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Kerins v. Hartley: Fear of AIDS Begets a New Implied Condition Exception for the Theory of Medical Battery

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**KERINS v. HARTLEY: FEAR OF AIDS BEGETS A NEW
“IMPLIED CONDITION” EXCEPTION FOR
THE THEORY OF MEDICAL BATTERY**

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*The devastating effects of AIDS and the widespread fear of contamination at home, work, school, health care facilities and elsewhere are, sadly, too well known*¹

Acquired Immune Deficiency Syndrome (AIDS)² is a terrifying disease. Those who have watched the deterioration and suffering of loved ones afflicted with AIDS are forever changed. Those who are infected with the Human Immunodeficiency Virus (HIV),³ the causative agent of AIDS, face almost certain death.⁴ This Note chronicles the legal journey of one case dealing with AIDS, *Kerins v. Hartley*.⁵

Kerins I illustrates how the deadly specter of AIDS can cloud legal judgment. In a case of first impression,⁶ the California Court of Appeal held that: (1) a patient who has tested negative for HIV, and cannot prove probable exposure to either HIV or AIDS, may be allowed to recover for her present fear of AIDS despite the infinitesimal chance of her ever contracting AIDS;⁷ and (2) a surgeon, although unaware of his HIV-positive status at the time of surgery,⁸ may be liable for the intentional tort of battery by virtue of an *im-*

1. *Herbert v. Regents of the Univ. of Cal.*, 26 Cal. App. 4th 782, 788, 31 Cal. Rptr. 2d 709, 712 (1994).

2. AIDS was first recognized in the United States in 1981. BLACK'S MEDICAL DICTIONARY 14 (Gordon Macpherson ed., 37th ed. 1992). The cause of the syndrome is a retrovirus—human immunodeficiency virus (HIV)—which is responsible for a vast number of AIDS-related conditions in the late stages of HIV infection. *Id.* In 1991 the World Health Organization (WHO) estimated that at least 10 million people were infected with HIV, and that one million of those infected were battling AIDS-related complications. *See id.* The WHO estimates that by the year 2000 there will be 40 million HIV-positive individuals worldwide. *Id.* at 15.

3. Persons are considered infected with HIV if they test positive for its antibodies. *Id.* at 14-15. Ultimately, the presence of certain diseases and medical complications may place the HIV-positive individual into the AIDS category. *Id.* at 15.

4. Although medical research continues, HIV infection is considered an incurable condition leading to serious life-threatening illnesses. *Id.*

5. No. B065917, 1993 Cal. App. LEXIS 786 (Cal. Ct. App. July 30, 1993). For purposes of clarity, the original California Court of Appeal's opinion in *Kerins v. Hartley* will hereinafter be referred to as *Kerins I*, the California Supreme Court opinion will be referred to as *Kerins v. Hartley*, and the remand will be referred to as *Kerins II*. Additionally, because *Kerins I* was ultimately reversed and the opinion deleted, this Note will use the LEXIS citation as the opinion remains available on-line.

6. *Kerins I*, 1993 Cal. App. LEXIS 786, at *2.

7. *Id.* at *33-36.

8. Although the plaintiff, Ms. Kerins, alleged that the defendant, Dr. Gordon, knew or should have known of his HIV-positive status at the time of the surgical procedure, the defendants claimed that Dr. Gordon was unaware of his condition until five days *after* the plaintiff's surgery. *Id.* at *3, *6. Whether Dr. Gordon's desire to be tested in the first instance indicated a level of awareness that might be construed as approaching knowledge is beyond the scope of this Note.

plied, rather than an express, condition placed on the patient's consent—to be operated on by an HIV-free physician.⁹

The decision was alarming for several reasons. First, it allowed a fear of AIDS claim to go to the jury absent proof of probable exposure to the disease.¹⁰ Unless plaintiffs are required to allege and prove exposure as a threshold matter, those who live with HIV/AIDS become potential victims of spurious claims. Second, even where it is conceivable that a plaintiff might be genuinely distressed by the possibility of having come into contact with HIV/AIDS, without requiring proof of exposure the court established a dangerous precedent allowing recovery for a fear that had no basis in fact. Third, the court allowed recovery when there was no indication that the defendant physician violated the relevant medical standard of care at the time of the incident.¹¹ Finally, by allowing the battery claim, the court sanctioned holding health care workers liable in intentional tort for failing to respect what was, in essence, an implied condition to the patient's consent—because *no express condition had been placed on that consent as defined by California case law*.¹² In summary, faced with a novel situation involving a feared disease, the appellate court in *Kerins I* abandoned established principles of liability¹³—principles that balance patient rights, medical practices, and economic incentives—to fashion a remedy for an undeserving plaintiff.

Ultimately, the California Supreme Court reversed and remanded *Kerins I*.¹⁴ Unfortunately, however, the supreme court's terse, one-sentence opinion¹⁵ contained no analysis, no articulation of policy, and little guidance. The case was thereby remanded without explanation to an appellate court that had been unable to decipher the issues initially. The reversal saved California from joining the minority of jurisdictions that sanction fear of AIDS as a means of monetary

9. *Id.* at *14-19. Although the *Kerins I* court stated that the condition placed on the consent, when liberally construed, *could* have been express, it is *not* an express condition as defined by California case law. See *infra* text accompanying notes 283-90.

10. *Kerins I*, 1993 Cal. App. LEXIS 786, at *33-34.

11. See *infra* note 272 and accompanying text for a discussion of the Centers for Disease Control (CDC) standards.

12. See *infra* part V for a discussion of what constitutes an express condition in California.

13. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 28 (5th ed. 1984) (discussing history of negligent conduct standards).

14. *Kerins v. Hartley*, 868 P.2d 906, 28 Cal. Rptr. 2d 151 (1994).

15. "The above-entitled review is transferred to the Court of Appeal, Second Appellate District Two, with directions to vacate its decision and to reconsider the cause in light of *Potter v. Firestone Tire and Rubber Co.*" *Id.*

recovery without exposure to the disease.¹⁶ Regrettably, however, the supreme court failed to separately address the battery claim.¹⁷ As a result, the door may remain open for future claims based on the the subsequent remand, *Kerins I*, theory of an implied condition to valid consent.

Part II of this Note details the trial and appellate courts' reasoning in *Kerins I*. Part III provides a historical framework of fear of AIDS cases at the time of *Kerins I*, and the lack of informed consent cases alleging a cause of action in battery rather than negligence. Part IV details the reliance on the California Supreme Court's decision in *Potter v. Firestone Tire & Rubber Co.*,¹⁸ which forced the court of appeal to reverse its holding in *Kerins I*. Finally, Part V discusses how both the supreme court's reversal and the subsequent remand, *Kerins II*, leave the battery claim without resolution.

II. STATEMENT OF THE CASE

A. *The Facts of Kerins I*

In June of 1986, Jean R. Kerins sought attention for severe abdominal pain from the Women's Medical Group of Santa Monica (WMG).¹⁹ Ms. Kerins's physician, Dr. James S. Gordon, diagnosed a uterine fibroid tumor and recommended surgery.²⁰ Faced with surgery, Ms. Kerins expressed concern about possible transmission of AIDS if a blood transfusion became necessary.²¹ Dr. Gordon advised her to store some of her own blood should the need for transfusion arise.²² Ms. Kerins also asked Dr. Gordon, "How is your health?"²³ to which Dr. Gordon replied, "Well, I go to the gym regularly and I run every morning."²⁴

On November 5, 1986, Dr. Gordon successfully removed the tumor.²⁵ Nothing in the "detailed operative report of the surgery [indi-

16. See discussion of *Faya v. Almaraz*, 620 A.2d 327 (Md. 1993), *infra* part III.A.2.

17. See *Kerins v. Hartley*, 868 P.2d at 906, 28 Cal. Rptr. 2d at 151.

18. 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993).

19. *Kerins I*, 1993 Cal. App. LEXIS 786, at *2.

20. *Id.* at *2-3.

21. *Id.* at *6.

22. *Id.*

23. *Id.* (quoting Ms. Kerins).

24. *Id.* (quoting Dr. Gordon).

25. *Id.* at *3.

cated] that any cuts were sustained by Dr. Gordon, or that there were any other unusual occurrences"²⁶ during the surgical procedure.²⁷

Sometime between November 3 and 6, 1986, Dr. Gordon was tested for HIV.²⁸ On November 10, 1986, five days after Ms. Kerins's surgery, Dr. Gordon learned that he was HIV-positive.²⁹ Within a short time Dr. Gordon revealed his HIV-positive status to his partners at WMG.³⁰ Dr. Gordon continued his practice until January of 1987, when he fell victim to pneumocystic pneumonia, an AIDS-related complication.³¹

When Dr. Gordon was well enough to return to practice, his partners at WMG refused his services.³² Dr. Gordon then filed suit against his partners for AIDS discrimination.³³ On April 21, 1988, Dr. Gordon publicly announced his suit in a televised news broadcast.³⁴ Ms. Kerins, seeing the broadcast, was tested for HIV within one day.³⁵ Approximately two weeks later Ms. Kerins received her results. She was HIV-negative.³⁶

According to data relied on in 1986, HIV is detectable in ninety-five percent of infected individuals within six months of exposure.³⁷ Ms. Kerins tested HIV-negative more than eighteen months after her surgery, making her risk of contracting AIDS during that surgery *extremely remote*.³⁸

26. *Id.*

27. *Id.* Notably, up until that date, *there had been no documentation* of HIV transmission from surgeon to patient during an exposure-prone procedure. *Id.* at *7-8.

28. *Id.* at *3.

29. *Id.*

30. *Id.* Dr. Gordon's partners, Dr. Marki J. Knox and Dr. Karen Blanchard, were also named as defendants in the case, as was WMG. *Id.* at *1.

31. *Id.* at *4 n.1. Pneumocystosis pneumonia results from an infection with *pneumocystis carinii*, a lung infection characterized by cysts. STEADMAN'S MEDICAL DICTIONARY 1224 (25th ed. 1990).

32. *Kerins I*, 1993 Cal. App. LEXIS 786, at *4 n.1.

33. *Id.* at *3-4.

34. *Id.*

35. *Id.* at *3, *5.

36. *Id.* at *5.

37. *Id.* Ms. Kerins's expert witness, Dr. William T. O'Connor, testified that current tests were even more accurate—99.8%. *Id.* at *5 n.2. Yet Ms. Kerins has *refused* to be retested since 1988 to determine if she has become HIV-positive. *Id.*

38. *Id.* at *23 & n.6. First, Ms. Kerins's own statistical data supported the fact that the risk of percutaneous, that is, through-the-skin injury to physicians during surgery that could cause blood-to-blood exposure is approximately 6.9%. *Id.* at *23 n.6. Additionally, the actual risk of HIV transmission from surgeon to patient via percutaneous exposure is estimated at 0.3%. See Centers for Disease Control, *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, MORBIDITY & MORTALITY WKLY. REP., July 12,

Nevertheless, Ms. Kerins filed suit in Los Angeles County Superior Court against Dr. Gordon³⁹ and WMG, seeking general and punitive damages, including health care expenses, lost past and future earnings, and compensation for severe mental anguish and emotional distress, which she allegedly suffered upon discovering that Dr. Gordon performed surgery upon her to remove a large uterine fibroid tumor at a time when he was infected with [H]uman [I]mmunodeficiency [V]irus.⁴⁰

B. *The Trial Court and Appellate Decisions*

1. Procedural history

Ms. Kerins's complaint included causes of action for negligent infliction of emotional distress and battery.⁴¹ The defendants moved for summary judgment, contending that Ms. Kerins had not suffered any legally compensable injury.⁴² The trial court granted the defendants'

1991, at 1, 3 [hereinafter MMWR]. Moreover, Ms. Kerins conceded that the probability of conversion from her 1988 HIV-negative status to a 1993 HIV-positive result is no more than one in 20, or 5%. *Kerins I*, 1993 Cal. App. LEXIS 786, at *23 n.6.

From the 1988 data available at the time of Ms. Kerins's test, the defendants conservatively calculated that her risk of developing AIDS was at most one in 300,000. *Id.* Based on more current data, and assuming that Ms. Kerins would still test HIV-negative, the defendants estimated that Ms. Kerins's risk of developing AIDS is one in 24 million. *Id.*

As previously stated, there is no known case of HIV being transmitted from physician or health care worker to patient—in surgery or otherwise. Admittedly, there has been great speculation as to the five patients of an AIDS-infected Florida dentist who became HIV-positive. See Larry Gostin, *CDC Guidelines on HIV or HBV-Positive Health Care Professionals Performing Exposure-Prone Invasive Procedures*, 19 LAW, MED. & HEALTH CARE 140, 141 (1991). The CDC, however, has not been able to establish conclusively how the transmission occurred. *Id.* Furthermore, it has been noted that the dentist's procedures for infection control were substandard: *The dentist used the same gloves on more than one patient and did not sterilize his instruments.* *Id.* As a result, an AIDS authority has signaled that "the Florida case appears so unusual it would be unfair to base public policy on the assumption that HIV could be easily transmitted in a dental practice." *Id.*

39. Ms. Mary Kathleen Hartley has since been substituted for Dr. Gordon as special administrator of his estate after his death from AIDS on July 11, 1990. *Kerins I*, 1993 Cal. App. LEXIS 786, at *1-2.

40. *Id.*

41. *Id.* at *12-19. The complaint also set forth causes of action for intentional misrepresentation and intentional infliction of emotional distress. *Id.* at *36 n.9. The trial court, however, had no occasion to consider those additional causes of action because the defendants did not move for their summary adjudication. *Id.* Therefore, the appellate court in *Kerins I* did not consider these causes of action in its opinion. *Id.* Accordingly, this Note does not address these additional causes of action.

42. *Id.* at *11-12.

motion for summary judgment.⁴³ The grounds were twofold: (1) Ms. Kerins's fear of AIDS was unreasonable as a matter of law; and (2) no battery occurred because Dr. Gordon had performed the agreed-upon procedure.⁴⁴

2. The trial court's reasoning

a. *the emotional distress cause of action*

The trial court felt that Ms. Kerins's fear of AIDS was unreasonable as a matter of law pursuant to *Thing v. La Chusa*.⁴⁵ *Thing* created a bright-line rule regarding bystander recovery for emotional distress.⁴⁶ In *Thing*, a minor child named John Thing was struck by an automobile.⁴⁷ His mother, who was nearby, did not see or hear the incident, but was told of the event by her daughter.⁴⁸ When Mrs. Thing first saw John, he was bloody and unconscious; she believed him to be dead.⁴⁹ Mrs. Thing sued the driver of the automobile for the emotional shock and injury to her nervous system caused by the driver's negligence.⁵⁰ The *Thing* court held that the plaintiff could not recover for the distress that she experienced upon learning that a negligent driver injured her minor son, because she did not personally observe the incident.⁵¹

Unlike the plaintiff in *Thing*, Ms. Kerins was not a bystander in the operating room—she was the direct victim of Dr. Gordon's alleged negligence. Therefore, the trial court must have drawn an analogy to *Thing* to avail itself of the California Supreme Court's previous policy determinations in the area of emotional distress.⁵² Mrs. Thing could not recover for her distress because, as a matter of policy, she simply had not met the settled criteria for establishing bystander dis-

43. *Id.*

44. *Id.*

45. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

46. *Id.* at 667-68, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81.

47. *Id.* at 647, 771 P.2d at 815, 257 Cal. Rptr. at 866.

48. *Id.*

49. *Id.*

50. *Id.* at 648, 771 P.2d at 815, 257 Cal. Rptr. at 866.

51. *Id.* at 669, 771 P.2d at 830, 257 Cal. Rptr. at 881.

52. *See id.* at 664, 771 P.2d at 827, 257 Cal. Rptr. at 878 (stating that "the right to recover for negligently caused emotional distress must be limited . . . [P]olicy considerations include both the burden on the courts in applying vaguely defined criteria and the importance of limiting the scope of liability for negligence. . . . A 'bright line in this area of the law is essential.' " (quoting *Elden v. Sheldon*, 46 Cal. 3d 267, 277, 758 P.2d 582, 588, 250 Cal. Rptr. 254, 260 (1988))).

stress⁵³—regardless of the depth and validity of the distress she experienced.

Similarly, the *Kerins I* trial court reasoned that absent any proof of probable exposure to HIV, her HIV-negative status, and the extremely remote risk of her ever becoming HIV-positive, *Ms. Kerins's fear of developing AIDS was unreasonable as a matter of law.*⁵⁴ This was not a question of fact for a jury's determination, but rather a question of law that could be resolved by relying on the available statistical data.⁵⁵ Therefore, without proof, or even allegation of probable exposure, and with no symptoms of the disease or its causative agents, the trial court found Ms. Kerins's fear unreasonable based upon the public policy established in *Thing*.⁵⁶

Although *Kerins I* was a case of first impression in California,⁵⁷ the trial court's rationale was consistent with the majority jurisdiction approach in fear of AIDS cases: Absent proof of probable exposure to HIV/AIDS, or proof of HIV/AIDS infection, fear of AIDS is unreasonable as a matter of law.⁵⁸

53. *Id.* at 667-68, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81 (holding that in absence of physical injury or impact to plaintiff, damages for emotional distress should be recoverable only if plaintiff: "(1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness" (footnotes omitted)).

54. *Kerins I*, 1993 Cal. App. LEXIS 786, at *20-21. Additionally, the trial court found Ms. Kerins's refusal to be retested since 1988 a factor that weighed against the reasonableness of her fear of developing AIDS. Respondents' Brief on Appeal at 22 n.14, *Kerins v. Hartley*, 17 Cal. App. 4th 713, 21 Cal. Rptr. 2d 621 (1993) (No. B065917). The trial court stated: "I suspect the only reason [plaintiff] hasn't been retested . . . is that [] the only thing that can prove [is] things that are bad for her [case], namely, she still doesn't have H.I.V. and that is what she doesn't want the jury ever to know." *Id.* (alterations in original) (quoting trial court). Ms. Kerins's explanation for her failure to be retested is that it would be "possibly professionally damaging" to her. *Id.* at 7 n.5 (quoting Ms. Kerins's statements to trial court). HIV test results in California, however, are confidential. CAL. HEALTH & SAFETY CODE § 199.21 (West Supp. 1994). Therefore, it is the *filing* of an action that makes such test results public and potentially "professionally damaging," *not* the actual testing, which, by law, is confidential.

55. *See, e.g., Mitchell v. Superior Court*, 37 Cal. 3d 591, 608, 691 P.2d 642, 652, 208 Cal. Rptr. 886, 896 (1984) (stating that reasonableness of fear of future disease after exposure to pesticide DBCP is principally predicated on whether fear is consistent with scientific data regarding effects of exposure to DBCP).

56. *Kerins I*, 1993 Cal. App. LEXIS 786, at *22-23.

57. *Id.* at *2.

58. *See id.* at *24-26. For a discussion of the majority approach to fear of AIDS cases at the time of *Kerins I*, see *infra* part III.A.1.

b. the battery cause of action

The trial court reasoned that Dr. Gordon successfully performed the operation Ms. Kerins consented to—the removal of the fibroid tumor.⁵⁹ Therefore, under the authority of *Cobbs v. Grant*,⁶⁰ which held that the theory of battery is reserved for operations to which the patient has not consented,⁶¹ there was no battery as a matter of law because there was no intentional deviation from the consent given.⁶²

Interestingly, it was only *after* the grant of summary judgment based on *Cobbs* that Ms. Kerins *first presented* her “express condition” theory of battery.⁶³ Ms. Kerins alleged that her situation was more akin to those of *Ashcraft v. King*⁶⁴ and *Grieves v. Superior Court*⁶⁵ than the one presented in *Cobbs*.⁶⁶ Both *Ashcraft* and *Grieves* illustrate how consent can be conditioned on an express request; if that request is disregarded, the consent becomes invalid.⁶⁷ Therefore, relying on *Ashcraft* and *Grieves*, Ms. Kerins alleged that she created an express condition when she asked Dr. Gordon, “How is your health?”—an express condition to be operated on by a healthy, HIV-free doctor.⁶⁸ Thus, Ms. Kerins’s new contention was that she did not consent to the operation performed because the express condition of being operated on by a healthy, HIV-free doctor was violated, thereby vitiating her consent.⁶⁹

The trial court’s denial of the motion for reconsideration in light of Ms. Kerins’s new express-condition theory was significant.⁷⁰ Apparently, the trial court felt that the *Ashcraft* and *Grieves* fact patterns

59. *Kerins I*, 1993 Cal. App. LEXIS 786, at *11-12.

60. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972). For a full discussion of *Cobbs v. Grant*, see *infra* part III.B.1.

61. *Cobbs*, 8 Cal. 3d at 243, 502 P.2d at 10, 104 Cal. Rptr. at 514.

62. *Kerins I*, 1993 Cal. App. LEXIS 786, at *12.

63. *Id.* at *16-17 (stating that “express condition” theory was first presented in Ms. Kerins’s reply to defendant’s opposition to her motion for reconsideration).

64. 228 Cal. App. 3d 604, 278 Cal. Rptr. 900 (1991). In *Ashcraft*, the court of appeal held that the evidence was sufficient under *Cobbs* to allege a battery because consent to operate was conditioned on the use of only family-donated blood. *Id.* at 609-10, 278 Cal. Rptr. at 902-03. For a full discussion of *Ashcraft v. King*, see *infra* part III.B.2.

65. 157 Cal. App. 3d 159, 203 Cal. Rptr. 556 (1984). In *Grieves*, the court of appeal held that the plaintiff’s allegations were sufficient to state a cause of action in battery because an issue of fact existed as to whether Mrs. Grieves conditioned her consent to a postpartum tubal ligation on the birth of a healthy child. *Id.* at 165-66, 203 Cal. Rptr. at 560. For a full discussion of *Grieves*, see *infra* part III.B.2.

66. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

67. See *infra* part III.B.2.

68. *Kerins I*, 1993 Cal. App. LEXIS 786, at *16-17.

69. *Id.* at *14.

70. *Id.* at *11.

were not applicable to the present situation. The trial court stated that no battery occurred as a matter of law under the authority of *Cobbs*—the judgment did not rely on *Ashcraft* or *Grieves* in its determination of the case.⁷¹

The logic of the trial court was as follows: (1) In order to state a cause of action in battery—which excludes consent-based operations—an apparent consent must never have become operative because the defendant disregards an express condition as in *Ashcraft* and *Grieves*;⁷² (2) Ms. Kerins's question—"How is your health?"—was not an express condition, as were the conditional consents given in *Ashcraft* and *Grieves*;⁷³ therefore, (3) *Ashcraft* and *Grieves* are distinguishable from *Kerins* and, according to *Cobbs*, no battery occurred because Dr. Gordon performed the operation to which Ms. Kerins had consented.⁷⁴

3. The appellate court's reasoning in *Kerins I*

The appellate court in *Kerins I* reversed the holding of the trial court on both causes of action, finding material issues of fact that precluded affirmance of the summary judgment.⁷⁵ Specifically, the *Kerins I* court reversed the trial court's determination as to the reasonableness of Ms. Kerins's fear of AIDS and the possibility of the occurrence of a battery. The *Kerins I* court held that (1) Ms. Kerins's fear of AIDS could be reasonable, even absent proof of exposure to, or infection with, HIV/AIDS,⁷⁶ pursuant to the Maryland Court of Appeals' decision in *Faya v. Almaraz*;⁷⁷ and (2) there was a triable issue of fact as to whether Ms. Kerins's question concerning Dr. Gordon's health constituted an express condition that the operation be performed by a healthy doctor.⁷⁸

a. the reasonableness of Ms. Kerins's fear of AIDS

The appellate court in *Kerins I* did not find Ms. Kerins's fear of AIDS unreasonable as a matter of law, even though the court noted that Ms. Kerins could not offer any evidence of exposure to HIV to

71. *Id.* at *12-14.

72. *See id.* at *16-17.

73. *See id.*

74. *See id.*

75. *Id.* at *35-36.

76. *See id.* at *33-34.

77. 620 A.2d 327 (Md. 1993). For a full discussion of *Faya v. Almaraz*, see *infra* part III.A.2.

78. *Kerins I*, 1993 Cal. App. LEXIS 786, at *17.

controvert Dr. Gordon's testimony.⁷⁹ The only evidence proffered by Ms. Kerins was the data on the risk of transmission of HIV from physician to patient during surgery.⁸⁰ In fact, the court stated that Ms. Kerins's data "tends to support [Dr. Gordon's] claim that, statistically speaking, the risk is minuscule that an infected surgeon will actually suffer a percutaneous injury which results in HIV transmission to a patient."⁸¹ Despite Ms. Kerins's inability to prove exposure to HIV,⁸² and the data supporting the remote risk of her actual exposure to HIV, the *Kerins I* court allowed Ms. Kerins to go forward with her fear of AIDS claim.

i. the *Faya v. Almaraz* decision

After cataloging the majority approach with an "impressive array of so-called AIDS-phobia cases,"⁸³ *Kerins I* ultimately relied on the Maryland Court of Appeals' decision in *Faya v. Almaraz*,⁸⁴ a case it deemed "remarkably like appellant's."⁸⁵ *Almaraz* involved a surgeon specializing in breast cancer who was HIV-positive at the time he performed two surgeries.⁸⁶

79. *Id.* at *23. It has been argued, however, that patients under general anesthesia are unfairly prejudiced if forced to prove exposure, as they are totally unaware of the events at the time of possible exposure. See *Almaraz*, 620 A.2d at 337. Although it is undisputed that general anesthesia forecloses the possibility of a plaintiff observing events that might cause exposure, being HIV-positive after surgery performed by an HIV-infected doctor may obviate the need to actually observe exposure. If it could be proven that there were no other independent sources that could have caused the plaintiff's HIV infection, exposure from the HIV-positive physician could reasonably, albeit circumstantially, be inferred.

80. See MMWR, *supra* note 38, at 3.

81. *Kerins I*, 1993 Cal. App. LEXIS 786, at *23; see discussion *supra* note 38.

82. The issue regarding proof of exposure is the defining line between the minority and majority approaches to fear of AIDS cases. The majority approach—embraced by the trial court—requires allegation or demonstration of probable exposure to HIV. See, e.g., *Burk v. Sage Prods.*, 747 F. Supp. 285 (E.D. Pa. 1990) (holding that plaintiff stuck by discarded needle could not establish HIV exposure because plaintiff could not show needle had been used on AIDS patient, and plaintiff tested HIV-negative 13 months after incident).

Conversely, the minority approach—exemplified by *Almaraz* and relied on by the appellate court—states that the "requirement that plaintiffs must allege actual transmission [of HIV] would unfairly punish them for lacking the requisite information to do so." *Almaraz*, 620 A.2d at 337. The minority and majority approaches are discussed in depth *infra* part III.A.1-2.

83. *Kerins I*, 1993 Cal. App. LEXIS 786, at *25. For a discussion of the majority position that absent proof of exposure to HIV/AIDS, fear of AIDS is unreasonable and presents no legally cognizable injury, see *infra* part III.A.1.

84. 620 A.2d 327 (Md. 1993).

85. *Kerins I*, 1993 Cal. App. LEXIS 786, at *29.

86. *Id.*

Dr. Rudolf Almaraz, a surgeon at Johns Hopkins Hospital in Baltimore, had been aware of his HIV-positive status since 1986.⁸⁷ In 1988 and 1989, respectively, Dr. Almaraz performed surgery on Sonja Faya⁸⁸ and Perri Mahoney Rossi.⁸⁹ Dr. Almaraz was not diagnosed with full-blown AIDS⁹⁰ until October 27, 1989; thus, he *knew* he was *HIV-positive* at the time of Ms. Faya's surgery, and that he had developed *full-blown AIDS* at the time of Ms. Rossi's surgery.⁹¹

Dr. Almaraz died of AIDS on November 16, 1990.⁹² Ms. Faya and Ms. Rossi learned of the surgeon's AIDS-related death from a newspaper story in December 1990, over one year after Ms. Rossi's surgery and about twenty months after Ms. Faya's last procedure.⁹³ Ms. Faya and Ms. Rossi were tested for the HIV virus at that point; both were HIV-negative.⁹⁴

Ms. Faya and Ms. Rossi sued Dr. Almaraz's estate⁹⁵ for "negligence, negligent failure to obtain the patients' informed consent, fraud, and intentional infliction of emotional distress."⁹⁶ Dr. Almaraz's estate filed a demurrer to the complaints, and the trial court dismissed the action, stating that the claims did not present a legally

87. *Almaraz*, 620 A.2d at 329.

88. Faya's 1988 surgery was a partial mastectomy. *Id.* She had another operation, removal of an axillary hematoma, in March 1989. *Id.*

89. Rossi's 1989 operation was the removal of a benign lump from her breast. *Id.*

90. The term "full-blown AIDS" is generally used to signal the HIV-positive patient's first diagnosis of an ailment known to be indicative of acute immune dysfunction. *Id.* Dr. Almaraz suffered from cytomegalovirus retinitis, a type of eye infection. *Id.* The initial diagnosis of Dr. Almaraz's full-blown AIDS was confirmed by a second physician on November 17, 1989. *Id.*

Other illnesses that signal full-blown AIDS are (1) Kaposi's sarcoma, a type of cancer; (2) *pneumocystis carinii* pneumonia; (3) cytomegalovirus infections of the gastrointestinal tract and eye; (4) mycobacterium avium-intracellulare, a type of tuberculosis; and (5) severe prolonged herpes or yeast infections. *Id.*

91. This is the most significant difference between *Almaraz* and *Kerins I*: Dr. Almaraz *knew* that he was HIV-positive at the time of his surgeries, but there was *uncontroverted evidence* that Dr. Gordon had *no knowledge* of his HIV-positive status prior to Ms. Kerins's surgery—he did not receive his test results until *after* the procedure was performed. *Kerins I*, 1993 Cal. App. LEXIS 786, at *3. In this sense the *Almaraz* case is remarkably *unlike Kerins I*.

92. *Almaraz*, 620 A.2d at 329.

93. *Id.*

94. *Id.* at 329, 331.

95. The Johns Hopkins Hospital was also named as a defendant in the suit. *Id.* at 329-30. This Note, however, does not explore the agency and vicarious liability theories of an employer whose employee is infected with HIV/AIDS.

96. *Id.* at 330. Additionally, Faya alleged negligent misrepresentation and breach of contract, and Rossi alleged loss of consortium, breach of fiduciary duty, and battery. *Id.*

cognizable injury because the plaintiffs did not allege exposure to HIV during surgery and were not HIV-positive.⁹⁷

The Maryland Court of Appeals reversed and remanded, holding that under the facts presented, Ms. Faya's and Ms. Rossi's fear with regard to developing AIDS was not unreasonable as a matter of law.⁹⁸ The court felt that the majority jurisdiction threshold to recovery—allegation of exposure to AIDS—unfairly punished the plaintiffs for lacking the requisite information to know if exposure occurred.⁹⁹

However, the court went on to state that the plaintiffs' fear of developing AIDS might be deemed unreasonable *after* the receipt of their HIV-negative test results because "there is current credible evidence of a 95% certainty that one will test positive for the AIDS virus, if at all, within six months after exposure to it."¹⁰⁰ The court stated:

Once [the plaintiffs] learned of their HIV-negative status more than a year after their respective surgeries, the possibility of their contracting AIDS from Dr. Almaraz became extremely unlikely and thus, as a matter of law, might be deemed unreasonable. Therefore, [the plaintiffs] may only recover for their fear and its physical manifestations which may have resulted from Almaraz's alleged negligence for the period constituting their reasonable window of anxiety—the period between which they learned of Almaraz's illness and received their HIV-negative results.¹⁰¹

Although the *Almaraz* opinion allowed recovery for emotional distress absent proof of HIV exposure, the court established definite parameters that limited its holding. The *Almaraz* court held that the period of recovery was limited specifically to the time that the fear of acquiring the disease would have been reasonable; as soon as information that made the fear unreasonable was or would have been available to the plaintiff, the fear became unreasonable as a matter of law.¹⁰²

Kerins I agreed with the basic principle of *Almaraz*: Whether or not exposure to HIV/AIDS can be proven, the fear of developing the disease after a surgical procedure performed by an HIV-infected phy-

97. *Id.* at 330-31.

98. *Id.* at 336.

99. *Id.* at 336-37.

100. *Id.* at 337 (citation omitted).

101. *Id.*

102. *Id.* at 337 n.10.

sician becomes unreasonable only after certain events occur.¹⁰³ However, *Kerins I* seemed to part from the *Almaraz* decision when it laid down its criteria for exactly *when* the fear of developing AIDS becomes unreasonable as a matter of law.¹⁰⁴ The *Almaraz* court formulated a bright-line equation for the unreasonableness of the plaintiffs' fear—as soon as an HIV-negative test result was or would have been available to abate the fear, the fear becomes unreasonable as a matter of law.¹⁰⁵ In contrast, *Kerins I* fashioned a three-part test to determine unreasonable fear absent proof of exposure, and held that Ms. Kerins's

unabated emotional distress became unreasonable, ergo, not compensable, once the following events occurred: she received access to the operative report and/or in some other manner received assurances that no actual exposure to Dr. Gordon's blood had occurred; she received test results negative for the presence of HIV antibodies; and she had the opportunity to obtain counseling on the accuracy and reliability of the testing methods employed and the very remote probability of [becoming HIV-positive] more than 18 months after surgery.¹⁰⁶

By characterizing the test as it did, the *Kerins I* court did not give California a bright-line "unreasonable, ergo, noncompensable" *Almaraz* standard. The *Almaraz* court clearly stated that recovery can only be obtained for the time that would have elapsed between the knowledge of a possible HIV transmission and the receipt of HIV-negative results—whether or not testing is done.¹⁰⁷ The *Kerins I* court, on the other hand, did not state that the clock stops once the information becomes available to the plaintiff—the limits placed on the duration of the fear were far less restrictive.¹⁰⁸

Additionally, *Kerins I* added two requirements to the *Almaraz* test: (1) counseling with regard to the accuracy of the testing method;

103. See *Kerins I*, 1993 Cal. App. LEXIS 786, at *33-34.

104. See *id.* at *35.

105. More specifically, the *Almaraz* opinion states that the window of anxiety closes once satisfactory information becomes available that puts to rest the fear of injury. Hence, even had the [plaintiffs] not undergone immediate blood testing, their recovery span would be limited to the same duration, for the fear-relieving information, if known to them, would have been available for their retrieval.

Almaraz, 620 A.2d at 337 n.10.

106. *Kerins I*, 1993 Cal. App. LEXIS 786, at *35.

107. *Almaraz*, 620 A.2d at 337 n.10.

108. See *Kerins I*, 1993 Cal. App. LEXIS 786, at *35.

and (2) access to the operative report “and/or” assurances that no exposure occurred.¹⁰⁹ This tripartite standard, contrasted with the bright-line rule of *Almaraz*, would have been much more difficult to apply on a case-by-case basis.¹¹⁰ Most important, however, the *Kerins I* test did not restrict the time that may elapse before the plaintiff’s fear becomes unreasonable for failure to avail herself of the fear-relieving information.¹¹¹

ii. the *Molien v. Kaiser Foundation Hospitals* analogy

The *Kerins I* court drew an analogy to *Molien v. Kaiser Foundation Hospitals*¹¹² in support of its decision that Ms. Kerins’s initial fear of developing AIDS was not unreasonable as a matter of law.¹¹³ The plaintiff in *Molien*, Stephen Molien, sued a doctor and a hospital for negligent infliction of emotional distress because the doctor had incorrectly diagnosed and treated his wife for syphilis.¹¹⁴ Mrs. Molien was then advised to have Mr. Molien examined to determine if he had

109. *Id.*

110. Assume that HIV-test results are available to a potential plaintiff within five days after an HIV test. Under *Almaraz*, compensation for emotional distress based on fear of AIDS can only encompass the time between the knowledge of the possible HIV transmission and the five-day wait for the negative test result. *Almaraz*, 620 A.2d at 337 & n.10. Additionally, the *Almaraz* court stated that the measurement starts when the plaintiff learns of the possible exposure and *could* have taken an HIV test—regardless of when the plaintiff *actually decides* to take the test. *See id.*

Conversely, under the *Kerins I* tripartite standard, there is no requirement as to when the plaintiff should or could take an HIV test. *Kerins I*, 1993 Cal. App. LEXIS 786, at *35. Therefore, if a plaintiff is fearful—or worse, in denial—when does the clock stop? What if the plaintiff waits one year to take the test? Does the time period of compensation then become one year and five days?

Additionally, the *Kerins I* court required “counseling” regarding the accuracy of the testing. *Id.* How long might this add to the period of compensation? What defines “counseling”? What amount of “counseling” is sufficient? What if the “counseling” that the plaintiff needs to truly accept the HIV-negative test as accurate is one year of therapy? The compensation period then becomes the one year needed to take the test, five days to get the result, and another year of “counseling.”

Finally, the *Kerins I* court required access to the medical report “and/or” assurances as to lack of exposure to HIV. *Id.* What constitutes an “assurance”? Is it verbal or written? What defines access to a medical report? Is a photocopy sufficient? Does one need the assurance *and* the report? A hypothetical plaintiff could use the language in *Kerins I* to support yet another period of possible compensation. Ultimately, the *Kerins I* standard becomes one of flexible judicial discretion rather than *Almaraz*’s reasonable formula for emotional compensation.

111. *Id.*

112. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

113. *Kerins I*, 1993 Cal. App. LEXIS 786, at *34-35.

114. *Molien*, 27 Cal. 3d at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832.

transmitted the disease to his wife.¹¹⁵ Mr. Molien's tests revealed that he was not infected, and therefore not the source of his wife's alleged infection.¹¹⁶

Although Mr. Molien tested negative for syphilis, the fact that it is known to be a sexually transmitted disease caused Mrs. Molien to believe that her husband had engaged in an extramarital affair.¹¹⁷ As a result of Mrs. Molien's misdiagnosis and the tensions it created, the Moliens' marriage dissolved.¹¹⁸

Mr. Molien brought suit for negligent infliction of emotional distress and loss of consortium.¹¹⁹ The trial court sustained demurrers to both causes of action, and Mr. Molien appealed.¹²⁰ The Supreme Court of California, in a landmark decision,¹²¹ held that Mr. Molien's causes of action should not have been dismissed¹²² because the collapse of his marriage resulting from Mrs. Molien's erroneous syphilis diagnosis was reasonably foreseeable.¹²³ As such, Mr. Molien was allowed to go back to the trial court and prove the extent of his emotional distress.

On the basis of *Molien*, the *Kerins I* court stated that the "initial alarm [Ms. Kerins felt] at hearing news that her surgeon had risked infecting patients with AIDS cannot be dismissed as unreasonable as a matter of law."¹²⁴ There are, however, facts that distinguish *Molien* from *Kerins I*.

Mr. Molien was permitted recovery for genuine emotional distress after his wife was erroneously diagnosed with a serious disease.¹²⁵ Unlike *Molien*, *Kerins I* dealt with the fear of contracting a disease in the future.¹²⁶ Additionally, Ms. Kerins was *never told* that she in fact had been exposed to AIDS or had contracted AIDS—

115. *Id.*

116. *Id.*

117. *Id.* at 920, 616 P.2d at 814, 167 Cal. Rptr. at 832.

118. *Id.*, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.

119. *Id.*, 616 P.2d at 815, 167 Cal. Rptr. at 833.

120. *Id.*

121. The *Molien* decision is considered an epic one because it was one of the first decisions that permitted an action for emotional distress regardless of whether there was any resulting physical injury from the emotional disturbance. See *id.* at 930-31, 616 P.2d at 821, 167 Cal. Rptr. at 839. The trend toward discarding the requirement of physical harm as a result of the emotional distress started with *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970).

122. *Molien*, 27 Cal. 3d at 931, 616 P.2d at 821, 167 Cal. Rptr. at 839.

123. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

124. *Kerins I*, 1993 Cal. App. LEXIS 786, at *35.

125. *Molien*, 27 Cal. 3d at 930-31, 616 P.2d at 821, 167 Cal. Rptr. at 839.

126. *Kerins I*, 1993 Cal. App. LEXIS 786, at *7.

while Mrs. Molién was positively, although erroneously, diagnosed with syphilis.

The *Kerins I* court's reliance on *Molién* was misplaced. *Molién* permitted recovery for a mistaken diagnosis of a serious disease which caused the breakup of a marriage.¹²⁷ Ms. Kerins had not faced an erroneous diagnosis—in fact she had been assured that her chance of ever contracting AIDS was essentially nonexistent.¹²⁸

b. a battery occurred if Ms. Kerins's consent was conditional

The *Kerins I* court held that the trial court's reading of *Cobbs v. Grant*¹²⁹ was "unduly restrictive."¹³⁰ In *Cobbs*, the California Supreme Court limited the intentional tort of battery to situations where the surgeon performs an operation to which the patient has not consented.¹³¹ The trial court relied on *Cobbs* to foreclose Ms. Kerins's cause of action for battery because the operation Dr. Gordon performed was the one to which Ms. Kerins had consented.¹³²

The *Kerins I* court disagreed with the trial court's determination. The *Kerins I* court reasoned that Ms. Kerins's question to Dr. Gordon—"How is your health?"—and the storing of her blood presented a factual question as to whether Ms. Kerins's consent was conditional, and thus should be resolved by the trier of fact.¹³³

The court in *Kerins I* conceded that Ms. Kerins's pleadings had not alleged that an express condition had been placed on her consent until she filed her response to the defendants' opposition to the motion for reconsideration.¹³⁴ Nevertheless, the *Kerins I* court stated that Ms. Kerins's question, "How is your health?" might have placed

127. *Molién*, 27 Cal. 3d at 930-31, 616 P.2d at 821, 167 Cal. Rptr. at 839.

128. This kind of "intangible injury" is exactly the type of emotional distress claim specifically deemed uncompensable in previous policy determinations by the California Supreme Court. See, e.g., *Baxter v. Superior Court*, 19 Cal. 3d 461, 463, 563 P.2d 871, 872, 138 Cal. Rptr. 315, 316 (1977) (stating that due to "the intangible nature of the injury . . . we decline . . . to permit recovery"); *Borer v. American Airlines*, 19 Cal. 3d 441, 450, 563 P.2d 858, 864-65, 138 Cal. Rptr. 302, 308-09 (1977) (stating that "subsequent authority support[s] our decision in this case to deny a cause of action founded upon purely intangible injury"); see *infra* part III.A for a comparison of *Baxter*, *Borer*, and *Kerins I*.

129. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

130. *Kerins I*, 1993 Cal. App. LEXIS 786, at *19.

131. *Cobbs*, 8 Cal. 3d at 240-41, 502 P.2d at 8, 104 Cal. Rptr. at 512.

132. *Kerins I*, 1993 Cal. App. LEXIS 786, at *11-12.

133. See *id.* at *17-19.

134. *Id.* at *16-17.

an express condition on her surgery—the condition of being operated on by a doctor free of HIV infection.¹³⁵

As a result, the *Kerins I* court held that a jury should have determined whether the question, “How is your health?” and storing one’s own blood indicated an express condition as laid down by *Ashcraft*¹³⁶ and *Grieves*.¹³⁷ The *Kerins I* court stated that, in liberally construing Ms. Kerins’s pleadings, facts could be established that arguably supported Ms. Kerins’s contention that her consent was expressly conditioned on the operation being performed by a healthy doctor.¹³⁸

Further supporting its holding that a legally cognizable cause of action for battery may exist, the *Kerins I* opinion cited *Rains v. Superior Court*.¹³⁹ In *Rains*, patients of a group of physically abusive psychiatrists brought an action alleging battery, and the court of appeal held that the misrepresentation of the therapeutic purpose of an otherwise offensive contact vitiates consent.¹⁴⁰

Ms. Kerins, however, did not allege a nontherapeutic purpose in her complaint. In fact, the successful operation that Dr. Gordon performed accomplished the very therapeutic purpose it hoped to achieve—the removal of a fibroid tumor.¹⁴¹ One can only surmise that the *Kerins I* court felt that Ms. Kerins’s consent was vitiated by a misrepresentation analogous to the one in *Rains*: Dr. Gordon misrepresented his health by not revealing he had just taken an AIDS test and might be HIV-positive, just as the psychiatrists misrepresented the therapeutic aspects of the abusive treatment to the patients in *Rains*.

The *Kerins I* court, therefore, concluded that Ms. Kerins’s allegations could support an action in battery¹⁴² on the basis of a possible express condition under the authority of *Ashcraft*¹⁴³ and *Grieves*¹⁴⁴ and the misrepresentation analogy to *Rains*.¹⁴⁵

135. *Id.* at *19.

136. 228 Cal. App. 3d 604, 278 Cal. Rptr. 900 (1991) (stating operation expressly conditioned on use of only family-donated blood).

137. 157 Cal. App. 3d 159, 203 Cal. Rptr. 556 (1984) (stating procedure expressly conditioned on birth of healthy baby).

138. *Kerins I*, 1993 Cal. App. LEXIS 786, at *17-19.

139. *Id.* at *19 (citing *Rains v. Superior Court*, 150 Cal. App. 3d 933, 198 Cal. Rptr. 249 (1984)).

140. 150 Cal. App. 3d 933, 940, 198 Cal. Rptr. 249, 254 (1984).

141. *Kerins I*, 1993 Cal. App. LEXIS 786, at *2-3.

142. *Id.* at *19.

143. 228 Cal. App. 3d 604, 278 Cal. Rptr. 900 (1991).

144. 157 Cal. App. 3d 159, 203 Cal. Rptr. 556 (1984).

145. 150 Cal. App. 3d 933, 198 Cal. Rptr. 249 (1984).

III. HISTORICAL FRAMEWORK

A. *The Fear of AIDS Cases at the Time of Kerins I and the Previous Policy Determinations of the California Supreme Court*

The majority of jurisdictions have held that plaintiffs should not recover for fear of AIDS absent allegations or proof of exposure to AIDS/HIV.¹⁴⁶ Fortunately, California's recent policy determination in *Potter v. Firestone Tire & Rubber Co.* supports such a bright-line rule.¹⁴⁷ The decision in *Kerins I*, however, aligned California law with the minority position, allowing compensation for fear of AIDS without alleging or proving probable exposure. The *Kerins I* position conflicted not only with the supreme court's subsequent opinion in *Potter*, but directly contravened previous policy determinations in the area of emotional distress recovery.

The bright-line limitation in the emotional distress area is illustrated by supreme court cases such as *Borer v. American Airlines*¹⁴⁸ and *Baxter v. Superior Court*.¹⁴⁹ In *Borer*, the mother of nine children was injured when the cover of a lighting fixture struck her in an American Airlines terminal.¹⁵⁰ The children sued for loss of parental consortium.¹⁵¹ The supreme court denied the children relief, stating that "policy rather than logic is the determinative factor."¹⁵²

Similarly in *Baxter*, a sixteen-year-old child was reduced to the mental age of three, suffered hearing impairment, total blindness, and partial paralysis as a result of the administration of a general anesthetic.¹⁵³ The parents of the child sued for emotional distress and the court denied recovery "[f]or the policy reasons stated in *Borer* [and] the intangible nature of the injury."¹⁵⁴

146. See *infra* part III.A.1.

147. See *infra* part IV for a discussion of the recent California Supreme Court decision in *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993) (holding that generally, absent present physical injury or illness, damages for fear of cancer are recoverable only if more probable than not that cancer will occur).

148. 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

149. 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977).

150. *Borer*, 19 Cal. 3d at 445, 563 P.2d at 861, 138 Cal. Rptr. at 305.

151. *Id.*

152. *Id.* at 446, 563 P.2d at 861, 138 Cal. Rptr. at 305 (quoting *Ekalo v. Constructive Serv. Corp.*, 215 A.2d 1, 7 (N.J. Sup. Ct. 1965)).

153. *Baxter*, 19 Cal. 3d at 463, 563 P.2d at 872, 138 Cal. Rptr. at 316.

154. *Id.*

In *Elden v. Sheldon*¹⁵⁵ the court denied recovery for a man who watched his unmarried cohabitant die in an automobile accident.¹⁵⁶ Although the court recognized that unmarried couples are "bound by emotional ties as strong as those that bind formally married partners,"¹⁵⁷ it concluded that "[t]he need to draw a bright line in this area of the law is essential."¹⁵⁸ The court further stated that "[t]he 'problems of multiplication of actions and damages' that would result from such an extension of liability would place an intolerable burden on society."¹⁵⁹

Extracting the policy from these decisions, it is clear that regardless of the *genuineness* of the emotional distress suffered, and the *legitimacy* of the resulting injury, not all emotional distress is compensable. In the present dispute, no one would deny that Ms. Kerins suffered severe emotional distress at discovering that Dr. Gordon was HIV-positive, *but the fact remained that Ms. Kerins had not suffered a legally compensable injury*. Ms. Kerins was HIV-negative, and the data supporting her test results showed that ninety-five percent of individuals exposed to HIV will test positive after six months.¹⁶⁰ Ms. Kerins tested HIV-negative more than one year after her surgery with Dr. Gordon.¹⁶¹ Furthermore, had Ms. Kerins agreed to be retested, the result would be accurate for up to 99.8 percent of those individuals exposed.¹⁶²

It is inconceivable that the same court that would deny emotional distress recovery to a mother whose child lay seemingly dead in the street,¹⁶³ to the parents of a teenage boy rendered infantile, blind, and paralyzed for life,¹⁶⁴ to the nine children who lost the full care of their mother,¹⁶⁵ and to the man who watched his live-in lover die,¹⁶⁶ would allow recovery for emotional distress to a woman who *had no symptoms of a disease, could not allege exposure to the disease, and who had refused to be reassured of her negative condition up to a 99.8 percent certainty*.

155. 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

156. *Id.* at 269, 758 P.2d at 582, 250 Cal. Rptr. at 254.

157. *Id.* at 273, 758 P.2d at 585-86, 250 Cal. Rptr. at 258.

158. *Id.* at 277, 758 P.2d at 588, 250 Cal. Rptr. at 260.

159. *Id.* (quoting *Borer*, 19 Cal. 3d at 448, 563 P.2d at 863, 138 Cal. Rptr. at 307).

160. *Kerins I*, 1993 Cal. App. LEXIS 786, at *5.

161. *Id.* at *3-5.

162. *Id.* at *5 n.2.

163. *Thing v. La Chusa*, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

164. *Baxter v. Superior Court*, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977).

165. *Borer v. American Airlines*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

166. *Elden v. Sheldon*, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

Therefore, the *Kerins I* court blatantly disregarded stare decisis and the difficult policy considerations behind the aforementioned California Supreme Court decisions by allowing Ms. Kerins to seek emotional distress compensation for her present fear of a disease that had *not yet manifested itself and in all probability never would*.¹⁶⁷ Compare Ms. Kerins's claim for present distress over an "improbable future injury" with the present distress of the plaintiffs who were denied recovery for their emotional distress in the cases above and the result is clear: California could not ultimately adopt the minority position of recovery for emotional distress absent probable exposure to HIV/AIDS without seriously compromising its previous policy determinations.

Part IV reveals that the California Supreme Court's recent decision in *Potter v. Firestone Tire & Rubber Co.*¹⁶⁸ mandated alignment with the majority position in fear of AIDS cases, therefore maintaining consistency in its approach to emotional distress recovery. However, an overview of the two methodologies at the time of the *Kerins I* opinion will help to reveal the flawed logic of the *Kerins I* appellate court.

1. The majority jurisdiction approach at the time of *Kerins I*

In the majority of jurisdictions, in order to recover for the fear of contracting AIDS in the future, a plaintiff must prove probable exposure to the disease.¹⁶⁹ In *Johnson v. West Virginia University Hospitals*,¹⁷⁰ a patient infected with AIDS bit a police officer employed by the university.¹⁷¹ The officer, who had not been informed of the patient's infected status, was called to help when the patient became un-

167. *Kerins I*, 1993 Cal. App. LEXIS 786, at *23 n.6.

168. 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993).

169. See *infra* text accompanying notes 170-92. However, proof of probable exposure to HIV from an HIV-infected physician is easier to show today than in 1986. See MMWR, *supra* note 38, at 5. The current CDC recommendations advise that, in addition to protective barrier techniques, health care workers who perform exposure-prone procedures should: (1) know their HIV status—this was not a requirement in 1986 when Dr. Gordon performed his surgery; and (2) not perform exposure-prone procedures unless an expert review panel has determined under what conditions, if any, they may continue performing such procedures. See *id.* These guidelines will significantly reduce a recurrence of a *Kerins I*-type incident, and if such an incident were still to occur, the breach of the duty of care can now be more readily shown. Moreover, in either a majority or minority jurisdiction, if one has HIV-positive test results, a cause of action for emotional distress may rest on that positive test alone, providing that the causal link to the defendant's conduct is shown.

170. 413 S.E.2d 889 (W. Va. 1991).

171. *Id.* at 891.

ruly.¹⁷² The officer assisted the medical staff in restraining the patient, and the patient, who had his own blood in and around his mouth at the time,¹⁷³ then bit the officer.¹⁷⁴ The officer prevailed at the trial level in his action for negligent infliction of emotional distress,¹⁷⁵ and the West Virginia Supreme Court of Appeals affirmed.¹⁷⁶

It was undisputed that the officer had been exposed to the blood of the AIDS-infected patient.¹⁷⁷ The court noted that the bite caused the officer to bleed, mixing his blood with that of the AIDS-infected patient.¹⁷⁸ Even the expert for the hospital conceded that there had been exposure.¹⁷⁹ The court discussed other fear of AIDS cases and stated that “before a recovery for emotional distress damages may be made due to a fear of contracting a disease, such as AIDS, there must first be *exposure* to the disease. If there is no exposure, then emotional distress damages will be denied.”¹⁸⁰

In *Hare v. State*,¹⁸¹ the “no exposure, no recovery rule” was reiterated in similar circumstances—but this time to deny compensation. *Hare* dealt with a hospital employee bitten by an inmate who was transferred to the hospital after a suicide attempt.¹⁸² The appellate court affirmed the lower court’s determination that the fear was unreasonable as a matter of law because there was no proof that the inmate had HIV/AIDS; therefore, there was no proof of exposure.¹⁸³

172. *Id.*

173. Evidence at trial showed that the patient had bitten himself and drawn his own blood prior to biting the officer. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 897.

177. *Id.* at 893.

178. *Id.*

179. *Id.*

180. *Id.*; see also *Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79 (W. Va. 1991) (denying mortician who embalmed AIDS-infected body recovery for fear of AIDS in spite of contact with deceased’s bodily fluids because protective gear was worn and no proof of puncture or exposure to AIDS virus was shown), *overruled on other grounds* by *Courtney v. Courtney*, 37 S.E.2d 436, 443 (W. Va. 1993) (stating that claims for severe emotional distress are governed by two-year statute of limitations, rather than one year as stated in *Gregory*).

181. 570 N.Y.S.2d 125 (App. Div.), *appeal denied*, 580 N.E.2d 1058 (N.Y. 1991).

182. *Id.* at 126.

183. *Id.* at 127; see also *Ordway v. County of Suffolk*, 583 N.Y.S.2d 1014 (Sup. Ct. 1992) (denying surgeon who unknowingly operated on HIV-positive patient recovery for fear of AIDS because no puncture of surgical gear or unusual occurrence and therefore no proof of exposure to AIDS).

As a result, the court held that the plaintiff's emotional distress was too remote and speculative to be compensable.¹⁸⁴

In *Lubowitz v. Albert Einstein Medical Center*,¹⁸⁵ the plaintiff was an *in vitro* fertilization participant who learned that the donated placenta had tested positive for HIV antibodies.¹⁸⁶ Although the plaintiff tested HIV-negative, she experienced severe emotional distress.¹⁸⁷ The hospital later retested the placenta and found that the initial test had been a false-positive, and that the plaintiff had never been exposed to AIDS.¹⁸⁸

Regardless of the donated placenta's initial HIV-positive result, the fact that neither the plaintiff nor the placenta had subsequently tested positive justified the affirmance of summary judgment against her emotional distress claim.¹⁸⁹ Distress without actual exposure, according to the court, "simply is not enough. [Plaintiff] cannot recover, in her asymptomatic state, monetary damages for a risk or fear of developing AIDS in the future."¹⁹⁰ Thus, even a rationally based fear of exposure to AIDS based on the first positive test was not sufficient, absent some indication that the plaintiff was suffering symptoms indicative of exposure.

Lastly, in *Neal v. Neal*,¹⁹¹ a wife sought emotional distress damages where she feared contracting AIDS—or some other sexually transmitted disease—from her husband's extramarital affair. The appellate court affirmed the lower court's grant of summary judgment against the wife concluding that "in order to be actionable, a plaintiff's fear of a disease must be based on more than the mere possibility of exposure to a disease."¹⁹²

The above cases quite clearly illustrate the majority position ignored by *Kerins I*: Without proof of exposure to HIV or its causative agents, there can be no recovery for present emotional distress based on the fear of contracting AIDS in the future.

184. *Hare*, 570 N.Y.S.2d at 127.

185. 623 A.2d 3 (Pa. Super. Ct. 1993).

186. *Id.* at 4.

187. *Id.*

188. *Id.*

189. *Id.* at 5.

190. *Id.*; see also *Burk v. Sage Prods.*, 747 F. Supp. 285 (E.D. Pa. 1990) (denying paramedic stuck by disposed needle recovery for fear of AIDS because no proof existed needle had been used on AIDS patient and paramedic was HIV-negative on five occasions—therefore no exposure to AIDS was established).

191. 873 P.2d 881 (Idaho Ct. App. 1993), *aff'd in part*, 873 P.2d 871 (Idaho 1994) (holding that fear of disease claim must include allegation of exposure).

192. *Id.* at 889.

2. The minority jurisdiction approach at the time of *Kerins I*

The court in *Kerins I* relied on *Faya v. Almaraz*,¹⁹³ a case representative of the minority jurisdiction approach to fear of AIDS cases. The minority rule states that where there is no proof of exposure to HIV/AIDS, there still may be recovery for the emotional distress suffered during the period that the plaintiff must wait before receiving HIV-negative test results.

Almaraz, as discussed above,¹⁹⁴ reversed a lower court's demurrer denying two patients of an HIV-positive surgeon recovery for their fear of contracting AIDS even though (1) they could not prove or allege exposure to HIV, and (2) they both tested HIV-negative one year after their respective surgeries.¹⁹⁵

The appellate court in *Almaraz* relied on *Carroll v. Sisters of St. Francis Health Services*.¹⁹⁶ In *Carroll*, the court held that the plaintiff, a hospital visitor, could recover for her fear of acquiring AIDS after being pricked by needles that were possibly AIDS-contaminated—even though there was no proof of her exposure to AIDS or HIV.¹⁹⁷ The period of recovery allowed in *Carroll*, as in *Almaraz*, was the time between the plaintiff's needle injury and the receipt of her HIV-negative test results.¹⁹⁸

193. 620 A.2d 327 (Md. 1993).

194. See *supra* part II.B.3.

195. *Almaraz*, 620 A.2d at 336. Interestingly, at the trial court level *Almaraz* followed the majority approach to fear of AIDS. The trial court, before the reversal by the Maryland Court of Appeals, sustained the demurrer to the two patients' actions stating that "without proof of exposure, that is, without a positive HIV test, the plaintiff cannot present compensable damages." *Faya v. Estate of Almaraz*, No. 90345011, 1991 WL 317023, at *4 (Md. Cir. Ct. May 23, 1991); *Rossi v. Estate of Almaraz*, No. 90344028, 1991 WL 166924, at *4 (Md. Cir. Ct. May 23, 1991).

196. No. 02A01-9110-CV-00232, 1992 Tenn. App. LEXIS 845 (Tenn. Ct. App. Oct. 12, 1992).

197. *Id.* at *4-5. The dissent in *Carroll*, however, was representative of the majority approach—that absent proof of exposure the claim should not be allowed. "The unsubstantiated fear that one may have been exposed to the AIDS virus is not a sufficient basis under our authorities to support a claim for emotional distress." *Id.* at *18 (Highers, J., dissenting).

198. *Id.* at *14. Interestingly, *Carroll*—the very opinion relied upon by *Almaraz* for allowing recovery absent exposure to HIV or AIDS—was reversed by the Tennessee Supreme Court. *Carroll v. Sisters of St. Francis Health Servs.*, 868 S.W.2d 585 (Tenn. 1993). The supreme court stated that "[i]n order to recover emotional damages based on the fear of contracting AIDS, the plaintiff must prove, at a minimum, that he or she was actually exposed to HIV." *Id.* at 594. *Carroll*, therefore, is now consistent with the majority jurisdiction approach to fear of AIDS.

B. The Battery Cases

1. The distinction between medical battery and medical negligence: *Cobbs v. Grant*

The trial court in *Kerins I* relied on *Cobbs v. Grant*¹⁹⁹ to dismiss Ms. Kerins's allegations of battery. *Cobbs* confronted the issue of whether a patient may assert a claim of battery against a doctor for performing a procedure to which the patient has consented, where the doctor fails to disclose an improbable yet inherent risk to the procedure, and that risk then materializes.²⁰⁰

The plaintiff in *Cobbs* suffered from a duodenal ulcer.²⁰¹ Dr. Grant, his surgeon, explained the nature of the operation to the plaintiff but failed to disclose the inherent low probability risks attendant to the surgery.²⁰² After the procedure was performed, the plaintiff's ulcer seemed to disappear, and he was released from the hospital.²⁰³ Upon returning home, the plaintiff experienced severe abdominal pain and was advised to return to the hospital.²⁰⁴ At the hospital, the plaintiff went into shock, and emergency surgery revealed an injury to the plaintiff's spleen which necessitated its removal.²⁰⁵ Inherent in the first procedure to which the plaintiff had consented was a five-percent risk of a spleen injury requiring surgery.²⁰⁶

Subsequent to the original surgery, the plaintiff also developed a second ulcer.²⁰⁷ This "new" ulcer was also an inherent risk of the surgery first performed on the plaintiff, and required a third operation to remove fifty percent of the plaintiff's stomach.²⁰⁸ The plaintiff had one last complication as a result of his surgery—the premature absorption of a suture.²⁰⁹ This, too, was a risk inherent in the first surgery.²¹⁰

The jury, in a general verdict, found for the plaintiff in the amount of \$45,000.²¹¹ The California Supreme Court reversed and re-

199. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

200. *Id.* at 239-41, 502 P.2d at 7-8, 104 Cal. Rptr. at 511-12.

201. *Id.* at 234, 502 P.2d at 4, 104 Cal. Rptr. at 508.

202. *Id.*

203. *Id.*

204. *Id.* at 235, 502 P.2d at 4, 104 Cal. Rptr. at 508.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*, 502 P.2d at 5, 104 Cal. Rptr. at 508.

209. *Id.*

210. *Id.*

211. *Id.*, 502 P.2d at 5, 104 Cal. Rptr. at 509.

mandated citing error: Because the verdict was a general one, the court was not able to tell if the jury award was based on the theory of vitiated consent—battery—or lack of informed consent—negligence.²¹² As a result, to assist on retrial, the court set out standards showing when such an action would lie in battery, and when it would lie in negligence.²¹³

Although the court found the question a “close” one, it stated: The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence.²¹⁴

The California Supreme Court discussed the policy reasons which supported the majority’s rule of pleading such actions in negligence:

[M]ost jurisdictions have permitted a doctor in an informed consent action to interpose a defense that the disclosure he omitted to make was not required within his medical community. However, expert opinion as to community standard is not required in a battery count, in which the patient must merely prove failure to give informed consent and a mere touching absent consent. Moreover a doctor could be held liable for punitive damages under a battery count, and if held liable for the intentional tort of battery he might not be covered by his malpractice insurance.²¹⁵

2. The “express condition” cases

Ms. Kerins, distinguishing her case from *Cobbs*,²¹⁶ alleged that she had consented to the operation on the condition it was performed

212. *Id.*

213. *Id.* at 239, 502 P.2d at 7, 104 Cal. Rptr. at 511.

214. *Id.* at 240-41, 502 P.2d at 8, 104 Cal. Rptr. at 512.

215. *Id.* at 240, 502 P.2d at 8, 104 Cal. Rptr. at 512.

216. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

by a healthy doctor.²¹⁷ As previously discussed, Ms. Kerins first made this allegation only *after* the grant of summary judgment by the trial court.²¹⁸ Ms. Kerins's express condition allegation relied on two California cases, *Ashcraft v. King*²¹⁹ and *Grieves v. Superior Court*.²²⁰

In *Grieves*, Cheryl Grieves, a pregnant woman, consented to a postpartum tubal ligation on the condition that the surgery be done only if her child was born free of any abnormalities.²²¹ After Mrs. Grieves gave birth to a daughter, the tubal ligation was performed.²²² Immediately after the procedure, Mrs. Grieves was informed that the child had been diagnosed with a genetic disorder, trisomy 18.²²³ The child died two months after the diagnosis.²²⁴

Mrs. Grieves and her husband brought suit against the hospital, the surgeon, and the surgeon's assistant seeking damages for medical malpractice, wrongful life, and wrongful death.²²⁵ The trial court sustained the defendants' demurrers with leave to amend, and the plaintiffs thereafter amended their complaint to include allegations of battery.²²⁶ The trial court then sustained the defendants' demurrers to the battery cause of action without leave to amend.²²⁷

The plaintiffs appealed, and the court held that the complaint was sufficient to state a cause of action in battery.²²⁸ The appellate court noted that the issue of whether Mrs. Grieves's consent to the tubal ligation was conditioned on the birth of a healthy child was an issue of fact to be determined at the trial level.²²⁹

The *Grieves* court distinguished *Cobbs* by stating, "*Cobbs* refers to complications which *result* from a surgical procedure, not complications which occur *prior to* surgery."²³⁰ In *Cobbs*, the subsequent surgeries that the plaintiff endured were all low probability inherent risks attendant to and resulting from that particular surgery;²³¹ in *Grieves*,

217. *Kerins I*, 1993 Cal. App. LEXIS 786, at *14-15.

218. See *supra* text accompanying note 134.

219. 228 Cal. App. 3d 604, 278 Cal. Rptr. 900 (1991).

220. 157 Cal. App. 3d 159, 203 Cal. Rptr. 556 (1984).

221. *Id.* at 162, 203 Cal. Rptr. at 557. A tubal ligation is a procedure that prevents pregnancy. *Id.* at 162 n.1, 203 Cal. Rptr. at 557 n.1.

222. *Id.* at 162, 203 Cal. Rptr. at 557.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 163, 203 Cal. Rptr. at 558.

228. *Id.* at 165-66, 203 Cal. Rptr. at 560.

229. *Id.* at 165, 203 Cal. Rptr. at 560.

230. *Id.* at 165, 203 Cal. Rptr. at 559.

231. *Cobbs*, 8 Cal. 3d at 234, 502 P.2d at 4, 104 Cal. Rptr. at 508.

the appellate court felt that the risk was not inherent, nor was it a result of the surgery—consent was simply conditioned on the birth of a healthy baby.²³²

In *Ashcraft v. King*,²³³ Daisy Ashcraft, a sixteen-year-old girl diagnosed with scoliosis,²³⁴ was referred to orthopedic specialist Dr. John D. King. In a presurgery interview, Dr. King explained that Daisy might need blood during the surgical procedure.²³⁵ Daisy's mother, Lulu Ashcraft, stated that she only wanted Daisy to have " 'family blood.' "²³⁶ Dr. King replied " 'that's fine' "²³⁷ and informed Mrs. Ashcraft to contact the hospital to arrange for the donations.²³⁸ Although Mr. and Mrs. Ashcraft, as well as several other members of their family, gave blood before and during the operation, the blood used in the procedure was from the general supply at the hospital and not from the family donors.²³⁹

The surgery on Daisy was performed in 1983; at that time, no test had been developed that could identify HIV-tainted blood.²⁴⁰ In 1987, however, the hospital informed the Ashcrafts that Daisy had been transfused with blood donated from an HIV-positive source.²⁴¹ Daisy was then tested for HIV. She was HIV-positive.²⁴²

Daisy brought a medical malpractice suit against Dr. King on theories of negligence and battery.²⁴³ The trial court granted Dr. King's motion for a nonsuit on the issue of battery, and submitted the case to the jury only on the theory of negligence.²⁴⁴ The jury, after five days of deliberation, found in favor of Dr. King.²⁴⁵

The court of appeal reversed the judgment of the trial court as to the nonsuit of battery, and remanded the battery cause of action to the trial court.²⁴⁶ The court of appeal felt that the trial court's failure

232. *Grieves*, 157 Cal. App. 3d at 165, 203 Cal. Rptr. at 559.

233. 228 Cal. App. 3d 604, 278 Cal. Rptr. 900 (1991).

234. Scoliosis is a condition involving curvature of the spine which can become debilitating if left uncorrected. *Id.* at 608, 278 Cal. Rptr. at 901.

235. *Id.*

236. *Id.* at 612, 278 Cal. Rptr. at 904 (quoting Lulu Ashcraft's conversation with Dr. King).

237. *Id.* at 613, 278 Cal. Rptr. at 904 (quoting Dr. King's response to Mrs. Ashcraft).

238. *Id.*

239. *Id.* at 609, 278 Cal. Rptr. at 902.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 617, 278 Cal. Rptr. at 907.

to instruct the jury as to the alleged battery was error, and that the instructions as to Dr. King's negligence were not adequate to negate the error since the jury did not have the chance to consider the theory of conditional consent.²⁴⁷ The court of appeal held that Daisy's evidence as to the condition that only family-donated blood was to be used was sufficient to defeat a nonsuit on the issue of battery.²⁴⁸ The court of appeal stated:

Evidence in this case showed defendant had permission to operate on [the] condition [that] he used family-donated blood but that he operated using blood from the hospital's general supply. Under the rationale of *Cobbs*, this evidence was sufficient to allow the jury to infer an intent to willfully disregard plaintiff's conditional consent.²⁴⁹

It is clear, therefore, that both *Ashcraft* and *Grieves* were found to be outside the rule of *Cobbs* because the plaintiffs had placed an express condition on their consent to a surgical procedure, which, when disregarded, negated their consent—thus constituting a battery.

IV. *KERINS II* AND THE ANALOGY TO *POTTER V. FIRESTONE TIRE & RUBBER CO.*

The California Supreme Court used their decision in *Potter v. Firestone Tire & Rubber Co.*²⁵⁰ to reverse and remand *Kerins I*. Although *Potter* was a bold and invaluable decision with regard to the erroneous fear of AIDS determination made in *Kerins I*,²⁵¹ *Potter* was not on point with respect to the battery cause of action. This section, therefore, shall reveal the facts and holding of *Potter*, as well as the court's reversal of the negligent infliction of emotional distress claim in *Kerins I*. Part V will analyze the *Potter* decision as applied to the battery cause of action by the *Kerins II* appellate court on remand.

A. *The Facts and Holding of Potter*

When *Kerins I* was granted certiorari, the California Supreme Court was about to render a decision in *Potter*.²⁵² *Potter* aligns California with jurisdictions requiring more than mere exposure to a dis-

247. *Id.* at 615-16, 278 Cal. Rptr. at 906.

248. *Id.* at 612, 278 Cal. Rptr. at 904.

249. *Id.* at 613, 278 Cal. Rptr. at 904.

250. 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993).

251. *See infra* part IV.A-B.

252. 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993).

ease to warrant recovery,²⁵³ holding that even where there is established exposure to the causative agent of a disease, in the absence of a present physical injury the plaintiff must prove, corroborated by reliable medical or scientific opinion, that it is more probable than not that the disease will develop in the future.²⁵⁴

In *Potter*, the plaintiffs ingested toxic chemicals that the defendant knowingly and unlawfully deposited in a neighboring landfill, contaminating the plaintiffs' water supply.²⁵⁵ The trial court, finding the defendant negligent, acknowledged the plaintiffs' present fear of developing cancer in the future after direct exposure to carcinogens.²⁵⁶ The court of appeal affirmed the judgment,²⁵⁷ holding that: (1) due to the circumstances surrounding the plaintiffs' ingestion, they need not establish a present physical injury to recover for their fear of cancer; and (2) the plaintiffs' present fear of cancer was certain, and as such they need not prove that it was probable that they would develop cancer in the future.²⁵⁸

The California Supreme Court disagreed with the court of appeal's approach. The supreme court stated that although the plaintiffs must establish the reasonableness of their fear of cancer, the court of appeal "erred in concluding that reasonableness is established by the mere fact of an exposure to, or a significant increase in, the risk of cancer."²⁵⁹ The court went on to state that

exposure, without more, does not provide a basis for fearing future physical injury or illness which the law is prepared to recognize as reasonable. . . . [W]ithout any regard to the na-

253. See, e.g., *Nesom v. Tri Hawk Int'l*, 985 F.2d 208, 211 (5th Cir. 1993) (holding that absent proof material used in surgery contained Creutzfeld-Jakob Disease—a fatal neurological disorder—there could be no recovery for fear of developing disease); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 396 (5th Cir. 1986) (holding that damages are permissible where fear of cancer results from exposure to asbestos); *Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528, 1533 (D. Kan. 1990) (holding that demonstration of exposure is essential to any claim of personal injury arising from toxic exposure); *Barth v. Firestone Tire & Rubber Co.*, 661 F. Supp. 193, 196-97 (N.D. Cal. 1987) (holding that plaintiff was permitted to seek recovery for fear of cancer due to exposure to cancer-causing toxins); *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1560 (N.D. Ill. 1983) (holding that *in utero* exposure to DES was sufficient for recovery of emotional distress damages due to fear of cancer).

254. *Potter*, 6 Cal. 4th at 997, 863 P.2d at 816, 25 Cal. Rptr. 2d at 571.

255. *Id.* at 975, 863 P.2d at 801, 25 Cal. Rptr. 2d at 556.

256. *Id.* at 977-78, 863 P.2d at 802-03, 25 Cal. Rptr. 2d at 557-58.

257. Except with regard to the appellate court's award for continued medical monitoring and the postjudgment order directing the defendant to pay costs and interest. *Id.* at 979, 863 P.2d at 804, 25 Cal. Rptr. 2d at 559.

258. *Id.*

259. *Id.* at 989, 863 P.2d at 810-11, 25 Cal. Rptr. 2d at 565-66.

ture, magnitude and proportion of the exposure or its likely consequences, [mere exposure] provides no meaningful basis upon which to evaluate the reasonableness of one's fear.²⁶⁰

The *Potter* court recognized that a plaintiff fearing a twenty-to-thirty percent chance of developing a disease is not unreasonable as a matter of law. Nonetheless, the court felt public policy dictated that unless developing the disease is probable, emotional recovery should be denied.²⁶¹

The facts of *Potter*, however, presented unique circumstances which the court did not ignore: Because the defendant knowingly dumped toxic waste, it acted with conscious disregard of the plaintiffs' safety. With this in mind, the court created an exception to the "more probable than not" standard: Where a defendant acts with oppression, fraud, or malice,²⁶² and the plaintiff can establish that the defendant's breach caused exposure, the plaintiff need not meet the more probable than not standard.²⁶³ In this instance the plaintiff must merely show that the fear stems from knowledge—corroborated by medical science—that the risk of cancer is *significantly increased* and has resulted in an actual risk of cancer.²⁶⁴

260. *Id.*, 863 P.2d at 811, 25 Cal. Rptr. 2d at 566.

261. *Id.* at 990, 863 P.2d at 811, 25 Cal. Rptr. 2d at 566. The public policy concerns engendered by allowing recovery to these plaintiffs were as follows: (1) the need to restrict the creation of an unlimited class of potential plaintiffs, *id.* at 991, 863 P.2d at 812, 25 Cal. Rptr. 2d at 567; (2) the detrimental effect on the health care field in the area of prescription drugs—whose potential effects may not develop for years—and the potential class of plaintiffs who may seek recovery with no physical injury for fear of adverse effects of these drugs, *id.* at 991-92, 863 P.2d at 812-13, 25 Cal. Rptr. 2d at 567-68; (3) the consequence of allowing recovery to those who have fear of cancer—and yet may never develop the disease—may be to seriously diminish the capability of defendants and their insurers to adequately compensate those who do legitimately develop the disease, *id.* at 993, 863 P.2d at 813, 25 Cal. Rptr. at 568; and (4) the need to have a "sufficiently definite and predictable threshold for recovery" for consistency in case-by-case adjudication, *id.* at 993, 863 P.2d at 813, 25 Cal. Rptr. 2d at 568-69.

262. The court referenced California Civil Code § 3294 for the definition of these terms, and stated that an example of such conduct would be exemplified by "'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.'" *Id.* at 998, 863 P.2d at 817, 25 Cal. Rptr. 2d at 572 (quoting CAL. CIV. CODE § 3294(c)(1) (West 1994)).

263. *Id.* at 999-1000, 863 P.2d at 818, 25 Cal. Rptr. at 573.

264. *Id.* It could be argued that if Dr. Gordon was aware he might have been HIV-positive when he operated on Ms. Kerins, he acted with a conscious disregard of her safety. Had that been the case, Ms. Kerins might have been able to bypass the more-probable-than-not standard under *Potter*. Hypothetically, the analysis would then focus on whether Ms. Kerins could show that her fear stemmed from knowledge corroborated by medical science that her risk of contracting HIV had been increased and had resulted in an actual risk of AIDS. The relevant medical data, however, actually revealed that Ms. Kerins's risk

B. Kerins II: *The Impact of Potter Reverses Kerins I*

The California Supreme Court granted certiorari in *Kerins I*, and, after the questionable judgment displayed by the *Kerins I* court, the supreme court merely ordered—in a one sentence opinion—that the court of appeal “vacate its decision and . . . reconsider the cause in light of *Potter v. Firestone Tire and Rubber Co.*”²⁶⁵ In short, the California Supreme Court never discussed the merits of the issue or the facts of the case, thus missing the opportunity to issue a seminal decision regarding fear of AIDS.

The result on remand is not surprising. In *Kerins II*,²⁶⁶ the court of appeal reversed its original position. The *Kerins II* court perfunctorily dismissed its logic in *Kerins I* by stating:

Without the benefit of the Supreme Court’s decision in *Potter v. Firestone* . . . we rejected the approach of several other jurisdictions which consider emotional distress damages due to fear of AIDS legally noncompensable unless the plaintiff alleges and proves actual exposure, and it is more probable than not that the plaintiff will actually develop the disease.²⁶⁷

1. The emotional distress claim in light of *Potter*

The *Kerins II* opinion goes through the *Potter* “more probable than not” test,²⁶⁸ finding that Ms. Kerins’s cause of action for fear of AIDS would not stand.²⁶⁹ The court in *Kerins II* then stated that the defendant in *Potter* had a duty to any foreseeable person coming into contact with its toxic waste.²⁷⁰ Therefore, the *Kerins II* court held that Dr. Gordon had an analogous duty to a patient such as Ms. Kerins who might, during surgery, make foreseeable contact with his blood.²⁷¹

The *Kerins II* court concluded, however, that no breach of that duty could be found by Dr. Gordon, *because even if he knew he was infected with HIV at the time of surgery, the CDC guidelines in 1986*

of contracting AIDS was infinitesimal. See *supra* note 38. Therefore, even if this line of analysis were pursued, the result under *Potter* would still be the same—Ms. Kerins would not have been able to show that she had an actual risk of contracting AIDS.

265. *Kerins v. Hartley*, 868 P.2d 906, 28 Cal. Rptr. 2d 151 (1994).

266. *Kerins II*, 27 Cal. App. 4th 1062, 33 Cal. Rptr. 2d 172 (1994).

267. *Id.* at 1066-67, 33 Cal. Rptr. 2d at 174 (citation omitted).

268. See *supra* part IV.A.

269. *Kerins II*, 27 Cal. App. 4th at 1074, 33 Cal. Rptr. 2d at 174.

270. *Id.* at 1072, 33 Cal. Rptr. 2d at 177.

271. *Id.*

did not require that he disclose this to his patients.²⁷² Therefore, Ms. Kerins's claimed emotional distress was not proximately caused by a breach of any legal duty on the part of Dr. Gordon. As such, Ms. Kerins's complaint, in light of *Potter*, was estopped from going any further.²⁷³ Interestingly, that was the first time the appellate court considered any analysis of "duty" relevant; however, had they done such an analysis in *Kerins I*, the result would have been identical.

Assured that they were now safely within the confines of the California Supreme Court's policy, the *Kerins II* court went out of its way to expose the absurdity of the cause of action it once championed.²⁷⁴ The *Kerins II* opinion suggested that, even assuming Ms. Kerins's inquiries about Dr. Gordon's health created a higher duty of disclosure,²⁷⁵ her claim would still fail under the *Potter* "more probable than not standard."²⁷⁶ The court in *Kerins II* finally admitted that the evidence at trial revealed that "there remained only the most speculative possibility that [Ms. Kerins] would actually develop AIDS at some point in the future. According to *Potter*, no recovery for negligent infliction of emotional distress is permitted."²⁷⁷

The ultimate contradiction in the *Kerins II* analysis is that the court only *then* found Ms. Kerins's fear of AIDS unreasonable as a matter of law. Without even discussing the fact that Ms. Kerins could not prove or allege exposure to HIV, the court stated that "[t]he record clearly establishes that there is no 'significant' risk that [Ms. Kerins] will in the future develop AIDS as the result of exposure to HIV during the surgery performed by Dr. Gordon. This makes [Ms. Kerins's] fear of AIDS unreasonable as a matter of law."²⁷⁸ If the record had so "clearly established" that there was no risk of HIV transmission to Ms. Kerins—*why was it only clear to the appellate court then?* The record in *Kerins II* was no different from what it was one year earlier in *Kerins I*.

272. *Id.*; see also Mark Barnes et al., *The HIV-Infected Health Care Professional: Employment Policies and Public Health*, 18 LAW, MED. & HEALTH CARE 311, 313-24 (1990) (stating that 1986 CDC standards did not require disclosure of health care worker's HIV-positive status) (citing *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus During Invasive Procedures*, MORBIDITY & MORTALITY WKLY. REP., Apr. 11, 1986, at 221-23).

273. *See id.* at 1072, 33 Cal. Rptr. 2d at 177-78.

274. *See id.* at 1077, 33 Cal. Rptr. 2d at 181.

275. *Id.* at 1072, 33 Cal. Rptr. 2d at 178.

276. *Id.*

277. *Id.* at 1074, 33 Cal. Rptr. 2d at 179.

278. *Id.* at 1075, 33 Cal. Rptr. 2d at 180.

V. THE BATTERY CAUSE OF ACTION AFTER *POTTER*

The *Kerins II* court's analysis with regard to the battery cause of action was virtually nonexistent. Observing that no discussion of battery was present in the *Potter* opinion, the court analogized to *Potter* and stated that

[s]ince [Ms. Kerins's] fear of developing AIDS is not based on knowledge, corroborated by reliable medical or scientific opinion, that her risk of developing AIDS has significantly increased *and* has resulted in an actual risk of AIDS that is significant, she cannot recover emotional distress damages on a technical battery theory.²⁷⁹

This analysis was deficient in several areas. First, Ms. Kerins's complaint *was not* for emotional distress damages based on battery, but rather damages for the unconsented-to touching itself. The emotional distress damages flowing from the actual battery were covered by the fear of AIDS claim; the award sought for the alleged battery perpetrated by Dr. Gordon was entirely different. Yet the court in *Kerins II* failed to address the battery claim as a separate entity.²⁸⁰

Fortunately, however, the *Kerins II* court could not sustain the battery claim due to the California Supreme Court's wholesale reversal of *Kerins I*. But having failed to resolve the battery issue for the appellate court on remand, the California Supreme Court has allowed plaintiffs to end run the policy of protecting physicians from unwarranted intentional tort liability.²⁸¹ A plaintiff under the *Kerins I* standard need only allege circumstantial factors that create an implied condition—for example, the question, "How is your health?"—and they may circumvent the policies established in *Cobbs v. Grant*²⁸² and bring a suit for battery. Therefore, the battery analysis in *Kerins I* could create a new exception to *Cobbs v. Grant*—that of implied condition to an effective consent.

The cases cited by the *Kerins I* court in support of Ms. Kerins's express condition theory are *Ashcraft v. King*²⁸³ and *Grieves v. Superior Court*.²⁸⁴ Both cases reveal that *express conditions*, as opposed to

279. *Id.* at 1077, 33 Cal. Rptr. 2d at 181.

280. *Id.*

281. See *Cobbs v. Grant*, 8 Cal. 3d 229, 240-41, 502 P.2d 1, 8, 104 Cal. Rptr. 505, 512 (1972).

282. *Id.*

283. 228 Cal. App. 3d 604, 278 Cal. Rptr. 900 (1991).

284. 157 Cal. App. 3d 159, 203 Cal. Rptr. 556 (1984).

implied conditions, were placed on the consent to the particular procedure.

In *Ashcraft*, the express condition to spinal surgery was the use of only family-donated blood.²⁸⁵ The court held that the fact that the blood used was from the general hospital supply and not that of family donors was sufficient to state a cause of action in battery.²⁸⁶ Similarly, in *Grieves* the express condition placed on the consent to a tubal ligation was the birth of a healthy child.²⁸⁷ The operation was performed in violation of that express condition—the child was *not* born healthy—and the court determined that the action sounded in battery.²⁸⁸

Both *Ashcraft* and *Grieves* had express and unequivocal conditions placed on the consent to the performed procedure. If the condition is express and unequivocal, and the physician exceeds the terms of that condition, then the consent does not become operative and the act of performing the procedure is a battery.²⁸⁹ In *Kerins I*, however, there was *no express or unequivocal condition placed on the consent given*.²⁹⁰ The *Kerins I* court instead relied on circumstances to create an implied condition, thereby recognizing it as an exception to the rule of *Cobbs*.²⁹¹ Nowhere in *Cobbs*, *Ashcraft*, or *Grieves* is the theory of implied condition accepted as either the equivalent to an express condition or as an exception to the rule of *Cobbs*.

“Express” may be defined as “exact, precise [and] specific,”²⁹² while a “condition” may be defined as “a premise upon which the fulfillment of an agreement depends.”²⁹³ California case law has defined an express condition as one that is created by the intent of the

285. *Ashcraft*, 228 Cal. App. 3d at 612-13, 278 Cal. Rptr. at 904.

286. *See id.* at 613, 278 Cal. Rptr. at 904.

287. *Grieves*, 157 Cal. App. 3d at 162, 203 Cal. Rptr. at 557.

288. *Id.* at 165-66, 203 Cal. Rptr. at 559-60.

289. *See* discussion of *Ashcraft* and *Grieves*, *supra* part III.B.2.

290. Although, arguably, the determination of whether a condition was express is a question of fact, it is this Author's opinion that the mere statement “How is your health?” could not be labeled an express condition by any reasonable trier of fact. However, the statement could perhaps constitute an *implied condition*. Thus, this Author's conclusion is that a cause of action depending on such a condition would be a new exception to actions normally brought in negligence.

291. *See supra* part III.B.1 for a discussion of *Cobbs v. Grant*.

292. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 410 (Frederick C. Mish ed., 10th ed. 1993).

293. *Id.* at 240.

parties to the agreement and is stated with precision.²⁹⁴ Additionally, the cases that the *Ashcraft* court cited reveal that express conditions to consent which state a cause of action in battery are those that are *explicit*, not merely implied.²⁹⁵

Ms. Kerins's question to Dr. Gordon, "How is your health?" would not be considered equivalent to the designation of an express condition to be operated on by an HIV/AIDS-free surgeon. Even Ms. Kerins did not initially contend that this was her intent when she posed the question to Dr. Gordon.²⁹⁶ This is exemplified by Ms. Kerins's deposition stating that she asked Dr. Gordon the question " 'just somehow for some reason . . . because . . . I hadn't ever asked him.' " ²⁹⁷

The above admission by Ms. Kerins regarding the question "How is your health?" clearly illustrates that her consent to surgery was in no way *expressly conditioned* on Dr. Gordon being free of HIV/AIDS. Furthermore, the question "How is your health?" is not even minimally analogous to previous express conditions recognized by California courts,²⁹⁸ nor is it logically connected to such a specific limitation on a surgical procedure.

Although Ms. Kerins discussed her fear of AIDS with Dr. Gordon and stored her own blood should the need for transfusion arise,²⁹⁹ these facts merely indicate that Ms. Kerins communicated concern regarding exposure to AIDS. *This is not equivalent to an express condition.*

The *Kerins I* court stated that a liberal construction of Ms. Kerins's pleadings *might* support the contention that an express "good

294. See *Schwab v. Bridge*, 27 Cal. App. 204, 206-07, 149 P. 603, 604-05 (1915); see also *Owens v. Owens*, 210 Cal. App. 2d 705, 708, 26 Cal. Rptr. 847, 849 (1962) (stating that conditions precedent are "strictly construed" against relying party).

295. *Chambers v. Nottebaum*, 96 So. 2d 716, 717-18 (Fla. Dist. Ct. App. 1957) (stating operation expressly conditioned on nonuse of spinal anesthetic); *Clark v. Miller*, 378 N.W.2d 838, 847 (Minn. Ct. App. 1986) (stating procedure expressly conditioned on discovery of arthritic condition or malalignment); *Rolater v. Strain*, 137 P. 96, 97-98 (Okla. Ct. App. 1913) (stating foot operation expressly conditioned on premise that procedure would not entail removal of any bone); *Moscicki v. Shor*, 163 A. 341, 341-42 (Pa. Super. Ct. 1932) (stating extraction expressly conditioned upon removal of some but not all abnormal teeth).

296. Respondent's Petition for Review to the California Supreme Court at 28, *Kerins v. Hartley*, 17 Cal. App. 4th 713, 21 Cal. Rptr. 2d 621 (1993) (No. B065917) (quoting Ms. Kerins's deposition testimony).

297. *Id.*

298. See discussion of *Ashcraft* and *Grieves*, *supra* part III.B.2.

299. *Kerins I*, 1993 Cal. App. LEXIS 786, at *6.

health" condition was placed on her consent.³⁰⁰ This Author disagrees. It is conceivable her question and conduct created an implied condition—but *there is no basis in the facts, as supported by California law or the plain meaning of the words, for the establishment of an express condition.* Neither Ms. Kerins's communications nor her conduct specifically, precisely, or unequivocally showed any intent to expressly condition her consent to surgery on Dr. Gordon's HIV-free status.

Ms. Kerins raised the express condition theory only *after* she had failed at the trial level with her claim of negligence.³⁰¹ Ms. Kerins's counsel perhaps realized that negligence was not as worthy an allegation as express condition because in 1986, when Dr. Gordon performed the procedure, *he was under no duty pursuant to the prevailing standards laid down by the CDC to reveal his HIV-positive status.*³⁰² Therefore, regardless of whether he knew of his HIV-positive condition at the time of Ms. Kerins's surgery, he was under no duty to reveal the condition of his health to her.³⁰³ Moreover, even if Dr. Gordon *was* aware of his possible infection, the CDC in 1986 *did not recommend* that HIV-infected health care workers stop performing exposure-prone procedures.³⁰⁴ Therefore, under the relevant CDC guidelines, Dr. Gordon would not have considered his health as posing a risk to Ms. Kerins.

Realizing, after defeat at the trial level, that the duty of care in 1986 might not effectively support a negligence judgment, Ms. Kerins and her attorneys must have made the strategic decision to plead an express condition. Obviously, if Ms. Kerins had truly intended to place an express condition on her consent *she would have alleged it at the outset*, rather than waiting for a judgment to be entered against her.³⁰⁵

The fact that the *Kerins I* court allowed such a transparent argument to reverse a determination grounded on the policy enumerated in *Cobbs* is at best unsettling. The decision regarding battery in *Kerins I* could now be interpreted as sanctioning pleadings that turn traditional negligence actions into intentional torts by using circumstantial events to create an implied condition to a given consent. The net

300. *Id.* at *19.

301. *Id.* at *15-17.

302. *See* Barnes et al., *supra* note 272, at 313-14.

303. *See supra* text accompanying note 272.

304. *Kerins II*, 27 Cal. App. 4th at 1072, 33 Cal. Rptr. 2d at 177.

305. *Kerins I*, 1993 Cal. App. LEXIS 786, at *19.

effect of the battery decision in *Kerins I* is that the rule of *Cobbs* is swallowed, and lack of informed consent actions against physicians could now once again be brought as intentional torts if creatively pled.

VI. CONCLUSION

What is the aftermath of *Kerins I* and *Kerins II*? Although a bright-line test established by the California Supreme Court in *Potter v. Firestone Tire & Rubber Co.*³⁰⁶ has delineated when a valid claim for fear of AIDS may lie, it is unclear whether a battery cause of action against a physician may be supported by an implied condition placed on the consent to treatment. As previously discussed,³⁰⁷ the arguments raised by the *Kerins I* court in favor of the implied condition theory were never directly refuted by either the supreme court or by the appellate court in *Kerins II*.

With regard to the fear of AIDS claim, the trial court's initial determination was, in this Author's belief, the correct one; it recognized that where there is no proof of exposure to HIV, no cause of action for fear of AIDS will lie. The California Supreme Court adopted the trial court's standard, adding that even with exposure to a disease, the chances of contracting the disease must be more probable than not. But it is the appellate court's decisions and reasoning in *Kerins I* and *Kerins II* that are disturbing.

The *Kerins I* court may have allowed the terror surrounding AIDS to influence its judgment regarding Ms. Kerins's claim. The court in *Kerins I* had ample legal ammunition to shoot down Ms. Kerins's fear of AIDS claim. Ms. Kerins was not HIV-positive. She had no proof of exposure. Additionally, she refused to be retested after testing HIV-negative. Finally, Ms. Kerins herself supplied medical data that she had an infinitesimal chance of ever contracting AIDS. Yet the *Kerins I* court allowed her claim. By sanctioning recovery for fear of AIDS without proof of exposure, the *Kerins I* court subjected a vast number of HIV-positive and AIDS-infected persons to potential liability for contact with ignorant, yet terrified, AIDS-free persons.

Adding insult to injury, the *Kerins II* court acted as if the correct result was apparent from the start. Although reversal by the California Supreme Court mandated its changed opinion, it is eerie that the appellate court stated the record was "clear" as to the lack of

306. 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993).

307. See *supra* part V.

probability of Ms. Kerins ever becoming HIV-positive,³⁰⁸ when in fact this was the *same* record they had previously used to allow her spurious claim.

With regard to the battery cause of action, again, the trial court's determination was the appropriate one. *Cobbs v. Grant*³⁰⁹ illustrated the mandate of the supreme court with regard to physician liability: So long as the doctor performs the procedure to which the patient has consented, there is no liability for battery. Later, *Ashcraft v. King*³¹⁰ and *Grieves v. Superior Court*³¹¹ held that a battery claim may lie if an express condition to the patient's consent is disregarded.³¹² The trial court recognized that no express condition was placed on Ms. Kerins's consent and that the operation performed was the one consented to; therefore, under *Cobbs*, no battery had occurred. Yet the *Kerins I* court allowed the battery claim under *Ashcraft* and *Grieves*, although no express condition had been stated by Ms. Kerins. As such, a new exception to the rule of *Cobbs*—that of implied condition—may have been born.³¹³

What is curious is the complete disregard of the battery cause of action in both the supreme court reversal and *Kerins II*. By not confronting the battery issue on remand, the *Kerins I* analysis remains in limbo. Although officially reversed, the implied condition theory could be resurrected if a court were to rely on circumstance to create an implied condition to a patient's consent. Without a firm denunciation by the supreme court on this issue, physicians must now be concerned with various interpretations of patient-doctor conversations, and how those conversations, coupled with circumstance, might affect consent. It is this Author's opinion that physicians must be concerned with patient care and the express conditions placed on that care—not possible permutations of casual conversations that could create implied conditions.

Ultimately, the real importance of the *Kerins* saga is the dismissal of the fear of AIDS claim. *Kerins II*, by virtue of *Potter v. Firestone Tire & Rubber Co.*,³¹⁴ reveals that legally cognizable injuries are compensable, while speculative fear is not. *Kerins II* illustrates that an irrational fear of AIDS will not be tolerated; there must be proof of

308. See *supra* note 38.

309. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

310. 228 Cal. App. 3d 604, 278 Cal. Rptr. 900 (1991).

311. 157 Cal. App. 3d 159, 203 Cal. Rptr. 556 (1984).

312. See *supra* part III.B.2.

313. See *supra* part V.

314. 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993).

exposure as well as a likelihood of developing the disease. Although AIDS, unfortunately, is not a disease of the past, an unfounded fear of AIDS can no longer give rise to litigation in California courts.

*Joie Marie Gallo**

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