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Recommended Citation
Jill Trachtenberg, Living in Fear: Recovering Negligent Infliction of Emotional Distress Damages Based on the Fear of Contracting AIDS, 2 DePaul J. Health Care L. 529 (1999)
Available at: https://via.library.depaul.edu/jhcl/vol2/iss3/4

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LIVING IN FEAR: RECOVERING NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS DAMAGES BASED ON THE FEAR OF CONTRACTING AIDS

Jill Trachtenberg*

INTRODUCTION

Acquired immune deficiency syndrome (AIDS) has afflicted millions of Americans since 1981. To date, no known cure exists for AIDS, and the syndrome is considered to be 100 percent fatal.¹ In 1989, the first lawsuit claiming “AIDS phobia” was brought in the United States.² At this time, millions of Americans, fearing they had come in contact with the disease, rushed to be tested for the human immunodeficiency virus (HIV), which indicated whether a person would eventually develop AIDS. The test for HIV was considered to be highly accurate.³ Additionally, the uncertainty surrounding the modes of transmission of AIDS⁴ frightened millions of Americans. The result of such fear was the use of the court system to handle cases of frightened individuals who mistakenly thought they had been exposed to HIV.⁵ As the number of HIV infected individuals rose,

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⁴AIDS can only be transmitted through certain kinds of contact: direct blood to blood contact, such as through shared needles of intravenous drug users or through blood transfusions, or unprotected sexual contact via vaginal or seminal fluids.
⁵An example of the fear present among many individuals was the influx of lawsuits by individuals who were bitten by other individuals, even though the “biters” were not infected with HIV. See Hare, 570 N.Y.S.2d at 126.
litigation surrounding HIV exposure or even potential exposure rose as well. While lawsuits based on a fear of disease are not new, AIDS and HIV exposure challenged the legal system to address a disease that is incurable and fatal.

In the last decade, more than one dozen cases have been brought in the United States claiming negligent infliction of emotional distress as a result of coming in contact with AIDS; in many cases, this contract occurred via a hypodermic needle or syringe. In New York alone, eight cases alleging this claim have been brought since 1989. The first of these claims occurred in 1991. In the following discussion, state cases in New York as well as other jurisdictions will be analyzed and compared by looking at how the courts have treated individuals who have been actually exposed to HIV, versus individuals who feared exposure to HIV even though that fear turned out to be unfounded. Additionally, the claim of negligent infliction of emotional distress will be examined in its traditional role, as well as the part it now plays in cases involving AIDS and HIV.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Negligent infliction of emotional distress has been alleged as a cause of action for decades. In 1961, New York courts first allowed the negligent infliction of emotional distress claim as a separate tort action. Courts were reluctant to allow such a claim to stand on its own for two reasons: first, that a flood of litigation would ensue, and second, that proving the nature of the injury or injuries would be difficult. The counter-argument to these concerns was that the system should not preclude a legitimate claim. Therefore, although the concept of negligent infliction of

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10 See id. at 729-32.
11 Ferrera, 152 N.E.2d at 252 (stating "it is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim").
emotional distress was eventually adopted, the scope of the claim has taken on several different forms and has been greatly expanded since its inception. Three major transformations have occurred:

(1) recovery for the fear of disease when an actual injury occurred,
(2) recovery in the absence of an injury to the claimant (this includes the zone of danger rule and the bystander rule), and
(3) recovery for the fear of disease, even in the absence of an injury, assuming the claim was genuine.

Actual Injury
In 1958, the New York Court of Appeals, in *Ferrara v. Galluchio*, sustained a negligence claim based on the fear of disease. The jury had rendered a verdict for $25,000 including $15,000 for mental anguish, even though the plaintiff had only brought a claim for medical malpractice. The facts of this landmark case are quite simple. Plaintiff received x-ray treatment for bursitis of her right shoulder, and as a result of the treatment suffered burns. Plaintiff was also informed the affected area might become cancerous. Thus, plaintiff sustained an actual injury for which she was compensated. However, every six months following the treatment, plaintiff was required to have her shoulder examined for cancerous evidence. The court found “[t]here was a real connection between the ultimate damage and the original wrong.” In later cases, this connection was termed “genuineness.” The court went on to state that each individual living within New York had a right to be free from mental disturbance. This case firmly established that negligent infliction of emotional distress claims based upon the fear of disease could be successful, provided an actual injury existed.

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15 *Ferrera*, 152 N.E.2d at 250.
16 *Id.* at 251.
18 *Id.* at 250.
19 *Id.* at 251.
20 *Id.*
21 *Id.*
24 *Ferrera*, 152 N.E.2d at 252.
Absence of Injury

Tort law has greatly expanded since Ferrera was decided. While negligent infliction of emotional distress once required an actual injury to the plaintiff, tort law gradually expanded to allow uninjured third parties to bring negligence claims. This occurred through a zone of danger rule, which allowed an individual to recover based upon his proximity to the accident or injury, and through a limited bystander recovery rule, which allowed recovery for individuals who witnessed the death or serious injury of a family member.

Zone of Danger

The zone of danger rule allows an individual who is threatened with bodily harm by the defendant's conduct to recover for emotional distress stemming from viewing the death or injury of a family member. The plaintiff cannot be a mere observer or witness, but rather a participant in the event which caused the danger. Additionally, there must be a special relationship to the defendant. This rule of recovery was adopted by many jurisdictions and the Restatement of Torts Second, and therefore, gradually became the majority rule nationwide.

Based on the zone of danger theory, the plaintiff must not only witness the harm of a family member, but the plaintiff must also be within the "zone of danger" herself. In Dillon v. Legg, a mother and sister witnessed a car collision with a young boy, resulting in his death. The Supreme Court of California dismissed the mother's claim because she was not within the zone of danger; however, the sister's claim was sustained, as she was closer to the accident and may have "feared for her own safety." While New York does not allow for this type of recovery, several jurisdictions, including California, permit recovery, even when the plaintiff is not within the zone of danger. California, as well as several

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27See Bovsun, 461 N.E.2d at 847.
31Id. at 914.
32Id. at 915.
33Id. (allowing for recovery based on foreseeability).
other jurisdictions, has allowed recovery based on foreseeability. These jurisdictions have adopted the rule set forth by the California Supreme Court in *Dillon*, which states "[t]hat damages may be recovered for the emotional trauma caused when a plaintiff witnesses the injury or death of a close relative even though the plaintiff himself is not within the zone of danger . . . , provided that the emotional injury is reasonably foreseeable."

**Bystander Recovery**

As a general rule, bystanders cannot recover damages for the negligent infliction of emotional distress in New York state; however, a limited exception to this rule does exist. In 1984, New York carved an exception from the zone of danger rule to include bystander recovery. The rule was expanded to allow "one who is himself or herself threatened with bodily harm in consequence of the defendant's negligence to recover based on emotional distress resulting from viewing the death or serious injury of a member of his or her immediate family." The comments to section 436 of the *Restatement (Second) of Torts* support this limited exception. The *Restatement* states that if the negligence of an individual threatens bodily harm to another, and affects that individual’s emotional well being, the defendant is subject to liability if the person actually injured is a member of the plaintiff's immediate family.

This exception was first used in New York in *Bovsun v. Sanperi*. This case marked a significant deviation from the long-standing rule barring bystander recovery. As a result of *Bovsun*, New York allowed for bystander recovery limited to those persons who were within the zone of danger. New York did not extend recovery to individuals based on foreseeability as California did in *Dillon v. Legg*. Therefore, New York

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35 *Id.* at 846 (citing *Dillon*, 441 P.2d at 920).


37 *Bovsun*, 461 N.E.2d at 843.

38 *Id.* at 847.

39 *RESTATEMENT (SECOND) OF TORTS* § 436 cmt. f (1965).

40 *Bovsun*, 461 N.E.2d at 843.

continued to view bystander recovery as an exception to the general rule prohibiting such recovery.

In *Bovsun*, a family vehicle was on the shoulder of a highway. The father was behind the vehicle when the vehicle was struck in the rear. The family, who was in the car and did not actually witness the accident, became immediately aware of what had occurred. Recovery damages were allowed, as the family was deemed within the zone of danger. Under the *Bovsun* rule, the family members did not actually have to witness the accident, as long as the family members were immediately aware of the victim’s injuries and observed the victim immediately after the accident.

The bystander recovery rule may only apply to immediate family members, and furthermore, the courts have narrowly construed the definition of “immediate family.” In *Trombetta v. Conkling*, plaintiff witnessed the death of her aunt by a tractor-trailer. Plaintiff did not live with her aunt. The New York State Court of Appeals held the plaintiff was not entitled to recover based on this relationship, establishing a bright line rule to prevent fictitious suits brought under a bystander recovery theory, and the aunt/niece relationship did not meet this bright line test.

The courts have also limited bystander recovery in situations where the plaintiff was outside the zone of danger. In *Tobin v. Grossman*, a mother brought suit to recover for injury to her child. The child was hit by a car outside the family home. While the mother did not actually witness the accident, she heard the brakes of the vehicle screech to a halt, and looked outside to find her child lying on the ground. The Court of Appeals did not allow recovery for emotional distress because the mother herself was not within the zone of danger. This case clearly

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44Id.
45Id.
46Id. at 845.
47Id.
49Id.
50Id.
51Id.
53Id. at 420.
54Id.
55Id. at 419.
demonstrates the difference between New York's and California's recovery rules. Had Tobin occurred in California, the mother might have recovered based on a foreseeability standard. However, New York does not allow for this means of recovery based on foreseeability.

GENUINENESS OF THE CLAIM

The final element crucial to sustaining a negligent infliction of emotional distress cause of action is the "genuineness of the claim." Satisfaction of this element was crucial for AIDS phobia claims to survive the judicial process. In 1989, the first AIDS phobia case was brought in New York. Two years later, in 1991, a New York court allowed recovery for a negligence cause of action in *Castro v. New York Life Insurance Company*. The court permitted the claim to stand because it could be tied to a distinct event which would cause a reasonable person to develop a fear of contracting the disease. This link between the event and the fear was referred to as the "genuineness of the claim," and this link indicated the claim was legitimate.

AIDS PHOBIA IN NEW YORK

New York follows the majority rule regarding recovery in AIDS phobia cases, which requires a showing of actual exposure to HIV or AIDS. A minority view, which has only been adopted by two states, allows recovery based upon a general reasonableness standard.

*Castro v. New York Life Insurance Company* was the first New York case sustained on AIDS phobia grounds; however, it was not the first case brought based on contracting HIV. Cases based on individuals who contracted the virus from other individuals, blood transfusions, or contaminated needles had been litigated since the mid 1980's, when AIDS was confirmed to be a communicable, and fatal disease. At that time,

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59 Id. at 698.
60 See infra, p. 545-58, for a discussion of the majority rule.
most of the litigation was aimed at blood banks that had distributed infected blood to hospitals for blood transfusions. During the early years of the AIDS epidemic, blood banks had not implemented testing procedures for HIV. In cases of blood transfusion negligence claims, the plaintiffs had direct, identifiable physical injuries. Claims for AIDS phobia differ from these older and somewhat traditional claims because an injury is not required.

Prior to Castro, one New York case alleged negligent infliction of emotional distress based on exposure to HIV (AIDS phobia). In Hare v. State, plaintiff, a hospital employee, was injured when a hospitalized prison inmate bit him. Although plaintiff was awarded $35,000.00, this award was for pain, suffering, medical expenses and loss of earnings, not for the fear of developing the AIDS virus. The plaintiff was unable to recover for several reasons:

1. the claim was too speculative to award damages;
2. plaintiff provided no proof that the inmate who bit plaintiff had the AIDS virus (actual exposure standard was not met); and
3. plaintiff did not show proximate cause.

In order for a claimant to recover for AIDS phobia, he must show the emotional distress was directly caused by the negligence of the defendant. Additionally, the claimant must prove that the breach was the proximate cause of the defendant's negligence. While the plaintiff lost weight and suffered cold symptoms, the court held he had not suffered an injury as he continued to test negative for AIDS.

Castro v. New York Life Insurance Company was the second case brought within the New York State court system. In Castro, the New York State Supreme Court, New York County stated:

64 See id.
65 Several federal cases alleging AIDS phobia were brought prior to this time.
67 Id.
68 Id. at 126-27.
70 Hare, 570 N.Y.S.2d at 127.
[i]t must be proven that the condition suffered is a direct result of defendant's breach of duty, and that the breach was a proximate cause of injuries. Prospective consequences must be expected to flow with reasonable certainty from the harm, and if the claim can be tied to a distinct event which could cause a reasonable persons to develop a fear of contracting AIDS, there is a genuineness to the claim. 

In Castro, plaintiff brought a personal injury case, claiming that while she was working as a cleaning person, she was stuck in the thumb with a discarded syringe needle. In her complaint, she alleged the needle could have been contaminated with HIV, and therefore she may have been exposed to the virus. The plaintiff presented the medical records of her psychiatrist as extensive proof of the emotional injury she suffered following the incident. The court held that because her claim could be directly tied to a specific event, she had stated a legitimate claim. However, because no proof existed of actual exposure to the HIV, the case has been criticized as being too permissive. However, looking back at this decision, it may not have been too permissive, but rather the start of a different kind of thinking about what is considered to be a recoverable claim for emotional distress.

Following Castro, Ordway v. County of Suffolk was brought in 1992. In Ordway, a physician brought suit claiming negligent infliction of emotional distress based on the fear of contracting HIV after performing a surgical procedure on an arrestee who had been brought into the hospital. The physician was unaware of the patient's HIV positive status. The court stated that performing procedures on an individual brought to the hospital by a third party (a police officer) and being unaware of the HIV status of the patient is insufficient as a matter of law

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72 Id. at 696 (citing Hare v. State, 570 N.Y.S.2d 125 (Sup. Ct. 1991)).
73 Castro, 588 N.Y.S.2d at 696.
74 Id.
75 Id.
76 Id.
77 Tischler v. Dimmena, 609 N.Y.S.2d 1002, 1007 (Sup. Ct. 1994) (stating that while a precipitating incident existed in Castro, there was no hint of exposure, which indicates that Castro should be limited to its unique facts).
79 Id.
80 Id. at 1015.
to sustain a claim. There was no indication of legitimacy (genuineness) required when no injury resulted from the incident or exposure. There was also no loss of income as a result of his exposure to the virus. Finally, there was no indication that the treatment offered in this case would have been altered in any way as a result of disclosure of the patient’s HIV positive status.

To bring a law suit for negligence, it must be shown that there was a duty and a breach of this duty. However, in Ordway, neither the patient, nor the county, was under a duty to disclose the patient’s HIV status to the physician under Article 27-F of the New York State Public Health Law. This law was enacted in response to the New York legislature’s recognition of a need for maximum confidentiality of HIV related information. To carry out this intent, regulations were effectuated which prohibited the disclosure of HIV-related information solely to carry out “infection control precautions.” Therefore, because the defendant had no duty to disclose the patient’s HIV status under New York law, the physician was unable to meet the required elements of a negligence claim, and his cause of action was dismissed.

In Tischler v. Dimenna, the defendant had a duty to inform the plaintiff of the defendant’s HIV status. The plaintiff had engaged in intercourse with the defendant, who was HIV positive. The plaintiff was not aware of defendant’s HIV status. The court stated that the defendant’s duty to inform the plaintiff arose when he knew or should have known he had a communicable disease. Additionally, the defendant had a duty not to intentionally or negligently inflict mental distress upon the plaintiff. The court further stated the “plaintiff has proven probable exposure to the disease.” This perhaps was the first time a New York

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81 Id.
82 Id. (The facts indicate that there was no broken glove, pierced skin or bite mark and the physician never tested positive for HIV. Therefore, he sustained no injury.)
84 N.Y. PUB. HEALTH § 2782 (McKinney 1992).
85 Ordway, 583 N.Y.S.2d at 1014 (citing N.Y. COMP. CODES R. & REGS tit. 10, § 63.5 (1992)).
87 Id.
88 Id.
89 Id. at 1004.
90 Id.
LIVING IN FEAR: CONTRACTING AIDS

The court deviated from an actual exposure standard. The court then stated "the issue of reasonableness of the plaintiff's fear and for what period of time that fear is compensable are questions for the jury after hearing her testimony and upon a full review of actual medical testimony." This was a victory and what could be deemed a landmark case in New York, in that the court understood the fear of contracting AIDS was inherent in many individuals. In reaching its conclusion, the court discussed the different methods for testing for HIV, the effectiveness of such methods, and the latency period of approximately six months in which a positive result might not appear, even if the virus was present in a person's body. In addition, this was the first court in New York to not only recognize a latency window period, but to propose allowing limited recovery beginning at the date that exposure to HIV was discovered. Finally, the court discussed reasonableness, a concept later expanded upon in Williamson v. Waldman in New Jersey. The Tischler decision followed the reasoning set forth in a Pennsylvania case, Lubowitz v. Albert Einstein Medical Center, which was decided one year prior to Tischler.

The Lubowitz decision recognized the AIDS/HIV virus had a latency period during which an individual who had HIV could test negative. This was one of the first courts to acknowledge the existence of a latency period. However, even after acknowledging this period, the court apparently did not know what to do with this information, or how to apply the information to this case. The court proposed granting summary judgment with leave to sue at a later date if AIDS developed. This proposal prevented frivolous suits brought by people who tested negatively for HIV for years. It also avoided awarding monetary damages based upon an irrational fear, and forced litigants to have a substantial claim before wasting time and money. However, the Pennsylvania court failed to realize that the plaintiffs were bringing suit based upon a fear, not upon an actual injury. Therefore, the court missed the point of the claim when it dismissed the action pending actual contraction of the disease.

92 Id.
93 Id. at 1002.
94 Id.
97 Id. at 4.
98 Id.
The crux of AIDS phobia is that it deals specifically with that reasonable fear of contraction of HIV, not the actual contraction of the disease.

Maryland and New Jersey have since followed up on the Lubowitz decision. These courts took the information acquired in Lubowitz and applied it in a logical and consistent manner. The courts recognized there was a six to twelve month latency period in which tests could not conclusively indicate whether an individual had contracted HIV virus. During this time period, the courts concluded, assuming that the fear was reasonable and could be tied to a specific event, damages should be awarded for fear of AIDS. These courts recognized that the claim being brought was for fear of acquiring the disease, and not for actual injury. However, to date, these two jurisdictions constitute only a minority viewpoint, and New York has not chosen to adopt this view.

However, there may be some hope for New York. First, as seen in Tischler, New York courts have begun to recognize that a latency period does exist for HIV, and courts have even suggested allowing limited recovery. Second, in Brown v. New York City Health & Hospital Corporation, Justice Lisa attempted to follow up on Tischler. In Brown, Justice Lisa suggested that any damages for AIDS phobia should be limited to the fear experienced within one year, and a one year statute of limitations be set on AIDS phobia claims. Additionally, Justice Lisa noted plaintiffs have a duty to mitigate damages by undergoing HIV testing during the window period. While it is apparent that New York is taking a step in the right direction by recognizing the existence of the latency period, New York has yet to apply the rules suggested by Justice Lisa.

In 1994, Kaufman v. Physical Measurements was litigated in New York. A postal worker stuck his finger on a hypodermic needle protruding from a package addressed to a laboratory. Although he tested negative for HIV on five separate occasions during the course of eighteen

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99 See discussion, infra pp. 562-65.
100 See discussion, infra pp. 562-65.
103 Id. at 770.
104 Id. at 771; Tischler, 609 N.Y.S.2d at 1008 stating that the plaintiff has a duty to mitigate damages and should be required to take the HIV test three months after exposure.
106 Id. at 508
months, the postal worker brought suit claiming negligent infliction of emotional distress based on the fear on contracting HIV. The court found there was no genuineness to the claim. It was later determined that the individual whose blood had been extracted did not have HIV.

While New York recognized the existence of a latency period earlier in the year (Tischler was decided several months prior to Kaufman), the trial court did not apply the latency period reasoning to Kaufman. Had this standard been applied, recovery might have been allowed during the first year only, thus precluding the plaintiff pursuing a cause of action eighteen months later. However, even after learning that both the plaintiff and the individual whose blood had been taken were both HIV negative, the court did not dismiss the case. Instead, the trial court stated the basis of plaintiff's claim was a documented physical injury, and allowed the claim to stand. The New York State Supreme Court later reversed the trial court, stating "[t]here is no objective medical evidence in this record to substantiate the concern that Kaufman has contracted or been exposed to HIV."

As cases based on AIDS phobia continued to enter the courts, juries were asked to put dollar figures on the fear of contracting AIDS. In Sargeant v. New York Infirmary Beekman Downtown Hospital, a jury initially awarded a Jehovah's witness $500,000 for fear of disease and mental anguish, caused by a violation of his religious beliefs. Plaintiff was a Jehovah's witness who was given plasma during the course of treatment. Upon realizing that he was being given a blood product, he demanded the treatment be discontinued. He made no statement upon admission indicating he would not accept blood products. Approximately six months later, plaintiff brought suit claiming fear of disease and mental anguish. At the time of suit, plaintiff tested negative

107 Id.
108 Id.
109 Id.
110 Kaufman, 615 N.Y.S.2d at 508.
111 Id.
112 Id.
114 Id. at 9.
115 Id.
116 Id.
117 Id.
for both HIV and Hepatitis C. However, the trial court found the transfusion constituted a physical invasion and allowed both claims. The court reasoned that had suit been brought for fear of disease alone, plaintiff might not have recovered any damages. Justice Freedman, who presided over the case, expressed strong doubts as to whether the plaintiff had a viable claim for AIDS phobia per se, because he had tested negative for HIV. The following year upon appeal, the judgment was reversed and the case was dismissed.

Based upon the nature of this claim, dismissal of the case was the appropriate decision. In circumstances when the blood that came into contact with the plaintiff is immediately determined to be HIV negative, recovery is not warranted. Because no uncertainty exists, the crucial element of anxiety or "phobia" is absent. Ironically, the New York State Supreme Court's ruling in Kaufman which required "objective medical evidence to substantiate a claim" was actually more applicable to Sargeant, than to Kaufman. In Sargeant, no "objective medical evidence to substantiate the claim" existed, and yet the trial court allowed the case to continue. Had the Kaufman standard been applied in Beekman, this case would have been properly dismissed at the onset.

The majority trend in AIDS phobia cases is to disallow recovery of emotional distress damages if the plaintiff cannot show actual exposure to HIV and/or it is substantially likely that the plaintiff was not infected with HIV, and therefore, will not develop AIDS. In determining whether to uphold a claim for AIDS phobia, New York courts have looked at several factors:

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119Id.
120Id.
121Id.
122Barbara Goldberg, A Different Reading for 'Sargeant' Ruling, N.Y. L.J. April 7, 1995, at 2.
124Arthur Grebow and Paul R. Lees-Haley, Fear of Future Illness, 47 CPCU 449 (1994). This "more likely than not" test has recently been adopted in California pursuant to Potter v. Firestone Tire & Rubber, 863 P.2d 795 (Cal. 1993). However, as discussed later, the author does not believe it is the appropriate test to use in AIDS related cases.
(1) whether there is proof the defendant has HIV or AIDS (actual exposure),
(2) the mode of transmission; and
(3) the genuineness of the claim.

Several of these factors may overlap. Additionally, this is a case by case
approach based on a totality of the circumstances analysis.

The first factor examined is whether the defendant had HIV and whether actual exposure can be demonstrated. Some proof must exist indicating the defendant had HIV. New York courts infrequently award damages based on speculation or the mere possibility that an individual will contract HIV. In *Hare v. State*, one of the reasons the claim was not sustained was because the plaintiff could not prove he had been exposed. Even when a plaintiff has been able to show some exposure, the claim may be conditionally dismissed. The medical proof must be sufficient; if the tests for HIV are consistently negative, it is unlikely the claim will be sustained. Several courts have ordered the plaintiff to undergo HIV testing. While this seems drastic, it is to be expected if an individual brings an AIDS phobia claim. In *Brown v. New York City Health & Hospital Corporation*, the court stated "by commencing a lawsuit seeking damages for having contracted HIV/AIDS infection, a plaintiff places her HIV status in issue and may not thereafter refuse to submit to a definitive HIV-antibody test."

The second factor examines the way in which the virus was allegedly transmitted. Courts recognize that the transfusion of blood, or biting an individual, are unlikely modes of transmission. For example, the *Hare* case involved plaintiff who was bitten by the defendant. This case was eventually dismissed. Courts today recognize the method by which blood is drawn and transfused has been perfected and, therefore, it is an unlikely mode of HIV transmission. Additionally, it is rare, though not

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126 *Id.*
128 *Hare*, 57 N.Y.S.2d at 125.
129 *Id.*
133 *Id.* at 127.
134 Dr. Szembeny, Addressing the AIDS Law Class on AIDS in the United States (Sept. 1995).
impossible, to contract HIV through biting. Cases involving hypodermic needles seem to be the most frequently sustained.\textsuperscript{135} This is among the most likely methods of transmitting the disease, as accidentally putting another individual’s blood directly in contact with one's blood is one way in which HIV is spread.

The third factor examined is the genuineness of the claim. This is an essential part of the analysis. If the transmission cannot be tied to a specific event, and there is no genuineness to the claim, the claim will most likely be dismissed. In other words, merely being exposed to an individual who has the disease will not suffice to sustain a claim. In \textit{Doe v. Doe}, a woman brought suit claiming that her husband had a homosexual affair, which placed her at risk of contracting HIV.\textsuperscript{136} There was no proof that either she or her husband had ever been exposed to the disease.\textsuperscript{137} She was unable to point to any distinct event or any specific point in time when the exposure might have occurred.\textsuperscript{138} Based on a lack of genuineness, the claim was dismissed.\textsuperscript{139}

While not specifically outlined in every case, the courts do use this three factor analysis. A balancing test, encompassing these factors, as well as others, must be used in every case. As previously discussed, only one New York case has awarded damages based on AIDS phobia.\textsuperscript{140}

New York has not been very tough on the AIDS phobia cases. Since 1994 (after recognizing the latency period), New York has become tougher (as evidenced in \textit{Kaufman}); however, the three factor analysis is not difficult to satisfy. If an individual who has truly been exposed to HIV brings a claim, he will not have a difficult time meeting New York’s three part test and making out a \textit{prima facie} case.

While New York single-handedly has the most cases filed claiming AIDS phobia, several other states have addressed this issue. With the exception of Maryland and New Jersey, which have adopted the general reasonableness standard, the analysis in the majority of the states has not

\textsuperscript{136}Doe v. Doe, 519 N.Y.S.2d 595, 596 (Sup. Ct. 1987).
\textsuperscript{137}\textit{Id.}
\textsuperscript{138}\textit{Id.}
\textsuperscript{139}\textit{Id.}
\textsuperscript{140}Award of $500,000 Found Excessive for Transfusion to Jehovah's Witness, N.Y. L.J., August 24, 1994, at 21 (Sargeant v. N.Y. Infirmary Beekman Downtown Hospital is an unreported case which was decided in the Supreme Court of New York County in 1994).
greatly differed from New York’s analysis, which uses the actual exposure standard.

**OTHER JURISDICTIONS**

At the same time that Castro was decided in New York, the West Virginia Supreme Court was deciding Johnson v. West Virginia University Hospital.¹⁴¹ In Johnson, plaintiff was awarded $1.9 million in damages for being exposed to the AIDS virus.¹⁴² While the analysis was similar to that used in New York, the award amount was quite different. In Johnson, a police officer employed by University Hospital helped subdue a patient.¹⁴³ Although the physicians and hospital workers were aware that the patient had AIDS, the plaintiff was not informed.¹⁴⁴ Contrary to hospital policy, the hospital failed to tell the officer so he could take certain precautions.¹⁴⁵ The patient, who had blood in and around his mouth, bit plaintiff, causing a break in the skin, which caused the blood of the plaintiff and the patient to come into contact.¹⁴⁶ As a result of this incident, plaintiff received psychological counseling due to loss of sleep and appetite and his wife left him for fear that she might contract HIV.¹⁴⁷ However, plaintiff continuously tested negative for HIV.¹⁴⁸

Under a New York analysis, this claim probably would have been sustained because the three basic elements needed to satisfy the claim were present. The individual who bit plaintiff had AIDS, the mode of transmission allowed both individuals’ blood to come into contact with each other (biting is usually not considered a likely mode of transmission because the virus is infrequently transferred through saliva) and there was genuineness to the claim. It should be noted the patient bit the plaintiff in 1988 and this case was not brought until 1990.¹⁴⁹ However, the minority viewpoint allowing claims to be sustained based upon the six to

¹⁴² Id. at 891.
¹⁴³ Id.
¹⁴⁴ Id.
¹⁴⁵ Id.
¹⁴⁷ Id.
¹⁴⁸ Id.
¹⁴⁹ Id. at 889.
twelve month latency period did not come into existence until 1993. As this was two years after Johnson was decided, the precedent was not yet established.

Lubowitz v. Albert Einstein Medical Center was decided in 1993. The plaintiffs brought suit claiming the blood used to impregnate Mrs. Lubowitz through in vitro fertilization tested HIV positive. While the blood did test positive on one occasion, subsequent testing indicated the first test was a false-positive. The court dismissed the claim because no compensable injury existed. However, the court did state "if Robyn Lubowitz eventually were to contract AIDS [as the result of the events outlined in this case], she would have a cause of action for a compensable injury at that time." The court recognized that testing negative on one or two occasions did not mean the individual would remain free of the AIDS virus, thereby acknowledging that a latency period existed. However, as the case was brought based on fear of the disease, not actual contraction of the disease, and the fear could be tied to a specific event (the false-positive), damages should have been awarded for the six to twelve month period in which the plaintiffs experienced actual fear. This one incident was enough to create reasonable fear.

In Kerins v. Hartley, a California court applied an analysis similar to the one used in past cases and recognized the existence of a window of anxiety and awarded damages based upon that window. In Kerins, plaintiff was operated on by a physician infected with HIV. At the time of surgery, the physician thought he might be infected, but had not been informed of the results of his test. Approximately, two years later, the physician announced he was HIV positive on a televised news broadcast seen by plaintiff. Plaintiff immediately underwent HIV testing and was informed two weeks later she was HIV negative. The trial court granted

\[150\text{Id.}\]


\[152\text{Id. at 4.}\]

\[153\text{Id.}\]

\[154\text{Id.}\]

\[155\text{Id. at 6.}\]


\[157\text{Kerins v. Hartley, 21 Cal. Rptr. 2d 621, 621-22 (Cal. Ct. App. 1993).}\]

\[158\text{Id. at 623.}\]

\[159\text{Id.}\]

\[160\text{Id.}\]

\[161\text{Id.}\]
The Appellate Court, Division One, reversed, stating that recovery should be allowed during the “window of anxiety.” However, the court recognized the latency period had expired, and she had only experienced fear for a limited two week period. Plaintiff was not awarded any damages for this period. Less than a year later, as a result of the California Supreme Court’s ruling in Potter v. Firestone Tire and Rubber, the California Supreme Court granted the physician petition to review and transferred the case to the Appellate Court, Division Two. This court reversed the ruling of the Appellate Court, Division One and reinstated the trial court’s summary judgment ruling in favor of the physician.

The Potter case disregarded the analysis of the Appellate Court, Division One in Kerins. The Potter court did not involve an AIDS case and also did not consider a “window of anxiety” time frame. Potter was a tort case that centered on a toxic waste dump and the potential for contracting cancer as a result of one’s proximity to the toxic area. The California Supreme Court attempted to compare Potter and Kerins by discussing various public policy concerns about why a claim of negligent infliction of emotional distress should not be allowed to stand alone. The court at length discussed the affordability of liability insurance for toxic tort cases and the impact these cases could have upon the health care field. The result of this analysis was the court imposed a burden on the plaintiff to demonstrate it was “more likely than not” he would develop the disease in question in the future.

The California Supreme Court’s treatment of Kerins in light of Potter fails to address some significant differences between the facts of the two cases. First, HIV and cancer are not comparable. If cancer is detected in its early stages, it may be successfully treated. However, once HIV is detected, no treatment exists to date that could successfully fight the

163 Id. at 628.
164 Id.
165 Id.
168 Id. at 633.
169 Potter, 863 P.2d at 801.
170 Id. at 804.
171 Id.
172 Id.
outcome of death. Second, because HIV has a "window of anxiety," a person has a somewhat definitive time frame to learn whether he has contracted the disease. Current research indicates that this time frame is between six months and one year.\textsuperscript{173} The California Supreme Court's analysis ignores these differences by failing to treat the medical conditions differently; cancer and HIV have different tests, different modes of transmission and different treatments. Additionally, the fear of developing cancer was a starting point for the HIV claims presently being litigated.\textsuperscript{174} Initially, cancer cases originally recognized that a claim could stand based upon the fear of contracting a disease. However, over the course of time, the courts have restricted recovery based on the fear of getting cancer, and newer decisions show no signs of retreating.\textsuperscript{175}

The Appellate Court, Division Two should have affirmed the trial court's ruling and taken it a step further by allowing damages for the two week period in which plaintiff experienced fear. Her fear was reasonable and tied to a specific event, and therefore genuine. The claim should have allowed damages from the point of discovery, regardless of how minimal they would have been. The point is that plaintiff did experience reasonable fear for the two week period and should have been compensated for it.

Following Kerins, the Arizona Court of Appeals decided TransAmerica Insurance v. Doe.\textsuperscript{176} Again, the court failed to recognize the latency period that the Lubowitz court applied. The court in TransAmerica required an actual injury, testing positive for the AIDS virus, before awarding damages.\textsuperscript{177} This court also misunderstood that the crux of the claim was the fear of getting HIV, and not the injury of contracting HIV.\textsuperscript{178} Such recovery, based on fear of AIDS and not on physical injury, was eventually permitted in two state cases, Faya v. Almarez\textsuperscript{179} and Carroll v. Sisters of St. Francis Health Services.\textsuperscript{180}

\begin{footnotes}
\textsuperscript{173}See Williamson v. Waldman, 696 A.2d 14, 23 (N.J. 1997) (stating the window of anxiety is six months to one year).
\textsuperscript{174}See Ferrera v. Galluchio, 152 N.E.2d 249 (N.Y. 1958) (allowing recovery based upon the fear of developing cancer).
\textsuperscript{175}See id.
\textsuperscript{177}Id. at 291.
\textsuperscript{178}Id.
\textsuperscript{180}Carroll v. Sisters of St. Francis Health Serv. Inc., 868 S.W.2d 585 (Tenn. 1993).
\end{footnotes}
Since 1993, only two states have allowed recovery for AIDS phobia claims, using a general reasonableness standard to determine whether the claim was legitimate. These decisions have been the most logically consistent to date. The two cases are *Faya v. Almarez*¹ in Maryland and *Williamson v. Waldman*² in New Jersey. However, *Carroll v. Sisters of St. Francis Health Services*³ in Tennessee and *Doe v. Surgicare of Joliet*⁴ in Illinois, while using an actual exposure standard, still recognized that a latency period existed and allowed recovery for this minimal time period.

In *Faya v. Almarez*, plaintiff was operated on by the defendant physician, who knew he had the AIDS virus.⁵ The plaintiff became aware of the physician's AIDS condition through a newspaper article more than one year after surgery.⁶ The court stated in order to sustain a claim, the plaintiff had to demonstrate the physician breached a duty of care and the breach proximately caused a legally cognizable injury.⁷ The court allowed the plaintiff to recover limited damages for mental anguish.⁸ The plaintiff could only "[r]ecovery for the fear of and its physical manifestations which may have resulted from Almarez' [the physician] alleged negligence for the period constituting their reasonable window of anxiety—the period between which they learned of Almarez' illness and received their HIV-negative results."⁹

In essence, the court had two choices in this case; it could deny recovery based upon the fact that the window of anxiety (a six to twelve month period) had expired, or it could permit recovery. It chose to do the latter. It appears the court basically adopted a modified version of medical malpractice recovery, which allows for recovery from the time of discovery. Such a theory was appropriate in this case, because discovery was ultimately impossible at an earlier date. The court essentially expanded upon *Lubowitz* and arrived at a fair and logical result.

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¹ *Faya*, 620 A.2d at 327.
³ *Carroll*, 868 S.W.2d at 585.
⁶ *Id.*
⁷ *Id.* at 333.
⁸ *Id.*
⁹ *Id.* at 337.
In *Carroll v. Sisters of St. Francis Health Services*, plaintiff accidentally placed her hand into a container holding contaminated needles. In denying plaintiff's claim for damages, the court stated no proof existed that the plaintiff had been exposed to the HIV virus because she could not prove exposure to the disease at any time. Additionally, plaintiff tested negative for HIV five times over a three year period. The court chose to reject the general reasonableness standard adopted by *Faya*. Instead, the court required actual exposure to the disease in order to establish a *prima facie* case for emotional damages. However, the court allowed damages for emotional distress assuming "[a]ny damages for emotional distress were confined to the time between discovery of the [exposure] and the negative medical diagnosis or other information that puts to rest the fear of injury." While the court chose to adopt the actual exposure analysis, it did recognize that recovery should be allowed for the relevant latency period or the time in which the "ordinary, reasonable person under the circumstances" experiences fear. While this court did not expand upon the definition of a "reasonable person," several years later in *Williamson v. Waldman*, the New Jersey Supreme Court carefully defined this term.

In *Doe v. Surgicare of Joliet*, plaintiff was stuck with an unsterile needle by a medical technician during the course of surgery; however, she was not informed of this until approximately two months after the surgery occurred. The physician refused to identify the technician and the technician refused to undergo HIV testing. The court recognized that ninety-nine percent of HIV cases are detected within six months of exposure, but refused to allow plaintiff to recover for those six months. The court, in applying the actual exposure standard, stated because there was no proof the plaintiff had been exposed to the HIV virus, recovery would not be permitted. The dissent pointed out the inconsistency in

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190 *Carroll v. Sisters of St. Francis Health Serv. Inc.*, 868 S.W.2d 585, 586 (Tenn. 1993).
191 *Id.* at 590.
192 *Id.*
193 *Id.* at 591.
194 *Id.* at 594.
198 *Id.*
199 *Id.* at 1201.
200 *Id.*
using the actual exposure standard in this case. Justice Barry stated "[t]hat this logic (requiring actual exposure) is flawed when applied to cases in which the defendant’s actions have made it impossible for the plaintiff to prove actual exposure." Again, it seems that this case exemplifies a situation where the plaintiff should have been allowed to recover for damages incurred during the time frame she was uncertain as to her HIV status. In other words, the recovery period should have begun at the time of discovery of possible infection.

In Barrett v. Danbury Hospital, plaintiff was seated on a stretcher which had blood on the surface. The physician noticed the existence of the blood, but thought the blood was from the plaintiff. The physician eventually discovered the source of the blood was not the plaintiff. Plaintiff then brought suit claiming he might have been exposed to HIV contaminated blood and therefore, was fearful of contracting HIV. The trial court adopted the actual exposure standard. Based on this standard, the court concluded no proof existed showing the plaintiff had ever been exposed to the HIV/AIDS virus. The court stated, "[the] fear is unreasonable in view of the facts and evidence presented to this court, because the plaintiff failed to demonstrate that he actually had been exposed to any disease causing agent ...." The plaintiff urged the court to adopt the Montineri standard. Under this standard, a plaintiff may recover if the defendant should have realized his conduct involved an unreasonable risk of causing emotional distress and the distress might cause bodily harm. In affirming the trial court, the appellate court stated that regardless of whether the actual exposure standard or the Montineri standard was applied, plaintiff had not established a case for emotional distress.

This case differs from previous AIDS phobia cases because no foreign blood entered the body. However, if even the smallest chance

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201 Id. at 1204.
203 Id.
204 Id.
205 Id. at 750.
206 Id. at 751.
208 Id.
209 Id. at 756.
211 Id.
existed that the blood did enter the body, plaintiff should be permitted to recover for the requisite latency period under the general reasonableness theory, until the fear is alleviated through appropriate testing during the latency period.

In Chizmar v. Mackie, the defendant misdiagnosed plaintiff, stating she had AIDS, when in fact, she was HIV negative. The superior court determined plaintiff had not sustained physical injury and therefore, was unable to recover damages for negligent infliction of emotional distress. The Supreme Court of Alaska reversed, stating that a physical injury was not required to recover damages. While damages are not traditionally awarded in the absence of a physical injury, exceptions to this rule exist when the claim is neither false nor insubstantial.

The Chizmar court adopted the reasoning of Molien v. Kaiser Foundation Hospital. In Molien, the Supreme Court of California allowed a husband to recover when a physician negligently misdiagnosed his wife with syphilis. The Molien court recognized "emotional injury may be as debilitating as physical harm, it is no less deserving of redress." Based on this analysis, as well as the duty owed by the physician to refrain from activity which presented a foreseeable and unreasonable risk of causing emotional harm, redress was not allowed in the Chizmar case. Under this analysis, recovery would also not have been allowed in New York. In Lubowitz, plaintiff was also misdiagnosed as having tested false-positive. Recovery in that case was denied, although the court failed to address the physician's duty in that case.

In 1997, Williamson v. Waldman was decided by the New Jersey Supreme Court. The case had a similar fact pattern as the New York Castro case. In Williamson, the New Jersey Supreme Court allowed a cleaning woman who was pricked with a lancet (a surgical object used to acquire blood samples) to recover damages based upon negligent infliction

213 Id.
214 Id.
215 Id.
217 Id. at 814.
218 Id.
220 Id.
of emotional distress.\textsuperscript{223} The woman saw her physician on June 10, 1991, four days after the incident.\textsuperscript{224} Her physician informed her that she needed to be tested for HIV for the next seven to ten years.\textsuperscript{225} In 1994, after undergoing several tests, all of which were negative, her physician modified the testing time to a year or two, which had already passed.\textsuperscript{226} The trial court granted summary judgment for the defendants because the plaintiff had not demonstrated actual exposure to HIV.\textsuperscript{227} However, the Appellate Court reversed and remanded the decision back to the trial court with an instruction that actual exposure need not be shown, and that recovery could be based upon a reasonable fear, which was a question for the jury.\textsuperscript{228} The New Jersey Supreme Court affirmed the Appellate Court's decision, and stated "emotional distress damages must be based on the fears experienced by a reasonable and well-informed person and should be limited to the 'window of anxiety'."\textsuperscript{229} The court stated the "window of anxiety" was between six months and one year, and the fact the plaintiff's own physician had given her inaccurate information did not extend the window beyond the one year time frame.\textsuperscript{230} This was the first time the New Jersey Supreme Court had ever given a "window of anxiety" any consideration.

The court also carefully examined what constituted a "reasonable and well-informed person." Before bringing a claim for emotional distress damages based on the fear of contracting HIV, the court held an individual must avail himself of all information pertaining to the disease available to the general public.\textsuperscript{231} The court placed a burden upon an individual to educate himself about the nature of HIV, and to contact another physician if the individual had any question as to what an appropriate treatment plan should be.\textsuperscript{232} Specifically, the court defined a reasonable person as one "of ordinary experience who has a level of knowledge that coincides

\textsuperscript{223}Williamson, 696 A.2d at 22.
\textsuperscript{224}Id.
\textsuperscript{225}Id.
\textsuperscript{226}Williamson v. Waldman, 696 A.2d 14, 17 (N.J. 1997).
\textsuperscript{227}Id. at 14.
\textsuperscript{228}Id.
\textsuperscript{229}Id.
\textsuperscript{230}Id.
\textsuperscript{231}Id. at 22.
\textsuperscript{232}Williamson v. Waldman, 696 A.2d 14, 22 (N.J. 1997).
with then-current, accurate, and generally available public information about the causes and transmission of AIDS."\(^{233}\)

The New Jersey Supreme Court synthesized previous decisions and devised a fair and equitable means of recovery. Requiring individuals to be educated about the nature of their injuries before bringing a claim may be a burden to some, but this requirement is logical and legitimate, and certainly avoids having unnecessary lawsuits brought before the courts. This serious matter deserves more research than what currently exists. As a result of this decision, New Jersey adopted what the New Jersey Supreme Court dubbed the "enhanced reasonableness standard" and thus, joined Maryland in acknowledging the minority viewpoint.\(^{234}\) This was the first time that the New Jersey courts had sustained such a claim.

A majority and minority standard have emerged in the United States for allowing recovery based upon AIDS phobia. The majority standard, embraced by New York, requires actual exposure to HIV in order to recover.\(^{235}\) These states require genuineness and actual exposure, and look to the mode of transmission.\(^{236}\) With respect to the mode of transmission, transmission by means of a hypodermic needle is the most likely claim to be sustained because genuineness is never a problem. There is always a specific incident, namely the prick of the needle.\(^{237}\) Cases involving surgical procedures are also likely to be sustained. In these cases, there is a bodily intrusion and blood is exposed. Again, genuineness is rarely a problem.\(^{238}\)

The minority viewpoint, adopted by Maryland and New Jersey, is based upon a general reasonableness standard.\(^{239}\) These two states have allowed recovery for AIDS phobia in the absence of an actual injury, and have recognized claims brought based on fear. Pursuant to this standard, there must be genuineness: a reasonable belief the individual has been exposed to HIV and has the virus. Thus, the mode of transmission is relevant. The states operating under the general reasonableness standard have been more lenient in allowing plaintiffs to recover from the date of

\(^{233}\) Williamson, 696 A.2d at 22.
\(^{234}\) See id. at 24.
\(^{235}\) See supra pp. 545-58.
\(^{236}\) See supra pp. 545-58.
\(^{239}\) See supra p.562-65.
discovery, provided the window period has not expired.\textsuperscript{240} Several actual exposure states, including New York, have recognized the existence of the window period, but have not allowed recovery based upon this window. Under the general reasonableness standard, if an individual has a reasonable belief he has been infected with HIV, and is tested on a continuous basis during the window period, he may recover for the time period in which he reasonably experienced mental anguish.\textsuperscript{241}

Both the majority and minority standards have recognized a window period. However, the majority states have refused to apply the information in a logical and consistent manner. The majority opinion contradicts itself by identifying the information, but refusing to apply it to allow for recovery. The minority viewpoint becomes the better standard for two reasons. First, the minority viewpoint allows the latency period to be applied in a normal and natural manner. Second, the minority viewpoint acknowledges the claim is being brought for fear of the disease, and not the actual contraction of the disease. Hopefully, over the course of the next few years, the general reasonableness standard will become the majority viewpoint in the United States.

CONCLUSION

Negligent infliction of emotional distress has gone through a major transformation over the last few decades. Recent cases have shown that recovery has become more prevalent. While New York may make recovery a bit more difficult than other states such as California, which allows recovery based on foreseeability, if an individual has legitimately been exposed to HIV, it is likely a claim will at least be sustained. However, damages may not always be awarded.

There are some changes which must be made in regard to recovering for AIDS phobia. First, courts must recognize the claim is being brought for the fear of contracting the disease, and not actual contraction. The actual exposure standard, which is the majority standard in this country, fails to recognize this difference. Only two minority states, Maryland and New Jersey, have recognized the fear element, and have adopted a general

\textsuperscript{240}See Faya v. Almarez, 620 A.2d 327 (Md. 1993).
\textsuperscript{241}Id.
reasonableness standard. This is much more logical in that it recognizes what has occurred, not what may occur in the future.

Second, it is imperative that attorneys do both extensive legal and medical research. Attorneys must know what a claim for AIDS phobia entails, and must inform the court of these details. Tests for HIV are constantly being updated and advanced, and attorneys must be aware of these changes. While several courts have acknowledged the six to twelve month latency period, every attorney and every court in 1999 should be aware of this time period. AIDS has been in existence for more than a decade and extensive research has been done during this time. Courts should be made aware of this when redressing these claims.

Third, courts should recognize in some cases, these claims are nothing more than medical malpractice claims and should be treated as such. This is especially true in misdiagnosis cases. Were the misdiagnosis claims brought under medical malpractice law, the statute of limitations would begin at the time of discovery. This should be true in AIDS phobia cases as well. Plaintiffs should be able to recover damages for the time period in which the individual discovers he may have been exposed to HIV. When a person legitimately suffers mental anguish, some sort of redress should be available.

AIDS phobia claims are not disappearing. Only individuals who have suffered through the period of not knowing whether they have been infected with HIV can understand the depths of their anguish. The courts should recognize this anguish by allowing for recovery during the latency period, in which no person can truly say whether an individual has in fact been infected with the HIV virus.