THE COVERAGE OF AIDS-RELATED DISCRIMINATION UNDER HANDICAP DISCRIMINATION LAWS: THE US AND AUSTRALIA COMPARED

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INTRODUCTION

AIDS is a disabling, fatal and incurable disease. Its victims suffer the added burden of the ostracism and prejudice of a fearful and misinformed public. Discrimination impairs the public health effort to slow the spread of the virus because infected individuals will be unwilling to identify themselves by coming forward for testing, counselling and treatment. This article examines the extent to which handicap discrimination laws passed before the advent of the AIDS pandemic may be used to combat AIDS related discrimination in the employment context.[1] The application of these laws to AIDS raises fundamental legal and policy issues which are often obscured by more 'traditional' concepts of handicap, such as blindness or loss of limbs. Courts have typically determined which physical conditions should be treated as handicaps on the basis of the degree of physical impairment. Many individuals infected with the AIDS virus appear as healthy and able-bodied as the uninfected, or develop symptoms no worse than a heavy cold. On this basis, it has been argued that asymptomatic infected individuals and those in the early stages of the disease cannot be regarded as handicapped. However, an alternative definition of handicap, which would include all AIDS infected individuals,

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[1] Part IVA, Anti-Discrimination Act, 1977 (N.S.W.); Divisions 3 & 4, Equal Opportunity Act 1984 (Vic.); Part V, Equal Opportunity Act 1984 (S.A.); Part IVA, Equal Opportunity Act 1984 (W.A.). The handicap provisions of the Western Australian Act were actually passed in 1988, but they conform to the established scheme of discrimination laws in Australia and specifically, closely follow the handicap provisions of the older New South Wales Act.

holds a condition to be a handicap solely on the basis of the prejudical reactions of others to that condition, irrespective of whether the condition is also physically disabling. Unlike gender and race discrimination laws, employers cannot be required to be blind to the fact that a person is handicapped because it may have a direct bearing on his or her ability to perform the job. Handicap discrimination laws provide employers a defence where they are unable to make reasonable accommodations for a handicapped person. The health of many handicapped individuals can be stabilized and their capacity for work relative to those of the able-bodied will remain fairly constant over time. Employers will be able to make fairly certain predictions about handicapped persons' likely productivity and the continuing cost of employing them. While individuals infected with the AIDS virus may go years without exhibiting any ill effects, the onset of the disease is unpredictable and the decline in the individual's health can be precipitous and rapid. This raises questions about how long an employer must continue to employ a person after the onset of the AIDS sysmptoms and whether employers can minimize the risk of future expense by refusing to hire asymptomatic infected individuals. While there have only been a few cases under the Australian handicap laws, cases decided under the comparable American legislation have dealt with some of these issues in the context of other conditions, and, lately, in the first wave of AIDS cases.

A. BRIEF DESCRIPTION OF AIDS

Many of the legal issues concerning AIDS turn on its peculiar epidemiology. AIDS is a viral infection which suppresses, and in the worst cases destroys, the body's immune system. The virus, known as Human Immunodeficiency Virus (HIV), does this by invading and killing white blood cells, called T lymphocytes (T-cells). Consequently, diseases which rarely infect people with fully functioning immune systems can prove seriously debilitating or fatal to those infected with HIV.

There are three distinct stages in the syndrome's progression after infection with HIV; seropositivity, AIDS-related complex (ARC) and full blown AIDS.[2] In the seropositive stage, the person has been infected with the HIV but it lies dormant within some of the T-cells. While mere infection with HIV may have little or no immediate adverse impact on a person's health, in the longer term the virus may cause dementia and other mental

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[2] The categories were first identified by the U.S. Centers for Disease Control and are now universally accepted. See 32 Morbidity and Mortality Weekly Report 389 (1985) (hereinafter referred to as MMWR); and Curran, *The Epidemiology of AIDS: Current Status and Future Prospects*, 229 Sci. 1352 (Sept 1985). More recently, the CDC has proposed that the syndrome be sub-divided into four categories, based on symptomology; (1) early acute, though transient, signs of the disease; (2) asymptomatic infection; (3) persistent swollen glands; and (4) the presence of opportunistic infections. See *CDC Classification System for Human T-Lymphotrophic Type III/Lymphadenopathy-Associated Virus Infection*, 105 Annals Internal Med. 234 (1986).

disorders, even though the individual may not yet exhibit the symptoms of the later two stages.[3] A seropositive person can transmit the virus.

The onset of ARC comes with the activation of the virus within the infected T-cells, causing minor to moderate damage to the body's immune system. ARC sufferers exhibit some symptoms which are suggestive of the syndrome but do not manifest the secondary complications, including infection by an opportunistic disease. The symptoms include weight loss, swollen glands, night sweats, lethargy, and oral thrush. ARC may be no more than a minor inconvenience or irritant for some, while for others it may be seriously debilitating.

AIDS is the most serious stage and is fatal in most, perhaps all, cases.[4] The body's immune system suffers a major collapse and the body is invaded by a host of infections and malignancies. The two most common are a cancer called *Kaposi's Sarcoma*, which is otherwise rare in people aged under sixty, and *Pneumocytis carinii pneumonia*, a similarly rare lung infection.

The time which can elapse from initial infection to the development of full blown AIDS may be up to seven years, with an average of four years.[5] Death occurs on the average of one or two years after the onset of full-blown AIDS. A widely accepted estimate is that between twenty to twenty-five percent of those infected with HIV will develop AIDS and that about another twenty-five to thirty percent will develop ARC but progress no further.[6] However, recent speculation is that most, if not all, HIV infected people will eventually develop full blown AIDS.[7]

Most public attention, and hysteria, has focused on how the syndrome is transmitted. The virus is fragile and cannot survive long outside the

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[3] Stolar, *Human T-call Lymphotrophic Virus Type III Infection of the Central Nervous System* 256 JAMA 2360.

[4] The CDC reported in 1986 that of those diagnosed with full blown AIDS in 1981, only 15 per cent were alive, Liberson, *Realities of AIDS*, NY Review, Jan. 16, 44. Another study reported a death rate of seventy two per cent over a three year period, see *Employers and Insurers Grapple with the Frightening Problem of AIDS*, 58 White Collar Report (BNA) 553 (Nov. 20 1985).

[5] Gong and Rudnick, AIDS: FACTS AND ISSUES, at 12. There are now suggestions that HIV may lie dormant for considerably longer periods before activating, Bradbeer, *HIV and Sexual Lifestyle*, 294 Br. Med. J. 5 (1987).

[6] In a study of seventy eight seropositive men over a three year period only ten per cent developed full blown AIDS. See T. Spira, *Analysis of Progression of Immunologic Abnomalities in a Cohort of Homosexual Men with the Lymphadenopathy Syndrome*, Second International Conference on AIDS, Paris, June 1986. Another study found a conversion rate to AIDS over four years of ten per cent per year. See J. Gold & D. Armstrong, *Continuing High Risk for AIDS in a Cohort of Homosexual Men with Persistent Unexplained Lymphanadenopathy*, given at the same conference. Data from a 1987 study of 104 seropositive men in San Francisco indicate that the risk of AIDS may increase yearly. After seven years, thirty six per cent had developed AIDS. Altman, *Data Suggest AIDS Risk Rises Yearly* NY Times, Mar 3 1987 at c1.

[7] In the U.S., the National Academy of Sciences has estimated the percentage to be up to fifty per cent, Morgan, *AIDS Current and Future Trends*, 101 Public Health Rep. 459 (1986). Some other researchers have suggested the percentage will eventually climb to seventy-five to ninety per cent, Gallo, *Long-Term Seropositivity for HTLV-III in Homosexual Men Without AIDS: Development of Immunologic and Clinical Abnormalities*, 104 Ann Intern Med 496 (1986); see also 324 Nature 199 (1986).

human body. It is readily killed by simple household cleansers.[8] Transmission requires at least a mixing of bodily fluids. While HIV has been isolated in most bodily fluids, including saliva, tears and urine, epidemiological evidence has only implicated blood and semen as mediums of transmission.[9] The major avenues of infection are sexual intercourse, where infected semen comes in direct contact with the soft tissue of the anus or vagina, and a needle where infected blood is injected straight into the blood stream.[10] Comprehensive studies of people living in the same household with HIV infected individuals found no case of transmission through 'social contact'.[11] In these households there was considerable sharing of towels, toothbrushes, beds, baths, and food utensils; and some more intimate physical contact such as kissing.[12]

B. THE U.S. AND AUSTRALIAN LEGISLATION

The basis for comparing New South Wales, Victorian, South Australian and Western Australian handicap laws with the US laws is three-fold. First, the Australian and American laws, like most of the anti-discrimination statutes enacted in the common law world over the last twenty years, have a common ancestor in the U.S. *Civil Rights Act.* Enacted in the wake of President Kennedy's assassination, this Act prohibited discrimination on the ground of race, national origin and gender. The priciple American handicap discrimination law, the *Rehabilitation Act,* was expressly modelled after it. The English *Race Discrimination Act* and *Sex Discrimination Act* were also patterned after the *Civil Rights Act* and the substantial judicial elaborations on it.[13] In turn, the four Australian Acts closely follow the form of the English laws, adding the extra ground of handicap, and in the case of the South Australian and New South Wales Acts, the further ground of sexual orientation. The American ancestory of the Australian laws has been recognised in relation to the

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[8] Grouse, *HTLV-III Transmission,* 254 JAMA 2130 (1985).

[9] The concentration in other bodily fluids is apparently too low and the usual portals of entry to the body for those fluids too robust to result in transmission. *Education and Foster Care of Children Infected With Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus,* 34 MMWR 517 (1985).

[10] Among drug abusers at a New York detoxification centre, eighty-seven per cent tested seropositive. Of all heterosexual deaths from AIDS, ninety per cent are attributable to infection through needle-sharing, see 1 AIDS Alert, June 1986, at 103.

[11] Frieland et al, *Lack of Transmission of HTLV III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis* 314 New Eng. J. Med. 344 (1986). For contrary view giving greater credence to the possibility of social transmission, see Mercola, 34 Medical Trial Technique Quarterly No. 1, at 45, (1987).

[12] However, there are a handful of instances of infection which suggest the possibility of transmission other than through needles and intercourse, but in these cases parts of the infected person's body were frequently exposed, almost immersed, in the fluids of an infected person, such as a mother caring for an infected baby with diarrhea who failed to take even simple precautions, such as washing her hands. *Epidemiologic Notes and Reports, Apparent Transmission of HTLV III/LAV from Child to a Mother Providing Health Care,* 35 MMWR 76 (Feb. 1985).

[13] *Steel* v. *Union of Post Office Workers* [1978] 2 All E.R. 504 and *Clarke* v. *Eley (IMI) Kynoch Ltd* [1982] I.R.L.R. 482.

gender discrimination provisions[14] and recently specific reference was made in a handicap discrimination case to the U.S. case law.[15]

The second point of comparison between the Australian and American laws lies in the fundamental issues with which any law seeking to protect the handicapped against discrimination must deal. These include which of the wide range of human abnormalities, frailties and conditions should be defined as handicaps and how to deal with a handicapped person who is less capable of doing the job than his or her able-bodied competitors and what level of resources employers should be required to devote to assisting handicapped employees.

Following from this, the third point of comparison lies in a similarity of wording and basic concepts in the American and Australian laws. Section 504 of the *Rehabilitation Act* defines a handicapped person as:

> a person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

The regulations implementing this section define physical impairment as:

> any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; muscoskeletal; special sense organs; respiratory, including the speech organs; cardiovascular; reproductive, digestive genito-urinary; hemic and lymphatic; skin; and endocrine.

The New South Wales Act defines a 'physically handicapped person' to mean:

> a person who, as a result of having a physical impairment to his body, and having regard to any community attitudes relating to persons having the same physical impairment as that person and to the physical environment, is limited in his opportunities to enjoy a full and active life.

'Physical impairment' is separately defined as:

> any defect or disturbance in the normal structure and functioning of the person's body, whether arising from a condition subsisting at birth or from an illness or injury.

The South Australian and Victoria provisions, which are very similar

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[14] *Australian Iron & Steel* v. *Ndjaska* (1988) 12 N.S.W.L.R. 587 (Court of Appeal), per Priestly J. at 603 et seq.

[15] *Jamal* v. *Secretary, Department of Health* (1988) 14 N.S.W.L.R. 252 (Court of Appeal).

to each other, are less elaborate in their definitions. 'Physical impairment' is defined in South Australia to mean:[16]

> (a) the total or partial loss of any function of the body;
> (b) the loss of a limb, or of a part of the body;
> (c) the malfunctioning of any part of the body, or
> (d) the malformation or disfigurement of any part of the body, but does not include an intellectual impairment or mental illness.

The Western Australian Act, which is the most recent of the Australian legislation, closely follows the wording of the New South Wales Act, folding its definitions of physical and mental impairment into a single definition of impairment, as follows:[17]

> (a) any defect or disturbance in the normal structure or functioning of a person's body;
> (b) any defect or disturbance in the normal structure or functioning of a person's brain;
> (c) any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour,
> whether arising from a condition subsisting at birth or from an illness or injury and includes an impairment which presently exists or existed in the past but has now ceased to exist.

The American and Australian Acts also provide that, unlike such factors as race and gender, an employer is not absolutely barred from taking into account a person's handicap but is only required to make 'reasonable accommodations' for the handicap. The main provision of the *Rehabilitation Act* establishing liability for discrimination provides that 'no otherwise qualified individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation' in programmes and employment covered by the Act. The regulations provide that an otherwise qualified handicapped individual means:

> an individual with a handicap who is capable of performing the essential functions of the job or jobs for which he or she is being considered with reasonable accommodation to his or her handicap;

Reasonable accommodation is defined as:

> changes and modifications which can be made in the structure of a job or employment . . ., or in the manner in which a job is performed . . ., unless it would impose an undue hardship on the [employer].

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[16] S. 5(1).
[17] S. 4(1).

The main liability provisions of the four Australian discrimination laws, including those dealing with handicap discrimination, closely follow the wording of the English race and sex laws. Section 49B(1)(b) of the New South Wales Act provides that a person discriminates against a handicapped person:

> if . . . he treats him less favorably than in the same circumstances or in circumstances which are not materially different, he treats, or would treat a person who is not a physically handicapped person.

This format of comparing the treatment of a person with a protected characteristic to the actual or theoretical treatment of a person without that characteristic mirrors a test developed by the American courts in applying the *Civil Rights Act.*[18]

The defense of reasonable accommodation is established by s. 491 of the New South Wales Act, as follows:

> Nothing in s. 49B(1)(b) . . . renders unlawful discrimination by an employer . . . against a physically handicapped person on the ground of his physical impairment if, with respect to the work required to be performed in the course of employment . . . it appeared to the employer . . . on such grounds, as having regard to the circumstances of the case, it was reasonable to rely that the physically handicapped person, because of his physical impairment—
> (a) would be unable to carry out that work; or
> (b) would, in order to carry out that work, require services or facilities which are not required by persons who are not physically handicapped persons and which, having regard to the circumstances of the case, cannot reasonably be provided or accommodated by the employer.

The reasonable accommodation provisions of the Western Australian Act again parallel the provisions in the New South Wales Act. The main difference is that the Western Australian Act exempts employers from providing services or facilities to a handicapped person where that would impose 'an unjustified hardship on the employer',[19] which as discussed below might suggest a somewhat heavier burden on employers than under the New South Wales Act.

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[18] The Supreme Court held that the complainant's initial evidentiary burden was discharged by showing: (1) that he or she belonged to a protected group; (2) that he or she applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his or her qualifications he or she was rejected; and (4) that after his or her rejection the position remained open, and the employer continued to seek applications from persons of the complainant's qualifications but without the protected characteristic. The evidentiary burden then shifted to the defendant to prove a legitimate, non-discriminatory explanation. The Court explained that the purpose of this pattern of proof was eliminated other innocent explanations for the employer's actions, such as a disparity in education.

[19] S. 66Q.

The Victorian Act provides a defence where the accommodations 'cannot or could not reasonably be made available'[20] and the South Australian Act exempts the employer where the handicapped person could not 'perform adequately the work genuinely and reasonably required for the employment or position in question'.[21]

While the Australian handicap discrimination laws share some basic concepts and language with the U.S. *Rehabilitation Act*, there are significant differences, as well between the four Australian Acts themselves, which may have significance for the extent of protection each Act provides against AIDS related discrimination.

C. HIV INFECTION AS A HANDICAP

1. Contagious Diseases as Handicaps

In a number of the earlier American AIDS cases, employers argued that a person who had fallen ill after contracting a contagious disease was so far removed from 'traditional' notions of handicap that the U.S. Congress could not have intended the *Rehabilitation Act* to cover them. In the recent case of *School Board of Nassau v. Arline*[22] the U.S. Supreme Court rejected this argument in relation to a tuberculosis sufferer. The Court held that a broad concept of the handicapped 'not limited to the so-called traditional handicaps' was inherent in the statutory definition.[23]

The Solicitor-General mounted an alternative argument that while the physical effects of a disease might be covered by the *Rehabilitation Act*, its contagiousness was not.[24] The argument is built on the proposition that an immune carrier cannot be considered handicapped because the disease has no effect on him or her other than the contagiousness, which is itself no handicap since the only detriment is to others. Rather, '. . . the carrier may be analogized to a perfectly healthy person carrying a test tube containing the infectious agent'. If it should happen that the carrier is not immune but falls ill, 'the ability to spread the disease is not thereby transformed into a handicapping condition because it is now accompanied by the disabling effects of the disease'. While an employee cannot be dismissed on the basis of the impairing symptoms of a disease, he or she can still be dismissed as posing a risk of infection to co-workers

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[20] S. 22(5).

[21] S. 71.

[22] 107 S.Ct 1123 (1987).

[23] Id. n. 5 at 1129.

[24] The U.S. Department of Justice has also adopted a similar position in relation to HIV, *Memorandum for Ronald E. Robertson, General Counsel, Department of Health and Human Services, Re: Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-related Complex, or Infection with the virus* signed by Charles J. Cooper, Assistant Attorney-General, Office of Legal Counsel, June 2 1986. This opinion will be referred to as the Cooper opinion to distinguish it from the later opinion referred to in note 42.

and customers. This would undermine much of the protection which is to be gained from treating diseases as handicaps in the first place.

The majority of the Supreme Court rejected this argument, saying:

> Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of [The Rehabilitation Act], which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others. . . . society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. *The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments.*[25]

The issue has been put beyond doubt with the recent amendment of the *Rehabilitation Act* to include 'an individual who has a currently contagious disease or infection'.[26] The New South Wales and Western Australian Acts also specifically refer to impairments 'arising from diseases'.[27] However, in a remarkable delegation of legislative power, s. 66U of the Western Australian Act provides that the Governor may promulgate regulations excluding from the Act's protection persons suffering from an infectious disease, 'prescribing the terms and conditions subject to which a provision of this Act shall not have effect and . . . [the regulation] . . . may be expressed so as to provide that the provision shall not have effect in relation to such a person generally or or in such circumstances as are prescribed or to such an extent as is prescribed or in relation to such activities as are prescribed.' The history of the American legislation, including cases such as *Arline*, clearly demonstrates that sensible measures dealing with a person's contagiousness readily fall within the reasonable accommodation provisions. The Western Australian provision seems a concession to the sort of irrational fears against which the handicapped laws are directed, and given that it was enacted in 1988, it may well have been driven in large part by the misplaced public fears of AIDS.

The South Australian and Victorian Acts make no mention of diseases as impairments, but neither do they mention any other causes of

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[25] *Supra* note 22, at 1129 (emphasis added).

[26] Pub. L. No. 100-259, sec 9, 102 Stat. 28, 31-32 (1988).

[27] S. 4, N.S.W.; S. 4(1) W.A.

impairment.[28] Rather the focus of their definitions of handicap is on the fact of impairment. Whether the impairment arose from a congenital defect, an accident, a contagious disease etc, the mere fact of its existence seems sufficient.

2. *Whether ARC and Seropositivity are Handicaps*

While diseases may be the source of a handicap, this may not necessarily mean that a person infected with a particular disease is handicapped by it. A disease may only produce minor or transitory symptoms. The U.S. Justice Department has argued that the concept of handicap connotes some level of physical disability which, on a continuing basis, significantly reduces a person's physical capacities below those of the able-bodied. While the Department readily accepted that full blown AIDS would be considered a handicap, it argued that whether a person with ARC is handicapped has to be decided on a case by case basis depending on how serious and frequent the bouts of illness are. Further, seropositive individuals fall outside the definition of handicap altogether since 'by definition, persons who are merely seropositive have not yet suffered any substantial adverse health consequences due to the virus'. The Department characterized seropositivity as no more than a 'statistical predictor' of possible future illness. While it recognised that a seropositive individual would likely face hostility from others, prejudice alone could not make up for the absence of an immediate disabling effect:

> To be sure [a seropositive individual] may suffer adverse social and professional consequences . . . but a person cannot be regarded as handicapped simply because others shun his company. Otherwise, a host of personal traits—from ill temper to poor personal hygiene—would constitute handicaps . . .[29]

The Justice Department's view of a threshold level of disability would seem to accord with the commonsense notions of a physical handicap and finds support in a number of American cases. In *de la Torres* v. *Bolger*,[30] the Court of Appeals for the Fifth Circuit held that left-handedness was not a handicap but rather a 'physical characteristic' with little or no disabling impact. In *Jasany* v. *United States Postal Service*,[31] the Court of Appeals for the Sixth Circuit held that being cross-eyed had so little impairing effect that it 'did not rise to the level of a physical impairment'.[32] In *Stevens* v. *Stubbs*,[33] a case with some analogy to ARC, the plaintiff

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[28] S. 5 Vic.; S. 4 S.A.

[29] The Cooper opinion was actually referring to an immune carrier, but it treated an asymptomatic HIV infected person as analogous to an immune carrier.

[30] 781 F 2d 1134 (5th Cir 1986).

[31] 755 F 2d 1244 (6th Cir 1985).

[32] Id. at 1250.

[33] 576 F Supp 1409 (ND Georgia 1983).

suffered repeated minor health problems over two years which required his absence from work. In rejecting a claim of discrimination under the *Rehabilitation Act*, the court said that 'at best the record shows only that the plaintiff may have suffered from an undisclosed transitory illness which may have required him to take periods of sick leave . . . whatever the precise delineations of the term 'impairment' the court is unconvinced that it encompasses transitory illnesses which have no permanent effect on a person's health'.[34] In *Doss v. General Motors Corp.*,[35] a case with some analogy to seropositivity, the plaintiff suffered from a long term ear infection which placed him at greater risk of acquiring life threatening infections such as meningitis. The court also refused to find him handicapped, distinguishing between a handicapping condition and a mere state of 'ill-being'.

The obvious concern underlying these decisions is that unless there is some threshold of physical disability and permanency in the condition, a host of minor conditions and ailments will fall within the regime of handicap discrimination laws. However, there are significant theoretical and practical difficulties with a threshold of impairment approach. Setting the required level of disability in the abstract is inevitably arbitrary: should the person's physical capacities be three-quarters, a half or a third of the able-bodied before the person is treated as handicapped? Or should the impairment meet some vaguer standard of 'significant' or 'material'? Even if a standard can be formulated, determining whether a person has reached it can be open to considerable medical dispute, leaving courts no better standard than making an educated guess. In the Australian context, the difficulties of a threshold of impairment approach are amply demonstrated by the requirement under the *Social Security Act* that a recipient of an invalid person have a degree of incapacity for work of not less than 85 percent.[36] The difficulties of this approach are perhaps even greater in a regime which proscribes a course of conduct than in a regime which compensates after the fact of injury. On the Department of Justice's approach, an ARC sufferer could move in and out of the definition of handicap over time, with corresponding fluctuations in an employer's liability towards that employee under the handicap laws. An employer who dismisses an employee on the basis of some physical condition would not know for certain whether the employee was at that point protected by the handicap laws until medical experts and a court had conducted their forensic examination after the dismissal.

A threshold of impairment approach would also permit employers

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[34] Id. at 1414.

[35] 25 FEP Cases 419 (CD Ill 1980).

[36] S. 23, *Social Security Act* 1947 (Cth). For example, see *Re Fliedner and the Director-General of Society Security* (1983) 5 ALN N 402; and *Re Sheely and the Director-General of Social Security* (1982) 4 ALN N206.

to pre-empt the protection afforded by handicap discrimination laws by dismissing employees before their condition had progressed to the point where they would be considered handicapped. Finally, the more subtle consequence of this approach is to shift the focus away from the alleged discriminator's intent to the alleged victim's physical condition.

Recognising these difficulties with the threshold of disability approach, some American courts have sought to fashion an alternative approach which views handicap more broadly in terms of the limitations it imposed on a person's full participation in society. This approach recognises that these limitations may be traceable not only to a person's physical disabilities but also to the adverse reactions of others which excludes him or her from opportunities available to those without the condition. In the *Arline* case, the Supreme Court said that:

> the legislative history of the *Rehabilitation Act* demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual. Such an impairment might not diminish a person's physical or mental capacities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment. *Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from impairment.*[37]

Indeed, the Court thought that a person would be handicapped even where the only disadvantage of his or her physical condition was that it made employment difficult to obtain. The Solicitor-General had asserted that defining handicapped in this way in a complaint of employment discrimination would be 'a totally circular argument which lifts itself by its bootstraps'. The Court replied that 'the argument is not circular but direct . . . [since] plainly Congress intended to cover persons with a physical impairment (whether actual, past or perceived) that substantially limits one's ability to work'. Thus, the major life activity which is affected need not be a bodily function but may be a purely economic activity and the substantial limitation on that activity need not arise directly from the physical condition but solely from the adverse reactions of others to that condition.

This alternative model of handicap was applied in *Chrysler Outboard Corp* v. *DILHR*,[38] which has some analogy to seropositivity and ARC. The plaintiff suffered from acute lymphocytic leukemia, which placed him at significantly heightened risk of infection from normal or minor injury, although he was presently healthy and capable of doing the job.

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[37] *Supra* note 22, at 1127.

[38] 14 FEP Cases 344 (Wisc. Circ. Ct 1976).

The court held that handicap connoted 'a disadvantage which makes achievement unusually difficult.' If an employee's illness or defect makes it more difficult for him to find work by reason of the adverse reactions of others, then it operates to make achievement unusually difficult.[39]

In *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* v. *State of Wisconsin, Department of Industry, Labor and Human Relations*[40] the plaintiff had been a severe asthmatic as a child, but the condition had not recurred for seven years, and he was otherwise healthy. The railroad argued that to be handicapped an employee 'must be incapacitated from normal remunerative occupation, an economic detriment to the normal employer and require rehabilitative training.'[41] The court held that this construction of handicapped was too cribbed in light of the legislation's broad objective to encourage and foster to the fullest extent practicable the employment of all properly qualified persons:[42]

> If the individual can function efficiently on the job, then the mere fact that he is different from the average employee as to those statutorily prescribed bases, i.e., handicap, may not be used as a basis for discrimination.

However, some American courts have expressed a concern that a model of handicap based on the prejudice of others is so broad as to swallow much of the law of employment. In *Advocates for the Handicapped* the Illinois Appellate Court commented:

> We feel [the] approach would extend the proscriptions of the Act well beyond the scope intended by the legislature. Since virtually every consideration upon which an employer is likely to evaluate a prospective or current employee may be classified as either a mental or physical condition, the Act would be transformed into *a universal discrimination law*. Even such conditions as sex, age and race could be denominated as physical conditions and thus could be swept within the review of the handicap laws.[43]

Underlying this criticism is the rather pragmatic view that 'human nature being what it is people have their likes and dislikes.'[44] A degree of irrational decision-making unrelated to a person's true capacities is to be commonly expected; for example, an employer may take a dislike to a person on the basis of his or her hair style, or fatness, appearance or height.

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[39] Id. at 345.

[40] 215 NW 2d 443 (Wisc. Sup. Ct 1974).

[41] Id. at 445.

[42] Id.

[43] 67 Ill. App. 3d 512 at 516; 385 NE 2d 39 at 43 (Ill App. Ct. 1977) emphasis added.

[44] 347 NW 2d 256 at 260 (Minn. Supreme Court 1984).

However, a particular condition could not be considered a handicap merely on the basis of the idiosyncratic prejudices of a single employer, or even of a few employers. Unless the defendant employer's prejudices concerning a particular condition are sufficiently widespread amongst the general body of employers so as to make 'achievement unusually difficult', possession of that condition can hardly be said to be a handicap. No doubt this approach requires a judgment of degree about how widespread and significant the particular form of prejudice is, a criticism which was made of the disability threshold model. However, unlike the other approach, this judgment goes to the very heart of the handicap discrimination laws. Rather than calibrating degrees of disability, a court is deciding whether the prejudice against persons with a particular condition is sufficiently intense to warrant the court's intervention to protect them. A prejudice based model can also provide somewhat more certainty for employers because employees are covered by handicap discrimination laws by category of condition rather than on an individual basis. For example, an employer will know beforehand that all asthmatic employees are protected if the courts have previously determined that this is a handicap, rather than having to make a risky decision about whether a particular asthmatic employee is not protected because he or she is not so disabled.

The one American case which has considered the applicability of the *Rehabilitation Act* to seropositivity has adopted a prejudice based model of handicap. In *Doe* v. *Centinela Hospital*, a federal district court held that a person is handicapped if he 'has a physiological disorder or condition affecting a body system that substantially limits a 'function' only as a result of the attitudes of others to the disorder or condition.'[45]

The exclusion of seropositivity from the legal definition of handicap has been roundly criticised on scientific and public policy grounds. The medical experts argue that the legal profession has taken too literally the three categorizations of HIV infection into seropositivity, ARC and full blown AIDS, and that it was only intended as a diagnostic and reporting tool.[46] Indeed, the Centers for Disease Control, which first came up with the categories, has recently suggested that they be amended to four. The medical experts have also rejected the paradigm that a seropositive individual cannot be considered ill and is comparable to an immune carrier. The U.S. Surgeon General has said that;[47]

> It is inappropriate to think of [HIV infection] as composed of discrete conditions such as ARC or full blown AIDS. HIV infection is the starting point of a single disease which progresses through a variable

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[45] Unreported, Civ 87-2514 (C.D. Cal June 30, 1988).

[46] Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic, June 24, 1988, U.S. Government Printing Office, Washington, DC at 7, 121 and 123.

[47] Surgeon General's Report on Acquired Immune Deficiency Syndrome, 32 (1986).

> range of stages. In addition to an acute flu-like illness, early stages of the disease may involve subclinical manifestations i.e. impairments and no visible signs of illness. The overwhelming majority of infected persons exhibit detectable abnormalities of the immune system. Like a person with the early stages of cancer, [seropositive individuals] may appear outwardly healthy but are in fact seriously ill.

As the Surgeon-General indicates, emerging research evidence suggests the previous assumption that seropositive individuals are unaffected by the infection might be incorrect. They appear to have more minor health problems than the uninfected, stand some chance of developing brain disorders, and the estimates of the probability of them progressing to ARC and full-blown AIDS are being revised upwards.

Excluding seropositivity from the definition of handicap would be an invitation to employers to take pre-emptive action and lay off infected individuals before they develop ARC or AIDS. If seropositivity is not a handicap, then requiring employees or potential employees to submit to testing logically would not be prohibited. With the availability of relatively inexpensive testing procedures, there is real potential for widespread discrimination against the growing population of those infected with HIV.[48]

After coming under heavy fire for its views, the U.S. Department of Justice has recently reversed itself and now considers all stages of HIV infection to be handicaps, applying a prejudice based model of handicap.[49] Interestingly, the Department also thought that infected individuals were handicapped because they had lost the capacity to engage in unprotected sex without infecting partners and to procreate without infecting their babies.

3. The Australian Definitions of Handicapped

One Australian commentator has suggested that seropositivity may not be protected under the four Australian acts;[50]

> It is . . . doubtful whether the definition [of handicap] extends to an asymptomatic person who is antibody positive. Positive antibody status which is not accompanied by ARC or lymphadenopathy does not appear to amount to a 'defect or disturbance in the normal structure and functioning of the person's body' within the New South Wales legislation, since the formation of antibodies to a virus is

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[48] A recent survey of college students in the U.S. who were mainly white, heterosexual and not drug abusers indicated an infection rate of 2 in 1,000. Estimates of the general rate of infection in the U.S. population range between 4 and 6 in 1,000, or between 1 and 1.5 million people. New York Times, May 23, 1989, at C12.

[49] Memorandum to Arthur C. Culvahouse, Jr., Counsel to the President, September 27, 1988.

[50] M. Neave, *Individual Rights and AIDS*, First Annual Conference on Human Rights, Sydney, September, 1987.

a normal bodily process. Similarly, a healthy person who is antibody positive does not have a 'bodily malfunction' or 'a total or partial loss of any function of the body' (as required by the Victorian and South Australian definitions).

Like the Department of Justice's original opinion, this view seems to be based on a model of handicap which requires some threshold level of physical disability or damage. However, it is possible to read the four Australian Acts in light of the American experience to include all stages of HIV infection, including seropositivity.

The New South Wales definition most closely resembles the definition in the *Rehabilitation Act* and of the four Australian Acts can most readily accommodate a prejudice based model of handicap. The reference to limitations on the enjoyment of 'a full and active life' is not contained in the definition of physical impairment but rather in the separate definition of a handicapped person. Echoing the U.S. Supreme Court in *Arline*, the Equal Opportunity Tribunal said in *Kitt* v. *Tourism Commission* that 'the concept that the community attitudes to the person's impairment might be responsible for the limitation in life activities is expressly imported into the definition of physically handicapped person.'[51] Further, the definition of physical impairment can be read in a way which would include a condition which does not have any outward disabling impact on the individual. A thing with a latent 'defect', such as an immune system infected with inactive HIV, is defective just the same. It confuses cause with effect to say that the immune system is not defective until the immune system fails to perform and the infected individual falls ill. The invasion of HIV into a cell, and its continuing presence interwoven within cellular material, can also be said to cause a 'disturbance' in the structure of the cell and the immune system, though no ill effects have yet come of that disturbance.

A major difference between the *Rehabilitation Act* and New South Wales Act is the absence of the 'presumed handicap' element in the latter's definition of handicap. The American Act provides that persons will be considered to be handicapped where they are mistakenly regarded as having a handicap. However, a close reading of *Arline* and the other American cases in which the prejudice based model of handicap is used indicates that this model is not dependent upon 'presumed handicap' provisions. There is a distinction between being mistakenly perceived as having a condition which itself limits a person's activities and having a condition the misperception of which limits a person's life. The U.S. Department of Justice's original position on HIV infection clearly demonstrates this distinction. If an employer were to fire a seropositive individual because he mistakenly believed the employee was suffering

[51] (1986) EOC 92-186 at 76,882.

from full blown AIDS, the employee would be protected because the condition the employee was mistaken as having falls within the definition of handicap. However, if a doctor who was knowledgeable about HIV infection refuses to treat an individual whom he or she knew to be seropositive, there would be no remedy unless seropositivity itself fell within the definition of handicap. The absence of a presumed handicapped ground from the New South Wales Act should not be fatal to the inclusion of conditions within the definition of handicap on the basis of prejudice alone.

However, a difficulty with including seropositivity in the New South Wales Act is that the phrase 'structure *and* functioning' in the definition of physical impairment might suggest the need for some immediate dysfunction. This issue was considered in *Kitt* in relation to a similar phrase in the definition of intellectual impairment. Some medical experts gave evidence that the plaintiff's epilepsy caused both a disturbance in the brain's structure and its functioning, but others said that it only affected its functioning. The Tribunal thought that the phrase 'normal structure and normal functioning' expressed a single concept rather than two cumulative requirements.[52] The Tribunal concluded 'therefore any defect in either the normal structure or the normal functioning of the brain will constitute a defect in its normal structure and functioning.'[53] While recognising the grammatical difficulties of this approach, the Tribunal thought that a cumulative reading would undercut the broad purpose of the Act, apparently for reasons similar to the criticisms made above of the disability threshold.

The Western Australian Parliament may well have had this difficulty in mind when, in borrowing the wording of the New South Wales definition it changed the troublesome 'and' to an 'or', defining impairment to be 'any defect or disturbance in the normal structure *or* functioning of a person's body [or brain].'[54] Thus, seropositivity is arguably more comfortably brought within the Western Australian Act.

The inclusion of seropositivity within the ambit of the South Australian Act is more troublesome. It defines physical impairment as a 'partial loss in the body's functioning' and 'a malfunction of a bodily function'.[55] The Act does not expressly require a showing that the impairment limit a major life activity or the full enjoyment of life, as does the U.S. and the New South Wales legislation. On the one hand, the absence of this wording makes it more difficult to argue that handicap may arise from social prejudice alone. The focus seems more clearly

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[52] For a similar approach to another troublesome 'and' see *Traders Prudent Insurance Co. Ltd* v. *The Registrar of the Workers Compensation Commission of New South Wales* (1971) 2 N.S.W.L.R. 513.

[53] *Supra* note 51, at 76,880.

[54] S. 4(1).

[55] S. 5(1) S.A., S. 4(1) Vic.

on the degradation of the body. On the other hand, the absence of this wording also suggests that a degradation of a bodily function need not have any physically disabling impact on the person: for example, a person who has only one kidney may still be considered handicapped though he or she functions as well as a person with two kidneys. Further, the loss in bodily functions need only be 'partial'. Even if the South Australian Act may rightly be viewed as requiring some level of physical disability, the threshold may be set at a much lower level than in the U.S. cases which use this approach. Conditions which the U.S. courts have held do not 'rise to the level of a handicap' might well be treated as a handicap under the South Australian Act.

Before an infected person would fall within the definition of handicap in the South Australian Act, HIV may have to be active and at least done some damage to the immune system, although there may not yet be any consequential impact on that person's health. Unlike with the Department of Justice's original approach, ARC sufferers as a rule may be included in the definition of handicap, but seropositive individuals would still be excluded.

However, it is possible to advance a construction of the South Australian definition which includes seropositivity, though at some violence to its literal wording. HIV infection can be said to have caused a 'partial loss of a bodily function' because there has been an underlying, irreversible and potentially tragic loss in quality and reliability of the body's immune system. The immune system cannot be said to be the same after infection as it was before since it cannot be relied upon to continue protecting the person against disease as the virus may unpredictably and without warning activate and attack untouched T-cells. The term 'malformation or disfigurement of any part of the body' might be construed to include cells which have been disfigured by the virus weaving itself through their cellular material and to include the new malformed infected cells which result from the division of those cells.

The Victorian definition of impairment is very similar to that of the South Australian Act. However, it was recently amended to add 'the presence in the body of organisms causing disease' to the list of impairments.[56] The qualification would not seem to mean that the organism must be presently causing a disease in the infected person, but rather that the organism must be of a kind which causes disease. This amendment would bring all stages of HIV infection within the Victorian Act.

The Victorian definition of impairment was also amended to include 'an impairment which is imputed to a person'.[57] This provision will provide

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[56] Health (General Amendment) Act 1988, s. 39(a)(i), inserting paragraph (aa).

[57] Id, s. 39(a)(ii), inserting new paragraph (f).

protection to those who are mistakenly assumed to be HIV positive, for example, because they are a member of one of the high risk groups.

The uncertainties about the inclusion of HIV infection within the definition of handicap in the South Australian Act and, to a lesser extent, the New South Wales and Western Australian Acts, should be resolved by amendments to their definitions of impairment. For the reasons discussed above, a more general reworking of statutory language to permit a prejudice based model of handicap would more fully promote the objectives of the handicap discrimination laws and alleviate some of the practical difficulties which American courts have had to confront in measuring degrees of disability. However, if there is concern that these amendments would go too far, the two Parliaments should consider following the Victorian amendments or the amendments to the *Rehabilitation Act* which include within the definition of handicap individuals with a contagious disease or infection.

D. THE MAKING OF REASONABLE ACCOMMODATION

Deciding that a person is handicapped and has been discriminated against is only half the exercise. While it can be assumed that factors such as gender, race and sexual orientation are generally irrelevant to an individual's capacity to do a job, often the same cannot be said of a handicap. Requiring employers to disregard a handicap as they must disregard gender or race could result in people filling jobs who are unable to do the work required or do it safely or economically: for example, the blind driving school buses or typhoid sufferers preparing food.

The *Rehabilitation Act* and the four Australian acts require only that the employer make 'reasonable accommodations' for a handicapped person, and if this is not possible the employer may discriminate on the basis of the handicap with impunity. In the context of race or gender discrimination this positive obligation to assist might be labelled as 'affirmative action' or 'reverse discrimination', but in relation to the handicapped it forms an integral part of the very concept of not discriminating. As the Washington State Supreme Court said in *Holland* v. *Boeing*;[58]

> Identical treatment may be a source of discrimination in the case of the handicapped, whereas different treatment may eliminate discrimination against the handicapped and open the door to employment opportunities . . . An interpretation to the contrary would not work to eliminate discrimination. It would instead maintain the status quo wherein work environments and job functions are

[58] 90 Wash 2d 384 at 388, 583 P. 2d 621 at 623 (Wash. Sup. Ct 1978) (*en banc*).

> constructed in such a way that handicaps are often intensified because some employees are not physically identical to the 'ideal employee'.

As HIV infection will often significantly affect a person's capacity to work by, for example, weakening him or her or causing long absences from work, most discrimination cases are likely to come down to a dispute over the extent of an employer's obligation of accommodation. While there are only a handful of Australian cases on reasonable accommodation, they reflect much of the debate in the more developed American case law.

1. Reasonable Accommodation in the U.S.

The American courts at first had difficulty accepting that the duty of reasonable accommodation might require an employer to hire a handicapped person who was not as qualified for the job as his or her able-bodied competitors. The *Rehabilitation Act* prohibits discrimination against 'otherwise qualified handicapped persons' and the question arose as to what consideration should be given to the impact of the handicap in determining whether a person was qualified to do the job. In *Southeastern Community College* v. *Davis*,[59] the plaintiff had a severe hearing impairment and was refused admission to a nurse's training course on the basis that nurses had to be able to hear their patients. The Fourth Circuit Court of Appeals held that 'otherwise qualified handicapped individual' meant a person who was able to meet all of the requirements of the program '*except as to limitations imposed by the handicap*.' It then fell to the employer to show that it could not reasonably accommodate those limitations. The Court of Appeals found that the plaintiff could do all the tasks required of a nurse other than hearing patients and that it would not be burdensome to require the training institution to team her with a person who was not hearing impaired or to provide a translator. The Supreme Court reversed, saying of the Appeal Court's decision.

> Taken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be 'otherwise qualified' . . . An otherwise qualified person is one who is able to meet all of a program's requirements *in spite of his handicap*.[60]

The Supreme Court held that as the plaintiff could not hear the patients she was not otherwise qualified to be a nurse. The inference is that the handicap must have little or no disabling impact on the individual, at least so far as capacity for work goes. This would seem to render the duty of reasonable accommodation otiose as logically none would

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[59] 442 US 397 (1979).

[60] Id. at 406.

be required. However, the Court went on to hold that an employer does bear an affirmative burden to make accommodations for the handicapped, provided they are not 'substantial' or 'fundamental'. Accommodations of that magnitude would cross over the line from reasonable accommodation to affirmative action, which was not mandated by an anti-discrimination law. However, the Court cautioned that:

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens . . . Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.[61]

Many handicapped people will have difficulty in meeting the *Davis* test of job qualification, particularly if combined with the threshold of disability approach discussed above. The plaintiff would have to show that his or her disability is limiting enough 'to rise to the level of a handicap', but not so serious as to materially affect job performance.

Subsequent decisions of lower courts have endeavoured to circumvent *Davis* by measuring a handicap person's qualifications for a job on the basis of whether they can perform its 'essential features'. Generally speaking, where the task which the handicapped person cannot do by reason of his or her handicap is not essential to the job, it is a reasonable accommodation per se for the employer to hive off that task and have it done by someone else. Further, in respect of those tasks which are essential, the employer may also have to provide some positive assistance or allowance to enable the handicapped person to do them, such as special machinery. For example, in *Simon* v. *St. Louis County*,[62] a police officer incapacitated by a gunshot wound was discharged because he could not meet the force's requirement that all its officers, including those in desk-bound jobs, be capable of effecting an arrest against physical resistance. The District Court found that requiring the employer to abandon the rule was the sort of fundamental accommodation precluded by *Davis*. In reversing, the Court of Appeals for the Third Circuit commented;[63]

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[61] Id. at 412.

[62] 656 F 2d 316.

[63] Id. 321 n. 10 (3rd Cir 1983).

> It is clear that there is no requirement upon [the police force] to 'effect substantial modifications of standards to accommodate a handicapped person' . . . while the district court below held that substantial accommodations would be required, it is our view that this was based on the yet to be established assumption that the requirements were in fact necessary to the job.

However, there has been considerable disagreement between the courts over how much deference to give the employer's own views on essentialness of the challenged requirements. In *Doe* v. *New York University*,[64] the Court of Appeal for the Second Circuit thought *Davis* required 'considerable judicial deference . . . to be paid to the evaluation made by the institution itself, absent proof that its standards . . . served no purpose other than to deny participation to handicapped individuals.'[65] The Court went on to hold that the pivotal issue was whether the university had a 'reasonable basis' for finding the plaintiff not to be as well qualified as other applicants.[66]

By contrast, in *Strathie* v. *Dep. of Transportation*,[67] another Court from the same circuit expressly rejected the rational basis test because 'broad judicial deference resembling that associated with the rational basis [test] would substantially undermine Congress' intent that stereotypes or generalizations not deny handicapped individuals equal access. This 'objective' test has been framed in the following terms:

> A handicapped individual who cannot meet all of a program's requirements is not otherwise qualified if there is a *factual basis* in the record reasonably demonstrating that accommodating that individual would require a modification of the essential nature of the program, or impose an undue burden on the recipient of federal funds.[68]

Lower courts have also endeavoured to stretch the *Davis* requirement that the accommodations not be fundamental or substantial. The courts have held that the *Rehabilitation Act* requires at least 'modest affirmative steps' to accommodate the handicapped[69] and that the financial burden of the accommodations not be 'excessive'.[70] In *Nelson* v. *Thornburgh*,[71]

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[64] 666 F 2d 761, (2d Cir. 1981).

[65] Id. at 77.

[66] Id. emphasis added. See also *Doe* v. *Region 13 Mental Health-Mental Retardation Commission*, 704 F 2d 1402 (5th Cir 1983) *Kampmeier* v. *Nyquist*, 553 F 2d 296 (2d Cir 1977).

[67] 716 F 2d 227 (3rd Cir 1983).

[68] Id. at 231. See also *Pushkin* v. *Regents of the University of Colorado*, 658 F 2d 137 383 (1981).

[69] *Dopico* v. *Goldschmidt* 687 F 2d 644 (2nd Cir 1982); *American Public Transport Assoc.* v. *Lewis*, 655 F 2d 1272 (DC Cir 1981); *United Handicapped Federation* v. *Andre*, 558 F 2d 413 (8th Cir 1977); *Lloyd* v. *Regional Transportation Authority*, 548 F 2d 1277 (7th Cir 1977).

[70] *New Mexico Ass'n. for Retarded Citizens* v. *New Mexico*, 678 F 2d 847 (10th Cir 1983) *Majors* v. *Housing Authority*, 652 F 2d 454 (1981); *Tatro* v. *Texas*, 625 F 2d 454 (1981); *Tatro* v. *Texas*, 703 F 2d 823 (1983).

[71] 567 F Supp 369 (ED Pa. 1983), *aff'd* 732 F 2d 146 (3rd Cir 1984), *cert denied* 469 US 1188 (1985).

the plaintiffs were three blind clerks working for the state welfare department. The cost of providing reading assistants and braille machines would have been around $70,000 per annum, which the district court thought was not 'undue' when compared to the defendant's administrative budget of $300 million.

However, this expenditure amounted to nearly half of the total salaries paid to the plaintiffs. This made the 'unit cost' of the work done by the plaintiffs significantly higher than comparable work done by able-bodied employees. To require all comers to be accommodated at this level could impose significant burdens on an employer. A more sensible approach may be to apply some broad cost-benefit equation to reasonable accommodation, so that the employer's expenditure is not unreasonably out of proportion to the productive value of the handicapped person.[72]

Interestingly, the *Thornburgh* court also suggested that the costs to society of a handicapped person not being able to find employment should be considered:

> in enacting section 504, Congress recognized that failure to accommodate handicapped individuals also imposes real costs upon American society and the American economy. . . . When one considers the solid costs which would flow from the exclusion of persons such as the plaintiffs from the pursuit of their profession, the modest cost of accommodation—a cost which is likely to diminish as technology advances and proliferates—seems, by comparison, small.[73]

This recognises that 'while individual business efficiency is itself an important social value, it may not always coincide with social efficiency.'[74] However, the *Rehabilitation Act* only applies to federal government agencies, recipients of federal grants and private contractors with both, whereas the four Australian Acts apply across the board to all government and private sector employers.[75] While the state can no doubt bind itself and recipients of its funds to consider social costs in accommodating the handicapped, it may be questionable whether private employers can or should be required to do so.

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[72] For example, *Rhode Island Handicapped Action Committee* v. *Rhode Island Public Transit Authority* the Court of Appeal accepted that the defendant should not have to fit wheel-chair ramps to all its buses because the cost compared to the extra expected revenue exceeded the 'moderate burden' test. 718 F 2d 490 (1st Cir. 1983).

[73] *Supra* note 73, at 382.

[74] McGarity & Schroeder, *Risk-Orientated Employment Screening*, 59 Tex. L. Rev. 999 (1981).

[75] The United States Senate recently passed a comprehensive handicap discrimination bill which will apply across the board to all employers and the Act is likely to also be passed in substantially the same form by the House of Representatives and signed into law by the President. The reasonable accommodation provisions of the bill mirror those of the *Rehabilitation Act*. It is yet to be seen whether the courts will apply principles developed in relation to public sector employees under that Act to the new law. Washington Post, September 6, 1989 at A1.

2. *Reasonable Accommodation in Australia*

The only Australian case to have given any detailed consideration to the concept of reasonable accommodation is *Jamal* v. *Secretary, Department of Health*, decided under the New South Wales Act.[76] In this case, a hospital had refused to hire a doctor because his impaired vision caused by bilateral cataracts would prevent him driving at night between distant wards and doing fine suturing work.

The employer argued the doctor's capacity to do the job was not the same or similar to that of the able-bodied doctor who was hired and thus there was no discrimination within the meaning of s. 49A. The Tribunal held that if the employer took the handicap into account for whatever reason, there was discrimination and the question of whether the employer was justified in view of that person's reduced capacities fell to be considered in the context of the 'reasonable accommodation' of s. 49I. The employer's position closely resembles the Supreme Court's view in *Davis* of 'otherwise handicapped' while the Tribunal's position resembles the Court of Appeal's view which it rejected.

On appeal to the Supreme Court,[77] Justice Hunt upheld the employer's position. His Honour noted that all the provisions of the Act which outlawed the different forms of discrimination shared the wording 'the same circumstances or circumstances which are not materially different' and that as the capacity to work obviously had to be one of the compared circumstances between homosexuals and heterosexuals, men and women, the married and the single, logically it had to be compared between the handicapped and the non-handicapped. His Honour recognised that so read s. 49A would only protect a handicapped person who was as physically capable as the able-bodied.

Including factors related to a person's handicap in the comparison with the treatment of the able-bodied subverts the whole purpose of that comparison. As discussed above, the English provisions on which s. 49A are modelled resembles a structure of proof developed by the U.S. Supreme Court in applying the *Civil Rights Act.* The Supreme Court explained the purpose of this proof structure as follows;[78]

> it serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. . . . the prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'

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[76] (1986) EOC 72-162.

[77] *Secretary, Department of Health* v. *Jamal* (1986) EOC 92-183.

[78] *Texas Department of Community Affairs* v. *Burdine* 450 US 248 (1981) quoting from *Furnco Construction* v. *Waters* 438 US 567, 577 (1978).

This purpose of the comparison collapses if differences arising from the protected status are taken into account. The fact that relative work performance can be included in the comparison when applied to homosexuality, gender or race does not mean that it can be factored in when considering an allegation of discrimination against the handicapped, since it has nothing to do with these other protected statuses but has everything to do with being handicapped.

The Court of Appeal appeared to agree with the Tribunal's approach.[79] Justice Kirby thought that Justice Hunt's approach rendered the reasonable accommodation provisions redundant:

> the preferable construction, and that which achieves the apparent object of the Part is to require that s. 49B(1)(b) [and hence s. 49A] should be construed alongside s. 49I. In my view, the Act provides a legislative presumption that the prohibited ground (in this case physical impairment) is of itself irrelevant unless particular circumstances can be made out, as provided in . . . s. 49I.[80]

Justice Samuels confessed confusion over the competing constructions but nonetheless held that:

> [where] a physically handicapped person applies for work and is rejected on the ground that she would be unable to carry out the work because of her impairment . . . that would amount to discrimination within s. 49A(1)(a) . . . because the applicant was treated 'less favourably' because she was rejected on the ground of her impairment; and a person who was not physically handicapped would not have been rejected.[81]

Justice Mahoney said that he was prepared to accept the Tribunal's approach to s. 49A without deciding its correctness.[82] However, in the context of the gender discrimination provisions, his Honour has been one of the strongest advocates of excluding the protected characteristic from the comparison with the treatment of a person without that characteristic.[83]

As the South Australian and Victorian Acts have the same format of comparing the employer's treatment of the handicapped and the able-bodied, the Court of Appeal's decision in *Jamal* seems directly applicable to them. However, the Victorian Act has a unique provision exempting discrimination on the basis of physical impairment if the discrimination 'is on the basis of selecting the person who, irrespective of the impairment, is best suited to perform the duties relevant to the employment'. In *Campbell*

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[79] (1988) 14 N.S.W.L.R. 252, in particular, Kirby P. at 260.

[80] Id. at 259-260.

[81] Id. at 265.

[82] Id. at 266.

[83] *Tullamore Bowling and Citizens Club* v. *Lander* [1984] 2 N.S.W.L.R. 32.

v. *FH Productions Pty Ltd.*[84] counsel for the plaintiff argued that the general purpose of the Act would be undermined if this provision allowed an employer to judge an able-bodied person as better suited than a handicapped person simply because he or she did not have the impairment. The Equal Opportunity Board responded:

> although the Act is without doubt social legislation which should try to assist, we cannot believe that the Act requires an employer to select a person for employment who because of an impairment, is not the applicant best suited to perform the duties relevant to the employment. We interpret para(b) to mean that an employer is allowed to select the person who is, irrespective of impairment, best suited to perform the duties relevant to the employment but is not allowed to select the person who is second best suited to perform the duties relevant to the employment because the employer prefers not to engage an impaired person who was best suited to perform those duties. Thus it would not be appropriate for an employer to refuse to employ a one-armed telephonist who was extremely expert in performing a telephonist's duties simply because he or she preferred to see a person with two arms sitting at the receptionist's or telephonist's desk.[85]

While the Board is right to say that an employer cannot hire an able-bodied person who is less qualified than a handicapped person, that doesn't support the obverse conclusion that the employer is not required to hire a handicapped person who is not best suited because of an impairment. The employer has to consider whether the handicapped person might overcome that 'deficit' in his or her capacities if reasonable accommodations were made by the employer. The provision does no more than re-inforce the point that an employer does not discriminate if he or she chooses some valid point of comparison which is unrelated to the handicapped person's impairment and the able-bodied person is better qualified on that basis, for example superior education.

Turning now to the meaning of reasonable accommodation itself, the New South Wales Tribunal in *Jamal* again adopted an approach which mirrors the more activist American authorities. It held that the handicap person need only be able to do the job's 'essential requirements'; that reasonable accommodation required '. . . a balancing of the rights of the physically handicapped against those of the employer'; and that 'the employer is entitled to take into account any expense which might be occasioned . . .' which should be considered '. . . in light of such matters as the size of the employer's organization'.[86]

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[84] (1984) EOC 92-104.

[85] Id. at 76,027 (emphasis added).

[86] *Supra* note 76, at 76,600.

Justice Hunt held that 'section 49I provides no charter for affirmative action.'[87] Rather, his Honour thought that the section had the much narrower purpose of providing a defense of reasonable mistake for employers; that is, s. 49A is directed to the question of whether the handicapped person was *in fact* fit for the job and s. 49I to the subjective issue of whether the employer *in fact* believed he or she was not fit. His Honour rejected the 'essential features' test and held that the handicapped person had to be able to do *all* tasks required by the employer. Justice Hunt's view is even narrower than that taken by the U.S. Supreme Court, since even it recognised that the employer bore some modest affirmative obligation to assist the handicapped.

While the three judges of the Court of Appeal accepted that s. 49I imposed some affirmative obligations on the employer to assist the handicapped, they expressly rejected the 'essential features' test. Agreeing with Justice Hunt, Justice Mahoney said that '[the employer] is entitled to require that the employee be able to carry out the whole of the work which it has required to be performed in the course of the employment . . . the Tribunal is not entitled . . . to put aside anything which in fact the employer has required.'[88] Justice Samuels took a similar line. However, Justice Mahoney went on to distinguish between the work required to be performed and the means by which that work might be performed: 'the fact that the [means] could not be performed would not necessarily warrant the conclusion that the work in fact required to be performed by the employee could not be performed . . . it might be performed in another way.'[89] While his Honour would appear to have in mind the provision of special equipment and machines, he did not rule out the relevance of the possibility of someone else doing the task that the handicapped person cannot do.

Justice Kirby took a little more expansive view. His Honour thought that s. 49I(1)(a) was directed to situations where the handicapped person could not do the work 'at all', giving the example of the blind airline pilot.[90] However, 'most cases would be considered to fall under para(b) [of the s. 49I] because the person could do some of the required job tasks', with the result that an employer needs to consider what accommodations could be made. While some of these accommodations may allow a person to do the tasks he or she could not otherwise do, his Honour appears not to have foreclosed the possibility that it may be reasonable for the employer to hive off some tasks. On the more general question of the extent of the required accommodations required by s. 49I, his Honour referred to the *Davis* distinction between adjustments

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[87] *Supra* note 77, at 76,766.

[88] *Supra* note 79, at 268-269.

[89] Id. at 269.

[90] Id. at 262.

which were 'reasonable' and those which were 'fundamental' or 'substantial', but specifically reserved this issue for future decision.

In short, while the Court of Appeal's view on the 'otherwise qualified' issue is closer to the more activist American authorities, its view of the duty of accommodation is much closer to the more conservative American cases. The net result is that the New South Wales Act may be of limited assistance to individuals whose handicaps have some moderate impact on their work capacities, but it is unlikely to be of much assistance to the more significantly impaired.

The reasonable accommodation provisions of the Western Australian Act closely follow those of the New South Wales Act, and the cautious approach of the *Jamal* decision is likely to be influential with courts in that state. However, the Western Australian provision refers to services or facilities the provision of which are an 'unjustifiable hardship on employers'.[91] When determining whether an unjustifiable hardship exists 'all relevant circumstances of the particular case shall be taken into account, including the nature of the benefit or detriment likely to accrue or be suffered by all persons concerned, the nature of the impairment of the person concerned and the financial circumstances and the estimated amount of expenditure required to be made by the person claiming the unjustifiable hardship.'[92] This would seem to set in statutory form the costs/benefit analysis undertaken by U.S. courts, and would seem broad enough to mandate a weighing of non-financial and social considerations along the lines of the court's formulation in the *Thornburgh* case. Further, the Western Australian wording would seem to more clearly contemplate that the required accommodation of the handicap will impose a real and significant burden on employers: an accommodation may be a hardship to the employer but still be justifiable.

However, like the New South Wales Act, the Western Australian provision views the requirement for an accommodation of the handicapped through the eyes of the employer. The test is whether 'it is reasonable for an employer to conclude, on such grounds as having regard to the circumstances of the case and having taken all reasonable steps to obtain relevant and necessary information concerning the impairment it is reasonable for the employer to rely on, that the person with the impairment because of that impairment . . . would, in order to carry out the work require services or facilities that are not required by persons who do not have an impairment and the provision of which would impose an unjustifiable hardship on the employer.'[93] However, this lamentably tortuous piece of drafting may come much closer to a straightforward question of whether it was objectively reasonable to accommodate the

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[91] S. 66Q.

[92] S. 4.

[93] Id.

handicapped person than the New South Wales Act. The additional test of reasonable inquiry imposes an active duty on employers to gather information and seek advice about the matters which are weighed in making the decision about whether the accommodation imposes a unjustifiable hardship. An informed employer will have difficulty asserting that there were reasonable grounds for not accommodating the handicapped person when a reasonable employer who was appraised of the same information would have done so.

The reasonable accommodation provisions of the Victorian and South Australian Acts are worded in more objective language than s. 49I. The Victorian Act provides a defence where the accommodations 'cannot or could not reasonably be made available'[94] and the South Australian Act provides a defence where the handicapped person could not 'perform adequately the work genuinely and reasonably required for the employment or position in question'.[95] This wording would more readily permit an approach along the lines of the more activist American authorities, including, particularly in relation to the South Australian Act, the use of the threshold test of 'essential features'. In a number of cases the Victorian Equal Opportunity Board has had no qualms in making its own assessment of a handicapped person's capacity for a job or to utilize a service.[96]

The question of the extent of an employer's obligation of reasonable accommodation was considered by the Victorian Board in the context of the provision of services in *Blair* v. *Venture Stores Pty Ltd.*[97] A department store had discontinued a lift service, with the result that handicapped people lost access to the second floor. Restoring the lift service would have cost $76,000. Section 27(3) of the Victorian Act exempts discrimination in the provision of services where;

> in consequence of a person's impairment, the person requires the service to be performed in a special manner—
>
> (a) that cannot reasonably be provided by the person performing the service; or
>
> (b) that can on reasonable grounds be provided by the person performing the service on more onerous terms than the terms on which the service could reasonably be provided to a person not having that impairment.

The Board said that 'a minor inconvenience or a very small additional cost would not be onerous, but a cost which is a burden to bear is indeed

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[94] S. 22(5).

[95] S. 71.

[96] *Urie* v. *Cadbury Schweppes Pty Ltd* (1986) EOC 92-180; *O'Neill* v. *Burton Cables Pty Ltd* (1986) EOC 92-159; *Cooper* v. *Ford* (1987) EOC 92-191.

[97] (1984) EOC 92-103.

onerous',[98] which suggests a degree of obligation which would fall at the more modest end of the spectrum of US cases. However, the Board also said that '. . . the Act lays down a system of balances so that the achievement of equal opportunity will not threaten the viability of business enterprises by requiring compliance with onerous and unreasonable requirements',[99] which echoes U.S. cases at the other end of the spectrum. In this case, the Board thought that the cost of restoring the lift service was onerous, but it made much of the fact that the business was already in financially straightened circumstances. In another case dealing with the provision of services to the handicapped, *McKenna* v. *Re-Creation Pty Ltd*,[100] the Board held that it would not be onerous for a health club to make a side entrance accessible for a person in a wheel-chair and to make staff available to assist him in and out of the pool. The Board's reasoning is sparse, but it did note that the health club was not required to employ extra staff or install expensive equipment, such as a lift.

The equivalent provisions dealing with accommodations in the employment context refer only to accommodations which cannot reasonably be provided. This suggests that there may be some accommodations which would be reasonable for an employer to make, although they are onerous.

The rejection of the approach of the more activist American cases is mainly driven by the traditional concern that courts should not unduly interfere with an employer's running of his or her business. The 'essential features' test is not as objective and predictable a standard as the American courts make out. As one commentator has written, 'there is no strictly analytical way to decide which functions are essential to a particular job, [and] such a determination depends upon how one defines both the purposes of the job in question and the permissible goals of employers.'[101] Indeed, it often seems that whether a particular challenged practice is called essential or non-essential depends on the court's own view about whether the handicapped person deserves assistance in the facts of the particular case.

However, a rigid adherence to the employer's job description can deprive anti-discrimination laws of much of their force. This is not only because bigoted, inflexible or apathetic employers may use a handicapped person's inability to perform a peripheral task to exclude him or her from work which he or she is otherwise able to perform. It is inevitable that the majority will unconsciously shape a society in ways with which it feels most comfortable. The fact that work is required to be done in a certain way may have less to do with the objective requirements of

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[98] Id. at 76,022.

[99] Id. at 76,023 (emphasis added).

[100] (1984) EOC 92-100.

[101] Note, *Discrimination Against the Handicapped*, 97 Harvard Law Review 997 at 1012.

that work or the economic demands of the employer's business than with the fact that it better suits the able-bodied. At the end of the day, which accommodations are considered reasonable depends on how much effort and resources society is prepared to put into bringing the handicapped within the economic and social mainstream. The U.S. Supreme Court explicitly recognised this in its recent decision in *Alexander* v. *Choate*:

> The balance to be struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the [defendant] offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled.[102]

While this 'meaningful access' test is vague and elastic, it is perhaps the most realistic and appropriate description of the task which courts have been given in the enforcement of reasonable accommodation provisions.

E. Accommodating AIDS

1. Physical Ability to Perform the Work Required

Even under the narrowest view of reasonable accommodation, an employer probably could not object to employing a seropositive person since no accommodation is required because the person is not affected by the syndrome, or at least not in any major way.

The more activist American cases would require that as an infected employee weakened with the progression of ARC the employer hive off the more physically demanding aspects of the job which were not essential to the position, until the point came where the cost was substantial. By contrast, under the Court of Appeal's approach in *Jamal*, an employer might be required to provide some limited assistance to help an employee with ARC compensate for the loss of physical strength or other symptoms but as soon as the employee is unable to do any task assigned by the employer, he or she could be dismissed. This would probably come at a much earlier stage in the progression of ARC than under the more activist American cases. However, Justice Kirby, and perhaps Justice Mahoney, might be prepared to require that the ARC sufferer be kept on somewhat longer by hiving off some more minor tasks.

Even the more activist American cases would not seem to require the accommodation of a full blown AIDS sufferer, who will usually be so seriously weakened that any accommodation clearly would be 'fundamental' or 'substantial'. However, in *Chaulk* v. *U.S. District Court*, the Ninth Circuit Court of Appeals ordered a school to take back a teacher

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[102] 469 U.S. 287 at 301.

suffering full blown AIDS. The Court noted that although the teacher had been hospitalized with an opportunistic infection, his condition had stabilized and he was not so debilitated as to be unable to fully perform his job. Although the Court did not expressly discuss at what point the school could validly dismiss the employee, it seems implicit from the decision that the school may have to keep him on during further relapses until it became reasonably clear that there would be no further remissions. For many full blown AIDS sufferers this point may not be reached for several months, if not several years. However, as discussed below, this decision may not be consistent with other American authorities which permit an employer to dismiss an employee who though presently capable of performing the job, faces significant risk of a future disability.

2. Transfer to a Less Demanding Job

There is a confict between American authorities over whether the duty of reasonable accommodation requires an employer to offer alternate employment, such as 'light duties', to a handicapped employee who is no longer capable of doing their assigned job. In *Rhone* v. *US Department of the Army*[103] a federal district court accepted that an employer's duty of accommodation did not reach as far as creating an entirely new job tailor-made to the plaintiff's needs. However, emphasizing 'the strong expressions of congressional policy favoring a liberal employment of handicapped people in federal employment, the court held:

> As a matter of law the court finds that reasonable accommodation must include reassignment . . . while agencies cannot be expected to search ad infinitum for a position that will correlate with a handicapped employee's remaining abilities and qualifications, this court believes that federal employers are bound to undertake a reasonable and competent attempt to retain such employees in a capacity in which they are qualified and capable of serving.[104]

The court also noted that the transfer of an employee may often be the best option for the employer:

> as a matter of sound management policy, it is logical that reassignment should be considered a viable means of accommodation. It will often be less costly to place an employee into a position in which he can perform with little or no further accommodation versus what may approach solicitous coddling if he is propped up in a position where he may be only minimally productive.[105]

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[103] 44 EPD 37,511.

[104] Id. at 49,618.

[105] See also *Dean* v. *Municipality of Seattle-Metro* 708 P2d 393 (Wash. Sup. Ct. 1985).

In *Carty* v. *Carlin*[106] another federal district court reached the opposite conclusion. The court based its decision on a strict reading of the wording of the regulations, which required that a handicapped person be able to 'perform the essential functions of the position in question'[107] to be an 'otherwise qualified handicapped person' in the first place.

In a footnote in its decision in *Arline*, the U.S. Supreme Court appeared to take a similar view to the *Carlin* court, saying that '[while] employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee . . . they are not required to find another job for an employee who is not qualified for the job he or she was doing.'[108]

The wording of the accommodation provisions in the New South Wales and Western Australian Acts would also seem to be tightly bound to the particular job which the handicapped person fills or seeks. Section 49I of the New South Wales Act refers to making accommodations in order to carry out 'the work required to be performed in the course of the employment . . . concerned,' and s. 66O of the Western Australian Act is in similar terms. While the question was not considered in *Jamal*, the Court of Appeal's apparent rejection of hiving off aspects of the current job would seem to preclude any requirement to specially offer alternative 'light duties' employment to the handicapped.

Similarly, s. 71 of the South Australian Act exempts discrimination on the ground of physical impairment where the handicapped person can't perform the work genuinely and reasonably required 'for the employment or position in question'. However, the general reasonable accommodation duty in s. 83 of that Act is more loosely worded to require '. . . special assistance that cannot reasonably be provided in the circumstances in which the [unlawful] discrimination occurs.' While probably broad enough to include reassignment, if the handicapped person cannot do the present job then there would not seem to be any unlawful discrimination within the terms of the Act.

The Victorian Act may be somewhat more flexible. Section 21(4) exempts discrimination on the basis of physical impairment where 'taking into account the [handicapped] person's past training, qualifications and experience to employment of that kind, and, if the person is already employed, the person's performance as an employee', the handicapped person 'is . . . unable adequately to perform the work reasonably required . . .'[109] While 'the work reasonably required' might be read as referring to the position which the handicapped person filled, the broader classification of 'employment of that kind' and the obligation on the

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[106] 39 FEP Cases 1217 (DMd 1985).

[107] 29 CFR S. 161301(f).

[108] *Supra* note 22, at 1131 at n. 19.

[109] S. 21(4).

employer to assess the person's skills and experience suggest a broader approach, so that the reasonable course may be for the employer to require the employee to do some other related but less onerous work.

However, even if the four Australian Acts impose no duty to specially provide 'light duties' for the handicapped, employers who permit able-bodied employees to elect to change jobs for personal reasons may be discriminating if they do not also permit the handicapped to change to a job more suitable to their handicap. In the same *Arline* footnote in which it apparently rejected an obligation to reassign, the U.S. Supreme Court said that '[the employer] cannot deny a [handicapped] employee alternative employment opportunities reasonably available under the employer's existing policy.' Mainly to meet their obligations under workers' compensation laws and industrial awards, many Australian employers reserve a pool of specific jobs for workers who become disabled through work related injuries, which raises the question of whether it would be discriminatory not to give access to these jobs to those who are disabled for other reasons, such as by HIV. The four Australian Acts provide the employer with a defence where discrimination against the handicapped is the result of the employer's compliance with obligations under other legislation. However, these provisions have been narrowly read to require a showing that it is impossible to obey both laws, and not that it was merely burdensome or expensive.[110] For example, in *Najdovska* v. *Australian Iron & Steel Ltd* the New South Wales Tribunal rejected that state laws barring women from lifting more than 16 kilos justified a refusal to hire women as steel workers since the jobs either rarely required heavy lifting or the job tasks could readily be rearranged to ensure these laws weren't breached. While employers in allotting 'light duty' positions may have to prefer 'work-injured' employees, similar opportunities may have to be provided to AIDS disabled employees unless it can be shown that this imposes an undue burden.

3. Risk of Future Illness

While an HIV-infected person might be able to presently perform the job, he or she stands a real chance of developing more serious symptoms which will eventually render him or her unfit for the job. Employers who take on an HIV-infected person therefore face the prospect of future expenses which they would not face if free to hire an uninfected person: for example, higher health insurance costs, the provision of sick leave, the payment of a replacement worker, and eventually the loss of the investment made in training the employee.

The American courts have generally rejected employer defenses

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[110] *Clinch* v. *Commissioner of Police* (1987) EOC 92-203; *Kitt* v. *Tourism Commission* (1987) EOC 92-209, affirmed (1987) 92-209.

based on a handicapped person's greater risk of future ill health. In *Chrysler Outboard Corp* v. *DILHR*,[111] the plaintiff, who suffered from acute lymphocytic leukemia, was refused a job on the basis that he had a high risk of serious infection from minor injuries sustained at work which would result in lost work time to the employer. The court held that as the law was 'written in the present tense,' any future incapacity was immaterial and the only relevant inquiry was whether the applicant could do the job now.

However, a number of American cases have held that future risks sometimes may be a relevant consideration for employers.[112] Some courts have required that the prospect of future illness amounts to a 'reasonable degree of medical certainty'[113] while others have only required a 'possibility'.[114] Most courts, however, have required something in between, a 'probability' or 'reasonable probability'.[115] The decline into ill health must also be a 'probability within the foreseeable future' and not just at some indefinite future time.[116] In *EE Black* v. *Marshall*, the court said that 'a ninety percent chance of suffering a heart attack within one month clearly would be a valid reason for denying [an] individual the job, notwithstanding his status as a qualified handicapped individual.'[117] In *Chicago & Northwestern Railroad* v. *Labor & Industrial Review Commission*, the court thought that a ten to thirty percent chance that a welder might have an epileptic seizure was only a 'mere possibility'.[118]

Employers cannot rely on generalized assessments of risk of future injury but must make an individualized assessment of each person's own particular risk. In *City of New York* v. *Granelle* the New York Court of Appeals said that 'employment may not be denied based on speculation and mere possibilities, especially when such determinations are premised solely on the fact of an applicant's inclusion in a class of persons with a particular disability rather than upon an individualized assessment of the specific individual.'[119]

The American authorities have also been careful to stress that giving too much weight to future risk of injury can undermine the objective of handicap discrimination laws:

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[111] 14 FEP Cases 344 (Wisc. Circ. Ct 1976).

[112] *Bentivegna* v. *US Dept of Labor* 694 F 2d 619 (9th Cir. 1982) *Mantolete* v. *Bolger* 767 F 2d 1416 (9th Cir 1985).

[113] *Chicago, Milwaukee, St. Paul & Pacific Railroad* v. *Wisconsin Dept. of Industry, Labor & Human Relations*, 8 FEP 937.

[114] *Clark* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad* 12 FEP (Wash. Super. Ct 1975).

[115] In *Mantolete*, supra note 111 at 1421.

[116] *EE Black* v. *Marshall* 497 F Supp 1088 at 1105; *Maine Human Rights Commission* v. *Canadian Pacific Ltd* 31 FEP Case 1029 (ME Sup Jud Ct 1983).

[117] 497 F Supp 1088, 1105.

[118] 98 Wis 2d 592; 297 NW 2d 819 (1980).

[119] 510 NE 2d 799 (NY 1987); 70 NY 2d 100; 517 NYS 2d 715; 43 EPD 37 257.

> any qualification based on the risk of future injury must be examined with special care if the *Rehabilitation Act* is not to be circumvented easily, since almost all handicapped persons are at great risk from work related injuries. . . . allowing remote concerns to legitimize discrimination against the handicapped would vitiate the effectiveness of section 504 of the Act.[120]

Notwithstanding the apparent certainty of serious illness and death, the Florida Commission on Human Rights in *Shuttlesworth* v. *Broward County*[121] decided that the risk of an employee with full blown AIDS becoming incapacitated did not rise to the level of a 'substantial risk', while the Ninth Circuit in *Chaulk* did not refer to the issue at all. The Commission, and implicitly the Court of Appeals, seem to take a very strict view of how imminent and probable an infected individual's decline into the final stages of AIDS must be before the employer can dismiss him or her. Along the lines of the *Granelle* case, the fact that each plaintiff's condition had been stable for some time may have indicated that they had not yet reached that point. The Court of Appeals drew support from the *Arline* decision, where the plaintiff had also been seriously ill with tuberculosis in the past. However, while it was possible that she might suffer a further relapse, on present medical evidence an incapacitating relapse, and ultimately death, was almost a certain outcome for the plaintiff in *Chaulk*.

The health risks faced by an ARC sufferer seem broadly similar to those associated with the acute leukemia in *Chrysler Outboard*, including high risk of infection and slower recovery time. The generally accepted rate of between twenty to fifty percent of ARC sufferers developing AIDS is closer to the risk rejected in *Chicago & NW Railroad* than to the *EE Black* example.[122] Even if the risk ultimately proves to be higher, the usual length of time of the progression may still mean that it is not a probability in the forseeable future. The risk of progression from seropositivity to ARC would probably have to be discounted on the same basis, as well as because the ill-effects of ARC in any event may have to be accommodated.

The South Australian and Victorian Acts specifically provide employers with a defence of 'future risk of injury'. Section 21(4) of the Victorian Act provides that;

> discrimination on the ground of physical impairment [is exempted from the Act] if, because of the nature of the impairment and the environment in which the person works or is to work or the nature

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[120] Id. at 622-23.

[121] ECHR No. 85-0624, reported in *AIDS IN THE WORKPLACE*, 2d ed, BNA 281.

[122] These conclusions may have to be revised if some of the gloomier assessments of the number of seropositive individuals who will develop full blown AIDS prove correct.

of the work performed or to be performed, there is or is likely to be—

(ii) a substantial risk that the person will injure himself or herself;

Echoing the *Granelle* decision, the Victorian Board held in *Cooper* v. *Ford Motor Car Co.*[123] that employers had to make individualized assessments of the risks faced by employees.

In *Cooper* the Victorian Board also considered when a risk of self-injury amounted to a 'significant risk'. The complainant, a young fitter and turner, suffered from a similar latent back condition as the complainants in *EE Black* and *Granelle.* As in those cases, the complainaint's job involved frequent lifting of significant weights but also, as in those cases, he had been lifting similar weights without any difficulty for some time and there was nothing to indicate that he was at any more risk than the many others with similar conditions. While the American courts thought that the risk was not substantial, the Victorian Board thought it was, justifying the employer's decision not to employ the plaintiff. While each case is, of course, very fact specific, the different outcomes in relation to similar conditions may suggest that the Victorian Board may be more prepared to find a 'substantial risk'.

On a literal reading, the Victorian and South Australian defences would only cover injuries which are likely to occur in the workplace, and probably only those risks which are actually exacerbated by the work. Contrary to what might be assumed from the fact of their depressed immune system, ARC and AIDS sufferers are not at any particularly greater risk of infection in unhealthful environments, such as sanitation works, laboratories, or hospitals.[124] The sort of AIDS related risks which might be taken into account under these defences could include a weakened individual injuring himself or herself in a physically demanding job.

The New South Wales and Western Australian Acts make no reference to future risk of injury, and like the statute in *Chrysler Outboard* are 'written in the present tense'. However, as with the American courts, courts in both states seem unlikely to discount future risk of injury altogether. A future risk of injury may mean that the person would be unable to carry out the work or services, or facilities to permit the person to do it could not be reasonably provided, as provided in s. 49I of the New South Wales Act, or would be an unjustifiable burden as provided in s. 66O of the Western Australian Act. There will be some jobs where the employer may legitimately expect some assurance of the employee's

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[123] (1987) EOC 92-180.

[124] Most of the opportunistic infections that an HIV infected person may fall prey to are not specific to any work environment but are circulating in the general community. There is also no medical evidence to suggest that physical exertion will worsen a person's condition or hasten the onset of AIDS, see MMWR 691 (Nov. 15 1985).

future health, particularly for skilled jobs. It may be unreasonable to expect the employer to assume both the risk that the employment may only be short term and the prospect of the future expense of replacing that employee. However, in a fairly mobile workforce, employers can not reasonably expect to retain the services of the able-bodied for long periods, and the handicapped should not be held to a higher expectation of the length of their employment.

There is also not the same imperative in Australia to allow employers to take into account future risk. Health insurance is generally provided in the U.S. by employers, and employers and their insurers will have to bear the cost of high risk employees. In Australia most of the costs of HIV infection will be borne by Medicare and the federal social security system. The direct losses which the employer will suffer if a high risk employee eventually falls ill may be outweighed by the right the employee should have to work so long as he or she is reasonably productive.

3. Risks of Infection

A common explanation which is likely to be advanced as justification for discrimination on the basis of HIV infection is the fear of contagion. In *Arline* the U.S. Supreme Court held that 'a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate the risk.' The Court required that an individualized inquiry be made of the risk posed by an infected person:

> Such an inquiry is essential if [the Rehabilitation Act] is to achieve the goal of protecting handicapped individuals from the deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of [employees] as avoiding exposing others to significant health and safety risks. . . . this inquiry should include '[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probability the disease will be transmitted and will cause varying degrees of harm.'[125]

The Supreme Court gave no guidance on what level of risk of transmission was acceptable, though it seems fair to say that the factors interact, so that the more serious the consequences of the disease the lower the acceptable level of risk of transmission. Generally speaking, the American courts have been much more prepared to accept employer arguments

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[125] *Supra* note 22 at 1131.

of the risk of a handicapped person injuring others than the risk of injuring himself or herself. In *Hodgson* v. *Greyhound Lines*[126] the court upheld under the *Age Discrimination in Employment Act* a company rule setting an age limit of 40 years for long distance bus drivers as being in the interests of public safety. The court held that the employer need only establish that it had 'rational basis in fact to believe that elimination of its maximum hiring age will [result] in a *minimal increase* in risk of harm.' That level of acceptable risk was exceeded where elimination of the discriminatory practice '. . . might jeopardize the life of one more person than might otherwise occur under the [discriminatory] hiring practice'.[127]

It has been argued in a number of American cases that the potential consequences of infection are so catastrophic that even a slight risk of infection is not worth taking. In *District 27 Community School* v. *Board of Education*[128] the court rejected the exclusion of HIV infected children from schools on this basis:

> Throughout this case, petitioners focused their point of attack upon the reluctance of the medical experts to unequivocally state with certainty that [HIV] cannot be transmitted except through previously identified routes of transmission. The testimony reflects, however, that it is not in the nature of medical science to be governed by a "no risk" standard. Understandably, the public, not recognizing the underlying medical tradition, is suspicious of the seeming uncertainty. Yet, the fact that some lay people, both learned and unlearned, and some physicians of great skill and repute, may differ as to the efficacy and necessity for excluding from the regular classroom setting the HIV infected child who otherwise demonstrates a normal physical, neurological, developmental and behavioral condition, is not reason enough to declare the [school] Commissioner's policy to be without consideration or in disregard of the facts. As stated in *Matter of Viemeister* v. *White*, 79 N.Y. 235, 241, 72 N.E. 97: 'The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong and that science may yet show it to be wrong is not conclusive.'

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[126] 499 F 2d 859 (7th Cir. 1974), *cert denied sub nom Brennan* v. *Greyhound Lines, Inc.*, 419 US 1122 (1975).

[127] Id. at 863. *Beck* v. *Borough of Manheim*, 505 F Supp 923 (ED Pa 1981) ('where the risk of harm runs high and alternative measures lack certainty and adequacy [the ADEA] countenances a greater degree of arbitariness in setting the mandatory age requirement'); *Arritt* v. *Grisell*, 421 F Supp. 800 at 803 (ND W. Va. 1976) ('a minimal increase in risk of harm to others is all that need be shown to justify the maximum hiring age requirement here at issue'), *aff'd in part, rev'd in part, and remanded*, 567 F 2d 1267 (4th Cir. 1977). See also *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F 2d 224 (5th Cir. 1976); *Spurlock* v. *United Airlines, Inc.*, 475 F 2d 216 (10th Cir. 1972) *New York City Transit Authority* v. *Beazer*, 440 US 568, at 587 n. 31 (1987); *Dothard* v. *Rawlinson* 433 US 321 (1977).

[128] 502 NYS 2d 325.

This is a particularly powerful decision since it is difficult to imagine a situation more likely to gain a court's sympathy than the prospect of young children being infected with a deadly disease.

There may be a number of workplaces where the employment of an HIV infected person does present special problems. Health care workers, including ambulance staff, nurses, and doctors are typically exposed to patient's bodily fluids, wounds and internal body cavity, and often cut themselves with sharp instruments during these procedures, raising the theoretical possibility of transmission from patient to worker or vice versa. The CDC has characterized the risk of infection as 'extremely low' and maintains that it can be more than adequately guarded against by taking simple precautions, such as double-gloving.[129] However, the Department of Justice in its second opinion thought that on the *Arline* test the risk of infection from HIV infected staff performing invasive medical procedures was sufficient to warrant their exclusion or reassignment. The Department also thought that HIV infected individuals could be excluded from certain non-medical positions:

> given the evolving and uncertain state of knowledge concerning the effects of the AIDS virus on the central nervous system, it may not be possible, at least if the disease has sufficiently progressed, to make reasonable accommodations for positions, such as bus driver, airline pilot, or air traffic controller, that may allow very little flexibility in possible job assignment and where the risk of injury is great if the employer guesses wrongly and the infected person is not able to perform the duties of the job.[130]

However, when this opinion was written there were suggestions that up to seventy percent of HIV infected individuals would suffer serious mental deterioration, commonly long before they developed any other symptoms of the syndrome. On this basis, there had been calls for compulsory HIV testing in safety sensitive jobs. However, more recent scientific evidence indicates that 'dementia is distinctly unusual in asymptomatic HIV infected people', although the studies confirmed that from ten to twenty per cent of ARC sufferers have psychological or neurological symptoms.[131] If this evidence proves more accurate, there would seem little justification for excluding seropositive individuals from safety sensitive jobs, or for compulsory testing since the emergence of

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[129] *Preventing Transmission of Infection With HTLV III/LAV During Invasive Procedures*, MMWR 221 (1986); *Acquired Immune Deficiency Syndrome (AIDS); Precautions for Health Care Workers and Allied Professionals*, 32 MMWR 450 (1985).

[130] *Supra* note 49, at 28.

[131] McArthur, Fifth International Conference on AIDS, Montreal, June 1989, New York Times, June 3, 1989, at A10. This study found no statistically significant difference in cognitive skills between 247 seropositive men and 170 uninfected men. Another study found mental and cognitive problems amongst 42 per cent of ARC sufferers compared to 19 per cent of uninfected men.

other tell-tale signs of progression to ARC and full blown AIDS will indicate the heightened risk of dementia.

Congress recently amended the reasonable accommodation provisions of the *Rehabilitation Act* to provide:

> For the purposes of sections 503 and 504, as such sections relate to employment, [the term 'individual with handicaps'] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health and safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.[132]

However, the legislative history makes clear that the objective of the amendment was not to derogate from the case law but 'to expressly state in the statute the current standards . . . so as to reassure employers . . .'[133]

The New South Wales and Western Australian Acts again make no specific reference to the risk a handicapped person poses to others, but it may be that the employer can take account of this risk under the reasonable accommodation provisions. The Victorian and South Australian Acts both exempt discrimination on the grounds of physical impairment where there is a 'risk of injury' to others. Reflecting the U.S. case law, the absence of the word 'substantial' from these provisions suggests that the acceptable level of risk which the handicapped person poses to others is materially lower than in relation to the risk of injury to himself or herself. Even so, it seems unlikely that the risk posed by HIV infected employees in most workplaces would warrant their exclusion.

The recent amendments to the Victorian Act also included a provision which exempts an employer from liability for discrimination on the ground of physical impairment 'where the discrimination is reasonably necessary to protect public health'.[134] However, this provision would not seem to add much, and was most probably a political trade-off for the amendments which included HIV infection in the definition of handicap.

4. Fear and Loathing of Other Employees and Clients

Employers may argue that while they are aware of the minimal risk of contagion, co-workers and customers continue to hold irrational and inflated fears and would not accept a HIV infected employee, causing loss of productivity and business.

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[132] Pub. L. No. 100-259, sec 9, 102 Stat. 28, 31-32 (1988).

[133] Senator Harkin, co-sponsor, 134 Cong. Rec. H1065 (daily ed. Mar. 22, 1988).

[134] Health (General Amendment) Act 1988, s. 39(b).

The U.S. courts have rejected out of hand defences by employers based on customer preferences, on the basis that ' . . . it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the . . . discrimination was valid [since] it was these very prejudices the Act was meant to overcome.'[135] The U.S. Supreme Court's decision in *Arline* is a particularly powerful reaffirmation of this view in the context of infectious diseases. The proper response is for employers to provide accurate information and to educate their workforces.

However, the American courts have allowed some exceptions where a hostile reaction of third parties, though based on prejudice, poses some significant threat to their health. In *EEOC* v. *Mercy Health Center*,[136] a specialist hospital for difficult and traumatic births had considered allowing male nurses to assist in the delivery room. Patients and doctors voiced concern that the discomfort women would feel over the presence of male nurses could make the birthing process more dangerous. The court held that the hospital was justified in a 'females only' policy, saying that 'there is a factual basis for determining that the employment of male nurses in the labor and delivery area would cause medically undesired tension.'

With the present level of public hysteria over AIDS, a similar argument could be made by a hospital as justifying it excluding infected staff from jobs where they would be in contact with patients. However, unlike with male nurses, the patient will not usually know that a medical staffer is infected unless told. This raises difficult questions, which are beyond the scope of this article, about whether a hospital is obliged to inform the patients of risk of infection, even if those risks might be judged to be minimal by the experts.

CONCLUSION

The age-old response of societies to pandemics has been to turn on the infected. This response has been reflected in laws of quarantine and institutional confinement and by the reluctance of courts and other state institutions to protect victims against the fear, loathing and ignorance of the uninfected. As the U.S. Supreme Court has said of this sorry history, 'the isolation of the chronically ill and those perceived to be ill or contagious appears across cultures and centuries as does the development of complex

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[135] In *Diaz* v. *Pan American World Airlines, Inc.* 442 F 2d 385 at 389 (5th Cir) *cert denied* 404 US 950 (1971).

[136] 29 FEP Cases 159 (W.D. Okla. 1982) (upholding female BFOQ for staff nurse in labor and delivery); *Backus* v. *Baptist Medical Center*, 510 F Supp. 1191 (E.D. Ark 1981) (upholding female BFOQ for labor and delivery room nurse), *vacated as moot*, 671 F 2d 1100 (8th Cir. 1982); *Fesel* v. *Masonic Home of Del., Inc.*, 447 F Supp. 1346 (D. Del. 1978) (upholding female BFOQ for nurse in nursing home), *aff'd mem.*, 591 F 2d 1334 (3rd Cir. 1979); *Kaiser Found Hosp. & Medical Centers*, 67-2 Lab. Arb. Awards (CCH) 118471 (1967) (upholding female BFOQ for nurses who perform 'sensitive personal care' for female patients).

and often pernicious mythologies about the nature, cause and transmission.'[137] The purpose of handicap discrimination laws was to reverse deep-seated social instincts of exclusion, and to bring the disabled within the social and economic mainstream. The hysteria which AIDS has generated and the fact it has particularly affected those who already suffer prejudice by reason of their sexual orientation or drug addiction, presents the greatest challenge so far to this inclusionary philosophy. However, the cribbed view which generally has been taken of the Australian handicap discrimination laws in comparison to some courts applying comparable American legislation does not augur well for those who seek their protection against AIDS related discrimination.

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[137] *Supra* note 22, at 1129.