



Recovery of damages from the fear of cancer

POTTER SAYS IT'S POSSIBLE. HERE ARE THE HOOPS YOU WILL BE JUMPING THROUGH

Recovery of damages for the fear of contracting cancer stemming from exposure to carcinogens or other toxins in negligence actions is a relatively novel issue for California courts, despite the fact that other jurisdictions have already tackled the topic. The foregoing held true up until 1993, when, upon first impression, the California Supreme Court decided *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965.

In *Potter*, neighboring landowners who lived adjacent to a landfill were negligently introduced to carcinogens in their drinking water as a result of defendant tire manufacturer's illegal disposal of its toxic wastes. The plaintiffs sought the damages for, inter alia, the "fear of cancer" stemming from the exposure of toxic and/or harmful substances. The court ultimately held that emotional distress damages attributable solely to a fear of developing cancer or other serious illness as a result of the injury are recoverable only if plaintiff proves (1.) *actual exposure to a toxic or comparably harmful substance* as a result of defendant's negligent breach of duty owed to plaintiff, and (2.) *it is more likely than not* plaintiff will *develop the ailment* because of the exposure. (*Id.* at p. 997, emphasis added). Before *Potter*, California law had established that there was no duty to avoid negligently causing emotional distress to another (*Cohen v. NuVasive, Inc.* (2008) 164 Cal.App.4th 868).

What constitutes toxins and/or comparably harmful substances?

From a practical standpoint, what constitutes toxins or comparably harmful substances has broad interpretations. For example, *Potter* held that banbury drippings (a by-product of the tire manufacturing process) containing a combination of semiliquid toxic chemicals, liquid waste oils, liquid tread end cements, and solvents all were toxic substances allowing for recovery. Moreover, the United States Supreme Court has also held in

actions arising under the Federal Employer's Liability Act that exposure to asbestos is a work-related malady, and a plaintiff may recover damages attributable to a "genuine and serious" fear that the malady will develop into cancer. (*CSX Transp., Inc. v. Hensley* (2009) 556 US 838, 840-842.)

Therefore, individuals alleging recovery of general damages for the "fear of cancer" have significant freedom in arguing that the subject substance was toxic and/or harmful. By way of illustration, attorneys can refer to guidelines promulgated by the Occupational Safety and Health Administration (OSHA) or the Environmental Protection Agency (EPA) for an extensive list of what composes toxins and/or harmful substances. Moreover, air quality management districts may be used as reference. In Southern California, South Coast Air Quality Management District rules 1401-1472 are helpful.

Standard to recover emotional damages in NIED

With respect to claims for negligent infliction of emotional distress arising out of exposure to carcinogens and/or toxic substances, unless express exception to the general rule is recognized, in the absence of present physical injury or illness, damages for fear of cancer may be recovered only if the plaintiff pleads and proves that, as result of defendant's negligent breach of a duty owed to plaintiff, plaintiff was exposed to a toxic substance which threatens cancer or other serious disease and that plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that plaintiff would develop cancer in the future due to the toxic exposure.

It is imperative to note that there is no requirement to demonstrate physical injury to the plaintiff. The trial court in *Potter* characterized the subject injury resulting from exposure as a "presently

existing physical condition," not a physical injury. The Supreme Court however noted that it lacked sufficient information to determine whether impairment to the immune response system or cellular damage did in fact constitute a physical injury. Nonetheless, the holding in *Potter* ultimately awarded economic damages to the Plaintiff for the "fear of cancer" without the existence of a physical injury. It is this reason alone why *Potter* was so significant. The Court affirmed that Plaintiff need not show clinically verifiable cancerous or precancerous conditions in order to recover for emotional distress arising from the fear of cancer.

The *Potter* Court examined multiple policy considerations prior to reaching its conclusion. The Court reasoned that it is undeniable that everyone is exposed to carcinogens daily, thus creating an unlimited class of potential plaintiffs which must be restricted by some limitation. Moreover, the "more likely than not" threshold is necessary to prevent the detrimental impact unrestricted fear liability would have on the health care field. Lastly, the Court noted that the imposition of the "more likely than not" limitation establishes a "sufficiently definite and predictable threshold for recovery to permit consistent application from case to case." The Court further reasoned that without such a threshold, the likelihood of inconsistent results increases since juries may differ whether plaintiff's fear is genuine and reasonable. These policy considerations establish a difficult, but not impossible, burden for Plaintiff.

At the outset, an attempt to recover damages under this theory of law must first establish the defendant's negligence. As such, a plaintiff must establish a duty on the part of defendant toward plaintiff, defendant's breach of that duty, and harm to plaintiff caused by the breach. (Cal. Prac. Guide Civ. Pro. Trial Claims and Def. Ch. 6(I)-A.) That is the easy part. The following requirements are tougher to satisfy.

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A sincere fear of cancer

A plaintiff seeking to recover damages for fear of contracting cancer as a result of toxic exposure must do more than simply establish knowledge of toxic ingestion or exposure and significant increased risk of cancer. The plaintiff must demonstrate that, based on reliable medical or scientific opinion, the plaintiff harbors a sincere fear that toxic ingestion or exposure was of such magnitude and proportion as to likely result in the feared cancer. (*Potter*, 6 Cal.4th at p. 997.) The Court explicitly held that plaintiff must show that his or her actual risk of cancer is significant, not significantly increased.

The Court in *Potter* did not define what constituted a “significant risk” of cancer, however it did provide some guidance. The Court elaborated that “a plaintiff faced with a 20 percent or 30 percent chance of developing cancer cannot genuinely, seriously and reasonably fear the prospect of cancer.” (*Potter*, 6 Cal.4th at 990; see also *Kerins v. Hartley*, 27 Cal.App.4th 1069, 1074 (denying recovery where the risk of developing AIDS from surgery performed by HIV-positive physician was “statistically insignificant (1 in 300,000 by one measurement)); see also *Herbert v. Regents of Univ. of Calif.* 26 Cal.App.4th 782, 787 (holding .5% risk of developing AIDS from contaminated needle prick was not significant). Given the aforementioned, the Court indirectly adopted a “more-likely-than not” burden in determining what constitutes a “significant risk” of cancer.

However, there is an exception to the “more-likely-than not” standard in negligent-infliction-of-emotional-distress cases. A plaintiff who has been exposed to toxins or other harmful substances need not meet that “more-likely-than not” threshold for fear of cancer if the plaintiff pleads and proves that the defendant acted with “oppression, fraud or malice.” (*Potter*, 6 Cal.4th at p. 999.) Note however, irrespective of the notion that defendant acted with oppression, fraud or malice, the plaintiff is still required to show that his or her fear of cancer is reasonable, genuine and serious. (*Id.* at p. 1000.)

Standard to recover emotional damages in IIED

Along the same lines, recovery of fear-of-cancer damages in actions for intentional infliction of emotional distress do not depend on a showing of a medically corroborated belief that it is more likely than not that the plaintiff will develop the feared cancer as a result of the toxic exposure. In holding, the Court in *Potter* stated many reasons in support of its decision for not applying the “more likely than not” threshold for cases involving oppression, malice and fraud. (*Potter*, 6 Cal.4th at p. 1003.) In summation, the Court noted that the requirement to show “extreme and outrageous” conduct brings with it such a high degree of culpability, which in turn justifies recovery of greater damages...” (*Ibid.*) Moreover, the requirement of “extreme and outrageous” conduct directed at the plaintiff is such a high pleading requirement that it limits the class of potential plaintiffs who might sue for fear of cancer on this theory.

In practice, it is insufficient to merely establish that the defendant’s conduct was extreme and outrageous. It must also be established that the extreme and outrageous conduct was primarily aimed at the plaintiff. In *Potter*, the Court held that even though it is determined that defendants acted with oppression, malice and fraud, and that their conduct was extreme and outrageous, that alone was insufficient to support a claim for intentional infliction of emotional distress. In order to succeed, a plaintiff must allege and prove that defendants’ misconduct was directed primarily at the plaintiffs, or that it was calculated to cause them severe emotional distress, or that it was done with knowledge of their presence and with a substantial certainty that they would suffer severe emotional injury.

So you met the burden; Now what?

Assuming you are able to sufficiently establish that you are entitled to monetary damages stemming from the fear of cancer, how do you substantiate your damages? How do you prove how much your case is worth? How do you show

how much money justifies living life with the constant fear of cancer? In practice, plaintiffs must do more than discuss pain and suffering in general terms. Concrete evidence must be presented.

The first question that must be asked is, what constitutes emotional distress and pain and suffering? Emotional injuries may be one of the most difficult to prove. Unlike physical injuries, such as a broken femur or disc protrusion, emotional injuries are not objectively verifiable. No imaging study can be performed to corroborate pain and suffering.

Fortunately, there are a myriad of physical manifestations that come with emotional injuries. CACI 3905A says, “In general, courts have not attempted to draw distinctions between the elements of “pain” on the one hand, and “suffering” on the other; rather, the unitary concept of “pain and suffering” has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-93.) In addition, other physical manifestations that have been associated with emotional damages are depression or general unhappiness, agitation, moodiness, irritability, or anger, feeling overwhelmed, loneliness and isolation.

CACI 3905A also states that to recover for emotional damages, Plaintiff must prove that he/she is reasonably certain to suffer that harm. Reasonableness is the only limit on the amount of pain and suffering damages. No definite standard or formula is prescribed by law to fix reasonable pain and suffering compensation. Indeed, the law does not permit opinion testimony on the amount of such reasonable compensation, and argument urging a particular calculation or amount cannot be considered evidence. (*Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 764-68.)

Therefore, swing for the fence. This calculation is left to the jury’s subjective

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discretion. The jury is specifically instructed on the absence of a fixed standard in arriving at a pain and suffering award, the only guideline being “a reasonable amount based on the evidence and your common sense.” (*Greater Westchester Homeowners Ass’n v. City of Los Angeles* (1979) 26 Cal.3d 86, 103.) Our job as attorneys under this theory of recovery is to set forth evidence establishing that our clients are reasonably certain to suffer emotional damages due to the constant fear of cancer throughout their life. Remember that emotional distress is largely psychological. Therefore, it can be difficult to establish the entitlement of damages stemming from subjective injuries, especially in the absence of physical injury.

How do you prove emotional distress?

The primary way to establish emotional distress is through testimony. A plaintiff has firsthand knowledge regarding the intensity and duration of his or her pain and suffering. The more profound the mental anguish, the higher the likelihood of compensation. Similarly, perpetual and enduring pain over an extended period of time makes it easier to prove emotional distress. The preceding notion is prominent since a person’s likelihood of developing cancer as a result of toxic exposure is difficult to predict since many forms of cancer have latency periods of over 20 years. Therefore, the plaintiff’s testimony must drive home the fact that the plaintiff is constantly experiencing mental injuries correlated to emotional distress, and will continue to do so in the future. It is insufficient for the plaintiff to testify that the fear of cancer is depressing. Rather, testimony stating that “the relationship I shared with my spouse before the incident has completely deteriorated since I am constantly overwhelmed and very easily agitated” is more effective and paints a vivid picture for the jury.

Testimony of third persons, such as friends and family, is an outstanding tool in supporting a witness’s alleged emotional trauma. However, it is important to develop a witness list of those individuals

who can provide testimony of the plaintiff’s character traits and temperament both before and after the incident. A witness must be competent to testify and must testify from personal knowledge. The foregoing would ensure that they can opine to changes in the plaintiff’s, *inter alia*, behavior, mood or overall happiness, or any other psychological condition for that matter. For instance, individuals closely related to the plaintiff would have personal knowledge of said person’s inability to sleep, lack of desirability to attend family functions, or lack of appetite. However, if possible, non-related witnesses are more effective since their testimony is more objective and more credible to the jury. Additionally, certain witnesses may be disqualified by virtue of their relationship to the litigator. (Evid. Code § 703.) Therefore, a strategic and thorough witness list is essential to litigation success.

Medical, including psychiatric testimony

Testimony of a treating physician is also advantageous. Testimony of a medical professional, especially in the field of psychiatry can be very persuasive, especially if the treating physician testifies as an expert witness. As an expert, the doctor can offer opinion as to what physical manifestations have been exhibited by the plaintiff, and whether or not the exhibited physical manifestations are those that accompany pain and suffering and emotional distress.

Another useful means of testifying to the plaintiff’s emotional damages is through the use of plaintiff’s diary. It is common practice for defense counsel to ask plaintiff to produce their diary or daily journal log during discovery. However, what is highly uncommon is for a plaintiff to actually keep a diary memorializing daily symptoms of his or her injuries or a daily log of his or her emotional well-being. In cases such as this, where physical injury is neither present nor required, a good practice tool would be to encourage your client to keep a diary. Initially, it would show a good paper trail of the plaintiff’s progression

or regression of her emotional trauma. Alternatively, it can serve as an irreplaceable tool during trial in the event that the plaintiff is not able to recall the extent of her “pain and suffering,” and the diary can be used to refresh recollection.

In addition to testimony, demonstrative evidence can be very compelling in transmitting the intensity and duration of plaintiff’s pain and suffering and emotional distress. There is a plethora of demonstrative exhibits, including but not limited to: photographs, videos, letters, anniversary cards, timelines, medical illustrations, medical records, day-in-the-life videos, diagrams, graphs, models, etc. Each of the aforesaid examples of demonstrative evidence can aid jurors in not only understanding the extent and nature of the plaintiff’s pain and suffering, but also assist in valuating damages.

Conclusion

Although the holding in *Potter* was radical, the stringent standard articulated by the Court is in direct response to the numerous policy considerations the Court evaluated before establishing the *Potter* burden. Other jurisdictions have addressed the issue of availability of damages for emotional distress engendered by the fear of developing cancer in the future, however they have concluded that such damages are recoverable when they are derivative of claim for serious physical injuries. That being said, recovery for emotional damages stemming from the fear of cancer absent a physical injury, although challenging, is not impossible. For all practicing attorneys, I leave you with this: God speed!

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