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Emotional Distress Damages For Fear Of Contracting AIDS: Should Plaintiffs Have to Show Exposure To HIV?

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I. Introduction

It is difficult to imagine any other phenomenon which has permeated the social consciousness of our society in the last decade more than the Acquired Immunodeficiency Syndrome, or AIDS.[1] AIDS is not a disease in and of itself, but is the final stage in the progression of an illness, characterized by complete failure of the immune system.[2] AIDS is comparable to cancer in that both diseases are latent conditions which do not develop immediately after exposure to the causative agent.[3] An individual will develop AIDS only after being infected with the human immunodeficiency virus (HIV).[4] An infected person will typically not

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1. At least 284,000 cases of AIDS have been reported to the Center for Disease Control (CDC) since 1981. *Impact of the Expanded AIDS Surveillance Case Definition on AIDS Case Reporting - United States, First Quarter, 1993*, 42 MORBIDITY AND MORTALITY WKLY. REP. 308 (1993). The number of living individuals diagnosed with AIDS as of January, 1992, was around 90,000. *Id.* From January 1, 1993 to March 31, 1993, over 35,000 cases of AIDS were reported to CDC, a 204% increase over the number reported for the same period in 1992. Id. This increase is partly attributable to the expanded surveillance definition of AIDS promulgated by the CDC on January 1, 1993. Id. However, the great majority of the 1 to 2 million Americans who are infected with human immunodeficiency virus type 1 (HIV), the cause of AIDS, but are currently healthy. John N. Krieger, *Acguired Immunodeficiency Syndrome Antibody Testing and Precautions*, 147 J. UROLOGY 713, 713 (1992).

AIDS is essentially a composite of regional epidemics, affecting different segments of the population differently. CDC, *Update: Acguired Immunodeficiency Syndrome - United States, 1992*, 42 MORBIDITY AND MORTALITY WKLY. REP. 547 (1993). In most major cities, 20 to 50 percent of homosexual and bisexual men are infected with HIV, while infection among intravenous drug users ranges from 50 to 60 percent in New York City to less than 5 percent in other areas. *Id.* at 549. Intravenous drug users and men engaging in sexual intercourse with other men still constitute 80.3 percent of AIDS cases. Id. at 557. However, the steady increase in heterosexual transmission of HIV indicates that AIDS affects nearly every individual. HIV infection occurs in approximately 0 to 1.2 per 100 persons in populations without any identifiable risk factors. Krieger, *supra*, at 713. Infection is more common among non-Hispanic blacks and Hispanics than among nonHispanic whites. *Update: Acguired Immunodeficiency Syndrome - United States, 1992*, 42 MORBIDITY AND MORTALITY WKLY. REP. 547, 551 (1993). Race is not a risk factor but probably is a risk marker, reflecting other aspects of low socioeconomic status. *Id.*

2. Jonathan W. M. Gold, MD., *HIV-1 Infection: Diagnosis and Management*, 76 MED. CLINICS N. AM. 1,1 (1992).

3. The analogy to cancer is relevant because fear of AIDS caselaw grew out of cases addressing fear of cancer. *See infra* Part 111.

4. There are currently two known HIV viruses-. type 1 and type 2. HIV-2 remains largely confined to Africa, while HIV-1 is now found in most of the world. Flossie Wong-Staal, PhD., *The AIDS Virus: What We Know and What We Can Do About It*, 155 W. J. MED. 481 (1991).

The HIV virus is a retrovirus, a classification of viruses found in nearly all animals. Gold, *supra* note 3, at 5-6. Retroviruses are transmitted by commingling of body fluids during sexual

manifest symptoms of AIDS for an average of five to seven years.[5] Although it may be possible to delay the development of AIDS, all HIV-infected individuals will eventually develop AIDS.[6]

This comment will explore few of the many legal consequences of HIV infection. In particular, many plaintiffs have sought emotional distress damages in a variety of situations involving a potential exposure to HIV. This comment explores the viability of emotional distress claims for fear of AIDS , both as an independent cause of action and as a form of parasitic damages. Part II discusses emotional distress damages in general. Part III concerns emotional distress claims for fear of a future disease or condition, including cancer and AIDS. The discussion emphasizes the disagreement among courts as to whether or not a physical injury or a showing of exposure to HIV should be required for such claims. This comment concludes that a plaintiff claiming emotional distress for fear of contracting AIDS should at least be required to prove that he or she was exposed to the HIV virus.

II. Emotional Distress As A Cause Of Action

Traditionally, courts have been reluctant to allow recovery solely for mental disturbances caused by a defendant's negligence.[7] The rationale is that emotional distress is usually a temporary affliction and is easily fabricated.[8] Courts are usually more receptive if the mental anguish occurs in the context of an intentional tort, which by definition involves extreme and outrageous conduct calculated to cause physical or emotional damage to the victim.[9] In order to recover for emotional distress caused by a defendant's intentional, reckless or outrageous conduct, a plaintiff may not even have to show accompanying physical harm.[10] However,

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contact, blood-to-blood contact or neonatally (from mother to child). *Id.* at 6. These viruses normally affect the immune system as well as the central nervous system. *Id.* Retroviruses infect actively replicating cells', HIV-1 specifically targets the CD4+ lymphocyte (commonly known as the T-helper), remaining latent for extended periods of time until the cell is activated. *Id.*

5. Approximately 50% of HIV-infected men will develop AIDS within seven years of a positive HIV-test. Gold, *supra* note 3, at 5. Since it is nearly impossible to estimate the actual date of infection in most cases,determining the rates of progression from HIV infection to development of AIDS is difficult. *Id.* at 4-5 Development of AIDS occurs more rapidly in children and the elderly, while it is slower among young adults. *Id.* The speed of development can vary according to geographic location, since certain strains of the HIV virus are more virulent than others. *Id.* Race and sex may also contribute to the rate of progression. *Id.*

6. Gold, *supra* note 3, at 4.

7. RESTATEMENT (SECOND) OF TORTS § 436A (1965); W. KEETON, ET AL., PROSSER AND KEETON ON THE LAW TORTS § 54, 361 5th ed. 1984.

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

9. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

10. *See* State Rubbish Collectors Assoc. v. Siliznoff, 240 P.2d 282 (Cal. 1952) (allowing

emotional distress damages have traditionally been "parasitic," arising out of other damages recoverable for physical injury caused by a defendant's tortious conduct.[11]

For many years, courts universally adhered to the so-called "impact rule" which limits recovery for negligent infliction of emotional distress to plaintiffs who can prove that the defendant's negligent conduct caused a physical "impact" or injury to the plaintiff's person.[12] Courts relying on this rule reasoned that a plaintiff who suffered from some ascertainable physical injury would also experience fright and nervousness at the time of the injury.[13] In addition, courts discouraged fraudulent claims by making recovery for mental distress contingent on an objectively verifiable accompanying physical injury.[14]

Problems arose as courts began to loosen the definition of "impact" to include minor physical contacts that were often only tenuously connected to the harm, ranging from slight bruise[15] to inhalation of smoke[16] to getting dust in one's eye.[17] As the term "impact" became diluted, the rule essentially lost its function. Today, only a handful of courts still adhere to the "impact rule."[18]

In lieu of a physical impact requirement for emotional distress recovery, most jurisdictions began to require that the mental anguish be supported by a physical manifestation and, therefore, subject to objective measurement by the fact-finder.[19] Varying opinions as to what

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plaintiff to recover emotional distress damages without showing physical harm of any sort); Agis v. Howard Johnson Co., 355 N.E.2d 315 (Mass. 1976) (remedying intentional infliction of emotional distress when there was no physical injury except crying and general mental anguish), LaBrier v. Anheuser Ford, Inc., 612 S.W.2d 790 (Mo. Ct. App. 1981) (deeming defendant's loud and angry accusation that plaintiff's husband committed theft while aware of her weakened mental condition as "outrageous" conduct; plaintiff's physical injuries were crying fits, swollen and itchy eyes, a rash over her body and a return to medication.) *See also* RESTATEMENT (SECOND) OF TORTS § 46 and cmt.d (1965) (defining "outrageous conduct causing severe emotional distress" as the infliction of emotional anguish so great that no reasonable person could be expected to endure it).

11. *See* RESTATEMENT (SECOND) OF TORTS § 436A (1965).

12. KEETON, *supra* note 8, § 54, at 363.

13. *Id.*

14. *Id.*

15. Conley v. United Drug Co., 105 N.E. 975 (Mass. 1914) (granting emotional distress damages to plaintiff bruised when explosion caused him to faint and hit the floor).

16. Mortor v. Stack, 170 N.E. 869 (Ohio 1930).

17. Porter v. Delaware, Lackawanna Western R.R. Co., 63 A. 860 (N.J. 1906).

18. Florida, Illinois, Indiana, Kentucky, and Missouri still adhere to the impact rule. Payton v. Abbott Labs, 437 N.E. 2d 171, 176 n.6 (Mass. 1982). *Payton* provides a thorough and informative discussion of emotional distress damages. *Id.* at 174-78.

19. *Payton*, 437 N.E.2d at 181 (requiring physical harm to be "manifested by objective symptomatology and substantiated by expert medical testimony."). *Accord* Wyatt v. Gilmore, 290 S.E.2d 790 9N.C. Ct. app. 1982); Towns v. anderson, 579 P.2d 1163 (Colo. 1978); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 155 (Me. 1979)

constitute an "injury" or "illness" caused by mental distress led to problems with the physical manifestation requirement.[20] Most courts adopting the physical manifestation standard believe that some sort of objectively verifiable evidence is needed to corroborate the plaintiff's claim of emotional distress and prevent feigned mental anguish or the "tricks that the human mind can play upon itself."[21]

Physical manifestations of mental anxiety over the possibility of contracting a future disease may be demonstrated through direct testimony by the plantiff about experiencing crying fits, general nervousness, anxiety, stress, loss of sleep and so on.[22] Expert testimony supporting the plaintiff's testimony, such as the opinion of a psychologist or psychiatrist,[23] is usually convincing. The testimony of a minister or other counselor may also lend weight to a plaintiff's claim of mental anguish.[24]

None the less in 1970,[25] several jurisdictions began to allow plaintiffs to recover emotional distress damages under a general negligence theory, regardless of whether the plaintiff sustained any

("objective symptomatology" requirement); Sears, Roebuck & Co. v. Young, 384 So.2d 69, 71 (Miss. 1980) ("genuine physical consequences" requirement); Fournell v. Usher Pest Control Col, 305 N.W.2d 605 (Neb. 1981); Corso v. Merrill, 406 A.2d 300 (N.H. 1979) ("objective medical determination" standard, through use of expert medical testimony). *See also* RESTATEMENT (SECOND OF TORTS §§ 436, 436A (1965).

20. Vance v. Vance, 408 A.2d 728,733-34 (Md. 1979) (defining "physical injury" as mental harm "capable of objective determination"); Towns v. Anderson, 579 P.2d 1163 (Colo. 1978) (en banc) (finding physical manifestations *or* mental illness sufficient) (emphasis added); Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 155 (Me. 1979) (requireing illness or bodily harm "substantially manifested by objective symtomatology"); Corso v. Merrill, 406 A.2d 300, 304 (N.H. 1979) (requiring that the harm be and proved through qualified medical witnesses").

21. *Payton,* 437 N.E.2d at 175.

22. *See, e.g.*, Laxton v. Orkin Exterminating Co., 639 S.W.2d 431 (Tenn. 1982); Figlar v. Gordon, 53 A.2d 645 (Conn. 1947).

23. *See e.g.* Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984) (allowing doctor of psychology to testify about the legitimacy of plaintiff's emotional and psychological trauma over fear of future illness after she sustained brain, head and nose injuries; doctor also testified that her anxiety and depression would intensify with time); Ferrara v. Galluchio, 152 N.E.2d 249, *reh'g denied* 5 N.Y.2d 793 (N.Y. 1958) (allowing neuropsychiatrist to testify that plaintiff's fear of developing cancer after a severe x-ray burn could produce permanent anxiety). *See also* Devlin v. Johns-Manville Corp., 495 A.2d 495 (N.J. Super. Ct. Law Div. 1985) (distinguishing "cancerphobia" from fear of contracting cancer; since a "phobia" is a recognized psychological illness, medical experts are necessary to verify its presence, whereas a simple "fear" may be more subjective and understandable in simple terms by the fact-finder, therefore not always necessitating the use of expert testimony).

24. Clark v. Taylor, 710 F.2d 4 (1st Cir. 1983).

25. Rodrigues v. State, 472 P.2d 509 (Haw. 1970).

physical harm or injury in connection with the defendant's conduct.[26] These jurisdictions normally limited recovery for "serious mental distress . . . where a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress."[27] Not withstanding these decisions most jurisdictions still retain the physical harm requirement for emotional distress recovery, although strong dissents signify a trend toward a broader cause of action for negligent infliction of emotional distress.[28] For example, in *Payton v. Abbott Labs*,[29] Justice Wilkins and two others dissented on the grounds that a physical harm rule is arbitrary and allows plaintiffs with only minor injuries to recover for emotional distress while plaintiffs without any physical harm but great emotional distress go uncompensated.[30] Justice Wilkins felt that, at least with regard to certain plaintiffs, the genuineness and reasonableness of their emotional distress claims should be submitted to a jury.[31]

One additional development in the law liberalizing the standard for recovery of negligent infliction of emotional distress concerns plaintiffs who experience mental anguish because of harm to a third party. By the mid-1960's, most courts had abandoned the impact rule, opening the door for claims of emotional distress resulting from one's fear for the well-being of another.[32] Most courts allowed such a third-party victim to recover for mental distress as long as that person was within the "zone of danger" of the defendant's conduct.[33] Under this theory, a son hit by a motorist while crossing the street with his mother is the actual victim of the defendant's conduct, but the mother can recover emotional distress damages if she witnessed her son's injury *and* was within the "zone of danger" of the defendant's conduct. However, if our hypothetical mother

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26. The seminal case in the development of a cause of action for negligent infliction of emotional distress was Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980). In *Molien*, husband and wife plaintiffs suffered emotional distress after their doctor negligently misdiagnosed the wife with a venereal disease. The court did not require proof of physical injury since the emotional distress was foreseeable by the doctor. Therefore the jury could determine the existence and extent of the plaintiffs' mental anguish.

27. Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970).

28. Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982) (4-3 decision barring recovery); Fournell v. Usher Pest Control Co., 305 N.W.2d 605 (Neb. 1981) (5-2 decision).

29. 437 N.E.2d at 171.

30. *Id.* at 193 (Wilkins, J., dissenting).

31. *Id.*

32. Under the impact rule, such a claim would be impossible since the victim of the emotional distress must by definition be the actual victim of the defendant's tortious conduct.

33. KEETON, *supra* note 8, § 54, at 365. For cases adopting the "zone of danger" rule, see Keck v. Jackson, 593 P.2d 668 (Ariz. 1979), Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980), Vaillancourt v. Medical Center Hospital of Vermont, Inc., 425 A.2d 92 (Vt. 1980).

witnessed the accident from a safe distance, she would be barred from recovery under the "zone of danger" rule.

In 1968, California remedied the latter situation by extending the doctrine of negligent infliction of emotional distress to its limits in *Dillon v. Legg*.[34] The *Dillon* court explicitly rejected the "zone of danger" rule and created what is now known as the "bystander rule."[35] Under this approach, the *Dillon* Court restricted recovery to situations in which the plaintiff is located near the accident scene, directly observes the event, and is related in some way to the victim.[36] Moreover the *Dillon* approach imposes a duty on all negligent defendants to protect not only the injured party but anyone who might foreseeably suffer emotional harm because of injury to the actual victim.[37] At least a dozen states have adopted the *Dillon* approach, with most emphasizing the need for a close familial relationship between the bystander and the victim.[38]

The Restatement (Second) of Torts summarizes the general rules adhered to today. "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."[39] Generally, physical harm is required for emotional distress recovery, although the harm need not be the result of an actual physical impact to the plaintiff; physical manifestation of mental distress is usually sufficient. Claims for negligent infliction of emotional distress usually will not lie without proof of physical harm, although a growing minority have rejected this requirement in order to protect victims from mental anguish caused by an actor's conduct when that conduct involves an unreasonable risk of emotional harm.[40] With this discussion in mind, the concept of emotional distress recovery can now

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34. 441 P.2d 912 (Cal. 1968) (allowing mother and sister to recover for mental distress after seeing defendant's vehicle strike victim as she crossed the road).

35. *Id.*

36. *Id.* at 914.

37. *Id.* at 912.

38. Portee v. Jaffee, 417 A.2d 521 (N.J. 1980) (relying on *Dillon* factors to award emotional distress damages to a mother who watched unsuccessful efforts to rescue her seven year old son trapped in an elevator shaft). *See also* Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981); Corso v. Merrill, 406 A.2d 300 (N.H. 1979); Ramirez v. Armstrong, 673 P.2d 822 (N.M. 1983); Sinn v. Burd, 404 A.2d 672 (Pa. 1979); D'Ambra v. United States, 338 A.2d 524 (R.I. 1975).

39. RESTATEMENT (SECOND) OF TORTS § 436A (1965).

40. Taylor v. Baptist Medical Ctr., Inc. 400 So.2d 369 (Ala. 1981); Molien V. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980); Montinieri v. Southern New England Tel. Co., 398 A.2d 1180 (Conn. 1978).

be applied to a specific factual scenario: fear of contracting a future disease because of defendant's conduct.

III. Emotional Distress For Fear Of Future Disease Or Condition[41]

Emotional distress for fear of contracting AIDS is a relatively new remedy, since the disease itself has only been recognized since 1981. Consequently, courts look to analogous situations for guidance, particularly cases in which a plaintiff seeks emotional distress damages because some present injury might lead to a future disease or condition. Most jurisdictions allow a plaintiff to recover parasitic damages for fear of future harm; in other words, the damages are attached to the award for the actual physical injury caused by the defendant's tortious conduct.[42] A court's inquiry in these types of cases generally focuses on the defendant's duty, breach, and injury to the plaintiff and the reasonableness of a plaintiff's emotional distress over the possibility that a future disease or condition may develop as a consequence of the existing injury.[43] In the context of any fear of future disease claim, the injury requirement often means "exposure" to a disease-causing agent.

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41. This remedy must immediately be distinguished from damages recoverable for the possibility of the actual occurrence of a future condition or disease, which is outside the scope of this comment. Generally, these kinds of damages cover future medical expenses for monitoring of the plaintiff's condition as well as costs for treating the condition when and if it arises.

42. Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985); Herber v. Johns-Manville Corp., 785 F.2d 79 (3rd Cir. 1986); Plummer v. United States, 580 F.2d 72 (3d Cir. 1978); Hayes v. New York Cont. R.R., 311 F.2d 198 (2d Cir. 1962); Werlein v. United States, 746 F.Supp. 887 (D. Minn. 1990); Villari v. Terminix Int'l, Inc., 663 F.Supp. 727 (E.D. Pa. 1987), *later proceeding*, 692 F.Supp. 568 (E.D. Pa. 1987); Coover v. Painless Parker, Dentist, 286 P. 1048 (Cal. Ct. App. 1930); Flood v. Smith, 13 A.2d 677 (Conn. 1940); Warner v. Chamberlain, 30 A. 638 (Del. 1884) (by implication); Eagle-Picher Indus. v. Cox, 481 So.2d 517 (Fla. Dist. Ct. App. 1985); Wisner v. Illionis Cont. Gulf R.R., 537 So.2d 740 (La. Ct. App. 1988), *cert. denied*, 540 So.2d 342 (La. 1989); Buck v. Brady, 73 A. 277 (Md. 1909); Hoffman v. St. Louis Pub. Serv. Co., 255 S.W.2d 736 (Mo. 1953); Alley v. Charlotte Pipe and Foundry Co., 74 S.E. 885 (N.C. 1912); Ayers v. MacOughtry, 117 P. 1088 (Okla. 1911) (by implication); Trinity & S. Fry. Co. v. O'Brien, 46 S.W. 389 (Tex. Civ. App. 1898).

43. The following courts all require a plaintiff's fear and anxiety to be "reasonable," which is a determination to be made by the jury. *See* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986) (applying Mississippi law), *cert. denied*, 478 U.S. 1022 (1987); Hagerty v. L&L Marine Servs., 788 F.2d 315 (5th Cir. 1986) (applying Louisiana law); Wetherill v. University of Chicago, 565 F.Supp. 1553 (N.D. 111. 1983); Anderson v. W.R. Grace & Co., 628 F.Supp. 1219 (D. Mass. 1986) (applying Massachusetts law); Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984); Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982); Birkhill v. Todd, 174 N.W.2d 56 (Mich. Ct. App. 1969); Pandjiris v. Oliver Cadillac Co., 98 S.W.2d 969 (Mo. 1936); Devlin v. Johns-Manville Corp., 495 A.2d 495 (N.J. Super. Ct. Law Div. 1985); Walsh v. Brody, 286 A.2d 666 (Pa. Super. Ct. 1971); Laxton v. Orkin Exterminating Co., 639 S.W.2d 431 (Tenn. 1982) (by implication); Elliott v. Arrowsmith, 272 P. 32 (Wash. 1928) (recognizing rule); Funeral Servs. by Gregory, Inc. v. Bluefield Community Hospital, 413 S.E.2d 79 (W.Va. 1991).

With regard to fear of contracting AIDS, a plaintiff's anxiety will usually arise after some sort of injury exposes the plaintiff to the HIV virus. Nevertheless, before specifically addressing emotional distress damages for fear of contracting AIDS, it is necessary to discuss emotional distress damages for fear of developing cancer.

A. Fear Of Cancer As A Basis For Emotional Distress Damages

A series of decisions involving plaintiffs who feared developing cancer as a result of a defendant's tortious conduct set forth the principles guiding courts in fear of AIDS cases. An understanding of the analysis developed in these cases is crucial to a thorough understanding of the reasoning behind the fear of AIDS cases. The fear of cancer cases discussed below involved plaintiffs exposed to asbestos, diethylstilbestrol (DES), and other toxic chemicals.

1. Asbestos Plaintiffs

Many workers exposed to asbestos fibers in the course of their employment have sought emotional distress damages for fear of developing cancer. In all such cases where emotional distress damages were awarded, there was no issue concerning exposure. All the plaintiffs were unquestionably exposed to asbestos fibers since they had contracted asbestosis[44] or some other condition peculiar to asbestos exposure;[45] therefore, the physical injury requirement was automatically fulfilled. When plaintiffs were unable to demonstrate exposure to asbestos, recovery for emotional distress was denied.[46] Although the typical asbestos plaintiff's fear may not be technically reasonable,[47] most courts

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44. Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986) (applying Mississippi law); Eagle-Picher Indus. v. Cox, 481 So.2d 517 (Fla. Dist. Ct. App. 1985); Devlin v. Johns-Manville Corp., 495 A.2d 495 (N.J. Super. Ct. Law Div. 1985).

45. Herber v. Johns-Manville Corp., 785 F.2d 79 (3d Cir. 1986) (applying New Jersey law) (plaintiff showed evidence of pleural thickening); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985) (applying Texas law) (plaintiff showed pleural thickening, plaques, calcification and asbestosis).

46. Wisniewski v. Johns-Manville Corp., 759 F.2d 271 (3d Cir. 1985) (denying relatives of asbestos workers recovery for negligent infliction of emotional distress because they failed to allege injury caused by exposure to asbestos fibers; plaintiffs were allowed to recover for intentional infliction of emotional distress since defendant's conduct was arguably "extreme and outrageous," although no physical harm was shown); Cathcart v. Keene Indus. Insulation, 471 A.2d 493 (Pa. Super. Ct. 1984) (denying wife of worker afflicted with asbestosis recovery for negligent infliction of emotional distress until she could demonstrate physical injury linked to her alleged exposure to asbestos particles on her husband's clothing).

47. Eagle-Picher Indus., Inc. v. Cox, 481 So.2d 517 (Fla. Dist. Ct. App. 1985) (noting that plaintiff with asbestosis could not prove that asbestosis causes cancer, only that it increases chances that cancer will occur in the future, but ultimately holding that plaintiff's fears of future cancer were

allow asbestos plaintiffs to demonstrate the genuineness of their fears by submitting expert testimony as to the probability that they will develop cancer,[48] or that they will need periodic medical surveillance for cancer.[49] A plaintiff may also demonstrate the genuineness of his fear or anxiety by relying on personal knowledge. For instance, a plaintiff may have seen co-workers suffer from asbestos-related health problems.[50]

In *Devlin v. Johns-Manville Corp.*,[51] the New Jersey Superior Court summarized the logic behind allowing emotional distress recovery even if the likelihood is low that the future disease or condition will actually develop.[52] The court emphasized the foreseeability of the plaintiff's injury in the context of the defendant's duty to the plaintiff, rather than looking solely at the severity of the potential consequences.[53] Asbestos plaintiffs have been successful in arguing that as users of asbestos products they fall within the zone of any potential risk created by that use. Another way of stating this proposition is that the risk of using asbestos was foreseeable to the manufacturer. This notion of hinging emotional distress damages on the defendant's duty is especially relevant in the fear of contracting AIDS cases discussed below.

2. DES Daughters

The rationale behind allowing emotional distress recovery for fear of a future disease is illustrated by cases involving daughters of women treated with diethylstilbestrol (DES) during pregnancy.[54] Two of the leading cases in this area illustrate the willingness of courts to remedy such emotional distress claims. One court focused on the necessity of a

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justified since asbestosis was a painful reminder of plaintiff's exposure to asbestos and the possibility of cancer).

48. Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986) (applying Mississippi law) (permitting plaintiff to establish a greater than 50% likelihood he would develop cancer); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985) (applying Texas law) (finding that 50% likelihood of cancer fulfilled the requirement of a "medical probability" that a future disease will come to fruition); Shelton v. College Station, 765 F.2d 456 (5th Cir. 1985) (applying Texas law).

49. Devlin v. Johns-Manville Corp., 495 A.2d 495 (N.J. Super. Ct. Law Div. 1985).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 497.

54. Diethylstilbestrol (DES) was an experimental drug widely administered to pregnant women to prevent miscarriages. Payton v. Abbott Labs, 437 N.E.2d 171, 172 (Mass. 1982). DES has been identified as a causative agent in the development of clear-cell adenocarcinoma, a rare and deadly cancer of the reproductive organs of daughters of women treated with DES. *Id.* DES has also been linked to adenosis in these women, and more common, non-carcinogenic affliction of the female reproductive organs. *Id.*

physical harm as a prerequisite for recovery,[55] while the other focused on the reasonableness of the plaintiffs' anxiety.[56]

In Payton v. Abbott Labs,[57] Massachusetts' highest court recognized that one may experience emotional anziety as a result of an increased statistical likelihood of developing a future disease, but decided that such damages were not recoverable unless the plaintiff could produce evidence of physical harm.[58] The court noted that in cases allowing recovery of emotional distress damages absent proof of physical harm, the mental distress was usually reasonably foreseeable.[59] For instance, if the defendant's conduct was intentional or reckless,[60] or if the plaintiff witnessed the serious harm of a family member.[61] The *Payton* court held that in order to recover emotional distress damages for fear of contracting a future disease, the plaintiff must show (1) negligence, (2) emotional distress caused by the defendant's conduct, manifested by "objective symptomatology," and (3) that a reasonable person in the plaintiff's position would have suffered comparable mental distress.[62] The *Payton* rule is comparable to the analysis set forth in the asbestos cases. Both require physical harm and a reasonable, genuine apprehension of a future event. However, in *Payton*, the court never considered the medical probability of whether a plaintiff will develop the complications associated with exposure to DES.

In Wetherill v. University of Chicago,[63] a federal court addressed the issue of medical probability in detail.[64] The court rejected a standard which would have required the plaintiffs to show with medically "reasonable certainty" that certain complications would develop.[65] The court noted that a "reasonable certainty" standard would be at odds with traditional notions of proximate cause, which only require that the emotional distress be reasonably foreseeable.[66] In other words, the fear

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55. Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982).

56. Wetherill v. University of Chicago, 565 F.Supp. 1553 (N.D. III. 1983).

57. 437 N.E.2d 171 (Mass. 1982).

58. *Id.* at 180.

59. *Id.*

60. *Id.*

61. Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978) (justifying recovery for physical symptoms of emotional distress because plaintiffs were closely related to the victim, although not within the zone of danger). *Contra Payton*, 437 N.E.2d at 171 (indicating that the plaintiffs were the direct victims of the defendant's tortious conduct, but had suffered no physical injuries).

62. *Payton*, 437 N.E.2d at 181.

63. 565 F.Supp. 1553 (N.D. III. 1983).

64. *Id.*

65. *Cf.* Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (Ca. 1993) (imposing a "more likely than not" requirement that cancer will develop).

66. *Wetherill*, 565 F.Supp. at 1559.

that a future disease might develop must be reasonable, but the plaintiff's burden does not rise to the level of showing a high degree of likelihood.[67] In opting for this "reasonable fear" standard, the court stated that "fears of future injury can be reasonable even where the likelihood of such injury is relatively low."[68] The *Wetherill* plaintiffs' anxieties satisfied this "reasonable fear" standard since there was a known causal relationship between DES and cancer. The court also noted that any reasonable person in the plaintiffs' position would have similar anxiety when exposed to constant media coverage of scientific evidence relating to that causal connection.[69]

The *Wetherill* rule suggests that an element of subjectivity is proper in the consideration of whether or not to allow emotional distress recovery, while *Payton's* requirement of a physical injury reflects a concern for an objectively verifiable standard. This tension infects every case involving emotional distress claims. Notably, the *Wetherill* court considered the in utero exposure to DES as a "physical impact" of the defendant's conduct,[70] while the *Payton* court required the plaintiffs to show additional physical harm.[71]

3. Exposure to Toxic Chemicals

Other claims involving fear of developing cancer as a basis for emotional distress recovery involve exposure to carcinogenic chemicals. In *Laxton v. Orkin Exterminating Co.*,[72] the defendant contaminated a family's well-water supply with chlordane while treating the property for termites.[73] Although the family members were not physically harmed by ingesting the tainted water or by the resulting mental anguish,[74] the

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67. *Id.*

68. *Id. See also* Baylor v. Tyrrell, 131 N.W.2d 393, 402 (Neb. 1964) (requiring fear of developing cancer to have a "reasonable basis"); Ferrara v. Galluchio, 152 N.E.2d 249, 251 (N.Y. 1958) (requiring plaintiff to establish only a "basis for her mental anxiety," even if she can show only that cancer might develop); Murphy v. Penn Fruit Co., 418 A.2d 480 (Pa. Super. Ct. 1980) (awarding plaintiff emotional distress damages for fear of cancer and heart attack, even though her own doctors were certain that plaintiff's anxiety was medically unreasonable).

69. *Wetherill*, 565 F. Supp. at 1560. *See also Ferrara*, 152 N.E.2d at 252 (allowing emotional distress damages and justifying plaintiff's cancerphobia in part because it is "general knowledge" that wounds which do not heal frequently become malignant; this general knowledge comes from such sources as physical culture lectures to high school and college students, radio advice from insurance companies, and newspaper articles).

70. *Wetherill*, 565 F. Supp. at 1560.

71. *Payton*, 437 N.E.2d at 171.

72. 639 S.W.2d 431 (Tenn. 1982).

73. *Id.* Chlordane is a possible carcinogen. *Id.* at 434.

74. The wife was routinely upset during the period of time following the ingestion of the chemical and would call her husband at work crying; she also noticed a general malaise and

Tennessee Supreme Court upheld an award for negligent infliction of mental anguish for fear of future health problems because a plaintiff had ingested an indefinite amount of a harmful substance as a result of a defendant's negligence.[75] The court found that the ingestion was a sufficient "injury" in and of itself to support a claim for mental distress.[76] However, the *Laxton* court restricted the period of recovery to the time between the plaintiff's discovery of exposure to the chemical and the date when scientific or medical information allayed the plaintiffs' fears of future injury.[77]

As in asbestos and DES cases, plaintiffs claiming exposure to toxic chemicals must also show that their fear of developing a future disease is genuine.[78] A plaintiff may have special knowledge of the effects of a toxic substance to which he or she has been exposed,[79] or such information may be a matter of common knowledge.[80] Furthermore, a plaintiff may receive medical advice to undergo periodic treatments or tests for cancer,[81] or directly feel the physical effects of the chemical.[82]

Recently, one federal court applying California law allowed a group of plaintiffs exposed to toxic chemicals to recover for emotional anxiety, but suggested that absent an attendant physical injury such relief would be barred.[83] The court held that such parasitic damages for fear of cancer are available when there is a verifiable causal nexus between the

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listlessness in her children, heightening her anxiety. *Id.* at 433.

75. *Id.* at 434.

76. *Laxton*, 639 S.W.2d at 434.

77. The plaintiffs' time period for recovery of emotional distress damages ran from the date they discovered they had ingested chlordane until the date blood tests revealed that none of the family members exhibited abnormalities attributable to chlordane exposure. *Id.* This period of time amounted to about ten months. *Id.*

78. *See, e.g.*, Anderson v. W.R. Grace & Co., 628 F.Supp. 1219, 1228 (D. mass. 1986) (applying Massachusetts law). The plaintiffs alleged exposure to carcinogenic chemicals in their well-water and sought emotional distress damages for fear of an increased risk of leukemia and other cancers. The court held that the plaintiffs could recover "only for that degree of emotional distress which a reasonable person normally would have experienced under [the] circumstances." *Id.* (citing Payton v. Abbott Labs, 437 N.E.2d 171, 181 (Mass. 1982)).

79. Hagerty v. L&L Marine Servs., Inc., 788 F.2d 315, 318-319 (5th Cir. 1986), reconsideration, 797 F.2d 256 (1986) (noting that plaintiff was doused with carcinogens which contained properties he was aware of from studying the chemicals, and that plaintiff had also previously observed benzene absorb into his fingers and this knowledge heightened his fear since his entire body was exposed to the chemical).

80. Ferrara v. Galluchio, 152 N.E.2d 249, 252-53 (N.Y. 1958) (court acknowledged the legitimacy of "common knowledge" that non-healing wounds often indicate a cancerous condition).

81. *Hagerty*, 788 F.2d at 319. *See also* Clark v. Taylor, 710 F.2d 4 (1st Cir. 1983) (applying federal and Rhode Island law).

82. *Hagerty*, 788 F.2d at 317. (stating that plaintiff experienced dizziness, leg cramps and a stinging sensation in his extremities).

83. Barron v. Martin-Marietta, Corp. 868 F. Supp. 1203 (N.D. Ca. 1994).

injury and the possible development of cancer.[84] Recall that in *Payton v. Abbott Labs*,[85] a Massachusetts court imposed a similar physical injury plus reasonableness standard.[86]

Thus far, this discussion has centered on emotional distress damages for fear of a future disease or condition caused by an actor's tortious conduct. Normally, there is no question as to whether or not the plaintiff was actually exposed to a toxic agent; it is simply a prerequisite for the initiation of the action. When exposure has not been demonstrated, courts are quick to dismiss a plaintiff's claim for emotional distress.[87] With this background in mind, we can now proceed to the discussion of the "fear of contracting AIDS" cases in which exposure to the causative agent is often a major issue.

B. Emotional Distress Recovery For Fear Of Contracting AIDS

Recovery for emotional distress damages for fear of contracting AIDS is a relatively new remedy, since the disease itself is only in its second decade. Courts confronting emotional distress claims for fear of AIDS have relied on much of the caselaw discussed above to establish standards for recovery. A survey of the major decisions in this area reveals discord among various state and federal courts over the appropriate standard for allowing recovery for emotional distress for fear of AIDS. The majority of courts impose some sort of physical injury requirement, following the lead of the fear of cancer cases. The physical injury may take various forms. Some courts require emotional distress damages to be parasitic to physical damages, while the majority of courts acknowledge that actual exposure to HIV constitutes a physical injury. The unique deadliness of AIDS engenders unusually severe anxiety, even without actual proof of exposure to HIV. As a result, a substantial minority of courts emphasize the reasonableness of the plaintiff's fear rather than physical injury.

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84. *Id.* at 1211.

85. 437 N.E.2d 171 (Mass. 1982).

86. *See supra* notes 57-61 and accompanying text.

87. *See, e.g.* Maddy v. Vulcan Materials Co., 737 F. Supp. 1528, 1533-34 (D. Kan. 1990) (denying plaintiff emotional distress damages for alleged exposure to airborne gases since no expert evidence was offered to show that actual exposure to the chemicals occurred or that there was any physical injury which may have been caused by such an exposure); Harper v. Illinois Cent. Gulf R.R., 808 F.2d 1139, 1140 (5th Cir. 1987) (applying Louisiana law) (denying plaintiffs recovery for mental anguish resulting from fear of future health hazards after a train derailed more than one mile from their home and released dangerous chemicals; plaintiffs could offer no proof that they had been exposed to the chemicals, but presumably intended to incite the passions of the jury by introducing evidence of the carcinogenic properties of the chemicals, a tactic the court sought to forbid at all costs).

1. Plaintiff Must Show Accompanying Physical Injury

A number of courts require a plaintiff seeking emotional distress damages for fear of contracting AIDS to be parasitic to damages for an actual physical injury. Some courts allow physical symptoms of emotional distress to accomplish the same goal. In either case, a physical injury serves to objectify the very subjective fear.

A recent case in the Eastern District of Pennsylvania illustrates the "parasitic" view of damages for fear of contracting AIDS. In *Griffin v. American Red Cross*,[88] the court relied on Pennsylvania law and denied recovery for negligent infliction of emotional distress to an individual misdiagnosed with HIV. The diagnostic error was corrected within one day. The court barred recovery because the symptoms were caused by a mistaken belief rather than by the HIV virus.[89] Essentially the court requires demonstration of a legally cognizable physical injury, such as infection with HIV, to recover parasitic emotional damages.

Within the last year California has settled on a physical injury requirement to recover for fear of AIDS. In *Kerins v. Hartle*,[90] a California appellate court[91] required an actual present physical injury

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88. __F. Supp.__(E.D. Pa. 1994).

89. The Griffin court relied heavily on Lubowitz v. Albert Einstein Medical Center, 623 A.2d 3 (Pa. Super. Ct. 1993). In Lubowitz, the plaintiffs participated in an in vitro fertilization program. During the procedure, the defendant hospital transfused placental serum blood obtained from multiple donors into the wife's body. *Lubowitz*, 623 A.2d at 4. Three months later, the plaintiffs were informed that the placental blood had tested positive for the AIDS antibody, a result which was later discovered to be false. Id. During the period of time before the false-positivity of the results was discovered, the wife allegedly suffered from mental distress, manifested by nausea, vomiting and diarrhea, prompting her to seek damages for intentional and negligent infliction of emotional distress. Id. In denying recovery for her emotional distress, the court noted that since the placental blood was not actually infected, the plaintiff's symptoms were simply not caused by the HIV virus. *Id. But see* Moore v. Delaware Valley Health Network, Inc., __ F.3d __(3d Cir. 1994) (allowing emotional distress recovery for fear of tuberculosis after plaintiff was mistakenly diagnosed with TB and began treatment for the disease) and Molien v. Kaiser Foundation Hospitals, 616 P.2d 813 (Cal. 1980) (allowing recovery for emotional distress where doctor mistakenly diagnosed the wife with genital herpers).

90. 33 Cal. Rptr. 2d 172 (Cal. Ct. App. 1994). In Kerins, the plaintiff, Jean Kerins, underwent a complex and lengthy surgical procedure performed by the late Dr. James Gordon. *Id.* at 622. Over one year after the surgery, Kerins viewed a television news broadcast in which Gordon revealed that he was afflicted with AIDS. *Id.* at 623. In the same broadcast, two of Gordon's colleagues commented about the prevalence of surgeons cutting themselves during surgical procedures, and criticized Gordon for not informing his patients of his HIV status and the risk of exposure to HIV during surgery. *Id.* Kerins sought an HIV test the following day and received negative results two weeks later. *Id.* Kerins filed suit against Gordon and his employer for severe mental anguish and emotional distress for fear of contracting AIDS, the trauma of undergoing testing for HIV, and the knowledge that "even using current testing methods, negative results will not rule out with 100 percent certainty the admittedly remote possibility" of HIV infection. *Id.*

91. The California Supreme Court granted review of *Kerins* and then transferred the matter to

before a plaintiff could recover for fear of AIDS.[92] The court allowed an exception: the plaintiff can make out a fear of AIDS claim by proving a breach of a duty by the defendant, exposure to HIV, and that the fear stems from a knowledge, corroborated by medical opinion, that it is more likely than not that the plaintiff will develop AIDS in the future due to the exposure.[93] The court specifically sought to bar recovery when a plaintiff's fear is only speculative at best.[94] The court justified the rather strict rule with policy reasons, namely that the potential class of plaintiffs for such claims is too large and "the proliferation of fear of AIDS claims in the absence of meaningful restrictions would run an equal risk of compromising the availability and affordability of medical, dental and malpractice insurance, medical and dental care, prescription drugs, and blood products."[95]

Other courts allow plaintiffs to fulfill the physical injury requirement by showing the existence of physical symptoms of emotional distress. For example, in *Howard v. Alexandria Hospital*,[96] the plaintiff sued for fear of AIDS after her doctor operated on her with unsterilized instruments.[97] The Virginia Supreme Court held that the requisite physical injury, existed because the plaintiff experienced physical pain, headaches, nausea, vomiting, fever, chills, sweating and some side effects of antibiotic treatment.[98] This standard is reminiscent of the requirement

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the court of appeals with directions to vacate the decision and reconsider the cause in light of Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (Ca. 1993) (reaffirming the lack of an independent tort of negligent infliction of emotional distress in California unless the defendant breaches some other legal duty which threatens physical injury, and emotional distress is proximately caused by that breach, or unless defendant assumes duty to plaintiff in which emotional condition of plaintiff is the object).

92. *Kerins*, 33 Cal. Rptr. 2d at 177.

93. *Id.* at 177.

94. *Id.* at 179.

95. *Id.*

96. 429 E.E.2d 22 (Va. 1993).

97. *Id.* at 23.

98. *Id.* at 25. Similar physical symptoms resulted in recovery by other plaintiffs. *See, e.g.*, Johnson v. West Virginia Univ. Hosp., Inc., 413 S.E.2d 889, 892 (W. Va. 1992) (sleepnessness and loss of appetite); Burk v. Sage Prod., 747 F. Supp. 285 (E.D. Pa. 1990) (loss of sexual function, but court denied an award of damages since the plaintiff failed to show exposure to HIV had occurred). *But see* Poole v. Alpha Therapeutic Corp., 698 F. Supp. 1367 (N.D. III. 1988) (applying Illinois law) (denying wife recovery for emotional distress over fear of AIDS after husband was injected with HIV-infected blood because she could not prove physical harm resulted from the stress).

At least one court has held that the diagnostic testing procedures for HIV/AIDS do not constitute "bodily injury" since the tests themselves are necessary to determine if an injury has actually occurred. Transamerica Ins. Co. v. Doe, 840 P.2d 288, 292 (Ariz. Ct. App. 1992) (interpreting terms of an underinsured motorists policy). However, a positive HIV-test can itself constitute an injury. Funeral Serv. by Gregory, Inc. v. Bluefield Community Hosp., 413 S.E.2d 79, 82 (W. Va. 1991) (by implication, where court relied on a series of negative HIV-tests to establish

that emotional distress caused by the defendant's conduct be manifested by an "objective symptomatology,"[99] a standard which was borrowed from asbestos litigation.[100] The objective symptomatology standard is self-explanatory; courts are simply reluctant to award emotional distress damages where there is no objectively verifiable proof of the injuries caused by the stress.

2. The Exposure Standard

A majority of courts allow an independent claim of negligent infliction of emotional distress for fear of AIDS so long as the plaintiff can show actual exposure to the HIV virus as a result of the defendant's conduct. This exposure requirement qualitatively is not much different than the physical injury requirement discussed above. After all, exposure to HIV seems to constitute an "injury." Requiring proof of exposure seems like another way of requiring objective evidence, but at the same time represents a compromise between objectivity and the subjective nature of a plaintiff's fear of AIDS.[101]

In *Burk v. Sage Products*,[102] the plaintiff paramedic had been stuck by a needle while using a container for used syringes.[103] He sued the manufacturer of the container for negligent infliction of emotional distress because several AIDS patients were seen on the floor where the injury occurred.[104] The Eastern District court entered summary judgment for the defendant because the plaintiff could not prove that the needle which stuck him was ever used on an AIDS patient; therefore, he could not prove exposure to the HIV virus.[105]

An analogous situation confronted the high court of West Virginia in *Johnson v. West Virginia University Hospitals, Inc.*,[106] a case involving a police officer who assisted in the restraint of an unruly patient at the defendant's hospital.[107] During the struggle, the patient bit himself on the arm, then bit the plaintiff on the arm.[108] When the officer learned the patient was infected with the HIV virus, he sued the

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a lack of physical injury).

99. Payton v. Abbott Labs, 437 N.E.2d 171, 181 (Mass. 1982).

100. *See supra* note 61 and accompanying text.

101. *See infra* Part III.B.3, discussing the highly subjective "general reasonableness" standard.

102. 747 F. Supp. 285 (E.D. Pa. 1990).

103. *Id.* at 286.

104. *Id.*

105. *Id.*

106. 413 S.E.2d 889 (W. Va. 1991).

107. *Id.* at 891.

108. *Id.*

hospital for emotional distress for fear of contracting AIDS. The court ruled that the act of biting constituted sufficient proof of exposure, since the patient's HIV-infected blood commingled with the plaintiff's blood.[109]

The same court was again confronted with assessing a plaintiff's fear of AIDS claim in *Funerals by Gregory, Inc. v. Bluefield Community Hospital*.[110] In *Funerals by Gregory*, a mortician embalmed a body released by the defendant, and he was unaware that the decedent had been an AIDS patient.[111] The plaintiff sued for intentional and negligent infliction of emotional distress for fear of contracting AIDS, and claimed severe emotional anguish, humiliation and strain on marital relations.[112] In denying the plaintiff's request for emotional distress damages, the court noted that the plaintiff offered no evidence showing that he had actually been exposed to the HIV virus, but could only speculate about potential exposure during the embalming procedure.[113] Specifically, the court indicated that if the plaintiff could recall cutting himself during the procedure or somehow having commingled his blood with the decedent's body fluids, he could demonstrate exposure and thus a reasonable fear of exposure.[114]

One jurisdiction which recently changed from a no exposure requirement to requiring exposure is Tennessee. In *Carroll v. Sisters of Saint Francis Health Services, Inc.*,[115] the plaintiff was a visitor at a hospital and was stuck by a discarded needle when she put her hand into a used-syringe container, mistaking it for a paper towel dispenser.[116] The plaintiff sued the hospital for negligent, intentional and/or reckless infliction of emotional distress for fear of contracting AIDS.[117] Because the plaintiff tested negatively for HIV infection and could not offer proof that she had been exposed to the HIV virus as a result of the

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109. *Id.* at 893. Actual exposure is crucial to the scenario where a plaintiff is bitten by a known or suspected HIV-carrier. In Hare v. State, 570 N.Y.S.2d 125 (N.Y. App. Div. 1991), an x-ray technician bitten by a patient was denied recovery for his emotional distress for fear of contracting AIDS since his claim was based on an attendant nurse's off-the-cuff remark that "[t]his man may have AIDS." *Id.* at 126. No evidence was offered to corroborate the nurse's opinion.

110. 413 S.E.2d 79 (W.Va. 1991).

111. *Id.* at 80.

112. The court only considered the claim for intentional infliction of emotional distress since West Virginia does not recognize negligent infliction of emotional distress. *Id.* at 84.

113. *Id.* at 83. The court noted that embalming is a procedure which necessitates direct contact with the decedent's infected bodily fluids. *Id.*

114. *Id.*

115. 868 S.W.2d 585 (Tenn. 1993).

116. *Id.* at 586

117. *Id.* at 587.

needle stick, the Tennessee Supreme Court barred recovery for her mental anguish.[118]

The court adopted the "actual exposure" approach in order to preserve an objective standard in assessing negligent infliction of emotional distress claims.[119] However, the court intimated that a plaintiff can recover for fear of AIDS by showing exposure to HIV instead of a physical injury.[120] Essentially the court views the exposure requirement as imposing a lesser burden on the plaintiff than demonstrating an actual physical injury.[121] Whether this is simply a semantic argument is unclear.

Courts imposing a physical injury and/or exposure requirement realize that legitimate claims for emotional distress should not be overlooked just to prevent fraud. The courts are more concerned with having an objectively measurable standard than the reasonableness of the plaintiff's claim. The court in *Johnson v. West Virginia University Hospitals, Inc.*[122] captures the essence of the rationale: "We emphasize that our decision (to allow emotional distress recovery) . . . is not to permit recovery of emotional distress damages to anyone who comes into contact with a person who is infected with AIDS or merely believes that a person is infected with AIDS."[123] Some courts, have placed greater emphasis on the reasonableness of the plaintiff's fears.

3. A "General Reasonableness" Standard

A minority of jurisdictions adhere to a more liberal standard of recovery for emotional distress damages for fear of AIDS by allowing a plaintiff to recover for emotional distress without demonstrating exposure to HIV. The rationale behind such a liberal standard is that because AIDS is 100% fatal, a reasonable person, even potentially exposed to HIV, would be fearful. Given the unique deadliness of AIDS, greater concern for the reasonableness of the plaintiff's fear indicates judicial

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118. *Id.* at 594.

119. *Id.* The *Carroll* court does provide a thoughtful discussion of the gradual weakening of the minimum physical injury requirement in this area of the law. The court acknowledges that "many actions for emotional damages brought today are radically different from the cases which gave rise to the requirement in that they involve an exposure to an extremely dangerous agent ... which may have serious adverse health consequences at some point far into the future." Id. The court opines in dicta that "in some situations, whether the plaintiff has incurred a literal physical injury has little to do with whether the emotional damages complained of are reasonable." *Id. See infra* discussion of "general reasonableness" standard, which is premised on this notion.

120. *Id.*

121. *Id.*

122. 413 S.E.2d 889 (W. Va. 1991).

123. *Id.* at 894.

reluctance and perhaps inability to settle on a hard and fast objective rule in this area of the law.

The Maryland Supreme Court is the only highest state court to formally adopt a general reasonableness standard. In *Faya v. Almoray*,[124] two plaintiffs operated on by an HIV-positive surgeon, Rudolf Almaraz. Almaraz did not disclose his condition to either plaintiff.[125] Subsequently, the plaintiffs read about Almaraz's illness in a newspaper article and immediately underwent HIV tests, and both received negative results.[126] Both plaintiffs sued Almaraz and his employer for intentional infliction of emotional distress for fear of developing AIDS.[127] The plaintiffs claimed they experienced "pain, fear, anxiety, grief, nervous shock, severe emotional distress, headache and sleeplessness" as a result of their anxiety over the possibility of exposure to the HIV and developing AIDS.[128]

The trial court dismissed the complaints because the plaintiffs offered no proof that exposure to the surgeon's blood occurred during either surgical procedure; therefore, no legally compensable injury existed.[129] The court noted that the plaintiffs failed to offer reported cases of surgeon-to-patient transmission of the HIV virus, did not allege that Almaraz used improper barrier techniques or that any event occurred during surgery which could have caused a commingling of their blood and Almaraz's.[130] In addition, both plaintiffs tested negative for AIDS antibodies more than six months after the alleged exposure, assuring, with over 95% reliability, that the plaintiffs will never develop AIDS as a result of the operations performed by Almaraz.[131]

In reversing the trial court decision, the Maryland Court of Appeals disagreed that the plaintiffs' emotional distress was unreasonable as a matter of law.[132] The court was satisfied with the mere potential for

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124. 620 A.2d 327 (Md. 1993).

125. *Id.* at 328.

126. *Id.* at 329. At the time the newspaper article was published, it had been at least one year since either plaintiff had been operated on by Almaraz.

127. Id. at 330. The plaintiffs accused Almaraz of operating on them without informed consent. Id. They further alleged that Almaraz knew of his illness but failed to disclose HIV transmission as a potential risk involved with the invasive surgical procedures, a risk the plaintiffs claim they would have avoided had they been informed. Id. A health care worker's duty to disclose his HIV-positivity to a patient is a growing concern in the field of medical ethics. Unfortunately it is outside the scope of this comment.

128. *Id.* at 330.

129. *Faya*, 620 A.2d at 330-31.

130. *Id.*

131. *Id.* at 337.

132. *Id.* at 339.

exposure which existed in each of the invasive surgical procedures.[133] This risk, albeit small, was nevertheless foreseeable to Almaraz.[134] The court noted that it would be unfair to require plaintiffs to show actual exposure in these situations since most patients lack the information necessary for proof.[135]

The court supported the foreseeable risk standard by emphasizing the extreme danger of the risk involved, since AIDS is 100% fatal.[136] This reasoning echoes that of the fear of cancer cases, where the probability of the risk occurring was not a decisive factor as long as it was foreseeable to the defendant.[137] The court limited the plaintiffs' recovery for emotional distress for fear of contracting AIDS to a "reasonable window of anxiety."[138] The time period began with the plaintiffs' discovery of Almaraz's condition and ended with the receipt of negative HIV test results by the plaintiffs, an event after which the court felt their fears were legally unreasonable and thus uncompensable.[139]

A factually unusual case arising in New York also gave rise to a general reasonableness standard. In *Castro v. New York Life Insurance Co.*,[140] a New York appellate court sustained a cleaning worker's claim of emotional distress for fear of AIDS after she was stuck by a negligently discarded needle while at work.[141] The court stated that "[i]f a claim can be tied to a *distinct event* which could cause a *reasonable* person to develop a fear of contracting a disease like AIDS,

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133. *Id.* at 333.

134. *Id.* at 332, n.3 (acknowledging studies showing no documented cases of surgeon-to-patient HIV transmission during a surgical procedure).

135. *Id.* at 333. *See e.g.* Kerins v. Hartley, 21 Cal Rptr. 2d 621, 628 (Cal. Ct. App. 1993), *rev'd.* 33 Cal. Rptr. 2d 172 (Cal. Ct. App. 1994) (finding that plaintiff operated on by HIV-positive surgeon asserted that she was in surgery for over four hours, during which time surgeon's hands were at work in a bloody field, making it difficult to ever know conclusively if he cut himself or not).

136. *Fays*, 620 A.2d at 333.

137. *See supra* note 68 and accompanying text. The *Faya* court used the foreseeable risk analysis to suggest that Almaraz was negligent in failing to disclose his condition to his patients. *Faya*, 620 A.2d at 333. The court did not impose an affirmative duty of disclosure on HIV positive health care workers; however, the court refused to hold that Almaraz did not have a duty to inform his patients of the potential risk of HIV transmission during an invasive surgical procedure, regardless of how small the risk. *Id.* at 334. The court ruled that this assessment of a doctor's duty should have been left to a jury and not decided as a matter of law. *Id.* For support, the court cited recommendations of the American Medical Association suggesting that HIV positive doctors refrain from performing surgical procedures which create a risk of transmission to patients. *Id.*

138. *Id.* at 336.

139. *Id.*

140. 588 N.Y.S.2d 695 (N.Y. App. Div. 1991).

141. *Id.* at 697.

there is a guarantee of genuineness of the claim."[142] Although the fact that Castro injured her thumb was relevant to the court's decision, the court's decision to use the language "distinct event" rather than "injury" is significant.[143] Especially relevant to this comment is the court's reasoning for allowing recovery for mental anguish. The court emphasizes that the massive informational and educational campaigns about AIDS waged by health officials in the past decade would make any reasonable person stuck by a used hypodermic needle from which blood was drawn fearful of contracting AIDS.[144] A federal court[145] relied on *Castro* to sustain an emotional distress claim for fear of AIDS under the Federal Employees Liability Act.[146] The court noted that "the identity of the contaminator in Castro [was] unknown, making the fear of contraction more reasonable . . . [t]herefore, based upon the reasonableness of the fear, the breach of the duty, evidence of a specific incident and an actual physical injury, the facts in Castro arguably would support a claim even under the more narrow approaches taken by the lower courts."[147]

4. Reasonableness of Plaintiff's Fears as Deciding Factor

The struggle throughout all fear of disease cases is the degree to which a related physical injury or exposure to a disease causing agent is needed to make a plaintiff's fears reasonable as a matter of law. A related procedural issue is to what extent the entire inquiry should actually be a question of fact, since many cases have been resolved on a case-by-case basis due to their fact-sensitive nature. Should the plaintiff have the opportunity to convince a factfinder that her fears are genuine, even if she has no attendant physical injuries, but only a speculative fear of having been exposed to HIV?

As the above commentary suggests, courts dealing with fear of AIDS claims face a particularly thorny problem. Courts which choose not to require a showing of exposure must concern themselves with the reasonableness of the plaintiff's fears. This concern was addressed in

142. *Id.* (emphasis added).

143. *Id.* at 697, 698 *Contra* Burk v. Sage Prod., 747 F. Supp. 285 (E.D. Pa. 1990); Carroll v. Sisters of Saint Francis Health Serv., 868 S.W.2d 585 (Tenn. 1993) (both cases requiring exposure to HIV in the needle-stick scenario).

144. *Castro*, 588 N.Y.S.2d at 698. Castro testified that she had seen commercials on television about AIDS and was aware of the possibility of contracting HIV through contaminated blood. *Id.*

145. Marchica v. Long Island R.R., 810 F. Supp. 445 (E.D.N.Y. 1993).

146. 45 U.S.C.A. § 51 *et seq.*

147. *Id.* at 452 (quoting Harry H. Lipsig, *AIDS Phobia and Negligent Infliction of Emotional Distress*, N.Y.L.J., March 26, 1992 at 3,4).

Wetherill v. University of Chicago[148] where the district court adopted a "reasonable fear" standard rather than requiring a high degree of likelihood that cancer would develop.[149] The court relied on the plaintiff's general knowledge about the carcinogenic nature of DES since they were exposed to constant media coverage.[150] With regard to AIDS, most plaintiffs allege their fear is reasonable because the deadliness of AIDS is common knowledge. There has certainly been no dearth of media coverage of AIDS in the past decade, and one would be hard pressed to find an individual who does not have at least general knowledge of the disease, its modes of transmission and its 100% fatality rate. Courts are certainly not oblivious to this fact. For example, the Supreme Court of Tennessee acknowledged that the widespread publicity associated with AIDS and the fatality of the disease lend support to the idea that the question of reasonableness of a plaintiff's fear should be decided by a jury and not as a matter of law.[151] Additionally, Justice Barry of the Appellate Court of Illinois, Third District noted in his thoughtful dissent in *Doe v. Surgicare of Joliet, Inc.*[152] that the current explosion of media information about AIDS and its effect on its victims should at least get the plaintiff's case to a jury, even absent physical injury or exposure to HIV.[153]

Justice Barry raises another factor militating in favor of a general reasonableness standard. Even though the transmission of HIV in certain situations is highly speculative, the low risk may still be viewed as unreasonable to a patient operated on by an HIV-positive surgeon.[154] For example, in *Kerins v. Hartley*,[155] the plaintiff did not dispute that

148. 565 F. Supp. 1553 (N.D. Ill. 1983). *See supra* notes 63-68 and accompanying text.

149. *See also* Baylor v. Tyrrell, 131 N.W.2d 393, 402 (Neb. 1964) (requiring fear of developing cancer to have a "reasonable basis"); Ferrara v. Galluchio, 152 N.E.2d 249 (N.Y. 1958) (requiring plaintiff to establish only a "basis for her mental anxiety" even if she can show only that cancer might develop); Murphy v. Penn Fruit Co., 418 A.2d 480 (Pa. Super. Ct. 1980) (awarding plaintiff emotional distress damages for fear of cancer and heart attack, even though her own doctors were certain that plaintiff's anxiety was medically unreasonable).

150. *Wetherill*,565 F. Supp. at 1560. *See also* Ferrara v. Galluchio, 152 N.E.2d 249, 252 (N.Y. 1958) (allowing emotional distress damages for fear of cancer in part because it is "general knowledge" that wounds which do not heal frequently become malignant).

151. Carroll v. Sisters of Saint Francis Health Serv., 868 S.W.2d 585 (Tenn. 1993). Recall that the *Carroll* court ultimately ruled against the plaintiff because it was reluctant to allow a jury to award damages based only on a subjective emotional trauma. *Id.*

152. 1994 WL 461796, No. 3-93-0765 (Ill. App. Ct. 1994) (Barry, J. dissenting) (requiring showing of actual exposure for negligent infliction of emotional distress for fear of AIDS).

153. *Id.* at *6. *See also supra* notes 29-31 and accompanying text (discussing Justice Wilkins' dissent in Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982)).

154. *Id.* at *5.

155. 21 Cal. Rptr. 2d 621, 624 (Cal. Ct. app. 1993), *rev'd*, 33 Cal. Rptr. 2d 172 (Cal. Ct. App. 1994).

the risk of HIV transmission from a surgeon to a patient was virtually nonexistent, but she felt the data was irrelevant.[156] She argued that her fear of AIDS was objectively reasonable, because studies of the risk of surgeon-to-patient HIV transmission are inconclusive since research has not been done to adequately quantify the risk.[157] The plaintiff also offered expert testimony that certain individuals will continue to test negative for HIV for prolonged periods of time after infection, leading the intermediate appellate court to note that "even if [the plaintiff's] test results were negative for the next 25 years, she could not be 100% certain" she was not infected during the surgical procedure.[158] Kerins pointed out that she was in surgery for over four hours, during which time Gordon's hands were at work in a bloody field, making it difficult to ever know conclusively if he cut himself or not.[159]

B. The Need for an Exposure Requirement

The notion of the seriousness of the risk outweighing the remoteness of the risk was seen in asbestos and DES cases.[160] However, in the previous fear of cancer cases, exposure to a causative agent was never an issue because a causal connection between the defendant's conduct and the plaintiff's emotional injury was always present.[161] By abandoning the exposure requirement in fear of future harm cases and focusing on the reasonableness of the plaintiff's fears, courts are tampering with the very notion of proximate cause necessary for any negligence action, including negligent infliction of emotional distress. The causative link between a defendant's tortious conduct and a plaintiff's fears is too fundamental to be discarded. An exposure requirement has the advantage of also serving

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156. *Id.* at 624. Under the previous *Kerins* decision not requiring exposure, the court relied on data showing the risk of a health care worker sustaining a cut during surgery is about 6.9%, while the risk of HIV transmission from the worker to the patient as a result of such an injury is approximately 0.3%. *Id.* at 629 (citing, *Recommendations for preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, 40 MORBIDITY AND MORTALITY WKLY. REP. 1 (1991)).

157. *Kerins*, 21 Cal. Rptr. 2d at 625.

158. *Id.*

159. *Id.* at 628.

160. *See, e.g., supra* notes 63-68 and accompanying text discussing the *Wetherill* decision, where the court held that the fear of a future injury can be reasonable even where the likelihood of the future contingency actually occurring is low. Wetherill v. University of Chicago, 565 F. Supp. 1553 (N.D. Ill. 1983). Recall, however, that the *Wetherill* court also stressed that the in utero exposure to DES constituted a physical injury, an important requirement for recovery of emotional distress damages in most jurisdictions. *Id.*

161. *See, e.g., supra* note 74 and accompanying text discussing Laxton v. Orkin Exterminating Co., 639 S.W.2d 431 (Tenn. 1982), where ingestion of a harmful substance was necessary for recovery.

as a physical injury, providing a strong causal link between the defendant's conduct and the emotional harm.

The problem with the general reasonableness standard is not the award of damages to these particular plaintiffs, but the ramifications of using the standard in other contexts. The general reasonableness standard essentially dilutes the very meaning of reasonableness. By making reasonableness contingent on foreseeability of a risk, a plaintiff can theoretically recover by simply alleging fear of AIDS and showing that the fear is subjectively plausible by demonstrating that the risk was foreseeable.

The court in *Doe v Doe*[162] anticipates two situations where deference to a plaintiff's subjective fears could have undesirable consequences. Any spouse who could allege infidelity against his or her mate could theoretically bring a separate tort action for emotional distress damages for fear of contracting AIDS since any act of sexual intercourse in our society involves a foreseeable risk of exposure to the HIV virus.[163] Even if the risk is miniscule, the general reasonableness standard permits a cause of action. Similar situations will arise in non-sexual relationships. For example, if an individual has had a blood transfusion in the last fifteen years, presumably a duty to disclose this fact to a sexual partner would arise.

One fact that most medical experts will agree on is that we still know very little about AIDS. In situations involving something less than sexual intercourse, the general reasonableness standard becomes even more difficult to apply. Most experts agree that the HIV virus cannot be transmitted through casual contact, but if one expert can document one case of HIV being transmitted through saliva, a "general reasonableness" standard might be satisfied, since none of the decisions specify how much of a risk is sufficent to establish foreseealility. We are left to assume that the smallest imaginable risk will make an individual's fears reasonable and compensable.

A plaintiff's anxiety about contracting AIDS often reflects general misperceptions that exist in our society about the disease. Public reactions and stigmas associated with AIDS will likely have some effect on the numbers and types of claims brought by people who fear

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162. 519 N.Y.S.2d 595, 598 (N.Y. Sup. Ct. 1987).

163. *See Id.* The World Health Organization estimates that 250 to 500 million people currently engage in behavior placing them at risk for HIV infection. Jonathan W. M. Gold, MD., *HIV-1 Infection: Diagnosis and Management*, 76 MED. CLINICS N. AM. 1 (1992). It is estimated that over half of all Americans are not taking any personal precautions to protect themselves from HIV infection, although high-risk individuals are more likely to do so. Robert J. Blendon et al., *Public Opinion and Aids: Lessons for the Second Decade*, 267 JAMA 981, 982 (1992).

contracting AIDS because of some encounter with an HIV-infected individual. Studies indicate that stigmatizing attitudes and erroneous beliefs about AIDS and AIDS patients are still prevalent in our society. One such study found that a large number of people still believe HIV can be transmitted through casual contact, such as kissing, sharing drinking glasses, using public lavatory facilities, being coughed or sneezed on by an infected person, or through insect bites.[164] Many Americans still believe AIDS is primarily an affliction of male homosexuals or intravenous drug-users.[165] Another survey indicated that a substantial percentage of people nationwide thought HIV could be transmitted through insect bites or by donating blood.[166]

Quite simply, Americans are frightened of AIDS. As many as 82 percent of respondents to one survey called AIDS a "very serious" problem for all people living in the United States.[167] Nearly 75 percent felt that the AIDS epidemic will worsen throughout this decade.[168] Nearly one half believed AIDS is the worst health problem in this country, with cancer trailing in second place at 18 percent.[169] Media coverage of the AIDS epidemic has been constant for the last ten years, so it is not surprising that AIDS is a matter of common knowledge on which nearly everyone has an opinion.

It has already been suggested that the general reasonableness standard allows a plaintiff's subjective fears to enter into the formula for determining emotional distress recovery for fear of contracting AIDS. Once subjective beliefs begin to enter into fear of AIDS case, the possibility arises for recovery in situations where exposure is highly unlikely, such as through casual contact with an infected individual. At the very least, an increase in the number of fear of AIDS cases may occur as potential plaintiffs try to hit the litigation jackpot by alleging emotional anguish over a fear of contracting AIDS. By permitting plaintiffs to recover for mental anxiety over fear of AIDS in the absence of actual exposure, we risk fueling misperceptions about AIDS and how it is transmitted. The requirement of actual exposure to HIV safeguards

164. Gregory M. Herek, PhD and John P. Capitanio, PhD, *Public Reactions to AIDS in the United States: A Second Decade of Stigma*, 83 Am. J. of Pub. Health 574, 574-75 (1993).

165. *Id.* at 575.

166. *HIV/AIDS Knowledge and Awareness of Testing and Treatment-Behavioral Risk Factor Surveillance System 1990*, 40 MORBIDITY AND MORTALITY WKLY. REP. 794 (1991).

167. Robert J. Blendon, et al., *Public Opinion and AIDS: Lessons for the Second Decade*, 267 JAMA 981, 981 (1992).

168. *Id.*

169. *Id.*

against unnecessary litigation and prevents fraudulent claims because it is objectively verifiable and not based on mere assertions.

The litigation itself can also fuel public misperceptions. Plaintiffs claiming fear of AIDS usually question the reliability and validity of current HIV-testing procedures to some extent. In *Carroll*, an expert testified that AIDS-testing is not completely reliable since "seroconversion may be delayed for twelve months or more following exposure."[170] In *Kerins*, the plaintiff relied on statistics that anywhere from 95 percent to 99.8 percent of HIV-infected individuals will test positive within six months of exposure.[171] One study indicates that certain populations may continue to test negative for HIV antibodies using the ELISA test even though they are infected.[172]

This is just one example of the differing opinions among AIDS-researchers on key points. Such disparity makes it difficult to set any legal standards, especially a rule as vague as the general reasonableness standard. If a plaintiff's ability to recover emotional distress damages for fear of AIDS is contingent on that fear being reasonable, by what standard shall "reasonableness" be determined? If one expert states that reliable test results can be achieved in six months while another believes twelve months are needed, how shall a court determine the period of time during which recovery should be allowed? Crucial questions like these must be addressed but are left unanswered by a general reasonableness standard.

IV. Conclusion

Recovery of damages for fear of a future disease or condition has traditionally been limited to plaintiffs who can demonstrate that their fears are reasonable and tied to some physical injury. This physical injury can either be an actual impact, such as the nearly defunct "impact rule," or a physical manifestation of the mental distress. In cases involving intentional or reckless conduct by the defendant, the physical injury requirement may be abandoned as long as the plaintiff's fears are

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170. Carroll v. Sisters of Saint Francis Health Serv., Inc., No. 02A01-9110-CV-00232, 1992 WL 276717 at *4 (Tenn. App. 1992).

171. Kerins v. Hartley, 21 Cal. Rptr. 2d 621, 625 (Cal. Ct. App. 1993), *rev'd*, 33 Cal. Rptr. 2d 172 (Cal. Ct. App. 1994).

172. Elaine M. Sloand, MD, et al., *HIV Testing: State of the Art*, 266 JAMA 2862 (1991) (citing S.M. Wolinsky, et. al., *Human immunodeficiency virus type 1 (HIV-1) infection a median of 18 months before a diagnostic Western blot: evidence from a cohort of homosexual men*, 111 Annals of Internal Med. 961 (1989)). In this study, 14 out of 16 homosexual men repeatedly had negative HIV tests for up to 18 months but were HIV positive according to a more sophisticated but less widely used test.

reasonable. As a result, the reasonableness of a plaintiff's anxiety over the possibility of a future disease or condition is crucial to any form of emotional distress recovery. With regard to fear of cancer cases, plaintiffs always satisfied this reasonableness requirement by proving that they had been exposed to some disease-causing agent. The exposure requirement has become highly important in claims of emotional distress over the possibility of contracting AIDS as a result of a defendant's tortious conduct. Since AIDS is unique in that it is 100% fatal, a substantial minority of courts have been willing to liberalize the plaintiff's burden of proving the injurious link between the defendant's conduct and the plaintiff's fear.

Courts imposing this general reasonableness standard emphasize that the definition of reasonable fear includes any foreseeable risk of harm to the plaintiff, no matter how remote. If a plaintiff cannot show that exposure to HIV occurred, the plaintiff could not recover under the physical injury plus reasonableness standard set forth in the fear of cancer cases. Although this may or may not be a desirable outcome in a particular case, the exposure requirement serves a valuable purpose by assuring a causal link between the defendant's conduct and the victim's mental distress. Proof of exposure should not be abandoned hastily.

The general reasonableness standard attempts to accomodate the fears of a reasonable person exposed to the barrage of information about the deadliness of AIDS by allowing the jury to assess the reasonableness of a plaintiff's fears. Whether or not the issue should be decided as a matter of law is certainly debatable. However, the downside of relieving plaintiffs alleging fear of AIDS in speculative situations is that it perpetuates AIDS-phobia in our society.

This leads to a vicious circle where emotional distress recoveries are premised on common knowledge about the dangers of AIDS, but that knowledge is infected with judicial acknowledgement that what amounts to AIDS-phobia is reasonable as a matter of law. The practical solution to this problem is to require a plaintiff seeking only emotional distress damages for fear of AIDS to show that he or she has actually been exposed to the HIV virus.

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