The Fear of Disease as a Compensable Injury: An Analysis of Claims Based on AIDS Phobia

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THE FEAR OF DISEASE AS A COMPENSABLE INJURY: AN ANALYSIS OF CLAIMS BASED ON AIDS PHOBIA

INTRODUCTION

The premise that an individual is entitled to be free from mental disturbance\(^1\) has led to the recognition of fear as a debilitating emotional injury worthy of legal redress.\(^2\) Historically, courts had been reluctant to acknowledge a right to emotional tranquility.\(^3\) More recently, however, mental suffering has been recognized as a harm commensurate with physical injury\(^4\) and is

\(^1\) See Peter W. Huber, Liability 116 (1988). This idea dates as far back as the seventh century when tort damages were established by statute in England, and the “courts consider[ed] some claims for hurt feelings.” Id. The policy behind such a right was to “encourage recourse to the courts instead of retaliation.” Id. By the middle of the 19th century, the majority of American courts firmly supported this type of legal right. Id.; see also W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 54, at 359-60 (5th ed. 1984) (discussing reluctant recognition of mental disturbance of cognizable harm); 3 J.D. Lee & Barry A. Lindahl, Modern Tort Law, Liability & Litigation § 32.01, at 123 (Rev. ed. 1990) (noting that initial mental suffering recoveries were for “fright”).

\(^2\) See Jacob A. Stein, Stein on Personal Injury Damages § 3:4, at 63 (2d ed. 1991). Fear may be recoverable under the terms fright or anxiety. Id. “By definition, fright is a sudden alarm . . . . Usually, fright is not of long duration; but while it lasts, it is a feeling which may be of great intensity . . . . [It] often has demonstrable and measurable effects on human beings.” Id. § 3:5, at 64. Writing on anxiety, Stein states that “the dread of future consequences may be a real and sometimes disabling fact.” Id. § 3:11, at 74-75.

\(^3\) See Huber, supra note 1, at 116. Among the original reasons for this judicial reluctance was the concern over feigned or exaggerated injury and the belief that even if mental disturbance could be proved, it was difficult to measure. Id. Another perceived problem was potential proliferation of lawsuits arising from a single accident. Id. at 117; see also Keeton et al., supra note 1, § 54, at 360 (“vast increase in litigation”). Professor Keeton observes that:

There are at least three principal concerns, however, that continue to foster judicial caution and doctrinal limitations on recovery for emotional distress: (1) the problem of permitting legal redress for harm that is often temporary and relatively trivial; (2) the danger that claims of mental harm will be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the “wrongful” act.

Id. at 360-61. Though these concerns must be met, it is possible for the courts to separate valid claims from unmeritorious ones, and “it is not necessary to deny a remedy in all cases because some claims may be false.” Id. at 361.

\(^4\) Huber, supra note 1, at 117 (“[T]he law recognized that psychic injuries can be real and that in principle they deserve redress like any others.”); Keeton et al., supra note 1,
now a proper basis for a recovery of damages in tort. Within this
category of torts, courts have recognized the fear of developing a
disease as a compensable harm. The newest branch of disease-
phobia cases is the fear of contracting AIDS. Until recently, courts
refused to recognize such an action because both exposure and the
likelihood of developing the disease were inadequately estab-
lished. In Johnson v. West Virginia University Hospitals, Inc.,
however, the Supreme Court of Appeals of West Virginia permit-
ted recovery for the fear of developing AIDS, and in so doing,
extended this theory of liability to circumstances in which there
was virtually no chance that the plaintiff would ever develop the
disease. It is submitted that the result reached in Johnson was
erroneous, and it is urged that courts base their decisions on the
available medical data rather than sentiment.

This Note will explore the emerging case law discussing the
fear of AIDS and will examine how the developing standards have
led to an expansion in the elements of recovery. Part I will review
the different contexts in which a claim for mental disturbance may
be brought. Part II will review the law on emotional distress dam-
ages as related to the fear of disease. Part III will unravel the re-
cent decisions in search of clear standards. Finally, Part IV will
propose a method by which the courts can adjudicate such claims in a way that both promotes uniformity and discourages frivolous actions.

I. Tort Liability for Mental Distress

The right to recover damages for mental anguish caused by the fear of developing a disease has consistently been recognized by our courts. Underlying early decisions was the notion that compensation for mental distress was simply one of the types of damages recoverable in a personal injury action. Such damages included the fear of developing a condition in the future, if such fear was an immediate and necessary consequence of the plaintiff's injury.

A. Damages For Mental Anguish in a Personal Injury Action

Courts recognize that the majority of personal injuries result in some degree of physical pain and accompanying mental suffering. The mental suffering encompasses not only the emotional or psychological response associated with the physical pain, but also

15 See, e.g., Figlar v. Gordon, 53 A.2d 645, 648 (Conn. 1947) (permitting jury to consider plaintiff's anxiety over developing epilepsy in future as part of plaintiff's damage award); Alley v. Charlotte Pipe & Foundry Co., 74 S.E. 885, 886 (N.C. 1912) (finding that plaintiff's mental suffering over fear of developing cancer from his physical injury was compensable); Trinity & S. Ry. v. O'Brien, 46 S.W. 389, 391 (Tex. Civ. App. 1898) (“mental suffering resulting proximately from the bite of the dog formed an element of damage”).

16 Lee & Lindahl, supra note 1, § 32.02, at 125-26 (“Simply stated, recovery for emotional disturbance . . . is possible because there is a cause of action based on the violation of a legal right for which other damages were recoverable.”). In addition to personal injury, damages for mental suffering can also be sought in “actions for assault and battery, actions for injury to property, or actions for interference with the use and enjoyment of land.” Id. at 126.

17 See, e.g., Warner v. Chamberlain, 30 A. 638, 639 (Del. Super. Ct. 1884) (holding that plaintiff bitten by dog may recover damages that “necessarily arose” from such injury, including “fear and apprehension of hydrophobia”); Alley, 74 S.E. at 886 (affirming rule that plaintiff may recover for his fear of cancer, if it is “immediate and necessary consequence” of injury).

18 See Edward C. Martin, Personal Injury Damages Law and Practice § 6.1 (1990). Physical pain is the body’s physiological response to injury. Id. at 87. “The actual sensory feeling of pain is caused by the stimulation of specialized nerve endings in the body which, through a series of complex biochemical reactions, transmit a signal that the brain interprets as pain.” Id. (emphasis omitted). Mental suffering, on the other hand, is a psychological or emotional reaction, as opposed to physiological, which results due to a person’s sensation of physical pain. Id. at 87-88. Though physical pain and mental suffering often occur concurrently, they sometimes do not. Id. at 88. For example a paralyzed individual who cannot feel any physical pain may suffer from mental anguish due to his condition. Id.
the response to the potential repercussions of the injury.\textsuperscript{17} Therefore, damages for mental distress include both the pain and suffering that arose prior to trial, and the pain and suffering that may reasonably develop subsequent to trial.\textsuperscript{18}

There are many emotional reactions generally embraced by the term mental anguish,\textsuperscript{19} including fright,\textsuperscript{20} shock,\textsuperscript{21} neurosis,\textsuperscript{22} anxiety,\textsuperscript{23} embarrassment,\textsuperscript{24} and fear.\textsuperscript{25} In many of these categories,

\begin{itemize}
  \item \textsuperscript{17} See \textit{Stein}, supra note 2, § 3:2, at 59-60 ("Mental anguish, for which recovery is sought in personal injury actions, is generally considered as pain and suffering, covering not only the pain associated with the injury but also the mental reaction to that pain and to the possible consequences of the injury.").
  \item \textsuperscript{18} \textit{Stein}, supra note 2, at 60; see also \textit{Martin}, supra note 16, § 6.3 at 90 (stating that future physical pain includes both physical and mental suffering that injured party may reasonably anticipate to encounter in future).
  \item \textsuperscript{19} \textit{Restatement (Second) of Torts} § 46 cmt. j. (1965). "Emotional distress . . . includes all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea." \textit{Id.} at 77; see also \textit{Stein}, supra note 2, § 3:4, at 63 (enumerating types of mental anguish).
  \item \textsuperscript{20} See \textit{Brown} v. \textit{Crawford}, 177 S.W.2d 1, 3 (Ky. 1944) (stating general rule allows recovery for "mental suffering resulting from fright caused by the willful wrong of another"); \textit{Butler} v. \textit{Pardue}, 415 So.2d 249, 252 (La. Ct. App. 1982) (noting that fright, fear, or mental anguish occurring during an ordeal is legally compensable); \textit{LaCoure} v. \textit{LaCoure}, 820 S.W.2d 228, 234 (Tex. Ct. App. 1991) (approving jury instructions that severe emotional distress means any highly unpleasant mental reaction, including fright).
  \item \textsuperscript{21} See \textit{Birchfield} v. \textit{Texarkana Memorial Hosp.}, 747 S.W.2d 361, 368-69 (Tex. 1987) (explaining that mental anguish includes "shock and emotional trauma"). \textit{Cf.} \textit{Belt} v. \textit{Saint Louis-S.F. Ry. Co.}, 195 F.2d 241, 243 (10th Cir. 1952) (holding that plaintiff's increased shock was not mere mental disturbance, but rather a compensable physical injury); \textit{Vanoni} v. \textit{Western Airlines}, 56 Cal. Rptr. 115, 117 (Cal. Ct. App. 1967) (holding severe shock suffered by plaintiffs constituted physical injury because "a shock to the nervous system is an injury to the body rather than to the mind") (emphasis omitted).
  \item \textsuperscript{22} See \textit{Coco} v. \textit{Richland Gen. Contractors}, Inc., 411 So.2d 1260, 1262-63 (La. Ct. App. 1982) (stating that damages for traumatic neurosis could be recoverable as part of pain and suffering but medical expertise in psychiatric field is needed to establish plaintiff's condition), \textit{cert. denied}, 413 So.2d 909 (La. 1982); \textit{Richard} v. \textit{Guillory}, 392 So.2d 777, 781 (La. Ct. App. 1980) (holding that plaintiff who suffered from depressive neurosis due to auto accident could recover $10,000 in general damages for mental injury).
  \item \textsuperscript{24} See \textit{McDonald} v. \textit{United States}, 555 F. Supp. 935, 971 (M.D. Pa. 1983) (applying Pennsylvania law) (noting that individual's humiliation is recoverable as part of damages for pain and suffering); \textit{Wilson} v. \textit{Redken Labs, Inc.}, 562 S.W.2d 633, 636-37 (Ky. 1978) (holding that award of $30,000 for damages for mental anguish suffered due to plaintiff's embarrassment over loss of hair was not excessive); \textit{Edwards} v. \textit{Engen}, 178 N.W.2d 731, 734 (Minn. 1970) (holding that jury may consider embarrassment or emotional distress plaintiff was reasonably certain to experience in future, as part of recoverable damages).
a party may recover even if the feared injury does not occur.26 "For example, an expectant mother may recover damages for the mental anguish she undergoes in contemplation of the possibility of miscarriage or injury to her unborn child, even though shortly afterwards, the child is in fact born uninjured."27 Although some courts continue to handle fear of disease claims in this manner,28 other courts have analyzed such claims as independent actions for emotional distress.29 Courts that have proceeded down this latter path have done so with much caution,30 troubled by the issue of whether emotional distress, standing alone, should support a recovery of damages.31 Amidst the uncertainty of such a common, yet elusive injury,32 no general agreement has been reached by the courts as to what guidelines should govern.33

B. Damages for the Intentional Infliction of Emotional Distress

As an independent basis of tort liability, the intentional inflic-
tion of emotional distress is based on the notion that the "freedom from emotional disturbance [is] an interest worthy of protection in its own right." However, due to the vagueness of these claims, the propensity for their abuse, and their potential to vastly increase litigation, the law has placed limitations on this cause of action. Most jurisdictions require proof of four elements to establish intentional infliction of emotional distress. They are: (1) extreme and outrageous behavior by the defendant that (2) is either intentional or reckless; (3) extreme and severe emotional distress suffered by the plaintiff; and (4) a causal connection between the defendant's act and the plaintiff's anguish. Although this cause of

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35 See Keeton et al., supra note 1, § 12 at 55 (noting criticism of purported mental anguish injuries as "evanescent, intangible and peculiar").
36 Keeton et al., supra note 1, at 56. Professor Keeton observes that the objection to the acceptance of the mental anguish cause of action as leading to "fictitious claims [and] litigation in the field of trivialities and mere bad manners" is well-founded. Id.
37 Id.
38 See infra notes 39-44 and accompanying text; see also infra notes 45-75 and accompanying text (discussing cause of action for negligent infliction of emotional distress).
39 Kiely, supra note 34, § 2.2, at 68; see also Stein, supra note 2, § 3:21, at 102.
40 See Restatement (Second) of Torts § 46 cmt. d (1965); see also Lekich v. International Business Mach. Corp., 469 F. Supp. 485, 488 (E.D. Pa. 1979) (stating conduct must be so outrageous and extreme as to surpass bounds of decency in civilized society); cf. Bradshaw v. Swagerty, 563 P.2d 511, 514 (Kan. Ct. App. 1977) (holding mere insults were insufficient to support claim for intentional infliction of emotional distress). But see Goldfarb v. Baker, 547 S.W.2d 567, 569 (Tenn. 1977) (noting that conduct may be excused if resulting from annoyance or stress).
41 See Restatement (Second) of Torts § 46 cmt. i (1965); see also Thomas v. Douglas, 877 P.2d 1428, 1435 (9th Cir. 1994) (holding that defendant's refusal to transfer plaintiff-deputy to another substation despite his whistle-blowing activities was not done intentionally or in reckless disregard of the certainty that such emotional distress would occur); Ridgewells Caterer, Inc. v. Nelson, 688 F. Supp. 760, 764 (D.D.C. 1988) (stating that under District of Columbia law, it is possible to infer intent or recklessness from defendant's outrageous conduct).
42 See Restatement (Second) of Torts § 46 cmt. j. (1965); see also Girard v. Ball, 178 Cal. Rptr. 406, 414 (Cal. Ct. App. 1981) (defining severe emotional disturbance as distress that "no reasonable man in a civilized society should be expected to endure"); Harris v. Jones, 380 A.2d 611, 617 (Md. 1977) (holding that plaintiff who was teased by co-worker because of stutter did not state cause of action in intentional infliction of emotional distress because defendant's conduct was not shown to be severe); Contreras v. Crown Zellerbach Corp., 565 P.2d 1173, 1177 (Wash. 1977) (reversing dismissal of cause of action for intentional infliction of emotional distress based on plaintiff's heightened susceptibility to distress caused by ethnic background).
43 See Reed v. Linn County, 425 N.W.2d 684, 687 (Iowa Ct. App. 1988) (finding actual proximate causation to be element of claim); Robert v. Saylor, 637 P.2d 1175, 1179 (Kan. 1981) (noting need for "causal connection between defendant's conduct and plaintiff's
action may compensate individuals for their mental suffering, it has been narrowly interpreted and is extremely difficult to establish.44

C. Damages for the Negligent Infliction of Emotional Distress

An independent action for emotional distress may also arise when the defendant is charged solely with negligence.45 Courts, however, have been even more reluctant to find liability on this basis.46 Whereas a recovery in intentional tort seeks to compensate and punish a defendant’s conduct,47 a negligence claim merely looks to compensate a plaintiff for injuries caused by a defendant’s lack of due care.48

Various theories have been established that attempt to place limitations on this type of claim.49 Initially, a majority of courts permitted recovery for emotional injuries when there was some type of contemporaneous physical impact.50 Under this approach, the occurrence of physical impact created a presumption that emotional distress would ensue, thereby guaranteeing the validity of the plaintiff’s claim.51 Furthermore, even though courts recognized

mental distress”).

44 See Stein, supra note 2, § 3:21, at 102 (stating that “[l]iability is sharply limited to cases of particularly egregious behavior; the tort is construed very narrowly, and it is a very difficult tort to prove”).


46 In order to recover under a theory of negligent infliction of emotional distress, the plaintiff must establish that defendant owed a duty to the plaintiff, defendant breached that duty, and the plaintiff was injured as a result of defendant’s breach. Id. at 1035.


48 See generally Keeton et al., supra note 1, § 30, at 164 (explaining breach of duty element of negligence claim).

49 See infra notes 50-75 and accompanying text.

50 See, e.g., Bodine, 912 F.2d at 1376 (adapting district court’s reasoning that impact rule supplies court with proof that emotional distress has actually occurred); Saechao v. Matsakoun, 717 P.2d 165, 169 (Or. Ct. App. 1986) (adopting impact rule because it provides court with clear link between compensability and victimization of plaintiff due to defendant’s breach).
the impact requirement as being met when there was inconsequential contact,\textsuperscript{52} the absence of any such impact often precluded recovery.\textsuperscript{53} Eventually, however, it became apparent that, in many cases, the establishment of a physical impact bore no relationship to the emotional distress allegedly suffered by the plaintiff. Gradually, a majority of courts abandoned the impact rule\textsuperscript{54} and began to implement the "zone of danger" rule.\textsuperscript{55}

Under the zone of danger approach, only a plaintiff who was endangered by the defendant's conduct\textsuperscript{56} and in reasonable fear of injury\textsuperscript{57} could recover. Although this method may be broader in its


\textsuperscript{53} Kiely, supra note 34, § 3.1, at 110.

\textsuperscript{54} See Jeannelle v. Thompson Medical Co., 613 F. Supp. 346, 348 (E.D. Mo. 1985) (stating that Missouri law recognizes claim of emotional distress without physical impact); Hughes v. Moore, 197 S.E.2d 214, 217-19 (Va. 1973). Research indicates that at least 25 out of 35 jurisdictions that have considered the impact rule have either rejected or abandoned it. Id. at 219. The reasons for this sweeping change are: (1) medical science has reduced the difficulties of linking an injury to its subsequent distress; (2) the recognition that the possibility of fraudulent claims should not preclude legitimate ones from recovery; and (3) the fear of increased litigation, which has not been proved to occur, is insufficient to deny compensation. Id. at 218-19.

\textsuperscript{55} See RESTATEMENT (SECOND) OF TORTS § 313 (1965). The Restatement sets out the rule as follows:

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

(2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

\textsuperscript{56} See, e.g., Levit v. General Motors Corp., 682 F. Supp. 386, 387 (N.D. Ill. 1988) (denying recovery for negligent infliction of emotional distress resulting from household fire since plaintiffs were not home at time of fire and therefore not within zone of danger); Kimelman v. City of Colorado Springs, 775 P.2d 51, 52 (Colo. Ct. App. 1988) (finding plaintiffs who witnessed family member's casket falling headlong into grave could not recover under theory of negligent infliction of emotional distress because they were not in zone of danger), cert. denied, 493 U.S. 981 (1989).

\textsuperscript{57} See Gillman v. Burlington N. R.R., 878 F.2d 1020, 1024 (7th Cir. 1989) (affirming
scope, it still suffers from many of the deficiencies of the impact rule. Trivial differences in otherwise similar cases operate to grant recovery in one case, and yet deny recovery in another. Therefore, though both the impact and the zone of danger rules have the desired effect of curtailing excess litigation, they often set mechanical and unjust limitations on recovery.

A third approach adopted by the courts is known as the foreseeability rule or the "Dillon" rule. This approach holds the defendant liable if the plaintiff's emotional distress was reasonably foreseeable by the defendant at the time of the injury. Courts apply this method on a case by case basis, relying on three factors to determine foreseeability: (1) the plaintiff's proximity to the accident; (2) whether the plaintiff witnessed the accident first hand, as opposed to learning about it from others; and (3) the relationship between the plaintiff and the victim of the physical

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58 See Stein, supra note 2, § 3:24, at 117. Under the zone of danger rule, plaintiff only has to show risk of physical impact, not actual physical impact. Id.
59 Kiely, supra note 34, § 3:1, at 111.
60 Kiely, supra note 34, § 3:1, at 111; see also Johnson v. Rogers, 763 P.2d 771, 780 (Utah 1988) (stating that "the parent standing next to the child who is hit by a car has a cause of action; the parent standing 20 feet away does not").
61 Kiely, supra note 34, § 3:1, at 111.
62 Lee & Lindahl, supra note 1, § 32.13.
63 See Dillon v. Legg, 441 P.2d 912 (Cal. 1968). In Dillon, the California Supreme Court held that a mother may recover for the emotional distress she suffered as a result of witnessing the negligently caused death of her daughter, even though the mother herself suffered no physical impact and was not within the zone of danger. Id. at 921. In rejecting the zone of danger rule, the court reasoned that it was anomalous to deny compensation to the mother, but allow recovery to a sister who happened to be a few yards closer to the accident. Id. at 915. In granting recovery, "California [became] the first jurisdiction in the United States to extend liability beyond the zone of danger." Johnson, 763 P.2d at 771, 780.
64 Dillon, 441 P.2d at 919-20. In Dillon, the mother's distress was held to be reasonably foreseeable because a "negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will, upon witnessing the accident, suffer emotional trauma." Id. at 921. The court observed that there are two types of foreseeable risk. Id. at 920. One is the risk of actual physical impact, and the other is the risk of fright or shock so severe that it causes substantial injury in an ordinary person. Id. The risk factor applicable in Dillon was of the second type. Id.
65 Id. The court was reluctant to predetermine a defendant's liability in every situation and instead offered guidelines to help determine whether an ordinary man under such circumstances should reasonably have foreseen the injury. Id.
66 Id.
67 Id. In Dillon, the plaintiff was near the scene of the accident when it occurred. Id. at 914.
68 Id. In Dillon, the plaintiff had personally witnessed the accident. Id. at 914.
injury. Unfortunately, even under the *Dillon* approach, courts have frequently produced arbitrary results due to their strict application of the three guidelines.

Some jurisdictions have rejected these rigid criteria altogether and have recognized a cause of action for the negligent infliction of emotional distress even in cases in which bodily harm is not threatened. Under this theory, a plaintiff could recover for severe emotional distress that was the proximate and foreseeable result of the defendant’s negligence. Though this method may reflect a growing trend among the courts, a majority of jurisdictions still

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69 *Id.* The plaintiff in *Dillon* was the victim’s mother and therefore was closely related to the decedent. *Id.*

70 KIELY, *supra* note 34, § 3.2, at 112; see *Thing* v. *La Chusa*, 771 P.2d 814 (Cal. 1989) (en banc). In *Thing*, the plaintiff-mother was denied recovery for the negligent infliction of emotional distress she allegedly suffered upon arrival at the scene of a car accident where her son was injured. *Id.* at 830. The court held that since she did not witness the accident, she could not recover damages. *Id.* Under such circumstances, the court concluded that a plaintiff may recover only if the plaintiff is closely related to the injured party, the plaintiff is present at the scene when injury occurs, is aware that such related party is being injured, and the plaintiff subsequently suffers serious emotional distress. *Id.* at 829-30. In addition, some courts have limited recovery under the *Dillon* factors to those cases involving close familial relationships. See *Trapp* v. *Schuyler Constr.*, 197 Cal Rptr. 411 (Cal. Ct. App. 1983). In *Trapp*, two children under the age of 14 witnessed their first cousin drown in a swimming pool that was allegedly negligently maintained. *Id.* at 411. The plaintiffs alleged that they had a very close emotional relationship with the decedent and that they played together often. *Id.* Applying the *Dillon* criteria, the court held that the first cousins could not recover for negligent infliction of emotional distress as a matter of law. *Id.* at 412. The court found no reason to extend reasonable foreseeability to include first cousins and instead chose to limit such standard to the immediate family. *Id.*; see also *Portee* v. *Jaffee*, 417 A.2d 521, 526-27 (N.J. 1980) (stating existence of marital or intimate family relationship is necessary element in negligent infliction of emotional distress claim).

71 *STEIN, supra* note 2, § 3:25, at 118-19.

72 See *Paugh* v. *Hanks*, 451 N.E.2d 759, 765 (Ohio 1983). Serious emotional distress does not include trivial mental disturbances or mere hurt feelings. *Id.* Rather, it signifies distress with which a reasonable person, normally constituted, would be unable to cope. *Id.*; see also *Johnson* v. *Ruark Obstetrics*, 395 S.E.2d 85 (N.C. 1990). Severe emotional distress means any type of disabling mental condition that may be recognized and diagnosed by a trained professional. *Id.* at 97. Examples are “neurosis, psychosis, chronic depression, [or] phobia.” *Id.*


74 See *Paugh*, 451 N.E.2d at 764-65 (following line of cases that reject physical injury requirement); see also *Mauro* v. *Owens-Corning Fiberglas Corp.*, 542 A.2d 16, 23 (N.J. Super. Ct. 1988) (stating modern trend is to abandon physical injury requirement).
require the plaintiff to show some manifestation of the emotional distress in the form of a physical injury.\textsuperscript{75}

\section*{II. Emotional Distress Damages and the Fear of Disease}

Whether the claim for fear of future condition is brought as a separate action for emotional distress,\textsuperscript{76} or as part of a personal injury suit,\textsuperscript{77} all courts require certain elements.\textsuperscript{78} First, a plaintiff must prove exposure to the disease-causing agent.\textsuperscript{79} Second, the plaintiff's fear of developing the future condition must be reasonable.\textsuperscript{80} Though this latter requirement is generally a question for the trier of fact,\textsuperscript{81} the courts have established some guidelines for determining what may be deemed reasonable in an appropriate case.\textsuperscript{82}

Although the standards for determining what may constitute reasonable fear vary by jurisdiction, many jurisdictions hold that the fear of developing a future disease may be reasonable even


\textsuperscript{76} See supra notes 34-75 and accompanying text.

\textsuperscript{77} See supra notes 16-33 and accompanying text.

\textsuperscript{78} See infra notes 79-94 and accompanying text.


\textsuperscript{81} See Lavelle v. Owens-Corning Fiberglas Corp., 507 N.E.2d 476, 481 (Ohio Ct. C.P. 1987) (explaining that fact-finder must conclude claim for increased fear of cancer was reasonable).

\textsuperscript{82} See infra notes 83-94 and accompanying text.
when the actual likelihood of developing the disease is minimal.\textsuperscript{83} These jurisdictions, however, still require a reasonable connection between the fear and the prospect of future illness.\textsuperscript{84} That the feared condition is not likely to occur is relevant only in terms of the jury's determination of the claim's reasonableness\textsuperscript{85} and the amount of compensation awarded the plaintiff.\textsuperscript{86}

A minority of jurisdictions take the opposite approach and require that the feared condition be reasonably certain to occur\textsuperscript{87} or that there be an increased statistical likelihood of its occurrence.\textsuperscript{88} Under this analysis, the mere possibility of future harm is inadequate;\textsuperscript{89} the plaintiff is required to make some threshold showing of the possibility of developing the feared condition.\textsuperscript{90}

In addition, many jurisdictions demand proof of a functional impairment\textsuperscript{91} or a medically identifiable effect\textsuperscript{92} caused by the ex-

\textsuperscript{83} See, e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1206 (6th Cir. 1988) (explaining how mental anguish resulting from fear of future disease may be compensable even though feared condition not likely to develop); Dartez v. Fibreboard Corp., 765 F.2d 456, 467 (5th Cir. 1985) (stating that under Texas law, damages for mental anguish arising from fear of developing future disease are compensable even though disease not medically probable), cert. denied, 112 S. Ct. 2301 (1992); Wetherill v. University of Chicago, 565 F. Supp. 1553, 1559-60 (N.D. Ill. 1983) (deciding that only "reasonable certainty" is required, rather than "reasonable fear").

\textsuperscript{84} See Sterling, 855 F.2d at 1206 (stating mental distress damages normally not granted where connection between fear and plaintiff's injury too tenuous); Wetherill, 565 F. Supp. at 1560 (noting requirement of causal link between fear of future illness and physical impact).

\textsuperscript{85} See Dartez, 765 F.2d at 468.

\textsuperscript{86} See id.

\textsuperscript{87} See Rabb v. Orkin Exterminating Co., 677 F. Supp. 424, 428 (D.S.C. 1987). Under South Carolina law, a plaintiff can recover for mental anguish and severe emotional distress in three situations: (1) when the plaintiff can prove pain and suffering resulting in a physical injury provided the feared condition is reasonably certain to occur; (2) when extreme distress is caused by "outrageous" behavior; and (3) when a bystander witnesses a traumatic event. Id.; see also Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.) (allowing recovery for mental distress when pain and suffering result from defendant's gross misconduct), cert. denied, 478 U.S. 1022 (1986).

\textsuperscript{88} See Kosmacek v. Farm Serv. Co-op. of Persia, 485 N.W.2d 99, 105 (Iowa Ct. App. 1992) (reversing judgment for fear of future disease due to plaintiffs' failure to establish increased statistical likelihood of getting cancer); Lavelle v. Owens-Corning Fiberglas Corp., 507 N.E.2d 476, 481 (Ohio Ct. C.P. 1987) (stating that plaintiff must possess increased statistical likelihood of developing cancer in order to recover for fear of cancer).

\textsuperscript{89} See Kosmacek, 485 N.W.2d at 104-05.

\textsuperscript{90} Id. at 105.


\textsuperscript{92} See Rittenhouse v. Saint Regis Hotel Joint Venture, 565 N.Y.S.2d 365, 367 (Sup. Ct. 1990) (stating in nationwide asbestos litigation, courts allow recovery for fear of cancer when there is rational basis for such fear, i.e. clinical presence of asbestos fibers in lung), rev'd on
posure to the disease-causing agent. The policy underlying this requirement is that a reasonable person would not fear a future condition without some concrete evidence, i.e., some medical indication of exposure to the disease-causing agent.

III. JUDICIAL DECISIONS ON THE FEAR OF AIDS

Since the first case descriptions of AIDS in 1981, this fatal disease has become the highest public health priority in the nation. Additionally, claims based on the fear of developing AIDS ("AIDS phobia") have become more prevalent.


See, e.g., Hawaii Fed. Asbestos, 734 F. Supp. at 1567-70 (explaining that functional impairment provides court with objective evidence of connection); Rittenhouse, 565 N.Y.S.2d at 367-68 (dismissing plaintiff's action for fear of cancer because no connection between fear and exposure was established).


See The HIV/AIDS Epidemic: The First 10 Years, 40 MORBIDITY & MORTALITY WKLY. REP. 357 (June 7, 1991) [hereinafter AIDS Epidemic]. The first cases of AIDS were reported by health-care providers in California and the Centers for Disease Control. Id. By the end of 1981, there were 189 cases reported from 15 states and the District of Columbia. Id. at 358. Over three quarters of these cases were reported from California and New York alone. Id. The overwhelming majority of cases involved men and none involved children. Id. By 1980, however, every state had reported AIDS cases, and a growing number of these cases involved women. Id. Nearly 800 cases involved children less than 13 years old. Id.; see The Second 100,000 Cases of Acquired Immunodeficiency Syndrome-United States, June 1981-December 1991, 41 MORBIDITY & MORTALITY WKLY. REP. 28 (Jan. 17, 1992). The number of AIDS cases reported to the Centers of Disease Control rose to 100,000 by the end of 1989. Id. Two years later in 1991, that number rose to 206,392, while the number of reported AIDS-related deaths was 133,232. Id. Though most reported AIDS cases involved homosexual or bisexual men, the number of AIDS cases attributable to heterosexual transmission has increased, thereby increasing the number of cases involving women. Id.

See AIDS Epidemic, supra note 95, at 357 (estimating that by end of 1991 in United States AIDS would be second leading cause of death among men aged 25-44 and one of five leading causes of death among women aged 15-44).

See Ralph R. Reed, Preface to AIDS AND THE COURTS xi, xi-xii (Clark C. Abt & Kathleen M. Hardy eds., 1990).

A plaintiff suffering from AIDS phobia has allegedly been exposed to the Human Immunodeficiency Virus ("HIV"), the agent that causes AIDS, and consequently suffers from a fear of later developing the disease. As with other disease-phobia claims, the plaintiff's fear constitutes a present injury. In *Burk v. Sage Products, Inc.*, the United States District Court for the Eastern District of Pennsylvania considered a claim based on the emotional fear of contracting AIDS. In *Burk*, the plaintiff was a paramedic who, while using a device made by the defendant-manufacturer designed for the disposal and containment of used medical syringes, was stuck by a needle protruding from the container. The plaintiff alleged that a number of AIDS patients were seen on the hospital floor at the time the incident occurred. The plaintiff, however, was unable to prove that the needle was used on an AIDS of emotional distress based upon AIDS phobia because there was no proof of exposure).


100 See DONALD H.J. HERMANN & WILLIAM P. SCHURGIN, *LEGAL ASPECTS OF AIDS § 1:07 (1991).* A person becomes HIV infected when the virus enters the bloodstream and stimulates the development of antibodies. *Id.* At the initial stage of HIV infection, many people develop a "mononucleosis-like" illness. *Id.* Eventually, almost all of these people will then enter a stage where they carry the infection, without an overt manifestation of AIDS. *Id.; see also John G. Bartlett & Ann K. Finkbeiner, *THE GUIDE TO LIVING WITH HIV INFEC- TION* 9 (1991).* The HIV virus stimulates the gradual weakening of the human immune system. *Id.* An HIV-infected individual usually does not develop any symptoms of infection for years, or even decades. *Id.* When these symptoms do begin to appear, it is said that the individual is suffering from AIDS-related complex, or ARC. *Id.* The condition turns into AIDS when the immune system becomes even weaker and infections normally fought off by the immune system appear. *Id.*


104 *Id.* at 286. In a personal injury action, plaintiff sought recovery for various ailments allegedly resulting from his fear of developing AIDS. *Id.* The plaintiff sought relief on several grounds: negligence, breach of warranty, and strict liability. *Id.* The plaintiff also sued for the deterioration of his marriage, allegedly affected by emotional distress. *Id.*
patient; thus, initial exposure to the disease was not shown. In analyzing the plaintiff's claim, the district court determined that, although damages for the fear of contracting a disease after exposure may be compensable, damages stemming solely from a fear that the initial exposure had occurred are not. In addition, the plaintiff repeatedly tested negative for HIV infection more than one year after the incident. The court found that it is extremely unlikely that a person who tests HIV-negative more than six months after exposure to the virus will develop AIDS due to that exposure. Since the plaintiff could not prove exposure to the HIV virus, and because it had been medically established that the plaintiff was virtually guaranteed not to have contracted AIDS from this particular accident, the court granted the defendant's motion for summary judgment.

A similar result was reached in *Hare v. New York*, where an X-ray technician was bitten by a patient suspected of being infected with AIDS. In affirming the lower court's judgment denying plaintiff recovery for emotional distress resulting from the fear

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106 Id.
107 Id. at 287.
108 Id. Plaintiff did not allege that he had been injured by exposure to the HIV virus, but instead claimed injury by virtue of exposure to a needle. Id. at 288 n.2. In its analysis, the court stated that it was unable to find a jurisdiction whose laws permitted recovery for the fear of developing a disease when exposure to the disease-causing agent had not been proven. *Id. But see Faya v. Estate of Almaraz, Nos. 143, 144, 1993 WL 60500, at *9 (Md. Mar. 9, 1993)* where the Maryland Court of Appeals held that plaintiffs' failure to allege actual transmission of the HIV virus does not preclude their claim of negligence. The court reasoned that "Burk's requirement that plaintiffs must allege actual transmission would unfairly punish them for lacking the requisite information to do so." *Id.*
109 Id. at 288. The plaintiff had taken five blood tests since the accident, and each test was negative. *Id. at 288, 288.* However, the plaintiff still alleged that despite his HIV negative tests, he "cannot tell if he will contract AIDS in the future." *Id.* at 288. Despite the defendant's failure to challenge this contention, the court noted that due to the negative test results, there was a "high degree of medical certainty" that plaintiff would not develop AIDS from being stuck by the needle. *Id.*
110 Id.
111 Id. The court stated that Pennsylvania law normally requires as a prerequisite to recovery for emotional distress, that the distress be accompanied by physical injury. *Id.* at 286. In this case, the court felt that the plaintiff's loss of all sexual function as a consequence of the needle stick incident, appeared to satisfy this requirement. *Id.* at 287.
113 *Id.* at 126. The patient was a prison inmate who was transferred to Richmond Memorial Hospital due to an injury he sustained while attempting to commit suicide. *Id.* The following day, the inmate again tried to kill himself by repeatedly stabbing himself with a fork. *Id.* The plaintiff, who was working at the hospital, tried to assist a corrections officer in subduing the inmate and was bitten on the forearm in the process. *Id.*
of contracting AIDS, the court relied on the fact that there was no proof introduced at trial establishing that the patient did in fact have the disease; thus, exposure was uncertain. Further, on several occasions the plaintiff had tested HIV-negative. The court concluded that due to these two factors, plaintiff's emotional distress claim was too "remote and speculative" and relief was denied.

In Johnson v. West Virginia University Hospitals, Inc., the Supreme Court of Appeals of West Virginia became one of the first courts to hold that a plaintiff may recover for emotional distress based on a fear of developing AIDS. In Johnson, the plaintiff was bitten by an HIV-infected patient immediately after the patient had bitten himself. A deciding factor in Johnson, notably absent in each of the prior cases, was that the plaintiff's exposure was uncertain.

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114 Id. The lower court found that "the State had negligently failed to provide adequate supervision of the inmate and that the State's negligence constituted a proximate cause of the claimant's injuries." Id. Though the court denied recovery for the fear of contracting AIDS, it did grant the plaintiff damages for pain and suffering. Id.

116 Id. The only thing adduced at trial on whether the inmate had AIDS was the plaintiff's testimony regarding a statement made by a nurse at the hospital that the inmate may have had the disease. Id.

118 Id. "[N]o proof was introduced as to the likelihood of claimant's contracting AIDS under the circumstances presented." Id. at 127.

119 Id.

120 Id. The only other evidence on the topic was that the plaintiff had lost weight and had cold symptoms following the incident. Id.

121 See Burk, 747 F. Supp. at 286; Hare v. New York, 570 N.Y.S.2d 125, 126 (App. Div. 1991), appeal denied, 78 N.Y.S.2d 859 (1991); see also Doe v. Doe, 519 N.Y.S.2d 595, 595 (Sup. Ct. 1987). In Doe, the plaintiff sued her husband for, inter alia, the intentional infliction of emotional distress based on AIDS phobia. Id. The plaintiff's husband told her that he had homosexual relations with other men, and the plaintiff alleged that this information led to her fear of developing AIDS. Id. at 596. However, not only did the plaintiff fail to take an HIV test, but she also failed to allege that her husband had AIDS or was HIV-positive. Id. at 599. On granting the defendant's motion to dismiss, the court stated that there was no event which it could label the "precipitating action." Id.

Rather than being able to prove exposure, the plaintiff merely feared she may have been exposed. Id. The court was unwilling to base recovery on such a highly attenuated set
AIDS PHOBIA

sure to the virus was proven. However, the plaintiff never tested positive for the HIV virus. The AIDS phobia cases prior to Johnson, such as Burk and Hare, relied on two factors in denying recovery. First, the fact that exposure had not been established, and second, the fact that each plaintiff had tested negative for HIV. In addition, in two more recent cases in which exposure was uncertain, the HIV-negative status of the plaintiff was an important consideration in denying recovery. The Johnson court, however, never considered this factor in its analysis. Since the plaintiff had proven exposure and the jury had found his fear to be reasonable, the court upheld his recovery.

of facts. Id. at 599-600.

124 Johnson, 413 S.E.2d at 893. Before the patient bit the plaintiff, he had bitten himself on the arm. Id. As a result, the patient's HIV-infected blood was in and around his mouth when he bit the plaintiff. Id. Further, the bite broke the plaintiff's skin and caused his arm to bleed. Id. Therefore, it was clear that the plaintiff was exposed to the HIV virus, and expert testimony on behalf of the plaintiff confirmed that to be the case. Id. at 891.

125 See infra notes 127-28 and accompanying text.

126 See Burk, 747 F. Supp. at 288; Hare, 570 N.Y.S.2d at 126; Doe, 519 N.Y.S.2d at 599.

127 See Burk, 747 F. Supp. at 288; Hare, 570 N.Y.S.2d at 127; Doe, 519 N.Y.S.2d at 599.

128 See Burk, 747 F. Supp. at 288; Doe, 519 N.Y.S.2d at 599.


130 See Ordway, 583 N.Y.S.2d at 1015. In Ordway, the plaintiff was a surgeon who had operated twice on an HIV-infected patient, unaware of the patient's condition. Id. The plaintiff claimed that had he known of the patient's status, he would have taken certain precautions. Id. The plaintiff alleged to be living in fear that he had contracted the HIV virus. Id. On granting the defendant's motion for summary judgment on plaintiff's claim of negligent infliction of emotional distress, the court held that absent any unusual occurrence during either operation or any indication of legitimacy in plaintiff's postoperative condition, plaintiff's claim was insufficient as a matter of law. Id. at 1017. However, the court also stressed the fact that the plaintiff had tested negative for HIV.

In Funeral Serv. By Gregory, 413 S.E.2d at 79, the Supreme Court of Appeals of West Virginia for a second time ruled on the AIDS phobia issue, only two weeks after deciding Johnson. In Gregory, the plaintiff was a mortician who embalmed a corpse, unaware that it was infected with AIDS. Id. at 80. The plaintiff alleged that if he had known of this fact, he would have taken steps to minimize his exposure. Id. After the exposure he claimed to have suffered from fear of contracting AIDS. Id. at 81. He had been tested for HIV four times with negative results. Id. at 82. Relying on Johnson, the court held that if there is no evidence of actual exposure to the virus, the fear is unreasonable, and thereby affirmed the lower court's dismissal of plaintiff's claim. Id. at 84. However, the court also stated that because of plaintiff's HIV-negative status, there was no proof that plaintiff had been infected. Id. at 82.

131 See Johnson, 413 S.E.2d at 892-93. Though the court noted that the plaintiff was not infected, it concentrated more on the plaintiff's fear as displayed through his alleged sleeplessness, stress, and uncertainty. Id.

132 Id. at 893.

133 Id. at 894.
It is submitted that the Johnson court failed to consider one essential factor—the HIV status of the plaintiff. Courts adjudicating AIDS phobia cases should not rely entirely on guidelines for recovery based on other fear of disease cases. The factor that distinguishes AIDS phobia cases is that there are reliable and conclusive tests to determine whether a person has been infected with the HIV virus. By contrast, a worker exposed to asbestos cannot

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134 Id. The court, however, expressly limited its holding to the facts of Johnson, allowing recovery only if:

[T]he plaintiff is not an employee of the hospital but has a duty to assist hospital personnel in dealing with a patient infected with AIDS; the plaintiff's fear is reasonable; the AIDS-infected plaintiff physically injures the plaintiff and such physical injury causes the plaintiff to be exposed to AIDS; and the hospital has failed to follow a regulation which requires it to warn the plaintiff of the fact that the patient has AIDS despite the elapse of sufficient time to warn. Id.


136 See Bartlett & Finkbeiner, supra note 100, at 282. The most widely used method in determining whether or not a person has been infected with the HIV virus is testing for antibodies to the virus. Id. The body makes antibodies to kill microbes that invade human tissues. Id. Therefore, if antibodies are present, that means that microbes are, or once were, present. Id.; see also Paul H. Douglas & Laura Pinsky, The Essential AIDS Factbook 44 (1987). Many people mistakenly refer to HIV antibody testing as AIDS testing. Id. Such a label is incorrect because having HIV antibodies is not dispositive that one has AIDS, or even that one will develop AIDS in the future. Id. An HIV positive test result means that the patient has been infected by HIV and is capable of transmitting the virus. Id.; Hermann & Schurgin, supra note 100, § 8:08 (discussing HIV antibody testing and stating that presumably all HIV-infected persons can transmit virus).

There are two standard tests used in conjunction with one another for the detection of antibodies to HIV. See Bartlett & Finkbeiner, supra note 100, at 282; Douglas & Finksky, supra, at 45; Hermann & Schurgin, supra note 100, §§ 1:31-32, 3:04, 8:08-09, 10:14; Science Brief: AIDS Test Examined, Economist, July 2, 1988, at 70 [hereinafter Science Brief]. The first test is the enzyme-linked immunosorbent assay (ELISA) which indicates that antibodies may possibly be present. See Bartlett & Finkbeiner, supra note 100, at 282. To perform the ELISA test, HIV is grown, purified, and broken down into its component parts, which are placed in some type of solid phase. Id. When test serum is added, there will be a color change if the serum contains antibodies to HIV. Id.; see Science Brief, supra, at 70. An ELISA test takes between three and eight hours. Id. If an ELISA test does not detect any antibodies, it is concluded that the blood sample tested was not infected with the virus, and the test is normally not repeated. Id. However, if the test does detect antibodies, it is performed at least once but usually twice more. Id.

The second test, the Western Blot, is a validation test used to confirm that the antibodies are indeed present. See Bartlett & Finkbeiner, supra note 100, at 282; see also Science Brief, supra, at 70. ELISA tests that indicate antibodies to HIV two or three times consecutively are then tested using the Western Blot method. Id. In the Western Blot test, the main proteins of a laboratory-grown HIV virus, called antigens, are separated by electrical current and placed onto strips of a special paper. Id. If a blood specimen introduced does not contain antibodies to HIV, there will be no reaction when the specimen is placed
take a "cancer test" to determine whether he will develop the disease as a result. Thus, in such cases, the fear may reasonably last a lifetime since it is impossible to completely rule out future development of the feared condition.

While Johnson extended the AIDS phobia cause of action to allow a plaintiff who was clearly HIV-negative to recover, a New York court went even further, eliminating the need to show exposure to the AIDS virus. In Castro v. New York Life Insurance Co., the plaintiff-cleaning worker was stuck in the thumb with a used hypodermic needle and syringe found in a waste container.

Denying the defendant's motion to dismiss, the Supreme Court of New York County upheld the AIDS phobia claim. As in Burk,

on these strips. Id. However, if the sample does contain HIV, antibodies in the sample will align with the antigens on the strips Id. Since scientists know which antibodies bind to which antigens, they are able to identify specific antibodies. Id. Both specimens that are known to be negative and those that are known to be positive, are tested at the same time as the sample, to serve as a comparison. Id. The results of the Western Blot test have historically been controversial. Id. In July of 1989, however, the Centers for Disease Control specified criteria interpreting the results, which have consequently cleared up any discrepancies there may have once been. See generally Elaine M. Slaad et al., HIV Testing: State of the Art, 266 JAMA 2861, 2862 (1991) (stating that up to 70% of ELISA tests are not confirmed by second ELISA).

Since the Western Blot test detects the different antibodies individually, it is less likely than the ELISA to react to the wrong antibodies and produce false-positive results. See Science Brief, supra, at 70. The Western Blot is not used initially, however, because it is much more expensive, slower, and harder to perform than the ELISA. Id.

Recently, there has been a scare that a new virus may exist that will not test positive on an HIV antibody test. See Cases of AIDS-Like Illnesses that Test Negative for HIV to Be Published By CDC; New Virus May Exist, BLUE SHEET No. 35(3):2-3 (1992). There have been relatively few known cases of AIDS-like illnesses around the world in which the victims test HIV-negative. However, researchers feel confident that these cases are not examples of HIV infection. Id. Therefore, these disorders have no impact on the reliability of the HIV tests. See id.

137 See Lavelle v. Owens-Corning Fiberglas Corp., 507 N.E.2d 476, 479 (Ohio Ct. C.P. 1987) (stating that it cannot be proven that cancer will inevitably follow from asbestosis).
138 See supra notes 136-37.
140 Id. at 695. The plaintiff, while emptying garbage from a small waste container into a larger one, pushed down on the garbage and was stuck by the needle. Id. The plaintiff was working in the normal course of her employment during the incident. Id.
141 Id. at 698. The plaintiff brought two causes of action. Id. at 695. The first claim alleged that the defendant was negligent, on which the plaintiff based the claim for AIDS phobia. Id. at 695-96. The second claim alleged that plaintiff's husband, as co-plaintiff, lost the care, comfort, companionship, and consortium of his wife due to the injuries caused by the defendant. Id. at 696. The court stated that in order to recover on the negligence claim, the plaintiff must prove that the defendant owed her a duty, that the defendant subsequently breached that duty, that there existed "a reasonably close causal connection between the breach and the resulting injury, and that the plaintiff suffered actual loss, harm,
the identity of the contaminator was unknown, and exposure to the HIV virus was therefore uncertain. Furthermore, the plaintiff was tested for the HIV virus, but refused to reveal the results.

In permitting the claim to proceed, the court, citing Ferrara v. Galluchio, a seminal New York case allowing recovery for cancer-phobia, stated that if the claim is tied to a distinct event that would cause a reasonable person to develop a fear of contracting a disease such as AIDS, there is a "guarantee of genuineness" of the claim. The court reasoned that the average person exposed to all of the information circulating about AIDS, who is stuck by a used needle and syringe, could develop a fear of contracting the disease. Ferrara may be distinguished, however, because in that case the plaintiff's initial exposure to the agent which caused the potential for disease was not at issue. Further, by permitting

or damage." Id. at 697.


Castro, 588 N.Y.S.2d at 696. The plaintiff alleged that the defendant's employees were taking blood samples from prospective life insurance applicants and discarding the used needles and syringes in ordinary disposal containers, in violation of state law. Id. To support her claim for AIDS phobia, plaintiff brought in proof that she had four sessions with a psychiatrist after the incident and that the psychiatrist reported that the plaintiff believed that she would die of AIDS and was consequently unable to return to work. Id. at 697.

Id. at 696.

Id. Castro contended that Coney Island Hospital sent her for HIV testing which she continued regularly. Id. The defendant alleged that Castro refused to reveal her test results at the deposition and that the only evidence presented by Castro that she may develop AIDS was based on "ignorance and hysteria." Id.


Castro, 589 N.Y.S.2d at 697. The plaintiff's doctor determined that the plaintiff's disturbed mental condition was entirely attributable to the needle stick incident. Id. Consequently, the court found that plaintiff's mental anguish was directly tied to that event. Id. at 698.

Id. at 697. The court stressed plaintiff's awareness of the fact that AIDS can be contracted through HIV contaminated blood. Id. at 698.

Id. The court relied on what it called a "massive informational campaign waged by federal, state, and local health officials . . . to educate the public about this dreadful disease." Id.

152 N.E.2d at 250. In Ferrara, the plaintiff suffered an X-ray burn on her shoulder due to radiation therapy she was receiving from the defendants. Id. This condition was diagnosed as chronic radiodermatitis. Id. Approximately two years later, the plaintiff was advised by a dermatologist to have her shoulder checked every six months because the burn could become cancerous. Id. at 251. On affirming plaintiff's award for damages for cancer-phobia, the New York Court of Appeals found that the plaintiff's X-ray burn did not heal for an unusually long amount of time, that plaintiff's scab lasted for several years resulting
plaintiff's claim for AIDS phobia to proceed even though exposure was uncertain,\textsuperscript{161} the Castro court completely disregarded the express warning given by the court in Burk.\textsuperscript{162} The Burk court stated that there had never been a case in any jurisdiction which permitted recovery for emotional distress damages arising out of a fear of contracting disease when the plaintiff could not prove exposure to the disease causing agent.\textsuperscript{163} This result is not surprising; it can only be imagined how many groundless claims would be allowed under a standard requiring neither proof of exposure to HIV nor HIV test results. Many claims will arise in which individuals will allege "distinct events"\textsuperscript{164} in which they may have been exposed to the HIV virus, but are unable to prove it.\textsuperscript{165} Though other fear of disease cases may have relied on the genuineness of the plaintiffs' claim,\textsuperscript{166} exposure was never at issue.\textsuperscript{167} There is a substantial difference between the fear of contracting an illness after exposure to a disease-causing agent\textsuperscript{168} and the fear that an exposure may have occurred,\textsuperscript{169} the two concepts are distinct and must not be confused.\textsuperscript{170}

The distinction was similarly overlooked in Carroll v. Sisters of Saint Francis Health Services\textsuperscript{161} where the Court of Appeals of Tennessee permitted a claim based on the fear of contracting AIDS to proceed, even though the plaintiff could not establish exposure to the HIV virus.\textsuperscript{162} In Carroll, while visiting her sister in defendant's hospital, the plaintiff stuck three of her fingers on what appeared to be a towel dispenser, but was actually a contami-
nated needle receptacle.\textsuperscript{163} Relying on the Tennessee Supreme Court decision in \textit{Laxton v. Orkin Exterminating Co.},\textsuperscript{164} the court held that Tennessee does not require the "strict rules of actual exposure" imposed by Pennsylvania and West Virginia courts;\textsuperscript{165} rather, the standard is whether the fear is reasonable.\textsuperscript{166} Based upon expert testimony presented by the plaintiff stating that used needles are medically presumed to be capable of transmitting the HIV virus,\textsuperscript{167} the court found that there was a disputed issue of material fact as to whether plaintiff's fear of contracting AIDS was reasonable.\textsuperscript{168} The court did, however, limit the period of mental anguish to the time from the date of alleged exposure until the fear becomes unreasonable.\textsuperscript{169}

In a stern dissent, Judge Highers asserted that the "prevailing trend and, I believe, the better-reasoned rule, as well as Tennessee case law, all require" that a plaintiff is precluded from recovery for the emotional distress caused by the fear of contracting AIDS when the plaintiff cannot prove exposure to the HIV virus.\textsuperscript{170} The fact that the plaintiff had tested HIV-negative for nearly three years after the incident further established the unreasonableness

\begin{itemize}
  \item \textsuperscript{163} \textit{Id.} at *1. Plaintiff's complaint alleged that the hospital was negligent in placing the needle container near the wash basin and in failing to place warnings on it. \textit{Id.}
  \item \textsuperscript{164} 639 S.W.2d 431 (Tenn. 1982). In \textit{Laxton}, the plaintiffs brought suit to recover damages for, inter alia, the mental distress resulting from the alleged negligence of the defendant-exterminating company in contaminating plaintiff's water supply with a toxic chemical. \textit{Id.} at 431. The plaintiffs had used the contaminated water for "normal household purposes" for approximately nine months before finding out about the high level of toxic contamination. \textit{Id.} at 432-33. Though the plaintiffs became worried about their health and that of their children, blood tests taken a month later revealed that they had not been harmed. \textit{Id.} at 433. In reinstating the judgment of the trial court in favor of the plaintiffs, the court stated that "recovery for the negligent infliction of mental anguish should be allowed in cases where, as a result of a defendant's negligence, a plaintiff has ingested an indefinite amount of a harmful substance." \textit{Id.} at 434. However, the court limited the recovery of mental anguish to the "time between discovery of the ingestion and the negative medical diagnosis or other information that puts to rest the fear of injury." \textit{Id.}
  \item \textsuperscript{166} \textit{Carroll}, 1992 WL 276717, at *4; see supra notes 103-11, 120-34 and accompanying text.
  \item \textsuperscript{166} \textit{Carroll}, 1992 WL 276717, at *4. The court interpreted \textit{Laxton} to mean a plaintiff may recover for mental distress due to the ingestion of a "potentially harmful" substance. \textit{Id.}
  \item \textsuperscript{167} \textit{Id.} at *4. But see HERMANN & SCHURGIN, supra note 100, § 1:29 (citing studies establishing risk of infection after needle stick exposure to infected blood is in range of 0.3% to 0.9%).
  \item \textsuperscript{168} \textit{Carroll}, 1992 WL 276717, at *5.
  \item \textsuperscript{169} \textit{Id.}
  \item \textsuperscript{170} \textit{Id.} (Highers, J., dissenting). Judge Highers also emphasized \textit{Burk} as support for his position. \textit{Id.}
\end{itemize}
of the plaintiff’s fear. Concerned that the majority’s standard would lead to a floodgate of claims based on unsubstantiated fears, Judge Highers stated that proof of actual exposure must remain an essential prerequisite to recovery.

In addition to not considering the HIV status of the plaintiff, the courts in Castro and Carroll unmeritoriously expanded the guidelines for what may constitute exposure. In order to prevent the saturation of the courts with idle claims based on irrational fears of unproven events, exposure must remain a decisive element of a plaintiff’s fear of disease claim, including one for the fear of AIDS.

IV. PROPOSED SOLUTION

In accord with the decision in Burk, one of the most recent federal cases to deal with this issue, it is submitted that before a claim for the recovery of damages for the fear of developing AIDS may proceed, the plaintiff must prove both exposure to the HIV virus and that the fear was reasonable. Absent either requirement, the claim should be dismissed as a matter of law. Additionally, present medical research indicates that a negative HIV test six months after exposure virtually eliminates the likelihood that such exposure will result in the future development of AIDS. Thus,
HIV testing should also be a critical factor in a court’s assessment of whether a claim for AIDS phobia may proceed. A six-month period is suggested, after which, assuming negative results, fear of contracting AIDS would not be reasonable. This standard should remain flexible; if it is determined that this six-month period is either too short or long, the standard should be adjusted accordingly.

ally Transmitted Diseases Treatment Guidelines 1, in AIDS and HIV Infection in the General STD Setting, 38 Morbidity & Mortality Wkly. Rep. 5-8 (Sept. 1, 1989) [hereinafter AIDS and HIV] (stating that HIV test should be repeated three and six months after exposure to rule out infection); Steven Findlay, Speedier New Tests for the AIDS Virus, U.S. News & World Rep., Nov. 28, 1988, at 79 (reporting that current tests take up to six months from exposure to detect HIV). The time between infection and the development of antibodies is called the window period, and though it may last up to six months, it usually falls somewhere between 6 to 14 weeks. Hermann & Schurgin, supra note 100, § 1:30; see also Bartlett & Finkbeiner, supra note 100, at 283 (stating approximately one half of infected people will test positive for antibodies within six weeks, most will test positive within three months, and some people will not test positive for longer periods, possibly up to three years); Douglas & Pinsky, supra note 136, at 45 (explaining that antibodies to HIV are generally detectable fourteen weeks after infection, but in some cases it takes six to fourteen months or longer); AIDS and HIV, supra, at 1 (stating that antibodies are usually detectable within three months of exposure, but test should be repeated six months after as well); Sloand et al., supra note 136, at 2861 (stating that antibodies to HIV normally develop six to eight weeks after infection). Though some sources seem to indicate that it may possibly take longer than six months for antibodies to HIV to develop, the majority rely on studies in which researchers have been able to detect the HIV virus before the development of antibodies has begun, by means of a test called the polymerase chain reaction (PCR). See David T. Imagawa et al., Human Immunodeficiency Virus Type 1 Infection in Homosexual Men Who Remain Seronegative for Prolonged Periods, 320 New Eng. J. Med. 1458 (1989). Despite such findings, researchers have questioned the reliability of these tests because of the high false-positive rate and the inability to achieve consistent results. See Sloand et al., supra note 136, at 2862. However, other researchers believe that the number of false negative results is extremely low. Id.

In addition, during the early period of infection, before antibodies to HIV are produced, the likelihood that a negative test result for antibodies is false is “vanishingly small”. See Bartlett & Finkbeiner, supra note 100, at 283. For blood donors in general, only one in 40,000 or 200,000 will falsely test negative. Id. Further, the likelihood that a positive test result will be false is also “vanishingly small”. Id. These figures make the HIV antibody test one of the most accurate tests in medicine. Id. It is wisest to simply have the test repeated if there are any serious doubts. Id. In the rare situation when, after repeated tests, an individual still has questions, it may be wise to take one of the newer tests that detects the virus itself and therefore avoid the problem posed by the window period. Id.; Hermann & Schurgin, supra note 100, § 1:34; Findlay, supra, at 79. The false-negative problem (indicating infected blood as healthy) is a relatively minor problem, and the tests are more than 99% accurate when properly performed on people likely to be exposed to the virus. See Science Brief, supra note 136, at 71.

See supra note 177. A six-month period is suggested because it appears to reflect the consensus in the medical community of how long a person may in fact be infected with the virus, without testing positive on a HIV test. Id.
Finally, to mitigate the harshness of this standard it is proposed that a plaintiff who can prove exposure but tests negative for HIV should be permitted to recover for the emotional distress suffered during the six-month period in which the HIV tests were inconclusive.\textsuperscript{179} Contrary to \textit{Johnson}, in which the plaintiff received damages for the emotional distress he suffered for years after the exposure\textsuperscript{180} even though he consistently tested HIV-negative,\textsuperscript{181} a limitation such as this is not only more equitable, but is also consistent with existing medical knowledge.\textsuperscript{182} One recent case has already applied a similar restriction.\textsuperscript{183} This could be applied uniformly in every jurisdiction, regardless of how it defines reasonable fear.\textsuperscript{184} From jurisdictions that permit recovery where the possibility of contracting the future disease is slim,\textsuperscript{185} to those that require a high likelihood of development,\textsuperscript{186} a negative HIV test result six months after the alleged incident would serve to remove virtually all likelihood of developing AIDS due to the exposure.\textsuperscript{187} An HIV-negative test result would break the causal connection normally required between the exposure and the plaintiff’s fear.\textsuperscript{188}

On the other hand, an HIV-positive test result by the plaintiff should suffice as conclusive evidence that the plaintiff’s fear is reasonable. Empirical evidence suggests that approximately one half of the people infected with HIV will develop AIDS within eight to ten years after infection.\textsuperscript{189} Accordingly, if a plaintiff can establish


\textsuperscript{180} Johnson v. West Va. Univ. Hosps., Inc., 413 S.E.2d at 891.

\textsuperscript{181} Id.

\textsuperscript{182} See supra notes 177-78 and accompanying text (stating that six-month period is considered adequate to detect HIV).

\textsuperscript{183} See Faya v. Estate of Almaraz, Nos. 143, 144, 1993 WL 60500, at *9 (Md. Mar. 9, 1993), where the Maryland Court of Appeals held that plaintiffs’ recovery for the fear of contracting AIDS was limited to “the period constituting [plaintiffs’] reasonable window of anxiety—the period between which they learned of [possible exposure to the virus] and received their HIV-negative results.” Although the plaintiffs in Faya did not learn of their HIV-negative status until more than one year after the alleged exposure, the court did take judicial notice of the fact that “at least 95% of HIV carriers will test positive for the virus (though not manifest AIDS) within six months of acquiring it.” \textit{Id.} at *5.

\textsuperscript{184} See infra notes 185-96 and accompanying text.

\textsuperscript{185} See supra notes 83-86 and accompanying text.

\textsuperscript{186} See supra notes 87-90 and accompanying text.

\textsuperscript{187} See supra note 177.

\textsuperscript{188} See supra note 84 (citing cases where significant causal link was required).

\textsuperscript{189} \textit{Bartlett} & \textit{Finkbeiner}, supra note 100, at 9. Once stricken with AIDS, an individ-
that he is HIV infected, he can thereby prove that his chances of developing AIDS are significant. From jurisdictions that require a high likelihood of developing the future condition, to those that do not, an HIV-positive test result for the plaintiff should suffice to indicate the probability of eventually developing AIDS. In addition, a positive HIV test result clearly serves as a "medically identifiable effect" to provide the court with concrete evidence of the reasonableness of the plaintiff's fear. Finally, such a

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190 See AIDS and HIV, supra note 177, at 1.
191 See supra notes 87-90 and accompanying text.
192 See supra notes 83-86 and accompanying text.
193 See supra note 189 (stating that one medical report finds it statistically probable that HIV infection results in AIDS).
194 See supra note 92 (citing cases where "medically identifiable event" was required for recovery on fear of disease claim).

Three facts make the Johnson case troubling:

1) According to a 1989 Centers for Disease Control report, 95 percent of those contracting HIV will "seroconvert" or develop antibodies in the first six months. The CDC has stated that is "extremely unlikely" that seroconversion will occur more than a year after exposure.

2) The CDC has found no documented cases of AIDS transmission through biting or saliva, says Dr. Lyle Peterson, chief of the HIV Population Study Section.

3) The plaintiff was awarded $1.9 million for his "reasonable fear" of contracting AIDS.

Id. The Johnson decision is "unfortunate from a public policy standpoint. Why cater to people with serious misconceptions about how the disease is transmitted?" (quoting insurance defense lawyer Rita M. Theisen, member of ABA coordinating committee). "There's clearly an element of unreasonableness when virtually every medical authority is willing to testify that AIDS is not spread by biting." (quoting Michele Zavos, staff director for ABA's Coordinating Committee on AIDS). AIDS activists, alarmed by AIDS phobia suits, claim such cases "reinforce myths about how AIDS is spread." In addition to the public phobic response to AIDS, "[t]he judiciary has been lax about educating itself about the facts and science of AIDS." (quoting Carisa Cunningham, spokesperson for Washington D.C.-based AIDS Action Council); see also Susan Adams, Money for Fear, Why a Jury Awarded $21.75 Million to Rock Hudson's Lover, AM. L.AW., July 1989, at 136. In 1985, Marc Christian, lover of the late Rock Hudson, sued Hudson's estate and Hudson's secretary for the emotional distress Christian allegedly suffered over his fear of contracting AIDS. Id. Christian's fear arose from Hudson's failure to warn Christian that Hudson had AIDS. Id. A Los Angeles superior court jury awarded Christian $21.75 million in damages, more than half of which was to compensate Christian for his alleged emotional distress. Id. This was despite the fact that Christian had tested negative for HIV sixteen times in the
standard would advance the policy goals sought to be furthered by disease-phobia suits: deterring irresponsible behavior, and compensating victims for the period in which the uncertainty and fear reasonably persist.\textsuperscript{196}

**CONCLUSION**

AIDS has become a world-wide epidemic\textsuperscript{197} creating much fear and uncertainty. Our judges must not permit this AIDS hysteria to overwhelm the courtroom.\textsuperscript{198} A jury must be moved by reason rather than by fear.\textsuperscript{199} It is conceded that the strict guidelines suggested may stir disagreement in the legal community. It is nevertheless imperative that the courts begin to redirect their attention to the crucial issues by focusing on the medical facts of this disease rather than society's fears or passions.

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\textsuperscript{196} See Goldberg, *supra* note 195.

\textsuperscript{197} See generally HERMANN & SCHURGIN, *supra* note 100, \S 1:03 (stating that AIDS has been reported in 136 countries and territories).

\textsuperscript{198} Abby Rubenfeld, *People with AIDS or HIV-Infection as Plaintiffs in Tort Cases, in AIDS AND THE COURTS* 319, 320 (Clark C. Abt & Kathleen M. Hardy eds., 1990).

\textsuperscript{199} *Id.* at 321-322.