



University of Baltimore Law Review

Volume 23
Issue 1 Fall 1993

Article 7

1993

Notes: Torts — Negligence — Damages — a Right of Recovery Exists for Emotional Distress Injuries Arising from the Fear of Contracting an Infectious Disease, Even When Such Injuries Are Unaccompanied by Physical Impact and the Disease Is Not Contracted. *Faya v. Almaraz*, 329 Md. 435, 620 A.2d 327 (1993)

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Recommended Citation

Johnson, Laura L. (1993) "Notes: Torts — Negligence — Damages — a Right of Recovery Exists for Emotional Distress Injuries Arising from the Fear of Contracting an Infectious Disease, Even When Such Injuries Are Unaccompanied by Physical Impact and the Disease Is Not Contracted. *Faya v. Almaraz*, 329 Md. 435, 620 A.2d 327 (1993)," *University of Baltimore Law Review*: Vol. 23: Iss. 1, Article 7.

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NOTES

TORTS—NEGLIGENCE—DAMAGES—A RIGHT OF RECOVERY EXISTS FOR EMOTIONAL DISTRESS INJURIES ARISING FROM THE FEAR OF CONTRACTING AN INFECTIOUS DISEASE, EVEN WHEN SUCH INJURIES ARE UNACCOMPANIED BY PHYSICAL IMPACT AND THE DISEASE IS NOT CONTRACTED. *Faya v. Almaraz*, 329 Md. 435, 620 A.2d 327 (1993).

I. INTRODUCTION

As incidents of Acquired Immune Deficiency Syndrome (AIDS)¹ reach epidemic proportions, an increasing number of individuals infected with the disease must deal with the harsh physical and psychological trauma associated with the reality that he or she will likely die from the disease. Even the fear of contracting AIDS, with or without a positive diagnosis of HIV infection, can result in emotional distress that may significantly impact upon one's life.² Whether an individual may recover damages for this emotional distress, regardless of whether the disease eventually manifests itself, is a topic of continuing debate. Some might argue that one who is diagnosed as HIV-negative should be thankful for that diagnosis, and forego any attempt to recover damages for the emotional distress

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1. AIDS is caused by the human immunodeficiency virus (HIV), a retrovirus that attacks the human immune system by invading host cells and replicating itself. *Faya v. Almaraz*, 329 Md. 435, 439, 620 A.2d 327, 328 (1993). While the virus may be latent for as long as ten years, it gradually weakens the immune system and ultimately destroys the body's capacity to resist disease. *Id.* at 439, 620 A.2d at 328-29. An individual infected with AIDS suffers from a severely compromised immune system, and is subjected to numerous diseases and other infections that an otherwise healthy individual may be able to resist. *Id.* at 439, 620 A.2d at 329.
 2. Individuals faced with the fear of contracting AIDS have suffered from headaches, sleeplessness, nervous shock, fear, anxiety, grief, loss of appetite, and post-traumatic stress disorder, among other ailments. *Id.* at 442, 620 A.2d at 330; see also *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 891-92 (W. Va. 1991). Emotional reactions of this nature can so significantly affect the victim's life that psychological counselling is required. *Id.* at 891-92. Such psychological reactions may also render its victims unable to function normally. *Vance v. Vance*, 286 Md. 490, 501, 408 A.2d 728, 734 (1979).

suffered before the negative test results were received. Several of the nation's courts, including the Court of Appeals of Maryland, have taken the contrary view.³

In *Faya v. Almaraz*,⁴ the court of appeals held that Sonya Faya (Faya) and Perry Mahoney Rossi (Rossi) (collectively, appellants) could recover monetary damages for the fear of contracting AIDS, notwithstanding their HIV-negative diagnoses, if the injuries occasioned by their fear could be objectively demonstrated.⁵ Recovery was limited, however, to injuries sustained from the time the appellants first learned that they may have come in contact with the AIDS virus to the time they received their HIV-negative test results.⁶

By allowing recovery for the mere fear of contracting an infectious disease, the *Faya* decision further defines the limits of compensable harm resulting from emotional distress. Increased litigation for the recovery of damages for emotional distress injuries will surely be one effect of the decision. Even if courts adhere to the objective determination rule, the total amount of damages awarded in emotional distress actions may skyrocket because juries can now award damages to plaintiffs who were previously ineligible to receive them.

The appellants were patients of Dr. Rudolf Almaraz (Dr. Almaraz or Almaraz), an oncological surgeon specializing in breast cancer.⁷ Unbeknownst to each patient, they were operated on by Dr. Almaraz at a time when he knew that he was infected with the HIV virus.⁸ Almaraz had operated on Faya before he developed AIDS,

3. See *infra* notes 4, 87-90 and accompanying text.

4. 329 Md. 435, 620 A.2d 327 (1993). The companion case of *Rossi v. Almaraz* is reported with *Faya* because it arises from a similar set of facts and circumstances.

5. *Id.* at 439, 620 A.2d at 338-39. The court of appeals did not specifically state how an injury may be objectively demonstrated. Presumably, the injury must be reasonable under the circumstances, and should be manifested by an external condition or evidence indicative of a mental state. See, e.g., *Vance*, 286 Md. 490, 408 A.2d 728 (1979) (allowing plaintiff to recover for emotional distress injuries where testimony indicated that she suffered from spontaneous crying, was unable to function normally, and was too embarrassed to socialize, and where such injuries were manifested in the deterioration of her physical appearance); *Green v. T.A. Shoemaker & Co.*, 111 Md. 69, 73 A. 688 (1909) (holding that plaintiff may recover damages for fright and nervousness, where such injuries rendered plaintiff unable to perform her household duties and resulted in a medical diagnosis of nervous exhaustion).

6. *Faya*, 329 Md. at 455-56, 620 A.2d at 337. The court of appeals defined this period as the reasonable window of anxiety. *Id.* at 456, 620 A.2d at 337. The window of anxiety closes once satisfactory information becomes available to put the fear of injury to rest. *Id.* at 456 n.10, 620 A.2d at 337 n.10. The court implied that any emotional distress that continued after the appellants tested HIV-negative might be unreasonable. *Id.* at 455, 620 A.2d at 337.

7. *Id.* at 440, 620 A.2d at 329.

8. *Id.*

but had operated on Rossi shortly after being diagnosed with cytomegalovirus retinitis, an eye infection characteristic of full-blown AIDS.⁹ Almaraz died of AIDS on November 16, 1990.¹⁰

The appellants learned of Almaraz's illness for the first time on December 6, 1990, when they read about it in a local newspaper.¹¹ They immediately underwent blood tests which disclosed that neither appellant was a carrier of the HIV virus.¹² Nonetheless, by December 11, 1990, the appellants had commenced separate suits against Almaraz's estate, his Maryland professional association business entity, and Johns Hopkins Hospital for compensatory and punitive damages.¹³ In their complaints, the appellants alleged that they suffered

9. *Id.* Almaraz first learned that he was a carrier of the HIV virus in 1986. *Id.* Faya's operations occurred in October, 1988 and March, 1989. *Id.* Rossi's operation took place on November 14, 1989. *Id.* Almaraz's first diagnosis of cytomegalovirus retinitis was on October 27, 1989; this diagnosis was confirmed by a second ophthalmologist on November 17, 1989. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 441, 620 A.2d at 329. The precise date that the appellants learned of their HIV-negative status, when contrasted with the date they filed suit, is unclear. Impliedly, they knew of their HIV-negative status sometime after December 6, 1990 (when they first learned of Almaraz's illness), but on or before December 11, 1990 (when they commenced suit against his estate for compensatory and punitive damages). *Id.* Assuming both Faya and Rossi knew of their HIV-negative status on the day the suit was filed, at a maximum, their reasonable window of anxiety and the period for which they could recover damages for their emotional distress was five days. Conceivably, the reasonable window of anxiety could have been confined to mere hours, if the HIV-negative test results were received later in the same day that the appellants learned of Almaraz's illness.

13. *Id.* Both appellants alleged negligence, negligent failure to obtain their informed consent, fraud, and intentional infliction of emotional distress. *Id.* at 441, 620 A.2d at 330. Faya's complaint also alleged negligent misrepresentation and breach of contract. *Id.* Rossi's amended complaint contained the additional allegations of loss of consortium, breach of fiduciary duty, and battery. *Id.* Of these counts, the court of appeals did not address those relating to fraud, negligent misrepresentation, breach of contract, loss of consortium, or breach of fiduciary duty. In briefly addressing the count alleging battery, the court concluded that the cause of action for lack of informed consent is one in tort for negligence, and not one in tort for battery. *Id.* at 450 n.6, 620 A.2d at 334 n.6.

The court focused its analysis on what it deemed to be the core of appellants' complaints—the allegations that Almaraz acted wrongfully in performing the appellants' operations without first informing them that he was HIV-positive (and in Rossi's case, infected with AIDS), and that Almaraz and Johns Hopkins Hospital failed to inform the appellants of any risk of contracting HIV incidental to Almaraz's performance of the operations. *Id.* at 441, 620 A.2d at 330. The appellants claimed that had they known of Dr. Almaraz's illness, they could have withheld consent to their operations and could thereby have avoided any exposure to the HIV virus. *Id.* at 441-42, 620

from intense fear of contracting the AIDS virus as a proximate result of the surgeries and their subsequent discovery of Dr. Almaraz's illness.¹⁴

II. BACKGROUND

To recover damages for emotional distress, a plaintiff's injuries must be predicated upon the wrongful act of another. Thus, a claim for emotional distress damages frequently accompanies a suit for negligence.

Negligence is commonly defined as conduct that fails to meet the established legal standard for the protection of others against unreasonable risks of harm.¹⁵ To sustain an action in negligence, a plaintiff must establish four elements: (1) that the defendant had a legal duty to conform to a certain standard of conduct for the protection of others; (2) that the defendant breached this duty; (3) that there was a reasonable causal connection between the breach and the injury to the plaintiff; and (4) that the plaintiff suffered damage or actual loss resulting from the breach.¹⁶

In the AIDS context, a physician entrusted with the preservation of human life and the reduction of suffering may have an ethical duty to inform his patients of his HIV-positive status. However, the relevant inquiry is whether a similar duty is imposed upon the physician by law. While there is little guidance from existing case law concerning an HIV-positive physician's duty to inform his patient of his HIV-positive status, an examination of the elements of negligence and their application in the context of infectious disease cases, including AIDS, lends support for the imposition of such a duty.

A. Duty

A duty is a legally recognized obligation to conform to a certain standard of conduct toward another.¹⁷ Foreseeability is often an important factor used to determine the existence of a duty.¹⁸ If it is

A.2d at 330. Faya and Rossi's complaints alluded to the possibility that a puncture or laceration in Almaraz's protective garments could have allowed the commingling of his blood with their blood; however, they did not offer proof of such puncture or laceration. *Id.*

14. *Id.* at 442, 620 A.2d at 330. The other injuries alleged by the appellants included exposure to HIV and the risk of AIDS, physical injury and expenses arising from HIV testing, pain, anxiety, grief, nervous shock, severe emotional distress, headaches, and sleeplessness. *Id.*

15. RESTATEMENT (SECOND) OF TORTS § 282 (1965).

16. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

17. *Id.* § 53, at 356.

18. B.N. v. K.K., 312 Md. 135, 141, 538 A.2d 1175, 1178 (1988).

foreseeable that harm will befall another because of an actor's conduct, the actor may have a duty to refrain from engaging in that conduct.¹⁹

The recognition of a duty to prevent the transmission of infectious diseases is well-established.²⁰ This duty extends to cases involving the negligent transmission of venereal diseases.²¹ A recent Maryland case is illustrative.

In *B.N. v. K.K.*,²² the plaintiff and the defendant were involved in a sexual relationship during a period when the defendant knew he was infected with genital herpes, but failed to so inform the plaintiff.²³ Such failure included an occasion when the defendant was aware that his genital herpes was active and would be transmitted, but the defendant nonetheless engaged in sexual intercourse with the plaintiff.²⁴ Subsequent to this particular encounter, the plaintiff discovered she was infected with the disease.²⁵

In addressing the plaintiff's negligence cause of action, the *B.N.* court began with an inquiry into whether the defendant had a duty to inform the plaintiff of his infection.²⁶ The court observed that the concept of duty is predicated upon the "responsibility each of us bears to exercise due care to avoid unreasonable risks of harm to others."²⁷ Because the defendant knew that he had active genital

19. *Id.* at 141, 538 A.2d at 1178.

20. See *Gilbert v. Hoffman*, 23 N.W. 632 (Iowa 1885) (sustaining plaintiff's negligence action against hotel operator whose misrepresentation that premises were free from smallpox infection induced plaintiff to stay in hotel, given evidence that plaintiff later contracted smallpox during her stay); *Earle v. Kuklo*, 98 A.2d 107 (N.J. Super. Ct. App. Div. 1953) (recognizing cause of action on behalf of plaintiff who contracted tuberculosis from her parents' landlord, where the landlord, although infected with tuberculosis, negligently failed to warn tenants of her infection and failed to abstain from close personal contact with those tenants); *Smith v. Baker*, 20 F. 709 (C.C.S.D.N.Y. 1884) (permitting recovery based on negligence of father who took his children into plaintiff's boarding house while infected with whooping cough, thereby infecting plaintiff's child and the children of her boarders).

21. See, e.g., *Berner v. Caldwell*, 543 So. 2d 686 (Ala. 1989) (recognizing a negligence cause of action for transmission of genital herpes); *Duke v. Housen*, 589 P.2d 334 (Wyo.), *cert. denied*, 444 U.S. 863 (1979) (recognizing the existence of a claim for negligent transmission of gonorrhea, but reversing plaintiff's damage award because the claim was filed after expiration of statute of limitations).

22. 312 Md. 135, 538 A.2d 1175 (1988).

23. *Id.* at 138, 538 A.2d at 1177.

24. *Id.*

25. *Id.* at 138-39, 538 A.2d at 1177. The plaintiff knew that the defendant was the source of her infection because she had been monogamous throughout the course of their relationship. *Id.*

26. *Id.* at 141, 538 A.2d at 1178.

27. *Moran v. Faberge*, 273 Md. 538, 543, 332 A.2d 11, 15 (1975), *quoted in B.N.*, 312 Md. at 141, 538 A.2d at 1178.

herpes, yet engaged in sexual intercourse with the plaintiff, the court held that it was reasonably foreseeable that the plaintiff would be harmed by the defendant's conduct.²⁸ Therefore, the Court of Appeals of Maryland held that the defendant had a duty to either refrain from having sexual intercourse with the plaintiff, or advise her of his infection prior thereto.²⁹

While the existence of a cause of action for the negligent transmission of AIDS is an issue of first impression in most jurisdictions, of the few courts that have been confronted with the issue, most have been willing to impose a duty similar to that imposed in *B.N. v. K.K.*³⁰ For example, in *Doe v. Johnson*,³¹ a case involving Los Angeles Lakers basketball superstar Earvin "Magic" Johnson, Jr., the United States District Court for the Western District of Michigan held that a defendant owes a duty to his sexual partner to disclose the fact that he may have the HIV virus if, at the time of their sexual relationship, he (1) had actual knowledge that he was infected with the HIV virus, (2) had experienced symptoms associated with the HIV virus, or (3) had actual knowledge that a prior sexual partner had been diagnosed with the HIV virus.³² The court observed that where any of these factual scenarios are present, the "burden on [the infected] individual in revealing his or her HIV virus information is minimal when compared to the high risks of the disease."³³

The Supreme Court of New York expressed a similar philosophy in *Petri v. Bank of New York Co.*³⁴ The plaintiff who did not have AIDS and was not infected with the HIV virus, brought a claim

28. *B.N.*, 312 Md. at 143, 538 A.2d at 1179.

29. *Id.*

30. 312 Md. 135, 538 A.2d 1175 (1988).

31. 817 F. Supp. 1382 (W.D. Mich. 1993). The plaintiff, Jane Doe, alleged that Johnson had a legal duty to prevent the transmission of the HIV virus to her, and that he negligently breached that legal duty because he knew or should have known that he was infected with the virus. *Id.* at 1386. Allegedly, Johnson transmitted the HIV virus to Doe during one or both of their sexual encounters. *Id.* at 1385. Doe further alleged that because Johnson was sexually active with multiple partners prior to his sexual encounters with her, he knew or should have known that he had a high risk of becoming infected with the HIV virus. *Id.* Specifically, Doe argued that Johnson should have (1) warned her about his sexually promiscuous past, (2) informed her at the time of their sexual contact that he either "may have HIV" or did have HIV, (3) not engaged in sexual contact with her, or (4) used a condom or similar method of protection that would act as a barrier to transmission of the HIV virus to Doe. *Id.*

32. *Id.* at 1393. Thus, if Doe could prove that Johnson had actual knowledge of his HIV infection at the time of their sexual encounters, had experienced symptoms of such an infection prior thereto, or had actual knowledge that a prior sexual partner had been diagnosed with the HIV virus prior thereto, she would have a valid cause of action against Johnson for negligent transmission of the HIV virus. *Id.*

33. *Id.*

34. 582 N.Y.S.2d 608 (N.Y. Sup. Ct. 1992).

against Vaughn, a fellow bank employee, for intentional infliction of emotional distress.³⁵ Although the claim was not sufficiently explained in the plaintiff's pleadings, it was apparently founded upon allegations that the plaintiff had a sexual relationship with Vaughn, and that Vaughn failed to inform the plaintiff until the conclusion of their relationship that he was HIV-positive.³⁶

The court held that the plaintiff's claim against Vaughn was too speculative and remote.³⁷ When discussing whether an infected individual has a duty to inform his sexual partner of his HIV-positive status, however, the court opined that the infected individual has a duty "to use reasonable care not to transmit a sentence of death to his or her partner."³⁸ The court implied that this duty arises from the "special" relationship between the parties.³⁹ The court further opined that "if the state is to maintain the role of protector against needless death,"⁴⁰ a duty to warn a sexual partner of HIV infection must be established.⁴¹ The court also cited the existence of a great and overriding public interest in limiting the spread of AIDS as support for the imposition of this duty.⁴²

35. *Id.* at 609-10. Vaughn was one of several named defendants in this action. Plaintiff's primary claim was against the Bank of New York Mortgage Company (the Bank) for wrongful discharge due to discrimination and the Bank's fear that he had AIDS or was at a high risk for contracting AIDS. *Id.* at 610. The claim against the Bank was founded upon § 296(1)(a) of the Human Rights Law, which prohibits employers and others from engaging in discriminatory conduct against those with disabilities. *Id.* at 610-11. AIDS and HIV infection are disabilities falling within the protection that this section of the Human Rights Law affords. *Id.* The protection extends to those with actual disabilities, as well as to those whose disabilities are merely perceived. *Id.* at 611. Accordingly, the plaintiff's cause of action against the Bank for wrongful discharge could be maintained if he could prove that the perception that he had AIDS was the motivating force for his termination. *Id.* at 612.

36. *Id.* at 612-13.

37. *Id.* at 614. The court reasoned that "[s]omeone who has been exposed to HIV infection but has not come down with it has not suffered a physical injury for which a recovery in damages may be allowed." *Id.* at 613. While the court thus dismissed the plaintiff's claim against Vaughn, the dismissal was without prejudice, thereby allowing the plaintiff to "reinstate [his claim] in the event [he] becomes infected with HIV." *Id.* at 614.

38. *Id.* at 613.

39. *Id.* The court opined that the "uniquely intimate and special form of contact" present in a sexual relationship necessitates the imposition of a duty to warn one's sexual partner of HIV infection. *Id.* *But cf.* Doe v. Johnson, 817 F. Supp. 1382, 1393 (W.D. Mich. 1993) (imposing a duty to disclose HIV infection to a sexual partner, but placing little emphasis on the sexual relationship between the parties because "no special duties" arise from a consensual sexual encounter between two adults).

40. 582 N.Y.S.2d 608, 613 (N.Y. Sup. Ct. 1992).

41. *Id.* at 613.

42. *Id.* Arguably, these principles apply with equal force to non-sexual relationships.

B. Breach

Once a duty is legally recognized, there must be some standard by which the court is able to determine whether the actor has breached that duty. A breach of a legal duty is commonly defined as the failure of an individual to conform to the required standard of conduct.⁴³

Traditionally, the required standard of conduct in negligence actions is that of the reasonable person under like circumstances.⁴⁴ It has been stated that an actor "should realize that his act involves an unreasonable risk of [harm], if a reasonable man knowing so much of the circumstances surrounding the actor at the time of his act as the actor knows or should know, would realize the existence of the risk and its unreasonable character."⁴⁵

The reasonable person standard has been previously applied by the courts in the context of infectious diseases.⁴⁶ The Court of Appeals of Maryland, in *B.N. v. K.K.*,⁴⁷ recognized that "[w]hen a reasonable person knows or should have known that certain types of conduct constitute an unreasonable risk of harm to another, he or she has the duty to refrain from that conduct."⁴⁸ Thus, assuming as true the plaintiff's allegations that the defendant knew he was infected with genital herpes at the time of their sexual encounter, the defendant "had a duty either to refrain from sexual contact with [plaintiff] or to warn her of his condition."⁴⁹ If the defendant "negligently failed to do either, he breached his duty."⁵⁰

Likewise, in *Long v. Adams*,⁵¹ the Georgia Court of Appeals concluded that the defendant breached the duty of ordinary care not to injure others when, knowing that she was infected with genital

43. KEETON, *supra* note 6, at 164.

44. RESTATEMENT (SECOND) OF TORTS § 283 (1965). Where the individual upon whom the duty is imposed has special knowledge, such as a physician, that individual may be held to a heightened standard of care. *Id.* § 290 cmt. f.

45. *Id.* § 284 cmt. a.

46. See *Berner v. Caldwell*, 543 So. 2d 686, 689 (Ala. 1989); *R.A.P. v. B.J.P.*, 428 N.W.2d 103, 108 (Minn. Ct. App. 1988) ("A reasonable person should know that if he/she has a contagious, sexually transmittable disease . . . the disease is likely to be communicated through sexual contact."); *Kliegel v. Aitken*, 69 N.W. 67, 68 (Wis. 1896) ("[O]ne who negligently—that is, through want of ordinary care—exposes another to an infectious or contagious disease, which such other thereby contracts, is liable in damages therefor, in the absence of contributory negligence. . . .").

47. 312 Md. 135, 538 A.2d 1175 (1988).

48. *McCance v. Lindau*, 63 Md. App. 504, 514, 492 A.2d 1352, 1358 (1985), *quoted in B.N.*, 312 Md. at 141, 538 A.2d at 1178.

49. *B.N.*, 312 Md. at 143, 538 A.2d at 1179.

50. *Id.*

51. 333 S.E.2d 852 (Ga. Ct. App. 1985).

herpes, she engaged in sexual intercourse with the plaintiff without informing him of her infection.⁵² Similarly, in *Doe v. Johnson*,⁵³ although the court did not address the truth of the plaintiff's factual allegations that Johnson knew or should have known that he had or may have had HIV at the time of his sexual encounters with her, impliedly, if these allegations were proven, Johnson would have breached a legal duty to the plaintiff to inform her that he either had or may have had the HIV virus.⁵⁴ The court noted that the risk to the plaintiff of contracting the disease outweighed the burden on Johnson to reveal his HIV virus information.⁵⁵

C. Causal Connection

If a plaintiff is able to establish the existence of a legal duty and the subsequent breach of that duty by a defendant, the plaintiff must then establish a causal connection between the defendant's action and the damage or injuries that the plaintiff has suffered. This causal connection is frequently referred to as "proximate cause," a court-established limitation on a defendant's responsibility for the consequences of his conduct.⁵⁶ While this limitation is often examined in light of the nature and degree of the factual connection between the defendant's conduct and the plaintiff's damages, policy considerations also play an important role.⁵⁷

Where the transmission of infectious diseases is at issue, causation may be easily established if the defendant is the only individual who could have infected the plaintiff.⁵⁸ Such was the case in *B.N. v. K.K.*⁵⁹ The plaintiff had not engaged in sexual contact with anyone other than the defendant during the relevant period; hence, the genital herpes she contracted could only have been a result of the defendant's conduct.⁶⁰

Similarly, in *Berner v. Caldwell*,⁶¹ where the plaintiff presented credible evidence that she contracted a disease that could only be

52. *Id.* at 854.

53. 817 F. Supp. 1382 (W.D. Mich. 1993).

54. *Id.* at 1393. *But see* C.A.U. v. R.L., 438 N.W.2d 441 (Minn. Ct. App. 1989) (holding that defendant, who learned he had AIDS after his relationship with plaintiff, was under no duty to warn plaintiff when, at the time of their relationship, it was not reasonably foreseeable that he had the disease or that plaintiff would suffer harm through intimate sexual contact with defendant).

55. *Doe*, 817 F. Supp. at 1393.

56. KEETON, *supra* note 16, § 41, at 263-64.

57. *Id.*

58. *See* B.N. v. K.K., 312 Md. 135, 538 A.2d 1175 (1988). In cases involving sexually transmitted diseases, causation may be more difficult to prove if any number of sexual partners could have transmitted the disease to plaintiff.

59. *Id.*

60. *Id.* at 138, 538 A.2d at 1177.

61. 543 So. 2d 686 (Ala. 1989).

transmitted through sexual contact, that the defendant was the only individual with whom she had sexual contact, that she did not have the disease prior to her relationship with the defendant, and that before the end of their relationship she discovered she was infected with the disease, the inference that the defendant had infected the plaintiff was sufficient to support a claim of negligence.⁶²

The transmission of the HIV virus through sexual contact is sufficiently analogous to these cases to support the proposition that causation may be easily established if the defendant is the only HIV-infected individual with whom the plaintiff had contact of the type and nature sufficient to transmit the disease. Presumably, once a legal duty is established and it is shown that the defendant breached that duty, a causal connection between the defendant's breach and the plaintiff's injuries will follow.

D. Damages

Once causation is established, it is likely that any physical pain and suffering or related damages will be sufficient to satisfy the last element of negligence.⁶³ Where an infectious disease is actually contracted, the element of damages is generally satisfied. Damage in *B.N. v. K.K.*⁶⁴ occurred when the plaintiff contracted genital herpes, "a serious, painful, and incurable disease."⁶⁵

Damages similar in nature may occur through the negligent transmission of the HIV virus. The damages alleged by the plaintiff in *Doe v. Johnson*⁶⁶ included physical illness, severe emotional distress, loss of enjoyment of life, medical expenses, and lost wages and benefits.⁶⁷ Although at the time of her action Doe had not yet developed AIDS, she was certain to acquire it and "suffer a slow, certain, and painful death."⁶⁸

62. *Id.* at 688.

63. It may be difficult to establish actual loss if the only injuries alleged result from emotional distress. See *infra* notes 100-15 and accompanying text.

64. 312 Md. 135, 538 A.2d 1175 (1988).

65. *Id.* at 143, 538 A.2d at 1179. Genital herpes is a sexually transmitted viral disease that may be chronic and recurring, and for which no known cure exists. *Id.* at 140 n.5, 538 A.2d at 1178 n.5. Its characteristics include itching, burning genitalia, pain on urination, headaches, swollen lymph nodes, general muscular aches, fever, and overall discomfort. *Id.* at 140 n.4, 538 A.2d at 1178 n.4. It is the third most common sexually transmitted disease and can result in occasional complications such as meningitis and radiculitis. *Id.* at 140 n.7, 538 A.2d at 1178 n.7. Genital herpes has also been associated with the development of cervical cancer, with the dangers of miscarriage and premature delivery during childbirth, and with a high mortality rate for the children of its carriers. *Id.* at 144, 538 A.2d at 1180.

66. 817 F. Supp. 1382 (W.D. Mich. 1993).

67. *Id.* at 1385.

68. *Id.*

III. THE INSTANT CASE

In *Faya*, the appellants alleged that Dr. Almaraz was negligent in failing to inform them of his HIV-positive status.⁶⁹ The damages alleged by the appellants consisted primarily of emotional distress and related injuries.⁷⁰

To prevail in their negligence action, Almaraz must have breached a duty of care owed to the appellants, and that breach must have been the proximate cause of their injuries.⁷¹ The court thus began its analysis by deciding whether Dr. Almaraz owed a duty to the appellants to either inform them of his condition or to refrain from operating upon them.⁷²

The Court of Appeals of Maryland previously examined the scope of duty owed by one infected with a sexually transmitted disease in *B.N. v. K.K.*,⁷³ where it held that the defendant had a legal duty to the plaintiff to either refrain from sexual contact with her, or to inform her of his infected condition prior to such contact.⁷⁴ The similarities between genital herpes and AIDS,⁷⁵ in addition to the basic concept underlying the imposition of a duty,⁷⁶ allowed the *Faya* court to arrive at a similar conclusion. Because AIDS may be transmitted from surgeon to patient during an operation if the

69. 329 Md. 435, 447, 620 A.2d 327, 333 (1988).

70. *Id.* at 441, 620 A.2d at 330.

71. *Id.*

72. *Id.*

73. 312 Md. 135, 538 A.2d 1175 (1988).

74. *Id.* at 142, 538 A.2d at 1179. The duty arose because of the highly infectious nature of genital herpes and the foreseeability of its transmission. *Id.*

75. *Id.* Genital herpes is a sexually transmitted disease that is highly contagious, painful and incurable. *Id.* AIDS is likewise contagious, often painful and invariably fatal. *See Faya*, 329 Md. at 439-42, 620 A.2d at 329-30. The HIV virus is typically transmitted through genital fluids or blood that is transmitted from one person to another through sexual contact, the sharing of needles in intravenous drug usage, blood transfusions, infiltration into wounds, or from mother to child during pregnancy or birth. *Id.* at 439, 620 A.2d at 329. Four separate studies conducted during the years 1985-89 failed to disclose any documented cases of transmission of the HIV virus from HIV infected surgeons to patients. *Id.* at 446 n.3, 620 A.2d at 332 n.3. Another study found that the risk of HIV transmission from infected patient to health care worker was 0.3% per exposure. *Id.* Although the risk of HIV transmission appears to be extremely low, especially where the surgeon employs proper barrier techniques, the court of appeals recognized that the probability of harm occurring is not the sole factor for consideration when determining the existence of a duty. *Id.* at 447-49, 620 A.2d at 333. The seriousness of the potential harm must also be considered. *Id.* at 448, 620 A.2d at 333.

76. That basic concept is that each of us has a responsibility to exercise due care to avoid the unreasonable risk of harm to others. *Id.*

surgeon's blood is somehow commingled with that of the patient,⁷⁷ the court concluded that Almaraz may have owed a duty to the appellants to either disclose his condition or refrain from operating upon them.⁷⁸ The court cited *Sard v. Hardy*⁷⁹ for the proposition that a surgeon has a legal duty, absent emergencies, to obtain the "informed consent" of a patient before surgery is performed.⁸⁰ An

77. The commingling of a surgeon's blood with that of his patient is not difficult to envision. Professionals who perform seriously invasive procedures, such as a surgeon or a dentist, may puncture their skin with any number of sharp instruments, needles, or bone or tooth fragments. Larry Gostin, *Hospitals, Health Care Professionals, and AIDS: the "Right to Know" the Health Status of Professionals and Patients*, 48 MD. L. REV. 12, 20 (1989). Studies have indicated that a surgeon's glove will be cut or punctured in approximately one out of four cases. *Id.* at 20. A surgeon will sustain a significant cut to the skin in one out of 40 cases. *Id.* These studies demonstrate the very real possibility that a doctor may transmit the HIV virus to his patient.

78. *Faya*, 329 Md. at 448, 620 A.2d at 333. The *Faya* court found overwhelming support for its position in a policy statement on HIV-infected physicians issued by the House of Delegates of the American Medical Association (the "AMA"), which recommends that an infected physician either refrain from performing procedures that pose a significant risk of HIV transmission to a patient, or perform those procedures only with the patient's consent. *Id.* at 448-49, 620 A.2d at 334. The report further recommended that an infected physician disclose his condition to a public health officer or a local review committee, which would then determine the activities the physician could perform. *Id.* at 449, 620 A.2d at 334. The consent of both the local review committee and the patient would be required before the physician could perform surgery. *Id.*

Because Almaraz failed to inform the appellants of his HIV-positive status, thereby denying them the opportunity to withhold their consent, he may have breached a legal duty that may have been owed to the appellants. *Id.* at 459-60, 620 A.2d at 339. Whether an actual legal duty existed was a question that the court believed should be addressed by a jury, after an evaluation of Almaraz's conduct and its consequences. *Id.* at 460, 620 A.2d at 339.

79. 281 Md. 432, 379 A.2d 1014 (1977).

80. *Faya*, 329 Md. at 452 n.6, 620 A.2d at 339 n.6. A comprehensive analysis of the doctrine of informed consent is set forth in *Behringer v. Princeton Medical Ctr.*, 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991). *Behringer*, an otolaryngologist and plastic surgeon, had his surgical privileges suspended shortly after being diagnosed with AIDS. *Id.* at 1254. In examining whether the doctrine of informed consent required *Behringer* to disclose his illness to his patients, the court weighed *Behringer's* right to perform invasive procedures against the patient's rights, and held that the patient's rights prevailed. *Id.* at 1283. The court argued that an HIV-infected physician should withdraw from performing any invasive procedure that would pose a risk to a patient. *Id.*

Utilizing reasoning not unlike that of the *Faya* court, the *Behringer* court asserted that "[w]here the ultimate harm is death, even the presence of a low risk of transmission justifies the adoption of a policy which precludes invasive procedures where there is 'any' risk of transmission The ultimate risk to the patient is so absolute—so devastating—that it is untenable to argue against informed consent combined with a restriction on procedures which present 'any risk' to the patient." *Id.* The court opined that "[a]s small as the risk to any individual patient may be," when one considers that an infected surgeon may perform many operations "the aggregate risk thus becomes significant." *Id.* at 1283 n.20.

informed consent can only be obtained when the patient is provided with all of the information material to the patient's decision.⁸¹

In recognizing such a duty, the *Faya* court placed little emphasis on the trial court's assertion that the transmission of AIDS from doctor to patient is a mere theoretical possibility when the surgeon utilizes proper barrier techniques.⁸² The court reasoned that even though the appellants did not allege an actual exposure to the HIV virus, it would be unfair to penalize them for lacking the information to establish an actual avenue of transmission of the virus into their bloodstreams.⁸³

The relevant inquiries then became whether the appellants' injuries were proximately caused by Dr. Almaraz's failure to inform them of his HIV-positive status and whether those injuries were legally compensable. The court accepted without elaboration that Almaraz's breach of his legal duty was the proximate cause of the appellants' injuries.⁸⁴ The court spent considerably more time examining whether the appellants' fear and mental and emotional distress injuries were legally compensable.

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81. *Id.* The knowledge that one's surgeon is HIV-positive would likely be material in deciding whether to allow that surgeon to perform one's surgery. The importance and effect of this knowledge was considered by the Pennsylvania Superior Court in *In re Milton S. Hershey Medical Ctr.*, 595 A.2d 1290 (Pa. Super. Ct. 1991), where the issue on appeal was whether the hospitals where an HIV-infected doctor was employed should be permitted to disclose the doctor's HIV-positive status. The hospitals believed that it was their duty to inform the doctor's patients of their potential exposure to the HIV virus and to offer them treatment, testing and counseling. *Id.* at 1293. In weighing the competing interests of the doctor and his patients, including the doctor's concerns that he would suffer both personally and professionally if his illness was disclosed, the court tipped the scales "in favor of the public health, regardless of the small potential for transmittal of the fatal virus." *Id.* at 1297.
82. *Faya*, 329 Md. at 443, 620 A.2d at 330. Appellants did not allege that Almaraz failed to use these techniques, or that as a result of that failure an incident occurred that may have allowed the HIV virus to enter their bloodstreams. *Id.* at 443, 620 A.2d at 330-31. Accordingly, the trial court held that the appellants failed to establish any exposure to the HIV virus. *Id.* at 443, 620 A.2d at 330. Even if exposure had occurred, the appellants' negative test results more than six months after surgery made it extremely unlikely that they would develop AIDS. *Id.* at 443, 620 A.2d at 331. Hence, the trial court reasoned that absent any exposure to the HIV virus, the appellants' injuries resulted from the fear that "something that did not happen could have happened," and thus were not compensable. *Id.* The trial court dismissed the appellants' complaints for failure to state a legally compensable injury. *Id.*
83. *Id.* at 457, 620 A.2d at 337.
84. *Id.* at 450, 459, 620 A.2d at 334, 339. The court merely stated that appellants alleged facts which, if proven, "indicate that Dr. Almaraz may have breached a legal duty, thereby causing them to suffer legally compensable injuries." *Id.* at 459, 620 A.2d at 339.

Specifically, the appellants alleged that they incurred injuries consisting of HIV exposure and the risk of AIDS, physical injury and expenses resulting from blood testing for the HIV virus, pain, fear, anxiety, grief, nervous shock, severe emotional distress, headaches, and sleeplessness.⁸⁵ To determine whether these were legally compensable injuries, the court looked to both existing Maryland case law and the law from other jurisdictions for guidance.

The court first examined the divergent opinions of other jurisdictions on the question of whether damages are available to individuals who test HIV-negative but suffer from the fear of contracting AIDS and the physical consequences thereof. Those courts that have refused to allow the recovery of damages under these circumstances have often done so because the plaintiff failed to demonstrate an actual exposure to the HIV virus, and/or failed to suffer from any compensable injuries.⁸⁶

A less rigid approach has been adopted by those courts that have allowed the recovery of damages for emotional distress notwithstanding HIV-negative test results. The primary focus of these courts has been the reasonableness of the plaintiff's fear of contracting AIDS. Oftentimes, as in *Johnson v. West Virginia University Hospital*,⁸⁷ the nature of the plaintiff's injuries is an element considered by the court in its evaluation of the reasonableness of the plaintiff's fear.

In *Johnson*, the Supreme Court of Appeals of West Virginia allowed a police officer who tested HIV-negative after being bitten by an AIDS-infected patient to recover damages for emotional distress.⁸⁸ The court observed that the wounds inflicted by the bite

85. *Id.* at 442, 620 A.2d at 330.

86. See *Burk v. Sage Prods., Inc.*, 747 F. Supp. 285 (E.D. Pa. 1990) (holding that plaintiff could not recover for fear of contracting AIDS where he failed to allege that the syringe with which he was stuck contained contaminated blood, and where he tested HIV-negative at least five times during the 13 month period after the incident); *Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367 (N.D. Ill. 1988) (refusing to allow recovery to a wife whose husband had been negligently inflicted with the HIV virus where the wife, although exposed to the disease, failed to allege physical injury or illness); *Transamerica Ins. Co. v. Doe*, 840 P.2d 288 (Ariz. 1992) (holding that there was no right of recovery for plaintiffs who could prove exposure to HIV but who could not offer competent evidence of physical injury resulting therefrom); *Hare v. State*, 570 N.Y.S.2d 125 (App. Div. 1991) (denying recovery to a hospital employee bitten by an unrestrained inmate, where the employee failed to prove that the inmate was infected, and where the employee tested HIV-negative); *Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79 (W. Va. 1991) (refusing to allow recovery for a mortician who had worn protective clothing while embalming an AIDS-infected corpse and who failed to allege any method of exposure to the HIV virus).

87. 413 S.E.2d 889 (W. Va. 1991).

88. *Id.* at 894.

presented an actual exposure to the HIV virus, and were thus a factor supporting the reasonableness of the officer's fear of contracting AIDS.⁸⁹ The court emphasized, however, that mere contact with an HIV-infected individual is not enough to warrant an award of damages; rather, both a physical exposure to the HIV virus and physical manifestations of emotional distress are required.⁹⁰

A more comprehensive discussion of what constitutes "reasonable" fear was articulated by the court in *Carroll v. Sisters of St. Francis Health Services, Inc.*⁹¹ In *Carroll*, a hospital visitor who was pricked by contaminated needles sued the hospital for damages allegedly occasioned by her fear of contracting AIDS.⁹² The plaintiff was unable to demonstrate both an actual exposure to the HIV virus and that she tested HIV-positive.⁹³

The Tennessee Court of Appeals, in reversing summary judgment entered against the plaintiff on her claim for emotional distress damages, relied heavily on *Laxton v. Orkin Exterminating*,⁹⁴ which it construed as "set[ting] a standard of 'reasonableness' of the plaintiff's fear."⁹⁵ That standard implies that emotional distress injuries may be unreasonable if they arise after the fear of contracting an illness or disease becomes unrealistic.⁹⁶

The *Faya* court aligned itself with the approaches utilized by *Johnson* and *Carroll* when it determined that the appellants' fear of contracting AIDS was not unreasonable as a matter of law. The

89. *Id.* In addition to the wounds inflicted by the bite, the officer also suffered injuries consisting of sleeplessness, loss of appetite, and other physical evidence of emotional distress. *Id.* at 892.

90. *Id.* at 894.

91. 868 S.W.2d 585 (Tenn. 1993).

92. *Id.* at 586. Plaintiff was pricked by the contaminated needles when she sought to retrieve paper towels from what she believed to be a paper towel dispenser. *Id.* The object into which plaintiff placed her right hand was actually a contaminated needle receptacle. *Id.* Plaintiff alleged, *inter alia*, that the hospital was negligent in failing to place a warning label on the receptacle, and in placing the receptacle adjacent to the wash basin when it so closely resembled a paper towel dispenser. *Id.* As a result of the alleged negligence, the plaintiff sustained injuries that included anxiety, fear, and other emotional distress. *Id.* at 587.

93. *Id.* at 586-87.

94. 639 S.W.2d 431 (Tenn. 1982). The plaintiffs in *Laxton* were permitted to recover damages for mental anguish arising from the ingestion of polluted water, notwithstanding the lack of physical symptoms indicative of an illness. *Id.* at 434. Recovery was limited, however, to the "time between discovery of the ingestion and the negative medical diagnosis or other information that puts to rest the fear of injury." *Id.*

95. *Carroll*, 868 S.W.2d at 587.

96. A fear of contracting an illness or disease may be deemed unrealistic if, for example, a negative medical diagnosis is made or, in the case of infectious diseases, the incubation period has expired.

court refused to require the appellants to prove an actual avenue of transmission of the HIV virus.⁹⁷ Nonetheless, following the lead of *Laxton*, the court declared that the appellants' continued fear of contracting AIDS after the receipt of their HIV-negative test results might be unreasonable.⁹⁸ The court thus limited the appellants' possible recovery to their reasonable window of anxiety, defined as "the period between which they learned of Almaraz's illness and when they received their HIV-negative results."⁹⁹

The court next examined whether the nature of the appellants' injuries should preclude their right to recover damages for emotional distress. The court acknowledged the rigidity of the former Maryland rule that a plaintiff could not recover for fright or mental suffering arising from the negligent acts of another unless such injuries were connected with physical impact or injury.¹⁰⁰ This "physical impact" rule would likely have precluded the appellants' recovery because the only physical impact or injuries alleged were their blood tests for HIV antibodies.¹⁰¹ Because of the gradual loosening of the physical impact rule in Maryland, however, which began with *Green v. T.A. Shoemaker & Co.*,¹⁰² the court concluded that the injuries suffered by appellants were legally compensable.¹⁰³

The court's conclusion is well-grounded in precedent. As the court itself observed, similar injuries have been found compensable by the court of appeals in cases involving issues other than the fear of contracting AIDS. In *Green*, for example, the plaintiff suffered from fright and nervous shock resulting from her exposure to repeated rock blastings in the vicinity of her home.¹⁰⁴ Noting its inclination to allow recovery for emotional distress when "a material

97. 329 Md. 435, 455, 620 A.2d 327, 336-37 (1993).

98. *Id.* at 459, 620 A.2d at 338-39.

99. *Id.* at 459, 620 A.2d at 339.

100. *Id.* at 456, 620 A.2d at 337. Traditionally, Maryland courts refused to allow a cause of action for mere fright or mental suffering because these injuries can be easily simulated. *Green v. T.A. Shoemaker & Co.*, 11 Md. 69, 77, 73 A. 688, 691 (1909). It is also difficult to measure the suffering occasioned by such injuries and to ascertain the truth thereof. *Id.* at 77, 73 A. at 691.

101. *Faya*, 329 Md. at 441, 620 A.2d at 330. Impliedly, the physical impact or injury resulted from the pin prick that was made to appellants' skin as a result of the blood testing.

102. 11 Md. 69, 73 A. 688 (1909).

103. *Faya*, 329 Md. at 459, 620 A.2d at 338-39.

104. *Green*, 11 Md. at 71, 73 A. at 689. Although large rocks and stones were propelled onto the plaintiff's property, causing damage to her dwelling and the contents thereof, the plaintiff was never actually hit by a rock or a stone. *Id.* at 71-72, 73 A. at 689. Nevertheless, the plaintiff was put in such continual fear for her life that the resultant nervousness rendered her unable to perform her household duties. *Id.* at 74, 73 A. at 690. She eventually became incapacitated by her fright and nervousness. *Id.*

physical injury . . . result[s] from fright caused by a wrongful act,"¹⁰⁵ the court of appeals held that the plaintiff's injuries were legally compensable notwithstanding the absence of physical impact between the plaintiff and a falling rock or stone.¹⁰⁶ The court reasoned that because the blasting was the proximate cause of the plaintiff's injuries, and the injuries ought to have been foreseeable as a consequence thereof, there was no just reason to adhere to the general rule prohibiting recovery for nervous "affections" unaccompanied by physical impact.¹⁰⁷

The rationale of the *Green* court was also the basis of the court's decision in *Mahnke v. Moore*,¹⁰⁸ where the plaintiff instituted an action in tort against her father for injuries which included shock, mental anguish and permanent nervous and physical injuries.¹⁰⁹ The court recognized the plaintiff's right to sustain an action against her father's estate for the emotional injuries which she suffered, notwithstanding that those injuries were unaccompanied by physical impact.¹¹⁰ Similarly, in *Vance v. Vance*,¹¹¹ plaintiff's shock, sleep-

105. *Id.* at 77, 173 A. at 691. Recovery would not be allowed for mere fright without any physical injury resulting therefrom. *Id.*

106. *Id.*

107. *Id.* at 81, 173 A. at 692.

108. 197 Md. 61, 77 A.2d 923 (1951).

109. *Id.* at 62, 77 A.2d at 924. The plaintiff's injuries resulted from several traumatic events. She witnessed the murder of her mother by her father, and was kept with her mother's dead body for six days. *Id.* Subsequently, the plaintiff's father committed suicide before her eyes, splattering the plaintiff's face and clothing with his blood. *Id.*

110. *Id.* at 69, 77 A.2d at 927. The court of appeals reversed the judgment of the Circuit Court for Wicomico County, which held that the plaintiff could not sustain a cause of action in tort against the executrix of her father's estate for personal injuries caused by his atrocious acts. *Id.* at 65, 77 A.2d at 924-25. In reversing the judgment, the court relied on the rule adopted in *Green*, that where the wrongful act complained of is the proximate cause of the injury and the injury should have been foreseeable, the question of damages for that injury should be left to the jury. *Id.* at 69, 77 A.2d at 926-27. The court further recognized that "a plaintiff can sustain an action for damages for nervous shock or injury caused, without physical impact, by fright arising directly from defendant's negligent act or omission, and resulting in some clearly apparent and substantial physical injury as manifested by an external condition or by symptoms clearly indicative of a resultant pathological, physiological, or mental state." *Id.* at 69, 77 A.2d at 927 (quoting *Bowman v. Williams*, 164 Md. 397, 404, 165 A. 182, 184 (1933)). The case was remanded to the trial court for a determination as to whether the injuries suffered by plaintiff were "substantial" and thereby compensable. *Id.*

The court made its ruling despite the fact that a child is generally not permitted to maintain an action in tort against its parent. *Id.* at 68, 77 A.2d at 926. The court circumvented this general rule by reasoning that where the parent tortfeasor is deceased, an attempt to maintain discipline and tranquility in the home by prohibiting an action in tort by a child against a parent is

lessness, and other nervous disorders were deemed physical injuries that justified recovery of damages for emotional distress.¹¹² Refusing to confine the term "physical" to only bodily injuries, the court found the plaintiff's injuries compensable because the injuries were capable of objective determination.¹¹³

More recently, in *B.N. v. K.K.*,¹¹⁴ the court of appeals held that a nurse who contracted genital herpes from a doctor who failed to inform her of his infection prior to their sexual relations could be compensated for emotional distress if she could objectively demonstrate the severity of her injuries.¹¹⁵

illogical. *Id.* The court further reasoned that the parent-child relationship was not in need of protection, where as in *Mahnke*, the parent forfeited his parental authority and privileges by the commission of such cruel and inhumane acts. *Id.*

111. 286 Md. 490, 408 A.2d 728 (1979). After nearly 20 years of marriage and after bearing two children, the plaintiff learned that her husband was not divorced from his first wife at the time of his purported marriage to the plaintiff. *Id.* at 492-93, 408 A.2d at 729-30. As a result, the plaintiff was unable to function normally, could not sleep, and was too embarrassed to socialize with even those individuals who were attempting to be kind to her. *Id.* at 493, 408 A.2d at 730. The plaintiff sued her husband for compensatory damages for emotional distress that she allegedly suffered as a result of his negligent misrepresentation concerning the status of their marriage. *Id.* at 492-93, 408 A.2d at 729. She also sought damages for the intentional infliction of emotional distress, which she alleged resulted from his negligent misrepresentation and her subsequent knowledge of their true marital status. *Id.*
112. *Id.* at 501, 408 A.2d at 734. The plaintiff's claim for damages was based upon her husband's negligent misrepresentation. *Id.* The plaintiff's evidence was insufficient, however, to establish the separate tort of intentional infliction of emotional distress. *Id.* at 504, 408 A.2d at 735. To impose liability for this tort, a defendant's conduct must be intentional or reckless, the conduct must be extreme and outrageous, there must be a causal connection between the wrongful conduct and the emotional distress, and the emotional distress must be severe. *Id.* The court refused to hold that the defendant's conduct in *Vance* was intentional, reckless, extreme or outrageous. *Id.* at 506, 408 A.2d at 737.
113. *Id.* at 501, 408 A.2d at 734. The court opined that "physical" merely means that the injury for which recovery is sought is capable of objective determination. *Id.* at 500, 408 A.2d at 733-34. In this case, the plaintiff's injuries were manifested in her external condition. *Id.* at 501, 408 A.2d at 734. The deterioration of the plaintiff's physical appearance was evidenced by her unkempt hair, sunken cheeks and dark eyes. *Id.*
114. 312 Md. 135, 538 A.2d 1175 (1988). This case was before the court of appeals on a question certified by the United States District Court for the District of Maryland. *Id.* at 135, 538 A.2d at 1176. The certified question, which the court answered in the affirmative, was: "Does Maryland Recognize A Cause Of Action For Either Fraud, Intentional Infliction Of Emotional Distress, Or Negligence Resulting From The Sexual Transmission Of A Dangerous, Contagious, And Incurable Disease, Such As Genital Herpes?" *Id.*
115. *Id.* at 147-49, 538 A.2d at 1181-82. As a prerequisite to this finding, the court first determined that the plaintiff could maintain a cause of action in negligence

Thus, in allowing the appellants to recover for their injuries, the *Faya* court did not depart significantly from the court of appeals' prior rulings allowing recovery for emotional distress. Its decision in *Faya* was a logical extension of *Green* and *Mahnke*, which require that emotional distress injuries be a proximate result of the wrongful act of another, and *Vance* and *B.N.*, which require that those injuries be capable of objective determination. Accordingly, having alleged facts that, if proven, would establish that Almaraz owed the appellants a legal duty, that such duty was breached, and that their injuries were the proximate cause of that breach, the appellants could recover damages for emotional distress if the injuries resulting therefrom were capable of objective determination.¹¹⁶

Of course, an award of damages would not be made unless Dr. Almaraz was negligent. In this regard, *Faya* will have little impact upon existing Maryland law. Instead, its impact can be found in the court's willingness to allow recovery of damages for the fear that something which could have happened did not occur.

IV. ALTERNATIVE APPROACHES

To its proponents, the *Faya* decision represents a logical extension of existing Maryland case law and does nothing more than reaffirm the court's belief that recompense should be available to individuals suffering from emotional distress, although unaccompanied by physical injury, where those injuries are a proximate result

against the doctor. *Id.* at 143, 538 A.2d at 1179. It held that because the doctor had a highly infectious disease, and because the danger of transmitting that disease to others with whom he came into contact was foreseeable, the doctor had a duty to take reasonable precautions to avoid transmission of the disease. *Id.* This duty was breached when the doctor failed to inform the plaintiff of his condition and failed to refrain from engaging in sexual contact with her. *Id.* When the plaintiff became infected with genital herpes as a result of her contact with the doctor, she thereby suffered injuries proximately caused by the doctor's breach of his duty. *Id.*

The court then addressed the plaintiff's claim against the defendant for the intentional infliction of emotional distress. There are four elements that must be established to recover for the tort of intentional infliction of emotional distress. *See supra* note 112. The element which requires that the emotional distress be severe does not require that it produce total emotional or physical disablement. *Id.* at 148-49, 538 A.2d at 1181. The *B.N.* court held that the plaintiff's case satisfied the first three elements of the tort, but remanded the case to the jury to determine whether the plaintiff's emotional distress was severe. *Id.* at 148-49, 538 A.2d at 1182.

116. *See supra* note 3. The case was remanded to the Circuit Court for Baltimore City for further proceedings to determine the truth of the appellants' allegations. *Faya v. Almaraz*, 329 Md. 435, 459, 620 A.2d 327, 339 (1993).

of the defendant's breach of a legal duty. Critics of the decision may believe otherwise.

At a time when reported cases of AIDS and other sexually transmitted diseases are on the rise, it may be argued that the *Faya* decision will open a Pandora's box.¹¹⁷ The willingness of Maryland courts to allow recovery of damages for emotional distress resulting solely from the fear of contracting a disease, especially where the disease does not materialize, may significantly increase litigation and the amount of damages recoverable where none may have been recovered previously.¹¹⁸ On the other hand, where the consequences of a defendant's wrongful act are severe, it seems equitable to allow a plaintiff to recover damages resulting from any legitimate injuries arising from defendant's conduct, whether those injuries are to the mind or the body.

Where the transmission of AIDS is at issue, public policy may dictate that recovery be made available for those suffering from the fear of contracting the disease, even where the likelihood of infection is minimal. The *Faya* decision appears to embrace this view. Rather than focus on the probability of the appellants' infection under the circumstances of the case, the court of appeals focused on the fatal consequences of the harm that would have resulted had the appellants been infected. By acknowledging the seriousness of the potential harm, the court implied that an HIV-infected physician should refrain from performing surgery altogether. This may be especially appropriate where, as with AIDS, all avenues of transmission of the infectious disease are not yet known. Although there are no documented cases of AIDS transmission from surgeon to patient,¹¹⁹ it may be prudent to err on the side of caution, particularly where the potential consequences are so profound.

117. This fear may be justified. Less than nine months after the *Faya* decision, more than 30 former patients of Dr. Almaraz commenced suit against his estate alleging emotional distress injuries similar to those experienced by *Faya* and Rossi. Jay Apperson, *Ex-Patients of Doctor who Died of AIDS File Suit*, The Sun, Nov. 24, 1993, at 4B. Johns Hopkins Hospital corresponded with over 1,800 of the doctor's patients to disclose his illness. *Id.* It is conceivable, therefore, that many more of Dr. Almaraz's patients will bring similar actions against his estate.

118. See *supra* note 117.

119. See *supra* note 75. This argument may no longer be persuasive. The first reported case of possible HIV transmission from a health care worker to a patient was reported by the Centers for Disease Control on July 27, 1990. Jane H. Barney, Comment, *A Health Care Worker's Duty to Undergo Routine Testing for HIV/AIDS and to Disclose Positive Results to Patients*, 52 LA. L. REV. 933, 934 (1992). The report indicated that a Florida dentist was believed to have transmitted the HIV virus to Kimberly Bergalis and at least two of his other patients. *Id.* at 934.

The *Faya* decision appears to take such an approach by establishing a legal duty beyond that recommended by the AMA policy statement that HIV-infected physicians refrain from activity posing a *significant* risk of HIV transmission;¹²⁰ it implies that *any* risk of transmission, however slight, is patently unacceptable.¹²¹ Although the court cited *Sard v. Hardy*¹²² for the proposition that an HIV-infected physician may have a legal duty to inform a patient of his infection, the implications of the court's decision are that a mere warning is not enough.

The court's decision does not imply that a plaintiff has the *carte blanche* right to recover damages for emotional distress resulting from the fear of contracting AIDS or any other infectious disease. The *Faya* court wisely limits such recovery only to those injuries which are reasonable, that is, to those injuries that occur between the time a plaintiff learns of the possibility of infection and the time when the plaintiff's fear is put to rest.¹²³ Any fear which continues after that period may be unreasonable, and therefore uncompensable.¹²⁴ By requiring that such injuries also be objectively demonstrated,¹²⁵ the court seeks to ensure that the injuries are genuine and not merely simulated. In light of these safeguards, the *Faya* decision should not significantly increase the probability of fictitious claims for emotional distress.

V. CONCLUSION

With the *Faya* decision, the court of appeals has legitimized injuries to the mind, but has indicated its cognizance of the fact that such injuries must remain subject to close scrutiny. The *Faya* decision is a successful blend of reason and compassion. To deny recovery to a plaintiff whose injuries are capable of objective determination merely because that plaintiff was not physically injured in the traditional sense is to imply that the mind, which exercises ultimate domain over the body, is somehow less worthy of protection. This is a notion that *Faya* will hopefully dispel. The decision does not impose any greater burden on plaintiffs suffering from genuine injuries; instead, it serves to curtail frivolous claims while allowing those individuals who have genuinely suffered at the negligent hands of another an opportunity for recovery.

120. *Faya*, 329 Md. at 450-51, 620 A.2d at 334.

121. *Id.*

122. 281 Md. 432, 379 A.2d 1014 (1977).

123. *Faya*, 329 Md. at 455, 620 A.2d at 337.

124. *Id.*

125. *Id.* at 459, 620 A.2d at 338-39.

By also suggesting that a physician infected with the HIV virus may have a legal duty to inform his patient of such infection, the court has demonstrated a willingness to place the sanctity of human life over all other concerns. To refuse to require a physician to disclose his HIV-positive status because of concerns regarding the physician's privacy and ability to earn a living would be the equivalent of giving those who have the power to cure the power to kill as well.

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