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CAN HIV-NEGATIVE PLAINTIFFS RECOVER EMOTIONAL DISTRESS DAMAGES FOR THEIR FEAR OF AIDS?

JAMES C. MAROULIS

INTRODUCTION

A hospital patient who has tested positive for HIV¹—the virus that causes AIDS²—goes berserk and bites himself.³ With the infected blood on his teeth, he later bites the police officer sent to subdue him.⁴ Although the officer repeatedly tests negative for the AIDS virus⁵ over several years, he recovers damages for his fear of AIDS.⁶

A woman visiting a sick relative in a hospital is stuck by needles in a contaminated needle receptacle.⁷ She sues for damages, including fear of AIDS.⁸ She tests HIV negative and presents no evidence of exposure to HIV.⁹ The trial court grants the defendant's motion for summary judgment, but the appellate court determines that a jury should decide whether her fear is reasonable.¹⁰

A husband tells his wife that he has AIDS and asks her to move away so that she will not have to watch him die.¹¹ In fact, he is HIV negative and is telling a deliberate lie.¹² Upon discovering this deceit, the wife brings suit to recover emotional distress damages for her fear of AIDS, even though she is certain that she is HIV negative.¹³ The court denies the husband's motion to dismiss and holds that the wife has stated a valid claim for intentional infliction of emotional distress.¹⁴

As these cases indicate, HIV-negative plaintiffs are attempting to recover emotional distress damages for their fear that they will develop AIDS in the future. These cases create a tension between the public's fear of this deadly disease and traditional tort law policies limiting recovery for emotional distress damages.¹⁵ Because of HIV's unique attrib-

1. This Note uses the term "HIV" to refer to human immunodeficiency virus.

2. This Note uses the term "AIDS" to refer to acquired immunodeficiency syndrome.

3. See *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 890 (W. Va. 1991).

4. See *id.*

5. This Note uses the term "the AIDS virus" to refer to human immunodeficiency virus.

6. See *Johnson*, 413 S.E.2d at 891-92.

7. See *Carroll v. Sisters of Saint Francis Health Servs., Inc.*, No. 02A01-9110-CV-00232, 1992 WL 276717, at *1 (Tenn. Ct. App. Oct. 12, 1992).

8. See *id.* at *2.

9. See *id.*

10. See *id.* at *5.

11. See *Whelan v. Whelan*, 588 A.2d 251, 252 (Conn. Super. Ct. 1991).

12. See *id.*

13. See *id.*

14. See *id.* at 253.

15. See *infra* notes 52-64 and accompanying text.

utes, it is difficult to assess the validity of an HIV-negative plaintiff's fear-of-AIDS claim.

AIDS is unusual in several respects. First, there is no cure for AIDS, and the mortality rate is very high.¹⁶ Second, the number of AIDS cases is increasing rapidly, and AIDS is reaching epidemic proportions.¹⁷ At least 1.5 million people in the United States and five million people worldwide are infected with HIV.¹⁸ Third, AIDS is unusual because of its long dormancy period. For approximately three months following exposure, no test can determine whether a person is HIV positive.¹⁹ After this period, reliable tests can determine whether or not a person is infected.²⁰ An infected person who has not taken an AIDS test, however, is unlikely to know that he²¹ is HIV positive. Many people show no AIDS symptoms until ten years after initial infection.²² In fact, most HIV carriers are unaware that they have the virus.²³ Fourth, HIV is an unusual virus because it can only be transmitted by bodily fluids such as blood or semen.²⁴

Fear-of-AIDS claims are complicated by people's perception of AIDS. The public views AIDS with much fear and some panic.²⁵ This fear is

16. See Andrew N. Phillips et. al., *Immunodeficiency and the Risk of Death in HIV Infection*, 268 J. Am. Med. Ass'n 2662, 2664-65 (1992) (discussing mortality rate from AIDS).

17. See Gerald Friedland et. al., *Additional Evidence for Lack of Transmission of HIV Infection by Close Interpersonal (Casual) Contact*, 4 AIDS 639, 640 (1990).

18. See *id.* at 642.

19. See *Interpretation and Use of the Western Blot Assay for Serodiagnosis of Human Immunodeficiency Virus Type 1 Infections*, 38 Morbidity & Mortality Wkly. Rep. 1, 5 (July 21, 1989) ("[S]eroconversion typically occurs within 3 months of infection."); *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 Morbidity & Mortality Wkly. Rep. 509, 509 (Aug. 14, 1987) ("Persons exposed to HIV usually develop detectable levels of antibody against the virus within 6-12 weeks of infection.").

20. See *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 Morbidity & Mortality Wkly. Rep. 509, 509-10 (Aug. 14, 1987) (stating that persons "exposed to HIV usually develop detectable levels of antibody against the virus within 6-12 weeks of infection," and stating that AIDS tests are 99% accurate).

21. Singular and masculine words are used for practical purposes only and shall be deemed to include the plural and feminine, respectively, unless the context plainly indicates a distinction.

22. See *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 Morbidity & Mortality Wkly. Rep. 509, 509 ("Many infected persons may have minimal or no clinical evidence of disease for years.").

23. See *id.*

24. See Alan R. Lifson, *Do Alternate Modes for Transmission of Human Immunodeficiency Virus Exist?*, 259 J. Am. Med. Ass'n 1353, 1353-56 (1988).

25. See *AIDS Virus Found To Survive in Dentist's Tools*, L.A. Times, Nov. 22, 1992, at A20 (discussing "widespread fear about catching AIDS from dental procedures"); Mireya Navarro, *Fear of AIDS Is Higher in New York*, *Poll Finds*, N.Y. Times, June 26, 1991, at B3 (noting that a poll found that 43% of New Yorkers were "very concerned" about getting AIDS); Michael R. Kagay, *Poll Finds AIDS Causes Single People To Alter Behavior*, N.Y. Times, June 18, 1991, at C3 (discussing how people have changed their sexual behavior because they fear AIDS).

augmented by the fact that many people are ignorant about how HIV is transmitted.²⁶ Although most people know that they can contract HIV via sexual intercourse or sharing a hypodermic needle with an infected person,²⁷ many people mistakenly believe that they can contract the AIDS virus via casual contact. One survey found that 60% of people believed that HIV could be transmitted by using a public toilet,²⁸ and 73% feared that they would be infected if they shared eating utensils with an HIV-positive person.²⁹ Additionally, 47% believed that HIV could be transmitted by working with an infected person.³⁰ Misunderstandings about how the AIDS virus is transmitted have caused people to act based on unreasonable fears: people have refused to work with HIV-positive co-workers;³¹ workers have been fired because they are HIV positive;³² professional athletes have voiced concerns about playing against an HIV-positive opponent;³³ high school football teams have refused to compete against a school from a town with a high incidence of HIV infection.³⁴

Given the misunderstanding about how HIV is transmitted, it is not surprising that people who were never put at risk of contracting HIV have brought suit alleging fear of infection.³⁵ For example, a prisoner brought suit to recover for his fear of AIDS based on the fact that he shared "a drinking fountain, toilet, towels, shower stall, bath tub, and phone booth" with two HIV-positive patients.³⁶ The court found that the prisoner's fear was unfounded and granted the defendant's motion

26. See Gerald Friedland et al., *Additional Evidence for Lack of Transmission of HIV Infection by Close Interpersonal (Casual) Contact*, 4 AIDS 639, 642 (1990).

27. See *id.* at 642 (citing a survey that found that 69-91% of adults were knowledgeable about the major methods of transmission).

28. See *id.*

29. See *id.*

30. See *id.*

31. See Stuart Silverstein, *AIDS and the Workplace*, L.A. Times, Nov. 7, 1992, at D1 (seventeen of a store's 25 employees threatened to quit if an HIV-positive salesman, who had taken sick leave, came back to work).

32. See Barnaby J. Feder, *Unorthodox Behemoth of Law Firms*, N.Y. Times, Mar. 14, 1993, § 3, at 1, 6 (in a case in which a large law firm fired a lawyer because he had AIDS, the firm lost the ensuing suit and was required to pay \$1 million to the lawyer's estate).

33. See William Gildea, *With the Pleasure, a Strong Dose of Pain*, Wash. Post, Dec. 31, 1992, at D1 (professional basketball star Magic Johnson retired from the sport because other players expressed concerns that they would be exposed to possible infection if they played against him).

34. See Mike Clary, *Small Town Offers a Disturbing Look at Future of the AIDS War*, L.A. Times, Jan. 28, 1993, at A5.

35. See, e.g., *Seddens v. McGinnis*, 972 F.2d 352 (7th Cir. 1992) (text available in Westlaw, at *3) (granting a motion to dismiss a claim by a prisoner claiming that the prison exposed him to the risk of HIV transmission by not separating AIDS-infected prisoners from the prison population, and stating that the "plaintiff's fears regarding the risks associated with being housed near AIDS-infected inmates are unrecognized by the mainstream medical community, and reflect ignorance of the means by which AIDS can be transmitted").

36. *Bullock v. O'Leary*, No. 88 C 10148, 1991 WL 206058, at *1 (N.D. Ill. Sept. 30, 1991).

for summary judgment.³⁷

This Note examines the elements necessary to prove a cause of action for damages for fear of AIDS. This Note analyzes claims for emotional distress damages made by plaintiffs who have tested HIV negative.³⁸ Part I considers recovery for fear of AIDS as a damage resulting from a defendant's negligence or intentional tort. This part begins by analyzing the duty of care in fear-of-disease cases. Next, this part discusses proximate cause and focuses on two issues: first, whether a plaintiff claiming damages for fear of AIDS is required to provide evidence demonstrating actual exposure to HIV; second, whether a plaintiff can recover damages for his continuing fear of AIDS after taking a reliable test that indicates that he is HIV negative. Part II discusses and criticizes the reasoning of some decisions in fear-of-AIDS cases. Part III proposes two methods for limiting liability while allowing recovery for reasonable fear. This Note concludes that courts should limit plaintiffs' ability to recover damages for fear of AIDS.

I. TORT LAW UNDERLYING FEAR OF AIDS CLAIMS

Most plaintiffs who claim damages for fear of AIDS bring suit in tort.³⁹ This section examines the causes of action that can be the basis for a fear-of-AIDS claim. This section discusses negligence actions first, followed by battery, and intentional infliction of emotional distress.

A. Negligence: Duty and Breach

When a plaintiff brings a negligence action claiming damages for fear of AIDS, the plaintiff must demonstrate that the defendant breached a duty of care owed to the plaintiff.⁴⁰ The plaintiff must also show that the

37. See *id.* at *2.

38. This Note does not address the issue of recovery for fear of AIDS by HIV-positive plaintiffs. For a thorough treatment of this subject, see John Patrick Darby, Note, *Tort Liability for the Transmission of the AIDS Virus: Damages for Fear of AIDS and Prospective AIDS*, 45 Wash. & Lee L. Rev. 185 (1988). Many of the elements necessary for recovery are identical for HIV-negative and HIV-positive plaintiffs. One area, however, where claims by HIV-negative and HIV-positive plaintiffs substantially diverge is in the overall reasonableness of the claims. Because it is almost certain that an HIV-positive plaintiff will develop AIDS, the plaintiff's fear is clearly reasonable. It is unclear, however, whether an HIV-negative plaintiff's fear is reasonable.

39. See, e.g., *Cotita v. Pharma-Plast, U.S.A., Inc.*, No. 92-4139, 1992 WL 232765 (5th Cir. Oct. 8, 1992) (products liability); *Baranowski v. Torre*, No. CV90-0236178, 1991 WL 240460 (Conn. Super. Ct. Nov. 7, 1991) (intentional infliction of emotional distress); *Carroll v. Sisters of Saint Francis Health Servs., Inc.*, No. 02A01-9110-CV-00232, 1992 WL 276717, at *2 (Tenn. Ct. App. Oct. 12, 1992) ("negligence, gross negligence, conspicuous indifference, recklessness and/or willful and wanton conduct, battery, and negligent, intentional and/or reckless infliction of emotional distress"); *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889 (W. Va. 1991) (negligence).

40. See W. Page Keeton et. al., *Prosser and Keeton on the Law of Torts* § 30, at 164 (5th ed. 1984) (noting that duty and breach are essential elements of a negligence cause of action).

defendant's breach proximately caused the plaintiff's fear of AIDS.⁴¹

Before examining whether people have a duty not to make other people fear contracting a disease, it is helpful to examine whether people have a duty not to infect others with diseases. Plaintiffs can almost certainly bring a cause of action for negligent transmission of AIDS because, historically, courts have allowed recovery for negligent transmission of other diseases.⁴² Commonly, these cases involved venereal diseases.⁴³ Recently, courts have begun to recognize that a plaintiff can pursue a cause of action for negligent transmission of AIDS.⁴⁴ At least one court has noted that liability for transmission of AIDS can be based on the same theory as transmission of a venereal disease.⁴⁵ Further, other courts probably will treat AIDS as a venereal disease (for purposes of negligence actions) because some courts have recognized

41. *See id.* at 165.

42. *See* *Crim v. International Harvester Co.*, 646 F.2d 161 (5th Cir. 1981) (holding landowner liable for damages sustained when, due to landowner's negligence, invitee contracted valley fever); *Smith v. Baker*, 20 F. 709 (C.C.S.D.N.Y. 1884) (allowing recovery for negligently exposing people to whooping cough); *Capelouto v. Kaiser Found. Hosps.*, 500 P.2d 880 (Cal. 1972) (en banc) (allowing recovery when a plaintiff contracted salmonella due to hospital's negligence); *Hofmann v. Blackmon*, 241 So. 2d 752 (Fla. Dist. Ct. App. 1970) (holding that a cause of action existed when a physician allegedly negligently failed to diagnose the infant plaintiff's father as infected with tuberculosis and infant plaintiff allegedly was exposed to and contracted tuberculosis as a result), *cert. denied*, 245 So. 2d 257 (Fla. 1971); *Gilbert v. Hoffman*, 23 N.W. 632 (Iowa 1885) (allowing recovery for exposure to smallpox after defendants hotel-owners misrepresented that there was not an outbreak of smallpox at their hotel); *Minor v. Sharon*, 112 Mass. 477 (1873) (liability for exposure to smallpox); *Hendricks v. Butcher*, 129 S.W. 431 (Mo. Ct. App. 1910) (recognizing a cause of action for negligently exposing persons to smallpox); *Edwards v. Lamb*, 45 A. 480 (N.H. 1899) (negligent transmission of infection from a wound); *Earle v. Kulko*, 98 A.2d 107 (N.J. Super. 1953) (recognizing that negligent transmission of tuberculosis constitutes a cause of action); *Kliegel v. Aitken*, 69 N.W. 67 (Wis. 1896) (recognizing cause of action for negligent transmission of typhoid).

43. *See, e.g.*, *Berner v. Caldwell*, 543 So. 2d 686 (Ala. 1989) (recognizing a negligence cause of action for transmitting herpes); *Doe v. Roe*, 267 Cal. Rptr. 564 (Cal. Ct. App. 1990) (affirming a lower court's award of damages when a man negligently transmitted herpes to his girlfriend); *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273 (Cal. Ct. App. 1984) (recognizing that a cause of action can be maintained under theories of battery or negligence for transmitting herpes); *Long v. Adams*, 333 S.E.2d 852 (Ga. Ct. App. 1985) (recognizing a cause of action for negligent transmission of herpes); *B.N. v. K.K.*, 538 A.2d 1175 (Md. 1988) (same); *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. Ct. App. 1988) (same); *S.A.V. v. K.G.V.*, 708 S.W.2d 651 (Mo. 1986) (stating that the doctrine of spousal immunity does not bar a cause of action for negligence when husband allegedly transmitted herpes to his wife); *Crowell v. Crowell*, 105 S.E. 206 (N.C. 1920) (husband liable for negligently exposing wife to venereal disease); *Stafford v. Stafford*, 726 S.W.2d 14 (Tex. 1987) (court upholds claim of negligence when husband transmitted a venereal disease to his wife); *Duke v. Housen*, 589 P.2d 334 (Wyo.) (recognizing that negligent transmission of gonorrhea may be actionable but reversing award of damages because statute of limitations had expired), *cert. denied*, 444 U.S. 863 (1979).

44. *See* *United Blood Servs. v. Quintana*, 827 P.2d 509 (Colo. 1992) (en banc); *Smith v. Cutter Biological, Inc.*, 823 P.2d 717 (Haw. 1991).

45. *See* *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273, 276 n.3 (Cal. Ct. App. 1984) ("If a person knowingly has genital herpes, AIDS or some other contagious and serious disease, a limited representation that he or she does not have a venereal disease is no defense to this type of action.").

causes of action for negligently infecting a plaintiff with a sexually transmittable disease not identified as a "venereal disease" by the state legislature.⁴⁶

As in other negligence actions, the duty in transmission of disease cases is one of due care under the circumstances. Generally, a person has a duty not to expose others to a disease.⁴⁷ In cases involving venereal diseases, this duty requires a person who is or should be aware of the infection either to tell his partner about the condition or to abstain from having sex.⁴⁸ One court, however, declined to articulate any duty for persons infected with a venereal disease other than reasonable care under the circumstances.⁴⁹ Another court extended the duty of care not only to the sexual partner but also to the partner's husband.⁵⁰ That court reasoned that it was foreseeable that the defendant's sexual partner subsequently would have sex with her husband.⁵¹

Although the duty to act with due care requires people to take steps to prevent infecting others with diseases, including AIDS, it is far more difficult to determine under what circumstances people have a duty to protect others against the fear of developing a disease. Before a plaintiff can recover for fear of AIDS, he must demonstrate that a defendant had a duty not to cause the plaintiff to fear developing the disease, and that the

46. See, e.g., *Kathleen K.*, 198 Cal. Rptr. at 276 n.3 (noting that a cause of action will not be barred even though herpes is not listed as a venereal disease in the California health code); *Long v. Adams*, 333 S.E.2d 852, 856 (Ga. Ct. App. 1985) (noting that herpes can be considered a venereal disease even though it is not listed as such in the Georgia health code).

47. See *Hofmann v. Blackmon*, 241 So. 2d 752, 753 (Fla. Dist. Ct. App. 1970) ("It is recognized that once a contagious disease is known to exist a duty arises on the part of the physician to use reasonable care to advise and warn members of the patient's immediate family of the existence and dangers of the disease."), *cert. denied*, 245 So. 2d 257 (Fla. 1971); *Hendricks v. Butcher*, 129 S.W. 431, 432 (Mo. Ct. App. 1910) (noting that a person with smallpox has a duty either "to so conduct himself as not to communicate this disease" or a "duty to keep away from other persons, or should other persons approach him, to notify them of the fact so that they might protect themselves"); *Edwards v. Lamb*, 45 A. 480 (N.H. 1899) (defendant doctor failed to exercise due care in exposing plaintiff to infectious wound and plaintiff later developed infection).

48. See, e.g., *Berner v. Caldwell*, 543 So. 2d 686, 689 (Ala. 1989) ("We hold that one who knows, or should know, that he or she is infected with genital herpes is under a duty to either abstain from sexual contact with others or, at least, to warn others of the infection prior to having contact with them."); *Maharam v. Maharam*, 510 N.Y.S.2d 104, 107 (App. Div. 1986) (husband had affirmative duty to inform wife that he was infected with a venereal disease); *Mussivand v. David*, 544 N.E.2d 265, 270 (Ohio 1989) ("A person who knows, or should know that he or she is infected with a venereal disease has the duty to abstain from sexual conduct or, at a minimum, to warn those persons with whom he or she expects to have sexual relations of his or her condition."). Cf. *C.A.U. v. R.L.*, 438 N.W.2d 441, 441 (Minn. Ct. App. 1989) ("Respondent had no duty as a matter of law to warn appellant that he had the disease AIDS when at the time of their sexual relationship it was not reasonably foreseeable that he had the disease and could cause appellant harm.").

49. See *Long v. Adams*, 333 S.E.2d 852, 855 (Ga. Ct. App. 1985).

50. See *Mussivand v. David*, 544 N.E.2d 265, 273 (Ohio 1989).

51. *Id.*

defendant breached this duty. It is insufficient for a plaintiff to allege that the defendant breached some duty of care not to expose the plaintiff to AIDS; the plaintiff must demonstrate that this duty extended to protecting the plaintiff from emotional distress caused by his fear of infection. Addressing this issue requires examining both the law regarding emotional distress damages and how this law applies to fear of AIDS, given HIV's unusual characteristics.

1. Limitations on Emotional Distress Damages

For several reasons, courts traditionally have been reluctant to find that a defendant had a duty to prevent a plaintiff from suffering emotional distress. First, there is the problem of providing compensation for "harm that is often temporary and relatively trivial."⁵² Second, there is a "danger that claims of mental harm will be falsified or imagined."⁵³ Third, in negligence cases, there is the "perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences that appear remote from the 'wrongful' act."⁵⁴ Fourth, establishing proximate cause is often a problem, because the plaintiff's emotional injuries are remote from the physical consequences of the defendant's actions.⁵⁵ Fifth, there is the concern "that mental disturbance cannot be measured in terms of money."⁵⁶ Finally, allowing people to sue for emotional distress could produce a flood of litigation.⁵⁷

To address these concerns, courts have placed restrictions on plaintiffs who seek to recover for emotional distress. Historically, some courts have required a plaintiff to suffer some physical injury before holding a defendant liable for mental damages.⁵⁸ Although this continues to be an

52. Keeton, *supra* note 40, at 361.

53. *Id.*

54. *Id.*; Howard v. Mount Sinai Hosp., Inc., 217 N.W.2d 383, 385 (Wis. 1974) ("In this case, although there is no question about there being in fact a fear of future cancer, the claim of damages (by way of cancer) is so remote and is so out of proportion to the culpability of the tort-feasor.")

55. See Keeton, *supra* note 40, at 361; Howard v. Mount Sinai Hosp., Inc., 217 N.W.2d 383, 385 (Wis. 1974) ("[E]ven though the fear or phobia exists in fact, the defendants are not held accountable where, as here, public policy compels this court, because of the remoteness of this element of damage, to excuse defendants from liability.")

56. Keeton, *supra* note 40, at 360.

57. See *id.*

58. See *id.* at 363 ("With a cause of action established by the physical harm, 'parasitic' damages are awarded, and it is considered that there is sufficient assurance that the mental injury is not feigned."). See also Deleski v. Raymark Indus., Inc., 819 F.2d 377, 380 (3d Cir. 1987) (noting that both New Jersey and Pennsylvania law require a plaintiff to sustain some physical injury before emotional distress damages can be recovered); Adams v. Johns-Manville Sales Corp., 783 F.2d 589, 593 (5th Cir. 1986) ("Adams' reliance on these cases is misplaced. Each affirms an award for mental anguish caused by a physical injury proven to exist. The jury in this case concluded that Adams did not sustain an injury."); Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 274 (3d Cir. 1985) (no recovery for fear of cancer when plaintiffs sustained no physical injury); Poole v. Alpha Therapeutic Corp., 698 F. Supp. 1367, 1371 (N.D. Ill. 1988) ("Illinois courts have con-

important consideration in many jurisdictions,⁵⁹ injury is no longer required in every case.⁶⁰ Similarly, courts traditionally have required that the plaintiff sustain some form of physical impact (as contrasted with injury) as a result of the defendant's negligence before the plaintiff can recover mental damages.⁶¹ Today, however, many jurisdictions have abandoned the strict impact requirement.⁶² In fact, several courts have adopted a new approach that allows a plaintiff to recover emotional damages if the defendant's tortious conduct causes the death or serious injury of a close member of the plaintiff's family and if the plaintiff was in the zone of danger and was exposed to the possibility of similar injury.⁶³ Finally, some courts have adopted an approach that allows a plaintiff who has not suffered either injury or impact to recover for emotional distress if the defendant breached a duty of care owed to the plaintiff and, as a result, the plaintiff suffered emotional distress.⁶⁴

2. The Physical Injury Requirement

In cases involving fear of future illness, courts have applied the traditional common law requirement that a plaintiff suffer some physical injury before the defendant will become liable for emotional distress.⁶⁵

sistently refused to allow recovery for mental or emotional distress in the absence of a physical injury or illness, and the complaint alleges none."); *DeStories v. City of Phoenix*, 744 P.2d 705, 709 (Ariz. Ct. App. 1987) (person can recover emotional distress damages "when it is shown that there is a physical invasion of [the] person or the person's security").

59. See *supra* note 58.

60. See, e.g., *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 820 (Cal. 1980) (en banc) ("We agree that the unqualified requirement of physical injury is no longer justifiable."); *Culburt v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 437 (Me. 1982) (holding that a plaintiff may recover damages for negligent infliction of emotional distress even if the plaintiff suffered no physical injury).

61. See *Keeton*, *supra* note 40, at 363.

62. See *id.* at 364 (noting that "the great majority of courts have now repudiated the requirement of 'impact'"); *Niedermaier v. Brodsky*, 261 A.2d 84, 85 (Pa. 1970) ("recovery may be had from a negligent defendant, despite the fact that appellant's injuries arose in the absence of actual impact").

63. See, e.g., *Keck v. Jackson*, 593 P.2d 668, 669-70 (Ariz. 1979) (en banc) ("We conclude, therefore, that damages for shock or mental anguish at witnessing an injury to a third person, occasioned by a defendant's negligence are recoverable."); *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595, 596 (Mo. 1990) (en banc) ("We hold that a plaintiff may recover for emotional distress resulting from observing physical injury to a third person only if the plaintiff is within the zone of danger."); *Bovsun v. Sanperi*, 461 N.E.2d 843, 850 (N.Y. 1984) (recognizing recovery for negligent infliction of emotional distress without impact or physical injury where the plaintiffs witness the injury of a close family member and are in the zone of danger). The zone of danger rule is not very relevant to this Note because transmission of AIDS requires some physical contact with the virus, and thus a plaintiff will normally have sustained an impact or an injury. Because of the nature of the virus, it is unlikely that a person will fear developing AIDS in the future simply by being in the zone of danger when someone else was infected.

64. See *Keeton*, *supra* note 40, at 364-65.

65. See, e.g., *Jones v. United R.R.s. of S.F.*, 202 P. 919, 922 (Cal. Dist. Ct. App. 1921) ("that the mental suffering endured by plaintiff up to the time of the trial, due to her reasonable apprehension of permanent disability (which reasonable apprehension was the

Plaintiffs can satisfy the injury requirement in two ways. First, a plaintiff may suffer physical injury and, subsequent to that injury, suffer emotional distress. Second, a plaintiff may suffer such severe emotional distress that it causes physical injury.⁶⁶

Fear-of-cancer cases are probably the most common example of plaintiffs claiming damages for fear of future illness. In examining this type of claim, many courts have noted that the plaintiffs fulfilled the injury requirement.⁶⁷ In contrast, in cases in which a plaintiff claims damages for fear of cancer but has sustained no physical injury, courts have pointed to this fact in holding that the defendant had not breached any duty owed to the plaintiff.⁶⁸

For the purposes of the injury requirement, there is no significant difference between fear-of-AIDS cases and cases involving fear of other diseases. In both, many courts require a physical injury as a prerequisite to a plaintiff recovering emotional distress damages.⁶⁹ Because transmis-

proximate result of the accident), was an element to be considered by the jury in arriving at its verdict"); *Dulaney Inv. Co. v. Wood*, 142 S.W.2d 379, 384 (Tex. Civ. App. 1940) ("Where the plaintiff has testified to a physical condition tending to show a partial loss of use of one arm and one leg, since the accident, it was not error to permit him to testify to his fear of paralysis.").

66. See, e.g., *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 526 (Fla. Dist. Ct. App. 1985) ("If, however, the plaintiff has not suffered an impact, the complained-of mental distress must be 'manifested by physical injury.'") (citations omitted); *Payton v. Abbott Labs*, 437 N.E.2d 171, 181 (Mass. 1982) ("[A] plaintiff's physical harm must either cause or be caused by the emotional distress alleged.").

67. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 414 (5th Cir.) ("Under Mississippi law, damage awards for mental distress may be rendered when . . . the plaintiff's mental suffering is accompanied by a physical injury."); *cert. denied*, 478 U.S. 1022 (1986); *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1138 (5th Cir. 1985) ("Texas law permits the recovery of damages for mental anguish at least when there is actual physical injury."); *Griffin v. Keene Corp.*, No. 85 C 10748, 1990 WL 93292, at *3 (N.D. Ill. June 19, 1990) ("[P]laintiff has alleged that he suffered a direct physical injury as a result of his exposure to defendants' products, and seeks to recover for emotional distress resulting from this actual physical injury."); *McAdams v. Eli Lilly & Co.*, 638 F. Supp. 1173, 1175 (N.D. Ill. 1986) ("Illinois courts have thus allowed recovery for mental suffering when it accompanies a direct physical injury."); *Mauro v. Raymark Indus., Inc.*, 561 A.2d 257, 263 (N.J. 1989) (plaintiff who was exposed to asbestos has a right to recover for reasonable fear of future disease if plaintiff sustained physical injury); *Laxton v. Orkin Exterminating Co., Inc.*, 639 S.W.2d 431, 434 (Tenn. 1982) ("[W]here there is any physical injury at all—any attendant mental pain and suffering is compensable.").

68. E.g., *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 380 (3d Cir. 1987) (no recovery for fear of cancer absent showing of impact or injury); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30 (Ariz. Ct. App. 1987) (no recovery for fear of cancer when the plaintiffs failed to show any physical injury); *DeStories v. City of Phoenix*, 744 P.2d 705, 710 (Ariz. Ct. App. 1987) ("Toxic substance cases are in general harmony with the rule that damages may not be recovered for mental anguish absent proof of some present physical harm or medically identifiable effect.").

69. See *Steinhagen v. United States*, 768 F. Supp. 200, 208 (E.D. Mich. 1991) ("Having found medical negligence and severe physical, psychological and economic damage to Mrs. Steinhagen, the court will accordingly enter judgment for Plaintiff."); *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 892 (W. Va. 1991) ("[A]bsent physical injury, there is no allowable recovery for negligent infliction of emotional distress.");

sion of AIDS requires a mixing of bodily fluids such as blood, it is not surprising that most HIV-negative plaintiffs who have recovered damages for their fear of developing AIDS have sustained a physical injury.⁷⁰ For example, in *Johnson v. West Virginia University Hospitals, Inc.*,⁷¹ a police officer who was sent to subdue an AIDS patient suffered a physical injury when the patient bit him.⁷² The Supreme Court of West Virginia noted that this bite satisfied the injury requirement.⁷³ Similarly, in *Kaehne v. Schmidt*,⁷⁴ the plaintiff was injured when he was involved in a car accident.⁷⁵ Because he received unscreened blood as a result of this accident, the plaintiff feared developing AIDS.⁷⁶ The court allowed recovery and stated that "[w]hen a tortfeasor's conduct causes bodily harm for which he is liable, the tortfeasor is also liable for mental distress."⁷⁷

In cases in which HIV-negative plaintiffs have not sustained physical injury, however, courts have held that the defendant was not liable for the plaintiff's fear of future illness.⁷⁸ For example, in *Poole v. Alpha Therapeutic Corp.*,⁷⁹ the wife of a deceased hemophiliac sued a company that sold her husband an antihemophilic factor allegedly tainted with HIV.⁸⁰ As part of this suit, Mrs. Poole attempted to recover for her fear of developing AIDS.⁸¹ The court dismissed the claim because she could not show any physical injury.⁸²

3. The Impact Requirement

In determining whether a plaintiff is entitled to recover emotional distress damages, some courts have required that the plaintiff sustain some

Kaehne v. Schmidt, 472 N.W.2d 247 (Wis. Ct. App. 1991) (text available in Westlaw, at *1) ("When a tortfeasor's conduct causes bodily harm for which he is liable, the tortfeasor is also liable for mental distress, including fear and anxiety, resulting from the bodily harm.").

70. See, e.g., *Cotita v. Pharma-Plast, U.S.A., Inc.*, 974 F.2d 598, 599 (5th Cir. 1992) (needle prick); *Steinhagen v. United States*, 768 F. Supp. 200, 208 (E.D. Mich. 1991) (internal injuries from medical malpractice); *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 891 (W. Va. 1991) (bite on arm); *Kaehne v. Schmidt*, 472 N.W.2d 247 (Wis. Ct. App. 1991) (text available in Westlaw, at *1) (injuries from car accident).

71. 413 S.E.2d 889 (W. Va. 1991).

72. *Id.* at 892.

73. *Id.*

74. 472 N.W.2d 247 (Wis. Ct. App. 1991) (text available in Westlaw, at *1).

75. See *id.* at *2.

76. See *id.*

77. *Id.* at *1.

78. See, *Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367 (N.D. Ill. 1988); *Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79 (W. Va. 1991).

79. 698 F. Supp. 1367 (N.D. Ill. 1988).

80. See *id.*

81. See *id.* at 1371.

82. See *id.* ("[C]ourts have consistently refused to allow recovery for mental or emotional distress in the absence of a physical injury or illness, and the complaint alleges none.").

physical impact as a result of the defendant's tortious conduct.⁸³ The impact test differs from the injury requirement. For example, consider a case in which a person negligently drives a car and almost hits the plaintiff. Frightened by the near miss, the plaintiff suffers a heart attack. The plaintiff has sustained a physical injury: a heart attack. Yet, the defendant's negligent conduct has not caused any physical impact because the car missed the plaintiff.

In theory, the impact requirement provides a circumstantial guarantee that the plaintiff's alleged fear is genuine.⁸⁴ Thus, plaintiffs who have suffered even minimal impact have recovered emotional distress damages.⁸⁵

Most jurisdictions have now abandoned the impact requirement.⁸⁶ A minority of courts, however, still applies this requirement in cases in which plaintiffs claim damages for fear of developing a disease in the future.⁸⁷ For example, in assessing plaintiffs' claims for fear of developing cancer, some courts have examined whether the plaintiff sustained a physical impact as a result of the defendant's tortious conduct.⁸⁸

In analyzing fear-of-AIDS claims, the impact requirement is not a substantial factor. As in other fear-of-disease cases, almost all courts in fear-of-AIDS cases have not applied the impact requirement.⁸⁹

83. See Keeton, *supra* note 40, at 363.

84. See *id.* at 363.

85. See, e.g., *Plummer v. United States*, 580 F.2d 72, 76 (3d Cir. 1978) (impact of tubercle bacilli on lungs fulfills impact requirement).

86. See Keeton, *supra* note 40, at 364 (stating that "the great majority of courts have now repudiated the requirement of 'impact'"). See also *Niederman v. Brodsky*, 261 A.2d 84, 85 (Pa. 1970) ("Today we decide that on the record before us, appellant may go to trial and if he proves his allegations, recovery may be had from a negligent defendant, despite the fact that appellant's injuries arose in the absence of actual impact.").

87. See, e.g., *Plummer v. United States*, 580 F.2d 72, 76 (3d Cir. 1978).

88. See, e.g., *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1560 (N.D. Ill. 1983) ("Illinois case law requires only a causal link between the fear of future injury and the physical impact (as distinct from injury) of defendant's tortious conduct."); *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 526 (Fla. Dist. Ct. App. 1985) ("If the plaintiff has suffered an impact, Florida courts permit recovery for emotional distress stemming from the incident during which the impact occurred and not merely the impact itself.").

89. See generally *Cotita v. Pharma-Plast, U.S.A., Inc.*, 974 F.2d 598 (5th Cir. 1992); *Diaz Reyes v. United States*, 770 F. Supp. 58 (D.P.R. 1991); *Steinhagen v. United States*, 768 F. Supp. 200 (E.D. Mich. 1991); *Bullock v. O'Leary*, No. 88 C 10148, 1991 WL 206058 (N.D. Ill. Sept. 30, 1991); *Hosford v. Estate of Campbell*, 708 F. Supp. 7 (D.D.C. 1989); *Burk v. Sage Prods., Inc.*, 747 F. Supp. 285 (E.D. Pa. 1990); *Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367 (N.D. Ill. 1988); *Transamerica Ins. Co. v. Doe*, 840 P.2d 288 (Ariz. Ct. App. 1992); *R.E.G. v. L.M.G. (In re the Marriage of R.E.G.)*, 571 N.E.2d 298 (Ind. Ct. App. 1991); *Hare v. State*, 570 N.Y.S.2d 125 (App. Div. 1991); *Ordway v. County of Suffolk*, 583 N.Y.S.2d 1014 (Sup. Ct. 1992); *McBarnette v. Feldman*, 582 N.Y.S.2d 900 (Sup. Ct. 1992); *Doe v. Doe*, 519 N.Y.S.2d 595 (Sup. Ct. 1987); *Carroll v. Sisters of Saint Francis Health Servs., Inc.*, No. 02A01-9110-CV-00232, 1992 WL 276717 (Tenn. Ct. App. Oct. 12, 1992); *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889 (W. Va. 1991); *Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79 (W. Va. 1991); *Kaehne v. Schmidt*, 472 N.W.2d 247 (Wis. Ct. App. 1991) (text available in Westlaw).

4. Imposing a Duty in the Absence of Impact or Injury

In certain jurisdictions, in unusual circumstances, a plaintiff may have a cause of action for negligent infliction of emotional distress, even though the plaintiff has sustained neither physical injury nor impact.⁹⁰ For the plaintiff to prevail in these cases, the defendant must have breached some duty of care owed to the plaintiff, and the plaintiff must have suffered severe emotional distress as a result of this breach.⁹¹ For example, plaintiffs have recovered emotional distress damages after being incorrectly informed that a close relative had died.⁹² Similarly, in *Molien v. Kaiser Foundation Hospitals*,⁹³ a woman recovered emotional distress damages after her doctor misdiagnosed her as having syphilis.⁹⁴ The plaintiff was married, and the court found that it was "easily predictable that an erroneous diagnosis of syphilis and its probable source would produce marital discord."⁹⁵

In some jurisdictions, in circumstances similar to those in *Molien*, a plaintiff who is erroneously informed that he is HIV positive may have a cause of action for negligent infliction of emotional distress. For example, a court awarded \$228,000 to a man who was falsely diagnosed as being HIV positive.⁹⁶ Similarly, doctors misdiagnosed two men as HIV positive; these men suffered severe emotional distress as a result.⁹⁷ One of the men underwent treatment for AIDS for six years before discovering that he was not infected.⁹⁸ Although doctors believed that he had HIV, they never tested him for AIDS.⁹⁹ The other patient was diagnosed as having AIDS because, as an intravenous drug user, he was a member of a high-risk group.¹⁰⁰ In fact, doctors diagnosed him as having AIDS

90. See, e.g., *Martinez v. Long Island Jewish Hillside Medical Ctr.*, 512 N.E.2d 538, 539 (N.Y. 1987) (plaintiff recovered emotional distress damages when doctors negligently misinformed plaintiff that she needed an abortion, and she had an abortion).

91. See *Morris v. Hartford Courant Co.*, 513 A.2d 66, 70 (Conn. 1986) (plaintiff can recover for negligent infliction of emotional distress even if plaintiff has sustained neither physical injury nor impact) (citing *Montinieri v. Southern New England Tel. Co.*, 398 A.2d 1180, 1184 (Conn. 1978)); *Martinez v. Long Island Jewish Hillside Medical Ctr.*, 512 N.E.2d 538, 539 (N.Y. 1987) ("Under these unusual circumstances, where there is a breach of a duty owed by defendant to plaintiff, the breach of that duty resulting directly in emotional harm is actionable."); *Kennedy v. McKesson Co.*, 448 N.E.2d 1332, 1334 (N.Y. 1983) ("[W]hen there is a duty owed by defendant to plaintiff, breach of that duty resulting directly in emotional harm is compensable even though no physical injury occurred.").

92. E.g., *Johnson v. State*, 334 N.E.2d 590, 592 (N.Y. 1975).

93. 616 P.2d 813 (Cal. 1980) (en banc).

94. See *id.* at 821.

95. *Id.* at 817.

96. See *Reynolds Holding, Man Angered to Learn AIDS Diagnosis Was False*, S.F. Chron., Oct. 23, 1992, at A1, A21.

97. See *2nd Claim Over AIDS Misdiagnosis*, S.F. Chron., Dec. 1, 1992, at A20 [hereinafter *2nd Claim*]; *Holding, supra* note 96, at A1.

98. See *Holding, supra* note 96, at A1.

99. See *id.* at A21.

100. See *2nd Claim* at A20.

despite two negative AIDS tests.¹⁰¹ In both of these cases, the patients are precluded from bringing suit by their contracts with their medical provider and are now seeking to recover damages via arbitration.¹⁰²

B. *Negligence: Proximate Cause and the Reasonableness of a Plaintiff's Fear of AIDS*

Although courts may require a plaintiff to demonstrate injury before trying a claim for fear of AIDS, fulfilling this requirement is insufficient by itself to support recovery. The plaintiff must also demonstrate that the defendant's tortious conduct proximately caused the plaintiff to fear developing AIDS in the future.¹⁰³ In fear-of-AIDS cases, the proximate cause inquiry revolves around the issue of whether the plaintiff's fear is reasonable. Courts examine whether a plaintiff's fear of AIDS is reasonable because defendants are not held liable for a plaintiff's unreasonable fears.¹⁰⁴ Only reasonable fears are the proximate result of a defendant's tortious conduct.¹⁰⁵ In determining whether a plaintiff's fear is reasonable, courts commonly examine two elements. First, courts consider whether the plaintiff can demonstrate any evidence of actual exposure to the AIDS virus.¹⁰⁶ Second, courts examine whether the fear of AIDS remains reasonable after the plaintiff receives an HIV-negative test result.¹⁰⁷

1. The Exposure Requirement

In cases involving fear of developing AIDS, many courts require a plaintiff to present evidence that the defendant actually exposed the plaintiff to HIV.¹⁰⁸ Several HIV-negative plaintiffs who have recovered damages have shown exposure to the virus.¹⁰⁹

In cases involving fear of AIDS, courts have not clearly indicated

101. *See id.*

102. *See id.*; Holding, *supra* note 96, at A1, A21.

103. *See Keeton, supra* note 40, at 165 (stating that a plaintiff must demonstrate a "reasonably close causal connection between the conduct and the resulting injury").

104. *See Faya v. Almaraz*, 620 A.2d 327, 337 (Md. 1993) (plaintiffs may only recover for fear of AIDS "for the periods constituting their reasonable window of anxiety"); *Funeral Servs. by Gregory v. Bluefield Community Hosp.*, 413 S.E.2d 79, 84 (W. Va. 1991) (noting that unreasonable fear of AIDS is not compensable).

105. *See, e.g., Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1559 (N.D. Ill. 1983) (in cases involving fear of disease, proximate cause "demands a reasonable fear"); *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 894 (W. Va. 1991) (in analyzing whether the defendant proximately caused the plaintiff to fear AIDS, the court examined whether the plaintiff's fear was reasonable).

106. *See infra* notes 108-53 and accompanying text.

107. *See infra* notes 154-64 and accompanying text.

108. *See, e.g., Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 893 (W. Va. 1991) ("[B]efore a recovery for emotional distress damages may be made due to a fear of contracting a disease, such as AIDS, there must first be *exposure* to the disease.").

109. *See Cotita v. Pharma-Plast, U.S.A., Inc.*, 974 F.2d 598, 599 (5th Cir. 1992) (plaintiff stuck by needle while he was wearing plastic gloves covered with HIV-infected blood); *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 891 (W. Va. 1991) (plaintiff

whether the exposure requirement is an issue of proximate cause or the defendant's duty. Because evidence of exposure bears on the reasonableness of the plaintiff's fear of future infection, it appears to be an issue of proximate cause.¹¹⁰

Several factors indicate that the exposure requirement is a question of proximate cause. First, at least one court clearly views exposure in fear-of-AIDS cases as a question of proximate cause.¹¹¹ In *Carroll v. Sisters of Saint Francis Health Services, Inc.*,¹¹² the plaintiff was permitted to proceed with a cause of action alleging damages for fear of AIDS even though she did not present any evidence of exposure to HIV.¹¹³ The court indicated that the question to be resolved was the overall reasonableness of the plaintiff's fear and that evidence of exposure was one element in determining the reasonableness of the fear.¹¹⁴ Similarly, in *Faya v. Almaraz*,¹¹⁵ the Maryland Court of Appeals indicated that the exposure requirement is an issue of proximate cause, not the defendant's duty.¹¹⁶ In *Faya*, the appeals court reversed two trial court decisions that granted motions to dismiss claims for emotional distress damages for fear of AIDS.¹¹⁷ In holding that plaintiffs who failed to allege actual exposure to HIV could survive a motion to dismiss, the appeals court indicated that evidence of exposure went to the reasonableness of the plaintiff's fear, not the scope of the defendant's duty.¹¹⁸

Second, most courts analyze the issue of exposure to HIV in the context of examining the reasonableness of a plaintiff's fear.¹¹⁹ These courts apparently view a plaintiff's fear as unreasonable, and therefore not proximately caused by the defendant's breach, if the plaintiff cannot produce evidence of actual exposure to HIV. Thus it can be inferred that when courts have granted motions for summary judgment, because a plaintiff has not presented any evidence of exposure to the virus, the reasonableness of the plaintiff's fear is not a material issue of fact.¹²⁰

Third, if exposure were a question of duty, it would require a modification of the impact and injury requirements in several jurisdictions be-

bitten by HIV-positive person); see also *AIDS*, Nat'l L.J., Jan. 29, 1990, at S3 (discussing *Christian v. Sheft*, C574 153 (Cal. Super. Ct.)).

110. See *supra* note 105.

111. See *Carroll v. Sisters of Saint Francis Health Servs., Inc.*, No. 02A01-9110-CV-00232, 1992 WL 276717 (Tenn. Ct. App. Oct. 12, 1992).

112. No. 02A01-9110-CV-00232, 1992 WL 276717 (Tenn. Ct. App. Oct. 12, 1992).

113. See *id.* at *3, *5.

114. See *id.* at *4.

115. 620 A.2d 327, 330, 339 (Md. 1993).

116. See *id.* at 327, 330, 339.

117. See *id.* at 339.

118. See *id.* at 336-39.

119. See, e.g., *Burk v. Sage Prods., Inc.*, 747 F. Supp. 285, 286 (E.D. Pa. 1990); *Hare v. State*, 570 N.Y.S.2d 125, 127 (App. Div. 1991); *Ordway v. County of Suffolk*, 583 N.Y.S.2d 1014 (Sup. Ct. 1992); *Johnson v. West Virginia Univ. Hosps., Inc.* 413 S.E.2d 889, 893 (W. Va. 1991); *Federal Servs. by Gregory v. Bluefield Community Hosp.*, 413 S.E.2d 79, 84 (W. Va. 1991).

120. See, e.g., *Burk*, 747 F. Supp. at 286 (plaintiff tested negative five times).

cause plaintiffs who have been denied damages for fear of AIDS (because they could not prove exposure) have been able to show some physical impact or injury.¹²¹ It is unlikely that these courts intended to create an exception to the impact or injury rules. Such an exception would hold that a defendant who has caused a plaintiff to suffer an injury or impact has violated a duty not to cause the plaintiff to suffer emotional distress generally but has not violated a duty not to cause a plaintiff to fear AIDS.

Courts have dismissed most cases in which plaintiffs have failed to present any evidence of actual exposure to HIV.¹²² Although these plaintiffs may potentially have been exposed to the AIDS virus, they have not recovered because they have been unable to provide any evidence that the virus was actually present.¹²³ For example, in *Burk v. Sage Products, Inc.*,¹²⁴ a paramedic stuck his hand on a used needle.¹²⁵ Thus, he was potentially exposed to HIV because, if the needle were contaminated with the virus, he could become infected.¹²⁶ The court, however, refused to allow a claim based on potential exposure and required the plaintiff to present evidence indicating that the needle was, in fact, contaminated with infected blood.¹²⁷ The plaintiff presented no such evidence and the court granted the defendant's motion for summary judgment.¹²⁸ Most courts view the failure to present any evidence of actual exposure to HIV as dispositive of whether the plaintiff's fear of developing AIDS is reasonable.¹²⁹

In three sets of almost identical cases, HIV-negative plaintiffs who have presented evidence of actual exposure to the virus have recovered for their fear of AIDS, and plaintiffs who could not produce any evidence of actual exposure have not recovered. In *Johnson v. West Virginia Uni-*

121. See *Burk*, 747 F. Supp. at 285 (plaintiff stuck with needle); *Hare*, 570 N.Y.S.2d at 126 (plaintiff bitten on arm).

122. See, e.g., *Hare*, 570 N.Y.S.2d at 127 (hospital worker bitten by an inmate could not recover when "there was no proof adduced at trial establishing that the inmate was infected with AIDS"); *Funeral Servs. by Gregory v. Bluefield Community Hosp.*, 413 S.E.2d 79, 83 (W. Va. 1991) ("[B]efore a recovery for emotional distress damages may be made due to a fear of contracting a disease, such as AIDS, there must first be exposure to the disease. If there is no exposure, damages will be denied.") (citing *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 893 (W. Va. 1991)).

123. See *supra* note 122.

124. 747 F. Supp. 285 (E.D. Pa. 1990).

125. See *id.* at 286.

126. See Alan, R. Lifson, *Do Alternate Modes for Transmission of Human Immunodeficiency Virus Exist? A Review*, 259 J. Am. Med. Ass'n 1353, 1353 (1988) (indicating that a person can be infected with HIV by using a contaminated needle).

127. See *Burk v. Sage Prods., Inc.*, 747 F. Supp. 285, 287 (E.D. Pa. 1990) ("[P]laintiff cannot demonstrate that he was actually exposed to the AIDS virus because he cannot prove that the needle with which he was stuck was a needle that was used on an AIDS patient.").

128. See *id.* at 288.

129. See, e.g., *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 893 (W. Va. 1991).

versity Hospitals, Inc.,¹³⁰ the Supreme Court of West Virginia held that a jury correctly awarded damages for fear of AIDS to a police officer when an HIV-positive hospital patient bit himself and then, with infected blood on his teeth, bit the officer.¹³¹ Emphasizing the importance of the exposure requirement, the court found that "before a recovery for emotional distress damages may be made due to a fear of contracting a disease, such as AIDS, there must first be *exposure* to the disease."¹³² In contrast, a court denied recovery in a case in which a prison inmate who was bleeding after stabbing himself in the neck with a fork bit an X-ray technician.¹³³ The technician was denied recovery because "no proof was adduced at trial establishing that the inmate was infected with AIDS."¹³⁴

In *Cotita v. Pharma-Plast, U.S.A., Inc.*,¹³⁵ a nurse won damages for his fear of developing AIDS when an improperly packaged hypodermic needle stuck his hand while he was wearing plastic gloves splattered with HIV-contaminated blood.¹³⁶ Yet, in *Burk v. Sage Products, Inc.*,¹³⁷ the court granted summary judgment against a paramedic who stuck his hand on a used and discarded needle.¹³⁸ The paramedic did not recover because he failed to present any evidence that the needle was used on an AIDS patient.¹³⁹

In *Christian v. Sheft*,¹⁴⁰ Rock Hudson's homosexual lover recovered damages from Mr. Hudson's estate for his fear of developing AIDS.¹⁴¹ But in *R.E.G. v. L.M.G. (In re the Marriage of R.E.G.)*,¹⁴² the court denied recovery when a wife sought to recover emotional distress damages after she discovered that her husband had engaged in homosexual relationships.¹⁴³ Because the husband had repeatedly tested HIV negative,¹⁴⁴ the wife could not demonstrate actual exposure to HIV.¹⁴⁵

At least one court, however, has rejected the requirement that a plain-

130. 413 S.E.2d 889 (W. Va. 1991).

131. *See id.* at 891, 897.

132. *Id.* at 893. The same court applied the exposure requirement and denied recovery to a mortician who worked on an HIV-infected corpse but could not demonstrate any evidence of exposure to HIV. *See Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79, 84 (W. Va. 1991). The court distinguished this case from *Johnson*: "Plaintiff's position is in marked contrast to the other situations where recovery for fear of contracting a disease has been held compensable, in that plaintiff in this case is unable to demonstrate an exposure to a disease-causing agent." *Id.* at 83.

133. *Hare v. State*, 570 N.Y.S.2d 125, 125-27 (App. Div. 1991).

134. *Id.* at 127.

135. 974 F.2d 598 (5th Cir. 1992).

136. *See id.* at 599.

137. 747 F. Supp. 285 (E.D. Pa. 1990).

138. *See id.* at 288.

139. *See id.* at 287-88.

140. *See AIDS*, Nat'l L.J., Jan. 29, 1990, at S3 (discussing *Christian v. Sheft*, C574 153 (Cal. Super. Ct.)).

141. *See id.*

142. 571 N.E.2d 298 (Ind. Ct. App. 1991).

143. *See id.* at 300.

144. *See id.* at 302.

145. *See id.* at 303.

tiff must present some evidence of actual exposure to HIV. In *Carroll v. Sisters of Saint Francis Health Services, Inc.*,¹⁴⁶ a Tennessee appeals court held that a plaintiff could pursue a cause of action alleging damages for fear of AIDS even when she presented no evidence of actual exposure to the virus.¹⁴⁷ In *Carroll*, a woman who was visiting a relative in a hospital stuck her hand on several needles in a contaminated needle receptacle that she mistook for a paper towel holder.¹⁴⁸ The trial court granted partial summary judgment against the plaintiff because she did not present any evidence that the needles were contaminated with HIV-infected blood.¹⁴⁹ The appeals court reversed, expressly declining to apply "the strict rules of actual exposure" that require a plaintiff to show evidence of exposure before proceeding with a claim for fear of AIDS.¹⁵⁰ Rather, the appeals court stated that proof of exposure was only a factor in considering the overall reasonableness of the plaintiff's fear of disease.¹⁵¹ The court noted that summary judgment was inappropriate because a material issue of fact remained as to whether the plaintiff's fear of future illness was reasonable.¹⁵² It concluded that this was a question for a jury, rather than a matter that could be decided on a summary judgment motion.¹⁵³

2. Overall Reasonableness

The final question that courts must address in fear-of-AIDS cases is whether the plaintiff's emotional distress is reasonable. As discussed previously, courts may require a plaintiff to show injury,¹⁵⁴ impact,¹⁵⁵ evidence of exposure to HIV,¹⁵⁶ or some combination of these elements.¹⁵⁷ But, by themselves, these are insufficient grounds for recovery. Courts also assess the overall reasonableness of the plaintiff's claim, allowing recovery only in cases in which a plaintiff's fear is reasonable,¹⁵⁸

146. No. 02A01-9100-CV-00232, 1992 WL 276717, at *4 (Tenn. Ct. App. Oct. 12, 1992).

147. See *id.* at *4-5. The court squarely addressed the question of whether exposure was required when it stated that the primary issue in the case was: "whether plaintiff can recover for emotional distress caused by fear of contracting AIDS without proof that plaintiff was exposed to the AIDS virus." *Id.* at *3.

148. See *id.* at *1.

149. See *id.* at *2 ("The trial court granted partial summary judgment on the ground that plaintiff could not recover for her fear of contracting AIDS without proof that she was actually exposed to the AIDS virus.").

150. See *id.* at *4-5.

151. See *id.* at *4.

152. See *id.* at *5.

153. See *id.*

154. See *supra* notes 65-82 and accompanying text.

155. See *supra* notes 83-89 and accompanying text.

156. See *supra* notes 108-53 and accompanying text.

157. See, e.g., *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 892-93 (W. Va. 1991) (requiring plaintiff to demonstrate both injury and exposure before allowing recovery for fear of AIDS).

158. See, e.g., *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1559-60 (N.D. Ill. 1983) (recognizing that plaintiffs who were improperly exposed to DES must show

and denying recovery in cases in which the plaintiff's fear is unreasonable.¹⁵⁹

The overall reasonableness inquiry could be particularly significant in fear-of-AIDS cases because AIDS tests are accurate predictors of future infection¹⁶⁰ and because the scientific community continually scrutinizes the reliability of AIDS tests.¹⁶¹ As a result, fear-of-AIDS cases differ from other fear of disease suits. In a case in which a plaintiff claims damages for fear of a disease other than AIDS, there may be no accurate, current information that the court can use to determine the probability that the plaintiff will develop the disease.¹⁶² In contrast, a court deciding a fear-of-AIDS claim can refer to a plethora of current data.

In analyzing the overall reasonableness of HIV-negative plaintiffs' fear-of-AIDS claims, this Note follows the same two inquiries that courts appear to apply. First, what is the probability that the plaintiff will develop the feared future illness or injury?¹⁶³ Second, given this

both physical impact and reasonableness of fear); *Jones v. United R.Rs. of S.F.*, 202 P. 919, 922 (Cal. Dist. Ct. App. 1921) (plaintiff injured because of defendant's negligence could recover for "her reasonable apprehension of permanent disability"); *Petriello v. Kalman*, 576 A.2d 474, 481 (Conn. 1990) (in medical malpractice action, finding plaintiff's fear of future bowel obstruction was reasonable); *Walker v. Boston & Me. R.R.*, 51 A. 918, 919 (N.H. 1902) ("Upon the question of damages for future physical and mental pain, the jury were limited by the instructions given to such suffering as was shown to the direct, natural, and probable result of the defendant's fault."); *Ferrara v. Galluchio*, 152 N.E.2d 249, 253 (N.Y. 1958) (allowing plaintiff to recover for reasonable fear of cancer).

159. See *Watson v. Augusta Brewing Co.*, 52 S.E. 152, 153 (Ga. 1905) (The plaintiff "may not continue for an indefinite period to vex his soul with dread on account of having been 'cut on the inside,' and hold the defendant liable for his apprehensions."); *Louisville & Nashville R.R. v. Davis*, 250 S.W. 978, 979 (Ky. 1923) (holding that the trial court committed an error in allowing plaintiff who was injured in a car accident to testify regarding his fear of possible blood poisoning and fear of being crippled since these fears "were altogether groundless, and never materialized"); *Winik v. Jewish Hosp. of Brooklyn*, 293 N.E.2d 95, 95 (N.Y. 1972) (no recovery for fear of cancer when all doctors that plaintiff consulted informed her that there was no risk of cancer); *Howard v. Mount Sinai Hosp., Inc.*, 217 N.W.2d 383 (Wis. 1974) (no recovery for fear of cancer when fear was not reasonable).

160. See *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 *Morbidity & Mortality Wkly. Rep.*, 509, 510 (Aug. 14, 1987) (indicating that current AIDS tests are 99% reliable under "optimal laboratory conditions").

161. See *id.*; *Interpretation and Use of the Western Block Assay for Serodiagnosis of Human Immunodeficiency Virus Type 1 Infections*, 38 *Morbidity & Mortality Wkly. Rep.* 1 (July 21, 1989); Thomas R. O'Brien et al., *Testing for Antibodies to Human Immunodeficiency Virus Type 2 in the United States*, 41 *Morbidity & Mortality Wkly. Rep.* 1 (July 17, 1992).

162. See, e.g., *Petriello v. Kalman*, 576 A.2d 474, 481 (Conn. 1990) (different experts testified to different probabilities that plaintiff would develop bowel obstruction).

163. See, e.g., *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1559 (N.D. Ill. 1983) (stating that plaintiff need only demonstrate "a reasonable fear, not a high degree of likelihood, that the feared contingency be likely to occur"); *Heider v. Employers Mut. Liab. Ins. Co. of Wis.*, 231 So. 2d 438, 441-42 (La. Ct. App. 1970) ("The medical experts were of the opinion that there was a 2% to 5% chance that one with injuries such as Mrs. Heider's would experience epileptic seizures in years to come.").

probability, is the plaintiff's fear reasonable?¹⁶⁴

a. *Assessing the Probability of HIV Infection*

Two factors complicate the inquiry into whether it is reasonable for an HIV-negative plaintiff to fear developing AIDS. First, testing for HIV infection is not viable until approximately three months following exposure to the virus.¹⁶⁵ Thus it is necessary to assess a plaintiff's fear for both the period of time before the virus is detectable and the period after which testing becomes viable. Second, there are different tests for different strains of the virus.¹⁶⁶

It is important to distinguish between a plaintiff's fear immediately after being exposed to HIV and a plaintiff's fear after testing for HIV becomes possible. Even if a plaintiff were, in fact, infected with HIV, the current tests could not detect the virus until approximately three months after exposure.¹⁶⁷ Thus a plaintiff exposed to HIV may harbor a reasonable fear of AIDS for the three months immediately following exposure because there is no way to determine whether the plaintiff is infected.¹⁶⁸

When HIV tests become viable, it is substantially more difficult to assess the overall reasonableness of a plaintiff's fear because there are several strains of the virus, several different tests for the virus, and a plethora of data concerning the reliability of each test. By far the most common HIV strain in the United States is HIV Type 1,¹⁶⁹ and most

164. See, e.g., *Baylor v. Tyrrell*, 131 N.W.2d 393, 401-02 (Neb. 1964) (upholding award for emotional distress damages and noting that a physician's statement that a plaintiff's injuries " 'might' develop into cancer is a reasonable basis for a patient to have anxiety about the possibility of developing cancer").

165. See *supra* note 19. At this point, it is helpful to distinguish between detectability of HIV and evidence of AIDS symptoms. HIV is the virus that causes AIDS, and this virus can be detected approximately three months after a person has become infected. See *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, Morbidity & Mortality Wkly. Rep. 509, 509 (Aug. 14, 1987). However, a person who is infected with HIV may not demonstrate any AIDS symptoms until several years after being infected. See *id.*

166. See *infra* notes 169-86 and accompanying text.

167. See *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 Morbidity & Mortality Wkly. Rep. 509, 509 (Aug. 14, 1987) ("Persons exposed to HIV usually develop detectable levels of antibody against the virus within 6-12 weeks of infection.").

168. See John P. Darby, Note, *Tort Liability for the Transmission of the AIDS Virus: Damages for Fear of AIDS and Prospective AIDS*, 45 Wash. & Lee L. Rev. 185, 199 (1988) ("[A]n uninfected person who was exposed to HIV should be able to recover for the fear of AIDS the person suffered before discovering that he did not carry HIV."). Further, there is a striking similarity between a claim for fear of AIDS when there is no reliable method for determining infection and older cases involving fear of rabies. See, e.g., *Ayers v. Macoughtry*, 117 P. 1088, 1088 (Okla. 1911) ("by reason of the fact that it was impossible at the time to ascertain whether or not a dog has rabies or hydrophobia, plaintiff suffered great mental pain, and was put in fear of his life by reason of his apprehension of said wounds causing the said disease").

169. See *Testing for Antibodies to Human Immunodeficiency Virus Type 2 in the United States*, 41 Morbidity & Mortality Wkly. Rep. 1, 2 (July 17, 1992) (stating that incidents of HIV-2 are extremely rare in the United States).

AIDS tests given in this country are designed to detect this strain.¹⁷⁰

When a person is tested for HIV, the blood sample is given an initial test.¹⁷¹ This test is more than 99% reliable "under optimal laboratory conditions."¹⁷² If the initial test result is negative, usually no further tests are performed.¹⁷³ At this point, a false negative (that is, a negative result when the person is, in fact, infected) would most likely occur because the person took the test too soon after exposure to the virus.¹⁷⁴ If the initial test indicates HIV infection, the procedure is repeated using the same test.¹⁷⁵ If the results of these retests indicate infection, the sample is analyzed using a second type of test.¹⁷⁶ Although the second test uses a different method for determining infection, the two tests are comparably reliable.¹⁷⁷ When these two tests are used in combination, a false positive result is extremely improbable.¹⁷⁸ Yet, even the most accurate tests cannot guard against human error, which is probably the primary cause of test inaccuracy.¹⁷⁹

The second strain of the virus, HIV Type 2, is so rare in the United States that the Centers for Disease Control do "not recommend routine testing for HIV-2 . . . in settings other than blood centers."¹⁸⁰ Although HIV-2 is endemic in parts of West Africa and has been increasingly common in France and Portugal,¹⁸¹ the Centers for Disease Control only

170. *See id.*

171. *See Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 *Morbidity & Mortality Wkly. Rep.* 509, 510 (Aug. 14, 1987). Although the names of the tests may differ, the first test is normally called an "EIA" test and the second is commonly called a "Western Blot" test. *See id.*; *Interpretation and Use of the Western Blot Assay for Serodiagnosis of Human Immunodeficiency Virus Type 1 Infections*, 36 *Morbidity & Mortality Wkly. Rep.* (July 21, 1989).

172. *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 *Morbidity & Mortality Wkly. Rep.* 509, 510 (Aug. 14, 1987).

173. *See id.*

174. *See id.*

175. *See id.*; *Interpretation and Use of the Western Blot Assay for Serodiagnosis of Human Immunodeficiency Virus Type 1 Infections*, 38 *Morbidity & Mortality Wkly. Rep.* 1, 1 (July 21, 1989).

176. *See Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 *Morbidity & Mortality Wkly. Rep.* 509, 510 (Aug. 14, 1987); *Interpretation and Use of the Western Blot Assay for Serodiagnosis of Human Immunodeficiency Virus Type 1 Infections*, 38 *Morbidity & Mortality Wkly. Rep.* 1, 1 (July 21, 1989).

177. *See Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 *Morbidity & Mortality Wkly. Rep.* 509, 510 (Aug. 14, 1987).

178. *See id.* ("Under ideal circumstances, the probability that a testing sequence will be falsely positive in a population with a low rate of infection ranges from less than 1 in 100,000 . . . to an estimated 5 in 100,000.").

179. *See id.*

180. *See Testing for Antibodies to Human Immunodeficiency Virus Type 2 in the United States*, 41 *Morbidity & Mortality Wkly. Rep.* 1, 3-4 (July 17, 1992) ("Since 1987, 32 persons with HIV-2 infection have been reported in the United States.").

181. *See id.* at 2-3.

recommend special testing for this strain when specific facts indicate a possibility of exposure to HIV-2.¹⁸² If a person infected with HIV-2 takes the standard HIV-1 test available at most U.S. testing facilities, there is between a 60% and 91% chance that the test will detect the virus.¹⁸³ In contrast, the test specifically designed to detect HIV-2 infection is more than 99% reliable.¹⁸⁴ Finally, there may be at least one new strain of the virus that cannot be detected using any of the current tests.¹⁸⁵ As of July 1992, twenty-one people worldwide had shown signs of AIDS without testing positive for any known strain of the virus.¹⁸⁶

As these data indicate, it is difficult to ascertain the exact probability that an HIV-negative plaintiff is infected. HIV tests are very accurate compared with tests for other diseases, and a negative result would indicate a greater than 99% probability that the plaintiff is not infected.¹⁸⁷ A plaintiff, however, can make several arguments that the probability of infection is greater than it may initially appear: the disease might not have been detectable at the time of the test;¹⁸⁸ the test might not have been performed under ideal conditions; the test may be inaccurate because of human error;¹⁸⁹ the plaintiff may be infected with HIV-2, and the test the plaintiff received could not accurately detect this strain of the virus;¹⁹⁰ and the plaintiff may be infected with an undetectable strain of the virus.¹⁹¹

b. *Assessing the Reasonableness of the Fear*

After a court has examined the probability that a plaintiff who tests HIV negative may develop AIDS, it then must determine whether the plaintiff's fear is reasonable. In fear-of-disease cases, courts have not applied a uniform standard in assessing whether a plaintiff's fear is reasonable.

The most permissive standard that courts have applied in fear-of-disease cases eschews any inquiry into the probability of future infection. In these cases, plaintiffs have recovered damages for emotional distress that bears no rational relationship to the probability of future infection.¹⁹²

182. *See id.* at 4.

183. *See id.* at 3.

184. *See id.*

185. *Unexplained CD4+ T-Lymphocyte Depletion in Person Without Evident HIV Infection—United States*, 41 *Morbidity & Mortality Wkly. Rep.* 541, 541-45 (July 31, 1992).

186. *Id.* at 541.

187. *See supra* note 172.

188. *See supra* note 167.

189. *See supra* note 179.

190. *See supra* note 183.

191. *See supra* note 185.

192. *See, e.g.,* *Dempsey v. Hartley*, 94 F. Supp. 918, 920 (E.D. Pa. 1951) (When female plaintiff sustained injury to her breasts after a car accident caused by defendant's negligence, the court allowed plaintiff to recover for emotional distress, including fear of cancer, even though plaintiff's expert testified that "he never saw anything about her injuries

Under this standard, HIV-negative plaintiffs would recover for their fear of AIDS, although their fear might be entirely irrational.¹⁹³

Some courts have allowed recovery for fear of a future illness that "might" occur¹⁹⁴ or a possible illness that "cannot be ruled out."¹⁹⁵ Under these standards, HIV-negative plaintiffs who demonstrate exposure to the virus probably would be able to recover. Given that an individual who tests HIV negative could still be infected with some strain of the virus, such plaintiffs "might" develop AIDS in the future, and the possibility of future illness cannot be ruled out.

New York courts use a totality-of-the-circumstances test that examines whether there are factual guarantees that the plaintiff's claim is reasonable.¹⁹⁶ Under this approach, whether a plaintiff could recover for fear of AIDS would depend on all the circumstances, including whether the plaintiff has tested HIV negative.¹⁹⁷

The Supreme Court of Kansas articulated a stricter standard for plaintiffs seeking to recover for fear of future injury.¹⁹⁸ While stating that the plaintiff need not show that the feared injury or illness is "a medical certainty or probability," the court required "a showing that a substantial possibility exists for such an occurrence."¹⁹⁹ The court went on to say that damages for fear are "not recoverable when the future event is highly unlikely."²⁰⁰ Under this "substantial possibility" test, HIV-negative plaintiffs probably could not recover for fear of developing AIDS because tests are sufficiently accurate that a negative result eliminates any substantial possibility of infection.

Also, because AIDS is a fatal, degenerative disease, the grave consequences of infection may be a factor in determining whether a plaintiff's fear is reasonable. Even a slim probability of infection with a fatal disease may create a reasonable fear.²⁰¹

Given these differing standards, it is not surprising that courts have assessed the importance of a negative AIDS test differently. One court stated that plaintiffs can only recover damages for fear of AIDS for the

that should give her any reason to apprehend cancer."); *Murphy v. Penn Fruit Co.*, 418 A.2d 480, 482 (Pa. Super. Ct. 1980) (In case in which plaintiff was severely stabbed, the court granted recovery for emotional damages, including plaintiff's "constant fear of cancer, heart attack, and an early death, despite assurances of her doctors to the contrary.").

193. *Cf. id.*

194. *See Baylor v. Tyrrell*, 131 N.W.2d 393, 402 (Neb. 1964).

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

196. *See Ferrara v. Galluchio*, 152 N.E.2d 249, 252 (N.Y. 1958).

197. *See Hare v. State*, 570 N.Y.S.2d 125, 127 (App. Div. 1991) (rejecting plaintiff's claim and noting "the claimant himself was tested for AIDS several times with negative results").

198. *See Tamplin v. Star Lumber & Supply Co.*, 836 P.2d 1102, 1108 (Kan. 1992).

199. *Id.*

200. *Id.*

201. *Cf. Ayers v. Macoughtry*, 117 P.2d 1088, 1090 (Okla. 1911) ("Likewise it is a matter of general knowledge that one of the most horrible forms in which death can visit humanity is that of hydrophobia, and that this is incurred by being bitten by dogs which have it.").

period of time before testing becomes viable.²⁰² Several courts have recognized that, where a plaintiff has tested HIV negative, it was very improbable that the plaintiff was infected.²⁰³ These courts have used this fact as a major factor in determining that the plaintiff's fear was unreasonable.²⁰⁴ Other courts have allowed recovery for fear even though the plaintiff has tested HIV negative more than three months after exposure.²⁰⁵ Finally, some courts have refused to recognize the reliability of the tests.²⁰⁶

C. *Intentional Torts*

The previous section examined many of the elements necessary for bringing a negligence claim alleging fear-of-AIDS damages. Similar to negligence claims, plaintiffs can recover damages for fear of future illness or injury as a result of a defendant's intentional tort. In cases involving fear of AIDS, the intentional tort would almost always be either battery or intentional infliction of emotional distress. A person who commits an intentional tort is liable for injuries resulting from that tort. In cases in which an HIV-negative plaintiff brings a cause of action alleging an intentional tort and claiming damages for fear of AIDS, the causality analysis involves the issues of exposure²⁰⁷ and the overall reasonableness of the plaintiff's fear.²⁰⁸

202. See *Faya v. Almaraz*, 620 A.2d 327, 337 & n.10 (Md. 1993).

203. See *Burk v. Sage Prods., Inc.*, 747 F. Supp. 285, 288 (E.D. Pa. 1990) (stating that it "is extremely unlikely that a patient who tests HIV-negative more than six months after a potential exposure will contract the disease as a result of that exposure"); *Hare v. State*, 570 N.Y.S.2d 125, 127 (App. Div. 1991) (noting that "the claimant himself was tested for AIDS several times with negative results" and thus "the evidence adduced with respect to the claimant's emotional distress was remote and speculative").

204. See *supra* note 203.

205. See *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 891 (W. Va. 1991) (in a case in which exposure occurred three years previously, finding that plaintiff's continuing fear of AIDS is reasonable even though the plaintiff "is regularly tested for AIDS" but has not contracted HIV); *AIDS*, Nat'l L.J., Jan. 29, 1990, at S3 (discussing *Christian v. Sheft*, C574 153 (Cal. Super. Ct.)) ("So far Mr. Christian has tested negative for the acquired immune deficiency syndrome virus, but in his lawsuit he claimed great emotional distress caused by the continual fear that he may contract the disease."); see also *Carroll v. Sisters of Saint Francis Health Servs., Inc.*, No. 02A01-9110-Cv-00232, 1992 WL 276717, at *2 (Tenn. Ct. App. Oct. 12, 1992) (allowing plaintiff to pursue a claim for fear of AIDS even though over several years "HIV tests were performed on several occasions . . . and were all negative").

206. See *R.E.G. v. L.M.G. (In re the Marriage of R.E.G.)*, 571 N.E.2d 298, 302 (Ind. Ct. App. 1991) (The court refused "to take judicial notice of these materials which indicate that HIV is 99% detectable within three months' time and a false negative test for HIV is remote."); *Carroll v. Sisters of Saint Francis Health Servs., Inc.*, No. 02A01-9110-Cv-00232, 1992 WL 276717, at *4 (Tenn. Ct. App. Oct. 12, 1992) ("AIDS testing is not susceptible of the same degree of certitude as is testing for other pathogens.").

207. See *supra* text accompanying notes 108-53.

208. See *supra* text accompanying notes 154-206.

1. Battery

Transmission of a disease may constitute an intentional tort for which a plaintiff can recover damages.²⁰⁹ Cases in which a defendant has intentionally transmitted a disease are unusual. Battery causes of action occasionally arise, however, in cases involving transmission of venereal diseases, because a person's consent to sexual contact is vitiated when that person's partner fails to disclose the fact that he is infected with a venereal disease.²¹⁰ When consent is vitiated, the sexual contact constitutes a battery.²¹¹ Once a plaintiff has established a valid battery cause of action, a defendant is liable for all emotional damages resulting from the tortious conduct.²¹²

This raises the issue of whether a plaintiff can recover damages for fear of disease resulting from a battery when the plaintiff cannot demonstrate actual infection with the virus. In a fear-of-AIDS context, such a situation would likely arise in two ways. First, a person might deliberately attempt to infect someone with the virus.²¹³ In such a case, if an HIV-negative plaintiff were to claim damages for fear of AIDS, the issue would be whether the defendant's actions caused the plaintiff's fear.²¹⁴ The causality analysis would require courts to examine whether the defendant actually exposed the plaintiff to HIV²¹⁵ and whether the plaintiff's fear is reasonable.²¹⁶

Second, an HIV-negative plaintiff may have had sex with a person who did not reveal the fact that he was HIV positive. Currently, there are no cases that directly address this point. The theory underlying a battery claim in these circumstances is that the plaintiff did not make an informed consent.²¹⁷ Thus, an HIV-negative plaintiff claiming damages for

209. See, *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273, 276 n.3 (Cal. Ct. App. 1984).

210. Keeton, *supra* note 40, at 120. See also *Kathleen K.*, 198 Cal. Rptr. at 277 ("The basic premise underlying these old cases—consent to sexual intercourse vitiated by one partner's fraudulent concealment of the risk of infection with venereal disease—is equally applicable today, whether or not the partners involved are married to each other."); *Crowell v. Crowell*, 105 S.E. 206, 207 (N.C. 1920) ("It was a far greater assault for the husband to communicate to his wife . . . a foul and loathsome disease, which has caused her serious bodily injury, and which medical books hold to be a permanent injury of which she can never be entirely cured."); *De Vall v. Strunk*, 96 S.W.2d 245 (Tex. Civ. App. 1936) (transmission of genital crabs vitiates consent).

211. See *supra* note 210.

212. See Keeton, *supra* note 40, at 57 ("But if some independent tort, such as assault, battery, false imprisonment, or seduction could be made out, the cause of action served as a peg upon which to hang the mental damages and recovery was freely permitted.") (citations omitted).

213. See *Commonwealth v. Brown*, 605 A.2d 429 (Pa. Super. Ct. 1992) (HIV-positive defendant threw his feces at a prison guard, hitting the guard in the face). Although *Brown* is a criminal assault case, these facts would likely constitute a civil claim for battery.

214. See *supra* notes 103-206 and accompanying text.

215. See *supra* notes 108-53 and accompanying text.

216. See *supra* notes 154-206 and accompanying text.

217. See Keeton, *supra* note 40, at 119 ("A plaintiff cannot ordinarily be regarded as actually consenting to the defendant's conduct if the plaintiff assented to the conduct

fear of AIDS could claim that he would not have consented to sexual relations if he knew that the defendant was HIV positive.²¹⁸ In the cases that have recognized a battery in similar situations, however, the plaintiff has actually contracted the disease.²¹⁹ It is unclear whether courts will expand this concept of battery to embrace cases in which the plaintiff was exposed to a disease but failed to produce evidence of actual infection.

2. Intentional Infliction of Emotional Distress

In rare circumstances, an HIV-negative plaintiff can claim damages for fear of AIDS based on a theory of intentional infliction of emotional distress.²²⁰ Like emotional distress damages in other tort actions, courts have been reluctant to allow recovery for intentional infliction of emotional distress.²²¹ Modern courts, however, have allowed recovery for emotional distress without physical injuries in extreme or outrageous circumstances.²²² Courts have allowed recovery in cases in which a person has deliberately lied to the plaintiff and the circumstances rendered this conduct outrageous.²²³

In cases in which an HIV-negative plaintiff fears developing AIDS, intentional infliction of emotional distress claims have arisen in two ways. First, in *Whelan v. Whelan*,²²⁴ a husband who had engaged in sexual relations with his wife told her that he was HIV positive, knowing that, in fact, he was not.²²⁵ Under these facts, the court found that the

while mistaken about the nature and quality of the invasion intended by the defendant.") (citations omitted).

218. *Cf. Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273, 276 (Cal. Ct. App. 1984) (a battery case involving herpes).

219. *See supra* note 210.

220. *See, e.g., Whelan v. Whelan*, 588 A.2d 251 (Conn. Super. Ct. 1991) (woman brings intentional infliction of emotional distress claim against her husband after he deliberately lied to her by saying that he had AIDS).

221. *See Keeton, supra* note 40, at 55 ("[I]t has been said that mental consequences are so evanescent, intangible, and peculiar, and vary to such an extent with the individual concerned, that they cannot be anticipated, and so lie outside the boundaries of any reasonable 'proximate' connection with the act of the defendant.") (citations omitted); *id.* at 56 ("The most cogent objection to the protection of such interests lies in the 'wide door' which might be opened, not only to fictitious claims, but to litigation in the field of trivialities and mere bad manners."); *id.* at 55 (" 'Mental pain or anxiety,' said Lord Wensleydale in a famous English case, 'the law cannot value, and does not pretend to redress, when the unlawful act causes that alone.' ") (quoting from *Lynch v. Knight*, 9 H.L.C. 577, 598 (1861)).

222. *See Keeton, supra* note 40, at 60 ("[T]he rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind.") (citations omitted); *see also Daniels v. Adkins Protective Serv., Inc.*, 247 So. 2d 710, 711 (Miss. 1971) ("[D]amages are recoverable for mental pain and anguish by a willful, wanton, malicious or intentional wrong even though no bodily injury was sustained.") (citations omitted).

223. *See, e.g., Savage v. Boies*, 272 P.2d 349, 350 (Ariz. 1954) (falsely informing a woman that her husband and child were injured).

224. 588 A.2d 251 (Conn. Super. Ct. 1991).

225. *See id.* at 252.

plaintiff had a valid claim for intentional infliction of emotional distress.²²⁶ The *Whelan* court's decision is consistent with traditional views regarding intentional infliction of emotional distress. The defendant's conduct exceeded "all bounds usually tolerated by decent society."²²⁷ By lying to his wife and telling her that he was dying of AIDS, the defendant's conduct went far beyond "the field of trivialities and mere bad manners."²²⁸ Unlike cases in which the mental distress may "lie outside the boundaries of any reasonable 'proximate' connection,"²²⁹ it is a natural, probable, foreseeable consequence that the plaintiff would endure severe emotional distress after being falsely informed that her husband had exposed her to a deadly disease. Thus, allowing recovery for emotional distress under these circumstances would not lead to a flood of litigation.

Second, in *Baranowski v. Torre*,²³⁰ the defendant, who had engaged in homosexual relations with the plaintiff, falsely informed the plaintiff that it was unlikely that he, the defendant, was HIV positive.²³¹ In this case, the defendant misinformed the plaintiff by stating that the defendant's previous homosexual lover had died of cancer when, in fact, he had died of AIDS.²³² As in the previous example, the defendant deliberately lied in outrageous circumstances. Thus the court found "that probable cause exist[ed] that the claim of intentional infliction of emotional distress would be sustained."²³³

The *Baranowski* court may have erred in permitting the plaintiff to pursue a cause of action for intentional infliction of emotional distress because the defendant's lie did not cause the plaintiff's emotional distress. In a usual action for intentional infliction of emotional distress, the defendant has told a deliberate lie, and this lie has caused the plaintiff's mental damages.²³⁴ In contrast, the plaintiff in *Baranowski* suffered no emotional distress from the defendant's alleged lie that the defendant's former lover had died from cancer.²³⁵ Rather, the plaintiff suffered emotional distress when he discovered the truth.²³⁶ Thus, a claim for intentional infliction of emotional distress may be inappropriate under these facts.

II. DISCUSSION AND CRITICISM OF THE REASONING APPLIED BY COURTS IN FEAR-OF-AIDS CASES

Many of the arguments for limiting recovery for emotional distress

226. *Id.* at 252-53.

227. Keeton, *supra* note 40, at 60.

228. *Id.* at 56.

229. *Id.* at 55.

230. No. CV90-0236178, 1991 WL 240460 (Conn. Super. Ct. Nov. 7, 1991).

231. *See id.* at *1.

232. *See id.* at *1.

233. *Id.* at *2.

234. *See supra* note 223.

235. *See Baranowski*, 1991 WL 240460 at *2.

236. *Id.* at *1.

damages are applicable in cases involving claims for fear of AIDS. Courts should closely scrutinize these claims and should prevent plaintiffs from bringing suits for trivial harms²³⁷ or from bringing false claims.²³⁸ Also, there may be an attenuated link between a defendant's actions and a plaintiff's claimed damages, and thus it could be unfair to hold the defendant liable for these damages.²³⁹ In addition, the plaintiff's damages might not be the proximate result of defendant's tortious conduct.²⁴⁰ Further, allowing HIV-negative plaintiffs to recover for their fear of AIDS might provoke a deluge of litigation.²⁴¹

Strong public policy reasons indicate that courts should limit HIV-negative plaintiffs' ability to recover for fear of AIDS. AIDS is a fatal disease that has reached epidemic proportions.²⁴² Given the natural fear that people have of this disease, allowing liberal recovery²⁴³ will encourage individuals who wrongly believe that they have been exposed to HIV to bring suits alleging emotional damages. Many people are misinformed about how AIDS is transmitted, and they may incorrectly believe that they have been exposed to the virus.²⁴⁴ Further, public ignorance and fear may lead to improper jury verdicts. Jurors who harbor an irrational fear of AIDS may be inclined to award emotional distress damages even in cases in which the plaintiff's fear is unreasonable.

Given all of these potential problems, courts have used a variety of rationales to preclude plaintiffs from recovering for fear of AIDS.²⁴⁵

237. See Keeton, *supra* note 40, at 360-61.

238. See *id.*

239. See *id.* at 361; Howard v. Mount Sinai Hosp., Inc., 217 N.W.2d 383, 385 (Wis. 1974) ("In this case, although there is no question about there being in fact a fear of future cancer, the claim of damages (by way of cancer) is so remote and is too out of proportion to the culpability of the tort-feasor.").

240. See Keeton, *supra* note 40, at 361.

241. See *id.*

242. See Gerald Friedland et al., *Additional Evidence for Lack of Transmission of HIV Infection by Close Interpersonal (Casual) Contact*, AIDS, 639, 642 (1990) ("An estimated 1.5-2 million Americans and over 5 million people worldwide have become infected with HIV.") (footnotes omitted).

243. See Johnson v. West Virginia Univ. Hosps., Inc., 413 S.E.2d 889, 891 (W. Va. 1991) (plaintiff recovered \$1.9 million); AIDS, Nat'l L.J., Jan. 29, 1990, at S3 (discussing Christian v. Sheft, C574 153 (Cal. Super. Ct.)) (plaintiff originally awarded \$21.75 million, later reduced to \$5.5 million).

244. See Friedland et al., *supra* note 242, at 642 (noting that "a significant proportion of the population also continues to hold misconceptions about transmission by casual contact"). The article states: "78% [of the public] believed that transmission occurred through the use of public toilets, 19% by drinking from a carrier's glass, and 15% from hospitalization close to AIDS patients." *Id.*

245. See, e.g., Seddens v. McGinnis, 972 F.2d 352 (7th Cir. 1992) (text available in Westlaw) (no evidence of exposure); Bullock v. O'Leary, No. 88 C 10148, 1991 WL 206058, at *2 (N.D. Ill. Sept. 30, 1991) (same); Diaz Reyes v. United States, 770 F. Supp. 58, 60 (D.P.R. 1991) (denying damages for fear of AIDS in plaintiff's claim for negligent infliction of emotional distress when plaintiff could not demonstrate that defendant was negligent); Hosford v. Estate of Campbell, 708 F. Supp. 7, 8 (D.D.C. 1989) (plaintiff's claim for fear-of-AIDS damages was barred by Dead Man's Statute); Poole v. Alpha Therapeutic Corp., 698 F. Supp. 1367, 1372 (N.D. Ill. 1988) (plaintiff could not recover

Courts have carefully adhered to the injury requirement²⁴⁶ and, more importantly, many courts have required plaintiffs to demonstrate evidence of actual exposure to HIV.²⁴⁷ Strict adherence to the exposure requirement is logical because it is unreasonable for a plaintiff to fear a virus if the plaintiff was not exposed to the virus. Further, because the plaintiff bears the burden of producing evidence to substantiate his claim, it is reasonable to require the plaintiff to present some evidence of actual exposure to HIV in order to pursue a cause of action for fear of developing AIDS.²⁴⁸ A plaintiff who has failed to produce evidence of exposure to HIV has not met his burden of producing evidence to show that the defendant proximately caused the plaintiff to fear developing AIDS.²⁴⁹

Courts have allowed plaintiffs to pursue fear-of-AIDS cases where the facts clearly fall within a recognized cause of action for emotional distress damages. For example, in *Whelan v. Whelan*,²⁵⁰ the court denied the defendant's motion to strike a claim for intentional infliction of emotional distress. In that case, the defendant allegedly falsely informed his wife that he had AIDS.²⁵¹ Because a deliberate lie that is totally out of the bounds of acceptable social behavior can be the basis of a claim for intentional infliction of emotional distress,²⁵² the *Whelan* court correctly allowed the plaintiff to pursue her claim for damages for fear of AIDS even though she tested HIV negative.

Similarly, the facts in *Cotita v. Pharma-Plast, U.S.A., Inc.*²⁵³ contain all of the elements of a successful fear-of-AIDS claim. In this case, a nurse was stuck with a needle that was still in its package and lacked its

for fear of AIDS when she failed to show any physical injury); *Transamerica Ins. Co. v. Doe*, 840 P.2d 288, 290-92 (Ariz. Ct. App. 1992) (no recovery from insurer because fear of AIDS was not covered by terms of policy absent some physical injury); *R.E.G. v. L.M.G. (In re the Marriage of R.E.G.)*, 571 N.E.2d 298, 303 (Ind. Ct. App. 1991) (noting that ex-wife's claim of "AIDS-phobia" was based entirely on "conjecture or speculation" when she tested HIV negative and her ex-husband had repeatedly tested HIV negative); *Doe v. Doe*, 519 N.Y.S.2d 595, 598-99 (Sup. Ct. 1987) (plaintiff did not show that her claim was reasonable because she sustained no physical harm, and she produced no medical evidence to support her claim).

246. *See, Doe v. Doe*, 519 N.Y.S.2d 595, 598-99 (Sup. Ct. 1987).

247. *See, e.g., Burk v. Sage Prods., Inc.*, 747 F. Supp. 285, 287 (E.D. Pa. 1990) (requiring plaintiff to show evidence of actual exposure to HIV); *Hare v. State*, 173 A.D.2d 523, 524-25 (App. Div. 1991) (same); *Ordway v. County of Suffolk*, 583 N.Y.S.2d 1014, 1017 (Sup. Ct. 1992) (same); *Funeral Servs. by Gregory v. Bluefield Community Hosp.*, 413 S.E.2d 79, 84 (W. Va. 1991) (same).

248. *See, e.g., Kaehne v. Schmidt*, 472 N.W.2d 247 (Wis. Ct. App. 1991) (text available in Westlaw, at *1) ("The burden on the person claiming damages is to convince the jury, by the greater weight of the credible evidence to a reasonable certainty, that he has sustained or will sustain the mental distress and physical harm claimed as a result of the tortfeasor's negligent conduct.").

249. *See supra* notes 110-21 and accompanying text.

250. 588 A.2d 251 (Conn. Super. Ct. 1991).

251. *See id.* at 252.

252. *See Keeton, supra* note 40, at 60.

253. 974 F.2d 598 (5th Cir. 1992).

protective tip.²⁵⁴ The nurse feared that he would develop AIDS because he was wearing plastic gloves that were splattered with HIV-infected blood when his hand was stuck with the needle.²⁵⁵ Thus he sustained a physical injury—a needle wound. Further, because his glove was splattered with infected blood, he was exposed to the risk of infection.

A. *Recovery Without Presenting Any Evidence of Exposure*

In contrast, some courts have inappropriately extended the scope of liability by allowing plaintiffs to proceed with claims for damages for fear of AIDS. This is particularly true in cases in which courts have failed to enforce the exposure requirement rigorously. In *Carroll v. Sisters of Saint Francis Health Services, Inc.*,²⁵⁶ one of the most extreme examples, a Tennessee Appeals Court rejected the actual exposure requirement altogether.²⁵⁷ The court held that a plaintiff could pursue a cause of action for fear of AIDS without presenting any evidence of actual exposure to HIV.²⁵⁸ The court stated that exposure was simply a factor to consider in assessing the reasonableness of the plaintiff's fear.²⁵⁹

Admittedly, the *Carroll* court's approach has at least two advantages. First, by emphasizing the reasonableness of the plaintiff's fear as the only relevant consideration, this approach focuses directly on the proximate cause issue. In assessing whether the hospital is liable for the plaintiff's emotional distress, the central issue is whether her fear is reasonable. Second, the *Carroll* approach may be more fair to plaintiffs who have been exposed to HIV but, through no fault of their own, are unable to produce any evidence of exposure. For example, if a person is stuck by a contaminated needle and the needle is subsequently lost, the *Carroll* court would allow that person to bring a claim for fear of AIDS.²⁶⁰ In contrast, courts applying the strict actual exposure requirement would bar recovery even if the plaintiff were not responsible for losing the needle.²⁶¹ The actual exposure requirement may be unfair because a person who is stuck with a contaminated needle may not immediately be concerned with preserving evidence for a tort claim.

There are several problems, however, with the *Carroll* court's approach. First, allowing plaintiffs to pursue causes of action without showing any evidence of actual exposure is contrary to the general policy of limiting emotional distress damages. Courts have limited mental dam-

254. *See id.*

255. *See id.*

256. No. 02A01-9110-CV-00232, 1992 WL 276717 (Tenn. Ct. App. Oct. 12, 1992).

257. *See id.* at *4.

258. *See id.*

259. *See id.*

260. *Cf. Carroll v. Sisters of Saint Francis Health Servs., Inc.*, No. 02A01-9110-CV-00232, 1992 WL 276717, at *4 (Tenn. Ct. App. Oct. 12, 1992).

261. *Cf. Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889, 893 (W. Va. 1991) (requiring plaintiff to produce evidence of actual exposure).

ages in order to prevent false claims,²⁶² but, under the *Carroll* approach, it will be substantially easier for a plaintiff to recover for a bogus fear of AIDS because he does not have to present any evidence of exposure.²⁶³ Similarly, emotional distress may be remote from the defendant's tortious conduct, and thus the defendant may not have proximately caused the plaintiff's fear.²⁶⁴ By rejecting the exposure requirement, the *Carroll* court greatly extends the scope of the defendant's liability.

Additionally, relieving the plaintiff of the obligation to present any evidence of actual exposure is contrary to the requirement that plaintiffs establish each element of a cause of action by a preponderance of the evidence. A plaintiff must show that the defendant proximately caused the plaintiff's fear, and this depends on whether the plaintiff's fear is reasonable.²⁶⁵ In turn, whether a plaintiff's fear is reasonable depends on whether he was actually exposed to HIV.²⁶⁶ A plaintiff who presents absolutely no evidence of actual exposure to HIV, therefore, has failed to meet his burden of production.²⁶⁷

Further, the *Carroll* court disregards the long-standing goal of guarding against a deluge of emotional distress claims.²⁶⁸ If plaintiffs can claim damages for fear of AIDS without producing any evidence of actual exposure, there will be an incentive to claim fear of AIDS in any circumstance in which a plaintiff might have been exposed to the virus.²⁶⁹ Because physical injury occurs in most tort cases, a multitude of people

262. See Keeton, *supra* note 40, at 361.

263. See, e.g., *Doe v. Doe*, 519 N.Y.S.2d 595, 599-600 (Sup. Ct. 1987) (In a case in which plaintiff produced no evidence of exposure, the court stated: "This court will not, based on the highly attenuated and speculative allegations contained in the complaint before it, go far beyond the dictates of this state's highest court and thereby open the floodgates of psychological injury or 'phobia' cases.").

264. See Keeton, *supra* note 40, at 361.

265. See, e.g., *Howard v. Mount Sinai Hosp., Inc.*, 217 N.W.2d 383, 388 (Wis. 1974) (Hansen, J., concurring) ("[A] present fear as to a future harm is not a compensable element of damages if there is no reasonable basis established for the fear being entertained and no increased possibility of the consequence feared developing as a result of the injury sustained.").

266. See, e.g., *Burk v. Sage Prods., Inc.*, 747 F. Supp. 285, 287 (E.D. Pa. 1990) ("The court is more concerned with defendant's second ground for challenging plaintiff's complaint; namely, that plaintiff cannot demonstrate that he was actually exposed to the AIDS virus because he cannot prove that the needle with which he was stuck was a needle that was used on an AIDS patient."); *Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79, 84 (W. Va. 1991) ("[W]e conclude that if a suit for damages is based solely upon the plaintiff's fear of contracting AIDS, but there is no evidence of an actual exposure to the virus, the fear is unreasonable, and this Court will not recognize a legally compensable injury.").

267. See, e.g., *Bullock v. O'Leary*, No. 88 C 10148, 1991 WL 206058, at *2 (N.D. Ill. Sept. 30, 1991) (granting summary judgment where plaintiff presented no evidence of exposure to HIV); *Burk v. Sage Prods., Inc.*, 747 F. Supp. 285 (E.D. Pa. 1990) (same); *Ordway v. County of Suffolk*, 583 N.Y.S.2d 1014, 1017 (Sup. Ct. 1992) (same); *Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79 (W. Va. 1991) (same).

268. See Keeton, *supra* note 40, at 361.

269. This problem was noted by a New York court when it dismissed a cause of action

could bring viable claims for fear of AIDS. Every person who receives blood might be exposed to HIV; every person who is exposed to another person's bodily fluids might contract HIV; every person who suffers a cut or scratch might contract the virus. Based on the *Carroll* court's reasoning, in each of these circumstances, a plaintiff could claim damages for fear of AIDS, and a jury would have to decide whether the plaintiff's fear is reasonable.²⁷⁰ Also, *Carroll* is contrary to the weight of authority because most courts that have considered fear-of-AIDS cases require a plaintiff to present some evidence of actual exposure.²⁷¹

The *Carroll* court's decision may also be flawed because it relied heavily upon a Tennessee Supreme Court case that the court may have misread.²⁷² In that case, *Laxton v. Orkin Exterminating Co., Inc.*,²⁷³ a family whose well became contaminated with chlordane (a carcinogen) recovered damages for their fear of developing cancer in the future.²⁷⁴ In *Laxton*, however, the plaintiffs presented evidence that they had been actually exposed to the toxic chemical because they testified that they drank the contaminated water.²⁷⁵ Thus the *Laxton* court was examining whether plaintiffs who presented proof of actual exposure had a reasonable fear.²⁷⁶ *Carroll* is distinguishable because it presents the additional question of whether the plaintiff had been exposed to HIV at all.²⁷⁷ The *Carroll* court broadly expanded the *Laxton* holding when it concluded that a plaintiff who cannot demonstrate any evidence of actual exposure could reasonably fear AIDS.²⁷⁸

The *Carroll* court is not alone in allowing plaintiffs who have

alleging emotional distress damages for fear of AIDS because the plaintiff could present no evidence of exposure. See *Doe v. Doe*, 519 N.Y.S.2d 595, 599-600 (Sup. Ct. 1987).

270. See *Carroll v. Sisters of Saint Francis Health Servs., Inc.*, No. 02A01-9110-CV-00232, 1992 WL 276717, at *4-5 (Tenn. Ct. App. Oct. 12, 1992).

271. See *Burk v. Sage Prods., Inc.*, 747 F. Supp. 285, 288 (E.D. Pa. 1990) (plaintiff could not show exposure to the AIDS virus); *Hare v. State*, 570 N.Y.S.2d 125, 127 (App. Div. 1991) (no recovery for fear of AIDS when plaintiff was unable to show exposure to the virus); *Ordway v. County of Suffolk*, 583 N.Y.S.2d 1014, 1017 (Sup. Ct. 1992) (plaintiff could not show exposure to HIV and plaintiff tested HIV negative); *Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79, 82-84 (W. Va. 1991) (no recovery for fear of AIDS when plaintiff could not show exposure).

272. See *Carroll*, 1992 WL 276717 at *4 (citing *Laxton v. Orkin Exterminating Co., Inc.*, 639 S.W.2d 431 (Tenn. 1982)).

273. 639 S.W.2d 431 (Tenn. 1982).

274. See *id.*

275. See *id.* at 432-33.

276. See *id.* at 434 ("Here it is undisputed that the plaintiffs ingested polluted water when the defendants negligently permitted dangerous chemicals to infiltrate plaintiffs' household water supply.").

277. See *Carroll v. Sisters of Saint Francis Health Servs., Inc.*, No. 02A01-9110-CV-00232, 1992 WL 276717, at *3 (Tenn. Ct. App. Oct. 12, 1992) (the court stated that the issue was "whether plaintiff can recover for emotional distress caused by fear of contracting AIDS without proof that plaintiff was exposed to the AIDS virus").

278. See *id.* at *6 (Higher, J. dissenting) ("Proof of such actual exposure to a harmful substance is the critical element missing from the present case."). See also John P. Darby, Note, *Tort Liability for the Transmission of the AIDS Virus: Damages for Fear of AIDS and Prospective AIDS*, 45 Wash. & Lee L. Rev. 185, 200 (1988) (drawing an anal-

presented no evidence of HIV exposure to proceed with actions for fear of AIDS. In *Steinhagen v. United States*,²⁷⁹ a federal district court allowed a plaintiff to recover damages for fear of AIDS in a malpractice action.²⁸⁰ The plaintiff feared that she had contracted HIV because she had received a blood transfusion during surgery.²⁸¹ Not only did the court fail to indicate whether the plaintiff presented any evidence of actual exposure to HIV, but the decision also does not mention whether the blood that the patient received was screened for the virus. This case seems to indicate that merely receiving blood in a hospital may lead to a reasonable fear of AIDS that can give rise to a claim for emotional distress damages. Thus, *Steinhagen* appears to open the floodgates for a deluge of similar claims.

A closer review of *Steinhagen* indicates that it may not open the floodgates all that far. The plaintiff in *Steinhagen* suffered very severe physical injuries and emotional trauma due to the doctor's malpractice.²⁸² Significantly, the court did not separate the plaintiff's recovery for emotional distress damages, but merely noted that the plaintiff was being compensated for "severe physical, psychological and economic damage."²⁸³ Thus it is unclear whether the plaintiff recovered for her fear of AIDS or for the emotional distress resulting from her severe trauma generally.

Failure to present any evidence of exposure is one of two problems in *Kaehne v. Schmidt*.²⁸⁴ In this case, the plaintiff sustained injuries in a car accident and was given blood that was not screened for HIV.²⁸⁵ Although the plaintiff presented no evidence of actual exposure to HIV, a Wisconsin appeals court upheld his recovery of damages for fear of AIDS.²⁸⁶ Allowing the plaintiff to recover without demonstrating any evidence of exposure creates problems similar to those discussed in the analysis of *Carroll*.²⁸⁷

Additionally, the *Kaehne* court seemed to create and apply a bright-line rule for limiting liability. The court upheld the plaintiff's recovery for his fear of AIDS until he received a test indicating that he was HIV negative.²⁸⁸ Thus the court apparently created a rule that fear of AIDS

ogy between *Laxton* and fear-of-AIDS cases with HIV-negative plaintiffs and noting that a plaintiff would need to be exposed to HIV in order to recover).

279. 768 F. Supp. 200 (E.D. Mich. 1991).

280. *See id.* at 208.

281. *See id.*

282. *See id.* at 203-08.

283. *Id.* at 208.

284. 472 N.W.2d 247 (Wis. Ct. App. 1991) (text available in Westlaw).

285. *See id.* at *2.

286. *See id.*

287. *See supra* notes 262-71 and accompanying text.

288. *Kaehne v. Schmidt*, 472 N.W.2d 247 (Wis. Ct. App. 1991) (text available in Westlaw, at *2) ("Based on this risk and Kaehne's testimony, the jury could also find that Kaehne was reasonably worried about contracting AIDS until the time he received the negative test results.").

becomes unreasonable when a plaintiff receives a negative test result.

The *Kaehne* court failed to note, however, that the plaintiff had a duty to mitigate the damages suffered in the accident. The plaintiff recovered damages for the two years of fear he suffered before he took an AIDS test and tested negative.²⁸⁹ Yet, AIDS tests can be administered accurately three months following exposure to the virus.²⁹⁰ Thus the court could have limited recovery to damages for the three months before testing became possible.²⁹¹ Based on the incomplete reasoning in this case, the plaintiff could have increased his damages by abstaining from taking an AIDS test for an even longer period. If, as the *Kaehne* court indicated, an HIV-negative test result terminates the defendant's liability for damages for the plaintiff's fear of future illness,²⁹² then it is reasonable to impose a duty on plaintiffs to be tested.²⁹³ Although there are arguments that a plaintiff should recover even after testing negative for the virus,²⁹⁴ the court did not address these arguments.

B. Recovery After Plaintiff Tests Negative

In assessing the reasonableness of a plaintiff's fear, several courts have noted that the plaintiff tested HIV negative.²⁹⁵ Because AIDS tests accurately indicate whether a plaintiff is infected, courts have focused on negative test results in determining whether a plaintiff's fear is reasonable and, in turn, whether a defendant is liable for the plaintiff's fear.²⁹⁶ This focus is consistent with courts' examination of the overall reasonableness

289. *See id.*

290. *See supra* note 167 and accompanying text.

291. *See Faya v. Almaraz*, 620 A.2d 327, 337 & n.10 (Md. 1993) (plaintiff can only recover damages for fear of AIDS for period of time before testing becomes viable).

292. *See Kaehne v. Schmidt*, 472 N.W.2d 247 (Wis. Ct. App. 1991) (text available in Westlaw, at *2).

293. It is reasonable to require plaintiffs to undergo an AIDS test because the tests are readily available and inexpensive or free. The Centers for Disease Control note that the number of HIV testing sites increased from 1,577 in January 1988 to 5,013 in September 1989. *See Publicly Funded HIV Counseling and Testing—United States, 1985-1989*, 39 Morbidity & Mortality Wkly. Rep. 137 (March 9, 1990). Further, an estimated 2.5 million people were tested for AIDS at publicly funded facilities between 1985 and 1990. *Id.*

294. *See infra* notes 317-22 and accompanying text.

295. *See Diaz Reyes v. United States*, 770 F. Supp. 58, 62 (D.P.R. 1991) (The court denied recovery, noting that: "Plaintiff has repeatedly tested negative for the AIDS virus, but plaintiff alleges that current medical technology does not rule out the possibility that she is in fact infected, so her fear continues."); *Burk v. Sage Prods., Inc.*, 747 F. Supp. 285, 288 (E.D. Pa. 1990) ("It is extremely unlikely that a patient who tests HIV-negative more than six months after a potential exposure will contract the disease as a result of that exposure."); *Hare v. State*, 570 N.Y.S.2d 125, 127 (App. Div. 1991) ("[T]he claimant himself was tested for AIDS several times with negative results.")

296. *See Burk*, 747 F. Supp. at 288; *Faya v. Almaraz*, 620 A.2d 327, 337 & n.10 (Md. 1993) (plaintiffs can only recover damages for fear of AIDS during "their reasonable window of anxiety—the period between which they learned [about their exposure to the virus] and received their HIV-negative results"). *But see Carroll v. Sisters of Saint Francis Health Servs., Inc.*, No. 02A01-9011-CV-00232, 1992 WL 276717, at *4 (Tenn. App. Ct. Oct. 12, 1992) ("AIDS testing is not susceptible of the same degree of certitude as is testing for other pathogens for a number of reasons.").

of plaintiffs' claims for emotional distress in other cases.²⁹⁷ Plaintiffs can only recover emotional distress damages for reasonable fear.²⁹⁸

Even in cases in which a plaintiff may have originally developed a reasonable fear of AIDS, some courts have failed to examine the overall reasonableness of a plaintiff's claim after the plaintiff tests HIV negative. When properly administered, current AIDS tests are more than 99% reliable.²⁹⁹ In examining whether a plaintiff's fear of AIDS remains reasonable after testing has become viable, courts should take the accuracy of these tests into account.

Some courts have given insufficient weight to the fact that a plaintiff has tested HIV negative. For example, in *Johnson v. West Virginia University Hospitals, Inc.*,³⁰⁰ a police officer recovered \$1.9 million for his fear of AIDS, and the Supreme Court of West Virginia held that his fear was reasonable,³⁰¹ even though he repeatedly tested HIV negative for three years following exposure.³⁰² Although the court's opinion is somewhat vague, the plaintiff apparently recovered for past, present, and future fear that he might some day develop AIDS.³⁰³ Similarly, in *Christian v. Sheft*,³⁰⁴ Rock Hudson's former lover recovered from Mr. Hudson's estate for his fear of developing AIDS, despite the fact that the plaintiff had tested negative and, years after Mr. Hudson's death, had no AIDS symptoms.³⁰⁵

There are a number of reasons why these courts should have emphasized negative-HIV test results when they assessed the reasonableness of the plaintiffs' claims. First, although AIDS tests are not 100% reliable, they offer a solid statistical probability of infection that is very useful in determining whether a plaintiff's fear is reasonable. Because AIDS tests can be more than 99% accurate,³⁰⁶ the fact that a plaintiff tests HIV negative (after testing becomes viable) indicates a strong probability that the plaintiff is not infected. As a result, emphasizing negative test results would be consistent with past emotional distress policies that have sought to limit the defendant's liability by not awarding damages that

297. See *supra* notes 154-64 and accompanying text.

298. See *Faya v. Almaraz*, 620 A.2d 327, 337 (Md. 1993) (plaintiffs can only recover damages for fear of AIDS during "their reasonable window of anxiety"); *Howard v. Mount Sinai Hosp., Inc.*, 217 N.W.2d 383, 388 (Wis. 1974) (Hansen, J. concurring) (plaintiff cannot recover for unreasonable fear).

299. See *supra* note 172 and accompanying text.

300. 413 S.E.2d 889 (W. Va. 1991).

301. See *id.* at 894.

302. See *id.* at 891.

303. See *id.* at 891-92 (awarding emotional distress damages for past and present family turmoil, current sleeplessness and fact that plaintiff "is very uncertain about his future").

304. See *AIDS*, Nat'l L.J., Jan. 29, 1990, at S3 (discussing *Christian v. Sheft*, C574 153 (Cal. Super. Ct.)).

305. See *id.*

306. See *supra* note 172 and accompanying text.

were too remote from the tortious conduct.³⁰⁷ In *Christian and Johnson*, the plaintiffs repeatedly tested HIV negative and, thus, there is a tenuous link between the plaintiffs' continued mental suffering and the defendants' conduct.

Second, a greater emphasis on the reasonableness element limits a defendant's liability by not awarding compensation for future injuries that are very improbable and thus are not proximate.³⁰⁸ Such a policy would also discourage frivolous or baseless claims for fear of AIDS.³⁰⁹

Third, courts should not encourage the public to fear AIDS and doubt established medical procedures. In *Johnson*, by upholding an award for fear of AIDS to a man who has repeatedly tested negative over the course of three years, the highest court in West Virginia sent a clear message to the public that it considers it reasonable for a person to continue to fear AIDS even though the medical community believes that he is not infected.³¹⁰ Further, the court attributed a portion of Johnson's damages to the fact that his family, fearing that he might infect them, abandoned him.³¹¹ The family's fears in this case, however, were baseless because there is substantial medical evidence that people cannot transmit HIV via the daily contact involved in living with an infected person.³¹² Again, public policy requires that the Johnson family's unreasonable fears should not be considered a proximate result of the hospital's tortious conduct.

Although courts may question the reliability of AIDS tests because of the possibility of human error or because of the possibility of infection with a new strain of the virus, there is still good reason for courts to accept these tests as accurate. Human error is a real possibility in AIDS testing, but in cases in which HIV-negative plaintiffs have recovered for fear of AIDS, they have taken several AIDS tests and each test has come back negative.³¹³ This multiple testing substantially reduces the element of human error. Similarly, the fact that standard AIDS tests are not reliable predictors of HIV-2 infection³¹⁴ has little bearing on the reasona-

307. See Keeton, *supra* note 40, at 360-61; see also *Howard v. Mount Sinai Hosp., Inc.*, 217 N.W.2d 383, 385 (Wis. 1974).

308. See Keeton, *supra* note 40, at 361; *Howard* 217 N.W.2d at 385.

309. See Keeton, *supra* note 40, at 360.

310. See *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889 (W. Va. 1991).

311. See *id.* at 891 n.2, 891-92 (The plaintiff's wife divorced him and the plaintiff's "children did not want to be around him, nor did they want their children . . . around him, due to a fear that they may contract AIDS.").

312. See Gerald Friedland et al., *Additional Evidence for Lack of Transmission of HIV Infection by Close Interpersonal (Casual) Contact*, 4 AIDS 639, 639 (1990); Martha F. Rogers et al., *Lack of Transmission of Human Immunodeficiency Virus from Infected Children to Their Household Contacts*, 85 Pediatrics 210, 210 (1990).

313. See, e.g., *Johnson*, 413 S.E.2d at 891 ("Although the appellee is regularly tested for AIDS, he has not contracted the disease."); see also *Carroll v. Sisters of Saint Francis Health Servs., Inc.*, No. 02A01-9110-CV-00232, 1992 WL 276717, at *2 (Tenn. Ct. App. Oct. 12, 1992) ("The record also establishes that HIV tests were performed on several occasions . . . and were all negative.").

314. See *supra* note 183 and accompanying text.

bleness of the plaintiff's fear. HIV-2 is extremely rare in the United States, and thus there is little probability of infection.³¹⁵ Also, a plaintiff who claims to fear HIV-2 infection can take a test for this strain of the virus, and this test is over 99% reliable.³¹⁶

Admittedly, several strong counter-arguments suggest that an HIV-negative test result does not render a plaintiff's fear unreasonable. First, the tests may be less than 99% reliable in sub-optimal conditions.³¹⁷ Second, there may be at least one new strain of the virus that cannot be detected using current procedures.³¹⁸ Third, even if the tests were 99% accurate, a 1% chance of developing AIDS may be sufficient to establish that the plaintiff's fear was proximately caused. Courts have used various standards in assessing whether emotional damages were proximately caused.³¹⁹ Some of these standards are so permissive that they allow recovery even when there is no chance of the feared contingency actually occurring,³²⁰ other courts have allowed recovery when there is a chance that the contingency "might" occur,³²¹ or even when the possibility that it might occur "could not be ruled out."³²² Fourth, given the severe nature of this disease, even a remote chance of infection may be the basis of a reasonable fear. AIDS is a long-term degenerative disease that leads to a slow, painful death, and AIDS victims have faced discrimination and social ostracism. Thus, even a slim probability of infection may be sufficient to substantiate a reasonable fear.

III. PROPOSED SOLUTIONS

This Note proposes two alternative methods for determining whether HIV-negative plaintiffs should recover damages for fear of AIDS.³²³ The first simply adopts a stringent step-by-step application of traditional tort principles governing recovery for emotional distress. The second approach is based on an increased emphasis on overall reasonableness. Under this approach, HIV-negative plaintiffs would be precluded from recovering for their fear of AIDS after testing becomes viable.

A. *Traditional Common Law Approach*

An HIV-negative plaintiff seeking to recover for fear of AIDS under a negligence theory must satisfy several requirements. First, the plaintiff must satisfy the common law rule applied in the jurisdiction by demon-

315. See *supra* notes 180-82 and accompanying text.

316. See *supra* note 184 and accompanying text.

317. See *supra* note 172 and accompanying text.

318. See *supra* notes 185-86 and accompanying text.

319. See *supra* notes 192-200 and accompanying text.

320. See *supra* note 192.

321. See *Baylor v. Tyrrell*, 131 N.W.2d 393, 402 (Neb. 1964).

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

323. This Note does not propose any new method for analyzing claims for intentional infliction of emotional distress in cases similar to *Whelan v. Whelan*, 588 A.2d 251 (Conn. Super. Ct. 1991). See *supra* notes 224-29 and accompanying text.

strating either an injury or a physical impact.³²⁴ These common law rules limit the scope of the duty of care and insure that courts will not hold a defendant liable for damages that are remote from the wrongful conduct.³²⁵ Almost all legitimate claims for emotional damages for fear of AIDS will include some injury, because transmitting HIV requires a mixing of bodily fluid such as blood.

Additionally, in negligence or battery actions, courts should require plaintiffs to provide some evidence of actual exposure to HIV.³²⁶ Exposure is critical in the proximate cause analysis because whether the defendant proximately caused the plaintiff's emotional distress depends on whether the plaintiff's fear is reasonable.³²⁷ It is unreasonable for a person to fear infection when that person has not been exposed to a disease. Because plaintiffs bear the burden of establishing the proximate cause of their injuries, they must provide some proof of actual exposure to HIV to demonstrate that their fear is reasonable.³²⁸ When a plaintiff fails to produce any evidence of actual exposure, the plaintiff has failed to meet the burden of production on the issue of proximate cause and the court should grant summary judgment for the defendant.³²⁹

Under this analysis, actual exposure is an essential element of a cause of action for fear-of-AIDS damages.³³⁰ Given the extensive discovery possible in civil suits, requiring plaintiffs to provide some evidence of exposure is not an onerous burden. Allowing juries to decide whether the plaintiff's fear is reasonable even where there is no evidence of exposure invites jury speculation and may allow recovery based on ignorance or unreasonable fear of this disease.

Finally, courts should continue to examine the overall reasonableness of the plaintiff's fear. Courts should not determine the reasonableness of the plaintiff's fear solely by an application of the injury, impact, or exposure requirements. Rather, courts should exercise their discretion and examine the circumstances surrounding a plaintiff's alleged fear, including the plaintiff's HIV-negative test result. To this end, courts should

324. See *supra* notes 65-89 and accompanying text.

325. See *supra* notes 54-55.

326. See *supra* notes 108-53 and accompanying text.

327. See *supra* notes 111-21 and accompanying text.

328. See *supra* note 111-45 and accompanying text.

329. See, e.g., *Burk v. Sage Prods., Inc.*, 747 F. Supp. 285, 288 (E.D. Pa. 1990) (dismissing plaintiff's products liability claim for damages for fear of AIDS on summary judgment because plaintiff could not show actual exposure to HIV and because it was substantially certain that the plaintiff was not infected); *Ordway v. County of Suffolk*, 583 N.Y.S.2d 1014, 1017 (Sup. Ct. 1992) (granting defendant's motion for summary judgment because plaintiff could not demonstrate exposure and because the plaintiff had tested HIV negative).

330. Compare *Johnson v. West Virginia Univ. Hosps., Inc.*, 413 S.E.2d 889 (W. Va. 1991) (allowing recovery when HIV-negative plaintiff produced evidence of exposure to the virus) with *Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79 (W. Va. 1991) (denying recovery when HIV-negative plaintiff did not present evidence of exposure to the virus).

require plaintiffs to submit to AIDS tests as soon as, according to current medical knowledge, testing becomes viable.³³¹ Not only will this help a court to assess the overall reasonableness of a plaintiff's fear, but requiring a plaintiff to take an AIDS test may mitigate the defendant's damages.

Under this first approach, plaintiffs who demonstrate actual exposure to HIV could recover emotional distress damages for fear of AIDS for the period of time before testing becomes viable. This period is usually about three months following initial exposure.³³² Once testing has become viable, a plaintiff could recover only for continued fear if the circumstances indicate that the fear is reasonable.

B. *Limiting Recovery After a Plaintiff Tests HIV Negative*

In the alternative, the second method incorporates all the elements of the first approach in determining whether a plaintiff's fear is reasonable during the period when testing for AIDS is not viable,³³³ but cuts off a plaintiff's ability to recover once the plaintiff receives a negative test result.³³⁴ Under this approach, the plaintiff would be required to submit to an AIDS test as soon as accurate detection seemed likely; currently this is about three months following exposure to the virus.³³⁵ If the plaintiff claims damages for fear of HIV-2, then he would be required to take an HIV-2 test. Cutting off liability after the plaintiff receives a negative test result would be based on a judicial determination that the plaintiff's continuing fear is *per se* unreasonable.

Although this approach creates a bright-line rule that courts have

331. A counter-argument can be made that AIDS testing is intrusive and painful, and therefore the plaintiff should not be required to submit to such tests. Additionally, the issue arises as to who should pay for the test. This appears to be a less significant matter, however, because thousands of publicly-funded clinics nationwide test for AIDS.

Even taking these counter-arguments into consideration, however, it appears that plaintiffs should still be required to submit to testing. Courts require medical examinations of plaintiffs in other tort actions and there is no reason why a court should not require a plaintiff to take a quick, inexpensive (or free), and pertinent test that could reduce damages and greatly aid in assessing the reasonableness of a plaintiff's fear.

332. See *supra* note 167 and accompanying text.

333. Plaintiffs would still be required to fulfill the necessary impact or injury requirement and would have to present some evidence of actual exposure to HIV.

334. See *Faya v. Almaraz*, 620 A.2d 327, 337 (Md. 1993) (HIV-negative plaintiffs can only recover damages for fear of AIDS for period of time before they test HIV negative); see also *Kaehne v. Schmidt*, 472 N.W.2d 247 (Wis. Ct. App. 1991) (text available in Westlaw, at *2) (plaintiff recovered damages for fear of AIDS for period of time until he tested HIV negative).

335. *Interpretation and Use of the Western Blot Assay for Serodiagnosis of Human Immunodeficiency Virus Type 1 Infections*, 38 *Morbidity & Mortality Wkly. Rep.* 1, 5 (July 21, 1989) ("[S]eroconversion typically occurs within 3 months of infection."); *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 *Morbidity & Mortality Wkly. Rep.*, 509, 509 (Aug. 14, 1987) ("Persons exposed to HIV usually develop detectable levels of antibody against the virus within 6-12 weeks of infection.").

rarely applied in fear-of-disease cases,³³⁶ there are several reasons for imposing it in fear-of-AIDS cases. First, this solution is consistent with traditional tort notions regarding emotional distress because it continues the policy of limiting recovery to only those injuries that the defendant's tortious conduct proximately caused. Second, this approach creates no new rule of law but simply employs existing rules and requirements with a vigor consistent with historical emotional distress policies.³³⁷ Courts have always assessed emotional distress claims based on their overall reasonableness.³³⁸ Thus, courts would continue to do so and would simply be determining that, in this one type of fear-of-disease case, an extremely low probability of infection renders a plaintiff's fear *per se* unreasonable. Third, it may be equitable to cut off the plaintiff's recovery after the three month window has closed. It is possible that a plaintiff could test HIV positive after a court has rejected his claim for fear of AIDS. Yet, such a plaintiff might be able to bring a second cause of action to recover damages for prospective illness.³³⁹ Finally, if a person who fears HIV after testing negative is not infected, the person has recovered damages for the three months immediately following exposure when the fear was reasonable. But the court would deny further recovery after the plaintiff tests HIV negative.

CONCLUSION

In deciding fear-of-AIDS cases, many courts have vigorously enforced rules established to limit the scope of a defendant's liability. They have dismissed claims where plaintiffs have not suffered any physical injury. Further, they have required plaintiffs to produce evidence of actual exposure to HIV as a prerequisite to recovery. Other courts, however, have allowed HIV-negative plaintiffs to pursue causes of action alleging fear of AIDS, without requiring the plaintiff to demonstrate evidence of actual exposure to HIV or without giving sufficient weight to the fact that a negative test result is strong evidence that the plaintiff is not infected. These courts should reconsider their approach and require HIV-negative plaintiffs to present evidence of actual exposure. Further, they should closely examine the reasonableness of a plaintiff's fear in light of the fact that a very reliable test indicates that the plaintiff is not infected.

336. *But see supra* note 334.

337. *See supra* notes 52-57 and accompanying text.

338. *See supra* notes 154-64 and accompanying text.

339. This raises procedural questions that are outside the scope of this Note. On one hand, the plaintiff who loses an action for fear of future illness might be precluded from bringing an action for prospective illness based on the theory that plaintiffs cannot split claims. On the other hand, an HIV negative plaintiff could argue that the injuries were undiscoverable at the time and therefore the claim should not be barred. Further, a plaintiff's later claim for prospective illness might be barred for violating the applicable Statute of Limitations. Yet, the plaintiff could argue that the injury was not previously discoverable and the statute should be tolled.

