# UNDER WHAT CIRCUMSTANCES SHOULD COURTS ALLOW RECOVERY FOR EMOTIONAL DISTRESS BASED UPON THE FEAR OF CONTRACTING AIDS? *Johnson v. West Virginia University Hospitals, Inc.*, 413 S.E.2d 889 (W. Va. 1991)

Courts disagree as to the appropriate scope of recovery for negligent infliction of emotional distress.[1] Traditionally, plaintiffs could recover for emotional distress only if they proved a physical injury.[2] Under modern interpretations, however, many courts have rejected the physical injury requirement,[3] and some regard negligent infliction of emotional distress as an independent tort.[4] This progression has led the courts to allow recovery for emotional distress resulting from the fear

1. Intentional infliction of emotional distress is a separate and distinct cause of action and is beyond the scope of this comment. This type of cause of action requires proof of extreme and outrageous conduct resulting in serious emotional distress. *See generally* RESTATEMENT (SECOND) OF TORTS § 46 (1965) (discussing the elements of an intentional infliction of emotional distress claim and providing illustrative cases).

2. *See* Julie K. Sardine, Note, *The Wavering Line in Invisible Ink: Negligent Infliction of Emotional Distress in North Carolina* — Johnson v. Ruark Obstetrics & Gynecology Associates, 26 WAKE FOREST L. REV. 741, 747-48 (1991) (providing a historical overview of mental distress cases). "In early cases, assurance of a claim's legitimacy was provided by contemporaneous physical impact or injury from defendant's negligent act which resulted in mental injury." *Id.* at 747.

3. *See, e.g.*, Molien v. Kaiser Found. Hospitals, 616 P.2d 813 (Cal. 1980) (holding that physical manifestation of emotional distress was no longer required). *See also* Michele A. Scott, Note, *Proving Beyond a Reasonable Doubt: The Negligent Infliction of Emotional Distress*, 11 CARDOZO L. REV. 235, 249 (1989) (noting that a growing number of jurisdictions have abandoned the physical injury requirement due to the advances of modern medicine and psychiatry in establishing causal connections between negligent acts and psychological injury). *See infra* notes 20-24 and accompanying text for discussion of the trend toward eliminating the physical injury requirement.

4. *See, e.g.*, Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970) (holding that negligent infliction of serious mental distress is an independent legal tort); Ferrara v. Galluchio, 152 N.E.2d 249, 252 (N.Y. 1968) (stating that "freedom from mental disturbance is now a protected interest in this State").

of future disease.[5] Cases allowing the recovery of damages for fear of disease have focused on the probability of developing and the incubation period of the disease.[6] In the context of fear of latent diseases, the circumstances under which a court awards damages for emotional distress are more problematic.[7] In *Johnson v. West Virginia University Hospitals, Inc.*,[8] the Supreme Court of Appeals of West Virginia held that a plaintiff may recover damages for emotional distress for a fear of contracting Acquired Immune Deficiency Syndrome (AIDS) when the plaintiff proved actual exposure to the AIDS virus, actual physical injury, and physical manifestations of emotional distress.[9]

The plaintiff in *Johnson* worked as a police officer for a university security force.[10] While attempting to restrain an AIDS-infected patient at the university hospital, the patient bit the plaintiff.[11] The plaintiff brought suit against the hospital[12] for negligent infliction of emotional distress due to his fear of contracting AIDS.[13] The circuit

5. *See infra* notes 29-55 and accompanying text for a historical overview of disease phobia recovery.

6. Elliott v. Arrowsmith, 272 P. 32, 32-33 (Wash. 1928) (allowing recovery for mental anguish caused by reasonable concern of future illness or death as a result of injury, but not for vague or uncertain conditions); *cf.* Pandjiris v. Oliver Cadillac Co., 98 S.W.2d 969, 977 (Mo. 1936) (ruling that fear of paralysis or epilepsy developing from head injury was not recoverable because there was no evidence that those conditions were likely to develop).

7. *See infra* notes 32-38 and accompanying text for discussion of cases addressing the issue of recovery for fear of diseases of indefinite duration.

8. 413 S.E.2d 889 (W. Va. 1991).

9. *Id.* at 894.

10. *Id.* at 891.

11. *Id.* at 891-92. The patient first bit his own arm, causing blood to enter his mouth, and then bit plaintiff's forearm, causing a deep bloody wound.

12. Plaintiff could sue the hospital because he was not a hospital employee and, therefore, was not restricted to the remedies under Workmen's Compensation. *Id.* at 891 n.1. *Cf.* Bounds v. State Workmen's Compensation Comm'r, 172 S.E.2d 379, 382 (W. Va. 1970) (recognizing that remedies provided by workmen's compensation statutes are exclusive). *See generally* 101 C.J.S. *Workmen's Compensation* § 918 (1958) ("The general rule is that as between employer and employee, the rights and remedies provided in the compensation acts are exclusive, within the area of their operation").

The hospital assumed a duty to warn the plaintiff by establishing specific rules and regulations requiring the posting of warnings when it knows a patient possesses an infectious disease. This procedure allows police officers to take appropriate precautions before handling such a patient. The hospital did not follow its rules and regulations before the incident involved in the case. 413 S.E.2d at 893.

13. 413 S.E.2d at 891. The patient announced that he had AIDS when he arrived at the emergency room, one-half hour before the incident, but the hospital staff failed to

court jury rendered a verdict in favor of the police officer.[14] On appeal,[15] the Supreme Court of Appeals of West Virginia affirmed and held that recovery for emotional distress is appropriate when there is actual exposure to AIDS[16] accompanied by a physical injury[17] that causes emotional distress and physical manifestations of such distress.[18]

Historically, courts limited recovery for negligent infliction of emotional distress to those cases in which a physical injury accompanied the emotional distress.[19] For instance, the West Virginia Supreme

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alert the officer. Plaintiff did not learn of the patient's condition until after the accident. *Id.*

14. *Id.* The jury awarded the officer $2 million in damages, but the judge decreased the award to $1.9 million due to plaintiff's contributory negligence. *Id.*

15. The hospital contended on appeal that the damages were speculative and that the jury was improperly instructed on emotional distress damages. *Id.* at 892. The hospital also alleged that the court erred in denying its motion in limine to exclude evidence of plaintiff's emotional distress unless plaintiff could prove it was reasonable. *Id.* In addition, the hospital contended failure to prove proximate cause, improper instructions concerning the "permanency" of the injury, failure to include an assumption of the risk instruction, insufficient evidence to support the verdict, and a verdict contradictory to public policy. *Id.* at 894-97.

16. Counsel for the hospital admitted that the officer had been exposed to the AIDS virus through blood to blood contact. *Id.* at 893.

The admission by the hospital is significant because several cases have held that "exposure" does not result from a human bite. *See, e.g.*, United States v. Moore, 846 F.2d 1163, 1167 (8th Cir. 1988) (concluding that evidence did not support a finding that a human bite could transmit AIDS); Brock v. State, 555 So.2d 285, 288 (Ala. Crim. App. 1989) (finding that the court could not take judicial notice that "biting is a means capable of spreading AIDS" due to the lack of "established scientific fact").

17. Although the court failed to define "physical injury," it did state that the bite, which broke appellee's skin, constituted a physical injury. 413 S.E.2d at 892. The court also noted that the officer's sleeplessness, loss of appetite, and other physical manifestations of emotional distress were physical injuries. *Id.*

18. *Id.* at 894. *See infra* notes 56-66 and accompanying text for discussion of the court's reasoning.

19. "The [physical injury] doctrine was first announced in England in Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (1888). Curiously, the rule was abandoned only thirteen years later in Dulieu v. White & Sons, [1901] 2 K.B. 669; not in time, however, to block the spawning of the doctrine in this country." Gary S. Glickman, Comment, *DES and Emotional Distress*: Payton v. Abbott Labs, 37 U. MIAMI L. REV. 151, 154 n.16 (1982-83). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 361 (5th ed. 1984) [hereinafter PROSSER AND KEETON] (noting that when a defendant's negligence causes only mental disturbance, without physical injury, courts allow no recovery); RESTATEMENT (SECOND) OF TORTS § 436A

Court of Appeals, in *Monteleone v. Co-Operative Transit Co.*,[20] held that a plaintiff may recover damages for emotional distress when an actual physical injury is naturally connected or inseparable from the resulting emotional distress.[21] The physical injury requirement served as a means to guard against increased litigation and prevent fraudulent claims.[22]

Over the past century, however, state courts have awarded damages for emotional distress more liberally.[23] Courts have rejected the physical impact or injury standard[24] in favor of a standard requiring only physical manifestations of emotional distress.[25] Some state courts have gone so far as to require only serious emotional distress based upon an "ordinary man" or reasonableness standard.[26] Yet, the majority of ju-

(1965) (noting the requirement of physical injury for recovery of emotional distress damages).

For an overview of the rules applied in cases seeking recovery for emotional distress, see Susan M. Knepel, *Recovery for Emotional Distress Resulting from the Fear of Future Injury or Disease*, 37 FED. INS. & CORP. Q. 273, 274-77; Scott, *supra* note 3, at 238-41.

20. 36 S.E.2d 475 (W. Va. 1945).

21. *Id.* at 479-80.

22. *See* Payton v. Abbott Labs, 437 N.E.2d 171, 179 (Mass. 1982) (stating that courts "have recognized that emotional distress can be both real and serious in some situations, while trivial, evanescent, feigned, or imagined in others"); La Fleur v. Mosher, 325 N.W.2d 314, 316 (Wis. 1982) (holding that the physical manifestations requirement ensures that claims are "genuine"). *See also* Knepel, *supra* note 19, at 276 ("Courts feel that a physical manifestation guarantees that a claim is genuine.").

23. *See* Terry M. Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 FORDHAM L. REVIEW 527, 531-32 (1984) (outlining the different ways in which courts have lowered the requirements for proving a claim of emotional distress).

24. *Id.* at 532 & n.34; Scott, *supra* note 3, at 249. The courts of many states, including Alabama, California, Connecticut, Hawaii, Louisiana, Maine, Missouri, New Jersey, Pennsylvania, and Washington, abandoned the "physical injury" rule because it was too restrictive and prone to abuses. *Id.* Under the physical injury rule, plaintiffs with genuine emotional distress claims but no physical injury were denied recovery, while those with physical injuries could prevail by feigning emotional distress. *Id.*

25. Dworkin, *supra* note 24, at 532. *See also* Knepel, *supra* note 19, at 276 (noting the trend "to require the manifestation of some physical harm which occurs as a result of the emotional distress"). *Cf.* Pankopf v. Hinkley, 123 N.W. 625, 627 (Wis. 1909) (discussing when "physical injury flows directly from extreme fright or shock, caused by the ordinary negligence of one who owes the duty of care to the injured person" recovery for the resulting physical injury is compensable).

26. *See, e.g.*, Wetherill v. University of Chicago, 565 F. Supp. 1553, 1559 (N.D. Ill. 1983) (requiring fear of future injury to be "reasonable"); Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970) (allowing plaintiff to recover based upon a "reasonable man" standard for the emotional distress she suffered after her house flooded); Brantner v.

risdictions apply a "zone of danger" test, which allows those persons who are within a designated range of the danger to recover for emotional distress suffered as a result of a "fear for their own safety."[27] Less than ten states still utilize a pure physical impact standard in deciding emotional distress cases.[28]

For over a century courts have decided cases concerning emotional distress resulting from the fear of future injury or disease.[29] Initially,

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Jenson, 360 N.W.2d 529, 534 (Wis. 1985) (establishing criteria of "reasonableness" for determining liability in "fear of future harm" cases).

Advancements in medical science make it difficult to feign serious emotional distress. Molien v. Kaiser Found. Hosps., 616 P.2d 813, 820-21 (Cal. 1980) (holding that negligent infliction of emotional distress cases will depend on the severity of emotional injury, not physical manifestation, because emotional injury can be found with medical certainty and can be traced to the alleged shocking event). The "serious" requirement operates to prevent an increase in litigation, as well as fraudulent claims. *Id.* at 821. This "serious" or "serious mental distress" standard has been adopted in Alabama, California, Connecticut, Hawaii, Louisiana, Maine, Massachusetts, Missouri, New Jersey, Pennsylvania, and Washington. Scott, *supra* note 3, at 249 & n.93.

27. *See, e.g.*, Farrall v. Armstrong Cork Co., 457 A.2d 763, 771 (Del. Super. Ct. 1983) (applying the zone of danger rule); Mancino v. Webb, 274 A.2d 711, 713-14 (Del. Super. Ct. 1971) (ruling that parents may recover damages for emotional distress suffered as a result of negligent acts toward their children if the parent was within the zone of danger to the child); Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983) (substituting the contemporaneous injury or impact standard with the zone of danger rule); Resavage v. Davies, 86 A.2d 879, 881-83 (Md. 1952) (holding against plaintiff because she was not within the zone of danger); Stadler v. Cross, 295 N.W.2d 552, 553-54 (Minn. 1980) (adopting the zone of danger rule); Fournell v. Usher Pest Control Co., 305 N.W.2d 605, 607 (Neb. 1981) (reaffirming the adoption of the zone of danger rule); Whetham v. Bismarck Hosp., 197 N.W.2d 678, 684 (N.D. 1972) (restricting recovery to those within the zone of danger); Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861, 864-66 (Tenn. 1978) (same); Vaillancourt v. Medical Ctr. Hosp. of Vt., 425 A.2d 92, 95 (Vt. 1980) (same). *See also* Glickman, *supra* note 19, at 157-59 (providing an overview of the zone of danger rule); David B. Kline, *Negligent Infliction of Emotional Distress in Pennsylvania: Evolution from Physical Impact to Bystander Recovery*, PENN. B. ASS'N Q. 31, 35 (1989) (calling this test the "by stander rule"); Knepel, *supra* note 19, at 278-79 (discussing the zone of danger test).

28. Dworkin, *supra* note 23, at 550 n.179 (noting that "[f]ewer than ten states follow only the impact rule"); *see also* William Winter, *A Tort in Transition: Negligent Infliction of Mental Distress*, 70 A.B.A. J. 62, 64 (Mar. 1984) (noting that "only eight states still adhere to the impact rule: Arkansas, Florida, Georgia, Idaho, Indiana, Kentucky, Mississippi and North Carolina").

29. *See, e.g.*, Jones v. United R.R.s of San Francisco, 202 P. 919, 922-23 (Cal. Ct. App. 1921) (mental suffering due to fear of future disability); Watson v. Augusta Brewing Co., 52 S.E. 152, 153 (Ga. 1905) (fear of death due to glass in the stomach); Serio v. American Brewing Co., 74 So. 998, 1001 (La. 1917) (fear of hydrophobia due to dog bite); Buck v. Brady, 73 A. 277, 279 (Md. 1909) (same); Butts v. National Exch. Bank, 72 S.W. 1083, 1084 (Mo. Ct. App. 1903) (fear of blood poisoning); Walker v. Boston & Maine R.R., 51 A. 918, 919 (N.H. 1902) (fear of insanity); Alley v. Charlotte Pipe &

the cases involved diseases with short incubation periods, such as rabies.[30] Courts denied recovery to plaintiffs who asserted fear for an indefinite duration.[31] Gradually, courts extended the scope of recovery to plaintiffs who feared contracting diseases with unknown incubation periods, such as cancer and epilepsy.[32]

To prevail in these cases, courts required a plaintiff to prove a physical injury and to introduce medical evidence or expert testimony establishing the reasonableness of the fear.[33] Under the reasonableness

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Foundry Co., 74 S.E. 885, 886 (N.C. 1912) (fear of sarcoma); Ayers v. Macoughtry, 117 P. 1088, 1090 (Okla. 1911) (fear of hydrophobia); Southern Kan. Ry. Co. v. McSwain, 118 S.W. 874, 875 (Tex. Civ. App. 1909) (fear of blood poisoning); Godeau v. Blood, 52 Vt. 251, 254-55 (1880) (fear of hydrophobia); Elliott v. Arrowsmith, 262 P. 32, 32-33 (Wash. 1928) (mental anguish over damaged fetus).

30. *See, e.g.*, Serio v. American Brewing Co., 74 So. 998 (La. 1917) (allowing plaintiff to recover for emotional distress based upon fear of hydrophobia and pain suffered due to painful rabies treatments); Buck v. Brady, 73 A. 277 (Md. 1909) (allowing recovery for pain suffered through twenty-one days of rabies treatment); *see also* Dworkin, *supra* note 23, at 542 (discussing various claims for damages based on fear of disease).

The most common claims involved fear of contracting hydrophobia and rabies. *Id.* In general, rabies has an incubation period of one year or less. *Id.* at 542 n.117 (citing MERCK MANUAL OF DIAGNOSIS AND THERAPY 69 (D. Hovey 12th ed. 1972)). Hydrophobia, in contrast, has an incubation period of less than 100 days after exposure. *Id.* (citing Serio v. American Brewing Co., 74 So. 998, 1001 (La. 1917)).

31. *See* Watson v. Augusta Brewing Co., 52 S.E. 152, 153 (Ga. 1905) (denying recovery to plaintiff who swallowed glass on account of the glass being removed from his stomach and his health returning to its former condition); Pandjiris v. Oliver Cadillac Co., 98 S.W.2d 969, 977 (Mo. 1936) (denying recovery for fear of suffering epilepsy due to the lack of evidence establishing the probability of the disease developing); Elliott v. Arrowsmith, 272 P. 32, 32-33 (Wash. 1928) (denying recovery for fear that is "vague or fanciful" or that continues after removal of the fear-causing conditions). *See also* Dworkin, *supra* note 23, at 542 ("Fear that lasted beyond a reasonably definite period of time was not compensable"); Knepel, *supra* note 19, at 280 (courts denied recovery to plaintiffs whose fears of future disease were not grounded on sound probability).

32. *See, e.g.*, Alley v. Charlotte Pipe & Foundry Co., 74 S.E. 885 (N.C. 1912) (allowing recovery for fear of disease of indefinite duration). *See also* Knepel, *supra* note 19, at 280 (noting that the indefinite duration of a fear is no longer a reason for denying recovery).

33. *See* Ferrara v. Galluchio, 152 N.E.2d 249 (N.Y. 1958) (allowing recovery for fear of future cancer from a preexisting burn on the shoulder, when doctor confirmed fear by suggesting that plaintiff get six-month check-ups); Alley v. Charlotte Pipe & Foundry Co., 74 S.E. 885 (N.C. 1912) (allowing recovery for fear of cancer after physician testified that "plaintiff's wound was such that a sarcoma, or eating cancer, was liable to ensue"). *Cf.* Birkhill v. Todd, 174 N.W.2d 56, 61 (Mich. Ct. App. 1969) (denying recovery for anxiety about a "fictitious, vague, fanciful or imagined consequence"); Baylor v. Tyrrell, 131 N.W.2d 393, 402 (Neb. 1964) (stating that evidence must demonstrate "reasonable certainty" that anxiety resulted from injury); Howard v. Mt. Sinai Hosp., Inc., 217 N.W.2d 383, 385 (Wis. 1974) (denying plaintiff recovery for fear of

prong, the plaintiff did not need to show that the disease was reasonably certain to occur.[34] In contrast, some courts based recovery upon a likelihood standard: a standard requiring evidence that the feared future disease was reasonably certain to occur.[35] In recent cases involving toxic torts,[36] plaintiffs have been allowed to recover for fears that are not necessarily probable, but are medically reasonable.[37] Yet, those courts still recognizing the physical injury rule have denied recovery for emotional distress due to fear of future diseases based on ingestion of or exposure to harmful or toxic substances, without any accompanying physical injury.[38]

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cancer after catheter broke in plaintiff's shoulder because evidence suggested that cancer was not likely to result). *See generally* Dworkin, *supra* note 23, at 543-44 (noting cases that allowed recovery when a doctor's testimony supported the possibility of developing the disease, which proved the reasonableness of the fear).

34. *See* Heider v. Employers Mut. Liab. Ins. Co., 231 So.2d 438, 442 (La. Ct. App. 1970) (allowing plaintiff to recover for his fear of future epilepsy even though there was only a two to five percent chance of it developing); Lorenc v. Chemirad Corp., 179 A.2d 401, 414 (N.J. 1962) (upholding recovery for fear of cancer resulting from chemical burn on hand although the likelihood that cancer would develop was low).

35. Sheila L. Birnbaum, *Tort Damages for Fear and Risk of Injury*, PRAC. LAW., Oct. 15, 1985, at 25, 28 (citing illustrative cases). *Cf.* Pandjiris v. Oliver Cadillac Co., 98 S.W.2d 969, 977 (Mo. 1936) (denying recovery for fear of paralysis or epilepsy developing due to head injury because no evidence that those conditions were likely to develop). *See infra* notes 40-55 and accompanying text for cases that adopt this requirement.

36. For a thorough discussion of toxic tort cases, see Dworkin, *supra* note 23, at 545-74; Knepel, *supra* note 19, at 289-97.

37. *See* Laxton v. Orkin Exterminating Co., 639 S.W.2d 431, 434 (Tenn. 1982) (allowing family to recover for their fear of injury from ingestion of contaminated water upon finding the fear to be reasonable as indicated by medical treatment). *Cf.* In re Moorenovich, 634 F. Supp. 634, 637 (D. Me. 1986) (requiring fear of cancer from exposure to asbestos be reasonable for recovery of emotional distress). *But see* Payton v. Abbott Labs, 437 N.E.2d 171, 173-74 (Mass. 1982) (holding that although fear is reasonable, the anxiety must produce physical manifestations or flow from a physical injury in order for a plaintiff to recover in DES emotional distress claim).

When the fear is found to be reasonable, the recovery will be limited to the period when there is sound reason for fear. *See* Laxton v. Orkin Exterminating Co., 639 S.W.2d 432-34 (limiting recovery to time period between the discovery of the possible toxic ingestion and the time test results showed no abnormalities).

38. *See, e.g.*, Plummer v. Abbott Labs., 568 F. Supp. 920, 925 (D.R.I. 1983) (denying recovery to women who had previously ingested DES for their emotional distress based upon fear of developing cancer or medical problems because they failed to show proof of physical injuries); Westrom v. Kerr-McGee Chem. Corp., No. 82 C 2034 (N.D. Ill. Oct. 4, 1983) (denying recovery for fear of future cancer based upon exposure to radiation without alleged physical injury or impact). *Cf.* Ayers v. Township of Jackson, 461 A.2d 184, 189 (N.J. Super. Ct. Law Div. 1983) (denying recovery for fear of contaminated water unless there is proof of substantial bodily injury or illness). *But cf.*

Several courts have addressed the availability of emotional distress damages arising from a fear of AIDS.[39] In *Hare v. State*,[40] a New York appellate court affirmed the trial court's denial of recovery for mental anguish and emotional distress.[41] The plaintiff, an x-ray technician, was bitten by a patient who was attempting suicide.[42] The bite caused a deep wound in the technician's forearm, and people rumored that the patient had AIDS.[43] The *Hare* court upheld the denial of recovery for emotional distress because the plaintiff failed to prove that the patient had AIDS, that the plaintiff was exposed to the AIDS virus, and that the plaintiff was likely to contract AIDS.[44]

In *Burk v. Sage Products, Inc.*,[45] the district court for the Eastern District of Pennsylvania held that recovery for emotional distress resulting from fear of contracting AIDS requires proof of exposure to the AIDS virus and evidence that the exposed person is likely to contract AIDS.[46] The plaintiff in *Burk*, a paramedic, failed to prove that the needle that pricked him had been used to treat an AIDS patient.[47] Moreover, the paramedic tested negative to five HIV tests administered between the time of his alleged exposure and the time of trial.[48] The *Burk* court relied upon medical evidence indicating that a patient who tests negative to HIV antibodies more than six months after a potential exposure is extremely unlikely ever to contract the disease.[49]

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Wetherill v. University of Chicago, 565 F. Supp. 1553, 1560 (N.D. Ill. 1983) (holding that prenatal exposure to DES satisfied the requirement of physical impact/injury, although no evidence of physical injury). For discussion of the physical impact/physical injury requirement, see Birnbaum, *supra* note 35, at 26.

39. *See infra* text accompanying notes 40-55 for analysis of cases addressing the issue of emotional distress damages arising from a fear of contracting AIDS.

40. 570 N.Y.S.2d 125 (N.Y. App. Div. 1991).

41. *Id.* at 127.

42. *Id.* at 126. The technician was bitten while attempting to help a security officer calm the prison patient. *Id.*

43. *Id.* The plaintiff sued the state for personal injuries based upon the state's negligent failure to "properly supervise" a violent prisoner. This was the prisoner's second attempt at suicide within twenty-four hours. *Id.*

44. *Id.* at 127. The plaintiff tested negative to several AIDS tests. *Id.*

45. 747 F. Supp. 285 (E.D. Pa. 1990).

46. *Id.* at 287-88. The court came to this holding under Pennsylvania law. *Id.* at 286-88.

47. *Id.* at 287.

48. *Id.* at 286.

49. *Id.* at 288 (citing *Morbidity and Mortality Weekly Report*, July 21, 1989, Vol. 38, No. S-7, at 5). *But see* Roger N. Braden, *AIDS: Dealing with the Plague*, 19 N. KY.

*Rossi v. Estate of Almaraz*[50] involved a surgeon who died of AIDS approximately one year after performing surgery on the plaintiff.[51] The surgeon knew that he was HIV-positive at the time of the surgery, but had not yet been diagnosed with AIDS.[52] The plaintiff sued the surgeon's estate for her "daily fear of having been exposed to the risk of disease."[53] The Maryland Circuit Court, in applying the *Burk* principles that require exposure and a likelihood of contracting AIDS, denied recovery based on the lack of evidence showing actual exposure.[54] The court held that an emotional distress claim is groundless when the basis for the suit is merely "the fear that something that did not happen could have happened."[55]

In *Johnson v. West Virginia University Hospitals, Inc.*,[56] the Supreme Court of Appeals of West Virginia adopted an alternative standard for determining whether to allow recovery for emotional distress based upon the fear of contracting AIDS.[57] The court based its standard upon the traditional rule for emotional distress, which requires actual physical injury.[58] The court made this requirement more stringent by specifying that emotional distress and physical manifestations of emotional distress must result from the physical injury.[59] These require-

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L. REV. 277, 280 n.24 (1992) (noting that some researchers believe that accurate HIV antibody test results may not occur for several years).

50. 59 U.S.L.W. 2748 (Md. Cir. Ct. May 23, 1991).

51. *Id.* at 2748.

52. *Id.* The surgeon was diagnosed with AIDS thirteen days after he performed surgery on the plaintiff. *Id.*

53. *Id.* Plaintiff also sued for "surveillance damages" resulting from her AIDS testing. *Id.*

54. *Id.* The plaintiff never alleged that the surgeon failed to use proper barrier techniques during surgery, nor did she produce affirmative evidence of exposure to the AIDS virus. *Id.* at 2749.

55. 59 U.S.L.W. at 2749. On the same day it decided *Rossi*, the Maryland Circuit Court decided Faya v. Rossi, Estate of Almaraz, No. 90345011, 1991 WL 317023 (Md. Cir. Ct. May 23, 1991). In *Faya*, the plaintiff sued the surgeon's estate after learning that her surgeon died of AIDS. *Id.* at *1. Plaintiff sued for intentional infliction of emotional distress, fraudulent misrepresentation, breach of contract, and negligence. The court denied recovery because the plaintiff did not allege sufficient facts to support her allegation that she was even exposed to AIDS. *Id.* at *3.

56. 413 S.E.2d 889 (W. Va. 1991).

57. *Id.* at 894.

58. *Id.* at 892 (citing Monteleone v. Co-Operative Transit Co., 36 S.E.2d 475 (W. Va. 1945)).

59. *Id.* at 894.

ments, the court reasoned, ensure that the claim is genuine.[60] As in the other AIDS cases,[61] the court reiterated the requirement of "exposure" to the AIDS virus.[62] Unlike *Burk* and *Rossi*, the *Johnson* court refrained from adopting a requirement that the disease be "likely to occur."[63] Instead, the court set forth a requirement that the fear be "reasonable."[64] The court adopted the "reasonableness" standard from "cancerphobia" cases that addressed emotional distress due to asbestos inhalation.[65] The court reasoned that "exposure" to the AIDS virus through physical injury made the individual's resulting fear of AIDS "reasonable."[66]

The *Johnson* decision is incorrect for a number of reasons. First, the court adopted the outdated standard requiring physical injury.[67] By establishing a requirement of physical injury, the court impedes the advances made in this area of law.[68] Physical injury requirements foreclose recovery to plaintiffs with genuine claims. Furthermore, a physical injury requirement is inappropriate because the majority of AIDS cases result from sexual intercourse, blood transfusions, shared drug needles, child birth, and breast feeding,[69] none of which are generally considered "physical injuries." Additionally, the court's requirement of both a physical injury and a physical manifestation of emotional distress is specious in this context. Although the court does not define physical injury, it does note that the plaintiff's wound, sleeplessness,

60. *See supra* note 26 for discussion on the issue of genuineness.

61. *See supra* notes 40-55 and accompanying text for discussion of *Hare*, *Burk*, and *Rossi*.

62. 413 S.E.2d at 893.

63. *See supra* notes 46-55 discussing the holdings of *Burk* and *Rossi* that require a plaintiff to show a likelihood of contracting AIDS.

64. 413 S.E.2d at 894. *See supra* note 33 and accompanying text for discussion of the reasonable fears issue.

65. *Id.* at 893 (citing In re Moorenovich, 634 F. Supp. 634 (D. Me. 1986)).

66. *Id.*

67. *Id.* at 894. The majority of states have rejected the strict physical injury requirement due to its harsh and arbitrary results. *See supra* notes 25-27 and accompanying text discussing the trend to move away from the physical injury requirement and adopt a less stringent standard.

68. *See supra* notes 23-27 and accompanying text illustrating the recent advancements.

69. *See* Alexandra M. Levine, *Acquired Immunodeficiency Syndrome: The Facts*, 65 S. CAL. L. REV. 423, 437-41 (1991) (analyzing the means by which HIV may be transmitted). *See generally* Benjamin R. v. Orkin Exterminating Co., 390 S.E.2d 814, 815 n.2 (W. Va. 1990) (providing background facts concerning HIV and AIDS).

loss of appetite, and other physical manifestations satisfy the physical injury requirement.[70] If the court accepts physical manifestations of emotional distress as physical injuries, then there is essentially no distinction between a physical injury and a physical manifestation of the distress.[71]

Finally, the court adopted a reasonableness standard, instead of a likelihood standard, as the test to determine recovery.[72] The court adopted the reasonableness standard after comparing exposure to the AIDS virus with exposure to asbestos.[73] This comparison is erroneous because cancerphobia and emotional distress due to the fear of AIDS have distinguishing qualities. Individuals exposed to great amounts of asbestos suffer a greater than fifty percent chance of contracting cancer,[74] while the prospects for individuals contracting AIDS after testing negative for the HIV virus six months after exposure is extremely low.[75] The distinction is actually the application of the likelihood standard. Exposure to asbestos makes fear of cancer "reasonable" and therefore, justifies recovery for resulting emotional distress.[76] Negative AIDS test results received six months after exposure make fear of AIDS "unreasonable" and therefore unrecoverable.[77] Accordingly,

70. 413 S.E.2d at 892.

71. Furthermore, there are two indicators of emotional distress, primary responses and secondary responses. Scott, *supra* note 3, at 249. Secondary responses are the easiest to prove because they are longer in duration and are evidenced by physical manifestations. *Id.* Primary responses, in contrast, are often more severe than secondary responses but do not produce physical manifestations of emotional distress. *Id.* Therefore, the physical manifestation requirement is inappropriate because it could preclude recovery for the most severe cases of emotional distress.

72. Other states that have decided whether to allow recovery for fear of AIDS have used a standard considering the "likelihood" or "likeliness" of the individual contracting AIDS. *See supra* notes 35, 46, 49, 54, and accompanying text for cases applying the likelihood standard.

73. 413 S.E.2d at 893-94.

74. Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 413, n.24 (5th Cir. 1986) (noting medical testimony and statistics). *See also* Knepel, *supra* note 19, at 295 (proposing that perhaps such statistics will soon arise in the DES and groundwater contamination context).

75. *See supra* note 44 and accompanying text discussing the findings of the *Burk* court.

76. *See supra* note 37 and accompanying text for discussion of the reasonableness of fearing cancer after exposure to asbestos.

77. *See* Morrissy v. Eli Lilly & Co., 394 N.E.2d 1369 (Ill. App. Ct. 1979) (denying recovery for supposed increased risk of cancer or other problems due to DES when there is no reasonable certainty that exposure would lead to disease); Rittenhouse v. St. Regis Hotel Joint Venture, 565 N.Y.S.2d 365 (N.Y. Sup. Ct. 1990) (denying recovery

the court should have adopted a "likelihood" standard.[78]

The *Johnson* court's requirements are too restrictive for the majority of AIDS fear cases, which do not involve physical injury. In an effort to protect the judicial system from fraudulent and frivolous claims, the court has prevented recovery for genuine claims. Recovery should not be based upon "the fear that something that did not happen could have happened."[79] Rather, recovery for fear of AIDS infection should be based upon exposure and the statistical likelihood of contracting the disease.

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for fear of cancer due to asbestos exposure because there is no physical indication of disease).

Underlying the denial of recovery for emotional distress is a public policy interest against frivolous claims and unlimited liability. *See* Knepel, *supra* note 19, at 292-93 (analyzing a "cancer phobia" case and noting the possibility of overwhelming litigation because groundwater contamination may involve hundreds of thousands of people). Recovery will be denied in AIDS fear cases when there is no physical indication of disease and medical probability demonstrates that it is extremely unlikely that the individual will contract AIDS.

78. Fifteen days after *Johnson* was decided, the same court decided another case involving emotional distress damages for fear of contracting AIDS. Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp., 413 S.E.2d 79 (W. Va. 1991). In *Funeral Services*, the court denied recovery because the plaintiff could not prove that he had been exposed to the virus. *Id.* at 82-84. The court did not reach the question of what other requirements must be met for recovery.

79. Rossi v. Estate of Almaraz, 59 U.S.L.W. 2748 (Md. Cir. Ct. May 23, 1991).

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