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# LIABILITY IN TORT FOR THE SEXUAL TRANSMISSION OF DISEASE: GENITAL HERPES AND THE LAW

## INTRODUCTION

Several million Americans suffer from genital herpes, an incurable and highly contagious sexually transmitted disease.<sup>1</sup> In the past two years, a number of victims of genital herpes have filed suit to recover damages from sexual partners who infected them with the disease.<sup>2</sup> A few of these plaintiffs have been successful. In 1983, a Washington State judge awarded \$40,000 to a woman who contracted genital herpes from her husband.<sup>3</sup> In January 1984, an Iowa judge awarded \$50,000 to a woman who sued her ex-husband for infecting her with genital herpes.<sup>4</sup> The Second District Court of Appeal in California also recently upheld the right to sue in tort for the sexual transmission of genital herpes.<sup>5</sup>

The increased incidence of genital herpes poses an immediate health threat to the American public. The disease is recurrent and is

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<sup>1</sup> It is estimated that as many as 20 million Americans are infected with genital herpes. See *infra* notes 23-24 and accompanying text.

<sup>2</sup> See, e.g., *Olson v. Olson*, No. 567066-6 (Cal. Super. Ct., Alameda County, filed Dec. 21, 1982), reported in Williamson, *Wife Sues Husband For Giving Her Herpes*, San Francisco Chron., Mar. 25, 1983, at 2, col. 5. In *Olson*, the plaintiff is suing her husband for punitive and compensatory damages alleging battery, fraud, and negligence for infecting her with genital herpes. See also *Liptrot v. Basini*, No. 82-19427 (Fla. Cir. Ct., Broward County, filed Sept. 20, 1982), reported in Mellowitz & Rojas, *Herpes: A Cause for Legal Action?*, Nat'l L.J., Nov. 8, 1982, at 3, col. 1. Plaintiff Liptrot sued her former lover for fraudulently concealing that he had genital herpes, and subsequently infecting her with the disease. There was a voluntary dismissal of the suit on June 6, 1984. See also *St. Clair v. St. Clair*, No. DR82-3962 (Mo. Cir. Ct., Jackson County, filed 1982), reported in Ostroff, *New Case of Herpes: Banker Sued by Wife*, Nat'l L.J., Jan. 10, 1983, at 2, col. 4. Plaintiff has sued her husband for six million dollars in damages for infecting her with genital herpes. See also *Wife Says Mate Has Herpes and Sues Him for \$100,000*, N.Y. Times, Apr. 11, 1983, at B8, col. 3. In this suit, *Alex v. Alex*, filed in Wayne County, Michigan, plaintiff sought damages for "social stigma, humiliation, medical expenses and 'physical changes to herself and any children she may have desired to bear.'" *Id.* The suit was settled out of court. Bunting, *Herpes and the Law*, Detroit Free Press, June 27, 1984 (NEWSBANK, HEA 77:G5 (1984)). See also Margolick, *Herpes and Similar Matters Get More Attention in Court*, N.Y. Times, Feb. 26, 1984, at 24, col. 1 (genital herpes suits filed in California, Florida, Louisiana, Minnesota, Missouri, and Washington).

<sup>3</sup> *Alquist-McCarley v. McCarley*, Judgment upon Jury Verdict, No. 83-2-00413-4 (Wash. Super. Ct., Snohomish County, Sept. 16, 1983). See also Margolick, *supra* note 2.

<sup>4</sup> *McGaw v. Mormann*, No. CL 2021-0683 219-46-51C (Iowa Dist. Ct., Wapello County, Jan. 3, 1984), reported in *Ex-wife wins \$50,000 for case of herpes*, Syracuse Herald-American, Jan. 8, 1984, at A14, col. 1. The court found the defendant in default for failure to plead and determined that the woman was entitled to damages from her former spouse for his "willful or intentional act" of infecting her with genital herpes. *McGaw*, at 2.

<sup>5</sup> *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

presently incurable.<sup>6</sup> Genital herpes infections acquired by newborns during passage through the birth canal are often fatal or lead to serious physical and mental impairments.<sup>7</sup> In addition, there is an association between genital herpes infection and cervical cancer.<sup>8</sup> Finally, victims of the disease often suffer emotional and psychological distress.<sup>9</sup>

This Note contends that courts should impose liability for the transmission of genital herpes to advance the public policy objectives of arresting the spread of this disease, protecting the health and well-being of the American population, and guarding against serious or fatal infections of the newborn. First, the Note describes the health dangers posed by the genital herpes epidemic.<sup>10</sup> This Note then analyzes the application of standard tort doctrines—negligence, battery, and misrepresentation—to the sexual transmission of this disease.<sup>11</sup> The Note contends that a legally enforceable duty arises in sexual relationships to protect against the transmission of genital herpes. Furthermore, the infected partner should have an affirmative obligation to disclose his disease before engaging in sexual activity.<sup>12</sup> An infected partner's failure to comply with this obligation is a breach of that duty and a basis for liability in negligence.

Although battery or misrepresentation may serve as alternative grounds for liability, this Note argues that the broader scope of negligence liability better serves the public policy objective of controlling the spread of genital herpes infection.<sup>13</sup> The Note also explains that, in most jurisdictions, the traditional defenses of interspousal tort immunity and of the illegality of premarital or extramarital sexual conduct no longer preclude liability for the sexual transmission of genital herpes.<sup>14</sup> Finally, the Note maintains that an individual's right to privacy in sexual matters is subordinate to the public interest in controlling the spread of this disease and should not preclude a cause of action for genital herpes transmission.<sup>15</sup>

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<sup>6</sup> See *infra* notes 34-39 & 43-46 and accompanying text.

<sup>7</sup> See *infra* notes 52-57 and accompanying text.

<sup>8</sup> See *infra* note 47 and accompanying text.

<sup>9</sup> See *infra* notes 49-51 and accompanying text.

<sup>10</sup> See *infra* notes 26-57 and accompanying text.

<sup>11</sup> See *infra* notes 58-189 and accompanying text.

<sup>12</sup> See *infra* notes 79-127 and accompanying text. This Note generally employs male pronouns for the transmitter, although the disease may be transmitted by either the male or female sexual partner. Furthermore, this Note only addresses liability between sexual partners. Except for selected comments, it does not evaluate the liability of the transmitter of the disease to third parties. For an example of such a third-party suit, see *Jaffee v. Dills*, No. 84CI-02139 (Ky. Cir. Ct., Jefferson County, filed Mar. 19, 1984), reported in Wolfson, *Herpes Suits Enter the Third-Party Realm*, Nat'l L. J., May 7, 1984, at 3, col. 1 (professor suing lawyer for allegedly infecting professor's wife who then infected professor).

<sup>13</sup> See *infra* notes 139-89 and accompanying text.

<sup>14</sup> See *infra* notes 191-217 and accompanying text.

<sup>15</sup> See *infra* notes 218-39 and accompanying text.

## I

## DIMENSIONS OF THE PROBLEM

This section discusses the current genital herpes epidemic, describes the symptoms of the disease, and summarizes the serious health and emotional problems that result. The health risks associated with this disease underscore the need to limit its spread.

Until the mid-1950s, the medical profession achieved considerable success in combatting venereal disease in the United States.<sup>16</sup> This success was attributable to the use of antibiotics and an emphasis on early detection. In the late 1950s, there occurred a resurgence of venereal disease.<sup>17</sup> More frequent premarital and extramarital sexual activity and the popularity of new contraceptive techniques that offer less protection against disease contributed to the increase in venereal disease infection.<sup>18</sup> Medical authorities now consider sexually transmitted diseases to be a major health problem, causing victims "enormous suffering" and costing the nation "billions of dollars annually."<sup>19</sup>

In the last few years the spread of genital herpes, a sexually transmitted disease previously unfamiliar to most of the general population, has become a prominent health concern.<sup>20</sup> Genital herpes now affects

<sup>16</sup> L. LASAGNA, THE VD EPIDEMIC 1-2 (1975).

<sup>17</sup> Recent statistics demonstrate the upward trends of venereal disease infection:

	Primary and Secondary Cases of Syphilis	Rates per 100,000 Population
	1956	6,395
1960	16,145	9.1
1980	27,204	12.0
1981	31,266	13.7

  

	Cases of Gonorrhea	Rates per 100,000 Population
	1956	224,683
1960	258,933	145.3
1980	1,004,029	443.3
1981	990,864	435.2

CENTERS FOR DISEASE CONTROL, PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH & HUMAN SERVS., SEXUALLY TRANSMITTED DISEASE (STD) STATISTICAL LETTER: CALENDAR YEAR 1981, Table 3, Table 4 (1982).

The actual incidence of gonorrhea may be considerably higher if estimates of unreported cases are included in the totals. Sparling, *Neisseria gonorrhoeae*, in 2 PRINCIPLES AND PRACTICE OF INFECTIOUS DISEASES 1655, 1655 (G. Mandell, R.G. Douglas & J. Bennett eds. 1979) (one million reported cases of gonorrhea in 1977, but annual incidence "probably closer" to three million cases); see also *Sexually Transmitted Diseases Affect 1 in 20 Americans*, 95 PUB. HEALTH REP. 496, 496 (1980) (gonorrhea affects estimated two million Americans annually).

<sup>18</sup> L. LASAGNA, *supra* note 16, at 5-9; see also Wicsner & Parra, *Sexually Transmitted Diseases: Meeting the 1990 Objectives—a Challenge for the 1980s*, 97 PUB. HEALTH REP. 409, 409 (1982).

<sup>19</sup> Wicsner & Parra, *supra* note 18, at 409. The Surgeon General considers sexually transmitted diseases one of the United States' major health priority areas. *Id.*

<sup>20</sup> Although current publicity would suggest that genital herpes originated recently, it was described in the medical literature in the early 1700s and was a known affliction in the

more Americans than syphilis and may soon surpass gonorrhea as the most prevalent sexually transmitted disease.<sup>21</sup> Accurate information concerning the incidence and prevalence of genital herpes is unavailable because, unlike gonorrhea and syphilis, physicians and medical clinics are not normally required to report genital herpes cases to state health authorities.<sup>22</sup> It is estimated that from ten to twenty million Americans now suffer from the disease,<sup>23</sup> with 300,000 to 500,000 new cases each year.<sup>24</sup> Even though the total number of cases is unknown, the upward trend since the 1960s confirms the medical view of an "ongoing epidemic."<sup>25</sup>

#### A. Description of the Disease<sup>26</sup>

Genital herpes is a contagious viral infection transmitted by intimate physical contact.<sup>27</sup> The mucous membranes and soft skin of the

18th and 19th centuries. Corey, *The Natural History of Genital HSV*, HELPER, Mar. 1982, at 1. [THE HELPER is published quarterly by The Herpes Resource Center, a program service of the American Social Health Association.]. The physician to the king of France is credited with the first description of genital herpes in 1736. Hirsch, *Herpes Simplex Virus*, in 2 PRINCIPLES AND PRACTICE OF INFECTIOUS DISEASES 1283, 1283 (G. Mandell, R.G. Douglas & J. Bennett eds. 1979). Its recent epidemic spread is unprecedented, however. See Subak-Sharpe, "The Venereal Disease of the New Morality," TODAY'S HEALTH, Mar. 1975, at 42, 42 (10 years ago a "rare" condition, genital herpes now "exploding through the population").

<sup>21</sup> See *supra* note 17; see *infra* notes 23-25 and accompanying text.

<sup>22</sup> *Current Trends: Nonreported Sexually Transmissible Diseases—United States*, 28 MORBIDITY & MORTALITY WEEKLY REP. 61 (1979). The five sexually transmissible diseases that are usually reported include: gonorrhea, syphilis, chancroid, lymphogranuloma venereum, and granuloma inguinale. *Id.*

<sup>23</sup> W. WICKETT, HERPES: CAUSE & CONTROL 55 (1982) (quoting 1981 letter from the Director, Venereal Disease Control Division, Centers for Disease Control, estimating that 10-15 million Americans are infected); *Herpes: The VD of the '80s*, NEWSWEEK, Apr. 12, 1982, at 75, 75 (citing Federal Centers for Disease Control estimate that 20 million Americans have disease); *Questions From Our Readers*, HELPER, Summer 1983, at 8, 9 (referring to National Institutes of Health study group estimate of 20 million cases).

<sup>24</sup> *Sexually Transmitted Disease Control*, PUB. HEALTH REP., at 49, 49 (Supp. to Sept.-Oct. 1983 issue) (500,000 new cases annually); *Questions From Our Readers*, *supra* note 23, at 9 (National Institutes of Health study group estimate of 300,000-500,000 new infections each year).

<sup>25</sup> *Genital Herpes Infection—United States, 1966-1979*, 31 MORBIDITY & MORTALITY WEEKLY REP. 137, 138 (1982). Physician-patient consultations with fee-for-service, office-based physicians for genital herpes infections rose from 29,560 in 1966 to 260,890 in 1979. *Id.* at 137; see also Wiesner & Parra, *supra* note 18, at 413 (commenting on dramatic rise in number of patient encounters with private physicians for genital herpes infections between 1966 and 1981). In contrast, a study in the early 1970s suggested an incidence of less than one percent of genital herpes in the general population. Alexander, *Herpes Simplex Virus: A Cause for Concern*, 48 AM. J. MED. TECH. 241, 242 (1982).

<sup>26</sup> See generally R. HAMILTON, THE HERPES BOOK (1980); R. RICHARDS, VENEREAL DISEASES AND THEIR AVOIDANCE 83-84 (1974); W. WICKETT, *supra* note 23, at 24-36; Nahmias & Hutton, *Herpes Simplex*, in COMMUNICABLE AND INFECTIOUS DISEASES 301, 306 (F. Top & P. Wehrle 7th ed. 1972).

<sup>27</sup> Genital herpes infection is caused by a virus, herpes simplex. There are two closely related herpes simplex viruses, type 1 and type 2, and many strains of these two types. In general, type 1 is associated with cold sores on the lips, tongue or mouth and type 2 is associated with genital infections. See also Nahmias, *HSV DIAGNOSIS: Clinical and Laboratory*,

genital area are "sufficiently permeable"<sup>28</sup> to permit the virus to enter the body. After initial exposure, a victim generally develops symptoms within two to ten days.<sup>29</sup> Initial symptoms of an infection may be itching or burning sensations in the genital area. A series of painful fluid-filled blisters then develop at the site of infection.<sup>30</sup> Lymph nodes in the groin swell and become tender; flu-like symptoms such as muscle aches, fever, and headache may be evident. The blisters rupture to form shallow, painful sores that eventually scab and heal.<sup>31</sup> The initial outbreak usually lasts fourteen to twenty-eight days.<sup>32</sup> The intensity of suffering varies; indeed, some victims experience no overt symptoms when initially infected and thus remain unaware that they have contracted genital herpes.<sup>33</sup>

Even though the sores associated with the initial infection heal, the virus retreats to the nerve tissues of the body and lies dormant.<sup>34</sup> At

HELPER, June 1982, at 5-6. An estimated 15% of genital herpes cases are type 1, and 85% are type 2. PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH & HUMAN SERVS., NIH PUB. NO. 82-2005, GENITAL HERPES—QUESTIONS AND ANSWERS 1 (Oct. 1981) [hereinafter cited as GENITAL HERPES—Q AND A]. Both virus types cause similar symptoms in the initial outbreak.

Medical authorities have studied the possibility of nonsexual transmission of genital herpes. See, e.g., Nerurkar, West, May, Madden & Sever, *Survival of Herpes Simplex Virus in Water Specimens Collected From Hot Tubs in Spa Facilities and on Plastic Surfaces*, 250 J. A.M.A. 3081 (1983). Most observers discount transmission from inanimate objects. See *Fomites and Herpes Simplex Viruses: A Case for Nonvenereal Transmission?*, 250 J. A.M.A. 3093, 3093 (nonvenereal modes of transmission "uncommon"); *Managing Recurrent Herpes*, HELPER, Spring 1983, at 10, 10 (quoting medical officer in Venereal Disease Control Division of the Centers for Disease Control: "It is our impression . . . that if nonsexual herpes transmission occurs at all, it is rare.").

A victim may infect other parts of his own body by autoinoculation, that is by touching a herpes sore and then touching other areas of his body. Corey, *supra* note 20, at 2.

<sup>28</sup> R. HAMILTON, *supra* note 26, at 4-5.

<sup>29</sup> GENITAL HERPES—Q AND A, *supra* note 27, at 2; see also Corey, *supra* note 20, at 2 (incubation period usually two to fifteen days but occasionally longer).

<sup>30</sup> In men, lesions usually develop on the penis, but infection may also occur within the urethra. In women, the lesions may develop in the vagina, cervix, or vulva. In either sex, blistering may occur over the genital areas, thighs, and buttocks.

<sup>31</sup> Scarring is not usual, but may occur. W. WICKETT, *supra* note 23, at 31.

<sup>32</sup> PUBLIC HEALTH SERV., U.S. DEP'T OF HEALTH & HUMAN SERVS., HERPES GENITAL INFECTION 1 (1980) [hereinafter cited as HERPES GENITAL INFECTION].

<sup>33</sup> Nahmias, *supra* note 27, at 5. If the initial outbreak affects only the cervix, "which is relatively insensitive to pain," a woman may be unaware of infection. Kagan, *Herpes: It Can Be Treated—But Not Cured*, Ms., Jan. 1978, at 38, 38 (quoting director of Univ. of Washington Venereal Diseases Research Center); see also HERPES GENITAL INFECTION, *supra* note 32, at 1 ("infection of the cervix or vagina does not always cause symptoms").

There are several detection methods for the herpes virus, but the accuracy of these methods varies. See Moseley, Corey, Benjamin, Winter & Remington, *Comparison of Viral Isolation, Direct Immunofluorescence, and Indirect Immunoperoxidase Techniques for Detection of Genital Herpes Simplex Virus Infection*, 13 J. CLINICAL MICROBIOLOGY 913, 916-17 (1981); see also Solomon, Rasmussen, Varani & Pierson, *The Tzanck Smear in the Diagnosis of Cutaneous Herpes Simplex*, 251 J. A.M.A. 633, 634-35 (1984) (suggesting positive Tzanck preparation as accurate and economical device for early diagnosis).

<sup>34</sup> R. HAMILTON, *supra* note 26, at 5-6.

unpredictable intervals, the virus reactivates and the eruption of sores reoccurs.<sup>35</sup> Recurrences vary in duration, severity, and frequency.<sup>36</sup> Some individuals may be unable to recognize recurrences if the sores are internal<sup>37</sup> and the accompanying symptoms are nonexistent or mild. Prior to the re-emergence of sores, a victim may notice symptoms of burning, tingling or itching in the affected areas.<sup>38</sup> The sores associated with these subsequent outbreaks customarily last from seven to fourteen days.<sup>39</sup>

Victims of genital herpes are contagious during the initial attack and during subsequent recurrences. This infectious state lasts from the onset of the preliminary symptoms until the sores completely heal.<sup>40</sup> Virtually all medical authorities recommend that those infected should abstain from sex during outbreaks to avoid transmitting the disease.<sup>41</sup> Because recurrences may not always be recognized, victims are sometimes unaware of their contagious state.<sup>42</sup> For these sufferers, it is difficult to ascertain when they should refrain from sexual activity.

## B. Long Range Health Impact

There is no effective cure or treatment for genital herpes currently available.<sup>43</sup> Although certain new vaccines and treatments show some

<sup>35</sup> The cause of these recurrences is unknown, but it may include fever, emotional tension, premenstrual distress, or sexual intercourse. R. RICHARDS, *supra* note 26, at 83-84.

<sup>36</sup> Corcy, *supra* note 20, at 3. See generally Bierman, *A Retrospective Study of 375 Patients with Genital Herpes Simplex Infections Seen Between 1973 and 1980*, HELPER, Fall 1983, at 1, 3-4. Recurrences can develop at intervals ranging from days to years. Hirsch, *supra* note 20, at 1285. Four or five outbreaks a year is average. Rovner, *Health Talk: Herpes*, Wash. Post, Mar. 12, 1982, at C5, col. 1; see also R. HAMILTON, *supra* note 26, at 6 (some victims of genital herpes are spared recurrences); Corey, *supra* note 20, at 3 ("mean to median" number of total recurrences between four and seven).

<sup>37</sup> The sores may be located within the vagina or urethra.

<sup>38</sup> These "prodromal" symptoms may last from a few hours to several days. R. HAMILTON, *supra* note 26, at 47; Hirsch, *supra* note 20, at 1287.

<sup>39</sup> HERPES GENITAL INFECTION, *supra* note 32, at 2.

<sup>40</sup> GENITAL HERPES—Q AND A, *supra* note 27, at 3; Corey, *supra* note 20, at 2; *Questions from Our Readers*, HELPER, Dec. 1982, at 10 (quoting head of virology department at Univ. of Washington). During latent periods, "when the virus is lying dormant in nerve tissue, transmission cannot occur." R. HAMILTON, *supra* note 26, at 88-89.

<sup>41</sup> HERPES GENITAL INFECTION, *supra* note 32, at 2; *Herpes: The VD of the '80s*, *supra* note 23, at 76; *Questions From Our Readers*, *supra* note 40, at 10; see also R. HAMILTON, *supra* note 26, at 93 (advocating abstention from sexual activity until sores completely disappear). Although the use of male prophylactic devices may inhibit the transmission of disease during outbreaks of infection, their use does not eliminate the risk of transmission. See R. RICHARDS, *supra* note 26, at 84-85; *The New Scarlet Letter*, TIME, Aug. 2, 1982, at 62, 66; see also GENITAL HERPES—Q AND A, *supra* note 27, at 3 ("no information" whether prophylactics prevent spread of genital herpes); *Questions From Our Readers*, HELPER, Mar. 1982, at 8, 8-9 (discussing experiments on effectiveness of condoms as barriers to herpes virus).

<sup>42</sup> R. HAMILTON, *supra* note 26, at 89.

<sup>43</sup> An ointment, acyclovir, speeds the healing of herpes sores in an initial attack, but does not eradicate the virus. See Boffey, *Broad Gains Are Reported In Research on Herpes*, N.Y.

promise, further testing and research appear necessary.<sup>44</sup> Moreover, if a successful vaccine is developed, it may not combat the differing strains of the virus<sup>45</sup> or cure victims already afflicted with the disease.<sup>46</sup>

There may also be long-term physical consequences of genital herpes. Studies indicate that genital herpes infections may predispose women to cervical cancer.<sup>47</sup> Other complications of genital herpes in men and women include neuralgia and meningitis.<sup>48</sup>

The psychological trauma associated with genital herpes is often as debilitating as the physical consequences of the disease. Extreme depression, marital conflicts, and the disruption of social and sexual relationships are common.<sup>49</sup> According to one study, herpes victims "often pass from shock and denial through loneliness, anger, fear, self-imposed isolation and, finally, a deepening depression and a sense of entrapment similar to the hopelessness often felt by patients with chronic diseases like multiple sclerosis."<sup>50</sup> The social stigma associated with genital

Times, July 10, 1984, at C1, col. 4 ("[c]ure [r]emains [e]lusive"). In contrast, syphilis and gonorrhea can usually be cured with antibiotics and penicillin.

<sup>44</sup> Spear, *Problems with Developing an HSV Vaccine*, HELPER, June 1982, at 9, 9 (discussing reasons why development of herpes virus vaccine presents difficulties); Schmeck, *A Herpes Vaccine Effective in Mice*, N.Y. Times, Oct. 19, 1983, at A1, col. 1 (noting scientific hope that research will lead to successful vaccine against genital herpes); *Vaccine to Prevent Herpes Reported in Britain*, Wash. Post, June 14, 1983, at A13, col. 1 (testing and regulation of new vaccine would take "several years").

<sup>45</sup> *Vaccine to Prevent Herpes Reported in Britain*, *supra* note 44, at A13, col. 1.

Because numerous genetically different strains of herpes simplex virus exist, an individual can become infected with more than one strain. Raab & Lorincz, *Herpes Dating Services*, in *Letters*, 250 J. A.M.A. 728 (1983). Thus, sex between two sufferers of genital herpes is not risk free; victims can acquire new infections from each other, "with a possible increased recurrence rate." *Id.*; see also Corey, *supra* note 20, at 3 (discussing concept of reinfection).

<sup>46</sup> *Vaccine to Prevent Herpes Reported in Britain*, *supra* note 44, at A13, col. 1.

<sup>47</sup> These studies are not conclusive, however. D. BARLOW, SEXUALLY TRANSMITTED DISEASES: THE FACTS 68 (1979) ("no certain association"); Callahan, *The Herpes Epidemic*, NEW TIMES, June 12, 1978, at 51-52 (citing studies of doctors from Emory University School of Medicine and The Johns Hopkins University, but noting that "connection between herpes and cancer is still tenuous"); Leff, *Virus Time Bombs*, MED. WORLD NEWS, May 12, 1980, at 68 (speculated link); Nahmias & Roizman, *Infection with Herpes—Simplex Viruses 1 and 2 (Part 2)*, 289 NEW ENG. J. MED. 719, 722 (1973) (causal role of virus in cervical cancer "remains to be proved"). But see *Herpes: The VD of the '80s*, *supra* note 23, at 75 ("incidence of cervical cancer is four times higher among women with herpes than . . . those free of the disease"); Rapp, *Herpesviruses, Venereal Disease, and Cancer*, 66 AM. SCIENTIST at 670, 673 (1978) ("women with cervical cancer almost invariably have been exposed to herpes simplex virus prior to tumor development").

<sup>48</sup> Nahmias & Hutton, *supra* note 26, at 306.

<sup>49</sup> *Herpes: The VD of the '80s*, *supra* note 23, at 76 (survey indicating that "[a] quarter of herpes victims felt destructive rage"; 18% felt the disease contributed to dissolution of marriage or longterm relationship); McClintock, *Love's Labor's Cost*, ESQUIRE, Nov. 1982, at 145, 152 (quoting results of survey of herpes victims: 84% often depressed about disease; 40% suffered such loss of self-esteem that it affected their work; 35% experienced impotence or diminished sex drive); *The Misery of Herpes II*, NEWSWEEK, Nov. 10, 1980, at 105 ("frustration of herpes victims pervades their whole lives"); Rovner, *supra* note 36, at C5, col. 1 (noting shock, resentment and loss of self-esteem among victims of genital herpes).

<sup>50</sup> Laskin, *The Herpes Syndrome*, N.Y. Times, Feb. 21, 1982, § 6 (Magazine), at 94 (quot-

herpes prompted one popular news magazine to label the disease the "new scarlet letter."<sup>51</sup>

The greatest risks of genital herpes, however, are associated with childbirth. Women suffering from genital herpes have a greater likelihood of spontaneous miscarriage or premature delivery.<sup>52</sup> A child delivered through a birth canal during an outbreak of genital herpes is estimated to have a fifty percent chance of being infected.<sup>53</sup> Complications may include severe infection of the newborn's liver, kidneys, lungs, brain, and other vital organs.<sup>54</sup> The mortality rate among babies infected with herpes is estimated to be as high as fifty percent;<sup>55</sup> of the survivors, many will suffer serious mental or physical impairment.<sup>56</sup> Where an outbreak occurs or the possibility of an undetected outbreak exists, the recommended procedure to protect the child is delivery by cesarean section.<sup>57</sup>

Genital herpes is a chronic and lifelong disease. It is spreading rapidly in the United States. Because the disease poses a grave health hazard to the population, the public good requires steps to curtail its transmission. The prospect of potential legal liability for the transmission of genital herpes should encourage sexual partners to act more responsibly and, thereby, limit the spread of the disease.

ing Gillespie-Luby medical study); see also *The New Scarlet Letter*, *supra* note 41, at 64 (quoting psychiatrist's findings of a "leper" effect as some patients relate "convictions of their own ugliness, contamination or even dangerousness").

<sup>51</sup> *The New Scarlet Letter*, *supra* note 41, at 62.

<sup>52</sup> HERPES GENITAL INFECTION, *supra* note 32, at 3.

<sup>53</sup> Cohn, *4½-Minute Test for Herpes Developed by NIH Scientists*, Wash. Post, July 15, 1983, at A4, col. 2; see also W. WICKETT, *supra* note 23, at 181 (40% to 60% chance of infant infection).

<sup>54</sup> R. HAMILTON, *supra* note 26, at 99.

<sup>55</sup> W. WICKETT, *supra* note 23, at 36-37, 181 (half will suffer serious brain damage or die); Wiesner & Parra, *supra* note 18, at 410 (half may die in neo-natal period); Cohn, *supra* note 53, at A4, col. 2.

<sup>56</sup> Wiesner & Parra, *supra* note 18, at 410.

A recent study in King County, Washington, demonstrates the increased incidence of herpes infection among newborns. The rate of infection increased from 2.6 per 100,000 live births to King County residents in the years 1966-69 to 28.2 per 100,000 in 1982. Sullivan-Bolyai, Hull, Wilson & Corey, *Neonatal Herpes Simplex Virus Infection in King County, Washington*, 250 J. A.M.A. 3059, 3060 (1983).

Children infected at birth who survive may confront social rejection due to fears aroused by their disease. *Confusion over Infant Herpes*, TIME, Jan. 16, 1984, at 73, 73.

<sup>57</sup> D. BARLOW, *supra* note 47, at 68; W. WICKETT, *supra* note 23, at 37. *But see* Binkin & Alexander, *Neonatal Herpes: How Can It Be Prevented?*, 250 J. A.M.A. 3094, 3095 (1983) (in some instances, risks and costs of cesarean delivery outweigh benefits); *Managing Recurrent Herpes*, *supra* note 27, at 10 (quoting head of maternal-fetal medicine at George Washington University that cesarean delivery is "not a complete guarantee" of herpes-free birth). For a recent discussion of delivery by women with genital herpes, see Harger, Pazin, Armstrong, Breinig & Ho, *Characteristics and Management of Pregnancy in Women with Genital Herpes Simplex Virus Infection*, 145 AM. J. OBSTETRICS & GYNECOLOGY 784 (1983).

## II RELEVANT CAUSES OF ACTION

Tort law has been characterized as a "social mediator"<sup>58</sup> that balances the conflicting interests of individuals in order to achieve a "desirable social result."<sup>59</sup> Thus, courts must continually develop tort law in accordance with changes in social policy. In this evolutionary process, courts consider certain general objectives in determining whether to impose tort liability: punishment of wrongdoers, deterrence of wrongful conduct, compensation of the victim, and the implementation of "society's shared notions of fairness."<sup>60</sup> In addition, a court must consider whether, in imposing liability, it can promulgate rules that are administratively feasible.<sup>61</sup>

This Note reviews the law of torts to determine whether imposing legal liability for the sexual transmission of genital herpes is appropriate. The Note evaluates the issue of liability in the context of the fundamental objectives of tort law and the current trends in the evolution of tort liability. In the past, courts have applied one or more of three causes of action—negligence, battery, and misrepresentation—to the sexual transmission of venereal disease.<sup>62</sup> By using established precedent as a frame-

<sup>58</sup> M. SHAPO, *THE DUTY TO ACT* xi (1977).

<sup>59</sup> The phrase is Dean Prosser's who has described the law of torts as a "battleground of social theory." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 3, at 14-15 (4th ed. 1971). Given the importance of the common law system of precedent, Dean Prosser contends that "[t]here is good reason . . . to make a conscious effort to direct the law along lines which will achieve a desirable social result." *Id.* § 3, at 15. Prosser has also labeled tort law as an exercise in "social engineering." *Id.* § 3, at 14-16.

<sup>60</sup> J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* 33-35 (2d ed. 1981). Other torts scholars have enunciated similar objectives of tort liability. *See, e.g.*, W. PROSSER, *supra* note 59, § 4 (moral aspect of defendant's conduct, historical development, convenience of administration, capacity to bear loss, prevention and punishment); Williams, *The Aims of the Law of Torts*, 4 *CURR. LEGAL PROBLEMS* 137 (1951) (appeasement, justice, deterrence, compensation); *RESTATEMENT (SECOND) OF TORTS* § 901 (1979) (compensation, determination of rights, vindication of parties, punishment of wrongdoers, deterrence of wrongful conduct).

*See also* 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 11.5, at 743 (1956) (proposed solutions "must on the whole satisfy the ethical or moral sense of the community, its feeling of what is fair and just.") (footnote omitted). On the question of "fairness," see Fletcher, *Fairness and Utility in Tort Theory*, 85 *HARV. L.REV.* 537, 540-43 (1972) (using paradigms of reasonableness and reciprocity to evaluate whether judges should look only at interests of parties before the court or resolve "seemingly private disputes" in order to serve interests of entire community).

<sup>61</sup> For example, most courts in the past refused to allow recovery in cases involving mental distress from shock or fright where no physical impact occurred. The courts feared an onslaught of fraudulent claims. *See, e.g.*, *Waube v. Warrington*, 216 Wis. 603, 613, 258 N.W. 497, 501 (1935); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896). For a discussion of the recent trend to allow such recovery, *see infra* note 79.

<sup>62</sup> *See infra* notes 113, 143-44, 155-56, 205 and accompanying text. Venereal diseases are infections transmitted from one person to another "by and during sexual intercourse or contact." R. MORTON, *VENEREAL DISEASES* 17 (2d ed. 1972). In this Note, "venereal disease" is used interchangeably with "sexually transmitted disease." *See id.* at 18 ("no division in the medical mind between venereal and sexually transmitted diseases").

work for liability in genital herpes cases, this Note proposes theories of liability that courts can adopt without departing from traditional notions of tort law. The Note concludes that imposition of tort liability represents an effective means to help arrest the spread of genital herpes. By imposing liability, courts would reaffirm the basic principle that "[t]he final cause of law is the welfare of society."<sup>63</sup>

#### A. Negligence: Duty in the Sexual Relationship

Negligence has been defined as conduct that "falls below the standard established by law for the protection of others against unreasonable risk of harm."<sup>64</sup> The extent of liability for negligence is one of tort law's "perennial controversies."<sup>65</sup> According to the standard formulation, the elements of a negligence cause of action include: a legal duty on the part of the actor to conform to a standard of conduct for the protection of others; a breach of that duty; a reasonable causal connection between the actor's conduct and the consequent injury; and damage or actual loss to the injured party.<sup>66</sup>

The threshold question is whether a person has a legal duty to protect against the transmission of genital herpes.<sup>67</sup> Duty, a legally imposed obligation that arises from some relationship between the parties, requires one party to conform to a particular standard of conduct for the benefit of another.<sup>68</sup> The term "duty" is merely a label, however, that casts no light on whether liability should be imposed.<sup>69</sup> There is no universally accepted test for determining the existence of a duty; courts balance a variety of considerations. These factors include history, concepts of morality and justice, the convenience of the rule's administration, and social perceptions as to where loss should properly fall.<sup>70</sup> Duty is a flexi-

<sup>63</sup> B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921).

<sup>64</sup> RESTATEMENT (SECOND) OF TORTS § 282 (1965).

<sup>65</sup> R. KEETON, *VENTURING TO DO JUSTICE* 8 (1969).

<sup>66</sup> 1 J. DOOLEY, *MODERN TORT LAW: LIABILITY & LITIGATION* § 3.03 (B. Lindahl rev. ed. 1982); W. PROSSER, *supra* note 59, § 30, at 143-44; *see also* RESTATEMENT (SECOND) OF TORTS § 281 (1965).

<sup>67</sup> *See, e.g., Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 342, 162 N.E. 99, 99-100 (1928) (quoting *McSherry, C.J., in West Va. Central & P. Ry. v. State*, 96 Md. 652, 666, 54 A. 669, 671-72 (1903) ("In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which [duty] would have averted or avoided the injury.")).

<sup>68</sup> *See generally* W. PROSSER, *supra* note 59, § 53; RESTATEMENT (SECOND) OF TORTS § 4 (1965); Green, *The Duty Problem in Negligence Cases, Part I*, 28 COLUM. L. REV. 1014, 1022-26 (1928); Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 41-43 (1934).

<sup>69</sup> *See, e.g., Green, Assumed Risk as a Defense*, 22 LA. L. REV. 77, 77 (1961) (duty but a conclusion after consideration of policies and factors); *see also* *Waugh v. University of Hawaii*, 63 Hawaii 117, 135, 621 P.2d 957, 970 (1980) (quoting W. PROSSER, *supra* note 59, § 53, at 325-26: "'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection").

<sup>70</sup> *See, e.g., Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal.

ble concept conducive to judicial reinterpretation and modernization.<sup>71</sup> Therefore, court-created rules of duty<sup>72</sup> reflect "the mores of the community" at the time of decision.<sup>73</sup>

After recognizing a duty to protect against the transmission of genital herpes, courts must define the standard of conduct necessary to fulfill the duty. In negligence cases, courts use an objective standard of reasonableness, exemplified by the hypothetical reasonable man.<sup>74</sup> Under this standard, a person is liable in negligence if he knew or should have known facts that would cause a reasonable person to recognize that an

Rptr. 468, 471 (1975); *Klassa v. Milwaukee Gas Light Co.*, 273 Wis. 176, 184, 77 N.W.2d 397, 402 (1956) (both citing Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953)); see also 2 F. HARPER & F. JAMES, *supra* note 60, § 18.6, at 1052 (before duty is imposed, courts must balance plaintiff's and defendant's respective burdens, risks, and insurability). Professor Leon Green has suggested five factors as determinants of duty: administrative, ethical (moral), economic, prophylactic, and justice. Green, *supra* note 68, at 1033-34.

<sup>71</sup> The concept of duty is a relatively recent innovation. At early English common law, a defendant was responsible for the damage he inflicted whether or not he owed a "duty" to the injured person. W. PROSSER, *supra* note 59, § 53; Note, *The Death of Palsgraf: A Comment on the Current Status of the Duty Concept in California*, 16 SAN DIEGO L. REV. 793, 794 (1979); see also *Dillon v. Legg*, 68 Cal. 2d 728, 734-35, 441 P.2d 912, 916-17, 69 Cal. Rptr. 72, 76-77 (1968) (feudal society one of strict liability).

When negligence emerged as an independent tort in the 1800s, courts developed the concept of duty which, if absent, would preclude liability. See Winfield, *supra* note 68, at 51-58 (analyzing development of duty as requisite for negligence liability). For an early articulation of the duty concept, see *Heaven v. Pender*, [1883] 11 Q.B.D. 503, 508 (Brett, M.R., concurring).

A pro-defendant bias attributed to the need to limit the liabilities of the new, expanding industrial sector was incorporated into the concept of duty in the 1800s. See W. PROSSER, *supra* note 59, § 53, at 325; Green, *The Thrust of Tort Law, Part I: The Influence of Environment*, 64 W. VA. L. REV. 1 (1961); Sulnick, *A Political Perspective of Tort Law*, 7 LOY. L.A.L. REV. 410, 415 (1974); see also Cooperrider, *A Comment on The Law of Torts*, 56 MICH. L. REV. 1291, 1311 (1958) (commenting on unwillingness demonstrated by "judges of an earlier day" to expand coverage of tort law).

For a discussion of the development of fault as a "coextensive element" of duty during this period, see Note, *The Modern Concept of Duty: Hoyem v. Manhattan Beach City School District and School District Liability for Injuries to Truants*, 30 HASTINGS L.J. 1893, 1904-05 & 1904 n.91 (1979) [hereinafter cited as Note, *The Modern Concept of Duty*].

Courts have only recently incorporated social considerations into the concept of duty, thus showing sensitivity to victim injuries. W. PROSSER, *supra* note 59, § 4; see also Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 786 (1967) ("trend against fixed rules of law that facilitate[d] directed verdicts for the defendant [to] a more flexible and victim-oriented interpretation of personal injury law"); Horvitz, *Justice Tobriner's Tort Decisions: A Reaffirmation of the Common Law Process*, 29 HASTINGS L.J. 167, 168-70 (1977) (judicial focus on plaintiff injury); Note, *The Modern Concept of Duty*, *supra*, at 1906-07.

<sup>72</sup> See, e.g., Green, *supra* note 71, at 1 ("expansion of tort law is the product of the courts with minor assistance of legislatures").

<sup>73</sup> Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953); see also 1 F. HARPER & F. JAMES, *supra* note 60, at xxvii ("common law of torts . . . accommodate[s] itself to the changing thought and action of the times").

<sup>74</sup> W. PROSSER, *supra* note 59, § 32; see also RESTATEMENT (SECOND) OF TORTS § 283 (1965).

unreasonable risk of harm exists.<sup>75</sup> Using this standard as a basis for defining the appropriate conduct in genital herpes cases, this Note contends that courts should impose an obligation to disclose infection upon all persons who either know or should know that they are infected with genital herpes.

Once a court recognizes the existence of a duty to protect against the transmission of genital herpes and defines the conduct required to satisfy the duty, it can determine whether the facts of a particular case satisfy the final three elements of negligence liability. A plaintiff can show breach of duty by proving that the defendant did not comply with the standard of conduct required by the court. Because genital herpes is sexually transmitted, a plaintiff can demonstrate the connection between the defendant's conduct and the resulting injury, thereby satisfying the causation requirement.<sup>76</sup> Physical pain and suffering associated with contracting genital herpes, the emotional trauma, and the prospects of long-term complications constitute actual damage.<sup>77</sup> Furthermore, this Note contends that the defense of assumption of the risk is inapplicable to cases for the transmission of genital herpes.<sup>78</sup>

### 1. *Establishing the Duty*

Common law redefinition of the concept of duty has led to the expansion of liability in negligence. Contemporary case law provides two prominent examples of this broader scope of duty—the imposition of liability for the negligent infliction of mental distress,<sup>79</sup> and the relaxa-

<sup>75</sup> The actor, as a reasonable man, should realize that his act involves an unreasonable risk of causing an invasion of an interest of another, if a reasonable man knowing so much of the circumstances surrounding the actor at the time of his act as the actor knows or should know, would realize the existence of the risk and its unreasonable character.

RESTATEMENT (SECOND) OF TORTS § 284, comment a (1965).

<sup>76</sup> Problems of proof, however, may be substantial. Individuals whose sexual activity is not limited to one partner may be unable to demonstrate that this particular party was responsible for transmitting genital herpes. See Galante, *Herpes Victim Wins an Appeal*, Nat'l L.J., Feb. 6, 1984, at 40, col. 3 (quoting head of nationwide herpes study) (because some sufferers do not display symptoms, "it's . . . difficult to prove who got it from whom and when"). Because the usual incubation period for genital herpes is two to ten days, however, many plaintiffs should be able to trace the disease back to the source of the infection. See *supra* note 29 and accompanying text. Moreover, plaintiffs who have been infected and can demonstrate fidelity to one partner should not confront evidentiary difficulties.

As this Note only addresses liability between sexual partners and not third-party liability, proximate cause is not an issue. Assume, however, the situation where *A* communicates genital herpes to *B* and *B* then infects *C*. *A*'s act is the actual cause of *C*'s injury. Whether *A*'s sexual act is the proximate cause of *C*'s injury will be a question of law for the court to determine. Cf. *Livingston v. Gribetz*, 549 F. Supp. 238, 244 (S.D.N.Y. 1982) (negligence action will not lie for nonsexual transmission of herpes where proximate cause absent).

<sup>77</sup> See *supra* notes 26-32 & 47-57 and accompanying text.

<sup>78</sup> See *infra* notes 128-38 and accompanying text.

<sup>79</sup> At common law, there was no duty to protect another from negligently inflicted mental distress. Fischer, *Tort Law: Expanding the Scope of Recovery Without Loss of Jury Control*, 11

tion of landowner immunities.<sup>80</sup> The desire to prevent injury, to adequately compensate victims, and to impose greater responsibility on potential defendants are underlying themes in recent decisions extending the scope of duty.<sup>81</sup> Yet this liberalization of the duty concept

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HOFSTRA L. REV. 937, 942 (1983); *see also* W. PROSSER, *supra* note 59, § 54 (general discussion of mental distress). Courts barred recovery for fright unless the victim had some physical contact with a person or object. *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896). This traditional rule has been relaxed to allow recovery for the physical consequences of mental distress if the plaintiff is within a designated "zone of danger," even if no contact has occurred. *See, e.g.*, *Daley v. LaCroix*, 384 Mich. 4, 179 N.W.2d 390 (1970); *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). Subsequently, in *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), the California Supreme Court established a cause of action for mental distress on behalf of a mother who, although outside the "zone of danger" and not suffering any physical impact, had witnessed the defendant driver negligently hit and kill her daughter. *Id.* at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81. The court described the traditional concept of duty as a "legal device . . . designed to curtail the feared propensities of juries toward liberal awards," *id.* at 734, 441 P.2d at 916, 69 Cal. Rptr. at 76, and then rejected the two fears underlying the heretofore limited concept of duty: the fears of fraudulent claims and of indefinable liability. *Id.* at 736-39, 441 P.2d at 917-20, 69 Cal. Rptr. at 77-80. Finding these fears unjustified, the court dismissed as "artificial abstractions" the holdings that injury situs precludes duty. *Id.* at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85; *accord* *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979). *See generally* Note, *Negligent Infliction of Emotional Distress in Accident Cases—The Expanding Definition of Liability*—*Dziokonski v. Babineau*, 1 W. NEW ENG. L. REV. 795, 795-801 (1979).

<sup>80</sup> In *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), the California Supreme Court concluded that the common law categories of trespasser, invitee, and licensee did not reflect the primary considerations of whether immunity should be granted to the landowner. *Id.* at 116-17, 443 P.2d at 566-67, 70 Cal. Rptr. at 102-03. The court held that considering the status of the injured party to determine whether the landowner has a duty of care was "contrary to . . . modern social mores and humanitarian values," *id.* at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104, and further stated that the common law rules "obscured . . . the proper considerations which should govern determination of . . . duty." *Id.* The court then concluded that the common law status classifications should be replaced with a single standard of reasonable care. *Id.* at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

Other jurisdictions have also discarded the common law status categories. *See, e.g.*, *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976). Some courts have abolished the legal distinctions between invitees and licensees but have retained the common law with respect to trespassers. *See, e.g.*, *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973).

<sup>81</sup> Justice Tobriner, who authored the *Dillon* opinion, has stated that the concept of duty has become "a shorthand statement that one party must recompense another for the loss." Tobriner, *The Changing Concept of Duty in the Law of Torts*, 9 CAL. TRIAL LAW. J. 17, 21 (1970); *see also* Note, *The Modern Concept of Duty*, *supra* note 71, at 1906-11 (evolving concept of duty enabled California Supreme Court to consider variety of socio-economic interests).

The ramifications of the broader scope of negligence liability extend far beyond the landmark opinions in *Dillon* and *Rowland* and their progeny. *See generally* Fischer, *supra* note 79. Courts have extended liability in other areas as well, often altering long-standing common law principles. Some courts have discarded the common law rule that bars recovery for negligently inflicted pure pecuniary loss. *See, e.g.*, *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979) (negligent loss of expected economic advantage actionable). In addition, courts have recognized new causes of action. *See, e.g.*, *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (wrongful birth).

Courts have also been narrowing or eliminating common law immunities. *See, e.g., infra*

does not guarantee that courts will impose liability for the transmission of genital herpes.

Whether an individual afflicted with genital herpes owes a duty of care to his sexual partner to protect against the sexual transmission of disease will depend on judicial evaluation. To some courts, foreseeability of injury is the critical factor in defining duty;<sup>82</sup> that is, the defendant owes the plaintiff a duty of care if he could have reasonably foreseen that his actions might injure the plaintiff.<sup>83</sup> Although the primacy of foreseeability as a determinant is not universally accepted,<sup>84</sup> it has gained substantial support in contemporary analysis.<sup>85</sup>

With foreseeability as the standard, the duty threshold in genital herpes cases is readily met. It is foreseeable that an individual, who either knows or, upon the exercise of reasonable care, should have known that he is suffering from genital herpes, may infect his partner.<sup>86</sup> Indeed, during periods of an initial or recurrent outbreak, the likelihood of such transmission is so high that medical authorities recommend sex-

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notes 191-200 and accompanying text (family); *Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599 (Mo. 1969) (charities); *Mayle v. Pennsylvania Dep't of Highways*, 479 Pa. 384, 388 A.2d 709 (1978) (governmental units). In lieu of the older decisional rule of contributory negligence as a complete bar, there has been a marked shift to comparative negligence. *See Wade, Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299, 317 (1980) (more than two-thirds of states have repudiated contributory negligence and have some form of comparative fault).

<sup>82</sup> *See, e.g., Smith v. Tennessee Valley Auth.*, 699 F.2d 1043, 1045 (11th Cir. 1983) (holding that, under Tennessee law, existence of duty depends on whether "reasonably prudent person would foresee that his . . . conduct might endanger the plaintiff"); *Frankovitch v. Burton*, 185 Conn. 14, 20, 440 A.2d 254, 259 (1981) (test of duty found in foreseeability); *Brennen v. City of Eugene*, 285 Or. 401, 406, 591 P.2d 719, 722 (1979) (general rule that "scope of the duty owed is governed by the concept of 'foreseeability'"); *see also Robertson v. LeMaster*, 301 S.E.2d 563, 567 (W. Va. 1983) (listing jurisdictions applying foreseeability as primary determinant).

<sup>83</sup> *See generally* 2 F. HARPER & F. JAMES, *supra* note 60, § 18.2 (detailing foreseeability limitation on duty of care).

<sup>84</sup> Professor Leon Green criticized the use of foreseeability as a determinant of duty more than 50 years ago. He argued that it would illogically provide the judge with the same standard to determine whether a duty existed as it gives to the trier of fact for determining whether a duty was violated. Green, *supra* note 68, at 1029-30.

<sup>85</sup> *See* 2 F. HARPER & F. JAMES, *supra* note 60, § 18.2, at 1018 ("Duty . . . is measured by the scope of the risk which negligent conduct foreseeably entails.") (footnote omitted). *See generally* Murphy, *Evolution of the Duty of Care: Some Thoughts*, 30 DEPAUL L. REV. 147 (1980) (trend in tort law toward generalized rule of duty defined by foreseeability).

California became a primary proponent of the foreseeability doctrine in a series of landmark decisions. *See Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 434-35, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976) (duty of care owed to anyone foreseeably endangered by defendant's conduct); *Weirum v. RKO Gen.*, 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975) (foreseeability of risk "primary consideration" in establishing duty); *Dillon v. Legg*, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968) (in deciding whether defendant owed duty to plaintiff, "chief element" is foreseeability of risk).

<sup>86</sup> Not every individual infected knows or, upon the exercise of reasonable care, should know he is infected. *See supra* note 33 and accompanying text.

ual abstinence.<sup>87</sup> Moreover, because virtually all victims of genital herpes contract the disease during sexual activity, they should be cognizant of the manner of transmission.<sup>88</sup> Thus, the likelihood of harm arising from such sexual activities is recognizable.

Yet, not all injuries should be actionable.<sup>89</sup> Although the foreseeability test will identify reasonably expected injuries, it does not indicate whether policy values support the compensation of victims of genital herpes through legal action. Any expansion of duty should reflect considerations of public welfare, not merely foresight.<sup>90</sup>

An alternative method to determine whether a duty should exist is a balancing approach. This approach accommodates considerations of public welfare better than relying solely on foreseeability. Some courts that engage in balancing enunciate a general, often vague, framework,<sup>91</sup> while others explicitly detail disparate variables.<sup>92</sup> Appropriate factors to consider in balancing the burden of a duty against the social benefits of liability can be categorized as preventive, compensatory, moral and administrative.<sup>93</sup> Whether a duty exists depends on the weight the courts assign to these factors.

a. *Elements in the Balance.* (i) *Preventive.* One argument for establishing a duty is the recognized state interest in the prevention and con-

<sup>87</sup> See *supra* note 41 and accompanying text.

<sup>88</sup> See *supra* note 27. A survey of patients with genital herpes found that 95% of those who knew how they acquired the disease indicated that transmission occurred during sexual relations. Bierman, *supra* note 36, at 3. In Bierman's survey, however, a sizeable minority of patients were unable to identify how they acquired the infection. *Id.* 25.4% of the respondents replied that they had "knowingly" infected their sexual partners. *Id.*

<sup>89</sup> See W. PROSSER, *supra* note 59, § 4, at 18. Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 514-15 (1976).

<sup>90</sup> Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1418 (1961) ("[I]t is always *hindsight* that must be relied on for judgment—hindsight that may call into play far-flung considerations affecting the welfare of persons not parties to the litigation, for 'we the people' have a stake in every litigation and our interests can not be ignored.") (emphasis in original).

<sup>91</sup> See, e.g., *Rodriguez v. Besser Co.*, 115 Ariz. 454, 460, 565 P.2d 1315, 1321 (Ct. App. 1977) (determination of duty dependent on "multitude of policy considerations"); *Robertson v. LeMaster*, 301 S.E.2d 563, 568 (W. Va. 1983) ("[C]onsiderations include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.").

<sup>92</sup> See, e.g., *Wright v. Arcade School Dist.*, 230 Cal. App. 2d 272, 278, 40 Cal. Rptr. 812, 814-15 (1964) (citing *Raymond v. Paradise Unified School Dist.*, 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. 847, 851-52 (1963) (factors that lead to imposing duty of care include social utility of activity out of which injury arises, feasibility of rule of care, relative liability of parties to assume economic cost of injury, statutes and judicial precedents moral imperatives)).

<sup>93</sup> Several courts have divided policy issues into similar categories. See, e.g., *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 310-15, 379 P.2d 513, 522-25, 29 Cal. Rptr. 33, 42-45 (1963) (administrative, socio-economic, moral); *Donohue v. Copiague Union Free School Dist.*, 64 A.D.2d 29, 33, 407 N.Y.S.2d 874, 877 (1978) (moral, administrative, economic, preventative); *D'Ambra v. United States*, 114 R.I. 643, 652, 338 A.2d 524, 528 (1975) (moral, economic, administrative).

trol of contagious disease.<sup>94</sup> Numerous states have enacted statutes that make the communication of venereal disease a crime.<sup>95</sup> Furthermore,

<sup>94</sup> See, e.g., *Skilling v. Allen*, 143 Minn. 323, 325, 173 N.W. 663, 664 (1919) (noting that health of citizenry is an "economic asset" of state and assurance of good health a "matter of [state] importance"); *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 996, 198 Cal. Rptr. 273, 276 (1984) (noting interest of state in preventing and controlling "contagious and dangerous diseases"); see also *Sexually Transmitted Disease Control*, PUB. HEALTH REP. 49, 52-55 (Supp. to Sept.-Oct. 1983 issue) (listing federal government priority objectives in combatting venereal diseases).

<sup>95</sup> E.g., ALA. CODE § 22-16-17 (1977) (misdemeanor); COLO. REV. STAT. §§ 25-4-401(2), -407 (1982) (misdemeanor); DEL. CODE ANN. tit. 16, §§ 701, 709 (1983) (fine up to \$1,000 or imprisonment up to one year, or both); FLA. STAT. ANN. §§ 384.01, .03 (West 1973) (misdemeanor); IDAHO CODE §§ 39-601, -607 (1977) (misdemeanor); NEV. REV. STAT. § 441.290 (1981) (misdemeanor); N.Y. PUB. HEALTH LAW § 2307 (McKinney 1977) (misdemeanor); OKLA. STAT. ANN. tit. 63, § 1-519 (West 1984) (felony); UTAH CODE ANN. § 26-6-5 (Supp. 1983) (misdemeanor); VT. STAT. ANN. tit. 18, § 1106 (1982) (fine up to \$500, or imprisonment up to two years, or both); WASH. REV. CODE ANN. §§ 70.24.010, .080 (1975) (gross misdemeanor). Pursuant to several of these statutes, the mere exposure of another to venereal disease constitutes a misdemeanor. See, e.g., COLO. REV. STAT. § 25-4-401(2) (1982) (misdemeanor to "willfully expose"); NEV. REV. STAT. § 441.290 (1981) (misdemeanor to "knowingly expos[e]"); S.C. CODE ANN. §§ 44-29-60, -140 (Law. Co-op. 1977) (misdemeanor to "expose another"); S.D. CODIFIED LAWS ANN. § 34-23-1 (1977) (same); TENN. CODE ANN. §§ 68-10-107, -111 (1983) (same).

When a statute prohibits certain acts, a court may look to the statute for the standard of conduct that members of the community should follow. W. PROSSER, *supra* note 59, § 36. The court is under no compulsion to adopt the criminal standard in civil cases, but it may consider the legislation as an official determination that certain risks are foreseeable, and thus certain conduct is prohibited—and that no reasonable man would violate the prohibition. See generally *Morris, The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21, 21 (1949) (evaluating "appropriateness of using criminal proscriptions as a measure of fault and care in negligence cases"). The majority position is that the violation of a statute enacted for the protection of the public is negligence per se. J. HENDERSON & R. PEARSON, *supra* note 60, at 388-89; see, e.g., *Azure v. City of Billings*, 182 Mont. 234, 240, 596 P.2d 460, 464 (1979); *Bayne v. Todd Shipyards Corp.*, 88 Wash. 2d 917, 918-19, 568 P.2d 771, 772 (1977); see also RESTATEMENT (SECOND) OF TORTS § 288B (1965). Other courts find the violation to be only evidence of negligence. See, e.g., *Gill v. Whiteside-Hemby Drug Co.*, 197 Ark. 425, 431, 122 S.W.2d 597, 601 (1938) (violation of state law merely evidence of negligence).

Certain threshold requirements must be met before courts apply these venereal disease statutes to suits involving sexual transmission of genital herpes. The RESTATEMENT (SECOND) OF TORTS summarizes these as follows: the statute must be directed to "protect a class of persons which includes the one whose interest is invaded"; "protect the particular interest which is invaded;" "protect that interest against the kind of harm [that] resulted;" and "protect that interest against the particular hazard from which the harm results." RESTATEMENT (SECOND) OF TORTS § 286 (1965).

The venereal disease statutes protect the community from the effects of sexually transmitted diseases by protecting the bodily integrity of those engaged in sexual relationships. The statutory language also reflects an intent to curtail the spread of such contagion. See, e.g., OKLA. STAT. ANN. tit. 63, § 1-519 (West 1984) (felony to marry or to expose another to venereal disease or to "liability to contract the same"); UTAH CODE ANN. § 26-6-5 (Supp. 1983) (willful introduction of communicable disease into any community is misdemeanor).

Although these goals parallel those found in the genital herpes suits, the definition of venereal disease in virtually all state statutes does not include genital herpes. Several statutes define venereal disease to include only syphilis, gonorrhea, and chancroid. See, e.g., DEL. CODE ANN. tit. 16, § 701 (1983); FLA. STAT. ANN. § 384.01 (West 1973); IDAHO CODE § 39-601 (1977); LA. REV. STAT. ANN. § 40:1061 (West 1977); S.C. CODE ANN. § 44-29-60 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. § 34-23-1 (1977); WASH. REV. CODE ANN.

courts have taken judicial notice of the government's efforts to eradicate sexually transmitted diseases.<sup>96</sup> The health risks to the victim,<sup>97</sup> the threat to newborns,<sup>98</sup> and the unprecedented increase in the number of those infected with genital herpes during the past two decades<sup>99</sup> argue for a corrective response. Society can discourage the spread of genital herpes by placing a "mark of legal disapproval"<sup>100</sup> on transmission of the disease. As people become aware of these adjudications, sexual activity in situations where the transmission of genital herpes to an unknowing partner is a possible result should decrease.

(ii) *Compensatory*. In addition to the societal concern for prevention, there is concern for the injured plaintiff. The trend in modern tort law reflects a victim-oriented approach with compensation as a fundamental, if not primary, goal.<sup>101</sup> In genital herpes cases, the plaintiff has acquired an incurable disease. The victim confronts a prospect of lifelong

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§ 70.24.010 (1975); W. VA. CODE § 16-4-1 (1979). Other states add granuloma inguinale and lymphogranuloma venereum to the category. *E.g.*, ALA. CODE § 22-16-1 (1977); COLO. REV. STAT. § 25-4-40(1) (1982); R.I. GEN. LAWS § 23-11-1 (1979). In some states a designated state authority has authority to add to the list of venereal diseases. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2311 (McKinney Supp. 1983) (Comm'r of Health); OR. REV. STAT. § 434.005(3) (1981) (Health Div. of State Dep't of Human Resources); VT. STAT. ANN. tit. 18, § 1091 (1982) (Dep't of Health). Certain jurisdictions include "catchall" language. *E.g.*, NEV. REV. STAT. § 441.050 (1981) ("or any other disease which can be sexually transmitted"); TENN. CODE ANN. § 68-10-101 (1983) ("other venereal diseases"); OKLA. STAT. ANN. tit. 63, § 1-517 (West 1984) ("any other disease which may be transmitted from any person to any other person [by] sexual intercourse and found and declared by medical science or accredited schools of medicine to be infectious or contagious"). Courts could read this broad language to include genital herpes, but such vague descriptions do not provide adequate notice of a relevant standard of care.

Statutes that refer simply to the transmission of a contagious disease are also ambiguous. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 3353 (West 1979) ("any person afflicted with any contagious, infectious, or communicable disease who willfully exposes himself . . . is guilty of a misdemeanor"); IOWA CODE ANN. § 139.31, .32 (West 1972) ("[a]ny person who knowingly exposes another to infection from any communicable disease" guilty of a misdemeanor).

Moreover, courts may view statutes that have not been enforced for a considerable time as obsolete and refuse to apply them in cases of civil liability for the transmission of genital herpes. *See* W. PROSSER, *supra* note 59, § 36, at 200 (discussing "troublesome" problem of "obsolete" legislation).

Texas has recently revised its venereal disease law. *Texas Gets Tough Law on Transmitting Syphilis*, N.Y. Times, Aug. 29, 1983, at A12, col. 6. The new statute includes genital herpes in the definition of venereal disease, TEX. REV. CIV. STAT. ANN. art. 4445d, § 1.03 (Vernon Supp. 1984), but excludes the transmitter of genital herpes from criminal sanctions. Under the revision it is a misdemeanor to "knowingly" expose another to infection with a "reportable" venereal disease. *Id.* § 6.01. The statute, however, only includes syphilis and gonorrhea in the category of reportable venereal diseases although it gives the Texas Board of Health the authority to adopt rules adding other venereal diseases to this category. *Id.* § 2.01.

<sup>96</sup> *See, e.g., Ex parte Fowler*, 85 Okla. Crim. 64, 74, 184 P.2d 814, 819 (1947) ("matter of common knowledge").

<sup>97</sup> *See supra* notes 26-32, 47-51 and accompanying text.

<sup>98</sup> *See supra* notes 52-57 and accompanying text.

<sup>99</sup> *See supra* notes 23-25 and accompanying text.

<sup>100</sup> R. KEETON, *VENTURING TO DO JUSTICE* 153 (1969).

<sup>101</sup> *See supra* notes 71 & 79-81 and accompanying text; *see also* Green, *The Duty Problem in*

recurrences and accompanying emotional trauma. Although a monetary damages award is not the equivalent of a restoration of health, it can compensate medical expenses in full and emotional and physical suffering in part.

(iii) *Moral*. The quality of the defendant's conduct further justifies the recognition of a duty. The reasonable expectations of parties engaging in sexual activity is that sex will be an emotionally rewarding experience, not a setting for the transmission of disease. Such an intimate relationship is based on confidence and trust—that an individual aware of his contagion would infect an unknowing partner introduces an element of blameworthiness, of moral fault, that is a prominent factor in establishing liability.<sup>102</sup> The law of torts has been described as satisfying the "moral sense" of the community, its feeling of what is "fair and just."<sup>103</sup> To so callously disregard a sexual partner's well-being invites social opprobrium and reprimand.<sup>104</sup>

(iv) *Administrative*. In determining whether an individual should be liable for the sexual transmission of disease, the courts must consider whether they can create rules that are administratively feasible.<sup>105</sup> With an estimated 300,000 to 500,000 new genital herpes cases each year, a multitude of suits might overwhelm court dockets. Yet several factors indicate that the amount of new litigation will be manageable. If there is a threat of liability, herpes carriers would probably exercise greater care and awareness in sexual behavior, thereby reducing the frequency of genital herpes transmission. In addition, the fear of trial publicity may prompt many defendants to settle out-of-court. From the victim's perspective, personal embarrassment associated with revealing one's sexual activity may also militate against legal action. Furthermore, some victims may be unwilling to jeopardize a relationship by seeking compensation despite infection by their partners. Thus, factors exist that will counterbalance any potential surge of herpes litigation.

b. *Summary*. Considered together, the factors underlying duty support the imposition of liability for the sexual transmission of genital herpes. The administrative costs of extending liability can be controlled, whereas the compelling societal need to arrest the spread of this disease, the serious injury sustained by the victim, and the moral fault of

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*Negligence Cases: Part II*, 29 COLUM. L. REV. 255, 256 (1929) ("the hurt plaintiff captures the heart of judges . . . [t]his is justice").

<sup>102</sup> See *supra* note 60; see also Green, *supra* note 101, at 255 (moral factor "most compelling influence" on judges).

<sup>103</sup> 2 F. HARPER & F. JAMES, *supra* note 60, at 743.

<sup>104</sup> See, e.g., *Crowell v. Crowell*, 180 N.C. 516, 525, 105 S.E. 206, 211 (1920), *reh'g denied*, 181 N.C. 66, 106 S.E. 149 (1921) (Walker & Hoke, JJ., dissenting) ("not a word of condemnation too severe to be applied to the conduct" of husband who infected his wife with gonorrhoea).

<sup>105</sup> Green, *supra* note 68, at 1035-37 & 1044-45.

one who conceals infection from a sexual partner justify extending the protection of the legal system to the genital herpes victim. A duty in the sexual relationship to protect against the transmission of genital herpes to one's partner not only conforms to the reasonable expectations of the parties but reinforces the societal goal of ensuring community well-being. Furthermore, the duty imposed should remain the same regardless of the duration of the sexual relationship or the marital status of the parties; for the injury caused by the transmission of genital herpes and the threat to societal health is identical. Thus, the duty arises in the context of any sexual activity where the transmission of genital herpes is possible.

c. *Case Law Precedent: Negligence Liability and Contagious Diseases.*

The recognition of a duty to protect against the transmission of genital herpes would not be a radical departure from earlier precedent. Although previous venereal disease cases arose in battery,<sup>106</sup> various courts have articulated the principle that a person who negligently exposes another to infectious disease should be liable for damages.<sup>107</sup> These cases involved the transmission of smallpox,<sup>108</sup> whooping cough,<sup>109</sup> and tuberculosis<sup>110</sup> that, at the time, were either incurable or of grave health risk.

Although a majority of the decisions imposing liability for the transmission of disease involved contractual settings that arguably established a special relationship<sup>111</sup> and a higher level of care,<sup>112</sup> some courts have imposed liability for the transmission of disease in the normal course of daily activity.<sup>113</sup> As one court stated, "[t]o be *stricken with*

<sup>106</sup> See, e.g., *State v. Lankford*, 29 Del. (6 Boyce) 594, 102 A. 63 (1917); *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920), *reh'g denied*, 181 N.C. 66, 106 S.E. 149 (1921); see *infra* notes 143-56 and accompanying text.

<sup>107</sup> See, e.g., *Earle v. Kuklo*, 26 N.J. Super. 471, 475, 98 A.2d 107, 109 (1953) ("[t]he degree of diligence required to prevent exposing another to a contagious or infectious disease depends upon the character of the disease and the danger of communicating it to others") (quoting 25 AM. JUR. *Health* § 45, at 318); see also J. CLERK & W. LINDSELL, *CLERK & LINDSELL ON TORTS* § 10-45, at 423 (15th ed. 1982) (under English law "[not] settled whether a person suffering from an infectious disease can be liable for its negligent communication," but authors suggest that an action ought to lie).

<sup>108</sup> See, e.g., *Gilbert v. Hoffman*, 66 Iowa 205, 23 N.W. 632 (1885); *Franklin v. Butcher*, 144 Mo. App. 660, 129 S.W. 428 (1910); *Hendricks v. Butcher*, 144 Mo. App. 671, 129 S.W. 431 (1910).

<sup>109</sup> See, e.g., *Smith v. Baker*, 20 F. 709 (S.D.N.Y. 1884).

<sup>110</sup> See, e.g., *Earle v. Kuklo*, 26 N.J. Super. 471, 98 A.2d 107 (1953); see also *Kliegel v. Aitken*, 94 Wis. 432, 69 N.W. 67 (1896) (typhoid fever).

<sup>111</sup> For a discussion of the special relationship concept, see generally W. PROSSER, *supra* note 59, § 56, at 348-50; *RESTATEMENT (SECOND) OF TORTS* § 314A (1965); *McNiece & Thornton, Affirmative Duties in Tort*, 58 YALE L.J. 1272 (1949).

<sup>112</sup> *Gilbert v. Hoffman*, 66 Iowa 205, 23 N.W. 632 (1885) (guests in defendants' hotel contracting disease from another guest whom defendants knew had smallpox); *Earle v. Kuklo*, 26 N.J. Super. 471, 98 A.2d 107 (1953) (lessee of apartment in family home contracting disease from owner of home); *Kliegel v. Aitken*, 94 Wis. 432, 69 N.W. 67 (1896) (disease contracted while employed in infected household).

<sup>113</sup> See, e.g., *Franklin v. Butcher*, 144 Mo. App. 660, 667, 129 S.W. 428, 430 (1910) (victim

*disease* through another's negligence is in legal contemplation as it often is in the seriousness of consequences, no different from *being struck with an automobile* through another's negligence."<sup>114</sup>

## 2. *Conduct Required to Meet the Duty of Care*

In addition to recognizing the existence of a duty of care in the sexual relationship, courts must also define the standard of conduct required to meet that duty.<sup>115</sup> Only after the courts outline the conduct required can they determine whether the defendant has complied with that duty. If the defendant has not complied, he can be held liable in negligence.

Reasonable expectations of sexual partners suggest that a herpes sufferer would advise his sexual partner of the potential harm of infection and abstain from sexual activity during a primary attack or recurrence when the risk of communication is known. The epidemic increase<sup>116</sup> of genital herpes, however, belies this expectation. Rather, it appears that many individuals infected with genital herpes engage in sexual risk-taking and conceal their disease, thereby depriving their partners of the opportunity to make an informed decision.

Using the hypothetical reasonable man as a basis for defining the appropriate standard of conduct,<sup>117</sup> reasonable expectations suggest that an individual with genital herpes has an obligation to inform his sexual partner of his disease.<sup>118</sup> In *Hendricks v. Butcher*,<sup>119</sup> an early case involv-

walked with infected defendant and, on another occasion, met with infected defendant at saloon).

In *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920), *reh'g denied*, 181 N.C. 66, 106 S.E. 149 (1921), where a husband infected his wife with venereal disease, the court stated that it was a "well settled proposition of law that a person is liable if he negligently exposes another to a contagious or infectious disease." *Id.* at 519, 105 S.E. at 208. In *Duke v. Housen*, 589 P.2d 334 (Wyo. 1979), a woman suffering from gonorrhea brought suit against the man that infected her. Although holding that the statute of limitations had run, the court stated that one "who negligently exposes another to an infectious or contagious disease, which such other person thereby contracts, can be held liable in damages for his actions." *Id.* at 340.

<sup>114</sup> *Billo v. Allegheny Steel Co.*, 328 Pa. 97, 105, 195 A. 110, 114 (1937) (*dicta*) (emphasis in original).

<sup>115</sup> See *Green*, *supra* note 68, at 1025 (describing duty to use reasonable care as "pious aphorism" that does not indicate what is specifically required).

<sup>116</sup> See *supra* notes 23-25 and accompanying text.

<sup>117</sup> See *supra* notes 74-75 and accompanying text.

<sup>118</sup> One who has been diagnosed or is otherwise aware that he has the disease has no excuse for failure to disclose based on lack of knowledge. Further, as the appropriate standard for evaluating the conduct of a defendant is that of the reasonable man, those who should know that they have the affliction likewise have no excuse. See RESTATEMENT (SECOND) OF TORTS § 289 (1965). Some individuals who contract the disease, however, never experience any symptoms and are unaware of their affliction. See *supra* note 33 and accompanying text. In such cases, there could be no obligation to disclose and, therefore, liability for the transmission of disease should not ensue.

An obligation to warn or disclose has often been loosely termed a "duty." Where, however, liability for failing to warn or disclose is imposed, it is because there is an underlying

ing the transmission of smallpox, the court determined that once an individual is aware of his infection it is his duty to keep away from others, but where contact occurs he is obligated to inform them of his disease "so that they might protect themselves."<sup>120</sup> In a recent decision involving a suit for damages caused by the transmission of genital herpes, a California appellate court focused on the trust that is violated when one partner in an intimate relationship conceals a "venereal or other dangerous contagious disease."<sup>121</sup> Warning one's sexual partner of the risk of genital herpes transmission rather than concealing the infection eliminates any "advantage-taking" that would exist if the partner remained unaware of the potential harm.

Disclosure should not be limited to those periods when a herpes sufferer realizes that he is contagious. A person who knows he has genital herpes may, during a recurrence, misjudge when he is contagious or, if the symptoms are exceedingly mild, may be unaware of his contagious state. This uncertainty requires that an individual suffering from genital herpes disclose his affliction before sexual activity whether or not he believes he is currently contagious. *Full disclosure at all times* would permit an informed choice in sexual activity, reinforce candor and honesty in sexual decisions, and provide the greatest protection to the sufferer's sexual partner. Courts will enhance societal well-being by defining the duty in terms of a disclosure requirement. This obligation is likely to reduce the number of casual sexual encounters, increase the use of preventive measures, and promote sexual abstinence during periods when the risk of transmission is high. Because a failure to warn could result in liability, an individual infected with genital herpes would display increased care and concern for the welfare of sexual partners who might be injured by his actions. These modifications in behavior should combine to reduce the rate at which genital herpes is increasing.<sup>122</sup>

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duty to prevent harm to the injured party. *McGeorge v. City of Phoenix*, 117 Ariz. 272, 277-78, 572 P.2d 100, 105-06 (Ct. App. 1977). The duty here is inferred from the positive act of the sexual relationship; the duty does not arise from the omission of the warning or disclosure. *See also* L. ELDRIDGE, *MODERN TORT PROBLEMS* 13-14 (1941).

The concept of an obligation to disclose is not foreign to tort law. *See, e.g., Davis v. Rodman*, 147 Ark. 385, 392, 227 S.W. 612, 614 (1921) (attending physician "owes a duty to those who . . . are liable to be brought in contact with the patient" to inform them of disease); *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (therapist's duty to potential victim of patient may include duty to warn); *McIntosh v. Milano*, 168 N.J. Super. 466, 484, 403 A.2d 500, 509 (Law Div. 1979) (physician has obligation to warn third persons against possible exposure to venereal disease); *Obde v. Schlemeyer*, 56 Wash. 2d 449, 353 P.2d 672 (1960) (vendor duty to disclose termite infestation); 2 F. HARPER & F. JAMES, *supra* note 60, § 28.7, at 1547 (duty of manufacturer of a product to give "reasonable warning or instructions for safe use").

<sup>119</sup> 144 Mo. App. 671, 129 S.W. 431 (1910).

<sup>120</sup> *Id.* at 674, 129 S.W. at 432.

<sup>121</sup> *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 997, 198 Cal. Rptr. 273, 276 (1984).

<sup>122</sup> An analogy can be drawn between the obligation to disclose in genital herpes cases and the principle of informed consent in the medical field. According to that principle, a

Once courts determine that an obligation to disclose exists, they must define the elements of an adequate disclosure.<sup>123</sup> Disclosure should occur prior to the onset of sexual activity. The extent of the necessary warning will depend on the specific facts and circumstances.<sup>124</sup> The sophistication of one's partner, his or her ability to comprehend the warning, and the timing of the disclosure are of critical significance.<sup>125</sup> At a minimum, the warning must adequately indicate the scope of the danger and must reasonably communicate the extent or seriousness of harm that could result from infection. Thus, between experienced sexual partners, the mere statement that one has genital herpes should fulfill the disclosure threshold.<sup>126</sup>

But why an obligation to disclose and not an obligation by the uninfected partner to inquire? To some degree, the obligation to disclose is troubling. An innocent victim of genital herpes now suffering the physical and emotional trauma of this disease will be required to reveal his or her affliction to others. Yet the personal embarrassment and possible hurt of rejection that might accompany disclosure is a much less significant cost than the transmission of genital herpes to an-

physician is not entitled to treat a patient unless the patient has consented to the treatment. *See Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 154 Cal. App. 2d 560, 578, 317 P.2d 170, 181 (1957) ("[a] physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment"). *See generally* Meisel, *The Expansion of Liability for Medical Accidents: From Negligence to Strict Liability By Way of Informed Consent*, 56 NEB. L. REV. 51 (1977).

<sup>123</sup> One organization serving herpes sufferers has outlined a possible statement of disclosure. McClintock, *supra* note 49, at 154 (quoting from THE HELPER, a publication for herpes sufferers, which advises describing genital herpes as "an intermittent, self-limiting condition that comes and goes"). The trauma that sufferers of genital herpes experience is implicit in the advice never to use the words "incurable," "lesion," or "nightmare." *Id.*

<sup>124</sup> The adequacy of the warning will usually be a question of fact. *See, e.g.*, *Formella v. Ciba-Geigy Corp.*, 100 Mich. App. 649, 655, 300 N.W.2d 356, 359 (1980); *Michael v. Warner/Chilcott*, 91 N.M. 651, 655, 579 P.2d 183, 187 (1978).

<sup>125</sup> A detailed discussion of genital herpes by a layman might include inaccuracies that, upon detrimental reliance by his sexual partner, could lead to liability in negligence. *See, e.g.*, *Alice D. v. William M.*, 113 Misc. 2d 940, 450 N.Y.S.2d 350 (N.Y. Civ. Ct. 1982). In *Alice D.*, a woman relied on her lover's representation that he was sterile. The lover was mistaken and impregnated the woman. The court held that the defendant owed an obligation to give *accurate information* to his sexual partner:

[H]is representation of sterility, though made with an honest belief as to its truth, constitutes negligence because of his lack of reasonable care in properly ascertaining the true facts and informing the claimant as to them . . . (citation omitted) The defendant had a duty to take further steps to ascertain the truth regarding his condition . . . He did not and this is the basis for imposing liability . . .

*Id.* at 946, 450 N.Y.S.2d at 355.

<sup>126</sup> One partner's disclosure of infection does not relieve an infected companion from disclosing the fact that she is also infected. The multiple strains of the herpes virus create the possibility for transmission of a different strain from one partner to another, resulting in more frequent outbreaks. *See Raab & Lorincz, supra* note 45, at 728 (rejecting idea that "once you've got it, further exposure doesn't make any difference").

other unknowing partner. It is the herpes sufferer who exposes his partner to the prospect of a harmful contact and, given the general expectations of candor and a healthful sexual relationship, he should bear the burden of disclosure.<sup>127</sup> He knows of his disease and he is in the best position to warn. Furthermore, disclosure may reinforce elements of trust and sharing that can lead to longer, more supportive relationships. Consequently, it is more efficient and appropriate to impose a duty to disclose than an obligation to inquire.

### 3. *Assumption of the Risk*<sup>128</sup>

The final question a court must consider before imposing liability for the transmission of genital herpes is whether those who engage in sexual activity assume the risk of contracting this disease merely by consenting to such activity. Elements of the defense include the plaintiff's understanding of and voluntary exposure to a risk in circumstances that indicate a willingness to accept such risk.<sup>129</sup> At common law, a successful assumption of the risk defense barred recovery.<sup>130</sup>

When an individual infected with genital herpes accurately informs his sexual partner of his affliction but the partner understands the risk and voluntarily consents to sexual activity, the partner has expressly assumed the risk of contracting genital herpes and no liability should ensue for its transmission. This affirms the freedom of independent choice in sexual relations, allowing one to waive the right to be free from certain dangers.<sup>131</sup>

The question remains, however, whether an individual's participation in sexual relations manifests an implied assumption of the risk when he is unaware of a partner's infection. Arguably, the risk of contracting genital herpes is a risk that all should appreciate in light of sex education and widespread publicity. Therefore, an individual who consents to sex may be regarded as having impliedly assumed the risk of con-

<sup>127</sup> Inspection of one's sexual partner is not an effective safeguard against acquiring genital herpes. Contagious periods begin before sores appear. Furthermore, the sores may be internal and not visible. See R. RICHARDS, *supra* note 26, at 84.

<sup>128</sup> This Note treats assumption of the risk at this point because of its unique applicability to negligence. For a general discussion of tort defenses, see *infra* notes 190-217 and accompanying text.

<sup>129</sup> [A] plaintiff who fully understands a risk of harm to himself . . . caused by the defendant's conduct . . . and who nevertheless voluntarily chooses to enter or remain . . . within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk.

RESTATEMENT (SECOND) OF TORTS § 496C (1965). See also RESTATEMENT (SECOND) OF TORTS § 496B comment c (1965).

<sup>130</sup> W. PROSSER, *supra* note 59, § 68; Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 14 (1906).

<sup>131</sup> See Bohlen, *supra* note 130, at 14.

tracting herpes even though he is unaware of a partner's infection.<sup>132</sup>

On closer analysis, the argument favoring implied assumption of the risk in marital relationships can be rejected as against reasonable expectations. Premarital blood test requirements presume uninfected contact between spouses.<sup>133</sup> Furthermore, many jurisdictions find a spouse's infection with a venereal disease to be sufficiently grave to constitute grounds for annulment or divorce.<sup>134</sup> Because marriage generally represents a willingness to procreate,<sup>135</sup> one does not contemplate that sex with one's spouse may lead to genital herpes infection and the consequent health risks to any child conceived of that union.

Public policy also argues against the application of implied assumption of the risk to premarital or extramarital relationships. Society has a fundamental interest in the well-being of its citizens and strives to limit the harm that one individual permissibly can inflict upon another.<sup>136</sup> The magnitude of the societal health concerns associated with genital herpes precludes resort to this doctrine as a complete defense. Moreover, the community judgment expressed in states that have enacted legislation to make the transmission of venereal diseases a crime should bear weight in civil actions.<sup>137</sup> Equally compelling is the reasonable expectation of sexual partners that sexual activity will have physical and emotional rewards and will not be a setting for the transmission of an incurable disease.<sup>138</sup>

<sup>132</sup> Implied assumption of the risk, however, involves a subjective standard—it concerns what the particular plaintiff sees, knows, and understands. RESTATEMENT (SECOND) OF TORTS § 496D comment c (1965); Kionka, *Implied Assumption of the Risk: Does it Survive Comparative Fault?*, 1982 S. ILL. U.L.J. 371, 379. To some extent, a court may be willing to impute common knowledge. See W. PROSSER, *supra* note 59, § 68, at 448 (“the standard applied in fact does not differ greatly from that of the reasonable man”). A plaintiff's failure to adhere to an objective standard of care might constitute contributory negligence. See *id.* § 65.

<sup>133</sup> H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 2.10 (1968); Note, *Pre-Marital Tests for Venereal Disease*, 53 HARV. L. REV. 309, 310 (1939) (purpose of premarital venereal disease test laws to prevent transmission of venereal disease to future spouse and to prospective children); see, e.g., CONN. GEN. STAT. ANN. § 46b-26 (West Supp. 1984); FLA. STAT. ANN. § 741.051 (West Supp. 1984); N.J. STAT. ANN. § 37:1-9 (West Supp. 1984); N.Y. DOM. REL. LAW § 13-a (McKinney Supp. 1983).

<sup>134</sup> Annot., 5 A.L.R. 1016 (1920).

<sup>135</sup> See, e.g., *Mirizio v. Mirizio*, 242 N.Y. 74, 81, 150 N.E. 605, 607 (1926) (matter of public policy that marriages are for purpose of producing offspring); *Height v. Height*, 18 Misc. 2d 1023, 1024, 187 N.Y.S.2d 260, 262 (Kings County Sup. Ct. 1959) (same).

<sup>136</sup> See *Mansfield, Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 42 (1961) (as to physical harm, “there does not exist a sphere of individual interest where choice is sovereign no matter how great the injury”).

<sup>137</sup> See *supra* note 95.

<sup>138</sup> The doctrine of implied assumption of the risk is in disfavor in a number of jurisdictions, see Kionka, *supra* note 132, at 372 n.9, either having been limited, see, e.g., *Springrose v. Willmore*, 292 Minn. 23, 24-25, 192 N.W.2d 826, 827 (1971) (assumption of risk must be apportioned under state's comparative negligence statute), or abolished, see, e.g., *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 54, 155 A.2d 90, 95-96 (1959) (assumption of risk a “mere phase” of contributory negligence).

## B. Battery: The Sexual Transmission of Genital Herpes as an Intentional Tort

Battery is the intentional, harmful or offensive, and unprivileged contact with the person of another.<sup>139</sup> This tort offers an alternative ground on which to impose liability for the transmission of genital herpes. The sexual activity between partners satisfies the contact requirement for a cause of action in battery. The physical pain and illness, recurrent outbreaks, and other complications associated with genital herpes satisfy the requirement of harm.<sup>140</sup> The degree of scienter necessary to satisfy the "intent" requirement and the question of whether consent to sexual activity establishes a privilege precluding liability, however, are less easily resolved issues.

### 1. *Intent*

Intent encompasses "not only . . . those consequences which are desired, but also . . . those which the actor believes are substantially certain to follow from [his actions]."<sup>141</sup> Although instances where herpes sufferers purposely seek to infect their sexual partners appear to be rare,<sup>142</sup> infected individuals with no desire to harm their sexual companions may transmit the disease in a manner that fulfills the standard of intent.

In *State v. Lankford*,<sup>143</sup> a husband suffering from syphilis failed to inform his wife of his affliction and infected her. The court inferred the intent to communicate the disease from the "actual results" because of the husband's failure to disclose his infection.<sup>144</sup>

Although this failure of the husband to disclose was sufficient for the *Lankford* court to find intent, many courts may be reluctant to infer intent from the failure to disclose. As with syphilis and gonorrhea,<sup>145</sup>

<sup>139</sup> RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965); 1 F. HARPER & F. JAMES, *supra* note 60, § 3.3.

<sup>140</sup> RESTATEMENT (SECOND) OF TORTS § 15 (1965) (bodily harm defined as "physical impairment of the condition of another's body, or physical pain or illness"). See *supra* notes 27-39 and accompanying text. This Note does not address whether sexual activity between an individual infected with genital herpes and an uninfected partner to whom the virus is not transmitted constitutes an offensive contact within the meaning of the RESTATEMENT (SECOND) OF TORTS § 19 (1965) ("A bodily contact is offensive if it offends a reasonable sense of personal dignity").

<sup>141</sup> W. PROSSER, *supra* note 59, § 8, at 31; see also RESTATEMENT (SECOND) OF TORTS § 8A comment b (1965); Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955).

<sup>142</sup> *But cf. Herpes: The VD of the '80s*, *supra* note 23, at 76 (man recently infected with genital herpes "so angry that he determined to infect as many women as he could").

<sup>143</sup> 29 Del. (6 Boyce) 594, 102 A. 63 (1917).

<sup>144</sup> *Id.* at 596, 102 A. at 64.

<sup>145</sup> AMERICAN PUBLIC HEALTH ASS'N, CONTROL OF COMMUNICABLE DISEASES IN MAN 316 (A. Benenson 12th ed. 1975) (period of communicability of syphilis "[v]ariable and indefinite"); see also J. CHIAPPA & J. FORISH, THE VD BOOK 20-21 (1976) (discussing variable rates of gonorrhea transmission).

the fact that a person has genital herpes does not ensure that he will transmit the disease during each act of sexual intercourse. Medical authorities advise those infected with genital herpes to abstain from sexual relations only during periods of an initial outbreak or recurrence.<sup>146</sup> During these periods, an individual with genital herpes would recognize that it is "substantially certain" that any sex partners will be infected and he would possess the necessary degree of intent.

An infected party may, however, become contagious before discerning a recurrence. From the time visible sores appear until they completely heal, the risk of transmission is high and known.<sup>147</sup> But the disease may be transmitted during the onset of preliminary symptoms prior to the reemergence of sores.<sup>148</sup> If these symptoms are mild, the infected party may be unaware of the recurrence. Sexual activity in these circumstances would be negligent, but would not constitute an intentional wrong. Knowledge and appreciation of the risk of transmission, "short of substantial certainty, is not the equivalent to intent."<sup>149</sup>

This analysis presumes that the transmitter of genital herpes is aware that he has the disease. To establish a cause of action in negligence the infected party would have to show that the transmitter should have known that he was infected.<sup>150</sup> In contrast, to establish a cause of action in battery she must show that the transmitter had actual knowledge of his affliction.<sup>151</sup> Where an individual has contracted genital herpes but does not experience symptoms and, consequently, is unaware of his condition, liability would not ensue.

The knowledge requirements that allow a court to infer intent impose a significant limitation on the use of the cause of action in battery to curtail the spread of genital herpes. During unrecognized contagious periods, the element of intent is not satisfied even where genital herpes is transmitted. If those with the disease are obliged to disclose based on a duty of due care, however, the uninfected party has the opportunity to make an informed choice whether to risk infection, an opportunity that otherwise would be absent.

## 2. Consent

In the past, courts have held that a person who consents to sexual activity may not maintain an action in battery against a sexual part-

<sup>146</sup> See *supra* note 41 and accompanying text.

<sup>147</sup> See *supra* notes 40-41 and accompanying text.

<sup>148</sup> *Id.*

<sup>149</sup> W. PROSSER, *supra* note 59, § 8, at 32.

<sup>150</sup> See *supra* notes 74-75 and accompanying text.

<sup>151</sup> See also Note, *Torts—Mental Intent Requirement—Trespass and Negligence Compared*, 34 ROCKY MTN. L. REV. 268, 271 (1962) (degree of certainty of harm that must be proven under negligence "considerably less" than that required for intentional tort).

ner.<sup>152</sup> The general rule is that an individual who "effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it."<sup>153</sup>

Courts have distinguished between the consent to sexual activity and the consent to infection with venereal disease, however. In *Lankford*, the court held that a husband who infected his wife with syphilis was guilty of battery on the ground that his wife, "in confiding her person to her husband," did not consent to infection with a "loathsome" disease.<sup>154</sup> Similarly, in *Crowell v. Crowell*,<sup>155</sup> the North Carolina Supreme Court held that a husband's concealment of the risk of venereal disease infection vitiated his wife's consent to sexual intercourse and subjected him to liability.<sup>156</sup>

<sup>152</sup> See C. MORRIS & C.R. MORRIS, JR., *MORRIS ON TORTS* 29 (2d ed. 1980).

<sup>153</sup> RESTATEMENT (SECOND) OF TORTS § 892A (1979). This concept reflects the legal maxim, *volenti non fit injuria*—one is not legally injured who has either consented to the act complained of or who was willing for the act to occur. The maxim presupposes that the party is capable of giving consent to his own injury. See F. HARPER & F. JAMES, *supra* note 60, § 3.10, at 234-35; see also *McCue v. Klein*, 60 Tex. 168 (1883).

<sup>154</sup> 29 Del. (6 Boyce) 594, 596, 102 A. 63, 64 (1917). The court did not regard the husband's belief that his disease had been cured as an adequate defense. *Id.*

The *Lankford* case was a criminal battery action as opposed to a civil action. At that time in Delaware, no civil action was maintainable between husband and wife because of the interspousal tort immunity doctrine. See *infra* notes 191-202 and accompanying text. The fact pattern in *Lankford*, however, is sufficiently analogous to several of the genital herpes cases to be relevant here.

There are parallels in other battery cases to the principle that consent to sexual activity is not consent to exposure to venereal disease. For example, courts have concluded that the consent to eat food is not consent to eat poison or drugs. See, e.g., *State v. Monroe*, 121 N.C. 677, 28 S.E. 547 (1897) (consent to eat candy is not consent to eat candy covered with croton oil); see also *Johnson v. State*, 92 Ga. 36, 17 S.E. 974 (1893) (arsenic in coffee); *Commonwealth v. Stratton*, 114 Mass. 303 (1873) (love powders in figs); cf. *Bartell v. State*, 106 Wis. 342, 82 N.W. 142 (1900) (consent to medical treatment is not consent to lewd fondling).

<sup>155</sup> 180 N.C. 516, 105 S.E. 206 (1920), *reh'g denied*, 181 N.C. 66, 106 S.E. 149 (1921).

<sup>156</sup> *Crowell*, 181 N.C. at 68, 106 S.E. at 150.

Earlier English cases reached similar conclusions. See *Regina v. Bennett*, 4 Fost. & Finlason's Reports 1105 (1866) (holding that fraud vitiates consent, and that woman who is induced to have sexual intercourse without knowledge that her sexual partner has a venereal disease is the victim of fraud); *Regina v. Sinclair*, 13 Cox's Crim. Law Cases 28 (1867) (man who knew of his gonorrhea infection but failed to inform his sexual partner procured her consent by fraud, thereby nullifying the consent). See also P. WINFIELD & J. JOLOWICZ, *ON TORT* 44 (10th ed. 1975) (fraudulent concealment of venereal disease should negate victim's consent to cohabitation, making resultant infection a tortious battery); Fischer, *Fraudulently Induced Consent to Intentional Torts*, 46 U. CINN. L. REV. 71, 73 (1977) (failure to inform partner of venereal disease vitiates consent); Recent Cases, *Husband and Wife—Rights of Wife Against Husband and His Property—Wife's Right to Sue Her Husband for Torts—Assault*, 34 HARV. L. REV. 676, 676 (1921) ("The married woman consents to the battery incident to connubial intercourse, but in no wise to contact with [venereal disease]."); Recent Cases, *Battery—Consent—Mistake as to the Nature of the Offensive or Injurious Touch*, 15 TEX. L. REV. 255, 255 (1937) (in discussing *De Vall v. Strunk*, 96 S.W.2d 245 (Tex. Civ. App. 1936), where plaintiff was infected with crab lice by defendant-lover, suggesting as proper rule that plaintiff consented only to intercourse, not to the contamination of which plaintiff had no knowledge. *But see* *Hegarty v. Shine*, [1878] 14 Cox's Crim. Law Cases 124 (mere concealment of venereal disease not such a fraud to vitiate consent).

Courts have also rejected the defense of consent when it is obtained by express fraudulent misrepresentation. In *Barbara A. v. John G.*,<sup>157</sup> an unmarried woman who suffered an ectopic pregnancy and underwent surgery to save her life brought an action against the man who impregnated her.<sup>158</sup> She alleged that she relied on the man's intentional misrepresentation of his sterility when she consented to intercourse. In her cross-complaint, she argued that the act of impregnation exceeded the scope of her consent and that her consent to intercourse was fraudulently induced.<sup>159</sup> Based on these arguments, she contended that her consent was invalid and, therefore, that she had established a cause of action in battery. The court held that the facts stated a cause of action for battery,<sup>160</sup> analogizing from the conclusion in *Crowell and Lankford* that "a woman's consent to sexual intercourse [is] vitiated by the man's fraudulent concealment of the risk of infection."<sup>161</sup>

On the issue of invalid consent, the *Restatement (Second) of Torts* contends that if an individual is induced to consent "by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation," the consent is ineffective.<sup>162</sup> On the basis of the *Restatement's* illustrations, a person's ignorance of a sexual partner's genital herpes infection constitutes such a "substantial mistake" concerning the nature of the invasion of his interests.<sup>163</sup>

Thus, consent to intercourse should not bar recovery for genital herpes infection. The consent goes to the act of intercourse, not to the harmful contamination. If, however, one agrees to sexual activity with full and accurate knowledge of a sexual partner's genital herpes infection, no action in battery will lie.<sup>164</sup>

<sup>157</sup> 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

<sup>158</sup> *Id.* at 375, 193 Cal. Rptr. at 426.

<sup>159</sup> *Id.*

<sup>160</sup> The trial court had ruled that no cause of action was stated and had granted a motion for judgment on the pleadings. *Id.* at 373, 193 Cal. Rptr. at 425.

<sup>161</sup> *Id.* at 381, 193 Cal. Rptr. at 431. The court also held that the facts stated a cause of action for deceit. *See infra* notes 179-82 and accompanying text.

<sup>162</sup> RESTATEMENT (SECOND) OF TORTS § 892B (1979).

<sup>163</sup> The *Restatement* poses the hypothetical that if *A* consents to sexual intercourse with *B*, who is aware that *A* does not know *B* has a venereal disease, *B* is subject to liability to *A* for battery. *Id.* at comment e, illustration 5. This example parallels the concealment aspect of *Crowell and Lankford*. If *B* misrepresents that he is free from venereal disease, despite his knowledge of his infection, and that misrepresentation induces *A* to engage in sexual activity, *B* is similarly subject to liability for battery. *Id.* at comment h, illustration 11. This example is analogous to *Barbara A. v. John G.*

<sup>164</sup> *See* 1 F. HARPER & F. JAMES, *supra* note 60, § 3.10. This presumes that the infected party has not misrepresented the disease, e.g., by stating that he is not presently infectious when he is aware of an outbreak, or has not extracted consent by duress.

### 3. *Battery and Negligence: A Comparison*

Valid reasons exist for pursuing a cause of action in battery in lieu of, or in addition to, negligence. In some jurisdictions that bar tort actions between spouses, courts have created exceptions for intentional torts such as battery.<sup>165</sup> Further, a battery verdict permits a court to award both punitive and compensatory damages.<sup>166</sup>

Liability based *solely* on battery, however, would result in a more limited range of liability than that based on negligence. As discussed, it is more difficult to prove subjective "intent" in a battery action than it is to prove objective reasonableness in a negligence action. Because the primary objective of liability is to curtail the spread of genital herpes, courts should adopt the broadest acceptable range of liability. Moreover, the mutual dependence inherent in a sexual relationship presumes a degree of accountability that would impose a duty to protect against the transmission of genital herpes. An obligation to disclose one's infection would fulfill this duty. Thus, negligence liability would not only be more effective than battery in limiting the spread of genital herpes, but it would also more accurately mirror the expectations of the parties.

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<sup>165</sup> See *infra* notes 191-202 and accompanying text. The following example is a situation where a cause of action in battery would apply, but one in negligence would fail. *A*, who has genital herpes and knows that he is currently infectious, fully discloses his disease to *B*, who nonetheless consents to intercourse. *A*, in affirmatively disclosing the disease, meets the recommended standard of care. *A* does not know and has no way of knowing that *B*, because of age or mental incapacity, is incapable of consent. *B*, as a result of sexual intercourse with *A*, is infected. Although a negligence cause of action may not lie, the elements of a battery—intent as well as harmful and unprivileged contact—are satisfied.

<sup>166</sup> "Mere negligence" is not considered a sufficient basis for the award of punitive damages. *W. PROSSER, supra* note 59, § 2, at 10. There must be "circumstances of aggravation or outrage," or "fraudulent" motive, or "such a conscious and deliberate disregard of the interests of others that [the] conduct may be called wilful or wanton." *Id.* at 9-10 (footnotes omitted). See also *Morris, Punitive Damages in Tort Cases*, 44 *HARV. L. REV.* 1173 (1931) (general discussion of the role of punitive damages in tort); Note, *In Defense of Punitive Damages*, 55 *N.Y.U.L. REV.* 303, 303 n.1 (1980) (punitive damages awarded for intentional torts or when defendant "has displayed a reckless indifference to the potentially harmful consequences of his conduct"). State law punitive damage standards range from "gross negligence to reckless disregard to various levels of wilfulness [sic] and wantonness." *In re Northern Dist. of California, Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 850 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

Plaintiffs have demanded punitive damages in several genital herpes suits. See, e.g., *St. Clair v. St. Clair*, reported in *Ostroff, supra* note 2 (five million dollars in punitive damages); *Olson v. Olson*, reported in *Williamson, supra* note 2 (three million dollars in punitive damages). In *McGaw v. Mormann*, No. C.L. 2021-0683, 29-46-F.F. 51-C (Iowa Dist. Ct., Wapello County, filed June 28, 1983), the plaintiff demanded \$150,000 in punitive damages. *Id.* at 1.

C. Misrepresentation: Deceit In a Sexual Context<sup>167</sup>

Many theories of tort liability involve misrepresentation.<sup>168</sup> An individual may induce another to consent to a harmful contact by false representation, and thereby commit a battery. He may negligently mislead another into following a course of action that leads to injury.<sup>169</sup> As a separate tort, the elements of misrepresentation include a false representation by the defendant; the defendant's knowledge or belief of the falsity of the representation or the absence of any reasonable basis for the defendant to believe in its truth; the defendant's intention to induce the plaintiff to act in reliance upon the misrepresentation; the plaintiff's justifiable reliance upon the representation; and damage to the plaintiff resulting from such reliance.<sup>170</sup> Although courts usually apply the tort of misrepresentation only to commercial situations,<sup>171</sup> there is no reason to reject such an action when noncommercial interests are involved.<sup>172</sup>

A few courts have recently considered the applicability of this tort to false representation made in a sexual context. In *Stephen K. v. Roni L.*,<sup>173</sup> a paternity action, the defendant conceded that he was the father but filed a cross-complaint for fraud<sup>174</sup> alleging that he had relied on the mother's false representation that she had taken contraceptive measures. The court affirmed the dismissal of the cross-complaint, and declined to define a standard of conduct.<sup>175</sup> The court cited the "highly intimate

<sup>167</sup> The tort of misrepresentation evolved from the common law action of deceit. James & Gray, *Misrepresentation—Part I*, 37 MD. L. REV. 286, 286-89 (1977). Courts have limited actions in deceit to situations where an intent to mislead is present. See W. PROSSER, *supra* note 59, § 105, at 684. Deceit or fraudulent misrepresentation also has been loosely referred to as fraud. *Id.*

<sup>168</sup> RESTATEMENT (SECOND) OF TORTS ch. 22 scope note (1977).

<sup>169</sup> See, e.g., C. MORRIS & C.R. MORRIS, JR., *supra* note 152, at 291 (suit against crossing guard who accidentally waved car into path of speeding train involves negligent misrepresentation, but is tried as negligence suit).

<sup>170</sup> See 1 F. HARPER & F. JAMES, *supra* note 60, § 7.1, at 528; W. PROSSER, *supra* note 59, § 105, at 685-86; RESTATEMENT (SECOND) OF TORTS § 525 (1977).

<sup>171</sup> 1 F. HARPER & F. JAMES, JR., *supra* note 60, § 7.1, at 528 (law of deceit limited to misrepresentations that cause another to make unwise business judgment resulting in financial loss); see also Green, *Deceit*, 16 VA. L. REV. 749 (1930) (involves property interests affected by commercial and sales transactions); Bohlen, *Misrepresentation As Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733 (1929) (applicable to financial, commercial, or economic matters).

Professor Green notes that injuries to "interests of personality which are brought about through deception," Green, *supra*, at 749 (emphasis in original), may be classified as battery, citing *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920) (cause of action in battery when husband, knowing of his infection, communicated venereal disease to wife), *reh'g denied*, 181 N.C. 66, 106 S.E. 149 (1921), or negligence, see Green, *supra*, at 749 n.6.

<sup>172</sup> There have been few cases, however, upholding misrepresentation actions when personal injuries were involved. W. PROSSER, *supra* note 59, § 105, at 684.

<sup>173</sup> 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980).

<sup>174</sup> *Id.* at 641, 164 Cal. Rptr. at 619. The cross-complaint also alleged negligent misrepresentation and negligence. *Id.*

<sup>175</sup> *Id.* at 643, 164 Cal. Rptr. at 619-20.

nature of the relationship wherein the false representations may have occurred."<sup>176</sup> Similarly, in *Pamela P. v. Frank S.*,<sup>177</sup> a New York paternity action involving a woman's false representation that she was using contraceptives, the appellate division held that any inquiry into the woman's alleged fraud was an "impermissible" invasion of privacy.<sup>178</sup>

In contrast, the court in *Barbara A. v. John G.*<sup>179</sup> held that a man's intentional misrepresentation of his sterility constituted a cause of action for deceit.<sup>180</sup> In *Barbara A.*, the man had allegedly engaged in sexual intercourse with the appellant after he falsely assured her that he was sterile. As a result, she suffered an ectopic pregnancy and underwent life-saving surgery, which rendered her sterile. The court distinguished this situation, where the woman sought damages for injury to her own body, from that of *Stephen K.*, where child support was involved.<sup>181</sup> The court determined that the public policy concern for financial support of a child prevented the mother's misrepresentation from being actionable in *Stephen K.*, but there was no social policy to prevent the misrepresentation from being actionable in *Barbara A.*'s suit for personal injury.<sup>182</sup> Because genital herpes clearly involves bodily injury, courts may also be willing to apply misrepresentation to the genital herpes cases when the elements of the tort are demonstrably present.

In many cases involving the transmission of genital herpes, the plaintiff can prove a prima facie case of misrepresentation. The misrepresentation may be an intentional false statement, either in response to a direct inquiry or as an unsolicited remark that one is free of sexually communicable diseases. This element may also be satisfied if an individ-

<sup>176</sup> *Id.* at 643, 164 Cal. Rptr. at 620. According to the court, "[c]laims such as those presented by plaintiff Stephen . . . arise from conduct so intensely private that the courts should not be asked to nor attempt to resolve [them]." *Id.* at 643, 164 Cal. Rptr. at 619.

<sup>177</sup> 88 A.D.2d 865, 451 N.Y.S.2d 766 (1982), *appeal dismissed*, 58 N.Y.2d 969, 447 N.E.2d 84, 460 N.Y.S.2d 535 (1983).

<sup>178</sup> *Id.* at 866, 451 N.Y.S.2d at 767. The lower court had held that despite its finding of paternity the mother's misrepresentation barred recovery of child support unless the mother were unable to support the child's needs. *Pamela P. v. Frank S.*, 110 Misc. 2d 978, 443 N.Y.S.2d 343 (N.Y. Fam. Ct. 1981). The court expressed its belief that the holding in *Stephen K. v. Roni L.* had improperly ignored the "law of fraud and deceit." *Id.* at 979, 443 N.Y.S.2d at 344.

<sup>179</sup> 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

<sup>180</sup> *Id.* at 377, 193 Cal. Rptr. at 427. The court stated that the action for deceit was sanctioned by CAL. CIV. CODE § 1709 ("One who willfully deceives another with intent to induce him [or her] to alter his [or her] position to his [or her] injury or risk, is liable for any damage which he [or she] thereby suffers."). 145 Cal. App. at 375, 193 Cal. Rptr. at 426. The appellate court also stated that the plaintiff had a cause of action in battery, *see supra* text accompanying notes 157-61.

<sup>181</sup> 145 Cal. App. at 378-79, 193 Cal. Rptr. at 429.

The *Barbara A.* court also rejected the applicability of a privacy defense. *Id.* at 380-81, 193 Cal. Rptr. at 430-31; *see infra* notes 224-32 and accompanying text.

<sup>182</sup> 145 Cal. App. at 379-80, 193 Cal. Rptr. at 429.

ual intentionally conceals the fact of disease from his sexual partner.<sup>183</sup> Because the threat of contracting this incurable disease discourages sexual involvement,<sup>184</sup> an affirmative misrepresentation by the defendant regarding his infection demonstrates his intent to induce another party to rely on the misstatement and consent to sexual activity. Because an individual generally expects truthfulness in the sexual relationship, a plaintiff has a strong case for proving justifiable reliance. Finally, if genital herpes is communicated, the victim suffers damage.<sup>185</sup>

Although a prima facie case of misrepresentation can be established, many courts may be reluctant to expand the scope of the tort of misrepresentation to private sexual activity.<sup>186</sup> Alternative causes of action are available, however. If the misrepresentation is intentional, courts can impose liability in battery. If scienter is lacking, then a negligence cause of action would be appropriate.<sup>187</sup> Because stronger precedent exists for imposing liability for the transmission of genital herpes in battery and in negligence,<sup>188</sup> these causes of action appear to be preferable avenues for recovery.<sup>189</sup>

### III

#### TRADITIONAL DEFENSES TO LIABILITY FOR THE SEXUAL TRANSMISSION OF DISEASE

In early cases involving the sexual transmission of disease, defend-

<sup>183</sup> See W. PROSSER, *supra* note 59, § 106.

<sup>184</sup> See Matthews, *VD Rate in U.S. Takes Dramatic Turn Downward*, Wash. Post, July 2, 1983, at 1, col. 4 (health officials note "fears of herpes").

<sup>185</sup> See *supra* notes 27-39 & 47-51 and accompanying text.

<sup>186</sup> *But cf.* Note, *Fraud Between Sexual Partners Regarding the Use of Contraceptives*, 71 KY. L.J. 593, 615 (1982-83) (fraudulent misrepresentation should be recognized as cause of action where one partner misrepresents to other that contraceptives are being used).

<sup>187</sup> In *Alice D. v. William M.*, 113 Misc. 2d 940, 450 N.Y.S.2d 350 (N.Y. Civ. Ct. 1982), a woman sued to recover the cost of an abortion, alleging that she had relied on her sexual partner's assertion that he was sterile. The court held that because the defendant honestly believed he was sterile, the plaintiff's right to recover was based on negligence, not fraud. *Id.* at 946, 450 N.Y.S.2d at 355.

<sup>188</sup> See *supra* notes 106-14 & 139-64 and accompanying text.

<sup>189</sup> Misrepresentation may offer a useful avenue for third party liability in herpes cases. Suppose *A* either infects *B* with genital herpes or admits to *B* that he has the disease. *A* subsequently dates *C*, a relative or close friend of *B*. *C* makes inquiries to *B* regarding *A*'s health. *B* fails to disclose *A*'s infection. *C* contracts genital herpes from *A*. Is *B* liable to *C*? In *Leventhal v. Liberman*, 262 N.Y. 209, 186 N.E. 675 (1933), a woman brought an action against the father and sister of her former husband for false representations that had induced her to marry. The father and sister had assured the plaintiff prior to marriage that her future husband was in good health, although they knew the husband-to-be was tubercular and addicted to drugs. In ruling that the defendants were liable for damages sustained as a result of the marriage, the court stated that "there comes a time when the truth must be spoken." *Id.* at 213, 186 N.E. at 677. For contemporary evidence of reliance on third party information, see *The New Scarlet Letter*, *supra* note 41, at 65 (account of man contacting best friend of woman with whom he wanted to have sex to ask whether intended sexual partner had genital herpes).

ants, depending on their marital status, often relied on one of two defenses. A defendant sued by his or her spouse would raise the doctrine of interspousal tort immunity, which precludes one spouse from maintaining an action against the other for a personal tort. In extramarital or premarital relationships, a defendant would argue that the illegality of sexual activity itself precluded liability. In recent years, however, many courts have either limited or rejected the applicability of these defenses to tort liability.<sup>190</sup>

#### A. Interspousal Tort Immunity Doctrine

At common law, upon marriage, the legal existence of the wife was incorporated into that of the husband and the two were considered "one person in law."<sup>191</sup> The legal incidents of marriage therefore prevented one spouse from holding the other civilly liable for a tort occurring either before or during marriage.<sup>192</sup>

The doctrine of interspousal tort immunity has precluded liability in several cases involving the sexual transmission of disease.<sup>193</sup> In *Bandfield v. Bandfield*,<sup>194</sup> a wife sued her former husband for infecting her during marriage with an incurable venereal disease. In this 1898 decision, the Michigan Supreme Court refused to permit the wife to maintain the suit, stating that such an action "would be another step to destroy the sacred relation of man and wife."<sup>195</sup> *Bandfield* illustrates a principal rationale for the interspousal tort immunity doctrine—that to allow such personal tort actions between spouses would destroy the peace and har-

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<sup>190</sup> An important affirmative defense to the negligent or intentional infection of genital herpes is the statute of limitations. If the plaintiff fails to bring an action within the time set forth by the appropriate state statute, then recovery will be barred. *See, e.g.,* *Ross v. Ross* (Lake County Ct. App. Ohio 1983, available on LEXIS as *Ross vs. Ross*) (if transmission of genital herpes constitutes assault and battery, then one-year statute of limitation applies). *See also* *Duke v. Housen*, 589 P.2d 334, 338 (Wyo. 1979) (reversing district court award for negligent transmission of gonorrhea on ground that statute of limitations barred action).

<sup>191</sup> 1 W. BLACKSTONE, COMMENTARIES \*430.

<sup>192</sup> *See* McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 303-07 (1959) (discussing legal rights of married women at common law); *see also* *Merenoff v. Merenoff*, 76 N.J. 535, 539-42, 388 A.2d 951, 953-55 (1978) (reviewing history of interspousal tort immunity doctrine).

<sup>193</sup> *Schultz v. Christopher*, 65 Wash. 496, 501, 118 P. 629, 631 (1911) (to permit divorced wife to recover from husband for infecting her with venereal disease during marriage would be "against public policy"); *see also* *Regina v. Clarence*, [1888] 22 Q.B.D. 23 (marital privilege permits husband to knowingly infect wife with venereal disease and escape liability for assault).

In *Bencomo v. Bencomo*, 200 So. 2d 171 (Fla.), *cert. denied*, 389 U.S. 970 (1967), the Florida Supreme Court upheld the interspousal tort immunity doctrine and cited the following language from 41 C.J.S. *Husband and Wife* § 396: "In accordance with [the common law] rule . . . the wife cannot maintain an action against her husband for assault and battery, for deliberately infecting her with a venereal disease." 200 So. 2d at 173.

<sup>194</sup> 117 Mich. 80, 75 N.W. 287 (1898).

<sup>195</sup> *Id.* at 82, 75 N.W. at 288.

mony of the home.<sup>196</sup>

In recent years the doctrine of interspousal tort immunity has fallen into judicial disfavor. The *Restatement (Second) of Torts* takes the position that "[a] husband or wife is not immune from tort liability to the other solely by reason of [the marital] relationship."<sup>197</sup> A majority of states have adopted this position by abrogating the doctrine entirely.<sup>198</sup> In these jurisdictions, the doctrine will not bar suits involving liability for the transmission of genital herpes. Other states apparently allow such actions but only after a marriage has been terminated by divorce.<sup>199</sup> Several states have rejected interspousal tort immunity only as to intentional torts;<sup>200</sup> in these jurisdictions, plaintiffs would pursue a cause of

<sup>196</sup> See RESTATEMENT (SECOND) OF TORTS § 895F comment d (1979). For a critical analysis of the rationales supporting the interspousal tort immunity doctrine, see Judge Prager's dissent in *Guffy ex rel. Reeves v. Guffy*, 230 Kan. 89, 105-13, 631 P.2d 646, 655-60 (1981).

At least one state has construed its married women's act as allowing a woman to maintain an action against her husband for the transmission of venereal disease. *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920), *reh'g denied*, 181 N.C. 66, 106 S.E. 149 (1921). Beginning with Maine in 1844, every state enacted legislation to remove some or all of the common law disabilities of married women. See *McCurdy*, *supra* note 192, at 308 & n.40. See generally H. CLARK, *supra* note 133, § 9.1 (1968). In *Crowell*, the court held that the North Carolina married women's act gave the wife the right to recover damages for injuries to her person from her husband "as fully as against any one else." 180 N.C. at 521, 105 S.E. at 209. The wife in *Crowell* sued her spouse for infecting her with venereal disease. The court affirmed a judgment in favor of the wife but acknowledged that prior to the adoption of the married women's act, she could not have maintained the action. *Id.* at 520, 105 S.E. at 209. The defendant's moral turpitude seems to have particularly influenced the court's decision.

[N]o principle of justice can maintain the proposition in law, or in morals, that a debauchee, as the defendant admits himself to be, can marry a virtuous girl, and, continuing his round of dissipation, [contract a] venereal disease, communicate it to his wife, . . . subjecting her to humiliation and ruining her physically for life, . . . yet be exempted from all liability by the assertion that he and his wife are one . . . .

*Id.* at 523, 105 S.E. at 210. In contrast, the majority of American courts construed similar enactments to permit a wife to maintain an action against her spouse for torts involving property interests but not for tortious personal injury. RESTATEMENT (SECOND) OF TORTS § 895F comment c (1979); *McCurdy*, *supra* note 192, at 313-14.

In *Bandfield*, the court, after considering the Michigan married women's act, concluded that absent an "express" statute a wife had no right to maintain an action at law for a personal tort against her spouse. 117 Mich. at 82, 75 N.W. at 288. See also *Thompson v. Thompson*, 218 U.S. 611, 618-19 (1910) (construing a District of Columbia statute granting certain legal rights to married women and holding that, under the statute, a wife did not have the right to sue her spouse for battery); *Schultz v. Christopher*, 65 Wash. 496, 498-500, 118 P. 629, 629-30 (1911).

<sup>197</sup> RESTATEMENT (SECOND) OF TORTS § 895F(i) (1979).

<sup>198</sup> RESTATEMENT (SECOND) OF TORTS § 895F, at 287-89 (App. 1982).

<sup>199</sup> See, e.g., *Windauer v. O'Connor*, 107 Ariz. 267, 485 P.2d 1157 (1971) (intentional tort); *Stoker v. Stoker*, 616 P.2d 590 (Utah 1980) (intentional tort); see also RESTATEMENT (SECOND) OF TORTS § 895F, at 289-90 (App. 1982).

<sup>200</sup> See, e.g., *Windauer v. O'Connor*, 107 Ariz. 267, 268, 485 P.2d 1157, 1158 (1971) ("an intentional tort inflicted by one spouse on another so clearly destroys the concept of unity that the basis for the doctrine is lost"); *Apitz v. Dames*, 205 Or. 242, 287 P.2d 585 (1955); *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977).

action in battery rather than negligence. In those states that strictly adhere to the interspousal tort immunity doctrine,<sup>201</sup> the doctrine remains a formidable barrier to the success of genital herpes suits.<sup>202</sup>

### B. Illegality of Sexual Conduct

In recognition of traditional moral and religious values, many jurisdictions enacted criminal statutes against fornication and adultery.<sup>203</sup> These statutes have permitted defendants in sexual transmission of disease cases who were not married to their sexual partners to argue that the illegality of their sexual activity precluded liability. In several early cases, courts upheld this argument as an absolute defense.<sup>204</sup> In other

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<sup>201</sup> The following courts have upheld the doctrine of interspousal immunity for postnuptial torts: *Alfree v. Alfree*, 410 A.2d 161 (Del. 1979), *appeal dismissed*, 446 U.S. 931 (1980); *Raisen v. Raisen*, 379 So. 2d 352 (Fla. 1979), *cert. denied*, 449 U.S. 886 (1980); *Jones v. Swett*, 244 Ga. 715, 261 S.E.2d 610 (1979); *Tugaeff v. Tugaeff*, 42 Hawaii 455 (1958); *Vogel v. Robison*, 80 Ill. App. 3d 312, 399 N.E.2d 688, *appeal dismissed*, 449 U.S. 944 (1980); *Guffy ex rel. Reeves v. Guffy*, 230 Kan. 89, 631 P.2d 646 (1981); *Smith v. Southern Farm Bureau Casualty Ins. Co.*, 247 La. 695, 174 So. 2d 122 (1965); *McNeal v. Administrator of Estate of McNeal*, 254 So. 2d 521 (Miss. 1971); *Martinez v. Lankster*, 595 S.W.2d 316 (Mo. App. 1980); *State Farm Mut. Auto Ins. Co. v. Leary*, 168 Mont. 482, 544 P.2d 444 (1975); *Morrissett v. Morrissett*, 80 Nev. 566, 397 P.2d 184 (1964); *Varholla v. Varholla*, 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978); *Asplin v. Amica Mut. Ins. Co.*, 121 R.I. 51, 394 A.2d 1353 (1978); *Childress v. Childress*, 569 S.W.2d 816 (Tenn. 1978); *McKinney v. McKinney*, 135 P.2d 940 (Wyo. 1943); *see also Note, Torts—Interspousal Tort Immunity in Kansas: A Vestige of a Bygone Era—Guffy v. Guffy*, 30 U. KAN. L. REV. 611, 611 nn.3 & 5 (1982) (listing state court decisions on immunity doctrine).

Several courts that adhere to the immunity doctrine have held that the immunity does not apply to torts committed before marriage. *See, e.g.*, *Chen v. Liao*, 420 F. Supp. 472 (D. Del. 1976) (applying Delaware law); *Gaston v. Pittman*, 224 So. 2d 326 (Fla. 1969) (action for premarital tort can be brought after divorce); *O'Grady v. Potts*, 193 Kan. 644, 396 P.2d 285 (1964); *Hamilton v. Fulkerson*, 285 S.W.2d 642 (Mo. 1955); *Pearce v. Boberg*, 89 Nev. 266, 510 P.2d 1358 (1973). In these jurisdictions, victims of genital herpes who contract the disease from their spouse prior to marriage would appear to be allowed to sue.

<sup>202</sup> *See, e.g.*, *Ross v. Ross* (Lake County Ct. App. Ohio 1983, available on LEXIS as *Ross vs. Ross*) (upholding directed verdict and dismissal of complaint as interspousal immunity doctrine barred action for transmission of genital herpes). In one of the genital herpes suits, *St. Clair v. St. Clair*, the law of Missouri which follows the interspousal tort immunity doctrine is controlling. The complaint, however, claims that Missouri decisions upholding the doctrine violate the wife's "constitutional rights." *Ostroff, supra* note 2, at 40, col. 4.

<sup>203</sup> Fornication is the "[u]nlawful sexual intercourse between two unmarried persons." BLACK'S LAW DICTIONARY 588 (rev. 5th ed. 1979); *see, e.g.*, ILL. ANN. STAT. ch. 38, § 11-8 (Smith-Hurd 1979); MASS. ANN. LAWS ch. 272, § 18 (Michie/Law. Co-op. 1980).

Adultery is the "[v]oluntary sexual intercourse of a married person" with an individual other than the offender's spouse. BLACK'S LAW DICTIONARY, *supra*, at 47; *see, e.g.*, CONN. GEN. STAT. ANN. § 53 a-81 (West 1972); MASS. ANN. LAWS ch. 272, § 14 (Michie/Law. Co-op. 1980); *see also* D. MACNAMARA & E. SACARIN, SEX, CRIME, AND THE LAW 191 (1977) (laws prohibiting adultery generally considered necessary as "moral expression of the sanctity of the family").

<sup>204</sup> *E.g.*, *Hegarty v. Shine* [1878] 14 Cox's Crim. Law Cases 145. In *Hegarty*, a woman sued her lover in battery for transmitting syphilis to her. The court refused to hear the case on the theory of *ex turpi causa non oritur actio* (out of an illegal consideration, an action cannot arise). *Id.* at 150 (Palles, C.B.). Moreover, even if public policy did not preclude plaintiff's suit, the court stated that her lover's failure to disclose did not constitute fraud and, therefore,

cases, courts, although recognizing the defense of illegality, limited its application to situations where the parties were of "equal guilt."<sup>205</sup>

In contemporary society, however, changing social mores have led to an acknowledgment, if not an acceptance, of sexual relationships between unmarried individuals.<sup>206</sup> Relaxed sexual standards, often described as a "revolution" in the popular literature,<sup>207</sup> have led to more liberal social attitudes. Court decisions parallel this change.

Two California courts have recently upheld a plaintiff's right to sue for damages arising from a premarital sexual relationship. In *Barbara A.*

did not vitiate plaintiff's consent. "From such a relation [premarital sex], illegal and immoral in itself, no duty can arise, and in the absence of such duty, the concealment (although intentional and with a view to deceive), of a material fact, is . . . neither fraud nor evidence of fraud." *Id.* See also *Deeds v. Strode*, 6 Idaho 317, 323, 55 P. 656, 658 (1898) (transmission of gonorrhea during invalid marriage not actionable injury); *Oberlin v. Upson*, 84 Ohio St. 111, 117, 95 N.E. 511, 512 (1911) ("theory of the common law is that, since adultery and fornication are crimes, the woman is *particeps criminis* and hence . . . she cannot be heard to complain of a wrong which she helped to produce"); Recent Decisions, *Consent—Criminal Assault by Husband on Wife—Venereal Disease*, 18 COLUM. L. REV. 81, 82 (1918) (in civil cases involving venereal disease infection "against good policy to permit a recovery by [unmarried] plaintiff who exposes herself promiscuously, especially since she must have contemplated such a risk").

<sup>205</sup> *E.g.*, *De Vall v. Strunk*, 96 S.W.2d 245, 249 (Tex. Civ. App. 1936). In *De Vall*, the plaintiff, a single woman, consented to sexual intercourse with the defendant allegedly because he promised to marry her. As a result, she became infected with crab lice. Although the court recognized that no one by his own wrong acquires a right of action, it limited the use of this principle to cases where the parties were equally culpable. In this case, the court held that the defendant's actions were more culpable than the woman's premarital sexual activity because of his misrepresentation and his fraudulent promise to marry. *Id.* at 247.

In *Panther v. McKnight*, 125 Okla. 134, 256 P. 916 (1926), the plaintiff, relying on assurances by the defendant that they were legally married, cohabited with him. The marriage, however, was invalid. As a result of the cohabitation, the defendant infected the plaintiff with venereal disease and she commenced this action to recover damages. The defendant claimed that the plaintiff could not recover because she contracted the disease while violating a public law. The court rejected this argument, holding that the defendant's concealment of his disease as well as his misleading assurances of a lawful marriage were more culpable than the plaintiff's illegal sexual activity. *Id.* at 136, 256 P. at 918.

<sup>206</sup> See M. HUNT, *SEXUAL BEHAVIOR IN THE 1970s*, at 116 (1974) (1972 survey data for all age groups indicated "dramatically increased acceptance" of premarital intercourse in comparison to 1959 and 1968 surveys). Hunt's data also indicated a major increase in extramarital behavior for females between the ages of 18 and 24. *Id.* at 261-63; see also J. DELAMATER & P. MACCORQUODALE, *PREMARITAL SEXUALITY* 93 (1979) (data indicated "marked decline" in number of young people who believed premarital intercourse unacceptable as compared with findings of earlier studies); V. PACKARD, *THE SEXUAL WILDERNESS: THE CONTEMPORARY UPHEAVAL IN MALE-FEMALE RELATIONSHIPS* 33-79 (1968) (survey results indicate an increasing proportion of premarital intimacy among college females, and a slightly higher incidence among college males); Maykovich, *Attitudes Versus Behavior in Extramarital Sexual Relations*, 38 J. MARRIAGE & FAM. 693, 698 (1976) (permissive sexual norms in America have induced many women to approve of extramarital sexual relations); Schmidt, *Sex and Society in the Eighties*, 11 ARCHIVES OF SEXUAL BEHAV. 91 (1982) (commenting on more permissive approaches to sexuality).

<sup>207</sup> S. HITE, *THE HITE REPORT* 447-49 (1976); Leonard, *The End of Sex*, *READER'S DIG.*, Mar. 1983, at 132 (1980 survey of over 100,000 American women indicating that "revolution" occurred in sexual behavior).

*v. John G.*,<sup>208</sup> the court held that a woman stated a cause of action in battery and deceit by alleging that she relied on the respondent's misrepresentation of sterility in consenting to sexual intercourse and, as a result of intercourse, required surgery to correct an abnormal pregnancy.<sup>209</sup> Furthermore, in *Kathleen K. v. Robert B.*,<sup>210</sup> the court found that the plaintiff stated a cause of action by charging the defendant with infecting her with genital herpes.<sup>211</sup> Although neither court expressly rejected the defense of illegality of sexual conduct, neither decision focused on the legality of the litigants' sexual relationship. Thus, it appears that many, if not all, courts would no longer recognize the defense of illegality of conduct in sexual transmission of disease cases if such a defense were offered.

The nonenforcement,<sup>212</sup> modification,<sup>213</sup> or repeal of statutes prohibiting fornication and adultery further supports the position that courts will no longer accept the defense of illegality. In *Alice D. v. William M.*,<sup>214</sup> the court permitted the plaintiff to recover abortion costs even though her pregnancy resulted from a relationship that violated a New York statute prohibiting adultery.<sup>215</sup> The court noted that this statute had rarely been enforced during the past three decades<sup>216</sup> and held that invoking it here would be an injustice.<sup>217</sup>

The more liberal sexual attitudes, the nonenforcement of statutes punishing adultery and fornication, and the recent repeal or modification of many such statutes suggest that courts will accord little weight to the defense of illegality of sexual activity in transmission of genital herpes suits. Even in jurisdictions that wish to champion traditional morality, the need to curb the spread of genital herpes in order to protect public health should outweigh any perceived need to punish individual plaintiffs for premarital or extramarital sexual relations.

<sup>208</sup> 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

<sup>209</sup> *Id.* at 375, 193 Cal. Rptr. at 426; see *infra* text accompanying notes 224-32.

<sup>210</sup> 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

<sup>211</sup> *Id.* at 996-97, 198 Cal. Rptr. at 276-77; see *infra* text accompanying notes 233-37.

<sup>212</sup> See D. MACNAMARA & E. SAGARIN, *supra* note 203, at 187 (fornication statutes rarely prosecuted or enforced); G. MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 45 (1961) ("minute" number of adultery prosecutions); M. PLOSCOWE, SEX AND THE LAW 155 (1951) (nonenforcement of fornication and adultery statutes is "general rule").

<sup>213</sup> Compare G. MUELLER, *supra* note 212, at 84-88 (state-by-state listing of adultery and fornication statutes) with C. MASSEY & R. WARNER, SEX, LIVING TOGETHER, AND THE LAW 22-31 (1974) (same).

<sup>214</sup> 113 Misc. 2d 940, 450 N.Y.S.2d 350 (Civ. Ct. 1982).

<sup>215</sup> *Id.* at 946-49, 450 N.Y.S.2d at 355-57.

<sup>216</sup> *Id.* at 947, 450 N.Y.S.2d at 355.

<sup>217</sup> *Id.*

## IV

## PRIVACY: A FINAL CONCERN

Any proposal to impose tort liability for the transmission of genital herpes must confront the argument that it violates the constitutional right to privacy.<sup>218</sup> Three recent California decisions have addressed the right to privacy issue in the context of intimate relationships. In *Stephen K. v. Roni L.*,<sup>219</sup> a paternity action, the defendant crossclaimed for damages, alleging that he had had sexual relations with the child's mother, but that he had relied on her false assurances that she had taken oral contraceptives.<sup>220</sup> The trial court sustained the mother's demurrer to the crossclaim.<sup>221</sup> On appeal, the court expressed an unwillingness to supervise the promises of two consenting adults "as to the circumstances of their private sexual conduct."<sup>222</sup> The court affirmed the lower court's ruling, indicating that to do otherwise would "encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy."<sup>223</sup>

In a second case, *Barbara A. v. John G.*,<sup>224</sup> a woman brought an action against her sexual partner for damages<sup>225</sup> after suffering a life-threatening ectopic pregnancy.<sup>226</sup> She had consented to sexual relations in reliance on the defendant's knowingly false representation of his sterility. The trial court, relying on *Stephen K.*, ruled that the woman had failed to state a cause of action.<sup>227</sup> On appeal, however, the court distinguished *Stephen K.* on the ground that it involved damages for "wrongful birth," rather than for direct bodily injury.<sup>228</sup> Thus, *Stephen K.* involved public policy considerations regarding parental child support that were absent in *Barbara A.*<sup>229</sup> The appellate court further noted that the right

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<sup>218</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972) (ban on distribution of contraceptives to unmarried persons is unwarranted governmental intrusion into individual's right to privacy); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (individual has right "to be free, except in very limited circumstances, from unwanted governmental intrusions into [his] privacy"); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (state law prohibiting use of contraceptives by married couples unconstitutionally intrudes on right of marital privacy). See generally Kohn, *Conflicting Rights of Privacy and the Duty of Disclosure Between Sexual Partners*, 11 LAW, MEDICINE & HEALTH CARE 264-70 (1983).

<sup>219</sup> 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980).

<sup>220</sup> *Id.* at 641-42, 164 Cal. Rptr. at 619.

<sup>221</sup> *Id.* at 642, 164 Cal. Rptr. at 619.

<sup>222</sup> *Id.* at 644-45, 164 Cal. Rptr. at 620.

<sup>223</sup> *Id.* at 645, 164 Cal. Rptr. at 620.

<sup>224</sup> 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

<sup>225</sup> *Id.* at 373, 193 Cal. Rptr. at 425.

<sup>226</sup> In an ectopic pregnancy, the fertilized egg develops outside the uterus. *Id.* at 373 n.1, 193 Cal. Rptr. at 425 n.1 (citing *STEDMAN'S MEDICAL DICTIONARY* 1013 (3d unabridged lawyer's ed. 1972)).

<sup>227</sup> *Id.* at 374, 193 Cal. Rptr. at 425.

<sup>228</sup> *Id.* at 378-79, 193 Cal. Rptr. at 429.

<sup>229</sup> *Id.*

to privacy in sexual matters is "not absolute,"<sup>230</sup> and cited various examples of government intervention in matters affecting sexual activity.<sup>231</sup> The court concluded that the right to privacy does not "insulate from liability one sexual partner who by intentionally tortious conduct causes physical injury to the other."<sup>232</sup>

In *Kathleen K. v. Robert B.*,<sup>233</sup> a California appellate court again addressed the privacy issue. In *Kathleen K.*, a woman sued her former lover for infecting her with genital herpes. The trial court, relying on the right to privacy argument asserted in *Stephen K.*, ruled that the plaintiff failed to state a cause of action.<sup>234</sup> The appellate court reversed, holding that *Barbara A.* was controlling.<sup>235</sup> The court noted that the "right of privacy is not absolute" and could be "outweighed by the right of the state to protect the health, welfare and safety of its citizens."<sup>236</sup> The court determined that the tortious nature of the defendant's conduct in failing to disclose his infection, together with the state interest in arresting the spread of "contagious and dangerous diseases," established a cause of action.<sup>237</sup>

Understandably courts are reluctant to sanction state intrusion into the privacy of intimate relationships. The critical question, however, is whether such intrusion is warranted in particular circumstances. In the past, various state jurisdictions have enacted legislation imposing penalties for the transmission of venereal disease.<sup>238</sup> These laws demonstrate the significant community concern regarding the health consequences of sexually transmitted diseases. This concern suggests that courts should not permit the right of privacy to shield individuals who, by communicating genital herpes, endanger community health and inflict physical injury on their sexual companions.<sup>239</sup> Instead, courts, in imposing tort liability for the sexual transmission of genital herpes, must subordinate the right of privacy to the societal interest of protecting the public health.

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<sup>230</sup> *Id.* at 380, 193 Cal. Rptr. at 430.

<sup>231</sup> *Id.* at 380-81, 193 Cal. Rptr. at 430-31. Specifically, the court cited penal statutes covering forcible and consensual sexual acts, the prohibition of spousal rape, and the various civil law provisions concerning paternity. *Id.*

<sup>232</sup> *Id.* at 381, 193 Cal. Rptr. at 431.

<sup>233</sup> 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

<sup>234</sup> *Id.* at 994, 198 Cal. Rptr. at 274.

<sup>235</sup> *Id.* at 998, 198 Cal. Rptr. at 277.

<sup>236</sup> *Id.* at 996, 198 Cal. Rptr. at 276.

<sup>237</sup> *Id.* at 996-97, 198 Cal. Rptr. at 276.

<sup>238</sup> *See supra* note 95.

<sup>239</sup> *Cf. Note, supra* note 186, at 615 (where false representation of contraceptive use, right to privacy in sexual relations should not preclude legal action where "compelling state interest" for recovery).

## CONCLUSION

The strength of the common law is embodied in its capacity to respond to societal needs. The common law can fashion appropriate rules to advance community goals and to ensure that the losses arising from human interaction are distributed equitably.

American society now confronts an epidemic spread of genital herpes, a disease that infects upwards of ten percent of the population. Because the disease is presently incurable, a continuing increase in the number of individuals afflicted is anticipated. The health risks associated with genital herpes underscore the compelling need to arrest its spread.

Tort law offers a means to serve the public policy objective of curbing the spread of this disease while providing compensation to its many innocent victims. Through causes of action in negligence and battery, courts may impose liability on those who transmit genital herpes to their sexual partners.

Actions in negligence, by providing a broader range of liability, more ably serve this policy objective. Further, by recognizing that the sexual relationship creates a duty to protect one's partner from the sexual transmission of genital herpes, the law of negligence offers the framework to establish that the standard of care is the obligation to disclose one's infection to a sexual partner. Such disclosure would not only curb the spread of genital herpes but would also foster accountability and trust in the sexual relationship.

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