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I. INTRODUCTION

Madrid v. Lincoln County Medical Center is the first New Mexico case to recognize a cause of action for the negligent infliction of emotional distress (NIED) arising from possible exposure to the virus that causes acquired immunodeficiency syndrome (AIDS). The court in Madrid held that recognition of emotional distress claims arising out of a negligently created fear of contracting the human immunodeficiency virus (HIV) through a medically sound channel of transmission does not require proof of actual exposure to the virus. In other words, it matters not whether the suspected conduit of disease transmission actually carries HIV at the time of the alleged exposure incident.

With the Madrid decision, New Mexico joins a minority of jurisdictions that allow recovery for emotional distress arising from fear of possibly developing AIDS regardless of the threat posed by the actual transmission of HIV. In arriving at its decision, the Madrid court

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2 See id. at 274, 923 P.2d at 1159.
3 To wit, there may be circumstances under which exposure may be presumed. See id. (reciting the analysis from Williamson v. Waldman, 677 A.2d 1179, 1180-81 (N.J. Super. Ct. App. Div. 1996), aff'd and modified in part, 696 A.2d 14 (N.J. 1997)).
rejected the tort-recovery principles formulated in the “fear of future disease” cases. Instead, the court applied the traditional “physical impact” rule and reasoned that one’s fear of developing AIDS in the future is a rational concern—irrespective of actual HIV exposure—so long as there exists a medically recognized mode of transmission.

The implications of this decision go beyond concerns over excessive litigation, genuineness of claims, and the reasonableness of claimants’ fears. The court’s decision unnecessarily contributes to the gratuitous phobia that continues to surround AIDS, and promotes irrational beliefs concerning the manner and facility of HIV transmission. This Note reviews the evolution and current understanding of judicial tests for NIED analysis, questions the rationale employed by the Madrid court in its opinion, and discusses the implications from Madrid of recognizing a cause of action for emotional distress arising out of a fear of possibly developing AIDS, absent proof of actual HIV exposure.

II. STATEMENT OF THE CASE

On September 28, 1992, Sonia Madrid was transporting medical samples, including blood products, from Lincoln County Medical Center in Ruidoso, New Mexico to laboratory facilities in Albuquerque. At some point in transit, Madrid’s hands were splashed with bloody fluid leaking from two to four sample containers. The sample containers were inspected when they arrived in Albuquerque and only a single container was determined to have leaked fluid. Madrid claims that unhealed paper cuts present on her hands at the time of the incident came into contact with the bloody fluid. Aware of the widespread publicity surrounding AIDS, Madrid


6 See Madrid, 122 N.M. at 278, 923 P.2d at 1163.


8 It is unclear from the fact pattern where the containers were located during transport, and how the leaking fluid came into contact with the plaintiff’s hands.
knew that it was possible to contract the causative virus (HIV) through contact between open
wounds and bodily fluids, primarily HIV-infected blood.

After the incident, Madrid consulted a physician who advised her that due to the variable
latency period\(^9\) of the virus she should be tested periodically over the next six months to a year.
The recommendation was made without knowing whether the culprit blood sample was HIV-
positive or HIV-negative. Not until two months later did Madrid learn that the patient with
whose blood she had been splattered tested HIV-negative. However, because her physician
instructed her to get tested several times, Madrid felt that the single test result from the source
was inconclusive, even if it was negative. Furthermore, believing that more than one sample had
leaked, she thought necessary additional testing of those sample sources as well. Not until
Lincoln County Medical Center filed an affidavit nearly two years after the incident did she learn
that only one specimen had leaked, and that it was HIV-negative. Pursuant to advice from her
physician, Madrid was prophylactically inoculated against hepatitis A and B. She was also tested
for HIV at periodic intervals over a span of six months. Test results for this time period all came
back HIV-negative.

Madrid sued Lincoln County Medical Center for NIED arising from her fear that she
might have contracted HIV as a result of being negligently exposed to bloody fluid of unknown
origin. She sought damages for medical and other expenses, lost wages, and for pain and
suffering. The Medical Center moved for summary judgment, which the district court granted.
The district court agreed with the rule adopted by the majority of other jurisdictions "that actual
exposure to HIV is a threshold requirement in any claim for emotional-distress damages arising

\(^9\) The term "latency period" has been used to refer to both the time lapse between initial HIV infection and the onset
of symptomatic AIDS disease, see Jessamine R. Talavera, Quintana v. United Blood Services: Examining Industry
Practice in Transfusion-Related AIDS Cases, 2 Cornell J.L. & Pub. Pol'y 475, 519 n.11 (1993), and the time
between initial HIV infection and the development of HIV antibodies, see Joycelyn L. Cole, AIDS-Phobia: Are
(1994).
out of a fear of having contracted AIDS."10 The New Mexico Court of Appeals subsequently reversed the district court’s entry of summary judgment. While acknowledging that the majority of jurisdictions throughout the United States had adopted the “actual exposure” rule, the court of appeals nonetheless concluded that “threshold proof of the presence of HIV in the disease-transmitting agent would not be required.”11 The Supreme Court of New Mexico affirmed the court of appeals’ decision holding that proof of actual exposure to HIV was not required to sustain a cause of action for NIED based on a fear of developing AIDS provided a medically sound channel of transmission exists.12

III. CONTEXTUAL BACKGROUND

In terms of a cause of action for emotional distress arising from a negligently created fear of contracting HIV and possibly developing AIDS, Madrid represents a case of first impression in New Mexico.13 While rules governing recovery for NIED in the context of bystander-liability have been repeatedly addressed and modified by New Mexico case law,14 there exists little guidance from the courts concerning the application of purely traditional elements of NIED.15 Therefore, the absence of prior direction on this topic from the New Mexico courts and

10 See Madrid, 122 N.M. at 270-71, 923 P.2d at 1155-56.
11 See id. at 271, 923 P.2d at 1156 (citing Madrid v. Lincoln County Med. Ctr., 121 N.M. 133, 138, 909 P.2d 14, 19 (Ct. App. 1995)).
12 See id. at 269, 923 P.2d at 1154.
13 See id. at 271, 923 P.2d at 1156 (“New Mexico precedent is not determinative of this case.”).
15 The court in Madrid made it clear that the case before it was not a bystander-liability case. See Madrid, 122 N.M. at 271, 923 P.2d at 1156. Notwithstanding, the court spent a considerable portion of its opinion explaining its prior bystander-liability decisions because “the Court of Appeals’ reliance on bystander cases and their related rationale require[d] [the Court] to clarify apparent confusion in terminology and in policies applicable to recovery for emotional distress.” See id. The court of appeals’ dependence on bystander-liability precedent may be due, in part, to the fact that only New Mexico cases addressing bystander liability and intentional infliction of emotional distress exist—precedent addressing non-bystander negligent infliction of emotional distress and “fear of future disease” cases do not. However, the New Mexico Supreme Court had previously noted that emotional distress outside the bystander context is compensable under traditional principles of negligence. See Folz, 110 N.M. at 471, 797 P.2d at 260 (citing Binns v. Fredendall, 513 N.E.2d 278, 280 (Ohio 1987)).
generalized ignorance about HIV and AIDS impels both a review of the etiology of AIDS and an overview of traditional NIED analysis.

A. The Etiology of AIDS

The acquired immunodeficiency syndrome is an inevitably fatal infectious disease. AIDS first came to the attention of the United States’ medical community in 1981 following the discovery of several cases of rare skin tumors and lung infections in otherwise healthy homosexual men. Similar maladies were subsequently observed in intravenous drug users and hemophiliacs. Taken together, these findings hinted at a blood-borne and sexually transmitted infectious entity. Between 1983 and 1984, French and American scientists independently discovered the causative agent—a retrovirus now universally known as the human immunodeficiency virus (HIV). Once it gains access to its human host, HIV preferentially enters specialized white blood cells (CD4 cells) responsible for defending the body against pathogenic microorganisms such as bacteria, fungi, and viruses. HIV commandeers the metabolic machinery of CD4 cells, turning them into factories for the production of more infectious HIV particles—destroying the host cells in the process, and releasing hundreds of new particles.
viruses ready and able to infect more cells. This cyclical, exponential depletion of infection-fighting white blood cells leaves the infected individual susceptible to a variety of opportunistic infections like pneumonia, herpes, and fungal infections.

Although sometimes used interchangeably, the terms HIV disease and AIDS are not synonymous. Rather, HIV infection precedes and eventually leads to the development of AIDS. A definitive diagnosis of AIDS requires the combination of confirmed HIV infection and either a drop in the CD4 cell count below a certain critical level, or the development of one or more "AIDS-associated illnesses." HIV is transmitted through sexual contact, through blood or blood products, or from mother to child during the perinatal period. HIV cannot be transmitted from


26 Opportunistic infections are caused by pathogens that almost everyone is exposed to, yet only cause severe and persistent illnesses in individuals with compromised immune systems. See HIV/AIDS Handbook, supra note 22, at 92. See generally Lowell S. Young, Opportunistic Infections in the Immunocompromised Host, in Basic & Clinical Immunology 706, 706-09 (Daniel P. Stites et al. eds., 8th ed. 1994).

27 See Michael S. Saag, Clinical Spectrum of Human Immunodeficiency Syndrome Virus Diseases, in AIDS: Etiology, Diagnosis, Treatment and Prevention, supra note 19, at 203, 206-08.


29 See HIV/AIDS Handbook, supra note 22, at 85-92. While the presence of HIV is usually the minimum threshold requirement for a diagnosis of AIDS, an exception exists when HIV is undetectable and yet there exist certain AIDS-associated illnesses accompanied by immunosuppression. See id. at 85. AIDS-associated illnesses include a variety of bacterial, fungal, and viral infections, see id. at 104, neoplastic diseases, see id. at 118, and several neurologic diseases, see id. at 128-31.

one individual to another by mere casual contact. Even the risk of transmission through an invasive contact, such as a needle-stick injury, is minimal. After initial exposure, the presence of the virus can be determined by tests that detect HIV antibodies or components of the virus itself. However, it may take up to six months after initial infection before a patient tests HIV-positive. Furthermore, an individual infected with HIV can remain asymptomatic for several years.

The public concern over AIDS stems from the arcane nature of the disease, namely: (1) HIV may go undetected in the blood for several months; (2) infected individuals may remain asymptomatic for several years but still be infectious to others; (3) there exists no effective HIV vaccine and no known cure; and (4) HIV infection eventually progresses to AIDS—a condition that remains invariably fatal. In this regard, AIDS is much like cancer in that both diseases are latent, usually fatal conditions that develop at some indeterminable point in time after initial exposure to a causative agent.

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33 See HIV/AIDS Handbook, supra note 22, at 201-03.
34 There is a “window” of time between initial exposure to HIV and the production of detectable antibodies. See Ivan Yip, Note, Aidsphobia and the “Window of Anxiety”: Enlightened Reasoning or Concession to Irrational Fear?, 60 Brook. L. Rev. 461, 470 (1994) (if there are no antibodies detectable by six months it is a “relative certainty” that the individual is HIV-negative); see also Jaffe, supra note 31, at 8-9 (although HIV may be undetectable in the blood during the “window” period, the infected individual is still capable of transmitting the virus). However, ninety-five percent of HIV-infected patients will test positive within six months of initial exposure to the virus. See K.A.C. v. Benson, 527 N.W.2d 553, 557 n.5 (Minn. 1995). In addition, tests are now available that can reliably determine the presence of HIV within four to six weeks of exposure. See Mandana Shahvari, AIdrafs: Fear of AIDS as a Cause of Action, 67 Temp. L. Rev. 769, 775 (1994). But see Julia A. Metcalf et al., Acquired Immunodeficiency Syndrome: Serologic and Virologic Tests, in AIDS: Etiology, Diagnosis, Treatment and Prevention, supra note 19, at 177, 178 (noting that in uncommon cases it has taken up to three years to detect HIV using blood tests).
35 See Jaffe, supra note 31, at 11-12; Gerald Schochetman, Biology of Human Immunodeficiency Viruses, in AIDS Testing: Methodology and Management Issues 18, 27 (Gerald Schochetman & J. Richard George eds., 1992) (noting that HIV may remain in a latency period for up to ten years before symptoms emerge).
37 See Fink, Jr., supra note 28, at 779; Brian R. Garves, Fear of AIDS, 3 J. Pharmacy & L. 29, 30 (1994). However, unlike AIDS, cancer may develop due to a genetic predisposition not requiring exposure to a causative agent. See
sweeping ignorance regarding HIV transmission, that are mainly responsible for the genesis of the “fear of AIDS” cases.38

B. The Evolution of NIED as a Cause of Action

Traditionally, courts have been reluctant to allow recovery where the defendant’s negligence caused only emotional harm.39 Only when the mental disturbance has occurred in the context of an intentional tort involving extreme and outrageous conduct40 calculated to cause physical or emotional harm to the victim, have the courts been more willing to allow recovery.41 Under such circumstances, it has generally been required that the distress inflicted be of a severity which no reasonable person could be expected to endure.42

Unlike situations involving intentional conduct, the courts have taken a more prudent approach to recognizing compensation for emotional distress claims arising from mere negligent conduct.43 The circumspect attitude of the courts to this category of mental disturbance may be ascribed to tenuous causal relations, the ability of claimants to easily feign or imagine emotional


39 See W. Page Keeton et. al., Prosser and Keeton on the Law of Torts § 54, at 361 (5th ed. 1984); see also Restatement (Second) of Torts § 436A (1965) (“If the actor’s conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, the actor is not liable for such emotional disturbance.”). From the beginning, some courts were concerned over the potential increase in litigation because emotional distress was difficult to quantify and recovery of damages relied on conjecture and speculation. See Mitchell v. Rochester R.R. Co., 45 N.E. 354, 356 (N.Y. 1896).

40 Extreme and outrageous conduct has been defined as conduct “beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable as a civilized community.” See Restatement (Second) of Torts § 46 cmt. d (1965).


42 See Restatement (Second) of Torts § 46 cmt. j (1965); Dominguez, 97 N.M. at 215, 638 P.2d at 427. The New Mexico Supreme Court announced in Ramirez v. Armstrong that the same standard would henceforth apply to unintentional, negligent infliction of emotional distress claims. 100 N.M. at 541, 673 P.2d at 825 n.1.
injury, concerns over the potential for spurious and vexatious litigation, and hesitancy to punish negligent conduct.\textsuperscript{44} Therefore, in addition to satisfying the traditional elements of negligence,\textsuperscript{45} the courts have generally required proof of more objective criteria in order to guarantee or certify that a mental disturbance is, in fact, genuine.\textsuperscript{46} Over the years, the courts have developed several “screening devices” to achieve this goal.\textsuperscript{47}

1. \textit{The “Physical Injury,” “Physical Impact,” “Physical Manifestation,” and “Zone of Danger” Doctrines}

While “[t]here exists in New Mexico no recognized cause of action for negligent infliction of emotional distress except for bystander liability”\textsuperscript{48} New Mexico has accepted the traditional rule that where a defendant causes an actual physical injury to the plaintiff, he is liable not only for the physical consequences of his tortious impact but also for the emotional distress or mental suffering resulting from it.\textsuperscript{49} Such emotional distress damages have been traditionally referred to as “parasitic” to the “host” claim of damages—they are dependent upon and attach to the physical injury.\textsuperscript{50} Under the physical injury rule, plaintiffs could not sue under a separate tort cause of action labeled NIED.\textsuperscript{51} Instead, recovery was limited to emotional distress that occurred

\textsuperscript{43} See \textit{Keeton}, \textsuperscript{supra} note 39, § 54, at 360.
\textsuperscript{44} See Payton v. Abbott Labs, 437 N.E.2d 171, 178-79 (Mass. 1982); see also \textit{Keeton}, \textsuperscript{supra} note 39, § 54, at 361 (“The temporary emotion of fright . . . is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence . . .”).
\textsuperscript{46} See \textit{Keeton}, \textsuperscript{supra} note 39, § 54, at 362.
\textsuperscript{47} See Rees, \textsuperscript{supra} note 45, at 268.
\textsuperscript{48} Flores v. Baca, 117 N.M. 306, 310, 871 P.2d 962, 966 (1994). There exists in New Mexico no drafted jury instruction for non-bystander NIED. See N.M.R.A, Civ. U.J.I. 13-1630 committee comment (1997) (“New Mexico law is not sufficiently developed in this area to permit the drafting of a uniform jury instruction.”). In this regard, New Mexico has followed other jurisdictions in refusing to allow recovery for purely psychic injury, recognizing that emotional distress is usually a temporary affliction that is difficult to quantify and relatively easy to feign. See \textit{Keeton}, \textsuperscript{supra} note 39, § 54, at 361-63; Restatement (Second) of Torts § 436A cmt. b (1965).
\textsuperscript{50} See Restatement (Second) of Torts § 436A (1965).
contemporaneously with inflicted injuries. Eventually the courts expanded the "physical injury" concept, permitting recovery under an independent tort of NIED provided there was some proof of "physical impact." The impact rule, which limits recovery to plaintiffs who could prove that the defendant's negligent conduct caused a "physical impact" or "physical harm" to the plaintiff's person, became universally recognized by the courts. Presumably due to arbitrariness, however, the courts progressively stretched the boundaries of the term "impact," allowing recovery for mental distress flowing from innocuous contact. The terms "physical injury" and "physical impact" are at times treated as synonyms and at other times, as antonyms. For example, some commentators and jurisdictions have distinguished a "physical impact" from a "physical injury," treating the two as distinct and separate occurrences. Other jurisdictions have linked the concepts, requiring that a discernible physical injury result from an initial physical impact. Still others have treated the terms as indistinguishable.

In addition, rather than just recognizing emotional distress resulting from a physical insult, courts permitted recovery for those who could show some subsequent "physical

\[52\text{ See Payton v. Abbott Labs, 437 N.E.2d 171, 176 (Mass. 1982).} \]
\[53\text{ See id. The "impact" rule had its origins in Britain in the nineteenth century. See Lynch v. Knight, 9 Eng. Rep. 557 (H.L. 1861); Victorian Rys. Comm'r's v. Coulus, 13 App. Cas. 222 (P.C. 1888) (appeal taken from Vict.). Although the rule was subsequently overturned in Britain a short time later, see Dulieu v. White & Sons, 2 K.B. 669 (1901), by then it had already been adopted by the American courts, see Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896) and Spade v. Lynn & Boston R.R., 47 N.E. 88 (Mass. 1897). See also Archibald H. Throckmorton, Damages for Fright, 34 Harv. L. Rev. 260, 264-65 (1921) (discussing the adoption of the rule in several other U.S. jurisdictions).} \]
\[54\text{ The extent of the physical harm required under the rule varies. See, e.g., Plummer v. United States, 580 F.2d 72 (3d Cir. 1978) (finding that dormant bacterial infection satisfies requirement); Laxton v. Orkin Exterminating Co., 639 S.W.2d 431 (Tenn. 1982) (finding that ingestion of contaminated water satisfied requirement despite absence of physical symptoms). See also Vance v. Vance, 408 A.2d 728, 734 (Md. 1979) (stating that a physical harm must be verifiable by "objective determination").} \]
\[55\text{ See Keeton, supra note 39, § 54, at 363.} \]
\[56\text{ See id. at 363-64 & nn.43-53.} \]
\[58\text{ See, e.g., Wetherill v. University of Chicago, 565 F. Supp. 1553, 1560 (N.D. Ill. 1983).} \]
\[59\text{ See, e.g., R.J. v. Humana of Fla., Inc., 652 So. 2d 360, 362 (Fla. 1995); Etienne v. Caputi, 679 N.E.2d 922, 925 (Ind. Ct. App. 1997) (citing Shuamber v. Henderson, 579 N.E.2d 452, 454 (Ind. 1991)). See also Fink, supra note 28, at 781 (discussing the requirement of an accompanying physical injury resulting from an initial impact).} \]
manifestation” attributable to their emotional distress. Eventually, a handful of courts altogether abandoned the requirement of physical harm and recognized an independent cause of action for NIED. However, many of these same courts subsequently retreated from this position, eschewing NIED as an independent cause of action and narrowing the circumstances under which the absence of physical harm would still permit recovery.

In lieu of the physical impact rule, some jurisdictions employ a “zone of danger” test, which depends upon the proximity of the plaintiff to the risk of harm created by the defendant’s negligent conduct. In this context, “zone of danger” refers to those persons who are subjected to the risk of physical harm from the defendant’s conduct and who fear for their own safety, as opposed to those persons within the range of potential risk but whose emotional distress results from witnessing the harm to another (bystander-liability). However, in most jurisdictions, recovery for bystander-liability is no longer limited by the plaintiff’s presence within the “zone

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61 See Restatement (Second) of Torts §§ 436, 436A (1965); Marchica, 31 F.3d at 1203.
62 See Molien v. Kaiser Found. Hosps., 616 P.2d 813, 814 (Cal. 1980); Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970); Bass v. Nooney, 646 S.W.2d 765, 772 (Mo. 1983); St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 650 (Tex. 1987). As a limiting device, most courts required that the mental disturbance be objectively serious. See Rodrigues, 472 P.2d at 520 (“[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress . . . .”).
63 See Julie A. Davies, Direct Actions for Emotional Harm: Is Compromise Possible?, 67 Wash. L. Rev. 1, 13 (1992); see also, Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc., 770 P.2d 278, 281-82 (Cal. 1989) (limiting Molien v. Kaiser Found. Hosps., 616 P.2d 813 (Cal. 1980)). While physical harm was no longer necessary, other circumstances were required to establish the breach of a duty owed. In the absence of physical injury, recovery would be permitted if the mental disturbance "result[ed] from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two." Marlene F., 770 P.2d at 282 (emphasis added); see also Boyles v. Kerr, 855 S.W.2d 593, 596 (Tex. 1993) (establishing that a duty may arise from a statute, the common law, or from the actions of the parties). For example, recovery of damages for pure emotional distress, absent physical impact or manifestation, has been allowed in the context of physician-patient relationships, see Marlene F., 770 P.2d at 282 n.5, and where a contractual duty exists, see, e.g., Flores v. Baca, 117 N.M. 306, 311, 871 P.2d 962, 966 (1994) (mental distress arising from the breach of a funeral contract), and Chavez v. Manville Prods. Corp., 108 N.M. 643, 777 P.2d 371 (1989) (emotional distress resulting from retaliatory discharge in breach of an employment contract). See also Karen L. Chadwick, Fear of AIDS: The Catalyst for Expanding Judicial Recognition of a Duty to Prevent Emotional Distress Beyond Traditional Bounds, 25 N.M. L. Rev. 143, 149-52 (1995) (noting that “direct” liability doesn’t require physical harm or bystander status provided that a preexisting relationship between the plaintiff and the defendant establishes a duty to prevent emotional harm).
64 See Marchica, 31 F.3d at 1203.
66 See Restatement (Second) of Torts §§ 313(2), 436(3) (1965).
of danger.” While the development of the “zone of danger” rule seemingly ameliorated the harshness of the impact rule, several courts still required that emotional distress be demonstrated by some physical manifestation.

In New Mexico, the term “zone of danger” has different meanings depending upon the context in which it is used by the courts. For example, in the case of bystander-liability, New Mexico does not require that a plaintiff be within the “zone of danger” in order to recover for emotional distress from witnessing the peril or harm to another. In this setting, the phrase describes those “persons having some physical proximity to the tortfeasor.” While rejected as a rule for bystander recovery, the term is, nonetheless, used by the New Mexico courts as a general test of foreseeability: “a description of the class of persons that a reasonable person would conclude based on the circumstances was subject to a risk by the defendant’s acts or omissions.”

Outside of bystander-liability, most courts continue to apply the physical injury, physical impact and the physical manifestation rules – alone or in combination – to NIED claims. Such limiting devices satisfy the need for an objective check on the legitimacy of emotional injuries, providing a guarantee of genuineness. However, the desire of the courts to preserve authentic

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69 See Ramirez v. Armstrong, 100 N.M. 538, 542, 673 P.2d 822, 826 (1983) (adopting the rule established in Dillon v. Leeg. 441 P.2d 912, 920-21 (Cal. 1968), with the additional requirement that the plaintiff show some physical manifestation of his or her emotional distress). Ramirez was subsequently modified by Folz v. State, 110 N.M. 457, 471, 797 P.2d 246, 260 (1990) (abolishing requirement of subsequent physical manifestation of emotional trauma).
71 Id. (explaining how the phrase “zone of danger” was used in Calkins v. Cox Estates, 110 N.M. 59, 61, 792 P.2d 36, 38 (1990)).
72 See Keeton, supra note 39, § 54, at 361. In addition to providing indicia of genuineness, the physical injury/impact/manifestation rules are primarily used to establish duty and causation. See, e.g., Payton, 437 N.E.2d at 180 (“Emotional distress is reasonably foreseeable when there is a causal relationship between the physical injuries suffered and the emotional distress alleged.”). In the bystander-liability context, however, the injury, impact and physical manifestation rules have almost universally been abandoned. See Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 570 n.20 (1987); see also Madrid, 122 N.M. at 272, 923 P.2d at 1157 (explaining the holding from Folz, 110 N.M. at 471, 797 P.2d at 260, that a bystander need not suffer an initial physical impact nor a subsequent physical manifestation to recover damages for emotional distress).
claims for emotional distress at the expense of invalid ones has resulted in "inconsistency and incoherence" in the application of these rules.73

2. "Fear of Future Disease" Doctrine

Because AIDS only became a recognized disease in 1981,74 recovery of NIED damages for fear of developing AIDS remains a novel remedy, providing fertile ground for debate. Consequently, most courts have relied upon the rationale and analysis from the "fear of future disease"75 cases for guidance.76 For nearly a century, recovery for emotional distress arising from a fear of contracting a disease in the future has been recognized where the defendant's negligence gave rise to the fear.77 The majority of early cases "involved fears that were necessarily short-lived."78 It wasn't until the rise in toxic tort litigation79 that actions for more latent conditions such as "fear of cancer"80 became more commonplace.81 Cases analyzing fear

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73 See Camper v. Minor, 915 S.W.2d 437, 440 (Tenn. 1996). The frustration in discerning and applying the various rules was perhaps best expressed in Hunsley v. Giard, 553 P.2d 1096, 1098 (Wash. 1976), wherein the court stated: "Any attempt at a consistent exegesis of the authorities is likely to break down in embarrassed perplexity."


75 For an overview of American tort law regarding emotional distress as an element of recovery in future disease, see generally David Carl Minneman, Annotation, Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery, 50 A.L.R. 4th 13 (1986).


78 Terry Morehead Dworkin, Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?, 53 Fordham L. Rev. 527, 542 & n.121 (1984).


80 Fear of cancer cases began to appear in the middle of this century. See, e.g., Dempsey v. Hartley, 94 F. Supp. 918 (E.D. Pa. 1951) (fear of developing breast cancer); Flood v. Smith, 13 A.2d 677 (Conn. 1940) (same); Kimbell v. Noel, 228 S.W.2d 980 (Tex. Civ. App. 1950, writ ref'd n.r.e.) (same). Some courts and commentators have referred to the anxiety of developing cancer as "cancerphobia." See Gale & Goyer, supra note 5, at 724-25. The term "cancerphobia" was first used to describe a person's fear of developing cancer in Ferrara v. Galluchio, 152 N.E.2d 249, 251 (N.Y. 1958). However, "cancerphobia" and "fear of cancer" are distinct. The former refers to a phobic
of developing cancer have usually involved exposure to asbestos fibers, diethylstilbestrol (DES), and other potential carcinogens or chemical toxins. Before permitting compensation for fear of developing a disease at some point in the future, the courts have required that one or more of the traditional tests for NIED be satisfied—such as proof of a discernible physical injury, or proof of physical impact or physically invasive contact, and objective proof of reasonable fear. For the courts, fulfillment of these criteria provided objective proof of "actual

reaction in the absence of objective evidence, while the latter refers to an anxiety caused by the fear of developing cancer, but is not a mental illness. See Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 805 n.5 (Cal. 1993). See Glen Donath, Comment, Curing Cancerophobia Phobia: Reasonableness Redefined, 62 U. Chi. L. Rev. 1113, 1115 (1995). Traditionally, fear of cancer was analyzed by the courts as a subset of "nosophobia, the general fear of diseases." See id.


The physical impact requirement is usually satisfied by objective evidence of exposure to the disease-causing agent, irrespective of resulting symptomology. See, e.g., Plummer v. United States, 580 F.2d 72 (3rd Cir. 1978) (infectious bacteria entering the body); Mink, 460 F. Supp. 713 (ingestion of DES); Laxton, 639 S.W.2d 431 (ingestion of contaminated drinking water); Gideon, 761 F.2d 1129 (inhalation of asbestos fibers). But see Potter, 863 P.2d at 811 (holding that a toxic ingestion or exposure, without more, does not provide an actionable claim for fear of developing a future illness).

exposure” to a disease-causing entity, a general prerequisite to recovery.89 The policy underlying the “proof of exposure” requirement is that no reasonable person would fear contracting a future disease without some medically objective evidence of actual exposure to a disease-causing agent.90

Consequently, “fear of future disease” cases provide instructive precedent concerning the causal links between exposure, injury, and recovery.91 In its reasoning, however, the Madrid court largely ignored this panoply of “fear of future disease” precedent. Instead, the court opted for basic tort doctrine analysis, and declined to accept the reasoning developed and adopted by the majority of other jurisdictions.

IV. RATIONALE

A. Madrid Adopts the “Impact” Rule and Rejects the Majority “Actual Exposure” Test

The Madrid decision permits recovery on a cause of action for emotional distress based upon a negligently created fear of developing AIDS without requiring threshold proof of actual exposure to HIV, provided a medically sound channel of transmission exists.92 In other words, it is irrelevant whether the alleged conduit of HIV—bloody fluids in the Madrid case—actually

89 Most case law has required that a plaintiff not only demonstrate a physical injury, but also actual exposure. See, e.g., Harper v. Illinois Cent. Gulf R.R., 808 F.2d 1139, 1140 (5th Cir. 1987) (per curiam) (no recovery for emotional distress absent evidence of exposure to disease-causing agent). See also Fink, Jr., supra note 28, at 785 (“[T]he injury requirement often means ‘exposure’ to a disease-causing agent.”); Rees, supra note 45, at 264 (“All plaintiffs alleging emotional distress due to the fear of contracting a future disease must prove exposure to a disease-causing agent before allegations of emotional distress will be considered even remotely compensable.”).


91 See, e.g., Garves, supra note 37, at 30 (noting that the similarity between AIDS and cancer has resulted in courts analyzing such cases with similar standards); 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, 188 (1988) (“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.”). See also Neal v. Neal, 873 P.2d 881, 887 (Idaho Ct. App. 1993) (“The similarities between terminal cancer and AIDS—their latent manifestation and their deadly, incurable nature—have led courts and commentators to analyze actions for fear of contracting AIDS under the same standards as actions for fear of developing cancer.”)

contains HIV, or is otherwise HIV-infected. According to Madrid, it cannot be concluded "as a matter of law that at the time a person is negligently exposed to a disease-transmitting agent (blood) through a medically sound channel of transmission (open wounds) a fear of contracting AIDS is irrational."93

In its reasoning, the Madrid court relied on traditional tort principles that were formulated well before the advent of unique diseases like AIDS.94 Specifically, the court determined that the plaintiff was entitled to recovery because she suffered a "physical impact" as a result of the Medical Center's negligent conduct.95 Recruiting the opinion from Folz v. State, the Madrid court reasoned that "emotional . . . injuries which have arisen as a proximate result of the defendant[s'] tortious act are compensable under the traditional rule for recovery. The tortfeasor takes his victim as he finds him, the effect of his tortious act upon the person being the measure of damages."97 Applying this traditional rubric, the court concluded that limiting recovery by requiring threshold proof of "actual exposure" is unnecessary because "[i]t is the invasive 'impact' of the bloody fluid that gives rise to Madrid's claim for damages under the general rule that emotional injuries suffered by the victim of tortious impact are recoverable."98

The Madrid court refused to impose the majority "actual exposure" rule as a limiting device.99 It cautioned that such a rule would require plaintiffs to prove both that the conduit of disease transmission carried HIV, and that a medically sound channel of transmission existed.100 Instead, the court held that once "impact" with the alleged conduit of disease transmission was

93 See id. at 276, 923 P.2d at 1161.
94 For example, the impact rule made its debut in the late nineteenth century, see, e.g., Spade v. Lynn & Boston R.R. Co., 47 N.E. 88 (Mass. 1897), nearly one hundred years before the first case of AIDS was diagnosed.
95 See Madrid, 122 N.M. at 272, 923 P.2d at 1157. For this reason the court found it unnecessary to analyze NIED cases not involving a physical impact. See id.
96 In its opinion, the Madrid Court does not directly address whether the impact with bloody fluid satisfies causation. The Court intimates, however, that the impact makes the emotional injury a foreseeable consequence. See id. at 274, 923 P.2d at 1154.
97 See id. at 272 (quoting Folz v. State, 110 N.M. 457, 471, 797 P.2d 246, 260 (1990)).
98 See id. (citing Marchica v. Long Island R.R., 31 F.3d 1197, 1204 (2d Cir. 1994)). The Marchica court held that where a plaintiff "suffer[s] an actual physical injury . . . the rule governing fear of future disease is inapposite and the traditional negligent infliction of emotional distress analysis applies." 31 F.3d at 1204.
99 See Madrid, 122 N.M. at 272, 923 P.2d at 1157.
shown, only proof that a medically sound channel of transmission existed would be required.\(^{101}\)

In *Madrid*, blood coming into contact with unhealed paper cuts on the plaintiff’s hands was cited as the viable channel of transmission.\(^{102}\) For the court, a rule requiring proof of a medically sound channel of transmission, regardless of the presence of HIV, sufficiently limits potential liability yet permits the adjudication of genuine claims.\(^{103}\) In support of its reasoning, the court quoted from the opinion in *Williamson v. Waldman*:\(^{104}\)

> [W]here a defendant’s negligent act or omission provides an occasion from which a reasonable apprehension of contracting a deadly disease may eventuate, and where the quality of the conduct is such to create a presumption of exposure, the resulting claim for damages by reason of emotional injury may not be dismissed . . .

Implicit in the *Madrid* court’s holding is that claims for emotional distress arising from a fear of possibly developing AIDS are to be limited to the time period between the alleged exposure incident, and the receipt of conclusive test results demonstrating that the plaintiff is HIV-negative.\(^{106}\) This so-called “window of anxiety” rule originated in those few jurisdictions that, like *Madrid*, rejected the “actual exposure” test.\(^{107}\) The “window of anxiety” was defined by the *Madrid* court as a period of up to six months because “[u]nder the current state of medical knowledge, the absence of actual HIV infection will be known within six months after an

\(^{101}\) See id. at 275, 923 P.2d at 1160.

\(^{102}\) See id. at 277, 923 P.2d at 1162.

\(^{103}\) See id. at 270, 923 P.2d at 1155. See also *Madrid v. Lincoln County Med. Ctr.*, 121 N.M. 133, 141, 909 P.2d 14, 22 (Ct. App. 1995) (“ Plaintiff has asserted sufficient facts, if proven, to demonstrate that the exposure incident includes a medically sound method of transmission through the unhealed paper cuts on her hands . . . .”). The *Madrid* court also made it clear that where no medically sound channel of transmission exists, no claim for emotional distress will lie. See *Madrid*, 122 N.M. at 272, 923 P.2d at 1162.

\(^{104}\) See id. at 275, 923 P.2d at 1160.


\(^{106}\) See *Madrid*, 122 N.M. at 274, 923 P.2d at 1159 (emphasis added) (quoting *Williamson*, 677 A.2d at 1180-81).

exposure incident." The rationale behind the six-month time limit is that "emotional-distress damages must be based upon fears experienced by a reasonable and well-informed person." Accordingly, after the "window of anxiety" has passed, reasonable and well-informed persons should no longer experience continuing emotional distress because they know or should know that they are not HIV-infected. Any persisting fear would be unreasonable in that it would no longer be proximately caused by the defendant's negligence.

Finally, in addition to the rules it articulated specifically addressing the possible exposure to HIV, the Court noted that recovery of emotional distress damages for fear of developing AIDS would still require proof of all the traditional elements of a negligence cause of action. Therefore, under the Madrid decision recovery of damages in a NIED claim for fear of developing AIDS requires proof of: (1) a physical impact (exposure incident) between the possible disease-transmitting agent and the plaintiff, (2) a medically sound channel of transmission existing contemporaneously with the exposure incident, (3) awareness by the plaintiff that the exposure incident created a possibility of contracting a deadly disease, (4) enduring ignorance on the part of the plaintiff as to whether or not he or she was actually exposed to a deadly disease, (5) emotional distress arising during the "window of anxiety," and (6) all the elements of a traditional claim for negligence. In short, "[o]nly those persons whose conduct departs from the standard of reasonable care and results in an exposure through a medically sound channel of transmission will be held liable."

B. Rejecting the "Actual Exposure" Test Advances the Policy of Deterring Unreasonable Conduct

108 Madrid, 122 N.M. at 277, 923 P.2d at 1162. See also Madrid v. Lincoln County Med. Ctr., 121 N.M. 133, 137, 909 P.2d 14, 18 (Ct. App. 1995) ("Ninety-five percent of HIV-infected individuals will test HIV positive within six months of the date of exposure.")

109 See Williamson, 696 A.2d at 23.

110 See id.; Madrid, 121 N.M. at 142, 909 P.2d at 23.

111 See Madrid, 121 N.M. at 142, 909 P.2d at 23.

112 See Madrid, 122 N.M. at 277, 923 P.2d at 1162.

113 The required elements were derived by combining the supreme court's conclusion, see id. at 278, 923 P.2d at 1163, with the holding from the court of appeals, see Madrid, 121 N.M. at 143, 909 P.2d at 24.

114 See Madrid, 122 N.M. at 277, 923 P.2d at 1162.
In its opinion, the Madrid court addressed a number of concerns that have been raised as justification for adoption of the majority actual exposure test.\(^\text{115}\) Posited concerns have included the possibility of increased liability and medical malpractice insurance premiums, excessive litigation premised on irrational fears, decreased compensation for those victims who actually contract HIV and subsequently develop AIDS, and the creation of an unworkable rule that leads to inconsistent results and discourages settlements.\(^\text{116}\) In addressing these policy concerns, the Madrid court distinguished its reasoning from that formulated in the “fear of cancer” cases wherein many of the same considerations were involved.

First, the Madrid court evaluated the reasoning from Potter v. Firestone Tire & Rubber Co.\(^\text{117}\) In Potter, the California Supreme Court considered whether emotional distress arising from a fear of developing cancer in the future as a result of exposure to carcinogens permits recovery of damages in a negligence action.\(^\text{118}\) The plaintiffs in Potter discovered that carcinogenic chemicals had contaminated their domestic water wells as a result of the defendant’s negligent operation of a nearby toxic waste site.\(^\text{119}\) The plaintiffs were subsequently exposed to carcinogens via their ingestion of the contaminated water supply.\(^\text{120}\) While not addressing whether the ingestion of carcinogens qualified as a “physical impact,” the Potter court noted that it lacked a factual basis to decide whether the ingestion had resulted in a physical injury to which parasitic damages for emotional distress could attach.\(^\text{121}\) Regardless, the Potter court, relying on its former decisions, eschewed the physical injury requirement as a “hopelessly imprecise screening device.”\(^\text{122}\) Instead, the court focused on the reasonableness of the plaintiff’s

\(^\text{115}\) See id. at 275, 923 P.2d at 1162.
\(^\text{116}\) See id.
\(^\text{117}\) 863 P.2d 795 (Cal. 1993).
\(^\text{118}\) See id. at 805.
\(^\text{119}\) See id. at 801-02.
\(^\text{120}\) See id. at 808.
\(^\text{121}\) See id. at 807. Other courts have found that exposure to toxins resulting in immune system impairment or subcellular damage qualifies as a physical injury. See id. at 806 (and cases cited therein).
\(^\text{122}\) See id. at 810.
fear in developing cancer in the future due to a toxic exposure. The court concluded that in the absence of physical injury or illness, recovery of damages for fear of cancer should only be allowed if the plaintiff can demonstrate that it is medically "more likely than not" that cancer will develop in the future due to the toxic exposure. The court reasoned that a carcinogenic ingestion or exposure, without more, does not provide a reasonable basis for fearing future disease attributable to the exposure. From a policy standpoint, the Potter court was concerned about unreasonable claims based upon speculative fears and the magnitude of the potential class of plaintiffs because "all of us are exposed to carcinogens every day" and, therefore, "[a]ll of us are potential fear of cancer plaintiffs."

The "more likely than not" standard from Potter was subsequently applied in a "fear of AIDS" case by the California Court of Appeals in Kerins v. Hartley. In Kerins, the plaintiff brought a cause of action for NIED after learning that her physician, who had performed an invasive surgical operation on her, was HIV-infected. Following the direction given by the California Supreme Court in Potter, the Kerins court held that:

"[I]n the absence of physical injury or illness, damages for fear of AIDS may be recovered only if the plaintiff is exposed to HIV or AIDS as a result of the defendant's negligent breach of a duty owed to the plaintiff, and the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not he or she will become HIV seropositive and develop AIDS due to the exposure."
The Kerins Court concluded that the plaintiff’s likelihood of developing AIDS was a "most speculative possibility" and, therefore, any fear of developing AIDS in the future was, as a matter of law, unreasonable. In support of its decision, the Kerins court echoed the same policy concerns expressed in the Potter decision—namely, effects on the cost and availability of malpractice insurance, excessive litigation, and the adequacy of compensation for those who actually develop AIDS as a result of negligent conduct.

Without much elaboration, the Madrid court distinguished its reasoning from that in Potter, noting that while it is true that each of us are exposed to carcinogens every day, not all of us are exposed to HIV everyday. And while there exists much less medical certainty when and if one will develop cancer after exposure to a carcinogen, HIV infection—and, therefore, one’s propensity to develop AIDS—can be ruled out within six months of the initial exposure incident. Therefore, unlike the indefinite period of time involved in toxic exposure cases, the time period during which emotional distress may arise after a possible HIV exposure incident is confined to six months. By implication then, concerns over the magnitude of the class of potential plaintiffs and the resultant flood of litigation are not the same in the “fear of AIDS” context as they are in the “fear of cancer” context.

The Madrid court also distinguished its opinion from the Kerins decision. The court noted that under its rule, it too would have dismissed the plaintiff’s claim in Kerins because in that case, unlike Madrid, no medically sound channel of transmission was present. In Kerins, the absence of HIV exposure through a medically sound channel of transmission, in part, made the
plaintiff's fears unreasonable under the “more likely than not” standard. On the contrary, for the Madrid court, one’s fear of developing AIDS after an exposure incident involving contact with blood and unhealed wounds was not irrational. Therefore, the Madrid court adjudged the policy concerns expressed in Potter, and subsequently adopted in Kerins, as less compelling in the fear of AIDS context, especially when a medically sound channel of transmission exists.

As a result, the court found it unnecessary to employ the “actual exposure” test as a limiting device because it agreed with the argument that “with the channel of transmission test . . . there is little likelihood of disaster in the recognition of a cause of action for genuine cases of emotional distress.”

The primary policy objective advanced by the court’s ruling was the deterrence of unreasonable conduct. The court felt that given “the deadly nature of the AIDS virus, reasonable care should be encouraged . . . in the handling of potential disease-transmitting agents such as blood.” The court reasoned that imposing potential liability upon those whose conduct may create a risk of exposure to innocent persons would encourage reasonable care and deter others from engaging in unreasonable conduct. The court concluded that to the extent this deterrence scheme reduces exposure incidents, “recognition of a cause of action for negligent infliction of emotional distress serves the laudable goal of promoting public health.” Insofar as concerns over the impact of its ruling upon the costs of malpractice insurance, availability of

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138 See id. In Kerins, the operating physician employed universal precautions and there was no evidence to suggest that he sustained any cuts during the operation. See Kerins v. Hartley, 33 Cal. Rptr. 2d 172, 174, 177 (Ct. App. 1994).
139 See Kerins, 33 Cal. Rptr. 2d at 179.
140 See Madrid, 122 N.M. at 276, 923 P.2d at 1161. The court supported its contention that such fears are reasonable by citing N.M. Stat. Ann. § 24-1-9.1(A) (Repl. Pamp. 1996) – a statute permitting the testing of persons convicted of certain criminal offenses for sexually-transmitted diseases. See Madrid, 122 N.M. at 276, 923 P.2d at 1161 n.2. The court reasoned that because the statute permits HIV testing of criminal sex offenders, the New Mexico Legislature has recognized that “under circumstances in which a channel of transmission exists” fears in those persons potentially exposed to sexually transmitted disease are “to be expected.” See id.
141 See id. at 277, 923 P.2d at 1162.
142 Id.
143 See id. (citing Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (1990)).
144 See id. (emphasis added).
145 See id.
health care services, and the financial resources of defendants, the court responded that such
trepidations amount to unsupported conjecture. To that end, the court remarked: "[b]ecause
important policy goals are furthered by recognizing a cause of action for emotional distress from
an invasive impact caused by negligence, we will not rely on unsubstantiated predictions of an
insurance crisis as grounds for defeating such a cause of action."

V. ANALYSIS & IMPLICATIONS

A. The Madrid Decision Expands the Impact Rule Beyond Traditional Bounds

1. Misapplication of a Basic Tort Maxim

The Madrid court treated their holding as nothing more than the reaffirmation of the basic
tort maxim: "[t]he tortfeasor takes his victim as he finds him." This adage, however,
originated from and has been used to illustrate the "eggshell skull" or "thin-skulled" plaintiff
doctrine. Under the eggshell skull doctrine the tortfeasor is liable for unforeseeable injuries,
but only to the extent that his negligent conduct has resulted in the aggravation of a pre-existing
condition. This fundamental principle also exists under New Mexico law. Additionally, the
rule applies equally to both emotional and physical injuries.

147 See id.
148 Id. at 278, 923 P.2d at 1163.
149 See id. at 272, 923 P.2d at 1157 (quoting Folz v. State, 110 N.M. 457, 471, 797 P.2d 246, 260 (1990)).
150 See Dulieu v. White & Sons, 2 K.B. 669, 679 (1901); see also Pierce v. Southern Pac. Transp. Co., 823 F.2d
1366, 1372 (9th Cir. 1987) ("The eggshell plaintiff rule simply means that a tortfeasor takes his victim as he finds
him."); Lancaster v. Norfolk & W. Ry., 773 F.2d 807, 822 (7th Cir. 1985) ("The tortfeasor takes his victim as he
finds him . . . that is the eggshell-skull rule."); Pierce v. General Motors Corp., 504 N.W.2d 648, 656 (Mich. 1993)
("All first-year law students are taught that a tortfeasor 'takes his victim as he finds him,' and are given the example
of 'the man with the eggshell skull.'"); Casey v. Frederickson Motor Express Corp., 387 S.E.2d 177, 179 (N.C. Ct.
App. 1990) ("The thin skull rule is the rule of law that a negligent defendant takes the plaintiff as he finds him . . .").
152 See Keeton, supra note 39, § 43, at 292; 22 Am. Jur. 2d Damages § 922 & n.67 (1989). Prior to Madrid, the only
cases that have used the phrase "the tortfeasor takes his victim as he finds him" not to illustrate the eggshell doctrine
or the aggravation of a pre-existing injury are Binns v. Fредendall, 513 N.E.2d 278, 280 (Ohio 1987), Folz, 110
N.M. at 471, 797 P.2d at 260, and Hopson v. St. Mary's Hospital, 408 A.2d 260, 264 (Conn. 1979). The latter case
involved an action for loss of consortium. See Hopson, 408 A.2d at 264.
Teague, 96 N.M. 446, 451, 631 P.2d 1314, 1319 (Ct. App. 1981). See also Thomas v. Henson, 102 N.M. 417, 423,
Application of the eggshell skull doctrine “does not create a new class of plaintiffs.” Rather, it merely prohibits a defendant from eluding liability where his negligent conduct results in otherwise unforeseeable harm that would not have occurred but for the plaintiff’s inherent susceptibility to injury. Therefore, under the eggshell skull rule a plaintiff predisposed to psychological trauma is not precluded from recovery for emotional distress resulting from a physical injury just because an individual more normally constituted would not have suffered a similar harm. Paradoxically, the Madrid court employed “eggshell skull” terminology despite an absence of facts that the plaintiff possessed any predisposition to emotional harm or that the defendant’s conduct exacerbated any underlying preexisting conditions (emotional or physical), if indeed the plaintiff had any. While the plaintiff in Madrid did have pre-existing paper cuts, no explanation or analogous precedent was offered by the court to support the contention that emotional distress represents an exacerbation or aggravation of this type of injury. In any case, when the eggshell doctrine has been employed, at least the courts have required that any injury be the natural and probable consequence of the defendant’s negligent conduct. Attention to proximate causation was lacking in the Madrid decision, however.

2. A “Physical Impact” Resulting in an “Actual Exposure” Satisfies Proximate Causation by Making the Fear of Contracting HIV Foreseeable and Reasonable

a. The “Actual Exposure” Test Provides the Causal Nexus Between Impact and Emotional Injury

696 P.2d 1010, 1016 (Ct. App. 1984) (explaining that a defendant is responsible for injuries sustained by a plaintiff in a car accident, including aggravation of the plaintiff’s pre-accident condition, limited to the extent that the plaintiff failed to mitigate damages by not using a seat belt).

153 See, e.g., Brackett v. Peters, 11 F.3d 78, 81 (7th Cir. 1993) (“[P]sychological vulnerability is on the same footing with physical.”).
155 See id.
157 See, e.g., Whatley v. Red Ball Motor Freight, Inc., 351 So. 2d 850, 852 (La. Ct. App. 1977) (“[T]he tortfeasor takes his victim as he finds him. However, a tortfeasor is liable only for the direct and proximate results of his wrongful act.”).
For the Madrid court, the plaintiff's fear of developing AIDS was the natural and probable consequence of suffering an impact with bloody fluid. Without much rumination, the Madrid court decided that because a physical impact had occurred, the traditional rule applied: "emotional injuries suffered by the victim of [a] tortious impact are recoverable." Physical contact satisfied causation, reasoned the court, because it made the emotional harm resulting from the Medical Center's negligent conduct foreseeable. In other words, conduct that results in one being splashed with bloody fluid—even if it is unknown whether the fluid even contains HIV—should make an attendant fear of possibly developing AIDS foreseeable. In this regard, the Madrid decision represents a throw back to the early "impact" cases that permitted recovery pursuant to minor contacts that had no real part in causing the complained of harm.

As noted in Payton v. Abbott Labs, "[t]hat these classes of cases exist is not a sufficient basis for allowing recovery, absent some additional element of satisfactory proof, for emotional distress which is not a reasonably foreseeable result of a defendant's merely negligent conduct." While courts have held that establishing proximate causation requires that the emotional distress be reasonably foreseeable, "[f]oreseeability is only one element of [causation]." Other considerations include "whether the relationship between cause and effect is too attenuated." Such considerations explain why the impact rule as applied by the Madrid court
has been abandoned by the great majority of jurisdictions. While on the one hand, the rule has been criticized as imposing arbitrary limitations—denying recovery for genuine emotional disturbance in the absence of physical contact—on the other hand, it has been castigated when invoked to permit recovery where the physical impact had but a tenuous causal connection to the emotional harm. Concerns over attenuated causation have resulted in a more reasoned approach. For example, some courts have held that in order to recover under the impact rule “[t]he mental injury must be the natural and direct result of the plaintiff’s physical injury.” The same principle has even been espoused by the New Mexico courts when discussing the recovery of general damages for mental pain and suffering as a consequence of physical injuries: “damages are such as naturally and necessarily flow from the wrong act.” It seems axiomatic then that some causal connection between the negligent impact and the mental injury must be demonstrated before damages can be recovered.

In the “fear of future disease” context, actual exposure to the disease causing agent itself—as opposed to contact with something that might contain a disease causing agent—has provided this necessary causal link between impact and emotional distress. In these types of

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166 See Fink, Jr., supra note 28, at 781 & n.18; Payton, 437 N.E.2d at 176 n.6 (noting that Florida, Illinois, Indiana, Kentucky, and Missouri still apply the traditional impact rule).

167 See Keeton, supra note 39, § 54, at 364.

168 See Payton, 437 N.E.2d at 180; Fink, Jr., supra note 28, at 781; see also Keeton, supra note 39, § 54, at 364 (noting the "absurdity" in certain applications of the rule).

169 See, e.g., Etienne v. Caputi, 679 N.E.2d 922, 925 (Ind. Ct. App. 1997) (citing Shuamber v. Henderson, 579 N.E.2d 452, 454 (Ind. 1991)); see also Williamson v. Bennett, 112 S.E.2d 48, 52 (N.C. 1960) ("the emotional disturbance . . . must be the natural and proximate result of the injury . . . ."); Wyatt, 290 S.E.2d at 791 ("A tortfeasor is liable to the injured party for all of the consequences which are the natural and direct result of his conduct . . . ."); Luepke, supra note 28, at 1231 ("Under the [impact] rule, the plaintiff must prove that the defendant negligently caused the plaintiff to suffer a physical impact, and that the impact directly and immediately resulted in emotional distress."). The same has been expressed in cases analyzing “fear of AIDS” claims. See, e.g., Doe v. Northwestern Univ., 682 N.E.2d 145, 151 (Ill. Ct. App. 1997) ("A plaintiff who has suffered a physical impact and injury due to a defendant’s negligence may recover for emotional distress that the injury directly causes."). The same has been expressed in cases analyzing “fear of AIDS” claims. See, e.g., Doe, supra note 28, at 145, 151 (Ill. Ct. App. 1997) ("A plaintiff who has suffered a physical impact and injury due to a defendant’s negligence may recover for emotional distress that the injury directly causes.").


171 See Dworkin, supra note 78, at 346. See also Neal v. Neal, 873 P.2d 881, 887 (Idaho Ct. App. 1993) ("[I]n the reported cases permitting a plaintiff to recover for fear of cancer from exposure to carcinogens, the fact of exposure
cases, satisfaction of the impact rule has required proof of ingestion, inhalation, or some other more direct exposure to the identifiable carcinogen, contagion, or other disease causing entity to which plaintiffs' fear they have been subjected. By contrast, under the rationale from Madrid, satisfaction of the impact rule only requires minimal contact with the possible conduit of disease transmission, rather than impact with the disease-causing agent itself. For example, the plaintiff in Madrid experienced an impact with bloody fluid (a potential conduit of disease transmission). At the time of the incident it was unknown whether the fluid was even HIV-contaminated. Yet the plaintiff's cause of action for emotional distress was not dependent upon proof that she had suffered an impact with, or actual exposure to, HIV. Impact with blood alone was sufficient. In this regard, perhaps the Madrid decision is better characterized as a "fear of blood" case rather than a "fear of AIDS" case.

Such a holding invites ignorant claims. For example, under the Madrid reasoning recovery would be permitted "for the fear of developing tuberculosis based on evidence that a person had coughed in the plaintiff's face, or for fear of cancer where the plaintiff had inhaled or ingested an unknown substance, all without any proof that a disease-causing agent was present." The basis for recovery in Madrid is even more attenuated: the bloody fluid to which

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174 See id. at 278, 923 P.2d at 1163 (holding that summary judgment was inappropriate just because actual exposure had not been demonstrated).

175 In essence, the Madrid Court allowed recovery based upon a superficial contact that played "no part in causing the real harm." See, e.g., Keeton, supra note 39, ¶ 54, at 363 & n.42.

the plaintiff was exposed might have contained HIV, which might have been transmitted through unhealed paper cuts, and which might have survived transmission, maybe resulting in seroconversion.\textsuperscript{177} This represents a "possibility, based on a potential, based on a possibility."\textsuperscript{178}

To avoid such scenarios, the overwhelming majority of jurisdictions have required proof of actual exposure to HIV.\textsuperscript{179} The two-pronged "actual exposure" test requires proof of both a scientifically accepted channel of transmission and that the alleged conduit of transmission actually contained HIV.\textsuperscript{180} Courts adopting the actual exposure test have pointed out that "[t]o recognize a cause of action ... when the presence of HIV is not shown ... is clearly unsound ... [f]ear in such situations may be genuine but it is based on speculation rather than fact."\textsuperscript{181} Much like the "fear of future disease" precedent that spawned the actual exposure rule,\textsuperscript{182} cases analyzing fear of AIDS claims also recognized that "[p]ermitting recovery of damages in tort for fear of disease based solely upon an unproven supposition that exposure to a disease-causing agent could have occurred, absent any facts showing that exposure did in fact occur, would run afoul of the most basic tenets of tort law."\textsuperscript{183} Put another way, fear of disease stemming only after exposure to a disease-causing agent may present compensable damages, injuries stemming from fear of the initial exposure [incident] do not.

\textsuperscript{177} See, e.g., Neal, 873 P.2d at 889 (presenting an analogous factual scenario).
\textsuperscript{180} See Brown, 648 N.Y.S.2d at 886. However, some courts applying the actual exposure test have not required direct proof that HIV was present in the conduit of transmission. See, e.g., Brown, 648 N.Y.S.2d at 888. In those instances where the alleged conduit of transmission is unavailable for HIV-testing, other evidence may be introduced to demonstrate that HIV was present during the exposure incident. See id. See also Zakarin, supra note 45, at 282 ("[I]f the source of the possible contamination is unknown, then a fear of contracting AIDS will be considered genuine.").
\textsuperscript{181} See Majca, 682 N.E.2d at 256 (quoting Vallery v. Southern Baptist Hosp., 630 So. 2d 861, 867 (La. Ct. App. 1993)). See also Johnson v. West Virginia Univ. Hosp., 413 S.E.2d 889, 893 (W. Va. 1991) ("[B]efore a recovery for emotional distress damages may be made due to a fear of contracting a disease, such as AIDS, there must first be exposure to the disease. If there is not exposure, then emotional distress damages will be denied.").
\textsuperscript{182} See, supra notes 89-90 and accompanying text.
\textsuperscript{183} Lauren J. Camillo, Comment Adding Fuel to the Fire: Realistic Fears or Unrealistic Damages in AIDS Phobia Suits, 35 S. Tex. L. Rev. 331, 342 (1994). "There is insufficient authority in most jurisdictions to support the notion
from "the possibility of exposure is not a loss or detriment sufficient to create a legally compensable injury." 184

But for the Madrid court, the fear of possibly contracting HIV under the particular circumstances was a foreseeable one because the contact between bloody fluids and unhealed paper cuts provided a medically sound channel of transmission. 185 Having the channel of transmission requirement, surmised the court, made the second prong of the actual exposure test—proof that HIV is present—a redundant limiting device. 186 Apparently, the existence of a viable mode of transmission was enough to "create a presumption of exposure." 187 However, if the conduit of transmission does not contain HIV, the possibility of contracting HIV is probably "zero." 188

Nonetheless, even if the presence of HIV were to be presumed, it is debatable whether unhealed paper cuts suffice as a medically sound channel of transmission. For example, while HIV may be transmitted through contact between HIV-infected blood and non-intact skin, ninety-nine percent of all reported AIDS cases result from HIV transmission via sexual intercourse, intravenous drug abuse, or perinatal transmission. 189 Furthermore, the statistical probability of contracting HIV from a single needle stick injury—inarguably a more invasive impact than that suffered by the plaintiff in Madrid—assuming the needle was contaminated, is approximately 0.3 to 0.5 percent. 190 Even HIV transmission in the health care setting is extremely rare. To date, no cases of HIV transmission from a physician to a patient have been reported, and the theoretical risk of HIV transmission from an infected health care worker to a
patient, or visa versa, during an invasive procedure is remote. Finally, even if a person is exposed to HIV-infected blood or blood-products, the transmission of HIV is not certain to occur. Such information underscores the fact that the risk of contracting HIV from minor contacts is practically a statistical nullity. As noted by the Court in Doe v. Northwestern University: “[E]ven a foreseeable fear of deadly disease may not be compensable if the feared contingency is too unlikely.”

b. The “Actual Exposure” Test Assures That Fears Are Reasonable

In addition to making emotional distress foreseeable, the actual exposure test also satisfies causation by ensuring that one’s fear is reasonable. Given the statistical improbability of contracting HIV from incidental contacts, the absence of proof of exposure to HIV during the alleged transmission incident makes the fear of developing AIDS unreasonable. Undoubtedly, there are instances where individuals fearing a possible exposure to HIV develop symptomology reflecting the genuineness of their emotional distress. But it is not a question of whether the fear is genuine, rather it is a matter of whether the fear is reasonable. The reasonableness standard requires that a plaintiff who fears developing AIDS possess “that level of knowledge of the disease that is then-current, accurate, and generally available to the public.” This rule places an affirmative duty on individuals seeking recovery for fear of AIDS to take some

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191 See Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261, 1263 (4th Cir. 1995); K.A.C., 527 N.W.2d at 559 n.8; Gittler & Rennert, supra note 30, at 1317. But see Robert C. Gombar, AIDS in the Workplace: Selected Legal Issues, 350 PLI/Lit 103, 154-55 (discussing studies that documented the transmission of HIV from patients to healthcare workers).
192 See K.A.C., 527 N.W.2d at 559 n.8.
193 682 N.E.2d 145, 151 (Ill. Ct. App. 1997). See also Russaw, 472 S.E.2d at 512 (noting that damages can not be based on "imagined possibilities.")
195 See Brown, 648 N.Y.S.2d at 887. Of course, a positive HIV test would be prima facie proof of reasonable fear. See id. at 886.
197 See id.
responsibility in educating themselves about the acceptable modes of HIV transmission and the realistic risks of developing AIDS. This "self-education" requirement has not been viewed as unfair or unduly harsh given the widespread public information campaigns that have made such information readily accessible, if not unavoidable. Absent the requirement, recovery for fear of AIDS would reward ignorant beliefs about HIV transmission and the likelihood of developing AIDS. The inference being that reasonable persons would not fear developing AIDS unless there was proof of actual exposure to HIV. Several courts have found, therefore, that absent proof of actual exposure to HIV, any fear of developing AIDS is, as a matter of law, unreasonable.

In Madrid, however, the court considered one's fear of AIDS resulting from contact between bloody fluid and unhealed paper cuts reasonable, regardless of proof of actual HIV exposure. Ironically, in support of its position, the court referenced part of the New Mexico "Public Health Act," which permits victims of sexual assaults to request that their convicted assailants be tested for the presence of sexually transmitted diseases, including HIV. The court deemed the statute a recognition by the legislature that fears are to be expected in those persons potentially exposed to HIV under circumstances in which a medically sound channel of transmission exists. To the contrary, unlike Madrid, the statute enacted by the New Mexico

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199 See id. at 22 (citing Shahvari, supra note 34, at 794). It has been suggested that such a rule "effectively requires plaintiffs to mitigate their fears by learning what they can about the likelihood that they have contracted" HIV. See Majca v. Beekil, 682 N.E.2d 253, 256 (Ill. App. Ct. 1997).
200 See Williamson, 696 A.2d at 22.
201 See Majca, 682 N.E.2d at 255; Doc v. Northwestern Univ., 682 N.E.2d 145, 151 (Ill. Ct. App. 1997). But see Williamson, 696 A.2d at 20 (discussing how the objective reasonableness standard does not effectively counteract ignorance because it does not directly address the availability of accurate information about HIV and AIDS).
206 See id.
Legislature does not “presume” exposure. Instead, it permits testing of convicted assailants to determine whether they are, in fact, HIV-infected, thus providing for a reliable assessment of the threat of actual exposure posed to victims. Under the Madrid decision, recovery for fear of AIDS would be permitted where a sexual assault involves criminal penetration because the act would involve both a physical impact and a medically sound method of transmission. Therefore, the court’s use of the statute to illustrate that actual exposure is unnecessary to demonstrate the reasonableness of one’s fear is paradoxical.

Finally, the court concluded that one’s fear of developing AIDS absent proof of actual exposure to HIV was reasonable because of “the existing circumstances and the realities of the time” taking into consideration “reasonable reactions of real people.” Apparently, it is not unreasonable to fear contracting HIV from blood or medical waste, even absent proof of the presence of HIV, particularly in “light of common knowledge.” Unfortunately, this attitude serves to proliferate social stigmas and irrational phobias rather than justify legitimate claims. Public misconceptions regarding the transmission of HIV and the cause of AIDS should not be permitted to serve as a substitute for objective proof.

B. Policy Considerations Favor Adopting a Rule That Minimizes Social Stigmas and Public Phobias

Anxiety arising from the possibility of contracting HIV and developing AIDS generally reflects public misperceptions, misinformation, and ignorance about the disease. Furthermore, ignorance about HIV and AIDS promotes hysteria and irrational fears, as well as prejudice, stigmatization and discrimination against those infected with HIV. For example, most people still believe that HIV can be transmitted through casual contact, that AIDS remains primarily a

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207 See id. at 274, 823 P.2d at 1159 ("[T]he conduct is such to create a presumption of exposure . . . .") (quoting Williamson v. Waldman, 677 A.2d 1179, 1181 (N.J. Super. Ct. App. Div. 1996)).
209 See Madrid 122 N.M. at 274, 923 P.2d at 1159 (quoting Williamson, 677 A.2d at 1181).
210 See id. (quoting Williamson, 677 A.2d at 1181).
211 See Chadwick, supra note 63, at 159.
"gay disease," and that AIDS, not heart disease or cancer, represents the number one health
problem in the nation. Not surprisingly then, public misconceptions and social stigmas
associated with AIDS have resulted in unsubstantiated fears arising from benign incidents
resulting in an influx of fear of AIDS claims. Generalized ignorance and social stigmas
surrounding AIDS implicate serious public policy concerns that compel adoption of the actual
exposure rule because "[b]y permitting plaintiffs to recover for mental anxiety over fear of AIDS
in the absence of actual exposure, we risk fueling misperceptions about AIDS and how it is
transmitted." Public policy reasons in support of requiring proof of actual exposure were
perhaps best expressed by the Delaware Supreme Court in Brzoska v. Olson:

AIDS is a disease that spawns widespread public misconception based upon the dearth of knowledge concerning HIV transmission. Indeed, plaintiffs rely upon the degree of public misconception about AIDS to support their claim that their fear was reasonable. To accept this argument is to contribute to the phobia. Were we to recognize a claim for the fear of contracting AIDS based upon a mere allegation that one may have been exposed to HIV, totally unsupported by any medical evidence or factual proof, we would open a Pandora’s Box of “AIDS-phobia” claims by individuals whose ignorance, unreasonable suspicion or general paranoia cause them apprehension over the slightest of contact with HIV-infected individuals or objects. Such plaintiffs would recover for their fear of AIDS, no matter how irrational... the better approach is to assess the reasonableness of a plaintiff’s fear of AIDS according to the plaintiff’s actual—not potential—exposure to HIV.

The Madrid court failed to devote even a single sentence to any of these policy concerns.

Instead, the court declared that its decision would serve as an incentive to decrease the number of
negligent exposure incidents, thereby serving the “laudable goal of promoting public health.”

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215 See Fink, Jr., supra note 28, at 803 (emphasis in original).
216 668 A.2d 1355, 1363 (Del. 1995).
More realistically, the Madrid decision will serve the opprobrious goal of rewarding ignorance and promoting public misconceptions about HIV and AIDS.

VI. CONCLUSION

In Madrid, the New Mexico Supreme Court recognized for the first time a cause of action for negligent infliction of emotional distress for fear of developing AIDS arising from possible exposure to HIV. The decision formally recognizes a cause of action for negligent infliction of emotional distress outside the bystander-liability context. The Madrid court adopted the traditional impact rule, permitting recovery for emotional injuries resulting from a tortious impact, provided a medically sound channel of transmission exists. In doing so, the court rejected the “actual exposure” limiting device adopted by the majority of jurisdictions. The decision will do little to deter unreasonable conduct, but will go a long way in reinforcing social stigmas and public phobias about HIV and AIDS.

ERIC J. KNAPP