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SCARED TO DEATH: A CAUSE OF ACTION FOR AIDS PHOBIA

INTRODUCTION

According to a 1987 *New York Times* poll,¹ Acquired Immune Deficiency Syndrome (AIDS) is the most feared disease in the United States, except for cancer.² AIDS is caused by the Human Immuno-deficiency Virus (HIV),³ which can be transmitted in various ways.⁴ Medical studies have shown that a majority of

1. Ronald Sullivan, *AIDS Overtakes Disease of Heart as No. 2 Worry*, N.Y. TIMES, Mar. 25, 1987, at B4 (stating that a telephone survey of 1,000 randomly selected Americans ranked AIDS as the second most serious health problem and cancer as the most serious health problem).

2. *Id.* Other polls around the country have resulted in similar findings. See Bill Soiffer, *Perspective on Health, Surviving Cancer, but not Stigma*, L.A. TIMES, July 21, 1991, at M5 (stating that polls consistently rank cancer as the nation's most feared disease); Robert Steinbrook, *The Times Poll: AIDS Threat Changes Lifestyle of 1 in 5*, L.A. TIMES, July 30, 1987, at 1 (stating that cancer still remains the nation's most feared disease). *But cf.* Associated Press, *Fear of AIDS Rivals Worry Over Cancer*, N.Y. TIMES, May 12, 1987, at C3 (national telephone survey revealed that 44% of Americans feared one disease over another, and of those 44%, 48% named AIDS and 47% named cancer); Hilary Stout, *40% of Americans Fear They Will Contract AIDS, a Poll Indicates*, N.Y. TIMES, Nov. 29, 1987, at 26 (68% of Americans name AIDS as the nation's most serious health problem, 14% name cancer, and 7% name heart disease).

3. Jay A. Levy, *The Transmission of HIV and Factors Influencing Progression to AIDS*, 95 AM. J. MED. 86, 86 (1993) ("The human immunodeficiency viruses . . . have been shown to be the etiologic agents of acquired immunodeficiency syndrome AIDS.").

4. See U.S. PUBLIC HEALTH SERVICES, SURGEON GENERAL'S REPORT TO THE AMERICAN PUBLIC ON HIV INFECTION AND AIDS 1, 6 (1993) [hereinafter SURGEON GENERAL'S REPORT] ("The two main ways of spreading HIV are having sex and using contaminated needles to inject drugs. In addition, infected women can pass HIV infection to their newborns."); Levy, *supra* note 3, at 86 ("The known routes of transfer of the AIDS virus are blood, blood products, intimate sexual activity, and transmission from mother to child in utero, during delivery, or shortly after birth."); Helena Brett-Smith, M.D. & Gerald H. Friedland, M.D., *Transmission and Treatment, in AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC* 18, 23 (Scott Buris et al. eds., 1993) ("For infection to occur, an infected person's blood, semen, or vaginal

people who are infected by HIV will eventually develop AIDS.⁵ Besides being fatal,⁶ the disease is feared because of the long latency period of the virus.⁷ Since HIV may remain latent, a person who is infected may show no symptoms and still pass the vi-

secretions . . . must come into intimate contact with the blood or mucous membranes . . . of an uninfected person.”); *see also* *Faya v. Almaraz*, 620 A.2d 327, 329 (Md. 1993) (“HIV typically spreads via genital fluids or blood transmitted from one person to another through sexual contact, the sharing of needles in intravenous drug use, blood transfusions, infiltration into wounds, or from mother to child during pregnancy or birth.”); *Castro v. New York Life Ins. Co.*, 153 Misc. 2d 1, 6, 588 N.Y.S.2d 695, 697-98 (Sup. Ct. New York County 1991) (“The overwhelming consensus of medical opinion is clear: the HIV virus is not spread casually. Rather, it has specific and well-known modes of transmission through sexual contact, exposure to infected blood, or blood components, and perinatally from mother to infant.”); Bonnie E. Elber, Note, *Negligence as a Cause of Action for Sexual Transmission of AIDS*, 19 U. TOL. L. REV. 923, 927 (1988) (“[T]he virus can be transmitted via intimate sexual contact, exposure to infected blood, or from an infected pregnant mother to her fetus.”).

5. *See* Brett-Smith & Friedland, *supra* note 4, at 30 (“[D]ifferent syndromes related to HIV infection . . . and AIDS are viewed as sequential stages that evolve in a predictable pattern . . . in each infected individual.”); *see also* *Faya*, 620 A.2d at 329 (stating that medical studies indicate that most people carrying HIV will develop AIDS).

6. *See* Brett-Smith & Friedland, *supra* note 4, at 30 (“Once infection occurs, an irreversible course of progressive illness has been set in motion”); *see also* *Ordway v. County of Suffolk*, 154 Misc. 2d 269, 272, 583 N.Y.S.2d 1014, 1016 (Sup. Ct. Suffolk County 1992) (“AIDS . . . is ultimately fatal.”).

7. *See* Brett-Smith & Friedland, *supra* note 4, at 33 which states that: [f]ollowing seroconversion, most infected people completely recover their sense of health and well-being and become virtually asymptomatic. The current understanding is that the virus remains more or less quiescent within cells during this phase. [However], at a cellular level, HIV is never biologically latent or inactive, even though infected people may remain entirely asymptomatic for long periods.

Id.; *see also* *Faya*, 620 A.2d at 329 (stating that HIV may remain latent for up to ten years); *Castro*, 153 Misc. 2d at 6, 588 N.Y.S.2d at 698 (discussing the possibility that a victim may not know until much later that he or she is infected with HIV); Elber, *supra* note 4, at 924 (stating that AIDS has an incubation period).

rus on to another person.⁸ While any person can contract HIV,⁹ certain groups have a higher exposure to the virus.¹⁰

More frightening is the rate at which the disease is spreading. The disease has "increased more than 100-fold since [it] was discovered in 1981."¹¹ In 1981, there were approximately 100,000 people across the globe who were infected with HIV.¹² The figures from 1992 show that the number is now close to thirteen million.¹³ Other statistics predict that, within the next three years, 3.8 million of those infected with HIV will develop AIDS.¹⁴ It is no wonder that HIV and its resultant, AIDS, are so feared.

One of the ways a person can become infected with HIV is by being exposed to infected blood.¹⁵ Therefore, in New York, cases have arisen out of a fear of contracting AIDS as a result of exposure to infected blood through another person's negligent act.¹⁶ In other cases, the fear giving rise to legal action was

8. See Elber, *supra* note 4, at 924-25 ("[T]he victim is capable of passing the virus to others even though he exhibits no symptoms."); see also *supra* note 4 and accompanying text (discussing the ways in which HIV can be transmitted).

9. See Elber, *supra* note 4, at 925 (reporting that AIDS reaches all people including females, children, and all ethnic and racial groups).

10. See SURGEON GENERAL'S REPORT, *supra* note 4, at 1 ("In the second decade of the AIDS epidemic, gay men still account for the majority of AIDS cases reported each year . . ."); see also Elber, *supra* note 4, at 926 (stating that groups considered at higher risk include homosexual or bisexual men, drug users, and donees of blood).

11. Marsha F. Goldsmith, 'Critical Moment' at Hand in HIV/AIDS Pandemic, *New Global Strategy to Arrest its Spread Proposed*, 268 JAMA 445 (1992) ("According to *AIDS in the World 1992*, a comprehensive report produced by the Global AIDS Policy Coalition, 'the soaring number of cases of AIDS and infections with HIV, combined with a faltering world response, threatens to send the global epidemic of HIV/AIDS spinning out of control.'").

12. *Id.*

13. *Id.*

14. *Id.*

15. See *supra* note 4 and accompanying text (discussing the various ways in which HIV is transmitted).

16. See, e.g., *Ordway v. County of Suffolk*, 154 Misc. 2d 269, 583 N.Y.S.2d 1014 (Sup. Ct. Suffolk County 1992) (plaintiff-doctor alleged

based on failure to reveal homosexuality.¹⁷ Consequently, the issue at hand is whether emotional harm, arising out of the fear of contracting AIDS, constitutes a viable cause of action under the tort of negligent infliction of emotional distress.

This Comment will focus on whether the New York courts recognize negligent infliction of emotional distress for the fear of contracting AIDS as a viable cause of action. Part I of this Comment will initially lay out the elements of negligence to provide a foundation for the tort¹⁸ and will then discuss the history of negligent infliction of emotional distress in New York.¹⁹ Part II will consider the cases in New York dealing specifically with the negligent infliction of emotional distress for fear of contracting AIDS,²⁰ analogous disease-phobia cases,²¹ and potential future scenarios in which the tort may arise.²² This Comment concludes by stating that the fear of contracting AIDS, based on the tort of negligent infliction of emotional distress, is a viable cause of action when the requisite elements are present.²³

negligent infliction of emotional distress after unknowingly operating on an HIV-positive patient); *Castro v. New York Life Ins. Co.*, 153 Misc. 2d 1, 588 N.Y.S. 2d 695 (Sup. Ct. New York County 1991) (plaintiff alleged fear of contracting AIDS when pricked by a hypodermic needle negligently disposed of by the defendant); *Hare v. State*, 143 Misc. 2d 281, 539 N.Y.S.2d 1018 (Ct. Cl. 1989) (plaintiff feared AIDS when bitten by inmate who was negligently supervised by the state), *aff'd*, 173 A.D.2d 523, 570 N.Y.S.2d 125 (2d Dep't 1991).

17. *See, e.g., Doe v. Doe*, 136 Misc. 2d 1015, 519 N.Y.S.2d 595 (Sup. Ct. Kings County 1987) (plaintiff-wife alleged negligent infliction of emotional distress for AIDS phobia based on her husband's failure to reveal his homosexuality).

18. *See infra* notes 24-30 and accompanying text.

19. *See infra* notes 31-84 and accompanying text.

20. *See infra* notes 85-149 and accompanying text.

21. *See infra* notes 150-75 and accompanying text.

22. *See infra* notes 176-85 and accompanying text.

23. *See infra* notes 186-88 and accompanying text.

I. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN NEW YORK

A. Elements

A discussion of the tort of negligent infliction of emotional distress requires that the underlying elements first be addressed. These elements include all the requisite elements of negligence: namely, duty,²⁴ breach,²⁵ causation,²⁶ and injury.²⁷ While in a basic negligence action there need only be a "reasonably close causal connection between the conduct and the resulting injury,"²⁸ in an action for negligent infliction of emotional distress, there must be a direct causal connection between the defendant's conduct and the injury which the plaintiff sustains.²⁹ Furthermore, since the injury in a negligent infliction of emotional distress cause of action is fear or emotional harm, the injury must be substantiated by the genuineness of that fear.³⁰

24. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164 (5th ed. 1984). Duty is "[an] . . . obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Id.*

25. *Id.* Breach is "[a] failure on the person's part to conform to the standard required." *Id.*

26. *Id.* at 165. Causation is "[a] reasonably close causal connection between the conduct and the resulting injury." *Id.*

27. *Id.* Injury is "[a]ctual loss or damage resulting to the interests of another." *Id.*

28. *Id.*

29. See *Martinez v. Long Island Jewish Hillside Medical Ctr.*, 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987) (holding that emotional injuries directly caused by the defendant's breach are actionable); *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 448 N.E.2d 1332, 462 N.Y.S.2d 421 (1983) (holding that emotional injuries are compensable when they result directly from a breach).

30. See *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975) (stating that claim of emotional harm will be allowed as long as there is a showing of genuineness); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (stating that genuineness of proof of the claim must be looked for in the difficult cases).

What follows is a discussion of how the tort of negligent infliction of emotional distress has evolved in New York over the past century.

*B. The Physical Impact Requirement*³¹

In 1896, the New York Court of Appeals decided the case of *Mitchell v. Rochester Railway Co.*³² in which the plaintiff, a pregnant woman, was waiting for a horse and carriage, when one came dangerously close, but did not actually touch her.³³ The issue before the court was whether the plaintiff could recover for her fear when it resulted in her having a miscarriage, which she alleged was caused by the defendant's negligence.³⁴ Finding an absence of personal injury or physical impact, the court held that there could be no recovery for injuries resulting from mere fright.³⁵ Even though the fright may have caused subsequent physical injuries,³⁶ an initial physical impact was required to recover for injuries arising from fear.³⁷ The court reasoned that without physical impact, the result would be "a flood of litigation in cases where the injury complained of may be easily feigned

31. See KEETON ET AL., *supra* note 24, § 54, at 363 (stating that a physical impact was used by courts as a means of qualifying a mental disturbance as real, and that a physical impact could be anything including a "slight blow" or a "trifling burn").

32. 151 N.Y. 107, 45 N.E. 354 (1896), *overruled by* *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). *Battalla* overruled *Mitchell* by holding that the absence of a personal injury or a physical impact would not preclude the plaintiff from maintaining an action against the defendant for mental distress.

33. *Id.* at 108, 45 N.E. at 354.

34. *Id.* at 109, 45 N.E. at 354.

35. *Id.* at 110, 45 N.E. at 354. "These considerations lead to the conclusion that no recovery can be had for injuries sustained by the negligence of another, where there is no immediate personal injury." *Id.* at 110, 45 N.E. at 355.

36. The miscarriage which resulted occurred subsequent to plaintiff's fright. *Id.* at 109, 45 N.E. at 354.

37. In order for the plaintiff to recover for her fear, the horse would have had to actually touch the plaintiff. *Id.* at 109-10, 45 N.E. at 354-55.

without detection,"³⁸ and that "a wide field would be opened for fictitious or speculative claims."³⁹

A half-century later the landmark case of *Ferrara v. Galluchio*⁴⁰ was decided. In *Ferrara*, the defendants performed x-ray treatments on the plaintiff's shoulder.⁴¹ As a result of the negligently administered treatments, the plaintiff developed severe blisters on her skin.⁴² The plaintiff consulted a dermatologist who informed her of the possibility of the blisters becoming cancerous.⁴³ This information caused the plaintiff to develop cancer phobia.⁴⁴ While the plaintiff was awarded damages for her fear of cancer,⁴⁵ it is unclear whether this case abolished the physical impact requirement, since the plaintiff did incur an initial physical injury.⁴⁶ What is clear, however, is that this case allowed a cause of action for fear caused by another's negligence. Whereas the *Mitchell* court did not explicitly state that a cause of action for fear based on another's negligence was a viable claim, the *Ferrara* court held that "[f]reedom from mental disturbance is now a protected interest in this State."⁴⁷

38. *Id.* at 110, 45 N.E. at 354-55.

39. *Id.* at 110, 45 N.E. at 355.

40. 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

41. *Id.* at 18, 152 N.E.2d at 250, 176 N.Y.S.2d at 997.

42. *Id.*

43. *Id.* at 18-19, 152 N.E.2d at 250-51, 176 N.Y.S.2d at 997.

44. *Id.* at 19-20, 152 N.E.2d at 251, 176 N.Y.S.2d at 998.

45. *Id.* at 22, 152 N.E.2d at 253, 176 N.Y.S.2d at 1000.

46. Since the plaintiff initially sustained blisters, it is possible that the court granted recovery for her fear based on this initial impact, rather than just on the fear of developing cancer.

47. *Ferrara*, 5 N.Y.2d at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999. The court addressed the fact that cases involving purely emotional injuries have the implicit danger of being false claims, but strongly concluded that this truism should not impede courts from looking to the facts of each case to come to decisions based on medical and other acceptable and genuine forms of proof. *Id.* at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999-1000. It has also been stated that:

[m]ental suffering is no more difficult to estimate in financial terms, and no less a real injury, than "physical" pain; it is not an independent intervening cause, but a thing brought about by the defendant's negligence itself, and its consequences may follow in unbroken sequence from that negligence; and while it may be true that its

C. New York Abandons Physical Impact

New York abandoned the physical impact requirement in *Battalla v. State*.⁴⁸ In *Battalla*, a young boy was placed on a ski lift chair, but was not properly secured.⁴⁹ As a result of this negligent act, the boy experienced fright, which subsequently caused him illness and other physical manifestations.⁵⁰ This decision overturned *Mitchell*, in that, even though there was no physical impact which caused the boy's fright and subsequent injuries, judgment was nonetheless granted to the plaintiff.⁵¹ In response to the policy arguments set out in *Mitchell* requiring a physical impact,⁵² the *Battalla* court stated that "[a]lthough fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction."⁵³ Although the *Battalla* court agreed that damages might be sometimes hard to prove,⁵⁴ the court added that it "must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out the dishonest claims."⁵⁵ In abandoning the physical impact requirement, the *Battalla* decision is consistent with the decisions of a majority of jurisdictions that have dealt with this issue.⁵⁶

consequences are seldom very serious unless there is some predisposing physical condition, *the law is not for the protection of the physically sound alone.*

KEETON ET AL., *supra* note 24, § 54, at 360 (emphasis added).

48. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

49. *Id.* at 239, 176 N.E.2d at 729, 219 N.Y.S.2d at 35.

50. *Id.*

51. *Id.* at 242, 176 N.E.2d at 732, 219 N.Y.S.2d at 38.

52. See *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896) (holding that a physical impact was necessary to prevent claims that may be feigned).

53. *Battalla*, 10 N.Y.2d at 240-41, 176 N.E.2d at 731, 219 N.Y.S.2d at 37.

54. *Id.* at 242, 176 N.E.2d at 731, 219 N.Y.S.2d at 38.

55. *Id.* at 242, 176 N.E.2d at 731-32, 219 N.Y.S.2d at 38.

56. See KEETON ET AL., *supra* note 24, § 54, at 364 (stating that the majority of courts have abandoned requirement of physical impact); RESTATEMENT (SECOND) OF TORTS § 436 (1965) (stating that an actor is still

Although most jurisdictions have abandoned the physical impact requirement,⁵⁷ it has been replaced with the requirement of a consequent physical manifestation or injury resulting from the emotional harm.⁵⁸ New York, however, as demonstrated by the *Battalla* decision, does not require a physical manifestation or injury resulting from the emotional harm in order to justify a claim of negligent infliction of emotional distress.⁵⁹ Even if the *Battalla* decision is interpreted as allowing recovery for emotional harm based only on the existence of physical harm arising from fear,⁶⁰ the court's decision in *Johnson v. State*⁶¹ holds otherwise. The *Johnson* court held that as long as there was enough evidence to prove that emotional harm was suffered,⁶²

liable even if the harm is only a result of consequences of the fright and not caused by an initial injury); see, e.g., *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978); *Vicnre v. Ford Motor Credit Co.*, 401 A.2d 148 (Me. 1979); *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982); *Sears Roebuck & Co. v. Young*, 384 So. 2d 69 (Miss. 1980); *Fournell v. Usher Pest Control Co.*, 305 N.W.2d 605 (Neb. 1981); *Wyatt v. Gilmore*, 290 S.E.2d 790 (N.C. 1982); *Melton v. Allen*, 580 P.2d 1019 (Or. 1978).

57. See *supra* note 56 and accompanying text.

58. See KEETON ET AL., *supra* note 24, § 54, at 361 ("Where the defendant's negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, and in the absence of some other independent basis for tort liability, the great majority of courts still hold that in the ordinary case there can be no recovery.").

59. See *Battalla*, 10 N.Y.2d at 242, 176 N.E.2d at 731-32, 219 N.Y.S.2d at 38 ("[L]ook to the quality and genuineness of proof . . . and the ability of the court and jury to weed out the dishonest claims.").

60. See *id.* at 239, 176 N.E.2d at 729, 219 N.Y.S.2d at 35 (plaintiff suffered consequential injuries as a result of his fright, and therefore the decision might be interpreted as recovery being granted because of those injuries).

61. 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975). In *Johnson*, the plaintiff's mother was a patient in the defendant-hospital. The hospital erroneously sent a telegram to the plaintiff's aunt stating that the plaintiff's mother had died. *Id.* at 380, 334 N.E.2d at 591, 372 N.Y.S.2d at 640. Consequently, funeral arrangements were made and a wake was held. At the wake, the plaintiff examined the corpse and realized it was not her mother. *Id.* As a result of this incident, the plaintiff suffered severe emotional harm, for which the court allowed recovery. *Id.* at 379-80, 334 N.E.2d at 591, 372 N.Y.S.2d at 639.

62. *Id.* at 383-84, 334 N.E.2d at 593, 372 N.Y.S.2d at 643.

and there was a "guarantee of genuineness,"⁶³ then one could recover for emotional harm suffered as a result of another's negligent act.⁶⁴ Generally, the *Johnson* court held that if a duty is breached, a plaintiff may recover for emotional injuries which are proven to be directly caused by that breach.⁶⁵ The court of appeals has, time and again, reiterated the elements of a cause of action for negligent infliction of emotional distress, and, in each of those decisions, the court has not added an element of physical manifestation resulting from the emotional harm.⁶⁶ This rule of not requiring a subsequent physical injury is utilized in only a minority of states.⁶⁷

63. *Id.* at 384, 334 N.E.2d at 593, 372 N.Y.S.2d at 643 (citing *Ferrara v. Galluchio*, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 1000 (1958)); see also *Leahy v. Federal Express Corp.*, 613 F. Supp. 906, 908 (E.D.N.Y. 1985) ("The New York courts, while accepting claims of emotional distress, scrutinize claims carefully, seeking guarantees of genuineness.").

64. *Johnson*, 37 N.Y.2d at 383-84, 334 N.E.2d at 593, 372 N.Y.S.2d at 643.

65. *Id.*

66. See *Martinez v. Long Island Jewish Hillside Medical Ctr.*, 70 N.Y.2d 697, 699, 512 N.E.2d 538, 539, 518 N.Y.S.2d 955, 956 (1987) ("[W]here there is a breach of a duty owed by defendant to plaintiff, the breach of that duty resulting in emotional harm is actionable."); *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 506, 448 N.E.2d 1332, 1335, 462 N.Y.S.2d 421, 424 (1983) (emotional injury is compensable when there is a breach of duty which directly causes the emotional injury); *Howard v. Lecher*, 42 N.Y.2d 109, 111-12, 366 N.E.2d 64, 65, 397 N.Y.S.2d 363, 365 (1977) ("[W]e have held that there may be recovery for the emotional harm, even in the absence of fear of potential physical injury, to one subjected directly to the negligence of another as long as the psychic injury was genuine, substantial, and proximately caused by the defendant's conduct."); *Lando v. State*, 39 N.Y.2d 803, 805, 351 N.E.2d 426, 426-27, 385 N.Y.S.2d 759, 759-60 (1976) (allowing claimant recovery for emotional harm resulting from defendant hospital's negligence).

67. See *KEETON ET AL.*, *supra* note 24, § 54, at 364-65 ("[A] handful of courts have taken the final step and permitted a general negligence cause of action for the infliction of serious emotional distress, without regard to whether the plaintiff suffered any physical injury or illness as a result."); see, e.g., *Taylor v. Baptist Medical Ctr., Inc.*, 400 So. 2d 369 (Ala. 1981) (holding that mental suffering is recognizable without requiring physical injuries); *Molien v. Kaiser Found. Hosp.*, 616 P.2d 813, 821 (Cal. 1980) ("The essential question is one of proof; whether the plaintiff has suffered a

D. Confusion in the Courts

While it seems clear that the New York Court of Appeals does not require a physical manifestation of the emotional harm suffered in order to prove the genuineness of a claim,⁶⁸ lower courts have nonetheless confused the issue.⁶⁹ In *Green v. Leibowitz*⁷⁰ and *Lancellotti v. Howard*,⁷¹ the Appellate Division, Second Department added an element by requiring that the plaintiff be in danger of physical harm to recover for any emotional harm suffered.⁷² These decisions were premised on the court of appeals' decision in *Bovsun v. Sanperi*.⁷³ In *Bovsun*, the court

serious and compensable injury should not turn on this artificial and often arbitrary classification scheme."); *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970) (holding that mental distress claims should look to the genuineness of the claim); *Chappetta v. Bowman Transp., Inc.*, 415 So. 2d 1019 (La. Ct. App. 1982) (holding that damages for emotional distress should be awarded even in the absence of accompanying physical injuries); *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983) (holding that impact rule and "physical injury" resulting from the emotional distress should be abandoned); *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109 (Ohio 1983) (holding that a contemporaneous physical injury is unnecessary for negligent infliction of emotional distress cause of action).

68. See *supra* notes 59-67 and accompanying text.

69. See *infra* notes 70-79 and accompanying text.

70. 118 A.D.2d 756, 500 N.Y.S.2d 146 (2d Dep't 1986) (holding that while physical injury is no longer a necessary element for negligent infliction of emotional distress, the cause of action must be premised upon a breach of duty which "unreasonably endangers the plaintiff's physical safety").

71. 155 A.D.2d 588, 547 N.Y.S.2d 654 (2d Dep't 1989) (holding that emotional harm can only be recovered if there is a breach of duty which places the plaintiff in danger of physical safety).

72. *Green*, 118 A.D.2d at 757, 500 N.Y.S.2d at 148; *Lancellotti*, 155 A.D.2d at 588, 547 N.Y.S.2d at 655.

73. 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984). In *Bovsun*, Mr. Bovsun was seriously injured when his disabled car was struck in the rear, and he was pinned between his car and another vehicle. His wife and daughter were also injured, but not as seriously. Mrs. Bovsun and her daughter brought an action for emotional distress arising from their observation of Mr. Bovsun's injuries. *Id.* at 224, 461 N.E.2d at 844, 473 N.Y.S.2d at 358. The court of appeals allowed recovery based on the fact they were in the "zone of danger." *Id.* at 223-24, 461 N.E.2d at 850, 473 N.Y.S.2d at 364.

stated that in order to recover in circumstances in which the plaintiff was a witness to a "serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family,"⁷⁴ the element of "endangering the plaintiff's physical safety"⁷⁵ should be added. Since *Bovsun* refers to situations in which the plaintiff is a witness and not directly affected by the defendant's negligence, the lower courts' reliance on *Bovsun* in *Green* and *Lancellotti* is misplaced.⁷⁶ If the Appellate Division, Second Department in *Green* and *Lancellotti* wanted to deny recovery, it should have done so based on the lack of the genuineness of the claim and the insufficiency of proof of emotional injury in order to grant recovery.⁷⁷ Notably, however, not all lower courts have added this extra element,⁷⁸ and one even criticized the *Green* court for doing so.⁷⁹

In sum, New York does recognize a cause of action for negligent infliction of emotional distress for purely emotional injuries,⁸⁰ without an initial physical impact⁸¹ and without residual

74. *Id.* at 224, 461 N.E.2d at 844, 473 N.Y.S.2d at 358.

75. *Id.* at 229, 461 N.E.2d at 847, 473 N.Y.S.2d at 361.

76. The New York Court of Appeals, in *Bovsun*, recognized plaintiff's right to recover those damages attributable to emotional distress which were caused by a contemporaneous observation of an injury or death of a member of the immediate family, caused by the same conduct of the defendant. *Id.* at 233, 461 N.E.2d at 850, 473 N.Y.S.2d at 364.

77. The *Green* and *Lancellotti* courts denied recovery because there was no recognition of "a cause of action as broad as that asserted by the plaintiff." *Green*, 118 A.D.2d at 757, 500 N.Y.S.2d at 148; *Lancellotti*, 155 A.D.2d at 588, 547 N.Y.S.2d at 655.

78. *See* *Nadal v. State*, 110 A.D.2d 890, 891, 488 N.Y.S.2d 442, 443 (2d Dep't 1985) (holding that psychological injuries are recoverable when they are directly caused by the defendant's breach); *Ace v. State*, 146 Misc. 2d 954, 959, 553 N.Y.S.2d 605, 609 (Ct. Cl. 1990) (finding that psychological injuries directly caused by defendant's breach are recoverable).

79. *See* *Martell v. St. Charles Hosp.*, 137 Misc. 2d 980, 983, 523 N.Y.S.2d 342, 344 (Sup. Ct. Suffolk County 1987) ("In this court's view, the Appellate Division, Second Department, in *Green v. Leibowitz* . . . has added a requirement of an additional element of cause of action to recover damages for emotional injuries not intended to be included by the Court of Appeals.").

80. *See supra* notes 40-47 and accompanying text (discussion of *Ferrara v. Galluchio*).

physical manifestations.⁸² Thus, in order to maintain a prima facie case for negligent infliction of emotional distress, prospective plaintiffs need only show breach of a duty owed that directly results in their emotional harm.⁸³ The emotional harm will be compensable if it can be genuinely substantiated.⁸⁴

II. THE FEAR OF CONTRACTING AIDS

A. The Lower Court Decisions on Fear of AIDS

Although the New York Court of Appeals has not yet been confronted with the issue of whether the negligent infliction of emotional distress for the fear of contracting AIDS is a viable cause of action, lower courts in New York have had an opportunity to review the question.⁸⁵ From the discussion above, it appears that in order to sustain a cause of action for the fear of contracting AIDS, a plaintiff must demonstrate the existence of the aforementioned requisite elements.⁸⁶ The issue in the lower courts focuses on what constitutes a genuine and substantial fear

81. See *supra* notes 48-56 and accompanying text (discussion of *Battalla v. State*).

82. See *supra* notes 61-67 and accompanying text (discussion of *Johnson v. State*).

83. See *supra* notes 24-29, 65-66 and accompanying text.

84. See *supra* notes 30, 55, 63 and accompanying text; see also *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

85. See, e.g., *Ordway v. County of Suffolk*, 154 Misc. 2d 269, 583 N.Y.S.2d 1014 (Sup. Ct. Suffolk County 1992); *Castro v. New York Life Ins. Co.*, 153 Misc. 2d 1, 588 N.Y.S.2d 695 (Sup. Ct. New York County 1991); *Doe v. Doe*, 136 Misc. 2d 1015, 519 N.Y.S.2d 595 (Sup. Ct. Kings County 1987); *Hare v. State*, 143 Misc. 2d 281, 539 N.Y.S.2d 1018 (Ct. Cl. 1989), *aff'd*, 173 A.D.2d 523, 570 N.Y.S.2d 125 (2d Dep't 1991).

86. See *supra* notes 24-84 and accompanying text (discussing the elements of the tort of negligent infliction of emotional distress and the jurisprudence relative to this tort in New York).

of contracting AIDS.⁸⁷ While the number of cases are few, they are relatively recent.

In 1987, the Supreme Court, Kings County, decided the case of *Doe v. Doe*.⁸⁸ In a divorce proceeding, the plaintiff-wife sought damages from the defendant-husband based on her fear of contracting AIDS.⁸⁹ This fear was premised upon the defendant-husband's alleged failure to reveal his homosexuality.⁹⁰ While the *Doe* court stated that this action was for intentional infliction of emotional distress,⁹¹ the language used by plaintiff in her complaint spoke of duty and breach,⁹² and the court addressed plaintiff's allegations with reasoning far more consistent with the tort of negligent infliction of emotional distress.⁹³

After stating that it would be wrong to allow plaintiff-wife to recover damages for her alleged AIDS phobia in the midst of a divorce action,⁹⁴ the *Doe* court continued, in dicta, to analyze the

87. See *infra* notes 88-149 and accompanying text (discussing New York cases which turn on the degree of connection between the fear inducing event and the fear itself).

88. 136 Misc. 2d 1015, 519 N.Y.S.2d 595 (Sup. Ct. Kings County 1987).

89. *Id.* at 1018, 519 N.Y.S.2d at 597. Paragraph 46 of the complaint read: "That solely by reason of defendant's breach of his confidential relationship with plaintiff and defendant's failure to disclose his homosexuality and 'at high-risk' candidacy for ARC and AIDS, plaintiff has sustained severe emotional and psychological distress and potentially life-threatening disabilities." *Id.* Paragraph 47 of the complaint read: "[P]laintiff has endured great pain and suffering and has incurred a severe traumatic neurosis manifested by depression, anxiety, obsessional symptoms and severe AIDS-phobia, evidenced also by frequent crying spells, sleeplessness, nervousness, paranoia, and outbursts of rage." *Id.*

90. *Id.*

91. *Id.*

92. See *supra* note 89 and accompanying text.

93. *Doe*, 136 Misc. 2d at 1018-20, 519 N.Y.S.2d at 598-99. The *Doe* court makes references to *Johnson v. State*, *Ferrara v. Galluchio*, and *Martinez v. Long Island Jewish Medical Ctr.* in making its decision. These cases, however, are all premised on the tort of negligent infliction of emotional distress.

94. *Id.* at 1018, 519 N.Y.S.2d at 597-98. The court stated:

[Plaintiff-wife] is attempting to obtain a division of the marital property based on fault. Division of property by degree of fault has clearly been disallowed in this State absent a showing of exceptional circumstances

plaintiff-wife's action for negligent infliction of emotional distress.⁹⁵ Relying on *Johnson*, *Doe* maintained that the courts in New York are hesitant to grant recovery based on purely emotional harm, and therefore denied plaintiff's recovery.⁹⁶ However, this reliance on *Johnson* is misfounded.⁹⁷ While the *Doe* court stated that allowing this cause of action would equal the "opening of Pandora's Box"⁹⁸ because any divorce proceeding based on adultery would seek damages for the fear of AIDS,⁹⁹ the court of appeals would hold otherwise based on its decisions in *Battalla* and *Johnson*.¹⁰⁰ While both cases recognized that

(citations omitted). The court will not countenance this blatant attempt to avoid the dictates of the Legislature. If plaintiff believes this is an exceptional circumstance requiring the use of fault for property distribution, let her press that point within her matrimonial causes of action.

Id. Thus, the *Doe* court refused to entertain the tort claim and insisted that plaintiff-wife pursue compensation for her AIDS phobia within her divorce action or not at all.

95. *Id.* at 1018, 519 N.Y.S.2d at 598.

96. *Id.* at 1018, 519 N.Y.S.2d at 598 ("[I]n the absence of contemporaneous or consequential physical injury, courts have been reluctant to permit recovery for negligently caused psychological trauma, with ensuing emotional harm alone." (quoting *Johnson v. State*, 37 N.Y.2d 378, 381, 334 N.E.2d 590, 592, 372 N.Y.S.2d 638, 641 (1975))).

97. The *Doe* court, in relying on the *Johnson* decision, restated the general rule from which *Johnson* began its analysis. However, the *Doe* court failed to apply the eventual holding of *Johnson*. The *Johnson* court held that purely emotional harm can be compensated when it results from a breach of duty which directly caused the harm. *Johnson*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).

98. *Doe*, 136 Misc. 2d at 1019, 519 N.Y.S.2d at 598.

99. *Id.* ("If this cause of action were permitted to continue, any party to a matrimonial action who alleged adultery would now have a separate tort action for damages for 'AIDS-phobia' because in this day and age any deviation from the marital nest could possibly result in exposure to AIDS.").

100. See *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975) (holding that purely emotional injuries are injuries recoverable in tort so long as there is duty, breach, and direct cause); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (holding that despite the chance of fictitious claims where no physical impact existed, purely emotional injury resulting from an event which then leads to physical manifestations are actionable claims).

claims based on purely emotional injuries are perhaps more easily feigned than those which require physical injuries, both cases nevertheless held that emotional injuries are actionable so long as the court is able to find a guarantee of genuineness.¹⁰¹ Pursuant to this judicially created requirement, the *Doe* court did draw attention to the fact that the plaintiff's claim was not substantiated by credible proof.¹⁰² Having determined that plaintiff's fear was unfounded, the court stated that to allow a cause of action for the fear of contracting AIDS would be going above and beyond what the court of appeals had intended.¹⁰³

The court of appeals, in its decisions on negligent infliction of emotional distress, has emphasized the importance of analyzing cases in light of their specific and unique sets of facts.¹⁰⁴ Specifically, it has looked to the elements of duty, breach, direct cause, and proof of a valid claim of emotional harm to sustain a cause of action.¹⁰⁵ Therefore, the *Doe* court should have denied recovery only on the basis of inadequate proof of mental suffering, rather than precluding the cause of action. The *Doe* court did give some indication that a claimant would have to show more than an alleged fear, and that a court will not tolerate claims which are not substantiated.¹⁰⁶ Furthermore, the case indicates

101. *Johnson*, 37 N.Y.2d at 384, 334 N.E.2d at 593, 372 N.Y.S.2d at 643 (relying on *Ferrara v. Galluchio*, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 1000 (1958) and *Battalla*, 10 N.Y.2d at 242, 176 N.E.2d at 731-32, 219 N.Y.S.2d at 38).

102. *Doe*, 136 Misc. 2d at 1019, 519 N.Y.S.2d at 598. The court stated: "[We are] faced with a psychological claim based on a fear that is based on attenuated probabilities which in turn are based not on any medical fact or proof" *Id.*

103. *Id.* at 1021, 519 N.Y.S.2d at 599-600. "This court will not . . . go far beyond the dictates of this State's highest court and thereby open the floodgates of psychological injury or 'phobia' cases." *Id.*

104. *Johnson*, 37 N.Y.2d at 383-84, 334 N.E.2d at 593, 372 N.Y.S.2d at 643. The court stated that courts in general should look to the claim and the genuineness of it, rather than precluding the cause of action altogether. *Id.* Therefore, each tribunal should be guided by the facts of each set of circumstances that comes before it. *Id.*

105. *Id.*

106. *See Doe*, 136 Misc. 2d at 1019, 519 N.Y.S.2d at 598 ("The court is faced with a psychological claim based on a fear that is based on attenuated

that while a person may claim that he or she is suffering from a fear of contracting AIDS, that in itself will not substantiate the genuineness needed in order to sustain a cause of action.¹⁰⁷

In 1989, the New York courts were again faced with a claim of AIDS phobia. In *Hare v. State*,¹⁰⁸ the claimant-correction officer alleged that he suffered a fear of contracting AIDS as a result of being bitten by a prison inmate who was negligently supervised by the state.¹⁰⁹ The *Hare* court properly identified New York law,¹¹⁰ but denied recovery based on the fact that plaintiff's fear was speculative and not the direct result of the defendant's negligence.¹¹¹ The court maintained that plaintiff's fear was based on the statement of a nurse on duty who said that the inmate may have AIDS.¹¹² The court determined the nurse's statement to be a rumor at best and held that, since the plaintiff's fear was not directly caused by the defendant's breach, recovery would be denied.¹¹³ Moreover, the court denied recovery because there was no proof that the plaintiff's fear of contracting AIDS was genuine.¹¹⁴ Notably, however, the *Hare* court did not automatically dismiss a cause of action based on the fear of contracting AIDS as did the *Doe* court.¹¹⁵

probabilities which in turn are based not on any medical facts or proof").

107. *Id.*

108. 143 Misc. 2d 281, 539 N.Y.S.2d 1018 (Ct. Cl. 1989), *aff'd*, 173 A.D.2d 523, 570 N.Y.S.2d 125 (2d Dep't 1991).

109. *Id.* at 284, 539 N.Y.S.2d at 1020. The claimant, in an attempt to help other correction officers stop an inmate from plunging a fork into his throat, tried to remove the fork from the inmate's hand, and consequently was bit by the inmate. *Id.* at 282, 593 N.Y.S.2d at 1019.

110. *Id.* at 285, 539 N.Y.S.2d at 1021 (claimant must prove that his fear of contracting AIDS is directly tied to defendant's negligence (relying on *Martinez v. Long Island Jewish Medical Ctr.*, 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987))).

111. *Hare*, 143 Misc. 2d at 286, 539 N.Y.S.2d at 1021 ("The evidence is simply too speculative and remote to award damages on that basis.").

112. *Id.* at 283, 539 N.Y.S.2d at 1020.

113. *Id.* at 286, 539 N.Y.S.2d at 1021.

114. *Id.* ("[E]very test has proven the claimant's fear to be unfounded.").

115. *Doe v. Doe*, 136 Misc. 2d 1015, 1021, 519 N.Y.S.2d 595, 599-600 (Sup. Ct. Kings County 1987); *see also* Harry H. Lipsig, *AIDS Phobia and*

While *Hare* did not specifically state that there could be a cause of action for the fear of contracting AIDS, the Supreme Court, New York County, in *Castro v. New York Life Insurance Co.*¹¹⁶ did. In *Castro*, the plaintiff was pricked by a hypodermic needle which was negligently disposed of by the defendant, and as a result commenced a lawsuit alleging a fear of contracting AIDS.¹¹⁷ The *Castro* court properly stated that a cause of action existed because it reasoned that the plaintiff's fear of AIDS was directly caused by the defendant's breach,¹¹⁸ and the plaintiff's fear was considered to be a genuine fear.¹¹⁹ To determine the genuineness of the plaintiff's claim, the court looked for a specific occurrence which could be tied to the plaintiff's fear.¹²⁰ Additionally, the court relied on the plaintiff's doctor who documented her fear,¹²¹ and on the informational campaign which was directed at educating people about AIDS.¹²² Therefore, her claim of fear of contracting AIDS was more substantial, and accordingly, the court sustained her cause of action.¹²³

In analyzing *Hare* and *Castro*, one may wonder why the plaintiff in *Hare* did not have a viable cause of action when the plaintiff in *Castro* did. There are two reasons for the disparity

Negligent Infliction of Emotional Distress, N.Y. L.J., Mar. 26, 1992, at 3, 4 (1992) ("Significantly, the [*Hare*] court did not preclude bringing a claim for AIDS phobia but, sitting as both trier of law and facts, denied recovery based on that particular case only.").

116. 153 Misc. 2d 1, 588 N.Y.S.2d 695 (Sup. Ct. New York County 1991).

117. *Id.* at 2-3, 588 N.Y.S.2d at 695-96.

118. *Id.* at 6, 588 N.Y.S.2d at 698 ("[Plaintiff's] claim for mental anguish and 'AIDS phobia' is directly tied to the date on which she allegedly received the hypodermic puncture to her right thumb.").

119. *Id.* at 5-6, 588 N.Y.S.2d at 697-98 (claim tied to a distinct event, medical proof, and media information about AIDS shows genuineness of claim).

120. *Id.* at 6, 588 N.Y.S.2d at 698.

121. *Id.* at 5, 588 N.Y.S.2d at 697 (diagnosing plaintiff with a "Generalized Anxiety Disorder, acute, severe, disabling with multiple neurotic symptomatology" which was "causally related to the incident").

122. *Id.* at 6, 588 N.Y.S.2d at 698 (stating that media attention to the AIDS crisis helps to substantiate a fear).

123. *Id.* at 6-7, 588 N.Y.S.2d at 698.

between the cases. The obvious reason is that the plaintiff's fear of contracting AIDS in the *Hare* case was not directly caused by the defendant's negligence,¹²⁴ and in *Castro*, it was.¹²⁵ The more implicit reason is that in *Hare*, the identity of the inmate who bit the plaintiff was known, and, since there was no evidence to show that the inmate had AIDS, the plaintiff's fear was unfounded.¹²⁶ In contrast, the identity of the person in *Castro* who used the needle prior to the time that the plaintiff was pricked was not known.¹²⁷ Accordingly, the *Castro* court reasoned that:

[g]iven the massive informational campaign waged by Federal, State and local health officials over the last few years in an effort to educate the public about this dreadful disease, any reasonable person exposed to this information who is stuck by a used and discarded hypodermic needle and syringe from which blood was apparently drawn could develop a fear of contracting AIDS.¹²⁸

124. *Hare v. State*, 143 Misc. 2d 281, 286, 539 N.Y.S.2d 1018, 1021 (Ct. Cl. 1989) ("To award damages simply on the basis of risk, perceived solely on an unsubstantiated statement by Nurse Bergen, and a resulting fear or threat of developing the disease in the future is not the law of this jurisdiction."), *aff'd*, 173 A.D.2d 523, 570 N.Y.S.2d 125 (2d Dep't 1991).

125. *Castro*, 153 Misc. 2d at 6, 588 N.Y.S.2d at 698 (plaintiff's claim for AIDS phobia is directly tied to the date of the incident where she alleges that her thumb was punctured by a hypodermic needle).

126. *Hare*, 143 Misc. 2d at 286, 539 N.Y.S.2d at 1021-22 (stating that there was no evidence that the assailant had AIDS).

127. *See Castro*, 153 Misc. 2d at 2, 588 N.Y.S.2d at 695 (the needle was thrown out in a small waste container, thereby making the identity unknown); *see also* Lipsig, *supra* note 115, at 4 ("[T]he identity of the contaminator . . . is unknown, making the fear of contraction more reasonable.").

128. *Castro*, 153 Misc. 2d at 6, 588 N.Y.S.2d at 698. Other campaigns have also been directed at educating the public about AIDS; *see, e.g.*, Sylvia Mayer Baker, Comment, *HIV: Reasons to Apply Traditional Methods of Disease Control to the Spread of HIV*, 29 HOUS. L. REV. 891, 909 (1992) ("Education . . . has constituted the government's primary weapon in its effort to combat the spread of HIV."); Marsha F. Goldsmith, *Physicians at AMA Amsterdam News Seminar Offer Panoramic View of Their Varied Roles in Pandemic*, 268 JAMA 1237 (1992) (stating that of the 13 countries participating in the seminar, most identified educational campaigns as a

Therefore, if the source of the possible contamination is unknown, then a fear of contracting AIDS will be considered genuine. On the other hand, if the source of contamination is known, there must be some direct evidence that the source has AIDS or is HIV-positive. Thus, the plaintiff's claim in *Hare* would have been more genuine if the plaintiff developed his alleged fear as a result of being told by the inmate himself that the inmate had AIDS, rather than by hearing a rumor from a nurse that the inmate may have had AIDS.¹²⁹

In *Ordway v. County of Suffolk*,¹³⁰ although it was not sustained, the court held that a cause of action for the negligent infliction of emotional distress for the fear of contracting AIDS is a viable cause of action.¹³¹ In *Ordway*, a person was arrested and subsequently brought to the hospital.¹³² The plaintiff-doctor performed surgery on the patient.¹³³ At a later date the doctor was made aware that the patient had tested positive for HIV.¹³⁴

primary tool in combating the pandemic); Jean Marzello, *Talking to Kids about AIDS*, 63 PARENT'S MAG. 118 (1988) (stating that due to the growing awareness of AIDS, the surgeon general has asked both parents and teachers to begin educating children about AIDS "as young as possible"); Teri Randall, *CDC's Hot Line: 'America Responds to AIDS'*, 263 JAMA 2587 (1990) (discussing the CDC's hot line giving answers concerning HIV and AIDS to over 3,000 callers per day and the increased volume of calls due to advertising of the hot line by popular celebrities such as singer/performer Madonna and the rock group KISS).

129. See *Hare*, 143 Misc. 2d at 286, 539 N.Y.S.2d at 1021 ("To award damages simply on the basis of risk, perceived solely on an unsubstantiated statement by Nurse Bergen . . . is not the law of this jurisdiction."); see also *People v. Juan R.*, 153 Misc. 2d 400, 408 n.5, 589 N.Y.S.2d 256, 261-62 n.5 (Sup. Ct. Bronx County 1992) (assuming that there was a breach of duty owed to the police officer, the police officer apprehending the suspect for assault would have a cause of action for negligent infliction of emotional distress when the assailant bit the officer and told him that he had AIDS).

130. 154 Misc. 2d 269, 583 N.Y.S.2d 1014 (Sup. Ct. Suffolk County 1992).

131. *Id.* at 272-73, 583 N.Y.S.2d at 1016 (stating that case law previously decided shows that AIDS phobia is a viable cause of action).

132. *Id.* at 270, 583 N.Y.S.2d at 1015.

133. *Id.*

134. *Id.*

Although the plaintiff-doctor wore gloves during the surgical procedures, he claimed that, had he been made aware of the patient's condition, he would have taken extra precautions.¹³⁵ The court denied recovery to the plaintiff for several reasons. First, the court stated that the plaintiff-doctor had not "alleged that the operations he performed on the patient were in any way remarkable."¹³⁶ Additionally, the court added that the plaintiff's affidavit stating that he lived in fear of contracting AIDS was not proof enough to establish genuineness.¹³⁷ Therefore, since his fear was not genuine, relief was denied.

While the *Ordway* court alluded to a requirement of physical injury,¹³⁸ it did so in reliance on *Lancellotti v. Howard*.¹³⁹ Previously discussed, however, is the fact that the added element of being in danger of physical injury is misplaced.¹⁴⁰ Nonetheless, the *Ordway* court correctly reiterated the requirement that the

135. *Id.* Specifically, he was referring to "the use of a full face shield or goggles, a specific type of respirator or breathing protector, double gloves, changing gown every 30 minutes and wearing knee-high boots." *Id.*

136. *Id.* at 273, 583 N.Y.S.2d at 1016-17 (stating that the doctor's skin was not pierced, nor was there any evidence of a patient bite, broken gloves, or anything else that would distinguish this operation from any other).

137. *Id.* at 273, 583 N.Y.S.2d at 1017. "The plaintiff's allegations of subsequent injury consist of a general averment that he lives in 'fear and uncertainty and continually believe[s] [that he has] contracted the AIDS virus.'" *Id.*

138. *Id.* at 271-72, 583 N.Y.S.2d at 1016 ("Despite the absence of a rigid requirement of physical injury, however, the indicia of legitimacy invariably includes 'some form of physical trauma, however minimal, stemming from the defendant's negligence.'" (quoting *Lancellotti v. Howard*, 155 A.D.2d 588, 590, 547 N.Y.S.2d 654, 655 (2d Dep't 1989))).

139. 155 A.D.2d 588, 547 N.Y.S.2d 654 (2d Dep't 1989).

140. See *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975) (physical injury requirement discarded and replaced with an examination by the court to determine if the facts of the case contain a guarantee of genuineness); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (holding that the need for accompanying physical injuries is abolished); see also *supra* notes 68-84 and accompanying text (discussing the fact that while some lower courts have added this extra element, the New York Court of Appeals only requires duty, breach, direct cause and genuineness of the claim).

defendant must breach a duty which results in the cause of the plaintiff's emotional harm.¹⁴¹

Perhaps, however, what the *Ordway* court was trying to manifest was that for the disease to be transmitted, there must be some type of physical contact. While the court of appeals does not require a physical impact,¹⁴² the only way for HIV to be transmitted is through some sort of physical exposure to the virus.¹⁴³ In *Ordway*, since the plaintiff-doctor's bodily fluids did not come in contact with the patient's bodily fluids, the doctor could not have contracted HIV or AIDS.¹⁴⁴ Therefore, as a prelude to proving the genuineness of the fear of contracting AIDS, there must be some evidence of possible exposure to HIV through one of the ways in which it is transmitted.¹⁴⁵ This element of exposure is only necessary to establish genuineness and is not to be confused with requiring a physical impact or consequential physical manifestation. However, proving exposure to HIV is only the foundation of showing genuineness, it is not a substitution. The plaintiff must still show that he or she was in actual fear of contracting AIDS.¹⁴⁶

The *Hare* and *Castro* courts did not discuss the need to establish proof of exposure to HIV. The probable reason is that in those cases, unlike *Ordway*, the exposure to HIV was self-evident and did not need to be discussed.¹⁴⁷ In *Ordway*, the need for

141. *Ordway*, 154 Misc. 2d at 272, 583 N.Y.S.2d at 1016.

142. *See Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (physical impact requirement abandoned).

143. *See supra* note 4 and accompanying text (discussing the ways in which HIV is transmitted).

144. *Ordway*, 154 Misc. 2d at 273, 583 N.Y.S.2d at 1016-17 ("There was no broken glove, pierced skin, patient bite, etc. . . .").

145. *See supra* note 4 and accompanying text (discussing the ways in which HIV is transmitted).

146. *See Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975) (claim of emotional harm will be allowed as long as there is a showing of genuineness); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (plaintiff must show that his claim is genuine).

147. In *Hare*, the plaintiff was bitten, and therefore his blood was susceptible to being exposed to the inmate's blood which may have been infected with HIV. *Hare v. State*, 143 Misc. 2d 281, 282, 539 N.Y.S.2d 1018, 1019 (Ct. Cl. 1989), *aff'd*, 173 A.D.2d 523, 570 N.Y.S.2d 125 (2d

something "remarkable" was, in essence, a need to prove that the plaintiff was actually exposed to the possibility of contracting AIDS. In the absence of exposure, a plaintiff's claim for fear of contracting AIDS cannot be reasonably genuine.

It appears from these lower court decisions that the New York Court of Appeals would uphold a cause of action for the fear of contracting AIDS based on another's negligent act if the original requirements set forth by the court are present.¹⁴⁸ Additionally, the court of appeals would presumably require the various methods of proving genuineness as described above,¹⁴⁹ including, a direct link to the plaintiff's fear, medical documentation, plaintiff's reliance on outside information, and proof of actual exposure to HIV.

B. Analogous Disease-Phobia Cases

In addition to the aforementioned discussion, it seems probable that the New York Court of Appeals would sustain a cause of action for the negligent infliction of emotional distress for fear of contracting AIDS based on analogous disease-phobia cases. In *Ferrara v. Galluchio*,¹⁵⁰ the court upheld a plaintiff's claim of cancer phobia.¹⁵¹ While the court at that time may have required a physical impact to grant recovery,¹⁵² the *Ferrara* court determined that emotional harm is recoverable as long as there is ade-

Dep't 1991). In *Castro*, the plaintiff was pricked with a hypodermic needle, and therefore was susceptible to being exposed to the possible infected blood on the needle. *Castro v. New York Life Ins. Co.*, 153 Misc. 2d 1, 2, 588 N.Y.S.2d 695, 695 (Sup. Ct. New York County 1991).

148. *See supra* notes 24-30, 62-66 and accompanying text (duty, breach, proximate cause, and genuineness of claim).

149. *See supra* notes 119-22.

150. 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

151. *Id.* at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999.

152. *See supra* note 46 and accompanying text (discussing the fact that the plaintiff initially sustained blisters, and that the court may not have granted recovery for her fear of cancer without the initial impact of the blisters).

quate proof as to that claim.¹⁵³ In support of the genuineness of the plaintiff's claim the court stated:

[i]t is common knowledge among laymen and even more widely among laywomen that wounds which do not heal over long periods of time frequently become cancerous. Physical culture lectures to high school and college students, radio advice from life insurance companies, newspaper daily articles by doctors - all give the same advice.¹⁵⁴

This is analogous to the way in which information is given today regarding AIDS.¹⁵⁵ As a person in 1956 would reasonably fear cancer from x-ray burns given the informational campaign of that time period, a person in 1993 would reasonably fear AIDS from being exposed to blood or other bodily fluids which may be infected with HIV given the media's extensive distribution of information concerning the AIDS virus.

In *Martell v. St. Charles Hospital*,¹⁵⁶ the fear of cancer was again in issue. In *Martell*, the plaintiff sought to recover for emotional injuries as a consequence of being negligently misinformed by the defendant-doctors that she was suffering from cancer.¹⁵⁷ Holding that the plaintiff had adequately stated a cause of action for emotional injury,¹⁵⁸ the court proclaimed that "[i]f such misinformation is erroneously communicated to the patient

153. *Ferrara*, 5 N.Y.2d at 21, 152 N.E.2d at 252, 176 N.Y.S.2d at 999-1000. The court addressed the fact that cases involving purely emotional injuries have the implicit danger of being false claims, but strongly concluded that this truism should not impede courts from looking to the facts of each case to come to decisions based on medical and other acceptable and genuine forms of proof. *Id.*

154. *Id.* at 22, 152 N.E.2d at 252, 176 N.Y.S.2d at 1000.

155. See John Patrick Darby, Note, *Tort Liability for the Transmission of the AIDS Virus: Damages for the Fear of AIDS and Prospective AIDS*, 45 WASH. & LEE L. REV. 185, 192 (1988) ("Just as a reasonable and genuine fear of cancer constitutes a present injury, a reasonable and genuine fear of AIDS is a present injury, even though development of AIDS is speculative." (relying on *Hagerty v. L & L Marine Serv., Inc.*, 788 F.2d 315, 318 (5th Cir. 1986))).

156. 137 Misc. 2d 980, 523 N.Y.S.2d 342 (Sup. Ct. Suffolk County 1987).

157. *Id.* at 980-81, 523 N.Y.S.2d at 343.

158. *Id.* at 987, 523 N.Y.S.2d at 347.

through negligence a cognizable cause of action exists.”¹⁵⁹ However, the plaintiff still must show that her fear of cancer is reasonable in order to recover.¹⁶⁰

Similarly, then, one would probably state a cognizable cause of action if a physician misdiagnosed a patient with HIV or AIDS, based on the reasoning in *Martell*. Certainly, being negligently diagnosed with a disease which is fatal would ultimately end in emotional injury with which an action can be commenced.

Another type of disease phobia is asbestos phobia, or the fear of cancer resulting from exposure to asbestos fibers. This issue was dealt with in *Gerardi v. Nuclear Utility Services, Inc.*¹⁶¹ In *Gerardi*, the plaintiffs worked on a maintenance project which included “the dismantling of pipework and the removal and replacement of pipe gaskets.”¹⁶² The materials the plaintiffs used were mainly composed of asbestos.¹⁶³ While the plaintiffs worked, a large cloud of dust containing asbestos, which the workers presumably inhaled, formed around the work site.¹⁶⁴ Although the plaintiffs conceded that, at the present time, they were not infected by the disease,¹⁶⁵ the court held that “[i]n circumstances where a duty is owed by a defendant to plaintiff,

159. *Id.*

160. See *Winik v. Jewish Hosp. of Brooklyn*, 31 N.Y.2d 936, 293 N.E.2d 95, 340 N.Y.S.2d 927 (1972). Although a cause of action existed, the *Winik* court held that the appellant was unable to show that her fear of contracting cancer was reasonable. *Id.* at 937, 293 N.E.2d at 95, 340 N.Y.S.2d at 927. The *Martell* court distinguished *Winik* by stating that although the plaintiff in *Winik* failed to meet her burden of proving that her fear of cancer was reasonable, this would not automatically preclude other claimants from pursuing a claim. *Martell*, 137 Misc. 2d at 987, 523 N.Y.S.2d at 347; cf. *Kraus v. Spielberg*, 37 Misc. 2d 519, 236 N.Y.S.2d 143 (Sup. Ct. Kings County 1962) (directed verdict granted to defendant when plaintiff alleged tuberculosis phobia due to defendant's misdiagnosis since defendant's professional opinion of tuberculosis was medically warranted).

161. 149 Misc. 2d 657, 566 N.Y.S.2d 1002 (Sup. Ct. Westchester County 1991).

162. *Id.* at 658, 566 N.Y.S.2d at 1003.

163. *Id.*

164. *Id.*

165. *Id.*

breach of that duty resulting directly in emotional harm is compensable even though no physical injury has occurred"¹⁶⁶

Asbestos phobia was also dealt with in *Rittenhouse v. St. Regis Hotel Joint Venture*.¹⁶⁷ In *Rittenhouse*, the court held that exposure to asbestos alone was not sufficient to sustain a cause of action since asbestos removal projects were universal, and thus, "[a] reasonable person, exercising due diligence, should know that of those exposed to asbestos, only a small percentage suffer from asbestos-related physical impairment, and of that impairment group fewer still develop [recognizable diseases]."¹⁶⁸

Although the decisions in *Gerardi* and *Rittenhouse* seem inconsistent, reliance on either decision will support a viable cause of action for the fear of contracting AIDS. On the one hand, *Gerardi* held that as long as there is a breach of a duty which directly results in emotional harm, a cause of action for asbestos phobia will be upheld.¹⁶⁹ Similarly, then, AIDS phobia would be supported based simply on the existence of the requisite elements of the tort. On the other hand, *Rittenhouse* held that, without medical evidence to support the plaintiff's anxiety, fear of contracting cancer from asbestos fibers was unreasonable.¹⁷⁰ However, in contrast to asbestos phobia, a person exposed to HIV would have

166. *Id.* at 660, 566 N.Y.S.2d at 1004-05 (relying on *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 448 N.E.2d 1332, 462 N.Y.S.2d 421 (1983) and *Martinez v. Long Island Jewish Hillside Medical Ctr.*, 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987)).

167. 149 Misc. 2d 452, 565 N.Y.S.2d 365 (Sup. Ct. New York County 1990). The plaintiff, an interior decorator, sued the defendant for mental anguish caused by an alleged exposure to asbestos containing material which she was purportedly exposed to during a furniture liquidation sale at the defendant's hotel. *Id.* at 453, 565 N.Y.S.2d at 366. In light of the fact that all objective testing of plaintiff failed to demonstrate a physical manifestation of an asbestos related condition, the court held that the defendant's motion for summary judgment should be granted. *Id.* at 455-56, 565 N.Y.S.2d at 367-68.

168. *Id.* at 455, 565 N.Y.S.2d at 367 (quoting *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1570 (D. Haw. 1990)).

169. See *supra* notes 161-66 and accompanying text.

170. See *supra* notes 167-68 and accompanying text.

a reasonable fear.¹⁷¹ While the *Rittenhouse* court ruled that a reasonable person would not have a genuine fear of contracting an asbestos-related disease due to the widespread removal of asbestos and the unlikelihood of developing this type of disease,¹⁷² based on this same reasoning, a reasonable person would have a genuine fear of contracting AIDS if possibly exposed to the virus. Unlike asbestos removal, presently there is no cure for HIV, and its resultant, AIDS.¹⁷³ Since AIDS is a relatively new disease,¹⁷⁴ there is more that needs to be learned,¹⁷⁵ and hence, the absence of knowledge helps to substantiate a fear. Although it is necessary to show more than mere exposure to HIV, it is considered a more reasonable fear than simply being exposed to asbestos fibers.

C. Future Scenarios

In the future, in all likelihood, other scenarios will arise where the tort of negligent infliction of emotional distress for AIDS phobia will appear. Thus far, the tort has appeared in situations dealing with failure to reveal homosexuality,¹⁷⁶ a claimant being bitten,¹⁷⁷ an employee being stuck by a discarded needle,¹⁷⁸ and

171. See *supra* notes 1-14 and accompanying text (discussing facts about HIV infection, its relation to AIDS, and its current status as an incurable and fatal condition).

172. *Rittenhouse*, 149 Misc. 2d at 455, 565 N.Y.S.2d at 367.

173. See *supra* notes 1-14 and accompanying text (discussing the current state of medical technology in addressing HIV infection and AIDS).

174. See SURGEON GENERAL'S REPORT *supra* note 4, at 1 (stating that the first cases of AIDS were reported in 1981).

175. See *Castro v. New York Life Ins. Co.*, 153 Misc. 2d 1, 6, 588 N.Y.S.2d 695, 698 (Sup. Ct. New York County 1991) ("[T]he AIDS disease is still not completely understood by the medical profession . . .").

176. See *Doe v. Doe*, 136 Misc. 2d 1015, 519 N.Y.S.2d 595 (Sup. Ct. Kings County 1987) (plaintiff-wife sought damages for AIDS phobia based on defendant-husband's failure to reveal his homosexuality).

177. See *Hare v. State*, 143 Misc. 2d 281, 539 N.Y.S.2d 1018 (Ct. Cl. 1989) (plaintiff was bitten on arm by inmate rumored to have AIDS and subsequently developed an oppressive fear of contracting AIDS), *aff'd*, 173 A.D.2d 523, 570 N.Y.S.2d 125 (2d Dep't 1991).

a doctor performing surgery on a patient with AIDS.¹⁷⁹ Although no New York cases have been reported, it is possible that the tort may appear in the situation of sexual partners where one partner fails to disclose either his or her HIV-positive status or that he or she has AIDS. The following discussion goes through this analysis.

Take the hypothetical situation of a man and a woman who met at a bar. They decided, after talking for an hour or two, to leave the bar and go to one of their apartments, and as mature adults chose to engage in sexual intercourse. The man had recently been tested for HIV, which revealed his HIV-positive status. Before engaging in sexual intercourse with the woman, he neglected to tell her that he is HIV-positive. Additionally, during intercourse, there was no use of a contraceptive device, such as a condom, to help prevent the spread of a sexually transmitted disease. One week later, the man, overridden with guilt because of his failure to reveal to his sexual partner that he had tested positive for HIV, called her and told her that he is infected with the virus.

The woman, fearing that she may herself be infected with HIV, decided to take legal action and sued the man for fear of contracting AIDS based on the tort of negligent infliction of emotional distress. Based on the aforementioned discussion, it appears that the plaintiff-woman would have a viable cause of action. In the analysis of the *Hare* and the *Castro* cases, it was concluded that when the contamination source is unknown, a fear of AIDS is considered genuine, and if the contamination source is known, there needs to be direct evidence that the contaminated source has AIDS or is HIV-positive. In the situation at hand, the source of the contamination is known and there is evidence that the defendant has AIDS or is HIV-positive. He explicitly called the plaintiff and revealed that he had tested positive for HIV.

178. See *Castro*, 153 Misc. 2d 1, 588 N.Y.S.2d 695 (plaintiff sustained hypodermic needle puncture to the right thumb and possible HIV infection from a discarded needle and consequently alleged fear of contracting AIDS).

179. See *Ordway v. County of Suffolk*, 154 Misc. 2d 269, 583 N.Y.S.2d 1014 (Sup. Ct. Suffolk County 1992) (plaintiff-doctor feared contracting AIDS when he was not informed until after performing surgery that patient was HIV-positive).

Additionally, from the discussion of *Ordway*, the cause of action would probably be sustained. In *Ordway*, it was determined that, while negligent infliction of emotional distress does not require a physical impact or a consequential physical manifestation, in order to prove a fear of contracting AIDS, a plaintiff must be physically exposed to the virus in one of the ways it is transmitted. Here, it is evident that the plaintiff was physically exposed to the virus since she engaged in sexual intercourse with the defendant.

Assuming, arguendo, that the defendant breached a duty owed to the plaintiff by his failure to disclose his HIV-positive status, and the breach directly caused the plaintiff's emotional harm, then the plaintiff should be able to sustain a cause of action. The analysis in this situation, however, does not end here. The defendant in this situation may have defenses. Simply stated, he may defend his actions by showing that the plaintiff assumed the risk of her behavior or was contributorily or comparatively negligent.¹⁸⁰

In arguing an assumption of the risk defense, two requirements must be met.¹⁸¹ "[F]irst, the plaintiff must know that the risk is present, and [s]he must further understand its nature; and second, h[er] choice to incur it must be free and voluntary."¹⁸² In the scenario depicted, these two elements are present. The court reasoned in *Castro* that, based on the enormous information given today regarding AIDS, a person stuck by a discarded needle could develop a fear of AIDS. Likewise, a reasonable person should be expected to know, based on the information about AIDS, that a substantial risk of contracting AIDS exists upon engaging in unprotected sexual intercourse with a stranger. Thus, it is more than likely, and even self-evident, that the plaintiff knew that a risk of contracting AIDS was present upon engaging in sexual intercourse with the defendant. Additionally, the plaintiff made the free and conscious choice to engage in sexual inter-

180. See KEETON ET AL., *supra* note 24, §§ 65, 67 and 68, at 451-62, 468-98.

181. *Id.* § 68, at 486-87.

182. *Id.* at 487.

course with the defendant, and therefore, voluntarily made the choice to incur the risk of contracting AIDS. Hence, the plaintiff would be barred from recovery if the defendant could prove that the plaintiff assumed the risk.

Additionally, the defendant in this scenario might be able to show that the plaintiff was contributorily negligent. "Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm [s]he has suffered, which falls below the standard to which [s]he is required to conform for h[er] own protection."¹⁸³ Additionally, "contributory negligence, in general, is determined and governed by the same tests and rules as the negligence of the defendant."¹⁸⁴

Thus, the plaintiff had a duty to protect herself from diseases such as AIDS. She breached this duty by not insisting that the defendant wear a condom, by not abstaining from sexual intercourse, or by not asking the defendant whether he was infected with HIV or AIDS. Finally, it could be found that her resulting fear of contracting AIDS was a direct result of her own breach. Therefore, if the defendant can prove that the plaintiff was contributorily negligent, then that will serve as a complete bar to recovery in jurisdictions which continue to treat contributory negligence as an absolute bar.

Since this Comment deals specifically with the law in New York, the doctrine of pure comparative negligence comes into play. This doctrine states that "a plaintiff's contributory negligence does not operate to bar h[er] recovery altogether, but does serve to reduce h[er] damages in proportion to h[er] fault."¹⁸⁵ Thus, while the plaintiff may have breached a duty to herself by failing to demand the use of a condom, abstaining from sexual intercourse, or asking the defendant about his HIV-positive status, her breach will not create an absolute bar to recovery, but it will serve to lessen her recovery by an amount the jury deems her to be at fault.

183. *Id.* § 65, at 451.

184. *Id.* at 453.

185. *Id.* § 67, at 472.

Notwithstanding other possible causes of action, this scenario is one of many that could possibly arise. The model depicted is necessarily one based on the facts. Whether a plaintiff will have a cause of action for AIDS phobia depends on her actions as well as the defendants.

CONCLUSION

Clearly, negligent infliction of emotional distress for the fear of contracting AIDS is a viable cause of action. The New York Court of Appeals would sustain such an action based on its general acceptance of recovery for emotional harm. The court of appeals currently requires a breached duty which directly causes the plaintiff's emotional harm.¹⁸⁶ Additionally, the court would require a guarantee of genuineness to show that the emotional harm is actually being suffered.¹⁸⁷ While a physician's documented evidence, together with the wide spread media coverage, would usually be enough to guarantee the genuineness of fear, a cause of action for the fear of contracting AIDS would require an additional element. That is, the plaintiff must also show that he or she was actually exposed to contracting HIV in one of the specific ways in which the virus can be transmitted.¹⁸⁸ Furthermore, it is likely that the negligent infliction of emotional distress for the fear of contracting AIDS is a viable cause of action that the court of appeals would uphold based not only on the elements, but also on analogous disease-phobia cases. Finally, since AIDS is a relatively new disease and there is not yet a cure, there will certainly be other situations in which the cause of action for negligent infliction of emotional distress for the fear of contracting AIDS will arise.

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186. *See supra* notes 24-29, 65-66 and accompanying text (citing New York Court of Appeals decisions which provide for duty, breach, and direct cause).

187. *See supra* notes 30, 55, 63 and accompanying text (stating that a guarantee of genuineness is needed to substantiate a claim of negligent infliction of emotional distress).

188. *See supra* note 4 (discussing the ways in which HIV can be transmitted).

