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Emotional Distress Damages For Cancerphobia:¹ A Case For the DES Daughter²

Recent years have evidenced an increased dissemination of cancer related information to the public.³ This information explosion is, in large part, a product of increased television, radio and newspaper coverage of the medical field.⁴ As a result of this increased media coverage of cancer, a person could become preoccupied with his or her own cancer risk. Since most people have no objective basis for their fears, any emotional distress suffered due to thoughts of developing cancer is not likely to be legally compensable. This situation, however, is very different for the DES daughter.⁵

The DES daughter is an innocent victim of the harmful effects of Diethylstilbestrol (DES), a drug that was formerly administered to wo-

1. The term cancerphobia appeared in the case *Ferrara v. Galluchio*, 5 N.Y.2d 16, 19, 176 N.Y.S.2d 996, 998, 152 N.E.2d 249, 251 (1958). Cancerphobia was used to describe a phobic reaction or apprehension that was experienced by the plaintiff, due to her fear of contracting cancer in the future. The medical definition of a phobic reaction, however, is the recurrent experience of dread of a specific event or object *in the absence of objective danger*. See P. SOLOMON & V. PATCH, *HANDBOOK OF PSYCHIATRY* 77 (3rd ed. 1974). The term cancerphobia in this comment will refer to an anxiety rather than a phobia. Anxiety is defined as a *normal response* to threats towards one's body, possessions, way of life, loved ones or cherished values. *Id.* at 50.

2. The DES daughter is a term used to describe the female offspring of women who were administered the drug diethylstilbestrol (DES) during their pregnancy. DES was later withdrawn from the market for the use by pregnant women after it was discovered to be associated with abnormalities among the user's offspring. See generally, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 *FORDHAM L. REV.* 963 (1978) [hereinafter cited as Comment, *Enterprise Liability*]; see also Comment, *The DES Labyrinth*, 33 *S.C.L. REV.* 663 (1982) [hereinafter cited as Comment, *Labyrinth*].

3. See generally Goldberg, *Who Knows Best, the Doctor or the Reporter*, 30 *T.V. GUIDE* 43 (Nov. 27-Dec. 3, 1982).

4. See *id.* at 44.

5. See *infra* text accompanying notes 52-57 (discussion of the problems experienced by the DES daughter). The scope of this comment will be focused on the emotional distress suffered by the female offspring of the women who were administered DES. There is some evidence, however, indicating that male offspring may also suffer physical abnormalities of their reproductive system as a result of DES. See Gill, Schumacher & Bibbo, *Structural and Functional Abnormalities in the Sex Organs of Male Offspring of Mothers Treated with Diethylstilbestrol (DES)*, 16 *J. REPROD. MED.* 147, 152-53 (1976). Lawsuits have been initiated by DES sons against the drug manufacturers for damages that resulted from the drug. See Johnson & Dowie, *Revenge of a DES Son*, 8 *MOTHER JONES*, February/March 1982, at 33. A DES son faces the possibilities of developing testicular cancer, a disease that results in the removal of his testicles. See Sacramento Bee, Jan. 8, 1983, at 11, col. 2. For the purposes of this comment, the cause of action for the negligent infliction of emotional distress that is made for the DES daughter may also apply to the DES son.

men during pregnancy to prevent miscarriages.⁶ Once DES is administered to pregnant women, the drug permeates the fetus resulting in a 100 times greater risk of contracting the deadly cancer, clear-cell adenocarcinoma, among the daughters exposed to DES *in utero* than among the general population.⁷ After learning that she faces an increased statistical likelihood of contracting vaginal cancer, the DES daughter may become anxious and emotionally upset despite not having discovered any physical signs of cancer.⁸ The cause of her emotional distress is the knowledge that she belongs to a special class of women more likely to suffer one of several abnormalities of her reproductive organs than is the general population.⁹ This emotional distress, however, derives not only from her fears of contracting the deadly cancer, but also from her fears of the treatment and consequences of the cancer.¹⁰ The treatment in virtually all cases is radical surgery and a major consequence of the surgery is the possibility of becoming sterile.¹¹

Since the discovery of the relationship between the use of DES and cancer, the manufacturers of DES have been subjected to numerous lawsuits instituted by DES daughters who suffered a physical injury linked to their prenatal exposure to the drug.¹² Although these DES daughters have fought an uphill battle in litigation against the drug manufacturers for personal injury damages, a few DES daughters have overcome the many legal barriers to win compensation for their physical injuries.¹³ The California Supreme Court has been a leader in affording DES daughters their day in court.¹⁴ In particular, the court instituted an innovative tort theory to help the DES daughter prove her case against the drug manufacturers.¹⁵ To date, however, there has been no legal recourse for the DES daughter cancerphobia claimant

6. See *infra* text accompanying notes 20-22.

7. See Comment, *Labyrinth*, *supra* note 2, at 697. This particular fact becomes even more astonishing since clear-cell adenocarcinoma was infrequently reported prior to the DES linked cases. *Id.* There have been more than 400 clear-cell adenocarcinoma cases reported as of 1982. See Johnson & Dowie, *supra* note 5, at 32. DES causes cancer in approximately one to four per thousand DES daughters. See Comment, *Enterprise Liability*, *supra* note 2 at 965.

8. See *infra* text accompanying notes 157-66.

9. See *infra* text accompanying notes 40-51.

10. See *infra* text accompanying notes 40-51.

11. See *infra* text accompanying notes 44-51.

12. There have been estimates that as many as 1,000 lawsuits were in the nation's courts in 1980. See Podges, *DES Ruling Shakes Products Liability Field*, 66 A.B.A. J. 827, 827 (1980). In 1982 there were 373 lawsuits against Eli Lilly & Co. alone. See Johnson & Dowie, *supra* note 5, at 41.

13. See *infra* text accompanying notes 70-103.

14. See *infra* text accompanying notes 88-96. See generally *Sindell v. Abbott Labs*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

15. See *Sindell*, 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

absent the manifestation of a physical injury.¹⁶ The major obstacles in the DES daughter's claim for cancerphobia harbor in her inability to comply with the rigid requirements set forth by previous case law and unfavorable public policy factors.

This comment will determine whether California case law and public policy permits a DES daughter to maintain a cause of action against the manufacturers of DES for negligent infliction of emotional distress resulting from the fear of developing cancer.¹⁷ The emotional distress explored will be the anxiety that results from a DES daughter's fear of developing cancer in the future.¹⁸ This comment will demonstrate that the DES daughter has a viable cause of action regardless of whether she ever develops cancer as a result of DES.¹⁹ A discussion of the drug manufacturers' liability for the physical injuries suffered by the DES daughter will show their legal responsibility to compensate the DES daughter. Following this discussion will be an analysis of the current state of the law in the emotional distress area. The focus of this comment, however, will be upon the application of an emotional distress

16. See generally *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982). This is only one of very few reported cases in which DES daughters attempted to recover emotional distress damages prior to developing cancer. See also *Mink v. University of Chicago and Eli Lilly & Co.*, 77-C-1432 (1983) (The jury returned a verdict against the plaintiff), *Reeves, Fear not Enough*, 69 A.B.A. J. 725, 725 (1983).

17. This comment examines *negligently* inflicted emotional distress. A DES manufacturer can also be held liable on the basis of theories other than negligence. See *infra* text accompanying notes 60-61. This, however, should present no problem for the DES daughter's case for emotional distress. An emotional distress cause of action can also be based upon other tort theories such as strict liability and warranty. See *Shepard v. Superior Court*, 76 Cal. App. 3d 16, 21, 142 Cal. Rptr. 612, 615 (1977). The court in *Shepard* stated that the basis for permitting a cause of action on these other theories is that a person's emotional distress is just as foreseeable in a cause of action based on defects in manufacture or design, as it is for negligence. *Id.* at 21, 142 Cal. Rptr. at 615. The Supreme Court of Iowa similarly held that a cause of action for emotional distress would lie when a court held a defendant liable based on strict liability or breach of warranty theories. See *Walker v. Clark Equipment Co.*, 320 N.W.2d 561, 563 (Iowa 1982).

18. RESTATEMENT (SECOND) OF TORTS §46 comment j (1965), defines severe emotional distress as "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."

19. The focus of this comment will be on the cancerphobia cause of action initiated by the DES daughter. A cause of action for cancerphobia, however, may also arise under similar factual circumstances in which a defendant's wrongful conduct places a plaintiff in fear of a serious physical injury in the future. See, e.g., Comment, *Products Liability of the 1980's: Repose is not the Destiny of Manufacturers*, 61 N.C.L. REV. 33, 35 (1982) (asbestos cases may give rise to cancerphobia causes of action due to the latent nature of the cancer). See generally *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1974); *Vagley & Blanton, Aggregation of Claims: Liability for Certain Illnesses with Long Latency Periods Before Manifestation*, 16 FORUM 636, 637 (1981); Comment, *Labyrinth*, *supra* note 2, at 692-693. Exposure to harmful radiation may also create a situation causing a person to suffer cancerphobia. Currently there is litigation concerning governmental liability for the physical injuries caused by exposure to the atomic testing of the 1950's and 1960's. See L.A. Daily J., Oct. 12, 1982, at 5, col. 3; see also Comment, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 HASTINGS L.J. 933, 938-43 (1981). Lastly, exposure to dangerous chemicals that cause latent physical injuries may also give rise to a cancerphobia cause of action similar to the DES daughter's case. See *In re Agent Orange Product Liability Litigation*, 635 F.2d 987, 989 (2d Cir. 1980) (exposure to the chemical defoliant agent orange); see also *Sacramento Bee*, Dec. 9, 1982, at 19, col. 1 (current cancerphobia litigation resulting from exposure to the chemical DBCP).

cause of action to the DES daughter suffering from cancerphobia. This comment will conclude that a plaintiff can recover for her emotional injuries that occur prior to developing cancer. To provide a clear understanding of a cause of action for cancerphobia, an initial discussion of the drug DES and its effects on the DES daughter is necessary.

DIETHYLSTILBESTROL

An inquiry into the actions taken by the DES manufacturers prior to and during their marketing of DES should demonstrate their culpability. Additionally, this examination into their marketing practices will become helpful in a later discussion of policy limitations on their liability for cancerphobia.

A. Marketing History

Diethylstilbestrol,²⁰ commonly known as DES, is a synthetically produced estrogen that was used extensively by pregnant women from 1947 through 1971 to prevent miscarriages²¹ and spontaneous abortions.²² The drug was developed by British scientists in the late 1930's.²³ Following the development, American drug manufacturers wished to manufacture and market DES in the United States.²⁴ The United States Food and Drug Administration (FDA) regulations required each drug manufacturer desiring to market DES to submit reports to the FDA.²⁵ These reports required manufacturers to conduct their own research on the effects of the drug, a procedure that proved to be extremely expensive.²⁶ Consequently, in 1939, to facilitate the processing of the applications, the FDA adopted a plan allowing the drug manufacturers to pool their data for FDA approval.²⁷ The FDA

20. DES is synthesized from a coal tar derivative and is two and one half times more potent than natural estrogens. See *Bichler v. Eli Lilly & Co.*, 436 N.Y.S.2d 625, 628 (App. Div. 1982).

21. See Comment, *Enterprise Liability*, *supra* note 2 at 963; see also DRUGS IN LITIGATION: DAMAGE AWARDS INVOLVING PRESCRIPTION AND NONPRESCRIPTION DRUGS 110 (2nd ed. 1981); P. RHEINGOLD, DRUG LITIGATION, 107-111 (3rd ed. 1981) (a bibliography of medical articles concerning the state of the art of DES). There is also some evidence that DES was administered to pregnant women to promote healthier babies. Comment, *Diethylstilbestrol: Extension of Federal Class Action Procedures to Generic Drug Litigation*, 14 U.S.F.L. REV. 461, 461 (1980) [hereinafter cited as Comment, *Diethylstilbestrol*].

22. See *Johnson & Dowie*, *supra* note 5, at 30. A spontaneous abortion is defined as an expulsion of a human fetus during the first 12 weeks of gestation, whereas, a miscarriage is defined as an expulsion of a human fetus between the 12th and 28th weeks of gestation. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 5 (1976).

23. See *Bichler v. Eli Lilly & Co.*, 436 N.Y.S.2d 625, 628 (App. Div. 1981). The drug was used as a synthetic estrogen and had many advantages over previously produced synthetic estrogens, mainly DES was easily manufactured and administered, while also being inexpensive to produce. See *Johnson & Dowie*, *supra* note 5, at 30.

24. See *Bichler*, 436 N.Y.S.2d at 628.

25. *Id.*

26. *Id.*

27. *Id.*

adopted the plan and the manufacturers formed the "small committee" to expedite application procedures.²⁸ As a result, DES was approved in 1941 for limited use, however, none of the authorized uses related to pregnancy.²⁹ Not until 1947, after the drug manufacturers filed supplemental applications, did the FDA approve DES for use by women experiencing complications during pregnancy.³⁰ The use of DES by women during pregnancy was, however, approved only on an experimental basis.³¹ The FDA required that DES be marketed with a label warning users of the experimental nature of the FDA approval.³² From the year 1947 through 1971, DES was sold by hundreds of drug companies³³ under nearly 100 brandnames.³⁴ DES was prescribed to an estimated 3 million women in the United States.³⁵

Following the publication in 1971 of several scientific studies linking the use of DES by pregnant women to vaginal cancer in their daughters, the FDA suspended the use of DES by pregnant women.³⁶ The FDA now requires DES to bear a warning label stating that its use by pregnant women increases the risk of vaginal abnormalities in their offspring.³⁷ The effects of these abnormalities vary among DES daughters.³⁸ Most DES daughters will go through life without experiencing any physical side effects from the drug. Those unlucky daughters, however, who do suffer physical injury from the drug are faced with an array of complications. The following section will elaborate on the various complications DES daughters may face.

28. *Id.* The "small committee" consisted of several volunteer representatives of the major drug manufacturers. The committee was chaired by the representative of Eli Lilly & Co. The sole purpose of the committee was to expedite the FDA application procedures. *See also* Comment, *Diethylstilbestrol*, *supra* note 21, at 464.

29. *Id.*

30. *See Bichler*, 436 N.Y.S.2d at 628.

31. *See Sindell v. Abbott Labs*, 26 Cal. 3d 588, 593, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133 (1980).

32. *Id.*

33. The exact number of DES producers within the United States is unknown. The number has been estimated from 94 to as many as 300. *See* Comment, *Enterprise Liability*, *supra* note 2, at 964; *see also* *McCreery v. Eli Lilly & Company*, 87 Cal. App. 3d 77, 81, 151 Cal. Rptr. 730, 733 (1978) (estimated that there were 142 manufacturers of DES). *See* DRUG LITIGATION, *supra* note 21, at 138, for a sample advertisement placed by a DES manufacturer to promote the sale of DES to pregnant women.

34. *See* Johnson & Dowie, *supra* note 5, at 41.

35. *See* Comment, *Enterprise Liability*, *supra* note 2, at 964-65. Some estimates have been as high as 6 million women. *See* Johnson & Dowie, *supra* note 5, at 30.

36. *See* Comment, *Enterprise Liability*, *supra* note 2, at 965-66. DES still is being used for a number of other purposes. *Id.* at 963. Complaints have alleged that as early as 1938 the drug manufacturers were aware of the ineffectiveness of DES as a miscarriage preventative. One published report stated that DES could even cause miscarriage or abortion, not prevent them. *See Bichler*, 436 N.Y.S.2d at 629.

37. *See* PHYSICIANS' DESK REFERENCE 1011 (33rd ed. 1979). Today, Eli Lilly & Co. is the only listed manufacturer of DES. *Id.*

38. *See infra* text accompanying notes 34-57.

B. The Effects of DES

Since 1938, there have been numerous scientific studies examining the harmful effects of DES.³⁹ Recently completed tests demonstrate that from 30 to 90 percent of the women exposed to DES have vaginal adenosis,⁴⁰ a benign condition, and epothelial changes in the vagina and cervix.⁴¹ Vaginal adenosis is almost unknown in the normal population of women in this age group.⁴² A DES daughter in whom adenosis is positively identified must be monitored by bioposy at least twice a year, a procedure that can be both painful and expensive.⁴³

Aside from the benign condition caused by DES, use of the drug also has been linked to vaginal clear-cell adenocarcinoma,⁴⁴ a fast spreading and deadly disease calling for a treatment of radical surgery or radiation therapy.⁴⁵ The benign condition of adenosis is found in over 97 percent of the patients who later develop clear-cell adenocarcinoma.⁴⁶ Due to the malignant nature of clear-cell adenocarcinoma, frequent examinations are required to insure early detection.⁴⁷ If the cancerous condition is detected in its early stages, a hysterectomy and vaginectomy are required.⁴⁸ Surgical treatment of the cancer may cause the DES daughter to suffer from one of several complications.⁴⁹ Some of these complications include lack of bladder control, increased susceptibility to bladder infection, and pain during intercourse.⁵⁰ If the cancer is detected in its later stages, the cancerous condition may result in death.⁵¹

In addition to the severe physical injuries suffered by the DES daughter, she also faces the possibility of suffering emotional harm.⁵²

39. See PHYSICIANS' DESK REFERENCE 1011 (33rd ed. 1979); see also RHEINGOLD, *supra* note 21, at 261 (a sample physician's report on the diagnosis of a woman who has DES related complications). In the 1950's scientific studies reported that DES was not only ineffective as a miscarriage preventative, but that DES mothers had an increased chance of a miscarriage. See Bichler, 439 N.Y.S. 2d at 629, Johnson & Dowie, *supra* note 5, at 32.

40. Andenosis is a tissue placed abnormally in the vagina or cervix which results in greater quantities of benign tissue as risk of malignant change. See Comment, *Enterprise Liability*, *supra* note 2, at 965-66.

41. *Id.*

42. See Ulfelder, *The Stilbestrol-Adnenosis-Carcinoma Syndrome*, 38 *CANCER* 426, 428 (1976).

43. See *Sindell v. Abbott Labs*, 26 Cal. 3d at 593, 607 P.2d at 925, 163 Cal. Rptr. at 133. Women suffering from this disease are required to undergo treatment consisting of cauterization, surgery or cryosurgery. *Id.*

44. See PHYSICIANS' DESK REFERENCE 1011 (33rd ed. 1979).

45. See Comment, *Labyrinth*, *supra* note 2, at 669.

46. See Ulfelder, *supra* note 42, at 428.

47. See Comment, *Labyrinth*, *supra* note 2, at 669.

48. *Id.* at 664.

49. See Comment, *Labyrinth*, *supra* note 2, at 664.

50. See *id.*

51. See RHEINGOLD, *supra* note 21, at 237 (a copy of a letter sent from Eli Lilly & Co. reporting a DES related death to the FDA).

52. See Comment, *LABYRINTH*, *supra* note 2, at 664 "She becomes increasingly depressed

Specifically, she may suffer emotional distress as a result of actually developing vaginal cancer.⁵³ These emotional injuries occur contemporaneously with or subsequent to the physical injuries suffered due to the cancer and its treatments. Her emotional distress, however, is not limited to the distress accompanying the cancer. Emotional distress also can be suffered prior to the development of cancer.⁵⁴ Specifically, the DES daughter may suffer anxiety and apprehension in anticipation of developing cancer.⁵⁵ This cancerphobia also includes the fear of surgery and the fear of sterility.⁵⁶ Cancerphobia experienced by the DES daughter is the basis of her cause of action for the negligent infliction of emotional distress.⁵⁷ To understand the viability of this independent tort action against the drug manufacturers, it is necessary to analyze the current litigation involving the liability of DES manufacturers for the DES daughter's physical injuries.

C. DES in Litigation

The determination of whether drug manufacturers are liable for the physical injuries incurred by the DES daughter is critical in establishing their liability for her emotional injuries sustained prior to developing cancer. If the cancerphobia claimant is unable to show the DES manufacturers' culpability for her physical injuries, it is unlikely that she will be able to establish liability for her emotional injuries. Therefore, review of legal precedent concerning the liability of DES manufacturers for the DES daughter's physical injuries is important.

The gravamen of the complaints filed against the DES manufacturers was a claim for compensation for the physical injuries caused by the use of the drug.⁵⁸ Any allegations of emotional distress damages could only be presented as parasitic damages, claims attached to the host claims for damages for physical injuries.⁵⁹ Legal theories underlying the host claims of the DES daughters have varied.⁶⁰ Allegations directed at the liability of the manufacturers have included doctrines of (1) negligence, (2) strict liability, (3) violation of expressed or implied warranties, (4) false and fraudulent representations, (5) misbranding of

over her inability to bear children, anxious about her frequent postsurgery examinations, and fearful that her cancer might recur." *Id.*

53. *Id.*

54. See generally *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982).

55. *Id.*

56. *Id.*

57. See *infra* text accompanying notes 167-210.

58. See, e.g., *Sindell*, 26 Cal. 3d at 594-95, 607 P.2d at 926, 163 Cal. Rptr. at 134.

59. See *Payton*, 437 N.E.2d at 176; see also *Rodriques v. State*, 52 Hawaii 156, 172, 472 P.2d 509, 519 (1970).

60. *Id.*; see RHEINGOLD, *supra* note 21, at 393 and 861 (sample complaints filed on behalf of DES daughters).

drugs in violation of federal law, (6) conspiracy, and (7) lack of consent.⁶¹ This comment will deal exclusively with an analysis of the drug manufacturer's liability based on negligence. To assert successfully a claim for the *negligent* infliction of emotional distress, the cancerphobia claimant must first establish *negligence*.

1. The Negligent DES Manufacturer

Prior to demonstrating that the drug manufacturers are liable for negligent infliction of emotional distress, the manufacturers' negligent marketing of DES first must be established. A number of courts have examined this negligence issue and concluded that the drug manufacturers were negligent both in failing to adequately test the drug for its effects, and failing to warn users of the potential dangers of the drug.⁶² The California Supreme Court addressed this issue by stating that the negligence of the drug manufacturers is based upon the fact that they "marketed and promoted DES as a safe and efficacious drug to prevent miscarriage, without adequate testing or warning, and without monitoring or reporting its effects."⁶³ The conclusion of the Court was predicated on a number of facts. Specifically, the FDA originally authorized the use of DES by pregnant women, but only on condition that the drug carry a label warning users that DES was approved only on an experimental basis.⁶⁴ Despite this limited FDA authorization, the drug manufacturers promoted the sale of DES on a large scale basis⁶⁵ and sold DES without the required warning label.⁶⁶

Some courts, using information obtained by the drug manufacturers from completed tests showing the harmful effects of DES, have held that the manufacturers knew or should have known (1) DES is a carcinogenic substance, (2) administering a drug to pregnant women results in that drug being transmitted to the fetus, and (3) there is a grave danger after varying periods of time that DES will cause cancerous and precancerous growths in daughters of women who were given the drug.⁶⁷ Courts also have held that the defendant drug manufacturers knew or should have known that DES is ineffective as a miscarriage preventative.⁶⁸ Since this information could have been found through proper testing some courts held DES manufacturers negligent for both their failure to conduct adequate testing and to warn that the character-

61. See *Sindell*, 26 Cal. 3d at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.

62. See, e.g., *Bichler*, 436 N.Y.S.2d at 630.

63. See *Sindell*, 26 Cal. 3d at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.

64. *Id.*

65. *Id.*

66. *Id.*

67. See *id.*, 607 P.2d at 925-26, 163 Cal. Rptr. at 133-34.

68. *Id.*

istics of DES were not fully known.⁶⁹

Although the DES daughter can readily establish negligent marketing, she faces several major impediments to her litigation.⁷⁰ Some of the potential problems that a DES daughter plaintiff must address are issues of class action certification, statutes of limitation, collateral estoppel, and causation.⁷¹ The greatest roadblock to recovery encountered by the DES daughter is proving that the defendant drug manufacturer named in her suit was the cause-in-fact of her injury. An inquiry into this difficulty and the judicial solutions implemented to alleviate the problem is necessary.

2. Proving Cause-in-Fact

The DES daughter, as a plaintiff, has the burden of proof in demonstrating that an individual defendant drug manufacturer was the cause-in-fact of her injury.⁷² To meet this burden, she must identify the actual drug manufacturer who produced the drug taken by her mother.⁷³ The identification of the drug manufacturer presents an obstacle because she is often unable to obtain medical records and copies of prescriptions.⁷⁴ The latency period between the ingestion of the drug and the drug's harmful effects can be as long as twenty years; so, the large passage of time plays a major role in her inability to recover records.⁷⁵ Furthermore, the manner in which DES was marketed makes identification of a specific manufacturer virtually impossible.⁷⁶ DES was sold as a generic substance, interchangeable regardless of brandname or producer.⁷⁷ Pharmacists simply filled prescriptions without taking note of the brandname.⁷⁸ This procedure has greatly hindered the DES daughter's efforts in tracing the drug taken by her mother to a specific manufacturer.⁷⁹ As a result, when confronted with this inability to identify the actual manufacturer, the DES daughter failed to meet her burden of proof⁸⁰ and her case was nonsuited.⁸¹

69. *Id.*; see also *Bichler*, 436 N.Y.S.2d at 628.

70. See Comment, *Labyrinth*, *supra* note 2, at 668.

71. *Id.*

72. See *Sindell*, 26 Cal. 3d at 597, 607 P.2d at 928, 163 Cal. Rptr. at 136.

73. See Comment, *Enterprise Liability*, *supra* note 2, at 972.

74. *Id.*

75. *Id.* Physical harms, if they are manifested, usually do not occur until the DES daughter reaches puberty. The latency period can be as long as 20 years. See Anderson, Watring, Edinger, Jr., Netland & Safail, *Development of DES Associated Clear Cell Carcinoma: The Importance of Regular Screening*, 53 OBSTET. & GYNEC. 293, 297 (1979).

76. See *Bichler*, 436 N.Y.S.2d at 627.

77. *Id.*

78. *Id.*

79. *Id.*

80. See *Sindell*, 26 Cal. 3d at 597, 607 P.2d at 928, 163 Cal. Rptr. at 135-36.

81. See, e.g., *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 82-84, 150 Cal. Rptr. 730, 734-

New and innovative tort theories were accepted by the courts in an effort to remedy this inequity and to assist the DES daughter in overcoming the identification problem.⁸² There were several doctrines, adopted by a number of jurisdictions, created to resolve the multiple defendant problem faced by the DES daughter. Namely, the courts have incorporated doctrines of concert of action,⁸³ enterprise liability,⁸⁴ alternative liability⁸⁵ and market share liability.⁸⁶ The latter doctrine, which is the approach adopted by the California Supreme Court,⁸⁷ merits further examination.

The California Supreme Court in *Sindell v. Abbott Laboratories*⁸⁸ created the doctrine of market share liability, thereby allowing the DES daughter to circumvent the identification problem in proving cause-in-fact.⁸⁹ The court in *Sindell* adopted the principle enunciated by the court in *Summers v. Tice*,⁹⁰ placing the burden of proof for the issue of causation upon the defendants.⁹¹ The majority in *Sindell* noted the role of the drug manufacturers in marketing DES as a fungible product and the inability of identification being "no fault" of the plaintiffs as reasons for shifting the burden of proof.⁹² Thus, under market share liability, the defendant drug manufacturer has the burden of proving that they did not produce the drug taken by the plaintiff's mother.⁹³ If the drug manufacturer cannot exculpate itself, the manufacturer will then be held liable for a part of the total damages awarded by the court

35 (1978), (recent California case that reached this result); see also *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978).

82. See generally Comment, *Overcoming the Identification Burden in DES Litigation: The Market Share Liability Theory*, 65 MARQ. L. REV. 609 (1982).

83. See RESTATEMENT (SECOND) OF TORTS §876 (1979); see also, *Bichler v. Eli Lilly & Co.*, 436 N.Y.S.2d 625, 633 (App. Div. 1981) (accepting the concert of action theory). This tort theory was, however, rejected by the California Supreme Court in *Sindell*. The Court stated that an acceptance of this theory to solve the identification problem would mean that "virtually any manufacturer [could be held] liable for the defective products of an entire industry, even if it could demonstrate that the product which caused the injury was not made by the defendant." *Sindell*, 26 Cal. 3d at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141.

84. This theory was first suggested in *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972). But see *Sindell*, 26 Cal. 3d at 607, 607 P.2d at 935, 163 Cal. Rptr. at 142 (the court rejected this theory in the DES daughters case).

85. See, e.g., *Abel v. Eli Lilly & Co.*, 289 N.W.2d 20, 27 (Mich. App. 1979); see also RESTATEMENT (SECOND) OF TORTS §433(B)(3) (1965). But c.f. *Payton v. Abbott Laboratories*, 512 F. Supp. 1031 (D. Mass 1981) (the court rejected this theory in the DES daughter's case).

86. See *Sindell*, 26 Cal. 3d at 611-13, 607 P.2d at 937, 163 Cal. Rptr. at 145.

87. *Id.*

88. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

89. See *id.* at 611-13, 607 P.2d at 937, 163 Cal. Rptr. at 145.

90. 33 Cal. 2d 80, 199 P.2d 1 (1949). The plaintiff in *Summers* was injured when two hunters negligently shot in his direction. Although the plaintiff was unable to prove which of the two hunters fired the shot that struck him, they were held jointly liable for the loss if they could not resolve the issue of cause-in-fact among themselves.

91. *Id.* at 88, 199 P.2d at 5.

92. See *Sindell*, 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

93. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

to the plaintiff.⁹⁴ The amount of damages for which a particular defendant drug manufacturer will be liable varies according to its share of the total market of DES that was sold.⁹⁵

The decision of the California Supreme Court in *Sindell* exhibits a policy that negligent drug manufacturers should be held accountable for the harms caused by DES. The California State Legislature acquiesced in the policy laid down by the court in *Sindell* by soundly defeating a proposal to dismantle market share liability.⁹⁶ This defeat signalled approval of the judicial policy permitting DES daughters to recover damages for harms resulting from the drug manufacturers' negligence.⁹⁷ In furtherance of this policy, a California Appellate Court in *Miles Laboratory Inc. v. Superior Court*,⁹⁸ recently denied a motion for summary judgment submitted by the drug manufacturer on the grounds the manufacturer did not produce and promote DES for the purpose for which it was eventually used.⁹⁹ Miles Laboratory claimed it produced DES for purposes other than for use by pregnant women and should not be responsible for its misuse.¹⁰⁰ The court, however, in subscribing to the policy set forth by the court in *Sindell*, refused to allow the defendant drug manufacturer to escape liability.¹⁰¹ In particular, the court stated that when a drug manufacturer knows a drug it produces was being misused, and benefits from the misuse, the drug manufacturer will be held liable for the harms caused by the known misuse.¹⁰² In the instant case, Miles Laboratory knew the DES it produced was being used by pregnant women, notwithstanding the fact they did not promote DES for this use.¹⁰³

Now that liability under negligence for physical injuries has been clearly established in California, recovery should be expanded beyond physical injury where a plaintiff suffers emotional distress in legitimate anticipation of physical injury. Liability for a DES daughter's physical

94. *Id.*

95. *Id.*

96. California State Senator Davis, in 1981, proposed Senate Bill 228 that would have added to California Civil Code section 1714.91,

In any action based upon a product liability claim, a product seller shall not be liable to any person, or person's heirs, successors, or assigns, unless the claimant proves by a preponderance of the evidence that the product seller's own product caused the alleged personal injury, death or property damage.

If this bill had become law, it would have effectively reversed the *Sindell* decision. This bill, however, was defeated in the Senate Judiciary Committee by a 5 to 2 vote on January 19, 1981. Since that time, neither this bill, nor any similar proposal has been reintroduced.

97. *Id.*

98. 133 Cal. App. 3d 587, 184 Cal. Rptr. 98 (1982).

99. *Id.* at 593, 184 Cal. Rptr. at 102.

100. *Id.* at 592, 184 Cal. Rptr. at 101.

101. *Id.* at 595-96, 184 Cal. Rptr. at 103-04.

102. *Id.*

103. *Id.*

injuries provides a doctrinal underpinning upon which a DES daughter can base her cause of action for the negligent infliction of emotional distress. The significance of this connection will become more apparent in the next section. First, however, an action in emotional distress must be explored.

EMOTIONAL DISTRESS

The courts have rapidly evolved in recent years in the recognition of a person's mental state as a protectable interest. The growth in this cause of action, however, has been far from steady. This progression, in a number of jurisdictions, has culminated in acceptance of negligent infliction of emotional distress as an independent tort cause of action.¹⁰⁴ An understanding of the policies underlying this growth will be helpful in the ultimate application of the cause of action to the DES daughter.

Early decisions demonstrated a reluctance to award damages for emotional harms.¹⁰⁵ There were several reasons why the common law courts hesitated in allowing recovery for this type of harm.¹⁰⁶ The overriding policy concerns focused on the dual desire of the courts to hear only genuine claims and to prevent a flood of litigation.¹⁰⁷ The reluctance on the part of the common law courts against awarding

104. See *infra* text accompanying notes 139-147.

105. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS §54, at 327-35 (4th ed. 1971).

106. See *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 933, 122 Cal. Rptr. 470, 481 (1975) (the belief that emotional injuries were trivial in nature); *Spade v. Lynn & Boston Ry.*, 168 Mass. 285, 288, 47 N.E. 88, 89 (1897) (claims for emotional distress presented a high possibility of fraudulent and vexatious lawsuits); *Lynch v. Knight*, 11 Eng. Rep. 854 (1861) (it was too difficult to place money damages on emotional injuries and that juries were incapable of distinguishing real from feigned injuries).

107. See PROSSER, *supra* note 105, §54, at 327. In order to guarantee the genuineness of the claims, a physical impact or injury has generally been required prior to awarding damages for emotional distress. See *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 680, 44 P. 320, 322 (1896). Mental suffering alone would not afford a plaintiff a cause of action. *Id.* Only under special circumstances, was a plaintiff allowed to recover emotional distress damages absent a physical injury. See PROSSER, *supra* note 105, §54, at 327-35. One special circumstance occurred when a defendant's intentional conduct was deemed extreme and outrageous. Once this determination was made, the court allowed recovery absent a physical injury because the nature of the act itself insured the genuineness of the claim. See *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 498, 468 P.2d 216, 218, 86 Cal. Rptr. 88, 90 (1970). In cases of "extreme and outrageous intentional invasions of one's mental and emotional tranquility" the courts have awarded damages without the need for the plaintiff to prove a physical injury. *Id.*, see also *Perati v. Atkinson*, 213 Cal. App. 2d 472, 28 Cal. Rptr. 898 (1963); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952), RESTATEMENT (SECOND) OF TORTS §46 comment j (1965).

A second exception occurred under circumstances where a defendant's actions were of such a shocking nature, that the courts have generally held the plaintiff's claim to be genuine. See generally, PROSSER, *supra* note 105, §54, at 328-30. Examples of these special circumstances are the negligent delivery of a death notice, see *Western Union Co. v. Cleveland*, 160 Ala. 131, 53 So. 80 (1910); or the mishandling of a corpse, see *Chelini v. Nieri*, 32 Cal. 2d 480, 196 P.2d 915 (1948); *Carey v. Lima, Solmon & Tully Mortuary*, 168 Cal. App. 2d 42, 335 P.2d 181 (1954).

damages for emotional distress gradually subsided.¹⁰⁸ Dean Prosser stated that the fears causing the early courts to deny recovery for emotional injuries are not as prevalent today and, in general, the only valid public policy objection to recovery for emotional harms is the "danger of vexatious suits and fictitious claims."¹⁰⁹ Modernly, the courts have been unsettled as to the conditions required to bring an action for the negligent infliction of emotional distress.¹¹⁰ Although there is no generally accepted standard for recovery, the California Supreme Court appears to be committed to a liberal, factually oriented approach to recovery. The following section analyzes the current criteria set forth by the courts in California for recovery in an emotional distress cause of action.

A. California Recovery for Emotional Distress

In recent years, the California Supreme Court has expanded the parameters of an action for the negligent infliction of emotional distress beyond the boundaries of permissible recovery in a majority of jurisdictions.¹¹¹ The protection of the mental tranquility of an individual has been enlarged by two landmark decisions of the California Supreme Court, *Dillon v. Legg*¹¹² in 1968 and *Molien v. Kaiser Foundation Hospitals*¹¹³ in 1980. The court in *Dillon* rejected the fears retained by the common law courts which acted as a barrier to many potentially valid claims.¹¹⁴ The court stated that the fear of fraudulent claims "[did] not justify a wholesale rejection of the entire class of

108. Modernly, the plaintiff in a majority of jurisdictions does not have to suffer a physical impact in order to recover emotional distress damages. Rather a plaintiff must establish that he or she is within the "zone of danger". See RESTATEMENT (SECOND) OF TORTS §436 (1965). The "zone of danger" test, a judicially imposed screening device, was designed to exclude fraudulent claims by requiring a plaintiff to be within a zone of actual harm, and be in fear of their own personal safety. See, e.g., *Amaya v. Home Ice Fuel & Supply Co.*, 59 Cal. 2d 295, 310-11, 379 P.2d 513, 522-23, 29 Cal. Rptr. 33, 42-43 (1963) (overruled by *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)).

Although the physical impact rule has been eliminated by the majority of jurisdictions, a majority of courts still require that the plaintiff manifest a resulting physical injury as a consequence of their emotional distress. RESTATEMENT (SECOND) OF TORTS §436A (1965) states:

If an actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such disturbance alone, without bodily harm or compensable damage, the actor is not liable for such a disturbance.

The courts have retained this requirement as a way to minimize the risk of fraudulent claims and to avoid unlimited liability. See *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 P. 320 (1896).

109. See PROSSER, *supra* note 105, §54, at 328.

110. See generally Comment, *Negligent Infliction of Emotional Distress: New Horizons after Molien v. Kaiser Foundation Hospital*, 13 PAC. L.J. 179, 183-88 (1980).

111. *Id.* at 184.

112. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

113. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

114. See 68 Cal. 2d at 736, 441 P.2d at 917-18, 69 Cal. Rptr. at 77-78.

claims in which that potentiality arises."¹¹⁵ The California courts have attempted to resolve the problems inherent in emotional distress actions in a number of ways.¹¹⁶ Following a series of recent decisions, the standards required to bring an action for the negligent infliction of emotional distress are in a clouded state.¹¹⁷ The present state of the law will be clarified after an analysis of several of the more significant elements required to establish a *prima facie* case for the negligent infliction of emotional distress.

To establish a successful cause of action for the negligent infliction of emotional distress, the plaintiff must demonstrate the defendant owed the plaintiff a duty of care for the particular injury sustained.¹¹⁸ California views the concept of duty in terms of the foreseeability of risk presented.¹¹⁹ Therefore, the plaintiffs in an action for the negligent infliction of emotional distress must show that the emotional distress they suffered was a foreseeable consequence of the defendant's action.¹²⁰ There are two distinct tests currently available for determining if emotional distress was foreseeable.¹²¹ The status of the plaintiff will determine which of the two tests to employ. A plaintiff seeking recovery can allege either that the emotional distress was caused by the defendant's actions which harmed a third person¹²² or that the emotional distress was caused by a defendant's direct action against the plaintiff.¹²³ The *Dillon* court's analysis focused on the former situation, and the latter was examined by the court in *Molien*.

Specifically, the majority in *Dillon* established a set of guidelines for determining whether a duty was owed to a percipient witness plaintiff.¹²⁴ The plaintiff in *Dillon* did not fear for her own safety, yet the court awarded her damages for the emotional distress that resulted from witnessing an injury to a third person.¹²⁵ The court extended the boundaries of a duty owed to a new class of potential plaintiffs that had been arbitrarily denied recovery under the "zone of danger" test because the limitation of duty under the old test achieved unjust re-

115. *Id.*

116. See *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 935, 122 Cal. Rptr. 470, 482 (1975).

117. See Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 583 (1982).

118. See PROSSER, *supra* note 105, §53, at 324-27.

119. See 68 Cal. 2d at 739, 441 P.2d at 919, 69 Cal. Rptr. at 79.

120. *Id.*

121. See *Molien*, 27 Cal. 3d at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.

122. See 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 80.

123. See 27 Cal. 3d at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.

124. See 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 80.

125. *Id.* The Court in *Dillon* allowed a mother, who witnessed her daughter's death in an automobile accident, to recover damages for her emotional distress that she suffered as a result of witnessing her daughter's injury. *Id.*

sults.¹²⁶ The court set forth guidelines to be employed in determining whether the emotional distress of a percipient witness is foreseeable.¹²⁷ In particular, the court stated that emotional distress is foreseeable when the plaintiff shows (1) close proximity to the scene of the accident, (2) contemporaneous sensory perception, and (3) a close relationship to the primary victim.¹²⁸

In regard to the direct victim of the defendant's action, the analysis of duty differs.¹²⁹ To establish that a duty is owed to a direct victim, the standards set out by the court in *Molien* must be applied.¹³⁰ Rather than relying on a set of rigid guidelines, the court in *Molien* applied general principles of foreseeability to the facts at hand to determine if a duty existed.¹³¹ Therefore, based on the rationale in *Molien*, the court must decide on a case-by-case basis whether the risk of harm to the plaintiff was reasonably foreseeable.¹³² The court stated that once the plaintiff demonstrates foreseeability of the emotional distress, the defendant owes the plaintiff a duty of due care.¹³³

In addition to establishing duty as an element of the plaintiff's prima facie case, the plaintiff also must prove he or she actually suffered a harm.¹³⁴ The general standard in the majority of jurisdictions for proving harm is that the plaintiff show he or she sustained a physical injury.¹³⁵ This requirement of a physical injury was, however, eliminated by the California Supreme Court in *Molien*.¹³⁶ In *Molien* the court recognized negligent infliction of emotional distress as an independent tort cause of action.¹³⁷ The court expressly rejected the principles set forth in early common law decisions by stating "the unqualified requirement of physical injury is no longer justifiable."¹³⁸

In *Molien*, the plaintiff alleged that he suffered emotional distress as a result of the defendant's negligent diagnosis of his wife's condition.¹³⁹

126. *Id.* A number of other jurisdictions that have similarly allowed emotional distress damages for a percipient witness. *See, e.g.,* Leong & Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974); Dziokonski v. Babineau, 380 N.E.2d 1295, 1301 (Mass. 1978). *But see* Tobin v. Grossman, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969).

127. *See* 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

128. *Id.*

129. *See* 27 Cal. 3d at 923, 616 P.2d at 816-17, 167 Cal. Rptr. at 835.

130. *Id.* at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 835.

131. *Id.*

132. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 834-35.

133. *Id.*

134. *See* PROSSER, *supra* note 105, §30, at 143.

135. *See supra* note 107; *see also* BAJI No. 12.80 (6th ed. 1977).

136. *See* 27 Cal. 3d at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838; *accord* Rodrigues v. State, 52 Hawaii 156, 172, 472 P.2d 509, 520 (1970); Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433, 438 (Me. 1982).

137. *See* 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

138. *Id.* at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.

139. *Id.* at 918, 616 P.2d at 814, 167 Cal. Rptr. at 832.

She was misdiagnosed as having an infectious type of syphilis.¹⁴⁰ Consequently, the plaintiff was informed by his wife that the defendant physician requested he come in for blood tests to determine if he also had syphilis.¹⁴¹ The defendant's negligence resulted in the plaintiff's serious emotional distress, but the emotional distress was unaccompanied by any physical manifestations of his distress.¹⁴² Nevertheless, the court permitted the plaintiff to recover damages, describing the physical injury requirement as "an anachronism",¹⁴³ and concluded that emotional injury was just as debilitating as physical injury and was "no less deserving of redress."¹⁴⁴

The majority in *Molien* embraced a new standard for establishing a plaintiff's harm. Under this new standard, a plaintiff need simply demonstrate that his or her emotional distress is *serious*.¹⁴⁵ The court characterized *serious* emotional distress as a debilitating harm that could be shown by proof that "a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."¹⁴⁶ The issue of serious emotional distress is a matter of proof for jury determination.¹⁴⁷

The above-mentioned principles outline the basic approach followed by the California courts for establishing a cause of action for the negligent infliction of emotional distress. Before the discussion shifts to the application of California law to the DES daughter's case, a separate inquiry must be made into the situation of a plaintiff who suffers emotional distress as a result of a present fear of a future harm. Although the same elements are required for an emotional distress action for the fear of a future harm as well as for a present harm, the latter situation requires some special consideration.

B. Recovery for a Present Fear of a Future Harm

Courts in general have long recognized that anxiety due to a fear of a future harm may constitute a proper element of damages.¹⁴⁸ In particular, the courts have been especially appreciative of the mental anguish stemming from sensitive personal concerns such as cancer.¹⁴⁹ As early

140. *Id.*

141. *Id.*

142. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

143. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

144. *Id.*

145. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

146. *Id.* at 928, 616 P.2d at 819-20, 167 Cal. Rptr. at 837-38 (citing *Rodrigues*, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970)).

147. See 27 Cal. 3d at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

148. See generally *Jones v. United R. Co.*, 54 Cal. App. 744, 202 P. 919 (1921) (suffered emotional distress as a result of a fear of permanent disability in the future).

149. See generally *Dempsey v. Hartley*, 94 F. Supp. 918 (E.D. Penn. 1951) (the plaintiff re-

as 1951, a Federal District court allowed a plaintiff to recover damages for cancerphobia caused by a defendant's wrongful conduct.¹⁵⁰ In *Dempsey v. Hartley*,¹⁵¹ the court recognized the reasonableness of a plaintiff's fears that she may develop cancer in the future.¹⁵² The damages awarded were a derivative of, or an element of, a claim for physical injuries.¹⁵³ Similarly, the Court of Appeals of New York in *Ferrara v. Galluchio*¹⁵⁴ acknowledged that the fear of developing cancer, which the plaintiff reasonably supposed would result from her physical injury, was considered a proper element in recovery.¹⁵⁵ In *Ferrara*, the plaintiff received damages for her emotional suffering that was a consequence of her susceptibility to contracting cancer due to a negligent X-ray treatment she received from her physician.¹⁵⁶ These cases clearly represent a judicial acceptance of emotional distress recovery for cancerphobia as an *element* of damages in actions praying for compensation for a severe physical injury.

Conversely, various state courts have rejected claims for cancerphobia, absent the severe physical injury.¹⁵⁷ In a recent decision, the Massachusetts Supreme Judicial Court in *Payton v. Abbott Laboratories*,¹⁵⁸ denied recovery in a class action suit filed on behalf of 4,000 Massachusetts DES daughters.¹⁵⁹ Like all DES daughters, these plaintiffs faced an increased statistical likelihood of developing vaginal cancer.¹⁶⁰ Therefore, they claimed they suffered emotional distress¹⁶¹ and attempted to recover under an independent tort claim for the negligent infliction of emotional distress against the drug manufacturers.¹⁶² The court, however, refused to recognize the cause of action because the plaintiffs lacked proof of harm.¹⁶³ The court required that there

ceived serious breast injuries in an automobile accident and feared that she may develop breast cancer).

150. *Id.*

151. 94 F. Supp. 918 (1951).

152. *Id.* at 921.

153. *Id.* at 920.

154. 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249 (1958).

155. *Id.* at 21, 176 N.Y.S.2d at 999, 152 N.E.2d at 252.

156. *Id.*

157. See, e.g., *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982).

158. 437 N.E.2d 171.

159. *Id.* at 181.

160. See *supra* text accompanying notes 39-51.

161. Many plaintiffs are anxious and emotionally upset by the possibility that they will suffer one of several abnormalities of their reproductive organs or will contract clear-cell adenocarcinoma, which are conditions they are more likely to develop than the general population. On the advice of their physicians, some plaintiffs are submitting to periodic medical examinations so as to permit early detection of problems. These examinations may be expensive and traumatic.

Payton, 437 N.E.2d at 191.

162. *Id.* at 164.

163. *Id.* at 173.

must be some physical manifestation of emotional distress in order to prove actual harm.¹⁶⁴ The majority of states, including Massachusetts, requires a physical injury before allowing emotional distress damages.¹⁶⁵ As previously stated, this is not the law in California.¹⁶⁶ The next section will consider the essential factors for a successful claim for the negligent infliction of emotional distress and analyze their applicability to an emotional distress cause of action by the DES daughter who suffers cancerphobia.

NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS: RECOVERY FOR THE DES DAUGHTER SUFFERING CANCERPHOBIA

The determination as to whether a DES daughter can recover for her emotional injuries in California, absent any physical manifestation of the cancer, or of the emotional distress, is best illuminated by considering the *prima facie* elements of duty and harm separately. For the purposes of the analysis, this discussion will assume (1) the DES daughter has already established the negligence of the drug manufacturers in their marketing DES as a miscarriage preventative¹⁶⁷ and (2) the DES daughter has overcome the identification problem associated with the multiple defendants through market share liability.¹⁶⁸ The inquiry will first turn to the issue of duty.

A. A Duty Owed to the DES Daughter

The determination of whether the drug manufacturers' duty to the DES daughter extends to an obligation to refrain from creating an unreasonable risk to her emotional state must first be explored. As a part of this determination, the DES daughter must address any possible special limitations of the duty that is owed to her. For example, a number of jurisdictions impose limitations on the duty of defendants in cases of unborn persons as plaintiffs.¹⁶⁹ This presents a special problem since the negligent actions of the drug manufacturers occurred while the

164. *Id.* at 180.

165. See *supra* note 108. The *Payton* court relied upon Massachusetts law. See *Agis v. Howard Johnson Co.*, 371 Mass. 140, 143-45, 355 N.E.2d 315, 318-19 (1976) (Massachusetts rule of no recovery without a physical injury). The *Payton* court concluded that in order for the DES daughter to recover damages for the negligent infliction of emotional distress that has resulted from cancerphobia, the plaintiff must prove the following elements: (1) negligence, (2) emotional distress, (3) causation, (4) *physical harm manifested by objective symptomatology*, and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case. See *Payton*, 437 N.E.2d at 181 (emphasis added).

166. See *Molien*, 27 Cal. 3d at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.

167. See *supra* text accompanying notes 62-69.

168. See *supra* text accompanying notes 88-95.

169. See PROSSER, *supra* note 105, §55, at 335-38. These limitations arise from common law decisions that have held that there can be no recovery for injuries to a fetus. See, e.g., *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884).

DES daughter was a fetus.¹⁷⁰ In California, however, there is no limitation of duty towards prenatal plaintiffs. California gives statutory recognition to the fetus' independent legal existence.¹⁷¹ California Civil Code section 29 was adopted to create a cause of action for the benefit of the child¹⁷² and is potentially limitless in scope.¹⁷³ This does not, however, automatically establish that a duty is owed to the child. Rather, the DES daughter must still establish all of the *prima facie* elements, including duty, before she can recover.

Notwithstanding any special limitations, a duty exists if it was reasonably foreseeable a defendant's actions would create an unreasonable risk to the plaintiff's well-being.¹⁷⁴ Thus, the DES daughter must demonstrate the defendant drug manufacturers should have reasonably foreseen that, by producing a drug that created a risk of cancer in the user's offspring, the offspring would suffer emotional distress as a result of the risk. Because foreseeability is the critical inquiry, the court must decide whether to apply the guidelines set forth in *Dillon*¹⁷⁵ or the standard set forth in *Molien*¹⁷⁶ to determine if the DES daughter's emotional distress was foreseeable. To answer this question an examination of the status of the DES daughter plaintiff is required. The DES daughter suffers emotional distress as a result of a threat to her health attributable to the increased risk of developing cancer.¹⁷⁷ Therefore, her status as a plaintiff would be a direct victim rather than a percipient witness. Consequently, the DES daughter should meet the standard elaborated by the court in *Molien*.¹⁷⁸ Hence, to establish a duty, the pertinent facts surrounding the case of the DES daughter must be applied to the general principles of foreseeability.¹⁷⁹ Foreseeability is described best as an appreciation of the risk.¹⁸⁰ Expressed in other terms, a result is foreseeable when a defendant knew or should have known his or her actions created a risk.¹⁸¹ Accordingly, foreseeability of the DES daughter's emotional distress requires a two-step

170. See *supra* text accompanying notes 36-51.

171. See CAL. CIV. CODE §29. Section 29 provides that a "[c]hild conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth. . . ."

172. See *Norman v. Murphy*, 124 Cal. App. 2d 95, 98, 268 P.2d 178, 180 (1954).

173. See *Scott v. McPheeters*, 33 Cal. App. 2d 629, 631-32, 92 P.2d 678, 679-80 (1939).

174. See *supra* note 118.

175. See *supra* text accompanying notes 124-28.

176. See *supra* text accompanying notes 130-33.

177. See *supra* text accompanying notes 167-99.

178. See *Molien*, 27 Cal. 3d at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834. The court in *Molien* stated that in cases when a plaintiff is a direct victim of the defendant's action, the guidelines in *Dillon* are apposite, but not controlling. *Id.*

179. See 27 Cal. 3d at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.

180. See generally PROSSER, *supra* note 105, §31, at 145.

181. *Id.*

analysis. The first step is to determine whether the physical injuries sustained by the DES daughter were foreseeable. If they were, the second step analyzes whether the emotional distress caused by the DES daughter's fear of those physical injuries was also foreseeable.

Inquiry into the foreseeability of the physical injuries suffered by the DES daughter is unnecessary since the courts have resolved the issue in favor of the DES daughter.¹⁸² Namely, the court in *Bichler v. Eli Lilly & Co.*¹⁸³ examined this issue and concluded that it was reasonably foreseeable that the DES daughter would suffer physical harms as a result of her mother ingesting DES.¹⁸⁴ The court in *Bichler* based its decision on the fact that the drug manufacturers had the means to test, and only their failure to conduct the tests prevented discovery of the cancer risk inherent in DES.¹⁸⁵ Therefore, the defendant drug manufacturer knew or should have known the risks of physical injury they created by promoting DES for use by pregnant women.¹⁸⁶

Although the *Bichler* court established the foreseeability of physical injury, the DES daughter undertakes a more arduous task in demonstrating the second step, the foreseeability of her emotional distress which results from the fear of physical injury. The daughter must prove the drug manufacturers knew or should have known the increased risk of vaginal cancer in DES daughters would cause serious emotional distress.¹⁸⁷ The Court of Appeals of New York, in *Ferrara v. Galluchio*,¹⁸⁸ facing a similar question, answered in the affirmative.¹⁸⁹ The *Ferrara* court permitted a plaintiff to recover damages for emotional distress due to her fear of developing cancer in the future.¹⁹⁰ The plaintiff in *Ferrara* received a series of X-ray treatments from the defendant physician.¹⁹¹ After her treatment, the X-rayed area began to blister and form scabs.¹⁹² The plaintiff subsequently consulted a dermatologist who informed her that the area blistering was prone to becoming cancerous due to the negligent X-ray treatment she had received.¹⁹³ In her complaint, the plaintiff alleged that she had suffered

182. See *supra* text accompanying notes 68-78.

183. 436 N.Y.S.2d 625 (App. Div. 1981).

184. *Id.* at 634-35.

185. *Id.*

186. The jury in *Bichler* at the conclusion of the trial returned a general verdict in favor of the plaintiff, determining that the DES daughter's physical harms were foreseeable. No. 65534 (N.Y. Sup. Ct. Apr. 24, 1980).

187. See *supra* text accompanying notes 118-120.

188. 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249 (1958).

189. *Id.* at 21, 176 N.Y.S.2d at 1000, 152 N.E.2d at 253.

190. *Id.*

191. *Id.* at 17, 176 N.Y.S.2d at 997, 152 N.E.2d at 250.

192. *Id.*

193. *Id.*

emotional distress as a result of her doctor's negligent X-ray treatment.¹⁹⁴ The court held "[i]t is entirely plausible, under such circumstances, that plaintiff would undergo exceptional mental suffering over the possibility of developing cancer."¹⁹⁵

The factual circumstances underlying the conclusion of the court that the plaintiffs' emotional distress was foreseeable in *Ferrara* and *Molien* are in many respects similar to those of the DES daughter. In *Molien* the plaintiff feared he had syphilis,¹⁹⁶ even though he later discovered his fears were without foundation.¹⁹⁷ In *Ferrara* the plaintiff feared she would develop skin cancer.¹⁹⁸ Similarly, the DES daughter dreads developing a deadly vaginal cancer.¹⁹⁹ All of the feared physical injuries are very serious, and all of the plaintiffs suffered extreme emotional distress as a result of their fears of future serious physical injury. Therefore, a potential defendant should foresee that placing a person in fear of serious physical injury would logically result in the person suffering emotional distress. Consequently, a DES daughter who becomes aware of the high probability that she will develop cancer and as a result, suffers emotional distress, is a foreseeable plaintiff with foreseeable injuries. By establishing that her emotional distress was foreseeable, it can be concluded that the defendant drug manufacturers owed a duty to the DES daughter to avoid presenting unreasonable risks to her emotional well-being. With the duty of the manufacturer toward the DES daughter now established, the next step will be to demonstrate that the daughter suffered actual harm, and that the harm was legally compensable.

B. A DES Daughter's Harm

The old California prima facie requirement of harm in an emotional distress action would have acted automatically to preclude a large number of DES daughters from recovery.²⁰⁰ This exclusion would have been the case because the daughters had not yet developed cancer to evidence a harm, or because no manifestation of a physical injury had occurred as a result of the emotional distress.²⁰¹ As previously

194. *Id.*

195. *Id.* at 21, 176 N.Y.S.2d at 1000, 152 N.E.2d at 253. Similarly, the court in *Molien* addressed the issue of foreseeability of emotional distress and concluded that a person would suffer emotional distress when the defendant's conduct caused the plaintiff to fear the possibility of physical injury. See 27 Cal. 3d at 923, 616 P.2d at 816, 167 Cal. Rptr. at 835. The court based this finding on the fact that the defendants "knew or should have known that their diagnosis, that the plaintiff's wife had syphilis, and that he might also have the disease would cause him emotional distress." *Id.*

196. See *supra* text accompanying notes 140-41.

197. See 27 Cal. 3d at 923, 616 P.2d at 816, 167 Cal. Rptr. at 835.

198. See *Ferrara*, 5 N.Y.2d at 19, 176 N.Y.S.2d at 998, 152 N.E.2d at 251.

199. See *supra* text accompanying notes 157-65.

200. See *supra* text accompanying notes 134-38.

201. See *supra* text accompanying notes 54-56.

discussed, however, the court in *Molien* enumerated a new standard for determining harm in an emotional distress cause of action.²⁰² The court rejected the physical injury requirement and instead required that plaintiff show his or her emotional distress was *serious*.²⁰³ The court construed a serious emotional distress to mean a debilitating harm, and included within serious emotional distress conditions such as "traumatically induced neurosis, psychosis, chronic depression, or *phobia*."²⁰⁴ Courts use a reasonable person standard to determine if the emotional distress is serious.²⁰⁵ Therefore, the DES daughter must demonstrate that a reasonable woman would be unable to cope with the mental stress which is induced by her fear of developing vaginal cancer.²⁰⁶

To prove that her emotional distress is reasonable, the DES daughter must show objective reasons for suffering cancerphobia.²⁰⁷ Objective reasons for the daughter's belief that the use of DES leads to vaginal cancer can be shown by (1) information furnished to her by her physician regarding the link between DES and cancer,²⁰⁸ (2) information widely disseminated by public media relating to the increased likelihood that the DES daughter will develop cancer,²⁰⁹ and (3) information published in scientific reports.²¹⁰ All of these sources, corroborated by the fact that the DES daughter is confronted with the likelihood of developing a potentially fatal vaginal cancer leads to the conclusion that the DES daughter facing this threat is entirely reasonable in suffering emotional distress. Nevertheless, establishing the *prima facie* elements for an emotional distress cause of action will not assure a DES daughter a favorable judgment. After she has demonstrated a duty, a harm, negligence, and causation, a DES daughter must finally address any possible policy limitations which may arise to bar her cause of action against the drug manufacturers.

202. See *supra* text accompanying notes 136-38.

203. See *supra* text accompanying notes 136-47.

204. See 27 Cal. 3d at 933, 616 P.2d at 823, 167 Cal. Rptr. at 841 (emphasis added).

205. See *supra* note 146.

206. See *supra* note 146.

207. See PROSSER, *supra* note 105, §32, at 150.

208. See, e.g., *Ferrara*, 5 N.Y.2d 16, 21, 176 N.Y.S.2d 996, 999, 152 N.E.2d 249, 253 (the plaintiff learned from her physician that her shoulder was susceptible to becoming cancerous).

209. See *Sacramento Bee*, Jan. 25, 1983 at col. 2. In current litigation concerning cancerphobia resulting from exposure to the Chemical DBCP, a trial judge stated that as objective reasons for the emotional distress, the plaintiff could offer into evidence newspaper and television reports that led the plaintiffs to link the chemical with cancer.

210. See *Dempsey v. Hartley*, 94 F. Supp. 918, 921 (1951). The court stated that it was entirely reasonable for the person to suffer emotional distress, due to the information that had been published in *Cancer News*, which the plaintiff read. *Id.* at 921. An example of literature that was distributed to women to warn them of the possible harms resulting from DES, is a booklet that was published by the Department of Health, Education and Welfare. This booklet warned women who think they could be DES daughters to see their physicians as soon as possible. See RHEINGOLD, *supra* note 21, at 198-99.

C. Public Policy Considerations

Specifically, a DES daughter may hear the argument that the extension of an emotional distress cause of action to encompass her cancerphobia case against the drug manufacturers would contravene public policy.²¹¹ Courts have subscribed to several public policy arguments that stand for the proposition that it is best not to hold drug manufacturers liable for the harms they have caused.²¹² The arguments against imposing liability include the great social benefit derived from new pharmaceuticals, the need to have drugs that have unavoidably dangerous side effects, and the need to continue a high level of industry investment in drug research and development.²¹³ This policy of limiting the liability has been expressed in the Restatement of Torts²¹⁴ and in the courts.²¹⁵

This public policy argument, however, was rejected by the California Supreme Court in *Sindell*.²¹⁶ In *Sindell*, the court refused to limit the imposition of liability of the drug manufacturers despite the suggestion of the Restatement of Torts.²¹⁷ The reasons for this are simple. The Restatement of Torts states that public policy justifies the use of unsafe products notwithstanding their high degree of risk, but only where a *proper warning label is attached*.²¹⁸ The DES manufacturers cannot hide surreptitiously behind "public policy" in light of their actions in the promotion of DES for the sale to pregnant women. The drug manufacturers marketed DES in violation of the limited authorization granted by the FDA by promoting DES on an unlimited basis rather than the required experimental basis, and by selling DES without warning the users of the potential dangers.²¹⁹ The court has stated that liability for damages will cease at a point dictated by public policy or common sense.²²⁰ Although, in general, public policy tends to favor limitation on a drug manufacturer's liability, common sense under these circumstances dictates that the DES manufacturers should be given no special deference.

211. See *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 86-87, 150 Cal. Rptr. 730, 736 (1978).

212. *Id.*

213. *Id.*

214. RESTATEMENT (SECOND) OF TORTS §402A comment k (1965).

215. See *supra* note 211.

216. See *Sindell*, 26 Cal. 3d 588, 599, 607 P.2d 924, 926, 163 Cal. Rptr. 132, 134 (1980).

217. *Id.*

218. RESTATEMENT (SECOND) OF TORTS §402A (1965).

219. See *supra* text accompanying notes 62-69.

220. See *Milks v. McIver*, 264 N.Y. 262, 270, 190 N.E. 487, 488 (1934).

CONCLUSION

A scrutiny of recent case law governing recovery for the negligent infliction of emotional distress in California has demonstrated a progressive expansion in the protections afforded the emotional interests of individuals. The traditional barriers that consistently have barred valid claims have been slowly dismantled by the courts. This comment has demonstrated that within this larger framework, a new class of potential plaintiffs now is able to state a cause of action and have the opportunity to recover damages which were until recently, unrecoverable. This class of plaintiffs, DES daughters who suffer emotional distress prior to developing cancer, is now able to meet the standards dictated by the courts for an independent cause of action based on their cancerphobia.

In accordance with the standards establishing a duty of care, the DES daughter will be able to prove that the DES manufacturers knew or should have known that a risk was created to the DES daughters' mental tranquility. The DES daughter may demonstrate that the manufacturers owe her a duty, and that they are required to refrain from violating her mental interests. The daughter will also be able to meet the standards of the court for proving harm, even though she has neither developed cancer, nor manifested physical injuries as a result of her emotional distress. Since the abolishment of the antiquated physical injury requirement in California, no serious bar will hinder a DES daughter's claim.

The California Supreme Court has broadened its acceptance of emotional distress claims to the point that a DES daughter may recover damages from a negligent defendant who has caused her to suffer cancerphobia. The fears experienced by the DES daughter causing emotional distress are not only real, but they also are among the worst possible fears a person can endure. The DES daughter is uncertain as to what the future holds in store for her. She does not know if she will develop cancer in the future, nor does she know if she will ever be able to bear children. These fears are the direct result of the drug manufacturers who negligently marketed a dangerous and ineffective drug. Allowing these manufacturers to escape liability would create a grave injustice, especially in the face of the manufacturers' flagrant disregard of the limited authorization of DES by the FDA.

The California Supreme Court, in recognizing the injustice created by allowing the drug manufacturers to escape liability for the DES daughters' physical injuries, adopted a new doctrine of market share liability to alleviate the problem. This new doctrine should not present

problems for the DES daughter cancerphobia claimant. Her emotional distress damages fit within the theory as it was expounded by the court in *Sindell*. Market share liability is a doctrine conceived by the courts directed towards causation and the apportionment of damages, and not the ultimate legal responsibility owed to the DES daughter. A DES daughter's recovery for damages that result from her emotional injuries can be apportioned among the negligent drug manufacturers just as damages for physical injuries are apportioned. This at first may appear to be an extension of market share liability beyond the original intent of the court in *Sindell*. The courts, however, have already been awarding damages to DES daughters suffering emotional distress as parasitic damages to their claims for physical injuries and apportioning these damages among the negligent drug manufacturers. Now it is time for the courts to award damages for the DES daughters' emotional injuries that occur prior to their developing the cancer.

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