

The Potter Standard: More Likely Than Not A Shelter for Perpetrators of Toxic Harms?

by Kaylee Ann Newell

Introduction

Fear of contracting cancer is increasingly a part of our daily lives. Scientists are discovering human carcinogens at an alarming rate. The legal question remains: when should plaintiffs exposed to such carcinogens be compensated for their fear of contracting cancer in the future? The California Supreme Court addressed this issue in Potter v. Firestone Tire and Rubber Company.¹ The Potter court held that in the absence of physical injury, a plaintiff must show that it is more likely than not that he or she will develop the feared cancer in the future in order to recover for present emotional distress.² The court took a positive step towards fair compensation for emotionally injured plaintiffs, moving away from other jurisdictions which require physical injury before allowing recovery for emotional damages.³ However, the more likely than not standard adopted by the court is still unreasonable to emotionally injured plaintiffs because it confuses the recovery for *fear* of developing cancer with recovery for *enhanced risk* of developing cancer, places too heavy a burden on innocent plaintiffs and serves as a liability shelter for defendants' negligent use of toxic chemicals.

I. Statement Of The Case

A. *The Factual And Procedural Setting Of Potter*

Plaintiffs Frank and Shirley Potter and Joe and Linda Plescia lived adjacent to the Crazy Horse landfill, a class II landfill owned by the city of Salinas and operated by Salinas Disposal Service and Rural Disposal (SDS).⁴ Designation as a Class II landfill prohibits disposal of toxic substances and liquids on site because of the chance for contamination of nearby underground water sources.⁵

Beginning in 1967, defendant Firestone contracted with SDS to dispose of industrial wastes at Crazy Horse.⁶ SDS informed Firestone that no solvents, cleaning fluids, oils or liquids could be disposed of at Crazy Horse.⁷ Firestone agreed not to send these types of waste to Crazy Horse.⁸ However, in violation of the contractual agreement, Firestone sent large quantities of liquid waste to the landfill, including semiliquid toxic chemicals, liquid waste oils, liquid tread end cements and solvents.⁹

In 1977, the Firestone plant engineer sent an internal memo to the plant managers and department heads explaining the proper method of disposal for liquid wastes.¹⁰ In order to comply with the official plant policy outlined in the memo, Firestone attempted to dispose of the materials in a Class I landfill.¹¹ When compliance seemed too costly to the plant manager, the disposal program was discontinued and all waste materials were again dumped at Crazy Horse.¹² The plant engineer then sent another memo to plant heads pointing out the violation of California law.¹³

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In 1984, the plaintiffs discovered toxic chemicals had contaminated their domestic water wells.¹⁴

Chemicals found in the wells included benzene and vinyl chloride, both known to cause cancer in humans, as well as toluene, chloroform, 1,1-dichloroethene, methylene chloride, tetrachloroethene, 1,1,1-trichloroethane and trichloroethene.¹⁵ Many of these chemicals are strongly suspected to be human carcinogens.¹⁶

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In 1985, the plaintiffs filed separate suits against Firestone for damages and declaratory relief.¹⁷ The causes of action in the complaint included negligence, negligent infliction of emotional distress, intentional infliction of emotional distress and strict liability/ultrahazardous activity.¹⁸ The two cases were consolidated at trial.¹⁹

The trial court found that Firestone was negligent in its waste disposal practices.²⁰ The trial court also held Firestone liable for intentional infliction of emotional distress, finding that Firestone's decision to continue to dump liquid waste at Crazy Horse in spite of the internal memorandum on company policy constituted extreme and outrageous conduct.²¹ Additionally, the trial court found Firestone was strictly liable, concluding that dumping large amounts of toxic wastes in a Class II landfill was an ultrahazardous activity.²²

The court determined that exposure to the toxic chemicals led to an enhanced risk of developing cancer, which constituted a presently existing physical condition.²³ The court also found that because of the exposure, plaintiffs would always reasonably fear the onset of cancer.²⁴ The trial court awarded plaintiffs \$800,000 for fear of cancer and resultant emotional distress.²⁵ The court also awarded damages for medical monitoring for cancer,²⁶ psychiatric illness and the cost of psychiatric treatment,²⁷ general disruption of plaintiffs' lives and invasion of privacy,²⁸ and punitive damages.²⁹

Firestone appealed the decision of the trial court to the Court of Appeal, Sixth District.³⁰ The court of appeal reversed the award of the medical monitoring costs³¹ and a prejudgment order directing Firestone to pay costs and interests.³² The court affirmed the judgment in all other respects, including the award for intentional infliction of emotional distress. On the issue of negligent infliction of emotional distress for fear of cancer, the court of appeal upheld the damages finding that a physical injury was unnecessary under the circumstances.³³ Rather, the court found that in order to recover for fear of cancer a plaintiff must prove defendants' negligence, that serious emotional distress resulted from the negligence, that the distress is objectively serious, and that in determining seriousness evidence regarding the probability of developing cancer should be examined and that the fear of cancer claim be genuine.³⁴

B. The Rationale Behind The Potter Decision

The California Supreme Court reversed the court of appeal on the issue of recovery for fear of cancer. The court first discussed damages parasitic to an injury. The court refused to rule on whether impairment to the immune response system or cellular damage constitutes a physical injury for the purposes of emotional distress, determining that the factual record was insufficient to resolve that issue.³⁵ It therefore remains unclear from the decision as to what constitutes physical injury in this sort of situation, as the court did not rule on the issue.³⁶

The court then discussed nonparasitic fear of cancer recovery.³⁷ The court reiterated the current state of California law on recovery for negligent infliction of emotional distress, highlighting that there is no independent tort for the negligent infliction of emotional distress. The appropriate tort is negligence, which requires a duty to plaintiff.³⁸ With few exceptions, the breach of duty must threaten physical injury, not simply damage to property or financial interests.³⁹

Relying on Burgess v. Superior Court,⁴⁰ the court stated that physical injury is not a prerequisite for recovery for negligent infliction of emotional distress, especially where there is some guarantee of plaintiff's genuineness.⁴¹ The court then addressed the recovery of emotional damages for fear of cancer.⁴² Disagreeing with the court of appeals, the Potter court declined to adopt the lower court's reasoning on the fear of cancer issue.⁴³

Instead, the Potter court chose to adopt the more stringent test argued by defendant Firestone.⁴⁴ The court adopted a bright line test for recovery for fear of cancer, holding that a plaintiff must show it is more likely than not that he or she will develop the feared cancer in the future in order to be compensated. The court provided five public concerns as rationale.⁴⁵ These public policy reasons were:

- (1) the necessity of limiting the class of potential plaintiffs;⁴⁶
- (2) the detrimental impact that unrestricted liability would have on the health care system;⁴⁷
- (3) concern that recovery for fear of cancer would be detrimental to recovery by those later plaintiffs who sustain physical injury and actually develop cancer by using up the funds from which injured plaintiffs could recover;⁴⁸
- (4) the positive aspects of creating a "sufficiently definite and predictable threshold for recovery to permit consistent application from case to case";⁴⁹ and
- (5) limiting the class eligible for recovery would allow emotional distress absent physical injury to continue to be a recoverable item of damages.⁵⁰

Plaintiffs in California must now be able to show that it is more likely than not that they will develop cancer in the future before they can recover for their present emotional distress.⁵¹

II. Argument

A. Fear Of Cancer Recovery Versus Enhanced Risk

Fear of cancer is defined as an anxiety caused by the fear of developing cancer.⁵² This present fear constitutes a present damage, rather than a future damage.⁵³ In Cantrell v. GAF Corp.,⁵⁴ the Sixth Circuit outlined the distinction between fear of cancer and increased risk of cancer. Fear of cancer "is a claimed present injury consisting of mental anxiety and distress about developing cancer in the future, as opposed to increased risk of cancer, which is a potential physical predisposition of developing cancer in the future."⁵⁵ One is emotional whereas the other is physiological. Because fear is a present condition, plaintiffs' probability of developing cancer in the future is not determinative of whether a particular plaintiff should recover for a present fear.

Fear of cancer "is a claimed present injury consisting of mental anxiety and distress about developing cancer in the future, as opposed to increased risk of cancer, which is a potential physical predisposition of developing cancer in the future."

The Potter court chose to hold that a plaintiff must be able to show that they are more likely than

not to develop cancer in the future to recover for present emotional distress. By creating a more likely than not standard, the Potter court improperly merged two theories of recovery. By using that standard, the court imposes a test onto fear of cancer plaintiffs which is more applicable for enhanced risk of cancer recovery. Many courts have held that in order to recover for enhanced risk of cancer plaintiffs must prove with reasonable medical certainty that cancer will develop in the future.⁵⁶ In Sterling v. Velsicol Chemical Corp.,⁵⁷ the Sixth Circuit held that a 25-30 percent increase in susceptibility to cancer did not qualify as a reasonable medical certainty justifying recovery. Applying a probability standard makes sense in this context, because plaintiffs are recovering for their actual increase in risk of contracting cancer.

In contrast, using such a probability standard is not appropriate with respect to emotional distress. As the Sixth Circuit points out in Sterling,⁵⁸ in determining mental anguish, “the central focus of a court’s inquiry...is not on the underlying odds that the future disease will in fact materialize.” Rather, the probability of contracting cancer should be one factor in determining whether plaintiffs’ fear of contracting cancer is reasonable.⁵⁹ More likely than not is simply too stringent a standard for evaluating the objective reasonableness of a plaintiff’s fear of contracting cancer. Judging fear of cancer claims by this standard merges the claim with an enhanced risk claim, precluding many genuine plaintiffs from recovering on their reasonable fear of cancer. A merger fails to recognize the distinctly different nature of the emotional injury versus the physiological injury.

B. A More Likely Than Not Standard Places An Unreasonable Burden On Plaintiffs And Shields Defendants

The court of appeal, in its Potter⁶⁰ decision, purported to apply ordinary rules for emotional distress recovery to toxic torts.⁶¹ The lower court was following prior California Supreme Court decisions outlining requirements for recovery of emotional distress absent physical injury.⁶² Given the state of tort law in California prior to the Potter decision, the court of appeal’s use of a reasonableness test was appropriate.

To justify applying different standards to toxic tort victims than to an ordinary negligence plaintiff, the California Supreme Court pointed out five public policy reasons. These justifications serve

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to protect those companies whose negligence has endangered the health of private citizens.⁶³ The court seemed most concerned with opening the floodgates of litigation to everyone who has been exposed to some sort of carcinogen in their daily lives.⁶⁴ This argument seems somewhat contrived. By using the factors outlined in the court of appeal’s decision, the finder of fact is given a basis for determining if plaintiffs’ emotional distress resulting from

defendants’ negligence is objectively serious and genuine.⁶⁵ Clearly, this test enables the finder of fact to differentiate between unreasonable fear of contracting cancer and the reasonable fear of a plaintiff “who has consumed, cooked with, and bathed in water”⁶⁶ contaminated by defendants’ toxic waste.

The court was also concerned with potential size of a class in toxic court litigation. As Justice George pointed out in his dissent, the court opinion provides more protection for an individual harmed by another’s negligence, than for one of many individuals who may be exposed to toxic chemicals by a defendants negligence.⁶⁷ It is inconceivable to think that the court intended to shelter defendants whose

negligence with toxics injures many people rather than only a few. The court of appeal's approach protects the supreme court's policy concerns while still providing compensation to injured plaintiffs. Instead, the court created a bright line test that places an unfair burden on plaintiffs who are injured by negligent defendants.

III. Conclusion

When the California Supreme Court decided Potter it had the opportunity to approve the factors outlined by the court of appeal for determining fear of cancer recovery. Those factors distinguished recovery for fear of cancer from enhanced risk of cancer and provided a meaningful but achievable standard for plaintiffs to recover fear of cancer damages. A meaningful standard will allow genuine plaintiffs to recover for their fear of cancer, while not opening up the floodgates of litigation to unreasonable fear.

Instead, the California Supreme Court chose to adopt a bright line test requiring a plaintiff to show that in the absence of physical injury, plaintiff is more likely than not to develop the feared cancer in the future. This test went against the norms of conventional negligence law in California and muddled the distinction between fear of cancer recovery and recovery for enhanced risk of cancer. The Potter standard places an unreasonable burden on plaintiffs exposed to toxics, and provides an illogical shelter for defendants who are negligent using toxic chemicals.

About the Author: Kaylee Newell is a 2L at King Hall who graduated from UC Davis with degrees in Economics and International Relations.

Article Editor: Paul Gross

NOTES

¹ 6 Cal.4th 965, 25 Cal.Rptr.2d 550, 863 P.2d 795 (1993)(hereinafter 'Potter').

² Potter, 6 Cal.4th at 997. The court, however, carved out an exception to the more likely than not rule in cases, such as Potter, where defendants had acted oppressively, fraudulently or maliciously. In this situation the plaintiff must show that the fear of cancer is reasonable.

³ Cases in which courts have required a showing of physical injury for emotional damages include: Wisniewski v. Johns-Manville Corp., 759 F.2d 271 (3d Cir. 1985), Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171 (1982), and In re Hawaii Asbestos Cases, 734 F.Supp. 1563 (D. Hawaii 1990).

⁴ Potter, *supra*. note 1, at 975-976.

⁵ *Id.* at fn 9.

⁶ *Id.* at 975.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 975-976.

¹¹ *Id.* at 976.

¹² *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* Specifically, the trial court found that Firestone's liquid waste dumping at Crazy Horse fell below the appropriate standard of care.

21 *Id.* at 977.

22 *Id.*

23 *Id.*

24 *Id.* at 978.

25 *Id.* The court did not attribute the damages to any one theory of recovery.

26 *Id.* The trial court awarded \$142,975 for the present value of medical monitoring.

27 *Id.* The court awarded \$269,500 for psychiatric illness and treatment. The court found that these damages were separate and distinct from fear of cancer damages.

28 *Id.* The court awarded \$108,100 for general disruption of plaintiffs' lives, including the necessity to shower elsewhere, use bottled water and submit to water and soil testing on their property.

29 *Id.* Punitive damages awarded against Firestone for their conscious disregard of the rights and safety of others totalled \$2,600,000.

30 Potter v. Firestone Tire and Rubber Company, 274 Cal.Rptr. 885 (Ct. App. 1990).

31 *Id.* at 896.

32 *Id.* at 899.

33 *Id.* at 891. "...in circumstances such as these—where respondents have ingested carcinogens—it is not necessary for respondents to establish a present physical injury in order to recover for fear of cancer."

34 *Id.* at 892-93.

35 Potter, *supra* note 1, at 984.

36 *Id.* at 982. The court referred to cases outside the jurisdiction to demonstrate parasitic injury, i.e.: Ferrara v. Galluchio, 5 N.Y.2d 16, 176 N.Y.S.2d. 996, 152 N.E.2d 249 (1958)(plaintiff negligently burned during x-ray treatment could recover for fear cancer would develop on wound), Accord, Dempsey v. Hartley, 94 F.Supp. 918 (E.D.Pa.1951)(recovery for fear of breast cancer for traumatic breast injury), and Alley v. Charlotte Pipe & Foundry Co., 159 N.C. 327, 74 S.E. 885 (1912)(recovery for fear that sarcoma would ensue from burn wound). For a discussion on physical injury in Potter's wake *see* Macy's California, Inc. v. Superior Court, 41 Cal.App.4th 744, 48 Cal.Rptr.2d 496 (Ct. App. 1995)(holding needle prick doesn't constitute physical injury for recovery in fear of AIDS case).

37 *Id.*

38 *Id.*

39 *Id.* at 985.

40 2 Cal.4th 1064, 9 Cal.Rptr.2d 615, 831 P.2d 1197 (1992).

41 Potter, 6 Cal.4th at 986, citing Burgess, 2 Cal.4th at 1079.

42 *Id.* at 988. The court reversed plaintiffs' claim for intentional infliction of emotional distress holding that based on Christensen v. Superior Court, 54 Cal.3d 868, 2 Cal.Rptr. 79, 820 P.2d 181 (1991) in order to find Firestone liable of intentional infliction of emotional distress plaintiffs needed to show that Firestone's intentional and outrageous conduct was directed at the these particular

plaintiffs, or occurred in the presence of the plaintiff of whom the defendant is aware. Justices Mosk and Kennard both dissented on this point, arguing that Firestone's behavior clearly justified a finding of intentional infliction of emotional distress.

⁴³ *Id.* at 989. The Potter court found that the lower court's approach gave too much importance to the "mere ingestion of a carcinogen" (emphasis added).

⁴⁴ *Id.* at 990.

⁴⁵ *Id.*

⁴⁶ *Id.* at 991. The court emphasized that every person is now a potential fear of cancer plaintiff. Limiting the size of plaintiffs in the class was necessary, the Court felt, to keep insurance premiums down.

⁴⁷ *Id.* at 991. The court cited to an amicus brief, stating that access to prescription drugs would likely be impeded because thousands of prescription drugs currently having no harmful effect now may be found to have a harmful effect in the future. The threat of future lawsuits could lessen the availability of new drugs available. Also the Court worried that a lower standard could add to the medical malpractice insurance crisis in California.

⁴⁸ *Id.* at 993.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 997. More recent cases applying Potter standard to fear of AIDS include Herbert v. Regents of the University of California, 26 Cal.App.4th 782, 31 Cal. Rptr. 708 (Ct. App. 1994), Kerins v. Hartley, 27 Cal.App.4th 1062, 33 Cal.Rptr.2d 172 (Ct. App. 1994), Macy's California, Inc v. Superior Court, 41 Cal.App.4th 744, 48 Cal.Rptr.2d 496 (Ct. App. 1995); applying to fear of cancer *see* San Diego Gas & Electric Co. v. Orange County Superior Court, 41 Cal.App.4th 539, 38 Cal.Rptr.2d 811 (Ct. App. 1995)(petition for review granted).

⁵² *Id.* at fn 5, citing Gale & Goyer, Recovery for Cancerphobia and Increased Risk of Cancer (1985) 15 Comb.L.Rev. 723. Fear of cancer should be distinguished from cancerphobia, a mental illness evidenced by recurrent dread of contracting cancer in the absence of objective danger.

⁵³ *See* Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1205 (6th Cir. 1988), Potter, 6 Cal.4th at 1027 (George, dissenting).

⁵⁴ 999 F.2d 1007, 1012 (6th Cir. 1993).

⁵⁵ *Id.*

⁵⁶ *See* Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1204 (6th Cir. 1988), Ayers v. Township of Jackson, 189 N.J.Super. 561, 461 A.2d 184 (1983), Hagerty v. L&L Marine Services, Inc., 788 F.2d 315 (5th Cir. 1986) reconsideration denied, 797 F.2d 256 (5th Cir. 1986), Herber v. Johns-Manville Sales Corp., 785 F.2d 79 (3rd Cir. 1986).

⁵⁷ 855 F.2d 1188, 1205 (6th Cir. 1988)(hereinafter 'Sterling').

⁵⁸ *Id.* at 1206.

⁵⁹ Potter, *supra* note 30, 274 Cal.Rptr. at 893.

⁶⁰ *Id.* at 893.

⁶¹ *Id.*

⁶² Molien v. Kaiser Foundation Hospitals, 27 Cal.3d 916, 167 Cal.Rptr. 831, 616 P.2d 813 (1980), disapproved on other grounds, Burgess v. Superior Court, 2 Cal.4th 1064, 9 Cal. Rptr.2d 615, 831 P.2d 1197 (1992).

⁶³ *See* Potter, 6 Cal.4th at 1020 (George, dissenting).

⁶⁴ Potter, *supra* note 1, at 991.

⁶⁵ Potter, *supra* note 30, at 892-93.

⁶⁶ Potter, *supra* note 63, at 1019.

⁶⁷ *Id.* at 1020.