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EMOTIONAL DISTRESS ISSUES RAISED BY THE RELEASE OF TOXIC AND OTHER HAZARDOUS MATERIALS

Conrad G. Tuohey* & Ferdinand V. Gonzalez**

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I. INTRODUCTION

In environmental terms, the nineteenth and twentieth centuries were no more than periods of accumulated toxic neglect. Intent on maximizing employment, the public and legal systems tolerated and even promoted this toxic neglect. These circumstances persisted until the American public was mobilized, out of necessity, to alter the status quo and begin environmental protection efforts. It is rapidly becoming apparent that much of the twenty-first century will be directed toward reverse engineering and remedying this accumulated toxic neglect—technically, politically, and juridically.

Since circa 1980, the explosion of toxic tort litigation has substantively and procedurally challenged traditional tort law. To date, however, despite some response to the change in

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circumstances brought by this explosion of litigation, the judicial system has neither fully nor adequately addressed many of the most basic differentials between traditional tort law and emerging toxic torts. This is particularly true with regard to emotional distress injury and damage arising from an infinite variety of toxic episodes. Such episodes include toxic exposure of people via pathways from contaminated air, soil, and water; toxic related interruptions to people's freedom of movement; and toxic impacts causing loss in property value.

These toxic episodes are especially manifested in California, a state with a legacy of toxic insult and incubation commencing with gold mining operations at Sutter's Mill on the American River in 1848, if not before. In addition to mining contamination of soil and water from its tailings and chemical wastes, there have been significant pollution and hazardous material releases in California from or involving the following: lumbering and milling, agricultural animal waste, pesticides, oil and gas exploration, oil and gas production, distribution, and refining (including underground pipelines, hazardous material transportation, leaking pipelines, and storage tanks),

1. See, e.g., GAVIN M. CRAIG, CALIFORNIA WATER LAW IN PERSPECTIVE LXXI (West 1971).
landfill and waste disposal sites, utilities, leaching into aquifers and coastal runoff of pesticides and wastes, failing sewage lines and treatment plants surtaxed by age and increasing demand, the aerospace defense industry, shipyard and other manufacturing industries, and present

131 Cal. Rptr. 895 (Cal. Ct. App. 1976) (involving incident where plaintiff was sprayed with sulfuric acid from leaking pipeline).

8. See, e.g., Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965 (1993) (involving contaminated landfill); Cottle, 5 Cal. Rptr. 2d at 882 (involving a residential subdivision on top of a dump site for oil industry hazardous wastes); Cosman v. Chevron U.S.A., Inc., No. 37-48-02 (Orange County Super. Ct.) (the McCall Toxic Dump Site; residential subdivisions encroached near abandoned dump site containing 50,000 tons of contaminated jet fuel) (discussed at 1 MARSHALL HOUTS ET AL., COURTROOM TOXICOLOGY ch. 7 (1994)).

9. See Kennedy v. Southern Cal. Edison Co., 219 F.3d 988 (9th Cir. 2000) (involving radioactive "fuel fleas" alleged to have been taken home by worker from San Onofre Nuclear Generating Station causing wife's cancer); Ahrens v. Superior Court, 243 Cal. Rptr. 420 (Cal. Ct. App. 1988) (involving electrical transformer PCBs).


11. See, e.g., CAL. WATER CODE § 13142.5 (West 2000).


16. See, e.g., Rutherford v. Owens-Ill., Inc., 16 Cal. 4th 953 (1997) (involving plaintiff who worked 40 years in Mare Island Naval Shipyard and contracted asbestosis).

and formerly used defense sites, known as "FUDS."\textsuperscript{18}

California’s incredible population growth exacerbated the toxic import of these historic endeavors. This growth gave rise to increased demands on finite natural resources such as potable water and land. Urban sprawl developed previously remote areas where toxic dumping and manufacturing frequently occurred. In the last twenty years, these dramatic toxic events and the invention of advanced investigative technology have collectively raised societal awareness of the toxic implications, triggering an epidemic of toxic tort litigation.

Because there are relatively few decisions relevant to this now exploding toxic tort field, lawyers are eagerly awaiting further judicial definition, clarification, amplification, and direction. This is particularly so in regard to the availability of emotional distress damages resulting from toxic torts. To compound this problem, emotional distress damages were a highly contested issue, even prior to the advent of the toxic tort explosion.

The law has long been skeptical of emotional distress claims, as they frequently are purely subjective and easily feigned. As a consequence, elaborate concepts have been developed to assure their genuineness. Many of those now and municipalities alleged to have polluted the atmosphere in Los Angeles County, including automobile manufacturers; Christopher v. Jones, 41 Cal. Rptr. 828 (Cal. Ct. App. 1964) (involving a chemical repackaging plant); Hagy v. Allied Chem. & Dye Corp., 122 Cal. App. 2d 361 (Cal. Ct. App. 1953) (involving sulfur trioxide / sulfuric acid); Guttinger v. Calaveras Cement Co., 233 P.2d 914 (Cal. Ct. App. 1951) (involving a cement manufacturing plant).


Since about 1940, California, along with the rest of the western coastal states, served as the military research and development, testing, production, and logistical staging area for supplying Pacific Theater Operations in World War II, the Korean War, the Vietnam War, and the Cold War. These were imperatives, which at those times, understandably preempted domestic ecological concerns. \textit{See, e.g.,} Lockheed Martin Corp. v. Superior Court, 94 Cal. Rptr. 2d 652 (Cal. Ct. App. 2000), review granted, 98 Cal. Rptr. 2d 430 (Cal. 2000); McKelvey v. Boeing N. Am., Inc., 86 Cal. Rptr. 2d 645 (Cal. Ct. App. 1999); Rutherford v. Owens-Ill., Inc., 16 Cal. 4th 953 (1997); Martin Marietta Corp. v. Insurance Co. of N. Am., 47 Cal. Rptr. 2d 670 (Cal. Ct. App. 1995); Mangini v. Aerojet-Gen. Corp., 278 Cal. Rptr. 395 (Cal. Ct. App. 1991); Smith v. Lockheed Propulsion Co., 56 Cal. Rptr. 128 (Cal. Ct. App. 1967); \textit{see also} Arcade Water Dist. v. United States, 940 F.2d 1265 (9th Cir. 1991).
traditional concepts lack relevance to those who have been exposed to toxic and other hazardous materials.

This article examines the uncertainty surrounding the availability of emotional distress damages in toxic tort litigation under California law. Section II discusses the state of modern toxic tort law, including the general issues left unresolved by the relatively recent decisions in Potter and Cottle and the new issues that toxic megatorts present. Section III provides background information on the types of toxic torts and how the government usually handles them. Section IV details the impact of traditional liability theories on damages resulting from hazmat exposure, and provides guidance to plaintiffs for the best recovery for emotional distress damages. Section V compares severe emotional distress damages resulting from hazardous materials incidents, first with reference to economic loss, and then without reference to economic loss. Finally, Section VI concludes that damages for emotional distress and damages for other intangible harm constituting legal detriment may be available under traditional tort principles to individuals who are endangered and fear for their safety as a result of a hazmat incident, even in the absence of physical injury.

II. MODERN TOXIC TORTS

A. Recent Developments Regarding Emotional Distress in Toxic Tort Law

In the 1990s, the California courts handed down two significant toxic tort decisions involving emotional distress. These were Cottle v. Superior Court19 ("Cottle"), and Potter v. Firestone Tire & Rubber Co.20 ("Potter").

In a real sense, these two decisions are only the opening salvos of judicial responses to the following real toxic law questions. First, what juridical impedimenta will victims have to traverse to successfully prosecute their toxic tort cases? Second, from a public policy standpoint, who will be brought to bear the manifold social costs arising from toxic contamination: victims, taxpayers, or the contaminators—and, where appropriate, the contaminators' insurers and governmental

20. 6 Cal. 4th 965 (1993).
agency customers?

Unfortunately, as discussed herein, neither Cottle nor Potter fully address or clarify the unique aspects of toxic torts in relation to causation, burden of proof, and damage issues. In some regards, the issue of who will bear the costs has been finessed by stringently dealing with victims' claims, particularly their claims for emotional distress damages. In this context, this article examines the issues relating to the emotional distress damages often sustained by victims of hazardous material ("hazmat") releases which Cottle and Potter alluded to, but did not definitively resolve. After the Potter court specifically identified some of these "hard" toxic issues, the majority took inordinate care to explain that these issues were not before the court and would not be addressed. As discussed, infra, it is quite significant that Potter was an action that pleaded only negligence, negligent and intentional infliction of emotional distress, and strict liability/ultra-hazardous activity. Pleading the alternate theories of nuisance and trespass probably would have changed the outcome of the case.

Also of interest is that the Potter court did not make any reference whatsoever to the earlier Second District Court of Appeals' Cottle decision. The Cottle complaint, in addition to negligence, negligent and intentional infliction of emotional distress, and strict liability based on ultra-hazardous activity (personal injuries, just as pleaded in Potter), also alleged severe emotional distress based upon private and public nuisance, trespass, fraud, deceit, and property damage.

21. Indeed, the dissenting opinions in both Cottle and Potter most eloquently raise these and other profound and still unanswered questions which the courts must, in time, directly address.

22. "Hazardous material" usually means any material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety or to the environment if released into the workplace or the environment. See, e.g., CAL. HEALTH & SAFETY CODE § 25501(o) (West 1999). See generally CAL. CODE REGS. tits. 22, 26-27 (2000). See also CAL. HEALTH & SAFETY CODE § 25501.1; CAL. CIV. PROC. CODE § 726.5(e)(4) (West 1999); 40 C.F.R. pt. 355 (2000). Note that hazmat may be chemical, radiological, bacterial, fungal, or viral, and may be corrosive, ignitable, toxic, or explosive. Cf. CAL. HEALTH & SAFETY CODE §§ 108125, 108165-108185.

23. See Potter, 6 Cal. 4th at 980; cf. Aas v. Superior Court, 24 Cal. 4th 627, 652 n.16 (2000) (The Potter decision was "painstakingly limited to its specific factual and legal context.").

24. See infra Part IV.

25. The court said:
In *Cottle*, the court was reviewing only the preclusion of personal physical injury claims by the trial court because the trial court "found that plaintiffs had established their prima facie cases regarding their emotional distress and property damages claims, but not their personal physical injury claims." Thus, pleading durable, viable causes of action that can effectively sustain emotional distress damages is quite critical. *Potter* and *Cottle* left a litany of additional uncertainties. It is quite significant that neither *Potter* nor *Cottle* involved single, isolated, "toxic cloud" type of factual circumstances, with their own unique and profound psychological impacts.

What is not resolved by these decisions is whether the judicial system can or will accommodate both plaintiffs with minimal or transient present and patent emotional distress toxic injuries as well as those plaintiffs whose emotional distress toxic injuries are latent, or not completely manifested until later. The rule against splitting a cause of action, statutes

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In the underlying *Cottle* action, approximately 175 owners and renters of certain residential properties located in the Oxnard Dunes (the Dunes) residential subdivision in Oxnard, California sued various defendants... for personal injuries (both physical injuries and emotional distress injuries) and property damages as a result of defendants' construction and development of the Dunes on a site that for many years had been used as a dumping ground for certain oil industry wastes and other byproducts. In particular, plaintiffs allege that they suffered injuries due to defendants' failure to disclose the prior use of the property. *Cottle v. Superior Court*, 5 Cal. Rptr. 2d 882, 886 (Cal. Ct. App. 1992) (emphasis added). *See also* Dolan v. Buena Eng'rs, Inc., 29 Cal. Rptr. 903, 905-06 (Cal. Ct. App. 1994) (lead case consolidated with *Cottle* discussing both of their identical pleadings); cf. McKelvey v. Boeing N. Am., Inc., 86 Cal. Rptr. 2d 645 (Cal. Ct. App. 1999). The *McKelvey* pleadings were similar to those of *Dolan/Cottle*. *See id.* at 650 n.3. That is, the *Dolan/Cottle* and *McKelvey* pleadings included significantly more causes of action than those of *Potter*. While the *Cottle* evidentiary sanction precluded physical injury damages only, the *McKelvey* action was dismissed in whole on demurrers without leave to amend on the ground that the statute of limitations had run and the allegations of the complaints were insufficient to invoke the delayed discovery rule exception. It is unclear why the causes of action for continuing trespass and continuing public and private nuisance were dismissed on that ground as well. *See id.* at 651 n.6. *But see* Kafka v. Bozio, 191 Cal. 746, 750-52 (1923); Angeles Chem. Co. v. Spencer & Jones, 51 Cal. Rptr. 2d 594 (Cal. Ct. App. 1996); Capogeannis v. Superior Court, 15 Cal. Rptr. 2d 796 (Cal. Ct. App. 1993). The whole issue is enough to cause plaintiffs' counsel severe emotional distress for fear of malpractice. *See* Miranda v. Shell Oil Co., 26 Cal. Rptr. 2d 655 (Cal. Ct. App. 1993).

27. *See infra* Part V.B.
of limitation, and the belated discovery rule are all concerns which impact latent emotional distress toxic injuries.

B. Toxic Megatorts

Another issue left unresolved by the decisions in Potter and Cottle is what the response should be to emotional distress damages sustained from toxic megatorts. Contra Costa County, located east of the San Francisco Bay in Northern California is illustrative of this phenomenon. It provides an example of a major collision point between petrochemical and certain defense industry facilities, on the one hand, and encroaching suburban home building on the other. This county affords an opportunity to study hazmat releases and all of their impacts. For example, in 1993 a rail tank car in a gasoline refinery complex ruptured, releasing a cloud of sulfuric acid which was estimated to be three miles wide and fifteen miles long. This occurred during a business day and resulted in direct civil actions initially filed on behalf of some 65,000 individually named plaintiffs, as well as extensive legal media

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coverage, a congressional hearing, a congressional report, a California state governmental environmental health investigation, and an academic study of its psychological impacts. There was a $180,000,000 settlement, most of which was allocated for personal injury and exemplary/punitive damages, but the personal injury damages appear to have been overwhelmingly for emotional distress, and not physical injury, in view of the court's finding that the claims involved "minimal or transitory injury."

In addition to such single, isolated releases of hazmat into the air, more and more soil and groundwater pollution is being discovered. No doubt, this is in part due to hazmat migration and permeation into potable water tables, urban sprawl towards once isolated dumping grounds, agricultural fields, and past and present industrial sites. In the wake of such highly dramatic and sometimes horrific events, victims, lawyers, and even courts are typically preconditioned to expect astronomical injuries and profound damages. Fortunately, to date, reality frequently proves otherwise and many victims are not profoundly injured, at least not physically. Nevertheless, many of these toxic episodes negatively impact residential areas and the families housed therein. The largest single asset of most citizens typically is the financial investment they make in their


33. See STAFF OF HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, COMMITTEE ON NATURAL RESOURCES, 103D CONG., REPORT ON LIVING WITH RISK: COMMUNITIES AND THE HAZARD OF INDUSTRIAL CONTAMINATION (Comm. Print 1994).

34. See Sandra McNeel et al., Acute Health Effects Due to a Large Sulfuric Acid Release in Richmond, California, July 1993, Environmental Health Investigation Branch, Division of Environmental Health and Occupational Disease Control, California Department of Health Services (1995) (on file with author).


own homes. Contamination of those homes or of their neighborhoods could well destroy the economic value of their investment. Such a profound pecuniary loss can understandably trigger severe emotional distress per se, quite independent from that caused by psychological trauma to a person resulting from direct hazmat exposure to himself or his family.

Whatever their economic detriment and emotional distress damages may be, the judicial process entitles such victims to full redress. In order to cope with such massive toxic tort litigation, courts increasingly serve as "gatekeepers" in order to determine whether such damage claims will be allowed to proceed and, if so, how. While this judicial "gatekeeping" function is often directed at medical causation in personal injury-toxic tort litigation, it is also directed at assessing the


38. See generally 1 HOUTS ET AL., supra note 8, ch. 7; FRED SETTERBERG & LONNY SHAVELSON, TOXIC NATION: THE FIGHT TO SAVE OUR COMMUNITIES FROM CHEMICAL CONTAMINATION (1993).

39. See Cottle v. Superior Court, 5 Cal. Rptr. 2d 882 (Cal. Ct. App. 1992) (Exercising its "inherent powers," the trial court terminated causes of action for personal injury via an evidentiary exclusion order made during motions in limine, in lieu of a summary judgment before trial, or nonsuit or directed verdict during trial.). By way of contrast, statutory examples of the gatekeeping function of the court are those requiring plaintiffs to establish pre-trial a prima facie case: (1) for civil conspiracy against an attorney (See CAL. CIV. CODE § 1714.10 (West 1998).) or (2) for punitive damages against a health care provider (See CAL. CIV. PROC. CODE § 425.13 (West 2000).), before they are allowed to plead a conspiracy cause of action or punitive damage allegations, respectively.

40. Courts have latitude in fashioning novel procedural solutions. See CAL. CIV. PROC. CODE §§ 128, 404 (West 1999); CAL. R. CT. 1500 (West 2000) (regarding coordination of complex cases); CAL. R. CT. 1800 (West 2000) (regarding "complex cases" which require special judicial case management, including those involving environmental and toxic tort claims or mass tort claims); CAL. R. CT. APP. § 19(h) (West 2000) (regarding complex litigation); see also Cottle, 5 Cal. Rptr. 2d at 882; cf. MANUAL FOR COMPLEX LITIGATION (3d ed. 1995).

genuineness or the significance of intangible emotional distress damage claims, claims for economic detriment, and claims for emotional distress.\textsuperscript{42} In some cases, alleged emotional distress may be predicated in whole or in part upon serious economic detriment or pecuniary loss.\textsuperscript{43}

Toxic and other hazmat releases raise present personal injury and property damage issues. However, they also frequently involve unique future economic damages such as medical monitoring costs and delayed pecuniary losses, as well as future personal damages, such as post-traumatic stress disorders, diverse emotional distress manifestations, future physical symptoms, and other forms of detriment. The fact that long latency periods may follow hazmat exposure is now judicially recognized and accepted.\textsuperscript{44} Such present damages, if modest in relation to the initially perceived magnitude of the hazmat episode, and such deferred damages, are frequently overlooked or ignored by victims' counsel and by courts.

Hazmat releases may also arrest or impede one's freedom of movement. For instance, the release of a chemical fog, smoke, or spray of such density as to impede and obstruct the free and safe use of a highway, making it dangerous and unsafe for vehicular travel, is a nuisance.\textsuperscript{45} Such impediment to free movement may be compelled, simply recommended by governmental action through the exercise of police powers,\textsuperscript{46} or created by the mere exercise of common sense by members of the public affected by the release. Such constraints on

\textit{Admissibility}, 26 \textsc{Envtl. L.} 1161 (1996).


\textsuperscript{44} Indeed, latency is often recognized as a unique characteristic of hazmat exposure. See Potter, 6 Cal. 4th at 980; Miranda v. Shell Oil Co., 26 Cal. Rptr. 2d 655 (Cal. Ct. App. 1993).


movement frequently trigger damage considerations *apropos*, if not somewhat unique, to hazmat episodes. Resulting damage claims may consist of severe emotional distress, even in the absence of physical impact. This can be based upon discomfort or anxiety, as in nuisance, or fear or anxiety, as in negligence.

In the final analysis, many damage claims based on the impairment of one's freedom and disruption of movement may prove to be relatively minor depending upon the specific facts presented. However, it does not necessarily follow that all such economic detriment and emotional distress damage claims are without merit. Defendants often argue that these dramatic, widely publicized, and sometimes catastrophic incidents are no more than open invitations for fraudulent and frequently trivial claims for damages. Similar skepticism (if not cynicism) is often directed to claimed emotional and mental suffering which may be highly subjective, particularly in the absence of strong indicia of genuineness, such as physical impact or physical injury. However, as discussed, *infra*, both Cottle and Potter

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47. Damages for physical injuries immediately and directly sustained by one exposed to hazmat are beyond the scope of this article.

48. Counsel for toxic tort plaintiffs have been accused of engaging in iatrogenic or choreographic tactics. In *Mitchell v. Superior Court*, 37 Cal. 3d 591, 610-11 (1984), a claimant seeking emotional distress damages from contamination of an aquifer was asked to provide information of communication received by the claimant from her attorney concerning the harmful effects of the contaminant. The California Supreme Court refused the discovery, stating in part that:

Such a holding [permitting discovery] would potentially uphold a harassment tactic whereby defendants such as these are able to shift the focus of the case from damages caused by chemical pollutants to damages caused by allegedly inflammatory or false information provided by self-serving attorneys. . . . [T]he implications of their arguments are unmistakably clear. In other similar cases, defendant chemical manufacturers have contended that plaintiffs' injuries were caused not by exposure to toxic chemicals but rather by hysteria induced by plaintiffs' doctors. Once again, this technique not only obfuscates many of the substantive issues in a case but also frequently places the wrong "defendant" on trial. Quite simply, such tactics should not be tolerated in the courts of this state.

*Id.* Cf. *Christensen v. Superior Court*, 54 Cal. 3d 868, 901-02 (1991). Media reports of a "psychologically devastating event" are not the source of emotional distress damages and do not affect the plaintiff's standing; however, they go to the "reasonableness" of a plaintiff's claim for severe emotional distress. *See id.* *Christensen*, a non-toxic cremation case, was heavily and repeatedly relied upon by the Potter majority. Its relevance to toxic torts is tenuous, at best, inasmuch as *Christensen* involved the disposition of cremated remains, and neither life threatening trauma to one or one's family, nor loss of the value of one's home. *See Hansen*, *supra* note 31.

49. *See infra* Part V.B.
are quite clear that in toxic cases, neither physical impact nor physical injury is required for emotional distress and property damage claims. The real question is the genuineness of such emotional distress claims. This is true whether they are predicated upon the nature of the toxic episode, the trauma of the toxic episode, the economic loss, or all of the foregoing.

III. HAZARDOUS MATERIALS INCIDENTS AND THE RESULTING GOVERNMENTAL RESPONSE

A. Hazardous Materials Incidents

The infinite varieties of factual circumstances surrounding toxic tort cases are beyond measure and may arise over or exist for only minutes or decades. They may involve any number of hazardous materials, alone or in combination with others, and in many forms. Hazmat incidents may occur anywhere in situ or in transit, and may contaminate or threaten to contaminate air, soil, or water. This may result in pollution or contamination that causes or threatens to cause personal injury, property damage, or interference with the rights of citizens. While hazmat releases into the air may produce immediate adverse impact, the more insidious, "slower" contamination of groundwater and soil also can harm and frequently result in the same detriment, including property damage, fear, and evacuation. Such "slower" releases

50. A hazmat release incident is one where the hazmat may be identified and the emissions traced to an identifiable or isolated point source, such as an oil refinery adjacent to a residential community. See, e.g., Hagy v. Allied Chem. & Dye Corp., 122 Cal. App. 2d 361 (Cal. Ct. App. 1953). The problem of overall pollution, as in urban air pollution occurring daily and hazmat emanating from several sources, and which are subject to regulatory controls, is not treated as a hazmat incident in this article. See, e.g., Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350 (Cal. Ct. App. 1971). However, it is settled that a single event can constitute a nuisance. See Ambrosini v. Alisal Sanitary Dist., 317 P.2d 33 (Cal. Ct. App. 1957).

51. Airborne hazmat requires special consideration because typically a toxic cloud disperses within minutes leaving no trace in the air, or evidence on the ground may dissipate in a short time. See generally Margie Tyler Searcy, How to Handle a Toxic Cloud Case, in 3 A GUIDE TO TOXIC TORTS 31-1, 31-1 to 31-151 (1998).

52. See, e.g., Green v. General Petroleum Corp., 205 Cal. 328 (1928). Residents were forced to leave their home following the blow-out of an oil well being drilled in a neighboring property, which resulted in oil, mud, and rocks falling onto their property, entitling them to "eviction" damages. See id.; see also Newhall Land & Farming Co. v. Superior Court, 23 Cal. Rptr. 2d 377 (Cal. Ct. App. 1993) (hazmat discharged onto ground leached through the soil and polluted groundwater
typically involve migrating pollution from inactive or abandoned disposal sites, hazardous waste sites, and industrial facilities. In the case of an abandoned site or of a hazardous waste disposal site, the difficulties confronting a victim include identifying the (potentially large) number of possible tortfeasors, i.e., the generators and transporters of hazmat, and identifying or isolating the chemical(s) responsible for any claimed injury.44

While hazmat releases frequently involve fixed or stationary facilities and often have off-site effects, the threat from hazmat transporters such as railroad tank cars and highway trucks cannot be ignored. Their mobility and concealed nature greatly lessen the ability of society to protect itself against such transient releases. For example, evacuation of thousands of persons from their homes and businesses may well be the only remedy to avoid possible injury from an

resulting in a public nuisance; landowner could not sell the property and suffered damages).


54. For instance, personal injury evidence was ordered excluded in the case of residents and former residents of a residential subdivision built on top of a site used several years for the dumping of oil industry hazardous wastes. The residents admitted their inability to specify which chemical in the "caldron of chemicals" in the site caused their claimed injuries, leaving emotional distress and property damage claims. See Cottle v. Superior Court, 5 Cal. Rptr. 2d 882, 884-86 (Cal. Ct. App. 1992); cf. Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965 (1993). Such an "identity crisis" is virtually insurmountable where the exposure is to manifold hazmat. See Brinker, supra note 41, at 1298-99.

55. Airborne release of hazmat from a facility may foreseeably impact surrounding neighborhoods based upon knowledge of the predominate wind direction for the area. Some courts "don't need a weatherman to know which way the wind blows," and may take judicial notice of such basic facts. See, e.g., Jorgensen v. Beach 'N' Bay Realty, Inc., 177 Cal. Rptr. 882, 887 (Cal. Ct. App. 1981) (citing Bob Dylan's song Subterranean Homesick Blues as authority for doing so); cf. Hofmann Co. v. E.I. Du Pont de Nemours & Co., 248 Cal. Rptr. 384 (Cal. Ct. App. 1988) (employees of a toxic chemical plant criticized a proposed residential development adjacent to and downwind of the plant which was "a place unsafe and hazardous for human life and health"); Miles v. A. Arena & Co., 73 P.2d 1260 (Cal. Ct. App. 1937) (pesticidal dust sprayed from aerial crop duster above adjoining land drifted in a light breeze killing 56 hives of bees); CAL. FOOD & AGRIC. CODE § 14021 (West 1999).

overturned hazmat railroad tanker\textsuperscript{57} or from a leaking pipeline.\textsuperscript{68} Railroad tank cars and semi-trailer trucks are often used as storage receptacles\textsuperscript{69} as well as transport vehicles. Hazmat sources are infinite and ubiquitous.

Urban expansion has encroached upon areas historically used for a multitude of hazmat industrial purposes and has reached into established agricultural areas as well. Hazards from agricultural crop pesticide applications and drift\textsuperscript{60} are particularly profound because pesticides by definition are poisons designed to attack and destroy living organisms and are deliberately released into the environment for that specific purpose through various media, including aerial spraying and dusting, which carry the risk of pesticide spillage from the intended target area.\textsuperscript{61} Non-target victims may be sprayed directly or exposed indirectly through the drift phenomenon, and the usual casualties are neighbors of pesticide users, frequently including homes, schools (including schoolchildren, teachers, and staff), crops, and livestock.\textsuperscript{62}

Home, school, and work venues are often affected by releases\textsuperscript{63} but there is no denying that every sector of the

\textsuperscript{57} See Louisville & Nashville R.R. Co. v. Wollenmann, 390 N.E.2d 669 (Ind. Ct. App. 1979) (involving a tanker filled with liquid propane which created a risk of explosion and fire).


\textsuperscript{59} See CAL. HEALTH & SAFETY CODE § 25503.7 (West 2000) (entitled "Railroad car or marine vessel remaining at same facility more than 30 days; hazardous contents deemed stored; notice to administering agency"); cf. Blackwell, 203 Cal. Rptr. at 706 (involving workers sprayed with sulfuric acid unloading rail tank car).

\textsuperscript{60} See CAL. FOOD & AGRIC. CODE § 12972 (pesticides are to be used in a manner that prevents substantial drift to nontarget areas); see also 40 C.F.R. § 170.210(a).


\textsuperscript{62} See id. See also WILLIAM H. RODGERS, JR., 3 ENVIRONMENTAL LAW: PESTICIDES AND TOXIC SUBSTANCES 326-30 (1988).

\textsuperscript{63} See generally NICHOLAS A. ASHFORD & CLAUDIA S. MILLER, CHEMICAL EXPOSURES: LOW LEVELS AND HIGH STAKES (1991); JANETTE D. SHERMAN, CHEMICAL EXPOSURE AND DISEASE: DIAGNOSTIC AND INVESTIGATIVE TECHNIQUES (1994); FRANK E. JONES, TOXIC ORGANIC VAPORS IN THE WORKPLACE (1994). These releases are often called "sick building syndromes." See id.; see also CAL.
population is at risk. Some victims may be far more vulnerable to economic and psychological impacts than others. Of course, not every interference with one's movement will be deemed an invasion of one's liberty interests or property rights. There are normal inconveniences incident to living in an increasingly complex and compact society which are not actionable. However, it is rare for a hazmat release to be deemed a "normal" incident that society can tolerate. Certainly, statutory schemes, if not public policies, dictate otherwise.

B. Governmental Response to Hazardous Materials Incidents

A hazmat release requires an immediate assessment and investigation to ascertain whether the release warrants intervention to protect public health and safety and, if so, the kind of intervention. In most cases, prudence would require

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64. See, e.g., CAL. HEALTH & SAFETY CODE § 25534.1. A hazmat accident risk management plan prepared by a hazmat handler pursuant to statute must consider proximity of specific populations including residential areas, schools, hospitals, health care, and day care facilities.

In disastrous episodes, disaster mental health services by necessity often are directed first to the disaster workers themselves, and often are provided by volunteers. Cf. CAL. HEALTH & SAFETY CODE §§ 25511(d)-(e) (requiring disclosure of hazmat inventory and processes includes trade secret information but only to recognized administering agencies and their employees, including fire and emergency rescue personnel). See also Lipson v. Superior Court, 31 Cal. 3d 362, 366 (1982) (stating that the "firefighter rule" will not preclude recovery by firemen injured as a result of an owner's failure to disclose presence of hazardous substances).


66. See People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090 (1997). “Life in organized society and especially in populous communities involves an unavoidable clash of individual interests . . . It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together.” Id. at 1105.

taking precautionary steps before a hazmat event to predetermine appropriate intervention to mitigate or ensure against any risk of injury. In other words, the exact nature of the risk to the public health or safety need not be known before government takes preemptive action. Indeed, the fact that government may not know the exact nature of the particular risk is the very aspect of a hazmat release that makes it prudent to issue precautionary warnings and initiate mitigating measures. The taking of preventative or mitigating measures for such an eventuality, as well as the identification of specific populations which may be jeopardized, are components of every hazmat release response plan.

With advance knowledge of the consequences of a hazmat release, public health and safety officials can plan and train to maximize immediate and appropriate response action, and to avoid placing the safety of residents of a community at an unacceptable risk. A hazmat release response plan may include mechanisms for warning residents of any potential or actual danger of hazmat releases.

In the workplace environment, governmental hazard alerts to workers regarding potential risks from exposure to toxic materials are critical as well. The burgeoning knowledge about the propensities of more and more substances by manufacturers, employers, and the public, resulting from laws mandating research and education on hazmat, the recognition of the public and employees' "right to know" and corresponding duties of disclosure, and the proliferation of hazmat lists, have

69. See, e.g., CAL. HEALTH & SAFETY CODE §§ 25531.1-25534.1.
70. "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, unless permitted or authorized by a regulatory agency. See CAL. HEALTH & SAFETY CODE § 25501(s).
71. See, e.g., ICN Pharms., Inc. v. State, 5 Cal. Rptr. 2d 94 (Cal. Ct. App. 1992). A pharmaceutical manufacturer sought to enjoin the California Department of Health Services ("DHS") from issuing a hazard alert (under CAL. LABOR CODE §§ 6351, 6361-6362 (West 1999)) which warned pregnant health care workers to avoid exposure to a medication manufactured by ICN. See id. Although the issue had been rendered moot by the dissemination of the hazard alert throughout the state, the court considered the appeal because the authority of "DHS to alert California workers to potential risks from toxic materials and hazardous substances" is "a matter of continuing public interest which is likely to recur." Id. at 95-96.
all brought about these critical governmental hazard alerts.\textsuperscript{72} The source of the hazmat release is relevant in this regard because it is known, for instance, that chemical manufacturing operations and refinery facilities handle a variety of toxic and harmful substances which are used in their processes.\textsuperscript{73} Some historically have released such substances into neighborhoods surrounding their facilities.\textsuperscript{74}

The mere threat of a hazmat release may trigger initial emergency or precautionary responses which may be similar to those invoked in actual releases. Apart from the magnitude of a hazmat release and the extent of the communities potentially affected thereby, various statutory enactments tend to ensure government’s intervention in hazmat releases. As repositories of data on toxic materials and of the hazmat handled by these facilities, government agencies are particularly equipped to respond, direct, and coordinate a response to an emergency. They can best determine the type of response necessary to protect the public health and safety.\textsuperscript{75} Immediate notification to public health and safety officials of a hazmat release or of a threatened release is mandated by statute.\textsuperscript{76} Furthermore,

\begin{itemize}
\item \textsuperscript{72} See, e.g., CAL. LAB. CODE §§ 6361-6390; CAL. HEALTH & SAFETY CODE §§ 25500-25531. As an example of the breadth of scientific data being accumulated in the development of ambient air quality standards, required by sections 39000 through 39009 of the California Health and Safety Code, which created the State Air Resources Board, basic data on toxicology, occupational health, and epidemiological studies are consulted to determine the health effects of air pollution. See Western Oil & Gas Ass'n v. Air Resources Bd., 37 Cal. 3d 502, 512-16 (1984); see also CAL. HEALTH & SAFETY CODE §§ 103875-103885 (establishing a registry for the incidence of cancer correlated to environment and population); cf. Kizer v. Sulnick, 248 Cal. Rptr. 712, 717-18 (Cal. Ct. App. 1988) (finding government may subpoena medical and health data compiled by counsel and physician hired by counsel).
\item \textsuperscript{74} For example, in 1987, the California Legislature enacted the “Air Toxics ‘Hot Spots’ Information and Assessment Act,” which was predicated upon significant findings that “75 percent of the United States population lives in proximity to at least one facility that manufactures chemicals,” and that an incomplete survey had indicated that “nearly every chemical plant studied routinely releases into the surrounding air significant levels of substances proven to be or potentially hazardous to public health.” CAL. HEALTH & SAFETY CODE § 44301(b). The Air Toxics Hot Spots law established a statewide program for the inventory of air toxics emissions from individual facilities as well as requirements for risk assessment and public notification of potential health risks. See id. § 44360.
\item \textsuperscript{75} See id. § 25531; ICN Pharms., 5 Cal. Rptr. 2d 94.
\item \textsuperscript{76} See CAL. HEALTH & SAFETY CODE § 25507. The rule applies to railroad incidents involving the release or threatened release of hazmat as well. See CAL.
public health and safety officials responding to a hazmat release are granted immunity for any injury or property damage resulting from their efforts to abate a hazmat release or hazard. 77 Finally, public agencies responding to a hazmat release are entitled to recover emergency response costs from every person responsible for the release. 78

Thus, the action of government in issuing shelter in place or evacuation orders 79 in response to a hazmat release does not break the chain of causation insofar as injuries suffered by the public are caused by and are the direct and natural consequence of tortious conduct. Although evacuation, shelter in place, or other activity taken in response to a release constitutes the very detriment that the public may later complain of, government’s response action (and the plaintiffs’ compliance therewith) is not a superseding cause that relieves a defendant of any liability for its negligent or tortious conduct. 80

Even though government may have been mistaken (in that the substances did not pose any risk of substantial harm) in issuing a shelter in place or evacuation order, it does so in the exercise of its emergency police powers as a precautionary step to

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77. See CAL. HEALTH & SAFETY CODE § 25400; Washington v. County of Contra Costa, 45 Cal. Rptr. 2d 646 (Cal. Ct. App. 1995); CAL. GOV’T CODE §§ 8655-8660 (Emergency Services Act). Also see the immunity provisions under the Tort Claims Act which may apply, such as sections 815.2 and 820.2 of the California Government Code (discretionary immunity), and section 855.4 of the California Government Code (public health immunity). Governmental immunity from tort claims under the Tort Claims Act and the Emergency Services Act have been held to apply to the state’s conduct in aerial spraying of pesticides to eradicate the Mediterranean fruit fly, causing damage to automobiles negligently sprayed with the pesticide. See Farmers Ins. Exch. v. State, 221 Cal. Rptr. 225 (Cal. Ct. App. 1985); see also Macias v. State, 10 Cal. 4th 844 (1995) (manufacturers and distributors of pesticide have no duty to warn public inconsistent with state’s warnings in conjunction with state’s spraying of pesticides pursuant to Emergency Services Act).

78. See, e.g., CAL. HEALTH & SAFETY CODE § 13009.6.

79. See CAL. HEALTH & SAFETY CODE § 101375.

80. See BAJI, supra note 43, No. 3.79 (conduct of third party is a normal consequence of the situation created by the defendant); CAL. CIV. CODE § 3333 (West 1999).
ensure the public's safety. A state's police power is rooted in the law of necessity. The state's sovereign powers permit it to promote the order, safety, health, morals, and general welfare of society. Local governments have the same police power as does the State of California under the Emergency Services Act.

Clearly, hazmat reporting laws impose the duty to report the presence of hazmat under negligence tort theory upon those making, transporting, handling, storing, and otherwise dealing with hazmat. Such a duty of compliance is owed to the public, and a breach of that duty would "threaten physical injury, not simply damage to property or financial interests."

C. Governmental Response Actions: Evacuation, Shelter in Place, Traffic Interruptions, etc.

Government ordered responses to a hazmat release may take the form of, among infinite other actions, shelter in place, quarantine, evacuation, traffic intervention, detour, or closure. Many communities have siren and other emergency mechanisms in place to warn the populace of emergency conditions or direct them to radios and television, as media often play a significant role in alerting the public of toxic releases and hazards.

The appropriate response action certainly depends on the hazmat situation. For example, shelter in place may provide a

81. See CAL. GOV'T CODE § 8550. The California Emergency Services Act responds to a fundamental role of government to provide broad services in the event of natural or manmade emergencies which result in conditions of disaster or of extreme peril to life or property, with the objective of protecting and preserving health, safety, life, and property. See id. Such conditions include air pollution (See CAL. GOV'T CODE § 8558(c.)), highway spills of hazmat (See CAL. GOV'T CODE § 8574.17.), and the creation of a "toxic disaster" contingency plan to provide for a more coordinated and effective response (See CAL. GOV'T CODE § 8574.16.). Time permitting, temporary restraining orders may be obtained. See CAL. CIV. PROC. CODE § 731 (West 1999).


84. Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 985 (1993). However, a cause of action for private nuisance may be predicated upon mere threat.

85. See McKelvey v. Boeing N. Am., Inc., 86 Cal. Rptr. 2d 645 (Cal. Ct. App. 1999) (where mass media coverage of a toxic event was considered sufficient to trigger the commencement of the statute of limitations, absent plaintiffs pleading why they were not on notice); see also McGill v. M. J. Brock & Sons, Inc., 91 Cal. Rptr. 2d 135 (Cal. Ct. App. 1999).
level of protection from a toxic cloud, depending upon the specific material and its concentration, and the specific individual. If persons were evacuated through a toxic cloud, where concentrations were highest, or visibility limited, far more serious health problems might ensue. Shelter in place in an airborne release can be supported on several bases: (1) evacuation might expose more residents to the cloud of chemicals, (2) logistical difficulty of evacuating numerous residents, (3) the most appropriate method of avoiding damage from the cloud, and (4) difficulties of predicting with any degree of certainty what wind, rain, and humidity changes might occur, thereby potentially exposing those who were being evacuated to further hazard. Of course, such a response action order would be a discrete determination, ideally based upon data previously provided to local government by the releasor.

Under other circumstances, evacuation may be more appropriate, depending on the nature of the release, which could be chemical, radiologic, fungal, bacterial, or viral. Absent governmental order, citizens in the path of an airborne hazmat release might seek safety by sheltering in place in their own homes, offices, or school rooms. They may do this as a reasonable precautionary measure based upon their perception of the danger, without awaiting safety warnings or instructions from public health and safety officials. Depending on the incident and hazards, evacuating or sheltering in place may be necessary to prevent or mitigate plaintiff's damages. Costs incurred to prevent or mitigate damages are recoverable. As discussed, infra, evacuation can be immediate and temporary or permanent. Each type of evacuation has different economic impacts, based upon the danger or perceived danger. For example, evacuation may preclude a worker from getting to work with resulting wage loss, or it may mean the loss of equity in one's home. Each circumstance understandably might

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86. See BAJI, supra note 43, No. 4.40 (Duty of One in Imminent Peril); id. at 4.41 (Responsibility of One Causing the Perilous Situation). The latter instruction provides that when a person, acting under the impulse of fear, makes a reasonable effort to escape from a peril and injures himself, the injury is deemed caused by the person creating the peril, even though after the event it may appear that the effort to escape was unwise or that the person would not have been injured if that effort would not have been made.

87. See CAL. CIV. CODE § 1714 (West 1999).

88. See Barnes v. Berndes, 139 Cal. 32, 36 (1903) (finding expenses incurred to minimize damages recoverable in a nuisance action).

89. See infra Part V.
trigger severe emotional distress, depending upon the loss and the victim.

IV. LIABILITY THEORIES AND THEIR IMPACT ON HAZMAT DAMAGES

Potter and Cottle both emphasize just how critical pleading or failing to plead viable theories and causes of action may be. Pleadings where the only injury claimed from a hazmat incident is emotional distress, nuisance, fraud and deceit, trespass, and assault or battery, ultimately may prove as effective, if not more, than when negligence or intentional infliction of emotional distress is pleaded.

Where damages are sought for economic loss in toxic tort cases, the disruption and endangerment of life and the engendering of fear occasioned by the hazmat release require a legal theory and a cause of action which are appropriate and viable.90

A defendant who has engaged in tortious conduct is liable for all detriment caused, whether it could have been anticipated or not.91 Detriment is a loss or harm suffered to person or property.92 Juries are instructed that a prevailing plaintiff is entitled to “damages in an amount that will reasonably compensate plaintiff for all loss or harm” which amount shall include “[r]easonable compensation for any fears, anxiety and

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90. Equally important is finding and invoking insurance coverage, wherever possible. See 9 HARRY D. MILLER & MARVIN B. STARR, CALIFORNIA REAL ESTATE LAW § 29:84 (2d ed. 1989). The government may even legislatively subpoena an insurer’s files relating to toxic pollution prior to litigation, in the interest of public health and safety. See Connecticut Indem. Co. v. Superior Court, 23 Cal. 4th 807 (2000).

In certain instances, such as the insolvency, bankruptcy, or dissolution of an insured tortfeasor, the insurance policy may be its only relevant and viable asset which may be available for the exclusive use and benefit of all of the victims who may elect to proceed against it, rather than file claims in the defendant’s insolvency proceeding. See Webster v. Superior Court, 46 Cal. 3d 338, 351 (1989) (holding that insolvent insurance company was covered by liability insurance). The same rule applies in a bankruptcy proceeding; a plaintiff is not precluded from maintaining a lawsuit against a bankrupt tortfeasor if the plaintiff’s eventual recovery will be paid by the bankrupt’s insurer. See id. at 349; cf. CAL. INS. CODE § 11580(b) (West 1988). From time to time, it is worth recalling the fundamental that every person who suffers detriment from the unlawful act or omission of another may recover from the person at fault compensation in money, called damages. See CAL. CIV. CODE § 3281 (West 1988).

91. See CAL. CIV. CODE § 3333.

92. See id. § 3282.
other emotional distress suffered by the plaintiff. Negligence and nuisance causes of action both support claims for economic loss, mental and emotional distress, and annoyance, even in the absence of physical impact or injury. Liability for harmful consequences outside one’s property is not novel under the law of negligence. In a nuisance action, the mere threat of harm to others outside one’s property is sufficient for liability to attach.

The dilemma that frequently confronts plaintiffs is whether to pursue a cause of action based on intentional conduct or to pursue a negligence cause of action. Although the former might be covered by insurance, the latter is more likely to be.

In toxic tort cases, the choice of theories is particularly problematic in cases where the injury is purely emotional distress. As illustrated below, a preferred cause of action is nuisance, where the primary focus is on the harm rather than on the conduct of the defendant. Proof of the existence of the nuisance will suffice.

A. Negligence

The issue in a negligence action is whether, in the management of his property, the owner or possessor of land has

93. BAJI, supra note 43, No. 12.88 (emphasis added).
95. See County of San Diego v. Carlstrom, 16 Cal. Rptr. 667 (Cal. Ct. App. 1961) (holding that presence in a residential community of an extreme fire hazard creating a fear of fire in the lives of the people of that community is a public nuisance).
96. See generally 4 BERNARD E. WITKIN, CALIFORNIA PROCEDURE, PLEADING §§ 356, 362 (3d ed. 1985). Of course, the theories would all depend on the facts of each case, but inconsistent theories are allowed and both may be pleaded and an election made at the appropriate time. See id. However, standing to sue may be critical, particularly in a nuisance action, and plaintiff’s status may be challenged outright. See CAL. CIV. PROC. CODE § 430.10 (West 1999).
97. The challenge may be for the pleader to plead to the insurance. Coverage under a personal injury provision of a policy is not determined by the damages sought from the insured, but by the nature of the tort claims alleged against it. See Martin Marietta Corp. v. Insurance Co. of N. Am., 47 Cal. Rptr. 2d 670, 678-79 (Cal. Ct. App. 1995) (holding that company sued by governmental entities to remediate groundwater and contamination emanating from a landfill had a potential for coverage under policy insuring against liability for “wrongful entry or eviction, or other invasion of the right of private occupancy,” which would include trespass and nuisance claims); MARGIE SEARCY-ALFORD, 1 A GUIDE TO TOXIC TORTS § 5.01(2), at 5-4 to 5-7 (1992).
acted as a reasonable person under all circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor’s degree of control over the risk-creating condition are the factors the trier of fact considers in evaluating the reasonableness of a defendant’s conduct.  

1. **Degree of Care—Amount of Caution Varies**

The risk incident to the handling of fire, firearms, explosives, highly inflammable matters, and corrosive or otherwise dangerous fluids requires a great deal of care. In other words, the standard of care required of the reasonable person when dealing with dangerous articles is so great that a slight deviation will constitute negligence. Similarly, the storage of hazmat in an isolated area or in an unpopulated region may require less caution to constitute ordinary or reasonable care, compared to the storage of similar hazmat in a densely populated community or residential area. These are factors that may require a hazmat handler to maintain extraordinary safeguards in order to discharge its duty of reasonable care.

Defendants’ duty of care is established by their exclusive control and superior knowledge of their hazmat, how they store it, its proximity to populated areas, their profiting from the enterprise, and the use of dangerous instrumentalities under their control.

2. **Creator of the Peril**

A duty may arise from acts or omissions that created the peril or increased the risk of harm to citizens. A breach of that duty occurs by the failure to prevent the harm or warn citizens of the existence of the peril. In determining whether a duty

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100. See BAJI, supra note 43, No. 3.41 (Specific Application of Duty in Dangerous Activity).


102. See generally 6 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS §§ 762-766 (9th ed. 1988).

103. See Potter, 6 Cal. 4th at 975-77; Lipson v. Superior Court 31 Cal. 3d 362, 371-73 (1982); Sprecher, 30 Cal. 3d at 369-70.

104. See Johnson v. State, 69 Cal. 2d 782, 786 (1968) (finding creation of foreseeable peril by placing teenager with criminal record and history of homicidal
to protect or warn the public may be found where a hazardous condition of property exists, "[t]he crucial element is control." The dispositive factor for determining liability is the person's ability to control the dangerous activities or instrumentalities which have the ability to cause harm. A person in control is responsible for creating or maintaining the dangerous conditions that caused the harm.

Of course, control is not the exclusive basis. The pivotal elements for liability based upon interests in property are ownership, possession, or control, which are disjunctive and separate, each sufficient to establish a duty. The question of control, however, is significant in identifying defendants responsible for a hazmat release. For instance, in incidents involving railroad tank cars not in transit, it is becoming a common business practice to store hazmat in rail tank cars or leave hazmat laden railroad cars unattended for various lengths of time. In such a situation, several different parties may be implicated if hazmat were released from the tank car, including the hazmat manufacturer, the hazmat owner, the hazmat transporter, the owner or user of the track, and the hazmat storer (the railroad).

3. Negligence Per Se

What constitutes due care under the circumstances is ordinarily a question of fact for the jury in each case. However, judicial decisions or statutes may prescribe the proper conduct of a reasonable person in particular situations, and conduct below that standard is negligence per se. Safety laws require the reporting of the storage of hazmat.

\[\text{tendencies, violence, and cruelty in foster home; conduct created a duty to warn foster parents of the facts; see also Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 49 (1975) (finding affirmative act of defendant created an undue risk of harm).}\]

\[\text{Alcaraz v. Vece, 14 Cal. 4th 1149, 1159-62 (1997).}\]

\[\text{See id. at 1162.}\]

\[\text{See CAL. HEALTH & SAFETY CODE § 25503.7; see also infra Part IV.D-F (regarding fraudulent concealment of material facts).}\]
manufacturing facilities frequently discharge hazmat into the ground, air, and water around them. A hazmat release itself, and the resulting pollution and contamination, violates health statutes and state regulations. In such cases, a presumption of negligence may arise from the statutory violation.

In certain instances, statutes or ordinances relating to hazmat expressly state the applicable standard of care. Usually, however, the statute or ordinance prohibits certain conduct and makes it a crime, without reference to civil liability. It is then sometimes assumed that a cause of action for negligence per se may be stated any time a legislative enactment is violated. This is not the case. Disobedience of a statute for which criminal sanctions are imposed does not amount to civil negligence as a matter of law under all circumstances. If the government enacted legislation for the protection of others, the criminal penalty may imply that its violation constitutes a breach of the duty of care. In this case, the significance of the statute in a civil suit for negligence is its formulation of a standard of care that the court may adopt in the determination of liability. Accordingly, the court may

110. See CAL. CIV. CODE §§ 3479, 3480 (West 1999) (nuisance statutes); CAL. HEALTH & SAFETY CODE § 42400.1 (negligent emission of air contaminants and as owners of the source of air contaminants); id. § 41700 (discharge of air contaminants which result in a public nuisance; air quality and water quality standards set up by region/district as well as specific to the facilities); see also Portman v. Clementina, 305 P.2d 963 (Cal. Ct. App. 1957) (finding violation of section 3479 of the California Civil Code is nuisance per se); cf. Pintor v. Ong, 259 Cal. Rptr. 577 (Cal. Ct. App. 1989).

111. See Gallup v. Sparks-Mundo Eng'g Co., 43 Cal. 2d 1, 9 (1954). Negligence may be presumed if (1) the defendant violated a statute; (2) the violation proximately caused injury to the plaintiff; (3) the injury resulted from an occurrence that the statute was designed to prevent; and (4) the plaintiff was one of the class of persons for whose protection the statute was adopted. See CAL. EVID. CODE § 669 (West 1999); Selger v. Steven Bros., Inc., 272 Cal. Rptr. 544 (Cal. Ct. App. 1990).

112. See supra notes 99, 101 and accompanying text.

113. A statute that provides for a criminal proceeding only does not create a civil liability; if there is no provision for a remedy by civil action to persons injured by a breach of the statute, it is because the legislature did not contemplate one. See Clinkscales v. Carver, 22 Cal. 2d 72, 75 (1943); Nowlon v. Koram Ins. Ctr., Inc., 2 Cal. Rptr. 2d 683 (Cal. Ct. App. 1991). In a criminal prosecution, strict liability may be imposed without proof of criminal intent or negligence under the public welfare exception to the mens rea requirement. See People v. Chevron Chem. Co., 191 Cal. Rptr. 537 (Cal. Ct. App. 1983) (finding company criminally liable for discharge of wastes into state waters).

114. As noted in the Restatement (Second) of Torts, the initial question is always whether the legislation should be given any effect in a civil suit if there is no provision for civil liability.
accept the legislative determination that such conduct falls below that required of a reasonable person.115

Because the government heavily regulates most hazmat, prior to filing a complaint, counsel for a victim of a hazmat incident or exposure should determine whether any statutes or regulations apply to the defendants’ conduct and, if appropriate, allege that the defendants’ conduct constitutes negligence *per se*.116 Furthermore, resort to environmental statutes that have expanded dramatically since the 1970s presents the advantage of drawing clearer lines of liability and remedies in a hazmat contamination than under traditional common law theories.117

In this context, the *Potter* court stated that negligence is a tortious “cause of action in which a duty to the plaintiff is an essential element.”118 The *Potter* court then expressly held, “[t]hat duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship.”119 The court then found that the defendant had violated “a duty imposed upon it by law and regulation to dispose of toxic waste only in a class I landfill and to avoid contamination of underground water.”120 In other cases it has been held that violation of a statutory duty is a tort, which then allows the recovery of all detriment proximately caused by the breach of

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Since the legislation has not so provided, the court is under no compulsion to accept it as defining any standard of conduct for purposes of a tort action. . . . When the court does adopt the legislative standard, it is acting to further the general purpose which it finds in the legislation, and not because it is in any way required to do so.

RESTATEMENT (SECOND) OF TORTS § 286 cmt. d (1963-64).

115. See Clinkscales, 22 Cal. 2d at 75; see also Alechoff v. Los Angeles Gas & Elec. Corp., 257 P. 569 (Cal. Ct. App. 1927) (burning trash in manner or at times prohibited by ordinance). See generally 6 WITKIN, supra note 102, § 820, at 173.

116. See Searcy-Alford, supra note 97, § 3.03. Many such statutes are expressly cumulative. See, e.g., CAL. HEALTH & SAFETY CODE § 25512 (West 1999) (regulating hazmat inventory reporting and hazmat release planning; states *inter alia* that “submission of any [hazmat] information required under this chapter does not affect any other liability or responsibility of a business with regard to safeguarding the health and safety of an employee or any other person”).


119. Id. at 985.

120. Id. (citing CAL. WATER CODE §§ 13050, 13350(a) (West 1999)).
that duty, including emotional distress damages,\textsuperscript{121} without physical injury or impact. In rare instances, the statute expressly provides for absolute liability upon the occurrence of an event. For instance, section 3333.3 of the California Civil Code states that a pipeline corporation operating as a public utility is absolutely liable, without regard to fault, for injuries and damages resulting from crude oil spilling from its pipeline.

B. \textit{Trespass}

Trespass is a violation of the exclusive right to possession of property and involves the physical invasion of property. Nuisance is distinguishable from trespass in that the mere intentional entry on land may violate the right of exclusive possession and create a right of action for trespass, while conduct or activity cannot amount to a nuisance unless it substantially interferes with the use and enjoyment of the land.\textsuperscript{122} Thus, in \textit{Green v. General Petroleum Corp.},\textsuperscript{123} residents forced to leave their home following the blowout of an oil well being drilled which resulted in oil, mud, and rocks falling on their property, were entitled to "eviction" damages on a trespass theory, even though the court found that the oil company was not negligent in conducting the drilling operation. In another case, the wrongful deposit of hazardous wastes on property and failure to remove the wastes also constituted trespass where it interfered with the exclusive possession of the property.\textsuperscript{124}

If there has been no physical or particulate matter passing over or onto property, and the only interference in plaintiff's use and enjoyment of his property is noise, light, or odor emanating from another property, there is no trespass.\textsuperscript{125}

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\item \textsuperscript{121} See, e.g., Pintor v. Ong, 259 Cal. Rptr. 577, 579 (Cal. Ct. App. 1989) (finding the duty of care arising from a statute is absolute and the court is not dealing with a negligence action and its concepts of foreseeability).
\item \textsuperscript{122} See Lussier v. San Lorenzo Valley Water Dist., 253 Cal. Rptr. 470 (Cal. Ct. App. 1988).
\item \textsuperscript{123} 205 Cal. 328 (1928).
\item \textsuperscript{124} See Mangini v. Aerojet-Gen. Corp., 278 Cal. Rptr. 395 (Cal. Ct. App. 1991) (involving landowner who sued the former lessee of the property for trespass caused by hazardous wastes deposited by the lessee who failed to remove or clean up the waste as required by the lease).
\item \textsuperscript{125} See Wilson v. Interlake Steel Co., 32 Cal. 3d 229 (1982) (involving noise waves transmitted through the air which did not constitute trespass, but if merely bothersome but not damaging, may be dealt with as a nuisance); see also San Diego Gas & Elec. Co. v. Superior Court, 13 Cal. 4th 893, 936 (1996) (finding that electric
Once a cause of action for trespass is established, damages for emotional distress, mental anguish, discomfort, and annoyance may be recovered. 126

C. Strict Liability—Ultra-hazardous Activity

Strict liability is liability without fault and may be predicated upon product liability or ultra-hazardous activity. As a general principle, one who carries on an ultra-hazardous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm. 127 The theory of ultra-hazardous activity is that certain activities create such a serious risk of danger that it is justifiable to place liability for the loss on the person engaging in them, regardless of lack of culpability on his part. This liability is thus termed “absolute” or “strict.” 128 Traditionally, strict liability may be based on the release of substances naturally on the land, 129 the “non-natural use” of land, or the release of substances brought and stored on land. 130 Strict liability arises regardless of whether the defendant knows the activity is abnormally dangerous. 131 The elements of ultra-hazardous activity are:

1. the existence of a high degree of risk of some harm to the person, land, or chattels of others;
2. the likelihood that the harm that results from it will be great;
3. the inability to eliminate the risk by the exercise of reasonable care;
4. the extent to which the activity is not a matter of

127. See RESTATEMENT (SECOND) OF TORTS § 519 (1979). California adopted the Restatement rule in Luthringer v. Moore where the Supreme Court noted that “certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy.” 31 Cal. 2d 489, 500 (1948). See also BAJI, supra note 43, No. 6.60.
128. See 6 WITKIN, supra note 102, § 1228, at 662.
130. See Rylands v. Fletcher, 1 L.R.-E. 265 (1866). See generally 6 WITKIN, supra note 102, § 1229, at 664.
common usage;
5. the inappropriateness of the activity to the place where
it is carried on; and
6. the extent to which its value to the community is
outweighed by its dangerous attributes.\footnote{132}

Whether an activity is ultra-hazardous is a question of
law\footnote{133} determined not at the pleading stage, but at the time of
trial by the court.\footnote{134} Familiar examples of ultra-hazardous
activities giving rise to strict liability include dangerous uses of
land, such as blasting,\footnote{135} fumigation using hydrocyanic gas,\footnote{136}
and crop dusting with toxic chemicals.\footnote{137} Whether the
manufacture or maintenance of toxic chemicals is an ultra-
hazardous activity is not resolved in California.\footnote{138}

In one California case, the court imposed strict liability
against a seller of drain cleaner that contained sulfuric acid.\footnote{139}
A court also imposed strict liability for damage to property
caused by the blowout of an oil well due to pressure of
underground natural gas.\footnote{140} In Green, discussed previously,
although the defendant was making a lawful use of its property
and no negligence was proven, the court held defendant liable,
referring to the maxim: "One must so use his own rights as not
to infringe upon the rights of another."\footnote{141}

Because liability for an ultra-hazardous activity is imposed
irrespective of the exercise of reasonable care and regardless of
fault, a person who engages in such activity is subject to a
narrower liability than would otherwise obtain. Strict liability
applies only to harm that is within the scope of the abnormal
risk that is the basis of the liability.\footnote{142}

\footnotesize{\begin{itemize}
\item \textit{See} Luthringer v. Moore, 31 Cal. 2d 489 (1948).
\item \textit{See} SKF Farms, 200 Cal. Rptr. 497.
\item \textit{See} Lipson v. Superior Court, 182 Cal. Rptr. 629, 639 (1982).
\item \textit{See} Green v. General Petroleum Corp., 205 Cal. 328 (1928).
\item \textit{Restatement (Second) of Torts} § 519 cmt. e (1977). \textit{See also} William L. Prosser, \textit{Nuisance Without Fault}, 20 Tex. L. Rev. 399, 403 (1942); Goodwin v. Reiley, 221 Cal. Rptr. 374, 377 (Cal. Ct. App. 1985) (finding drunk driving not an ultra-hazardous activity and drunk driver not liable for victim's parents' emotional}
\end{itemize}
Consequently, emotional distress claims of parents who were not percipient witnesses and who only learned of their son’s motorcycle accident after the fact were denied in *Goodwin v. Reilly*, the court concluding that, even were the defendant *strictly* liable for his driving, his liability would not extend beyond that imposed for negligence.\(^{143}\) Therefore, it seems the limits imposed with respect to recovery for emotional distress caused by negligence, e.g., plaintiff must be a “direct victim” or a percipient “bystander” under the theory of *Dillon v. Legg*,\(^{144}\) would similarly restrict claims for emotional distress resulting from an ultrahazardous activity.

Emotional distress damage has been held to be recoverable in an action predicated on a strict liability theory.\(^{145}\) However, economic loss damages may not be recoverable in a strict liability (products liability) action.\(^{146}\)

Releases of toxic substances constitute ultra-hazardous activity.\(^{147}\) Other jurisdictions consider the mere storage or dumping of hazardous substances onto land as an abnormally dangerous activity.\(^{148}\) One author urges that sound public policy would require that any release or disposal of toxic substances, purposeful or accidental, be found an ultrahazardous activity for which strict liability should be imposed, citing several decisions in other states which have imposed liability on this theory.\(^{149}\) Again, it is hard to comprehend any public policy that would exonerate a tortfeasor, while leaving a

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\(^{143}\) *Goodwin*, 221 Cal. Rptr. at 377 (liability for emotional distress would not be imposed on a negligence theory because the parents were not percipient witnesses under *Dillon v. Legg*, 68 Cal. 2d 728 (1968)).

\(^{144}\) 68 Cal. 2d 728.

\(^{145}\) See *Shepard v. Superior Court*, 142 Cal. Rptr. 612 (Cal. Ct. App. 1977) (allowing claim for emotional trauma resulting in physical injuries based upon a strict product liability theory asserted against car manufacturer by plaintiffs who witness a family member being thrown out of vehicle and dying).


\(^{147}\) See, e.g., *Luthringer v. Moore*, 31 Cal. 2d 489, 496-500 (1948) (arguing that asphyxiation from escape of toxic gas used to fumigate adjoining premises constitutes an ultra-hazardous activity, since the use of such gas is perilous and likely to cause injury to persons even though the utmost care was used, the pesticide applicator knows or should know that injury might result, and the usage is not common or carried on generally for the public).

\(^{148}\) See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) (arguing the mere maintenance of a site on which corroding tanks were stored, holding hundreds of thousands of gallons of hazardous waste, constituted an abnormally dangerous activity).

\(^{149}\) See 9 MILLER & STARR, supra note 90, § 29.83, at 212 n.8.
victim without judicial recourse. Such a result would be on its face unconstitutional and unlawful.\footnote{150}

D. \textit{Fraud or Fraudulent Concealment}

According to one authority, an assertion of fraudulent concealment at common law might be appropriate, "[i]f a potentially harmful condition were concealed from a purchaser, renter, lessee, etc., or from authorities responsible for the environmental safety of neighboring residents."\footnote{151} The proposition is supported by the enactment of federal and state "Community Right-to-Know" laws. The federal Emergency Planning and Community Right-to-Know Act,\footnote{152} enacted in 1986, imposes federal mandates upon state and local governments regarding acutely hazardous materials. In 1986, California also enacted "Chapter 6.95" of Division 20 of the California Health and Safety Code, entitled "Hazardous Materials Release Response Plans and Inventory."\footnote{153} In 1988, the legislature added the "Emergency Planning and Community Right to Know Act of 1986 Implementation" to Chapter 6.95.\footnote{154}

These federal and California statutes impose a broad duty upon businesses handling hazardous materials to disclose to local government material facts about their business. This includes an inventory of hazardous materials, equipment, safety processes, and storage, and general management of hazardous materials, which are all necessary to assess the hazards and the steps necessary to prevent or minimize the risks of releasing hazardous materials. The disclosure requirements are met through various reporting requirements, including site-specific business plans, risk management and prevention programs, spill prevention and response plans, and off-site consequence analyses of a release or potential release.\footnote{155} The reporting requirements of Chapter 6.95 are not limited to fixed facilities, but extend to rail tank cars and maritime vessels used as storage.\footnote{156} Such reporting requirements do not
impose any duty upon the local government repository for such reports, due to governmental immunity. 157

The "Right to Know" which is conferred upon the public includes the right to be informed of the hazardous materials which potentially affect the community, and the right to participate in decision making about risk reduction options and measures. 158

Another statute imposing a duty to warn is the Safe Drinking Water and Toxic Enforcement Act, 159 also known as Proposition 65. The warning requirement states: "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10." 160

158. In the legislative history the legislature stated:
   The Legislature finds and declares that the public has a right to know about acutely hazardous materials accident risks that may affect their health and safety, and that this right includes full and timely access to hazard assessment information, including offsite consequence analysis for the most likely hazards, which identifies the offsite area which may be required to take protective action in the event of an acutely hazardous materials release.
   The Legislature further finds and declares that the public has a right to participate in decisions about risk options and measures to be taken to reduce the risk or severity of acutely hazardous materials accidents.
   CAL. HEALTH & SAFETY CODE § 25531.1 (emphasis added).
   The public, however, has no general right of access to a business's trade secret information. See, e.g., id. § 25511 (under Air Toxics Hot Spots program); see also id. § 44346; Masonite Corp. v. County of Mendocino Air Quality Management Dist., 49 Cal. Rptr. 2d 639 (1996).
   There are also drawbacks to allowing public access to business data and practices, not the least of which is the possibility of abuse or misuse of information, such as by criminal elements.
   By law, chemical companies must provide "worst case" accident scenario information to the EPA, but it is up to the agency's discretion on how such information is made public. Last year, Congress directed the agency to weigh the threat of possible terrorism against the public's right to know in making that determination.
   The chemical industry, the FBI, and some lawmakers complained that the EPA was planning to make so many details available that terrorists could use the information to single out a chemical plant and cause an accident. See EPA Proposes Stifling News on Chemical Accidents, THE ORANGE COUNTY REGISTER, April 28, 2000, at A14.
159. CAL. HEALTH & SAFETY CODE §§ 25249.5-25249.13.
There is no California case involving a hazmat release that recognizes a toxic tort claim for fraud, deceit, or concealment predicated upon a violation of these environmental statutes. However, the possibility of asserting such causes of action might be explored in an appropriate case. Emotional distress damages have been allowed in cases involving fraudulent conduct. Furthermore, the decision in *Potter*, which allows a lower than the “more likely than not” threshold of proof to recover emotional distress damages without physical injury in the event defendant is guilty of fraud, oppression, or malice, is a factor which should not be overlooked.

E. *Intentional Infliction of Emotional Distress*

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and bodily harm that results from it.

The elements of this tort are: “(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.”

An essential element of this intentional tort, which distinguishes it from negligent infliction of emotional distress, is that the defendant's outrageous conduct must be “directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware.” Hence, even though the California...
Supreme Court in *Potter* believed that Firestone acted with oppression, fraud, or malice in disposing hazardous wastes at a landfill which contaminated a drinking water supply, the case had to be remanded for trial. The court was not clear whether Firestone actually knew of the plaintiffs and their consumption of the contaminated water, or only realized that any person who would consume the water would suffer emotional distress upon discovering the facts. According to the California Supreme Court, if it were the latter, the requirement that the outrageous conduct be directed at the plaintiff was lacking.\(^6\)

However, this requirement ignores the alternative “reckless” conduct as a basis for an intentional infliction of emotional distress cause of action. Citing this requirement as “misguided,” a dissenting Justice Mosk stated that the *Potter* majority opinion, requiring a defendant to direct his conduct at the plaintiff or be aware of particular plaintiffs, is inconsistent with the definition of “reckless.” By definition, a reckless person acts in disregard of the results of his conduct.\(^6\)\(^7\) “A defendant’s conduct is in reckless disregard of the probability of causing emotional distress if he has knowledge of a high degree of probability that emotional distress will result and acts with deliberate disregard of that probability or with a conscious disregard of the probable results.”\(^6\)\(^8\) Thus, a tortfeasor, who knows that an illegal deposit of hazmat at a dump would pose a health hazard to anyone near the dump, acts in reckless disregard to the probability of causing emotional distress.

In *Potter*, the majority found that Firestone “had a duty to any person who might foreseeably come in contact with its hazardous waste” and there was no claim “that plaintiffs were not foreseeable victims of its negligence.”\(^6\)\(^9\) In fact, the trial court in *Potter* found that “[d]efendant had to realize that the eventual discovery of such a [contaminated] condition by those drinking the contaminated water would almost certainly result in their suffering severe emotional distress.”\(^10\) The majority in *Potter* also found that Firestone acted “in conscious disregard of

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\(^6\) California Civil Code, which does not. See also 5 WITKIN, supra note 102, §§ 706-709 (9th ed. 1998 & Supp. 2000).

\(^7\) See *Potter*, 6 Cal. 4th at 1002-03.

\(^8\) See id. at 1013-14 (Mosk, J., concurring in part and dissenting in part).

\(^9\) 2 COMM. ON STANDARD JURY INSTRUCTIONS, supra note 163, § 12.77, at 168.

\(^10\) *Potter*, 6 Cal. 4th at 986.

\(^11\) Id. at 1000.
the rights and safety of others," and concluded that punitive damages were proper. However, the majority determined it was unclear whether Firestone was liable for intentional infliction of emotional distress because it was ambiguous whether Firestone actually knew of the "particular plaintiffs." In its effort to restrict emotional distress claims in a toxic exposure context, the Potter court heightened the importance of a defendant's ignorance in guiding its conduct and defense of an action. Not surprisingly, the Potter court not only exalted the defendant's ignorance of the facts, but also suggested that ignorance of the law is an excuse in a toxic tort case.

F. Assault or Battery

Mental and emotional suffering are frequently the principal damages in many torts such as assault, battery, false imprisonment, defamation, nuisance, and trespass. "A civil action for assault is based upon an invasion of the right of a person to live without being put in fear of personal harm."

Where one claims injury from a hazmat exposure, he may assert the claim upon the theory of battery or harmful contact. The elements of battery are intent to cause harmful or offensive contact, and such contact with the person of another. "[B]attery is well suited to hazardous substance litigation because it provides liability any time an actor intentionally causes another to come into contact with an offensive foreign substance." As in most cases of intentional

171. Id.
172. See id. Compare Potter with Acadia, Cal., Ltd. v. Herbert, 54 Cal. 2d 328, 337-38 (1960) (defendant acted with intent to oppress and was held liable for punitive damages and for the mental suffering caused to the plaintiff husband for his discomfort and for his mental suffering in seeing his wife suffer, even in the absence of physical injury).
173. See infra Part V.B.3.b.
177. See id.
conduct, emotional distress is a recoverable item of damage in battery.

The long-accepted rule is that physical injury or impact will support "parasitic" emotional distress damages. In a toxic exposure case, where no physical injury has manifested, it is not clear whether subclinical and subcellular levels of changes constitute physical injury to which emotional distress damages may attach. In one case, damage to the immune system caused by a change to the bone marrow was deemed to constitute physical harm sufficient to support a cause of action for personal injury. According to the court, the effect on the bone marrow was a detrimental change in the physical condition of the body which constitutes "loss or harm suffered in person" under section 3282 of the California Civil Code. The court offered no opinion as to whether the harm was sufficient to support parasitic damages for fear of cancer. In another case, the federal district court held that under California law, injury to the immune system is a form of actionable physical injury.

The possibility for consideration of toxic exposure as a physical impact, at least where no physical injury has manifested, was eliminated in Potter, when the California Supreme Court clearly stated that "a physical impact (i.e., a toxic exposure), standing alone, is not sufficient for recovery of

179. See, e.g., Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 986 (1993). The California Supreme Court, however, lamented that the physical injury requirement permitted recovery no matter how trivial the injuries were, and that it "encourages extravagant pleading and distorted testimony." Id. at 987 (citing Molien v. Kaiser 27 Cal. 3d 916, 930 (1980)). The utilization of the term "parasitic" itself is somewhat pejorative and begs the question, which gives rise to the argument that a cause of action for negligent infliction of emotional distress should be recognized. See Kenneth W. Miller, Toxic Torts and Emotional Distress: The Case for an Independent Cause of Action for Fear of Future Harm, 40 ARIZ. L. REV. 681 (1998); cf. Mary Donovan, Is the Injury Requirement Obsolete in a Claim for Fear of Future Consequences?, 41 UCLA L. REV. 1337 (1994).

180. See Potter, 6 Cal. 4th at 982 ("No California cases address whether impairment of the immune system response and cellular damage constitute 'physical injury' sufficient to allow recovery for parasitic emotional distress.").

181. See Duarte v. Zachariah, 28 Cal. Rptr. 2d 88, 98-100 (1994) (finding that overdose of negligently prescribed medication impaired ability of bone marrow to produce blood platelets; platelets are the component of blood that causes the blood to clot in response to a wound or cut).

182. See id. at 99 n.6.

183. See Barth v. Firestone Tire & Rubber Co., 673 F. Supp. 1466 (N.D. Cal. 1987); see also Margie Tyler Searcy, 1 A GUIDE TO TOXIC TORTS § 10.04(1)(b) (1998).
fear of cancer damages.” No doubt, there will be exceptions carved out of such a generalization which fails to address and distinguish between the infinite kinds of toxic exposures and hazmat, and the many fears and anxieties besides fear of cancer or other serious disease triggered by such exposures.

For instance, sulfuric acid is a strong corrosive acid which can irritate the skin, eyes, nose, throat, and lungs upon contact. The physical pain suffered upon contact with the acid should support a claim for substantial harm or detriment. People with preexisting conditions, such as respiratory problems, illnesses, and difficulty breathing, may be more sensitive to sulfuric acid. In one case, for example, driving through a dense fog of sulfuric acid released from a facility triggered a dormant cancer of the larynx in one victim, requiring a laryngectomy, for which the chemical company was held responsible.

Additionally, harmful contact with hazmat intentionally caused could arguably support a common law claim for battery. Poisoning is a physical invasion of a person’s bodily

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184. Potter, 6 Cal. 4th at 996 n.16.
185. See generally National Institute of Mental Health, Facts About Anxiety Disorders, <http://www.nimh.nih.gov/anxiety/anxiety/idx_fax.htm> (identifying and defining “panic disorder” and “post-traumatic stress disorder” as being two “anxiety disorders”). “Anxiety disorders are the most common mental illness in America: more than 19 million Americans are affected by these debilitating illnesses each year.” Id.
186. It causes rapid destruction of tissues and severe burns on contact with bodily tissues of any kind. See Hagy v. Allied Chem. & Dye Corp., 122 Cal. App. 2d 361 (1953); Edwards v. Post Transp. Co., 279 Cal. Rptr. 231, 234 (Cal. Ct. App. 1991) (stating that “[t]he chemical is highly toxic, very reactive and will attack most materials” such that “if it comes in contact with humans the resulting harm is likely to be great”); Colson v. Standard Oil Co., 131 Cal. Rptr. 895 (Cal. Ct. App. 1976) (stating that plaintiff was sprayed with sulfuric acid from leaking pipeline).
187. See generally 2 COMM. ON STANDARD JURY INSTRUCTIONS, supra note 163, § 12.72, at 163.
188. See Hagy, 122 Cal. App. 2d at 373. Evidence showed that the chemical released, sulfur trioxide, when combined with moisture, turns into sulfuric acid and that the transformation occurs as well in combination with body fluids and tissue juices, such as in the eyes, nose, mouth, and larynx. See id. at 364, 373-75.
189. Intent is essential only where the battery was committed in the performance of a lawful act. However, if the battery was committed in the performance of an unlawful or wrongful act, the intent of the wrongdoer to injure is immaterial. See Lopez v. Surchia, 112 Cal. App. 2d 314, 318 (1952). In other words, if the wrongdoer did an illegal act which was likely to result in injury, he is responsible for the resulting injury even though he did not intend to cause the injury. See id.; see also CAL. EVID. CODE § 665 (West 1999) (“A person is presumed to intend the ordinary consequence of his voluntary act.”); cf. id. § 668 (“An unlawful intent is presumed from the doing of an unlawful act.”). These
integrity and privacy because poisons are physical things, and the poisoning of a person involves the putting of poisons in or on the body. Contact for purposes of battery may include contact with the person, his clothes, or anything in contact or connected with the person.

In another "exposure" case, a plaintiff pricked with a hypodermic needle feared contracting AIDS, and as a result was found not to have sustained a physical impact or a direct physical injury, and thus could not support a parasitic claim to emotional distress. Following the Potter rationale, the court ruled that physical impact is not a relevant issue. Rather, what is relevant is whether plaintiff suffered a physical injury, which requires actual harm occurring when the hazmat "causes detrimental change to the body." A needle prick, per se, was held not to be such an injury.

Potter should be compared with other cases which recognize that emotional distress caused by negligent conduct may result in physical injuries, even when the initial emotional distress did not result from physical impact or personal injuries, and those cases where fright and emotional distress cause injury to the nervous system and, therefore, cause a compensable physical injury. Thus, a court held that fright and emotional distress caused by spoken words alone, with no contemporaneous physical impact, resulting in exacerbation of plaintiff's glandular condition, was compensable. In Cook v. Maier, an automobile negligently driven collided with a trash

presumptions relate to civil actions. But see Potter, 6 Cal. 4th at 998 (arguing the exception to the "more likely than not" threshold should not focus on defendant's intentional violation of the law).

190. See David W. Slawson, The Right to Protection From Air Pollution, 59 S. Cal. L. Rev. 672, 742 (1986); cf. CAL. PENAL CODE § 244 (West 1999); CAL. HEALTH & SAFETY CODE § 108125 (West 1999).


194. See Emden v. Vitz, 88 Cal. App. 2d 313, 318-19 (1948) (concerning an apartment owner and managers who screamed at a tenant who became frightened, upsetting her glandular condition); Sloane v. Southern Cal. Ry. Co., 111 Cal. 668 (1896) (holding that injury to the nervous system, induced by fright, is injury to the physical system and, therefore, a physical injury); see also 2 COMM. ON STANDARD JURY INSTRUCTIONS, supra note 163, § 12.81.

burner, fence, and the corner of plaintiff's house, causing rocks and parts of the fence to be scattered around plaintiff. As a result plaintiff feared for her safety. Even though there was no physical impact, plaintiff's fright and shock caused her to lose feeling in her arm, a physical injury which the court held compensable. Interestingly, the *Cook* court opined that the fright alone experienced by the plaintiff was not an injury that could be the basis of a claim for damages. These cases require emotional distress to be accompanied by some physical manifestation in order to recover emotional distress damages.

After *Cook*, it was another sixty years before courts recognized recovery for emotional distress damages alone in similar situations.

G. Nuisance

A hazmat release may result in significant personal injuries, or it may disrupt a community or endanger the comfort, health, and safety of the public. These conditions or harm constitute a detriment and a nuisance. When the detriment is to a considerable number of persons, businesses, or property, it is a public nuisance. A nuisance is statutorily defined as:

Anything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage

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196. See also Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 184 (1931) (describing the collision between a truck and a street car, which propelled the truck and caused it to smash into the front of a building where the plaintiff was; the plaintiff viewed the incident and although he was not hit by the truck, he feared for his own safety). Damages for personal injuries were awarded for the extreme nervousness suffered and the resulting headaches, sleeplessness, loss of weight, and other disturbances. See id.

197. See Wooden v. Raveling, 71 Cal. Rptr. 2d 891 (Cal. Ct. App. 1998) (involving a similar claim of a woman who feared for her safety when a negligently driven automobile was propelled toward her after colliding with another vehicle, but did not actually strike her; the plaintiff did not claim any physical injury, but the court nevertheless allowed her emotional distress claim); see also Gutierrez v. Alvarado, 101 Cal. Rptr. 1 (Cal. Ct. App. 1972) (holding that emotional distress damages are recoverable by plaintiff who suffered a miscarriage and believed, albeit erroneously, that her miscarriage was caused by defendant shooting blanks at her feet a month before the miscarriage).

198. See CAL. CIV. CODE § 3281 (West 1997).

or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway . . .

One treatise states: "Paraphrased, a nuisance is a condition which adversely affects health, morals, or enjoyment of property, or which hinders free movement of people or things from place to place."

Nuisance law focuses on the harm suffered by a person or the public, not on the conduct causing it. It is determined by the consequences of defendants' conduct, regardless of whether defendants' activities were conducted with due care. As aptly stated in one case, "it is immaterial whether the acts be considered willful or negligent; the essential fact is that, whatever be the cause, the result is a nuisance." Thus, a nuisance has been described by one court as "not a separate tort but a species of damage." The amount of damages recoverable in a nuisance action is governed by sections 3281 and 3333 of the California Civil Code and include all damages suffered whether anticipated or not. Furthermore, when the nuisance is intentional, exemplary damages may be awarded.

By definition, a hazmat release that threatens a person or the public constitutes actionable nuisance. An actual release may result in pollution of the air, water, or soil. The essence
of a private nuisance is an interference with the use and enjoyment of a property right. Therefore, the fact that plaintiff may have suffered a personal injury or an interference with some purely personal right is not sufficient to support an action based on private nuisance.\textsuperscript{210} There must be an interference with the use and enjoyment of a property interest.\textsuperscript{211}

There are countless ways to interfere with the use and enjoyment of land, including physical interference with the condition of the land itself and disturbance in the comfort or conveniences of the occupant including his peace of mind. Mere threat of a future injury that is a present menace and that interferes with enjoyment of property is a nuisance.\textsuperscript{212} However, where the injury caused by a nuisance consists only of emotional distress, discomfort, annoyance, or other inconvenience, a cause of action for private nuisance may not be asserted.\textsuperscript{213} To be actionable as a private nuisance, the

contaminants or other material which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or which endanger the comfort, repose, health or safety of any such persons or the public, or which cause, or have a natural tendency to cause, injury or damage to business or property.

See also CAL. WATER CODE §§ 13000-14050 (West 1992); id. § 13050(m). Water pollution occurring as a result of treatment or discharge of wastes in violation of sections 13000 et seq. of the California Water Code is a public nuisance per se. See Newhall Land & Farming Co. v. Superior Court, 23 Cal. Rptr. 2d 377, 381 (Cal. Ct. App. 1993); see also CAL. WATER CODE § 13050(m); Selma Pressure Treating Co. v. Osmose Wood Preserving Co., 271 Cal. Rptr. 596, 607 (Cal. Ct. App. 1990); Newhall Land & Farming Co., 23 Cal. Rptr. 2d 377 (finding contamination of groundwater is a public nuisance); cf. Beck Dev. Co. v. Southern Pac. Transp. Co., 52 Cal. Rptr. 2d 518, 551-54 (Cal. Ct. App. 1996) (finding that underground oil contamination of private property which is unlikely to migrate into groundwater and invade public water supply is not a public nuisance).


213. For instance, family members, workers, or students ordered evacuated from their home, place of work, or schools during a hazmat release may not have property rights interfered with but nevertheless are harmed by the release. See WILLIAM H. RODGERS, JR., 1 ENVIRONMENTAL LAW AIR AND WATER § 2.4, at 43 (1986). Such evacuations or other emergency response may result in wage losses, temporary childcare costs, and other detriment incident to the response. Whether these same family members, workers, and students may bring a public nuisance
discomfort or emotional distress must be tied to an invasion of a property right, either ownership or leasehold. The possibility that a lawful facility may some day become a nuisance is not sufficient to give rise to a cause of action for private nuisance when there is no actual interference with a property right. For instance, the installation of above-ground fuel storage tanks near offices or homes, while they may engender fear of future injury from an explosion or other accident, do not interfere with any property right and, therefore, do not give rise to a private nuisance.

A public nuisance is one that affects an entire community or neighborhood at the same time, or any considerable number of persons, although the extent of the annoyance or damage inflicted on individuals may be unequal. It comprehends an act or omission that interferes with the interests of the community or the health, comfort, and convenience of the general public. It is not dependent on disturbance of any rights in land but is based on interference with rights of the community at large. The Second Restatement of Torts identifies five categories of public rights that may constitute public nuisance when unreasonably interfered with: the public health, the public safety, the public peace, the public comfort, or the public convenience.

An example of a public nuisance is presented by the activities of a street gang which menaced a neighborhood by congregating on sidewalks, lawns, and in front of residences at all hours of the day and night. The members were talking loud, openly drinking and smoking marijuana, taking over the

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216. See CAL. CIV. CODE § 3480 (West 1997).

217. See Venuto, 99 Cal. Rptr. at 350.

218. See id.

streets, and impeding traffic. The court described the inconvenience and constraints on movement to the community residents, "the people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Relatives and friends refuse to visit..." In concluding that the activities of the street gang constituted a public nuisance, the court remarked, "The freedom to leave one's house and move about at will, and to have a measure of personal security is implicit in 'the concept of ordered liberty' enshrined in the history and basic constitutional documents of English-speaking people.

As this case shows, the mere threat of harm is sufficient for liability to attach. However, to support an action on a public nuisance, a plaintiff must show more than a mere possibility of future injury. A single plaintiff must demonstrate that an actual and unnecessary hazard to the public is present. In a public nuisance, where the public at large is placed at a risk, no interest in real property is required. However, in order to maintain a public nuisance action for damages, a plaintiff must suffer harm of a different kind from that suffered by members of the public. It is not enough that a plaintiff suffers the same

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221. Id. at 1100.
222. Id. at 1125. See also Lew v. Superior Court, 25 Cal. Rptr. 2d 42 (Cal. Ct. App. 1993).
223. See County of San Diego v. Carlstrom, 16 Cal. Rptr. 667 (Cal. Ct. App. 1961) (holding that the presence in a residential community of an extreme fire hazard creating a fear of fire in the lives of the people of that community is a public nuisance); see also Lew, 25 Cal. Rptr. 2d at 46 (regarding fear for their own and family's safety by neighbors of an apartment maintained as a "drug house").
225. See RESTATEMENT (SECOND) OF TORTS § 821B (1979) "[U]nlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land."
226. See CAL. CIV. CODE § 3493 (West 1997) (authorizing a private party to bring an action for damages on a public nuisance if it is specially injurious to himself). This statute has been interpreted strictly so as to forbid a city from recovering damages on a public nuisance action as a result of damages to utility poles, conductors, and fixtures damaged during a fire, but it may recover such damages on its negligence cause of action. See City of Los Angeles v. Shpegel-Dimsey, Inc., 244 Cal. Rptr. 507, 512-13 (Cal. Ct. App. 1988); cf. Selma Pressure Treating Co. v. Osmose Wood Preserving Co., 271 Cal. Rptr. 596 (Cal. Ct. App. 1990) (interpreting CAL. CIV. PROC. CODE § 731 (West 1980); the state may recover
inconvenience, is deprived of the same enjoyment, or is exposed to the same threat or injury as everyone else exercising the same public right.

The Second Restatement of Torts states that an individual with a private nuisance cause of action suffers injury different in kind from the public, which allows him to bring an action for public nuisance as well. Thus, where the nuisance is a private as well as a public nuisance, there is no requirement that the plaintiff suffer damage different in kind from that suffered by the general public. Section 821C of the Restatement (Second) of Torts identifies some of the particularized harm different in kind and degree from that suffered by the public:

1. Physical harm. In a case in this category, plaintiff was driving on a highway adjacent to which county employees were abating mosquitoes by spraying a fog-like gas which drifted onto the highway where it obstructed the vision of motorists. Because of the obstruction, plaintiff had to stop her car and get out on the highway where she was run over and injured. Her injuries were special damages different in kind from the obstruction in the highway that interfered with the rights of the general public.

2. Private nuisance.

3. Interference with access to land.

4. Pecuniary loss. For example, lost business profits,

\[\text{damages for pollution of groundwater resulting from discharge of hazardous wastes}.\]

227. See RESTATEMENT (SECOND) OF TORTS § 821C; see also CAL. CIV. CODE § 3493.


229. See RESTATEMENT (SECOND) OF TORTS § 821C cmt. d.


232. See RESTATEMENT (SECOND) OF TORTS § 821C cmt. f; see, e.g., Phillips v. City of Pasadena, 27 Cal. 2d 104 (1945); Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 121 (1907).
which can be established by customers' loss of access to a business.

5. Delay and inconvenience causing plaintiff to incur special expense of a different kind.\textsuperscript{234} Mere delay or inconvenience caused by the obstruction of a highway is not particular harm of a different kind even though it may be greater in degree with other members of the communities. As explained in the Restatement, normally there may be no difference in the interference with one who travels a road once a week and one who travels it every day. However, if a person traverses the road a dozen times a day he nearly always has some special reason to do so, and that reason will almost invariably be based upon some special interest of his own, not common to the community.\textsuperscript{236}

Thus, the critical issue is whether a private party has requisite standing to bring a public nuisance action based upon an injury different in kind. Arguably, every individual will respond somewhat differently to a mass hazmat exposure, and such differentiations might suffice.\textsuperscript{236}

Although the remedies for public nuisance include a civil action, presumably for damages, abatement, or an indictment, the code restricts their availability.\textsuperscript{237} A public nuisance will be a basis for tort remedies of personal harm or property damage only if the plaintiff can show special injury to himself of a character different in kind, not merely in degree, from that suffered by the general public.\textsuperscript{238} When such an action is brought, it is only to seek redress for the harm suffered by the

\\textsuperscript{233}See Restatement (Second) of Torts § 821C cmt. h; see also Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974) (commercial fishermen sued for losses caused by a negligent spill); Phillips, 27 Cal. 2d 104 (allowing owner of a mountain resort to sue for damages on a nuisance theory for loss of patronage as a result of the city barricading a road which served as an ingress/egress to the resort); Gardner v. Stroever, 89 Cal. 26 (1891). See generally Keeton et al., supra note 191, § 90, at 649.

\textsuperscript{234}See Restatement (Second) of Torts § 821C cmt i.

\textsuperscript{235}See id. cmt. c.

\textsuperscript{236}Individuals differ in their responses to toxic substances. The underlying causes of individual variability include: age, sex, and genetic makeup; lifestyle and behavioral factors, including nutritional and dietary factors; alcohol, tobacco, and drug use; environmental factors; and preexisting disease. See, e.g., Nicholas A. Ashford & Claudia S. Miller, Chemical Exposures 5-10 (1991). But see Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350 (Cal. Ct. App. 1971).


plaintiff himself, not by the public. In other words, even though the public is harmed, it does not have any means of redressing its harm.\footnote{239}{See William Prosser, Private Action for Public Nuisance, 52 VA. L. REV. 997, 997-1027 (1966). Prosser states that injury to health is a special injury not common to the public but reiterates that individual recovery will not be allowed (in 1966) where the health of the entire community is threatened (citing Baltzeger v. Carolina Midland Ry., 32 S.E. 358 (S.C. 1899)). See id. at 1012. In Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350 (Cal. Ct. App. 1971), three residents of Santa Clara County who sued a manufacturer to abate air pollution, alleging that the health of citizens of the county had been injured, and that they suffered severe respiratory ailments, could not show a sufficient injury different in kind to confer standing. See id. For instance, an employer who lost the services of employees who were prevented from getting to work or who were required to leave their place of work as a result of a hazmat release could bring an action for public nuisance for the lost services in George A. Hormel & Co. v. Maez, 155 Cal. Rptr. 337, 341 (Cal. Ct. App. 1979), but the employees themselves who experienced emotional distress, discomfort, and annoyance as a result of the release, like the rest of the general public, could not bring a public nuisance action. A public entity cannot assert a claim for damages on a public nuisance theory on its own behalf, and certainly not on behalf of others. See CAL. CIV. PROC. CODE § 731 (West 2000). When a public official sues, it does so in its representative capacity to abate a public nuisance to protect the public interest. See id.; Selma Pressure Treating Co. v. Osmose Wood Preserving Co., 271 Cal. Rptr. 596, 603 (Cal. Ct. App. 1990). When a nuisance action is brought under section 731 of the California Civil Procedure Code by a public official, abatement is the sole remedy and damages are not permitted under that statute. See People ex rel. Gow v. Mitchell Bros.' Santa Ana Theater, 114 Cal. App. 3d 923, 930-32 (1981). Response costs incurred and statutory penalties are separate and are recoverable. See supra Part III.} In a hazmat incident which causes fear, anger, inconvenience, and disruption in the lives of members of a community, those who can show special injury such as physical harm or interference in the use of their property as a result of the release can bring an action for public nuisance. Ironically, the rest of the public who have no property rights interfered with or who do not suffer any physical harm, but nevertheless suffer the general harm which gives rise to the nuisance, have no standing to seek damages in an action for public nuisance.\footnote{240}{See generally CAL. CIV. PROC. CODE § 382 (West 2000).} The public may possibly benefit when an individual brings a public nuisance action on its behalf, such as a public official suing to abate a public nuisance\footnote{241}{See supra Part III.} or a class action by a private individual.\footnote{242}{See Lockheed Martin Corp. v. Superior Court, 94 Cal. Rptr. 2d 652 (Cal. Ct.} In a class action, the prerequisite special injury or community interest requirement might militate against the class action device.\footnote{243}{See supra Part III.} When an individual alleges that all
members of the class suffered special injuries, a class action for public nuisance cannot be maintained. For example, in *Diamond v. General Motors Corp.*, the plaintiff sought to represent all residents of Los Angeles County who had been damaged by air pollution, alleging claims of negligence, nuisance, trespass, and strict liability. The *Diamond* court noted that the case consisted of an aggregation of individual tort claims of persons classified only by their residence within a political subdivision of the state. It affirmed the trial court's finding that "the number of parties, the diversity of their interests, and the multiplicity of issues all in a single action would make the proceeding unmanageable." The court also noted that plaintiff's allegation that each member of the class had suffered special injury in that each "is prevented from enjoying his own unique property" (a private nuisance) was incompatible with a class action for public nuisance.

This concept of common-special damages seems to conflict with the traditional concept of special or particular damage in private nuisance cases. Dean Prosser has said:

> A considerable class of persons, such as landowners near a factory who are inconvenienced in their dwellings by its dust, smoke and odors, may sue and recover. It is only when the class becomes so large and general as to include all members of the public who come in contact with the nuisance, that the private action will fail.

Thus, it would seem that the aggregation of individual tort claims of persons harmed by a public nuisance in a class action is not feasible. Furthermore, a mass tort action for personal

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244. See *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639, 642-43 (Cal. Ct. App. 1971); see also *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 459 (1974) (finding that a class action cannot be maintained where each member's right to recover depends on facts peculiar to his case).

245. See *Diamond*, 97 Cal. Rptr. at 641.

246. Id. at 642.

247. Id. (quoting Prosser, *supra* note 239, at 1009).

248. For instance, an association of commercial property owners and individual owners could not maintain a public nuisance action against a county for building 300,000 gallon fuel storage tanks on an airport runway close to the industrial park owned by plaintiffs. The claimed damages of extreme mental anguish and fear for the destruction of their lives or property in the event of an accident which would be catastrophic, diminished the value of their properties, and risk of higher insurance premiums, according to the court, applied to all homes and businesses in the area of the airport. The proximity of plaintiffs to the runway merely exposed them to a higher degree of damages, but not a different kind. See *Koll-Irvine Ctr. Property App. 2000), review granted, 98 Cal. Rptr. 2d 430 (Cal. 2000).
injuries cannot be certified as a class action. Tort claims for emotional distress damages also have been denied class treatment. The major elements in tort actions for personal injuries, emotional distress, and even real property damage are liability, causation, and damages. Issues of comparative fault and assumption of risk vary widely in individual cases, which is why courts are reluctant to process mass personal injuries as class actions. The preferred procedure for


In federal court, an action may not be settled on a classwide basis unless the requirements for litigating the case as a class action are met. See, e.g., Jenkins v. Raymark Indus., Inc. 782 F.2d 468, 472 (5th Cir. 1986) (concerning certification of mass tort claims of plaintiffs with asbestos-related claims); Sala v. National R.R. Passenger Corp., 120 F.R.D. 494, 498-500 (E.D. Pa. 1988) (certification of personal injury claims resulting from trail derailment). See generally Fed. R. Civ. P. 23(b)(3). Furthermore, in federal court an action may not be settled on a classwide basis unless the requirements for litigating the case as a class action are met. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609 (1997).

250. See Fuhrman v. California Satellite Sys., 231 Cal. Rptr. 113, 120 (Cal. Ct. App. 1986). In finding a class action complaint alleging claims for emotional distress is inappropriate for class certification, the Furhman court stated:

[The] injury alleged in each of the first six causes of action is 'severe intimidation, shock, distress, humiliation, alarm, frustration, harassment, embarrassment, defamation and disruption... Perhaps no cause of action is less susceptible to a class action than one for infliction of emotional distress. Recovery in each case necessarily depends on the particular characteristics of each plaintiff.

Id. at 425. See also Altman v. Manhattan Sav. Bank, 148 Cal. Rptr. 100, 103-04 (Cal. Ct. App. 1978) (dismissing unnamed class members on grounds that no community of interest existed because emotional distress claims required "complex proof unique to each member on his damages for loss of peace of mind"); Stilson v. Reader's Digest Ass'n, Inc., 104 Cal. Rptr. 581, 583 (Cal. Ct. App. 1972) (striking class allegations from complaint alleging mental anguish damages).

251. In City of San Jose v. Superior Court, 12 Cal. 3d 447 (1974), the court found a class action "incompatible with the fundamental maxim that each parcel of land is unique." City of San Jose, 12 Cal. 3d at 461. In addition, the court observed that claims for diminution in property value depend on an "extensive examination of the circumstances" concerning each plaintiff's property. Id. at 461. See also Diamond v. General Motors Corp., 97 Cal. Rptr. 639, 643 (Cal. Ct. App. 1971).

252. See Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1122-25 (1988). In denying class certification in this mass-tort action, the court in Jolly stated:

As a general rule... so called 'mass accidents' or 'common disasters' are considered not appropriate for class litigation. This inappropriateness is based upon the overwhelming uniqueness of the issues stemming from the necessity for the trier to hear and determine individually each victim's injuries, his suffering, financial loss, etc.
disposition of such causes is to aggregate them by consolidation or coordination.  

Despite the limits on standing imposed by nuisance law, there appears to be an advantage in pleading nuisance liability over a cause of action based upon other tortious conduct, such as negligence, particularly in releases that result in pollution and contamination. For example, according to the Potter court, in the absence of physical injury or impact, a defendant's negligence will support an award of emotional distress damages only if a claimant fits within the rubric of a "direct victim." Thus, whether an individual can recover damages for negligent infliction of emotional distress is dependent upon traditional tort analysis and the elements of duty, breach, causation, and

Thus even though a common question may be involved (e.g., the defendant's tort) the matter is not suitable for a class action. Id. at 1121.

253. See id. at 1103; Rose v. Medtronics, Inc., 166 Cal. Rptr. 16, 19 (Cal. Ct. App. 1980) (suggesting consolidation). A small claims court may hear an action in nuisance. See City of San Francisco v. Small Claims Court, 190 Cal. Rptr. 340, 343 (Cal. Ct. App. 1983). In this case, judgment was in favor of numerous individuals who filed in small claims court 183 consolidated claims alleging the city airport noise constituted a nuisance (Greater Westchester Homes Ass'n v. City of Los Angeles, 26 Cal. 3d 86 (1979) causing damages to each claimant in the maximum jurisdictional amount of the court (then $750.00). See City of San Francisco, 190 Cal. Rptr. at 342. The "mass filing" of claims and their consolidation did not present any problem even though the defendant faced a potential liability of over $135,000. See id. at 345. The jurisdictional amount limitations apply to each plaintiff's individual claim; in a consolidated action, the fact that the aggregate amount of the claims is greater does not create a jurisdictional defect. See id. However, in a class action, the claims of individual class members are aggregated in determining the amount in controversy. See Archibald v. Cinerama Hotels, 15 Cal. 3d 853, 861 (1976). Hence, class actions are usually within superior court jurisdiction. See id.

In other jurisdictions, the liability issue in a hazmat incident is considered common amongst class members and predominating over damage issues. See, e.g., Mcgee v. Shell Oil Co., 659 So. 2d 812, 815 (La. Ct. App. 1995) (allowing residents evacuated as a result of a sulfuric acid release, who claimed damages for inconvenience as well as personal injuries, to bring a class action because "the issues of liability common to class members predominate over the questions of damage assessment affecting individual members"); see also Louisville & Nashville R.R. Co. v. Wollenmann, 390 N.E.2d 669, 672 (Ind. Ct. App. 1979) (finding that even if damages would have to be proved for each class member, a larger, predominant issue was involved, i.e., the negligence of the railroad); Jenkins v. Raymark Indus., 782 F.2d 468, 471 (1986) (finding the "state of the art" defense common to all plaintiffs in certified class action for asbestos related mass-tort claims); Sala, 120 F.R.D. 494, 498-99 (allowing victims of train derailment to sue as a class because it is likely plaintiffs will sue under the same theories of liability and defendant will mount the same defenses even if the claims were pursued independently).

damages.\textsuperscript{255} The foregoing limits imposed with respect to recovery for emotional distress caused by a defendant's negligence do not apply when the distress is the result of a defendant's commission of the distinct torts of trespass, nuisance, or conversion.\textsuperscript{256}

Nuisance liability may arise from conduct that is not otherwise tortious.\textsuperscript{257} Nuisance focuses on the injury or condition itself, rather than on the culpability of conduct causing it, and the exercise of due care will not protect against the finding of a nuisance.\textsuperscript{258} At common law, a public nuisance was a criminal offense and a tort. Where the conduct creating a public nuisance violated a statute, liability was strictly imposed even though the conduct was "purely accidental and unintentional."\textsuperscript{259} Some authorities contend, however, that a nuisance may result only from intentional, negligent, or ultra-hazardous activities.\textsuperscript{260}

With regard to a nuisance, damages for annoyance and discomfort may be recovered without showing that the nuisance caused actual damages to plaintiff's property, his person, or his family.\textsuperscript{261} In contrast, in negligent infliction of emotional distress actions, physical injury, physical impact and, more recently, toxic exposure and resultant probability of future injury, are required to provide a semblance of genuineness to

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\item \textsuperscript{256} See, e.g., Gonzales v. Personal Storage, Inc., 65 Cal. Rptr. 2d 473, 479 (Cal. Ct. App. 1997) (finding a tenant of a storage facility entitled to emotional distress damages for the mishandling of her property on a conversion theory, but not on negligence); cf. Windeler v. Scheers Jewelers, 88 Cal. Rptr. 39, 45 (Cal. Ct. App. 1970) (holding that a plaintiff who lost six rings entrusted to defendant for resetting was entitled to damages for the shock (from being told of the loss) to her nervous system as a result of defendant's negligence).
\item \textsuperscript{257} See Tuohey, supra note 202, at 27-28.
\item \textsuperscript{258} See Snow v. Marian Realty Co., 212 Cal. 622 (1931); see also Green v. General Petroleum Corp., 205 Cal. 328 (1928).
\item \textsuperscript{259} Leslie Salt Co. v. San Francisco Bay Conservation & Dev. Comm'n, 200 Cal. Rptr. 575, 584 (Cal. Ct. App. 1984) (citing RESTATEMENT (SECOND) OF TORTS § 812 cmt. e (1979)).
\item \textsuperscript{260} See, e.g., Lussier v. San Lorenzo Valley Water Dist., 253 Cal. Rptr. 470, 474 (Cal. Ct. App. 1988). See generally Prosser, supra note 239, at 1003 ("Liability may rest upon any of the three familiar tort bases: intent, negligence, or strict liability.").
\item \textsuperscript{261} See Acadia, Ltd. v. Herbert, 54 Cal. 2d 328 (1960); see also Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 272-75 (1955); Smith v. County of Los Angeles, 214 Cal. App. 3d 266, 287-88 (1989).
\end{itemize}
claimed emotional injury.

Numerous factors are taken into consideration in determining the existence of a nuisance. The law is one of degree; a reasonable use under one set of facts might be unreasonable under another. Discomfort and annoyance are elements of damage proximately caused by a nuisance. One complaining of a mere annoyance “must submit, in the interest of the public generally, to the discomfort usually incident to the circumstances of the place and the trades carried on around him.” The annoyance must be real.

There is a dichotomy between conditions that injure health and those that create personal discomfort. Under the law of nuisance, where personal discomfort (as opposed to injured health) is the basis of the complaint, the test of liability is the effect the interference has on the comfort of normal persons of “ordinary sensibilities.” Hence, persons with allergies and preexisting respiratory disorders aggravated by air pollution are historically unable to assert a public nuisance claim.

In a negligence cause of action, the court requires more than an allegation of a “subjective state of discomfort” to

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263. See Acadia, 54 Cal. 2d at 328.


265. See Gallo, 14 Cal. 4th at 1090. An example is provided by Green v. General Petroleum Corp., 205 Cal. 328, 337 (1928), where the court awarded “eviction” damages for the annoyance and discomfort suffered by residents forced to leave their home following the blowout of an oil well being drilled which resulted in oil, mud, and rocks falling onto their property, although the oil company was not negligent in conducting the drilling operation.


267. On the other hand, in a negligence action, the negligent actor is responsible for the exacerbation of any preexisting condition. See RESTATEMENT (SECOND) OF TORTS § 461 (1976); see also Hagy v. Allied Chem. & Dye Corp., 122 Cal. App. 2d 361 (Cal. Ct. App. 1953) (concerning latent laryngeal cancer stimulated by exposure to sulfuric acid fog); BAJI, supra note 43, No. 14.65 (concerning damages for aggravation of preexisting condition in a negligence cause of action). In Acadia a mentally unstable plaintiff suffered a relapse and the court held it immaterial whether the defendant knew of the existing condition, stating that, “a tortfeasor must take his victim as he finds him.” Acadia, 54 Cal. 2d at 338. See also Deevy v. Tassi, 21 Cal. 2d 109, 123 (1942) (preexisting heart condition aggravated by assault and battery).
recover emotional distress damages.\textsuperscript{268} Emotional distress must be serious. That is also true in hazmat cases.\textsuperscript{269}

However, the issue of standing to assert either a private or a public nuisance claim is critical. The special injury requirement for bringing a public nuisance cause of action is a severe limitation on the public's remedies. Hazmat release victims seeking redress for their emotional distress would have to resort to the traditional tort theories of negligence and strict liability.

Each member of the community must then establish the elements of duty, breach, causation, and damages. Each member must demonstrate that the disruption, discomfort, and emotional distress suffered by each of them is compensable. The crucial issue is whether members of the community may recover these damages in the absence of any personal or physical injury.

In the toxic tort context, a negligent infliction of emotional distress claim requires as an element that the claimant be exposed to the hazmat.\textsuperscript{270} Without having been exposed to hazmat, victims do not have a claim. The victim's only recourse is the theory that his safety has been put at risk by the hazmat release.\textsuperscript{271} In a toxic tort context, the concern for public health and safety are the immediate concerns of a hazmat release. These concerns arise from the possibility of exposure to the hazmat. The pathways of exposure include inhalation, skin, or eye contact with contaminated air, water, or soil, or ingestion of nutrients exposed to such contamination.\textsuperscript{272} The issue that inevitably arises is whether any type of recovery is available to those victims whose detriment consists only in the disruption of their daily activities.

Hazmat release victims may not have standing to bring a public nuisance action if the consequences of the hazmat release are widespread.\textsuperscript{273} No public health or welfare interest

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\item \textsuperscript{269} See Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 989 (1993); BAJI, supra note 43, No. 12.80.
\item \textsuperscript{270} See Potter, 6 Cal. 4th at 989.
\item \textsuperscript{271} See Wooden v. Raveling, 71 Cal. Rptr. 2d 891 (Cal. Ct. App. 1998).
\item \textsuperscript{272} See JANETTE D. SHERMAN, CHEMICAL EXPOSURE AND DISEASE 58-60 (1994); STEPHEN HALL ET AL., CHEMICAL EXPOSURE AND TOXIC RESPONSES 11 (1997).
\end{itemize}
is served by a limitation imposed by the special injury requirement. Instead, it merely relieves a tortfeasor of the consequences of its conduct where the injured happened to be an entire community or numerous individuals. The greater the catastrophe, the greater immunity the tortfeasor may obtain. This is not a logical interpretation or application of the law or any societal goal, nor is it sound public policy. Under the statutory definition of nuisance, a public nuisance is distinguished from a private nuisance where an “entire community or neighborhood, or any considerable number of persons” are affected. Unfortunately for all concerned, the semantics of “community,” “neighborhood,” or “number” can be amorphous at best. For example, where all of the citizens of Santa Clara County were alleged to have been subjected to a public nuisance (air pollution), four individual plaintiffs were unable to plead special injury beyond the public nuisance, so as to constitute a private nuisance. It is hard to imagine any public nuisance more detrimental to the public health and safety than the spreading of a toxic risk.

In any event, it is hard to comprehend any public policy that would exonerate a tortfeasor, or even a criminal wrongdoer, while leaving a victim without judicial recourse. Where a toxic nuisance injuriously affects the public, every

274. One author has noted that nuisance law has been historically structured to favor the economic interests of industries while environmental concerns, property, and health interests of the public were relegated:

Especially in the nineteenth century, economic, rather than ecological, considerations shaped the application of nuisance law in cases concerned with the environment. Several legal scholars have argued that during the era of industrialization, economic development took precedence over environmental concerns in the courts... Even prior to the Civil War, American courts reshaped the distinction between public and private nuisances “into a major barrier against individual interferences with the process of internal improvements.” The only means available to reach a public nuisance was through an indictment brought by public authorities. The public nuisance doctrine could be used to defeat a private damage remedy. “The most significant fact about the public nuisance doctrine,” Horwitz concluded, “was that it enabled courts to extend to private companies virtually the same immunity from lawsuits that the state received under the theory of consequential damages.”


affected member should be able to pursue the full panoply of tort remedies available to tort victims, no matter how great the number of victims. 278

V. SEVERE EMOTIONAL DISTRESS DAMAGES RESULTING FROM HAZARDOUS MATERIALS INCIDENTS

A. With Reference to Economic Detriment

A natural and probable consequence of the harm caused by the release of hazmat into the environment is the disruption of the activities of everyone affected. Apart from the personal discomfort or mental suffering inflicted, a hazmat incident frequently interrupts all manner of personal and economic pursuits. Clearly, a sudden, isolated hazmat episode such as a toxic cloud, a ruptured tank car or pipeline, the discovery of explosives, virus, bacteria, escaping radiation, and similar events will interdict free mobility and cause economic loss. In some situations, there may be a duty on the part of victims to cease their activities and to take steps to prevent or minimize injury to themselves. 279 Others simply are prevented from continuing with their activities. 280 In these cases, the disruption and economic loss are directly attributable to the release and should be recognized legally as detriment for which the victim should be compensated. 281

Loss or damage that a victim may recover are economic damages, which means that they are objectively verifiable monetary losses. 282 They may include, past and future medical expenses including diagnostic 283 and monitoring costs, 284 loss of

278. See CAL. CIV. CODE §§ 3281, 3333; cf. Tuohey, supra note 202, at 5.
279. See CAL. CIV. CODE § 1714(a) (West 1998) (“Every one is responsible . . . for an injury occasioned to another by his want of ordinary care . . . except so far as the latter has, wilfully or by want of ordinary care, brought the injury upon himself.”) (Emphasis added). However, in the midst of a catastrophe, it is difficult to determine whether one should zig or zag, to say the least. See BAJI, supra note 43, Nos. 4.40-4.41.
280. For example, in Mcgee v. Shell Oil Co., residents, evacuated as a result of a release of sulfuric acid which vaporized into the atmosphere, and claimed damages for inconvenience as well as for personal injuries. 659 So. 2d 812, 813 (La. App. 5th. Cir. 1995).
281. See CAL. CIV. CODE § 3333 (West 1997).
282. See, e.g., CAL. CIV. CODE § 1431.2 (West Supp. 2000); 2 COMM. ON STANDARD JURY INSTRUCTIONS, supra note 163, § 14.76.
283. Medical costs for diagnostic evaluation of injury are recoverable. But for his exposure to hazmat, a plaintiff would not have been obliged to seek and obtain medical diagnoses (as distinguished from treatment), in order to determine the
past and future earnings, loss of property or use of property, costs of repair or replacement, diminution in value of nature and extent of his injuries, if any. This right of recovery was affirmed in Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1005 (1993), reaffirming the rule enunciated in Miranda v. Shell Oil Co., 26 Cal. Rptr. 2d 655, 656 (Cal. Ct. App. 1993), that expenditures for medical testing and evaluation which would be unnecessary, if the plaintiff had not been wrongfully exposed to pollutants, are a correlative detriment within section 3333 of the California Civil Code.

284. Future medical monitoring costs are recoverable. See Potter, 6 Cal. 4th at 1004-09; Miranda, 26 Cal. Rptr. 2d at 658-60; 2 COMM. ON STANDARD JURY INSTRUCTIONS, supra note 163, § 14.10.1 (1999). The need for medical monitoring is determined on an individual basis, based upon the individual's history and circumstances. Therefore, in a mass tort action, certification of a medical monitoring class is improper. See Lockheed Martin Corp. v. Superior Court, 94 Cal. Rptr. 2d 652 (Cal. Ct. App. 2000) (holding that "medical monitoring" class for thousands claiming exposure from contaminated groundwater is improper; there is no sufficient community of interest based upon the numerous individual issues and proof relating to each individual's need for and entitlement to monitoring), review granted, 98 Cal. Rptr. 2d 430 (Cal. 2000); see also Gutierrez v. Cassiar Mining Co., 75 Cal. Rptr. 2d 132, 135-36 (Cal. Ct. App. 1998) (holding that the court must consider pre-existing condition to determine the extent of medical monitoring (new or different) that became necessary as a result of defendant's conduct).

285. See, e.g., Varjabedian v. City of Madera, 20 Cal. 3d 285 (1977) (granting damages for plaintiff's forfeiture of a Cal-Vet loan for being "forced to move" from his home due to the nuisance created by a nearby sewage treatment plant).

286. See, e.g., More v. San Bernardino, 118 Cal. App. 732 (1931). Contamination of water supply and other injuries to real property caused by sewage flowing onto plaintiff's property are objectively verifiable monetary losses. Likewise, contamination of groundwater is a public nuisance; a private landowner's inability to sell property as a consequence (because the contamination spread under the owner's property), as well as the costs incurred by the landowner to investigate the contamination, give rise to a claim for a private nuisance in favor of the landowner. See Newhall Land & Farming Co. v. Superior Court, 23 Cal. Rptr. 2d 377 (1993). By statute, a real property owner may be compelled to record a notice of the presence of hazardous substances in the property. Such property includes: (1) land where a significant disposal of hazardous waste has occurred resulting in a significant existing or potential hazard to public health or safety ("hazardous waste property") and (2) land within 2,000 feet of hazardous waste property ("border zone property"). See CAL. HEALTH & SAFETY CODE §§ 25117.3-25117.4 (West 1992); see also id. §§ 25229-25230 (West 1999); 9 MILLER & STARR, supra note 90, § 29.53. Because of the depressing effect such declaration and notice may have on the value of the property, the legislature requires the assessor to reassess such land subject to the restriction. See CAL. HEALTH & SAFETY CODE § 25240 (West 1999); CAL. REV. & TAX CODE § 402.3 (West 1990). Aside from the hazardous wasteland use restriction, section 402.1 of the 1990 California Revenue and Taxation Code also requires the assessor to consider the effect of other environmental constraints to the use of land on the value of land. Cf. CAL. CIV. PROC. CODE § 726.5 (West Supp. 2000).

287. For an injury to real property, the proper measure of damages is the lesser of diminution in value of the property or costs of repair, "the lesser rule." See Mozzetti v. City of Brisbane, 136 Cal. Rptr. 751, 757 (Cal. Ct. App. 1977); see also Shaffer v. Debbas, 21 Cal. Rptr. 2d 110 (Cal. Ct. App. 1993) (holding that since costs of repair were $130,000 and diminution in value because of damage was
property, remediation costs, response costs, loss of

$585,000; the proper award was costs of repair); CAL. CIV. PROC. CODE § 726.5 (West Supp. 2000).

288. See, e.g., Varjabedian, 20 Cal. 3d at 293-95 (holding that diminution in value of the home was caused by the fumes and odors from the sewage plant). Note that loss of value damages may be recovered in a nuisance action only if the nuisance "permanently" damaged the property. If the nuisance is abatable, loss of value damages cannot be awarded. See Alexander v. McKnight, 9 Cal. Rptr. 2d 453 (1992). See generally 9 MILLER & STARR, supra note 90, § 29.14. Aside from the negative impact from environmental constraints on land use imposed by administrative agencies, disclosure requirements imposed by statutes such as sections 1102 et seq. of the California Civil Code (requiring disclosure upon the sale of residential property), inflict a burden on anyone wishing to dispose of contaminated property, the market value or desirability of which has been affected. See generally Tracy, supra note 37. See also Alex Geisinger, Nothing but Fear Itself: A Social-Psychological Model of Stigma Harm and Its Legal Implications, 76 NEB. L. REV. 452, 454 (1997) ("[T]he harm from stigma is to reputation and not to property."); see, e.g., Reed v. King, 193 Cal. Rptr. 130 (Cal. Ct. App. 1983); Cooper v. Jevne, 128 Cal. Rptr. 724, 727 (Cal. Ct. App. 1976); Alexander, 9 Cal. Rptr. 2d at 456.

289. Hazmat contamination and cleanup costs support a reduction in the property's valuation/assessment. See, e.g., Firestone Tire & Rubber Co. v. County of Monterey, 272 Cal. Rptr. 745, 750-52 (Cal. Ct. App. 1990) (requiring assessor to consider pollution cleanup costs which reduce fair market value of property; however, there was insufficient evidence that assessor was aware of the pollution when valuation was made) ("A property is assessed at the price at which a willing buyer and a willing seller would consummate an open market sale of the property considering the polluted condition of the property."). Mola Dev. Corp. v. Orange County Assessment Appeals Bd., 95 Cal. Rptr. 2d 546, 547-48 (Cal. Ct. App. 2000) (holding market value of contaminated property is properly assessed by deducting cost of cleanup). A victim's lender may also accede to rights detrimental to the victim. See CAL. CIV. PROC. CODE § 726.5 (West Supp. 2000).

290. A private party in a nuisance case may recover the reasonable cost of his own efforts to abate a nuisance or to prevent future injury. See KEETON ET AL., supra note 233, § 89, at 640. These include expenses incurred for sampling, testing, and monitoring their tap and other water supply costs of bottled water, and other substitute sources for subsistence, relocation costs, temporary shelter, etc. See, e.g., Newhall Land & Farming Co. v. Superior Court, 23 Cal. Rptr. 2d 377 (1993) (holding costs incurred by private landowner to investigate groundwater contamination gives rise to a claim for private nuisance). Public agencies may recover emergency response costs. See CAL. HEALTH & SAFETY CODE § 13009.6 (West 2000); see also id. §§ 25500 et seq., 25514.5-25514.6, 25531 et seq., 25540 (West 1999); CAL. CIV. CODE § 3484 (West 1997); CAL. CIV. PROC. CODE § 731 (West 1980). In the absence of such statutes, the general nuisance laws (CAL. CIV. CODE §§ 3479 et seq. (West 1997)), which allow abatement as a remedy for a public nuisance, do not authorize recovery by a public entity of expenses incurred in abating a nuisance, such as fire suppression costs. See City of Los Angeles v. Shpegel-Dimsey, Inc., 244 Cal. Rptr. 507 (Cal. Ct. App. 1988) (holding that in the absence of a statute or ordinance authorizing recovery, city could not recover substantial expenses in putting out a fire) (citing County of San Luis Obispo v. Abalone Alliance, 233 Cal. Rptr. 846 (Cal. Ct. App. 1986) (unless provided by statute or ordinance, the cost of public services for protection is to be borne by the public as a whole)) (decided before enactment of CAL. HEALTH & SAFETY CODE §
employment and employee services, loss of business opportunities, and lost business profits. Also categorized as economic damages are loss of economic or education potential, loss of productivity, absenteeism, support expenses, accidents or injury, and other pecuniary loss (caused by the use of an illegal controlled substance).

A caveat with regard to a nuisance action is that the business interference and the resulting pecuniary loss must be particular to the plaintiff or to a limited group that includes the plaintiff. When it becomes general and widespread as to affect a whole community or a wide area within it, there is no distinct kind of damage suffered, and a public nuisance action cannot be maintained to recover the losses.

A person who reasonably attempts to minimize his damages can recover the expenses incurred, and often those damages result from a reasonable effort to prevent or minimize

13009.6).

291. See, e.g., George A. Hormel & Co. v. Maez, 155 Cal. Rptr. 337 (Cal. Ct. App. 1979) (finding company entitled to damages for the wages it paid to employees who were idle for two hours as a result of a power failure at the company's plant). Compensation for a person's time spent in cleaning up debris from falling leaves from branches of a tree overhanging the person's premises is special damage attributable to a nuisance. See Bonde v. Bishop, 112 Cal. App. 2d 1, 5 (Cal. Ct. App. 1952).

292. See, e.g., Louisville & Nashville R.R. Co. v. Wollenmann, 390 N.E.2d 669 (Ind. Ct. App. 1979) (concerning a class action for damages brought by two operators of an inn on behalf of several thousand individuals evacuated from their homes and businesses because of the threat of explosion and fire from an overturned propane gas tanker); Harbor Beach Surf Club v. Water Taxi, 711 So. 2d 1230 (Fla. Dist. Ct. App. 1998) (holding the erection of a footbridge too low over a lake, which prevented taxi company from servicing a hotel and apartments, was a public nuisance and the taxi company suffered lost business opportunities and lost profits).

293. See Phillips v. City of Pasadena, 27 Cal. 2d 104 (1945) (holding that recovery is allowed for loss of profits when business is interfered with by a nuisance); see also Hutcherson v. Alexander, 70 Cal. Rptr. 366, 372-73 (Cal. Ct. App. 1968) (declaring a fence a nuisance as it was erected to hide plaintiff's business premises from view of highway travelers); Christopher v. Jones, 41 Cal. Rptr. 828 (Cal. Ct. App. 1964) (entitling an orchard owner to an injunction against chemical repackaging plant in an industrial-zoned area releasing chlorine gas that harmed fruit trees); Guttinger v. Calaveras Cement Co., 105 Cal. App. 2d 382 (Cal. Ct. App. 1951) (concerning cattle raising business that lost use of grazing land covered by dust and debris from adjacent cement manufacturing plant). However, economic losses cannot be recovered on a strict liability theory. See Seely v. White Motor Co., 63 Cal. 2d 9, 15 (1965) (concerning product liability).


295. See Prosser, supra note 239, at 1015. Unfortunately, geography is blurry in this context and no bright line test exists.
damages. Section 3333 of the California Civil Code provides that, for the breach of an obligation not arising from contract, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

There is judicial recognition that severe economic damage, *per se*, may justify emotional distress damages. In *Crisci v. Security Insurance Co.*, the court noted: “[D]amages for mental distress have also been awarded in cases where the tortious conduct was an interference with property rights without any personal injuries apart from mental distress.”

This passage seems to establish a right to recover damages for emotional distress in cases dealing solely with property damage. Further, *The California Book of Approved Jury Instructions*, Number 12.85, which cites both *Crisci* and *Jarchow* as authority, provides: “A plaintiff who has suffered a substantial financial injury which was caused by a defendant’s intentional or reckless wrongful conduct, is entitled to recover damages from that defendant for any mental or emotional distress resulting from such financial injury.

*Cooper*, on the other hand, found no California case allowing recovery for emotional distress arising out of negligent injury to property. The *Cooper* court enunciated the rule that recovery for emotional distress arising out of loss of property is limited to cases in which, at a minimum, a duty of care exists by virtue of a preexisting relationship between the parties or in which the damage arises out of an intentional tort.

In contrast, the *Potter* court expressly held that the duty may be imposed by law, as well as assumed by the defendant, and even then the “breach of the duty must threaten physical injury, not simply damage to property or financial interests.”

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296. See O’REILLY, supra note 151, § 23.03. See, e.g., *Jarchow v. Transamerica Title Ins. Co.*, 122 Cal. Rptr. 470, 485 (Cal. Ct. App. 1975) (awarding attorney fees incurred to quiet title and in addition, supported damages for emotional distress based upon negligent conduct).

297. CAL. CIV. CODE § 3333 (West 2000).


299. 66 Cal. 2d 425, 433 (1967).

300. BAJI, supra note 43, No. 12.85.


In *Jarchow*, where the defendant assumed the duty, the court required "substantial damage" apart from the emotional injury in order to allow emotional distress damages on a negligence theory. The court noted, however, that the substantial damages need not be "compensable." "[I]nterference with one's legally protected interests is sufficient damage." Yet, the *Jarchow* court found support for the emotional distress damages based on the "substantial damages" of attorney fees and loss of use damages awarded to the plaintiffs. Interestingly, the *Jarchow* court expressly stated that it was not setting forth a rule that would permit recovery for negligently inflicted emotional distress where mental injury was the only damage caused by the tortious conduct, leaving that question for the California Supreme Court. The "damage" required to support an emotional distress claim need not be compensable under *Jarchow* seems to be saying that a claimant did not suffer any legal detriment other than emotional distress. *Jarchow* may provide an exception to the physical impact or injury rule. This case and others allow recovery of emotional distress damages in an action based on negligence, but typically involve a preexisting relationship between the parties or otherwise involve intentional tortious conduct.

Cooper v. Superior Court, 58 Cal. Rptr. 13 (Cal. Ct. App. 1984)).
304. See id. at 489.
305. Id. at 484-85 (emphasis added). No California case has allowed recovery for emotional distress arising solely out of property damage. See *Cooper*, 58 Cal. Rptr. 13 (finding that tractor rolling into plaintiff's home causing damage to the house, grounds, and swimming pool did not entitle plaintiff to emotional distress damages unless there was a threshold showing of some preexisting relationship or intentional tort); Lubner v. City of Los Angeles, 53 Cal. Rptr. 2d 24, 30 (Cal. Ct. App.1996) (finding that in the absence of a preexisting relationship or intentional tort, emotional distress damages are not recoverable for destruction of fine art as a result of a city truck crashing into a home).
306. See *Jarchow*, 122 Cal. Rptr. 470, 484 n.11.
307. In *Jarchow*, the court awarded plaintiffs emotional distress damages based upon the rationale that plaintiffs suffered substantial damages of a character which provided sufficient guarantee of genuineness of the claimed emotional distress. These substantial damages consisted of attorney fees of $7,100 and damages of $170 for loss of use of property. Significantly, these financial losses or expenditures were incurred by the plaintiffs voluntarily: (1) attorney fees were incurred to pursue a quiet title action voluntarily commenced by the plaintiffs; and (2) plaintiffs voluntarily desisted from pursuing their plan to develop the property until after the cloud on the title to the property had been eliminated. See id. at 479, 484.
B. Without Reference to Economic Detriment

On the emotional distress side, the circumstances of a hazmat release incident, particularly the sudden airborne release of toxic chemicals with known injurious effects,\(^{308}\) has both physical\(^{309}\) and emotional impacts.\(^{310}\) The fear and horror of personally being exposed to a cloud of poison gas, or knowing that family members have been exposed, are absolute emotional trauma in its purest form.\(^{311}\) Fear also results where the episode is undetected, low level, and long term,\(^{312}\) as for example when the long term insidious hazmat contamination of soil and water, or of indoor pollution by pesticides, fungi, or other substances, where individuals may learn of personal and familial hazmat exposure after years, or even decades.\(^{313}\)

Under the broad statutory mandate of section 3333 of the California Civil Code, which allows damages "for all detriment," regardless of "whether it could have been anticipated or not," California courts have long recognized that where one wrongfully exposes another to a reasonable possibility of future disease or disability, resulting emotional distress is a compensable detriment. For example, an elderly plaintiff injured in a cable car accident who believed she would be permanently disabled was denied damages for any future disability, which was not proven. Nevertheless she was entitled to damages for her "reasonable apprehension of being permanently disabled, which apprehension and consequent mental suffering was a direct and proximate result of her injury."\(^{314}\)

In another case, a patient was overexposed to dental x-rays, which gave rise to the possibility that she might develop cancer at some time in the future.\(^{315}\) In response to a claim on

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308. See Bowler & Schwarzer, supra note 65.
309. See Bowler et al., supra note 35.
310. See Bowler et al., supra note 65.
311. See Searcy-Alford, supra note 97, EMOTIONAL DISTRESS AND FEAR § 3.12(2), at 3-78.3 to -78.7.
312. Cf. Miller, supra note 179, at 704-05.
313. See, e.g., Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965 (1993) (concerning residents living adjacent to a landfill into which carcinogens had been illegally dumped, contaminating the residents' water supply); Cottle v. Superior Court, 5 Cal. Rptr. 2d 882 (Cal. Ct. App. 1992) (building of residential subdivision on top of a former dump site for oil industry hazardous wastes and by-products).
315. See Potter, 6 Cal. 4th at 982 n.6 (citing Coover v. Painless Parker, Dentist, 105 Cal. App. 110 (1930)).
appeal that the evidence regarding the possibility of cancer was wholly speculative, the appellate court disagreed, noting that the patient’s present emotional distress was entirely non-conjectural. The court stated, “[t]he necessity of constantly watching and guarding against cancer, as testified to by the physician, is an obligation and a burden that the defendant had no right to inflict upon the plaintiff.”

In a federal case applying California law, an employee alleged claims for fraudulent concealment, battery, and emotional distress arising out of exposure to toxic substances at his workplace. The employee did not allege any presently diagnosable injury, but alleged two forms of physical injury: (1) an injury to his immune system rendering him more susceptible to developing cancer, and (2) an injury through the increased risk of cancer. The employee also alleged fear and emotional distress. The court ruled that the allegation that he suffered fear of contracting serious or lethal diseases as a result of the toxic exposure stated a present injury sustaining a claim for relief.

This recognition of the right to recover damages for the tortious infliction of fear of future disease is important for several reasons. First, it reflects a broad understanding that, when caused by the tort of another, such emotional distress is a legitimate compensable injury, not simply a vicissitude of modern life that the victim must simply grin and bear. Second, it means that courts are confident that when all of the other elements of a tort are present—duty, breach of duty, and causation—the trier of fact can distinguish the truly injured plaintiff from the counterfeit. In this context, Potter held, “physical injury is not a prerequisite for recovering damages for serious emotional distress” especially where “there exists a guarantee of genuineness in the circumstances of the case.”

The distress resulting from a hazmat incident does not result solely from toxic exposure. If one looks at a community with one or more facilities in which toxics and hazmat are stored and handled, one could reasonably foresee that every...

316. Coover, 105 Cal. App. at 115. Note that the necessity is also imposed upon parents whose children have been exposed to hazmat.


318. Potter, 6 Cal. 4th at 986 (citing Burgess v. Superior Court, 2 Cal. 4th 1064, 1079 (1992)).
hazmat incident would impact the community surrounding it. For example, in hearings before the House Committee on Natural Resources in connection with the sulfuric acid release from the General Chemical Corporation Richmond Works in July 1993, the public health director of Contra Costa County stated with regard to the repeated hazmat releases and their adverse impacts on the communities in Richmond:

When we look at the protection of public health, we need to look at the communities most heavily impacted. Study after study has demonstrated what is really completely obvious in the first place, which is that the communities that are most heavily impacted by hazardous materials and toxics are predominantly minority communities and low-income communities, and that these communities already suffer disproportionately from a whole variety of public health problems.

If we look at Richmond, California, here, where this event occurred, we see not only have a heavy concentration of toxics and hazardous materials, but this community is already disproportionately impacted by every public health problem from AIDS to unemployment. We need to look at the health impacts of this sort of release in a broader context than just a single isolated release of a sulfuric acid cloud in the community, important as that is.

Scientifically accurate as these medical bulletins may be and we need consultation from CAL EPA, OES, and people in this audience—but when Dr. Brunner's medical bulletins say, there will be no long-term health impacts, so don’t worry be happy, this needs to be put in context. In this event, the fact is that thousands of people were injured, even if only temporarily, and thousands of other people were so frightened and so concerned, legitimately, that they needed to come for medical attention for evaluation of themselves and their children and reassurance, and that 15 people were hospitalized, even though the majority of those already had underlying disease.

We also need to remember this is not an isolated occurrence. This has happened again and again and repeatedly over the last few years in this community and throughout Contra Costa County, and we issue the same bulletin on the no long-term health impacts. Everyone in the community knows what everyone in the health department knows—that this could have been much worse
and that the potential threat for these kinds of releases exceeds what we have seen already. People in the community already have enough problems and enough concerns and enough health impacts, and they don't need to worry about whether their children are going to be gassed in their homes and whether the health impact exceeds just the respiratory irritation.

Impact also includes the outrage, the invasiveness of having toxic stuff spread over your homes and your children's toys—what Henry Clark refers to as toxic trespass—this also needs to be figured into the health impacts.

When people of a community are forced to remain indoors or forced to evacuate and leave their homes, schools, or workplaces, it cannot be denied that such people are emotionally and economically adversely impacted. Yet, the law has always been skeptical of emotional distress damage claims, primarily because of the difficulty of ascertaining that they are genuine. This is particularly true in mass toxic tort situations. However, given the astronomic costs of toxic tort litigation, with expensive discovery and experts, it is suggested that such costs alone are sufficient to deter claims for emotional distress.

In negligence cases, the traditional requirement for recovery of emotional distress damage has been physical injury or physical impact. The Second Restatement of Torts states that a negligent actor is not liable for conduct that results in emotional disturbance alone, without bodily harm or other compensable damage. This is the law because first, emotional disturbance that is not serious enough to have physical consequences is trivial and thus, non-compensable. Second,
emotional disturbance is subjective and easily feigned, and bodily harm which results from it provides a guarantee of genuineness of the claim. Finally, when a defendant is merely negligent, the fault is not great enough to make a purely mental disturbance compensable.

California allows emotional distress damages when accompanied by a physical impact or a manifestation of physical injury. Courts are quick to explain, however, that physical injury or physical impact is not a prerequisite to the recovery of emotional distress damages. In certain cases of negligence, courts have allowed recovery in the absence of physical impact or physical injury in many situations. First, where the negligence results in toxic exposure and produces a fear of cancer or future disease which is more likely than not to occur because of the exposure. Second, where the negligence is of a type that will cause highly unusual and predictable emotional distress. Third, where the negligence arises in a situation involving breach of fiduciary or quasi-fiduciary duties, as in a bad faith refusal to pay insurance proceeds. Fourth, where recovery is based upon witnessing an injury to a close relative (the “bystander” principle). Fifth, where “reckless” wrongful conduct has caused substantial financial injury. Furthermore, in many torts such as assault, battery, false imprisonment, and defamation, mental suffering will frequently constitute the principal element of damages.

Emotional distress without physical injury which results from “traditional” torts versus “toxic” torts characterized by a long latency period can be distinguished by the seriousness of the risk of harm, the inability to eliminate the risk following

325. See RESTATEMENT (SECOND) OF TORTS § 436A cmt. b.
327. See id. See generally PAUL D. RHEINGOLD, MASS TORT LITIGATION (1996).
330. See Thing v. La Chusa, 48 Cal. 3d 644 (1989); see also Dillon v. Legg, 68 Cal. 2d 728 (1968).
331. See BAJI, supra note 43, No. 12.85; cf. Tuohy, supra note 298.
332. See, e.g., State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 338 (1952) (concerning intentional infliction of emotional distress).
exposure, and the duration of risk, which may be lifelong. The duration of the risk and the injured party's helplessness to remove the risk provide the most compelling arguments for a change in traditional emotional distress jurisprudence. Traditional common law did not and could not contemplate that long after a negligent actor ceased the negligent activity the plaintiff would suffer from the fear of eventually being harmed by the activity. Likewise, the traditional common law could not foresee the reality that a plaintiff could remove herself from the negligent activity and yet still be at risk because of it.

Thus, one exposed to hazmat which does not immediately manifest personal injury, physical or emotional, is confronted with a series of difficult issues. First, is whether one should pursue a class action within the statute of limitations, thereby tolling the statute for other potential members of the class, while making sure that one individually files in a timely manner. Unfortunately, because of the idiosyncratic nature of an individual's exposure to hazmat, class certification may not be available. Second is the filing of an independent direct action.

We neither overlook nor underestimate the dilemma posed to a toxic-tort plaintiff by the single cause of action principle. The time between exposure to toxins and the onset of disease may, and likely will, be long. The plaintiff who secures an award for immediate physical injury, monitoring costs, or some other proper item of damage, might be foreclosed from recovering damages in a second suit filed when the disease actually develops, years, perhaps decades, after the exposure, on the ground a cause of action cannot be "split." The problem is magnified if the plaintiff is unable to recover, in the first action, damages for the increased risk of disease. In addition, statute of limitations rules may prevent the plaintiff from waiting until the disease develops before bringing an action.


333. See Miller, supra note 312, at 688-89.
334. See id.

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336. See, e.g., Anderson v. Southern Pac. Co., 41 Cal. Rptr. 743, 753 (Cal. Ct. App. 1964) ("It is common knowledge that some people are allergic to many substances which have no detrimental effect upon the great majority."); cf. ASHFORD & MILLER, supra note 63.
action that, with other "mass accident" victims, might be "congregated." Class certification and congregation of toxic tort actions are more feasible, if at all, where product liability, as opposed to hazmat releases into the air, water, or soil, are involved. Third is the invocation of the "delayed discovery rule," where California courts toll the running of the statute of limitations during the latency period until appropriate symptomology manifests itself. Of course, this is a risky election because a court arriving at its own belated determination of the time lapse after sufficient injury manifestation might conclude that the statute had already run. Media publicity may also trigger the running of the statute.


339. In California, there is an elaborate statutory procedural mechanism for product liability litigation which facilitates class action (Consumer Legal Remedies Act, CAL. CTV. CODE §§ 1750 et seq. (West 1994)), whereas there is nothing comparable for non-consumer toxic exposures. As for the latter, courts are obliged to fashion their own solutions under their general discretionary powers under sections 128, 382, and 404 et seq. of the 1994 California Civil Procedure Code, as well as rules 1500 et seq. of the 1991 California Rules of Court, creating a fertile field for inconsistency.

340. The issue is delineating between when a cause of action accrues and between the statute of limitations period begins to run. As a rule, when injury or damage is the last element of a tortious cause of action to occur, the cause of action accrues once any actual and appreciable harm has occurred. There must be appreciable harm before the damage element of a cause of action accrues, triggering the commencement of the limitations period. See San Francisco Unified Sch. Dist. v. W.R. Grace & Co., 37 Cal. App. 4th 1318, 1331, 1335 (Cal. Ct. App. 1995). Under the discovery rule, for statute of limitations purposes, a cause of action for a latent injury does not accrue until plaintiff discovers or reasonably should have discovered that he has suffered a compensable injury. The policy reason behind the discovery rule is to ameliorate the harsh rule that would allow the limitations period for filing suit to expire before a plaintiff has or should have learned of the latent injury and its cause. See Buttram v. Owens-Corning Fiberglas Corp., 16 Cal. 4th 520, 530-31 (1997).


It is unclear whether the facts that particular newspapers published articles on particular subjects on particular dates are either "of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute" (Evid. Code, § 452, subd. (g)) or "are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" (id., subd. (h)). (Compare People v. Massie (1998) 19 Cal. 4th 550, 566, fn. 4 [refusing to take judicial notice of newspaper articles]; and People v. Ramos (1997) 15 Cal. 4th 1138, 1167 [affirming refusal to take judicial notice]; with Nogart v. Upjohn Co. (1999) 21 Cal. 4th 383, 408 [taking judicial notice that a
Typically, media coverage may publicize the detection of hazmat some distance from one's home or business, rendering it difficult, if not impossible, for a private citizen to conduct an independent investigation on someone else's property, even if that private citizen could afford to underwrite such a cost. Even an independent investigation of soil or water on one's own property may be cost prohibitive. Therefore, in the overwhelming majority of soil and water contamination cases, private citizens are generally reduced to wait for the cognizant lead governmental investigative agency to conduct its investigation and publicly release its findings, which can and frequently does take years.

In a case involving claims for property damage, however, a court held that when a statewide agency orders an investigation of groundwater and soil because of the discovery of contamination on plaintiff's property, a plaintiff is deemed to have been put on notice of serious contamination problems, which reasonable diligence would have discovered the full extent of the problems. Plaintiff was not entitled to the benefit of the discovery rule, and the statute of limitations (for injury to real property) commenced to run from the date of the state order.4

Alternatively, rather than risk a later determination that the statute was triggered by publicity, one could file immediately upon learning of the contamination detection. This may defer trial until there is a definitive determination that would quantify and qualify the hazmat as to that person. Here, however, the mandatory five-year statute within which the action must be brought to trial443 might well run before such a definitive determination is made, causing a dismissal of the

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See CAL. CIV. PROC. CODE § 583.310 (West 1998).


342. See CAMSI IV v. Hunter Tech. Corp., 230 Cal. App. 3d 1525, 1536-38 (Cal. Ct. App. 1991). In denying rehearing, the court noted that plaintiff failed to plead a continuing nuisance or trespass claim and refused to amend to so plead, so as to avoid the bar of the statute of limitations. See id. at 1541.

343. See CAL. CIV. PROC. CODE § 583.310 (West 1998).
HAZMAT AND EMOTIONAL DISTRESS

prematurely filed action.

Rather than reduce the running of the statute of limitation in toxic cases to a game, the fairer solution is to trigger its running from the release of the final governmental investigative report. Certainly, such an agonizing waiting experience constitutes emotional distress that unevenly impacts any population, and may range from "severe" to "nominal," according to proof.

However, the Delayed or Belated Discovery Rule has proven to be somewhat effective, even where different toxic injuries manifest themselves, one after another, in asbestos cases. In any event, a toxic victim should not be expected to make a self-diagnosis of a progressive disease, because even when the toxic injury becomes apparent it may be totally impossible to determine when it was inflicted.

1. Per Se, Without Physical Injury or Impact

In the seminal case of Molien v. Kaiser Foundation Hospitals, the California Supreme Court recognized that "interest in freedom from negligent infliction of emotional distress is entitled to independent legal protection" and held that a husband whose wife was negligently misdiagnosed as having syphilis was entitled to damages for the emotional distress he suffered upon learning of the erroneous diagnosis. The court declared that "there is a duty to refrain from negligent infliction of emotional distress," and allowed the husband to recover emotional distress without showing contemporaneous physical impact or injury. In the absence of physical injury, the tort is not negligent infliction of emotional distress, but simply negligence, with its usual elements.


346. 27 Cal. 3d 916, 928 (1980).

347. See id. at 924-31.

348. Id. at 928.

349. See Potter, 6 Cal. 4th 965, 985 (1993); see also Miller, supra note 312, at
development of the law permitting emotional distress without injury or impact dealt primarily with the sole recovery of emotional distress, such as for fear of one's own safety (the "direct victim" rule) and fear for the safety of another ("bystander" rule). Whether a toxic tort plaintiff can recover emotional distress damages alone is presently dependent upon traditional tort analysis.

The term, "direct victim," is a misnomer as it literally describes all plaintiffs who have been injured by a breach of a duty owed to them. The right to recover emotional distress damages as a "direct victim" arises from a breach of duty that is assumed by the defendant or imposed on the defendant as a matter of law, or from defendant's preexisting relationship with the plaintiff. Some non-bystander cases narrowly define a "direct victim" as one who has a preexisting relationship with the defendant. If a "preexisting relationship" is essential, no member of any community adjacent to a hazmat facility will ever be deemed a "direct victim," even if all the elements of negligence otherwise exist.

This "direct victim" concept was disapproved of in Wooden v. Raveling, a case involving negligent infliction of emotional

704-05 (analyzing Molien).

350. See, e.g., Webb v. Francis J. Lewald Coal Co., 214 Cal. 182 (1931); see also Molien, 27 Cal. 3d 916.

351. See Dillon v. Legg, 68 Cal. 2d 728 (1968); see also Thing v. La Chusa, 48 Cal. 3d 644 (1989).


353. The term originated in Molien, which reasoned that because the physician's negligence was directed at the wife and the husband, the husband was a "direct victim." Molien, 27 Cal. 3d at 922-23; see also Klein, 54 Cal. Rptr. 2d at 36-37.


In Krupnick, the court stated, "[O]ne must have had a preexisting relationship with the defendant in order to have a protected interest in being free from unintentionally caused emotional distress." Krupnick, 34 Cal. Rptr. at 45.

356. See Krupnick, 34 Cal. Rptr. at 45 (portending that much concluding, based upon the absence of a preexisting relationship between the parties, that "[a]s a consequence, plaintiffs could never be or become direct victims of defendant's unintentional behavior." ) (emphasis added).

distress absent impact, physical injury, or bystanders.\textsuperscript{358} The court applied the analysis in direct victim cases under traditional principles of negligence.\textsuperscript{359} However, the court rejected the concept that a "direct victim" case is based exclusively on a preexisting relationship between the parties and held that there are three sources of duty supporting a direct victim case: (1) a duty assumed by the defendant, (2) a duty imposed on the defendant by law, and (3) a duty arising out of a preexisting relationship between the plaintiff and the defendant.\textsuperscript{360} The Wooden court alluded to the Potter decision, noting that in Potter, the defendant had violated a duty imposed by law not to dispose of toxic contaminants in a landfill. It concluded that the breach of that duty supported a claim for emotional distress.\textsuperscript{361}

\begin{footnotesize}
\textsuperscript{358} Before the Krupnick decision was rendered, the California Supreme Court had debunked the special relationship "direct victim" theory in Potter that "[c]ontrary to amici curiae's suggestions, this principle (emotional distress without physical injury or impact in a negligence action) has never been restricted to cases involving bystanders or preexisting relationships. Notably, amici curiae cite no authority even suggesting such a limitation." Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 986 (1993) (emphasis added).

\textsuperscript{359} In upholding the woman's right to recover emotional distress damages for her fear of her safety, the Wooden court ruled by quoting Justice George's concurring and dissenting opinion in Potter:

[quote]
Well over half a century ago, this court recognized a plaintiff's right to recover damages for fright, shock, and nervous distress when the negligent conduct of a defendant places the plaintiff personally at risk, causing the plaintiff reasonably to fear for his or her own safety, even in the absence of any injurious impact. [Citation]. Thus, for example, if an automobile driver negligently speeds by a pedestrian in a crosswalk, narrowly missing the pedestrian but causing him or her reasonably to suffer serious emotional distress as a result of the encounter, the pedestrian is entitled to recover damages for reasonable emotional distress, even though the driver's conduct, while posing a risk of personal harm to the pedestrian, did not in fact inflict any direct physical injury.... [S]o long as the defendant has breached a duty of care owed to the plaintiff, thereby subjecting the plaintiff to an unreasonable risk of personal injury or illness, and the defendant's conduct is of such a nature that a reasonable person, in the plaintiff's position, would sustain serious emotional distress as a result of such conduct, the plaintiff who in fact sustains such emotional distress generally is entitled to recover damages for that distress.

Wooden, 71 Cal. Rptr. 2d at 897-98 (quoting Potter, 6 Cal. 4th at 1021 (George, J., concurring in part and dissenting in part)).

\textsuperscript{360} See also In re Air Crash Disaster Near Cerritos, 973 F.2d 1490 (9th Cir. 1992) (arguing that individuals on the ground fearing for their own safety are direct victims).

\textsuperscript{361} See Wooden, 71 Cal. Rptr. 2d at 896; see also, Pintor v. Ong, 259 Cal. Rptr. 577, 579 (Cal. Ct. App. 1989) (violating a statutory duty is a tort which entitles
In light of Wooden, California clearly recognizes a direct victim cause of action for fear of safety directly resulting from a negligent act causing the threatened impact of an automobile.\textsuperscript{362} By the same token, persons in the path of a hazmat release who fear for their safety also should be entitled to damages for their fear and anguish. The potential effects of an exposure to toxin and other hazmat are no less lethal than the impact of an automobile.\textsuperscript{363}

Another “category” of negligent infliction of emotional distress claims has been referred to as toxic “exposure” claims, typified by the Potter case.\textsuperscript{364} In Potter, the California Supreme Court stressed that recovery of damages for emotional distress does not require physical injury or impact,\textsuperscript{365} and the principle of recovery is not restricted to bystander or preexisting relationships. The Potter court stated that, “precedent in the law of nuisance and trespass establishes quite clearly that emotional distress without physical injury is compensable.”\textsuperscript{366}

However, a defendant’s liability for negligently causing mental distress is limited by the requirement that the distress be serious.\textsuperscript{367} Furthermore, there must either be proof of mental distress “of a medically significant nature” or of “some guarantee of genuineness in the circumstances of the case.”\textsuperscript{368} Toxic exposure by itself is required, but exposure by itself is not

\textsuperscript{362} See Wooden, 71 Cal. Rptr. 2d 891; Cook v. Maier, 33 Cal. App. 2d 581 (Cal. Ct. App. 1939).

\textsuperscript{363} See, e.g., Merry v. Westinghouse Corp., 684 F. Supp. 847, 852 (M.D. Pa. 1988) and cases cited therein (physical impact could be inferred from the fact plaintiffs inhaled, ingested, and absorbed hazmat in contaminated wells).


\textsuperscript{365} Note again that the Potter court held that ingestion of carcinogenic substances will not, per se, support a claim for fear of cancer. See Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 971-72. Accord Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997) (arguing that in a toxic tort context, exposure to a carcinogenic substance is not physical impact adequate to support a claim for negligent infliction of emotional distress under the Federal Employers’ Liability Act).

\textsuperscript{366} Potter, 6 Cal. 4th at 986 n.10; see also 2 COMM. ON STANDARD JURY INSTRUCTIONS, supra note 163, § 12.88.

\textsuperscript{367} See Potter, 6 Cal. 4th at 989 n.12.

\textsuperscript{368} Id. at 987-88 (quoting Molien v. Kaiser, 27 Cal. 3d 916, 930 (1980) (citing Rodriguez v. State, 472 P.2d 509, 520 (1970))). See also Miller, supra note 312, at 697 n.114.
enough to establish the reasonableness of the fear of cancer. The *Potter* court went on to hold that fear of cancer is compensable without a showing of symptoms, as long as plaintiff shows that the fear stems from reliable medical and scientific evidence that it is more likely than not that cancer will develop in the future from exposure to the toxic substances.

The *Wooden* case is similar to cases in which plaintiffs were denied recovery for emotional distress suffered as a result of the loss of property. The *Potter* court noted that, although recovery is available for emotional distress arising out of defendant's breach of duty, "[e]ven then, with rare exception, a breach of the duty must threaten physical injury, not simply damage to property or financial condition." In *Gonzales v. Personal Storage, Inc.*, a storage facility tenant was denied emotional distress for the negligent handling of her property, but was allowed to recover those damages for emotional distress resulting from the conversion of her property. In *Erlich v. Menezes*, a negligent breach of contract to build a house resulted only in economic injury. The court held that the homeowner was not entitled to emotional distress damages. In sharp contrast, where a tenant sued a landlord for negligent failure to repair defective premises, the court held that "negligent infliction of emotional distress-anxiety discomfort is compensable without physical injury in cases involving tortious interference with property rights." The court emphasized that tenancy interests are a protected property right.

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370. See *Potter*, 6 Cal. 4th at 989; see also 2 COMM. ON STANDARD JURY INSTRUCTIONS, supra note 163, § 12.80.1 (1995) (Negligent Infliction of Emotional Distress Fear of Cancer/AIDS). For further discussion, see infra Part IV.C.2. Toxic insult and its potential injury is idiosyncratic and each person in a mass toxic exposure will be impacted differently, rendering such a burden of proof virtually impossible for a victim to meet. See generally Boston, supra note 42, at 195-231.


372. 65 Cal. Rptr. 2d 473 (1997).

373. 21 Cal. 4th 543 (1999).


375. See id.
2. Discomfort and Annoyance Arising from Nuisance / Trespass

Discomfort and annoyance, as distinguished from fear or anxiety, are recognized elements of damage proximately caused by a nuisance.\textsuperscript{376} For example, residents forced to leave their home following a blowout of an oil well, which resulted in oil, mud, and rocks falling on their property, were entitled to “eviction” damages on a trespass theory even though the oil company was not negligent in conducting the drilling operation.\textsuperscript{377} Similarly, residents who were evacuated as a result of a release of sulfuric acid that vaporized into the atmosphere were allowed to claim damages for inconvenience, as well as personal injuries.\textsuperscript{378} The creation of smells and noxious odors that are a source of discomfort or that diminish the value of neighboring property constitutes a nuisance.\textsuperscript{379}

Similarly, the disruption in the life activities of plaintiffs and the community in which they reside or work caused by the release is a compensable personal discomfort. In Potter, the plaintiffs, whose water supply had been contaminated, were awarded damages by the trial court for the general disruption of their lives and invasion of their privacy. The plaintiffs had to shower elsewhere, use bottled water, and submit to intrusions by numerous agencies involved in testing water and soil.\textsuperscript{380}

Where a city constructed a sewage treatment plant near the plaintiff’s home, causing discomfort to the plaintiff and his family because they had to move from the house to avoid the unbearable, noxious odors, plaintiff recovered damages for the diminished value of the property, damages for personal discomfort, and damages for the additional costs of obtaining financing for their home.\textsuperscript{381}

\textsuperscript{376} See Acadia, Cal., Ltd. v. Herbert, 54 Cal. 2d 328 (1960).
\textsuperscript{377} See Green v. General Petroleum Corp., 205 Cal. 328 (1928).
\textsuperscript{378} See Mcgee v. Shell Oil Co., 659 So. 2d 812, 813 (La. App. 5th. Cir. 1995).
\textsuperscript{380} See Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965 (1993). The award was not challenged on review. See id. at 980.
\textsuperscript{381} See Varjabedian, 20 Cal. 3d 285. The court also held that the city’s plant operation creating the nuisance may also be a ground for an action for inverse condemnation, where plaintiff’s property was rendered “untenantable for residential purposes” entitling plaintiff to just compensation for the resulting
A dangerous condition created by others, which causes an emergency and renders the continued occupation of citizens in their homes unsafe, is a "partial eviction" of citizens from their property.\(^{382}\) A partial eviction can also occur when the dangerous condition destroys the citizens' use and enjoyment of their property. In any hazmat incident, citizens in fear for their own and their family's safety typically would seek the safety of their homes, offices, or schoolrooms. They typically would also attempt to depart and evacuate from the scene of a hazmat release, as a reasonable precautionary measure, even without a governmental shelter in place or evacuation order. This resulting disruption in the citizens' lives is a detriment that is reasonably foreseeable by hazmat handlers.

Similarly, the regularity of hazmat incidents and releases of toxic chemicals from facilities which travel offsite and impact communities by way of repeated exposures and injuries unnecessarily inflict extreme pressure and fear in the lives of the people in the community. Such insult should be compensated.

3. Mental and Emotional Suffering

A plaintiff may only recover for serious emotional distress.\(^{383}\) However, fear and anxiety may arise during the toxic episode, as well as after.\(^{384}\) Indeed, in some communities that exist in the shadow of frequent hazmat episodes, such as Richmond, California, fear and anxiety may exist even before a toxic episode. As addressed by the House of Representatives Investigative Report of the General Chemical Release:

Contra Costa County in Northern California is one example of a densely populated community coexisting with heavy industry. Accidents are commonplace; since 1980 the County's Hazardous Materials Unit has responded to 35 accidents, and there have been several more less serious incidents. One of the most dangerous accidents occurred on July 26, 1993 when oleum leaked from a tank car during unloading at General Chemical's Richmond facility. A toxic sulfuric acid cloud measuring several

\(^{382}\) See McIvor v. Mercer-Fraser Co., 76 Cal. App. 2d 247, 253 (1946).
\(^{383}\) See Potter, 6 Cal. 4th at 989 n.12; see also 2 COMM. ON STANDARD JURY INSTRUCTIONS, supra note 163, §§ 12.72-12.73, 12.80.
\(^{384}\) See, e.g., Miller, supra note 312, at 688-90 (distinguishing the emotional consequences of toxic torts from those of traditional torts).
miles in size passed over the area, causing alarm, panic and fear. . . .

Contra Costa County has the highest concentration of hazardous materials per square mile of any county in California. The region's residents live daily with the threat posed by these materials. Although the risk of accidents can never be eliminated, all possible steps must be taken to reduce this risk. Steps must also be taken to improve current emergency notification and response procedures. The recommendations outlined in this report should be followed to help achieve these goals.385

Moreover, there are many species of emotional distress. In Pintor v. Ong,386 the court stated that "the injury must be severe, i.e., substantial or enduring as distinguished from trivial or transitory," and further stated that, "[t]he range of injury broadly encompasses . . . all highly unpleasant mental reactions . . ." and "includes fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain."387

a. Psychological Disorders

Claims have been brought for post-traumatic stress disorder ("PTSD") based upon exposure to environmental contaminants.388 PTSD claims involve allegations of distinct and specific mental injury. Essentially, such a claim requires proof that a particular traumatic event, a recognized stressor, would produce significant symptoms of distress in almost everyone experiencing such an event.389 Before recovering for

387. Id. (citing Thing v. La Chusa, 48 Cal. 3d 644, 648-49 (1980); cf. Tuohy, supra note 321
388. See generally National Institute of Mental Health, Facts About Anxiety Disorders <http://www.nimh.nih.gov/anxiety/idx_fax.htm> (identifying and defining "post-traumatic stress disorder" as being "Persistent symptoms that occur after experiencing a traumatic event such as rape or other criminal assault, war, child abuse, natural disasters, or crashes. Nightmares, flashbacks, numbing of emotions, depression, and feeling angry, irritable or distracted and being easily startled are common."). See also Bowler & Schwarzer, supra note 65, at 167-80; M. DORE, LAW OF TOXIC TORTS § 7.02A (1998) (Post-Traumatic Stress Disorder (PTSD)).
389. PTSD patients are described as being "stuck in time and are continually re-
PTSD, a claimant may be obliged to establish the requisite symptoms for PTSD set out in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.\(^{390}\)

Hazmat releases, which a community is repeatedly subjected to, or ones that are of sufficient magnitude as to require preventative and other precautionary measures, arguably constitute psychologically traumatic events because they produce significant symptoms of distress in anyone experiencing such events.\(^{391}\) A person suffering PTSD need not experience a traumatic event but may have witnessed or been confronted with an event that involved actual or threatened death, serious injury, or a threat to the physical integrity of himself or of others, and suffered intense fear, helplessness or horror as a result.\(^{392}\) PTSD can affect young children.\(^{393}\)

b. **Fear of Future Cancer, Serious Illness, or Injury**

The unique nature of toxic torts, particularly the long latency periods associated with cancer (and perhaps other serious diseases)\(^{394}\) has produced claims, not only for actual injuries from exposure, but also for the *increased risk* of developing cancer. Toxic torts also present claims for emotional distress arising from the fear of contracting cancer, and for

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\(^{390}\) See National Institute of Mental Health, *supra* note 388; see also American Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994); Friedman, *supra* note 389.


\(^{392}\) See Friedman, *supra* note 389.

\(^{393}\) See id.

\(^{394}\) See Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 980 n.5 (1993) ("[W]hile plaintiffs identified fear of cancer as the principal basis for the emotional distress claim at issue, our discussion is equally relevant to emotional distress engendered by fear that other types of serious physical illness or injury may result from toxic exposure.").
medical monitoring to detect the onset of such diseases.\textsuperscript{396}

As a result of the latency period within which some symptoms manifest, victims may wait months, years, or even decades while tests and examinations are conducted to determine whether they have life threatening diseases resulting from hazmat exposure.\textsuperscript{396} Another difficult question in the toxic tort context is whether the passage of time can serve to make causation too remote to permit imposition of liability.\textsuperscript{397} Some authorities comment that the lapse of considerable time during which a negligently created condition remains static will not negate liability.\textsuperscript{398}

Claims for fear of cancer seek damages for the emotional distress suffered. Damages for emotional distress for fear of cancer in the absence of a present physical injury or illness may be recovered only if a plaintiff proves that (1) as a result of defendant's conduct, plaintiff is exposed to a toxic substance that threatens cancer, and (2) plaintiff's fear stems from a knowledge, corroborated by reliable scientific and medical opinion, that it is more likely than not that the plaintiff will develop cancer in the future due to the exposure.\textsuperscript{399} Toxic exposure is required, but the exposure itself is not enough to establish the reasonableness of fear of cancer.\textsuperscript{400} The standard of proof is lower; a claim for fear of cancer or other serious

\textsuperscript{395} See generally ENVIRONMENTAL LITIGATION, supra note 178, at 130-31.


\textsuperscript{397} See, e.g., Dillon v. Legg, 68 Cal. 2d 728, 741 (1968) (stating that a cause of action for emotional trauma should be sustained whenever the injury was reasonably foreseeable, "excluding the remote and unexpected").

\textsuperscript{398} See KEETON ET AL., supra note 233, at 277-78; RESTATEMENT (SECOND) OF TORTS § 433(c) (1984); see also Lineaweaver v. Plant Insulation Co., 37 Cal. Rptr. 2d 902, 906-09 (Cal. Ct. App. 1995) (stating several considerations in establishing causation) (citing RESTATEMENT (SECOND) OF TORTS § 433(c)). In the asbestos exposure context, the plaintiff must show that exposure was a substantial factor in contributing to his injury, and plaintiff who, inter alia, worked with or near asbestos product over 30 years showed sufficient evidence from which inference of causation could be made.

\textsuperscript{399} See Potter, 6 Cal. 4th at 997.

\textsuperscript{400} See id. at 989.
injury may be made without demonstrating that cancer is more likely than not to occur where it is pleaded and shown that the defendant’s conduct in causing the exposure amounts to oppression, fraud, malice, or “despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.”

More is required, however, than mere proof that the defendant acted with oppression, fraud, or malice. The plaintiff must demonstrate that his fear of cancer is “reasonable, genuine and serious,” and the fear must stem from knowledge, corroborated by reliable medical or scientific opinion, that the toxic exposure has “significantly increased the plaintiff’s risk of cancer and has resulted in an actual risk of cancer that is significant.” The standard of proof is the same in the event defendant is liable for intentional infliction of emotional distress as a result of defendant’s “extreme and outrageous conduct,” or when the defendant has acted oppressively, fraudulently, or maliciously, and even when there is technical battery.

If a person intends to injure or to inflict emotional distress upon another by poisoning, and there is no scientific proof that the victim was injured, then the victim, following the rule of Potter, would have no cause of action for negligent or intentional infliction of emotional distress. Such a result is hard to comprehend.

The real question in toxic tort cases is whether it is advisable to claim the “fear of developing cancer or other serious injury” type of emotional distress damages and accordingly be saddled with the stringent burden of producing reliable scientific proof of injury. If that specie of emotional

401. _Id.; see also_ CAL. CIV. CODE § 3294(c)(1) (West 1999).
402. _Potter,_ 6 Cal. 4th 999-1000.
403. _Id. at_ 1003-04.
405. The main issue on review in _Potter_ was “whether emotional distress engendered by fear of cancer or other serious physical illness or injury” may be recovered in a negligence action. _Potter_ 6 Cal. 4th at 973. The trial court in _Potter_ had awarded “psychiatric illness” damages ($269,500) to the plaintiffs separate and distinct from the fear of cancer damages awarded ($800,000). _Id. at_ 980. Firestone did not offer any argument other than its “perfunctory claim that the psychiatric
distress is neither claimed nor pleaded as a matter of tactical choice, the question is whether a claim for other serious emotional distress suffered as a result of the toxic exposure remains viable. Conversely, in the absence of present injury the question would be whether fear of future consequences remains the only detriment in every toxic exposure case in which the Potter standard would apply. An affirmative answer would consequently leave plaintiff without recourse.

For example, compare Potter with Wooden, which involved a plaintiff's contemporaneous fear for her safety from a threatened impact by an automobile negligently driven by defendant. In that case, there was no discussion as to the nature or seriousness of the injury from the threatened automobile impact, but the court nevertheless permitted emotional distress damages for plaintiff's fear for her own safety. Thus, in a negligence case, a plaintiff has a right to recover damages for fright, shock, and nervous distress when the negligent conduct of a defendant places the plaintiff personally at risk and causes the plaintiff to reasonably fear for his own safety. This is true even in the absence of any injurious impact.

Just as the plaintiff in Wooden was entitled to recover emotional distress damages, so must a person who is in danger of hazmat exposure or who is actually poisoned by hazmat as a result of a defendant's negligent conduct. These plaintiffs should be able to recover emotional distress damages, even though the conduct did not result in actual physical injury. In such a hazmat incident, the plaintiff is a direct victim who has been exposed to toxins and who personally will suffer the risk of physical injury as a result of defendant's conduct. The result in Potter is to give the individual victim of a toxic tort less protection than would be accorded the victim of a traditional course of negligent conduct.

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406. The California Supreme Court in Potter treated "fear of cancer" damages as a distinct form of distress, emphasizing that "the only damages at issue here are the fear of cancer component of the emotional distress award . . . ." Id. at 980 (emphasis added). See also Miller, supra note 312, at 684 (a particular type of emotional distress common to toxic exposure cases is the anxiety or worry over contracting a disease in the future, or fear of future harm, a "subset" of emotional distress).


408. See Potter, 6 Cal. 4th at 1020.
A direct victim who suffers physical injury is entitled to recover all reasonably foreseeable damages, including damages for emotional distress resulting from witnessing injuries to a third person, related or not. The category of tort would not be based upon the bystander theory, but on a direct victim case. In such a case, a relationship between the plaintiff and the third party injured is “relevant only in determining the validity or severity of the claimed emotional distress.”

Extending this analysis, inasmuch as the plaintiff in Wooden was a direct victim entitled to recover emotional distress damages for fear of the danger to her safety from the defendant's negligent conduct, the above principle can be applied to her so as to allow her an additional recovery for emotional distress claims for her fear in seeing others suffer. In other words, emotional distress from seeing others injured is available as a consequential injury to all direct victims, whether or not they are physically injured. No published case has dealt directly with this issue in a negligent toxic tort context.

However, in a nuisance case, it is well settled that where tortious conduct causes mental suffering and emotional distress, the plaintiff is entitled to recover for the mental suffering. In Acadia, the defendant tortiously breached an agreement by shutting off plaintiffs' water supply. The disruption of the water supply was a nuisance, and it interfered with the use and enjoyment of the land by the plaintiff and his wife, who consequently suffered a relapse of her mental illness. The husband was awarded emotional distress damages for his observation of his wife's mental suffering.

409. See CAL. CIV. CODE § 3333 (West 1997).
411. As observed by the court, "once a plaintiff has been negligently placed within the area of physical risk and has actually sustained a physical impact, his cause of action for emotional distress is not limited to the psychological sequelae which as a matter of reasonable foreseeability result from the episode as a whole." Id. at 107-08 (citing Eyrich v. Dam, 473 A.2d 539, 564 (N.J. Super. Ct. App. Div. 1984)).
412. Id. at 107.
413. See Acadia, Cal., Ltd. v. Herbert, 54 Cal. 2d 328, 337-38 (1960).
414. See id. The California Supreme Court recognized that the discomfort and annoyance to a plaintiff as a result of a nuisance is separate and distinct from the mental suffering of fearing for the safety of others (plaintiff's wife):

It is settled that, regardless of whether the occupant of land has sustained physical injury, he may recover damages for the discomfort
Severe emotional distress damages for fear of one’s safety and for the safety of one’s family (as in Acadia) are thus recoverable even in the absence of physical injury. Severe emotional distress experienced upon discovery that one or one’s family had historically consumed toxic and carcinogenic substances in a contaminated water supply (as in Potter) presents a worse scenario than that in Acadia. Yet, the Potter court, because it involved a negligence claim only, restricted recovery of emotional distress damages (for fear of cancer) because there was no physical injury.

A family that consumes contaminated water for twenty years and later discovers this fact is most certain to suffer severe emotional distress. The family then has to undergo tests and examinations to determine whether they have been injured or not. A lay person’s perceptions of the consequences of his toxic exposure lack medical or scientific input. Such a family will languish, not knowing whether they will suffer any life-threatening or debilitating injury in the future. Following disclosure of the hazmat exposure, the family predictably will experience a traumatic episode, and until any present and future injury is ruled out, the family will have to further endure the uncertainty of their lives. Emotional distress damages have been awarded in circumstances involving less toxic or non-life-

\textit{and annoyance} of himself and the members of his family and for mental suffering occasioned by fear for the safety of himself and his family when such discomfort or suffering has been proximately caused by a trespass or nuisance. 

\textit{Id.} at 337 (emphasis added).

415. \textit{See} Miranda v. Shell Oil Co., 26 Cal. Rptr. 2d 655 (Cal. Ct. App. 1993). Anyone exposed to toxins and hazmat and who suffers no observable physical injury but must undergo medically necessary tests to determine whether injuries exist, may recover any costs incurred as damages. Therefore, although no physical injury is present, substantial compensable damages accompany the emotional distress suffered as a consequence of the toxic exposure. \textit{See id.} at 672-73.

416. It is in the context of this hazmat poisoning that aggressive management and scrutiny is important to identify early the onset of symptoms or changes, be they physiological or psychological, attributable to the exposure, particularly in young children. Medical monitoring as a consequence of the exposure may be required for years. \textit{See, e.g.,} J. Routt Reigart & James R. Roberts, \textit{Recognition and Management of Pesticide Poisonings} (5th ed. 1999) (in collaboration with the Certification and Worker Branch, Field and External Affairs Division, Office of Pesticide Programs, U.S. Environmental Protection Agency). Both authors are pediatricians specifically focusing on the impact of pesticidal exposure on children and their implications. Needless to say, many such neurological, psychological, physiological, and other developmental implications, \textit{per se}, may well trigger parental emotional distress.
threatening ingestion or exposure. For instance, judicial notice has been accorded by the courts to the fact that a normal person will suffer emotional disturbance by seeing a repulsive looking object in a bottle which she had just drunk which may and often will result in nausea or produce other discomfort or more serious results.\textsuperscript{417} It is significant that judicial notice of the resultant emotional disturbance was accorded by the court in response to the argument that there was no evidence that the contents of the bottle were deleterious or harmful, or that no damages could be recovered unless a party was actually poisoned or was injuriously affected by the drink.\textsuperscript{418} A \textit{fortiori}, the shock and horror experienced in learning of one’s exposure to carcinogens or harmful substances by drinking contaminated water or by inhaling polluted air or through other media are a proximate result of the exposure and a detriment to the well-being of an individual that just cannot be ignored. Toxic hazmat is insidious and life threatening and not merely offensive to sensitivities.\textsuperscript{419} Individuals and families caught in an isolated hazmat release, such as a toxic cloud, will no doubt experience the same anguish as those whose sensitivities are offended.

Even if the threat of cancer or other serious injury were eventually dispelled, the family already would have suffered emotionally and mentally.\textsuperscript{420} During this interlude, the victims suffer the same emotional distress as a person who is later determined to have a “more likely than not” chance of developing cancer in the future. Furthermore, there is no relief to the victim who learns that he has only a forty-nine or thirty percent chance of developing cancer. The \textit{Potter} court did not


\textsuperscript{418} See Moss, 103 Cal. App. 2d at 383 (citing Medeiros, 57 Cal. App. 2d at 714).

\textsuperscript{419} See Tuohey, supra note 202, at 34; see also Walter M. Rogers, \textit{It’s All Right to Kill People, but Not Trees}, 66 NOTRE DAME L. REV. 893 (1991).

\textsuperscript{420} In Lexton v. Orkin Exterminating Co., 639 S.W.2d 431 (Tenn. 1982), plaintiffs who unknowingly ingested water contaminated with chlordane, a highly toxic substance, were allowed to recover damages for mental suffering as a result of their natural concern and anxiety over the harmful effects of the substance to their own health and the health of their children. Damages for mental anguish were \textit{limited} to the time between the discovery of the ingestion of the toxic substance and the time of the negative medical diagnosis or other information that put to rest the fear of injury.
erect the unrealistically high standard on the basis that emotional harm could not have resulted from defendant’s conduct. The Potter majority acknowledged that it would be reasonable for a person who ingested toxic substances to harbor a genuine and serious fear of cancer, stating that “we would be very hard pressed to find that, as a matter of law, a plaintiff faced with a 20 percent or 30 percent chance of developing cancer cannot genuinely, seriously and reasonably fear the prospect of cancer.”421 It concluded that the standard it was establishing would “foreclose compensation to many persons with genuine and objectively reasonable fear.”422

California recognizes a cause of action for a parent or other close family member who witnesses tortious physical injury to her family member. By the same token, if a close family member witnesses the tortious envelopment of her relative in a cloud of poisonous gas, or learns that she unwittingly witnessed her child drink poisonous water or play in contaminated soil for years, an action for emotional distress is warranted.

In the final analysis, is there a distinction between the emotional distress resulting from the threat posed by a hazmat release for which an action would lie, as compared with that which results from a long term, insidious hazmat exposure, and its sequelae? In either case, the victim and the victim’s family should be entitled to their damages for their respective emotional distress just as in any other tort. The only distinction may be a visual one in that the victim in a hazmat exposure may not necessarily manifest an immediate physical injury, whereby both he and his family thereafter are reduced to waiting for the symptoms.

Some authors have commented that the “more likely than not” threshold is an arbitrary barrier set up by the Potter court to establish a “bright-line” rule which takes away the issue of the reasonableness of the fear from the jury and whose purpose is “to avoid the difficulties of adjudicating claims on their merits.”423 It is clear that the unsympathetic analysis given by the Potter court was meant to categorically restrict emotional distress claims in negligence cases, using policy arguments that an unrestricted class of plaintiffs would overburden the judicial process.

422. Id. at 993.
423. Miller, supra note 179, at 705; see also Donovan, supra note 179, at 1391.
Potter, unlike Acadia, did not deal with a nuisance or trespass cause of action and its ramifications. Expressly citing Acadia, the majority in Potter acknowledged that emotional distress damages would be recoverable without physical injury when caused by a nuisance condition or trespass. Had Potter involved a nuisance or trespass cause of action, the result could have been different. The Potter majority took great measures to limit its holding allowing the recovery of emotional distress damages to an action based solely upon negligence. The court meticulously avoided addressing the issue of whether such damages could be recovered based upon intentional misconduct. For instance, in attempting to carve out an exception to the "more likely than not" threshold, the court suggested looking at the "totality of circumstances" in "evaluating a defendant's conduct." The plaintiffs in Potter contended that the "more likely than not" threshold should not apply where a defendant violates a statute or regulation prohibiting the disposal of toxins. Ignoring its own guidance to consider the "totality of circumstances," the California Supreme Court stated that any exception to the rule should not focus on "intentional violators of the law." Surprisingly, the court downgraded the significance of the defendant's intentional conduct by offering this rationale as to why it should not be an exception: "For one thing, while a defendant may be aware that its conduct is wrong and potentially dangerous, it may not have

424. See Potter, 6 Cal. 4th at 986 n.10.
425. The dissent stated:
   The existing tort of nuisance is also available for cases, like this one, in which the improper handling of toxic wastes has contaminated a property owner's source of drinking water. This court has previously remarked, in the context of a nuisance action, that emotional distress occasioned by fear of disease resulting from drinking contaminated water is compensable "at least where . . . the tortious acts are willful." Id. at 1016 n.1 (Kennard, J., dissenting) (emphasis added) (quoting Acadia, Cal., Ltd. v. Herbert, 54 Cal. 2d 328, 338 (1960) (citations omitted).
426. See id. at 1013. "(C)reating an anomalous new cause of action in negligence requiring proof of malicious conduct. When a defendant acts with conscious disregard of the plaintiff's health and safety and exposes the plaintiff to toxins, the plaintiff may state a claim for intentional tort." Id. (Mosk, J., concurring in part and dissenting in part). "The majority properly recognizes and applies the principle that greater moral fault justifies increased liability for resulting harm, but it unaccountably fails to recognize that liability premised on proof of malice is not liability for negligence." Id. at 1019 (Kennard, J., concurring in part and dissenting in part).
427. Id. at 998.
428. Id.
knowledge of a particular statute or regulation proscribing it.” Alternatively, the California Supreme Court further speculated, “There may be times where a defendant does not specifically intend to violate the law, yet the defendant proceeds to act egregiously in conscious disregard of others.”

For anyone to speculate about defendant’s conduct and knowledge is, under the facts of Potter, tenuous at best. First, the Potter court already found that Firestone engaged in intentional misconduct in that it “actively discouraged compliance with its internal policies and California law” prohibiting the disposal of Firestone’s hazardous wastes at a Class II landfill. It also found Firestone’s conduct was perpetrated “solely for the sake of reducing corporate costs.” The facts were enough to bring Firestone’s conduct under the “oppression, fraud or malice” rule. Second, the Potter majority expressly found that Firestone was aware of the proscriptions on waste disposal, and found that its management was specifically informed by a plant engineer responsible for environmental matters that Firestone’s waste disposal policy “was required by California law.” Third, ignorance of the law is no excuse. Section 668 of the

429. Id.
430. See Potter, 6 Cal. 4th at 976. The California Supreme Court found the salient facts regarding Firestone’s misconduct to include that the landfill at which Firestone disposed its wastes is a Class II landfill. Unlike sites classified as Class I, a Class II landfill is prohibited from taking toxic substances and liquids because of the danger that they will leach into and contaminate groundwater. Firestone was informed of the prohibitions at the outset. Firestone’s internal policy was to take its waste to a Class I dump site. This policy was required by California law. Ignoring its policy and the law, Firestone dumped its liquid and toxic wastes at the Class II landfill to reduce its costs. See id.
431. Id. at 977. Such a finding of illegal cost reduction efforts might justify a cause of action for unfair business practices and false advertising as well. See CAL. BUS. & PROF. CODE § 17200 (1997).
432. See Potter, 6 Cal. 4th at 1000.
433. Id. at 976. See also id. at 1018 (Kennard, J., concurring in part and dissenting in part) (describing Firestone’s conduct as a “flagrant and willful violation of environmental laws and regulations designed to protect public health”).
434. See People v. Snyder, 32 Cal. 3d 590, 592-93 (1982) (“It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof.”); see also Pintor v. Ong, 259 Cal. Rptr. 577, 579 (Cal. Ct. App. 1989) (arguing the duty of care arising from a statute is absolute; the violation of a statute is a tort and a defendant who violates a statutory duty is liable for all consequences of his conduct whether anticipated or not; in this case, defendant was liable for plaintiff’s emotional distress even in the absence of physical injury). In a nuisance context, at common law, conduct resulting in a public nuisance is an interference with the public right and constitutes a criminal offense. Moreover, it
California Evidence Code unequivocally provides: “An unlawful intent is presumed from the doing of an unlawful act.” As discussed, evidence in *Potter* pointed to Firestone’s willful misconduct and violation of the law. No evidence showed that it was otherwise sufficient to overcome the presumption of law. Despite finding that Firestone acted reprehensibly and in conscious disregard of the rights and safety of others, the California Supreme Court again underscored the fact that it was dealing with a negligence case. It stated, *inter alia*, that, “punitive damages may be assessed in cases on unintentional tort actions under Civil Code section 3294.4.”

The “guarantee of genuineness” requirement to meet the standard of proof required to support a claim of mental distress considers a defendant’s conduct. Intentionally inflicted emotional distress is a traditional guarantee of the genuineness of a plaintiff’s claim for emotional distress, as well as a built in inhibitor of proliferating lawsuits. When the nature of these toxic torts is considered in combination with the other circumstances present, a plaintiff’s right to recovery simply cannot be seriously questioned. Where the toxic tort is a result of intentional conduct of the defendant, such conduct by itself may well be sufficient to establish the genuineness of the emotional distress claim.

also constitutes a tort. *See id.; see also* Leslie Salt Co. v. San Francisco Bay Conservation & Dev. Comm’n, 200 Cal. Rptr. 575, 584 (Cal. Ct. App. 1984) (citing RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1984)). Where specific conduct is proscribed by statute, consistent with common law, a defendant may be held in violation of the statute “even though his interference with the public right was purely accidental and unintentional.” Leslie Salt, 200 Cal. Rptr. at 584. Thus, whether the context be civil or criminal, in the event of a violation of a statute, liability is strictly imposed. *See id. at 585-86; People v. Chevron Chem. Co., 191 Cal. Rptr. 537 (Cal. Ct. App. 1983) (criminal).*

435. *Potter*, 6 Cal. 4th at 1004; *see also id.* at 1000 n.20 (stating that the burden of proof is a preponderance of the evidence for a plaintiff to recover compensatory damages “when a defendant has acted with ‘oppression, fraud or malice’ to negligently inflict emotional distress” (emphasis added)).

436. *See, e.g.*, Mercado v. Leong, 50 Cal. Rptr. 2d 569, 574 (Cal. Ct. App. 1996); State Rubbish Collectors Ass’n v. Siliznoff, 38 Cal. 2d 330 (1952); Emden v. Vitz, 88 Cal. App. 2d 313 (1948); *see also Potter*, 6 Cal. 4th at 976; Thing v. La Chusa, 48 Cal. 3d 644 (1980).


438. *See, e.g.*, Acadia, Cal., Ltd. v. Herbert, 54 Cal. 2d 328, 337-38 (1960) (holding that the defendant acted with malice or intent to oppress and was liable for punitive damages and for the emotional distress suffered by a husband and wife even in the absence of physical injury; the plaintiff's distress was proximately caused by the defendant's wrongful acts, and therefore, it was immaterial whether the defendant knew of the wife's unstable mental condition).
At common law, in actions for the torts of assault, slander, or libel per se, recovery was permitted for mental distress without the need to show physical or financial injury.439 Where these torts have been committed, the genuineness of mental distress is guaranteed by the nature of the tortious conduct itself because any reasonable person would suffer mental distress as a result of such acts. Indeed, as the California Supreme Court explained in Molien, any intentional tort "will support an award for emotional distress alone, but only in cases involving 'extreme and outrageous invasions of one's mental and emotional tranquility.'"440 In such cases, "it is the outrageous conduct that serves to insure that the plaintiff experienced serious mental suffering and convinces the courts of the validity of the claim."441 In other words, "[t]he outrageousness is considered a sufficient screening device in itself so that the other screening mechanisms can be eliminated without raising fears of frivolous claims and a flood of litigation."442

VI. CONCLUSION

Starting with the Industrial Revolution, through the end of the Twentieth Century and beyond, American industry successfully socialized many of its costs, such as hazmat disposal of solid wastes, emitting air pollution from smokestack facilities and vehicles, and the diversion of industrial wastes to (public) municipal waste treatment facilities. At the same time, it privatized profits, which resulted in part from such cost cutting and saving.443 Toward the end of the Twentieth Century, it became apparent that many of these socialized, publicly underwritten or absorbed costs were no longer tolerable and were to be replaced with industrial user fees, stronger environmental law enforcement, increased fines, and civil liability, as matters of public policy.

Governmental institutions, including courts and

439. See Thing, 48 Cal. 3d at 648-50; see also KEETON ET AL., supra note 233, § 10, at 43, § 112, at 794-95.
441. Id.
442. Terry M. Dworkin, Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora’s Box?, 53 FORDHAM L. REV. 527, 558 (1984); see also Thing, 48 Cal. 3d 644, 649.
443. For an excellent discussion on these issues, see Melosi, supra note 274.
legislatures, tolerated toxic abuses. Sometimes this occurred because of occasional war research and productive imperatives, and always because of the political rationalization of a full working economy. Ironically, a portion of the employment sector now consists, and for the foreseeable future will consist, of an "aftermarket" directed toward detecting, undoing, and remedying much of that damage.

Legal precedents such as Venuto, and statutory limitations such as public nuisance liability (immunity),\textsuperscript{444} are tantamount to granting immunity from damages. They should now be revisited and remedied. Public policy, such as that set forth in Potter, needs to be fully clarified by the courts, if not modified by the legislature.

An effective, democratic and uniform judicial system with bright line tests is an alternative to subjective, inconsistent judicial "gatekeeping" and "public policy" pronouncements, \textit{ex cathedra}, in toxic tort litigation. This is particularly true where the public is unfairly made to bear the economic detriment and emotional distress of an industry's, and sometimes the government's, tortious conduct involving releases of hazmat. Such circumstances are hardly consistent with the social contract theory and, indeed, are detrimental to a vulnerable sector of society all too often reduced to living in proximity to hazmat point sources.

In a hazmat incident, sheltering in place, evacuation, disruption, and other detriment to the lives of people in the affected community are the foreseeable consequences of the conditions created by the hazmat handler or, more accurately, mishandler. If legal process can effectively address minor consumer claims by way of class actions and other consumer legal remedies, wherein class members receive several dollars each,\textsuperscript{445} then the legal system can and should deal equally well with mass toxic tort claims, however minor such claims ultimately may prove to be.

In California, such a judicial pursuit in hazmat litigation is consistent with express constitutional guarantees possessed by


the People as their “inalienable rights.” “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” In the final analysis the question often becomes: to what extent should the court’s “gatekeeper” function impede a victim with modest economic detriment or emotional distress from proceeding to trial and obtaining a jury determination of the full measure of that victim’s damages?

In instances of scaled-down damages in some hazmat exposures, which often evolve out of dramatic, and sometimes horrific, episodes, there nevertheless are certain mechanisms available with which to measure such damages, however modest they may be. Judicial approaches constantly are being fashioned and modified so that such damages can be adjudicated effectively, the number of plaintiffs notwithstanding. Some of these approaches include the utilization of aggregation or mass toxic tort congregation of multiple plaintiff claims by direct group actions collectively designated as “complex litigation,” class action, consolidation, coordination, concerted action, small claim actions, global resolutions providing for fluid recovery


447. See generally Cooper, supra note 338; RHEINGOLD, supra note 327. See also Library of Congress Catalog Card No. 96-85345 (1996); Boston, supra note 42.

448. See RHEINGOLD, supra note 327; Library of Congress Catalog Card No. 96-85345 (1996).


450. See CAL. CIV. PROC. CODE § 382 (West 1872); FED. R. CIV. P. 23. See generally Coffee, supra note 337.

451. See CAL. CIV. PROC. CODE § 1048 (West 1971); see, e.g., Rutherford v. Owens-Corning Ill., Inc., 16 Cal. 4th 953 (1997); Cottle, 5 Cal. Rptr. 2d at 883; cf. FED. R. CIV. P. 42(a).

452. See CAL. CIV. PROC. CODE §§ 403 et seq. (West 1996); CAL. R. CT. 1500 et seq. (2000); see also CAL. GOV'T CODE §§ 68070 et seq. (West 2000).


funds, and trust funding for subsequent injuries. Certainly, exemplary or punitive damages remain an option where appropriate because the rights and safety of others manifestly are involved in many toxic episodes.

While such mechanisms may be available, subject to the litigants’ fundamental constitutional rights and safeguards, basic procedural and substantive rights remain unclear. This is a result of confusing decisions, such as the stated public policy arguments favoring insurers expressed in *Potter* and the exercise of the court’s “inherent powers” expressed in *Cottle*, to create a “quasi-summary judgment” concealed in the form of a motion *in limine*. The dissenting opinions in both decisions eloquently state misplaced priorities and inherent dangers. It is reasonable to anticipate that, when future courts or legislatures revisit *Potter* and *Cottle*, they will do so with more circumspection and the benefit of more caselaw.

In analyzing *Potter*, it is worthwhile to again review what the *Potter* court expressly stated it was not reviewing. It was not reviewing the award for the general disruption to plaintiffs’ lives, the psychiatric illness *component* of the emotional distress award, nor any legal theories, other than negligence.

*Potter* was a negligence case only, and the complaint did not plead nuisance, assault, or trespass. Even here, however, the *Potter* court concluded that plaintiff’s foreseeability might be a factor. Such an approach is tantamount to shooting an arrow into the air and being exonerated because the stricken plaintiff was not known or contemplated by the shooter, i.e., random victims would be without remedy.

What *Potter* did address was damages for emotional distress solely for fear of developing cancer or other serious illness, which might arise in the future. In this narrow subset, the *Potter* court concluded that such a fear must be based upon a condition established by scientific and medical evidence that it is “more likely than not” to occur. Therefore, the *Potter* court implicitly also was not reviewing emotional distress *already* suffered.

Such past and present emotional distress can be predicated


456. See CAL. CIV. CODE § 3294 (West 1905).

upon a severe fear or anxiety of one’s safety and for the safety of one’s family members contemporaneously experienced in a single toxic cloud incident or upon belatedly learning that one or one’s family was historically impacted by contaminated soil or water. A toxic exposure will not always place the victim at risk for cancer or disease. However, between the time of exposure and definitively learning from scientific and medical experts that such a result is not more than likely to occur, a plaintiff nevertheless would be agonizing over the consequences of his toxic exposure.

For many victims, this emotional distress may be their worst injury. Between the two milestones in time, a victim of toxic exposure should be entitled to compensation for all emotional distress suffered for his own safety and for that of his family.

It has been suggested that Potter lets plaintiffs fall back on the alternative cause of action predicated upon a current physical injury, but the Potter court left unresolved the definition of a physical injury (as it relates to cellular damage or injury to the immune system). That issue has now been decided in Duarte v. Zachariah, which held that damage to the immune system is physical harm.

Thus, the narrowly restrictive nature of Potter may be its saving aspect. Potter appears to be limited to actions based only upon a negligence theory, and the restrictions to recovery of emotional distress relate to the “fear of cancer and other serious illness or injury” component of emotional distress. As Potter acknowledged, there is sufficient basis in nuisance law for a victim to recover emotional distress damages, even including a “fear of cancer or other serious injury” claim, despite the absence of injury.

These nuisance cases allow recovery for damages for “discomfort and annoyance” as well as damages for “mental suffering” occasioned by fear over the safety of others. This is somewhat of a hybrid “direct victim” and “bystander” claim. Furthermore, there are non-impact, non-injury cases that correctly apply negligent tort principles and allow for a victim, who experiences a “fear for his safety,” to recover emotional distress absent physical injury. In these cases, typified by

458. See Donovan, supra note 179.
460. See supra Part IV.F.
Wooden v. Raveling, recovery has been allowed without the burden of proving the nature of the injury that might have occurred or the medical probabilities of the injury developing. The tort principle of authorizing recovery for emotional distress when a plaintiff is personally endangered by a defendant’s negligent conduct and suffers serious emotional distress out of fear for his own safety should apply to support a toxic exposure plaintiff’s claim for damages for serious emotional distress as a result of their concern for their own health.

Even short of toxic exposure, the general disruption of a community caused by a hazmat incident represents another detriment that the judicial system should countenance. As shown, the mere threat of harm is sufficient for liability to attach. The inconvenience and constraints on movement to community residents, including making them prisoners in their own homes, and isolating them from relatives and friends, should all be compensable detriment. Freedom to leave one’s house or workplace and to move about at will, with a measure of personal security, is “implicit in the concept of ordered liberty” enshrined in our history and in our Constitution.

In addition to such personal health and safety considerations, fear of an adverse impact upon one’s real property value because of on- and off-site contamination is a platform from which severe emotional distress should become actionable in negligence, nuisance, or trespass. Environmental constraints on the use of real property, the inability to sell, and enjoyment of property constitute a private nuisance.

As the cases show, in the event of a nuisance, emotional distress damages are recoverable, even in the absence of physical injury. Negligence, assault, trespass, or other tortious conduct may well serve as a vehicle for nuisance, although nuisance is a condition and not necessarily an act or omission.

What then are the factors and the reasonable proposals for promoting a judicial system that fully recognizes the detriment that results from a hazmat release and affords relief for the emotional distress suffered by innocent victims?

463. There is, of course, also a fundamental constitutional right of an individual to travel. See Kent v. Dulles, 357 U.S. 116, 125-26 (1958).
First, technological advances dealing with and mitigating hazmat are now such that society should no longer tolerate hazmat contamination impacting innocent victims random or otherwise. More stringent laws and law enforcement, including full compensation for emotional distress created by such abuses, will dissuade further abuses.

Second, the overbroad and highly questionable decision of Venuto must be revisited. The decision addressed whether air pollution constitutes a public nuisance and precluded a private citizen from bringing an action for damages because of the numerosity of potential plaintiffs. The proposition that one relinquishes one's right to seek damages if everyone is damaged simply because it is a public nuisance and creates an immunity from damages, borders on the absurd. The blurred distinction of where a private nuisance ends and a public nuisance begins is questionable, at best, and arbitrary and capricious, at worst. The victim's damage, however, remains constant.

Third, with specific reference to nuisance, hazmat contamination always should be deemed to be a continuing nuisance in that contamination, per se, is against public policy and should be remedied. In Capogeannis, the court stated its public policy considerations:

Our conclusion is influenced primarily by policy considerations identified in Spaulding and cognate cases. First and foremost, today's environmental awareness establishes beyond argument that there is simply no legitimate interest to be served by permitting this contamination to persist. Conversely, the well documented tendency of such contamination to migrate, particularly in groundwater, strongly supports a conclusion that the contamination should be cleaned up as promptly and as thoroughly as possible. Both considerations support application, in this case, of the courts' general preference for a finding of continuing nuisance (or, at least, of a question close enough to empower the Capogeannises to proceed upon that theory). Such a finding will tend to encourage private abatement, and perhaps monetary cooperation in abatement efforts, if only to limit successive lawsuits.464

Fourth, a broader and provocative alternative is to simply

recognize a separate, independent, and free-standing tort of negligent infliction of emotional distress.\textsuperscript{465}

Thus, there are clear indications and opportunities for the Twenty-First Century to be an important and most provocative time for rectifying damage done to our planet, our health, and our safety. We wish our heirs, successors, and assigns the best in such endeavors, for they will succeed only through the legal process.

\textsuperscript{465} See Miller, supra note 179, at 704-05.