Case Western Reserve Law Review

Volume 34 | Issue 4 Article 5

1984

Kathleen K. v. Robert B.: A Cause of Action for Genital Herpes Transmission

Kimm Alayne Walton

KATHLEEN K. v. ROBERT B.: A CAUSE OF ACTION FOR GENITAL HERPES TRANSMISSION

Genital herpes is a contagious and incurable disease which has reached epidemic proportions in this country and abroad. In a recent case, Kathleen K. v. Robert B., *a California Court of Appeal recognized a tort cause of action for the transmission of genital herpes. This Note analyzes the viability of this cause of action and argues that tort theories of battery, negligence, deceit, and negligent misrepresentation provide grounds for such an action against a nonmarital partner. It suggests further that the herpetic has an affirmative duty to disclose his condition or to abstain from sexual activity during an outbreak. Finally, the Note proposes a framework for analyzing genital herpes transmission claims and identifies situations in which recovery should be available.*

INTRODUCTION

IN THE FIRST RULING of its kind,[1] the California Court of Appeal for the Second District recognized a cause of action for genital herpes transmission. The case, *Kathleen K. v. Robert B.*,[2] was brought by a fifty-year-old female herpes victim. Plaintiff, a nurse, alleged that she contracted genital herpes by way of sexual intercourse with defendant, a fifty-five-year-old physician, despite his assurance of freedom from venereal disease.[3] Her claim, dismissed on the pleadings by the trial court for failure to state a cause of action, was preserved in the historic ruling. With similar suits pending in seven other states,[4] the legal ramifications of genital herpes transmission should receive significant exposure in coming months.

Genital herpes has reached epidemic proportions in the

1. *See* Galante, *Herpes Victim Wins an Appeal*, Nat'l L.J., Feb. 6, 1984, at 3, col. 1.

2. 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

3. *See* Galante, *supra* note 1.

4. *See* Margolick, *Herpes and Similar Matters Get More Attention in Court*, N.Y. Times, Feb. 26, 1984, § 1, at 14, col. 1 (Florida, Louisiana, Minnesota, Missouri, Washington, and California); Wolfson, *Herpes Suits Enter the Third-Party Realm*, Nat'l L.J., May 7, 1984, at 3, col. 1 (Kentucky). A claim has also been filed in Iowa, Mormann v. Mormann, No. C1-2021 (Dist. Ct., Wapello Cty. filed June 28, 1983). For details on these cases, see *infra* note 43.

United States and Europe.[5] Currently the focus of extensive media attention,[6] it has been described as everything from a minor skin irritation to the scourge of the sexual revolution.[7] Estimates of the number of genital herpes sufferers in the United States alone range from five to twenty million,[8] with several hundred thousand new cases anticipated yearly.[9]

In view of *Kathleen K.*, this Note analyzes the viability of a cause of action for genital herpes transmission. It suggests that contracting the disease from a nonmarital[10] partner is actionable by logical application of the traditional tort theories of battery,[11] negligence,[12] deceit,[13] and negligent misrepresentation.[14] In conjunction with the discussion of the latter two torts, the Note explores their extension to complete omissions—where, unlike the situation in *Kathleen K.*, plaintiff has failed to inquire and defendant is silent regarding the presence of disease. The Note contends that during genital herpes "attacks"[15] the herpetic should be under an affirmative duty to disclose his condition to prospective partners or abstain from sexual activity.[16] The Note concludes with a proposed framework for analyzing genital herpes transmission claims, and identifies situations in which recovery should be made available.[17]

---

5. W. WICKETT, HERPES: CAUSE AND CONTROL 17 (1982); *see* 5 HERPES RESOURCE CENTER, THE HELPER 1 (Summer 1983) [hereinafter cited as THE HELPER].

6. *E.g.*, Clark, *Herpes: The V.D. of the 80's*, NEWSWEEK, Apr. 12, 1982, at 75; Emanuel, *Harping on Herpes*, NEW REPUBLIC, Sept. 13, 1982, at 14; Hewson, *The Herpes Threat: Why Casual Sex Isn't Casual Anymore*, McCALL'S, Sept. 1982, at 49; Lenard, *The Battle to Wipe Out Herpes*, SCI. DIG., Nov. 1982, at 36; Leo, *The New Scarlet Letter*, TIME, Aug. 2, 1982, at 62; Margolick, *supra* note 4; McClintock, *Love's Labor's Cost*, ESQUIRE, Nov. 1982, at 145; Offit, *The Herpes Epidemic: Has It Destroyed the Sexual Revolution?*, GLAMOUR, Dec. 1982, at 36; Oppenheim, *What You Should Know About Herpes*, SEVENTEEN, Oct. 1982, at 154; Soave, *Herpes: The Causes and How to Cope*, MADEMOISELLE, Feb. 1982, at 76; Van Gelden, *The Terrible Curse of Herpes*, ROLLING STONE, Mar. 4, 1982, at 23; Wallis, *Battling an Elusive Invader*, TIME, Aug. 2, 1982, at 68; Wilentz, *Fanning the Herpes Scare*, THE NATION, Oct. 2, 1982, at 289.

7. *See* Leo, *supra* note 6, at 62.

8. R. HAMILTON, THE HERPES BOOK 4 (1982); Boffey, *Treatment Found to Prevent Flareup of Herpes Symptoms*, N.Y. Times, June 14, 1984, at 1, col. 1.

9. W. WICKETT, *supra* note 5, at 56-57; Boffey, *supra* note 8.

10. In the absence of the marital relationship, no established legal duty exists between transmittor and transmittee, and there are no issues of interspousal tort immunity.

11. *See infra* notes 107-22 and accompanying text.

12. *See infra* notes 123-62 and accompanying text.

13. *See infra* notes 171-85 and accompanying text.

14. *See infra* notes 186-91 and accompanying text.

15. *See infra* notes 31-35 and accompanying text.

16. *See infra* notes 192-226 and accompanying text.

17. *See infra* text following note 225.

The plaintiff in *Kathleen K.* based her claim on four separate liability theories: battery, negligence, deceit, and intentional infliction of emotional distress.[18] All were rejected by the trial court,[19] which relied on *Stephen K. v. Roni L.*,[20] a wrongful birth case. There, a California court had refused to consider a father's attempt to avoid child support obligations by claiming he was "tricked into fathering a child he did not want."[21] The court stated, "[A]s a matter of public policy the practice of birth control, if any, engaged in by two partners in a consensual sexual relationship is best left to the individuals involved, free from any governmental interference."[22]

Upon the trial court's refusal to entertain her claim, the plaintiff in *Kathleen K.* appealed. By the time her case was ready to be heard, California's First District Court of Appeal had decided *Barbara A. v. John G.*,[23] upholding battery and deceit causes of action brought by a woman who had relied on her former lawyer's misrepresentation that he was sterile. As a result of his deceit, she had suffered an ectopic pregnancy requiring surgery that left her infertile.[24]

The appellate court in *Kathleen K.* relied heavily upon *Barbara A.*. It also noted the trial court's misplaced reliance on *Stephen K.*—that case had involved no physical injury to either partner;[25] moreover it had involved a child, which raised completely different policy concerns.[26] Thus, the *Kathleen K.* court remanded the case for trial.[27]

---

18. Complaint at 1-6, *Kathleen K.*

19. Kathleen K. v. Robert B., No. WEC 72582, slip op. at 2 (Cal. Super. Ct., Los Angeles Cty., Feb. 25, 1983).

20. 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980).

21. *Id.* at 643-44, 164 Cal. Rptr. at 620.

22. *Id.*

23. 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

24. *Id.* at 375, 193 Cal. Rptr. at 426.

25. 150 Cal. App. 3d at 995, 198 Cal. Rptr. at 275.

26. *Id.* at 996.

27. *Kathleen K.* raises questions left unanswered by the court's opinion. First, the court approved plaintiff's claim without distinguishing the various bases for recovery or revealing which theories, if any, were invalid. *Id.* at 994, 198 Cal. Rptr. at 274. Second, although plaintiff seeks damages for lost work time, medical expenses, and emotional suffering, Complaint at 2-5, she has yet to quantify her damages. Galante, *supra* note 1. Finally, and most troubling, are the difficulties of proof and causation—defendant asserts, among other defenses, that he did not realize he was infected with herpes when he had intercourse with plaintiff, Answer to Complaint at 3, and that she did not contract herpes from him but from "other individuals whose name(s) and identity(ies) [sic] are unknown at this time . . . ." *Id.* Issues of proximate cause and proof of facts are beyond the scope of this Note. Rather, the Note assumes the following: (1) defendant's knowledge of the dis-

I. MEDICAL BACKGROUND

The disease labeled herpes has two principal types[28]—Herpes I, or oral herpes, characterized by cold sores on the lips,[29] and Herpes II, or genital herpes, upon which this Note focuses.[30] Genital herpes is typically contracted through sexual intercourse with a herpetic undergoing an attack of the disease.[31]

A genital herpes attack, which usually occurs within eight days of exposure to the virus,[32] is first indicated by an itching or tingling sensation beneath the skin, followed within two to fifteen days by blisters.[33] The blisters become open sores which release a fluid carrying the Herpes II virus.[34] During attacks, the disease is highly contagious.[35] After a few days the sores harden and, within a week, begin to fade—until the next attack, which may occur within four weeks or never again.[36] In remission, the disease is

---

ease, *see infra* notes 99-106 and accompanying text; (2) sexual intercourse between defendant and plaintiff, proof of which would presumably mirror the requirements in common law paternity actions (before tissue typing or blood tests were available), *see, e.g.*, Holmes v. McLean, 5 Conn. Cir. Ct. 476, 256 A.2d 849 (1969); and (3) plaintiff's subsequent infection with the disease.

28. Less prevalent strains of herpes, such as herpes zoster (commonly known as shingles), or other forms of infection, such as herpes encephalitis (affecting the brain) and herpes keratitis (affecting the eye), are not considered here, as they are not sexually transmitted. Herpes keratitis, for instance, is transmitted through autoinoculation (touching an active sore and then rubbing one's eyes) or neurogenically (the oral herpes virus, resting in the trigeminal ganglia, travels to the eyes instead of the lips). R. HAMILTON, *supra* note 8, at 115-22.

29. Herpes I is mild in comparison to Herpes II. W. WICKETT, *supra* note 5, at 56. Herpes I is extremely common—nearly 30 million Americans per year are afflicted with it, *id.* at 18, and the propensity to contract oral herpes exists in nearly 100% of all adults in this country (meaning that the virus already exists somewhere in their system). *Id.* at 78. It is a minor irritation at worst, and considering both its overwhelming prevalence and its communicability in a variety of ways other than sexual contact, it is an inappropriate topic for discussion in this Note.

30. An estimated 30% of sexually active American adults have been exposed to Herpes II. *Id.* at 1.

31. It is remotely possible to contract genital herpes through nonsexual means. A tiny percentage of genital herpes cases may be triggered by stress, excess exposure to radiation, or exposure to the herpes virus on toilet seats or clothing. *Id.* at 74, 80.

32. *Id.* at 24.

33. Leo, *supra* note 6, at 63.

34. W. WICKETT, *supra* note 5, at 30.

35. *Id.* When genital herpes lesions are present in the mother at childbirth, there is a 50% chance the infant will be born with the disease. *Id.* at 36. This risk can be greatly reduced by Caesarean section. *Id.* at 36-37. A vaginal delivery can subject the child to infection with herpes encephalitis, which may lead to brain damage and even death. *Id.* at 36.

36. *Id.* at 30-31. While approximately one third of Herpes I sufferers are afflicted with recurrences, the recurrence rate is considerably higher among genital herpetics. Juel-Jensen, *Genital Herpes*, 7 CLINICAL & EXPERIMENTAL DERMATOLOGY 355, 356 (1982). There

virtually nontransmittable, since the Herpes II virus is carried only in the fluid released by the open sores associated with an attack.[37] Thus, the standard of care this Note suggests does *not* require that the herpetic never again engage in sex, or that he *invariably* inform his prospective partner. Rather, the suggested standard demands abstention or disclosure only when the sores are present and the risk of transmission is extremely high.

Unfortunately, even the cessation of attacks does not mean the disease is gone forever. Genital herpes is incurable,[38] which may explain why so much attention has been focused on it. Two additional factors have also contributed to the herpes panic—the physical and emotional effects of the disease. Physically, apart from the sores themselves, Herpes II is associated with itching, burning genitalia, pain on urination, headaches, swollen lymph nodes, general muscular aches, fever, and overall discomfort.[39] The emotional effects of genital herpes are startling. They frequently

---

is some evidence that the frequency of attacks diminishes with age. W. WICKETT, *supra* note 5, at 35-36. Recurrences are less serious than the initial attack of the disease; they are milder, of shorter duration, and are marked by fewer lesions. R. HAMILTON, *supra* note 8, at 42.

37. That the virus is carried by a fluid explains the possibility of contracting the disease from toilet seats, towels, etc. The chance of catching genital herpes from a damp towel or toilet seat is one percent or less, Leo, *supra* note 6, at 64, and thus is so remote that it will not be considered in this Note.

38. R. HAMILTON, *supra* note 8, at 13. Nevertheless, considerable research is being done and a cure for the disease is forthcoming. There are several possibilities; one is the cottonseed oil extract gossypol. *See* Wichmann, Veherei & Luukainen, *Inhibiting Herpes Simplex Type 2 Infection in Human Epithelial Cells by Gossypol, a Potent Spermicidal and Contraceptive Agent*, 59 AM. J. OBSTETRICS & GYNECOLOGY 593 (1982). There is also a potential cure involving the food preservative butylated hydroxytoluene (BHT). *See* Snipes, Person, Keith & Kupp, *Butylated Hydroxytoluene Inactivates Lipid-Containing Viruses*, 188 SCIENCE 64 (1975). Another possibility is the drug, acyclovir, a synthetic compound thought to halt the DNA production process of the herpes virus. *See* Reichman, Badger, Mertz, Corey, Richman, Connor, Redfield, Savoia, Oxman, Bryson, Tyrrell, Portnoy, Creagh-Kirk, Keeney, Ashikaga & Dolin, *Treatment of Recurrent Genital Herpes Simplex Infections with Oral Acyclovir*, 251 J. AM. MED. A. 2103 (1984); Straus, Takiff, Seidlin, Bachrach, Lininger, DiGiovanna, Western, Smith, Lehrman, Creagh-Kirk & Alling, *Suppression of Frequently Recurring Genital Herpes: A Placebo-Controlled Double-Blind Trial of Oral Acyclovir*, 310 NEW ENG. J. MED. 1545 (1984). The genetically engineered substance interferon potentially lessens the severity of herpes symptoms. Letter to the author from Dr. Alan Walton, President, University Genetics (May 24, 1984) (on file with the *Case Western Reserve Law Review*).

39. R. HAMILTON, *supra* note 8, at 5; W. WICKETT, *supra* note 5, at 24-31. Herpes I does *not* feature these symptoms, making it a much less serious strain of the virus. W. WICKETT, *supra* note 5, at 56.

The widely held belief that one can have genital herpes and not even know it becomes untenable in the face of such symptoms. The asymptomatic herpetic, who carries the virus but suffers no telling physical symptoms, is very rare. W. WICKETT, *supra* note 5, at 76-77. Because such a carrier has no symptoms from which to discern his illness, this Note does

include shock, emotional numbing, isolation and loneliness, rage, and perhaps even serious depression and impotence.[40] The sufferer's self-image may be drastically affected, sometimes resulting in a "leper syndrome."[41] Considering these emotionally crippling effects—combined with the incurability of the disease, its physical symptoms, and the social stigma attached to it—transmission of genital herpes should be viewed as an actionable transgression, not merely an unpleasant side effect of sexual intimacy.

II. LEGAL BACKGROUND

Aside from *Kathleen K.*, there is no precedent for the actionability of transmitting genital herpes.[42] The lack of precedent may be traced to a variety of factors. First, the incidence of genital herpes has only recently reached epidemic proportions.[43] Second, confusion of genital herpes with diseases such as shingles, syphilis, eczema, and leprosy[44] may have decreased the likelihood of suit being brought specifically for genital herpes transmission.

---

not advocate imposing liability upon the asymptomatic herpetic for transmitting the disease.

40. Leo, *supra* note 6, at 63. Many herpetics go through stages similar to mourning the death of a loved one. "Often there is a frantic search for a doctor who will give a different diagnosis, or a kind of magical bargaining with the disease ('Maybe if I don't have sex for a while, it will go away.')." *Id.*

41. *Id.* " '[S]ome patients describe convictions of their own ugliness, contamination or even dangerousness.' " *Id.* (quoting psychiatrist Elliot Luby).

42. Complaints also have been filed in Florida, Louisiana, Minnesota, Missouri, Washington, Kentucky, and Iowa. *See supra* note 4.

The Florida case, Liptrot v. Basini, No. 82-19427 (Fla. Cir. Ct., Broward Cty., filed Sept. 20, 1982), has attracted considerable media attention. *See* Mellowitz & Rojas, *Herpes: A Cause for Legal Action?*, Nat'l L.J., Nov. 8, 1982, at 3, col. 1. *Liptrot* resembles *Kathleen K.* in every major respect: plaintiff and defendant were mere acquaintances and defendant had assured plaintiff that he had "no communicable diseases." *Id.* Plaintiff noticed a sore on defendant after having intercourse; when she inquired, he replied that "his doctor did not know what the sore was, but that it was not contagious." The *Liptrot* complaint, based on misrepresentation, sought $100,000 in damages. *Id.*

The Missouri case, St. Clair v. St. Clair, No. DR82-3962 (Mo. Cir. Ct., Jackson Cty., filed Dec. 27, 1982), is a $6 million claim by a wife against her husband, a bank president. Ostroff, *New Case for Herpes: Banker Sued by Wife*, Nat'l L.J., Jan. 10, 1983, at 2, col. 1. Plaintiff alleged deceit which made the marriage voidable. *Id.*

The complaint filed in Kentucky, Jaffee v. Dills, No. 8484 CI-02139 (Ky. Cir. Ct., Jefferson Cty., filed Mar. 19, 1984), involves a third-party herpes claim. *See* Wolfson, *supra* note 4. In that case plaintiff claims that defendant infected plaintiff's wife, who transmitted the disease to him. The theory of the suit is criminal conversation.

Other pending herpes claims include Olson v. Olson, No. 567066-6 (Cal. Super. Ct., Alameda Cty., filed Dec. 21, 1982) and Mormann v. Mormann, No. C1-2021 (Iowa Dist. Ct., Wapello Cty., filed June 28, 1983).

43. *See supra* notes 8-9 and accompanying text.

44. W. WICKETT, *supra* note 5, at 17.

Finally, and perhaps most significantly, the stigma associated with genital herpes may have discouraged potential plaintiffs from pressing claims.[45]

Despite the dearth of case law regarding genital herpes, there are analogous decisions treating transmission of other diseases. Successful claims have been based, for instance, on the transmission of smallpox,[46] tuberculosis,[47] whooping cough,[48] typhoid,[49] and "serious infections."[50] Courts have readily placed an affirmative duty upon the diseased person himself[51]—or upon a responsible party like an employer,[52] parent,[53] doctor,[54] or innkeeper[55]—*not* to transmit the disease to others. Courts determine the degree of care required of the diseased person according to the character of the disease and the danger of its communication.[56] The duty of care arises upon knowledge of the presence of disease;[57] breach constitutes negligence and subjects the transmittor to liability for resulting damages.[58] "When the disease is infectious, there is a legal obligation on the sick person . . . not to do anything that can be avoided which shall tend to spread the infec-

45. One plaintiff's attorney has commented on the "notoriety" her client is likely to gain by pressing her claim for genital herpes transmission. Mellowitz & Rojas, *supra* note 42.

46. *E.g.*, Franklin v. Butcher, 144 Mo. App. 660, 129 S.W. 428 (1910); Hendricks v. Butcher, 144 Mo. App. 671, 129 S.W. 431 (1910) (same defendant in each case had infected members of two families). One smallpox case involved the liability of a third party, charged with failing to seclude the smallpox victim from others. *See* Missouri, Kan. & Tex. Ry. v. Wood, 95 Tex. 223, 66 S.W. 449 (1902).

47. *E.g.*, Earle v. Kuklo, 26 N.J. Super. 471, 98 A.2d 107 (1953).

48. *E.g.*, Smith v. Baker, 20 F. 709 (C.C.S.D. N.Y. 1884).

49. *E.g.*, Kliegel v. Aitken, 94 Wis. 432, 69 N.W. 67 (1896).

50. Edwards v. Lamb, 69 N.H. 599, 45 A. 480 (1899).

51. *See, e.g.*, Earle v. Kuklo, 26 N.J. Super. 471, 98 A.2d 107 (1953).

52. Missouri, K. & T. Ry. v. Wood, 95 Tex. 223, 66 S.W. 449 (1902).

53. Smith v. Baker, 20 F. 709 (C.C.S.D.N.Y. 1884); Kliegel v. Aitken, 94 Wis. 432, 69 N.W. 67 (1896).

54. Gill v. Hartford Accident & Indem. Co., 337 So. 2d 420 (Fla. Dist. Ct. App. 1976); Edwards v. Lamb, 69 N.H. 599, 45 A. 480 (1899).

55. Gilbert v. Hoffman, 66 Iowa 205, 23 N.W. 632 (1885).

56. *See infra* note 132 and accompanying text.

57. Earle v. Kuklo, 26 N.J. Super. 471, 475, 98 A.2d 107, 109 (1953). In Long v. Chicago, K. & W. R.R., 47 Kan. 764, 28 P. 977 (1892), defendant railroad was held not liable for its employee's transmission of smallpox to another, since it had no knowledge of employee's illness.

58. *See, e.g.*, Smith v. Baker, 20 F. 709, 709-10 (C.C.S.D.N.Y. 1884); Gilbert v. Hoffman, 66 Iowa 205, 210, 23 N.W. 632, 634 (1885); Franklin v. Butcher, 144 Mo. App. 660, 668, 129 S.W. 428, 430 (1910); Hendricks v. Butcher, 144 Mo. App. 671, 673-74, 129 S.W. 431, 432 (1910); Edwards v. Lamb, 69 N.H. 599, 599, 45 A. 480, 481 (1899); Earle v. Kuklo, 26 N.J. Super. 471, 475, 98 A.2d 107, 109 (1953); Kliegel v. Aitken, 94 Wis. 432, 435, 69 N.W. 67, 68 (1896).

tion . . . ."[59]

That liability has been found for nonsexually transmitted diseases demonstrates that some courts are willing to impose a more burdensome duty than that proposed in this Note for the herpetic. The standard of care proposed here is less stringent, due to a factual distinction: viruses of diseases like tuberculosis are airborne and thus the sufferer must abstain from all social contact to prevent infection of others.[60] Herpes, on the other hand, is a contact infectious agent—it lives on humans and is spread through human contact.[61] Thus, the genital herpetic need only forego sexual intercourse while contagious to fulfill his obligation not to infect others—a far less burdensome duty than that imposed by courts to prevent the spread of airborne viruses.

The disease most analogous to genital herpes is venereal disease. In fact, according to the standard definition of venereal disease as "a contagious disease that is typically acquired in sexual intercourse,"[62] genital herpes *is* a venereal disease—the *Kathleen K.* court characterized it as such.[63] But even if it is not technically a venereal disease, the analogy is virtually complete: like the recognized venereal diseases, herpes is serious,[64] socially stigmatizing, and, most importantly, transmitted sexually, thus bearing the same morality implications.

Courts have confronted venereal disease in a variety of contexts.[65] It has been likened to a violent assault inflicting serious

59. Metropolitan Asylum Dist. v. Hill, 6 App. Cas. 193, 204 (H.L. 1881); *see* Missouri, K. & T. Ry. v. Wood, 95 Tex. 223, 233, 66 S.W. 449, 451 (1902).

60. *See* Earle v. Kuklo, 26 N.J. Super. 471, 474-75, 98 A.2d 107, 108-09 (1953).

61. R. HAMILTON, *supra* note 8, at 4.

62. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2540 (P. Gove ed. 1971); *see supra* note 31.

63. 150 Cal. App. 3d at 996 n.3, 198 Cal. Rptr. at 276 n.3.

64. *Id.* at 996, 198 Cal. Rptr. at 276.

65. *See, e.g.*, Logan v. Marshall, 680 F.2d 1121 (6th Cir. 1982) (as *defense* to rape, where victim had gonorrhea); Dean Rubber Mfg. Co. v. United States, 356 F.2d 161 (8th Cir. 1966) (prosecution for misleading advertising); Stone v. Stone, 136 F.2d 761 (D.C. Cir. 1943) (concealment as basis for annulment); Carr v. Carr, 6 Ind. App. 377, 383, 33 N.E. 805, 807 (1893) (as grounds for desertion); McKnight v. McKnight, 401 So. 2d 445 (La. Ct. App. 1981) (wife's refusal to sleep with husband who had venereal disease not grounds for denial of alimony); Kline v. Kline, 179 Md. 10, 16 A.2d 924 (1940) (willful transmission grounds for divorce); Gaw v. Gaw, 327 Mich. 120, 41 N.W.2d 341 (1950) (grounds for divorce based on wrongful imputation of venereal disease to spouse); Carlson v. First Nat'l Bank 355 S.W.2d 928 (Mo. 1962) (as factor in determining capacity to execute will); France v. St. Clare's Hosp., 82 A.D.2d 1, 441 N.Y.S.2d 79 (1981) (libel); Stewart v. Hoosier Casualty Co., 67 Ohio App. 509, 37 N.E.2d 438 (1941) (as not covered by ordinary health and accident insurance policy); Hensley v. Heavrin, 277 S.C. 86, 282 S.E.2d 854 (1981) (misdiagnosis of venereal disease as basis for emotional distress claim); De Vall v. Strunk, 96

bodily injury on the transmittee's person, for which damages may be recovered.[66] Courts have required that the transmittor know or should know he is diseased before liability will attach.[67] They have been willing to infer such knowledge from the circumstances,[68] and to infer an intent to transmit from the infection itself.[69] Courts also have declared the transmission of venereal disease to be outside the scope of the transmittee's consent to sexual intercourse.[70]

That venereal disease may be transmitted between unmarried, casual partners has not abrogated liability.[71] Courts have readily ignored the moral implications of the transmittee's conduct;[72]

S.W.2d 245 (Tex. Civ. App. 1936) (defamation); Harvey v. Harvey, 298 S.E.2d 467, 470-71 (W. Va. 1982) (grounds for invalid marriage).

66. Crowell v. Crowell, 180 N.C. 516, 518, 105 S.E. 206, 207 (1920). In *Crowell*, a wife successfully sued her husband for damages for infecting her with venereal disease.

67. *See, e.g.*, State v. Lankford, 29 Del. (6 Boyce) 594, 596, 102 A. 63, 64 (1917).

68. *See* Cook v. Cook, 32 N.J. Eq. 475 (N.J. 1880), where the court imputed transmittor's knowledge of his syphilitic condition because he had a serious case, had consulted a doctor, was taking appropriate medicine, and had had the disease twice before. Courts even have inferred knowledge from the sole fact that defendant had consulted a doctor prior to transmission. *See, e.g.*, Carbajal v. Fernandez, 130 La. 812, 812-13, 58 So. 581, 581 (1912).

69. *Lankford*, 29 Del. (6 Boyce) at 596, 102 A. at 64.

70. *Id.* at 595, 102 A. at 64. "The fraud practiced upon the 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 . . . syphilis." *Id.*

71. Between such partners, there is no recognized special relationship of trust and confidence giving rise to an affirmative duty to disclose. *See infra* notes 210-25 and accompanying text. *But see Kathleen K.*, 150 Cal. App. 3d at 997, 198 Cal. Rptr. at 276-77 ("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.").

72. *See, e.g.*, Duke v. Housen, 589 P.2d 334 (Wyo. 1979) (female plaintiff awarded $1.3 million for contracting gonorrhea from casual sex partner). Defenses based on plaintiff's immorality have met resounding rejection by courts in a variety of other circumstances. *See, e.g.*, Cramer v. Tarr, 165 F. Supp. 130 (D. Me. 1958) (unmarried couple registered under false name; sued for injuries sustained jumping from hotel during fire; plaintiffs' illicit purpose in occupying hotel room held not to have altered their status as guests to whom defendant innkeepers owed reasonable duty of care); Holcomb v. Meeds, 173 Kan. 321, 246 P.2d 239 (1952) (unmarried couple registered at hotel under false name died of carbon monoxide poisoning due to faulty ventilation; immorality held to be of no consequence unless unlawfulness of act would tend to produce injury); Meador v. Hotel Grover, 193 Miss. 392, 406, 9 So. 2d 782, 786 (1942) (decedent came to hotel to visit prostitutes and was crushed in elevator shaft; in holding for decedent's estate, court stated: "Regardless [of a plaintiff's] moral delinquency, matters which affect his personal character or reputation are no concern of the courts in their examination of his rights as a litigant."); Rapee v. Beacon Hotel Corp., 293 N.Y. 196, 56 N.E.2d 548 (1944) (if defendant has duty, plaintiff's immoral behavior does not abrogate it).

moreover, they refuse to employ the doctrine of in pari delicto.[73] Defendant's transmission of venereal disease is deemed to eclipse any immorality on plaintiff's part.[74] As the *Barbara A.* court stated, "We do not think . . . at this stage of social mores, that it is relevant to judge [unmarried partners] on the basis of morality."[75]

The importance of the morality issue is further diminished by the fact that twenty-four states make venereal disease transmission a criminal offense,[76] signifying that transmitting a serious disease is reprehensible regardless of the method of transmission. Of these states, one requires willfulness,[77] fourteen require knowledge,[78] and nine make transmission a strict liability offense, omitting any reference to scienter on the transmittor's part.[79] State criminal laws characterize the transmission of venereal disease variously from a low-level misdemeanor[80] to a felony,[81] and pen-

73. *See, e.g.*, Panther v. McKnight, 125 Okla. 134, 136, 256 P. 916, 918 (1926); De Vall v. Strunk, 96 S.W.2d 245, 247 (Tex. Civ. App. 1936).

74. *See, e.g.*, De Vall v. Strunk, 96 S.W.2d at 247.

75. 145 Cal. App. 3d 369, 382, 193 Cal. Rptr. 422, 431 (1983).

76. *See* ALA. CODE § 22-16-17 (1975); ARIZ. REV. STAT. ANN. § 36-631 (1983) ("contagious or infectious disease"); CAL. HEALTH & SAFETY CODE § 3198 (West 1979); COLO. REV. STAT. § 25-4-401(2) (1973); DEL. CODE ANN. tit. 16, § 701 (1974); FLA. STAT. ANN. § 384.02 (West 1972); IDAHO CODE § 39-601 (1977); LA. REV. STAT. ANN. § 40:1062 (West 1977); MONT. CODE ANN. § 50-18-112 (1983); NEV. REV. STAT. § 441.220 (1979); N.J. REV. STAT. § 26:4-42(e) (1964); N.Y. PUB. HEALTH LAW § 2307 (McKinney 1977); N.D. CENT. CODE § 23-07-21.3 (1978); OKLA. STAT. ANN. tit. 63, § 1-519 (West 1973); OR. REV. STAT. § 434.180(l) (1981); R.I. GEN. LAWS § 23-11-1 (1979); S.C. CODE ANN. § 44-29-60 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 34-23-1 (1977); TENN. CODE ANN. § 68-10-107 (1983); UTAH CODE ANN. § 26-6-34 (1976) (proscribing transmission of "communicable" diseases); *id.* § 26-6-36 (explicitly declaring venereal disease to be communicable); VT. STAT. ANN. tit. 18, § 1106 (1982); WASH. REV. CODE ANN. § 70.24.010 (1975); W. VA. CODE § 16-4-20 (1979); WYO. STAT. § 35-4-109 (1977) (proscribing transmission of "contagious" diseases); *id.* § 35-4-130 (explicitly declaring venereal disease to be contagious).

77. N.D. CENT. CODE § 23-07-21.3 (1978).

78. ARIZ. REV. STAT. ANN. § 36-631 (1983); CAL. HEALTH & SAFETY CODE § 3198 (West 1979); COLO. REV. STAT. § 25-4-401(2) (1973) (reasonable suspicion); FLA. STAT. ANN. § 384.02 (West 1972); IDAHO CODE § 39-601 (1977); MONT. CODE ANN. § 50-18-112 (1983); NEV. REV. STAT. § 441.220 (1979); N.J. REV. STAT. § 26:4-42(e) (1964) (implied knowledge since statute refers to "conduct"); N.Y. PUB. HEALTH LAW § 2307 (McKinney 1977); OR. REV. STAT. § 434.180(1) (1981) ("conduct"); R.I. GEN. LAWS § 23-11-1 (1979); UTAH CODE ANN. § 26-6-34 (1976); VT. STAT. ANN. tit. 18, § 1106 (1982); WYO. STAT. ANN. § 35-4-109 (1979).

79. ALA. CODE § 22-16-17 (1975); DEL. CODE ANN. tit. 16, § 701 (1974); LA. REV. STAT. ANN. § 40:1062 (West 1977); OKLA. STAT. ANN., tit. 63, § 1-519 (West 1973); S.C. CODE ANN. § 44-29-60 (Law. Co-op 1976); S.D. CODIFIED LAWS ANN. § 34-23-1 (1977); TENN. CODE ANN. § 68-10-107 (1983); WASH. REV. CODE ANN. § 70.24.010 (1975); W. VA. CODE § 16-4-20 (1979).

80. *See, e.g.*, OR. REV. STAT. § 434.990(l) (1981) (class C misdemeanor).

81. *See* OKLA. STAT. ANN. tit. 63, § 1-519 (West 1973).

alties range from six months' hard labor[82] to a $500 fine.[83] The policy underpinning these statutes is protecting public health,[84] a goal equally applicable to genital herpes transmission[85]—perhaps even more so since herpes is incurable. Indeed, the statutes' failure to include herpes expressly may be explained by the fact that the disease has only recently burst upon the social scene,[86] while the venereal disease statutes were enacted in the late nineteenth and early twentieth centuries.[87]

With the exception of one,[88] these criminal statutes do not mention civil liability for transmission. But the jump from criminal to civil liability has been made by courts,[89] commentators,[90]

---

82. *See* ALA. CODE § 22-16-17 (1975).

83. *See* TENN. CODE ANN. § 68-10-111 (1983); WYO. STAT. § 35-4-109 (1977).

84. *See, e.g., Ex parte* James, 147 Tex. Crim. 430, 432, 181 S.W.2d 83, 84 (1944); *cf.* City of San Francisco v. Boyle, 191 Cal. 172, 177, 215 P. 549, 553 (1923) (tuberculosis). In State v. Rackowski, 86 Conn. 677, 680, 86 A. 606, 607-08 (1913), the court upheld the quarantine of a scarlet fever sufferer, observing that "[protecting public health] is a chief end of government, and the legitimate exercise of the power of the State for the accomplishment of such a purpose is a governmental duty which falls within the police power. Its origin rests in necessity." In Skillings v. Allen, 143 Minn. 323, 325-26, 173 N.W. 663, 664 (1919), the court noted that "[t]he health of the people is an economic asset. The law recognizes its preservation as a matter of importance to the state. . . . The laws of this state have been framed to protect the people, collectively and individually, from the spread of communicable diseases."

85. Herpes may already be subject to criminal liability in Nevada and Vermont. The Nevada statute defining venereal disease includes syphilis, gonorrhea, "or any other disease which can be sexually transmitted," NEV. REV. STAT. § 441.050 (1979), which would include genital herpes. The Vermont statute, in similar language, embraces "any other [significant] sexually transmitted disease . . . amenable to control." VT. STAT. ANN. tit. 18, § 1091 (1982).

86. *Kathleen K.*, 150 Cal. App. 3d at 996 n.3, 198 Cal. Rptr. at 276 n.3. Herpes itself, however, is at least 2000 years old. The ancient Greeks gave the disease its name—"herpes" in Greek means "to creep." The disease was known to the Roman emperor Tiberius, who attempted to curb an epidemic of herpes by outlawing kissing at public ceremonies and rituals. R. HAMILTON, *supra* note 8, at 16.

87. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 34-23-1 (enacted 1919); TENN. CODE ANN. § 53-1107 (enacted 1921); WASH. REV. CODE ANN. § 70.24.010 (enacted 1919); WYO. STAT. § 35-4-109 (enacted 1876).

88. WYO. STAT. § 35-4-110 (1977) imposes civil liability on those found guilty under its communicable disease statute, § 35-4-109—which, pursuant to § 35-4-130, includes venereal disease. Section 35-4-110 requires compensation for, among other things, "all expenses incurred by reason of such sickness."

89. *See, e.g.*, Panther v. McKnight, 125 Okla. 134, 136, 256 P. 916, 918 (1926) (because defendant's transmission of venereal disease constituted felony, plaintiff had cause of action in damages for harm so proscribed); *cf.* Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581, 588, 177 P.2d 279, 283 (1947) (failure to conform to statutory standard of care is negligence per se).

90. *See, e.g.*, Hall, *Interrelation of Criminal Law and Torts*, 43 COLUM. L. REV. 967 (1943); Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361

and the *Restatement (Second) of Torts*,[91] giving rise to the theory of negligence per se. An analysis of these sources reveals that, in the case of venereal disease transmission, negligence per se is particularly appropriate.

To establish negligence per se, plaintiffs must satisfy five requirements. First, the statutory violation must be the proximate cause of plaintiff's injury.[92] In the case of sexually transmitted diseases, the statutory violation—having sexual intercourse while in a diseased condition—does cause plaintiff's injury. Second, the purpose of the statute must be to protect the particular interest which has been invaded.[93] The protected interest—bodily integrity in the form of freedom from disease—is identical whether the action is criminal or civil. Third, the statute must protect that interest against the kind of harm which has occurred.[94] Where the disease has been sexually transmitted and the results are serious, this requirement is also satisfied. The fourth requirement is that the plaintiff must show he is within the class of individuals the legislature intended the statute to protect.[95] Since the policy underlying venereal disease statutes is the state's interest in protecting public health, every member of the public falls within the statute's protection. Finally, the harm withstood must be of the same general type which the legislature intended to prevent by enacting the statute.[96] Again, both the method of transmission and the resultant harm are identical in criminal and civil law. The status of genital herpes as a venereal disease, or a perfect analogy to it, therefore mandates civil liability for the transmission of genital herpes.

III. Application of Tort Analysis to the Transmission of Genital Herpes

The plaintiff in *Kathleen K.* pressed four causes of action: negligence, battery, intentional infliction of emotional distress, and affirmative misrepresentation.[97] This Note analyzes each theory separately, as well as a type of misrepresentation not present in

(1932); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914).

91. §§ 285(b), 286 (1979).

92. Falvey v. Hamelburg, 347 Mass. 430, 435, 198 N.E.2d 400, 403 (1964).

93. RESTATEMENT (SECOND) OF TORTS § 286(b) (1979).

94. *Id.* § 286(c).

95. *Id.* § 286(a).

96. *Id.* § 286(d).

97. Complaint at 1-6, *Kathleen K.*

Kathleen K. but which this Note regards as viable: nondisclosure.[98]

The touchstone of a claim for the transmission of disease is the requirement that defendant knew, or should have known, of his affliction prior to transmitting it to plaintiff.[99] This is true whether the claim is based on battery, negligence, or deceit. Courts have imposed a standard of knowledge under which a person is assumed to appreciate his surroundings and to know "a few elementary facts about himself,"[100] including basic rules of health.[101] Since genital herpes is transmittable only during attacks which are manifest by severe outward symptoms—burning, oozing lesions on the genitalia, coupled with headaches and general malaise[102]—the requisite knowledge should be easily established in the herpes context.[103] Moreover, courts have inferred knowledge in venereal disease transmission cases[104] from the seriousness of the infection, and defendant's having consulted a doctor, taken medicine and applied remedies, or suffered previous bouts of the disease.[105] The obvious physical symptoms of genital herpes, in conjunction with proof of one or more of these factors, should

98. *See infra* notes 192-225 and accompanying text.

99. *See, e.g.*, Lawrence v. Commonwealth, 138 Ky. 323, 324-25, 127 S.W. 1013, 1013-14 (1910) (smallpox).

100. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, 183 (5th ed. 1984); *see* RESTATEMENT (SECOND) OF TORTS § 290 (1979). *See generally* Note, *Minimum Standard of Knowledge—Duty to Know*, 23 MINN. L. REV. 628, 633-37 (1939) (detailing certain elementary facts which every adult of ordinary intelligence is held to know).

A useful standard in the genital herpes context might be the test for conspicuousness employed by the Uniform Commercial Code, which inquires whether an item can reasonably be expected to arouse attention. *See* U.C.C. § 1-201(10) comment 10 (1978).

101. W. PROSSER & W. KEETON, *supra* note 100, at 183.

102. *See supra* note 39 and accompanying text.

103. This is true regardless of the herpetic's gender, and despite the common misconception that because female genitalia are internal, women can contract genital herpes and not know it. In women, attacks always include vulvar lesions, which are easily seen and readily felt. R. HAMILTON, *supra* note 8, at 90. Herpes II symptoms should thus alert individuals of both sexes to a physical problem meriting further investigation.

104. The transmittor's knowledge of his disease has not been a significant issue in the few reported venereal disease cases. In Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920), for instance, defendant acknowledged on cross-examination that he had had gonorrhea. *See also* State v. Lankford, 29 Del. (6 Boyce) 594, 594-95, 102 A. 63, 64 (1917) (physician's testimony supported defendant's admission of knowingly transmitting syphilis).

105. *See, e.g.*, Carbajal v. Fernandez, 130 La. 812, 812-13, 58 So. 581, 581 (1912); Cook v. Cook, 32 N.J. Eq. 475, 478 (N.J. 1880). The *Cook* court concluded:

> Taking into consideration the fact that he had had the venereal disease [syphilis] twice; that he had associated with at least one lewd woman a very short time after his marriage, and that his physical condition was such as to render it extremely probable that he was again infected, it was his duty to abstain from connubial

enable plaintiffs to establish that the transmittor knew or should have known of his disease.[106]

A. *Battery*

The plaintiff in *Kathleen K.* based her battery claim on her inability "validly [to] consent to sexual intercourse with defendant because of his failure to inform her that he was a carrier of venereal disease."[107] Thus, she alleged, her contamination was an "unconsented and unprivileged touching"[108] amounting to a battery.[109] The crux of the unconsented touching requirement is that the touching offend a reasonable sense of personal dignity.[110] Battery may be approached under three separate analyses. In addition to the *Kathleen K.* court's uninformed consent route, battery also may be established by analogy to mutual combat,[111] and by a theory of limited consent.[112]

The analysis employed in *Kathleen K.* requires conceptualizing the physical contact between plaintiff and defendant as two separate and distinct touchings: one, the sexual touching, which was within plaintiff's consent, the other, contamination with the Herpes II virus, which was not,[113] due to plaintiff's ignorance of

---

intercourse with his wife, at least until after he had been assured by competent medical authority that her health would not be endangered thereby.

Id. at 478-79.

106. *See* Carbajal v. Fernandez, 130 La. 812, 813, 58 So. 581, 581 (1912).

107. Brief for Appellant at 2, *Kathleen K.*

108. *Id.* The traditional battery is flexible enough to fit modern contexts like herpes litigation. As one attorney for an early herpes plaintiff has commented, "If you're hit at a crosswalk, it makes no difference whether it's by a 1964 Chevy or a Buck Rogers antigravity machine. . . . The fact that it's a new vehicle doesn't mean you need a new theory." Margolick, *supra* note 4, col. 1.

109. Prosser and Keeton have defined battery as an intentional and unpermitted contact with plaintiff's person. W. PROSSER & W. KEETON, *supra* note 100, at 39.

110. RESTATEMENT (SECOND) OF TORTS § 19 (1979). The *Restatement* offers the following illustration: "A, who is suffering from a contagious skin disease, touches B's hands, thus putting B in reasonable apprehension of contagion. This is an offensive touching of B." *Id.* comment a, illustration 3.

111. *See infra* notes 116-18 and accompanying text.

112. *See infra* notes 119-22 and accompanying text.

113. One area in which courts readily find that plaintiff did not consent to a separate touching is medical malpractice. *See, e.g.*, Berkey v. Anderson, 1 Cal. App. 3d 790, 82 Cal. Rptr. 147 (1969) (plaintiff's prior consent to series of electromyograms is not consent to myelogram with spinal puncture); Zoterell v. Repp, 187 Mich. 319, 153 N.W. 692 (1915) (consent to hernia removal is not consent to removal of both ovaries); Bang v. Charles T. Miller Hosp., 251 Minn. 417, 88 N.W.2d 186 (1958) (consent to prostate resection invalid where plaintiff did not know it involved tying off sperm ducts); Corn v. French, 71 Nev. 280, 289 P.2d 173 (1955) (consent to exploratory surgery is not consent to mastectomy).

the disease.[114] Under this analysis, plaintiff's consent to sexual relations would *not* constitute consent to the second, separate touching—the transmission of the herpes virus. Therefore, the transmittor would be liable for infecting his uninformed partner with herpes. Liability is not abrogated merely because plaintiff does not immediately discover that the unpermitted touching has occurred.[115]

A majority of courts recognize the principle of mutual combat—that a person cannot consent to a criminal act.[116] Therefore, in states where transmission of venereal disease is a crime,[117] courts following the mutual combat rule would abrogate plaintiff's consent even where plaintiff *knew* of defendant's diseased status. In jurisdictions where transmission is not a crime, the policy of preserving public health[118] might furnish a basis for invalidating plaintiff's uninformed consent.

Finally, if transmission of genital herpes is viewed as part and parcel of the act of sexual intercourse and not as a distinct touching, liability may still result. In all touching situations, consent is limited to that to which the plaintiff *actually* consents, and defendant can go no further.[119] The applicability of this reasoning to herpes transmission is buttressed by viewing the transmission as a trespass of the person and analogizing to the trespass of land, where a right of entry for one purpose is not a right of entry for all purposes.[120] The analogy to trespass is valid since the interest protected by the battery cause of action, personal integrity,[121] is more compelling than the integrity of property protected by the trespass action.[122]

---

114. *See* State v. Lankford, 29 Del. (6 Boyce) 594, 102 A. 63 (1917) (husband guilty of assault and battery for transmitting venereal disease to wife). The *Lankford* court concluded: "The fraud practiced upon the 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." *Id.* at 595, 102 A. at 64.

115. *See* RESTATEMENT (SECOND) OF TORTS § 18 comment d (1979).

116. W. PROSSER & W. KEETON, *supra* note 100, at 122.

117. *See supra* note 76.

118. *See supra* note 84 and accompanying text.

119. *See* RESTATEMENT (SECOND) OF TORTS § 892(a)(4) (1979).

120. *See* Cartan v. Cruz Constr. Co., 89 N.J. Super. 414, 420, 215 A.2d 356, 360 (1965) ("[C]onsent to enter for one purpose does not constitute authority to enter for another.").

121. W. PROSSER & W. KEETON, *supra* note 100, at 39-40.

122. *Id.* at 115 ("[T]he law has always placed a higher value upon human safety than upon mere rights in property."); *see* Katko v. Briney, 183 N.W.2d 657, 660 (Iowa 1971).

B. *Negligence*

Negligence is defined as conduct which falls below the standard established by law for the protection of others against an unreasonable risk of harm.[123] For a negligence action to succeed, the interest invaded must be protected against unintentional invasion,[124] the conduct of the actor must have been negligent towards another or a class of individuals to which the other belongs,[125] the injury must have been proximately caused by the actor's conduct,[126] and no defenses can exist to abrogate the actor's liability.[127] The conduct may consist either in an act which the actor should realize involves an unreasonable risk of invading another's interest[128] or a failure to take action necessary to protect another when the actor is under a duty to act.[129] The standard to which the actor's conduct must conform is that of the reasonable person under like circumstances.[130]

Traditionally, disease transmission cases have been based on negligence.[131] The duty owed by the transmittor is calculated in relation to the method and likelihood of transmission.[132] The duty derives from the general legal obligation to exercise due care in one's own conduct so as not to injure another.[133]

---

123. RESTATEMENT (SECOND) OF TORTS § 282 (1979).

124. *Id.* § 281(a).

125. *Id.* § 281(b).

126. *Id.* § 281(c).

127. *Id.* § 281(d).

128. *Id.* § 284(a).

129. *Id.* § 284(b).

130. *Id.* § 283.

131. *See, e.g.*, Smith v. Baker, 20 F. 709 (C.C.S.D.N.Y. 1884) (defendant liable for damages caused by spread of child's whooping cough at boarding house); Gilbert v. Hoffman, 66 Iowa 205, 23 N.W. 632 (1885) (innkeeper liable for admitting new guests when he had knowledge of prevalence of smallpox in his hotel); Hendricks v. Butcher, 144 Mo. App. 671, 129 S.W. 431 (1910) (defendant liable for negligently communicating smallpox to an entire family); Edwards v. Lamb, 69 N.H. 599, 45 A. 480 (1899) (surgeon negligent for directing plaintiff to assist in dressing wound, knowing there was danger of infection but assuring her there was none); Missouri, K. & T. Ry. v. Wood, 95 Tex. 223, 66 S.W. 449 (1902) (defendant liable to third parties for negligently allowing quarantined smallpox patient to wander away and infect them); Kliegel v. Aitken, 94 Wis. 432, 69 N.W. 67 (1896) (defendant liable for failing to reveal child's typhoid fever).

132. In Earle v. Kuklo, 26 N.J. Super. 471, 98 A.2d 107 (1953), for example, defendant had tuberculosis, which is transmitted by coughing into the air. *Id.* at 474, 98 A.2d at 108. Noting the capacity of the disease to "float about in the form of tiny globules for a considerable time and distance," *id.*, the court held that defendant had a duty to notify plaintiffs (who lived in the same house) of her disease, and to abstain from close personal contact with them. *Id.* at 475, 98 A.2d at 108-09.

133. *See, e.g.*, Skillings v. Allen, 143 Minn. 323, 325, 173 N.W. 663, 663-64 (1919). There, a physician who released a child from the hospital with highly contagious scarlet

The negligence claim in *Kathleen K.* was premised on defendant's having had sexual relations with plaintiff when he "knew or in the exercise of reasonable care should have known that he had venereal disease and was a carrier of same."[134] This claim highlights two behavior patterns giving rise to potential liability for negligent transmission of genital herpes: (1) the herpetic failed to use reasonable care in determining that he had genital herpes; and (2) the herpetic failed to use reasonable care to protect the transmittee against infection.

1. *Awareness of Disease*

While courts have generally required that defendant have had actual or imputed knowledge of his disease before liability can attach,[135] awareness of the specific nature of the disease is not required. Defendant need only realize that he is diseased.[136] Since the presence of open, oozing genital sores manifests a serious problem regardless of whether or not the sufferer has identified it as genital herpes, any defendant who has experienced an attack should be deemed to possess the requisite knowledge. Proof that defendant had visited a doctor concerning the herpes symptoms would increase the courts' willingness to impute knowledge.[137]

It may be argued that the real basis of negligence lies in defendant's failure to recognize his ability to transmit disease, and that the presence of obvious physical symptoms should not be relied on to impute knowledge of contagion. However, courts have inferred knowledge of the causal connection between circumstances and results in contexts less clear-cut than genital herpes. For instance, one court has imputed the knowledge that eating moldy food causes serious injury.[138] There is nothing inherent in mold to suggest it is dangerous, but, as the court said, the individual simply must realize this fact.[139] No more of a leap in logic is required to impute the knowledge that engaging in sexual rela-

---

fever assured the parents that no danger of infection existed. Both parents ultimately contracted the disease. *Id.* at 324-25, 173 N.W. at 663. The father, who lost wages, successfully brought a negligence action against the physician.

134. Brief for Appellant at 2, *Kathleen K.*

135. *See, e.g.*, Lawrence v. Commonwealth, 138 Ky. 323, 324-25, 127 S.W. 1013, 1013-14 (1910) (smallpox).

136. *See, e.g.*, Cook v. Cook, 32 N.J. Eq. 475, 480 (N.J. 1880).

137. *See* Carbajal v. Fernandez, 130 La. 812, 812-13, 58 So. 581, 581 (1912); Cook v. Cook, 32 N.J. Eq. 475, 478 (N.J. 1880).

138. Kroger Grocery & Bakery Co. v. Woods, 205 Ark. 131, 167 S.W.2d 869 (1943).

139. *Id.* at 134, 167 S.W.2d at 871.

tions while afflicted with overt herpes symptoms will injure the other party.

Knowledge has been imputed in a variety of other situations as well. For example, all members of society are expected to know that touching electric wires can cause shocks,[140] that striking a match in a room where one smells gas can result in explosion,[141] that cars can skid on icy roads,[142] that working in cold water can result in exposure,[143] that working in cold railroad cars can cause illness,[144] and that driving on threadbare tires can lead to blowouts,[145] even though these experiences are by no means common to all individuals. The sole link among these scenarios is common sense: so that society may function, people are presumed to have a certain basic level of knowledge.[146] As society becomes more advanced and complex, the level of knowledge must increase correspondingly. Since courts invariably require defendant's knowledge of his disease in venereal disease cases, a separate inquiry into defendant's knowledge of communicability would be superfluous. In fact, a detailed analysis of the basis for a negligence claim in venereal disease cases is never undertaken; rather, the opinions focus on public policy and morality issues.[147] Thus, once the genital herpes plaintiff has demonstrated defendant's awareness of his disease, knowledge of its communicability should be automatically imputed.

2. *Failure to Protect Transmittee*

Since the negligence standard of care is reasonableness, transmittors with knowledge of their infection may attempt to defend on a "heat of passion" theory. According to this analysis, duties demanding reasonableness and rationality should not be imposed upon parties who are responding to powerful, inherently irrational urges. The analogy is to cases involving drunken tortfeasors who have defended on the ground that, due to their inebriated state, they were unable to act reasonably. The rationale underlying the defense is that use of "intoxicating liquors does to some extent

140. Aller v. Iowa Elec. Light & Power Co., 227 Iowa 185, 288 N.W. 66 (1939).
141. Lanigan v. New York Gas-Light Co., 71 N.Y. 29 (1877).
142. Wolfe v. State *ex rel.* Brown, 173 Md. 103, 194 A. 832 (1937).
143. Jurovich v. Interstate Iron Co., 181 Minn. 588, 233 N.W. 465 (1930).
144. Hicks v. Southern Ry., 23 Ga. App. 594, 99 S.E. 218 (1919).
145. Ridley v. Grifall Trucking Co., 136 Cal. App. 2d 682, 289 P.2d 31 (1955).
146. *See* Note, *supra* note 100, at 633-37.
147. *See, e.g.*, Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920).

blind the reason and exasperate the passions."[148] Nevertheless, courts have rejected the defense, maintaining that since defendant became drunk voluntarily, he is responsible for any harm resulting from his carelessness.[149] Similarly, courts should rebuff attempts by genital herpes transmittors to negate their negligence by claiming that they were unable to act reasonably while inflamed with sexual passion. While sex may not be a matter of reason and logic,[150] the herpetic defendant should not escape liability on this ground, since he voluntarily engaged in a course of conduct that would likely result in sexual intercourse.

It can be argued that herpes transmission cannot be negligent, since knowledge of the disease and its communicability is required before liability will attach. Knowledge implies a higher standard of culpability than negligence, which implies only carelessness.[151] However, the traditional cause of action for disease transmission is negligence, perhaps because knowledge is equated with willfulness, and it strains credibility to imagine many situations where disease transmission is deliberate.[152]

3. *The Balancing Formula Applied to Herpes Transmission*

The traditional balancing test for determining negligence—whether the magnitude of the risk of harm exceeds the social utility of the act[153]—weighs in favor of liability for the

148. Commonwealth v. Hawkins, 69 Mass.(3 Gray) 463, 466 (1855) (intoxication cannot be used to justify or extenuate murder to manslaughter).

149. *See id.* "If the condition of a man's mind, when unexcited by liquor, is capable of distinguishing between right and wrong, reasoning and acting rationally, and he voluntarily deprives himself of reason by intoxication, and commits an offense while in that condition, he is criminally responsible for it." Thomas v. State, 105 Ga. App. 754, 757, 125 S.E.2d 679, 682 (1962).

150. The crude sex-urge . . . is entirely incapable of being sublimated. If it is strongly excited, it needs, in its urgency, an immediate release. It cannot be deflected from its one aim to different aims, or at most can be as little diverted as the need to urinate or as hunger and thirst. It insists on gratification in its original realm.

T. REIK, THE PSYCHOLOGY OF SEX RELATIONS 11 (1945). *See also* H. ELLIS, PSYCHOLOGY OF SEX 17-37 (2d ed. 1938) (describing the phenomena of "tumescence" and "detumescence"—the compelling biological urge to mate which transcends the species of the animal world, from the languid courtship of the hermaphrodytic garden slug to the "psychic aspects" of sex in "the highest stages of civilization"); T. REIK, *supra*, at 11 (crude sex drive is instinctive biological need, conditioned by chemical changes within organism aimed at relieving physical tension).

151. W. PROSSER & W. KEETON, *supra* note 101, at 169.

152. *But see* Leo, *supra* note 6, at 64 (stating that "[s]ome [herpetics] act out their fantasies of revenge").

153. RESTATEMENT (SECOND) OF TORTS § 291 (1979); *see* Suchomajcz v. Hummel Chem. Co., 524 F.2d 19, 24 (3d Cir. 1975); Eaton v. Long Island R.R., 398 F.2d 738, 742

transmission of genital herpes. The risk of injury, infection with genital herpes, is great if the herpetic is having an attack when contact takes place.[154] On the other hand, defendant's pursuit of personal gratification has no social utility whatsoever, and the resulting harm is affliction with an incurable, socially stigmatizing, and emotionally crippling disease.[155] The interest that the herpetic seeks to protect—his own sexual satisfaction—is not legally cognizable. Thus, liability would almost certainly flow under the negligence balance.

4. *Availability of Alternatives*

Essential to a claim for negligence is the availability of alternatives to defendant's course of conduct—if defendant had no choice but to act as he did, then liability will not attach for the results of his behavior.[156] Reasonable care under the analysis of this Note requires that during an attack the herpetic either abstain from sexual activity or fully disclose his condition to whomever he is likely to infect. These alternatives are not only reasonable but necessary to protect others from infection with a serious, contagious disease. Indeed, they comprise the hallmark of the negligence theory—defendant's duty to the plaintiff.[157] The duty of every diseased individual, long established by disease transmission statutes[158] and cases,[159] is to avoid infecting others. The duty

(2d Cir. 1968). The *Eaton* court posited that "[i]n determining whether a course of conduct is reasonable, the probability and gravity of injury must be balanced against the ease of taking preventive measures." *Id.* This standard, when applied to the context of genital herpes transmission, inescapably leads to liability. The burden of preventive measures such as disclosure or abstention is modest when compared to the certainty and severity of infection.

An issue raised by the *Kathleen K.* suit is whether a defendant physician may be held to an expert's standard of knowledge in recognizing the presence of herpes. Ordinarily, an individual possessing skill or knowledge superior to that of the ordinary person will be held to conduct consistent with such special ability. W. PROSSER & W. KEETON, *supra* note 100, at 185.

154. *See* R. HAMILTON, *supra* note 8, at 5; W. WICKETT, *supra* note 5, at 30.

155. *See supra* notes 32-41 and accompanying text.

156. W. PROSSER & W. KEETON, *supra* note 100, at 172. Whether the reasonableness standard has been satisfied by defendant's intermediate precautions presents a jury question. For instance, a man might realize he has herpes, realize he is having an attack, and might reasonably believe that using a condom prevents transmission. *See* THE HELPER, *supra* note 5, at 4. In fact, the severe contagiousness of herpes—virtually any contact with the virus leads to transmission, *see supra* note 35 and accompanying text—would make this precaution inadequate.

157. *See* RESTATEMENT (SECOND) OF TORTS § 284(b) (1979).

158. *See supra* notes 76-96 and accompanying text.

159. *See supra* notes 46-59 and accompanying text.

is calculated in relation to the means and likelihood of transmission.[160]

The duty of care proposed for the herpetic is not so much related to sexual conduct as to presence of disease. The duty requires that the diseased individual behave in such a way as to prevent his actions from creating an unreasonable risk of harm to another.[161] For the herpetic, this duty translates into avoiding sexual relations during attacks,[162] or disclosing the presence of disease to prospective partners.

C. *Intentional Infliction of Emotional Distress*

The type of conduct leading to liability for intentional infliction of emotional distress "exceed[s] all bounds usually tolerated by decent society [and] . . . is especially calculated to cause, and does cause, mental distress of a very serious kind."[163] The plaintiff in *Kathleen K.* alleged that "defendant, by deliberately having sexual intercourse with plaintiff at a time that he knew he was a . . . carrier of herpes, acted outrageously and . . . exceeded the bounds of human decency," thereby causing plaintiff "physical injury and severe emotional distress."[164] Although this claim was successfully pursued in *Kathleen K.*, the nature of a claim for emotional distress in the genital herpes context is fundamentally at odds with the rationale behind the cause of action: recovery for injuries where there has been no physical contact.[165] In the genital herpes context transmission is impossible without contact, and so an independent claim for emotional distress is inconsistent with the facts, and unnecessary.[166] The only scenarios for which a claim for emotional distress might be appropriate are misdiagnosis of another disease as genital herpes, which would cause emo-

160. *See supra* notes 132-133 and accompanying text.

161. RESTATEMENT (SECOND) OF TORTS § 298 (1979).

162. Dr. Hamilton views abstinence as the only viable means of reducing the risk of infection. R. HAMILTON, *supra* note 8, at 25.

163. Brief for Appellant at 3, *Kathleen K.*; *see* W. PROSSER & W. KEETON, *supra* note 100, at 60.

164. Brief for Appellant at 3, *Kathleen K.*

165. *See* Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1036-37 (1936); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 875 (1939); *see also* Dillon v. Legg, 68 Cal. 2d 728, 746-47, 441 P.2d 912, 924-25, 69 Cal. Rptr. 72, 84-85 (1968) (mother recovered from negligent motorist for emotional trauma suffered in witnessing her child's death).

166. Indeed, in the pertinent section of the *Restatement* not a single illustration involves contact. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1979).

tional trauma without contact,[167] or wrongful imputation of genital herpes, where the claim for emotional distress would be grounded in defamation.[168] But in the context of genital herpes transmission, emotional distress is more properly an item of *damages* flowing from the injury itself,[169] and thus is not suitable as an independent claim.[170]

D. *Deceit and Negligent Misrepresentation*

Misrepresentation in the genital herpes context involves defendant's inducing plaintiff's consent to physical contact by misrepresenting the risk of injury to plaintiff. There are two potential liability theories for genital herpes transmission based on misrepresentation—affirmative misrepresentation, both intentional and negligent, and nondisclosure. Accordingly, the following fact patterns might support a suit based on misrepresentation: (1) injury to plaintiff resulting from defendant's affirmation of health when he knows or in the exercise of reasonable care should know he has herpes, and (2) defendant's remaining silent, knowing plaintiff's ignorance of his condition and risking transmission anyway. Since both subcategories of misrepresentation involve fundamentally different facts—one, an affirmative statement, and the other, an omission—and rely on entirely separate theoretical underpinnings, they are discussed separately.

1. *Affirmative Misrepresentation*

a. *Deceit*. Traditionally, one who intentionally misrepresents a fact, thereby causing physical harm to another who has justifia-

167. *See, e.g.*, Hensley v. Heavrin, 277 S.C. 86, 282 S.E.2d 854 (1981) (physician's incorrect diagnosis of syphilis gave rise to cause of action for emotional distress).

168. *See, e.g.*, State *ex rel.* Curtis v. Crow, 580 S.W.2d 753 (Mo. 1979) (libel); De Vall v. Strunk, 96 S.W.2d 245 (Tex. Civ. App. 1936) (slander).

169. The *Restatement* notes that emotional distress may be an element of damages where other interests have been invaded and tort liability has arisen apart from the emotional distress. RESTATEMENT (SECOND) OF TORTS § 46 comment b (1979).

170. The case relied upon by the plaintiff in *Kathleen K.* as a basis for her emotional distress claim, Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980), is inapplicable to herpes transmission cases. In *Molien*, defendant physician had negligently diagnosed and treated plaintiff's wife for syphilis, which caused plaintiff's divorce. Plaintiff sued the doctor for negligent infliction of emotional distress. *Molien* is distinguishable from *Kathleen K.* on these grounds. First, *Molien* dealt with negligent infliction of emotional distress; the emotional distress pleaded in *Kathleen K.* was intentional. Second, *Molien* was a third-party suit whereas the injury in *Kathleen K.* was to the plaintiff personally. Third, there was no physical contact in *Molien*; thus, the sole issue in that case—to what extent injuries unaccompanied by physical impact should be compensated—is not present in the herpes transmission scenario.

bly relied on the statement, is liable for resulting damages.[171] The plaintiff in *Kathleen K.* alleged that "defendant [in response to plaintiff's inquiry] represented to her that he was free from venereal disease at a time when he was in fact a carrier, knew himself to be a carrier, and knew that plaintiff was relying on his willful misrepresentation." Reasonably relying on defendant's misrepresentation, "plaintiff . . . engage[d] in sexual intercourse with him and contracted venereal disease solely as a result."[172] A claim for deceit generally mirrors these allegations. Plaintiff must show (1) a representation[173] made by defendant (2) concerning a material[174] (3) fact;[175] (4) knowledge or belief on the part of defendant

171. *See* RESTATEMENT (SECOND) OF TORTS § 557A (1979).

172. Brief for Appellant at 3, *Kathleen K.*

173. Prosser and Keeton have defined representation as "conduct calculated to convey a misleading impression under the circumstances of the case." W. PROSSER & W. KEETON, *supra* note 100, at 736. The representation need not be a spoken communication. *See* Salzman v. Maldaver, 315 Mich. 403, 24 N.W.2d 161 (1946) (seller liable for misrepresentation consisting of stacking aluminum sheets so as to hide corroded sheets from purchaser); *see also* Sorenson v. Adams, 98 Idaho 708, 571 P.2d 769 (1977) (written misrepresentation); Cassidy v. Uhlmann, 170 N.Y. 505, 63 N.E. 554 (1902) (fraudulent transfer).

Since the misrepresentation need not be verbal, an argument can be made that by engaging in sexual intercourse, defendant implicitly represents that he is healthy. This implied representation differs from that made in wrongful birth or pregnancy actions such as Stephen K. v. Roni L., 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980). The presumption in the pregnancy context is fertility, not sterility, whereas in the herpes transmission context the presumption is health, not disease.

174. *See* RESTATEMENT (SECOND) OF TORTS § 538 (1979); W. PROSSER & W. KEETON, *supra* note 100, at 753-54. Prosser and Keeton as well as the *Restatement* have treated materiality in the context of the justifiability of plaintiff's reliance. Nevertheless, materiality has often been listed as an independent requirement of relevancy or minimum importance. *See, e.g.*, Shores v. Sklar, 647 F.2d 462, 468 (5th Cir. 1981); Nader v. Alleghany Airlines, 626 F.2d 1031, 1036 (D.C. Cir. 1980).

175. W. PROSSER & W. KEETON, *supra* note 100, at 755. Thus, an action for deceit would not lie where defendant's assertion is an opinion or a promise. But defendants could not avoid liability with cleverly worded assertions since courts look to the reasonable interpretation of defendants' language. *See, e.g.*, Barbara A. v. John G., 145 Cal. App. 3d 369, 376, 193 Cal. Rptr. 422, 427 (1983) (defendant's assurance, " 'I can't possibly get anyone pregnant,' " justified plaintiff's assumption that defendant was sterile). In Liptrot v. Basini, No. 82-19427 (Fla. Cir. Ct., Broward County, filed Sept. 20, 1982), plaintiff had questioned defendant regarding a sore, to which defendant had replied that "his doctor did not know what the sore was, but that it was not contagious." Mellowitz & Rojas, *supra* note 42. If defendant's statement were true, his physician may be liable as well; if it were false, it would constitute a traditional, albeit imaginative, fraud practiced on the plaintiff. In ambiguous representation cases, the *Restatement* mandates liability where the maker knows a statement is capable of two interpretations and intends that it be misunderstood. RESTATEMENT (SECOND) OF TORTS § 527(a) (1979). Thus, whether defendant's statement may be deemed fact or opinion depends to some extent on plaintiff's own interpretation. If plaintiff's interpretation is reasonable—if a reasonable person would conclude that defendant is representing himself as disease-free—defendant's statement will be deemed a statement of fact, potentially actionable as a misrepresentation.

that the representation is false,[176] or reckless disregard for its accuracy;[177] (5) defendant's intent to deceive—to induce plaintiff to act or refrain from acting in reliance on the untruth;[178] (6) plaintiff's justifiable reliance;[179] and (7) damage to plaintiff as a result of such action.[180]

Applied to genital herpes transmission, an action for deceit might lie where, prior to sexual activity, defendant has affirmed his health to plaintiff or denied that he is diseased. If either representation is untrue because defendant in fact was having an attack of genital herpes at the time, the first three elements appear to be satisfied.[181] The fourth requirement would be met if plaintiff establishes that defendant knew or believed he had herpes or some other genital disease,[182] or at least recognized his ignorance regarding facts that he has represented as true.[183] The crucial fifth element—intent to deceive—would require proof that defendant intended the representation to induce plaintiff's participation in the sexual activity.[184] Plaintiff might satisfy the sixth requirement,

176. W. PROSSER & W. KEETON, *supra* note 100, at 740-45. The *Restatement* holds that a misrepresentation is actionable if defendant knows or believes the statement is false, lacks confidence in its accuracy, or knows he has no basis for the representation. RESTATEMENT (SECOND) OF TORTS § 526(a)-(c) (1979).

177. RESTATEMENT (SECOND) OF TORTS § 526(b) (1979). Under this standard, defendant—with open sores on his genitals—cannot evade liability through "willful ignorance" of the disease; he can "become liable not so much for being ignorant as for remaining ignorant, and this obligation may require him to know at least enough to conduct an intelligent inquiry as to what he does not know." W. PROSSER & W. KEETON, *supra* note 100, at 741-42.

178. W. PROSSER & W. KEETON, *supra* note 100, at 741.

179. RESTATEMENT (SECOND) OF TORTS § 537 (1979); W. PROSSER & W. KEETON, *supra* note 100, at 750-53. Reliance in the genital herpes context may take the form of action (participating in sexual activity) or nonaction (foregoing an inspection of defendant's genitalia regardless of how easy the investigation would have been). *See* RESTATEMENT (SECOND) OF TORTS § 540 (1979).

180. W. PROSSER & W. KEETON, *supra* note 100, at 765. The element of privity, or "scope of influence," may be implicated in third-party herpes transmission claims such as those brought by spouses of defendants' victims, *see supra* note 100; no such issue arises in claims by direct transmittees.

181. *See supra* notes 173-75 and accompanying text.

182. For relaxation of the knowing falsehood requirement, see Rosenberg v. Howle, 56 A.2d 709, 711-12 (D.C. 1948) (reckless disregard for truth); Hollerman v. F.H. Peavey & Co., 269 Minn. 221, 227-28, 130 N.W.2d 534, 539-40 (1964) (defendant knew he lacked basis for determining truth or falsity of his statement). Even if defendant were incapable of diagnosing his disease, the dramatic overt symptoms would indicate that he was not disease-free; were he to represent otherwise, his statement would constitute a "knowing" misrepresentation. A minority of courts permit deceit to lie for negligent misstatements. W. PROSSER & W. KEETON, *supra* note 100, at 746.

183. *See supra* note 177 and accompanying text.

184. In other words, defendant need not have intended to transmit herpes, but merely

justifiable reliance, by pointing to defendant's superior knowledge of his own body and the existence of disease. Finally, plaintiff would be permitted monetary recovery upon establishing damage causation—that reliance on defendant's representation was at least "a substantial factor determining the course of conduct that resulted" in plaintiff's infection with genital herpes.[185] Since it is not improbable that a plaintiff could plead and prove all the foregoing elements in the genital herpes context, a cause of action in deceit is viable.

b. *Negligent Misrepresentation*. The majority of courts recognize an action for negligent misrepresentation. Thus, plaintiffs unable to prove knowledge of falsity and intent to deceive may yet recover damages on this theory. An actor makes a negligent misrepresentation when, although he has an honest belief in the truth of his representation,[186] he was negligent either in obtaining[187] or communicating[188] the information it contains. In the area of genital herpes transmission, defendant might make a negligent misrepresentation because he failed to use reasonable care in determining whether he had genital herpes or some other communicable disease. In disease transmission cases, courts have imputed knowledge of venereal disease to defendants.[189] Moreover, in the genital herpes context knowledge of communicability can be inferred from knowledge of the disease.[190] Therefore, whether or not defendant was aware he misrepresented the facts, and with

---

to mislead. His *motive* for engaging plaintiff in sexual activity is immaterial—the key is that defendant contemplated plaintiff's reliance. *See* Green, *The Communicative Torts*, 54 TEX. L. REV. 1, 26-27 n.85 (1975). Thus, the seduction itself is not actionable, a fundamental misunderstanding on defendant's part in *Kathleen K.* There, defendant argued that plaintiff's claim was basically one for seduction, or the "use of deception to effectuate intercourse," an action not recognized in California. *See* Brief for Respondent at 12, *Kathleen K.* Defendant contended that plaintiff could not disguise the nature of her claim by alleging fraud and negligence. *Id.* This argument fatally misconstrues the herpes claim, where the harm complained of is not plaintiff's having engaged in sexual intercourse, but plaintiff's contagion with an incurable disease. *Cf. supra* text accompanying notes 113-15.

185. *See* RESTATEMENT (SECOND) OF TORTS § 546 (1979). Since deceit requires scienter, punitive damages may also flow. *See* Brief for Appellant at 3, *Kathleen K.*; *see* W. PROSSER & W. KEETON, *supra* note 100, at 9. "Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award . . . 'punitive' . . . damages." "[I]t is not so much the particular tort committed as defendant's motives and conduct in committing it" which determine whether punitive damages are appropriate. *Id.* at 11.

186. W. PROSSER & W. KEETON, *supra* note 100, at 745.

187. RESTATEMENT (SECOND) OF TORTS § 552(1) (1979).

188. *Id.*

189. *See supra* note 105 and accompanying text.

190. *See supra* notes 135-36 and accompanying text.

or without the intent to deceive, he may be liable for having conveyed negligently obtained information. Damages are those resulting from plaintiff's reliance on defendant's representations.[191]

2. *Nondisclosure*

The traditional axiom is that a person need not disclose a fact, or otherwise act affirmatively, unless the law has imposed a duty upon him to do so.[192] This Note maintains that the herpetic, during an attack, should be legally required either to abstain from sexual conduct or to disclose the presence of disease to the prospective partner, proceeding only if the partner consents. Several compelling theories support recognition of such a duty.

a. *Failure to Disclose as Misfeasance*. The most compelling argument for recognizing a duty to disclose the presence of genital herpes is that it is *not* a new affirmative duty at all. Rather, such disclosure is implicit in the general duty to use care in one's conduct not to cause serious physical injury to another.[193] In effect, by disclosing beforehand the presence of disease, the herpetic gives the transmittee an opportunity to offer informed consent to the possibility of infection. The *Restatement* supports this view by suggesting that a prior warning can remove the "unreasonable character" of a subsequent act, thereby removing negligence.[194] Disclosure in the genital herpes context is thus better viewed as a function of informed consent,[195] negating what would otherwise

191. Courts' initial reluctance to recognize negligent misrepresentation, based on the potentially unbounded liability to which defendants might be subject, can be overcome in the herpes transmission context by requiring strict privity. *See* W. PROSSER & W. KEETON, *supra* note 100, at 745; *cf.* RESTATEMENT (SECOND) OF TORTS § 552(2)(a) (1979).

192. "A man cannot be said to conceal what he is not bound to reveal, suppress what he is under no duty to express, or keep back what he is not required to put forward." Keeton, *Fraud—Concealment and Nondisclosure*, 15 TEX. L. REV. 1, 12 n.27 (1936); *see also* Windram Mfg. Co. v. Boston Blacking Co., 239 Mass. 123, 126, 131 N.E. 454, 455 (1921) ("It may now be said to be firmly established that silence as to matters which there is no duty, original or supervening, to divulge, however actionable a positive misrepresentation of such matters may be, . . . subjects the party observing silence to no legal liability whatever.").

193. *See* RESTATEMENT (SECOND) OF TORTS § 281 comment e (1979); Skillings v. Allen, 143 Minn. 323, 325, 173 N.W. 663, 663-66 (1919).

194. RESTATEMENT (SECOND) OF TORTS § 301(2)(b) (1979).

195. Consent might provide a defense to a herpes transmission claim based on battery. Consent is a willingness for conduct to occur, *see* RESTATEMENT (SECOND) OF TORTS § 892 (1979), which negates the existence of the battery, W. PROSSER & W. KEETON, *supra* note 100, at 112, based on the maxim *volenti non fit injuria*—to one who is willing, no wrong is done, RESTATEMENT (SECOND) OF TORTS § 496A comment b (1979). To be valid, consent must be fully informed. Thus, consent to sexual intercourse would not constitute consent

be negligence, than as a discrete duty to warn. If the herpetic fails to disclose and nevertheless proceeds to infect his partner, he has caused a serious physical injury to another for which he should be liable in negligence.

While American law has generally been hostile to the imposition of affirmative duties, the philosophy behind that policy— that he who goes unwarned or unaided remains no worse off than he was before[196]—has no application to the genital herpes context. There, he who goes unwarned will indeed be worse off. If the herpetic fails to act— either by abstaining or by disclosing his condition—plaintiff will contract a painful, incurable disease. One mistake of courts[197] and commentators[198] has been to view the duty to disclose in a vacuum. However, the genital herpes transmission claim is not based on duty of general public disclosure such as the manufacturer's duty to warn. Rather, the claim is based on omission to do an act (disclosure) required only because the herpetic is having an attack and has not elected abstinence. In this particular context, to act without disclosure exposes another to an unreasonable risk of harm.

This distinction is illuminated by the test for distinguishing misfeasance from nonfeasance: "whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good."[199] Under this standard, nondisclosure by the herpetic, who then engages in sexual conduct during an attack, is categorized as misfeasance. Such a defendant is not merely "refusing to become an instrument for good," but is launching an instrument of harm. Thus, viewing disclosure as an affirmative duty to warn is inappropriate in the context of herpes transmission.

Alternatively, the absence of a representation in the herpes context may be viewed as an implied representation of health. By not disclosing his disease and yet engaging in sexual activity, the

---

to infection with herpes unless the transmittee were aware of the herpetic's condition before consenting. Since transmitting an incurable disease with painful physical and emotional effects is contact of a substantially different nature than the sexual contact, it would thus require a specific consent.

196. Terry, *Negligence*, 29 HARV. L. REV. 40, 52 (1915).

197. *E.g.*, Kathleen K. v. Robert B., No. WEC 72582, slip op. at 2 (Cal. Super. Ct., Los Angeles County, Feb. 25, 1983).

198. *E.g.*, THE HELPER, *supra* note 5, at 5.

199. H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 168, 159 N.E. 896, 898 (1928) (Cardozo, C.J.).

herpetic is misrepresenting a matter of fundamental concern to his partner—a fact "basic to the transaction."[200] In the business context, the elements of misrepresentation include the requirement that the actor know the other is about to enter into a transaction under a mistake of fact, and the requirement that the other have a reasonable expectation of disclosure.[201] To illustrate, the *Restatement* offers a hypothetical in which *A* sells *B* a house riddled with termites without disclosing the condition. *A* is liable to *B*;[202] the reasonable expectation is that the house is free of infestation and structurally sound. Similarly, among couples who engage in sexual activity, the reasonable expectation is that the other is free of transmittable disease. Thus, it may be argued that nondisclosure of genital herpes is not nonfeasance at all, but rather an implicit representation of being disease-free.

b. *Failure to Disclose as Nonfeasance*. If failure to disclose is viewed as nonfeasance, then the genital herpes context is one of the clearest in which a duty to disclose should be imposed. The principal reason that affirmative duties do not exist currently in American law is the difficulty in framing them—determining when they arise and under what circumstances.[203] Nevertheless, commentators have lamented the lack of such duties,[204] and there is support for the prediction that affirmative duties are the future of tort law.[205] In fact, two states have already enacted affirmative duty statutes,[206] and many Western European countries have had

200. *See* RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1979).

201. *Id.*

202. *Id.* comment j, illustration 3.

203. *See* Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DE PAUL L. REV. 30, 67-68 (1951); *see also* Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 209, 235-36 (1905) (arguing that assumption of affirmative duties must be based on consideration); McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1282-83 (1949) (urging that affirmative duties be imposed "only in situations where the one under a duty to act has voluntarily brought himself into a certain relationship with others from which he obtains or expects benefit"); *cf.* Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 449, 509 (1965) (arguing that obligatory duty to act is feasible and offering a proposed standard).

204. *See, e.g.*, Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112-13 (1908); Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630, 652-54 (1966); McNiece & Thornton, *supra* note 203, at 1289; Rudolph, *supra* note 203, at 409-502.

205. *See* Ames, *supra* note 204, at 112-13; McNiece & Thornton, *supra* note 203, at 1289.

206. Vermont's Duty to Aid the Endangered Act provides in pertinent part:

(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or

them for some time,[207] indicating that such duties are not outside the ambit of tort law.

The herpes transmission situation is uniquely suited to the imposition of an affirmative duty to warn. First, the duty can be clearly and easily defined—it simply requires the statement, "I have genital herpes." It involves no danger to the herpetic and, if the other partner proceeds in the face of this warning, an assumption of the risk defense[208] might lie. With these considerations in mind, a duty to disclose is not unrealistic and involves only that which is required of every member of society—to act reasonably under the circumstances.[209]

The case for imposing a duty to disclose upon the herpetic is strengthened by analogizing to those special relationships upon which affirmative tort duties traditionally have been based. One key relationship requiring heightened duty by law is the fiduciary relationship,[210] which demands general disclosure of all relevant material.[211] If herpes transmission takes place, for instance, be-

---

without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

VT. STAT. ANN. tit. 12, § 519 (1973); *see also* MINN. STAT. ANN. § 604.05 (West Supp. 1984).

207. *See* Feldbrugge, *supra* note 204, at 655 app. (France, Italy, West Germany).

208. Assumption of the risk involves plaintiff's argument "to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do . . . ." W. PROSSER & W. KEETON, *supra* note 100, at 480. The underlying theory is that a "plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." RESTATEMENT (SECOND) OF TORTS § 496A (1979).

A successful assumption of the risk defense must fulfill two requirements. First, plaintiff must know and understand the risk he is facing. *Id.* § 496D ("Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character."). Second, plaintiff's choice to incur the risk must be entirely free and voluntary. W. PROSSER & W. KEETON, *supra* note 100, at 490. Applied to genital herpes transmission, assumption of the risk would require either (1) that defendant disclose his condition and the risk of transmission and plaintiff proceed anyway, or (2) that plaintiff observe defendant's condition, fully appreciate its nature, and undertake the risk of infection nonetheless. A subjective standard is used to determine if the plaintiff knows, understands, and appreciates the risk involved. RESTATEMENT (SECOND) OF TORTS § 496D comment c (1979).

209. *See, e.g.*, Depue v. Flatau, 100 Minn. 299, 303, 111 N.W. 1, 2 (1907).

210. *See* RESTATEMENT (SECOND) OF TORTS § 551 comments e & f (1979); Keeton, *supra* note 192, at 11. Professor Keeton has compiled the following list of fiduciary relationships: principal—agent, trustee—cestui, parent—child, guardian—ward, and attorney—client. He noted, however, that these relationships have been "confined within narrow limits," excluding, for example, the relationship among tenants in common, banks and their depositors, and stockholders and directors. *Id.*

211. Keeton, *supra* note 192, at 34. Professor Keeton offers the following hypothetical:

tween a husband and wife,[212] the fiduciary relationship would require at least disclosure. Such a duty may also exist between fiancees.[213] But "fiduciary relationship" is not a legal talisman for all those relationships in which any duty is owed. Falling between the fiduciary duty and the general duty of due care are several intermediate relationships which courts have acknowledged and, beyond that, special circumstances in which courts have required disclosure regardless of the parties' relationship.

One widely recognized intermediate relationship is that of "special confidence."[214] Partners to the sexual intercourse, if only for a brief time, share a trust and intimacy which elevates their relationship from the level of mere friend or acquaintance. Their confidential relationship should invoke a heightened duty, requiring disclosure of specific facts as circumstances dictate:[215] the risk of contracting an incurable disease demands disclosure even to one with whom intimacy has only briefly been shared.

Another intermediate relationship invoking heightened duty is

---

> A director, in purchasing stock other than through a broker, might well be required to disclose facts which greatly affect the value of the stock, and which are not shown by the books of the corporation, whereas the ordinary buyer would be under no such duty. In fact, the decisions point to this conclusion. Also, if *A* and *B* are friends, should not *B* be entitled to require a fuller disclosure than would be the case where *A* and *B* are rivals and bitter enemies?

Id. at 34-35.

212. *Cf.*, *e.g.*, Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920) (gonorrhea).

213. *See* THE HELPER, *supra* note 5, at 5.

214. *See* Barbara A. v. John G., 145 Cal. App. 3d 369, 382-83, 193 Cal. Rptr. 422, 431-32 (1983) (such relationship may be "founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship"); *see also* Adickes v. Andreoli, 600 S.W.2d 939, 945-46 (Tex. Civ. App. 1980). Friendship alone, however, is not enough. *See* Eaton v. Sontag, 387 A.2d 33, 37 (Me. 1978).

In finding a duty to disclose, courts have extended the principle of special confidence to situations in which "the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed." W. PROSSER & W. KEETON, *supra* note 100, at 739. These circumstances are facially similar to those of fiduciary relationships; in fact, the *Restatement* considers them together. *See* RESTATEMENT (SECOND) OF TORTS § 551 comment f (1979). The only significant distinction may be that, while fiduciary relationships have been narrowly confined to distinct roles, confidential relationships have been found in a variety of settings and do not depend on role designation. *See* Ruebsamen v. Maddocks, 340 A.2d 31, 35 (Me. 1975). For instance, while certain family relationships may normally be considered ones of trust and confidence, a confidential relationship may not be presumed solely on the basis of kinship. RESTATEMENT (SECOND) OF TORTS § 551 comment f (1979). Special confidence could not be found in the relationship of two long-estranged brothers, for example. *Id.* Thus, the finding of a confidential relationship seems to require case-by-case analysis of the trust one has placed in the other. *See Ruebsamen*, 340 A.2d at 35.

215. *See Kathleen K.*, 150 Cal. App. 3d at 997, 198 Cal. Rptr. at 276-77.

that of social guests.[216] The basis of the theory is that, to one who is an invited guest in another's home,[217] the host owes a duty not only to do no harm but to take positive steps to insure that no harm befalls the guest.[218] As one court has stated:

> [W]henever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect.[219]

The plaintiff who has been invited into the herpetic's home is at the very least a social guest. As such, the herpetic owes plaintiff a duty to protect against plaintiff's injury. As proposed by this Note, this duty mandates either abstention from sexual contact or disclosure of the risk of transmission.

Even where no legally cognizable relationship exists,[220] courts have imposed a duty to disclose depending on, among other things, the parties' relationship,[221] the nature of the undisclosed fact,[222] the materiality of the undisclosed fact,[223] the type of damage which the uninformed party will, or is likely to, suffer as a result of nondisclosure,[224] and the conduct of the party with knowledge of the undisclosed fact.[225] All considerations point to an affirmative duty to disclose the presence of genital herpes to a prospective partner—the intimacy of the situation, the seriousness of the disease, the grave risk of damage to the transmittee, and the

---

216. *See* Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 227-28 (1908); Gregory, *supra* note 203, at 45-50.

217. The social guest is to be distinguished from trespassers and licensees. *See* Bohlen, *supra* note 216, at 228.

218. *See* Depue v. Flatau, 100 Minn. 299, 303-04, 111 N.W. 1, 2-3 (1907); *see also* Hutchinson v. Dickie, 162 F.2d 103, 106 (6th Cir.), *cert. denied*, 332 U.S. 830 (1947) (yacht); Tubbs v. Argus, 140 Ind. App. 695, 698-700, 225 N.E.2d 841, 842-43 (1967) (automobile).

219. *Depue*, 100 Minn. at 303, 111 N.W. at 2.

220. *Compare* Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (under certain circumstances, psychiatrist has duty to warn one whom patient has threatened), *with* Thompson v. Alameda County, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980) (county has no duty to notify citizens that parolee has made generalized threats of violence).

221. *See supra* note 211.

222. Professor Keeton draws the distinction between intrinsic defects in the subject matter (where there is more likely to be a duty to disclose), and extrinsic facts. Keeton, *supra* note 192, at 35.

223. *Id.* at 39.

224. *Id.* at 36.

225. *E.g.*, active concealment. *Id.* at 36-37.

transmittor's superior awareness of his own physical condition.[226] In other words, disclosure is a simple and effective means of behaving reasonably under the circumstances.

E. *Defenses*

1. *Comparative Negligence*

The defendant in a genital herpes lawsuit might assert the defense of comparative negligence to escape liability at least in part. That defense divides liability between plaintiff and defendant according to their relative degrees of fault.[227] The defendant might assert the defense by making two arguments. First, the sheer prevalence of the disease should put plaintiff on notice that he may contract herpes *any* time he has sex with a nonmarital partner.[228] Plaintiff thus had a duty to safeguard himself but breached that duty. Second, plaintiff's decision to have sex with defendant and his negligent participation in such activity should, under a comparative negligence theory, shift at least some of the liability for the resulting injury to plaintiff.

The major problem with such use of comparative negligence is the extent of plaintiff's duty to safeguard himself from all dangers. Existing case law indicates that plaintiff's duty to protect himself from every possible harm is not high.[229] He need not have investigated nor questioned his potential sex partner. Even plaintiff's

226. *See* Chailland v. Smiley, 363 S.W.2d 619, 625 (Mo. 1963) (heightened duty on party best able to avert harm).

227. W. PROSSER AND W. KEETON, *supra* note 100, at 471-72.

228. *See supra* text accompanying notes 5-9.

229. In Saunders v. Kaplan, 101 So. 2d 181 (Fla. Dist. Ct. App. 1958), for example, plaintiff entered defendant's cocktail lounge. He observed one of the waitresses using a squeegee to remove water from the terrazzo floor. *Id.* at 183. After she finished, plaintiff started to dance, slipped, fell, and hurt his knee. *Id.* The court held that plaintiff was negligent in producing his own injury. Since the floor had apparently been cleared of water, plaintiff was justified in proceeding to dance. *Id.* In Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962), plaintiff attended a costume party wearing a hula skirt borrowed from her aunt. The skirt had been purchased from defendant. It caught fire and plaintiff was engulfed in flames. *Id.* at 151. She sued defendant for damages. Defendant asserted that plaintiff was responsible since the skirt was too long and too large for her, that it swept the floor when plaintiff sat, and that she wore it at a party where there were many people smoking without ashtrays. *Id.* at 152-53. Nevertheless, the court found no negligence on plaintiff's part. *Id.* at 153. *See also* Huxol v. Nickell, 205 Kan. 718, 721-22, 473 P.2d 90, 93 (1970) (college night watchman, while peering into library windows with flashlight, fell into an 8-foot-deep hole dug by defendant contractor but was not found negligent since there were no barricades or signs, or dirt piled up around the hole to suggest its presence); Johnson v. Rulon, 363 Pa. 585, 590-72, 70 A.2d 325, 327-29 (1950) (glancing up at "food signs" in defendant's restaurant, plaintiff, upon turning to hang up his coat, stepped into an open

failure to investigate a *rumor* of an outbreak of an infectious disease does not shift a portion of defendant's fault onto plaintiff.[230]

Furthermore, no duty to anticipate negligence exists under tort law;[231] one who fails to anticipate a danger to himself is therefore not negligent.[232] The only way such a duty to anticipate could arise would be if the danger of herpes were widespread and a large segment of the general public could recognize the physical manifestation of a herpetic outbreak. If those two conditions were met, the defendant might escape part of his liability for transmitting the disease to plaintiff if he could prove, for example, that plaintiff saw his sores. Courts do not impose this duty to know, however, when the danger is new and unfamiliar to most people as in the case of herpes.[233] Thus, plaintiffs generally need not take affirmative action to avoid partial liability.

A secondary problem with the assertion of comparative negligence is the question of causation. The defendant cannot logically assert that plaintiff's consent to have sex with him absolves him

---

trap door and fell into the basement below; plaintiff was negligent in bringing about his injury, since he was justifiably distracted by the food signs).

230. Gilbert v. Hoffman, 66 Iowa 205, 23 N.W. 632 (1885). Defendants in *Hoffman* failed to close their hotel until the rumor of a smallpox infection within the hotel had been verified. Plaintiff checked into the hotel without being informed of the disease by defendants. She contracted the disease and sued defendants. Defendants claimed that plaintiff should be denied recovery because she had checked into the hotel after hearing a rumor, and had not inquired as to its accuracy. The court found for plaintiff, saying that "[b]y keeping their hotel open for business, [defendants] in effect represented to all travelers that it was a reasonably safe place at which to stop . . . ." *Id.* at 210, 23 N.W. at 634.

231. *See, e.g.*, Witort v. United States Rubber Co., 3 Conn. Cir. Ct. 690, 693-94, 223 A.2d 323, 326-27 (1966) (plaintiffs, who parked their cars in lot at defendant's factory, could not be expected to anticipate that the factory would spew latex onto their cars, ruining the paint jobs); Logan v. McPhail, 208 Kan. 770, 776, 494 P.2d 1191, 1196 (1972) (a motorist may reasonably assume that other drivers will obey the traffic laws); Woodard v. First of Ga. Ins. Co., 333 So. 2d 709, 711 (La. Ct. App. 1976) (pistol owner not negligent in failing to anticipate that his friend, defendant, who was an experience hunter, would handle the gun carelessly and shoot him); Mesher v. Osborne, 75 Wash. 439, 451, 134 P. 1092, 1097 (1913) (mother, in allowing her child to play in neighbor's yard unattended, was not negligent when child fell into a hidden cesspool and drowned since she had no reason to know of the danger and defendant had a duty to keep cesspool properly covered).

232. Robinson v. Meding, 52 Del. 578, 587, 163 A.2d 272, 277 (1960); Ford v. Tremont Lumber Co., 123 La. 742, 748, 49 So. 492, 494 (1909); McCulloch v. Horton, 102 Mont. 135, 146, 56 P.2d 1344, 1346 (1936).

233. *See* The Nitroglycerine Case, 82 U.S. (15 Wall.) 524 (1872), where employees of an express carrier pried open a box that was leaking a sweet-smelling oil, not realizing it was nitroglycerine, and an explosion resulted. In response to a claim that the employees were negligent in such behavior, the court concluded they had no reason to know the substance was dangerous since nitroglycerine had only recently been discovered and its explosive nature was not widely known.

from liability.[234] That argument assumes that plaintiff's consent caused his own injury. In fact, it is defendant's activity that is the most direct causative factor: had defendant informed plaintiff of his infectious condition, plaintiff might not have engaged in sexual relations. The only way that a plaintiff could be denied recovery under this theory would be if he were aware of the danger, and expressly or deliberately assumed the risk of contracting genital herpes.[235] Since comparative negligence is based on plaintiff's specific behavior,[236] he should only share fault in this type of egregious case.

2. *Unwarranted Intrusion of the Right to Privacy*

A defense based on the right to privacy deemphasizes the question of liability and instead focuses on whether there should be judicial inquiry into sexual relations between consenting adults. The trial court in *Kathleen K.* relied on *Stephen K. v. Roni L.*[237] in rejecting the genital herpes claim. The court stated that this claim required the courts "to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct."[238]

The validity of this defense is unconvincing. The right to privacy is by no means absolute. Instead the inquiry is, according to the court in *Kathleen K.*, whether some governmental activity is an *unwarranted* intrusion of the right to privacy.[239] The state has a fundamental interest in the protection of public health, even where such an interest invades the individual's right to privacy.[240] Venereal disease statutes,[241] for example, are clearly intrusive upon the individual's privacy, since transmission invariably takes place away from public view.

Furthermore, while "the constitutional right to privacy normally shields sexual relations from judicial scrutiny, it does not do so where the right to privacy is used as a shield from liability at

234. RESTATEMENT (SECOND) OF TORTS § 465 (1979).

235. W. PROSSER & W. KEETON, *supra* note 100, at 495-98.

236. *See, e.g.*, Alvis v. Ribar, 85 Ill. 2d 1, 16, 421 N.E.2d 886, 892 (1981); Scott v. Rizzo, 96 N.M. 682, 688-89, 634 P.2d 1234, 1240-41 (1981).

237. 105 Cal. App. 3d 640, 644-45, 164 Cal. Rptr. 618, 620 (1980).

238. *Kathleen K.*, No. WEC 72582, slip op. at 2 (Cal. Super. Ct., Los Angeles Cty., Feb. 25, 1983).

239. 150 Cal. App. 3d at 996, 198 Cal. Rptr. at 276.

240. Barbara A. v. John G., 145 Cal. App. 3d 369, 380, 193 Cal. Rptr. 422, 430 (1983).

241. *See supra* note 76.

the expense of the other party."[242] Traditional notions of privacy cannot be used to work hardship and injustice against injured parties.[243] Thus, the privacy defense cannot be used to unfairly interfere with the viability of a tort claim based on transmission of herpes.

IV. CONCLUSION

There are three relevant issues involved in determining whether liability should attach for transmission of genital herpes. These form the theoretical framework of every possible herpes transmission claim, and thus are helpful in determining which claims should be recognized and under which circumstances.

First, did defendant know, or have reason to know, that he had genital herpes at the time of the sexual activity which caused plaintiff's infection? This inquiry is relevant to all the causes of action discussed in this Note—battery, negligence, deceit and misrepresentation. In the case of battery and negligence, liability

242. 145 Cal. App. 3d at 385, 193 Cal. Rptr. at 433. Defense counsel in *Kathleen K.* has commented to reporters: "The courts should not intrude into areas of such intimacy and privacy. Doesn't romance consist of exaggeration, fabrication, little white lies? And don't we want it that way?" Margolick, *supra* note 4. The answer to this question turns on whether one considers the concealed transmission of an incurable, socially stigmatizing disease a "little white lie."

243. *Barbara A.*, 145 Cal. App. 3d 369, 381, 193 Cal. Rptr. 422, 430 (1983). The defendant in *Kathleen K.* characterizes the genital herpes claim as requiring the court to supervise promises made between consenting adults. 150 Cal. App. 3d at, 198 Cal. Rptr. at 275-76. The claim has nothing to do with promises—it simply remedies a serious harm committed by one adult against another adult in private. However, the cases cited by defendant (which the trial court found so persuasive, *see supra* notes 19-22 and accompanying text) are inapposite to the genital herpes context. While they do involve inducement to have sex through deceit, they are all brought by or on behalf of third parties—the children born of the fraudulently induced intercourse. Such cases turn on public policy issues regarding the rights and welfare of children; they have no application to a scenario involving physical injury to one of the partners. *See, e.g.*, Stephen K. v. Roni L., 105 Cal. App. 3d 640, 645, 164 Cal. Rptr. 618, 621 (1980) (where woman falsely represented she was taking birth control pills but became pregnant by defendant, defendant was required, regardless of the fraud, to make support payments for the unwanted child); *see also* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 259-63, 190 N.E.2d 849, 858-59 (1963) citing the "staggering" social impact such a new tort would have); Williams v. Strate, 18 N.Y.2d 481, 223 N.E.2d 343, 344, 276 N.Y.S.2d 885, 8987 (1966) (where illegitimate child sued state hospital for "wrongful birth" in failing to safeguard her mentally deficient mother from rape resulting in plaintiff's conception, court denied recovery, citing undefined "policy and social reasons" and the difficulty of measuring her alleged damages). As the *Barbara A.* court noted, a significant distinction between these cases and suits between sex partners for physical injury is "the element of damage." 145 Cal. App. 3d at 378, 193 Cal. Rptr. at 429. In *Stephen K.*, plaintiff was seeking damages for the 'wrongful birth' of his child resulting in support obligations and alleged damages for mental suffering. Here, no child is involved; appellant is seeking damages for a severe injury to her own body. *Id.* at 378-79, 193 Cal. Rptr. at 429.

hardly seems justifiable without this knowledge, since defendant could neither have foreseen nor intended the transmission. Further, knowledge is essential to any action in deceit.

Second, did plaintiff ask defendant whether he had genital herpes? This inquiry is relevant to finding affirmative misrepresentation. Where plaintiff has questioned defendant, the court is relieved of determining whether to impose an affirmative duty to disclose. Furthermore, an inquiry by plaintiff—either verbally or in the form of an investigation—abrogates the issue of plaintiff's own negligence, since plaintiff took positive steps to protect himself.

Finally, did defendant disclose to plaintiff that he had herpes, regardless of whether he was asked? If so, plaintiff would have no claim on any ground.

A cause of action for genital herpes transmission is viable and requires only the integration of a controversial, highly publicized disease into the traditional tort law framework. Several objections to this cause of action have been raised: the highly private context of transmission, the alleged immorality involved, the lack of precedent, the difficulties in framing affirmative duties, and the fear that, with the multitude of existing and prospective herpetics,[244] courts would be flooded with litigants. But none of these objections destroys the viability of the herpes claim.

Morality is an evanescent and constantly shifting concept.[245] As the court in *Barbara A.* noted, "We do not think . . . at this stage of social mores, that it is relevant to judge appellant's action on the basis of morality."[246]

The prevalence of genital herpes suggests that nonmarital sex is commonplace in today's society. The courts need look no further than state legislation for inspiration; there, the transmission of venereal diseases has long been a criminal offense.[247] None of these statutes require that the parties involved be married in order for liability to attach, indicating that the focus is not on morality but instead is on the prevention of serious diseases.

244. *See supra* text accompanying notes 8-9.

245. "In a very vague general way, the law of torts reflects current ideas of morality, and when such ideas have changed, the law has tended to keep pace with them." W. PROSSER & W. KEETON, *supra* note 100, at 21.

246. 145 Cal. App. 3d at 382, 193 Cal. Rptr. at 431.

247. *See supra* notes 76-87 and accompanying text.

The "floodgates of litigation"[248] argument has proven wrong time and again. The lifting of the "impact" rule in rewarding damages for mental anguish,[249] allowing third parties to recover under contracts,[250] and the recognition of the right to privacy,[251] were all prophesied to overwhelm the courts with frivolous claims. They have not.[252] As one commentator has noted, "It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds."[253] Moreover, it is possible that the social stigma attached to sexually transmitted disease would have a dampening effect on the number of cases actually filed. Ultimately, the fact that liability can logically be based on theories firmly entrenched in tort law is justification enough for recognizing a cause of action for genital herpes transmission.

KIMM ALAYNE WALTON

248. *See* Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896) (using phrase in rejecting claim for injuries sustained through fright caused by negligence).

249. *See* Spade v. Lynn & B. R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897).

250. *See* Winterbottom v. Wright, 152 Eng. Rep. 402, 403 (Ex. 1842).

251. *See* Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190, 200, 50 S.E. 68, 72 (1905).

252. *See* W. PROSSER & W. KEETON, *supra* note 100, at 56.

253. *Id.*