

THE REAL FATAL ATTRACTION: CIVIL AND CRIMINAL LIABILITY FOR THE SEXUAL TRANSMISSION OF AIDS

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I. INTRODUCTION—HISTORICAL AND MEDICAL BACKGROUND OF AIDS

Few if any medical discoveries in the past decade will have as profound an impact on the United States as one made in 1981. In that year physicians

in both New York and Los Angeles encountered a medical phenomenon¹ which has since thrust this country into a new era. This phenomenon arose when previously healthy men developed prolonged states of ill health followed, after many weeks or months, by fatal infections.² While doctors had encountered such infections before, they were limited to individuals who had genetic immune deficiencies, who were immunologically crippled by malignant disease, or who had ingested powerful drugs to facilitate organ transplants.³ The destruction of the immune system in these new cases, however, did not result from any of the above circumstances.⁴

After persistent research, doctors discovered that a unique virus, referred to as human immunodeficiency virus [hereinafter HIV],⁵ was infecting the individuals and destroying their bodies' ability to prevent disease. Further, researchers learned that the virus invades and kills the white blood cells, known as T-helper cells,⁶ which are primarily responsible for preventing infectious disease.⁷ As a consequence of the destruction of these cells, the individual is not only reduced to a perpetual state of illness, but is also made susceptible to relatively rare and lethal infections.⁸

Several discoveries indicated that HIV was uniquely dangerous. First, HIV is a retrovirus, as opposed to an ordinary virus.⁹ Second, while the virus

1. D. ALTMAN, *AIDS IN THE MIND OF AMERICA* 31 (1986).

2. Osborn, *The AIDS Epidemic: Discovery of a New Disease*, in *AIDS AND THE LAW: A GUIDE FOR THE PUBLIC* 18 (H. Dalton & S. Burris eds. 1987) [hereinafter Osborn].

3. *Id.*

4. *Id.*

5. The virus is also referred to as Human T-Lymphotropic Virus Type III (HTLV-III) and Lymphadenopathy Associated Virus (LAV). See IOWA DEPT. OF PUBLIC HEALTH, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 9 (1987) [hereinafter SURGEON GENERAL'S REPORT].

6. The body's immune system is made up of T-lymphocytes, a type of white blood cell. *The AIDS Epidemic: The Search for a Cure*, *NEWSWEEK*, Apr. 18, 1983, at 76. These are divided into T-helper cells and T-suppressor cells. *Id.* The T-helper cells help other immune cells to perform their functions, while the T-suppressor cells restrain the immune system from over-reacting. *Id.* HIV destroys the T-helper cells within the immune system and thus inverts the ratio of T-helper to T-suppressor cells. This weakens the immune system's ability to resist opportunistic infections. *Id.*

7. Green, *The Transmission of Aids*, in *AIDS AND THE LAW: A GUIDE FOR THE PUBLIC* 29 (H. Dalton & S. Burris eds. 1987) [hereinafter Green].

8. *Id.*

9. Several characteristics of the retrovirus warrant concern. First, the scientific community has been aware of human retroviruses only since 1979. Grieco, *Medical Facts Related to Legal Issues*, in *AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS* 29 (1986) [hereinafter Grieco]. Scientific knowledge about HIV, therefore, is relatively limited. Second, a retrovirus has the ability to reverse the normal process of transcription so that a DNA provirus copy can be integrated permanently into the human cell. Goedert, *HTLV-III (AIDS Virus): Modes of Transmission and Natural History*, in *AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS* 23 (1986) [hereinafter Goedert]. Third, a retrovirus is able to activate a variety of host genes which are distant from the viral integration site, and can result in a myriad of manifestations. *Id.* Fourth, a retrovirus has a long incubation period prior to the manifestation of illness. *Id.* These factors result in the

is easily destroyed when outside the human body,¹⁰ it is remarkably immune to destruction once inside the body.¹¹ Third, there is no treatment which permanently reverses the suppression of the body's immune system, nor is there a vaccine which could prepare that system to defend itself against HIV.¹² Moreover, no scientific cure is expected for at least another decade.¹³

After an individual has been infected with HIV, there are three distinct conditions which may result. These conditions are the seropositive state, AIDS-related complex [hereinafter ARC], and acquired immune deficiency syndrome [hereinafter AIDS]. While the conditions generally progress in the above order, the manifestation of an earlier stage does not necessarily mean that a more dangerous subsequent condition will develop.¹⁴

As previously indicated, the first of these conditions is the seropositive state. An individual classified as seropositive is one who has HIV antibodies in his blood system.¹⁵ The seropositive condition generally develops within two or three months after the initial infection with the virus.¹⁶ During the seropositive state an individual is asymptomatic, evidencing no outward symptoms of the virus, and may remain without symptoms for months, years, or indefinitely.¹⁷ The average incubation period of HIV, prior to the onset of AIDS and after the seropositive state, is approximately four and one-half years,¹⁸ but it can be as long as seven years.¹⁹

efficient destruction of the human immune system, and also propose a difficult challenge to the scientific community in rendering the virus harmless.

10. R.E. LONG, AIDS 15 (1987). In fact, common detergents and cleansers, including hand soap, will kill HIV. *Id.*

11. The virus is dependent upon an intimate association with certain body cells which usually attack and destroy foreign substances; once within those cells it is virtually immune. *Id.* Moreover, since the virus thrives in a chilly environment, it survives best inside the cells rather than in the serum, the liquid part of the blood. F. SIEGAL, AIDS: THE MEDICAL MYSTERY 42 (1983). See also R.E. LONG, AIDS 15 (1987). Thus, the very cells which normally protect an individual from parasitic infection become the essence of this virus' survival.

12. Green, *supra* note 7, at 29.

13. While there is no cure for HIV, there is a drug which delays the inevitable death of an AIDS victim. Zidovudine, formerly known as Azidothymidine, received Federal Drug Administration approval in March 1987, and is currently the only agent approved for use in the United States. SEXUALLY TRANSMITTED DISEASE SECTION, IOWA STATE DEPT. OF PUBLIC HEALTH, AIDS: IOWA INFORMATION AND RESOURCE MANUAL 16 (1987). The drug, however, is quite expensive. One estimate indicates that it costs upwards of \$10,000 per year. Heinlein, *Drug Prolongs Life*, Des Moines Register, Apr. 17, 1988, at 4B, col. 3.

14. Many clinical researchers, however, believe that the progression is inevitable. PUBLIC HEALTH SERV., U.S. DEPT. OF HEALTH & HUMAN SERVS., 1 AIDS: A PUBLIC HEALTH CHALLENGE I-1, I-2 (1987) [hereinafter PUBLIC HEALTH CHALLENGE].

15. Green, *supra* note 7, at 29.

16. *Id.*

17. PUBLIC HEALTH CHALLENGE, *supra* note 14, at I-2. See also Green, *supra* note 7, at 30.

18. Green, *supra* note 7, at 30.

19. *Id.* Another source indicates that the incubation period of the virus following a contaminated blood transfusion varies from eight months to six years. See C.F. FARTHING, S.E. BROWN, R.C.D. STAUGHTON, J.J. CREAM & M. MUHLEMANN, A COLOUR ATLAS OF AIDS 17 (1986).

While a person who is seropositive may never develop symptoms or acquire ARC or AIDS, he is capable of transmitting the virus to others.²⁰ During the seropositive state the carrier's blood contains a greater concentration of HIV than in the subsequent stages of the infection.²¹ Thus, the seropositive individual, who is asymptomatic and has the highest concentration of the virus, is the greatest potential threat for the transmission of the virus to another.

The second condition which may develop after the initial infection is AIDS-related complex (ARC). ARC causes moderate damage to the immune system and is characterized by non-specific symptoms of illness which are, in effect, less severe manifestations of symptoms associated with AIDS.²² ARC can be characterized, therefore, as a transition stage between the initial infection with HIV and the potentially complete manifestation of AIDS. The significant difference between ARC and AIDS is that although death may occur in ARC patients before the full development of AIDS, most patients maintain their marginal status for a period of time without progressing to full-blown AIDS.²³

The third stage is acquired immune deficiency syndrome (AIDS).²⁴ At this stage the immune system has been destroyed, and the body is continually susceptible to additional infections and opportunistic diseases.²⁵ The diagnosis of AIDS includes the determination of whether the patient has the HIV antibodies in his blood, thereby indicating the seropositive state.²⁶ The victim also has few T-helper blood cells and a low ratio of T-helper blood cells to T-suppressor blood cells.²⁷ The final requirement is the presence of one or more opportunistic infections, which indicate an underlying cellular immunodeficiency.²⁸

The visible manifestations of AIDS which result from the immune deficiencies described above include unexpected weight loss,²⁹ persistent fever,³⁰

[hereinafter A COLOUR ATLAS].

20. Green, *supra* note 7, at 30.

21. Grieco, *supra* note 9, at 30.

22. PUBLIC HEALTH CHALLENGE, *supra* note 14, at I-2.

23. *Id.* To date, approximately thirty percent of ARC patients have progressed to AIDS. *Id.* Another study indicated that half of the carriers of HIV will develop AIDS and another twenty-five percent will develop ARC within nine years of infection. See Eckholm, *Half of AIDS Carriers May Develop Disease*, Des Moines Register, Mar. 13, 1988, at 2A, col. 1.

24. For a description of the suffering experienced by an AIDS victim, see *People v. Camargo*, 135 Misc. 2d 987, ___, 516 N.Y.S.2d 1004, 1005 (Sup. Ct. 1986) (the court dismissed controlled substance charges against an AIDS victim with three to four months to live).

25. Opportunistic diseases are those diseases which result from a weak or destroyed immune system and which otherwise would be prevented. PUBLIC HEALTH CHALLENGE, *supra* note 14, at I-1. See also Green, *supra* note 7, at 30.

26. Green, *supra* note 7, at 30.

27. *Id.*

28. *Id.*

29. Generally, AIDS victims lose more than ten pounds in less than two months. AIDS

swollen glands, enlarged lymph nodes,³¹ night sweats,³² persistent diarrhea, dry persistent cough, bumps or blotches on or under the skin,³³ persistent fatigue, and occasionally brain impairment.³⁴ In addition, with the destruction of the immune system, the individual becomes susceptible to a wide range of diseases and infections. Two opportunistic diseases which were previously rare in Americans, *Pneumocystis carinii* pneumonia³⁵ and Kaposi's sarcoma,³⁶ have become leading causes of death among AIDS patients.³⁷

While the incident of AIDS appears relatively low, the infection nonetheless has spread at an alarming rate. Since its initial conception in Africa more than a decade ago,³⁸ the virus has become pandemic, infecting every

COALITION OF NORTHEAST IOWA, NORTHEAST COUNCIL ON SUBSTANCE ABUSE, & AMERICAN RED CROSS HAWKEYE CHAPTER, IV USERS BEWARE (1987) [hereinafter IV USERS BEWARE]. Another source indicates that the weight loss symptom involves loss of greater than ten percent of total body weight. See A COLOUR ATLAS, *supra* note 19, at 16.

30. A "persistent fever" has been defined as fever lasting longer than three months. A COLOUR ATLAS, *supra* note 19, at 16. However, it also has been defined as fever lasting longer than one week. IV USERS BEWARE, *supra* note 29.

31. Lymph node enlargement commonly results from most infections. F. SIEGAL, AIDS: THE MEDICAL MYSTERY 17-18 (1983). It is generally transitory, but if it persists, it is a danger sign. *Id.*

32. Generally, the night sweats associated with AIDS last for several weeks. IV USERS BEWARE, *supra* note 29.

33. The bumps and blotches usually are located inside the mouth, nose, eyelid, or rectum. *Id.*

34. On rare occasions the virus may invade brain cells and cause forgetfulness, impaired speech, seizures, or trembling. *Id.*

35. The most common cause of death, accounting for approximately one-half of the fatalities, is *Pneumocystis carinii* pneumonia. Green, *supra* note 7, at 30. *Pneumocystis carinii* is an extremely rare parasitic lung infection which previously only afflicted individuals who were severely immuno-suppressed by the ingestion of certain drugs which were provided to combat cancer or which were necessary for organ transplants. Osborn, *supra* note 2, at 18. While the agent of the disease is carried by most individuals, it is rendered harmless by a healthy immune system. F. SIEGAL, AIDS: THE MEDICAL MYSTERY 22-23 (1983). With the deterioration of that system, however, the victim is killed by a disease his immune system was once able to suppress. *Id.*

36. Kaposi's sarcoma is a multicentric cancer which results in the development of independent tumors at various locations on the body. F. SIEGAL, AIDS: THE MEDICAL MYSTERY 38 (1983). The cancer manifests itself in bluish or pink lesions which are slightly raised above the surface of the skin. *Id.*

37. About half of all AIDS patients die from *Pneumocystis carinii* pneumonia. Green, *supra* note 7, at 30. On the average, death occurs two years after the individual is diagnosed as having AIDS. *Id.* In fact, seventy percent of all people with AIDS die within two years of diagnosis. U.S. DEPT. OF HEALTH & HUMAN SERVS., COPING WITH AIDS: PSYCHOLOGICAL AND SOCIAL CONSIDERATIONS IN HELPING PEOPLE WITH HTLV-III INFECTION 1 (1986).

38. It is hypothesized that the virus is an evolutionary descendant of a virus which has existed in monkeys for as long as 50,000 years. R.E. LONG, AIDS 12 (1987). African green monkeys carry a virus, STLV-III, which is remarkably similar to the AIDS virus. *Id.* at 13. Africans have frequently been exposed to such monkeys, which forage in garbage dumps and frequently bite and scratch humans. *Id.* In addition, many Africans ate the monkeys as food. *Id.* It is assumed that this contact with green monkeys first implanted the progenitors of the

major continent in the world.³⁹ In Africa alone, the virus already has infected between two and five million people, and it is estimated that by the year 2000, one out of every two sexually active adults in Africa will be infected.⁴⁰

The virus is firmly established in North America, particularly in the United States.⁴¹ While almost half of the AIDS victims come from New York City, San Francisco, and Los Angeles, AIDS has been reported throughout this country's fifty states.⁴² The Center for Disease Control (CDC), the federal agency responsible for monitoring diseases, estimates that 1.5 million Americans now carry the virus, but display no symptoms.⁴³ Moreover, it is estimated that each day one thousand to two thousand additional Americans become infected with HIV.⁴⁴ There have been more than 37,000 reported cases of AIDS, with approximately fifty-eight percent of those cases resulting in death.⁴⁵ It is estimated that by 1991 over 270,000 Americans will have the disease, resulting in approximately 170,000 deaths.⁴⁶ In Iowa there has been a total of 135 cases reported since 1983.⁴⁷

AIDS virus in the human bloodstream. *Id.*

39. For patterns of HIV infection in the world, see Piot, Plummer, Mhalu, Laamboray, Chin & Mann, *AIDS: An International Perspective*, 239 *SCIENCE* 573, 576 (1988). See also *The Bind That Ties All Nations*, U.S. NEWS & WORLD REP., Jan. 12, 1987, at 64.

40. Serrill, *In the Grip of the Scourge*, *TIME*, Feb. 16, 1987, at 58. Africa has been so infested with the AIDS virus, especially among its young people, that one expert feels that AIDS will have a major impact on the development of the continent. *Id.* at 59. In fact, the virus is so pervasive throughout the continent that the countries of Zaire, Uganda, Rwanda, Burundi, Tanzania, and Zambia create an "AIDS belt." *Id.* at 58.

41. It is hypothesized that the disease migrated into this country when New York homosexuals visited Haiti, a popular vacation area in 1970, and became infected from the local populace. The virus had previously been transported to Haiti from Zaire as a result of cultural exchanges between the two French-speaking countries. R.E. LONG, *AIDS* 14 (1987).

42. McAuliffe, *AIDS: At the Dawn of Fear*, U.S. NEWS & WORLD REP., Jan. 12, 1987, at 62.

43. *Id.*

44. Boffey, *U.S. Offers Goal to End Spread of Deadly AIDS*, N.Y. Times, Oct. 1, 1985, § C1, col. 1.

45. DIRECTOR OF PUBLIC HEALTH, IOWA STATE DEPT. OF PUBLIC HEALTH, *FACTS ABOUT AIDS* (1987). Moreover, there is considerable concern that current estimates are extremely conservative. Perhaps best exemplifying the alleged "cover-up" is the death certificate of the famous musician Liberace. *Counting the AIDS Victims*, *NEWSWEEK*, Mar. 25, 1987, at 65. The doctor certified that death was the result of heart failure brought on by a degenerative brain disease. *Id.* The coroner challenged the finding and attributed the death to immune deficiency resulting from AIDS. *Id.* The obvious concern is that since a death certificate is a public record, many officials may be tempted to list innocent-sounding causes of death in an attempt to avoid embarrassing the decedent's survivors. *Id.* The current statistics, therefore, may underestimate the deaths attributable to AIDS. *Id.* See also *AIDS: How Wide the Cover-up?*, U.S. NEWS & WORLD REP., Feb. 23, 1987, at 8.

46. SURGEON GENERAL'S REPORT, *supra* note 5, at 6 (1987) (statement of C. Everett Koop). See also Schreiber, *The Future of AIDS*, *USA WEEKEND*, Des Moines Sunday Register, Mar. 11-13, 1988, at 5; McAuliffe, *AIDS: At the Dawn of Fear*, U.S. NEWS & WORLD REP., Jan. 12, 1987, at 60.

The pervasiveness of the virus in Africa and the United States exemplifies its ease of transmission. The virus is transmitted when certain body fluids of a seropositive carrier enter into a recipient's blood stream.⁴⁸ This transmission generally occurs through sexual contact,⁴⁹ exposure to infected blood products, and birth from an infected mother.⁵⁰ It should be stressed that such direct⁵¹ transmission is required for the virus to be transmitted between individuals because, as previously indicated, if the virus is not within the host cells, it is easily killed.⁵²

Since the exchange of body fluids is necessary to transmit the virus, individuals who engage in particular activities have been labelled at "high risk" for HIV infection. These groups include homosexual and bisexual men, intravenous drug users, blood donors and receivers, persons having heterosexual contact with HIV carriers, and children born to infected mothers.⁵³ Homosexual and bisexual men account for approximately seventy-three percent of the AIDS cases, and heterosexual men and women who are intravenous drug users account for approximately seventeen percent.⁵⁴ Although these two groups currently have a disproportionate share of AIDS and HIV infection, persons at risk include virtually every sexually active person who has not been engaged in an exclusively monogamous sexual relationship during the past five to ten years.⁵⁵

As stated previously, the means by which HIV is transmitted are well documented. Preventing the spread of the virus is a realistic proposition if HIV carriers modify their sexual behavior. As evidenced by the alarming spread of the virus across this country, behavior modification is necessary and apparently practiced by an ineffective number. The severity of the po-

47. SEXUALLY TRANSMITTED DISEASE SECTION, IOWA STATE DEPT. OF PUBLIC HEALTH, AIDS CASES—IOWA (Office Interim Report, Jan. 23, 1989).

48. CENTERS FOR DISEASE CONTROL, 34 MORBIDITY & MORTALITY WEEKLY REP., 681, 682 (Nov. 15, 1985) [hereinafter MMWR], reprinted in AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS 35, 36 (1986) [hereinafter LEGAL ASPECTS]. While the virus has been isolated from blood, semen, saliva, tears, breast milk, and urine, only blood and semen have been implicated in transmission. *Id.*

49. "Sexual contact" includes intercourse, sodomy, fellatio, and cunnilingus.

50. MMWR, *supra* note 48, at 682, reprinted in LEGAL ASPECTS, *supra* note 48, at 36. See also Green, *supra* note 7, at 31.

51. Several studies indicate that nonsexual household contacts with AIDS patients, including casual contact with saliva and tears, will not result in the transmission of the virus. MMWR, *supra* note 48, at 682, reprinted in LEGAL ASPECTS, *supra* note 48, at 36. On the other hand, Masters and Johnson, two well-known sex therapists, conclude that transmission can, and does, occur as a result of person-to-person contact such as kissing. Masters, Johnson & Kolodny, *Sex in the Age of Aids*, NEWSWEEK, Mar. 14, 1988, at 45.

52. R.E. LONG, AIDS 15 (1987).

53. MMWR, *supra* note 48, at 682, reprinted in LEGAL ASPECTS, *supra* note 48, at 36. See also SURGEON GENERAL'S REPORT, *supra* note 5, at 14-21 (1987).

54. U.S. DEPT. OF HEALTH & HUMAN SERVS., COPING WITH AIDS: PSYCHOLOGICAL AND SOCIAL CONSIDERATIONS IN HELPING PEOPLE WITH HTLV-III INFECTION 4 (1986).

55. SURGEON GENERAL'S REPORT, *supra* note 5, at 16.

tential consequences from the transmission of the virus warrants placing responsibility and liability on infected individuals who engage in acts which may result in the transmission of HIV.

The remainder of this note examines the potential civil and criminal liability of an individual who sexually transmits HIV to another individual. The civil causes of action discussed include battery, fraudulent misrepresentation, negligent misrepresentation, intentional infliction of emotional distress, and negligence. The crimes examined include murder, manslaughter, attempted murder, and assault. An examination of these crimes reveals the need for specific legislation which imposes criminal liability on the defendant who intentionally transmits the AIDS virus.

II. CIVIL LIABILITY

This section of the note will explore the various theories of tort liability which may apply to the individual who intentionally or negligently transmits HIV to a sex partner. These theories include battery, fraudulent misrepresentation, negligent misrepresentation, intentional infliction of emotional distress, and negligence.⁵⁶

The basis for imposing liability on the HIV transmitter is analogous to the basis for imposing liability for the sexual transmission of other sexual diseases.⁵⁷ There are no published Iowa cases on this subject,⁵⁸ but case law from other states is useful. The potential defenses available to the HIV transmitter also will be discussed. While this discussion concentrates on defenses available to the HIV defendant-transmitter under Iowa law, a more general discussion is also included.

A. Causes of Action

1. Battery

One theory of recovery for the sexual transmission of HIV is the intentional tort of battery. An actor is subject to liability for battery if "(a) he acts intending to cause a harmful or offensive contact with the person of the

56. The potential tort liability for the transmission of the AIDS virus has been addressed by other authors. See generally Note, *Tort Liability for AIDS?*, 24 Hous. L. Rev. 957 (1987); Baruch, *AIDS in the Courts: Tort Liability for the Sexual Transmission of Acquired Immune Deficiency Syndrome*, 22 TORT & INS. L.J. 165 (1987); Hermann, *AIDS: Malpractice and Transmission Liability*, 58 U. Colo. L. Rev. 63 (1986-87).

57. See generally Note, *Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law*, 70 CORNELL L. REV. 101 (1984) [hereinafter Note]; Annotation, *Tort Liability for Infliction of Venereal Disease*, 40 A.L.R.4th 1089 (1985).

58. The only known Iowa case in which the plaintiff was able to recover for the sexual transmission of a sexual disease was *McGaw v. Mormann* (unpublished decision). In *McGaw* the plaintiff was awarded \$50,000 in damages for her former spouse's "willful and intentional act" of infecting her with genital herpes when the defendant defaulted for failure to plead. See Note, *supra* note 57, at 101 & n.4.

other or a third person, or an imminent apprehension of such contact, and (b) a harmful contact with the person directly or indirectly results."⁵⁹ To maintain an action for battery, an essential element is intent to cause the harmful contact. The intent element is met where the actor desires to cause the consequences of his actions or where he believes that the consequences are substantially certain to result.⁶⁰

In *State v. Lankford*⁶¹ the Delaware Supreme Court addressed the question whether a cause of action for battery may be maintained for transmitting a sexual disease. In *Lankford* the defendant-husband admitted that he transmitted syphilis to his wife and that he had not informed her that he had the disease prior to engaging in sexual intercourse.⁶² The court held that since the accused knew he was infected with syphilis and his infection was unknown to his wife, the intent to communicate the disease to her by having sexual intercourse could be inferred from the results.⁶³

While *Lankford* specifically addressed the essential element of intent, recent cases also provide support for liability under a battery theory. In *Long v. Adams*⁶⁴ the plaintiff alleged that the defendant infected him with genital herpes, which among other things⁶⁵ constituted a battery. Similarly, the plaintiff in *Kathleen K. v. Robert B.*⁶⁶ alleged battery as a basis for recovery when she contracted genital herpes through sexual intercourse with the defendant.⁶⁷ By reversing the trial courts' rulings in favor of summary judgment for the defendant, both the Georgia and California appellate courts recognized the potential liability for battery within the sexual disease context.⁶⁸

Applying this precedent to the situation in which an individual knows he⁶⁹ is infected with HIV and fails to disclose that fact to his sex partner

59. RESTATEMENT (SECOND) OF TORTS § 13 (1965). See also RESTATEMENT (SECOND) OF TORTS § 892(B) comment e, illustration 5 (1979). Illustration 5 states that where "A consents to sexual intercourse with B, who knows that A is ignorant of the fact that B has a venereal disease, B is subject to liability to A for battery." *Id.*

60. RESTATEMENT (SECOND) OF TORTS § 8A (1965). See also W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 8, at 34 (5th ed. 1984) [hereinafter PROSSER ON TORTS].

61. *State v. Lankford*, 29 Del. 594, 102 A. 63 (1917). Although this case involved criminal liability for battery, the elements for civil liability are essentially the same.

62. *Id.* at ___, 102 A. at 64.

63. *Id.* at ___, 102 A. at 64.

64. *Long v. Adams*, 175 Ga. App. 538, 333 S.E.2d 852 (1985).

65. The plaintiff also alleged negligence and intentional infliction of emotional distress. *Id.* at ___, 333 S.E.2d at 853.

66. *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

67. *Id.* at ___, 198 Cal. Rptr. at 274. The plaintiff also alleged negligence, intentional infliction of emotional distress and fraud. *Id.* at ___, 198 Cal. Rptr. at 274.

68. *Id.* at ___, 198 Cal. Rptr. at 274; *Long v. Adams*, 175 Ga. App. 538, ___, 333 S.E.2d 852, 853 (1985).

69. For purposes of this note, "he" is used in the generic sense.

who is subsequently infected with HIV, it is likely that the victim could recover under a battery theory. The element of contact is clearly met through the sexual intercourse. There is no doubt that such contact is harmful or offensive, as the partner probably will experience great emotional suffering and considerable physical injury.⁷⁰ While there may be a problem in establishing an intent to pass the virus to the partner,⁷¹ *Lankford* makes it clear that such desire may be inferred. The major problem in imposing liability for battery, however, will be establishing that the defendant had knowledge of his infection. Because the incubation period of HIV is so long,⁷² it is possible that an HIV carrier could infect another person without knowing it. If the defendant was unaware of his HIV infection, a cause of action for battery will be unsuccessful.

2. *Fraudulent Misrepresentation*

Another intentional tort action which exists for the HIV victim is fraudulent misrepresentation. This cause of action arises where an HIV infected individual, prior to sexual intercourse, makes an express or implied statement to another that he is not infected with HIV and then subsequently transmits the virus.⁷³

The elements of fraudulent misrepresentation in a sexual relationship action were stated in *Barbara A. v. John G.*⁷⁴ as: (1) a false representation made by the defendant; (2) knowledge or belief on the part of the defendant that the representation is false, or that the representation was made by the defendant without reasonable grounds for believing its truth; (3) an intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation; (4) justifiable reliance upon the representation by the plaintiff; and (5) damage to the plaintiff, resulting from such reliance.⁷⁵ Applying these elements to the AIDS situation, an HIV carrier is potentially liable if he knowingly conceals his HIV infection from a prospective sex partner, or if he affirmatively misrepresents that he is not infected, and the plaintiff justifiably relies on this information.

70. See *supra* note 24. See also *infra* notes 103, 110.

71. It has been reported, however, that one homosexual male continued to have sex with three to five males per week even though he knew he had AIDS. See Alder, Greenberg, Hager, McKillop & Namuth, *The AIDS Conflict*, NEWSWEEK, Sept. 23, 1985, at 18.

72. See *supra* notes 18-19 and accompanying text.

73. This kind of scenario is increasingly likely to arise. As more people become aware of AIDS and its devastating effects, it is more likely that an individual will inquire about a potential partner's sexual health status before engaging in sexual intercourse.

74. *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983). While *Barbara A.* is a case of fraudulent misrepresentation which arose when an attorney stated, "I can't possibly get anyone pregnant," and the plaintiff subsequently suffered an ectopic pregnancy, the elements of fraudulent misrepresentation would be the same in an AIDS case.

75. *Id.* at —, 193 Cal. Rptr. at 427. See also RESTATEMENT (SECOND) OF TORTS § 525 (1977).

An action for fraudulent misrepresentation probably will arise where the HIV defendant remains silent about his infection. The general rule is that silence or tacit nondisclosure does not constitute deceit.⁷⁶ An important exception to this rule is that the party with superior knowledge of the fact, resulting in an inequality of condition or knowledge between the parties, has a duty to disclose.⁷⁷ In *Smith v. Peterson*,⁷⁸ for example, the Iowa Court of Appeals held that "[t]he party with the superior knowledge . . . has the duty to disclose those material facts which may be unfavorable to the other party."⁷⁹ This rule may provide a persuasive argument for an AIDS plaintiff in the situation where the defendant was asymptomatic and was not known by the plaintiff to be a member of a high risk group. Since the HIV carrier is in a better position to know if he is infected with the virus,⁸⁰ the plaintiff should not be penalized for not having knowledge of the defendant's infection.

The viability of a fraudulent misrepresentation cause of action in the AIDS context is strongly supported by *Doe v. Doe*.⁸¹ In *Doe* the plaintiff-wife sought compensatory damages for fraud based upon her husband's failure to disclose that he had engaged in a homosexual relationship.⁸² The New York Supreme Court held that the allegations were insufficient to state a claim based solely on fraud because the wife did not actually contract AIDS; she was merely subjected to possible exposure to the condition.⁸³ The court emphasized that an earlier decision, in which the court held that the plaintiff-wife could maintain an action against her husband for the wrongful transmission of genital herpes under a fraud theory,⁸⁴ could be distinguished because the plaintiff in that case actually contracted the sexual disease.⁸⁵ A reasonable inference from this decision is that a fraudulent misrepresentation claim is viable where the plaintiff actually contracts HIV from the defendant.

Support for a fraud claim where an HIV-infected individual sexually transmits the virus to another is also found in California decisions. In *Kathleen K. v. Robert B.*,⁸⁶ the plaintiff sued the defendant for infecting her with

76. PROSSER ON TORTS, *supra* note 60, § 106, at 737.

77. *Id.* Another exception which has been recognized is where the parties stand in some fiduciary or confidential relationship to each other. *See id.* at 738-39. A fiduciary or confidential relationship has been held to exist between both married and non-married sex partners. *See infra* text accompanying notes 116-23.

78. *Smith v. Peterson*, 282 N.W.2d 761 (Iowa Ct. App. 1979).

79. *Id.* at 767.

80. *See infra* notes 145-46 and accompanying text.

81. *Doe v. Doe*, 136 Misc. 2d 1015, 519 N.Y.S.2d 595 (Sup. Ct. 1987).

82. *Id.* at ___, 519 N.Y.S.2d at 596. The plaintiff also alleged infliction of emotional distress. *Id.* at ___, 519 N.Y.S.2d at 596.

83. *Id.* at ___, 519 N.Y.S.2d at 597.

84. *See Maharam v. Maharam*, 123 A.D.2d 165, 510 N.Y.S.2d 104 (1986).

85. *Doe v. Doe*, 136 Misc. 2d at ___, 519 N.Y.S.2d at 597.

86. *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

genital herpes.⁸⁷ When the defendant argued that genital herpes is not a venereal disease, the court stated:

We are not inclined to bar appellant's cause of action on the basis that genital herpes is not a venereal disease. It is a disease that can be propagated by sexual contact. Like AIDS it is now known by the public to be a contagious and dreadful disease. At the core of this action is the misrepresentation of defendant that he did not have a contagious disease that could be passed to his partner. If a person knowingly has genital herpes, AIDS or some other contagious and serious disease, a limited representation that he or she does not have a venereal disease is no defense to this type of action.⁸⁸

It appears quite clear that courts, at least those in California and New York,⁸⁹ are willing to impose liability for injury which is caused by an HIV carrier who makes fraudulent representations to his sex partner. As in battery, the plaintiff must show that the defendant had actual knowledge that he had AIDS or knew he was infected with HIV. If the defendant previously had been diagnosed as having been infected with HIV, one way to prove actual knowledge would be through expert medical testimony.⁹⁰ Another means to prove knowledge might be through a third party who knew the defendant had tested positive for the virus. If this type of evidence is unavailable, a definite proof problem will exist since the incubation periods for HIV⁹¹ vary, and it is therefore possible that a defendant might not have known he was infected with the virus.

3. *Negligent Misrepresentation*

The AIDS plaintiff could avoid the proof problems⁹² of a fraudulent

87. The plaintiff's complaint set forth causes of action based on negligence, battery, intentional infliction of emotional distress, and fraud theories. *Id.* at ____, 198 Cal. Rptr. at 274.

88. *Id.* at ____, 198 Cal. Rptr. at 276 n.3.

89. Additional jurisdictions have recognized an action for fraud in other sexual relationship contexts. *See, e.g.,* Devall v. Strunk, 96 S.W.2d 245 (Tex. Civ. App. 1936) (court held that the plaintiff alleged a proper cause of action for fraud where the plaintiff consented to sexual intercourse with the defendant and contracted "crabs" from the defendant).

90. While there is a potential physician-patient privilege problem, that privilege could be waived. In *Shalhoub v. Viverito*, 133 Misc. 2d 765, 508 N.Y.S.2d 135 (Sup. Ct. 1986), an action in which the plaintiff sought to recover for genital herpes contracted in a sexual relationship with the defendant, the court held that the physician-patient privilege is waived in all actions where the mental or physical condition of a party is in controversy. *Id.* at ____, 508 N.Y.S.2d at 137.

91. *See supra* notes 18-19 and accompanying text.

92. It also should be pointed out that the burden of proof is somewhat higher in a fraudulent misrepresentation claim. As in all fraud cases, the plaintiff must prove each element of the claim with clear and convincing evidence. *See, e.g.,* Alice D. v. William M., 113 Misc. 2d 940, ____, 450 N.Y.S.2d 350, 354 (Civ. Ct. 1982). The Iowa courts also hold that fraud must be proved by a preponderance of clear and convincing evidence. *See, e.g.,* Hagarty v. Dysart-Geneseo Comm. School Dist., 282 N.W.2d 92, 95 (Iowa 1979).

misrepresentation claim by choosing to allege a claim for negligent misrepresentation. Negligent misrepresentation is different from fraudulent misrepresentation in that the plaintiff does not have to prove the defendant possessed the state of mind required for a finding of fraudulent misrepresentation.⁹³ The elements of a negligent misrepresentation claim include: (1) a duty to give correct information; (2) knowledge or its equivalent that the information is desired for a serious purpose; (3) knowledge that the person to whom the information is given intends to rely and act on that information; (4) injury which will be caused to the other person by the false or erroneous information; and (5) a relationship between the parties such that the party to whom the information is given has the right to rely on the other for information.⁹⁴

*Alice D. v. William M.*⁹⁵ provides support for a claim of negligent misrepresentation in the sexual relationship context. In *Alice D.* the parties discussed the use of contraceptives before they engaged in sexual intercourse, and the defendant told the plaintiff that he was sterile.⁹⁶ The plaintiff subsequently became pregnant.⁹⁷ The court held that the plaintiff could not recover on the basis of fraudulent misrepresentation because the defendant honestly believed he was sterile.⁹⁸ The court did, however, allow the plaintiff to recover for negligent misrepresentation.⁹⁹

The reasoning of the court in *Alice D.* may be applied in the AIDS context where the plaintiff, prior to sexual intimacy, directly confronts the defendant about his "HIV status," and the defendant negligently misrepresents his status. Like the defendant in *Alice D.*, who was held to a duty to properly ascertain his sterility,¹⁰⁰ the HIV defendant may be held to a duty to ascertain whether he is infected with HIV. This duty, of course, depends on whether the defendant had reason to believe he was infected with the virus. If the defendant is a member of a high risk group,¹⁰¹ there is a stronger argument that the defendant had reason to believe he was infected.

4. *Intentional Infliction of Emotional Distress*

As discussed previously, there is a long incubation period between development of the HIV antibodies and the actual development of AIDS.¹⁰²

93. See PROSSER ON TORTS, *supra* note 60, § 107, at 742.

94. *Alice D. v. William M.*, 113 Misc. 2d at ___, 450 N.Y.S.2d at 354. See also RESTATEMENT (SECOND) OF TORTS § 311 (1965).

95. *Alice D. v. William M.*, 113 Misc. 2d 940, 450 N.Y.S.2d 350 (Civ. Ct. 1982).

96. *Id.* at ___, 450 N.Y.S.2d at 351-52.

97. *Id.* at ___, 450 N.Y.S.2d at 352.

98. *Id.* at ___, 450 N.Y.S.2d at 354.

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

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

101. See *supra* text accompanying notes 53-54.

102. See *supra* notes 18-19 and accompanying text.

Thus, one may test positive for the virus, yet not develop any physical symptoms for an extended period of time. It is inevitable that the knowledge that one has been infected with the life-threatening virus will result in severe emotional anxiety.¹⁰³ A cause of action based upon the intentional infliction of emotional distress may provide a remedy for those who have been exposed to the virus, but the virus has not actually manifested itself in ARC or AIDS.¹⁰⁴

In cases alleging the intentional infliction of emotional distress, liability is found only where the defendant's conduct has been extreme and outrageous.¹⁰⁵ The conduct must be so extreme as to go beyond all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community.¹⁰⁶ In *Kathleen K. v. Robert B.*,¹⁰⁷ the court noted that the defendant's conduct in transmitting genital herpes to the plaintiff was indeed outrageous, considering the severity, danger, contagion level, and incurability of the disease.¹⁰⁸ If the court is willing to consider the transmission of genital herpes outrageous, surely the sexual transmission of AIDS would meet the standard. Not only is AIDS severe, dangerous, contagious, and incurable, it is fatal.

*Doe v. Doe*¹⁰⁹ is perhaps the strongest authority available to support a claim based upon an intentional infliction of emotional distress theory. In *Doe* the wife's claim for intentional infliction of emotional distress was based on her husband's failure to disclose that he was homosexual and therefore at high risk of contracting AIDS.¹¹⁰ The court dismissed the claim

103. The type of emotional distress experienced by an individual who has had sexual contact with an AIDS victim was described by an attorney for Marc Christian, an alleged sex partner of Rock Hudson who sued Hudson's estate, alleging that Hudson continued to have sex with Christian after Hudson learned he had AIDS.

Marc tells me he has nightmares about dying all the time . . . Then he'll wake up, look in the mirror and wonder if and when [the AIDS symptoms] will happen. Everytime he feels the least bit ill he thinks he's going to die. It could be five years before he knows. He's been to a doctor who told him he will probably get AIDS, the exposure was so high. He's scared to death.

Gorney, *The Courts, Sexually Contracted Diseases, and a Partner's Right to Know*, Wash. Post, Nov. 14, 1985, at C1, col. 3. See also *infra* note 110. See generally U.S. DEPT. OF HEALTH & HUMAN SERVS., *COPING WITH AIDS: PSYCHOLOGICAL AND SOCIAL CONSIDERATIONS WITH HELPING PEOPLE WITH HTLV-III INFECTION* (1986).

104. From a practical standpoint it seems wise to consider such a cause of action because the HIV defendant may die before the plaintiff actually develops ARC or AIDS. On the other hand, if the defendant has begun to deteriorate from AIDS, his financial resources probably are depleted or near depletion and he may be judgment proof. For authority concerning the costs of medical care, see *infra* note 128.

105. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

106. *Id.*

107. *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

108. *Id.* at —, 198 Cal. Rptr. at 276.

109. See *supra* text accompanying notes 81-83.

110. The essential paragraphs of the complaint read:

because it was not based on any tangible injury, but was "based on a fear that was based on attenuated probabilities which in turn are not based on any medical fact or proof, but instead on the recollections of a phone call made by plaintiff all of which adds up to the plaintiff alleging that she has been inflicted with a made-up condition, 'AIDS-phobia.'"¹¹¹ The court's emphasis on the plaintiff's failure to prove she had actually been infected with the AIDS virus suggests the viability of a cause of action for intentional infliction of emotional distress where the plaintiff can prove he was infected with HIV by the defendant.¹¹²

5. Negligence

To prevail on a negligence theory, a plaintiff must establish: (1) that the defendant had a legal duty to act prudently so as to protect others from an unreasonable risk of harm; (2) that the defendant breached that duty; (3)

46. That solely by reason of defendant's breach of his confidential relationship with plaintiff and defendant's failure to disclose his homosexuality and "at high-risk" candidacy for ARC and AIDS, plaintiff has sustained severe emotional and psychological distress and potentially life-threatening disabilities.

47. That by reason of defendant's breach of his confidential relationship with plaintiff and defendant's failure to disclose his homosexuality and "at risk" candidacy for ARC and AIDS, plaintiff has endured great pain and suffering and has incurred a severe traumatic neurosis manifested by depression, anxiety, obsessional symptoms and severe AIDS-phobia evidenced also by frequent crying spells, sleeplessness, nervousness, paranoia, and outbursts of rage.

Doe v. Doe, 136 Misc. 2d at ___, 519 N.Y.S.2d at 597.

111. *Id.* at ___, 519 N.Y.S.2d at 598. The defendant's Reply Affirmation argued that the plaintiff's emotional distress was self-inflicted because the defendant tested negative for AIDS on two occasions, yet the plaintiff refused to submit to an AIDS test and chose instead "to wallow in ignorance, unfounded fear and self-inflicted mental and emotional distress." Reply Affirmation for Defendant at 3, *Doe v. Doe*, 136 Misc. 2d 1015, 519 N.Y.S.2d 595 (Sup. Ct. 1987) (No. 15929/87).

112. While the court in *Doe* implied that an actual infection with the virus is necessary to a recovery for emotional distress, juries have awarded emotional distress damages based solely on the fear of being infected with HIV. In Houston, Texas, a jury in a state district court awarded a woman \$500,000 for emotional distress suffered during her two-year marriage. The plaintiff's complaint included allegations that the defendant-husband committed adultery with women who placed the wife at risk of exposure to AIDS. Taylor, *Divorcing Wife Gets \$500,000 for Distress*, NAT'L L.J., Jan. 25, 1988, at 3, col. 1.

A case more directly supporting recovery for emotional distress without actual HIV infection is that involving Rock Hudson's estate. A Los Angeles Superior Court jury ruled that \$14.5 million in compensatory damages should be paid to Marc Christian, the lover of the late Rock Hudson, for great emotional distress, even though Christian had tested negative for HIV. *Rock Hudson's Lover Awarded \$7 Million More*, Chicago Tribune, Feb. 18, 1989, at 1, col. 3. See also *Rock Hudson's Lover Wins*, NAT'L L.J., Feb. 27, 1989, at 6, col. 1 (\$14.6 million in compensatory damages awarded). The jury also found that Hudson's personal secretary should pay \$7.25 million in punitive and exemplary damages for maliciously concealing the fact that Hudson had AIDS while the actor and Christian continued to have a sexual relationship. *Rock Hudson's Lover Awarded \$7 Million More*, Chicago Tribune, Feb. 18, 1989, at 1, col. 3.

that there is an adequate causal connection between the defendant's conduct and the injury suffered by the plaintiff; and (4) that the plaintiff suffered damage or loss.¹¹³

a. *Duty*. The first question in considering a negligence claim against an HIV carrier is whether that person has a legal duty to warn his sex partner of his infection. Historically, a duty arose:

Whenever one person . . . is by circumstances placed in such a position with regard to another that every one of ordinary sense . . . would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other . . .¹¹⁴

The modern view is that a duty will be found where reasonable persons would recognize a duty and agree that it exists.¹¹⁵

A legal duty to warn a sexual partner of a sexually transmitted disease has been recognized in a number of cases. In those cases involving liability between a husband and wife, it is not surprising that courts are willing to impose a legal duty to warn. In *Maharam v. Maharam*,¹¹⁶ for example, the court found that a thirty-one-year marital relationship gave rise to an affirmative duty to speak.¹¹⁷ In *Crowell v. Crowell*,¹¹⁸ also an action between a wife and her husband for the transmission of a venereal disease, the North Carolina Supreme Court stated that "it is a well-settled proposition of law that a person is liable if he negligently exposes another to a contagious or infectious disease . . ."¹¹⁹

While *Crowell* dicta suggest that there is a legal duty between non-married individuals to prevent the transmission of a sexual disease, there is additional case law which directly supports that proposition. In *Duke v. Housen*¹²⁰ the plaintiff filed a claim against her sex partner for infecting her with gonorrhea. The Wyoming Supreme Court reversed the trial court's judgment for the plaintiff due to the statute of limitations, but the court made it clear that such a cause of action was well-grounded when it stated: "At the very foundation of plaintiff's claim against defendant lie the principles of the law of tort. One who negligently exposes another to an infectious or contagious disease, which such other person thereby contracts, can be

113. PROSSER ON TORTS, *supra* note 60, § 30, at 164-65. See also RESTATEMENT (SECOND) OF TORTS § 281 (1965).

114. PROSSER ON TORTS, *supra* note 60, § 53, at 358 (quoting Lord Esher).

115. *Id.* at 359.

116. *Maharam v. Maharam*, 123 A.D.2d 165, 510 N.Y.S.2d 104 (1986). In this case the wife sued for compensatory and punitive damages upon allegations that her husband fraudulently and negligently infected her with genital herpes. *Id.* at ____, 510 N.Y.S.2d at 105.

117. *Id.* at ____, 510 N.Y.S.2d at 107.

118. *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920).

119. *Id.* at ____, 105 S.E. at 208.

120. *Duke v. Housen*, 589 P.2d 334 (Wyo. 1979).

held liable in damages for his actions."¹²¹

In *Kathleen K. v. Robert B.*,¹²² the California Court of Appeals also made it clear that a legal duty exists between non-married sexual partners. The court rejected the defendant's argument that a confidential relationship of trust does not exist between non-married persons because "a certain amount of trust and confidence exists in any intimate relationship, at least to the extent that one sexual partner represents to the other that he or she is free from venereal or other dangerous contagious disease."¹²³

In view of the fact that most courts recognize a legal duty to prevent the transmission of sexually infectious diseases, it is logical to impose a duty on an HIV carrier to warn his sex partner of his infection with the AIDS virus. AIDS, unlike other sexually transmitted diseases, is fatal. Since the consequences of contracting the virus are so severe, there is no logical reason to refuse to impose a legal duty to prevent its transmission.

After recognizing that a legal duty exists, it is necessary to establish a standard of conduct which must be reached to fulfill that duty. Under a negligence theory the standard of conduct is set by a hypothetical "reasonable person" who acts with "ordinary prudence."¹²⁴ This objective standard purports to impose liability upon an actor who exposes another to a situation that the actor knows, or should know, would cause an unreasonable risk of harm.¹²⁵

The objective standard of conduct requires the HIV carrier who knows or should know¹²⁶ that he was infected with the virus to disclose his infection to his sex partners. Such a disclosure requirement, when compared to the emotional trauma,¹²⁷ hospital care and expenses,¹²⁸ and the high risk of death¹²⁹ associated with HIV, is minimal.

121. *Id.* at 340.

122. *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

123. *Id.* at ____, 198 Cal. Rptr. at 276-77. See also *Long v. Adams*, 175 Ga. App. 538, 333 S.E.2d 852 (1985). The court in *Long* stated that the legal duty "owed by one sexually active person to another . . . is the same one that every individual in this state owes another: the duty to exercise ordinary care not to injure others." *Id.* at ____, 333 S.E.2d at 854.

124. PROSSER ON TORTS, *supra* note 60, § 32, at 174. See also RESTATEMENT (SECOND) OF TORTS § 283 comment c (1965).

125. RESTATEMENT (SECOND) OF TORTS § 284 (1965).

126. It may be difficult to determine when an individual "should know" he is infected with HIV. Most people probably would agree that a homosexual male who engaged in unprotected anal sex with a multitude of partners should know of his infectiousness, but the female sex partner of a male she does not know is bisexual or an IV drug user probably should not be required to know that she might be dangerous to others.

127. See *supra* notes 103, 110.

128. For a detailed description of the medical costs associated with AIDS, see Fox & Thomas, *AIDS Cost, Analysis and Social Policy*, 15 LAW, MEDICINE & HEALTH CARE 186 (1987-88). See also Bloom & Carliner, *The Economic Impact of AIDS in the United States*, 239 SCIENCE 604 (1988).

129. See *supra* text accompanying notes 45-46.

The courts also may look to statutory laws for guidance in setting a standard of conduct. Legislatures across the country have enacted laws which make it a misdemeanor to engage in sexual intercourse while knowingly infected with a venereal disease or knowingly exposing another to an infectious disease. In Iowa any person who knowingly exposes another to infection from any communicable disease is liable for all resulting damages¹³⁰ and is guilty of a simple misdemeanor.¹³¹ The Iowa administrative rules specifically include AIDS among the communicable diseases which are reportable.¹³²

Colorado,¹³³ Idaho,¹³⁴ North Carolina,¹³⁵ Rhode Island,¹³⁶ and Texas¹³⁷ also have recently enacted changes in their laws to include AIDS and HIV infection in the list of infectious diseases. Florida¹³⁸ and Louisiana¹³⁹ have passed specific laws which prohibit an individual with the AIDS virus from having sexual intercourse with another without informing the potential partner of his HIV infection.

In Iowa a violation of the contagious disease statute (which, as previously indicated, includes AIDS) is potentially negligence per se.¹⁴⁰ A majority of courts are in accord with Iowa law and hold that a statutory violation

130. See IOWA CODE § 139.31 (1987).

131. See IOWA CODE § 139.32 (1987).

132. See IOWA ADMIN. CODE r. 641-1.2 & 641-1.2(1) (1987).

133. See COLO. REV. STAT. § 25-4-1401 (Supp. 1987) (declares AIDS an infectious and communicable disease).

134. See IDAHO CODE § 39-601 (Supp. 1988) (AIDS, ARC, and other manifestations of HIV infection in the list of designated venereal diseases declared contagious, infectious, communicable, and dangerous to public health).

135. See N.C. GEN. STAT. § 130A-133 (Supp. 1988) ("communicable condition" defined as "the state of being infected with a communicable agent but without symptoms").

136. See R.I. GEN. LAWS § 23-11-1 (Supp. 1988) (changes the venereal diseases law to the sexually transmitted disease law). See also R.I. GEN. LAWS § 23-5-9 (Supp. 1988) (declares AIDS an infectious and communicable disease).

137. See TEX. REV. CIV. STAT. art. 4419b-1 (Vernon Supp. 1989).

138. See FLA. STAT. § 384.24 (Supp. 1989) (prohibits anyone with HTLV-III infection from having sexual intercourse with any other person unless the other person has been informed of the presence of the condition and has consented to the sexual intercourse). See also FLA. STAT. § 384.34 (provides for fine up to \$500 for each violation of the sexually transmissible disease law).

139. See LA. REV. STAT. § 14:43.5 (Supp. 1989) (prohibits individuals from intentionally exposing others to the AIDS virus through sexual contact without the knowing and lawful consent of the other, and provides for a fine of not more than \$5,000, imprisonment with or without hard labor for not more than ten years, or both, for a violation).

140. In *Peterson v. Taylor*, 316 N.W.2d 869 (Iowa 1982), the Iowa Supreme Court held that once a violation of a statute is established, negligence is conclusively presumed. *Id.* at 876. Other Iowa cases have held, however, that whether a violation of a statute or ordinance is conclusively negligence or evidence of negligence is to be decided in light of the purpose and intent of that statute or ordinance. See, e.g., *Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221 (Iowa 1974).

constitutes conclusive evidence of negligence.¹⁴¹ Some courts, however, hold that a violation of a statute is only evidence of negligence.¹⁴² In either case, where such a statute exists, it prescribes a standard of conduct which should be considered in a negligence action for the sexual transmission of HIV.

b. *Breach of Duty*. Once the court has established that a legal duty exists and has defined the standard of conduct required to fulfill that duty, the next question is whether the defendant HIV carrier failed to conform to that standard. The plaintiff is responsible for proving the defendant's breach of duty by a preponderance of the evidence, but the final determination whether a duty was breached is usually reserved for the jury.¹⁴³

Where there is no statute concerning the defendant's duty, the foreseeability of risk may be a critical factor in determining whether the defendant breached his duty of care toward the plaintiff.¹⁴⁴ Under the foreseeability of risk standard, the plaintiff must show that the defendant knew or should have known¹⁴⁵ of his infection with HIV as well as of the possibility of transmitting the virus to the plaintiff.¹⁴⁶

A potential problem in proving the defendant had knowledge of his HIV infection is the fact that the virus has a wide range of incubation periods.¹⁴⁷ Since a negligence standard demands only that a defendant "should have known of the risk," the plaintiff may be able to overcome this problem by establishing that the defendant falls within one of the high-risk groups¹⁴⁸ or that he was experiencing some of the symptoms associated with the condition.¹⁴⁹ The fact that the defendant honestly believes he is not infected with the virus does not necessarily relieve him of his burden of ascertaining

141. PROSSER ON TORTS, *supra* note 60, § 36, at 230.

142. *Id.*

143. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 19.1, at 1062 (1956).

144. PROSSER ON TORTS, *supra* note 60, § 31, at 169-73.

145. With the availability of blood tests to identify those who are infected with HIV, an increasing number of HIV carriers will have knowledge of their infection. Arguably, those in the high-risk groups should know of their potential infectiousness.

146. If the defendant is aware of his infection, it should not be difficult to show that he knew or should have known that the virus could be transmitted to a sex partner. It has been widely publicized that AIDS can be transmitted through sexual contact, and those who test positive for the virus are usually educated about methods of prevention. For example, a bill introduced in the Iowa legislature stated: "Particular attention shall be given to explaining the need for the precautions necessary to avoid transmitting the virus." H.F. 2294, 72d Leg., 2d Sess. (1988). Furthermore, the United States Department of Health and Human Services sent out a brochure, "Understanding AIDS," to every postal customer during the summer of 1988. This brochure discusses, among other things, the ways in which the virus can be transmitted.

147. See *supra* notes 18-19 and accompanying text.

148. See *supra* text accompanying notes 53-54. This does not hold those who fall into a high-risk group to a higher standard of care. Medical experts have determined that certain groups of people are more susceptible to AIDS. Those people are put on notice that they may be suffering from the AIDS virus when characteristic symptoms appear. It is still a question of fact, however, whether a particular individual "should have known."

149. See *supra* notes 29-34 and accompanying text.

his true status.¹⁵⁰

c. *Causation*. The third element which the plaintiff must prove to recover on a negligence claim is that the defendant's breach of duty caused the plaintiff's injury or harm.¹⁵¹ In a negligence action for the sexual transmission of HIV, the plaintiff must prove, by a preponderance of the evidence, that the defendant's actions actually caused him to contract HIV.

One causation problem arises because HIV is not transmitted exclusively by sexual intercourse. HIV also can be transmitted by contaminated needles or blood transfusions.¹⁵² The plaintiff, therefore, must first establish that the virus was transmitted to him through sexual intercourse. The plaintiff also has to prove that it was the defendant who was the transmitter. If the plaintiff has had sexual intercourse with numerous partners, it will be especially difficult to prove that it was the defendant who transmitted the virus to him.¹⁵³

d. *Injury*. The final element of a negligence action is that the plaintiff must have suffered an injury.¹⁵⁴ The plaintiff must show that he suffered some loss or damage.¹⁵⁵ This element is satisfied if the plaintiff has contracted HIV and the virus has developed into ARC or AIDS, since these conditions include physical manifestations.¹⁵⁶ In addition, the physical injury is accompanied by some psychological injury.¹⁵⁷ The inevitable medical expenses¹⁵⁸ are also part of the injury.

Where the plaintiff has been infected with the virus, but has not yet developed any symptoms, the plaintiff may not be able to effectively establish the extent of his injury. While the plaintiff may suffer extreme psychological trauma, the majority of courts hold that there can be no recovery for mental disturbance without some accompanying physical injury.¹⁵⁹ In these jurisdictions the plaintiff would not be able to recover for the negligent transmission of the virus until the virus began to manifest itself in physical symptoms. The general rule in Iowa, however, is that emotional distress does not have to manifest itself physically; the outrageousness of the defendant's conduct may be enough in itself to demonstrate that the distress is

150. In *Alice D. v. William M.*, 113 Misc. 2d 940, 450 N.Y.S.2d 350 (N.Y. Civ. Ct. 1982), the court held the defendant negligent for not exercising reasonable care in determining if he was sterile. By analogy, the HIV defendant may be held negligent for failing to determine whether he was infected with HIV.

151. See *supra* note 113 and accompanying text.

152. See *supra* notes 50, 53 and accompanying text.

153. Even though causation might be difficult to prove, the difficulty should not preclude the action since the causation problems are factual matters. See Comment, *AIDS: A Legal Epidemic?*, 17 AKRON L. REV. 717, 728 (1984).

154. See *supra* note 113 and accompanying text.

155. RESTATEMENT (SECOND) OF TORTS § 907 comment a (1965).

156. See *supra* notes 29-34 and accompanying text. See also *supra* note 24.

157. See *supra* notes 103, 110.

158. See *supra* notes 13, 128.

159. PROSSER ON TORTS, *supra* note 60, § 54, at 361.

genuine.¹⁶⁰ Thus, the AIDS plaintiff in Iowa has a better opportunity to recover for all types of damages resulting from his HIV infection.

B. Defenses

The civil causes of action for the sexual transmission of HIV discussed previously are subject to a variety of defenses. In actions based upon an intentional tort theory, consent is always a defense. In negligence actions, assumption of risk and contributory or comparative negligence may be asserted. Interspousal immunity, illegality, and the right of privacy should be considered in either type of action. Each of these defenses is discussed more thoroughly *infra*.

1. Consent

Consent is a possible defense to an action based upon an intentional tort for the sexual transmission of HIV. One who effectively consents to the intentional conduct of another which is intended to invade his interests cannot recover in an action for the conduct or for harm resulting from it.¹⁶¹ In a case involving the sexual transmission of HIV, it is likely that the plaintiff consented to the sexual intercourse. Thus, the defendant may argue that any injury which resulted from the intercourse was within the scope of the consent. The plaintiff may counter this argument, however, by stating that the consent was limited to the intercourse and did not extend to the contraction of a fatal disease (that is, contracting HIV is not a natural or expected result of consensual intercourse).

In *State v. Lankford*¹⁶² the court held that although the wife confides her body to her husband, she "does not consent to cruel treatment, or to infection with a loathsome disease."¹⁶³ While *Lankford* involved a husband-wife relationship, the duty between non-married individuals is essentially the same.¹⁶⁴ In *Barbara A. v. John G.*,¹⁶⁵ for example, the court held that the appellant, who was not married to the appellee, stated a cause of action when the appellant was impregnated by the appellee, who had told her, "I can't possibly get anyone pregnant."¹⁶⁶ The court stated that, while consent normally vitiates the wrong, the act of impregnation exceeded the scope of the consent.¹⁶⁷

Where the AIDS plaintiff alleges a cause of action based upon fraudu-

160. *Poulsen v. Russell*, 300 N.W.2d 289, 297 (Iowa 1981).

161. RESTATEMENT (SECOND) OF TORTS § 892A (1979). See also PROSSER ON TORTS, *supra* note 60, § 18, at 112 (consent "goes to negative the existence of any tort in the first instance").

162. *State v. Lankford*, 29 Del. 594, 102 A. 63 (1917).

163. *Id.* at ___, 102 A. at 64.

164. See *supra* text accompanying notes 120-23.

165. *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

166. *Id.* at ___, 193 Cal. Rptr. at 426.

167. *Id.*

lent misrepresentation, consent will not be used as a defense because "[a] plaintiff cannot ordinarily be regarded as actually consenting to the defendant's conduct if the plaintiff assented to the conduct while mistaken about the nature and quality of the invasion intended by the defendant."¹⁶⁸ Several cases have held that an individual's consent to sexual intercourse is vitiated by the sex partner's fraudulent concealment of the risk of infection by a venereal disease. In *Lankford* the court stated that "the fraud practiced upon the [plaintiff]-wife would abrogate any consent she might give for sexual intercourse, as it cannot be supposed that a wife would consent to sexual intercourse with her husband if she knew that he was infected with a disease such as syphilis."¹⁶⁹ In *Kathleen K. v. Robert B.*, the court agreed that "consent to sexual intercourse [is] vitiated by one partner's fraudulent concealment of the risk of infection with venereal disease"¹⁷⁰

2. Assumption of Risk

The doctrine of assumption of risk is similar to the consent defense in that the underlying principle for both defenses is "that no wrong is done to one who consents."¹⁷¹ The assumption of risk defense differs, however, in that it is available as a defense only in negligence, and not in an intentional tort action.

An assumption of risk may be expressed or implied. An express assumption of risk occurs where the plaintiff, by contract or otherwise, "expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct."¹⁷² The plaintiff would be barred from recovery if the HIV defendant could show he warned the plaintiff of his infection, and the plaintiff appreciated the danger of, as well as the nature, character, and extent of, AIDS.¹⁷³ Thus, if the defendant told the plaintiff he had tested positive for HIV, and the plaintiff still agreed to the sexual intercourse, the plaintiff has expressly assumed the risk of contracting the condition.

An implied assumption of risk occurs when a plaintiff, who fully understands a risk of harm to himself caused by the defendant's conduct, nevertheless voluntarily chooses to remain subject to that risk, and therefore manifests his willingness to accept the risk.¹⁷⁴ The HIV defendant may ar-

168. PROSSER ON TORTS, *supra* note 60, § 18, at 119. See also RESTATEMENT (SECOND) OF TORTS § 892B (1979).

169. *State v. Lankford*, 29 Del. at ___, 102 A. at 64.

170. *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, ___, 198 Cal. Rptr. 273, 277 (1984).

171. RESTATEMENT (SECOND) OF TORTS § 496A comment b (1965).

172. RESTATEMENT (SECOND) OF TORTS § 496B (1965).

173. See RESTATEMENT (SECOND) OF TORTS § 496D comment b (1965). Since AIDS and its harmful effects have been extensively publicized in the press, as well as on radio and television, the defendant should not have a difficult time showing that the plaintiff appreciated the danger of the condition.

174. RESTATEMENT (SECOND) OF TORTS § 496C (1965). See also PROSSER ON TORTS, *supra* note 60, § 68, at 484-86.

gue that the plaintiff impliedly assumed the risk of contracting the virus simply by engaging in the sexual intercourse. This assertion is stronger if both parties were members of a high-risk group for contracting HIV since, arguably, there is then a known risk for developing AIDS. On the other hand, there is a strong public policy consideration in favor of liability. As evidenced by the various state statutes prohibiting the transmission of venereal diseases,¹⁷⁵ the state has a legitimate interest in protecting the health of its citizens. To say that one impliedly assumes the risk of contracting HIV simply by engaging in sexual intercourse flies in the face of the legislative purpose of these statutes.

3. Contributory/Comparative Negligence

In Iowa an additional defense in a negligence action for the sexual transmission of HIV is comparative fault. The doctrine of comparative fault was adopted by the Iowa Supreme Court in *Goetzman v. Wichern*.¹⁷⁶ It bars a plaintiff from recovering where the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendant(s).¹⁷⁷ Additionally, the damages awarded are reduced in proportion to the amount of fault attributable to the plaintiff where the plaintiff's fault is less than that of the defendant(s).¹⁷⁸ Thus, in a case involving the sexual transmission of HIV, if the defendant can prove the plaintiff was aware of the defendant's HIV infection, or should have been aware of it, the plaintiff cannot recover if he is found to be at greater fault than the defendant for his resulting HIV infection. If damages are awarded to the plaintiff, the amount awarded will be reduced in proportion to any fault which can be attributed to the plaintiff.¹⁷⁹

In determining whether an HIV plaintiff has contributed to his contraction of HIV, one consideration may be whether the plaintiff asked the defendant if he had AIDS or was infected with the virus. Where the defendant possesses no obvious manifestations of infection with HIV or where there is no evidence that the plaintiff had knowledge that the defendant was a member of a high-risk group, there is a strong argument that the plaintiff should

175. See *supra* notes 130-39 and accompanying text.

176. *Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982). The doctrine has been codified in chapter 668 of the Iowa Code.

177. See IOWA CODE § 668.3 (1987).

178. *Id.*

179. In states which recognize contributory negligence, the HIV plaintiff will be barred from recovery if the defendant can prove the plaintiff was aware of the defendant's infection or should have been aware of it. In a state which recognizes pure comparative negligence, the plaintiff's recovery will be proportionate to the percentage of the defendant's fault, regardless of the extent to which the plaintiff has contributed to his harm. Because the doctrine of comparative negligence varies in each state, the status of the doctrine in the particular jurisdiction must be ascertained to determine the feasibility of a contributory or comparative negligence defense.

not be required to inquire about the defendant's sexual health. If, however, the defendant shows that the plaintiff had knowledge of the defendant's infection or that the plaintiff knew the defendant was at high risk for HIV infection, the plaintiff may be found partially negligent.¹⁸⁰

The HIV defendant also may argue that the plaintiff should have engaged in safe sex practices and was negligent in failing to do so.¹⁸¹ This would be particularly true if the plaintiff was a homosexual male, since homosexual activity increases the risk of contracting the virus.¹⁸² This may, of course, depend on whether the plaintiff was aware of his susceptibility to HIV, but the fact that HIV and AIDS have been widely publicized increases the probability that the plaintiff had notice or knowledge that homosexual activity increases the chances of contracting HIV.¹⁸³

4. Interspousal Immunity

Many cases alleging liability for the transmission of a sexual disease have been between a husband and wife.¹⁸⁴ In this situation, the defendant must ascertain the status of the doctrine of interspousal immunity in his jurisdiction.

Historically, a husband or wife was precluded from suing his spouse for tortiously infecting him with a sex disease. In *Schultz v. Christopher*¹⁸⁵ the plaintiff-wife alleged that at the time she married the defendant, he was afflicted with a venereal disease and communicated it to her within two weeks of their marriage.¹⁸⁶ The court construed the applicable statute¹⁸⁷ as

180. It would be difficult to prove that the plaintiff knew the defendant was an HIV carrier, but the plaintiff could have had access to the defendant's medical records, or a third party could have disclosed the defendant's infection to the plaintiff.

181. In addition to proposing that an AIDS plaintiff has a duty to use condoms (or request his sex partner to do so) to decrease his chances of contracting the virus, a defendant might also argue that the plaintiff should have taken additional precautionary measures, including: limiting the number of sex partners, since the greater the number of partners, the greater the chances of contracting the virus; avoiding sexual contact with persons who abuse intravenous drugs; and abstaining from sexual contact with any person whose past history and current health status are unknown.

182. See *supra* text accompanying note 54.

183. See *supra* notes 146, 173.

184. See, e.g., *S.A.V. v. K.G.V.*, 708 S.W.2d 651 (Mo. 1986); *Doe v. Doe*, 136 Misc. 2d 1015, 519 N.Y.S.2d 595 (N.Y. Sup. Ct. 1987); *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920).

185. *Schultz v. Christopher*, 65 Wash. 496, 118 P. 629 (1911).

186. *Id.* at —, 118 P. at 629.

187. The statute read as follows:

All laws which impose or recognize civil liabilities upon a wife, which are not imposed or recognized as existing to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights she shall have the same right to appeal in her own individual name to the court of law or equity for redress and protection that the husband has.

Id. at —, 118 P. at 629-630.

placing the husband and wife on the same legal footing.¹⁸⁸ The conclusion reached was that since a husband has no right to sue his wife for a tort, the wife cannot sue her husband.¹⁸⁹ Likewise, in *Bandfield v. Bandfield*¹⁹⁰ the court stated that in the absence of an express statute, a spouse has no right to maintain an action against his spouse for the transmission of a venereal disease.¹⁹¹ Interestingly enough, these jurisdictions and twenty-eight others,¹⁹² including Iowa,¹⁹³ have totally abolished the doctrine of interspousal immunity. In these jurisdictions it is clear that a lawsuit involving liability for the transmission of HIV will not be barred because of interspousal immunity.

Some states, while not totally barring an action against a spouse, allow an action against a spouse only after a divorce.¹⁹⁴ In other states interspousal immunity has been abolished only for intentional torts.¹⁹⁵ In these states the spouse should consider an action for battery or fraudulent misrepresentation. In those states retaining the doctrine of interspousal immunity,¹⁹⁶ a spouse will not be able to recover damages for the sexual transmission of HIV.¹⁹⁷

188. *Id.* at —, 118 P. at 629-30.

189. *Id.* at —, 118 P. at 630.

190. *Bandfield v. Bandfield*, 117 Mich. 80, 75 N.W. 287 (1898).

191. *Id.* at —, 75 N.W. at 288.

192. The twenty-eight other jurisdictions include Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, West Virginia, and Wisconsin. See *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 652 n.1 (Mo. 1986). The RESTATEMENT (SECOND) OF TORTS also favors the abolition of the doctrine: § 895F(1) states that "[a] husband or wife is not immune from tort liability to the other solely by reason of that [the marital] relationship." RESTATEMENT (SECOND) OF TORTS § 895F(1) (1979).

193. The Iowa Supreme Court abolished the doctrine of interspousal immunity in *Shook v. Crabb*, 281 N.W.2d 616 (Iowa 1979).

194. See, e.g., *Windauer v. O'Connor*, 107 Ariz. 267, 485 P.2d 1157 (1971).

195. See, e.g., *Ebert v. Ebert*, 232 Kan. 502, 656 P.2d 766 (1983); *Smith v. Smith*, 205 Or. 286, 287 P.2d 572 (1955) (dictum); *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977) (but see *Price v. Price*, 732 S.W.2d 316 (Tex. 1987) (abolishing immunity for all torts)). See also *Stafford v. Stafford*, 726 S.W.2d 14 (Tex. 1987) (venereal disease case). In a relatively recent action against a spouse for transmitting genital herpes, the Missouri Supreme Court changed its previous rule (which abolished interspousal immunity only in intentional torts) and abolished the immunity in negligence actions as well. See *S.A.V. v. K.G.V.*, 708 S.W.2d 651 (Mo. 1986).

196. E.g., *Alfree v. Alfree*, 410 A.2d 161 (Del. 1979); *Raisen v. Raisen*, 370 So. 2d 1148 (Fla. Dist. Ct. App. 1978) *aff'd*, 379 So. 2d 352 (Fla. 1979), *cert. denied*, 449 U.S. 886 (1980); *Robeson v. International Indem. Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981).

197. Unless the reasoning of the court in *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978) is followed. In *Lusby* the court allowed the wife to bring a tort action against her husband because of the outrageous nature of the intentional tort. *Id.* at —, 390 A.2d at 77. Certainly the transmission of HIV, which may subsequently develop into AIDS, a fatal condition, would be considered outrageous.

5. Illegality

The fact that the underlying sexual intercourse which ultimately resulted in the transmission of HIV was illegal may provide another avenue of defense for the HIV defendant. In Iowa the general rule is that an individual cannot maintain a cause of action for an illegal or immoral act or transaction to which he is a party.¹⁹⁸ For the Iowa HIV defendant, the illegality defense may be appropriate in an action where the underlying sexual activity is sodomy.¹⁹⁹ In other jurisdictions the illegality defense may apply where there is a statutory prohibition against fornication,²⁰⁰ sodomy,²⁰¹ or adultery.²⁰²

The potential for the success of the illegality defense based upon fornication is supported by *Panther v. McKnight*.²⁰³ In *Panther* the plaintiff sued the defendant for transmitting a venereal disease to her, but the defendant argued that the plaintiff could not recover because she illegally cohabited with him, and where a party suffers an injury while violating a public law,²⁰⁴ he cannot recover for the injury where the illegal act was the cause.²⁰⁵ In response, the court stated that there is a well-established exception to this rule which recognizes that the parties must be *in pari delicto*²⁰⁶ in order for the rule to apply.²⁰⁷ Since the plaintiff did not, at the time of the intercourse, have knowledge of the defendant's venereal disease, the court held that the plaintiff and the defendant were not *in pari delicto*.²⁰⁸

An appellate court in Texas also has followed the rule of *in pari delicto* to defeat the illegality defense. In *Devall v. Strunk*²⁰⁹ the defendant argued that the dismissal of the case against him for the transmission of crabs²¹⁰ should be affirmed because the sexual intercourse was illegal.²¹¹ Applying

198. See *Cole v. Taylor*, 301 N.W.2d 766, 768 (Iowa 1981).

199. See *infra* notes 218-23 and accompanying text.

200. See, e.g., N.C. GEN. STAT. § 14-184 (1986); R.I. GEN. LAWS § 11-6-3 (1956); WIS. STAT. ANN. § 944.15 (1985).

201. See, e.g., GA. CODE ANN. § 16-6-2(b) (1984); KAN. STAT. ANN. 21-35-5 (1974); MO. STAT. ANN. § 566.060 (Vernon 1979); N.D. CENT. CODE § 18.2-361 (1982); WIS. STAT. ANN. § 944.17 (1985).

202. See, e.g., N.Y. PENAL CODE § 255.17 (1980); N.C. GEN. STAT. § 14-184 (1986); N.D. CENT. CODE § 12.1-20-09 (1985).

203. *Panther v. McKnight*, 125 Okla. 134, 256 P. 916 (1926).

204. The basis of the defendant's argument for the violation of a public law was that he had married the plaintiff before the statutorily required six-month period following his previous marriage had elapsed. *Id.* at ___, 256 P. at 917.

205. *Id.* at ___, 256 P. at 918.

206. "In pari delicto" means "in equal fault." BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

207. *Panther v. McKnight*, 125 Okla. at ___, 256 P. at 918.

208. *Id.* at ___, 256 P. at 918.

209. *Devall v. Strunk*, 96 S.W.2d 245 (Tex. Civ. App. 1936).

210. "Crabs," technically referred to as crab lice, is defined as "a sucking louse infecting the pubic region of the human body." WEBSTER'S NEW COLLEGIATE DICTIONARY 302 (1985).

211. *Devall v. Strunk*, 96 S.W.2d at 247.

the rule of *in pari delicto*, the court held that the plaintiff was far less culpable:

[W]hatever of either illegality or immorality the two of them together may have indulged in, the woman's deception—induced an unknowing yielding of her clean body to such a union with his disease-carrying one—could not, by any just standard this tribunal knows of, have left her act so culpable as his.²¹²

Applying the balancing test of the *in pari delicto* exception to a case involving the sexual transmission of HIV, it appears that the AIDS plaintiff could defeat the illegality defense. In instances where both parties are deemed to have committed an illegal act, it is reasonable to hold the HIV defendant more culpable since he was the one who spread the lethal virus.

Another theory which the AIDS plaintiff could raise in an attempt to defeat the illegality defense was addressed in *Long v. Adams*.²¹³ In *Long*, an action for the negligent and intentional transmission of genital herpes, the court held that the parties violated the state's criminal fornication statute, but stated that "[i]t is well established that a person can recover in tort for injury suffered as a result of his own criminal activity."²¹⁴ The court explained that "an injured party is debarred of a right to recover when injured while engaged in the performance of an illegal or criminal act . . . not upon the ground that his conduct is negligent and is the proximate cause of his injury"²¹⁵

In some states it is illegal to engage in sodomy.²¹⁶ This is particularly relevant in determining liability for the sexual transmission of HIV, since the virus is efficiently spread through anal intercourse.²¹⁷ The first question which must be addressed is whether the sodomy statute is constitutional. In *State v. Pilcher*²¹⁸ the Iowa Supreme Court held an antisodomy statute unconstitutional to the extent it regulated consensual sodomy performed in private by adult persons of the opposite sex.²¹⁹ The court clearly stated, however, that its holding was limited to the factual situation of that particular case.²²⁰

212. *Id.*

213. *Long v. Adams*, 175 Ga. App. 538, 333 S.E.2d 852 (1985).

214. *Id.* at ____, 333 S.E.2d at 855.

215. *Id.* at 855 (quoting *Allen v. Gornito*, 100 Ga. App. 744, 112 S.E.2d 368 (1959)). *But see Deeds v. Strode*, 6 Idaho 817, 55 P. 656 (1898) (plaintiff married the defendant before being legally divorced from her first husband). In *Deeds* the court stated that the plaintiff's infection with a venereal disease was "consequent upon her own illegal act, and we know of no principle of law authorizing recovery for injuries in such a case." *Id.* at ____, 55 P. at 658.

216. *See supra* note 201.

217. *Goedert, supra* note 9, at 23. *See also Green, supra* note 7, at 32.

218. *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976).

219. *Id.* at 359. Some states prohibit only homosexual sodomy. *See, e.g., Mo. STAT. ANN. § 566.090 1(3)* (Vernon 1979); *TEX. PENAL CODE § 21.06* (Vernon 1974).

220. *State v. Pilcher*, 242 N.W.2d at 360.

The clear statement made by the Iowa Supreme Court regarding its limited holding in *Pilcher* is of particular significance in light of the United States Supreme Court's decision in *Bowers v. Hardwick*.²²¹ In *Bowers* the Court held that a state statute prohibiting sodomy is consistent with the due process clause.²²² The Court stated that adult homosexuals have no fundamental right to practice consensual sodomy, even in the privacy of their own bedroom.²²³ The *Bowers* decision makes it more likely that the illegality defense may still be viable in Iowa under certain circumstances, and should be considered in a case involving liability for the sexual transmission of HIV.

The final type of illegal sexual intercourse which may provide a defense for the sexual transmission of HIV is adultery. The defense of illegality based upon adultery was addressed by the court in *Alice D. v. William M.*²²⁴ In *Alice D.* the plaintiff, a single woman, sued the married defendant for the costs of an abortion and related expenses incurred when she was impregnated by the defendant, who represented that he was sterile.²²⁵ The court considered the issue of whether the plaintiff would be barred from relief based upon the doctrine of "unclean hands," since the state statutorily prohibited adultery.²²⁶ The court recognized the fact that the adultery statute had not been enforced during the past thirty years, and held that it would be an injustice to deny the plaintiff recovery on that basis.²²⁷

The court's discussion in *Alice D.* about the violation of an adultery statute also raises an important point for successfully asserting the illegality defense based upon the violation of a fornication or sodomy statute. While many states still have such statutes on the books, they are not necessarily enforced. It would be inequitable to begin enforcing these statutes solely due to the advent of a new sexually transmitted disease. This is particularly true in light of the more liberal sexual attitudes in modern society. For these reasons, the defense of illegality may not be successful.

6. Right of Privacy

The final hurdle that an AIDS plaintiff might confront is the argument that the imposition of liability for the sexual transmission of HIV violates the constitutional right to privacy.²²⁸ In *Kathleen K. v. Robert B.*,²²⁹ the

221. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

222. *Id.*

223. *Id.* at 191.

224. *Alice D. v. William M.*, 113 Misc. 2d 940, 450 N.Y.S.2d 350 (N.Y. Civ. Ct. 1982).

225. *Id.* at ____, 450 N.Y.S.2d at 351.

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

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

228. The United States Supreme Court has ruled that an individual has a right to privacy in some sexual relationship contexts. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (ban on distribution of contraceptives to unmarried persons violates the right to privacy).

California Court of Appeals stated that the right to privacy is not protected where governmental intrusion is warranted.²²⁹ One kind of warranted intrusion, the court stated, is to protect the public's health, welfare, and safety.²³¹ In *Kathleen K.*, in which the plaintiff sued for the negligent or intentional infliction of genital herpes, the court held that the defendant's tortious conduct, coupled with the interest of the state in the prevention and control of contagious diseases, was not protected by the constitutional right of privacy.²³² Even though this case involved the transmission of genital herpes, the court explicitly recognized the similarity of AIDS as a contagious and dreadful disease.²³³ Thus, at least in California, it appears that a claim based on a constitutional right of privacy will not bar a suit for the sexual transmission of HIV.

While *Kathleen K.* rejected the right to privacy argument, this defense should not be overlooked. In *Stephen K. v. Roni L.*,²³⁴ a paternity suit in which the defendant filed a cross-complaint alleging he had relied on the plaintiff's false representations that she was using birth control, the court dismissed the cross-complaint because "[c]laims such as those . . . arise from conduct so intensely private that the courts should not be asked to nor attempt to resolve [them]."²³⁵ Similarly, in *In re L. Pamela P.*,²³⁶ also a paternity action, the court held that "this kind of inquiry [is] an impermissible invasion of 'the zone of privacy created by several fundamental constitutional guarantees . . .'"²³⁷ While both of these cases involved wrongful birth, they still present the issue of the right to privacy in a sexual context and may prove helpful to an HIV defendant.

C. Civil Liability—Conclusion

The basic premise underlying tort law is to compensate individuals who have been injured by another individual's conduct. An individual who has been infected with HIV from a sex partner certainly has been injured. The previous discussion of the civil causes of action which are available to the

229. *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

230. *Id.* at ___, 198 Cal. Rptr. at 276.

231. *Id.* at ___, 198 Cal. Rptr. at 276.

232. *Id.* at ___, 198 Cal. Rptr. at 276. In *Kathleen K.* the court relied heavily on *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983), in which the court stated that the right to privacy "does not insulate a person from all judicial inquiry into his or her sexual relations . . ." especially where "one sexual partner . . . by intentionally tortious conduct causes physical injury to the other." *Id.* at ___, 193 Cal. Rptr. at 430.

233. *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, ___, 198 Cal. Rptr. 273, 276 n.3 (1984).

234. *Stephen K. v. Roni L.*, 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980).

235. *Id.* at ___, 164 Cal. Rptr. at 619.

236. *In re L. Pamela P.*, 88 A.D.2d 865, 451 N.Y.S.2d 766 (1982).

237. *Id.* at ___, 451 N.Y.S.2d at 767 (quoting *Griswold v. Connecticut*, 381 U.S.479, 485 (1965)).

AIDS victim, however, identified obstacles which may preclude recovery for the injuries suffered.

The major problem with proving an intentional tort, such as battery or fraudulent misrepresentation, is that the plaintiff must show the defendant knew of his HIV infection. It is likely that the defendant did not know of his infection at the time of the sexual contact because of the long incubation period of the virus.

The AIDS plaintiff may have a better chance of recovery if he alleges a nonintentional tort such as negligent misrepresentation or negligence. In these actions the plaintiff only needs to show that the defendant "should have known" of his HIV infection at the time of the sexual contact. This standard may be met if the defendant is a high-risk candidate for AIDS, or if the defendant had experienced AIDS-related symptoms.

The best chance of recovery for the AIDS plaintiff may be a cause of action based on the infliction of emotional distress. There is no doubt that the plaintiff who has been infected with HIV suffers great emotional distress. The plaintiff who has not tested positive for HIV infection may still have a cause of action, as he will probably suffer anxiety while waiting to see if he has been infected. The potential for recovery for emotional distress in such a situation has been demonstrated by two jury verdicts which awarded damages for the fear of being infected with HIV.

Even if the plaintiff is able to prove the elements of a cause of action for the sexual transmission of HIV, there are practical limitations in recovering damages. If a judgment is obtained, the defendant may not have enough assets to satisfy the judgment. The time needed to litigate a claim increases the likelihood that the defendant's own condition has progressed to a stage where he is unable to work, and increases the likelihood that the defendant has expended his assets for his own medical bills. It is even possible that the defendant will die before the case is litigated. The combination of the problems in establishing liability due to the unique nature of the AIDS virus, and the practical limitations of executing on a favorable judgment, lead one to believe that AIDS may be a civil wrong without a remedy.

III. CRIMINAL LIABILITY

As previously indicated, HIV is usually transmitted through the exchange of body fluids. Because this method of transmission does not occur through casual contact, an affirmative act on the part of the carrier is required.²³⁸ The next section of this note examines potential criminal liability for HIV carriers who sexually transmit the virus. First, current Iowa criminal statutes which are potentially applicable against HIV defendants are

238. Field & Sullivan, *AIDS and the Criminal Law*, 15 *LAW, MEDICINE & HEALTH CARE* 46, 46 (1987) [hereinafter *AIDS and the Criminal Law*].

discussed. Second, the adoption of a new criminal statute which is specifically designed to deter HIV transmission is suggested.

There are several difficulties inherent in imposing criminal liability for the sexual transmission of HIV. First, linking the defendant's conduct to the transmission of HIV to the victim is a formidable obstacle to the imposition of criminal sanctions.²³⁹ In many instances the actual moment of transmission is unknown, because many victims have engaged in multiple high-risk²⁴⁰ activities, including numerous sexual encounters.²⁴¹ Therefore, the actual HIV transmission from the defendant to the victim is difficult to establish.

A second difficulty is demonstrating that the defendant was aware of his contagious condition. In the instance of the ARC or AIDS victim, such an awareness can be inferred from the required medical care. There are, however, fifty to one hundred times²⁴² more individuals in the seropositive state who may be completely unaware of their infection. Absent the imposition of criminal strict liability,²⁴³ the defendant who is unaware of his infection cannot form the intent required by many criminal statutes.

Another difficulty involving criminal intent arises when HIV has caused brain impairment to the defendant. When the defendant has ARC or AIDS, there is a possibility that the infection has destroyed his ability to reason.²⁴⁴

239. Robinson, *AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 *HOFSTRA L. REV.* 91 (1985). In Iowa it is not essential to prove that the defendant actively participated in the immediate act causing death. See *State v. Marti*, 290 N.W.2d 570 (Iowa 1980). Acts intervening between that of the defendant and the death may break the chain of causation, but only those intervening causes which are also superseding causes will be sufficient to relieve the defendant of liability. *Id.* at 586.

240. See GOEBERT & BLATTNER, *THE EPIDEMIOLOGY OF AIDS AND RELATED CONDITIONS: AIDS, ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION* (1985).

241. *Id.*

242. Eckholm, *Women and Aids: Assessing the Risks*, N.Y. Times, Oct. 28, 1985, at A16, col.2.

243. Criminal strict liability is usually limited to areas in which there is substantial governmental regulation; violations are punished by a fine rather than imprisonment. *AIDS and the Criminal Law*, *supra* note 238, at 47.

244. See *State v. Waymire*, 504 So. 2d 953 (La. Ct. App. 1987). The defendant was convicted of attempted aggravated rape. *Id.* at 959. One of the defendant's arguments on appeal was that he was suffering from mental deterioration as a result of AIDS and such deterioration should have been considered a mitigating factor. *Id.* The court, however, refused to address the issue as it had not been asserted in the trial court. *Id.*

In Iowa proof of the defendant's diminished mental capacity has been allowed to negate the possibility of premeditation and deliberation. *State v. Gramenz*, 256 Iowa 134, 126 N.W.2d 285 (1964). Such a defense would be available only for first degree murder. If the impairment is extremely severe, however, insanity may be asserted as a defense to any criminal charge. The Iowa Code provides that:

A person shall not be convicted of a crime if at that time the crime is committed the person suffers from such a diseased or deranged condition of the mind as to render the person incapable of knowing the nature and quality of the act the person is committing or incapable of distinguishing between right and wrong in relation to that act. IOWA CODE § 701.4 (1987).

Obviously, criminal statutes are not designed to incarcerate the mentally impaired. It is recognized, however, that only a relatively small number of ARC and AIDS patients ever experience such mental deterioration as a result of the condition.²⁴⁵

A. Current Criminal Statutes

1. Murder

The following sections examine the potential criminal liability of individuals who transmit HIV. The most serious charge which could be based on the transmission of HIV is murder. While there are two degrees of murder in the Iowa Code,²⁴⁶ this note does not distinguish between degrees; instead it approached them on an alternative basis. If a first degree murder charge is not warranted, a charge of murder in the second degree may be warranted.

Under the Iowa Code, first degree murder is committed when a person willfully, deliberately, and with premeditation kills another.²⁴⁷ The defendant, therefore, must not only kill his victim with malice aforethought,²⁴⁸ but also with a specific intent to kill.²⁴⁹ The Iowa Supreme Court has indicated that the use of a deadly or dangerous weapon,²⁵⁰ or an instrument likely to

245. See *supra* note 34 and accompanying text.

246. "A person who kills another person with malice aforethought either express or implied commits murder." IOWA CODE § 707.1 (1987).

A person commits murder in the first degree when the person commits murder under any of the following circumstances: (1) The person willfully, deliberately, and with premeditation kills another person; (2) The person kills another person while participating in a forcible felony; (3) The person kills another person while escaping or attempting to escape from lawful custody; or (4) The person intentionally kills a peace officer, correctional officer, public employee, or hostage while under the jurisdiction of the Iowa department of corrections, or in a city or county jail.

IOWA CODE § 707.2 (1987). "A person commits murder in the second degree when the person commits murder which is not in the first degree." IOWA CODE § 707.3 (1987).

247. See IOWA CODE § 707.2 (1987).

248. See *State v. Jespersen*, 360 N.W.2d 804, 807 (Iowa 1985) (citing *State v. Blair*, 347 N.W.2d 416, 421 (Iowa 1984)).

249. *Id.*

250. The Iowa Code defines a "dangerous weapon" as:

[A]ny instrument or device designed primarily for use in inflicting death or injury upon a human being or animal when used in the manner for which it was designed. Additionally, any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being, is a dangerous weapon. Dangerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, other firearm, dagger, razor, stiletto, or knife having a blade of three inches or longer in length.

IOWA CODE § 702.7 (1987).

See also *United States v. Moore*, 846 F.2d 1163 (8th Cir. 1988). In *Moore* federal prisoner James Vernell Moore, who tested positive for HIV, bit two guards and was convicted on two counts of assault with a deadly weapon in violation of 8 U.S.C. §§ 111, 1114 (1987). *Id.* at 1164.

produce death accompanied by an opportunity to deliberate is evidence of malice aforethought.²⁵¹

Obviously, the first requirement under the murder statute is the death of the victim.²⁵² In the HIV context, however, the victim is unlikely to die for a considerable time after the transmission of HIV, due to its dormancy period.²⁵³ If the defendant also suffers from the disease, in all probability he will die before the infected victim. Under these circumstances the charge of murder is useless. The defendant, however, may be indefinitely in the seropositive state, while the victim experiences the full range of the disease. On the inevitable death of that victim, murder is an appropriate charge against the defendant.

The second requirement for a murder conviction is that the HIV transmitter be aware that he carries the virus. Assuming the individual is aware of his infection, the defendant must engage in conduct calculated to transmit the virus while intending to cause the death of the victim. Such an intent is clearly exhibited when the defendant engages in sexual activity aimed at infecting the victim for the purpose of killing him.

The requisite criminal intent, however, may be negated by the relationship existing between the individuals engaging in the intimate sexual contact²⁵⁴ by which the virus is transmitted. Moreover, establishing such intent is hampered by the realization that engaging in sexual activity "is a highly indirect *modus operandi* for the person whose purpose is to kill."²⁵⁵ It appears, therefore, that a murder charge is available only in extreme situations.

One such situation, however, is exemplified by the case of a prostitute who knows that he carries the deadly and transmittable virus, yet fails to take precautions prior to engaging in sexual conduct. The indifference exhibited by the individual in exposing a number of persons to a potentially lethal virus evidences a depraved heart which is equivalent to an intent to murder.²⁵⁶ A second situation warranting a murder charge arises where a

On appeal the Eighth Circuit affirmed the verdict. *Id.* The court noted that the evidence was sufficient to support the jury's finding that the defendant's mouth and teeth were used as a deadly and dangerous weapon, even though that evidence did not support a finding that the defendant's conduct could transmit AIDS. *Id.* at 1167-68.

251. See *State v. Mulder*, 313 N.W.2d 885, 888 (Iowa 1981) (citing *State v. Smith*, 240 N.W.2d 693, 695 (Iowa 1976); *State v. Lass*, 228 N.W.2d 758, 766 (Iowa 1975)); *State v. Nunn*, 356 N.W.2d 601 (Iowa Ct. App. 1984).

252. "A person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice, that person has experienced an irreversible cessation of spontaneous respiratory and circulatory functions." IOWA CODE § 702.8 (1987).

253. See *supra* notes 18-19 and accompanying text.

254. See *supra* note 49.

255. *AIDS and the Criminal Law*, *supra* note 238, at 47 (emphasis in the original).

256. "Malice aforethought may be found in an act which demonstrates a willful and wanton disregard for human life, even though the intent to kill may not be present." YEAGER & CARLSON, IOWA PRACTICE: CRIMINAL LAW AND PROCEDURE § 135 (1979) [hereinafter IOWA PRAC-

person rapes another who eventually dies as a result of the defendant's HIV transmission. In such a circumstance the requisite intent is inferred, as above, from a depraved heart. In addition, malice may also be implied through the felony murder rule.²⁵⁷

2. *Involuntary Manslaughter*

While occasions may arise supporting a murder charge, such a charge is generally inapplicable in a HIV sexual transmission case. An alternative sanction under the Iowa Code is a charge of involuntary manslaughter.²⁵⁸ There are two involuntary manslaughter charges in the Iowa Code. The first is based on the unintentional death of another which results from the reckless commission of a public offense.²⁵⁹ The second requires the same type of unintentional but reckless killing; however, a showing of a public offense is not necessary.²⁶⁰ While there is no difference in the proof required under the two sections, the first carries a more severe penalty because it is aggravated by the commission of a public offense.²⁶¹

Involuntary manslaughter occurs when a person unintentionally causes the death of another by the reckless commission of a public offense.²⁶² The actual transmission of the HIV virus would be a public offense in violation of the communicable disease section of the Iowa Code.²⁶³ The ultimate issue, therefore, would center on whether the defendant's conduct was reckless.

Reckless conduct is evidenced by either willful or wanton disregard for the safety of others.²⁶⁴ The statute allows reckless conduct to be established

TICE]. The defendant's use of a deadly weapon gives rise to an inference of malice. *Id.* at § 136 (citing *State v. Hunter*, 243 Iowa 361, 51 N.W.2d 409 (1952)). It could be argued that HIV is a dangerous weapon as defined in the Iowa Code. See *supra* note 250.

257. Under the Iowa Code the felony murder rule is applicable to forcible felonies, which includes rape. IOWA CODE §§ 707.2(2), 702.11 (1987). It is necessary however, to establish a causal connection between the felony and the homicide in order to imply the malice from the felony. *State v. Schrier*, 300 N.W.2d 305 (Iowa 1981).

258. See IOWA CODE § 707.5 (1987).

259. IOWA CODE § 707.5(1) (1987) states, "A person commits a class 'D' felony when the person unintentionally causes the death of another person by the commission of a public offense other than a forcible felony or escape." *Id.*

260. See IOWA CODE § 707.5(2) (1987). A conviction under this section is an aggravated misdemeanor. *Id.* "A person commits an aggravated misdemeanor when the person unintentionally causes the death of another person by the commission of an act in a manner likely to cause death or serious injury." *Id.* This is merely a codification of the previous crime of negligent homicide. See IOWA PRACTICE, *supra* note 256, at § 148.

261. See *State v. Inger*, 292 N.W.2d 119 (Iowa 1980).

262. See *State v. McFadden*, 320 N.W.2d 608 (Iowa 1982); *State v. Conner*, 292 N.W.2d 682 (Iowa 1980).

263. See IOWA CODE §§ 139.31-32 (1987). It is a simple misdemeanor for any person knowingly to expose another to infection from any communicable disease. *Id.*

264. *State v. Kernes*, 262 N.W.2d 602 (Iowa 1978).

by an objective standard.²⁶⁵ Actual awareness of HIV infection on the part of the defendant is therefore unnecessary. If the individual knows or should know of his seropositive state, engaging in sexual acts of transmission without precautions is reckless conduct.

It is currently estimated that approximately eighty percent of urban area homosexuals are infected with the virus.²⁶⁶ Because of the pervasiveness of HIV infection, members of that group should be aware that they are probably infected and should modify their sexual conduct in order to avoid transmission to another. Engaging in sexual conduct capable of transmitting the virus without precautions is wanton disregard for the safety of others. If as a result of that conduct another dies, an involuntary manslaughter charge is warranted.²⁶⁷

3. Attempted Murder

In situations where the victim does not acquire the virus or where the virus is not fatal, an attempted murder charge is feasible. A person commits attempted murder when he has the intent to cause the death of another and does any act expecting to set in motion a force or chain of events which will cause the death of another.²⁶⁸ Obviously attempted murder does not require that the victim die. It is sufficient that the defendant intends to cause the death of another, and that his expectations of causing death are not unreasonable.²⁶⁹ Medical commentary makes it clear that it is reasonable to expect death following HIV transmission.²⁷⁰ The inquiry, therefore, centers on

265. IOWA PRACTICE, *supra* note 256, at § 148.

266. At least eighty percent of all homosexuals in urban areas in this country have an inversion of the T-cell subset ratio, which indicates probable infection. F. SIEGAL, AIDS: THE MEDICAL MYSTERY 57 (1983) (the inversion of T-cell subset ratio indicates that the individual was exposed to some form of an infectious disease, not necessarily AIDS).

267. See *State v. Kernes*, 262 N.W.2d 602 (Iowa 1978).

268. IOWA CODE § 707.11 (1987) states that:

A person commits a class "B" felony when, with the intent to cause the death of another person and not under circumstances which would justify the person's actions, the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of the other person.

It is not a defense to an indictment for attempt to commit murder that the acts proved could not have caused the death of any person, provided that the actor intended to cause the death of some person by so acting, and the actor's expectations were not unreasonable in the light of the facts known to the actor.

269. "The overt act requirement is usually described as an 'act which goes beyond mere preparation and amounts to the commencement of the consummation.'" IOWA PRACTICE, *supra* note 256, at § 162. "The second paragraph of IOWA CODE § 707.11 should lay to rest the notion that impossibility of consummation is a defense to a criminal attempt prosecution. The [C]ode places the emphasis on the expectations accompanying the act, but insists that those expectations be reasonable." IOWA PRACTICE, *supra* note 256, at § 163. See also *State v. Mitchell*, 139 Iowa 455, 166 N.W. 808 (1908).

270. See *supra* notes 45-46 and accompanying text

the defendant's intent in engaging in sexual activities with the victim.²⁷¹

Barlow v. Superior Court exemplifies a fact scenario from which an attempted murder charge can arise.²⁷² In *Barlow* the defendant was marching in the Gay Pride Parade in San Diego when he became involved in a scuffle with police.²⁷³ During the confrontation he bit two officers, puncturing the skin and drawing blood.²⁷⁴ In response to an officer's inquiry whether he had AIDS, the defendant stated that, "You better take it that I do have AIDS for the officers' sake."²⁷⁵ While the defendant was not prosecuted for attempted murder, the facts support such a charge.²⁷⁶

In the sexual transmission context, an attempt to infect another through sexual contact is sufficient to support attempted murder charges. Thus, attempted murder charges were filed against a Los Angeles man who was selling his blood and engaging in prostitution even though he allegedly knew he was suffering from AIDS.²⁷⁷

While different methods of transmission are involved in the above scenarios, the intent to cause death through HIV transmission is similar. Moreover, death can result regardless of the method of transmission selected.

4. Assault

Several provisions of the Iowa assault statute are applicable to a defendant HIV transmitter.²⁷⁸ It is to be noted, however, that the consent de-

271. A charge of intent to kill was filed against Terry Lee Phillips in California after he had vowed to spread the disease and then allegedly raped a woman. Layaco, *Assault with a Deadly Virus: What Courts Should Do When AIDS Is Allegedly Used as a Weapon*, TIME, July 20, 1987, at 63 [hereinafter *Assault with a Deadly Virus*].

272. *Barlow v. Superior Court*, 190 Cal. App. 3d 1652, 236 Cal. Rptr. 134 (1987) (ordered not published).

273. *Id.* at ___, 236 Cal. Rptr. at 135.

274. *Id.* at ___, 236 Cal. Rptr. at 135.

275. *Id.* at ___, 236 Cal. Rptr. at 135-36.

276. In *Barlow* the state attempted to secure a search warrant in order to test the defendant's blood for the presence of HIV to prosecute an attempted murder charge. *Id.* at ___, 236 Cal. Rptr. at 135. The court of appeals ruled against the search because the sample was taken five weeks after the incident and, therefore, would not be probative of the defendant's intent. *Id.* at ___, 236 Cal. Rptr. at 138. In addition, the court indicated that a California statute prohibited the disclosure of any AIDS testing results, so the state would not be able to use the findings during prosecution. *Id.* at ___, 236 Cal. Rptr. at 138-39. In the absence of a statute, however, a seropositive blood sample immediately procured, coupled with the defendant's statements, could provide evidence of his intent to engage in an act of transmission.

277. *Assault with a Deadly Virus*, *supra* note 271, at 63.

278. Iowa CODE § 708.1 (1987) defines assault. It states:

A person commits an assault when, without justification, the person does any of the following:

1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.

2. Any act which is intended to place another in fear of immediate physical

fense is specifically listed within the statute.²⁷⁹ This provision provides a limited defense, since it applies to mildly violent acts between voluntary participants in non-criminal activity.²⁸⁰ In addition, the act consented to "must not create an unreasonable risk of injury or a breach of the peace."²⁸¹

The consent defense would not apply where HIV is transmitted to an unsuspecting other. The uninformed recipient engaging in an act of sexual transmission is consenting to the sexual act, but that individual is not consenting to the acquisition of HIV.²⁸² Moreover, there is a strong public policy argument against the use of consent as a defense in a case involving an act of HIV transmission.²⁸³ Allowing individuals to engage in unprotected but consensual acts of transmission will inevitably further the spread of the virus.²⁸⁴ The harm is not only to the consenting recipient, but also to society as a whole through the continuing distribution of a lethal virus.

The most serious assault charge is assault with intent to inflict serious bodily injury.²⁸⁵ To warrant a conviction, the assault must have been committed with the specific intent to commit serious injury upon another.²⁸⁶ Under this statute the defendant is required to form the specific intent to inflict injury to another through the transmission of the virus. The defendant's expectations concerning transmission of the virus differentiate the charge from attempted murder. If the defendant considered HIV infection a "mere" serious injury, as opposed to a deadly virus, the specific intent as-

contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.

3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

IOWA CODE § 708.1 (1987).

279. IOWA CODE § 708.1 states, in pertinent part:

Provided, that where the person doing any of the above enumerated acts, and such other person, are voluntary participants in a sport, social or other activity, not in itself criminal, and such act is a reasonably foreseeable incident of such sport or activity, and does not create an unreasonable risk of serious injury or breach of peace, the act shall not be an assault.

Id.

280. IOWA PRACTICE, *supra* note 256, at § 176. See *State v. Spargo*, 364 N.W.2d 203 (Iowa 1985) (the act which is consented to must be lawful).

281. IOWA PRACTICE, *supra* note 256, at § 176.

282. See *State v. Lankford*, 29 Del. 594, —, 102 A. 63, 64 (1917) (the fact that a wife consented to intercourse with her husband did not mean she consented to infection with a loathsome disease).

283. This would not include behavior which has been modified in order to prevent the transmission of HIV during high-risk activities, *i.e.*, the use of condoms during intercourse.

284. In *Regina v. Bennet*, 176 Eng. Rep. 925 (W. Cir. Ct. 1866), the court indicated that the defendant would be found guilty of indecent assault as a result of having intercourse with a female whom he infected with gonorrhea unless the recipient had consented after full disclosure.

285. See IOWA CODE § 708.2(1) (1987). Iowa statutes have never recognized the offense of battery as something separate from assault. IOWA PRACTICE, *supra* note 256, at § 172.

286. See IOWA CODE § 708.2(1) (1987).

sault charge could be invoked.

For example, assault charges were brought against Private Adrian G. Morris.²⁸⁷ The defendant was charged with several counts of aggravated assault as a result of engaging in sexual relations with several fellow soldiers while knowing he was an HIV carrier.²⁸⁸ The defendant engaged in oral sex with a serviceman, and had intercourse with a servicewoman.²⁸⁹ The defendant knew of his infection, but he failed to inform either party of his condition.²⁹⁰

A second example is found in *United States v. Johnson*.²⁹¹ In *Johnson* the defendant tested positive for HIV and was instructed on the possibility and danger of sexually transmitting the virus.²⁹² The defendant also was instructed on protective measures to reduce the possibility of transmitting the virus through sexual acts.²⁹³ Nonetheless, the defendant attempted to perform anal sex with a non-consenting male partner.²⁹⁴ Although the act was never consummated, the court found the defendant guilty of aggravated assault.²⁹⁵ The court indicated that the virus was a means of assault which was capable of causing death or grievous harm, and that it was used in a manner which was likely to result in death or grievous harm.²⁹⁶

Alternatively, a simple assault charge can be filed against the defendant transmitter who fails to form the intent necessary to support a charge of aggravated assault.²⁹⁷ The simple assault statute merely requires that the defendant intend²⁹⁸ to touch another person offensively.²⁹⁹ The Iowa courts have indicated that any offensive touching is sufficient for a guilty verdict.³⁰⁰ Accordingly, the defendant's intent to contact his partner, without informing him that the contact is capable of transmitting a lethal virus is sufficient for a guilty verdict.

The Eighth Circuit Court of Appeals has affirmed a conviction involving assault by an AIDS carrier. In *United States v. Katzenbach*³⁰¹ the defendant, a federal prisoner, was involved in a "scuffle" with three corrections

287. *Assault with a Deadly Virus*, *supra* note 271, at 63.

288. *Id.*

289. *Id.*

290. *Id.* Prior to the filing of charges, neither party had tested positive for HIV. *Id.*

291. *United States v. Johnson*, 27 M.J. 798 (A.F.C.M.R. 1988 (WESTLAW, 138044)).

292. *Id.* at 800-01.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. See IOWA CODE § 708.2(2) (1987). See also *State v. Brown*, 276 N.W.2d 910 (Iowa Ct. App. 1985).

298. See IOWA CODE §§ 708.1(1), 708.1(2), 708.2(2), 708.2(3) (1987).

299. *Id.*

300. See *State v. Johnson*, 291 N.W.2d 6, 9 (Iowa 1980).

301. *United States v. Katzenbach*, 824 F.2d 649 (8th Cir. 1987).

officers.³⁰² The defendant swung at one officer, bit another, and scratched a third.³⁰³ In addition, the defendant spat on all three officers.³⁰⁴ The court upheld the convictions on three separate counts of assault, rejecting Katzenbach's argument that there was but a single altercation which constituted a single assault.³⁰⁵

B. Proposed Legislation

Statutes currently available in Iowa for the prosecution of HIV carriers whose conduct can lead to the transmission of the virus are insufficient to address the AIDS crisis. Absent actual awareness of his infection, the HIV transmitter can avoid current criminal sanctions of any severity. The uncertain consequences of HIV infection, and the problem of demonstrating the intent of the defendant, make it difficult to apply current criminal provisions. Specific criminal legislation is warranted.

The state of Iowa has a substantial interest in preventing the transmission and spread of a lethal virus.³⁰⁶ This interest is especially great with respect to the transmission of HIV because of its grievous impact on both the infected individual and society. In furtherance of that interest, the state should design legislation to prohibit the transfer of body fluids which may contain the AIDS virus. Because of the severe consequences of HIV infection, a criminal statute is warranted to sanction individuals who know or should know of their infection, yet take no precautionary measures when engaging in sexual activity with an uninformed sex partner.

The Iowa legislature recently declined to enact a criminal statute which specifically addresses HIV transmission. A bill was introduced in the Iowa legislature which sought to make individuals who knowingly expose or knowingly subject another to the danger of contracting HIV guilty of a class C felony.³⁰⁷ The decision not to enact this statute was, at best, unfortunate.³⁰⁸

302. *Id.* at 650.

303. *Id.*

304. *Id.*

305. *Id.* at 652. As the ruling in *Katzenbach* centered on the multiplicity challenge, the court failed to address the vitality of assault charges for acts of transmission by an HIV carrier. The case obviously would be of more significance if the original charge had been for charges of a more serious nature, given the potential consequences of the defendant's actions. In fact, more severe charges appear warranted as the defendant's actions evidenced an intent to spread the lethal virus.

306. See *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

307. H.F. 2344, 1988 Iowa Laws.

308. This concern is reflected by a poll which shows that approximately fifty percent of those polled indicated a desire for the creation of specific criminal legislation designed to curb the spread of AIDS. Gustin & Ziegler, *A Review of AIDS-Related Legislation and Regulation Policy in the United States*, 15 LAW, MEDICINE & HEALTH CARE 5, 12 (1987). A countervailing concern arises from the state's attempt to regulate intimate sexual activity between adults.

The proposed bill prohibited individuals who know that they have HIV from engaging in activities which endanger a recipient victim. The statute failed to address the more pervasive harm caused by individuals who are unaware of their HIV infection, yet engage in acts of transmission. These individuals outnumber actual ARC or AIDS victims who are aware of their illness, and they carry the most virulent HIV infection.

The Iowa legislature should adopt a more comprehensive statute which bases guilt on principles akin to those of negligence rather than on traditional criminal culpability. While at first blush such a proposal may appear extreme, the severe consequences of HIV transmission and its alarming pervasiveness warrant strong measures. As indicated within the involuntary manslaughter portion of this note, negligence principles are not strictly forbidden in the criminal area. A statute which criminalizes acts of transmission by individuals who know or should have known of their infection would encompass the vast majority of potential HIV transmitters. The statute would place upon individuals in high-risk groups the burden of determining whether they are infected with HIV. If such individuals continue to engage in acts of sexual transmission, they would be subject to criminal penalties.

While such a statute should include penalties for both intentional and negligent transmission of HIV, the two crimes are obviously different. A more severe penalty is warranted for the intentional wrongdoer. Nonetheless, the sanctions applicable to any act of HIV transmission must be severe enough to deter what has become this country's "black plague."

IV. CONCLUSION

The recent jury verdict against Rock Hudson's estate, based on Hudson's intentional failure to reveal his AIDS infection to a sex partner, reflects the public's concern with preventing the transmission of the AIDS virus. One way to prevent the spread of the virus is through continuing to educate individuals about the modes of HIV transmission. A more effective means of preventing the transmission, however, is to impose civil and criminal liability on the HIV carrier who intentionally or negligently transmits the virus to another.

This note has examined the civil responsibility of an HIV carrier who sexually transmits the virus to another. The note presented several theories of liability which are available to an infected plaintiff, and discussed the defenses available to the HIV defendant. The note also examined current

Moreover, fears have been expressed that such statutes would be misused in order to harass and convict members of the high-risk groups who are traditionally viewed as "undesirables." See *People v. George*, 137 A.D.2d 876, 524 N.Y.S.2d 557 (N.Y. App. Div. 1988) (the defendant asserted that his AIDS infection was a factor in his sentencing). A similar concern has been voiced by the Iowa Supreme Court in *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976) (the court declared a criminal sodomy law unconstitutional to the extent that it regulated consensual sodomy between private parties).

Iowa criminal statutes which are available to sanction the HIV carrier who intentionally or negligently transmits the virus. As the inadequacies of these statutes are apparent, this note suggests that new legislation be adopted which specifically prohibits both intentional and negligent acts of HIV transmission.

This decade began with the frightening discovery of HIV and its manifestation in a unique and fatal condition commonly known as AIDS. The imposition of both civil and criminal liability is perhaps the most effective means to keep the devastating effects of HIV from continuing into the decades ahead.

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