



Winter 1-1-1988

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Recommended Citation

John Patrick Darby, *Tort Liability for the Transmission of the AIDS Virus: Damages for Fear of AIDS and Prospective AIDS*, 45 Wash. & Lee L. Rev. 185 (1988).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol45/iss1/5>

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TORT LIABILITY FOR THE TRANSMISSION OF THE AIDS VIRUS: DAMAGES FOR FEAR OF AIDS AND PROSPECTIVE AIDS

Acquired Immune Deficiency Syndrome (AIDS) is an epidemic, fatal disease.¹ The Human Immuno-deficiency Virus (HIV)² causes AIDS by weakening the human immune system and leaving the system susceptible to

1. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 1, 12 (1986) [hereinafter SURGEON GENERAL'S REPORT]. Acquired Immune Deficiency Syndrome (AIDS) kills 16% of people with AIDS within three months of diagnosis, 23% within six months of diagnosis, 35% within a year, 57% within two years, and 81% within three years. Fatteh, *AIDS: An Exhaustive Review of Medical and Legal Aspects*, in LEGAL MEDICINE 1986 1, 3 (C. Wecht ed. 1986). Although only half of the people who have contracted AIDS have died, AIDS eventually is fatal. SURGEON GENERAL'S REPORT, *supra*, at 12; LEGAL-MEDICAL STUDIES, INC., AIDS: LEGAL POLICIES 3 (1985) [hereinafter LEGAL POLICIES].

Currently, no cure for AIDS exists. SURGEON GENERAL'S REPORT, *supra*, at 10. The AIDS virus mutates 100 to 1000 times faster than a normal virus. Wallis, *AIDS: A Growing Threat*, TIME, Aug. 12, 1985, at 15. Scientists have been unable to study the AIDS virus long enough to decode the virus and prepare a vaccine. *Id.* Accordingly, scientists do not expect to develop a safe and effective vaccine against AIDS within the next 10 years. E. FINEBERG, AIDS IMPACT ON PUBLIC POLICY 18 (1986). AIDS is spreading at an alarming rate. SURGEON GENERAL'S REPORT, *supra*, at 6. Since the identification of 60 initial AIDS cases in 1981, the number of reported AIDS cases has risen exponentially. Fatteh, *supra*, at 3; see W. DORNETTE, AIDS AND THE LAW 87 (1987) (stating that number of reported AIDS cases doubles every fourteen to fifteen months). In August 1987 health officials had reported over 39,200 cases of AIDS in the United States. Stengel, *The Changing Face of AIDS*, TIME, August 17, 1987, at 12. In addition, approximately 1.5 million Americans carry the Human Immuno-deficiency Virus (HIV), which causes AIDS. SURGEON GENERAL'S REPORT, *supra*, at 13. Authorities estimate that by 1991 some 145,000 people in the United States will have AIDS. *Id.* In addition, approximately 179,000 Americans will die of AIDS by 1991. *Id.* The Surgeon General expects 54,000 Americans to die from AIDS in that year alone. *Id.* at 28.

2. SURGEON GENERAL'S REPORT, *supra* note 1, at 9. Scientists also have named the AIDS virus Human T-Lymphotropic Virus Type III (HTLV-III) and Lymphadenopathy Associated Virus (LAV). *Id.*

Researchers have detected HIV in several body fluids. *Id.* at 16. Blood and semen are the only proven effective transmitters of HIV. *Id.* A person infected with HIV [hereinafter an HIV carrier] can transmit HIV without having AIDS. *Id.* at 11. An HIV carrier, like a person who has AIDS, transmits HIV through sexual contact, the sharing of contaminated intravenous needles and syringes, and the transfusion of blood products. *Id.* A pregnant woman carrying HIV also may transmit HIV to her child during pregnancy or birth. *Id.* at 20. Researchers have concluded, however, that a person cannot transmit HIV through common exposure, such as sharing meals, sneezing, coughing or other casual contact. *Id.* at 21.

Instead of causing AIDS, HIV may cause the AIDS-Related Complex (ARC). SURGEON GENERAL'S REPORT, *supra* note 1, at 11. ARC is similar to AIDS but generally less severe than AIDS. *Id.* Symptoms of ARC include weight loss, fever, night sweats, diarrhea and lack of resistance to infection. *Id.* A person with ARC may later develop AIDS. INSTITUTE OF MEDICINE & NATIONAL ACADEMY OF SCIENCE, MOBILIZING AGAINST AIDS 22 (1986) [hereinafter MOBILIZING AGAINST AIDS]. ARC can be fatal. Washington Post, Jan. 13, 1988, at A14, col. 1.

infections a healthy system could resist.³ A person infected with HIV ("HIV carrier") may carry the virus for many years before developing AIDS.⁴ In

3. Fatteh, *supra* note 1, at 7; SURGEON GENERAL'S REPORT, *supra* note 1, at 9-10. HIV attacks white blood cells, the primary agent of the human immune system. *Id.* AIDS develops when the HIV's assault has caused an almost complete failure of the immune system. *Id.* at 1-2. Common symptoms of AIDS include fatigue, fever, weight loss, diarrhea, and the enlargement of lymph glands in the neck and groin. Fatteh, *supra*, note 1 at 9-10. A person who develops AIDS is unusually susceptible to several viral, protozoal, fungal and bacterial infections. *Id.* at 8 (1986). The two most common illnesses of a person with AIDS are *Pneumocystis carinii* pneumonia (PCP) and Kaposi's Sarcoma. Address by Dr. Mervyn Silverman, Symposium of the Arizona State University Center for the Study of Law, Science and Technology (April 7-8, 1986), in RESPONDING TO THE AIDS EPIDEMIC 3, 5 (1986) [hereinafter Silverman]. PCP is a severe pneumonia with symptoms that include fever, respiratory problems, weight loss and general malaise. SURGEON GENERAL'S REPORT, *supra* note 1, at 11-12; Fatteh, *supra* note 1, at 9. Kaposi's sarcoma is a skin cancer that causes purplish blotches and bumps on the skin. *Id.* at 12. Normally, Kaposi's sarcoma is a relatively mild disease that rarely causes death. Silverman, *supra*, at 5. However, Kaposi's sarcoma can kill an AIDS victim. *Id.*

In addition, HIV may attack the nervous system, causing brain damage. SURGEON GENERAL'S REPORT, *supra* note 1, at 10. HIV's effect on a person's brain may cause head aches, loss of motor and speech control, impaired mental functioning, loss of vision, and seizures. Fatteh, *supra* note 1, at 9.

4. Allen, *Etiology, Epidemiology and Natural History of AIDS and HTLV-III/LAV Infection*, in AIDS: THE LEGAL COMPLEXITIES OF A NATIONAL CRISIS 123, 140 (E. Alter ed. 1987). HIV can remain latent for an incubation period of months and even years. Fatteh, *supra* note 1, at 3. Experts disagree over exact incubation periods for AIDS, but all concur that incubation periods may vary widely from individual to individual. Allen, *supra* at 140. Most experts predict incubation periods ranging from less than a year to more than seven years. *Id.* One researcher has stated that an infected person can harbor HIV for 14.2 years before developing AIDS. See Fatteh, *supra* note 1, at 4-5 (discussing estimates of AIDS incubation period). Authorities consider five years a reasonable mean incubation period for AIDS. *Id.*; Allen, *supra*, at 140. Even if the HIV carrier never develops AIDS, the HIV carrier still has the potential to develop the disease for a long time. *Id.* at 139. Because HIV genetically imprints itself into a host cell, HIV may infect an HIV carrier for the rest of the carrier's life. *Id.* As long as a person carries HIV, he is at substantial risk of developing AIDS. SURGEON GENERAL'S REPORT, *supra* note 1, at 12.

Because of HIV's unpredictable incubation period and scientists' limited experience with HIV, scientists have difficulty estimating an HIV carrier's risk of developing AIDS. Allen, *supra*, at 140. Most authorities estimate that 20% to 40% of HIV carriers will develop AIDS within five years. See, e.g., SURGEON GENERAL'S REPORT, *supra* note 1, at 12 (estimating that 20% to 30% of HIV carriers will develop AIDS within five years); Silverman, *supra* note 3, at 8 (estimating that 40% of HIV carriers will develop AIDS); MOBILIZING AGAINST AIDS, *supra* note 2, at 21 (discussing studies which show that 25% to 34% of homosexual male HIV carriers develop AIDS within four years). Scientists are uncertain, however, whether in long-term projections an HIV carrier's risk of developing AIDS will increase or decrease. MOBILIZING AGAINST AIDS, *supra*, at 22. If the risk proves not to decrease over time, the incidence of AIDS among HIV carriers will be much higher than current estimates indicate. *Id.* No evidence indicates that the risk of AIDS decreases over time. *Id.* On the contrary, evidence indicates that the risk of AIDS increases over time. See Barnes, *AIDS: Statistics But Few Answers*, SCIENCE, June 12, 1987 1423, 1424 (stating that long term study of HIV carriers indicates that 15% of HIV carriers will develop AIDS within five years and 36% of HIV carriers will develop AIDS within six and one-half years). In addition, another 25% of HIV carriers will develop AIDS-Related Complex (ARC) within five years. MOBILIZING AGAINST AIDS, *supra*, at 22; see

response to the widespread suffering and death that AIDS has caused, commentators have argued that courts should allow an AIDS victim to maintain a cause of action against the person who infected the AIDS victim with HIV.⁵ In addition, conventional tort theory should allow an HIV

supra note 2 (discussing ARC). Early studies of ARC indicate that 6% to 20% of ARC patients will develop AIDS. *Id.*

A growing body of evidence suggests that HIV will cause sickness in most HIV carriers. Wash. Post, Jan. 13, 1988, at A1, col. 6. Under the present definition of AIDS, only HIV carriers with opportunistic diseases such as *Pneumocystis carinii* pneumonia and Kaposi's Sarcoma have full-blown AIDS. *Id.* at A14, col. 1; see *supra* note 3 and accompanying text (discussing opportunistic diseases associated with AIDS). Alternative definitions of AIDS would include HIV carriers who develop ARC, dementia, and other serious symptoms of HIV infection. Wash. Post, Jan. 13, 1988, at A14, col. 1. Many HIV carriers who do not have AIDS under the present definition of AIDS are still very sick and may even die from HIV infection. *Id.* Furthermore, scientists at Walter Reed Army Institute of Research estimate that 90% of HIV carriers will suffer measureable damage to their immune systems within three to five years of infection. *Id.* Federal health officials also estimate that HIV carriers develop ARC ten times more often than HIV carriers develop AIDS. *Id.* Because physicians often confuse ARC with other illnesses, such as hepatitis and mononucleosis, ARC probably occurs more often than figures indicate. *Id.*; see *supra* note 2 (discussing ARC).

5. See, e.g., Lipton, *Blood Donor Services and Liability Issues Relating to Acquired Immune Deficiency Syndrome*, 7 J. LEGAL MED. 131, 135 (1986) (stating that blood bank negligent in providing for purity of blood products may be liable for transmission of AIDS); Hermann, *AIDS: Malpractice and Transmission Liability*, 58 UNIV. COLO. L. REV. 63, 106-07 (1987) (stating that in certain circumstances, courts should hold people and institutions liable for transmitting AIDS to AIDS victim); Note *You Never Told Me . . . You Never Asked: Tort Liability for the Sexual Transmission of AIDS*, 91 DICK. L. REV. 529, 529-30 (1986) (stating that by analogy to herpes and venereal disease cases, person should be liable for sexually transmitting AIDS to AIDS victim).

A person who knowingly transmits AIDS to a sexual partner may be liable under theories of battery, fraudulent misrepresentation, negligence, or tort based on a statutory violation. See Hermann, *supra*, at 89 (discussing four possible causes of action against person who infects AIDS sufferer with AIDS); *You Never Told Me, supra*, at 529 (recognizing battery, fraud, and negligence as possible causes of action against person who transmits AIDS sexually). Similarly, a person who knowingly transmits AIDS by sharing a contaminated intravenous needle may also be liable under theories of battery, fraudulent misrepresentation, or negligence. See Hermann, *supra*, at 83-84 (recognizing possible causes of action against person who allowed AIDS victim to inject needle contaminated with HIV).

In theory hospitals, blood banks and other institutions that transfuse blood, may be liable for the transmission of HIV under strict products liability or an implied warranty of fitness. See Lipton, *supra*, at 132 (recognizing strict liability or implied warranty as possible means for AIDS sufferer to recover damages for contracting AIDS from contaminated blood products); Hermann, *supra*, at 77 (same). However, statutes in most jurisdictions now protect blood banks and hospitals from strict products liability or implied warranty liability for the transfusion of contaminated blood products. See Lipton, *supra*, at 135 (stating that 47 jurisdictions define blood transfusion as service not subject to implied warranties or strict liability). Hospitals and blood banks, however, may be liable for the negligent transfusion of AIDS-contaminated blood. See *id.* at 135 (recognizing possible liability for negligent blood donor services); Hermann, *supra*, at 106 (recognizing common law negligence as most likely means of recovery for AIDS victim who contracts AIDS from contaminated blood products). Despite highly effective testing and screening procedures, medical authorities estimate that an average of 75 people per year will contract AIDS through infected blood transfusions.

carrier who has not developed AIDS to recover damages for the fear of developing AIDS.⁶ By extension, conventional tort theory also may allow an HIV carrier to recover damages for developing AIDS before the carrier develops AIDS.⁷

Because of similarities between HIV and carcinogens, courts analyzing liability for transmitting HIV should examine a defendant's liability under established law for exposing a plaintiff to a carcinogen.⁸ Carcinogens and HIV both cause painful, deadly and incurable diseases.⁹ In addition, the effects of both carcinogens and HIV are not evident for long and variable periods.¹⁰ Similar to AIDS, cancer is a latent disease that normally develops years after a person's exposure to a carcinogen.¹¹ Courts allow a plaintiff suing for exposure to a carcinogen to recover damages for the plaintiff's fear of developing cancer if the plaintiff meets certain requirements.¹² First,

Washington Post, Oct. 2, 1987, at A9, col. 2.

Commentators also have pointed out the possible liability of institutions such as hospitals, schools, and prisons to persons contracting AIDS from fellow patients, students, or prisoners. See Comments of Charles Brewer and William Jones, Arizona State University Center for Study of Law, Science and Technology Symposium (April 7-8 1986) in *RESPONDING TO THE AIDS EPIDEMIC* 103 (1986) (discussing possible civil liability for transmitting AIDS). For instance, prison officials may have a duty to segregate inmates with HIV to prevent the spread of AIDS through homosexual rape. *Id.* at 110. Also, a doctor who diagnoses an HIV infection in a patient may have a duty to inform the patient's sexual partner of the danger of AIDS. *Id.* at 115; see *Tarasoff v. Regents of Univ. of California*, 17 Cal.3d 342, 551 P.2d 334, 131 Cal.Rptr. 14 (1976) (holding psychologist liable for failure to disclose patient's intent to commit murder); see generally Note, *The Conflict Between a Doctor's Duty to Warn a Patient's Sexual Partner that the Patient Has Aids and a Doctor's Duty to Maintain Patient Confidentiality*, 45 WASH. & LEE L. REV. 355 (1988).

6. See *infra* notes 12-87 and accompanying text (discussing HIV carrier's ability to recover damages for fear of AIDS).

7. See *infra* notes 88-152 and accompanying text (discussing HIV carrier's ability to recover damages for prospective case of AIDS that has not yet developed).

8. See *infra*, notes 9-11 and accompanying text (discussing similarities between carcinogens and HIV).

9. See H. BOYLE, *MALIGNANT NEGLIGENCE* 4-5 (1979) (stating that cancer is now second leading cause of death among Americans); *STEDMAN'S MEDICAL DICTIONARY* 223 (5th ed. 1982) (defining carcinogen as any substance that produces cancer); *supra* notes 1-3 and accompanying text (stating that HIV causes AIDS, which is fatal).

10. See H. BOYLE, *supra* note 9, at 6 (stating that cancers have long latency period); *supra* note 4 and accompanying text (stating that HIV infection may have long latency period before developing into AIDS). Not every exposure to a carcinogen results in cancer. *Id.* at 43. In addition, because the carcinogen must pass through a series of events before interacting with cells and causing cancer, the latency period of most cancers is from five to forty years. *Id.*

11. See H. BOYLE, *supra* note 9, at 6 (stating that latency periods for cancer commonly run from five to forty years); *supra* note 4 (discussing latency period for AIDS).

12. See, e.g., *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 82 (3rd Cir. 1986) (allowing recovery for plaintiff's fear of cancer based on plaintiff's inhalation of asbestos fibers); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 414 (5th Cir. 1986) (allowing recovery for plaintiff's fear of cancer based on plaintiff's inhalation of asbestos fibers), *cert. denied* 106 S.Ct. 1339 (1986); *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1228 (D. Mass. 1986) (allowing recovery for plaintiff's fear of cancer based on plaintiff's exposure to toxic

courts require the plaintiff to meet a standard of reasonable and genuine fear of cancer.¹³ Second, courts require the plaintiff to suffer physical injury from exposure to the carcinogen.¹⁴

chemicals through contaminated ground water); *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1560 (N.D. Ill. 1983) (allowing recovery for plaintiff's fear of cancer based on plaintiff's exposure to diethylstilbestrol); *Lorenc v. Chemirad Corp.*, 37 N.J. 56, 80, 179 A.2d 401, 413 (1962) (allowing recovery for plaintiff's fear of cancer based on plaintiff's severe chemical burns); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958) (allowing recovery for plaintiff's fear of cancer based on plaintiff's X-ray burns); see also *Gale & Goyer, Recovery for Cancerphobia and Increased Risk of Cancer*, 15 CUMB. L. REV. 723, 730 (1985) (stating that courts considering fear of cancer universally have accepted theory of recovery, and minority of courts denying recovery have done so because of factual defects in plaintiff's case).

In addition to allowing recovery for fear of cancer, courts have allowed plaintiffs to recover damages for fear of future illnesses or conditions other than cancer. See, e.g., *Martin v. City of New Orleans*, 678 F.2d 1321, 1327 (5th Cir. 1982) (allowing recovery of damages for plaintiff's fear of paralysis and circulatory system problems from bullet wound), *cert. denied* 459 U.S. 1203 (1983); *Plummer v. United States*, 580 F.2d 72, 76 (3rd Cir. 1978) (allowing recovery for plaintiff's fear of sickness after exposure to active tuberculosis); *Hayes v. New York Cent. R.R.*, 311 F.2d 198, 201 (2d Cir. 1962) (allowing recovery for plaintiff's fear of amputation after frostbite); *Kapuschinsky v. United States*, 259 F. Supp. 1, 8 (D.S.C. 1966) (allowing recovery for plaintiff's anxiety over possible development of arthritis after doctor's malpractice); *Davis v. Graviss*, 672 S.W.2d 928, 933 (Ky. 1984) (allowing recovery for plaintiff's fear of future neurological, eye and speech problems resulting from skull injury); *Baylor v. Tyrrell*, 177 Neb. 812, —, 131 N.W.2d 393, 402 (1964) (allowing recovery for plaintiff's fear of bone deterioration after automobile accident).

13. See, e.g., *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 318 (5th Cir. 1986) (holding that plaintiff is entitled to damages for mental anguish where fear of cancer is reasonable and causally related to defendant's negligence); *Wetherill v. University of Chicago*, 565 F.Supp. 1553, 1559 (N.D. Ill. 1983) (stating that notion of proximate cause requires plaintiff to show reasonable fear of cancer to recover damages for fear of cancer); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 22, 152 N.E.2d 249, 251-252, 176 N.Y.S.2d 176, 996, 998 (1958) (holding that plaintiff must show genuine and reasonable fear to recover for fear of cancer); *Howard v. Mt. Sinai Hospital*, 63 Wis.2d 515, 519, 217 N.W.2d 383, 385 (holding that plaintiff could not recover for fear of cancer because fear was unreasonable and remote from injury).

14. See, e.g., *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 85 (3rd Cir. 1986) (allowing claim for plaintiff's fear of cancer because plaintiff suffered present physical injury); *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986) (denying plaintiff's claim for fear of cancer because jury concluded plaintiff had no physical injury); *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1138 (5th Cir. 1985) (recognizing that plaintiff must show physical injury to recover damages for fear of cancer); *Payton v. Abbott Labs*, 386 Mass. 540, —, 437 N.E.2d 171, 174 (1982) (denying recovery for plaintiff's fear of cancer because plaintiff did not have present physical injury); *Ayers v. Township of Jackson*, 189 N.J.Super. 561, 571, 461 A.2d 184, 189 (1983) (denying recovery for plaintiffs' fear of cancer because plaintiffs had no present physical injury), *aff'd in part, rev'd in part* 106 N.J. 557, 525 A.2d 287 (1987).

The majority of courts hold that a plaintiff cannot recover damages for any sort of mental distress in a negligence case without a physical injury. W. KEETON, PROSSER & KEETON ON TORTS 361 (5th ed. 1982) [hereinafter PROSSER & KEETON]. see *infra* note 33 (discussing physical injury requirement). Courts generally do not require a plaintiff to have a physical injury to recover for mental distress when the defendant's conduct is intentional, reckless or outrageous. RESTATEMENT (SECOND) OF TORTS § 46 (1965); see also *Jackson v. Johns-Manville*

The Fifth Circuit Court of Appeals employed the reasonable and genuine fear standard in *Hagerty v. L & L Marine Services, Inc.*¹⁵ In *Hagerty* the Fifth Circuit Court of Appeals considered whether the plaintiff, Hagerty, could recover for reasonable and genuine fear of contracting cancer.¹⁶ In *Hagerty* defective loading equipment spilled dripolene, a carcinogenic chemical, on Hagerty as he worked on the defendant's barge.¹⁷ As a result of the exposure to dripolene, Hagerty immediately experienced dizziness and leg cramps.¹⁸ The following day Hagerty felt stinging in his extremities.¹⁹ Hagerty knew that dripolene was a carcinogen, and he consulted a doctor who advised Hagerty to seek periodic testing for cancer.²⁰ Hagerty ultimately left his job, fearing further exposure to the carcinogen.²¹ Although Hagerty had no cancer at the time of the suit, he sought damages for fear of developing cancer.²² The United States District Court for the Eastern District of Louisiana granted summary judgment for the defendants on the ground that Hagerty's cause of action had not accrued.²³ The plaintiff appealed the district court's grant of summary judgment.²⁴

Sales Corp., 781 F.2d 394, 414 (5th Cir. 1986) (holding that plaintiff can recover for fear of cancer without physical injury when defendant's conduct is wilful, gross, or wanton), *cert. denied*, 106 S.Ct. 3330 (1986); *Payton v. Abbot Labs*, 386 Mass. 540, —, 437 N.E.2d 171, 175-176 (1982) (stating that physical injury is not required for emotional distress where defendant's conduct is extreme, outrageous and either intentional or reckless).

15. 788 F.2d 315 (5th Cir. 1986).

16. *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 317 (5th Cir. 1986).

17. *Id.* In *Hagerty* the defective loading equipment on the barge later spilled dripolene on the plaintiff a second time. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 319.

22. *Id.* at 316. In *Hagerty* the plaintiff also sought to recover damages for an increased risk of contracting cancer in the future, as well as the medical expenses from monitoring the onset of any cancer. *Id.* at 319. Because the plaintiff did not allege that the risk of developing cancer was greater than 50%, the court held that the plaintiff did not state a claim for possible development of cancer. *Id.*; see *infra* notes 88-152 and accompanying text (discussing recovery of damages for disease that has not yet developed). Addressing the plaintiff's claim for the cost of continuing medical examinations, the *Hagerty* court noted that a plaintiff ordinarily may recover for any reasonable medical expenses resulting from an injury. *Hagerty*, 788 F.2d at 319. Further, the court stated that a plaintiff must mitigate his damages with medical treatment. *Id.* Accordingly, the court held that the cost of the plaintiff's medical examinations was a valid element of recovery. *Id.*; see *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83 (3rd Cir. 1986) (allowing asbestosis sufferer to recover damages for cost of medical surveillance to monitor onset of cancer); *Ayers v. Township of Jackson*, 189 N.J.Super. 561, 572, 573, 461 A.2d 184, 190 (allowing plaintiffs exposed to toxic wastes to recover damages for medical surveillance, even though future injury from exposure was not probable), *aff'd in part, rev'd in part*, 106 N.J. 557, 525 A.2d 287 (1987).

23. *Hagerty*, 788 F.2d at 316. After the district court in *Hagerty* granted summary judgment for the defendants, the plaintiff appealed to the United States Court of Appeals for the Fifth Circuit. *Id.* The circuit court decided that Hagerty's cause of action accrued when Hagerty suffered an injury from his exposure to dripolene. *Id.* at 317. The circuit court held that the dizziness, leg cramps, and stinging Hagerty felt after his exposure to dripolene presented an issue of physical injury and made summary judgement improper. *Id.*

24. *Id.*

On appeal, the United States Court of Appeals for the Fifth Circuit noted that under traditional tort rules the plaintiff could recover damages from the defendant for all past, present and probable future harm resulting from the exposure to dripolene.²⁵ The court acknowledged that if Hagerty's present fear of cancer was reasonable and genuine and related to the defendant's negligent act, damages could include mental anguish.²⁶ The court determined that whether the plaintiff's fear was reasonable and genuine was an issue of fact for the jury.²⁷ The *Hagerty* court, therefore, held that the physical effects the dripolene had had on the plaintiff, the plaintiff's knowledge that dripolene was a carcinogen, and the plaintiff's concern over

25. *Id.*

26. *Id.* at 318. The court reasoned that Hagerty's fear of cancer was a present fact, even though the cancer itself was speculative. *Id.*

The plaintiff's fear of a future disease may be reasonable and genuine even though the plaintiff's chance of developing the disease is low. *See, e.g., Dartz v. Fibreboard Corp.*, 765 F.2d 456, 468 (5th Cir. 1985) (holding that fear of cancer is compensable, even if cancer is not medically probable); *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1559 (N.D. Ill. 1983) (holding that fear of cancer can be reasonable even where likelihood of cancer is low); *Heider v. Employers Mutual Liability Ins. Co. of Wis.*, 231 S.2d 438, 441-42 (La.App. 1970) (holding that plaintiff could recover for mental anguish arising from 2% to 5% risk of becoming epileptic); *Baylor v. Tyrrell*, 177 Neb. 812, —, 131 N.W.2d 393, 402 (1964) (stating that fear of cancer need only have reasonable basis); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 251 (1958) (holding that plaintiff must establish a basis for fear of cancer, but need not prove cancer will develop); *Murphy v. Penn-Fruit Co.*, 274 Pa.Super. 427, 436, 418 A.2d 480, 485 (1980) (holding that plaintiff could recover for fear of cancer and heart attack even though fear was unfounded medically).

In *Wetherill v. University of Chicago* the United States District Court for the Northern District of Illinois considered the requirements for recovery for fear of future cancer. *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1559 (N.D. Ill. 1983). In *Wetherill* the plaintiffs sued the defendants for the plaintiffs' pre-natal exposure to diethylstilbestrol (DES), a carcinogen. *Id.* at 1556. Though the plaintiffs did not have cancer at the time of trial, the plaintiffs sued for the fear of developing cancer as a result of exposure to DES. *Id.* at 1559. The plaintiffs wished to introduce evidence that DES was a carcinogen. *Id.* The defendants argued that since cancer was not reasonably certain to develop from the plaintiffs' exposure to DES, the plaintiff's fear of cancer was not compensable and, therefore, was irrelevant. *Id.* Accordingly, the defendants sought to exclude evidence of the causal relationship between DES and cancer. *Id.*

The *Wetherill* court noted that the concept of proximate cause demanded only a reasonable foreseeability of an injury. *Id.* Consequently, the court reasoned that the plaintiffs' anxiety only had to be reasonable for the plaintiffs to recover damages for fear of cancer. *Id.* The court further reasoned that requiring cancer to be reasonably certain before the plaintiffs could recover damages for fear of cancer would distort traditional notions of proximate cause. *Id.* Because of the causal relationship between DES and cancer, the court concluded, the plaintiff's fear of cancer was reasonable. *Id.* The *Wetherill* court held, therefore, that the defendant's evidence of the relationship between DES and cancer was admissible. *Id.*

27. *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 318 (5th Cir. 1986); *see Clark v. Taylor*, 710 F.2d 4, 14 (1st Cir. 1983) (upholding jury award for plaintiff's fear of cancer); *Wetherill v. University of Chicago*, 565 F.Supp. 1553, 1559 (N.D. Ill. 1983) (holding that whether plaintiff's fear is reasonable is question of fact for jury); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, 253, 176 N.Y.S.2d 996, 1000 (1958) (upholding jury award for plaintiff's fear of cancer).

future exposure to carcinogens, which led the plaintiff to quit his job, supported Hagerty's cause of action against L & L Marine Services for fear of contracting cancer.²⁸

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.²⁹ To collect damages for fear of AIDS under the *Hagerty* rationale, an HIV carrier must prove that his fear of AIDS is genuine and reasonable.³⁰ Because the risk of developing AIDS from an HIV infection is substantial, an HIV carrier will have little

28. *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 318-319 (5th Cir. 1986); see also *Clark v. Taylor*, 710 F.2d 4, 14 (1st Cir. 1983) (holding that evidence of plaintiff's immediate physical discomfort after exposure to carcinogen and expert testimony about possible effects of carcinogen supported jury finding that plaintiff's fear of cancer was reasonable and genuine).

29. See *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 318 (5th Cir. 1986) (stating that plaintiff's fear of cancer was present injury, even though cancer was speculative); see also *supra* notes 9-11 and accompanying text (discussing similarities between AIDS and cancer).

30. See *Hagerty*, 788 F.2d at 318 (stating that plaintiff must show reasonable and genuine fear to recover damages for fear of cancer). In addition to meeting the reasonable fear standard, a plaintiff seeking to recover damages for fear of cancer may have a duty to mitigate his fear. See *Lorenc v. Chemirad Corp.*, 37 N.J. 56, 78-79, 179 A.2d 401, 413 (1962) (recognizing plaintiff's duty to mitigate fear of cancer). In *Lorenc* the plaintiff sued the defendant chemical company for the defendant's negligent packaging of a chemical, which resulted in severe chemical burns on the plaintiff's hands. *Id.* at 58, 179 A.2d at 404. The plaintiff testified that because the burns did not heal properly, he feared the cancer would develop on the burned skin. *Id.* at 74, 179 A.2d at 410. No scientific evidence suggested that the chemical was a carcinogen. *Id.* However, chronic festering of the skin, such as the plaintiff experienced, indicated potential malignancy. *Id.* The plaintiff refused to undergo a skin graft of the affected areas, though a successful graft probably would have eliminated the prospect of cancer. *Id.* at 75, 179 A.2d at 411. The trial court submitted to the jury the question of what effect the plaintiff's fear of cancer and the plaintiff's failure to submit to surgery should have on the plaintiff's claim for damages. *Id.* at 78, 179 A.2d at 412. The jury returned a verdict of \$25,000 in favor of the plaintiff. *Id.* at 58, 179 A.2d at 404.

On appeal, the defendant charged that the trial court erred in allowing the jury to consider testimony about the plaintiff's fear of cancer. *Id.* at 76, 179 A.2d at 411. The defendants argued that the trial court should have excluded the cancer evidence because the plaintiff had not mitigated his fear of cancer by treating his physical injury to avoid developing cancer. *Id.* at 77, 179 A.2d at 412. The Supreme Court for the State of New Jersey acknowledged that a plaintiff in personal injury action has a duty to exercise ordinary care to seek medical treatment to relieve his pain and disability. *Id.* at 78, 179 A.2d at 412. The court noted, however, that a plaintiff does not have an absolute duty to undergo surgical treatment to mitigate his damages. *Id.* The court stated that a plaintiff reasonably may refuse surgery if the surgery probably would be dangerous, extraordinarily painful or unsuccessful. *Id.* at 78, 179 A.2d at 413. The court stated that whether the plaintiff's failure to undergo surgery was reasonable was an issue of fact for the jury to decide. *Id.* at 79, 179 A.2d at 413. The court further stated that the effect of the plaintiff's failure to mitigate his fear on the plaintiff's claim was also an issue for the jury. *Id.* The court held, therefore, that the trial court properly submitted the cancer evidence to the jury. *Id.* at 81, 179 A.2d at 413.

A duty to mitigate would have little effect on an HIV carrier's suit for fear of AIDS because no current medical procedures can lessen an HIV carrier's risk of contracting AIDS. See *supra* note 1 (stating that no vaccine or cure for AIDS exists or is likely to exist in next 10 years).

difficulty proving that his fear of AIDS is genuine and reasonable.³¹ An HIV carrier who establishes that his fear of AIDS is reasonable and genuine should be able to collect damages for fear of AIDS if the carrier also can show that HIV infection is a physical injury.³²

The plaintiff must establish a physical injury because most jurisdictions require a physical injury in claims for mental anguish.³³ Courts adhere to

31. See Silverman, *supra* note 3, at 8 (estimating that 40% of HIV carriers will develop AIDS); SURGEON GENERAL'S REPORT, *supra* note 1, at 12 (estimating that 20% to 30% of HIV carriers will develop AIDS within five years). An ordinary person carrying HIV will fear AIDS. See *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1560 (N.D.Ill. 1983) (stating that ordinary person exposed to drug that causes cancer would reasonably fear cancer); *Dempsey v. Hartley*, 94 F. Supp. 918, 921 (E.D. Pa. 1951) (given widespread occurrence of breast cancer, plaintiff's fear that cancer would develop from injury to breast is reasonable) *Ferrara v. Galluchio*, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252-253, 176 N.Y.S.2d 996, 1000 (stating that doctor's restatement to plaintiff of common lay knowledge that burn wounds which do not heal frequently become cancerous guaranteed validity of plaintiff's fear of cancer).

In addition to establishing that the relationship between HIV and AIDS would cause a reasonable HIV carrier to fear AIDS, the plaintiff might present witnesses to testify about the plaintiff's emotional reaction to the HIV infection, or the plaintiff's expressions of fear. See *Clark v. Taylor*, 710 F.2d 4, 14 (1st Cir. 1983) (stating that testimony of two witnesses to whom plaintiff expressed fear of cancer supported damages for fear of cancer).

32. See *Hagerty v. L & L Marine Servs., Inc.*, 797 F.2d 256 (5th Cir. 1986) (holding that plaintiff could recover damages for fear of cancer because plaintiff's fear was reasonable and plaintiff had physical injury); *supra* note 12 (listing cases that have allowed plaintiff to recover damages for fear of cancer if fear is reasonable and plaintiff has physical injury). The *Hagerty* court's initial opinion said that the plaintiff could recover damages for serious mental distress with or without physical injury. *Hagerty*, 788 F.2d at 318. On reconsideration, however, the Fifth Circuit sitting en banc affirmed earlier Fifth Circuit opinions adhering to the physical injury requirement, holding that the *Hagerty* court had assumed that the plaintiff had an actionable injury independent from the plaintiff's mental distress. *Hagerty v. L & L Marine Servs., Inc.*, 797 F.2d 256, 256 (5th Cir. 1986).

33. See, e.g., *Payton v. Abbott Labs*, 386 Mass. 540, —, 437 N.E.2d 171, 180 (1982) (holding that plaintiff must suffer physical harm to recover damages for negligent infliction of mental distress); *Ayers v. Township of Jackson*, 189 N.J. Super 561, 571, 461 A.2d 184, 189 (1983) (holding that plaintiff could not recover for fear of cancer because plaintiff had no present physical injury), *aff'd in part, rev'd in part*, 106 N.J. 557, 525 A.2d 287 (1987); *Laxton v. Orkin Exterminating Co., Inc.*, 639 S.W.2d 431, 433 (Tenn. 1982) (holding that plaintiff could not recover damages for negligent infliction of mental disturbance without physical injury or some other independent basis for tort liability); RESTATEMENT (SECOND) OF TORTS § 436A (1965) (stating that actor not liable for negligent infliction of emotional distress without bodily harm or other compensable damage); PROSSER & KEETON, *supra* note 14, at 361 (noting that great majority of courts will not allow plaintiff to recover damages for negligent infliction of mental disturbance without physical harm). Courts adhering to the physical injury requirement will not allow a plaintiff to recover damages for mental injury without objective physical evidence that the plaintiff has suffered an injury. *Payton v. Abbott Labs*, 386 Mass. 540, —, 437 N.E.2d 171, 181 (1982). Only a handful of jurisdictions have abandoned the physical injury requirement altogether. See, e.g., *Taylor v. Baptist Medical Center, Inc.*, 400 So. 2d 369, 374 (Ala. 1981) (repudiating physical injury requirement because requirement was medically unrealistic); *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 928, 616 P.2d 813, 820, 167 Cal. Rptr. 831, 838, (1980) (rejecting physical injury requirement because requirement ineffectively screened false claims and encouraged distorted pleading and

the physical injury requirement for three reasons.³⁴ The first reason is to prevent false or imaginary claims by providing objective physical evidence to substantiate the plaintiff's mental distress.³⁵ The second reason is to

testimony); *Montinieri v. Southern New England Tele. Co.*, 175 Conn. 337, _____, 398 A.2d 1180, 1184 (1978) (holding that recovery for negligent infliction of mental distress does not depend on physical injury); *Rodrigues v. State*, 52 Haw. 156, _____, 472 P.2d 509, 519-520 (1970) (recognizing that duty to refrain from negligent infliction of serious mental distress is independent of duty to avoid infliction of physical harm); *Sinn v. Burd* 486 Pa. 146, _____, 404 A.2d 672, 679 (1979) (rejecting physical injury requirement as artificial bar to recovery where plaintiff could establish authenticity of mental distress by other methods).

Formerly, a majority of courts held that a plaintiff could not recover damages for mental distress unless the defendant's negligence caused some physical impact that had a physical effect on the plaintiff. PROSSER & KEETON, *supra* note 14, at 363. To accommodate worthy claims, courts expanded the physical impact requirement to the point where any impact, even if very slight and totally unrelated to the harm the plaintiff suffered, would satisfy the physical impact requirement. *Payton*, 386 Mass. at _____, 437 N.E.2d at 176; PROSSER & KEETON, *supra* note 14, at 363. Today, most jurisdictions have dropped the physical impact requirement and only require the plaintiff to show a physical injury to recover damages for mental distress. *Payton*, 386 Mass. at _____, 437 N.E.2d at 177; PROSSER & KEETON, *supra* note 1, at 363.

Under the physical injury requirement, the plaintiff's physical harm does not have to result from a physical impact. *Payton*, 386 Mass. at _____, 437 N.E.2d at 178; RESTATEMENT (SECOND) OF TORTS, § 436(1) (1965). Physical harm resulting from emotional stress satisfies the physical injury requirement, even if the defendant's negligence caused no physical impact on the plaintiff. RESTATEMENT (SECOND) OF TORTS, § 436(1) (1965). For instance, a negligent automobile driver who frightens a pregnant woman into a miscarriage is liable under the physical injury requirement, even though the automobile did not touch the woman. *Id.* at § 436A, comment a. Of course, physical injury that does result from physical impact satisfies the physical injury requirement as well. *See, e.g.*, *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 414 (5th Cir. 1986) (holding that respiratory disorder resulting from impact of asbestos fibers on plaintiff's lungs satisfies physical injury requirement) *cert. denied*, 106 S.Ct. 3339 (1986); *Clark v. Taylor*, 710 F.2d 4, 14 (1st Cir. 1983) (holding that physical discomfort resulting from impact of chemical on plaintiff's skin satisfies physical injury requirement); *Brafford v. Susquehanna Corp.*, 586 F.Supp. 14, 17 (D. Colo. 1984) (holding that damage to plaintiff's chromosomes resulting from impact of radioactive gas on plaintiff satisfies the physical injury requirement).

Although the physical injury requirement is not as strict as the physical impact requirement, any physical impact which satisfies the physical impact requirement and produces a physical effect on the plaintiff will satisfy the physical injury requirement. *See, e.g.*, *Jackson*, 781 F.2d at 414 (holding that respiratory disorder resulting from impact of asbestos fibers on plaintiff's lungs satisfies physical injury requirement); *Clark*, 710 F.2d at 14 (holding that physical discomfort resulting from impact of chemical on plaintiff's skin satisfies physical injury requirement); *Brafford*, 586 F.Supp. at 17 (holding that damage to plaintiff's chromosomes resulting from impact of radioactive gas on plaintiff satisfies physical injury requirement). Because physical impact is sufficient but not necessary to satisfy the physical injury requirement, the few courts which still apply the physical impact requirement implicitly apply the physical injury requirement as well. *See McAdams v. Eli Lilly & Co.* 638 F.Supp. 1173, 1175 (N.D. Ill. 1986) (equating physical injury requirement and physical impact requirement). As a result, this note refers to the physical injury requirement even in cases where the court refers to the physical impact requirement.

34. *See infra* notes 35-37 and accompanying text (discussing reasons for physical injury requirement).

35. *See Payton v. Abbott Labs*, 386 Mass. 540, _____, 437 N.E.2d 171, 178 (1982)

prevent burdening both defendants and courts with claims for temporary or trivial mental distress.³⁶ The third reason is to avoid burdening merely negligent defendants with liability for remote consequences of wrongful acts.³⁷

Courts generally apply the physical injury requirement liberally.³⁸ Many courts have allowed a very slight physical injury to satisfy the physical injury requirement.³⁹ For example, in *Plummer v. United States*⁴⁰ the United States Court of Appeals for the Third Circuit considered what level of physical injury is necessary to support a suit for the fear of contracting a latent disease.⁴¹ In *Plummer* the plaintiffs, prisoners in a federal penitentiary, shared a cell with an inmate suffering from tuberculosis.⁴² Although the plaintiffs had no symptoms of the disease, dormant bacteria that could later develop into tuberculosis had infected the plaintiffs.⁴³ The plaintiffs sought to recover damages for fear of contracting tuberculosis.⁴⁴ In *Plummer* the United States District Court for the Middle District of Pennsylvania dismissed the plaintiffs' claim for fear of tuberculosis, reasoning that none of the plaintiffs had demonstrated the physical injury necessary for a claim for mental anguish.⁴⁵ The plaintiffs appealed the district court's holding to the United States Court of Appeals for the Third Circuit.⁴⁶

The Third Circuit in *Plummer* noted that the purpose of the physical injury requirement is to prevent false and imaginary claims.⁴⁷ The circuit

(stating that physical injury requirement prevents false and imaginary claims by requiring objective evidence to substantiate the plaintiff's mental distress); PROSSER & KEETON, *supra* note 14, at 360-61 (same); RESTATEMENT (SECOND) OF TORTS, § 436A, comment b (same).

36. See *Payton v. Abbott Labs*, 386 Mass. 540, ____ , 437 N.E.2d 171, 178 (1982) (stating that physical injury requirement prevents claims for temporary or trivial mental distress); PROSSER & KEETON, *supra* note 14, at 360-61 (same); RESTATEMENT (SECOND) OF TORTS, § 436A, comment b (same).

37. See *Payton v. Abbott Labs*, 386 Mass. 540, ____ , 437 N.E.2d 171, 178 (1982) (stating that physical injury requirement protects merely negligent defendants from liability for remote consequences of wrongful acts); PROSSER & KEETON, *supra* note 14, at 360-61 (same); RESTATEMENT (SECOND) OF TORTS, §436A, comment b (same).

38. See *infra* note 39 (discussing courts that have allowed very slight physical injury to satisfy physical injury requirement).

39. See, e.g., *Brafford v. Susquehanna Corp.*, 586 F. Supp. 14, 17 (D. Colo. 1984) (holding that damage to chromosomes satisfies physical injury requirement); *Wetherill v. Univ. of Chicago*, 565 F.Supp. 1553, 1560 (N.D. Ill. 1983) (holding that prenatal exposure to harmful drug satisfies physical injury requirement); *Vance v. Vance*, 286 Md. 490, 408 A.2d 728, 733-734 (1979) (holding that any mental injury which jury objectively can determine satisfies physical injury requirement); *Laxton v. Orkin Exterminating Co., Inc.*, 639 S.W.2d 431, 434 (Tenn. 1982) (holding that drinking polluted water satisfies physical injury requirement).

40. 580 F.2d 72 (3rd Cir. 1978).

41. *Plummer v. United States*, 580 F.2d 72, 73 (3rd Cir. 1978).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 74.

46. *Id.* at 73.

47. *Id.* at 76.

court further determined that under Pennsylvania case law, any physical injury, however slight, is sufficient to support a claim for mental suffering.⁴⁸ The court noted that bacteria had infected the plaintiffs.⁴⁹ The court reasoned that even if the current effect of the bacteria was slight, the bacteria eventually could cause a deadly disease.⁵⁰ The court held, therefore, that the infection with dormant bacteria satisfied the traditional physical injury requirement and supported the plaintiffs' claim for mental anguish.⁵¹

Under the reasoning of the *Plummer* court, an HIV carrier should be able to establish that his HIV infection is a physical injury that will support a claim for fear of AIDS.⁵² Like tuberculosis bacteria, HIV is a foreign organism that can lie dormant in a person and later develop into a lethal disease.⁵³ Although a person cannot see or feel an HIV infection, a doctor can document an HIV infection and present objective evidence of potential harm to the HIV carrier.⁵⁴ Because courts consistently have found that very slight physical effects that have devastating potential satisfy the physical injury requirement, an HIV carrier should be able to satisfy the physical injury requirement.⁵⁵

Courts consistently have allowed a plaintiff to recover for the present fear of contracting cancer in the future if the plaintiff can satisfy the reasonable fear standard and the physical injury requirement.⁵⁶ An HIV carrier, therefore, may be able to recover for the present fear of AIDS if the carrier submits sufficient evidence to a court to meet the reasonable

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *See supra* notes 1-3 and accompanying text (stating that HIV attacks human immune system and may cause death).

53. *See supra* note 4 and accompanying text (stating that HIV may lie dormant for lengthy incubation period, frequently developing into AIDS); *supra* note 43 and accompanying text (stating that tubercle bacteria can lie dormant for lengthy incubation period and later cause deadly disease).

54. *See infra* note 59 (discussing objective tests that can determine the presence of HIV in person's blood).

55. *See, e.g.,* *Plummer v. United States*, 580 F.2d 72, 76 (3rd Cir. 1987) (holding that infection by presently harmless bacteria satisfies physical injury requirement); *Brafford v. Susquehanna Corp.*, 586 F. Supp. 14, 18 (D. Colo. 1984) (holding that undocumented subcellular changes in plaintiffs resulting from exposure to radon gas could satisfy physical injury requirement); *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1560 (N.D.Ill. 1983) (holding that plaintiffs' prenatal exposure to drug satisfies physical injury requirement); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 434 (Tenn. 1982) (holding that exposure to polluted water satisfies physical injury requirement); *supra* notes 48-50 and accompanying text (discussing *Plummer* court's holding that infection by dormant bacteria can satisfy physical injury requirement); *supra* notes 1-3 and accompanying text (discussing potentially fatal effects of HIV on HIV carrier).

56. *See supra* note 12 (listing courts that have allowed plaintiffs meeting reasonable fear standard and physical injury requirement to recover damages for fear of cancer and other diseases).

fear standard and the physical injury requirement.⁵⁷ Furthermore, a person exposed to HIV who is not an HIV carrier may be able to recover damages for fear of developing AIDS before the person found that he did not carry HIV.⁵⁸ HIV can remain undetected in the human body for more than a year.⁵⁹ Blood tests that determine the presence of HIV in a person's body are only certain fourteen months after the HIV exposure occurs.⁶⁰ A person exposed to HIV, therefore, may have a cause of action for his past fear during the fourteen month interlude between the person's exposure to HIV and the person's discovery that he does not carry HIV.⁶¹

To recover damages for past fear of AIDS, a plaintiff would have to meet the physical injury requirement and the reasonable fear standard for his past fear.⁶² For example, in *Laxton v. Orkin Exterminating Co., Inc.*⁶³ the Tennessee Supreme Court considered whether plaintiffs could recover damages for past fear of developing cancer after tests had proved that the

57. See *supra* notes 8-11 and accompanying text (noting similarities between carcinogens and HIV and arguing that methods courts employ to allow plaintiffs to recover for fear of cancer apply to an HIV carrier's suit for fear of AIDS).

58. See *supra* notes 57-82 and accompanying text (arguing that person exposed to HIV may recover for fear of AIDS prior to discovering that he does not carry HIV).

59. Wash. Post, Oct. 2, 1987, at A1, col. 2. Doctors commonly use two tests to establish the presence of HIV in a person's blood. MOBILIZING AGAINST AIDS, *supra* note 2, at 176. The first test for HIV infection is the enzyme-linked immunosorbent assay (ELISA). *Id.* ELISA tests are highly sensitive and often produce false positive results. Fatteh, *supra* note 1, at 11. After repeated positive ELISA tests, medical researchers confirm the HIV infection with a Western blot test or an immuno fluorescent assay. MOBILIZING AGAINST AIDS, *supra* note 2, at 176. Both the Western blot test and the immuno fluorescent assay are less sensitive but more specific than ELISA tests. *Id.* The tests reveal the presence of HIV in a person's blood, but do not diagnose a case of AIDS. Fatteh, *supra* note 1, at 11. Doctors diagnose AIDS by uncovering the presence of opportunistic diseases that indicate a failure of the immune system. SURGEON GENERAL'S REPORT, *supra* note 1, at 11.

Researchers previously thought the ELISA test revealed the presence of HIV in a person's blood two to 12 weeks after infection. See *id.* at 10 (stating that tests can detect HIV antibodies two weeks to three months after infection). More recent studies suggest that a person can carry HIV for up to fourteen months and still show negative test results for HIV antibodies. Wash. Post, Oct. 2, 1987, at A1, col. 2.

60. E. FINEBERG, AIDS IMPACT ON PUBLIC POLICY 19 (1986) (noting that during interlude between exposure to HIV and development of antibodies, person exposed to HIV will not know if he carries HIV).

61. See *supra* note 31-32 (discussing HIV carrier's reasonable fear of developing AIDS). Scientists do not know how great an exposure to HIV is necessary to transmit the virus. Wash. Post, Oct. 2, 1987, at A9, col. 2. Certain contact with an HIV carrier, however, creates a high risk of infection with HIV. SURGEON GENERAL'S REPORT, *supra* note 1, at 14-15. Therefore, a person exposed to HIV reasonably will fear contracting AIDS for fourteen months, until tests can establish that the person's exposure to HIV did not result in infection with HIV. See *supra* note 4 and accompanying text (discussing interlude between exposure to HIV and development of antibodies to HIV, during which person exposed to HIV will not know whether he carries HIV).

62. See *infra* notes 71-74 and accompanying text (discussing physical injury requirement for past fear of cancer); *infra*, note 72 (discussing reasonable fear standard for past fear of cancer).

63. 639 S.W.2d 431 (Tenn. 1982).

plaintiffs had no cancer.⁶⁴ In *Laxton* the defendant, Orkin, negligently contaminated the plaintiff's water supply with chlordane, a carcinogenic chemical.⁶⁵ The plaintiffs subsequently drank the contaminated water and used the contaminated water for normal household purposes.⁶⁶ After learning that the water was contaminated, Mr. and Mrs. Laxton feared that the chlordane would harm their family.⁶⁷ Approximately one year after Orkin originally contaminated the Laxton's water supply, only one month after the Laxtons understood the risks from exposure to chlordane, test results proved that the chemical had had no effect on any member of the family.⁶⁸ Although the Laxtons suffered no physical damage as a result of exposure to chlordane, they sought damages for the past fear of contracting cancer.⁶⁹ The Tennessee Court of Appeals set aside the trial court's award of damages for the plaintiffs' mental anguish, and the plaintiffs appealed to the Tennessee Supreme Court.⁷⁰

The Supreme Court in *Laxton* recognized that under Tennessee law a plaintiff could recover for mental distress only after showing a physical injury.⁷¹ Nonetheless, the Tennessee court noted that a minimum showing of physical injury could support recovery on claims of mental anguish.⁷² The *Laxton* court felt that drinking polluted water was sufficient physical injury to support an award for mental anguish, even though medical tests revealed no further physical injury from the contaminated water.⁷³ The

64. *Laxton v. Orkin Exterminating Co., Inc.*, 639 S.W.2d 431, 431 (Tenn. 1982).

65. *Id.* at 432. The plaintiffs in *Laxton* lived in a rural area and drew water from an underground spring. *Id.* The defendant's serviceman sprayed the grounds around the plaintiff's house with a termite pesticide that contained chlordane and other chemicals. *Id.* The pesticide leached into the plaintiff's spring and contaminated the water with chlordane. *Id.*

66. *Id.* In *Laxton* Mr. Laxton took several showers and Mrs. Laxton washed an occasional load of clothes. *Id.*

67. *Id.* at 433.

68. *Id.* at 433. In *Laxton* the plaintiffs obtained a new water supply after discovering that their previous water source was polluted with chlordane. *Id.* After the plaintiffs had the second water source, the chlordane posed no further threat. *Id.* The Tennessee court offered no explanation of why chlordane presented no latent threat to the Laxtons. *See id.* (stating that single blood test established that chlordane had not harmed plaintiffs).

69. *Id.*

70. *Id.* at 431-32. The *Laxton* trial court directed a verdict for the plaintiffs on the issue of the defendant's negligence and submitted the issues of causation and damages to the jury. *Id.* at 431. The jury returned a verdict of \$12,721 in favor of the plaintiffs. *Id.* The verdict included damages for the plaintiff's mental anguish. *Id.* On appeal, the Tennessee Court of Appeals reversed the damages for mental anguish, holding that the plaintiffs had not suffered a physical injury. *Id.* at 432.

71. *Id.* at 433.

72. *Id.* at 434.

73. *Id.* The *Laxton* court did not specifically address the reasonable fear standard. *Id.* The Tennessee court, however, approved the trial judge's instruction to the jury that upon a finding of physical injury, any attendant mental pain is compensable. *Id.* Although the *Laxton* court's opinion does not completely foreclose recovering damages for unreasonable fear, a plaintiff seeking damages for past fear of a future disease probably will have to meet the reasonable fear standard. *See supra* notes 13 and 26 and accompanying text (discussing accepted application of reasonable fear standard to claims for fear of future disease).

court held that the Laxtons could recover damages for the fear of cancer after learning of the danger from chlordane, and before tests dispelled any fear of cancer.⁷⁴

Under the court's analysis in *Laxton*, an uninfected person who was exposed to HIV⁷⁵ should be able to recover for the fear of AIDS the person suffered before discovering that he did not carry HIV.⁷⁶ Although the

74. *Laxton*, 639 S.W.2d at 434.

75. See SURGEON GENERAL'S REPORT, *supra* note 1, at 13 (stating that HIV carrier cannot transmit HIV through casual contact such as sharing utensils and non-sexual touching). Only sexual contact with an HIV carrier, or exposure to an HIV carrier's contaminated blood creates a substantial risk of transmitting HIV. *Id.* at 21.

76. See *supra* notes 9-11 and accompanying text (noting similarities between exposure to HIV and exposure to carcinogens). Courts have allowed recovery for past fear that never materialized in contexts other than cancer. See *Fehely v. Senders*, 170 Or. 457, _____, 135 P.2d 283, 291 (1943) (allowing plaintiff to recover damages for fear of harm to plaintiff's unborn child, even though child was born unharmed).

In *Fehely v. Senders* the Supreme Court of the State of Oregon considered whether a pregnant plaintiff's fear that a personal injury might harm her unborn child was an element of damage even though the plaintiff's fear proved to be groundless. *Id.* at _____, 135 P.2d at 283. The plaintiff in *Fehely* was six months pregnant when she suffered injuries in an automobile accident. *Id.* The plaintiff's physical injuries included various bruises and cuts and a blow to the abdomen from the steering wheel of the car. *Id.* After a physician advised the plaintiff to avoid certain activities and to remain in bed for two weeks after the accident, the plaintiff feared that the injury might harm her unborn child. *Id.* The plaintiff's baby, however, was born normal. *Id.* The plaintiff sought damages for her personal injuries and her past fear that her injuries had harmed her unborn baby. *Id.* Over the defendant's objection, the trial court admitted evidence of the plaintiff's past fear of an abnormal childbirth. *Id.* The jury returned a verdict in favor of the plaintiff and the defendant appealed. *Id.* The Oregon Supreme Court first noted that a plaintiff may recover damages for mental distress that flows as a natural consequence directly from physical injuries resulting from the defendant's negligence. *Id.* at _____, 135 P.2d at 285. The court determined that the plaintiff's fear for her unborn child was the natural consequence of the injury to the pregnant plaintiff's abdomen. *Id.* at _____, 135 P.2d at 290. The court stated that the plaintiff's mental anguish was reasonable, even though the plaintiff's fear proved to be unfounded when the plaintiff gave birth to a healthy child. *Id.* Therefore, the court recognized that the extent of the plaintiff's suffering, and the proper compensation for the plaintiff's suffering, were questions of fact for the jury. *Id.* Accordingly, the court held that the trial judge did not err in submitting the question of the plaintiff's past mental suffering to the jury. *Id.* at _____, 135 P.2d at 291; see also, e.g. *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847, 854 (La. Ct. App. 1951) (allowing plaintiff to recover damages for fear of harm to plaintiff's unborn child, even though child born unharmed); *Carter v. Public Service Coordinated Transport*, 47 N.J. Super 379, 390, 136 A.2d 15, 22 (1957) (same); *Elliot v. Arrowsmith*, 149 Wash. 631, 635, 272 P. 32, 33 (1928) (same).

Conversely, however, a plaintiff exposed to HIV probably would not be able to recover damages for fear of AIDS the plaintiff experiences after blood tests establish that the plaintiff does not carry HIV. *Cf. Watson v. Augusta Brewing Co.*, 124 Ga. 121, 124-25, 52 S.E. 152, 153 (1905) (disallowing recovery for plaintiff's fear of injury from swallowed glass occurring after removal of glass); *Laxton v. Orkin Exterminating Co., Inc.*, 639 S.W.2d 431, 434 (Tenn. 1982) (disallowing recovery for fear of cancer occurring after medical diagnosis proved cancer would not develop); *Elliot v. Arrowsmith*, 149 Wash. 631, 633-634, 272 P.2d 32, 33 (1928) (disallowing recovery for plaintiff's fear of injury occurring after removal of conditions that might cause injury). The finder of fact probably would determine that the plaintiff's fear of

plaintiff no longer would fear developing AIDS, the plaintiff nonetheless had feared AIDS for a specific period in the past.⁷⁷ A negative blood test proving that HIV has not entered the plaintiff's body does not erase the plaintiff's past fear of AIDS.⁷⁸ Therefore, the uninfected plaintiff should be able to establish that fearing AIDS while the plaintiff thought he was an HIV carrier was reasonable.⁷⁹ Furthermore, under *Laxton*, the plaintiff's exposure to HIV would satisfy the physical injury requirement.⁸⁰ The plaintiff could establish a physical injury because the plaintiff's exposure to HIV is analogous to the Laxtons' exposure to chlordane.⁸¹ Because a plaintiff who was exposed to HIV but not infected by HIV could establish both a reasonable fear of AIDS and a physical injury, a court should allow a person to recover damages for fear of AIDS for the period the person thought he might carry HIV.⁸²

Given widespread acceptance that fear of cancer is a compensable injury, courts should allow an HIV carrier to maintain a cause of action for both past and present fear of AIDS.⁸³ Courts traditionally were reluctant to recognize mental suffering as a compensable injury in anticipation of uncertain, trivial and false claims.⁸⁴ Courts, however, have reduced the

AIDS after a conclusively negative blood test is unreasonable and, therefore, is not actionable. *Cf. Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315 (5th Cir. 1986) (court held that plaintiff could recover for fear of cancer only if fear was reasonable and genuine). *see supra* notes 26-27 and accompanying text (discussing reasonable fear standard of *Hagerty*).

77. *See supra* note 61 (arguing that person who reasonably believes that he is HIV carrier will reasonably fear AIDS, even though belief later proves groundless).

78. *Cf. Laxton v. Orkin Exterminating Co., Inc.*, 639 S.W.2d 431, 434 (Tenn. 1982) (allowing plaintiff to recover for fear of cancer that later proved groundless); *Fehely v. Senders*, 170 Or. 457, —, 135 P.2d 283, 290 (1943) (allowing plaintiff to recover for past fear of injury to unborn child, even though child was born healthy).

79. *See supra* note 61 (arguing that person exposed to HIV through sexual contact or exposure to contaminated blood products reasonably may believe HIV infection has occurred); *see also supra* note 31 and accompanying text (arguing that HIV carrier will reasonably fear contracting AIDS).

80. *Cf. Laxton v. Orkin Exterminating Co., Inc.*, 639 S.W.2d 431, 434 (Tenn. 1982) (drinking water contaminated with carcinogen satisfies physical injury requirement); *see also supra* notes 9-11 and accompanying text (noting similarities between HIV infection and exposure to carcinogen).

81. *See supra* notes 9-11 and accompanying text (discussing similarities between exposure to HIV and exposure to carcinogens).

82. *See supra* note 12 and accompanying text (noting widespread acceptance among courts that plaintiff establishing physical injury can recover damages for reasonable fear of future harm).

83. *See supra* note 12 and accompanying text (noting widespread acceptance of past and present fear of cancer as actionable injury); *see also supra* notes 9-11 and accompanying text (discussing similarities between AIDS and cancer).

84. *See, e.g., Cleveland, C., C. & St. L. Ry. Co. v. Stewart*, 24 Ind.App. 374, —, 56 N.E. 917, 923 (1899) (court held that damages for mental distress are too speculative to be base for recovery); *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 109, 45 N.E.2d 354, 355 (1896) (court held that mere fright did not constitute a personal injury); *Ewing v. Pittsburgh, C.C. & St. L. Ry. Co.*, 147 Pa. St. 40, 44, 23 A. 340, 340 (1892) (court held that defendant had no duty to protect plaintiff from mental distress); PROSSER & KEETON, *supra* note 14, at

problem of unworthy claims in the context of fear of a future disease by requiring that the plaintiff's fear be reasonable and genuine and that the plaintiff suffer physical injury.⁸⁵ Most courts now agree that mental injury can be as definite as physical injury.⁸⁶ The possible consequences of an HIV infection are so serious that a court should not dismiss an HIV carrier's fear of AIDS as trivial or false.⁸⁷

In addition to recovering damages for the fear of developing AIDS, an HIV carrier may be able to recover damages for contracting AIDS before the carrier develops AIDS.⁸⁸ To an HIV carrier, AIDS is a prospective disease that has not yet developed, but may develop.⁸⁹ Although no court has considered whether an HIV carrier may recover for prospective AIDS, a majority of courts considering damages for a prospective cancer have allowed plaintiffs to recover damages for prospective cancer if the plaintiff can show more than a fifty percent chance of contracting cancer.⁹⁰ If the plaintiff has less than a fifty percent chance of contracting cancer, courts

55 (noting that courts traditionally regarded mental pain too speculative to be compensable). Recognizing mental distress as an actionable injury, courts have overruled traditional holdings disallowing recovery for mental distress. *See Kroger Co. v. Beck*, 176 Ind.App. 202, ___, 375 N.E.2d 640, 643 (1978) (recognizing mental distress as actionable injury in Indiana); *Niederman v. Brodsky*, 436 Pa. 401, ___, 261 A.2d 84, 86 (1970) (overruling *Ewing v. Pittsburgh Ry.*); *Batalla v. State*, 10 N.Y.2d 237, 239, 176 N.E.2d 729, 730 (1961) (overruling *Mitchell v. Rochester Ry.*); *see also supra* note 86 and accompanying text (discussing modern acceptance of mental distress as actionable injury).

85. *See supra* note 26 (discussing reasonable fear standard for claims of fear of future harm); *supra* note 33 (discussing physical injury requirement for claims of mental anguish).

86. *See, e.g., Taylor v. Baptist Medical Center, Inc.*, 400 So.2d 369, 374 (Ala. 1981) (allowing plaintiff to recover damages for mental anguish even though plaintiff suffered no physical injury); *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 930, 616 P.2d 813, 821, 167 Cal.Rptr. 831, 839 (1980) (recognizing cause of action for negligent infliction of emotional distress); *Berman v. Allan*, 80 N.J. 421, 433, 404 A.2d 8, 15 (1979) (recognizing emotional suffering as actionable injury); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958) (court recognized freedom from mental disturbance as legally protected interest).

87. *See supra* notes 1-3 and accompanying text (discussing potentially fatal effects of HIV infection); *supra* note 31 and accompanying text (discussing ordinary person's reaction to HIV infection).

88. *See infra* note 90 (listing courts allowing a plaintiff who meets a requisite standard of proof to recover damages for cancer that has not yet developed); *supra* note 9-11 and accompanying text (discussing similarities between cancer and AIDS).

89. *See supra* notes 2-4 accompanying text (discussing relationship between HIV and AIDS).

90. *See, e.g., Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1138 (5th Cir. 1985) (allowing plaintiff to recover for prospective cancer that is more likely than not to occur); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 411-412 (5th Cir. 1986) (allowing plaintiff to recover damages for greater than 50% chance of developing cancer) *cert. denied*, 106 S.Ct. 3339 (1986); *Johnson v. Armstrong Cork Co.* 645 F. Supp. 764, 769 (W.D.La. 1986) (allowing plaintiff to recover damages for prospective cancer more likely than not to occur from asbestos exposure); *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 666, 464 A.2d 1020, 1026 (1983) (holding that plaintiff could recover for prospective cancer if weight of evidence indicated that cancer would develop from exposure to asbestos).

generally do not allow the plaintiff to recover damages for prospective cancer.⁹¹ For example, in *Gideon v. Johns-Manville Sales Corp.*⁹² the Fifth Circuit Court of Appeals considered whether the plaintiff, Gideon, could recover damages for prospective lung cancer.⁹³ In *Gideon* the plaintiff handled asbestos products for nearly forty years as a part of his work for insulation companies.⁹⁴ Gideon sought damages from several asbestos manufacturers for the asbestosis he contracted from inhaling asbestos fibers during the course of his employment.⁹⁵ At trial Gideon's expert witness testified that Gideon's exposure to asbestos created a risk of cancer that was greater than fifty percent.⁹⁶ The jury awarded Gideon damages of \$501,100.⁹⁷ The defendants appealed to the United States Court of Appeals for the Fifth Circuit, contending that the district court erred in allowing

91. See, e.g., *Hagerty v. L & L Marine Servs. Co.*, 788 F.2d 315, 320 (5th Cir. 1986) (holding that plaintiff did not state cause of action for future development of cancer because plaintiff did not allege cancer probably would develop in the future); *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 82 (3rd Cir. 1986) (denying plaintiffs recovery for prospective cancer because development of cancer was not reasonable medical probability); *Laswell v. Brown*, 683 F.2d 261, 269 (8th Cir. 1982) (holding that plaintiff could not recover damages for mere possibility of contracting cancer from genetic cellular damage) *cert. denied*, 459 U.S. 1210 (1983); *Mink v. University of Chicago*, 460 F. Supp. 713, 719 (N.D. Ill. 1978) (holding that plaintiffs who alleged mere risk of developing cancer from exposure to diethylstilbestrol failed to state cause of action); *Morrissy v. Eli Lilly & Co.*, 76 Ill.App.3d 753, 761, 394 N.E.2d 1369, 1376 (1979) (refusing to recognize plaintiff's risk of developing cancer from exposure to diethylstilbestrol as present injury because cancer was not reasonably certain to occur); *Ayers v. Township of Jackson*, 189 N.J.Super 561, 568, 461 A.2d 184, 187 (1983) (holding that plaintiffs could not recover damages for prospective cancer from exposure to toxic wastes because plaintiffs failed to show cancer probably would develop), *aff'd in part, rev'd in part*, 106 N.J. 557, 525 A.2d 287 (1987); *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1094 (Pa. 1985) (holding that trial court properly had excluded evidence of plaintiff's increased risk of cancer from exposure to asbestos because development of cancer was not probable); see also *Harp v. Illinois Central Gulf R.R. Co.*, 55 Ill.App.3d 822, 829, 370 N.E.2d 826, 830 (1977) (stating that plaintiff could not recover damages for prospective rupture of disc because future disc rupture was not reasonably certain to occur); *Dunshee v. Douglas*, 255 N.W.2d 42, 47 (Minn. 1977) (stating that to support award for prospective stroke, plaintiff must prove stroke is reasonably certain to occur); *Jolicoeur V. Conrad*, 106 N.H. 496, —, 213 A.2d 912, 914 (1965) (holding that plaintiff could not recover damages for prospective bone inflammation because plaintiff could not prove prospective condition more likely than not to occur).

92. 761 F.2d 1129 (5th Cir. 1985).

93. *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1134 (5th Cir. 1985).

94. *Id.*

95. *Id.* The plaintiff sued 17 defendants, all of whom manufactured asbestos products, for contracting asbestosis, an inflammation of the lungs occurring in people who inhale asbestos particles. *Id.*; see *STEDMAN'S MEDICAL DICTIONARY* 128 (5th ed. 1982) (defining asbestosis).

96. *Gideon*, 761 F.2d at 1138. The defendants' witnesses testified that the plaintiff did not have a greater than 50% chance of developing cancer. *Id.* at 1138.

97. *Id.* at 1134. The jury returned a verdict against seven of the defendants for \$500,000, awarded the plaintiff \$1,000 in punitive damages against one of the defendants, and awarded the defendant's wife \$100 for loss of consortium. *Id.* The district court reduced the verdict to \$350,070 to reflect the plaintiff's settlement with three of the defendants. *Id.*

evidence of Gideon's risk of cancer because Gideon did not have cancer at the time of the trial.⁹⁸

Considering Gideon's claim for prospective cancer, the Fifth Circuit stated that a plaintiff must recover all damages that result from a tort in a single cause of action.⁹⁹ The court stressed that under the single cause of action rule the plaintiff could not split the cause of action and seek damages for later injuries in a second suit.¹⁰⁰ The court reasoned that Gideon's suit had to cover damages for diseases that had developed and diseases that could later develop.¹⁰¹ The court noted that if a plaintiff has a less than fifty percent chance of developing a prospective disease, the plaintiff could not recover for the prospective disease because mere possibility does not meet the preponderance of evidence standard.¹⁰² The court determined that to recover damages for prospective cancer, Gideon had to prove that cancer was more likely than not to develop.¹⁰³ The circuit court held, therefore, that the district court properly admitted the evidence that Gideon had a greater than fifty percent risk of developing cancer.¹⁰⁴

Under the standard the Fifth Circuit used in *Gideon*, an HIV carrier could maintain a suit for prospective AIDS.¹⁰⁵ However, given the divergence of opinion among experts of an HIV carrier's chance of developing AIDS, the HIV carrier may have difficulty establishing a greater than fifty percent chance of contracting AIDS.¹⁰⁶ As the court noted in *Gideon*, the jury would have to decide whether the plaintiff's chances of developing AIDS

98. *Id.* at 1136. In *Gideon* the defendants claimed that the district court erred on a number of grounds other than admitting evidence of the plaintiff's risk of cancer. *Id.* at 1134. The defendants challenged the competence of the plaintiff's expert witnesses and the sufficiency of evidence on a number of issues. *Id.* The defendants also charged that the trial court erred in instructing the jury concerning the plaintiff's mitigation of damages and alleged design defects in the plaintiff's products. *Id.* at 1134-35. The Fifth Circuit in *Gideon* agreed that the evidence was insufficient to establish the liability of two of the defendants. *Id.* at 1146. Otherwise, the circuit court upheld the district court's actions. *Id.*

99. *Id.* at 1136.

100. *Id.* at 1137.

101. *Id.*

102. *Id.* at 1137; see also *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 82 (3rd Cir. 1986) (stating that purpose of reasonable probability standard is simply to provide compensation for harm that is likely to occur and to deny compensation for harm that is not likely to occur).

103. *Gideon*, 761 F.2d at 1138. The *Gideon* court further explained that the traditional method of proving a prospective disease is to present expert testimony on the probability that the prospective disease will develop. *Id.* The court stated that the expert testimony that Gideon had a greater than 50% risk of dying from cancer was crucial to determining the extent of Gideon's injury and the amount of Gideon's damages. *Id.* The court concluded that whether the testimony was correct was an issue of fact for the jury to decide. *Id.*

104. *Id.*

105. See *id.* at 1138 (holding that jury must decide whether plaintiff meets requisite standard of proof to recover damages for prospective cancer); *Lorenc v. Chemirad Corp.*, 37 N.J. 56, 76, 179 A.2d 401, 411 (1962) (holding that whether or not plaintiff had stated cause of action for prospective cancer was issue of fact for jury to decide).

106. See *supra* note 4 (discussing HIV carrier's chances of developing AIDS).

were over fifty percent.¹⁰⁷ If the HIV carrier could convince the jury that he has a greater than fifty percent chance of developing AIDS, the HIV carrier should be able to recover damages for prospective AIDS under the standard of recovery that the Gideon court employed.¹⁰⁸

In contrast to the *Gideon* court's position, which allows the plaintiff to recover for a prospective disease only when the plaintiff has a greater than fifty percent chance of developing the disease, a minority of courts have allowed plaintiffs with less than a fifty percent chance of developing a prospective disease to recover damages for the increased risk of contracting the prospective disease.¹⁰⁹ Furthermore, a number of courts have allowed a

107. See *Gideon*, 761 F.2d at 1138 (holding that plaintiff's chances of developing cancer were issue of fact for jury to decide); see also *infra* note 109 (listing courts that have allowed plaintiff to recover for less than 50% risk of contracting prospective disease).

108. See *supra* note 90 and accompanying text (discussing established case law which holds that plaintiff with greater than 50% chance of developing cancer can recover damages for prospective cancer); see also *supra* notes 9-11 and accompanying text (discussing similarities between cancer and AIDS).

109. See, e.g., *McCall v. United States*, 206 F.Supp. 421, 426 (E.D. Va. 1962) (allowing plaintiff to recover damages for 3% to 25% chance that plaintiff would develop epilepsy from head injury); *Davis v. Graviss* 672 S.W.2d 928, 932 (Ky. 1984) (given substantial supporting evidence, jury may compensate plaintiff for increased likelihood of brain disorders even though disorders are mere possibility); *Feist v. Sears, Roebuck & Co.*, 267 Or. 402, —, 517 P.2d 675, 680 (1973) (stating that mere possibility of development of future condition could not, standing alone, support award of damages, but could serve as basis for additional damages); *Schwegel v. Goldberg*, 209 Pa. Super. 280, —, 228 A.2d 405, 409 (1967) (holding that \$7500 verdict partially based on a five percent chance that injury would cause future seizures not excessive); *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wash.2d 609, 614, 664 P.2d 474, 487 (1983) (stating that cancer patient could maintain cause of action against hospital whose negligence reduced patient's chance of survival by fourteen percent); see also *Evers v. Dollinger*, 95 N.J. 399, 406, 471 A.2d 405, 415 (1984) (holding that plaintiff who already had cancer could introduce evidence that defendant's negligence increased plaintiff's risk of cancer); *Jones v. Montefiore Hospital*, 494 Pa. 410, —, 431 A.2d 920, 925 (1981) (holding that plaintiff with breast cancer could recover damages for defendant's negligence which increased plaintiff's risk of contracting cancer).

For example, in *Schwegel v. Goldberg* the Superior Court for the State of Pennsylvania considered whether the jury could consider possible future effects of an injury when assessing damages. *Schwegel v. Goldberg*, 209 Pa. Super. 280, —, 228 A.2d 405, 409 (1967). In *Schwegel* the defendant struck the plaintiff with an automobile. *Id.* at —, 228 A.2d at 406. The plaintiff's expert witness testified that because of the brain injuries the plaintiff suffered in the accident, the plaintiff had a five percent chance of developing seizures within the next twenty years. *Id.* at —, 228 A.2d at 408. The jury awarded the plaintiff \$7500 and the plaintiff's father \$236. *Id.* at —, 228 A.2d at 406. The defendant appealed the trial court's denial of the defendant's motions for judgment notwithstanding the verdict and for a new trial. *Id.*

In support of the motion for a new trial, the defendant charged on appeal that the testimony concerning the possible complications of the plaintiff's injury was speculative and inadmissible. *Id.* The *Schwegel* court noted that the plaintiff's brain injury from the accident was not speculative. *Id.* at —, 228 A.2d at 409. The court further determined that the expert's statistical estimate of the plaintiff's chance of developing seizures was not speculative. *Id.* The court stated that excluding possible future effects of an injury from the jury's consideration would be unfair because the plaintiff had to sue within the statute of limitations

plaintiff with less than a fifty percent chance of contracting the prospective disease to maintain a separate cause of action after the prospective disease develops, even if the disease develops after the normal statute of limitations period has expired.¹¹⁰ Courts allowing separate causes of action consider the later development of the prospective disease a separate injury from the physical injury that forms the basis of the plaintiff's present suit.¹¹¹ Ac-

and could bring only one action for all past, present, and future injuries. *Id.* Rather than excluding medical evidence of the plaintiff's low risk of developing seizures altogether, the court decided to rely on the amount of damages to determine whether the jury had accorded the plaintiff's risk of seizures too much weight. *Id.* In view of the plaintiff's physical and emotional injuries, the court felt the \$7500 verdict reasonably reflected the plaintiff's relatively low risk of developing seizures. *Id.* Accordingly, the court held that the trial court had properly admitted evidence of the plaintiff's increased risk of developing seizures. *Id.*

Commentators have argued that courts should allow a plaintiff with less than a 50% chance of developing a prospective disease to recover damages for increased risk of developing the disease. *See, e.g., Gale & Goyer, Recovery for Cancerphobia and Increased Risk of Cancer*, 15 CUMB. L. REV. 723, 742 (1985) (arguing that rejecting statistical evidence of increased risk of cancer systematically undercompensates victims of serious injury); Note, *Increased Risk of Cancer as an Actionable Injury*, 18 GA. L. REV. 563, 564 (1984) (arguing that recognizing less than 50% risk of cancer is consistent with fundamental concern of tort law—allocation of risk); King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L. J. 1353, 1376-1380 (1981) (arguing that drawing line for recovery of damages for increased risk of cancer at 50% arbitrarily denies recovery for statistically demonstrable injury and subverts basic rules and objectives of tort law).

110. *See, e.g., Herber v. Johns-Manville Corp.*, 785 F.2d 79, 82 (3rd Cir. 1986) (denying plaintiff's claim for prospective cancer, but recognizing that plaintiff could maintain second cause of action for exposure to asbestos when plaintiff developed cancer); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 112 (D.C. Cir. 1982) (recognizing asbestosis and cancer as separate diseases and holding that plaintiff's cause of action for cancer would accrue when plaintiff developed cancer); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 574 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) (holding that plaintiff could recover for cancer and phlebitis from single exposure to drug in separate actions); *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 668-69, 464 A.2d 1020, 1027 (1983) (recognizing asbestosis and cancer as separate injuries and holding that cause of action for lung cancer accrues when plaintiff discovers or should discover cancer); *Devlin v. Johns-Manville Corp.*, 202 N.J.Super. 556, 565, 495 A.2d 495, 500 (1985) (denying plaintiff's claim for increased risk of cancer, but holding that plaintiff had right to sue again if cancer later developed); *Ayers v. Township of Jackson*, 189 N.J.Super. 561, 568, 461 A.2d 184, 187 (1983) (denying plaintiffs' claim for prospective cancer from exposure to toxic wastes, but recognizing plaintiffs' right to maintain separate cause of action for cancer if plaintiffs developed cancer in the future) *aff'd in part, rev'd in part*, 106 N.J. 556, 525 A.2d 287 (1987). *But see, Graffagnino v. Fibreboard Corp.* 776 F.2d 1307, 1309 (5th Cir. 1985) (allowing plaintiff only one cause of action for all injuries from exposure to asbestos); *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1137 (5th Cir. 1985) (holding that plaintiff suing for asbestosis could not recover damages for cancer in later suit); *Carbonaro v. Johns-Manville Corp.*, 526 F. Supp. 260, 262 (E.D. Pa. 1981) (court held that plaintiff suing defendant for asbestosis could not bring second claim against same defendant for cancer, even if plaintiff could not have discovered cancer until after first suit), *aff'd*, 688 F.2d 819 (3rd Cir. 1982).

111. *See, e.g., Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 112 (D.C. Cir. 1982) (holding that asbestosis and cancer from same exposure to asbestos were separate injuries); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 574 (3rd Cir. 1976) (holding that phlebitis

cordingly, the courts allow the plaintiff to maintain a suit for the disease after the disease develops, regardless of the statute of limitations for the original injury or an earlier suit for the original injury.¹¹² The statute of limitations for a cause of action for the prospective disease does not begin to run until the disease develops.¹¹³

For example, in *Devlin v. Johns-Manville Corp.*¹¹⁴ the Superior Court for the State of New Jersey considered whether the plaintiffs could recover damages for increased risk of developing cancer.¹¹⁵ In *Devlin* the plaintiffs were truckdrivers and shipyard workers who handled asbestos in the course of their jobs.¹¹⁶ The plaintiffs sued the defendant asbestos manufacturers for damages from the asbestosis that the plaintiffs contracted during their employment.¹¹⁷ Although the plaintiffs did not have cancer, the plaintiffs included in their suit claims for damages for the increased risk of lung cancer from asbestos exposure.¹¹⁸ None of the plaintiffs had a greater than fifty percent chance of developing cancer.¹¹⁹ The defendants argued that the statute of limitations would bar the plaintiffs' suit for cancer damages if the plaintiffs failed to sue within two years after the plaintiffs discovered the development of asbestosis.¹²⁰ Alternatively, the defendants maintained that if the plaintiffs sued within the statute of limitations but could not prove that the chance of future cancer was greater than fifty percent, the single cause of action rule would not allow the plaintiffs to sue when the cancer developed.¹²¹

The Superior Court of New Jersey determined that the plaintiffs could not meet the standard of proof necessary to recover for a prospective disease because the plaintiffs did not have a greater than fifty percent chance of contracting cancer.¹²² The court further noted that New Jersey law did not allow the plaintiffs to recover for increased risk of cancer when the risk of developing cancer was less than fifty percent.¹²³ Addressing the defendants'

and cancer resulting from same exposure to drug were separate injuries), *cert. denied* 429 U.S. 1038 (1977); *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 668, 464 A.2d 1020, 1027 (1983) (holding that asbestosis and cancer from same exposure to asbestos were separate injuries); *see also infra* note 132 (discussing recognition of HIV infection and AIDS as separate diseases).

112. *See supra* note 110 and accompanying text (discussing courts that have allowed plaintiffs to bring second suit for prospective disease after disease develops).

113. *See supra* note 110 and accompanying text (discussing courts that have tolled statute of limitations for prospective disease until disease develops).

114. 202 N.J. Super. 556, 495 A.2d 495 (1985).

115. *Devlin v. Johns-Manville Corp.*, 202 N.J. Super 556, 559, 495 A.2d 495, 497 (1985).

116. *Id.* at 559, n. 1, 495 A.2d at 495, n.1.

117. *Id.*

118. *Id.* at 559, 495 A.2d at 495.

119. *Id.* The plaintiffs in *Devlin* stipulated that they could not prove that they had a greater than 50% chance of developing cancer. *Id.*

120. *Id.* at 568-69, 495 A.2d at 502.

121. *Id.*

122. *Id.* at 564-65, 495 A.2d at 499-500.

123. *Id.* at 564, 495 A.2d at 500. The *Devlin* court noted that no court in New Jersey had allowed a plaintiff to recover for the increased risk of cancer standing alone. *Id.*

argument that the statute of limitations and the single cause of action rule barred the plaintiffs' suits, the court determined that a strict application of the statute of limitations and the single cause of action rule effectively would prevent suits by most of the plaintiffs in *Devlin* who later contracted cancer from their exposure to asbestos.¹²⁴ The court explained that, under the defendants' reasoning, the plaintiffs could recover damages for cancer only if the plaintiffs sued within two years of discovering asbestosis and if cancer developed during the pendency of the asbestosis suit.¹²⁵

To avoid unfairly precluding a claim for cancer that already had developed, the court recognized asbestosis and asbestos-related cancer as separate injuries.¹²⁶ The court decided that the cause of action for the plaintiffs' prospective cancer did not accrue until cancer developed.¹²⁷ Consequently, the court held that the statute of limitations for the plaintiffs' cancer suit would not begin to run until the plaintiffs discovered or should have discovered cancer.¹²⁸ The court further noted that the single cause of action rule does not preclude a second cause of action when the court in the first action reserves the plaintiff's right to maintain a second action.¹²⁹ Consequently, although the court denied the plaintiffs' claim for increased risk of cancer, the court held that the plaintiffs had a right to sue again for exposure to asbestos if the plaintiffs later developed cancer from exposure to asbestos.¹³⁰

A court following the *Devlin* rationale could allow an HIV carrier to maintain a second cause of action for AIDS when AIDS develops if the HIV carrier fails to establish a greater than fifty percent chance of developing AIDS in an initial suit for prospective AIDS.¹³¹ A court considering an HIV carrier's suit for AIDS could recognize HIV infection and AIDS as separate injuries.¹³² The court could deny the HIV carrier's claim for

124. *Id.* at 568, 495 A.2d at 502.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* The *Devlin* court also noted that a court may allow a plaintiff to maintain two causes of action for a single tort when extraordinary circumstances overcome the policies that favor preclusion of a second action. *Id.*

130. *Id.* at 500.

131. See *supra* notes 126-30 and accompanying text (discussing *Devlin* court allowing plaintiff to maintain separate causes of action for asbestosis and cancer).

132. Cf. *supra* note 126 and accompanying text (discussing *Devlin* court's recognition of asbestosis and cancer as separate injuries). A court might hesitate to recognize an HIV infection as an injury separate from AIDS because unlike cancer and asbestosis, which develop independently of each other, AIDS develops from HIV. See *supra* note 4 (noting that HIV causes AIDS). However, HIV can cause complications other than AIDS. See *supra* note 4 (noting that HIV can cause AIDS-Related Complex and brain damage). In addition, an HIV infection is arguably an actionable injury even if the HIV never develops into AIDS. Cf. *Plummer v. United States*, 580 F.2d 72, 73 (1st Cir. 1978) (holding that infection with dormant tuberculosis bacteria constituted physical injury); see also *supra* notes 53-55 and accompanying text (arguing that HIV infection is physical injury). Apart from the risk of developing AIDS, an HIV carrier

prospective AIDS if the plaintiff's chance of developing AIDS is less than fifty percent while specifically reserving the HIV carrier's right to sue again if the plaintiff later develops AIDS.¹³³ The applicable statute of limitations, therefore, would not begin to run until the HIV carrier discovers or should discover that AIDS has developed.¹³⁴

The *Devlin* approach, however, is only practicable in jurisdictions that have adopted the discovery rule for the statute of limitations.¹³⁵ Under the discovery rule, the plaintiff's second cause of action accrues when the plaintiff discovers or should discover cancer, and not when a carcinogen enters the plaintiff's body.¹³⁶ A traditional application of the statute of limitations, in which the statute runs from the time of the tort, may preclude the plaintiff's second action before the plaintiff discovers, or even suffers injury.¹³⁷ However, most jurisdictions have adopted the discovery rule for statutes of limitations.¹³⁸

cannot engage freely in sex, have children, or donate blood. See SURGEON GENERAL'S REPORT, *supra* note 1, at 14, 20, 21 (Surgeon General warning HIV carriers not to engage in certain activities). Furthermore, infection with HIV carries a significant social stigma. See AIDS: LEGAL POLICIES, *supra* note 1, at 3-5 (discussing nationwide paranoia over AIDS leading to widespread refusal to associate with HIV carriers). Given the harmful effects of HIV on an HIV carrier apart from the carrier's risk of contracting AIDS, a court should be able to recognize HIV infection and AIDS as separate injuries. Cf. *supra*, note 110 (listing courts that have recognized latent cancer as separate injury from initial injury resulting from effects of carcinogen); *supra* notes 9-11 and accompanying text (discussing similarities between carcinogens and HIV).

133. Cf. *supra* notes 126-30 and accompanying text (discussing *Devlin* court's denial of plaintiff's cause of action for prospective cancer but reserving plaintiff's right to bring second suit when cancer occurred).

134. See *supra* note 129 and accompanying text (discussing *Devlin* court's application of the discovery rule for the statute of limitations); *infra* note 136 (discussing discovery rule).

135. See *infra* note 137 and accompanying text (discussing preclusion of suits for latent disease by traditional application of statute of limitations).

136. See *infra* note 137 and accompanying text (discussing adverse effects of traditional application of statute of limitations on claim for latent disease). Courts traditionally have held that the statute of limitation begins to run when damage occurs from the tort. PROSSER & KEETON, *supra* note 14, at 165. Difficulties emerged in the areas of medical malpractice and products liability for toxic drugs and chemicals, where the statutory period commonly ran out before the plaintiff knew of any injury. *Id.* To avoid possible injustices under the traditional application of the statute of limitations, courts and legislatures have adopted the discovery rule, where the statute of limitations does not begin to run until the plaintiff discovers or should discover his injury. *Id.* at 166. The discovery rule is the modern trend in all areas of tort law. *Id.* at 166-167. Nonetheless, since statutes of limitation are legislative creations, courts must follow legislative instruction on when the statute begins to run. *Id.* at 167.

137. See *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 1013, 430 N.E.2d 1297, 1299, 446 N.Y.S.2d 244, 246 (1981) (precluding plaintiffs' cause of action for asbestosis because statute of limitations began to run from date of last exposure to asbestos) *cert. denied*, 456 U.S. 967 (1982); *Locke v. Johns-Manville Corp.*, 221 Va. 951, 958, 275 S.E.2d 900, 905 (1981) (holding that cause of action for asbestosis accrues when damage to lungs first occurs, even if plaintiff could not have discovered damage).

138. See, e.g., *Franklin v. Albert*, 381 Mass. 611, _____, 411 N.E.2d 458, 460-61 (1980) (adopting discovery rule for statute of limitations); *Moran v. Napolitano*, 71 N.J. 133, 140-

Even if a court applies the discovery rule to allow a plaintiff with a prospective disease to maintain a separate cause of action once the prospective disease develops, the *Devlin* court's approach, allowing the plaintiff to split the claim for the prospective disease from the claim for the initial injury, presents certain problems.¹³⁹ The *Devlin* approach leaves a defendant vulnerable to a suit for many years because the plaintiff's second cause of action will not accrue until the prospective disease develops, perhaps many years after the first suit.¹⁴⁰ In addition, a long delay between the tort and the trial decreases the availability of evidence and the reliability of testimony, increasing the chances of an inaccurate factual determination.¹⁴¹ The speed with which AIDS kills its victims is an additional factor weighing against the splitting of an HIV carrier's claim.¹⁴² Both the defendant and the plaintiff in a cause of action for AIDS are likely to die before the claim comes to trial.¹⁴³

Although the *Devlin* court's position of allowing a plaintiff with a prospective disease to split his claim against the defendant presents certain problems, the *Gideon* court's approach of forcing a plaintiff with a prospective disease to recover all damages for the prospective disease in a single cause of action presents more serious disadvantages than the *Devlin* court's approach.¹⁴⁴ The single cause of action rule is poorly suited to cases of latent disease.¹⁴⁵ Under *Gideon* a plaintiff who cannot demonstrate a greater

41, 363 A.2d 346, 350-51 (1976) (adopting discovery rule and noting that discovery rule is now the majority rule in other states); *Foil v. Ballinger*, 601 P.2d 144, 147 (Utah 1979) (stating that statute of limitations begins to run when person knows or should know he has suffered injury); PROSSER & KEETON, *supra* note 14, at 166 (noting that many jurisdictions have adopted discovery rule for statutes of limitations).

139. See *infra* notes 140-43 and accompanying text (discussing difficulties with *Devlin* court allowing plaintiff to split cause of action for prospective disease from claim for present injury).

140. See *supra* note 4 (stating that AIDS may have latency period of over seven years); *supra* note 11 (stating that cancer may have latency period of up to 40 years).

141. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (stating that purpose of statutes of limitations is to avoid cases in which absence of witnesses, fading memories, and lost evidence impairs search for truth); *Johnson v. Davis*, 582 F.2d 1316, 1319 (4th Cir. 1978) (stating that statutes of limitations ensure prompt litigation and accurate factual determination); *Byrne v. Autohaus on Edens, Inc.*, 488 F.Supp. 276, 281 (N.D. Ill. 1980) (stating that litigants and courts should not be involved in actions in which passage of time seriously may impair search for truth).

142. See *infra* note 143 and accompanying text (discussing disadvantages of delaying suit for development of AIDS).

143. See *Fatteh*, *supra* note 1, at 3 (stating that AIDS kills 16% of its victims within three months of diagnosis, 23% within six months, 35% within one year, and 57% within two years); *supra* note 4 and accompanying text (discussing likelihood that HIV carrier will develop AIDS).

144. See *infra* notes 145-52 and accompanying text (discussing why *Devlin* court's approach of allowing plaintiff suing for prospective disease to split claim is preferable to *Gideon* court's approach of not allowing plaintiff with less than 50% chance of developing prospective disease to recover damages for prospective disease).

145. See *Hagerty v. L & L Marine Servs., Inc.* 788 F.2d 315, 320 (5th Cir. 1986) (stating that single cause of action rule tends to overcompensate or undercompensate claims for latent disease).

than fifty percent chance of developing a prospective disease must choose between two unsatisfactory alternatives.¹⁴⁶ The plaintiff's first alternative is to sue immediately for a comparatively minor injury.¹⁴⁷ If the plaintiff sues immediately, however, the plaintiff will not be able to recover for the more serious prospective disease.¹⁴⁸ The plaintiff's second alternative is to sue when the prospective disease develops, but the statute of limitations then may bar the plaintiff's cause of action.¹⁴⁹ Accordingly, the *Gideon* approach effectively prevents a plaintiff with less than a fifty percent chance of developing a latent disease from recovering damages for the prospective disease, even after the prospective disease develops.¹⁵⁰ While the *Devlin* approach may make litigation more difficult by delaying causes of action and consequently increasing the chances of inaccurate factual determinations, the *Gideon* approach may preclude worthy claims altogether.¹⁵¹ Therefore, if a plaintiff brings an action for prospective AIDS and the plaintiff's chances of developing AIDS are less than fifty percent, the *Devlin* court's position of claim splitting is preferable to the *Gideon* court's position of denying the plaintiff's cause of action for prospective AIDS.¹⁵²

Whatever an HIV carrier's chance of contracting AIDS, the HIV carrier should be able to maintain an immediate cause of action against the person

146. See *Devlin v. Johns-Manville Corp.*, 202 N.J.Super. 556, 568, 495 A.2d 495, 502 (1985) (stating that plaintiff who cannot split cause of action for asbestosis and cancer faces "Catch-22" situation).

147. See *id.* (stating that plaintiff with prospective cancer faces two unsatisfactory alternatives in bringing suit for cancer).

148. See *supra* note 91 and accompanying text (stating that majority of jurisdictions do not allow plaintiff with less than 50% chance of developing prospective injury to recover damages for prospective injury).

149. See *supra* note 137 and accompanying text (discussing adverse effect of statute of limitations on causes of action for latent diseases). Both cancer and AIDS may develop after the applicable statute of limitations has run. See *supra* note 4 (stating that AIDS may lie dormant for more than seven years); *supra* note 11 (stating that cancer may lie dormant for 40 years). If prospective AIDS or cancer does not develop before the statute of limitations has run, the plaintiff will not be able to maintain an action for cancer or AIDS. See *supra* note 137 and accompanying text (discussing adverse effect of statutes of limitations on causes of action for latent diseases). In the alternative, the plaintiff's prospective disease may never develop, in which case the plaintiff has foregone recovering damages for his initial injury. See *supra* note 4 (stating that person with prospective case of AIDS may have only 20% to 40% chance of developing AIDS).

150. See *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136 (5th Cir. 1985) (stating that plaintiff who has sued for initial exposure to carcinogen may not bring second suit when cancer develops); *Devlin v. Johns-Manville Corp.*, 202 N.J.Super. 556, 568, 495 A.2d 495, 500 (1985) (recognizing that if plaintiffs cannot split asbestosis and cancer claims, plaintiffs effectively are precluded from recovering damages for cancer).

151. See *supra* note 141 and accompanying text (noting that delaying suits increases chances of inaccurate factual determination); *supra* notes 147-51 and accompanying text (arguing that *Gideon* court's approach of not allowing plaintiff with latent disease to split claims effectively prevents certain plaintiffs from recovering damages for worthy claims).

152. See *supra* notes 144-51 and accompanying text (discussing advantages of *Devlin* court's position to *Gideon* court's position).

who transmitted HIV to the carrier.¹⁵³ A plaintiff who carries HIV will be able to satisfy the physical injury and reasonable fear standards that courts consistently have required a plaintiff to meet in order to recover damages for fear of contracting a latent disease.¹⁵⁴ Infection with HIV is a physical injury, even though HIV may not develop into AIDS for years.¹⁵⁵ In addition, because an ordinary person who carries HIV reasonably will fear contracting AIDS, an HIV carrier should be able to recover damages for mental distress from fear that AIDS will develop.¹⁵⁶ Furthermore, if the HIV carrier can prove that he is more likely than not to develop AIDS, the HIV carrier should be able to recover damages for prospective AIDS.¹⁵⁷ If the HIV carrier cannot prove that he is more likely than not to develop AIDS, the court should recognize HIV infection as a separate injury from AIDS and allow the carrier to maintain a second cause of action for AIDS when AIDS develops.¹⁵⁸

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153. See *supra* notes 52-55 and accompanying text (arguing that HIV infection is actionable injury).

154. See *supra* notes 52-55 and accompanying text (noting that HIV carrier should be able to establish physical injury); *supra* notes 29-31 and accompanying text (noting that HIV carrier should be able to satisfy reasonable fear standard).

155. See *supra* notes 52-55 and accompanying text (arguing that HIV infection is physical injury that satisfies physical injury requirement).

156. See *supra* notes 83-87 and accompanying text (arguing that HIV carrier should be able to recover damages for fear of AIDS).

157. See *supra* notes 105-08 and accompanying text (arguing that if HIV carrier can prove he has greater than 50% chance of contracting AIDS, carrier should be able to recover damages for prospective AIDS).

158. See *supra* notes 131-34 and accompanying text (arguing that HIV carrier who cannot recover damages for prospective AIDS should be able to recover for AIDS in separate cause of action if AIDS later develops).

