Pace Law Review

Volume 15
Issue 2 *Winter 1995*

Article 6

January 1995

Marchica v. Long Island Railroad: "AIDS-Phobia" Recovery under the Federal Employers' Liability Act

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Note

Marchica v. Long Island Railroad: "AIDS-Phobia" Recovery Under the Federal Employers' Liability Act

I. Introduction

The pandemic spread of Acquired Immune Deficiency Syndrome ("AIDS")[1] throughout the United States, and society's growing concern for its deadly consequences,[2] have contributed to a diverse amount of AIDS-related litigation finding its way into the courts today.[3] In the case of *Marchica v. Long Island*

1. AIDS is a fatal disease that destroys the body's natural immunity defense system, thus rendering it incapable of fighting off certain life-threatening infections and malignancies. *See* ABA AIDS COORDINATING COMMITTEE, AIDS THE LEGAL ISSUES: DISCUSSION DRAFT OF THE AMERICAN BAR ASSOCIATION AIDS COORDINATING COMMITTEE 8 (1988). The retrovirus which causes AIDS, commonly known as the Human Immunodeficiency Virus ("HIV"), can be acquired through infected blood, semen, vaginal fluids, or perinatally through the womb of an infected mother. *Id.* at 10-11. The recipient of the HIV virus, however, does not develop the AIDS disease immediately upon infection. *See* Mathilde Krim, *Preface to the Second Edition* of LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., AIDS LEGAL GUIDE at p-1 (Abbey R. Rubenfeld ed., 2d ed. 1987). Instead, the virus may lie dormant for some time, or else enter a latent incubation period in which the immune system gradually breaks down over the course of several years. *Id.* Technically, the AIDS disease develops only after one or more of several opportunistic "indicator" diseases manifests itself in the body. *Id.*

2. *See* Marsha F. Goldsmith, *Physicians at AMA Amsterdam News Seminar Offer Panoramic View of their Varied Roles in Pandemic (AIDS Pandemic)*, 268 JAMA 1237, 1245 (1992). Current statistics estimate that approximately one million individuals in the United States alone are infected with the HIV virus. *Id.* at 1245. Since HIV is most commonly transmitted through intimate sexual contact and injectional drug use, two activities involving very strong "human drives," the disease has been virtually impossible to stop. *Id.* at 1246.

3. *See* 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, 187-88 & nn.5-7 (1988) (recognizing the various causes of action and theories of liability that AIDS-related litigation may encompass).

Railroad,[4] a federal district court had to determine for the first time whether a railroad-employer could be liable under the Federal Employers' Liability Act ("FELA")[5] for the negligent infliction of emotional distress upon an employee who had suffered from the fear of contracting AIDS (also referred to as "AIDS-phobia").[6] The employee developed AIDS-phobia after pricking himself with a discarded hypodermic needle that he accidentally picked up while working in an area of a railroad station frequented by drug addicts, prostitutes, and homeless people.[7] He alleged that the railroad was negligent in failing to maintain his workplace in a reasonably safe condition, and that this negligence was the cause of his resulting physical and psychological injuries.[8] Because this was a case of first impression for the federal courts, the Eastern District of New York was unable to seek direct guidance from any of the circuits. However, after analyzing the liberal standards intended to govern FELA negligence actions,[9] and after examining recent state law developments in the area of AIDS-phobia recovery,[10] the court sustained this cause of action and denied the employer's motion for summary judgment.[11] It concluded that "FELA [did] encompass a cause of action for fear of contracting the AIDS virus where the basis of the claim [was] a documented physical injury sustained by the plaintiff," despite the absence of actual exposure to the Human Immunodeficiency Virus ("HIV").[12] The case then proceeded to trial where a jury found the railroad company

4. 810 F. Supp. 445 (E.D.N.Y. 1993), *aff'd*, 31 F.3d 1197 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 727 (1995).

5. 45 U.S.C. § 51 (1988 & Supp. V 1993).

6. *Marchica*, 810 F. Supp. at 446.

7. *Id.* at 446.

8. *Id.* at 447.

9. *Id.* at 449-51.

10. *Id.* at 451-53.

11. *Id.* at 453.

12. *Id.* at 449, 453. HIV is the causative virus that produces the AIDS disease. *See* Krim, *supra* note 1, at p-1. It can be transmitted through bodily fluids during intimate sexual activity, through contaminated hypodermic needles during injectional drug use, from mother to infant during pregnancy and through infected blood transfusions. *Id.* The HIV virus impairs a person's natural defense system by specifically attacking the body's supply of disease-fighting, T-lymphocyte white blood cells. *See* ABA AIDS COORDINATING COMMITTEE, *supra* note 1, at 10. Once enough of these T-lymphocyte cells are destroyed, the body becomes "immunoincompetent" and can no longer fight off the opportunistic infections and cancers that develop into full-blown AIDS. *Id.* at 10, 12.

partially liable and awarded the plaintiff compensation for his past pain and emotional distress, as well as for his future damages.[13]

On appeal, the Second Circuit affirmed the district court's judgment and determined that recovery for the emotional distress injuries fell within the permissive scope of FELA.[14] In doing so, it ruled that "a FELA plaintiff who has suffered a physical impact may recover for a fear of developing AIDS if the impact caused by the defendant's negligence occurred under circumstances that would cause a reasonable person to develop a fear of AIDS."[15] Even though the plaintiff could not prove actual exposure to the HIV virus, the Second Circuit agreed that the circumstances surrounding the plaintiff's needle-prick injury rendered his AIDS-phobia claim cognizable under FELA.[16]

In this Note, Part II.A and II.B examine the general provisions and scope of FELA in order to demonstrate that claims for negligent infliction of emotional distress, based upon the fear of contracting a serious disease, are cognizable under the statute. Part II.C.1 then focuses on the discrepancy which existed within the federal circuits at the time this case went to trial concerning the appropriate requirements needed to sustain a FELA claim for negligent infliction of emotional distress. However, in light of the Supreme Court's recent ruling in *Consolidated Rail Corp. v. Gottshall*,[17] a case that was decided pending the railroad's appeal, this issue was resolved by the time *Marchica* reached the Second Circuit.[18] Part II.C.2 discusses the Supreme Court's decision in *Gottshall*, and its newly-articulated standard for emotional distress recovery under the statute.

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13. Marchica v. Long Island R.R., 31 F.3d 1197, 1201 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 727 (1995). The jury initially awarded the plaintiff $225,000 for his "past pain, suffering and emotional distress" and an additional $55,000 for his "future damages." *Id.* However, since the railroad was found to be only 45 percent culpable, the judgment against it was reduced to $126,000. *Id.*

14. *Id.* at 1200.

15. *Id.* at 1206.

16. *Id.*

17. 114 S. Ct. 2396 (1994).

18. *Marchica*, 31 F.3d at 1203 (deferring to the common law standard set forth in *Gottshall*).

Part II.D then examines non-FELA, common law developments in the AIDS-phobia arena. This section will investigate how the issue of AIDS-phobia has been addressed in various state courts, and it will also highlight two conflicting standards for recovery that have been adopted in different jurisdictions. Next, Part III will detail the facts of *Marchica* and discuss the Second Circuit's affirmance of the lower court's judgment. Part IV will then analyze the issue of FELA recovery for AIDS-phobia in order to show that the circuit decision was correct, and that certain emotional distress injury may be compensable under FELA in similar situations. This section supports the Second Circuit's finding that proof of actual exposure to the HIV virus is not a mandatory requirement for AIDS-phobia recovery in a needle-prick situation, despite several non-FELA cases that have been decided otherwise.[19]

Finally, in light of the massive AIDS awareness campaign being waged in the media today, Part V concludes that a physically traumatic injury such as a needle prick may be enough to support a valid AIDS-phobia claim, in both FELA and non-FELA situations alike, for injuries that develop within a reasonable time period.

II. Background

A. *The Federal Employers' Liability Act*

Employers have always had a duty at common law to use reasonable care in providing their employees with a safe working environment.[20] Congress eventually recognized the importance of this duty as it applied to the railroad industry, and it codified the specific provisions of FELA.[21] The first section of FELA states that:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole

19. *See* discussion *infra* part II.D.1.

20. *See* Bailey v. Central Vt. Ry., 319 U.S. 350, 352-53 (1943) (referring to the well-established duty that exists in the master-servant relationship); *see also* 3 LABATT, COMMENTARIES ON THE LAW OF MASTER & SERVANT § 917 (2d ed. 1913).

21. 45 U.S.C. §§ 51-60 (1988).

> or in part from the negligence of any of the officers, agents, or employees of such carrier . . . .[22]

This provision contains four requirements that a plaintiff must satisfy before he can recover under the statute.[23] First, there must be some type of injury suffered by the plaintiff.[24] Second, the plaintiff's work must have been related to interstate commercial transport.[25] Third, there must be proof of the employer's negligence.[26] Finally, the employer's negligence "must have played a role in the injury."[27] This Note focuses on the first "injury" requirement in order to decide whether the plaintiff's emotional distress was actionable under FELA.

B. *Scope of FELA*

When FELA was enacted in 1906, Congress's main objective was "to provide a federal remedy for railroad workers who suffer[ed] personal injuries as a result of the negligence of their employer or their fellow employees."[28] Congress acknowledged that railroad workers had special needs because they were regularly exposed to great risks in the workplace, and often were unable to provide for their own safety.[29] Thus, the statute was designed to facilitate recovery for meritorious claims, and to eliminate some of the traditional tort defenses that have been available to employers.[30] Essentially, Congress realized that

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22. *Id.* § 51.

23. *See* Halko v. New Jersey Transit Rail Operations, 677 F. Supp. 135, 139 (S.D.N.Y. 1987).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 561 (1987).

29. Sinkler v. Missouri Pac. R.R., 356 U.S. 326, 329 (1958) (citing Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943)).

30. *See* Gottshall v. Consolidated Rail Corp., 988 F.2d 355, 366-67 (3d Cir. 1993) (describing various deficiencies in the common law tort principles which FELA corrected by eliminating traditional impediments to recovery). For example, under §§ 53 and 54, FELA respectively limits a railroad's use of contributory negligence and assumption of risk as defenses. *Id.* at 367. Also, § 60 prohibits an employer from firing an otherwise "at-will" employee for merely offering information about a FELA controversy, or pursuing his own FELA claim. *Id.* Furthermore, § 55 prevents carriers covered by this statute from contracting away their FELA liability or limiting it pursuant to any regulation. *Id.* Any such agreement will be treated as void by the courts.

railroad workers often lacked the resources and economic bargaining power needed to protect their interests, and therefore determined that the cost on "human overhead" should be artificially shifted to the railroads who could better bear this burden.[31]

FELA is not, however, a workmen's compensation statute.[32] Evidence of the employer's negligence is still a prerequisite for recovery, just as in any other negligence action.[33] Nevertheless, the federal courts have consistently interpreted the statute in a broad manner by departing from common law negligence rules and applying very liberal constructions.[34] Moreover, the language of the statute is purposefully expansive.[35] The statute does not attempt to define negligence, but instead leaves that up to the courts.[36] Also, there are no restrictions on the types of railroad employees that are covered, the causes of injury that are actionable (except that they must involve the employer's negligent conduct), or the particular types of injuries that are compensable.[37]

When Congress originally enacted the statute, its primary focus was upon " 'injuries and death resulting from accidents on interstate railroads . . . [since] . . . these were the major causes of injury and death resulting from railroad operations.' "[38] However, neither the language of the statute, nor legislative history

31. *See* Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) (stating that FELA "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."); Tiller v. Atlantic Coast Line Ry. Co., 318 U.S. 54, 58 (1943).

32. Ellis v. Union Pac. Ry., 329 U.S. 649, 653 (1947).

33. *Id. Accord*, Wilkerson v. McCarthy, 336 U.S. 53, 61 (1949).

34. *See, e.g.*, Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506-07 (1957) (rejecting the stricter common law causation requirements, and instead ruling that "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury" is the standard to determine if a FELA action proceeds to a jury); Chicago, R.I. & P.R.R. v. Melcher, 333 F.2d 996, 999 (8th Cir. 1964) (determining that "under [FELA], the right of the jury to pass upon the question of fault and causality must be most liberally viewed."); Lancaster v. Norfolk & W.R.R., 773 F.2d 807, 812-13 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987) (applying FELA to cover an intentional tort situation, even though it is technically a negligence statute).

35. Urie v. Thompson, 337 U.S. 163, 181 (1949).

36. Yawn v. Southern Ry., 591 F.2d 312, 315 (5th Cir.), *cert. denied*, 442 U.S. 934 (1979).

37. *See* 45 U.S.C. § 51.

38. *Yawn*, 591 F.2d at 315 (quoting *Urie*, 337 U.S. at 181).

indicates any Congressional intent to preclude certain injuries.[39] The only express limitation is that injuries must result "'in whole or in part from the negligence' of the carrier."[40] Therefore, reading any unexpressed limitations into this statute would be contrary to "the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act . . . ."[41]

Due to FELA's broad language and remedial nature, the Supreme Court has confirmed that FELA should be interpreted and applied liberally in accordance with Congressional intent.[42] As a result, courts have sustained claims for non-traditional types of railroad injuries in addition to those that are more commonplace in the industry.[43]

With the development of the common law tort of negligent infliction of emotional distress over the years,[44] the federal courts have been faced with deciding what types of emotional distress injuries are compensable under FELA, and in what situations they may be recovered. Until very recently, there was no Supreme Court decision that provided any definitive guidance on this matter.[45] This produced an inconsistency among the circuits respecting the requirements needed to sustain an emotional distress claim under the statute.[46] In the case of

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39. *Urie*, 337 U.S. at 181.

40. *Id.* (quoting 45 U.S.C. § 51).

41. *Id.* at 181-82.

42. *See, e.g.*, Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 561-62 (1987); *Urie*, 337 U.S. at 180-82; Jamison v. Encarnacion, 281 U.S. 635, 640 (1930).

43. *See, e.g.*, Harrison v. Missouri Pac. R.R., 372 U.S. 248, 249 (1963) (recognizing a cause of action under FELA for injuries sustained from an intentional assault by another railroad employee); Lillie v. Thompson, 332 U.S. 459, 461-62 (1947) (recognizing a cause of action under FELA for injuries sustained from an intentional assault by a non-employee); Gallose v. Long Island R.R., 878 F.2d 80, 82-85 (2d Cir. 1989) (recognizing a FELA claim for "non-traditional" types of injury where a railroad employee was bitten by a dog on railroad property); Hartel v. Long Island R.R., 476 F.2d 462, 464-65 (2d Cir.), *cert. denied*, 414 U.S. 980 (1973) (recognizing a FELA action where a railroad ticket agent was shot and killed during a hold-up).

44. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 359-66 (5th ed. 1984).

45. As of June 24, 1994, federal courts now have a standard to follow. *See* Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396 (1994).

46. *See infra* part II.C.1 (discussing the conflict between the circuits over the proper standard needed to support a claim for negligent infliction of emotional distress in a FELA action).

Atchison, Topeka and Santa Fe Railway v. Buell,[47] the Supreme Court had previously declined an opportunity to articulate a uniform rule. The employee in that case had filed a FELA action against the railroad, alleging that the railroad was negligent in providing him with a safe workplace because it condoned the conduct of other employees who harassed, threatened and intimidated him on the job.[48] The employee asserted that this negligence caused him to suffer an emotional breakdown.[49] The Ninth Circuit upheld the employee's claim and concluded that pure emotional injury was compensable under FELA.[50] Upon review, the Supreme Court refrained from taking a definitive stance on this issue, and simply stated in dicta that whether emotional injury was compensable under FELA was not subject to a "yes" or "no" answer.[51] Instead, it would be necessary to look at the circumstances of each case, such as the nature of the injury or the character of tortious activity involved, in order to make such fact-specific determinations.[52] The Court concluded that "FELA jurisprudence gleans guidance from common law developments," and that "broad pronouncements in this area may have to bow to precise application of developing legal principles to the particular facts at hand."[53] Accordingly, the federal courts were forced to look to common law developments in their respective jurisdictions for guidance on this issue.

C. *Common Law Limitations to Emotional Distress Recovery*

In most states, general non-FELA claims for emotional distress have been recognized in some form or another under common law.[54] However, courts have exercised caution in this area

47. 480 U.S. 557 (1987).

48. *Id.* at 559.

49. *Id.*

50. *Id.* at 561. The district court granted the railroad's summary judgment motion because it believed that the Railway Labor Act, and not FELA, provided the exclusive resolution for labor disputes in the railroad industry. *Id.* at 560. "[A]lthough the question had neither been raised by the parties nor addressed by the District Court . . .," the Ninth Circuit still decided to express its opinion on this issue. *Id.* at 560-61 (footnotes omitted).

51. *Id.* at 570.

52. *Id.* at 568.

53. *Id.* at 568, 570.

54. *See* KEETON ET AL., *supra* note 44, § 54, at 359-61.

so as to avoid certain undesirable results.[55] Their primary concerns have been focused on: (1) preventing legal redress for harm that is temporary and trivial; (2) avoiding an increased number of falsified claims that may be pursued by dishonest litigants; and (3) minimizing disproportionately unfair financial burdens that would be imposed upon negligent defendants for remote and tenuous consequences resulting from their alleged wrongful conduct.[56] As a result, several different standards that evolved from the common law were also adopted to some extent by the various circuits.[57] These standards all differed with respect to the degree of physical symptomology that a plaintiff had to demonstrate in order to substantiate an emotional distress claim.[58]

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55. *Id.* at 360-61.

56. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965); Payton v. Abbott Labs, 437 N.E.2d 171, 178-81 (Mass. 1982).

57. *See infra* part II.C.1.

58. *See* KEETON ET AL., *supra* note 44, § 54, at 362-65 (detailing the various common law requirements that have developed for emotional distress recovery). Professor Keeton points out that courts generally require emotional injury to be accompanied by some form of physical harm or symptomology. *Id.* Originally, a physical "impact" or "contact" injury test was the standard adopted by most courts. *Id.* at 363-64. Under this approach, recovery for emotional injury was denied unless the plaintiff could show that it arose from some type of physical impact or contact. *Id.* The theory behind this rule was that it allegedly guaranteed the genuineness of the emotional injury claim. *Id.* However, most jurisdictions have abandoned that rigid requirement today, since it fails to provide a fair and accurate guideline in many situations. *Id.* at 364. Evolving out of the physical impact test is the "zone of danger" test. *Id.* at 365. This broadens the impact test a bit by allowing recovery not only for those who sustain a physical impact, but also for those who are threatened with immediate physical harm because of their location within a "zone of danger." *See* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm - A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 488-90 (1982). The theory behind this rule is that "a near miss may be as frightening as a direct hit." *Id.* at 488. Currently, fourteen jurisdictions follow a zone of danger test. *See* Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2406 (1994). Another standard, first articulated in a 1968 California case, is the "relative bystander" test. *See* Dillon v. Legg, 441 P.2d 912, 914, 920 (Cal. 1968). This test, which is followed in almost half of the states, allows for bystanders who are outside of the zone of danger to recover for emotional distress in situations where such injury is "brought on by witnessing the injury or death of a third party (who typically must be a close relative of the bystander)." *Gottshall*, 114 S. Ct. at 2407. Still another test adopted by many jurisdictions today is the physical "manifestation" test. *See* KEETON ET AL., *supra* note 44, § 54, at 364. In order for a plaintiff to recover, this test requires the emotional distress to "manifest" itself in some physical form that qualifies as a requisite "injury, illness, or . . . consequence." *Id.* Note that many courts applying a zone of danger or relative

1. *Prior Discrepancy Within the Circuits*

The requirements needed to sustain FELA claims for emotional distress injuries varied among the circuits depending upon which common law standard they applied. For example, at least one of the circuits adhered to a strict physical "impact" or "contact" requirement.[59] In *Bullard v. Central Vermont Railway*,[60] the First Circuit upheld this standard when it reduced a plaintiff's generous jury award for emotional distress damages.[61] There, a railroad employee sought recovery for his alleged emotional distress injuries after surviving a freight train collision.[62] In addition to injuring his foot, the employee also claimed mental anguish because "his job require[d] him to pass the accident site nearly every day and . . . he expect[ed] to see the deceased members of [his] crew waiting for him as he pass[ed]."[63] Although a jury awarded the employee $35,000 in total damages, the First Circuit found this amount to be "grossly excessive" because it was above and beyond any amount properly attributable to his minor foot injury.[64] The court ultimately concluded that only mental suffering resulting from a precipitating physical injury was compensable under FELA.[65] Thus, he could recover for limited mental distress arising from the actual accident for which there was competent evidence.[66] However, he could not be compensated for "his sadness at the passing of his friends," nor his alleged mental or nervous after-effects in the absence of any "probative evidence of com-

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bystander test will also require a showing of some physical manifestation. *See Gottshall*, 114 S. Ct. at 2407 n.11. Finally, a few courts have gone one step further by completely abandoning these judicially created tests. KEETON ET AL., *supra* note 44, § 54, at 364-65. These courts look merely to the seriousness and reasonableness of the alleged emotional distress on a case-by-case basis to determine if it may be genuine. *Id.* at 365 & n.60. *See also* Terry M. Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 FORDHAM L. REV. 527, 531 (1984) (discussing the recent trends in requirements for negligent infliction of emotional distress claims in toxic tort cases).

59. *See supra* note 58 (describing and distinguishing the different tests).

60. 565 F.2d 193 (1st Cir. 1977).

61. *Id.* at 197-98.

62. *Id.* at 195-96.

63. *Id.* at 196.

64. *Id.*

65. *Id.* at 197.

66. *Id.*

pensable psychological or neurological effects enduring beyond the day of the accident."[67]

This decision was later relied upon by the First Circuit in *Moody v. Maine Central Railroad*[68] to support a district court's firm holding that "there [could] be no recovery for emotional disturbance under the FELA" unless it was the necessary or natural consequence of "some *precipitating* physical injury."[69] In that case, a railroad employee claimed that he was negligently injured by the railroad due to the long and continued psychological abuse he encountered at work.[70] He alleged that this abuse caused him to experience fatigue and depression, and to suffer angina attacks.[71] The First Circuit denied the plaintiff's recovery and agreed with the district court's finding that even if the depression, fatigue and angina attacks were enough to constitute a physical injury resulting from the plaintiff's mental disturbance, "it would be a consequence of the mental disturbance and would not constitute the requisite *precipitating* physical injury."[72] However, the circuit court did admit that its position in *Bullard* might be questionable due to the Supreme Court's subsequent decision in *Buell*.[73] It acknowledged that *Buell* "attempt[s] to leave the door to recovery for wholly emotional injury somewhat ajar but not by any means wide open."[74]

The "zone of danger" test,[75] which is an extension of the impact test, had seemingly been espoused by another circuit. In *Lancaster v. Norfolk and Western Railway*,[76] a case decided before the Supreme Court's decision in *Buell*, the Seventh Circuit adopted this requirement when affirming the plaintiff's claim for emotional distress.[77] In that case, a railroad employee

67. *Id.*

68. 620 F. Supp. 1472, 1473 (D. Me. 1985), *aff'd*, 823 F.2d 693 (1st Cir. 1987).

69. *Id.* at 1473.

70. Moody v. Maine Cent. R.R., 823 F.2d 693, 693 (1st Cir. 1987).

71. *Id.*

72. *Moody*, 620 F. Supp. at 1474.

73. *Moody*, 823 F.2d at 694.

74. *Id.*

75. *See supra* note 58. This test is usually applied in conjunction with a physical manifestation requirement.

76. 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987).

77. *Id.* at 813, 823.

developed paranoid schizophrenia[78] and alleged that his mental condition was instigated by the improper and abusive treatment he received from his supervisors.[79] Among other things, he claimed that they hit and threatened him, and touched his body in an offensive manner.[80] Although the complaint was based on an allegation of intent (rather than negligence), the court broadly pronounced that FELA would not create a cause of action for any tortious injuries which lacked physical contact or threat of physical contact.[81] Accordingly, this requirement was satisfied because of the physical nature of the supervisor's conduct.[82]

Subsequently, in *Ray v. Consolidated Rail Corp.*,[83] the Seventh Circuit reaffirmed this position.[84] There, a plaintiff alleged that the verbal threats, harassment and intimidation he received from his superior resulted in his nervous breakdown.[85] However, the plaintiff did not allege any physical contact, or threat of physical contact, from the negligent conduct.[86] Relying on its prior decision in *Lancaster*, the Seventh Circuit dismissed the emotional distress claim.[87] It also noted that the Supreme Court's decision in *Buell* did not require a different result because the issue of wholly emotional distress recovery under FELA was not directly resolved in that case.[88]

Several of the circuit and district courts, following a recent common law trend, rejected strict adherence to the physical impact rule by allowing recovery for emotional injury when it was accompanied by some manifestation of physical injury.[89] For example, in *Adkins v. Seaboard System Railroad*,[90] the Sixth

78. Paranoid schizophrenia is a type of "psychosis," or mental disorder, evidenced primarily by delusions of persecution and a morbid over-evaluation of oneself. STEDMAN'S MEDICAL DICTIONARY: FIFTH UNABRIDGED LAWYER'S EDITION 1261 (5th ed. 1982).

79. *Lancaster*, 773 F.2d at 810-11.

80. *Id.* at 811.

81. *Id.* at 813.

82. *Id.* at 815.

83. 938 F.2d 704 (7th Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992).

84. *Id.* at 705.

85. *Id.* at 704.

86. *Id.*

87. *Id.* at 705.

88. *Id.*

89. *See supra* note 58.

90. 821 F.2d 340 (6th Cir.), *cert. denied*, 484 U.S. 963 (1987).

Circuit dismissed a plaintiff's claim for emotional distress recovery because he failed to allege any resulting physical injury.[91] The plaintiff in that case, a former railroad employee, claimed that certain railroad employees "deliberately . . . conspired to have [him] terminated . . . culminating in him suffering great emotional distress and physical pain as a result of these actions."[92] Although the case involved intentional infliction of emotional distress, the court decided that claims for "pure emotional injury [were] not cognizable under FELA."[93] Therefore, recovery was denied because of the employee's failure to allege a manifestation of any specific physical injury arising out of the emotional distress.[94]

Similarly, in *Halko v. New Jersey Transit Rail Operations*,[95] the Southern District of New York noted that most jurisdictions rejected the stricter impact rule, and instead required that " 'the mental distress be certified by some physical injury, illness, or other objective physical manifestation.' "[96] The plaintiff in that case was a widow who brought a FELA action on behalf of her deceased husband. She alleged that his suicide resulted from the tormenting he received at work by supervisors, and that the railroad was negligent in hiring and supervising its managerial staff.[97] The court held that the suicide, albeit a delayed result, was definitely a sufficient physical manifestation to satisfy the requirement.[98]

Another district court opinion which analyzed and upheld a physical manifestation rule was *Amendola v. Kansas City Southern Railway*.[99] The plaintiffs in that case brought a FELA action against the railroad to recover for their fear of contracting asbestosis[100] or asbestosis-related cancers.[101] The court agreed that FELA could potentially support claims for negligent

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91. *Id.* at 342.
92. *Id.* at 341.
93. *Id.* at 342.
94. *Id.*
95. 677 F. Supp. 135 (S.D.N.Y. 1987).
96. *Id.* at 139 (quoting KEETON ET AL., *supra* note 44, § 54, at 360-61).
97. *Id.*
98. *Id.*
99. 699 F. Supp. 1401 (W.D. Mo. 1988).
100. Asbestosis is the inflammation and fibrosis of the lungs caused by the inhalation of tiny asbestos particles. *See* STEDMAN'S MEDICAL DICTIONARY: FIFTH UNABRIDGED LAWYER'S EDITION 128 (5th ed. 1982). Asbestos, a fibrous compound

infliction of emotional distress in the form of cancer-phobia.[102] However, the plaintiffs' particular cause of action failed because the complaint did not allege any physical harm caused either by the fear of contracting the disease, or by the asbestos itself.[103] The court applied what it considered to be the moderate and fair rule established by the Massachusetts court in *Payton v. Abbott Labs*.[104] That rule required a plaintiff to show some type of physical harm that either caused the emotional distress, or alternatively, was caused by the emotional distress, before recovery would be permitted.[105] The court in *Amendola* reasoned that such a test provided an equitable safeguard against false claims and frivolous suits, while still allowing recovery for cases involving valid emotional injuries.[106] Although the court recognized that some meritorious claims might be precluded under this standard, it agreed with *Payton's* unwillingness to "impose upon the judicial system and potential defendants the burden of dealing with [emotional distress] claims . . . that are trivial, evanescent, temporary, feigned, or imagined" for the sake of those few exceptions.[107]

The Western District of New York also upheld a physical manifestation requirement in *Reese v. CSX Transportation*.[108] There, an inexperienced employee was transferred to a stressful job assignment as a track switchman in charge of overseeing numerous sets of railroad tracks.[109] After approximately one week in this new position, the employee experienced anxieties and depression stemming from his fear of causing a fatal acci-

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composed of calcium and magnesium silicates, is commonly used in insulation and fireproofing materials. *Id.*

101. *Amendola*, 699 F. Supp. at 1402-03. Two such asbestos-related cancers are "pleural mesothelioma" (a malignant tissue growth that forms in the membranous lining of the lungs) and "bronchial carcinoma" (a malignant tissue growth that forms in the bronchial tubes). *See* STEDMAN'S MEDICAL DICTIONARY: FIFTH UNABRIDGED LAWYER'S EDITION 196, 223, 861, 1100 (5th ed. 1982).

102. *Amendola*, 699 F. Supp. at 1408.

103. *Id.* at 1411.

104. 437 N.E.2d 171, 181 (Mass. 1982) (requiring a showing of some physical harm that either "precipitated" the emotional distress, or else "arose out of" the emotional distress).

105. *Id.* at 181.

106. *Amendola*, 699 F. Supp. at 1410-11.

107. *Id.* at 1410 (quoting *Payton*, 437 N.E.2d at 180).

108. No. 90-CV-344E, 1992 WL 119163 (W.D.N.Y. May 22, 1992).

109. *Id.* at *1-*2.

dent due to improper training.[110] He subsequently had a stroke that resulted directly from this emotional injury and anxiety.[111] The court rejected the railroad's motion to dismiss the employee's claim for his failure to satisfy the physical contact standard.[112] Instead, it followed the *Halko* decision, and only required a showing of some physical manifestation due to the emotional injury.[113] In doing so, the court reasoned that the stroke was a sufficient physical injury to sustain the cause of action.[114]

Finally, three circuits concluded, or at least acknowledged, that claims for pure emotional injury under FELA were compensable even without satisfying any common law physical symptomology test. In *Taylor v. Burlington Northern Railroad*,[115] the Ninth Circuit reaffirmed its position in *Buell*, and stated that the law of the circuit allowed railroad employees to assert claims under FELA for wholly emotional injury.[116] The plaintiff in *Taylor* sought to recover damages for his paranoid schizophrenia, which allegedly resulted from managerial harassment on the job.[117] Although the complaint was ambiguous as to any allegations of physical contact or physical manifestations, the court sustained his claim.[118] It reasoned that its own decision in *Buell* was binding, despite the Seventh Circuit's contrary position in *Lancaster*.[119]

Cases involving FELA's companion statute, the Jones Act,[120] have also provided some relevant insight into this area.

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110. *Id.* at *2.

111. *Id.*

112. *Id.* at *1, *3.

113. *Id.* at *3.

114. *Id.* However, the court did not address the issue of whether "wholly emotional injury," without more, was cognizable under FELA. *Id.* at *4 n.6.

115. 787 F.2d 1309 (9th Cir. 1986).

116. *Id.* at 1313.

117. *Id.* at 1312.

118. *Id.* at 1313.

119. *Id.* *See supra* notes 76-82 and accompanying text.

120. 46 U.S.C. app. § 688(a) (1988). The Jones Act, which governs employers' negligence in maritime cases, incorporates FELA by reference, and extends the same liberal remedies and liability standards to seamen as FELA does to railroad workers. *See* Marriott v. Sedco Forex Int'l Resources, Ltd., 827 F. Supp. 59, 72 (D. Mass. 1993). The negligence concepts are essentially identical under both statutes. *Id.* at 73. Thus, courts are able to look to both Jones Act and FELA cases for

In *Hagerty v. L.& L. Marine Services*,[121] the Fifth Circuit sustained a cause of action for the fear of contracting cancer.[122] The plaintiff, a Jones Act seaman, was accidentally doused with a carcinogenic chemical while working.[123] Despite his satisfaction of both the physical impact and manifestation requirements, the court criticized such tests as being unrealistic standards for recovery.[124] Although each is supposed to "provide courts with an objective means of ensuring that the alleged mental injury is not feigned,"[125] it reasoned that these arbitrary tests did not prove any more reliable in the fact-finder's determination process.[126] Instead, the Fifth Circuit adopted a reasonableness standard that did not demand a physical symptomology prerequisite.[127] Accordingly, the court placed emphasis on the plaintiff's prior knowledge that dripolene was a carcinogen.[128] Because he realized that benzene had been absorbed into his body as a result of the drenching, and because his doctor advised him to undergo periodic testing for cancer, the particular facts presented "sufficient indicia of genuineness" to allow his cancer-phobia claim to proceed to the jury.[129]

The Eastern District of Pennsylvania also acknowledged the possibility of recovering for pure emotional injuries under FELA in *Carroll v. Consolidated Rail*.[130] In that case, an assistant railroad dispatcher alleged that the depression, paranoia, anxiety, and functional impairments he suffered were a direct

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guidance when examining negligent infliction of emotional distress issues in either setting. *Id.*

121. 788 F.2d 315 (5th Cir. 1986).

122. *Id.* at 317, 319.

123. *Id.* at 317. The chemical involved in this accident was "dripolene," a compound containing benzene. *Id.* Benzene is a toxic substance which the Occupational Safety and Health Administration has listed as a potential cancer-causing agent. 2 MCGRAW-HILL ENCYCLOPEDIA OF SCIENCE & TECHNOLOGY 467 (6th ed. 1987).

124. *Hagerty*, 788 F.2d at 318.

125. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 330-33 (4th ed. 1971)).

126. *Id.*

127. *Id.*

128. *Id.* at 318-19.

129. *Id.* at 319.

130. No. Civ.A.89-4650, 1991 WL 32859 (E.D. Pa. Mar. 6, 1991), *aff'd*, 941 F.2d 1200 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 916 (1992).

result of his chaotic and stressful working environment.[131] Eventually, the employee was forced to quit work because of his "emotionally impoverished state," and claimed that his injuries were caused by the railroad's unsafe and inadequate working conditions.[132] The court, however, dismissed the plaintiff's claim because his alleged injuries arose merely out of the ordinary stress inherent in office management, rather than from any excessive dangers in the workplace.[133] In reaching its decision, the court adopted the Third Circuit's approach as set forth in *Holliday v. Consolidated Rail*.[134] The Third Circuit in *Holliday* also rejected an employee's claim for stress-related injuries caused by unpleasant working conditions, but stated in dicta that "[w]e are not holding that there can never be a recovery under the FELA for emotional conditions unless the employee suffers an immediate physical injury . . . or unless there is at least an accident of some kind . . . ."[135] Thus, the Third Circuit acknowledged the potential for emotional distress recovery without any physical symptomology requirements by concluding that such determinations should be made on a fact-specific basis, rather than by applying any bright-line rules.[136]

Three years later, this very same liberal reasoning was used by the Third Circuit in *Gottshall v. Consolidated Rail*[137] to completely reject all of the common law limitations placed on FELA emotional distress recovery.[138] Consequently, this decision forced the Supreme Court to take a closer look at the issue and articulate a uniform federal standard.

2. *The New FELA Standard*

In *Consolidated Rail Corp. v. Gottshall*,[139] decided just one month before the Second Circuit's review of *Marchica*, the

131. *Id.* at *1-*3.
132. *Id.* at *1, *3.
133. *Id.* at *3.
134. 914 F.2d 421, 424 (3d Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991).
135. *Id.* at 426-27.
136. *Id.* at 427.
137. 988 F.2d 355 (3d Cir. 1993), *rev'd*, 114 S. Ct. 2396 (1994).
138. *Id.* at 370-71.
139. 114 S. Ct. 2396 (1994). The Supreme Court actually consolidated and reviewed two separate Third Circuit decisions on this FELA issue: Gottshall v. Consolidated Rail Corp., 988 F.2d 355 (3d Cir. 1993) and Carlisle v. Consolidated

Supreme Court finally determined the "proper" standard to be applied when evaluating claims for negligent infliction of emotional distress brought under FELA.[140] The respondent in that case ("Gottshall") had been a member of a Conrail work crew that was assigned to replace some defective railroad tracks on a hot summer day.[141] Because they were working under time constraints, the crew was discouraged from resting or taking any breaks.[142] Shortly into their workday, one of the crew members, a long-time friend of Gottshall, suffered a heart attack in front of Gottshall and the other men.[143] Gottshall immediately attempted to resuscitate his friend while the crew supervisor went to get assistance.[144] However, by the time paramedics arrived at the scene, his friend had died.[145] The crew supervisor then ordered all of the men back to work within sight of the decedent's body.[146] Although the body had been covered with a sheet by the paramedics, they had directed that it remain undisturbed until a coroner's examination several hours later.[147]

As a result of this experience, Gottshall became extremely distraught and unable to work during the next few days without thinking about the events surrounding his friend's death.[148] He eventually sought professional psychiatric attention, and was diagnosed as suffering from post-traumatic stress disorder and major depression.[149] Gottshall also experienced other physical and psychological side-effects such as suicidal tendencies, anxiety, weight loss, nausea, insomnia and recurring nightmares.[150]

Gottshall then brought a FELA claim against the railroad, alleging that its negligence "created the circumstances under which he had been forced to observe and participate in the

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Rail Corp., 990 F.2d 90 (3d Cir. 1993). This Note focuses only on the facts from the *Gottshall* decision.

140. *Gottshall*, 114 S. Ct. at 2409-11.
141. *Id.* at 2400.
142. *Id.*
143. *Id.*
144. *Id.* at 2400-01.
145. *Id.* at 2401.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*

events surrounding [his friend's] death."[151] Although the district court determined that a remedy under FELA was not available for Gottshall's emotional distress injuries, the Third Circuit reversed this ruling.[152] In doing so, it disregarded all of the traditionally recognized common law tests because of their "harsh and unfair results."[153] Given the tension that exists between the limiting effect of these common law tests and the more liberal recovery policy of FELA, the circuit court stated that preference should be given to the latter by discarding these "doctrinal common law distinctions . . . when they bar recovery on meritorious FELA claims."[154] Instead, the circuit proposed its own "genuineness" test.[155] It reasoned that judges should be capable of "weeding out" frivolous claims on their own by carefully scrutinizing the facts, and determining whether they "provide [the] threshold assurance that there is a likelihood of genuine and serious emotional injury."[156]

Because Gottshall had satisfied the circuit's "genuineness" standard (by offering sufficient proof to substantiate the genuineness and severity of his injuries), and he alleged the FELA elements needed to present genuine issues of material fact, the Third Circuit remanded the case for trial.[157] In response to Conrail's petition for review, the Supreme Court granted certiorari so that it could address this issue held over from *Buell* and resolve the conflict that had developed among the circuits.[158]

On review, the Court reversed the Third Circuit and criticized its rejection of the common law developments.[159] After examining the remedial and humanitarian purpose of FELA, and the liberal construction traditionally given to it by the Court in order to further these goals, the Court agreed that damages from negligent infliction of emotional distress may be recover-

151. *Id.*
152. Gottshall v. Consolidated Rail Corp., 988 F.2d 355 (3rd Cir. 1993).
153. *Id.* at 367-68.
154. *Id.* at 369 (citations omitted).
155. *Id.* at 371.
156. *Id.*
157. *Id.* at 374, 383.
158. *Gottshall*, 114 S. Ct. at 2403.
159. *Id.* at 2408. The Court said that "[b]y treating the common-law tests as mere arbitrary restrictions to be disregarded if they stand in the way of recovery on 'meritorious' FELA claims, the Third Circuit put the cart before the horse . . . ." *Id.*

able under the statute.[160] Quoting the Third Circuit's own words, it acknowledged that "severe emotional injuries can be just as debilitating as physical injuries."[161] However, unlike the Third Circuit, the Supreme Court recognized the importance of "gleaning guidance" from the common law in FELA jurisprudence.[162] Relying on its prior opinion in *Buell*, the Court noted that "[FELA] is founded on common-law concepts of negligence and injury," and, except for certain modifications, qualifications, or alterations in the language of the statute, these common law concepts "are entitled to great weight in [a FELA] analysis."[163] Therefore, the Court determined that "common-law principles must play a significant role" in the issue at hand because the statute did not address negligent infliction of emotional distress.[164]

Based on this premise, the Court viewed the circuit's decision as being "fatally flawed" for failing to adopt one of the traditional, common law tests used to define and limit a railroad's duty under these circumstances.[165] Although most jurisdictions have recognized a right to recover for emotional distress, the Court pointed out that none would permit recovery for all incidences of emotional harm that might be causally linked to another person's negligence.[166] Instead, various "rules" or "tests" have been adopted and applied by the courts in order to balance different policy considerations and to set logical limitations on the liability that may be imposed.[167] Without such limitations to emotional distress recovery, courts have recognized that certain problems would inevitably result.[168] These problems include the risk of flooding the courts with trivial suits, the possibility of entertaining falsified or imagined claims (due to the difficulty in determining the validity and scope of emotional injury), and the potential for placing infinite and un-

160. *Id.* at 2407.
161. *Id.* at 2408 (quoting *Gottshall*, 988 F.2d at 361).
162. *Id.* at 2404, 2408.
163. *Id.* at 2404.
164. *Id.*
165. *Id.* at 2408.
166. *Id.* at 2405.
167. *Id.*
168. *Id.* at 2405-06, 2411.

predictable liability upon defendants who may not reasonably foresee certain emotional injuries.[169]

After examining what it characterized as the three major limiting tests, (the "physical impact" test, the "zone of danger" test, and the "relative bystander" test),[170] the Court found that the common-law zone of danger test was the proper standard to apply in FELA claims for negligent infliction of emotional distress.[171]

Compared to the other tests, or alternatively, no test at all, the Court reasoned that the "zone of danger test best reconciles the concern of the common law with the principles underlying our FELA jurisprudence."[172] Because the zone of danger test would encompass all cognizable claims under the physical impact test, the Court believed that Congress' primary goal of "alleviating the physical dangers of railroading," and compensating for injuries and death that arise from these physical dangers, would still be furthered.[173] However, unlike the more restrictive physical impact test, it would allow employees who develop emotional injury caused by the fear of a physical impact to recover despite the absence of an actual impact.[174] Accordingly, an employer would not be relieved from liability in the fortuitous event that an impact did not occur.[175] Also, the Court found historical support for the zone of danger test.[176] Although not as widely accepted as the physical impact test upon FELA's enactment in 1908, it was nevertheless in existence at that time and utilized by a significant number of jurisdictions.[177] The Court concluded that Congress could have reasonably intended for the more progressive zone of danger test to operate in FELA situations because it "would have been more consistent . . . with FELA's broad remedial goals."[178]

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169. *Id.*

170. *Id* at 2406-07. *See infra* note 58 for a discussion of the different common law tests.

171. *Id.* at 2410.

172. *Id.*

173. *Id.* at 2410-11.

174. *Id.* at 2411.

175. *Id.*

176. *Id.* at 2410.

177. *Id.*

178. *Id.*

On the other hand, the Court found no historical support for the relative bystander test, and commented on its lack of relevancy to most FELA cases.[179] It noted that most states applying this test only permit recovery where an individual witnesses the death or severe injury of a close family member.[180] Because FELA allows only railroad employees and their estates to bring claims under the statute, the Court stated that "it would be a rare occurrence for a worker to witness during the course of his employment the injury or death of a close family member."[181]

Despite Gottshall's contention that the zone of danger test would arbitrarily exclude some valid emotional injury claims, the Court ultimately found that it best reconciled the common law concerns (especially the fear of unlimited and unpredictable liability) with the Court's FELA jurisprudence.[182] Therefore, the zone of danger test, which limits recovery to those plaintiffs who either sustain a physical impact or are placed in immediate risk of physical impact, was the standard accepted by the Supreme Court to govern FELA claims for negligent infliction of emotional distress.[183]

D. *State Law Treatment of AIDS-phobia Cases*

Although there is now a uniform federal standard for evaluating negligently inflicted emotional distress under FELA, cases involving disease-phobia claims (such as "cancer-phobia" and "asbestosis-phobia") demonstrate that the problem may not be completely solved. Due to the latent nature of such diseases, and the inability of experts to immediately and accurately detect their presence in claimants, courts are faced with an even tougher job trying to discern the validity of emotional distress in these situations. This problem becomes particularly apparent when the disease involved is AIDS.[184]

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179. *Id.* at 2411.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* The case was remanded to the Third Circuit to determine whether Gottshall could have satisfied the zone of danger requirements. *Id.*
184. Statistics report that HIV kills approximately 81% of infected individuals within three years after developing full blown AIDS. Darby, *supra* note 3, at 185 n.1 (citing Abdullah Fatteh et al., *AIDS: An Exhaustive Review of Medical and*

Because there are no previous FELA cases dealing directly with AIDS-phobia, one must look to non-FELA case law developments for guidance.[185] This section examines how various state courts, including New York, and various federal courts applying state law, have addressed the issue of AIDS-phobia recovery in their jurisdictions. Just as federal courts had adopted different tests for recovery in general, FELA emotional distress recovery cases, states have also adopted different prerequisites for recovery in cases dealing with the fear of contracting AIDS. The following two groups of cases demonstrate the major split in authority with respect to AIDS-phobia jurisprudence.

1. *Channel of Exposure Requirement*

A good number of courts have dismissed AIDS-phobia claims where the plaintiff fails to demonstrate an actual "channel of exposure" to the HIV virus, or a documented injury in the form of testing positive for HIV.[186] For example, in *Burk v. Sage Products*,[187] the Eastern District of Pennsylvania dismissed an AIDS-phobia claim under Pennsylvania state law.[188] The plaintiff in that case, a hospital paramedic, was pricked by a used hypodermic needle protruding out of a defective disposable syringe waste container.[189] Although several AIDS-infected patients had been seen on his particular hospital floor that day, the plaintiff failed to prove that any of them had used the nee-

Legal Aspects, *in* LEGAL MED. 1986, at 3 (1986)). However, the incubation period for the disease, (from the point of initial HIV exposure to the point of physical manifestation of AIDS symptoms), is highly unpredictable. *Id.* at 186 n.4. Most experts agree that this latent incubation period varies widely from individual to individual, and can range from several months to more than seven years. *Id.* Thus, an HIV-infected individual always has the potential to develop or transmit AIDS, even if the physical symptoms lie dormant for years. *Id.* Despite this elusive latency period between HIV infection and actual AIDS manifestation, studies report that detecting the HIV virus itself is generally more immediate and accurate. 38 MORBIDITY AND MORTALITY WKLY. REP. s-7 (July 21, 1989) (stating that at least 95% of HIV infected individuals test positive for the virus within six months of acquiring it, even though AIDS may not manifest for several years).

185. Courts must "glean guidance" from the common law in FELA and Jones Act jurisprudence. *See, e.g.*, Marriott v. Sedco Forex Int'l Resources, Ltd., 827 F. Supp. 59, 73 (D. Mass. 1993) (referring to the Supreme Court's language in *Buell*).

186. *Id.* at 74.

187. 747 F. Supp. 285 (E.D. Pa. 1990).

188. *Id.* at 288.

189. *Id.* at 286.

dle in question.[190] In addition, he later tested negative for the HIV virus five times.[191] The court subsequently dismissed his claim on grounds that he failed to establish actual exposure to HIV.[192] It conceded that most Pennsylvania courts would recognize an emotional injury claim so long as the emotional injury was accompanied by some manifestation of a physical injury.[193] However, when emotional distress results from the fear of contracting a disease, an additional "exposure" element would be required as well.[194]

The court in *Burk* adhered to the Third Circuit's decision in *Wisniewski v. John-Manville Corp.*,[195] which affirmed the dismissal of several asbestosis-phobia claims on a similar theory.[196] The appellants in that case, wives and children of several deceased asbestos workers, sought to recover for their fear of contracting cancer due to possible second-hand "household" exposure to asbestos brought in on their husbands' and fathers' contaminated work clothes over the years.[197] Although the claimants alleged emotional distress injuries in the form of identifiable "physical" headaches, they failed to allege any injuries or symptoms that could be medically linked to the asbestos as proof of an actual exposure.[198] After analyzing *Wisniewski*, the court in *Burk* concluded that "while injuries stemming from a fear of contracting illness after exposure to a disease-causing agent may present compensable damages, injuries stemming from fear of the initial exposure do not."[199] Thus, *Burk* acknowledged that AIDS-phobia recovery could be allowed in certain situations, but not where there was a question as to the initial exposure.[200]

The court in *Burk* further grounded its decision in logic and policy considerations. It admitted that the long incubation period in which AIDS symptoms lie dormant may produce uncer-

190. *Id.*
191. *Id.*
192. *Id.* at 288.
193. *Id.* at 286-87.
194. *Id.* at 287.
195. 759 F.2d 271 (3d Cir. 1985).
196. *Id.* at 274.
197. *Id.* at 273.
198. *Id.* at 273-74.
199. *Burk*, 747 F. Supp. at 288.
200. *Id.* at 287.

tainty as to an actual exposure.[201] However, it also reasoned that a person infected with HIV "[would] still test positive for the HIV virus during this latency period," and that the virus could usually be detected within six months after exposure.[202] Thus, one year and five negative blood tests later, the court was unwilling to allow recovery for his AIDS-phobia after it had become substantially certain that the disease would not develop.[203]

This exposure requirement was also relied upon by the West Virginia Supreme Court of Appeals in *Johnson v. West Virginia University Hospital*[204] to affirm a jury award for AIDS-phobia damages.[205] The appellee in that case, a police officer, was bitten in the arm while attempting to restrain an AIDS-infected hospital patient.[206] Evidence demonstrated that the patient had previously bitten his own arm, and had some infected blood in his mouth at the time he bit the appellee.[207] After analyzing decisions from other jurisdictions on this issue, the court agreed that "before a recovery for emotional distress damages . . . [is allowed] . . . there must first be *exposure* to the disease."[208] Based on the facts surrounding the bite wound, the court found that the officer definitely established a potential channel of exposure to satisfy this requirement.[209] The court also believed that his emotional injuries were reasonable, notwithstanding his negative HIV test results and his failure to contract the disease three years after the incident occurred.[210] To support this reasonableness determination, the court placed great weight on the fact that he "was actually *exposed* to the AIDS virus."[211]

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201. *Id.* at 288.

202. *Id.* (citing statistics from 38 MORBIDITY AND MORTALITY WKLY. REP. s-7 (July 21, 1989)).

203. *Id.* at 288. The court also disregarded the physical "contact" from the needle prick as a sufficient basis for the claim. *Id.* n.2. It stated that the laceration did not demonstrate an injury from exposure to the AIDS virus, but merely an injury by "exposure to a hypodermic needle." *Id.*

204. 413 S.E.2d 889 (W. Va. 1991).

205. *Id.* at 894.

206. *Id.* at 891.

207. *Id.*

208. *Id.* at 893.

209. *Id.*

210. *Id.* at 891.

211. *Id.* at 894.

In *Funeral Services by Gregory, Inc. v. Bluefield Community Hospital*,[212] the same court affirmed the dismissal of an AIDS-phobia claim where the appellant failed to satisfy the exposure requirement.[213] There, a mortician sued a hospital and a doctor for releasing a corpse to him without disclosing that it was infected with AIDS.[214] He sought recovery for damages based on his AIDS-phobia related emotional injuries.[215] He claimed that if he had known the body was infected, he would have worn additional protective garments during the embalming process.[216] However, the court noted that the appellant had not alleged any physical impairments as a result of the incident, and could not prove an exposure to the disease by any medically-established means known to transmit the virus.[217] In fact, the evidence demonstrated that he was wearing proper protective gear, he did not stick himself with any contaminated instruments, and he did not puncture his gloves during the course of the embalming process.[218] The court, referring to *Burk* and *Wisniewski*, and relying on its prior opinion in *Johnson*, concluded that a claimant must first show exposure to the AIDS virus before recovery would be allowed.[219] It stated that "if a suit for damages is based solely upon the plaintiff's fear of contracting AIDS, but there is no evidence of an actual exposure to the virus, the fear is unreasonable, and . . . not . . . a legally compensable injury."[220] Since the appellant did not show an actual exposure to the virus, and he subsequently tested negative four times for HIV antibodies, his claim for AIDS-phobia was dismissed.[221]

Several New York courts have also applied this exposure requirement. In *Hare v. State*,[222] the Second Department af-

212. 413 S.E.2d 79 (W. Va. 1991), *overruled on other grounds by* Courtney v. Courtney, 437 S.E.2d 436, 442-43 (W. Va. 1993).

213. *Id.* at 84.

214. *Id.* at 80-81.

215. *Id.* at 81.

216. *Id.*

217. *Id.* at 82-83.

218. *Id.*

219. *Id.* at 83-84.

220. *Id.* at 84.

221. *Id.* at 82, 84.

222. 173 A.D.2d 523, 570 N.Y.S.2d 125 (2d Dep't), *appeal denied*, 78 N.Y.2d 859, 580 N.E.2d 1058, 575 N.Y.S.2d 455 (1991).

firmed a lower court's denial of an AIDS-phobia claim.[223] There, a hospital x-ray technician was bitten by a prison inmate while attempting to prevent the inmate from committing suicide in the hospital.[224] Although one of the nurses at the scene thought the inmate might have had AIDS, this fact was never substantiated at trial.[225] The court ultimately affirmed the denial of recovery because the claimant failed to prove that the inmate had AIDS, and because the claimant himself had tested HIV negative several times after the incident.[226] It decided that the evidence of emotional distress was too "remote and speculative," even in light of his documented physical bite injury and subsequent manifestation of weight loss.[227]

In another case, *Doe v. Doe*,[228] a New York supreme court upheld an exposure requirement when it dismissed a wife's claim for AIDS-phobia damages against her husband.[229] There, the wife had filed for divorce after learning of her husband's extra-marital homosexual affairs. She alleged in a separate cause of action that his status as a high-risk AIDS candidate caused her to develop severe emotional and psychological distress.[230] Accordingly, in addition to the equitable share of their marital property she would have received under New York law, she sought separate compensation for alleged damages arising from her fear of contracting AIDS.[231] Among the several principles relied upon to deny recovery, the court focused heavily on her failure to offer proof that she had actually been exposed to AIDS.[232] It noted that her husband had actually tested negative for the HIV virus, and that she had refused to take an HIV test

223. *Id.* at 525, 570 N.Y.S.2d at 127.
224. *Id.* at 523, 570 N.Y.S.2d at 126.
225. *Id.* at 524, 570 N.Y.S.2d at 126.
226. *Id.* at 524-25, 570 N.Y.S.2d at 127.
227. *Id.*
228. 136 Misc. 2d 1015, 519 N.Y.S.2d 595 (Sup. Ct. Kings County 1987).
229. *Id.* at 1021, 519 N.Y.S.2d at 599-60.
230. *Id.* at 1018, 519 N.Y.S.2d at 597.
231. *Id.* at 1018-19, 519 N.Y.S.2d at 598.
232. *Id.* at 1020, 519 N.Y.S.2d at 599. The court also characterized this as an attempt to circumvent New York's equitable distribution rules with respect to the division of marital property. *Id.* at 1018, 519 N.Y.S.2d at 597. Because New York only looks at fault in exceptional circumstances, the court reasoned that this point should be argued in her matrimonial cause of action, and not as an independent cause of action. *Id.* at 1018, 519 N.Y.S.2d at 597-98.

to help support her position.[233] The court found her fear to be unreasonable since it was based not on an actual exposure, but merely on the fact "that she *may* have been exposed to AIDS."[234] Also, the court refused to open up what it believed would be a "Pandora's box" of emotional distress claims.[235] It believed that "any party to a matrimonial action who alleged adultery would . . . have a separate tort action for damages for 'AIDS-phobia' " since extra-marital sexual activity increases the risk of exposure to AIDS.[236]

One other New York court also appeared to uphold an exposure requirement in *Ordway v. County of Suffolk*.[237] In that case, a prisoner was sent to a hospital emergency room where he underwent two successive operations during the course of a one-week period.[238] After the second operation, the plaintiff-surgeon discovered that the prisoner was HIV positive, and plaintiff subsequently developed a fear of contracting AIDS.[239] Although he had worn the usual surgical garments and gear during the operations, the plaintiff alleged that he would have taken additional precautions had he known of the patient's condition.[240] The court, however, dismissed the plaintiff's claim because of his failure to allege any unusual occurrence during the operations, such as "[a] broken glove, pierced skin, patient bite, etc.," which could distinguish them from any other ordinary operation.[241] Moreover, the court noted that the plaintiff had not tested positive for the HIV virus, or demonstrated any other indicia of legitimacy in his postoperative condition.[242] Although not stating in express terms, the court appeared to espouse an exposure requirement by determining that the plaintiff could not recover for his mere fear and uncertainty of contracting AIDS.[243]

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233. *Id.* at 1021, 519 N.Y.S.2d at 599.
234. *Id.* at 1020, 519 N.Y.S.2d at 599.
235. *Id.* at 1019, 519 N.Y.S.2d at 598.
236. *Id.*
237. 154 Misc. 2d 269, 583 N.Y.S.2d 1014 (Sup. Ct. Suffolk County 1992).
238. *Id.* at 270, 583 N.Y.S.2d at 1015.
239. *Id.*
240. *Id.*
241. *Id.* at 273, 583 N.Y.S.2d at 1016-17.
242. *Id.* at 273, 583 N.Y.S.2d at 1017.
243. *Id.*

The Supreme Court of Tennessee also upheld an exposure requirement for AIDS-phobia recovery in *Carroll v. Sisters of Saint Francis Health Services*.[244] There, a hospital visitor was pricked by several hypodermic needles after she accidentally reached her hand into a used needle receptacle that resembled a paper towel dispenser.[245] Besides the physical puncture wounds to her fingers, the plaintiff alleged anxieties and emotional distress caused from her fear of contracting AIDS.[246] The trial court dismissed the plaintiff's AIDS-phobia claim since she could not prove that the needles specifically exposed her to the HIV virus.[247] However, after interpreting what it believed was the proper standard under Tennessee case law for disease-phobia cases, the appellate court repudiated the "strict rules of actual exposure imposed by the courts in Pennsylvania and West Virginia."[248] Instead of focusing on whether an actual HIV exposure occurred, the appellate court looked to whether the plaintiff's fear of contracting AIDS, after being exposed to needles that were "presumably" contaminated, was reasonable under the circumstances.[249] In answering this question affirmatively, it looked to extrinsic factors to support the reasonableness of her fear.[250] The appellate court made note of the unique and unpredictable characteristics of the AIDS virus, as well as the presumption in the medical field that "all body substances and all instruments that have or may have been in contact with those body substances, including any and all discarded needles, are contaminated with the AIDS virus and are capable of transmitting AIDS to a person."[251]

The Tennessee Supreme Court refused to accept such a liberalized interpretation of its past disease-phobia cases.[252] Instead, it expressly adopted the more objective "actual exposure"

244. 868 S.W.2d 585 (Tenn. 1993).

245. *Id.* at 586.

246. *Id.* at 587.

247. *Id.*

248. Carroll v. Sisters of Saint Francis Health Servs., Inc., No. 02A01-9110-CV-00232, 1992 WL 276717, at *4 (Tenn. Ct. App. Oct. 12, 1992) citations omitted.

249. *Id.* at *4-*5.

250. *Id.*

251. *Id.*

252. Carroll v. Sisters of Saint Francis Health Servs., Inc., 868 S.W.2d 585, 593 (Tenn. 1993).

standard.[253] It stated that in order to recover for AIDS-phobia damages, "the plaintiff must prove, at a minimum, that he or she was actually exposed to HIV."[254]

Finally, The Supreme Court of Idaho also adopted a similar position in the recent case of *Neal v. Neal*.[255] There, a wife alleged emotional injury based on her fear of contracting AIDS and other sexually transmitted diseases after her husband had an extra-marital affair.[256] Although the court agreed that the plaintiff might have been subjected to an increased risk of contracting such diseases, it affirmed the lower court's dismissal of her claim since she was unable to demonstrate an actual exposure.[257] According to the record, the plaintiff failed to allege that her husband or his lover had any sexually transmitted diseases. Moreover, she had not contracted any diseases from them.[258] Relying on *Carroll*, *Burk*, *Funeral Services by Gregory*, and *Doe*, the court found that "there can be no reasonable fear of contracting such a disease absent proof of actual exposure."[259]

2. *Specific Incident of Potential Exposure*

Other courts have sustained causes of action where the plaintiff could allege a specific incident of "potential exposure" that created a reasonable fear of contracting AIDS, even in the absence of an actual, established channel of exposure to the virus.[260] For example, In *Faya v. Almarez*,[261] the Maryland Court of Appeals sustained two plaintiffs' causes of action on this theory.[262] There, two breast cancer patients of an AIDS-infected

253. *Id.* at 594.
254. *Id.*
255. 873 P.2d 871 (Idaho 1994).
256. *Id.* at 873, 876.
257. *Id.* at 876.
258. *Id.*
259. *Id.* Because the plaintiff failed to establish that her fear was "reasonable," the court did not have to address the second issue of whether her emotional distress was "sufficiently genuine." *Id.*
260. In addition to the two cases mentioned in this section, see also Poole v. Alpha Therapeutic Corp., 698 F. Supp. 1367, 1372 (N.D. Ill. 1988) (finding that a wife, whose hemophiliac husband contracted AIDS from the defendant's antihemophilic factor, alleged facts sufficient to place her in the zone of danger, but was denied recovery under Illinois law because she failed to allege a requisite physical injury arising from the emotional distress).
261. 620 A.2d 327 (Md. 1993).
262. *Id.* at 339.

surgeon sought emotional distress recovery for their fear of contracting AIDS after the surgeon performed surgery on them.[263] The trial court dismissed both claims because the plaintiffs had failed to allege exposure to HIV by any accident or incident during the surgery that would have caused the doctor's blood to commingle with their own.[264] The court of appeals, however, reversed the lower court's decision.[265] It instead ruled that patients who are operated on by AIDS-infected doctors may have valid claims for AIDS-phobia, even though they have not identified an actual mode of transmission or tested HIV positive.[266]

Similarly, in *Castro v. New York Life Insurance Co.*,[267] a plaintiff's AIDS-phobia claim was sustained, despite an absence of proof of exposure.[268] There, a cleaning worker was stuck by a discarded hypodermic needle used for taking blood samples as she was gathering trash from a waste container.[269] She alleged emotional injuries from the fear of contracting AIDS as a result of the needle puncture.[270] The defendant-insurance company argued that her fear was merely speculative and based on her own "ignorance, fear and hysteria."[271] However, the court sustained her cause of action.[272] It ruled that if this type of emotional injury is "tied to a distinct event which could cause a reasonable person to develop a fear of contracting a disease like AIDS, there is a guarantee of genuineness of the claim."[273] More importantly, the court focused on the current develop-

263. *Id.* at 329-30.

264. *Id.* at 330.

265. *Id.* at 339.

266. *Id.* at 336-37. The court stated that the exposure requirement of *Burk* would "unfairly punish them for lacking the requisite information to prove an actual transmission." *Id.* at 337. However, the court did mention that the plaintiff's continued AIDS-phobia after receiving negative HIV test results would probably be deemed unreasonable: "Once appellants learned of their HIV-negative status more than a year after their respective surgeries, the possibility of contracting AIDS . . . became extremely unlikely . . . and . . . might be deemed unreasonable." *Id.* Thus, their recovery should be limited to a period "constituting their reasonable window of anxiety." *Id.*

267. 153 Misc. 2d 1, 588 N.Y.S.2d 695 (Sup. Ct. N.Y. County 1991).

268. *Id.* at 7, 588 N.Y.S.2d at 698.

269. *Id.* at 2, 588 N.Y.S.2d at 695.

270. *Id.* at 3, 588 N.Y.S.2d at 696.

271. *Id.* at 4, 588 N.Y.S.2d at 696.

272. *Id.* at 5, 588 N.Y.S.2d at 697.

273. *Id.*

ments in the AIDS arena as a way to further verify the genuineness of her fear.[274] It acknowledged society's increased awareness of the primary modes of AIDS transmission, especially in light of the massive AIDS educational campaign.[275] Also, the dormant qualities of the virus prevent it from being physically detected for many years after an incident of exposure.[276] The court determined that "any reasonable person exposed to this information who is stuck by a used and discarded hypodermic needle and syringe from which blood was apparently drawn could develop a fear of contracting AIDS."[277]

III. Case: *Marchica v. Long Island Railroad Co.*

The plaintiff, John Marchica, was employed as a structural welder for the Long Island Railroad ("LIRR").[278] On October 25, 1989, he and several co-workers were assigned to the Hempstead Railroad Station to secure a protective metal window grating over a basement window shaft.[279] The purpose of this project was to prevent vagrants in the area from breaking into the building and gaining access into the trainman's room.[280] These break-ins, which had become a recurring problem for the railroad, were of particular concern because drug addicts, illegal aliens, and prostitutes were known to frequent the station.[281] In fact, evidence indicated that hypodermic needles, crack vials and other drug paraphernalia were often found on the floor of the trainman's room and in other parts of the station.[282]

As the men began to weld the grate in place with their acetylene torches, they noticed that a pile of leaves, sticks, broken glass, paper and other garbage lying in the bottom of the shaft

274. *Id.* at 6, 588 N.Y.S.2d at 697-98.

275. *Id.* (citing statistics from *Recommendations for Prevention of HIV Transmission in Health Care Settings*, 36 MORBIDITY AND MORTALITY WKLY. REP. s-2, s-3 (Supp. 1987)).

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

277. *Id.*

278. Marchica v. Long Island R.R., 31 F.3d 1197, 1200 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 727 (1995).

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

presented a potential fire hazard.[283] Marchica volunteered to clear away the smoldering debris from their work area.[284] As he reached into the pile to push some of the garbage aside, Marchica felt a sharp pain in his right hand.[285] He immediately pulled his hand out of the pile and discovered that a discarded hypodermic needle had pierced his protective work glove and was sticking in his right palm.[286]

Subsequently, Marchica removed the needle and was taken to nearby Winthrop University Hospital to have his hand examined.[287] The doctor attending the wound advised him to get tested for HIV, to receive a tetanus and hepatitis shot, and to abstain from having sexual relations with his wife.[288] Later that same day, doctors at the LIRR medical department also examined his finger.[289] They, on the other hand, advised him not to worry, and to merely "go home and wash his hands with warm soapy water."[290] In fact, they even disposed of the hypodermic needle without testing to find out whether the needle or blood contained in the syringe was contaminated in any way.[291] Following the advice given at Winthrop, Marchica received an initial HIV test several days after the incident.[292] He also had additional blood tests taken one month, six months, and one year after the incident.[293]

Due to the needle puncture, and the information he received from the doctors at Winthrop, Marchica developed various anxieties and emotional problems.[294] He even sought professional help from a psychologist, and had anti-depressants prescribed to him by a psychiatrist.[295] Marchica eventually re-

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283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* One of Marchica's co-workers testified that he observed blood in the barrel of the hypodermic, and also saw blood coming from Marchica's puncture wound. *Id.*
288. *Id.* at 1200-01.
289. *Id.* at 1200.
290. *Id.*
291. *Id.* at 1200-01.
292. *Id.* at 1200.
293. *Id.* at 1201.
294. *Id.* He experienced severe weight loss after the incident, and witnesses had observed him crying and vomiting on different occasions. *Id.*
295. *Id.*

ceived negative HIV results back from his blood tests during the course of his psychiatric treatment.[296] One final blood test taken two years later also produced negative HIV results.[297]

Marchica then brought a FELA action against the railroad in June of 1992.[298] He alleged that the LIRR's negligence in "failing to provide him with a safe place to work," proximately caused the physical injury to his hand, and his fear of contracting AIDS.[299] In response, the LIRR moved to dismiss all of Marchica's AIDS-phobia related claims on the basis that he failed to prove actual exposure to the HIV virus, and that he had further tested negative for the virus.[300] Relying on cases which have required proof of actual exposure for disease-phobia recovery, the LIRR contended that his emotional distress damages were too speculative and not compensable.[301]

In addressing this case, the court had to first determine "whether a claim for negligent infliction of emotional distress [was] cognizable under FELA."[302] It answered this question in the affirmative by acknowledging the broad, remedial FELA standards, and the fact that recovery for negligent infliction of emotional distress under the statute was well-established (notwithstanding the application of different common-law tests among the circuits).[303] In this particular situation, the district court found that because Marchica suffered a precipitating physical injury, the claim could be substantiated by applying a traditional physical "impact" requirement.[304]

Second, the court had to look to the common law for guidance on the exposure issue in AIDS-phobia cases.[305] Following courts that had rejected a strict exposure requirement, the court instead placed greater weight on the surrounding factual circumstances to determine the reasonableness of Marchica's

296. *Id.*
297. *Id.*
298. Marchica v. Long Island R.R., 810 F. Supp. 445, 447 (E.D.N.Y. 1993).
299. *Id.*
300. *Id.*
301. *Id.* at 488.
302. *Id.* at 449.
303. *Id.* at 450-51. *See supra* note 58.
304. *Marchica*, 810 F. Supp. at 450, 453.
305. *Id.* at 451-52.

fear.[306] The court concluded that being physically pricked by a used hypodermic needle from an unknown source might present a genuine and reasonable claim for emotional injury, even in the absence of actual exposure to the HIV virus.[307]

The court denied the LIRR's motion for summary judgment, and ruled that the validity of Marchica's emotional injury and the issue of the LIRR's negligence were both factual questions for the jury.[308] The case then proceeded to trial where a jury found the railroad partially liable, and awarded Marchica compensation for both his past and future emotional distress damages.[309]

On appeal to the Second Circuit, the LIRR raised three issues in opposition to the lower court's judgment.[310] It first contended that recovery for AIDS-phobia was erroneously permitted in this case because the lower court had not applied the proper legal standard.[311] Specifically, the LIRR asserted that proof of exposure plus "a reasonable medical probability" of acquiring AIDS must be demonstrated before a plaintiff can recover for AIDS-phobia emotional distress damages.[312] Because Marchica had proven neither of these, the LIRR asserted that his fear of developing AIDS was unreasonable as a matter of law.[313] Next, the railroad argued that Marchica's fear was not objectively rational since he was not informed as to the medical realities of AIDS and how the virus could be transmitted.[314] Finally, the LIRR contended that even if proof of exposure was not required to support a claim for AIDS-phobia recovery under FELA, a limit should be placed on the recovery measured by "the time between the possible exposure and when the plaintiff could have learned to a medical certainty that he had not been exposed or would not develop the disease."[315] Therefore, his award for future damages should not have been permitted.[316]

306. *Id.* at 452.
307. *Id.* at 453.
308. *Id.*
309. *Marchica*, 31 F.3d at 1201.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*

In a de novo review of the district court's decision, the Second Circuit first affirmed that negligently inflicted emotional distress presented an actionable injury under the statute.[317] Although it acknowledged the remedial nature of FELA and analyzed the various common-law principles that had evolved throughout the states,[318] the court merely had to look to *Gottshall* for its answer.[319] Because Marchica suffered a physical puncture wound, he satisfied the common law "zone of danger" test recently espoused by the Supreme Court for FELA negligent infliction of emotional distress claims.[320] Therefore, he could properly recover damages "for all injuries—physical and emotional—proximately caused by the physical impact."[321]

The Second Circuit next looked to common law disease-phobia and AIDS-phobia developments in order to determine whether AIDS-phobia emotional distress injuries, specifically where exposure to the disease had not been proven, were recoverable.[322] It first rejected the LIRR's assertion that certain fear-of-future-disease jurisprudence, rather than traditional negligent infliction of emotional distress analysis, should govern.[323] The various cases proffered by the railroad held that in the disease-phobia situations presented, the plaintiff had to show at a minimum that actual exposure, plus a reasonable medical likelihood of developing the disease in the future, existed before recovery could be permitted.[324] Some of the cases even required the plaintiff to show something more, such as a present injury caused by the exposure, reasonable certainty that future injury would occur, or a physical manifestation of the emotional distress injuries.[325] The Second Circuit, however, rejected this position on grounds that such "analysis applies only '[w]ith respect to infliction of emotional distress absent physical injury

317. *Id.* at 1202-04.

318. *Id.* at 1202-03. The court set forth and analyzed the various tests ("physical impact," "zone of danger," "bystander test," "manifestation of physical injury" and "foreseeability test") which have been upheld in different jurisdictions. *Id.*

319. *Id.* at 1203.

320. *Id.*

321. *Id.*

322. *Id.* at 1204.

323. *Id.*

324. *Id.*

325. *Id.*

or contact.' "[326] It reasoned that proof of exposure (or any additional requirement) was needed only when no physical injury occurred that could help guarantee the genuineness of the plaintiffs' claim.[327] Therefore, this line of case-law upholding a strict exposure requirement was inapplicable to Marchica's situation.[328] Because he sustained an actual physical injury, "the traditional negligent infliction of emotional distress analysis applie[d]."[329]

Looking next to specific AIDS-phobia developments, the court recognized that inconsistent case law had emerged in this area.[330] The LIRR pointed to the numerous cases which have upheld an exposure requirement, or exposure plus something more, as a prerequisite to recovery.[331] However, after noting that several courts rejected a strict, actual exposure requirement,[332] the Second Circuit was not convinced that a common-law rule requiring "proof of exposure and a medical likelihood of developing the disease" had been established.[333] Instead, the court applied the same reasoning it had used for general fear-of-developing-disease cases, and found that an exposure requirement is only needed when "the traditional tests of genuineness in negligent-infliction-of-emotional-distress cases" cannot be satisfied.[334] Because Marchica satisfied the zone of danger test, and because of the broad and remedial nature of FELA, the Second Circuit rejected a strict exposure requirement in this con-

326. *Id.* (citing Nesom v. Tri Hawk Int'l, 985 F.2d 208, 210 (5th Cir. 1993), a case relied upon by the LIRR).

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 1206.

331. *Id.* at 1204-05 (citing, *inter alia*, Burk v. Sage Products, Inc., 747 F. Supp. 285 (E.D. Pa. 1990); Neal v. Neal, 873 P.2d 871 (Idaho 1994); Carroll v. Sisters of Saint Francis Health Servs., Inc., 868 S.W.2d 585 (Tenn. 1993); Funeral Services by Gregory, Inc. v. Bluefield Community Hosp., 413 S.E.2d 79 (W. Va. 1991); Johnson v. West Va. Univ. Hosps., Inc., 413 S.E.2d 889 (W. Va. 1991); Hare v. State, 173 A.D.2d 523, 570 N.Y.S.2d 125 (2d Dep't 1991); Ordway v. County of Suffolk, 154 Misc. 2d 269, 583 N.Y.S.2d 1014 (Sup. Ct. Suffolk County 1992); and Doe v. Doe, 136 Misc. 2d 1015, 519 N.Y.S.2d 595 (Sup. Ct. Kings County 1987)).

332. *Id.* at 1205-06 (citing Poole v. Alpha Therapeutic Corp., 698 F. Supp. 1367 (N.D. Ill. 1988); Faya v. Almarez, 620 A.2d 327 (Md. 1993); Castro v. New York Life Ins. Co., 153 Misc. 2d 1, 588 N.Y.S.2d 695 (Sup. Ct. N.Y. County 1991)).

333. *Id.* at 1205.

334. *Id.*

text as well.[335] It ultimately concluded that his claim was actionable, and that "a FELA plaintiff who has suffered a physical impact may recover for fear of developing AIDS if the impact caused by the defendant's negligence occurred under circumstances that would cause a reasonable person to develop a fear of AIDS."[336]

The Second Circuit also rejected the LIRR's second argument and found that there was a rational basis for Marchica's emotional distress.[337] In light of the vast AIDS-awareness campaign, which has identified the sharing of contaminated needles and syringes as a viable means of transmission, the court determined that a jury could find this fear reasonable.[338] As for the LIRR's last point concerning future damages, the LIRR argued that Marchica had tested HIV-negative three times over the course of three years.[339] The LIRR claimed that, as a matter of law, "any continuing emotional distress stemming from a fear of developing AIDS" after Marchica was medically certain he would not acquire the disease was unreasonable.[340] Although the court agreed that such a continuing fear would be unreasonable, it distinguished this "unreasonable" fear of developing the AIDS disease from the permanent nature of post traumatic stress disorder which did constitute valid and compensable future emotional distress.[341] Because Marchica's expert testimony emphasized this distinction, the court found it to be a sufficient basis for the future emotional distress award.[342]

IV. Analysis

A. *The FELA Issue*

The Second Circuit properly concluded that a plaintiff's claim for negligent infliction of emotional distress may be cognizable under the provisions of FELA.[343] As previously discussed,

335. *Id.* at 1205-06.
336. *Id.* at 1206.
337. *Id.* at 1206-07.
338. *Id.*
339. *Id.* at 1207.
340. *Id.*
341. *Id.* at 1207-08.
342. *Id.* at 1208.
343. *Id.* at 1202-05.

the Supreme Court has consistently held that the statute is broad and remedial in nature, and should therefore be liberally construed to achieve Congress' objectives.[344] Consequently, this has enabled railroad employees to recover under FELA provisions for a wide variety of injuries besides those which are more commonly associated with railroad negligence.[345] Examples of such compensable, non-traditional injuries now frequently involve claims for emotional distress.

Moreover, the common law tort of negligent infliction of emotional distress has gained wide recognition in a majority of states.[346] Indeed, the Second Circuit acknowledged the long-standing principle "that if a negligent actor's conduct results in a physical injury for which there is liability, the actor is also liable for whatever emotional harm stems from the physical injury."[347] Because FELA jurisprudence looks to the common law for guidance,[348] claims for negligent infliction of emotional distress should also be actionable under FELA. Thus, when the court affirmed Marchica's AIDS-phobia award, it was merely following the well-established trend of permitting liberal FELA recovery.

The only other issue in the FELA inquiry, which the Second Circuit did not have to contend with, concerned the appropriate prerequisite for emotional distress recovery that should apply under the statute. Previously, the lack of a uniform FELA standard had provided a source of disagreement between the circuits.[349] At trial, the district court had to determine how it could substantiate the genuineness of Marchica's emotional harm. After finding that Marchica had suffered a physical injury from the puncture wound, the district court was able to justify its decision under the strict "physical impact" test.[350] In light of the generous FELA standards, and the impetus by some

344. *See supra* notes 34-43 and accompanying text.

345. *See supra* note 43.

346. KEETON ET AL., *supra* note 44, § 54, at 363-66.

347. *Marchica*, 31 F.3d at 1202.

348. Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 568-69 (1987).

349. *See supra* part II.C.1.

350. *Marchica*, 810 F. Supp. at 449-50. The court specifically emphasized that this was one for "psychological difficulties following a particular type of physical injury." *Id.*

courts to permit recovery for wholly emotional injury,[351] this decision was a relatively conservative one because the court did not have to abandon a traditional, common law test. The language used by the court even limited its decision to only those AIDS-phobia actions premised specifically on "a documented physical injury sustained by the plaintiff."[352]

The Second Circuit, on the other hand, easily relied upon *Gottshall* to find that Marchica met the zone of danger test articulated by the Supreme Court as the appropriate standard under FELA. Because the Supreme Court decided that this best reconciled the common law concerns of limiting potential liability with the remedial objectives of FELA,[353] the circuit court did not have to engage in a lengthy analysis. It correctly held that Marchica "suffered a physical impact," and was therefore entitled to receive compensation for all of his physical and emotional injuries "proximately caused by the physical impact."[354]

This Note does not attempt to discuss whether the outcome reached in *Gottshall* was proper. However, it should be noted that the "impact" rule (which is the foundation of the "zone of danger" test) has received criticism in the past and has been abandoned in many jurisdictions.[355] Some criticism has focused on situations where the injury from an impact is relatively insignificant, and lacks the trustworthiness to support an emo-

351. *See supra* notes 115-38 and accompanying text.

352. *Marchica*, 810 F. Supp. at 449.

353. Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2410 (1994).

354. *Marchica*, 31 F.3d at 1203. The court also pointed out that Marchica could have satisfied the "physical manifestation test" and "foreseeability test" as well. *Id.*

355. *See* Dworkin, *supra* note 58, at 545-56. In toxic tort cases, many jurisdictions have abandoned the stricter, but not necessarily more accurate "impact" requirement as a screening device for emotional injury claims. *Id.* Instead, they have adopted a "manifestation" test as a way to guarantee the genuineness of the claim. *Id.* A few others have gone even further by abandoning the traditional tests altogether and merely looking to the seriousness and reasonableness of the emotional distress based on the surrounding circumstances. *Id. See also* Susan J. Zook, *Under What Circumstances Should Courts Allow Recovery for Emotional Distress Based Upon the Fear of Contracting Aids?* Johnson v. West Virginia Hospitals, Inc., *413 S.E.2d 889 (W. Va. 1991)*, 43 J. URBAN & CONTEMP. L. 481, 483-87 (1993).

tional injury claim.[356] One might argue that a needle-prick injury is also a rather insubstantial and inaccurate means of justifying the extent of alleged emotional injury in AIDS-phobia situations. However, given the realities of the AIDS crisis, the deadly and elusive characteristics of the disease, and society's increasing knowledge and concern for the epidemic, the better position is that such an injury can be enough to support an award for emotional distress injuries. Indeed, the Second Circuit properly acknowledged that the emotional distress flowing from Marchica's needle-prick impact was "reasonably foreseeable, as it was of the sort that a person in his circumstances would ordinarily experience."[357]

B. *The Exposure Requirement Issue*

The narrower problem presented in this case was that, despite the physical needle-prick injury, there was no proof of an exposure to the HIV virus, or of an injury in the form of testing positive for the virus. It has been argued that allowing recovery in such a situation would result in an increase in falsified and imagined claims based upon unforeseeable levels of emotional harm, especially with respect to diseases like AIDS that have long, latent incubation periods and can not be immediately detected. The purpose of an actual exposure requirement in such cases would be to further ensure that the emotional injury is real, rather than trivial, temporary or imagined.[358]

In the AIDS arena, courts have been inconsistent when confronted with the question of an exposure requirement.[359] As this Note discussed, one line of cases has required that a plaintiff demonstrate, at a minimum, an actual channel of exposure to the virus.[360] An extensive analysis and reasoning behind requiring proof of exposure was given by the Idaho Court of Appeals in *Neal v. Neal*.[361]

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356. *See* KEETON ET AL., *supra* note 44, § 54, at 363-64 (giving examples of some physical impacts that are questionable indicators of valid emotional distress).

357. *Marchica*, 31 F.3d at 1204.

358. *See* Payton v. Abbott Labs, 437 N.E.2d 171, 178-81 (Mass. 1982).

359. *See supra* part II.D.

360. *See supra* part II.D.1.

361. 873 P.2d 881 (Idaho Ct. App. 1993). Although the decision was affirmed by the Supreme Court of Idaho, the reasoning behind this requirement is embel-

In *Neal*, the court applied a two-part test for deciding whether a rational, non-speculative basis existed for emotional distress in a disease-phobia situation.[362] First, the court required a showing that the emotional injury was "sufficient."[363] It found that the plaintiff fulfilled this prong by satisfying the common law "physical manifestation" test.[364] However, it also imposed an exposure requirement in order to guarantee that the fear was "reasonable."[365] Accordingly, the court reasoned that even in circumstances where emotional injury is sufficiently evidenced (in that case by the satisfaction of a physical manifestation requirement), it would still be unreasonable if proof of actual exposure was lacking. The court criticized cases such as *Castro* and the district court decision in *Marchica*, which permitted recovery for the fear of contracting AIDS absent proof of exposure.[366] It concluded that such cases were without merit because "a plaintiff's fear of a disease must be based on more than the mere possibility of exposure to a disease or disease-causing agent."[367] The court concluded that decisions like these could invariably lead to recovery in frivolous situations, such as where: (1) a plaintiff undergoes a general blood transfusion and develops a fear of getting AIDS; (2) someone coughs in a plaintiff's face who then develops a fear of getting tuberculosis; or (3) a plaintiff ingests an unknown substance and develops a fear of getting cancer.[368] Ultimately, the appellate court decided (and the state supreme court affirmed) that the additional exposure requirement was a necessary safeguard against tenuous and unreasonable claims finding their way into the courts.[369]

Although the position which *Neal* and other courts take is premised on a desirable objective to limit recovery in unreason-

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lished in greater detail by the appellate court. *Compare id.* at 886-89 *with* Neal v. Neal, 873 P.2d 871, 876 (Idaho 1994). *See supra* discussion accompanying notes 255-59.

362. *Neal*, 873 P.2d at 888.

363. *Id.* at 887.

364. *Id.* Note that the Idaho Supreme Court did not determine whether physical manifestation satisfied the "sufficiency" prong of the test. *Id.* at 876.

365. *Id.* at 887.

366. *Id.* at 888.

367. *Id.* at 889.

368. *Id.*

369. *Id.*

able disease-phobia cases, it would be too strict a standard if applied in an AIDS-phobia situation involving a needle-prick injury. First, since the "physical impact" requirement has been satisfied, the claim survives an initial judicial screening based upon one of the traditional common law limitations that have been recognized by the courts. Second, and more importantly, the attention given to the disease in the media today, including widespread information about how it is transmitted, further establishes the reasonableness of the emotional injury. Thus, the Second Circuit in *Marchica* was justified in following the opposing line of cases, including *Faya* and *Castro*, that have rejected this strict exposure requirement.[370]

If the plaintiff can instead allege a "specific incident of possible exposure" which created a reasonable fear of contracting the disease, this should provide a sufficient basis for the jury to determine whether or not that fear was reasonable. Decisions like *Neal*, which insist on a strict exposure requirement, fail to realize that certain case-specific factors in a "specific incident of potential exposure" must still be considered in order to guarantee that the resulting emotional distress is reasonable. For example, a court should look at whether the identity of the original needle user is unknown,[371] whether the plaintiff had knowledge (or a lack thereof) that contaminated hypodermic needles are a major source of HIV transmission, and whether the plaintiff was advised by medical specialists to receive thorough HIV blood testing after being punctured.[372] When viewed

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370. *Marchica*, 31 F.3d at 1205-06.

371. *See* Harry H. Lipsig, *AIDS Phobia and Negligent Infliction of Emotional Distress*, N.Y. L.J., March 26, 1992, at 3-4 (commenting on the distinction between *Hare* and *Castro* with regard to the issue of a needle user's unknown identity). Lipsig states:

> Unlike *Hare*, the identity of the contaminator in *Castro* is unknown, making the fear of contraction more reasonable . . . . Therefore, based upon the reasonableness of the fear, the breach of the duty, evidence of a specific incident, and an actual physical injury, the facts in *Castro* arguably would support a claim even under the more narrow approaches taken by the lower courts.

Id.

372. All of these factors were involved in Marchica's needle-prick incident, and provided the jury with a sound basis to help guarantee the reasonableness of his fear. *Marchica*, 31 F.3d at 1206-07. The Second Circuit even stated that it would be "unable to embrace the notion that a reasonable person, punctured by a

in this manner, the concerns expressed by the Idaho Court of Appeals in *Neal* are misplaced since the courts can look to surrounding circumstances in order to determine whether the fear of contracting a disease such as AIDS is reasonable. Consequently, successful claims for frivolous emotional distress recovery will not flood the courts, even though a strict exposure requirement has been abandoned.

The Second Circuit also acknowledged one other important limitation to a plaintiff's recovery. In a needle-prick situation like this, factors may subsequently arise (such as finding out that the needle was not contaminated, or receiving HIV-negative blood tests back after a certain time period) that could make a plaintiff's formerly reasonable AIDS-phobia fear unreasonable. The Maryland Court of Appeals in *Faya v. Almarez*[373] proposed an equitable standard when it stated that plaintiffs "may only recover for their fear . . . which may have resulted from [defendant's] negligence *for the period constituting their reasonable window of anxiety* . . . ."[374] This period in *Faya*, as well as in any other needle prick situation, would end at a point when the plaintiff receives his or her HIV negative test results back after a reasonable period of time.[375] Given current data that demonstrates 95% of HIV infected individuals usually test positive for the virus within six months, this six-month period can be used as an effective gauge to determine the reasonable window of anxiety. Such a point in time establishes with sufficient medical certainty that the plaintiff has not been exposed to the virus, and therefore will not contract it.

Although the Second Circuit affirmed the $55,000 award for Marchica's future emotional distress in this case, it did so by making a legitimate distinction between the continuing fear of developing AIDS and the permanent emotional distress injuries resulting from post-traumatic disorder and its accompanying physical symptoms.[376] The circuit conceded that after a period of three years and three negative blood tests, any continuing

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discarded hypodermic needle with blood in it, in a location known to be frequented by drug users, . . . would not fear developing AIDS." *Id.* at 1206.

373. 620 A.2d 327, 337 (Md. 1993). *See supra* discussion accompanying notes 261-66.

374. *Id.* (emphasis added).

375. *Id.*

376. *Marchica*, 31 F.3d at 1207-08.

fear of developing AIDS was unreasonable as a matter of law.[377] However, it concluded that the jury award for future damages was no longer based on mere AIDS-phobia, but was rather compensation for validly established, permanent injuries in connection with post-traumatic stress disorder.[378] As long as a court instructs the jury as to this distinction, an award for future damages does not violate the principle set forth in *Faya*.

V. Conclusion

The court in *Marchica* properly concluded that a claim for emotional injury, based on the fear of contracting AIDS from a needle prick, was actionable under FELA despite the absence of a proven channel of exposure to the HIV virus. As long as a plaintiff has alleged a specific incident of possible exposure pursuant to a physical impact, a court can still verify the genuineness and reasonableness of the emotional injury claim by relying on the particular facts at hand and looking to the distinctive aspects of the disease. This Note agrees with the Second Circuit's approach as it relates to FELA cases, and would extend the application of this standard to non-FELA situations as well. Thus, when an individual is stuck by a dirty, discarded hypodermic needle, and that person is well-informed about the AIDS crisis in society, a jury could find that the fear of developing the disease is very real and substantial. If the circumstances eventually demonstrate a point in time which would render the fear unreasonable, recovery can be limited to the period constituting a reasonable window of anxiety, rather than denying a valid claim in its entirety.

Joseph Loparco

377. *Id.* at 1207.
378. *Id.* at 1207-08.