

RECOVERY FOR EMOTIONAL DISTRESS  
DUE TO FEAR OF AIDS:  
EXPOSING AIDSPHOBIA IN ALABAMA

"There is a disease in existence that does not discriminate. It has no prejudice and it has befriended many people. Although this disease is very sociable, it is also very deadly. The disease being referred to is Acquired Immune Deficiency Syndrome."<sup>1</sup>

I. INTRODUCTION

Acquired Immune Deficiency Syndrome (AIDS)<sup>2</sup> is a fatal disease<sup>3</sup> resulting from the Human Immunodeficiency Virus (HIV).<sup>4</sup> The virus attacks the immune system and diminishes the body's ability to fight infections and other diseases.<sup>5</sup> Trans-

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1. Joycelyn L. Cole, Comment, *AIDS-phobia: Are Emotional Distress Damages For a Fear of AIDS a Legally Compensable Injury?*, 19 T. MARSHALL L. REV. 333, 333 (1994).

2. AIDS "is a specific group of diseases or conditions which are indicative of severe immunosuppression related to infection with the human immunodeficiency virus." Kathryn Kruse, *Recent Development, Snyder v. Mekhjian: New Jersey AIDS Assistance Act Permits Limited Discovery of Blood Donor Information by Plaintiff Suing Health Care Entity for Contraction of AIDS Through Blood Transfusion*, 37 VILL. L. REV. 337, 337 n.1 (1992) (quoting CENTERS FOR DISEASE CONTROL, HIV/AIDS SURVEILLANCE REPORT 1 (1991)).

3. See UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 1, 12 (1986) (noting that AIDS kills 16% of infected people within three months of diagnosis, 23% within six months, 35% within a year, 57% within two years, and 81% within three years).

4. The Center for Disease Control and other organizations believe that HIV is the cause of AIDS. HIV gradually destroys the body's immune system by reducing the number of necessary T-Lymphocyte cells. As a result, an individual infected with HIV becomes more susceptible to infection. See Sidney D. Watson, *Eliminating Fear Through Comparative Risk: Docs, AIDS, and the Anti-Discrimination Ideal*, 40 BUFF. L. REV. 739, 746 (1992). The most common of these infections are pneumocystis carinii pneumonia, Karposi's sarcoma, and candida esophagitis. See CENTERS FOR DISEASE CONTROL, UPDATE: HUMAN IMMUNODEFICIENCY VIRUS INFECTIONS IN HEALTH CARE WORKERS EXPOSED TO BLOOD OR INFECTED PATIENTS 36, No. 1S, MMRW 265-89.

5. AIDS TASK FORCE OF ALABAMA, QUESTIONS & ANSWERS: LIVING HEALTHY WITH HIV 1.

mission of HIV is not believed to occur through casual contact: "you cannot get it from a toilet seat, by sharing drinking glasses or other eating utensils, shaking hands, kissing, hugging, or sleeping together. You cannot give it to anyone else by sneezing or coughing on them or by preparing their food."<sup>6</sup> Rather, transmission of HIV from an infected person to another person is generally believed to require the direct transfer of bodily fluids.<sup>7</sup> The most common routes of exposure to HIV are through sexual contact,<sup>8</sup> blood or blood products,<sup>9</sup> and from mother to child.<sup>10</sup> HIV is similar to other viruses in that it may cause no symptoms at all, mild or moderate symptoms, or more serious symptoms or diseases related to AIDS.<sup>11</sup> HIV is a unique and horrifying virus because once a person is infected, the virus can remain undiscovered in the body for over a year.<sup>12</sup> Perhaps the most frightening aspect of HIV is the fact that infected individuals can remain asymptomatic for a decade or longer.<sup>13</sup>

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6. *Id.* at 3. See also Cole, Comment, *supra* note 1, at 335 (citing CENTERS FOR DISEASE CONTROL, AIDS INFORMATION: HIV TRANSMISSION, No. 320020, January 1, 1993). In studies of families living with an HIV-positive member, no incidences of nonsexual, nonblood, or nonperinatal transmission were found, regardless of the fact that they shared bathrooms, eating utensils, and toothbrushes. See *id.*

7. AIDS TASK FORCE OF ALABAMA, *supra* note 5, at 3; Alan R. Lifson, *Transmission of the Human Immunodeficiency Virus*, in AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT, AND PREVENTION 111, 111-13 (Vincent T. DeVita, Jr. et al. eds., 3d ed. 1992).

8. See AIDS TASK FORCE OF ALABAMA, *supra* note 5, at 3. Although the most efficient transmission through sexual contact appears to occur in male-to-male anal intercourse, it has been well documented in male-to-female and female-to-male contact. See Lifson, *supra* note 7, at 112-13.

9. See AIDS TASK FORCE OF ALABAMA, *supra* note 5, at 3. A large percentage of adults with AIDS are thought to have contracted the disease through blood transfusions, the sharing of intravenous needles and syringes, or other contact whereby contaminated blood enters the bloodstream through cuts, lacerations, etc. See Lifson, *supra* note 7, at 112-13.

10. See AIDS TASK FORCE OF ALABAMA, *supra* note 5, at 3. HIV transmission from mother to child can occur transplacentally to the fetus. See Lifson, *supra* note 7, at 115. Consequently, an HIV-positive mother can theoretically infect her child at birth by way of the large doses of blood the mother loses, although no such cases have been discovered. See *id.* At least one HIV-positive mother has infected her newborn through breast feeding. See *id.* at 115-16.

11. AIDS TASK FORCE OF ALABAMA, *supra* note 5, at 2.

12. See *id.*; John Patrick Darby, Comment, *Tort Liability for the Transmission of the AIDS Virus: Damages for Fear of AIDS and Prospective AIDS*, 45 WASH. & LEE L. REV. 185, 197 (1988).

13. See Gerald Schochetman, *Biology Of Human Immunodeficiency Viruses*, In

HIV and AIDS have recently reached epidemic proportions in the United States. As a result, the public has become increasingly cognizant of the extreme and deadly nature of the virus that causes AIDS.<sup>14</sup> Because AIDS commands massive attention from the media and the public, and because the disease inevitably results in death, "fear of AIDS is commonplace."<sup>15</sup> It is, therefore, no surprise that this combination of societal panic and a fatal disease has led to lawsuits where a party, suspecting that he or she has been exposed to HIV, seeks to be compensated for the emotional distress resulting therefrom.<sup>16</sup> These claims are often brought even though the plaintiff has tested negative for HIV, leading to the conclusion that the plaintiff was not exposed to and, therefore, will not contract AIDS.<sup>17</sup> In some jurisdictions, however, a plaintiff may nonetheless seek and recover emotional distress damages due to the fear of contracting AIDS in the future.<sup>18</sup> This cause of action has become known as a claim for "AIDSphobia."<sup>19</sup>

Although a lawsuit of this kind may have been filed in the Alabama court system, no Alabama court to date has issued a published decision addressing the issue of whether to recognize AIDSphobia claims, or identifying what the elements of such a claim should be in this state. However, as the infected population of the state increases,<sup>20</sup> so does the possibility of exposure to the virus.<sup>21</sup> Consequently, it is only a matter of time before

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*AIDS Testing: Methodology And Management Issues* 18, 27 (Gerald Schochetman & J. Richard George eds., 1992) (describing how the latency period may continue for 10 years or longer before an infected person may experience physical symptoms).

14. See Karen L. Chadwick, *Fear of AIDS: The Catalyst for Expanding Judicial Recognition of a Duty to Prevent Emotional Distress Beyond Traditional Bounds*, 25 N.M. L. REV. 143, 143 (1995).

15. Richard K. Vanik, Comment, *Emotional Distress for Fear of Exposure to AIDS: An Infection Headed for Texas*, 32 HOUS. L. REV. 1451, 1453 (1996).

16. See Chadwick, *supra* note 14, at 143.

17. See Victoria L. Rees, *AIDSphobia: Forcing Courts to Face New Areas of Compensation for Fear of a Deadly Disease*, 39 VILL. L. REV. 241, 243 (1994).

18. See *infra* sections II(A) and II(B).

19. See Rees, *supra* note 17, at 243.

20. Approximately 4,851 people in Alabama are reported to have AIDS. ALABAMA AIDS UPDATE 1 (February 6, 1998). Of these, 4,788 are adults and 63 are children. *Id.* Of those in Alabama diagnosed with AIDS, 2,590 have died, while 2,261 are living. *Id.*

21. See Vanik, *supra* note 15, at 1454 (citing Susan Y. Chu et al., *Epidemiology of HIV in the United States*, in AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT, AND PRE-

AIDSphobia lawsuits become more prevalent in Alabama courts. Part II of this Comment will discuss the evolution and elements of emotional distress claims, especially those involving fear of a future disease. Part III of this Comment will explore the general principles that have emerged from AIDSphobia cases in other jurisdictions. Part IV of this Comment will apply these principles to those of Alabama tort law in an attempt to predict and propose possible outcomes of future Alabama cases.<sup>22</sup> Part V will conclude this Comment.

## II. RECOVERY FOR EMOTIONAL DISTRESS IN "PHOBIA" CLAIMS

### A. *Elements of an Emotional Distress Claim*

There are two types of emotional distress claims that tort law recognizes: intentional infliction of emotional distress and negligent infliction of emotional distress. In order for a plaintiff to establish a prima facie case for intentional infliction of emotional distress, he or she must prove: (1) the defendant's conduct was "extreme and outrageous;"<sup>23</sup> (2) the defendant intended to cause severe emotional distress to the plaintiff;<sup>24</sup> (3) the defendant's extreme and outrageous conduct caused the emotional distress of the plaintiff;<sup>25</sup> and (4) the plaintiff's emotional distress was severe.<sup>26</sup>

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VENTION 107 (Vincent T. DeVita, Jr. et al. eds., 3d ed. 1992), for the proposition that high HIV infection rates correlate with continuing high rates of HIV transmission and suggest increases in morbidity and mortality in the foreseeable future).

22. See generally Vanik, *supra* note 15, for a similar discussion on AIDSphobia cases in the state of Texas.

23. See *American Rd. Serv. Co. v. Inmon*, 394 So. 2d 361, 364 (Ala. 1980) (labeling the cause of action "tort of outrage"); RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) (defining "extreme and outrageous conduct" as that which exceeds "all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community").

24. See *Inmon*, 394 So. 2d at 364; *Womack v. Eldridge*, 210 S.E.2d 145, 147-48 (Va. 1974). The plaintiff may satisfy this element by proving that the defendant "had the specific purpose of inflicting emotional distress" or that the defendant acted recklessly in disregarding the high probability that his or her conduct would cause emotional distress. *Id.* at 148.

25. See *Inmon*, 394 So. 2d at 364.

26. See *id.*; *Harris v. Jones*, 380 A.2d 611, 616-17 (Md. 1977) (stating that the



In order for a plaintiff to establish a prima facie case for negligent infliction of emotional distress, he or she must prove: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached this duty; (3) the defendant's breach caused the emotional distress of the plaintiff; and (4) the plaintiff suffered emotional distress.<sup>27</sup> Plaintiffs have confronted substantial obstacles in proving a prima facie case for negligent infliction of emotional distress. For example, courts and plaintiffs have struggled over the issues of whether the injuries suffered were actually and proximately caused by the defendant, and whether the plaintiff has alleged physical injury either caused or accompanied by severe emotional distress.<sup>28</sup>

Additional difficulties in establishing a prima facie case for negligent infliction of emotional distress exist with respect to policy concerns. One such policy consideration, the dangerous potential of fraudulent claims, has been described in the following manner:

The temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the intentional tort context are lacking.<sup>29</sup>

Yet another judicial concern that frustrates a plaintiff's ability to prove negligent infliction of emotional distress is the notion that permitting such claims would "open the floodgates" to unbearable amounts of litigation.<sup>30</sup>

### *B. Proving Emotional Distress Claims*

Emotional distress has long been recognized as a legitimate element of recovery, both where the defendant has acted

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plaintiff must demonstrate that the emotional distress caused by defendant is more than a "reasonable man in a civilized society should be expected to endure").

27. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 30 (5th ed. 1984) (discussing traditional formula for cause of action based on negligence).

28. See Rees, *supra* note 17, at 246.

29. KEETON ET AL., *supra* note 27, § 54, at 361 (citation omitted).

30. KEETON ET AL., *supra* note 27, § 54, at 360-61.

intentionally<sup>31</sup> and where the defendant's negligence has caused physical injury.<sup>32</sup> Traditionally, however, damages for emotional distress in the absence of physical injury or intent have been allowed in only a limited number of cases.<sup>33</sup> Thus, in cases where emotional damages have been the sole result of a defendant's negligence, courts have been reluctant in allowing plaintiffs to recover.<sup>34</sup> Suspicion of such claims is based upon the fact that claims involving only emotional distress are often somewhat trivial, difficult to prove, and, thus, an inappropriate use of judicial resources.<sup>35</sup> In addition, the degree of fault in the case of mere negligence does not warrant allowing recovery for emotional injury and allowing recovery in all such cases would inevitably result in fraudulent claims.<sup>36</sup> As a consequence, courts have historically imposed physical impact<sup>37</sup> and physical manifestation<sup>38</sup> requirements to prevent an inundation of fraudulent claims.<sup>39</sup>

The philosophy behind the physical impact rule is that the actual impact or injury suffered by the plaintiff provides courts with assurance that the emotional distress is not fraudulent.<sup>40</sup>

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31. See, e.g., *Inmon*, 394 So. 2d at 364; *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 285 (Cal. 1952); *Funeral Servs. by Gregory v. Bluefield Community Hosp.*, 413 S.E.2d 79, 80 (W. Va. 1991); RESTATEMENT (SECOND) OF TORTS § 46 (1965).

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

33. See RESTATEMENT (SECOND) OF TORTS § 436A (1965) (discussing the view that claims for emotional distress without physical injury should not be allowed).

34. See *id.* ("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.").

35. See, e.g., *Knaub v. Gotwalt*, 220 A.2d 646, 648 (Pa. 1966).

36. See *Chadwick*, *supra* note 14, at 144-45 (citing RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965)); *Rees*, *supra* note 17, at 246.

37. The physical impact rule requires that a plaintiff's emotional distress be accompanied by some type of physical injury. See JOHN G. FLEMING, *THE LAW OF TORTS* 32 (7th ed. 1987).

38. The physical manifestation rule requires that a plaintiff's emotional distress manifest itself in the form of physical symptoms. See FLEMING, *supra* note 37, at 32.

39. See Amy L. Hansen, Note, *Establishing Uniformity in HIV-Fear Cases: A Modification of the Distinct Event Approach*, 29 VAL. U. L. REV. 1251, 1264-65 (1995).

40. See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 55, at 350-51 (3d ed. 1964) (stating that the theory behind the rule is that the impact provides

Similarly, the physical manifestation requirement serves to limit recovery to claims that can be proven through palpable physical proof under the assumption that only legitimate emotional distress claims manifest themselves in physical symptoms.<sup>41</sup> In a majority of jurisdictions today, however, courts do not require a showing of physical impact if a plaintiff can demonstrate that he or she was in the "zone of danger" of the defendant's negligent act.<sup>42</sup> Only in a minority of jurisdictions do courts still require plaintiffs (even those within the zone of danger) to establish manifestation of physical injury deriving from his or her emotional distress.<sup>43</sup> Consequently, in most jurisdictions, emotional distress torts have evolved from strictly "parasitic" torts to independent causes of action regardless of these prerequisites to recovery.<sup>44</sup> Some courts, however, continue to have reservations about recognizing negligent infliction of emotional distress as an independent cause of action and insist on requiring some physical evidence of distress.<sup>45</sup>

### C. Emotional Distress Recovery for Fear of Future Disease

Plaintiffs increasingly test the boundaries of emotional distress recovery in light of the expansive judicial recognition of independent emotional distress claims.<sup>46</sup> One area in which a duty to prevent emotional distress has gained recognition involves cases where the plaintiff has alleged "cancerphobia"<sup>47</sup>

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guarantee that the emotional distress is legitimate).

41. See Julie A. Davies, *Direct Action for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 3-4 (1992).

42. See Rees, *supra* note 17, at 248.

43. *Id.* (citing *Gottschild v. Consolidated Rail Corp.*, 988 F.2d 355, 361 (3d Cir. 1993), *rev'd*, 114 S. Ct. 2396 (1994), for the proposition that a minority of courts employ the "physical impact" rule, which "requires a contemporaneous physical injury or impact to recover for negligent infliction of emotional distress").

44. See Rees, *supra* note 17, at 248.

45. See *id.* (citing *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982) (denying emotional damage recovery to "DES daughters" because they failed to demonstrate actual physical harm accompanying their fear of cancer)).

46. See Rees, *supra* note 17, at 249.

47. The term "cancerphobia" was first used in the New York case of *Ferrara v. Galluchio*, 152 N.E.2d 249 (N.Y. 1958). See Rees, *supra* note 17, at 250. In that case, the court granted plaintiff recovery for her fear of developing cancer after she was exposed to radiation from unnecessary X-rays. See *id.* at 250-51. The court justified

and sought recovery for the fear of developing cancer in the future.<sup>48</sup> A cancerphobia case typically arises when the plaintiff is exposed to a known carcinogen. Due to extended latency periods and the inability of medical science to accurately predict the probability of cancer actually developing, it is possible that the plaintiff may not have suffered a compensable physical injury at the time of the lawsuit. The plaintiff, however, may still allege that he or she has suffered emotional distress due to the possibility that the exposure might result in future cancer development.

Although most jurisdictions have now recognized a plaintiff's ability to recover based on fear of developing cancer,<sup>49</sup> the physical injury and manifestation requirements continue to make such recovery tough to come by.<sup>50</sup> In line with the historic physical injury rule, if a plaintiff can prove that he or she has suffered physical harm, emotional distress damages are recoverable as parasitic damages.<sup>51</sup> In some cancerphobia cases, courts have strictly adhered to the general parasitic rule in determining whether to permit recovery. In *Jackson v. Johns-Manville Sales Corp.*,<sup>52</sup> for example, the plaintiff sued to recover for his fear of developing cancer due to exposure to asbestos. Because he had already been diagnosed with asbestosis, the plaintiff convinced the jury that he would probably develop cancer and

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its decision on the grounds that the claim was inherently authentic and that it was common knowledge among lay people that the injuries suffered by the plaintiff frequently resulted in cancer. See *id.* at 251.

48. See, e.g., *Jackson v. Johns-Manville Corp.*, 781 F.2d 394 (5th Cir. 1986); *Laxton v. Orkin*, 639 S.W.2d 431 (Tenn. 1982).

49. Rees, *supra* note 17, at 250 (citing Fournier J. Gale III & James L. Goyer, *Recovery for Cancerphobia and Increased Risk of Cancer*, 15 CUMB. L. REV. 723, 730-31 (1985)).

50. See *Payton v. Abbott Labs*, 437 N.E.2d 171, 175 (Mass. 1982) (denying recovery because plaintiff failed to establish physical injury); *Howard v. Mt. Sinai Hosp.*, 217 N.W.2d 383, 385 (Wis.), *reh'g*, 219 N.W.2d 576 (Wis. 1974) (denying recovery based on the remoteness of plaintiff's alleged damages); *Amader v. Johns-Manville Corp.*, 514 F. Supp. 1031, 1033 (E.D. Pa. 1981) (denying recovery for wife's fear that her husband might develop cancer). It should be noted, however, that these courts did not base denial of recovery on the noncompensability of fear of cancerphobia claims. See Gale & Goyer, *supra* note 49, at 731.

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

52. 781 F.2d 394 (5th Cir. 1986).

subsequently die as a result. Relying on asbestosis as the prerequisite physical injury, the court held that the plaintiff should be allowed to recover emotional distress damages because it was more likely than not that he would develop cancer.<sup>53</sup> As might be expected, courts which strictly follow the parasitic damage rule deny recovery in fear of cancer cases when no objective physical injury has been demonstrated.<sup>54</sup> In contrast, some jurisdictions allow recovery where there is no evidence of physical harm, provided a plaintiff can demonstrate a legally discernible impact (i.e., exposure to a known carcinogen).<sup>55</sup>

Although courts are still concerned with fraudulent emotional distress claims, many courts have nonetheless held that a plaintiff may recover for fear of contracting cancer without demonstrating the likelihood or probability that a future cancer will actually develop.<sup>56</sup> Such courts consider recovery for a plaintiff's cancerphobia to hinge on the "reasonableness" of the plaintiff's fear of developing cancer.<sup>57</sup> Unfortunately, however, the various jurisdictions following such a "reasonableness" standard have articulated disparate tests for determining what constitutes a "reasonable" fear.<sup>58</sup>

In response to increased judicial reception of cancerphobia emotional distress claims, a variety of disease-related emotional

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53. See *Jackson*, 781 F.2d at 414.

54. See, e.g., *In re Hawaii Federal Asbestos cases*, 734 F. Supp. 1563 (D. Haw. 1990). In that case, shipyard workers sought emotional distress damages for fear of developing cancer due to exposure to asbestos, although they showed no signs of asbestosis. Because the evidence of exposure did not rise to the level of "functional impairment," the court found no sufficient basis for allowing recovery for the plaintiffs who could not show physical injury. See *id.* at 1567. Exposure alone was not sufficient: there must be "a compensable harm underlying the emotional distress before recovery may be had for mental anguish." *Id.* at 1569. Relying on statistical evidence that the plaintiff's likelihood of developing cancer was remote, the court concluded that emotional distress in such a case was unreasonable as a matter of law. See *id.*

55. See, e.g., *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271 (3d Cir. 1985); *Laxton v. Orkin*, 639 S.W.2d 431 (Tenn. 1982).

56. See, e.g., *Dempsey v. Hartley*, 94 F. Supp. 918 (E.D. Pa. 1951) (permitting recovery where plaintiff's breast was in a "precancerous" condition, although the likelihood or probability that cancer would develop was not proved); *Flood v. Smith*, 13 A.2d 677 (Conn. 1940) (allowing plaintiff to recover for fear of breast cancer recurring without consideration of whether such recurrence was likely or probable).

57. See *Rees*, *supra* note 17, at 251-52.

58. *Id.* at 252.



distress claims have emerged, including claims for fear of contracting AIDS. Although AIDSphobia claims are a recent phenomenon, courts analyze such claims under both general emotional distress and cancerphobia principles.<sup>59</sup> Because AIDS is such a unique creature, however, courts continue to have difficulty in establishing proper standards of proof when plaintiffs seek to recover for emotional distress due to fear of contracting the virus.<sup>60</sup>

In cases where emotional distress damages are sought based on the *transmission* of HIV, the plaintiff's infection with HIV or AIDS provides the courts with tangible proof of injury.<sup>61</sup> Some courts acknowledge that a plaintiff's claim for emotional distress may be litigated in connection with the claim for HIV or AIDS infection.<sup>62</sup> In such cases, the claims for mental damages are brought after the plaintiff becomes infected with HIV or AIDS. Thus, in HIV transmission cases, the emotional distress claims follow the same pattern as other emotional distress claims, where the damages are accompanied by an objective, concrete, physical impact or manifestation.<sup>63</sup> In such cases, the actual transmission of HIV usually satisfies either the physical impact or physical manifestation requirements.<sup>64</sup>

The obstacles encountered in proving AIDSphobia claims<sup>65</sup> resemble those encountered by plaintiffs instituting traditional emotional distress claims. Since individuals who seek damages for their fear of contracting AIDS frequently sue under an intentional infliction of emotional distress theory,<sup>66</sup> a negligent infliction of emotional distress theory,<sup>67</sup> or a simple negligence

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59. *See id.*

60. *See id.*

61. *See* PHILIP H. CORBOY, LEGAL IMPLICATIONS: THE AIDS CRISIS, BRIEF 41 (Fall 1986).

62. *See* Hansen, *supra* note 39, at 1266.

63. *See supra* notes 31-43 and accompanying text.

64. *See id.*

65. A true AIDSphobia claim seeks recovery for emotional distress damages resulting from the fear of contracting AIDS in the future, as opposed to damages resulting from the actual transmission of HIV or from the likelihood of contracting HIV. *See* Rees, *supra* note 17 and accompanying text.

66. *See supra* notes 23-26 and accompanying text for a discussion of the elements which must be proved under this cause of action.

67. *See supra* note 27 and accompanying text for a discussion of the elements which must be proved under this cause of action.

theory, plaintiffs in such cases must prove the same elements that one must prove on a general emotional distress claim: duty, breach, cause, and damage. However, unlike a general emotional distress claim, and unlike an emotional distress claim connected to an HIV transmission claim, a true AIDSphobia claim raises considerations unique to the disease itself. For example, courts have attempted to restrict liability and ensure that emotional distress claims are legitimate by requiring physical injury by way of physical impact accompanying the fear<sup>68</sup> or physical manifestation of that fear.<sup>69</sup> However, "[t]he reality is that emotional security is valid and deserves the same respect as physical security. Individuals have the same right to physical and mental tranquility because both are important to human existence."<sup>70</sup> Consequently, many courts have abandoned the physical impact and manifestation rules in light of the fact that they are outdated and ridiculous in the face of current medical science and psychology regarding both the recognition and diagnosis of emotional injury.<sup>71</sup>

While the debate continues over the retention of the physical impact and manifestation requirements, the greatest focus in

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68. See, e.g., *Marchica v. Long Island R.R.*, 810 F. Supp. 445, 449 (E.D.N.Y. 1993) (holding that a puncture wound from a hypodermic needle satisfied the jurisdiction's physical injury requirement); *Johnson v. West Virginia Univ. Hosp., Inc.*, 413 S.E.2d 889, 891 (W. Va. 1991) (finding that a bite from an AIDS patient satisfied the physical impact rule). But see *Burk v. Sage Products, Inc.*, 747 F. Supp. 285, 287 (E.D. Pa. 1990) (stating that, absent an injury stemming from his alleged exposure to HIV, a plaintiff who was stuck by a needle protruding from a disposal container could not recover for fear of HIV).

69. See, e.g., *Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367, 1372 (N.D. Ill. 1988) (finding that wife of hemophiliac who contracted AIDS through contaminated blood failed to allege any physical injury or illness resulting from her emotional distress); *Ordway v. County of Suffolk*, 583 N.Y.S.2d 1014, 1016 (1992) (holding that, because plaintiff stated only that he lived in fear of HIV and failed to allege any physical manifestation of the fear, plaintiff's allegations did not guarantee legitimacy).

70. Hansen, *supra* note 39, at 1276.

71. See *id.* at 1269. "The study of psychiatry is now an integral and respected part of medical science." *Id.* at n.95 (quoting David J. Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 164 (1977)); see also *Taylor v. Baptist Medical Ctr., Inc.*, 400 So. 2d 369, 374 (Ala. 1981) (stating that "to continue to require physical injury caused by culpable tortious conduct, when mental suffering may be equally recognizable standing alone, would be an adherence to procrustean principles which have little or no resemblance to medical realities").

recent AIDSphobia cases is upon whether the plaintiff should be required to prove an actual channel of exposure to the virus in order to recover emotional distress damages.

### III. AIDSPHOBIA CASES IN OTHER JURISDICTIONS

In the context of AIDSphobia cases, tort law and public policy are pulling against one another. While tort law has traditionally limited recovery for emotional distress damages,<sup>72</sup> enormous public sympathy has justifiably emerged for those who legitimately fear contracting AIDS. Claims for emotional distress created by fear of contracting AIDS have been based upon negligent infliction of emotional distress,<sup>73</sup> intentional infliction of emotional distress,<sup>74</sup> and products liability.<sup>75</sup> This Comment will address only those claims which have been based upon a theory of negligence.

Courts in various jurisdictions have considered whether the fear of contracting AIDS presents a viable and compensable cause of action, with differing results.<sup>76</sup> Traditionally, in order for a plaintiff to have a legitimate claim for the fear of contracting a future disease, he or she must show exposure to a disease-causing agent<sup>77</sup> and that the fear is reasonable under the

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72. AIDS TASK FORCE OF ALABAMA, *supra* note 5. See *supra* notes 31-37 and accompanying text; KEETON ET AL., *supra* note 27, § 12, at 54-56 (explaining the traditional hesitance of courts to recognize that the negligent infliction of emotional distress is a legitimate and separate cause of action).

73. See, e.g., *Reynolds v. Highland Manor, Inc.*, 1998 WL 57007, at \*1 (Kan. Ct. App. Feb. 13, 1998); *Carroll v. Sisters of St. Francis Health Servs., Inc.*, 868 S.W.2d 585, 586-87 (Tenn. 1993); *Johnson v. West Va. Univ. Hosp., Inc.*, 413 S.E.2d 889, 891 (W. Va. 1991).

74. See, e.g., *Baranowski v. Torre*, No. CV90-0236178, 1991 WL 240460, at \*2 (Conn. Super. Ct. Nov. 7, 1991).

75. See, e.g., *Cotita v. Pharma-Plast, U.S.A., Inc.*, 974 F.2d 598, 599 (5th Cir. 1992).

76. See *infra* sections II(A) and II(B).

77. See, e.g., *Harper v. Illinois Central Gulf R.R.*, 808 F.2d 1139, 1140 (5th Cir. 1987) (indicating that plaintiff may not recover for emotional distress because of fear of future disease unless there is sufficient evidence of exposure to potentially harmful agent); *Cain v. Armstrong World Indus., Inc.*, 785 F. Supp. 1448, 1451 (S.D. Ala. 1992) (stating that, in order to recover for fear of contracting cancer, plaintiff is required to prove actual exposure to known carcinogen); *Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528, 1533 (D. Kan. 1990) (noting that plaintiff must demonstrate exposure to harmful substance to recover for emotional distress); *Harco Drugs, Inc.*

circumstances.<sup>78</sup> Although relying on the general principles articulated in cancerphobia cases, courts in AIDSphobia cases have not consistently required a plaintiff to demonstrate both exposure and reasonableness of the fear. Most, if not all, courts compel a plaintiff to show that his or her fear is reasonable, but they are divided on the issue of whether to require a plaintiff to prove that he or she was exposed to the virus. It appears that such courts apply either an "actual exposure" or a "reasonableness" standard.<sup>79</sup>

### A. Actual Exposure Standard

Recovery has been almost universally denied where the plaintiff has failed to prove either a verifiable injury in the form of a positive testing for HIV, or a specific channel of exposure to the virus.<sup>80</sup> For example, in *Burk v. Sage Products, Inc.*,<sup>81</sup> the United States District Court for the Eastern District of Pennsylvania utilized a strict exposure analysis and denied the plaintiff recovery for fear of AIDS which he alleged was the result of a needle stick incident.<sup>82</sup> In that case, Burk received a needle stick injury from a syringe that was protruding from a container manufactured by the defendant.<sup>83</sup> Burk brought a products liability action against Sage Products, claiming that he suffered severe emotional distress as a result of his fear of contracting AIDS.<sup>84</sup> Burk admitted that he could not prove that the needle

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v. Holloway, 669 So. 2d 878, 881 (Ala. 1995) (stating that plaintiff must show exposure to carcinogen to recover emotional distress damages).

78. See, e.g., *Harco*, 669 So. 2d at 881 (noting that plaintiff must show "reasonable basis for her distress" for fear of developing cancer).

79. See *Cole*, *supra* note 1, at 337. At least two courts do not apply either the "actual exposure" or the "reasonableness" standard. See *id.* The Arizona Court of Appeals and the United States District Court for the Northern District of Illinois use an "actual injury" approach. See *id.* The plaintiff must demonstrate that he or she has actually tested positive for HIV, regardless of whether actual exposure is proved. See *id.* (citing *Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367 (N.D. Ill. 1988); *Transamerica Ins. Co. v. Doe*, 840 P.2d 288 (Ariz. App. 1992)).

80. See *infra* notes 78-137 and accompanying text; *Cole*, Comment, *supra* note 1, at 338.

81. 747 F. Supp. 285 (E.D. Pa. 1990).

82. See *Burk*, 747 F. Supp. at 286.

83. *Id.* at 285.

84. *Id.*

was contaminated, but he alleged that a number of AIDS patients were on that floor of the hospital at the time of incident.<sup>85</sup> Subsequently, Burk tested negative for HIV on five occasions.<sup>86</sup>

The trial court disallowed Burk's claim for negligent infliction of emotional distress.<sup>87</sup> Although it acknowledged that the fear of contracting AIDS may be a compensable injury, the court did not regard Burk's claim as such a case.<sup>88</sup> The court's denial of recovery was based upon the fact that Burk had not alleged any injury arising from actual exposure to the AIDS virus.<sup>89</sup> Rather than demonstrating definite exposure to the virus, Burk's allegation merely showed that he had been exposed to a hypodermic needle.<sup>90</sup> "[P]laintiff's only injuries stem from his fear that he has been exposed to the disease. . . . [W]hile injuries stemming from a fear of contracting illness after exposure to a disease-causing agent may present compensable damages, injuries stemming from fear of the initial exposure do not."<sup>91</sup>

The Appellate Division of the Supreme Court of New York reached the same conclusion in *Hare v. State*<sup>92</sup> and denied recovery for fear of AIDS because the plaintiff failed to establish that he was actually exposed to HIV.<sup>93</sup> The plaintiff, an X-ray

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85. *Id.*

86. *Id.* at 286.

87. *Burk*, 747 F. Supp. at 286.

88. *Id.*

89. *Id.* at 288.

90. *Id.*

91. *Id.* at 288.

92. 570 N.Y.S.2d 125 (N.Y. App. Div. 1991).

93. *See Hare*, 570 N.Y.S.2d at 126-27. New York's Appellate Division recently confronted the issue of whether actual exposure is required in AIDSphobia claims. *See Montalbano v. Tri-Mac Enterprises, Inc.*, 652 N.Y.S.2d 780 (N.Y. App. Div. 1997). The plaintiff in that case claimed that he suffered emotional distress due to his fear of AIDS when he purchased and consumed the defendant's french fries, which he later discovered were covered with blood. *Id.* The court determined that damages for AIDSphobia could only be obtained when actual exposure was established. *Id.* at 781. The plaintiff, however, failed to demonstrate actual exposure to the virus, and there was "no logical probability that the blood allegedly found in a McDonald's french fries bag would be infected with HIV." *Id.* Since the plaintiff continued to test negative for HIV, the court affirmed the trial court's summary judgment in favor of the defendant. *Id.* at 782.

Although *Hare* and *Montalbano* expressly state that New York follows an "actual exposure" standard in AIDSphobia cases, it is questionable whether that proposition is true, for some New York decisions appear to follow a "reasonableness"



technician, was bitten by an inmate who was attempting to commit suicide.<sup>94</sup> The patient sank his teeth into the forearm of the plaintiff, resulting in a deep gash.<sup>95</sup> Consequently, the plaintiff sought emotional distress damages for his fear of contracting AIDS.<sup>96</sup> No evidence was introduced at trial substantiating the rumors that the inmate was HIV-positive or that he had AIDS.<sup>97</sup> The court, therefore, denied recovery to the plaintiff for his emotional distress, concluding that a claimant cannot recover for fear of AIDS when actual exposure is not proven; especially where, as here, the plaintiff tested negative for HIV and there was no proof showing a likelihood that he would contract the disease.<sup>98</sup>

In *Johnson v. West Virginia University Hospitals, Inc.*,<sup>99</sup> however, the West Virginia Supreme Court of Appeals utilized an actual exposure standard and determined that a plaintiff's fear of contracting AIDS was a compensable injury.<sup>100</sup> There are some distinctions in the facts of these two cases that may account for the different conclusions. Similar to the plaintiff in *Hare*, a hospital patient bit a security officer who was restraining him.<sup>101</sup> A key distinction in *Johnson* is the fact that the patient's own blood was in and around his mouth when he bit the plaintiff because the patient had already bitten himself on the arm.<sup>102</sup> Most notably, there was conclusive proof that the patient was in fact infected with AIDS and that the contaminated blood of the patient came into direct contact with the blood of the plaintiff.<sup>103</sup> Although the plaintiff continued to test nega-

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standard. See *Castro v. New York Life Ins. Co.*, 588 N.Y.S.2d 695 (Sup. Ct. N.Y. County 1991) (denying defendant's motion to dismiss because a reasonable person could legitimately fear contracting AIDS under the circumstances); *Marchica v. Long Island R.R.*, 810 F. Supp. 445 (E.D.N.Y. 1993) (denying defendant's motion to dismiss, which was based upon plaintiff's failure to allege actual exposure, because reasonableness of plaintiff's fear is question for factfinder).

94. *Hare*, 570 N.Y.S.2d at 126.

95. *Id.*

96. *Id.*

97. *Id.* at 126.

98. *Id.* at 127.

99. 413 S.E.2d 889 (W. Va. 1991).

100. *Johnson*, 413 S.E.2d at 894.

101. *Id.* at 891.

102. *Id.*

103. *Id.*

tive for AIDS, he did suffer from post traumatic stress disorder and his wife refused to have sexual relations with him for fear of contracting the virus.<sup>104</sup>

Adopting an "actual exposure" approach, the court held that a plaintiff must initially demonstrate actual exposure to the disease before he or she can recover for emotional distress damages due to a fear of contracting a disease such as AIDS.<sup>105</sup> "[I]f there is no exposure, then emotional distress damages will be denied."<sup>106</sup> Since the security officer was in fact exposed to the AIDS virus by way of the patient's bite, the court concluded that his fear was a compensable injury.<sup>107</sup>

Similarly, the Tennessee Supreme Court, in *Carroll v. Sisters of St. Francis Health Services, Inc.*,<sup>108</sup> ruled that proof of actual exposure was required to recover emotional distress damages for fear of contracting AIDS.<sup>109</sup> Carroll, the plaintiff, was visiting her sister in the hospital and washed her hands in a wash basin.<sup>110</sup> Reaching for a paper towel, Carroll unknowingly put her hand in a container used to dispose of needles and was pricked on three of her fingers.<sup>111</sup> Although she tested negative for HIV antibodies six times over a three-year period, Carroll sought to recover for her emotional distress caused by her fear of contracting AIDS.<sup>112</sup>

Carroll urged the court to adopt a "reasonableness" standard,<sup>113</sup> under which she would be entitled to recover as long as her fear of contracting AIDS was rational and well-grounded.<sup>114</sup> The hospital, on the other hand, argued that Carroll could not prevail unless she proved that the needle which injured her was contaminated with the virus.<sup>115</sup> The court accepted the latter contention, imposing an objective requirement

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104. *Id.* at 891.

105. *Johnson*, 413 S.E.2d at 893.

106. *Id.*

107. *Id.* at 894.

108. 868 S.W.2d 585 (Tenn. 1993).

109. *Carroll*, 868 S.W.2d at 594.

110. *Id.* at 586.

111. *Id.*

112. *Id.* at 586-87.

113. *See infra* section II(B).

114. *See Carroll*, 868 S.W.2d at 587-88.

115. *See id.*

of actual exposure as a necessary element of recovery.<sup>116</sup> Since Carroll had tested negative for AIDS and had admitted that she could not demonstrate actual exposure, the court concluded that her claim was insufficient as a matter of law.<sup>117</sup>

The Supreme Court of Tennessee recently affirmed the *Carroll* holding in the case of *Bain v. Wells*.<sup>118</sup> In that case, the plaintiff brought a negligent infliction of emotional distress claim against a drug and alcohol rehabilitation center, seeking damages for his fear of contracting AIDS.<sup>119</sup> Without his knowledge or consent, the plaintiff was placed in a room with a patient who was HIV-positive for approximately eight days.<sup>120</sup> During that period, the two shared a bathroom although plaintiff had an open cut on his buttock. The plaintiff also mistakenly used his roommate's disposable razor.<sup>121</sup> Following that incident, the roommate informed the plaintiff that he was HIV-positive.<sup>122</sup> The plaintiff subsequently sued the hospital under a negligent infliction theory, alleging that he had suffered severe emotional distress due to his fear that he would contract AIDS.<sup>123</sup>

Relying on the decision in *Carroll*, the court noted that proof of actual exposure to the virus is necessary to establish the reasonable connection between an act or omission of a defendant

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116. See *id.* at 594.

117. See *id.* The court mentioned, however, that if a plaintiff could prove exposure, damages for emotional distress would be "confined to the time between discovery of the [exposure] and the negative medical diagnosis or other information that puts to rest the fear of injury." *Id.* See also *Faya v. Almaraz*, 620 A.2d 327, 337 (Md. 1993) (stating that plaintiffs "may only recover for their fear and its physical manifestations which may have resulted from [defendant's] alleged negligence for the period constituting their reasonable window of anxiety—the period between which they learned of [defendant's] illness and received their HIV-negative results").

118. 936 S.W.2d 618 (Tenn. 1997).

119. *Bain*, 936 S.W.2d at 620-21.

120. *Id.* at 620.

121. *Id.*

122. *Id.*

123. *Id.* at 620. The plaintiff also alleged that the hospital's policy of placing HIV-infected patients in the same room with patients not infected, without warning or obtaining prior consent of the non-infected patients, constituted outrageous conduct which deviated from the standard of care in the community. *Bain*, 936 S.W.2d at 622-23. The court, however, rejected that contention, reasoning that since the hospital did not violate applicable healthcare standards, the conduct could not reasonably be characterized as extreme and outrageous. See *id.* at 623.

and the emotional distress of a plaintiff who fears contracting AIDS.<sup>124</sup> In addition to merely following precedent, the court also acknowledged that sound public policy considerations support requiring proof of actual exposure in AIDSphobia cases:

AIDS is a disease that spawns widespread public misperception based upon the dearth of knowledge concerning HIV transmission. Indeed, plaintiffs rely upon the degree of public misconception about AIDS to support their claim that their fear was reasonable. To accept this argument is to contribute to the phobia. Were we to recognize a claim for the fear of contracting AIDS based upon a mere allegation that one may have been exposed to HIV, totally unsupported by any medical evidence, or factual proof, we would open a Pandora's Box of "AIDS-phobia" claims by individuals whose ignorance, unreasonable suspicion or general paranoia cause them apprehension over the slightest of contact with HIV-infected individuals or objects. Such plaintiffs would recover for their fear of AIDS, no matter how irrational. We believe the better approach is to assess the reasonableness of a plaintiff's fear of AIDS according to the plaintiff's *actual*—not *potential*—exposure to HIV.<sup>125</sup>

There was no evidence to show that the infected roommate had cut himself while using his razor, or that the plaintiff had cut himself with the razor.<sup>126</sup> Furthermore, the plaintiff repeatedly tested negative for the virus over an eighteen month period.<sup>127</sup> Because the plaintiff offered no evidence of actual exposure and no evidence of a medically recognized channel of transmission, the court held that he had failed to establish proximate cause, an essential element in a cause for negligent infliction of emotional distress.<sup>128</sup>

In *Babich v. Waukesha Memorial Hospital, Inc.*,<sup>129</sup> the Wisconsin Court of Appeals followed this line of cases and applied an "actual exposure" standard in considering whether to allow emotional distress damages for fear of contracting

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124. *Id.* at 624.

125. *Id.* at 625 (quoting *Brzoska v. Olson*, 668 A.2d 1355, 1363 (Del. 1995) (emphasis in original)).

126. *Id.* at 621.

127. *Bain*, 936 S.W.2d at 621.

128. *Id.* at 625.

129. 556 N.W.2d 144 (Wis. Ct. App. 1996).

AIDS.<sup>130</sup> The plaintiff, Babich, was admitted to Waukesha Memorial Hospital because of an asthma attack.<sup>131</sup> When she got into her hospital bed she was stuck in the buttock by a syringe that had been left in the linens.<sup>132</sup> Babich tested negative for the AIDS virus on three occasions during the next eighteen months, but claimed she suffered severe emotional distress during that period.<sup>133</sup> As a result of her fear of contracting AIDS, Babich sought recovery for emotional distress.<sup>134</sup>

The court of appeals affirmed the trial court's granting of summary judgment in favor of the defendant hospital on the grounds that Babich could not prove that the needle was contaminated with the virus.<sup>135</sup> Recognizing that other courts analyzing such claims have applied two different tests, the court concluded that the "actual exposure" standard was the most appropriate in light of public policy concerns.

Requiring a needlestick victim to offer proof that the needle came from a contaminated source strikes a proper balance between ensuring that victims are compensated for their emotional injuries and that potential defendants take reasonable steps to avoid such injuries, but nonetheless protects the courts from becoming burdened with frivolous suits.<sup>136</sup>

In light of the fact that Babich could not prove actual exposure, the court feared that allowing her to pursue her claim would consequently subject the courts to more "fear of AIDS" or "AIDS-phobia" claims.<sup>137</sup> Although it did not dispute that this type of incident could "cause a layperson unfamiliar with the scientific data to reasonably fear that he or she was going to contract AIDS,"<sup>138</sup> the court found no other way to segregate a needlestick injury from some other event that could also create a reasonable, but scientifically unfounded, fear.<sup>139</sup> Babich conced-

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130. *Babich*, 556 N.W.2d at 147-48.

131. *Id.* at 145.

132. *Id.*

133. *Id.* at 146.

134. *Id.* at 146.

135. *Babich*, 556 N.W.2d at 148.

136. *Id.* at 147.

137. *Id.* at 148.

138. *Id.*

139. *Id.* at 148.



ed that she could not demonstrate that the syringe which stuck her was contaminated with HIV; therefore, the court denied recovery for her emotional distress caused by her fear of AIDS.<sup>140</sup>

Most recently, in *Reynolds v. Highland Manor, Inc.*,<sup>141</sup> a Kansas appeals court followed the majority rule and adopted the "actual exposure" standard for fear of AIDS cases.<sup>142</sup> In that case, the plaintiff sought emotional distress damages for her fear of contracting AIDS after she accidentally picked up a used condom left in her motel room.<sup>143</sup> Although the plaintiff had bloody cuticles and a burn on one of her fingers at the time of the incident, she was not certain that these areas came into contact with the contents of the condom.<sup>144</sup> Additionally, the contents of the condom were never tested, and the plaintiff tested negative for HIV four times following the incident at the motel room.<sup>145</sup> Consequently, the trial court granted the defendant's motion for summary judgment on several grounds, including the fact that the "plaintiff failed to demonstrate that she had been exposed to HIV."<sup>146</sup>

On appeal, the Kansas court noted that, in AIDSphobia cases, courts have considered whether the plaintiff can show that he or she has been exposed to HIV and whether the fear is reasonable even after a negative HIV test result.<sup>147</sup> The court further stated that "the clear majority of appellate courts have denied recovery where the plaintiff failed to demonstrate actual exposure to the virus that causes AIDS."<sup>148</sup> Although it recognized that some courts have not required the plaintiff to demonstrate such exposure, the court decided that Kansas should adopt the majority rule for several reasons.<sup>149</sup> First, recovery for claims based upon the fear of acquiring a disease can be had only in Kansas when a substantial probability exists that an

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140. *Babich*, 556 N.W.2d at 148.

141. 1998 WL 57007 (Kan. Ct. App. Feb. 13, 1998).

142. *Reynolds*, 1998 WL 57007, at \*6.

143. *Id.* at \*1.

144. *Id.*

145. *Id.*

146. *Id.* at \*2.

147. *See Reynolds*, 1998 WL 57007, at \*5.

148. *Id.*

149. *See id.* at \*6.

individual will acquire the disease.<sup>150</sup> As such, the court concluded that it is "highly unlikely" that a plaintiff can establish a substantial probability that he or she will contract AIDS if there is no evidence of exposure to the HIV virus.<sup>151</sup> The court also noted that public policy demands that plaintiffs meet a strict standard in order to sustain an AIDSphobia claims.<sup>152</sup> Specifically, the court believed that it might foster trivial emotional distress claims by allowing "plaintiffs to pursue claims based on unreasonable fears that they may acquire a disease to which they have never been exposed or have no evidence of exposure."<sup>153</sup>

It is not surprising that the majority of courts considering AIDSphobia cases impose the "actual exposure" standard. This approach, which attempts to weed out claims based upon irrational and unreasonable fear, appears to be consistent with the approach taken by the majority of courts in cases involving the fear of contracting other diseases, such as cancer. In requiring a plaintiff to prove both actual exposure and reasonableness of fear, these courts help to ensure that those with the highest likelihood of contracting AIDS recover while preventing the inundation of questionable, and possibly fraudulent, AIDSphobia claims.

### B. Reasonableness Standard

Although the majority of courts addressing this issue have utilized the "actual exposure" standard,<sup>154</sup> some jurisdictions do not require a plaintiff to present proof of exposure to establish a prima facie case for fear of contracting AIDS.<sup>155</sup> Rather, these courts require only that the plaintiff have a fear which is

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150. *See id.*

151. *Id.*

152. *Reynolds*, 1998 WL 57007, at \*7.

153. *Id.*

154. *See* section II(A). *supra*; *see also* *Kerins v. Hartley*, 21 Cal. Rptr. 2d 621, 629 (Cal. Ct. App. 1993) ("The majority trend is to disallow recovery of emotional distress damages if the plaintiff fails to plead or prove actual exposure to the AIDS virus. . . ."); *Williamson v. Waldman*, 696 A.2d 14, 18 (N.J. Super. Ct. App. Div. 1997) (noting that the majority of jurisdictions require that plaintiff demonstrate actual exposure as a condition for recovery).

155. *See infra* notes 158-190 and accompanying text.

reasonable under the circumstances.<sup>156</sup> Thus, in these jurisdictions, distinct events resulting in "potential" exposure may be sufficient to create a reasonable fear of becoming infected with the disease, making recovery possible.<sup>157</sup>

In *Castro v. New York Life Insurance Co.*,<sup>158</sup> for example, a New York court upheld the right to claim emotional distress for fear of contracting AIDS.<sup>159</sup> While handling garbage, a cleaning worker was stuck by a used hypodermic needle.<sup>160</sup> The court stated that, in order for a plaintiff to succeed, he or she must prove that the condition suffered is a direct result of the defendant's breach and that the breach was the proximate cause of the emotional distress.<sup>161</sup> In line with the traditional tort concepts of foreseeability, the court noted that the consequences must be reasonably expected to flow from the type of harm.<sup>162</sup> Relying on a "reasonableness" standard, the court determined that "if 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, there is a guarantee of genuineness of the claim."<sup>163</sup> The court denied the defendant's motion to dismiss, on grounds that any reasonable person cognizant of the massive amounts of health information available regarding AIDS could develop a legitimate fear of contracting the disease if stuck with a used syringe.<sup>164</sup>

A federal district court in New York reached a similar conclusion in *Marchica v. Long Island Rail Road*.<sup>165</sup> The plaintiff was a railroad worker who was stuck with a discarded hypodermic needle while clearing trash from a shaftway.<sup>166</sup> Although he tested negative for HIV, the plaintiff sued Long Island Rail Road, seeking emotional distress damages resulting from his fear of contracting AIDS.<sup>167</sup> The defendant moved the court to

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156. See *infra* notes 158-190 and accompanying text.

157. See Cole, *supra* note 1, at 341.

158. 588 N.Y.S.2d 695 (Sup. Ct. N.Y. County 1991).

159. See *Castro*, 588 N.Y.S.2d at 698.

160. *Id.* at 695.

161. *Id.* at 697.

162. *Id.*

163. *Id.* at 697.

164. See *Castro*, 588 N.Y.S.2d at 698.

165. 810 F. Supp. 445, 446 (E.D.N.Y. 1993).

166. See *Marchica*, 810 F. Supp. at 446.

167. *Id.* at 447. The plaintiff was informed upon taking the HIV test that it

grant summary judgment on the grounds that the plaintiff failed to demonstrate actual exposure, but the court decided instead to adopt a "reasonableness" test, holding that "whether the plaintiff's fear was reasonable. . . is a question for the finder of fact and will not be determined on papers submitted in a motion for summary judgment."<sup>168</sup>

The Maryland Court of Appeals also utilized a "reasonableness" standard in *Faya v. Almaraz*.<sup>169</sup> The defendant Almaraz, an oncological surgeon, knew himself to be HIV-positive, yet he performed a partial mastectomy and axillary dissection on Sonya Faya on October 8, 1988.<sup>170</sup> In March of the following year, Almaraz removed an axillary hematoma from Faya.<sup>171</sup> Six months later he surgically removed a benign lump from the breast of Perry Rossi.<sup>172</sup> In December of 1990, both Faya and Rossi learned of the now-deceased Almaraz's illness for the first time by reading about it in the newspaper.<sup>173</sup> Both women filed suit against Almaraz's estate,<sup>174</sup> although neither of them tested positive for AIDS.<sup>175</sup> The plaintiffs did not allege actual exposure to the virus; rather, they asserted the possibility that Almaraz might have cut himself during their surgeries, resulting in a commingling of his blood with their own.<sup>176</sup> As a result of

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could take six months for the HIV to incubate. *Id.* He subsequently disclosed to his psychologist that during that period he felt as if he were "on a death sentence." *Id.* Further testaments to his allegations of emotional distress were that he could not sleep due to nightmares, that his family bonds had been deteriorating, and that some of his co-workers would not shake his hands for fear of catching something. *Id.*

168. *Marchica*, 810 F. Supp. at 452.

169. 620 A.2d 327 (Md. 1993). At the time of its decision, the *Faya* court was the only appellate court which had addressed and adopted the general reasonableness standard. This standard had been used at the trial court level by a few courts. *See supra* notes 158-164 and accompanying text. More recently, in 1996, the New Mexico Supreme Court also rejected the "actual exposure" standard and adopted what is essentially a "reasonableness" standard in *Madrid v. Lincoln County Med. Ctr.*, 923 P.2d 1154 (N.M. 1996).

170. *Faya*, 620 A.2d at 329.

171. *Id.*

172. *Id.* Almaraz developed cytomegalovirus retinitis, the eye infection signaling full-blown AIDS, prior to performing surgery on Rossi. *Id.* The surgeon knew, therefore, that not only was he HIV-positive but that he had developed full-blown AIDS before the Rossi operation. *See id.*

173. *Faya*, 620 A.2d at 329. Almaraz died of AIDS on November 16, 1990. *Id.*

174. *Id.* at 329.

175. *Id.*

176. *Id.*

Almaraz's negligence, Faya and Rossi sought emotional distress damages for their fear of contracting AIDS.<sup>177</sup>

In considering whether the plaintiffs' fear of contracting AIDS was a legally compensable injury, the court did not find dispositive the fact that the plaintiffs did not allege actual exposure to or transmission of the virus.<sup>178</sup> Noting that the medical characteristics of HIV and AIDS were proper objects of judicial inquiry, the court acknowledged that the well-established facts concerning the virus had been accepted within the medical community.<sup>179</sup> The court recognized that the majority of other jurisdictions required actual exposure to the virus in order to recover for fear of AIDS, but it believed that the plaintiffs' fears were reasonable as a matter of law.<sup>180</sup> The court reasoned that the requirement of proving actual exposure or transmission unfairly harms most plaintiffs because they often lack the necessary information to do so.<sup>181</sup>

A New Jersey court recently decided to follow the minority rule in *Williamson v. Waldman*.<sup>182</sup> While attempting to remove EKG stickers from a trash can in defendant's medical offices, the plaintiff was pricked with a lancet, a surgical knife with a small, two-edged blade.<sup>183</sup> The lancet was disposed of within the rubbish, violating New Jersey regulatory requirements.<sup>184</sup> Although the plaintiff tested negative for HIV five times over a three-and-one-half year period, she instituted a negligent infliction of emotional distress claim, alleging damages for her fear of contracting AIDS as a result of the lancet prick.<sup>185</sup>

The court first explained that the defendant's violation of regulatory standards for disposing lancets created a rebuttable presumption of exposure.<sup>186</sup> It then noted that, where the quality of the defendant's conduct is such as to create this presumption of exposure to the virus, the plaintiff's resulting claim for

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177. *Faya*, 620 A.2d at 330-34.

178. *Id.* at 336.

179. *Id.* at 333.

180. *Id.* at 336.

181. *Id.*

182. 677 A.2d 1179 (N.J. Super. Ct. App. Div. 1996).

183. *Williamson*, 677 A.2d at 1180.

184. *Id.*

185. *Id.*

186. *Id.*



emotional distress should not be dismissed on summary judgment.<sup>187</sup> Rejecting the "actual exposure" test for determining AIDSphobia claims, the court adopted a "reasonableness" standard:

It cannot validly be said, as a matter of law, in the light of common knowledge, that a person who receives a puncture wound from medical waste reacts unreasonably in suffering serious psychic injury from contemplating the possibility of developing AIDS, even if only for some period of time, until it is no longer reasonable, following a series of negative tests, to apprehend that result. Indeed, one need not have actually acquired the HIV virus to be so affected by such a fear for a period, especially since some time must pass before an accurate test can be administered. We know of no reason, given existing circumstances and the realities of the times, as well as the policies that underlie tort law doctrine in this state, to require as a prerequisite to recovery for infliction of emotional distress that the plaintiff first establish actual exposure to the feared disease.<sup>188</sup>

Thus, the Appellate court reversed the trial court's granting of summary judgment in favor of the defendant.<sup>189</sup> Under this standard, the plaintiff would be successful only if the jury found the defendant negligent, and only to the extent it found "serious or substantial emotional injury from *reasonably* experienced emotional distress."<sup>190</sup>

Even though these jurisdictions do not require a plaintiff to demonstrate actual exposure, the precedent from a majority of courts indicates that, in order to prevail in AIDSphobia cases in the future, a plaintiff must actually be exposed to HIV.<sup>191</sup> In

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187. *Id.* at 1181.

188. *Williamson*, 677 A.2d at 1181.

189. *Id.* at 1182.

190. *Id.* (emphasis added).

191. *See* section II(A) *supra*; *see also* *Neal v. Neal*, 873 P.2d 871 (Idaho 1994) (rejecting plaintiff's claim against adulterous husband because she could not demonstrate that husband or partner was HIV-positive); *Doe v. Surgicare of Joliet, Inc.*, 643 N.E.2d 1200, 1201-03 (Ill. App. Ct. 1994) (denying recovery to plaintiff who was administered an anesthetic through needle that had stuck a surgical technician, because plaintiff failed to show actual exposure after testing negative for HIV); *Kaufman v. Physical Measurements, Inc.*, 615 N.Y.S.2d 508, 509 (N.Y. App. Div. 1994) (disallowing emotional distress claim for plaintiff pricked by a hypodermic needle because both plaintiff and individual on whom needle had been used tested negative for HIV); *Funeral Services by Gregory, Inc. v. Bluefield Community Hosp.*,

fact, some of the majority courts have expressly added the further requirement that a plaintiff prove a medically sound channel of transmission of the virus.<sup>192</sup> Furthermore, cases like *Castro*, *Marchica*, and *Faya*, which allowed recovery for fear of AIDS in the absence of showing actual exposure, have been severely criticized as setting a dangerous precedent that plaintiffs may recover in AIDSphobia cases although their claims are based on pure conjecture and speculation.<sup>193</sup>

### C. *The Reasonableness of the Fear*

Courts which utilize the "actual exposure" standard also require that a plaintiff's fear of contracting AIDS be reasonable under the circumstances. Analogous to the cancerphobia cases, once the court has determined the threshold requirement of actual exposure to HIV, it must next consider whether the plaintiff's resulting fear is reasonable.<sup>194</sup> In *Kerins v. Hartley*,<sup>195</sup> for example, the plaintiff sought to recover emotional distress damages due to her fear of contracting AIDS.<sup>196</sup> In facts almost identical to those in *Faya*, the defendant surgeon failed to disclose his HIV-positive status to the plaintiff before surgery.<sup>197</sup> The trial court granted summary judgment in favor of the defendant, but the California Court of Appeals reversed, reasoning that fear resulting from the possible exposure to HIV was reasonable until the plaintiff "has had sufficient opportunity to determine with reasonable medical certainty that he or she

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413 S.E.2d 79, 82-83 (W. Va. 1991) (denying emotional distress recovery on the grounds that there was no exposure to AIDS virus during normal embalming procedure and because proper precautions were utilized).

192. See, e.g., *Brown v. New York City Health & Hosps.*, 648 N.Y.S.2d 880, 887 (N.Y. App. Div. 1996) (requiring plaintiff to prove the existence of a scientifically accepted method of HIV transmission in addition to proving actual exposure).

193. See Vanik, *supra* note 15, at 1467-68 (citing Lauren J. Camillo, Comment, *Adding Fuel to the Fire: Realistic Fears or Unrealistic Damages in AIDSphobia Suits?*, 35 S. TEX. L. REV. 331, 344-46 (1994); Peter V. Lee & Lynn A. Shapiro, *Recent Developments, Fear of Exposure to HIV as Compensable Injury*, 2 S. CAL. INTERDISC. L. REV., 393, 397 (1993)).

194. See Vanik, *supra* note 15, at 1468.

195. 21 Cal. Repr. 2d 621 (Cal. Ct. App. 1993).

196. *Kerins*, 21 Cal. Repr. 2d at 621.

197. *Id.*

has not been exposed to or infected with the AIDS virus."<sup>198</sup> The California Supreme Court, however, ordered the court of appeals to reconsider the case<sup>199</sup> in light of *Potter v. Firestone Tire & Rubber Co.*,<sup>200</sup> a fear of cancer case. In *Potter*, the California Supreme Court held that emotional distress damages due to the fear of contracting cancer may be recovered only when there is actual exposure to a known carcinogen and when "it is more likely than not that the feared cancer will develop in the future."<sup>201</sup> On remand, the *Kerins* court reasoned that *Potter* applied with equal force in the AIDS context and ruled in favor of the defendant surgeon because it could not be proved that, more likely than not, the plaintiff would develop AIDS.<sup>202</sup>

A wide spectrum of standards have been implemented by various jurisdictions in determining the reasonableness of fear for contracting a disease.<sup>203</sup> The most "liberal" jurisdictions have permitted recovery in such cases when no viable connection exists between the fear and the actual likelihood of an occurrence of that which is feared.<sup>204</sup> Connecticut applies what appears to be a rebuttable presumption, where recovery is allowed when the possibility of contracting a disease cannot be disproven.<sup>205</sup> Nebraska is slightly more restrictive, allowing recovery for fear of disease if the feared event might occur.<sup>206</sup> With its requirement that the possibility of the feared disease be "more likely than not," California lies at the most "conservative"

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198. *Id.* at 632.

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

200. 863 P.2d 795 (Cal. 1993).

201. *Potter*, 863 P.2d at 800. The *Potter* court justified its decision to adopt the "more likely than not" standard on public policy grounds. *Id.* at 812. First, the increase in cancerphobia cases necessitates that some restrictions are needed to assure the availability of liability insurance. *Id.* Another policy reason articulated regards the concern for availability of compensation for those plaintiffs who actually develop cancer. *Id.* at 813. Finally, the court strongly desired to establish a definite and predictable threshold for permitting recovery in fear of disease cases. *See id.*

202. *Kerins v. Hartley*, 33 Cal. Rptr. 2d 172, 178 (Cal. Ct. App. 1994).

203. *See Vanik*, *supra* note 15, at 1469.

204. *See, e.g., Faya*, 620 A.2d at 336-37 (allowing recovery without any evidence of actual exposure to HIV); *Murphy v. Penn Fruit Co.*, 418 A.2d 480, 482 (Pa. Super. Ct. 1980) (permitting recovery for fear of contracting breast cancer although doctors testified that fear was unreasonable).

205. *See Figlar v. Gordon*, 53 A.2d 645, 648 (Conn. 1947).

206. *See Baylor v. Tyrrell*, 131 N.W.2d 393, 401-02 (Neb. 1964).

end of the spectrum.<sup>207</sup>

#### IV. ALABAMA LAW AND AIDSPHOBIA

No Alabama court has issued a published decision addressing the issue of whether to recognize an AIDSphobia claim, or what a plaintiff must prove under such a claim in this state. A recent case before the Alabama Supreme Court, however, did involve what could possibly have been considered an AIDSphobia claim.<sup>208</sup> In *Davis*, the plaintiff sought damages for emotional distress after she discovered human blood in the package that contained a biscuit and gravy she had partially eaten.<sup>209</sup> She sued under theories of negligence, wantonness, and the Alabama Extended Manufacturer's Liability Doctrine.<sup>210</sup> On appeal, the defendant contended that the plaintiff should not be allowed to recover damages based on her allegations that she suffered emotional distress arising out of a fear of contracting AIDS.<sup>211</sup> Specifically, the defendant characterized plaintiff's emotional distress as "AIDSphobia" and argued that she suffered no injury as a result of eating blood-tainted food.<sup>212</sup> Unfortunately, however, the court found it unnecessary to reach this issue because it viewed the defendant's argument as a new theory raised on appeal for the first time.<sup>213</sup> Thus, the court did not explicitly address the issue of whether a claim for AIDSphobia is cognizable in Alabama. Of course, it may be argued that the Alabama Supreme Court implicitly held that such a claim may be made since it permitted the plaintiff to recover for her emotional distress. Along that same line, it may be argued that the court implicitly held that a plaintiff need not

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207. *Potter*, 863 P. 2d at 800; *Kerins*, 33 Cal. Rptr. 2d at 178.

208. See *Flagstar Enterprises, Inc. v. Davis*, 1997 WL 564475 (Ala. Sept. 12, 1997).

209. *Id.* at \*1.

210. *Id.*

211. *Id.* at n.5.

212. *Id.*

213. *Flagstar*, 1997 WL 564475, at \*8 n.4. The court noted that the record indicated that the defendant tried its case on the theory that the plaintiff failed to prove each of the elements of her claims, "not on the theory, presented here for the first time, that as a matter of law she could recover no damages for emotional distress." *Id.*

prove actual exposure in order to prevail on such a claim because the plaintiff did not have the blood sample tested for HIV.<sup>214</sup> However, there simply is not enough information contained in the language of the case to indicate what Alabama courts will or should do. Arguments to the contrary would call for inferences based upon inferences from dicta.

Therefore, in the absence of any clear direction from Alabama courts, this section of the Comment seeks to explore Alabama case law regarding emotional distress damages and that regarding fear of contracting a disease. In light of these cases, the author will offer a prediction as to whether Alabama will expressly recognize an AIDSphobia claim and as to what elements a plaintiff will be required to prove.

*A. Recovery for Emotional Distress in Alabama: Is Negligent Infliction of Emotional Distress an Independent Tort?*

Alabama has long permitted recovery for emotional distress damages caused by a wrongful act where the mental suffering is accompanied by some physical injury.<sup>215</sup> In the absence of a physical injury, however, recovery for emotional distress has historically been denied.<sup>216</sup> In line with traditional common law tort principles, courts have justified the denial of recovery in such instances based upon the fear of fictitious or trivial claims, the distrust of the potentially conjectural nature of proof that would be offered, and the danger of opening the "floodgates" to unlimited litigation.<sup>217</sup>

In 1981, however, the Alabama Supreme Court reversed

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214. *Id.* at \*7. The court quoted testimony which implies that the blood had not been tested for HIV. *Id.* Assuming that to be the case, it would be highly unlikely that the plaintiff could prove that she was actually exposed to HIV.

215. See *Keel v. Banach*, 624 So. 2d 1022 (Ala. 1993) (permitting parents to recover emotional distress damages for their suffering in wrongful death claim); *Ex parte Hicks*, 537 So. 2d 486 (Ala. 1988) (holding that hospital charges for psychiatric care were recoverable damages in claim arising out of accident); *East Alabama Express Co. v. Dupes*, 124 So. 2d 809 (Ala. 1960) (permitting plaintiff to recover for worry about future result of whiplash injury); *Macke v. Sutterer*, 141 So. 651 (Ala. 1932) (allowing pregnant tenant injured in a fall to recover against landlord for emotional distress for her fear of being in danger of a miscarriage).

216. See, e.g., *Western Union Tel. Co. v. Jackson*, 50 So. 316 (Ala. 1909).

217. See *American Rd. Serv. Co. v. Inmon*, 394 So. 2d 361, 364 (Ala. 1980).



this line of reasoning in *Taylor v. Baptist Medical Center, Inc.*,<sup>218</sup> and held that emotional distress damages may be recoverable in cases where no physical injury is claimed.<sup>219</sup> In *Taylor*, the plaintiff was under the obstetrical care of the defendant, Dr. Herman Hassell.<sup>220</sup> After being instructed to go to Baptist Medical Center by Dr. Hassell at 3:00 a.m. one morning, the plaintiff gave birth to a child at 11:30 a.m., which was either stillborn or died within moments of birth.<sup>221</sup> Dr. Hassell did not arrive at the hospital until after the plaintiff had delivered, and no physician was present during her delivery period.<sup>222</sup> The plaintiff subsequently filed suit against the hospital and Dr. Hassell, alleging both negligence and breach of the contract of care.<sup>223</sup>

The Alabama Supreme Court reversed the trial court's granting of summary judgment in favor of the defendant.<sup>224</sup> Noting that Alabama has historically denied recovery for mental anguish in the absence of physical injury, the court acknowledged that in *American Road Insurance Co. v. Inmon*<sup>225</sup> it had recently explored the general requirement that physical injury must accompany emotional distress.<sup>226</sup> "While it is true that *Inmon* dealt with the intentional tort of outrageous conduct, nevertheless the analysis of the damages aspect was not by virtue of that fact limited solely to the tort of outrageous conduct

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218. 400 So. 2d 369 (Ala. 1981).

219. *Taylor*, 400 So. 2d at 374.

220. *Id.* at 371. Approximately twenty-three weeks into her pregnancy, the plaintiff underwent an emergency appendectomy. *Id.* At that time, her surgeon explained to her that the surgery could have an adverse effect upon her pregnancy. *Id.* The plaintiff began to experience labor pains three weeks later. *Id.* When the defendant was notified of this, he instructed her to go to Baptist Medical Center. *Id.* at 371.

221. *See id.*

222. *See id.*

223. *See id.* She did not bring a wrongful death claim against either the hospital or the doctor, and the court noted it was clear that she claimed no actual physical injuries. *Id.*

224. *Taylor*, 400 So. 2d at 374.

225. 394 So. 2d 361 (Ala. 1980). In *Inmon*, the court unequivocally recognized that intentional infliction of emotional distress constituted an independent tort in Alabama, thus abandoning the physical injury rule, at least in intentional tort cases. *Id.* at 365.

226. *Taylor*, 400 So. 2d at 372.

nor should it be so limited logically.<sup>227</sup> The issue of whether the plaintiff could recover for emotional distress alone in a negligence action was, therefore, before the court for the first time.<sup>228</sup> Following the rationale of *Inmon*, the court abandoned the physical injury rule in negligence cases and held that the plaintiff could recover for her mental anguish even though she suffered no physical injury.<sup>229</sup> "[T]o continue to require physical injury caused by culpable tortious conduct, when mental suffering may be equally recognizable standing alone, would be an adherence to procrustean principles which have little or no resemblance to medical realities."<sup>230</sup>

Emotional distress damages have also been held recoverable in claims involving property interests<sup>231</sup> and in contract claims.<sup>232</sup> Alabama law also recognizes a separate cause of action for the intentional infliction of emotional distress, sometimes called the "tort of outrage," whereby a defendant intentionally or recklessly causes severe emotional distress by way of extreme or outrageous conduct.<sup>233</sup>

Alabama, however, still refuses to recognize a separate tort for the negligent infliction of emotional distress.<sup>234</sup> In *Gideon v.*

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227. *Id.* at 373.

228. *Id.* at 374.

229. *See id.*

230. *Id.* More recently, in *Harco Drugs, Inc. v. Holloway*, the Alabama Supreme Court stated that it is permissible for a plaintiff to testify about her emotional distress, even in the absence of any physical injury. 669 So. 2d 878, 881-82 (Ala. 1995).

231. *See, e.g., Reinhardt Motors, Inc. v. Boston*, 516 So. 2d 509 (Ala. 1987) (allowing emotional distress damages where injury to property was committed under circumstances of insult and contumely); *Rice v. Merritt*, 549 So. 2d 508 (Ala. Civ. App. 1989) (permitting mental anguish in nuisance case).

232. *See, e.g., Sexton v. St. Clair Federal Savings Bank*, 653 So. 2d 959, 960 (Ala. 1995) (allowing emotional distress damages in breach of contract case because duty was "coupled with matters of mental concern or solicitude"); *Lawyer's Title Ins. Corp. v. Vella*, 570 So. 2d 578 (Ala. 1990) (permitting recovery for mental anguish in fraud case).

233. *See, e.g., Ex parte Lumbermen's Underwriting Alliance*, 662 So. 2d 1133 (Ala. 1995); *McAfee v. Shredders, Inc.*, 650 So. 2d 871 (Ala. 1994); *Cates v. Taylor*, 428 So. 2d 637 (Ala. 1993); *American Rd. Serv. Co. v. Inmon*, 394 So. 2d 361 (Ala. 1980).

234. *See Gideon v. Norfolk Southern Corp.*, 633 So. 2d 453 (Ala. 1994) (refusing to regard negligent infliction of emotional distress as actionable); *Allen v. Walker*, 569 So. 2d 350 (Ala. 1990) (denying to recognize the claim in an employee grievance case); *Green Tree Acceptance, Inc. v. Standridge & El-Jay's, Inc.*, 565 So. 2d 38 (Ala. 1990) (recognizing intentional, but not negligent, infliction of emotional distress);

*Norfolk Southern Corp.*,<sup>235</sup> for example, the plaintiff witnessed her three-year-old son's death when he was struck by a train. She brought a claim of negligent infliction of emotional distress under a "bystander" theory, seeking to recover emotional distress damages arising from witnessing her son's death. The court affirmed summary judgment against the plaintiff, rejecting the contention that the defendant owed a duty to the plaintiff because she was not a "foreseeable plaintiff."<sup>236</sup> Noting that it had previously refused to recognize claims of negligent infliction of emotional distress, the Alabama Supreme Court stated that it rejected them once again.<sup>237</sup> The court went further, stating that even if such a cause was actionable, it would not extend to bystanders such as the plaintiff.<sup>238</sup>

The Alabama Supreme Court's express refusal to recognize a cause of action for negligent infliction of emotional distress seems to conflict with both the holding and logic of *Taylor*, where the court permitted emotional distress damages in a negligence action even in the absence of any physical injury.<sup>239</sup> This apparent inconsistency was recently addressed by the court in *Flagstar Enterprises, Inc. v. Davis*.<sup>240</sup> In that case, the court once again reiterated that there is no cause of action in Alabama for the negligent infliction of emotional distress.<sup>241</sup> The court stated, however, that damages for emotional distress may be awarded in a simple negligence action even in the absence of physical injury.<sup>242</sup> The court attempted to reconcile the two principles by concluding that "one cannot negligently 'inflict' emotional distress on another."<sup>243</sup> Whether this can be viewed

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Foster v. Po Folks Restaurant, 675 So. 2d 455 (Ala. Civ. App. 1996) (declining to allow plaintiff who found worm in her food to recover under negligent infliction of emotional distress theory).

235. 633 So. 2d 453 (Ala. 1994).

236. See *Gideon*, 633 So. 2d at 453.

237. *Id.* at 454.

238. *Id.*

239. *Taylor*, 400 So. 2d at 374.

240. 1997 WL 564475, at \*10 n.5 (Ala. Sept. 12, 1997).

241. *Id.* at 10 n.5.

242. *Id.*

243. *Id.* (citing *Allen v. Walker*, 569 So. 2d 350 (Ala. 1990)). The court quoted the dictionary meaning of the term "inflict" and inferred that a person must have intent in order to actually "inflict" emotional distress on another. See *id.* In other words, the word "inflict" implies an intent to do harm.

as an unnecessary game of semantics, or as an honest attempt to establish law with an eye towards linguistic accuracy, the bottom line is that emotional distress damages can be awarded in the absence of physical injury.

A plaintiff's ability to recover emotional distress damages when no physical injury has occurred, however, does hinge on form and procedure. Specifically, it rests upon whether the plaintiff wisely characterizes the claim as one for negligence or imprudently states it as one for negligent infliction of emotional distress. Presumably, therefore, a plaintiff may be successful in recovering such damages if he or she disguises the claim as one for negligence,<sup>244</sup> but not if he or she sues under the theory of negligent infliction of emotional distress.<sup>245</sup>

### B. Fear of Future Disease

Alabama appears to be in accord with the majority of jurisdictions by imposing the exposure and reasonableness requirements in fear of disease cases.<sup>246</sup> For example, in *Cain v. Armstrong World Industries, Inc.*,<sup>247</sup> the United States District Court for the Southern District of Alabama consolidated several cases involving asbestos manufacturers and employers as defendants.<sup>248</sup> The plaintiffs won the jury trial, and the verdict awarded substantial sums for pain and suffering, past and future medical expenses, and punitive damages for the wrongful death claims.<sup>249</sup> Following the verdict, the defendants moved the court to grant a judgment notwithstanding the verdict.<sup>250</sup> The court denied that motion, reasoning that the plaintiffs had met the necessary requirements.<sup>251</sup> In particular, the court determined that each plaintiff presented sufficient evidence that he was exposed to asbestos and that the exposure was a sub-

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244. *See id.*

245. *See* Gideon v. Norfolk Southern Corp., 633 So. 2d 453, 454 (Ala. 1994).

246. *See supra* notes 77-78 and accompanying text.

247. 785 F. Supp. 1448 (S.D. Ala. 1992).

248. *Cain*, 785 F. Supp. at 1450. The actions consisted of ten personal injury and three wrongful death claims. *Id.*

249. *See id.*

250. *Id.* at 1450-51.

251. *Id.* at 1451.

stantial contributing factor to the injuries alleged.<sup>252</sup>

The court nonetheless granted a new trial to the defendants based upon the fact that the compensatory damages awarded were so excessive as to indicate passion and prejudice on the part of the jury.<sup>253</sup> With regards to the mental anguish element of the compensatory damages, the court determined that the emotional distress must be reasonable under the circumstances:

The fear of cancer is, in the Court's opinion, the most significant element of suffering in each of these cases. Such fear, however, must be reasonable and genuine and will, of course, vary with the individual. In other words, damages may be awarded only if a plaintiff *does* have a fear of cancer that causes mental anguish, not simply because plaintiff *could* have a fear of cancer. In addition, it is only the mental anguish that is compensable, not the probability of contracting cancer.<sup>254</sup>

Although the plaintiffs presented testimony that they suffered depression as a result of developing cancer, none of them required psychiatric care, nor were they prevented from carrying on with daily activities.<sup>255</sup> Most of the plaintiffs simply alleged that they feared contracting cancer without giving any specific examples about how that fear affected them.<sup>256</sup> Under the circumstances, the plaintiffs' cancerphobia was unreasonable, thus unfairly tainting the jury's award for general compensatory damages, and the court granted a new trial to the defendants.<sup>257</sup> In a cancerphobia case, therefore, an Alabama plaintiff apparently must show both actual exposure to a known carcinogen and that the fear is reasonable.<sup>258</sup> It, of course, re-

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252. *Cain*, 785 F. Supp. at 1451.

253. *Id.*

254. *Id.* at 1453.

255. *Id.*

256. *Id.*

257. *Cain*, 785 F. Supp. at 1453.

258. *Id.* at 1450-52; see also *Holloway*, 669 So. 2d at 881 (holding that plaintiff had a reasonable basis for her fear). Recently, in *Thomas v. BSE Industrial Contractors, Inc.*, a plaintiff brought a tort of outrage claim for his emotional distress, alleging exposure to asbestos. 624 So. 2d 1041, 1043 (Ala. 1993). Because the plaintiff failed to show that he was likely to contract cancer from his exposure, the court affirmed summary judgment for the defendants. *Thomas*, 624 So. 2d at 1046. The plaintiff's generalized fear of cancer was not reasonable and did not, therefore, rise to the level of severe emotional distress required to get to the jury. *Id.*



mains to be seen whether an Alabama plaintiff in an AIDSphobia case will be required to demonstrate both actual exposure and reasonable fear.

### C. Prediction and Proposal for Alabama

The dearth of Alabama case law regarding negligent infliction of emotional distress and fear of a future disease makes predicting how Alabama courts will treat AIDSphobia cases difficult at best. The Alabama Supreme Court's recent decision in *Davis* sheds light on the issue of emotional distress damages in negligence actions, offering some predictability as to how Alabama courts might treat "properly" plead AIDSphobia claims.

Initially, as a matter of public policy, Alabama courts should recognize the fear of contracting AIDS as a viable cause of action. Such recognition would promote important concerns of the state of Alabama, such as the protection of its citizens from infection by communicable diseases, including sexually transmitted diseases.<sup>259</sup> By placing a duty on persons to take reasonable precautionary measures to avoid potentially exposing others to AIDS, Alabama courts would give effect to this notion of protecting the public from harmful and deadly diseases.

An Alabama AIDSphobia plaintiff would, of course, be required to prove the traditional elements of a negligence-based claim: duty, breach, cause, and damage. A threshold question arises, however, as to what type of action could survive. An Alabama plaintiff seeking to recover emotional distress for fear of being exposed to AIDS stands little or no chance of succeeding if his or her claim is based upon negligent infliction of emotional distress, since that cause of action is not recognized in Alabama.<sup>260</sup> On the other hand, there does not appear to be a threshold problem (at least not one concerning physical impact or manifestation) with a plaintiff seeking to recover emotional distress damages for the fear of contracting AIDS based upon

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259. See *Berner v. Caldwell*, 543 So. 2d 686, 689-90 (Ala. 1989). In that case, the court held that the tortious transmittal of genital herpes is a viable cause of action in Alabama. *Id.* at 689. The court further noted that, while this case focused upon civil liability for transmitting herpes, "such liability could also be imposed for the transmittal of other sexually transmitted diseases," such as AIDS. *Id.* at 690.

260. See *Gideon*, 633 So. 2d at 454.

pure negligence.<sup>261</sup> In other words, an AIDSphobia plaintiff proceeding under a negligence theory apparently has no choice in Alabama but to bring the claim under simple negligence.

Assuming that an AIDSphobia claim based upon pure negligence would survive the traditional hurdles of the physical injury and manifestation requirements,<sup>262</sup> a more controversial issue would then face the Alabama courts: whether they should require the plaintiff to demonstrate actual exposure to HIV, or whether they should require only that the plaintiff allege some distinct event evincing that the fear is reasonable under the circumstances.<sup>263</sup> Unfortunately, Alabama courts have given little guidance as to which standard they might adopt. There is, however, some precedential value in Alabama case law regarding emotional distress recovery and cancerphobia claims. These cases offer some predictability on the issue of whether a true AIDSphobia plaintiff will have to prove actual exposure in Alabama. It is this commentator's contention that Alabama courts will most likely follow the majority of jurisdictions and require a plaintiff to prove actual exposure and reasonableness of fear in order to prevail on a true AIDSphobia claim. Many courts have justifiably and correctly treated AIDSphobia claims similar to other fear of disease claims, such as cancerphobia. Alabama courts should do the same, if for no other reason than that an AIDSphobia claim is exactly that: a claim for fear of contracting a disease. If Alabama courts consider this claim as such, they will most likely look to Alabama fear of disease cases and require that an AIDSphobia plaintiff prove both actual exposure and the reasonableness of the fear.<sup>264</sup>

Some commentators suggest that courts should strike a balance between the two extremes and implement a standard resembling that of a rebuttable presumption.<sup>265</sup> Analyzing AIDSphobia cases under this approach would consist of consider-

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261. See *Taylor*, 400 So. 2d at 374.

262. See *id.*

263. See sections II(A) and II(B) *supra*.

264. See *Cain*, 785 F. Supp. at 1450-52 (stating that actual exposure to a known carcinogen and reasonableness of fear are necessary requirements in a cancerphobia case).

265. See *Hansen*, *supra* note 39, at 1293-94 (citing *Marriott v. Sedco Forex Int'l Resources*, 827 F. Supp. 59, 75 (D. Mass. 1993)).

ing four factors:

- 1) whether the plaintiff is legitimately suffering from a fear of being exposed to HIV;
- 2) if so, whether the plaintiff can trace that fear to a distinct event of reasonably potential exposure;
- 3) if so, the burden shifts to the defendant to prove that actual exposure could not have occurred at the time of the accident; and
- 4) if the defendant cannot rebut this presumption, the plaintiff's recovery is limited to the "window of anxiety" period,<sup>266</sup> the period in which the plaintiff could not have known his or her HIV status with medical certainty.<sup>267</sup>

This approach recognizes that, while modern advancements in medical science as to the legitimacy of emotional distress claims may justify abandoning the actual exposure requirement, potentially fraudulent claims must be monitored in some way. Unlimited access to juries on such delicate yet frightening issues is not a solution. Thus, it is arguable that this proposal strikes a proper balance between two extremes by protecting legitimate plaintiffs while minimizing fraudulent claims.

There would be problems, however, with using this approach in Alabama courts. Specifically, it is not consistent with Alabama case law with respect to the requirements a plaintiff must meet in a fear of disease case. It seems clear that, in Alabama, it is the plaintiff's burden to demonstrate actual exposure to a harmful agent and the reasonableness of his or her fear.<sup>268</sup> It is not the burden of the defendant to prove that actual exposure did not occur in order to avoid liability. In sum, it would be inconsistent with pre-existing law to presuppose that actual exposure occurred based simply upon the plaintiff's showing that he or she could have been exposed due to a specific event. In Alabama, therefore, an AIDSphobia plaintiff should be required to demonstrate that he or she was actually exposed to HIV, and that the fear is reasonable, in order for a court to hold a defendant liable for emotional distress damages based upon mere

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266. See *Faya*, 620 A.2d at 337 (holding that plaintiffs may recover for the fear which may have resulted from the defendant's negligent act for the period constituting their "reasonable window of anxiety"—the time period between which the accident took place and the time they received negative HIV tests).

267. See *Hansen*, *supra* note 39, at 1293-94.

268. See *Cain*, 785 F. Supp. at 1450-52.

negligence.

## V. CONCLUSION

The issue of whether to require a plaintiff to prove actual exposure is undoubtedly a difficult one to resolve. There are pros and cons to adopting either approach. At one end of the spectrum is the actual exposure requirement,<sup>269</sup> which is a laudable attempt to prevent an inundation of fraudulent AIDSphobia claims. It is, of course, arguable that the strict application of this requirement produces potentially unwanted results because it places a difficult burden on plaintiffs who legitimately fear that they have been exposed to HIV.<sup>270</sup> For instance, consider the *Carroll* plaintiff who stuck her hand in a container holding a number of disposed syringes but who could not prove actual exposure.<sup>271</sup> Under the actual exposure requirement, she was denied recovery for what is arguably the reasonable chance of exposure because she could not prove which needle punctured her.<sup>272</sup> The majority of courts which have considered the issue, however, have concluded that the need to prevent the inundation of courts with trivial AIDSphobia claims outweighs the need to provide an easier burden on the plaintiffs. Indeed, if courts were to recognize a claim for the fear of contracting AIDS based upon a mere allegation that the plaintiff might have been exposed to the disease, they would "open a Pandora's Box of 'AIDS-phobia' claims by individuals whose ignorance, unreasonable suspicion or general paranoia cause them apprehension over the slightest of contact with HIV-infected individuals or objects."<sup>273</sup>

At the other end of the spectrum lies a less desirable standard, one which allows recovery for fear of AIDS even when the plaintiff fails to demonstrate exposure. One criticism against the actual exposure requirement and in favor of the reasonableness standard is that "actual exposure would limit recovery to plaintiffs who have the highest likelihood of contracting HIV infec-

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269. See section II(A) *supra*.

270. See *id.*

271. See *Carol*, 868 S.W.2d at 594.

272. See *id.*

273. *Bain*, 936 S.W.2d at 625 (quoting *Brzoska*, 669 A.2d at 1363).

tions and would exclude others whose fear is just as legitimate but whose likelihood of contracting the disease is merely less certain.<sup>274</sup> While recovery under the actual exposure standard would be limited, recovery under the reasonableness standard would most likely be limitless. If AIDSphobia plaintiffs are permitted to recover for their emotional distress under the liberal reasonableness standard, courts and defendants will likely become overburdened with waves of lawsuits in which plaintiffs claim to be fearful of contracting AIDS with the hopes of hitting the litigation jackpot, even though no likelihood exists that the disease will materialize. Rather than adopting a standard which would foster seemingly illegitimate emotional distress claims, "the better approach is to assess the reasonableness of a plaintiff's fear of AIDS according to the plaintiff's *actual*—not *potential*—exposure to HIV."<sup>275</sup>

Some may view a solution to the issue as simply choosing between the lesser of two evils. That perspective may very well be an accurate one. There is another concern, however, which must play a role in determining how Alabama courts will and should treat AIDSphobia claims: predictability of future outcomes. Alabama courts should analyze this issue with an eye towards following precedent and providing society with consistent, predictable guidelines to help people conform their conduct to a well-defined standard. A reasonableness standard does not and cannot provide future defendants with sufficient predictability because liability for fear of being exposed to AIDS would hinge simply on whether a jury considered the plaintiff's fear to be "reasonable." The actual exposure requirement, on the other hand, offers potential defendants enough guidance as to what steps they must take in order to prevent liability. Most importantly, the actual exposure requirement "strikes a proper balance between ensuring that victims are compensated for their emotional injuries and that potential defendants take reasonable steps to avoid such injuries, but nonetheless protects the courts from becoming burdened with frivolous suits."<sup>276</sup> Therefore, Alabama courts should follow their own precedent, and that of

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274. Vanik, *supra* note 15, at 1489.

275. *Bain*, 936 SW.2d at 625 (quoting *Brzoska*, 669 A.2d at 1363).

276. *Babich*, 556 N.W.2d at 147.



the majority of other jurisdictions, and require an AIDSphobia plaintiff to demonstrate actual exposure in order to recover emotional distress damages.

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