears latent injury must face a standard of proof that is a virtually insurmountable barrier to compensation. Plaintiffs who cannot meet the current evidentiary standards for mental injuries may choose to wait until the feared disease actually manifests before bringing suit, thereby risking problems with statutes of limitations, preservation of evidence and defendants' solvency.[75] A plaintiff who lives in fear for 20 years may never manifest the feared disease. Such a victim would never recover, even though he drastically altered his life's plans as a result of the exposure.

What is the effect on society if courts err in compensating claims of mental injury? There are two types of error that the court could make through the application of a given liability rule. Type I is finding mental injuries to exist when in fact they do not. Type II is not finding mental injuries when in fact they exist. While the courts appear willing to accept Type I error in immediate injury and special circumstances cases, in latent injury cases they appear willing to accept only Type II error. In practical terms, the standard of proof is so high in such cases that it virtually guarantees that no Type I errors will be committed. While the rationale for imposing such a burden is intricately intertwined with the economic and health interests of the parties and society, the courts are imposing the burden of persuasion on the party least likely to bear the burden if the parties negotiated its placement prior to the use of the substance. As a consequence, soci-

73. Best and Collins, *supra* note 69, at 133-34.
74. *Id.*
75. *Id.* at 122-23.

ety's resources are misallocated to the extent that the evidentiary burden is not placed on the party who can bear it at lowest cost.[76]

B. *Medical Evidence in Latent Injury Cases*

Medical advances in the detection and diagnosis of mental injuries are just beginning to establish the magnitude of such injuries in increased risk cases. Results from studies of families exposed to hazardous substances at Love Canal indicate that the mental injuries sustained may have far greater impact than the physical injuries.[77] Researchers describe an assortment of psychological and physiological problems such as depression, irritability, dizziness, nausea, weakness, fatigue and insomnia as an aftermath of the exposure.[78] Also, the uncertainty of the future health of children appears to be a major factor in the high rate of disintegration in family units.[79] In light of such evidence, some courts are beginning to recognize the need for compensating these mental injuries.[80]

However, the evidence which the plaintiff can produce on the causation of latent disease and related mental suffering is very likely to lie on the leading edges of medical science— epidemiology, pathological data and animal bioassays. This type of data has often been dismissed in the past by courts as too imprecise for decisions in particular cases, particularly cancer cases.[81] A further barrier to plaintiffs meeting their evidentiary requirements is

76. For a more detailed discussion on this topic, *see* Page, *A Generic View of Toxic Chemicals and Similar Risks*, 7 ECOLOGY L.Q. 207 (1978).

77. Knowledge of exposure may cause physical symptoms related to anxiety and interfere with marriage and child bearing plans. *See generally* Holden, *Love Canal Residents Under Stress*, 208 SCIENCE 1242 (1980).

78. *Id.*

79. *Id.*

80. For example, in *Punnett v. Carter*, the court recognized that harm could accrue from warning people of the possible risk of exposure from nuclear testing activities and refused to order the issuance of such a warning. Quoting the lower court:

> The effect of a warning from the United States Government that the recipient has been exposed to radiation which may cause mutagenic defects in his children could be thoroughly devastating. Obviously, the resulting anxiety would be immeasurable. Plaintiffs have not shown what impact such anxiety could itself have on an existing pregnancy. However, a risk of unnecessary abortion is present. [Test] participants may be unreasonably rejected as marital partners. Families that have long existed may be broken up. Recrimination and doubt may follow. Couples may make necessary family planning decisions which they would not have otherwise made.

Punnett v. Carter, 621 F.2d 578, 584 (3d Cir. 1980).

81. Ember, *Legal Remedies for Toxic Victims Begin to Take Shape*, CHEMICAL & ENG. NEWS, Mar. 28, 1983, 11, 14.

the withholding of the chemical composition of the suspect substances by industry in order to protect trade secrets.[82] Companies can also hinder efforts of independent researchers or potential plaintiffs to obtain information about health hazards.[83] As a consequence, the plaintiff often finds himself in need of evidence unobtainable because it is within the control of defendants.

IV. REDUCING THE EVIDENTIARY REQUIREMENTS IN LATENT INJURY CASES

The alternative proposed here begins with the paradigm "A created a dangerous condition that resulted in harm to B."[84] The harm to B is B's fear of a future physical illness. The dangerous condition is A's use of a product known or suspected by the public or the scientific community to be hazardous. "Hazardous" means the substance may or does induce latent injury.

To establish a prima facie case, a plaintiff would show (1) exposure to the hazardous substance, (2) the nature or suspected nature of the hazardous substance, and (3) that the defendant's activities brought about the exposure. Under this approach, the plaintiff's burden of proof is similar to that used in cases involving immediate physical injury or special circumstances. As a result, the defendant would be held strictly liable for the mental injuries alleged by the plaintiff. Compensation would be based

82. *See, e.g., Hearings on the Monitoring of Industrial Workers Exposed to Carcinogens, Before the Subcomm. on Labor of the Senate Comm. on Human Resources,* 95th Cong., 1st Sess. 34 (1977) (statement by NIOSH Director, Dr. John Ficklea, one-third of manufacturers polled considered use of suspected carcinogen to be a trade secret).

83. *See, e.g.,* Robblee, *The Darkside of Worker's Compensation: Burdens and Benefits in Occupational Disease,* 2 INDUS. REL. L. J. 596, at 607, 613 (1978) (early attempts to study brown lung disease stymied by mill owners who refused to allow scientists access to plants and records); *Hearings on the Toxic Substance Control Act Before the Subcomm. on the Environment of the Senate Commerce Comm.* 97th Cong., 1st Sess., pt. 1, at 62 (1977) (testimony of Dr. Daniel Pertshuk, Univ. of Pennsylvania, that Rohm & Haas suppressed data on BCME); Page, Book Review, 27 STAN. L. REV. 1345, at 1358 (1975) (Manufacturing Chemical Assoc. suppressed data on vinyl chloride); Richard, *New Data on Asbestos Indicate Cover-up of Effects on Workers,* Washington Post, Nov. 12, 1978, at A16-A17; *Hearings on Occupational Diseases and their Compensation Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor,* 96th Cong., 1st Sess, pt. 3, at 16 (1979) (statement of Sol Stein, Clothing and Textile Workers Union; Textile Mfgs. Inst. suppressed data on byssinosis); BNA Washington Memorandum, Sept. 30, 1980, at 1 (Dow Chemical Co. suppressed data on benzene); Blumenthal, *Files Show Dioxin Makers Knew of Hazards,* N.Y.Times, July 6, 1983, at 1, 10 (Dow and other chemical companies withheld safety concerns from government).

84. *See,* Epstein, *A Theory of Strict Liability,* 2 J. LEGAL STUDIES 151 (1973), *reprinted in* EPSTEIN, A THEORY OF STRICT LIABILITY: TOWARD A REFORMULATION OF TORT LAW (1980).

on the severity of the exposure with particular emphasis on the substance's ability or suspected ability to cause a future chronic illness or injury.

Plaintiff's fear of a latent injury must be reasonable, but reasonableness would not require a statistical certainty that the injury occur; rather, the substance need only be capable or suspected of being capable of causing a latent illness. For example, suppose A is using a chemical substance K, a suspected carcinogen, and due to an occurrence at A's facility, B is exposed to K. If this dangerous condition created by A results in B fearing latent injury, B can establish a prima facie case by showing that he was exposed to K, the nature of K, and A's control of K at the time of exposure.

Defendants would be able to rebut a prima facie case with the defenses of assumption of risk and plaintiff's trespass. A successful defense of assumption of risk would require defendant to show that the plaintiff decided to take the risk of a known and perceived harm in order to pursue some objective of his own. Under such circumstances, the plaintiff will be required to bear the costs of his mistakes. For example, suppose B agrees to work for A, whose business is the cleaning and repair of nuclear power plants. In accepting the employment, B agrees to expose himself to the maximum dosage of radiation considered safe each day, which is reached after ten minutes of exposure. In return, B receives 12 hours' pay.[85] If B later sues for fear of developing a latent illness, A can assert that B assumed the risk by accepting the employment. Note, however, that the use of the assumption of risk defense requires more than a mere showing by A that B knew he might be harmed:

> In the case of simple knowledge . . . the unique allocation of the risk is possible for if the plaintiff had knowledge of the harm associated with the defendant's activity, so did the defendant. The plea thus becomes trivial because it leads to the conclusion that both parties assumed the risk of the harm in question since both knew it could occur.[86]

85. Williams, *Ten Minutes Work for 12 Hours Pay? What's the Catch?*, Wall St. J., Oct. 12, 1983, at 1, col. 4 (reporting on the growth of firms that clean and repair nuclear power plants; workers are paid to expose themselves to their daily limit of radiation, a level reached after about ten minutes of exposure).

86. EPSTEIN, A THEORY OF STRICT LIABILITY, *supra* note 84, at 193.

Thus, the defendant must show that plaintiff assumed the risk to pursue some objective he felt was more beneficial than the potential costs of the exposure.

In cases where the plaintiff trespasses on the property of the defendant, and during that event suffers the exposure allegedly responsible for his mental injuries, the defendant will be able to assert the trespass as a defense to the injury allegation. As applied here, the plaintiff's knowledge of the danger is not important; by entering the defendant's property, the plaintiff shifts the risk to himself for any exposures to hazardous substances which might occur. The showing of trespass would be sufficient to bar recovery by the plaintiff.[87]

CONCLUSION

Current tort law sets workable evidentiary requirements for victims of exposure to toxic substances who seek compensation for mental distress, on condition that the exposure is accompanied by physical manifestations or caused by the defendant's outrageous conduct. However, if none of these conditions are met, and the only physical effect of the exposure is an increased risk of disease in the future, the plaintiff faces very stiff evidentiary requirements in order to recover for related mental distress. In the first place, the mental distress he suffers must manifest itself in physical symptoms. Moreover, he must show by expert testimony that he in fact suffers mental injury, that the physical symptoms were caused by the mental injury, and that the mental distress is a reasonable consequence of knowledge of the exposure.

We have proposed a new evidentiary standard that would make recovery possible in fear of latent injury cases. To make a prima facie case, the plaintiff should only be required to prove that the defendant's activities brought about exposure to a substance understood to be hazardous. This requirement could be met without expert testimony.

This new requirement would probably allow some plaintiffs with fraudulent or frivolous claims to obtain awards. However, this type of error is more desirable than making it virtually impos-

87. Note that this requirement is much different from the requirements set forth in the Restatements. The Restatements would require that the defendant show reasonable care for trespassers whenever he creates or maintains a "highly dangerous artificial condition" on his land that is likely to cause serious injury to trespassers, provided they cannot be expected to discover such condition. RESTATEMENT (SECOND) OF TORTS § 335 (1965).

sible for all of those who genuinely suffer from bare fear of latent disease to obtain compensation. The growing body of scientific knowledge of the psychological harm caused by fear of latent disease points to the seriousness of this affliction and offers a basis for establishing compensation. Finally, the victims of exposure to toxins are unable to protect themselves from the dangers of exposure, but the defendants in these cases are able to protect themselves against liability for emotional harm. Hence, it is more desirable to make the protection for those exposed to hazardous substances overly broad than to protect users of toxic materials against feigned claims of mental injury at the expense of those whose claims are real.