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FEAR OF AIDS: THE CATALYST FOR EXPANDING JUDICIAL RECOGNITION OF A DUTY TO PREVENT EMOTIONAL DISTRESS BEYOND TRADITIONAL BOUNDS

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INTRODUCTION

In recent years, Acquired Immune Deficiency Syndrome (AIDS) has reached epidemic proportions in the United States. As the prevalence of AIDS cases has increased, so has the public's awareness of the dire consequences of infection with the virus causing AIDS. For many, the omnipresence of AIDS has led to fear; in some cases, the fear has reached the level of hysteria. Not surprisingly, the combination of fear and a deadly disease has led to a number of lawsuits where the fearful party has sought compensation for emotional distress; thus, the "AIDSphobia" cases were born. Restrictions on the legal concepts of duty, breach and cognizable injury have been arbitrarily abandoned in some AIDSphobia cases in a judicial attempt to remedy this elusive harm. The public's fear of AIDS coupled with a judicial mentality of expanding liability has, to a large extent, transformed the cases involving AIDS into a morass of contradiction and inconsistent results.

This article traces the evolution of negligent infliction of emotional distress claims from the traditional rules narrowly restricting the parameters of recovery for mental anguish to the uncharted area of tort law known as the "fear of AIDS" or "AIDSphobia" cases. The journey through the emotional distress cases provides a foundation for recognizing the limited circumstances under which a duty to prevent "fear of AIDS" should be recognized.

Part I explores the historical basis for a duty to prevent emotional distress. This discussion focuses on how courts have defined the duty to prevent emotional distress, and examines the factors they have found relevant in determining whether a duty exists. Part I then considers the recognition of a duty to prevent emotional distress based on physical risk, bystander status and the relationship of the parties. Finally, this section examines the limitations on duties to prevent emotional distress imposed in the "fear of cancer" cases.

Part II considers how extant limitations on duty have been recognized in the context of "fear of AIDS" cases. It also examines those cases where recovery has been allowed for "fear of AIDS" based upon previously unrecognized concepts of duty.

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In Part III, this article concludes that the creeping expansion of recovery for emotional distress which is taking place in the "fear of AIDS" cases is unsupported by precedent and is, in many instances, an arbitrary and unwarranted extension of tort recovery.

I. THE DEVELOPMENT OF A RATIONALE THAT ALLOWS RECOVERY FOR NEGLIGENTLY INFLICTED EMOTIONAL DISTRESS

Emotional distress has long been recognized as a legitimate component of recovery either where the defendant has acted intentionally¹ or where the defendant's negligence in the first instance results in physical injury.² Damages for emotional distress absent intent or physical injury have traditionally been allowed in only a limited number of cases.³ In particular, recovery has been allowed where the mental distress is the result of the negligent transmission of a death notice⁴ or the negligent mishandling of a body.⁵ Emotional distress damages in consequence of such negligence, however, have not generally rested upon tort considerations of duty and breach, but rather upon "the making of the contract" for handling the body or sending the telegraph,⁶ or upon the idea that there is a quasi-property right in a dead body.⁷

In fact, courts have been loathe to allow recovery where emotional distress has been the sole result of negligence.⁸ The distrust of such claims has been based on a pervasive suspicion that claims for emotional distress—without more—are trivial, difficult to prove and thus not an appropriate use of judicial resources.⁹ It has also been urged that where the defendant is only negligent, her degree of fault does not warrant

1. See *State Rubbish Collectors Ass'n. v. Siliznoff*, 240 P.2d 282, 285 (Cal. 1952); *Funeral Services by Gregory v. Bluefield Community Hosp.*, 413 S.E.2d 79, 80 (W. Va. 1991); RESTATEMENT (SECOND) OF TORTS § 46 (1965).

2. See RESTATEMENT (SECOND) OF TORTS § 436 (1965); *Sloane v. Southern Cal. Ry. Co.*, 44 P. 320, 322 (Cal. 1896).

3. See RESTATEMENT (SECOND) OF TORTS § 436A (1965) (explaining the view that claims for emotional distress without physical injury should be disallowed).

4. See RESTATEMENT (SECOND) OF TORTS § 436A note at 24, (Tentative Draft No. 9, 1963) (stating that seven states recognize recovery for mishandling of a message concerning death or illness without any physical injury and an additional four states recognize such recovery by statute).

5. See, e.g., *Brown Funeral Homes & Ins. Co. v. Baughn*, 148 So. 154, 157 (Ala. 1933); *Chelini v. Nieri*, 196 P.2d 915, 915 (Cal. 1948). See also RESTATEMENT (SECOND) OF TORTS § 868, at 172 (Tentative Draft No. 16, 1970).

6. See *Bowers v. Colonial Stages Interstate Transit*, 43 S.W.2d 497-98 (Tenn. 1931).

7. See *Blanchard v. Brawley*, 75 So. 2d 891, 893 (La. Ct. App. 1954); *Lott v. State*, 225 N.Y.S.2d 434, 436 (N.Y. Ct. Cl. 1962); RESTATEMENT (SECOND) OF TORTS § 868, at 173 (Tentative Draft No. 16, 1970).

8. See RESTATEMENT (SECOND) OF TORTS § 436A (1965) ("If the 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 emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance").

9. See *Kalen v. Terre Haute & I. R.R.*, 47 N.E. 694, 695, (Ind. Ct. App. 1897); *Knaub v. Gotwalt*, 220 A.2d 646, 648 (Pa. 1966).

recovery for mere emotional injury and that recognition of such claims would result in numerous fraudulent claims.¹⁰

A. *The Physical Injury Requirement and Impact as a Substitute for Bodily Harm*

The requirement of a physical injury as a threshold for imposing liability for emotional distress has developed in two directions. First, recovery has been awarded by courts where a bona fide bodily injury precedes the plaintiff's emotional distress, i.e., the parasitic damage rule.¹¹ Alternatively, recovery has been allowed where the emotional distress manifests itself in some physical injury.¹²

The idea that emotional distress must be a sequela to bodily injury to support recovery led to an early recognition of an "impact" as a sufficient indicium of "injury" to substantiate an award for emotional distress damages.¹³ Impact served the laudable purpose of establishing that the defendant had imposed a recognized risk of physical harm upon the plaintiff, and thus supported the existence of the defendant's duty to prevent the emotional harm attendant to the type of physical risk inherent in the impact. However, the necessity of bodily injury as a prelude to recovery lost much of its vitality when it took the guise of impact. Impact became sufficient to establish liability although it was harmless in itself.¹⁴ Indeed, impact has been found in the slightest interference with the plaintiff's body. In one of the most extreme stretches of judicial imagination, impact was found where a circus horse "evacuated his bowels" into plaintiff's lap causing plaintiff emotional distress.¹⁵ According to Prosser, "[t]he true value of the impact requirement may lie in the opportunity which is afforded to the defendant to testify that there was in fact no impact."¹⁶

By 1963, a majority of jurisdictions had abandoned impact as a threshold requirement to recover for emotional distress.¹⁷ In lieu of impact, most jurisdictions began to recognize that emotional distress, manifested as a physical injury caused by the defendant's breach of duty to prevent physical harm, was sufficient to support recovery. In other words, where the actor's conduct created a risk of physical harm to the plaintiff that

10. RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965).

11. See *Martinez v. Teague*, 96 N.M. 446, 451, 631 P.2d 1314, 1319 (Ct. App. 1981).

12. See RESTATEMENT (SECOND) OF TORTS §§ 436, 313 (1965).

13. See *Kaiserman v. Bright*, 377 N.E.2d 261, 264 (Ill. Ct. App. 1978). The court noted that "it is clear that Illinois demands the pleading and proof of a physical impact, or contemporaneous physical injury . . . [i]n Illinois, if there is no physical impact, the right to recovery exists only in those cases where the infliction of severe emotional injuries was intentional" (citation omitted). *Id.*

14. See *Morton v. Stack*, 170 N.E. 869 (Ohio 1930) (recognizing inhalation of smoke as impact); *Porter v. Delaware, L. & W. R.R.*, 63 A. 860 (N.J. 1906) (recognizing dust in eyes as impact).

15. See *Christy Bros. Circus v. Turnage*, 144 S.E. 680 (Ga. Ct. App. 1928); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 364 (5th ed. 1984).

16. KEETON ET AL., *supra* note 15, § 54, at 364.

17. See RESTATEMENT (SECOND) OF TORTS § 436 at 22, (Tentative Draft No. 9, 1963) (listing cases abrogating the impact rule. It is also noted that by 1963 a diminishing minority adhered to the loosely defined impact rule.).

fell short of actually causing physical harm but did cause emotional injury which, in turn, manifested itself in physical injury, the plaintiff could recover for both the emotional and physical injuries.¹⁸ This principle is best illustrated in a series of miscarriage cases.¹⁹ In these cases, a pregnant plaintiff was typically put in fear of bodily injury by an instrumentality set in motion by defendant. Although the instrumentality fell short of an impact upon plaintiff, the plaintiff's fear nonetheless caused her miscarriage.²⁰ The very physical risk created by the defendant's negligent conduct came to fruition as a result of the plaintiff's fear. Recovery was also allowed in the unusual instance where defendant's conduct created a risk of severe emotional distress, and the risk of emotional harm was such that one could also reasonably foresee a risk of physical injury.²¹ In both instances, the presence of bodily harm served as proof that the defendant had breached a duty owed to the plaintiff, including a duty to prevent the attendant emotional distress.

The requirement of a physical component to the complained mental distress served to vitiate the fear of trivial or fraudulent claims.²² Underlying the "physical manifestation" rule is the principle that "[f]right alone, is not an injury that may be the basis of a claim for damages, but physical injury due to fright is compensable."²³ Eventually, many jurisdictions dispensed with the physical manifestation component and allowed recovery as long as other factors supported the genuineness of the plaintiff's claim of emotional distress.²⁴

B. *Bystander Status as the Basis for Recovery of Negligently Inflicted Emotional Distress*

Where the plaintiff suffered emotional distress as a mere bystander at the scene of an injury to a third person, a more expansive view allowing recovery evolved. The earliest cases allowing "bystanders" to recover for negligent infliction of emotional distress required the plaintiff to prove that the defendant's negligent conduct resulted in an impact on plaintiff's

18. See RESTATEMENT (SECOND) OF TORTS § 436(2) (1965).

19. See *Richardson v. Pridmore*, 217 P.2d 113, 117 (Cal. 1950); *Vargas v. Ruggiero*, 17 Cal. Rptr. 568, 573 (Cal. 1961).

20. See RESTATEMENT OF TORTS (SECOND) § 436 cmt. b, illus. 2 (1965):

A so negligently drives a team of horses that they get out of hand and run away.

They are not stopped until they stand with their heads one on either side of B, who is in the path of the run-aways. The horses do not touch B, nor does she faint or fall, but she sustains a severe fright and shock, which brings on a miscarriage.

A is subject to liability to B for both the mental disturbance and the miscarriage.

21. See RESTATEMENT (SECOND) OF TORTS § 436(1) (1965).

22. *KEETON ET AL.*, *supra* note 15, § 54, at 361. "Where the defendant's negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, and in the absence of some other independent basis for tort liability, the great majority of courts still hold that in ordinary cases there can be no recovery." *Id.*

23. *Cook v. Maier*, 92 P.2d 434, 436 (Cal. Ct. App. 1939).

24. See, e.g., *Bass v. Nooney Co.*, 646 S.W.2d 765, 772 (Mo. 1983) (rejecting the requirement of a physical manifestation of the psychic injury and allowing the claim in those cases where the distress was medically diagnosable and of sufficient severity so as to be medically significant).

body.²⁵ In this respect, the bystander cases followed the path of other negligence cases where no third parties were involved and there was direct emotional harm to a plaintiff resulting from his proximity to the risk of bodily injury. Although the impact itself did not have to be substantial enough to warrant recovery, the notion of impact still sufficed to substantiate the idea that the emotional distress was "parasitic" to the "injury" caused by defendant's breach of the duty owed to the plaintiff.²⁶ Because the early negligent infliction of emotional distress cases, whether arising out of bystander or direct liability, hinged on a finding of impact, this requirement negated any special status given bystanders. In essence, bystander liability was grounded on the same fiction as direct liability.

The impact rule in bystander cases has now been displaced in almost every jurisdiction²⁷ by one of two tests for recovery. The first departure from the impact requirement was the so-called "zone of danger" rule, which relied on the proximity of the plaintiff to the risk of harm in determining liability.²⁸ Subsequently, some jurisdictions adopted a "foreseeability test," which hinged on the proximity of the plaintiff to the harm of another coupled with the relationship of the plaintiff to the injured party.²⁹ In addition, under either test, most jurisdictions initially adhered to the requirement that there be some physical indicia of the claimed emotional distress.³⁰

The "zone of danger" rule required that, in order for a plaintiff to recover for emotional distress as a bystander to the injury of a third person, she must be positioned in relation to the danger so that the risk created by the defendant would result in fear and fright on the part of plaintiff for her own safety.³¹ The "zone of danger" rule thus served the exact same purpose as the impact rule: the risk of harm created by the defendant was such that one could reasonably infer that the defendant's act directly and foreseeably resulted in emotional distress to the plaintiff.³²

25. See *Brisbose v. Kansas City Public Service Co.*, 303 S.W.2d 619, 623 (Mo. 1957); *Little v. Williamson*, 441 N.E.2d 974 (Ind. 1982); *Cadillac Motor Car Division v. Brown*, 428 So. 2d 301, 302, (Fla. Dist. Ct. App. 1983); *Deutsch v. Shein*, 597 S.W.2d 141, 145 (Ky. 1980).

26. The impact rule was justified as a check so that alleged wrongdoers would not be subject to a plethora of claims. See, e.g., *Spade v. Lynn & Boston R.R.*, 47 N.E. 88, 89 (Mass. 1897).

27. But see *Hammond v. Central Lane Communications Ctr.*, 816 P.2d 593 (Or. 1991) (retaining the impact rule as to physical violations).

28. See, e.g., *Tobin v. Grossman*, 249 N.E.2d 419 (N.Y. 1969); see also *Whetham v. Bismark Hosp.*, 197 N.W.2d 678 (N.D. 1972); *Bovsun v. Sanperi*, 461 N.E.2d 843 (N.Y. 1984); *Shelton v. Russell Pipe & Foundry Co.*, 570 S.W.2d 861 (Tenn. 1978).

29. See *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). Note the more restricted form of the Dillon v. Legg foreseeability test enunciated in *Thing v. LaChusa*, 771 P.2d 814 (Cal. 1989). See e.g., *Cohen v. McDonnell Douglas Corp.*, 450 N.E.2d 581 (Mass. 1983); *Wargelin v. Sisters of Mercy Health Corp.* 385 N.W.2d 732 (Mich. Ct. App. 1986); *Versland v. Caron Transport*, 671 P.2d 583 (Mont. 1983); *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983).

30. See discussion *supra* part IA.

31. See *Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979); *Hopper v. United States*, 244 F. Supp. 314 (D. Colo. 1965).

32. See generally *Corso v. Merrill*, 406 A.2d 300 (Conn. 1979); *Lessard v. Tarca*, 133 A.2d 625 (Conn. 1957); *Quill v. Trans World Airlines*, 361 N.W.2d 438 (Minn. Ct. App. 1985); *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980).

Although a few early cases allowed a mother to recover for physical injury resulting from emotional distress caused by viewing an injury to her child,³³ such recovery was generally disallowed under the "zone of danger" rationale. The objection to such recovery was that unless the mother was put at physical risk she was an unforeseeable plaintiff.³⁴ The "zone of danger" test, although more expansive than the impact test, resulted in what many considered arbitrary results. Not surprisingly, the "zone of danger" test was eventually abandoned in a number of jurisdictions for a more liberal test not solely dependent on the bystander's position. In 1968, bystander liability began to expand to embrace physical harm stemming from the emotional trauma suffered by one not fearing for her own safety, but for the safety of another.

The so-called foreseeability test was first delineated in a California case, *Dillon v. Legg*.³⁵ In *Dillon*, the defendant, as a result of negligent driving, killed a child. The plaintiffs, mother and sister of the decedent child, witnessed the child's death. Although the sister might have recovered under the prevailing zone of danger test because she was put in fear for her own safety at the time of the child's injury, the mother was not so positioned. The court, recognizing that to allow the sister to recover and not the mother would be arbitrary, fashioned a flexible three-pronged test for bystander recovery.³⁶ The gist of the test was that in certain circumstances a defendant would not only owe a duty to the physically injured party but also to closely related persons who might foreseeably suffer emotional harm as a result of observing such an injury.

Dillon did not dispense with the idea that the positioning of the plaintiff with respect to the harm was critical in determining whether a duty was owed to the plaintiff. Nonetheless, the *Dillon* court recognized that additional factors might prove reliable in ascertaining whether the emotional harm to the plaintiff was genuine and sufficiently related to defendant's breach of duty to warrant recovery. Although it expanded the scope of recovery, *Dillon* nonetheless retained the requirement that the emotional injury be physically manifested.³⁷

33. See *Spearman v. McCrary*, 58 So. 927 (Ala. Ct. App. 1912); *Cohn v. Ansonia Realty Co.*, 148 N.Y.S. 39 (N.Y. App. Div. 1914); *Gulf, D. & S.F.R. v. Coopwood*, 96 S.W. 102 (Tex. Civ. App. 1906). See also discussion in RESTATEMENT (SECOND) OF TORTS § 313 (Tentative Draft No. 4, 1963).

34. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928); see also *Benson v. National Surety Co.*, 183 N.E. 505 (N.Y. 1932).

35. 441 P.2d 912 (Cal. 1968).

36. The test set forth in *Dillon* is as follows:

1) Whether plaintiff was located near the scene of the accident at the time of injury as contrasted with one who was a distance away from it.

2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident as contrasted with learning of the accident from others after its occurrence.

3) Whether plaintiff and the victim were closely related as contrasted with an absence of any relationship or the presence of only a distant relationship.

Id. at 920.

37. *Id.* "We note, first, that we deal here with a case in which plaintiff suffered a shock which resulted in physical injury and we confine our ruling to that case." *Id.*

The scope of *Dillon* was subsequently narrowed in *Thing v. LaChusa*.³⁸ In *Thing*, a child was injured as a result of the defendant's negligence. Although the mother did not personally view the accident, she rushed to the scene of the accident where she found her child badly injured and unconscious. The mother, believing her child was dead, suffered emotional trauma for which she sought recovery under *Dillon*.³⁹ The California Supreme Court denied recovery.⁴⁰

Where *Dillon* had previously been interpreted to extend recovery to those "near" the accident scene,⁴¹ *Thing* limited recovery to persons present at the scene of the accident who were aware of the injury to the victim as it occurred. In addition, *Thing* retained the restriction that only those persons closely related to the victim could recover for emotional distress.⁴² The court stressed that for emotional distress to be actionable by a bystander, it must be serious, beyond a disinterested viewer's reaction, and proportionate to the circumstances.⁴³

C. *Preexisting Relationship as a Basis for Recovery of Negligently Inflicted Emotional Distress*

The principles utilized to expand the concept of duty in the bystander cases proved inadequate in cases in which the plaintiff suffered a severe emotional injury as a result of the defendant's conduct but neither sustained a bodily injury nor witnessed an injury to a third person. Prior to 1980, a party who suffered such an injury generally did not have a recognizable cause of action. In the 1980s, there was a gradual expansion of recovery for negligently inflicted emotional distress where the victim was able to prove a preexisting relationship with the tortfeasor at the time of the emotional injury. For convenience, these cases are referred to as "relational" cases.⁴⁴ In such cases, the existence of the relationship gives rise to a duty to protect the plaintiff from emotional harm.⁴⁵ The duty owed to the plaintiff is specific, as opposed to the general duty owed to the public typical in bystander cases.

In *Molien v. Kaiser Foundation Hospitals*, the California Supreme Court advanced recovery for a victim suffering from negligently inflicted

38. 771 P.2d 814 (Cal. 1989).

39. *Id.* at 815.

40. *Id.* at 814.

41. *See, e.g.*, Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980).

42. *Thing*, 771 P.2d at 816.

43. *Id.* at 828.

44. *See, e.g.*, Marlene F. v. Affiliated Psychiatric Medical Clinic, 770 P.2d 278, 279 (Cal. 1989). The court found that "[b]y undertaking to treat both Robert and Marlene F. [the therapist] had a duty of due care to both patients . . . [t]herefore, it was reasonably foreseeable and easily predictable that [the therapist's] battering and sexually molesting Robert F. would lead to serious emotional distress in Marlene F." *Id.*

45. *See, e.g., id.* at 282, noting that the therapist's "abuse of the therapeutic relationship and molestation of the boys breached his duty of care to the mothers as well as to the children." *See also* Rowe v. Bennett, 514 A.2d 802, 804 (Me. 1985) (holding that patient stated claim against therapist for breach of duty of care and negligent infliction of emotional distress based on therapist's involvement with patient's companion).

emotional distress where the victim could establish a preexisting relationship with the tortfeasor.⁴⁶ In so doing, the court dispensed with the necessity of cloaking the cause of action in "bystander" garb. This reasoning closely parallels the age-old rationale for allowing damages for mishandling of bodies and errant death notices, i.e., a contractual underpinning giving rise to a duty to prevent harm.⁴⁷

The plaintiff in *Molien* was the husband of Valerie Molien, who had sought medical care at Kaiser Foundation Hospitals and was treated by the defendant, Dr. Kilbridge.⁴⁸ After examination and testing, Dr. Kilbridge advised Mrs. Molien that she had an infectious type of syphilis. The diagnosis was wrong. As a result of the mistaken diagnosis, Mrs. Molien undertook treatment for the syphilis and was advised by Dr. Kilbridge to inform her husband of the diagnosis, which she did.⁴⁹ Mr. Molien ultimately tested negative for syphilis and subsequently brought an action against his wife's doctor and Kaiser Foundation Hospitals claiming that as a result of the defendants' malpractice in diagnosing his wife he incurred "extreme emotional distress" as well as the ultimate break-up of his marriage.⁵⁰

The defendants, relying on *Dillon v. Legg*,⁵¹ argued that Mr. Molien did not state a claim for negligent infliction of emotional distress because he did not satisfy the "bystander" criteria. In particular, the defendants argued that Mr. Molien was not entitled to recover because he was not present when the misdiagnosis was given.⁵²

The court rejected the characterization of the cause of action as one grounded on "bystander" liability. Instead, the court reasoned that *Dillon*'s emphasis on foreseeability was an appropriate basis on which to determine liability where different circumstances gave rise to emotional injury. Thus, the court held that a duty to Mr. Molien arose on the part of the defendant because the "risk of harm (as a result of the negligent diagnosis) was reasonably foreseeable to defendants."⁵³ The foreseeability of the harm to plaintiff was, at least in part, premised on the nature of the diagnosis and on the fact that plaintiff's wife had been advised to inform her husband of the negligent diagnosis. The court thus found that a relationship was established between the doctor and the husband.⁵⁴

Notably, *Molien* also dispensed with the requirement that in order to recover for emotional injury, the plaintiff plead and prove a "physical

46. 616 P.2d 813 (Cal. 1980).

47. See *supra* text accompanying notes 4-5.

48. *Molien*, 616 P.2d at 814.

49. *Id.*

50. *Id.* at 815.

51. *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

52. *Molien*, 616 P.2d at 815.

53. *Id.* at 817.

54. *Id.*

manifestation" of that injury.⁵⁵ The court, in rejecting the physical harm requirement, stated:

in light of contemporary knowledge we conclude that emotional injury may be fully as severe and debilitating as physical harm, and is no less deserving of redress; the refusal to recognize a cause of action for negligently inflicted injury in the absence of some physical consequence is therefore an anachronism.⁵⁶

Some confusion between the relational cases and the bystander cases has arisen because the relational cases frequently occur under circumstances similar to the bystander cases, i.e., where there is an injury to a third person. The difference is that in relational cases, the defendant has an obligation to prevent direct emotional harm to the plaintiff; liability is not contingent on viewing an injury to another or fear for one's own safety.

Many of the early relational cases manipulated the facts so as to place the plaintiff into a "bystander" status. In *Haught v. Maceluch*,⁵⁷ Maceluch, the defendant physician, delayed performing a caesarean section on Haught until almost eleven hours after she was admitted to the hospital, despite indications of fetal distress. Haught claimed that as a result of the physician's negligence her daughter was born with severe brain damage requiring life-long medical care. She sought damages for her daughter's injuries as well as for her own emotional distress stemming from her daughter's condition. The jury returned a verdict in favor of plaintiff awarding her damages for the child's medical expenses, the child's lost earnings and for her own mental distress. The district court struck the emotional distress award and Haught appealed.⁵⁸

The Fifth Circuit reinstated the award for emotional distress, reasoning that the foreseeability test of *Dillon v. Legg*⁵⁹ supported Haught's recovery. The court stated "The most recent cases . . . have been unanimous in accepting the so-called modern rule announced in *Dillon*—namely, the rule that bystander recovery should be governed by general negligence principles."⁶⁰ The court found that Haught was foreseeable within the bystander framework of *Dillon* because "[n]ot only was appellant located

55. In *Molien*, the court stated: "In our view the attempted distinction between physical and psychological injury merely clouds the issue. The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme." *Id.* at 821. The court went on to state "[w]e thus agree with the view of *Rodriguez* [which states that] 'In cases other than where proof of mental distress is of a medically significant nature, the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case.'" *Id.* (citing *Rodriguez v. State*, 472 P.2d 509 (Haw. 1970)).

56. *Id.* at 814.

57. *Haught v. Maceluch*, 681 F.2d 291 (5th Cir. 1982). For a discussion of *Haught*, see Carolyn A. Goodzeit, Note: *Rethinking Emotional Distress Law: Prenatal Malpractice and Feminist Theory*, 63 *FORDHAM L. REV.* 175, 186 (1994); Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 *FORDHAM L. REV.* 527, 535 (1984).

58. *Haught*, 681 F.2d at 293.

59. See *supra* text accompanying notes 36-38.

60. *Haught*, 681 F.2d at 297.

near the scene of the accident, she was in some sense the scene itself."⁶¹ In addition, in order to satisfy the *Dillon* requirement that the plaintiff "contemporaneously perceive the event," the court held that "[g]iven the overwhelming strength of the proximity and relationship factors in this case, we think that a jury could find foreseeability even without the contemporaneous perception factor, or at least with weaker evidence of it."⁶² Although it correctly decided the case, the court ignored the fact that a special duty to prevent emotional harm might have arisen on the part of the defendant as a result of the doctor-patient status of the parties.

Subsequently, in *Burgess v. Superior Court of Los Angeles County*,⁶³ a case remarkably similar to *Haught*,⁶⁴ the California Supreme Court clarified the scope of liability for emotional distress first enunciated in *Molien*. In *Burgess*, the plaintiff's newborn son suffered severe and permanent brain damage as a result of the defendant's delay in delivering the child after diagnosis of a prolapsed cord. The plaintiff mother subsequently sought damages for the emotional distress she suffered as a result of the injury to her child.⁶⁵ Defendants argued that the mother's negligent infliction of emotional distress claim was barred because she did not contemporaneously observe the injury to her son as originally required in *Dillon* and subsequently modified in *Thing*.⁶⁶

The *Burgess* court rejected the defendants' argument and recognized that the facts gave rise to the defendants' "direct" liability for plaintiff's emotional distress as opposed to bystander liability.⁶⁷ The distinction between the two theories of liability "is found in the source of the duty owed by the defendant to the plaintiff."⁶⁸ The court reasoned that bystander cases are characterized by the fact that the defendant and plaintiff have no preexisting relationship and that the duty owed to the plaintiff by the defendant is the same as the duty owed to the public in general. On the other hand, cases in which the plaintiff is a direct victim of negligently inflicted emotional distress are characterized by the fact that the duty owed to the plaintiff is "assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two."⁶⁹

The presence of the preexisting relationship of the parties is thus sufficient to establish a duty to prevent emotional harm. In contrast, the more attenuated the relationship, the less likely it will support a duty

61. *Id.* at 299.

62. *Id.* at 300. The court used this language to find foreseeability despite the fact that plaintiff was under the effect of anesthesia at the time of the delivery. *Id.*

63. 831 P.2d 1197 (Cal. 1992).

64. *Haught v. Maceluch*, 681 F.2d 291 (5th Cir. 1990).

65. *Burgess*, 831 P.2d at 1199.

66. *Id.*

67. *Id.* at 1200.

68. *Id.*

69. *Id.* at 1201 (citing *Marlene F. v. Affiliated Psychiatric Medical Clinic*, 770 P.2d 278 (Cal. 1990)).

on the part of the defendant to prevent emotional harm. Indeed, unlike the mother, the father of the injured child in *Burgess* was not deemed to have had a preexisting relationship with the defendant⁷⁰ and was not entitled to recover for his emotional distress resulting from his child's injury.⁷¹

D. Cancerphobia:⁷² Impact and Physical Injury as Limitations on Recovery for Negligently Inflicted Emotional Distress

A duty to prevent emotional distress has gained recognition in the latter part of this century in cases where the plaintiff has alleged "cancerphobia" and sought compensation for the present fear that she may develop cancer in the future.⁷³ The typical cancerphobia case arises when the plaintiff is exposed to a known carcinogen. Because of long latency periods, idiosyncratic responses to exposure, and the inability of medical science to predict the probability of cancer actually developing, the plaintiff may not have suffered a compensable physical injury at the time the suit is initiated. Nonetheless, the plaintiff may allege emotional distress at the possibility that an exposure to a carcinogen *might* result in cancer.

In the cancerphobia cases, the extent of the defendant's duty to the plaintiff is called into question because the risk posed by the defendant's conduct is generally one of physical harm as opposed to solely emotional harm to the plaintiff.⁷⁴ If a physical harm can be proved, the loss due to emotional distress is recoverable as parasitic damages.⁷⁵ Where there is no physical harm, recovery has been allowed in some jurisdictions if the plaintiff can show a legally cognizable impact.⁷⁶

In some cancerphobia cases, courts have strictly adhered to the parasitic damage rule in determining whether recovery is proper. For example, in *Jackson v. Johns-Manville Sales Corp.*,⁷⁷ the plaintiff (Jackson) sued in federal court for emotional distress stemming from his exposure to as-

70. This result seems somewhat illogical considering the fact that in *Molien* the court recognized a relationship between a husband and his wife's doctor. *Molien*, 616 P.2d at 815.

71. See *Burgess*, 831 P.2d at 1203. But does it make any sense that the father of a child does not have a relationship with the doctor, but the husband does? Certainly in both cases the husband's interest is implicit in the relationship. See also *Marlene F.*, 770 P.2d at 278.

72. For an excellent discussion of the cancerphobia cases see Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 *FORDHAM L. REV.* 527 (1984). For purposes of this article cancerphobia may be defined as an individual's fear of developing cancer after being exposed to a known carcinogen. Because some courts consider phobias to be a compensable physical manifestation of emotional distress, it appears that the term "cancerphobia" was crafted in an attempt to add validity to a plaintiff's alleged injury. See, e.g., *Clark v. Perry*, 442 S.E.2d 57, 68 (N.C. Ct. App. 1994); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 193 (Ky. 1994).

73. See *Jackson v. Johns-Manville Corp.*, 781 F.2d 394 (5th Cir. 1986); *Laxton v. Orkin*, 639 S.W.2d (Tenn. 1982); *Wetherill v. University of Chicago*, 565 F. Supp 1553 (Ill. 1983).

74. Dworkin, *supra* note 72, at 546.

75. See, e.g., *Deleski v. Raymark Industries, Inc.*, 819 F.2d 377 (3d Cir. 1987); *Cathcart v. Keene Industrial Insulation*, 471 A.2d 493 (Pa. Super. Ct. 1984); *Mauro v. Owens-Corning Fiberglass Corp*, 542 A.2d 16 (N.J. Super. 1988); *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985).

76. See, e.g., *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271 (3d Cir. 1985).

77. 781 F.2d 394 (5th Cir. 1986).

bestos. He had already been diagnosed with asbestosis, which involved physical non-cancerous manifestations of asbestos exposure.⁷⁸ Jackson succeeded in convincing the jury that he would probably develop lung cancer from his asbestosis, and that he would die as a result of the cancer.⁷⁹ Applying Mississippi law,⁸⁰ the court held that Jackson was entitled to recover because it was more likely than not that cancer would develop.⁸¹ In essence, it was as if Jackson had already contracted cancer. Although the court relied on asbestosis as the prerequisite physical injury to the emotional distress claim,⁸² it appears that even without that condition the court could have made the emotional distress claim parasitic to the likelihood that Jackson would develop cancer.

Those courts which strictly adhere to the parasitic damage rule have refused to allow recovery for cancerphobia where there has been no objective measurable physical injury. Thus, courts have utilized the parasitic damage rule to determine that the defendant did not have a duty to prevent plaintiff's fear of cancer.⁸³ In *In re Hawaii Federal Asbestos cases*,⁸⁴ some of the plaintiffs who had worked in shipyards sought recovery from asbestos manufacturers for physical harm and emotional distress stemming from their workplace exposure to asbestos.⁸⁵ The shipyard workers, although presenting evidence of exposure to asbestos, had no symptoms of asbestosis.⁸⁶ The court found that there was not a sufficient basis upon which to award damages for physical injury because the evidence of exposure did not rise to the level of "functional impairment."⁸⁷ With respect to whether the physical changes attributable to exposure were sufficient to justify an award for emotional distress the court also responded in the negative.⁸⁸ The court held that there must be "a compensable harm underlying the emotional distress before recovery may be had for mental anguish."⁸⁹ The court concluded that any emotional

78. *Id.* at 410.

79. *Id.* at 414.

80. *Id.* at 398. On rehearing en banc, the Court of Appeals certified open questions of state law to the Mississippi Supreme Court, 757 F.2d 614 (5th Cir. 1985) (en banc). The Mississippi Supreme Court declined certification without discussion, 469 So. 2d 99 (Miss. 1985). *Jackson*, 781 F.2d at 396.

81. *Jackson*, 781 F.2d at 414. See also *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. Ct. App. 1994) where this probability rule was also applied.

82. *Jackson*, 781 F.2d at 414. The court also noted that the plaintiff was entitled to recover compensatory damages for emotional distress because he had also established gross misconduct on the part of the defendant. *Id.*

83. See, e.g., *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589 (5th Cir. 1984); *Payton v. Abbott Laboratories*, 437 N.E.2d 171 (Mass. 1982); *Cathcart v. Keene Industrial Insulation*, 471 A.2d 493 (Pa. 1984).

84. 734 F. Supp. 1563 (D. Haw. 1990).

85. *Id.* at 1567. Defendant moved for judgment notwithstanding the verdict for plaintiffs Sakauye, Chung, Renio, Kuon and Yonashiro, and moved for a new trial for plaintiff Lau. *Id.* at 1572-73.

86. *Id.* (plaintiffs Renio, Kuon and Yonashiro).

87. *Id.* at 1567. The court found that plaintiffs Renio, Kuon and Yonashiro had no physical injury due to asbestos exposure. However, plaintiffs Sakauye, Chung and Lau did prove a physical injury and were entitled to recovery for emotional distress damages. *Id.* at 1572-73.

88. *Id.* at 1567. The court noted that although plaintiffs Sakauye, Chung and Lau were entitled to damages for emotional distress, they were excessive under the facts of this case. *Id.* at 1573.

89. *Id.* at 1569 (citing *Rodriguez v. State*, 472 P.2d 509 (Haw. 1970)).

distress without evidence of a functional impairment was unreasonable as a matter of law.⁹⁰ In part, the court relied on statistical evidence showing that the plaintiffs' likelihood of contracting cancer was remote given their limited exposure to the asbestos.⁹¹

Similarly, in *DeStories v. City of Phoenix*,⁹² plaintiffs sought recovery for emotional distress as a result of their exposure to asbestos. The Arizona court refused to allow the negligence claim, stating that "[a]lthough the cases for the most part agree that recovery for mental anguish requires proof of an accompanying physical harm, they vary widely concerning the character of evidence held to be sufficient to demonstrate such harm."⁹³ The court distinguished cases allowing recovery for the impact of a toxic substance on plaintiff's body, noting that "the view that mere ingestion of a toxic substance constitutes sufficient physical harm on which to base a claim for damages for mental anguish goes beyond the reach of current Arizona case law."⁹⁴

In contrast, some courts have been willing to apply a version of the impact rule and to allow recovery where there is no physical injury but where the plaintiff can establish actual exposure to a known carcinogen. In order to support recovery, the impact must directly result in emotional trauma "of a kind and extent normally expected to occur in a reasonable person."⁹⁵ In *Laxton v. Orkin*,⁹⁶ the plaintiffs brought suit seeking damages for mental anguish, personal injury and property damage as a result of Orkin's negligence in contaminating the plaintiffs' household water supply with the toxic chemical chlordane.⁹⁷ A verdict was rendered in favor of the plaintiffs and each claimant was awarded damages for "injury, mental pain and suffering (mental anguish)" as a result of their drinking the contaminated water.⁹⁸ The Supreme Court of Tennessee, affirming the judgment, analogized the case to those involving contaminated food products, stating that

[r]ecovery of damages resulting from the ingestion of deleterious food or beverages also has been permitted in numerous cases in this state, though physical injury, if any, was slight In many of them, . . . recovery was permitted with a minimum showing of physical injury; where this did occur, full recovery has been allowed for the fright, shock, or other 'mental' aspect of the claim.⁹⁹

90. *Id.*

91. The court cited a study indicating that the incidence of lung cancer among shipyard workers would be approximately sixty-seven per million men per year. *Id.* at 1570 n.10 (citing Kolonel, *Cancer Occurrence in Shipyard Workers Exposed to Asbestos in Hawaii*, *CANCER RESEARCH* 45, 3924 (Aug. 1985)).

92. 744 P.2d 705 (Ariz. Ct. App. 1987).

93. *Id.* at 710.

94. *Id.* at 711.

95. *Adams v. Clean Air Systems*, 586 N.E.2d 940, 942 (Ind. Ct. App. 1992).

96. 639 S.W.2d 431 (Tenn. 1982).

97. *Id.* at 431.

98. *Id.*

99. *Id.* at 433-34.

Upholding the trial court's characterization of this case as a "technical physical injury," the court reasoned that recovery for negligent infliction of emotional distress should be allowed where "as a result of a defendant's negligence, a plaintiff has ingested an indefinite amount of a harmful substance."¹⁰⁰ Whether the ingestion was sufficient to support recovery without a diagnosable physical injury was, according to the court, a question of fact for the jury.¹⁰¹ It appears that the so-called "technical injury" consisted of exposure to a known carcinogen in a manner capable of resulting in the plaintiff's contracting cancer.

Some courts have been willing to define impact in a technical sense in analyzing whether damages for emotional distress were recoverable. In *Wetherill v. University of Chicago*,¹⁰² plaintiffs alleged that they had been exposed *in utero* to a form of synthetic estrogen, diethylstilbestrol (DES), administered to their mothers as part of an experiment conducted in the early 1950s at the University of Chicago Hospital. Though neither plaintiff suffered from cancer or a precancerous condition, both brought suit in Illinois Federal District Court claiming damages for their present fear of developing cancer in the future.¹⁰³ In allowing the plaintiffs' claim, the court reasoned that so long as there was a physical impact and a reasonable fear stemming from the impact, a claim for emotional distress would be proper.¹⁰⁴

The court found that the impact requirement was satisfied by the prenatal exposure to DES occasioned by the defendant's alleged tortious conduct.¹⁰⁵ The reasonableness of the plaintiffs' fears, although not contingent on a high degree of likelihood of future injury,¹⁰⁶ was satisfied because empirical studies have found a causal relationship between DES and cancer, and because both scientific and lay information available to the plaintiffs would lead a reasonable person to be in fear of contracting cancer after exposure to DES.

II. FEAR OF AIDS

A. *The Reality of AIDS*

AIDS was first recognized in the United States in 1981 after a number of cases of opportunistic¹⁰⁷ infections were reported among homosexual

100. *Id.* at 434.

101. *Id.*

102. 565 F. Supp. 1553 (Ill. 1983).

103. *Id.* at 1559.

104. *Id.* at 1560.

105. "[T]heir fears stem from their prenatal exposure to DES—the 'physical impact' of defendants' allegedly tortious conduct." *Id.*

106. *Id.* at 1559.

107. Opportunistic infections may be defined as "an organism capable of causing disease only in a host whose resistance is lowered, e.g. by other diseases or drugs." *STEDMAN'S MEDICAL DICTIONARY* 990 (5th ed. 1982).

The most common opportunistic infections associated with AIDS are pneumocystis carinii pneumonia, disseminated cytomegalovirus, disseminated mycobacterium avium-intracellular, candida eso-

men.¹⁰⁸ Shortly thereafter, AIDS was identified in a number of other groups including intravenous drug users,¹⁰⁹ hemophiliacs,¹¹⁰ children born to women who were intravenous drug users,¹¹¹ and members of certain populations primarily in Haiti and parts of Africa.¹¹² Although these initially identified risk groups still have the highest incidence of reported cases, the disease has now been confirmed in other groups, including significant numbers of heterosexuals.¹¹³ In addition, the epidemic has turned its force toward Asia and developing countries, leading experts to predict that by the year 2000, 40 million people will be infected with AIDS, ninety percent of whom will be in developing countries.¹¹⁴ Between 1981-90, more than 100,000 people in the United States died from AIDS.¹¹⁵ In 1991, it was estimated that one million people in the United States were infected with the virus causing AIDS,¹¹⁶ which is equal to one in every 250 people.¹¹⁷

In 1983, it was confirmed that AIDS was caused by a retrovirus now known by the acronym "HIV."¹¹⁸ Although the process of HIV transmission and infection has been studied in depth, much is still unknown. What is known leads scientists to believe that the present number of AIDS victims is merely the tip of the iceberg.¹¹⁹

The retrovirus works by first infecting a human cell where the genetic material of the virus, ribonucleic acid (RNA), is transcribed into the genetic material of humans, deoxyribonucleic acid (DNA).¹²⁰ The virus

phagitis, mucocutaneous herpes simplex, cryptococcus neoformans meningitis, cerebral toxoplasma gondii, enteric cryptosporidiosis. Another common manifestation of AIDS is Kaposi's sarcoma. See WILLIAM H. DORNETTE, AIDS AND THE LAW 9 (1987).

108. See *Pneumocystis Pneumonia—Los Angeles*, 30 MORBIDITY & MORTALITY WKLY. REP. 250 (Center for Disease Control, 1981).

109. See *Mortality Attributable to HIV Infection/AIDS—United States, 1981-90*, 40 MORBIDITY & MORTALITY WKLY. REP. 41, 43 (Center for Disease Control, 1991) [hereinafter *Mortality*].

110. *Id.*

111. *Id.*

112. *Id.*

113. See *AIDS in Women—United States*, 39 MORBIDITY & MORTALITY WKLY. REP. 845 (Center for Disease Control, 1990) (reporting AIDS among female sex partners of AIDS sufferers as well as reports of AIDS in prison populations).

114. See Geoffrey Cowley & Mary Hager, *The Ever-Expanding Plague*, NEWSWEEK, Aug. 22, 1994, at 37.

115. See *Mortality*, *supra* note 109, at 43.

116. *Id.*

117. See *HIV Prevalence Estimates and AIDS Case Projections for the United States: Report Based Upon a Workshop*, 39 MORBIDITY & MORTALITY WKLY. REP. RR-16 (Center for Disease Control, 1990).

118. HIV stands for Human Immunodeficiency Virus. Credit for identification of the virus is given to Luc Montagnier and Robert Gallo. See Gallo, *Isolation of Human T-Cell Leukemia Virus in Acquired Immune Deficiency (AIDS)*, 220 SCIENCE 865 (1983); Barrie-Sinoussi et al., *Isolation of a T-Lymphotropic Retrovirus from a Patient at Risk for Acquired Immune Deficiency Syndrome (AIDS)*, 220 SCIENCE 868 (1983).

119. See Harold Jaffe, *The Application of Medical Facts to the Courts*, in AIDS AND THE COURTS 7, 11 (Clark C. Abt & Kathleen M. Hardy eds., 1990). Jaffe makes the point that the famous "iceberg slide" shown at AIDS lectures indicates that those presently suffering from AIDS are the so-called tip of the iceberg. Beneath the waterline are those infected with the virus with non-life threatening conditions (AIDS Related Complex) and the base of the iceberg contains those infected with the virus who are at present totally asymptomatic. *Id.*

120. See *id.* at 8.

contains a unique enzyme or protein known as "reverse transcriptase" which allows it to transcribe its RNA to DNA.¹²¹

This process results in a latent infection which eventually results in the body's production of antibodies to the virus. The period between the initial infection and the production of antibodies that are identifiable in the individual's blood is known as a "window" period.¹²² During the window period, although the virus may be undetectable in an individual's blood, the individual is nonetheless infected and capable of transmitting the virus. An individual infected with HIV may not experience symptoms for months, years or even decades.¹²³ However, once infected, an individual becomes and remains infectious to others even if no symptoms are evident. Moreover, current research indicates that at certain times an individual may be more infectious than at other times.¹²⁴

The HIV virus can be transmitted by an infected person's blood, semen, or vaginal secretions coming into contact with the blood or mucous membranes of an uninfected person.¹²⁵ Although the virus has been found in saliva, there have been no reported cases of the virus being transmitted by a bite or through exposure to an infected individual's saliva.¹²⁶ The HIV virus does not survive well outside of the body and cannot be transmitted by casual contact.¹²⁷

The spread of the HIV virus has been attributed primarily to high-risk sexual practices.¹²⁸ To a lesser degree, transmission has been attributed to intravenous drug use, blood products used by hemophiliacs, heterosexual sex, and transfusions.¹²⁹ Transmission also occurs from a mother to her child in utero or through her breast milk.¹³⁰ About three percent of HIV infections are unexplained.¹³¹

121. See Helena Brett-Smith M.D. & Gerald H. Friedland, M.D., *Transmission and Treatment, in AIDS LAW TODAY* 18 (Scott Burris et al. eds., 1993).

122. See Jaffe, *supra* note 119, at 8.

123. A study conducted in connection with the San Francisco Department of Health on a group of homosexual men indicated that at three years postinfection with the HIV virus approximately five percent of the men in the study had developed symptoms of AIDS. At seven years post infection approximately one-third of the men in the study had developed symptoms of AIDS. At ten years only fifteen percent of the men remained symptom free. See *id.* at 11-12.

124. See Brett-Smith & Friedland, *supra* note 121.

125. *Id.* at 23.

126. See Jaffe, *supra* note 119, at 19; see also Gerald H. Friedland & Robert S. Klein, *Transmission of the Human Immunodeficiency Virus*, 317 *NEW ENG. J. MED.* 1125, 1129 (1987).

127. Jaffe, *supra* note 119, at 24.

128. Anal intercourse is considered to be the highest risk practice for spreading the virus due to the frequent tearing of the mucous membranes. See Brett-Smith & Friedland, *supra* note 121, at 25. At highest risk for becoming infected with the HIV virus are sexual partners who are the receptive partners (i.e., women in heterosexual relationships and receptive men involved in anal intercourse). *Id.*

129. Jaffe, *supra* note 119, at 15.

130. DORNETTE, *supra* note 107, at 7.

131. See Jaffe, *supra* note 119, at 16. With respect to the unknown means of transmission, Jaffe states:

We think, but cannot be certain, that these cases largely represent incomplete information. Many of these cases have died before they've been reported, or they may be people who are too ill to be interviewed or who don't want to be interviewed. When we get the opportunity to talk to these patients . . . we are able to reclassify the majority of them into one of the groups that I've described.

A number of issues surrounding the transmission of AIDS and the disease itself have generated anxiety among the public. The fact that HIV may not be detectable in an individual's blood during the window period, but nonetheless remains transmittable, raises serious issues about the public's exposure to the disease. Similarly, the fact that an individual may be infected with the disease but remains asymptomatic has raised anxiety among the public about possible exposure to the disease. Because the disease was initially viewed as a homosexual disease that was sexually transmitted, it engendered a reluctance to address the disease and its modes of transmission.¹³² Additional reasons why the public fears exposure to AIDS include the following: there is no immunization effective against the disease; once infected there is no cure for the disease; the disease is generally manifested in any number of opportunistic diseases from fungus to dementia; and the disease itself is invariably fatal.¹³³ In short, AIDS is a shocking disease.

What is clear is that a large portion of the public is either ignorant of how AIDS is transmitted or chooses not to believe it. A 1988 study done by the Georgia Institute of Technology¹³⁴ indicated that 66% of the people surveyed would be concerned about sharing a bathroom with an infected individual, 40% had concerns about sharing a cafeteria, and 63% were concerned about sharing tools. Other surveys indicate that members of the public still believe AIDS can be transmitted from a toilet seat or by other means of casual contact.¹³⁵

There is only one known instance of AIDS being transmitted from a health care worker (HCW) to a patient.¹³⁶ In that case, it was found that five patients of an HIV-infected Florida dentist were infected with a strain of the virus indicative of direct transmission from the blood of the dentist to the patient.¹³⁷ The events leading to transmission of the infection to the patients are unknown.¹³⁸ However, according to the Centers for Disease Control and Prevention, the risk of a HCW trans-

132. See Mervyn F. Silverman, *AIDS Medical Education for Lawyers, Judges, and Legislators*, in *AIDS AND THE COURTS* 27, 31 (Clark C. Abt & Kathleen M. Harvey eds., 1990); see also RANDY SHILTS, *AND THE BAND PLAYED ON* (1987).

133. Silverman, *supra* note 132, at 31-32.

134. Jaffe, *supra* note 119, at 34.

135. David Harold et al., *Employees' Reaction to AIDS in the Work Place* (Ga. Inst. Tech., 1988).

136. See *A Surgeon with Acquired Immunodeficiency Syndrome: A Threat to Patient Safety? The Case of William H. Behringer*, 94 AM. J. MED. 93 (1993); *Update: Investigations of Patients Who Have Been Treated by HIV-Infected Health Care Workers*, 41 MORBIDITY & MORTALITY WKLY. REP. 344, 346 (Center for Disease Control, 1992); *Update: Investigations of Persons Treated by HIV-Infected Health-Care Workers—United States*, 42 MORBIDITY & MORTALITY WKLY. REP. 329, 331 (Center for Disease Control, 1993) ("Among the 58 investigated practices described in this report, the dental practice in Florida remains the only documented instance of HIV transmission from an HCW to patients.").

137. See C. Fordham von Reyn et al., *Absence of HIV Transmission from an Infected Orthopedic Surgeon: A 13-Year Look-back Study*, 269 JAMA 1807 (1993).

138. See *Update: Investigations of Persons Treated by HIV-Infected Health Care Workers—United States*, 42 MORBIDITY & MORTALITY WKLY. REP. 329, 331 (Center for Disease Control, 1993).

mitting the virus to a patient is between 0.000024% and 0.0000024%.¹³⁹ In light of the statistical probabilities of the transmission of AIDS from a HCW, there has been speculation that the exposure was intentional in the Florida cases.¹⁴⁰ Interestingly, the public's perception of the risk of transmission from a HCW to a patient does not correlate with the statistical reality. In a *Newsweek* poll, forty-nine percent of those polled believed that HIV-positive HCWs should not be allowed to practice.¹⁴¹

Considering the widespread fear and misconceptions surrounding AIDS transmission, numerous lawsuits have been brought seeking damages for emotional distress due to possible exposure to AIDS. In those cases, as in any negligence action, it is elementary that in order to establish a viable claim the plaintiff must allege facts sufficient to give rise to a legally cognizable duty owed to her by the defendant which, in fact, was breached and which proximately caused the plaintiff's injury.¹⁴² That simple formulation incorporates two obstacles for one seeking recovery for negligent infliction of emotional distress based on a fear of AIDS. First, the plaintiff must establish the existence of a relationship between herself and the defendant giving rise to a legal duty which was in fact breached.¹⁴³ And second, the plaintiff must establish that her injury is such that it warrants recovery.

B. *The Relational Rationale for a Finding of a Duty to Prevent Fear of AIDS*

A number of the fear of AIDS cases have reached results consistent with the *Molien* rationale of allowing recovery where there is a preexisting relationship giving rise to a duty to prevent emotional harm.¹⁴⁴ It does not strain one's credulity to recognize that the doctor-patient relationship imposes an obligation on the part of the doctor to use care both in the treatment and diagnosis of a patient. Neither is it an illogical extension of existing law to say that the duties arising out of a fiduciary relationship include the duty to prevent emotional harm in the course of performing the obligations imposed by the relationship. Thus, where there is a preexisting relationship, risk of physical harm need not be present in order for the plaintiff to recover for her emotional distress.¹⁴⁵

139. See D.M. Bell et al., *Risk of Hepatitis B and Human Immunodeficiency Virus Transmission to a Patient from an Infected Surgeon Due to Percutaneous Injury during an Invasive Procedure: Estimates Based on a Model*, 1 *INFECT. AGENTS DIS.* 263 (1992).

140. See Rob Hiaasen, *Proof Lacking But Murder's Popular Theory in AIDS Dentist Puzzle*, *ORLANDO SENTINEL*, July 11, 1993, at B1.

141. See Barbara Kantrowitz et al., *Doctors and AIDS*, *NEWSWEEK*, July 1, 1991, at 49, 56.

142. See KEETON ET AL., *supra* note 15, at 164-65.

143. *Id.* at 357.

144. See e.g., *Marchica v. Long Island R.R.*, 810 F. Supp. 445, *aff'd*, 31 F.3d 1197 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 727 (1995). For a discussion of the *Molien* relational analysis reversed, see *Kerins v. Hartley*, 33 Cal. Rptr. 2d 172 (Cal. Ct. App. 1994).

145. *Molien*, 616 P.2d 813 (Cal. 1980). The risk created by defendant's negligence in diagnosis was one solely of emotional harm.

In *Faya v. Almaraz*,¹⁴⁶ the defendant doctor had operated on both plaintiffs during a period in which the defendant knew he was HIV-positive. Both plaintiffs learned of the doctor's illness more than one year after each individual's last operation.¹⁴⁷ Both were tested for HIV, with negative results. Subsequently, the plaintiffs brought suit seeking damages for their exposure to HIV, physical injury and costs resulting from medical surveillance in connection with their alleged exposure.¹⁴⁸

The Maryland trial court dismissed the plaintiffs' complaint on the basis that the plaintiffs had failed to plead sufficient facts regarding exposure to the AIDS virus.¹⁴⁹ The appellate court reversed, holding that the plaintiffs had stated a claim for negligent infliction of emotional distress for their alleged fear of AIDS.¹⁵⁰ Such a result would have been explicable under the rationale of the California court in *Molien*, but the Maryland court relied in large part on the fact that there was a "theoretical possibility"¹⁵¹ the defendant could have transmitted the AIDS virus during surgery. Thus, the court grounded its decision in terms of *impact*.

The court, in allowing the claim, first considered whether the facts could support a duty on the part of the doctor to either inform his patients of his condition or refrain from performing invasive surgery.¹⁵² Although the court did not emphasize the nature of the doctor-patient relationship, it held that such a duty might arise in light of the possibility of the risk of transmission coupled with the potential consequences of transmission.¹⁵³ The court acknowledged that the physician's duty of care encompassed disclosure of his HIV status despite the minimal risk of transmission of the virus.¹⁵⁴

The result in *Faya* appears to be correct. However, the court, in reaching the right result, contorted the reasoning used in the impact cases. The reliance on impact required the court to grope for some indicia of the risk of physical harm. The problem, however, was that there was no proof of plaintiff's actual exposure to the virus coupled with a mode of transmission. The court allowed the mere presence of HIV to constitute an impact.¹⁵⁵ The more direct analysis of *Molien* would have enabled the court to reach the same result without searching for an elusive possibility of physical harm. The doctor/patient relationship supports the conclusion

146. 620 A.2d 327 (Md. 1993).

147. Defendant died of AIDS on November 16, 1990. The plaintiffs both learned of the defendant's death from a local newspaper on December 6, 1990. *Id.* at 329.

148. *Id.* at 330.

149. In particular, the court noted that there were no reported cases regarding transmission of HIV from a surgeon to a patient, and the fact that there was no indication that improper barrier techniques were utilized during the surgeries. *Id.*

150. *Id.* at 339. Plaintiffs appealed to the Maryland Court of Special Appeals. The Court of Appeals of Maryland issued a writ of certiorari prior to intermediate review and reversed and remanded.

151. *Id.* at 334.

152. *Id.* at 333.

153. *Id.*

154. *Id.*

155. *See id.* at 334.

that a duty arose to protect the plaintiff from emotional harm in the form of fear of the risk of transmission of AIDS. The court's focus on an actual risk of transmission was misplaced. Under a relational analysis, as in *Molien*, if a relationship exists such that a duty is recognized to prevent emotional harm, the court need not find an actual risk of physical harm.

Thus under the *Molien* rationale, a court may find a duty despite lack of actual proof of exposure to HIV if there was a recognized relationship where the defendant was obligated to protect the plaintiff from emotional as well as physical harm. Therefore, although the physical risk of AIDS may be so remote as to bar recovery under any other analysis of duty, recovery for fear of AIDS is warranted where there is a preexisting relationship.¹⁵⁶

In *Kerins v. Hartley*,¹⁵⁷ the California Court of Appeals rejected its own previous relational analysis and refused to recognize a duty on the part of a physician to prevent fear of AIDS. In *Kerins*, the plaintiff (Kerins) brought suit for emotional distress based on the discovery that her surgeon was suffering from AIDS when he performed surgery on her.¹⁵⁸ Kerins contended she had consented to the surgery expressly upon the condition that the defendant, Dr. Gordon, was in good health.¹⁵⁹ Approximately eighteen months after her surgery, Kerins learned of the doctor's condition when she saw a televised newscast wherein he announced his illness.¹⁶⁰ Within two weeks of learning of the doctor's condition, Kerins was advised that she tested negative for AIDS.¹⁶¹

The detailed operative report did not indicate any cuts sustained by the doctor or any other unusual occurrences which would have substan-

156. See also *Marchica v. Long Island R.R.*, 810 F. Supp 445 (E.D.N.Y. 1993), *aff'd*, 31 F.2d 1197 (2d Cir. 1994), *cert. denied*, ___U.S.___, 115 S. Ct. 727 (1995). Plaintiff railroad employee was stuck by a needle in the course of his employment. He claimed that he suffered from "fear of AIDS". The court allowed his claim by interpreting the Federal Employer's Liability Act (FELA) as providing for recovery of emotional distress. That result is also consistent with recognition of a duty arising out of the employer/employee relationship to avoid infliction of emotional distress. See also *Marriott v. Sedco Forex Int'l. Resources*, 827 F. Supp 59 (D. Mass. 1993). Although there was proof of the likelihood of plaintiff's actual exposure to the HIV virus, the court found the basis for allowing American seamen to recover for their "fear of AIDS" under the "Jones Act which incorporates FELA by reference." *Id.* at 72. Cf. *Doe v. Surgicare of Joliet*, 643 N.E.2d 1200 (Ill. Ct. App. 1994) (recognizing that the plaintiff could recover as a direct victim or a bystander but denying recovery based on lack of exposure).

157. 33 Cal. Rptr. 2d 172 (Cal. Ct. App. 1994); see also *K.A.C. v. Benson*, 63 U.S.L.W. 2500 (Minn. 1995), where the Supreme Court of Minnesota rejected the Plaintiff's claim for negligent infliction of emotional distress resulting from her alleged exposure to the HIV virus during a gynecological procedure performed by the defendant doctor. The court refused to allow the claim absent proof of actual exposure.

158. *Kerins v. Hartley*, 21 Cal. Rptr. 2d 621 (Cal. Ct. App. 1993). The surgery consisted of an exploratory laparotomy, lysis of peritoneal adhesions, multiple myomectomies, uterine reconstruction and repair of the broad ligament. *Id.* at 623.

159. *Id.* at 626.

160. *Id.* at 623. The subject matter of the newscast was an AIDS discrimination lawsuit which the defendant, Gordon, had brought against his partners as a result of their refusal to allow him to continue practicing after his diagnosis of AIDS.

161. *Id.*

tiated an actual risk of transmission to Kerins.¹⁶² In fact, the evidence indicated that at the time of trial there had been no known instances of a medical doctor transmitting HIV to a patient.¹⁶³ In essence, the evidence established the mere presence of AIDS in the operating room and nothing more. The trial court, apparently utilizing a bystander analysis, granted defendant's motion for summary judgment.

The court of appeals reversed the trial court's grant of summary judgment in favor of the doctor. In so doing, the court relied in part on the traditional rule that an individual was entitled to recover for emotional distress where an intentional tort had been committed.¹⁶⁴ Kerins' complaint, according to the court, stated a claim for a technical battery. If the surgery was in fact conditioned on the doctor's good health and he proceeded despite his knowledge of having AIDS, then, according to the court, the patient would be entitled to recover for the intentional tort of battery.¹⁶⁵

The court also reinstated Kerins' claim for negligent infliction of emotional distress, relying on the relational analysis articulated in *Molien*. Despite the absence of any evidence of actual exposure to HIV, the court held that Kerins would be able to recover for her emotional distress during the period she reasonably believed that she may have contracted AIDS.¹⁶⁶ The applicable period commenced at the time that she learned her surgeon was infected with AIDS and ended when she discovered that she had not actually been exposed to infected blood.¹⁶⁷ The court acknowledged that despite the absence of proof of a verifiable physical risk, Kerins was entitled to recover because the risk created by the doctor's conduct, in light of his relationship with the patient, was one of emotional harm.¹⁶⁸

The Supreme Court of California granted the defendant's petition for review¹⁶⁹ and then transferred the case back to the court of appeals "with directions to vacate its decision and then reconsider the action in light of *Potter v. Firestone Tire & Rubber Co.*"¹⁷⁰ On rehearing, the court

162. *Id.* at 628.

163. *Id.* at 624.

164. *See id.* Other "fear of AIDS" cases have also recognized that recovery for emotional distress is warranted where the plaintiff has stated a claim for an intentional tort. *See, e.g., Whelan v. Whelan*, 588 A.2d 251 (Conn. Super. Ct. 1991) (recognizing that plaintiff, ex-wife of the defendant had stated a claim for intentional infliction of emotional distress and if proven could recover for her fear of AIDS where the defendant had falsely told her that he was HIV-positive in order to obtain dissolution of support and alimony orders); *Funeral Services by Gregory v. Bluefield Community Hosp.*, 413 S.E.2d 79 (W. Va. 1991).

165. *Kerins*, 21 Cal. Rptr. 2d at 627.

166. *Id.* at 632.

167. *Id.* She tested negatively for HIV antibodies and received counseling with respect to the accuracy of the testing procedures and the remoteness of the potential transmission more than 18 months after her surgery. *Id.*

168. *See id.* at 629.

169. *Kerins v. Hartley*, 868 P.2d 906 (Cal. 1994).

170. *Id.* (citing *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993)). In *Potter*, a cancerphobia case, the court held that in the absence of physical injury, recovery for negligent infliction of emotional distress due to alleged exposure can only be premised on a claim that is corroborated by reasonable medical and scientific opinion that it is more likely than not that cancer will develop in the future due to the exposure.

reversed itself and affirmed the trial court's grant of summary judgment as to both the negligence and intentional tort claims.¹⁷¹ In connection with the plaintiff's negligence claim, the court imposed a two-part test for recovery of damages where the claim is based on fear of AIDS. The stringent test adopted by the court, while not purporting to reject the existence of a duty owed to the plaintiff,¹⁷² nonetheless precluded recovery in essentially all cases where impact and exposure were absent. The test, as articulated by the court, required that where a plaintiff has not sustained a physical injury, she must show exposure to HIV or AIDS as a result of a breach of duty owed by a defendant.¹⁷³ In addition, the plaintiff must prove by reliable evidence that "it is more likely than not that he or she will become HIV seropositive and develop AIDS due to the exposure."¹⁷⁴ The court, avoiding a discussion of its previous duty analysis,¹⁷⁵ left unclear the scope of any duty owed to a plaintiff. While recognizing that recovery for negligent infliction of emotional distress is warranted where the "defendant assumes a duty to the plaintiff in which the emotional condition of the plaintiff is the object,"¹⁷⁶ the court nonetheless disregarded any duty a defendant might owe to a plaintiff with respect to fear of AIDS and concluded that the doctor only owed a duty to the patient to use due care in the performance of the surgical procedure.¹⁷⁷ The court, in rejecting its earlier duty analysis for "policy" reasons, studiously avoided discussion of *Molien*.¹⁷⁸ The result of the court's decision was to ignore its previously well-reasoned recognition of a duty based on the doctor-patient relationship to protect a patient from emotional harm when it is in the form of fear of AIDS.

171. *Kerins v. Hartley*, 33 Cal. Rptr. 2d 172, 181 (Cal. Ct. App. 1994). With respect to the "technical battery" claim, the court held that the plaintiff was required to show a significant risk of contracting AIDS in order to recover. *Id.* at 180.

172. It appears that the court was focusing on the issue of proximate cause. The court stated that, "[i]t is therefore questionable whether appellant's emotional suffering was proximately caused by the breach of any legal duty owed to her by [defendant]." *Id.* at 177-78.

173. *Id.* at 178.

174. *Id.* at 179.

175. The court stated that,

[f]or purposes of analyzing respondents' liability for negligent infliction of emotional distress, it is therefore questionable whether appellant's emotional suffering was proximately caused by the breach of any legal duty owed to her by Dr. Gordon. Assuming for the very limited purpose of argument that an independent duty of disclosure was created by appellant's specific inquires about the state of Dr. Gordon's health, appellant's claim for negligently inflicted emotional distress damages nevertheless falls under *Potter*.

Id. at 177-78.

176. *Id.* at 177 (citing *Potter*, 863 P.2d at 807).

177. *Id.* The court stated that "Dr. Gordon had an analogous duty to any patient who might foreseeably come in contact with his blood during surgery to use due care, and comply with current CDC guidelines governing performance of exposure-prone obstetric/gynecological procedure. It is not claimed that Dr. Gordon did not use due care in the performance of the surgical procedure itself." *Id.*

178. Among the policies referred to by the court were the extent of the class of possible plaintiffs, inconsistent results and overcompensation of plaintiffs having emotional damages with the result of a depletion of resources available to pay the claims of plaintiffs who have incurred physical injury. *Id.* at 178.

In many AIDS cases where the relationship has not been of the type traditionally found sufficient to warrant recovery for emotional distress, the relational rationale has properly been utilized to reject a finding of a duty owed by a defendant to prevent the plaintiff's fear of AIDS.¹⁷⁹ In *Ordway v. County of Suffolk*,¹⁸⁰ the plaintiff physician sought damages for his emotional distress as a result of performing two procedures on an inmate who the physician subsequently learned had tested HIV-positive. The New York court recognized that although there may have been a duty running from the physician to the patient, no such duty ran from the patient to the physician.¹⁸¹ In addition, the court held that although physical injury was not critical to recovery, without proof of an unusual occurrence or some indicia of reliability with respect to plaintiff's claim of emotional distress, plaintiff had failed to state a claim on which relief could be based.¹⁸² Again, a relational rationale would explain such a result. Although one could foresee some possible emotional harm under the circumstances, the relationship of patient/doctor was not one which would impose a duty on the patient to protect the doctor from "possible" exposure.¹⁸³ Similarly, courts have denied recovery for emotional distress for negligently inflicted fear of AIDS in marital relationships.¹⁸⁴

C. Ignoring the Relationship in Order to Deny Recovery for Fear of AIDS

Not all courts have embraced a relational analysis where there is an emotional injury consisting of "fear of AIDS." Thus, in *Lubowitz v. Albert Einstein Medical Center*¹⁸⁵ the Pennsylvania court denied the plain-

179. See *Doe v. Doe*, 519 N.Y.S.2d 595, 597 (N.Y. Sup. Ct. 1987); *Neal v. Neal*, 873 P.2d 881 (Idaho 1993); *Reyes v. United States*, 770 F. Supp. 58 (D.P.R. 1991).

180. 583 N.Y.S.2d 1014 (N.Y. Sup. Ct. 1992).

181. *Id.* at 1018. For a discussion of reverse informed consent, see A. Samuel Oddi, *Reverse Informed Consent: The Unreasonably Dangerous Patient*, 46 VAND. L. REV. 1417 (1993).

182. *Id.*

183. See also *Reyes*, 770 F. Supp. at 63. In *Reyes* the plaintiff sought recovery for emotional distress as a result of not being informed that her husband might contract AIDS after a blood transfusion. The husband did contract AIDS as a result of the transfusion; however, the wife tested negative for the HIV virus. The court refused to allow the claim stating, "the Puerto Rico Courts would not be prepared to recognize a duty of a doctor to violate the doctor-patient relationship, even to disclose the presence of AIDS to a spouse." *Id.* In this context, the plaintiff stood in the position of the husband in *Marlene F. v. Affiliated Psychiatric Medical Clinic*, 770 P.2d 278 (Cal. 1989), in that the underlying relationship was not sufficient to give rise to a duty to prevent emotional distress. *But see Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367 (N.D. Ill. 1988).

184. See *Doe*, 519 N.Y.S.2d at 595. In *Doe*, the wife sought recovery for her "fear of AIDS" after discovering that her husband had been involved in homosexual activities during the marriage. In denying the claim the court stated: "If this cause of action were permitted to continue, any party to a matrimonial action who alleged adultery would now have a separate tort action for damages for 'AIDSphobia' because unfortunately any deviation from the marital nest could result in exposure to AIDS." *Id.* at 598.

185. 623 A.2d 3 (Pa. 1993); see also *R.J. v. Humana of Florida, Inc.*, 625 So. 2d 116 (Fla. Dist. Ct. App. 1993). The plaintiff was erroneously told that he was HIV-positive. More than a year later it was discovered that he tested negative for the virus. Plaintiff's claim against his doctors and the laboratory performing the test was dismissed on the basis that there was no actual impact. However, the court certified the question "does the Impact Rule apply to a Claim for Damages from a negligent HIV diagnosis?" to the Florida Supreme Court. *Id.*

tiff's claim for fear of AIDS on the grounds that recovery was not warranted where there was no evidence of physical harm. Although the result is correct under an impact analysis, the court essentially ignored the existence of the parties' preexisting relationship.

The plaintiff in *Lubowitz* underwent an in-vitro procedure wherein an egg, taken from plaintiff (Lubowitz), was placed in a "placental serum" donated by an anonymous donor in order to be fertilized.¹⁸⁶ The egg was subsequently implanted in Lubowitz. After the implantation, she was informed that the placental donor's blood tested positive for HIV.¹⁸⁷ After additional testing on the donor's blood and Lubowitz's blood, Lubowitz was informed that both tested negative for HIV.

On the basis that there was no proof of actual exposure to HIV and no bodily injury, the court denied Lubowitz's claim for her negligently inflicted emotional distress.¹⁸⁸ The court failed to consider that, during the period between the time the patient was informed that she might have been exposed to AIDS and the period when her fears were put to rest, she would be entitled to recover on the basis of a doctor/patient relationship. Indeed, under a relational rationale, recovery would have been warranted for negligence on the part of a physician resulting in her patient's emotional distress.

D. Impact: AIDSphobia and Cancerphobia Merge

Where the parties have no preexisting relationship, the courts have disagreed on the standard required to establish a duty to protect a plaintiff from emotional harm. Some courts have rejected a finding of a duty owed to a plaintiff based on the plaintiff's failure to establish a legally cognizable impact consisting of exposure to the HIV virus together with a mode of transmission.¹⁸⁹ This, of course, is consistent with the rule sometimes applied in cancerphobia cases with respect to a duty to prevent emotional harm. Conversely, other courts have rejected the traditional role of proximity of physical harm and instead focused on the so-called "reasonableness" of the fear of the plaintiff in finding a duty to prevent fear of AIDS.¹⁹⁰ In so doing, the courts have shifted their focus away from a duty analysis (i.e., contemplation of the risk of defendant's conduct and the relationship of the parties) and instead have contemplated legally cognizable causation and damages.

In *Burk v. Sage Products, Inc.*,¹⁹¹ the Pennsylvania court utilized a strict impact analysis and denied recovery for plaintiff's fear of AIDS

186. *Lubowitz*, 623 A.2d at 4.

187. *Id.* (Lubowitz was also informed three months after the implant that the doctor tested HIV-positive).

188. *Id.* at 5.

189. See *Burk v. Sage Products*, 747 F. Supp. 285 (E.D. Pa. 1990); *Carroll v. Sisters of Saint Francis Health Services*, 868 S.W.2d 586 (Tenn. 1993); *Neal v. Neal*, 873 P.2d 881 (Idaho Ct. App. 1993). See also *Poole*, 698 F. Supp. 1367 (1988); *Smith v. Paslode Corp.*, 7 F.3d 116 (8th Cir. 1993).

190. See *Castro*, 588 N.Y.S.2d at 697.

191. 747 F. Supp. 285 (E.D. Pa. 1990).

which he alleged was the result of a needle stick incident. In *Burk*, the plaintiff (Burk) was stuck by a needle that was protruding from a container manufactured by the defendant. Although there was no proof the needle had been used on an AIDS patient, Burk alleged that at the time of the incident a number of AIDS patients had been seen on the floor where he was using the container.¹⁹² Subsequently, Burk tested negative for the HIV virus on five separate occasions.¹⁹³

The court disallowed Burk's negligent infliction of emotional distress claim reasoning that "plaintiff's only injuries stem from his *fear* that he has been exposed to the disease . . . [W]hile injuries stemming from a fear of contracting illness after exposure to a disease-causing agent may present compensable damages, injuries stemming from fear of the initial exposure do not."¹⁹⁴ In denying recovery, the court properly considered the rationale of the cancerphobia cases and the requirement of establishing a connection between the breach of duty on the part of the defendant and plaintiff's injuries.¹⁹⁵ In accord with the cancerphobia cases, absent proof of an impact of a type that substantiates the proximity of physical harm (i.e., a known carcinogen or HIV virus) or without proof of physical injury, recovery of emotional distress damages is barred. The *Burk* court also rejected recovery for AIDSphobia based on a "physical injury" or parasitic damages rationale on the basis that it was substantially certain that plaintiff would not ultimately contract AIDS.¹⁹⁶

Similarly, the Tennessee court in *Carroll v. The Sisters of Saint Francis Health Services*¹⁹⁷ denied the plaintiff's claim for negligent infliction of emotional distress based on a fear of AIDS, relying in large part on the cancerphobia cases.¹⁹⁸ In *Carroll*, the plaintiff (Carroll) was visiting her sister in the hospital and washed her hands in a wash basin. Searching for a paper towel, Carroll put her hand in a nearby container used to dispose of contaminated needles and was pricked on three of her fingers.¹⁹⁹ She was immediately tested for HIV antibodies and retested on five occasions over the next three years, and all test results were negative.²⁰⁰ Nonetheless, Carroll brought suit for her emotional distress resulting from her fear of possibly contracting AIDS.

The plaintiff argued that as long as her fear was "reasonable," she should be entitled to recover. The court rejected this argument. Instead, the court imposed an objective requirement of actual exposure as a

192. *Id.* at 286.

193. *Id.*

194. *Id.* at 288.

195. The court relied in part on *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271 (3d Cir. 1985).

196. *Burk*, 747 F. Supp. at 288.

197. 868 S.W.2d 585 (Tenn. 1993).

198. The court discussed *Laxton v. Orkin*, 639 S.W.2d 431 (Tenn. 1982); *Gamble v. Mintz*, 1991 Tenn. App. LEXIS 47 (Tenn. Ct. App. Jan. 30, 1991); and *Sterling v. Velsicol Chem. Co.*, 855 F.2d 1188 (6th Cir. 1988).

199. *Carroll*, 868 S.W.2d 586.

200. *Id.* at 586-87.

threshold for recovery.²⁰¹ According to the court, proof of "exposure" must be established at a minimum for recovery for fear of AIDS and any recovery would be limited to a defined "window of anxiety."²⁰²

In essence, the *Carroll* court used the impact rationale, finding that there must be proof of a sufficient risk of actual physical harm (i.e., exposure) in order to find that the defendant had a duty to protect the plaintiff from AIDSphobia.²⁰³

E. Extending a Duty to Prevent "Fear of AIDS" Where There is Neither a Relationship Nor Cognizable Physical Risk

In contrast, the New York court in *Castro v. New York Life Insurance Co.*,²⁰⁴ abandoned the restrictions of proximity of harm and/or relationship and allowed recovery for the plaintiff's fear of AIDS despite the absence of proof of actual exposure or physical injury. The plaintiff in *Castro* was a cleaning worker who was pricked by a needle found in a waste container in the defendant company's offices. The plaintiff alleged that on the date of the incident the insurance company's employees had been taking blood samples from prospective life insurance applicants and disposing of the syringes in a manner prohibited by state law.²⁰⁵ As a result of the needle prick, the plaintiff's psychiatrist averred that she had developed "a massive and overwhelming fear that she had contracted AIDS and would die soon."²⁰⁶ The plaintiff was subsequently tested on a number of occasions for the HIV virus and apparently refused to disclose the results of the testing.²⁰⁷

The *Castro* court held that the plaintiff had stated a claim for recovery for her fear of AIDS.²⁰⁸ The court's analysis leaves much to the imagination. The court began with the recognition that, in order to support a claim, the plaintiff must prove that her AIDSphobia is a direct result of the defendant's breach of duty.²⁰⁹ The court then retreated to a "reasonableness" analysis, finding that "any reasonable person exposed to this information [information provided by the media regarding the transmission of AIDS] who is stuck by a used and discarded hypodermic needle and syringe from which blood was apparently drawn could develop a fear of contracting AIDS."²¹⁰

201. *Id.* at 593.

202. *See id.* at 594.

203. *Id.* *See also* Hare v. State, 570 N.Y.S.2d 125 (N.Y. App. Div. 1991). Plaintiff was bitten while trying to restrain an inmate. A nurse stated that the patient "might" have AIDS. The court refused to allow the plaintiff's claim for his "fear of AIDS" on the basis that there was no proof the inmate was infected with AIDS and no actual physical injury attributable to a risk of AIDS. *Id.* at 126.

204. 588 N.Y.S.2d 695 (N.Y. Sup. Ct. 1991).

205. *Id.* at 696.

206. *Id.* at 697.

207. *Id.* at 696.

208. *Id.* at 697.

209. *Id.*

210. *Id.* at 698.

What the court failed to recognize is that the existence of fear, in and of itself, has consistently been rejected as a basis for the finding of a duty.²¹¹ If the reasonableness of a plaintiff's fear is the measure of duty, then certainly the earlier cases' reliance on positioning and relationship have unduly restricted recovery. Indeed, based on public perception, it is not unreasonable to fear AIDS when one is a co-worker of an AIDS-infected individual or where one has to share utensils with one who is HIV-positive.²¹²

The reasonableness of a plaintiff's fear is certainly relevant to the issue of damages.²¹³ However, it traditionally has not been used in determining the existence of duty and breach. By focusing on the plaintiff's fear rather than the actual risk created by the insurance company's alleged conduct, the court extended the scope of recovery for fear. Although such an extension of liability might be desirable, it is in marked contrast to the careful historical limitations placed on recovery in other phobia cases.

In *Vallery v. Southern Baptist Hospital*,²¹⁴ the Louisiana Court of Appeals resorted to a contortion of the impact rationale in order to allow recovery for "fear of AIDS." The plaintiffs in *Vallery* were husband and wife. Mr. Vallery was employed at the defendant hospital as a security guard and was called on a particular night to subdue a patient.²¹⁵ When Mr. Vallery attempted to restrain the patient, the patient's intravenous needle apparently became dislodged and he bled on Mr. Vallery's hand. After completing his shift Mr. Vallery went home and had sexual intercourse with his wife. The next day he was informed that the patient suffered from AIDS.²¹⁶ Both Mr. and Mrs. Vallery tested negative for HIV. Mr. Vallery's claims against the hospital were barred by the applicable Workers Compensation Statute.²¹⁷ Mrs. Vallery's claim for fear of AIDS, however, was upheld on appeal.

Mrs. Vallery claimed that, as a result of her husband's "exposure," she was put in fear that she might contract AIDS because of having sex with him before he was advised that he had been exposed to the HIV virus.²¹⁸ The court, relying on the cancerphobia impact reasoning, held that in order for the plaintiff to recover she must establish the presence of AIDS as well as a channel for transmission of the virus.²¹⁹ The court acknowledged that the plaintiff had not pleaded a channel of transmission

211. For example, if fear were the measure of existence of a duty then certainly both parents should recover for their fear with respect to an injury to their child. See *Burgess*, 831 P.2d at 1197.

212. See *supra* text accompanying notes 134-35.

213. See *Colla v. Mandella*, 85 N.W.2d 345 (Wis. 1957); *Davis v. Cleveland R.R.*, 21 N.E.2d 169 (Ohio 1939); *Haile's Curator v. Texas & P.R. Co.*, 60 F. 557 (5th Cir. 1894); *Delta Finance Co. v. Ganakas*, 91 S.E.2d 383 (Ga. Ct. App. 1956).

214. 630 So. 2d 861 (La. Ct. App. 1993).

215. *Id.* at 862.

216. *Id.* at 863.

217. *Id.* at 869.

218. *Id.* at 864.

219. *Id.* at 867.

in that there was no allegation that Mr. Vallery had any cuts on his hand when he was exposed to the HIV-positive blood.²²⁰ The court, nonetheless, left the transmission issue to Mrs. Vallery's proofs, relying on the fact that there might be a channel of transmission since hospital personnel wear gloves and the plaintiffs were advised to get AIDS testing.²²¹ The court, in determining that there was a duty owed to Mrs. Vallery applied an "ease of association test"²²² and concluded that "there is an intuitive association between the failure to warn Mr. Vallery and the emotional distress which befell Mrs. Vallery."²²³

Under any version of the impact reasoning, the conclusion in *Vallery* must be wrong. The Vallerys failed in the first instance to plead more than mere presence of HIV in that no actual physical risk giving rise to a duty was established without pleading a viable means of transmission to Mr. Vallery. With respect to Mrs. Vallery, the "impact" became mere speculation. The presence of the virus at the time of intercourse with her husband was at best tenuous. More importantly, the existence of a means of transmission from one who had a minimal contact with AIDS infected blood was never established.

CONCLUSION

The evolution of the law regarding recovery for negligently inflicted emotional distress has been influenced largely by attempts to limit frivolous suits, avoid fraud and to achieve judicial economies. In light of the prevalence of AIDS and the public's perception of the risk of AIDS, the courts' applications of historical limitations in determining whether a duty to prevent fear of AIDS exists will achieve these goals.

Approaching the AIDSphobia cases from a duty perspective provides the advantage of determining the viability of the plaintiff's claim at the outset of the case, thus contributing to judicial efficiency. It also provides consistency as to recovery.

In many AIDSphobia cases, a relational analysis would allow recovery in instances where the impact test has previously been applied with inconsistent results. Recovery would be allowed where the parties are in a special relationship such as the doctor/patient relationship or other relationships recognized by law. Recognition of a relational basis for a duty to prevent AIDSphobia will support recovery—regardless of the presence of actual exposure to AIDS—where the type of relationship provides an indicia of responsibility with respect to the emotional distress.

220. *Id.*

221. *Id.* at 868.

222. *Id.* at 869. The court applied the test set forth in *Roberts v. Benoit*, 605 So. 2d 1032, 1045, 1055 (La. 1991). "The critical test in Louisiana, however, is phrased in terms of 'the ease of association' which melds policy and foreseeability into one inquiry: Is the harm which befell the plaintiff easily associated with the type of conduct engaged in by the defendant?" *Vallery*, 630 So. 2d at 868.

223. *Vallery*, 630 So. 2d at 869.

Similarly, in those cases where the plaintiff's AIDSphobia is premised on impact, consistency in recovery will be realized where legal impact is indicative of the presence of a verifiable physical risk of harm. Thus, where impact is the *sine qua non* of recovery, there must be both actual exposure and a mode of transmission of HIV to establish the defendant's duty.

Unfortunately, both impact and relationship have been given different meanings by various courts. If a coherent, cohesive approach to the concept of a duty to prevent emotional distress were utilized in the AIDSphobia cases, conformity in results would follow. An intelligible approach to defining the obligation to prevent emotional distress will serve the judicial system in the twentieth century and beyond.