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The Rights of an AIDS Victim in Wisconsin

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COMMENTS

THE RIGHTS OF AN AIDS VICTIM IN WISCONSIN

I. INTRODUCTION

The first cases of acquired immunodeficiency syndrome (AIDS) were reported in 1981.[1] Since that time more than 16,000 reported cases have resulted in at least 8,000 deaths.[2] Each year the number of cases reported doubles.[3] These statistics have led to AIDS becoming the number one health priority in this country.[4]

Due to its newness, its deadliness and its rapid spread, AIDS poses a variety of legal issues that leaves the courts struggling to keep pace with the development of this disease. The fact that the two primary risk groups for this disease are presently homosexuals and intravenous drug users complicates these issues even further.[5] The large number of people already exposed to the virus[6] and the belief by many experts

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1. Although, in retrospect, patients with AIDS symptoms were seen earlier, the first AIDS cases were reported to the Center for Disease Control (CDC) in the spring of 1981. *Acquired Immune Deficiency Syndrome (AIDS) Update — United States*, 32 MORBIDITY & MORTALITY WEEKLY REP. 310 (1983).

2. N.Y. Times, Jan. 14, 1986, at C1, col. 2.

3. *Id.*, Dec. 22, 1985, at 29, col. 4.

4. Message from Secretary of Health and Human Services Margaret M. Heckler, FDA DRUG BULLETIN (Nov. 1985), *reprinted in* AIDS AND THE LAW (1986) [hereinafter Message]. *AIDS and the Law* is an American Institute-American Bar Association materials book collecting numerous articles on AIDS. It is cited throughout this article accompanying the original source when possible.

5. *HTLV-III Antibody Positive Individuals, A Clinician's Guide to Evaluation*, 85 EPIDEMIOLOGY BULL. 3 (1985) [hereinafter *Clinician's Guide*], *reprinted in* AIDS AND THE LAW 35 (1986).

6. *Provisional Public Health Service Inter-Agency Recommendations for Screening Donated Blood and Plasma for Antibody to the Virus Causing Acquired Immunodeficiency Syndrome*, 34 MORBIDITY & MORTALITY WEEKLY REP. 1 (1985) [hereinafter *Screening for Antibody*], *reprinted in* AIDS AND THE LAW 110 (1986). Experts approximate that anywhere from 50,000 to 100,000 people have already been exposed to the AIDS virus. The number of people exposed to the virus is determined by a blood test. This test reveals the presence of antibodies that the body formed when it was exposed to the HTLV-III virus. For further discussion of blood tests, see *infra* note 20 and accompanying text.

that this disease will rapidly spread to heterosexuals means that these legal issues do not only affect those in the high risk groups.[7] They affect us all. It will be the general population that will have to work beside AIDS victims,[8] go to school with these afflicted individuals,[9] pay the costs for their medical care[10] and generally co-exist in the same society.[11]

This Comment is an attempt to identify certain legal issues that are raised in Wisconsin by this new disease. It attempts to bring forward the manner in which other jurisdictions have recently handled these issues or analogous ones, and how they will probably be dealt with under Wisconsin law. This Comment will cover specifically whether a victim has the right to recover from someone who knowingly infects them with the virus (primarily through sexual contact, but the basic tort theories are applicable in a variety of factual settings),[12] an AIDS victim's rights to employment[13] and under what circumstances someone who might have AIDS should be able to procure insurance.[14]

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7. *Heterosexual Transmission of Human T-Lymphotropic Virus Type III/ Lymphadenopathy — Associated Virus*, 34 MORBIDITY & MORTALITY WEEKLY REP. 561 (1985), *reprinted in* AIDS AND THE LAW 93 (1986). This report looks to the presence of AIDS among prostitutes and heterosexual Africans and Haitians to suggest the spreading of AIDS in this country by heterosexual intercourse. *See also Heterosexual Transmission of HTLV-III*, 85 EPIDEMIOLOGY BULL. 11 (1985), *reprinted in* AIDS AND THE LAW 27 (1986).

8. *See infra* note 11 and accompanying text.

9. Although this topic is not within the scope of this Comment, it is a serious issue which just recently is drawing attention. For a discussion of the medical issues related to AIDS in the classroom, see *Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/Lymphadenopathy — Associated Virus*, 34 MORBIDITY & MORTALITY WEEKLY REP. 517 (1985), *reprinted in* AIDS AND THE LAW 108 (1986). For a discussion of the legal issues related to AIDS in the classroom, see Schwarz & Schaffer, *AIDS in the Classroom*, __ HOFSTRA L. REV. __ (198__), *reprinted in* AIDS AND THE LAW 421 (1986) (a revised draft of the unpublished future law review article appears).

10. *See infra* notes 140-52 and accompanying text.

11. This coexistence is necessary because quarantining AIDS victims is not a viable alternative. It would probably violate an AIDS victim's constitutional rights. *See* Comment, *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE L. & POL'Y REV. 479 (1984-85). It would also be impracticable due to the large number of asymptomatic individuals who cannot be identified but are considered infectious. *See supra* note 6 and accompanying text.

12. *See infra* notes 28-73 and accompanying text.

13. *See infra* notes 74-139 and accompanying text.

14. *See infra* notes 140-82 and accompanying text.

II. THE DISEASE

A basic understanding of how the disease operates is necessary to understand its effects on the legal rights of its victims.

The term "AIDS" refers to the most severe manifestation of a spectrum of clinical disease caused by a virus variously known as human T-lymphotropic virus (HTLV-III), lymphadenopathy-associated virus (LAV) or AIDS associated retrovirus (ARV).[15] This virus attacks and cripples the body's immune system by killing T-helper lymphocytes, thereby leaving the body vulnerable to opportunistic infections and malignancies. These infections and malignancies eventually lead to death, usually within one or two years.[16] The spread of the virus seems to occur only through the exchange of bodily fluids, that is, blood, blood products, or semen, between individuals.[17] There is no evidence suggesting that the virus can be spread by casual person-to-person contact.[18]

A great part of the danger of the disease arises due to a lengthy asymptomatic period of infection during which an apparently healthy individual may unknowingly spread the disease to other persons through the exchange of blood, blood products or semen.[19] One way to identify these asymptomatic individuals is by administering an AIDS antibody test.[20] This

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15. *Clinician's Guide, supra* note 5, at 1, *reprinted in* AIDS AND THE LAW 35 (1986). Human T-lymphotropic virus (HTLV-III) is the causative virus named by researchers at the National Institute of Health (NIH). Lympadenopathy-associated virus (LAV) is the causative virus named by French researchers at the Pasteur Institute in France. FDA DRUG BULLETIN, *supra* note 4, at 2, *reprinted in* AIDS AND THE LAW 20 (1986).

16. AIDS AND THE LAW 127 (1986). For the basis of this data, see generally J. SLAFF & J. BRUBAKER, THE AIDS EPIDEMIC: HOW YOU CAN PROTECT YOURSELF AND YOUR FAMILY, WHY YOU MUST (1986).

17. *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy—Associated Virus in the Workplace*, 34 MORBIDITY & MORTALITY WEEKLY REP. 682 (1985) [hereinafter *AIDS in the Workplace*], *reprinted in* AIDS AND THE LAW 50 (1986).

18. *Id.*

19. *Id.* "HTLV-III/LAV-*infected* individuals include those with AIDS (4); those diagnosed by their physician(s) as having other illnesses due to infection with HTLV-III/LAV; and those who have virologic or *serologic evidence of infection* with HTLV-III/LAV but who are not ill." *Id.* (emphasis added).

20. The screening test that is presently used by blood banks and plasma centers is the enzyme-linked immunosorbent assay (ELISA). This test has a high number of false positives. A false positive result occurs when, due to another virus or some unknown

III. RECOVERY IN TORT

Seventy-three percent of those with AIDS acquired the disease through homosexual intercourse.[28] Since the vast majority of AIDS victims had the disease transmitted to them by sexual contact, the scope of this section will involve their rights to recovery for damages from the partner who inflicted them with the virus.

When the virus is transmitted, the effects can be fatal.[29] If the transmitter is an asymptomatic carrier who does not know that he has the disease, the harm may be unavoidable. However, if the transmitter has had an antibody test, or has ARC or AIDS symptoms, their failure to act in a socially responsible manner results in a serious wrong.[30] The common law area of torts is designed to compensate individuals for such wrongs and should apply in these instances.[31] Since no case has yet reached the appellate level for the sexual transmission of AIDS, cases involving analogous communicable diseases will be used to suggest the most probable causes of action under which recovery is possible.

Of all communicable diseases, herpes in particular possesses close similarities to AIDS.[32] It is an incurable, sexually transmitted disease caused by a virus which cannot be medi-

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28. *The Public Health Service Response to AIDS*, AIDS INFORMATION BULL. 1 (1985), *reprinted in* AIDS AND THE LAW 7 (1986).

29. *See supra* note 16 and accompanying text.

30. *See supra* notes 24-26 and accompanying text.

31. W. PROSSER, THE LAW OF TORTS § 1, at 2 (4th ed. 1971); *see also* 1 J. DOOLEY, MODERN TORT LAW § 2.03 (1982). Although this Comment will not discuss intentional infliction of emotional distress, it is possible that there could be recovery under this cause of action. *See* McKissick v. Schroeder, 70 Wis. 2d 825, 235 N.W.2d 686 (1975); Ver Hagen v. Gibbons, 47 Wis. 2d 220, 177 N.W.2d 83 (1970); *see also* Kathleen K. v. Robert B., 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984) (recovery for intentional infliction of emotional distress held to be valid cause of action for transmission of genital herpes); Prentice & Murray, *Liability for Transmission of Herpes: Using Traditional Tort Principles to Encourage Honesty in Sexual Relationships*, 11 J. CONTEMP. L. 67, 79-80 (1984).

32. For a discussion of recovery for herpes transmission employing traditional tort principles, see Prentice & Murray, *supra* note 31, at 67; Comment, *You Wouldn't Give Me Anything, Would You? Tort Liability for Genital Herpes*, 20 CAL. W.L. REV. 60 (1983) [hereinafter Comment, *Tort Liability for Herpes*]; Comment, *Herpes: A Basis for Tort Action in California*, 24 SANTA CLARA L. REV. 189 (1984) [hereinafter Comment, *Herpes In California*].

cally prevented.[33] Individuals with the disease may be asymptomatic carriers who might or might not know they possess the affliction, yet display no outward symptoms.[34] Both diseases also carry considerable social stigmas. Herpes, of course, while incurable, is not fatal. Nor does it have the long incubation stage that AIDS possesses.[35]

A. Negligence

Wisconsin is one of a few states that expressly recognizes a cause of action for the transmission of a communicable disease.[36] In the case of *Kliegel v. Aitken*,[37] the plaintiff was a servant employed in a house where the owner's daughter was ill with typhoid fever. The plaintiff worked in the house and the sick child's room for a week without being informed of the girl's illness. When the plaintiff came down with a serious attack of typhoid fever a few days later, she commenced an action against the defendant/master. The suit was based on false misrepresentation as well as upon negligent failure to inform the plaintiff of the true nature of the disease and its dangerous character.

In affirming the trial court's decision in favor of the plaintiff, the court stated that "[t]he general principle is well established that one who negligently — that is, through want of ordinary care— exposes another to an infectious or contagious disease, which such other thereby contracts, is liable in dam-

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33. Herpes simplex II (HSV-2) is transmitted primarily by genital routes and generally affects the genital area. Herpes simplex I (HSV-1) is generally transmitted through non-genital routes and primarily affects the mouth. Nahmias & Roizman, *Infection with Herpes — Simplex Viruses 1 and 2* (pt. 1), 289 NEW ENG. J. MED. 667 (1973).

34. Baker, *Herpes Virus*, 26 CLINICAL OBSTETRICS & GYNECOLOGY 165, 167 (1983).

35. "Information about the course of infection with HTLV-III is incomplete, but the majority of infected adults will not acquire clinically apparent AIDS in the first few years after infection." *Screening for Antibody, supra* note 6, at 1, *reprinted in* AIDS AND THE LAW 110 (1986). Herpes symptoms will usually appear within three to four weeks. Baker, *supra* note 34, at 167.

36. *See Kathleen K.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (genital herpes); Hendricks v. Butcher, 144 Mo. App. 671, 129 S.W. 431 (1910) (smallpox); Earle v. Kuklo, 26 N.J. Super. 471, 98 A.2d 107 (1953) (tuberculosis).

37. 94 Wis. 432, 69 N.W. 67 (1896).

ages therefor, in the absence of contributory negligence or assumption of the risk."[38]

Since AIDS qualifies as an infectious disease, there is no reason why recovery for this disease should be any different than recovery for typhoid fever. When an individual fails to exercise ordinary care without intending to do any wrong and the act or omission subjects another to an unreasonable risk of injury, that individual is negligent.[39] When someone infected with AIDS has intercourse and fails to tell his or her partner, the risk to which the partner is exposed is unreasonable at the very least. The Wisconsin Supreme Court recognized the negligence involved in exposing someone to typhoid fever, and it should continue to recognize this negligence when dealing with AIDS.

Negligent conduct may also arise from carelessly exposing oneself to the disease, knowing that one is in a high risk group and failing to take an antibody test,[40] ignoring symptoms of the disease, or testing seropositive and continuing to have sexual relations anyway.[41] Due to the lack of knowledge as to its infectiousness, having sexual relations with another when one knows or should know that he or she is infected should be considered an unreasonable risk. A duty to inform the partner of a positive test result should be the minimum required of a person of ordinary prudence and intelligence.

B. Misrepresentation

In Wisconsin, the cause of action based on misrepresentation is cloudier. The *Kliegel* court only addressed the jury instructions regarding the scope of the agency of the individual who told the plaintiff that the defendant's daughter was only suffering from "nervous prostration."[42] Since the court ap-

38. *Id.* at 435, 69 N.W. at 68. *Kliegel* has never been cited in a Wisconsin case for this proposition.

39. Osborne v. Montgomery, 203 Wis. 223, 242-43, 234 N.W. 372, 379-80 (1931); *see also* W. PROSSER, *supra* note 31, § 105, at 685-86.

40. The groups of people categorized as being at a high risk to acquire AIDS are homosexual or bisexual men, intravenous drug users, hemophiliacs, and children born to mothers with AIDS. Haitians in this country are no longer considered a high risk group. *AIDS in the Workplace*, *supra* note 17 and accompanying text.

41. At least one individual who was informed that he had AIDS continued his sexual practices despite this knowledge. L.A. Daily J., Nov. 15, 1985, at 6, col. 1.

42. *Kliegel*, 94 Wis. at 437, 69 N.W. at 69.

proved of the jury instructions regarding this agency, it can be inferred that the court recognized the jury instructions dealing with misrepresentation as stating a valid cause of action.

Wisconsin case law dealing with misrepresentation supports this contention. Wisconsin's elements for intentional deceit or misrepresentation are:

1. The defendant made a false representation of fact;
2. The representation of fact was untrue;
3. The defendant knew the representation was untrue or made it recklessly without caring whether it was true or false;
4. The defendant made the representation intending to deceive and induce the plaintiff to act to the plaintiff's pecuniary damage;
5. The plaintiff believed the representation to be true and relied on it to his or her own injury or damage.[43]

The representation of fact does not necessarily have to be a verbal statement. Silence on the part of the infected party may be sufficient where there is a duty to speak.[44]

In *Scandrett v. Greenhouse*,[45] the court applied the rule that silence can be a misrepresentation in an attorney-client relationship. In *Scandrett* the court stated that:

> A man may not only deceive another to his hurt by deliberately asserting a falsehood, as, for instance, by stating that A is an honest man when he knows him to be a rogue, or that a horse is sound and kind when he knows him to be unsound and vicious, *but also by any act or demeanor which would naturally impress the mind of a careful man with a mistaken belief, and form the basis of some change of position by him.*[46]

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43. *See* Wis. JI — Civil 2401 (1969); *see also* Lundin v. Shimanski, 124 Wis. 2d 175, 368 N.W.2d 676 (1985); Goerke v. Vojvodich, 67 Wis. 2d 102, 226 N.W.2d 211 (1975); Williams v. Rank & Son Buick, Inc., 44 Wis. 2d 239, 170 N.W.2d 807 (1969); Hoar v. Rasmusen, 229 Wis. 509, 282 N.W. 652 (1938); W. PROSSER, *supra* note 31, § 105, at 685-86.

44. Killeen v. Parent, 23 Wis. 2d 244, 251, 127 N.W.2d 38, 42 (1964); *see also Lundin*, 124 Wis. 2d at 185 n.5, 368 N.W.2d at 681 n.5; *Goerke*, 67 Wis. 2d at 106-07, 226 N.W.2d at 214; Scandrett v. Greenhouse, 244 Wis. 108, 113, 11 N.W. 2d 510, 512 (1943); *Hoar*, 229 Wis. at 513-14, 282 N.W. at 654.

45. 244 Wis. 108, 11 N.W.2d 510 (1943).

46. *Id.* at 113-14, 11 N.W.2d at 512 (quoting Swift v. Rounds, 19 R.I. 527, __, 35 A. 45, 45 (1896) (emphasis in citing source only).

In a situation involving AIDS, the horse or rogue would be an apparently healthy person. This person might be seropositive or have AIDS in the ARC stage. Rather than having a sound healthy body, the person has one that is unsound and infectious. The infected individual's desire to proceed to have intercourse would naturally seem to lead a prospective partner to believe that the situation does not pose a threat to his or her life. Under the mistaken belief that there is no danger, the prospective partner proceeds to rely to his or her detriment and have intercourse.[47]

The necessary confidential relationship giving rise to a duty to speak has not yet been applied in Wisconsin to individuals who are sexually intimate. It has been expressly recognized in California when dealing with tortious liability for the transmission of herpes. In *Kathleen K. v. Robert B.*,[48] the California Court of Appeals determined that an unmarried woman's complaint seeking damages because of the transmission of genital herpes through sexual intercourse stated a cause of action for misrepresentation.[49] In determining that a confidential relationship exists similar to the one in a marital relationship, the court stated that "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.*"[50] With the confidential relationship established, there arises the duty to disclose. Silence by one partner is therefore a misrepresentation.

Other jurisdictions would seem to agree with California's recognition of a confidential relationship between sexual partners. Since they have recognized a confidential relationship existing between "old friends,"[51] it appears that they too

47. Other jurisdictions have recognized this representation as a valid cause of action for the transmission of a sexually transmitted disease. *See Kathleen K.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (genital herpes); State v. Lankford, 29 Del. 594, 102 A. 63 (1917) (syphilis); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920) (venereal disease).

48. 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

49. *Id.* at 996-97, 198 Cal. Rptr. at 276.

50. *Id.* at 997, 198 Cal. Rptr. at 276-77 (emphasis added).

51. *See* Alice D. v. William M., 113 Misc. 2d 940, 450 N.Y.S.2d 350 (1982); Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962); Adickes v. Andreoli, 600 S.W.2d 939, 945-46 (Tex. Civ. App. 1980).

would recognize a duty to disclose when two individuals are more than just friends.

Proving the third element of misrepresentation, that the defendant knew the representation was false or made it without caring about its veracity, raises some problems. Due to the virus' long incubation period, the fact that someone tests positive does not necessarily mean the person has or will develop AIDS.[52] It is probably the case that someone who transmitted the virus will be asymptomatic and not know he or she is infected. In this case the knowledge or reckless disregard of the knowledge element probably will not be met.[53] This might be the situation in a majority of the cases.[54]

A similar problem arises when a victim starts to progress to the ARC category. At this time he or she will start to develop the opportunistic infections that characterize this stage,[55] but may not recognize these infections as indicative of AIDS. These infections are, after all, not really AIDS, but rather bacteria and fungus diseases that attack a body with a suppressed immune system.

The reasonable care exercised in ascertaining the facts should also take into consideration whether or not the individual is a member of a high risk group.[56] It can be argued that members of these groups should be especially knowledgeable about the disease due to the attention it has received and their vested concerns. If, under these circumstances, a person of ordinary intelligence and prudence ought reasonably to have

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52. *See supra* notes 19 and 35 and accompanying text. Current data has not yet determined exactly what percentage of those exposed to the virus will develop AIDS or ARC. It is estimated by some experts that 5% to 19% of those exposed to the virus will develop fullblown AIDS within two to five years of infection. An additional 25% will probably progress to the ARC stage. *Screening for Antibody, supra* note 6, at 1, *reprinted in* AIDS AND THE LAW 110 (1986).

53. The burden of proving intent may be lessened if the plaintiff sought relief on a cause of action for negligent misrepresentation. The plaintiff would then only have to prove that the defendant was negligent in his or her representations. *See* Wis. JI — Civil 2403 (1969).

54. Since up to 1.5 million people may have been infected and not show any symptoms, it is probable that many of these people do not know that they are infectious carriers of the HTLV-III virus. AIDS AND THE LAW 123 (1986).

55. For a more detailed description of ARC symptoms, see *Clinician's Guide to Evaluation of HTLV-III Antibody Positive Individuals* 1 (1985), *reprinted in* AIDS AND THE LAW 113 (1986).

56. *See supra* note 40 and accompanying text.

ascertained that he had AIDS, then the plaintiff should be able to prove negligent misrepresentation and recover under that theory.[57] By the time fullblown AIDS sets in, the severe symptoms should leave little doubt as to the cause of their illness.

The fourth element of deceit, that the representation was made to deceive and induce the plaintiff to his pecuniary damage, should pose few problems in a suit for intentional misrepresentation. An AIDS victim would surely realize that no one would consent to sexual contact with someone who is infected.[58] The deceit and inducement elements are, therefore, evident.

The last element, belief in the representation and the reliance thereof, would be a question of fact. It seems likely, though, that consent to sexual relations would be strong evidence of belief and reliance that one's partner was free of AIDS.

There is a Wisconsin Supreme Court decision on the issue of the transmission of communicable diseases. The opinion finds support from the decisions of other jurisdictions as well as from the underlying theories of tort. It seems that a cause of action for negligence and misrepresentation would be recognized in certain circumstances for the sexual transmission of AIDS.

C. Battery

Battery is also a viable theory under which an AIDS victim may seek compensation. A battery is committed when force or violence is used without permission to intentionally inflict physical harm on another.[59] The issue is whether there is consent to sexual contact given the fact that one party did not know that the other party had AIDS.

In *Bartell v. State*,[60] the Wisconsin Supreme Court recognized that having sexual contact with another may constitute a battery where there is a misrepresentation as to its charac-

57. *See supra* note 53 and accompanying text.

58. Deceit vitiates consent. *See* W. PROSSER, *supra* note 31, § 105, at 685-86.

59. Wis. JI — Civil 2005 (1977); *see also* McCluskey v. Steinhorst, 45 Wis. 2d 350, 173 N.W.2d 148 (1970); Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891).

60. 106 Wis. 342, 82 N.W. 142 (1900).

ter.[61] In *Bartell*, the defendant made a girl remove her clothes while he supposedly administered a healing massage. The court affirmed a jury verdict that the removal of her clothes was unnecessary, fraudulent and done for Bartell's personal gratification. Due to the girl's ignorance of Bartell's true purpose, the act constituted an assault and battery.[62]

In the context of AIDS, the situation is similar. One party is not aware of the full circumstances surrounding the act. The girl in *Bartell* consented to a therapeutic massage. She did not consent to sexual contact. A prospective partner consents to sex but does not consent to sex with someone who has an infectious disease. Only a limited consent is given and anything beyond that limited consent constitutes battery.[63]

For a battery to exist it is necessary that the offensive contact be intentional. If the action of the infected party is merely negligent, there is no battery.[64] This could cause problems when dealing with a seropositive individual or someone who is asymptomatic. It can be argued that they do not believe they have the disease. Without the knowledge that they are committing an offensive contact, all the elements of a battery are not present and there can be no recovery.

D. Right to Privacy: A Defense

Besides the usual defenses against the above mentioned torts,[65] the right to privacy is a defense peculiar to sexual tort liability that extends to many of the issues surrounding AIDS.[66] The issue has been raised that the court's addressing these lawsuits is an unwarranted intrusion into the intimate

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61. *Id.* at 343, 82 N.W. at 143.

62. *Id.*

63. *See Kathleen K.*, 150 Cal. App. 3d at 996, 198 Cal. Rptr. at 276; *Lankford*, 29 Del. 594, 102 A. 63; *Crowell*, 180 N.C. 516, 105 S.E. 206; De Vall v. Strunk, 96 S.W.2d 245 (Tex. Civ. App. 1936); *see also* W. PROSSER, *supra* note 31, § 105, at 683.

64. *McCluskey*, 45 Wis. 2d at 357, 173 N.W.2d at 152; *Vosburg*, 80 Wis. at 527, 50 N.W. at 404.

65. For a discussion of these defenses, see Prentice & Murray, *supra* note 32, at 83-101; Comment, *Tort Liability for Herpes, supra* note 31, at 78-81; Comment, *Herpes in California, supra* note 32, at 192-96.

66. *See* Comment, *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, 15 GOLDEN GATE U.L. REV. 301 (1985); Comment, *supra* note 11.

sexual relations of individuals.[67] The United States Supreme Court has demonstrated a strong proclivity to judicial restraint when dealing with matters related to marriage, family and sex. In *Eisenstadt v. Baird*,[68] the Court determined that a Massachusetts statute prohibiting the sale of contraceptives to single persons, but not to married persons, was unconstitutional. The Court stated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[69] The choice to be sexually intimate with someone could arguably be categorized as a matter fundamentally affecting a person.

For the government to interfere with a fundamental right, the government must demonstrate a "compelling state interest."[70] This compelling state interest arises due to the state's responsibility to protect the public health, welfare and safety. These compelling state interests will supercede an individual's fundamental right to privacy.[71] In *Barbara A. v. John G.*,[72] the defendant had misrepresented to the plaintiff whom he impregnated that he was sterile. In determining that a right to privacy did not protect the defendant from litigation, the California court stated:

> Although the right to privacy is a freedom to be carefully guarded, it is evident that it does not insulate a person from all judicial inquiry into his or her sexual relations. We do not think it should insulate from liability one sexual partner who by intentionally tortious conduct causes physical injury to the other. Public policy does not demand such protection for the right of privacy.[73]

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67. Stephen K. v. Roni L., 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980) (the court held a cross-complaint alleging misrepresentation of birth control use against the mother in a paternity action did not state a cause of action).

68. 405 U.S. 438 (1972).

69. *Id.* at 453 (emphasis in original).

70. Roe v. Wade, 410 U.S. 113, 155 (1973).

71. *See id.* at 155-57.

72. 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

73. *Id.* at 381, 193 Cal. Rptr. at 431 (footnotes omitted). For a discussion of where the right to privacy should be guarded, see South Florida Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798 (Fla. Dist. Ct. App. 1985) (positive AIDS test result disclosed, subjecting individual to social censure, embarassment or discrimination).

The broad language used by this court clearly indicates that the sexual transmission of AIDS should also not be protected by a right to privacy.

IV. EMPLOYMENT DISCRIMINATION

In addition to worries about his or her health, an AIDS victim might also have to worry about survival in the employment market. Employers might refuse to hire a prospective employee or choose to fire a present employee if they learn of the employee's condition.[74] This discrimination is a very real concern of AIDS victims and might be occurring already.[75] Such discrimination would essentially deprive victims of the opportunity to earn a decent living.

In Wisconsin the hopes of an AIDS victim to combat this discrimination lies in the Wisconsin Fair Employment Act (FEA).[76] The purpose of this Act is to prevent discrimination based on sex, race, religion or handicaps.[77] The Act calls for a liberal and broad interpretation of its language.[78]

> There are three points essential to establishing that a person has been discriminated against in regard to employment due to a handicap: (1) the complainant must be handicapped within the meaning of the Fair Employment Act (FEA); (2) the complainant must establish that the employer's discrimination was on the basis of handicap; and (3) it must appear that the employer cannot justify its alleged

74. Recently, Wisconsin passed a law which prohibits discriminating against an employee based on an antibody test result. WIS. STAT. § 103.15 (1986). It is possible that discrimination will take place anyway. Employers could evaluate individuals in a manner similar to the one used by insurance companies.

75. *See, e.g.*, Shuttleworth v. Broward County, No. 85-6623-CIV (S.D. Fla. Dec. 3, 1986) (competent state employee released after supervisor discovered that he had AIDS).

76. WIS. STAT. §§ 111.31-.395 (1983-84). This is especially true in light of a United States Department of Justice — Office of Legal Counsel brief that an AIDS-infected worker would have no redress under the Vocational Rehabilitation Act, ch. 16, 87 Stat. 357 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1978)) for employment discrimination when the employer uses a pretext of fear of contagion to fire the employee. This would be true regardless of how irrational the fear of contagion would be. The Milwaukee J., June 24, 1986, at 4, col. 1.

77. WIS. STAT. § 111.31(2) (1983-84).

78. WIS. STAT. § 111.31(3) (1983-84).

discrimination under the exception set forth in § 111.32(5)(f), Stats.[79]

According to this, to receive the benefits of the Act, having AIDS must first be found to constitute a handicap within the meaning of the statute. The Wisconsin Supreme Court has determined that "[a] handicap is a mental or physical *disability* or *impairment* that a person has in addition to his or her normal limitations that makes achievement not merely difficult, but *unusually* difficult, or that limits the capacity to work."[80]

A. AIDS and ARC as Handicaps

A victim in the ARC or fullblown AIDS stage will have at least enlarged lymph glands, weight loss and a lower tolerance to infection.[81] These conditions would almost certainly impair one's ability to work.

The Wisconsin courts would probably come to the conclusion that these conditions are handicaps based on a state agency's finding that AIDS is a handicap and the courts' holdings in other decisions of what constitutes a handicap.

In *Racine Education Association v. Racine Unified School District*,[82] a Wisconsin Department of Industry, Labor and Human Relations (Equal Rights Division) examiner made an initial determination that AIDS and ARC are handicaps under the Wisconsin Fair Employment Act.[83] The complainant labor organization commenced the action after the Racine Unified School District adopted a work policy which would exclude district staff members who had AIDS or ARC from

79. Boynton Cab Co. v. Department of Indus., Labor & Human Relations, 96 Wis. 2d 396, 406, 291 N.W.2d 850, 855 (1980) (footnotes omitted).

80. American Motors Corp. v. Labor & Indus. Review Comm'n, 119 Wis. 2d 706, 714, 350 N.W.2d 120, 124 (1984) (emphasis in original).

81. *See supra* note 24 and accompanying text.

82. Wisconsin Dep't of Indus., Labor & Human Relations -Equal Rights Div., No. 8650279 (April 30, 1986) (initial determination).

83. *Id.* at 3. The report fails to determine which of the three categories of a handicap, under WIS. STAT. § 111.32(8) (1983-84), AIDS is classified. The statute defines a handicapped individual as an individual who:

(a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;

(b) Has a record of such an impairment; or

(c) Is perceived as having such an impairment.

WIS. STAT. § 111.32(8) (1983-84).

attending work.[84] The complaint also alleged that the policy had a disparate impact on sexually active homosexual and/or bisexual men.[85]

The examiner initially determined that both AIDS and ARC are legally protected handicaps under the Wisconsin Fair Employment Law and that, as a general rule, the school district sought to prohibit the attendance at work of the complainant's members who acquired AIDS.[86] The examiner also found that the school district's policy had a disparate impact on a group because of their sexual orientation.[87]

The fact that a Department of Industry, Labor and Human Relations examiner concluded that AIDS and ARC are handicaps does not mean that the issue is necessarily resolved. Circuit courts are not bound by the legal conclusions of an administrative agency.[88] The courts, though, will defer to a certain extent to the legal construction and application of a statute by the agency charged with enforcing the statute.[89] If there is a rational basis in law for the agency's interpretation, the court should not impose its judgment for that of the agency.[90] As will be demonstrated by looking to the Wisconsin court's interpretation of what constitutes a handicap, it is clear that case law supports this proposition.[91]

In *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Department of Industry, Labor and Human Relations*,[92] the Wisconsin Supreme Court approved a Department conclusion that the complainant's history of asthma constituted a handi-

84. *Racine Educ. Ass'n*, No. 8650279 at 1.

85. *Id.*

86. *Id.* at 3, 5; *see supra* note 83. The examiner further noted that the latest government report,*United States Public Health Service Guidelines on AIDS in the Work Place*, published on November 14, 1985, found that AIDS is not spread by casual contact in the work place. *Racine Educ. Ass'n*, No. 8650279 at 5.

87. *Racine Educ. Ass'n*, No. 8650279 at 5-6. This holding was based on a figure that approximately 73% of those with AIDS are sexually active homosexual and bisexual men with multiple partners.

88. Eaton Corp. v. Labor & Indus. Review Comm'n, 122 Wis. 2d 704, 708, 364 N.W.2d 172, 174 (Ct. App. 1985).

89. Larson v. Department of Indus., Labor & Human Relations, 76 Wis. 2d 595, 603, 252 N.W.2d 33, 36-37 (1977).

90. Klusendorf Chevrolet-Buick, Inc. v. Labor & Indus. Review Comm'n, 110 Wis. 2d 328, 331-32, 328 N.W.2d 890, 892 (Ct. App. 1982).

91. *See supra* notes 82-90 and accompanying text.

92. 62 Wis. 2d 392, 215 N.W.2d 443 (1974).

cap.[93] The supreme court has, therefore, already determined that a "disease" is a handicap. Additionally, in *Chrysler Outboard Corp. v. Department of Industry, Labor and Human Relations*,[94] a Wisconsin circuit court determined that an individual who suffers from acute lymphocytic leukemia has a handicap within the meaning of the Wisconsin FEA.[95] This disease is similar to AIDS in that it lowers the body's defenses to infections. The employer's doctor determined that the prospective employee ran an increased risk of infection from minor injuries and a resulting prolonged recuperation which would cause much lost time. The court determined that such a basis for not hiring the individual was a discriminatory practice when it stated:

> If an employee's illness or defect makes it more difficult for him to find work, then it certainly operates to make achievement unusually difficult. The petitioner's refusal to hire the complainant in the instant case because of his illness is a classic example of how such an illness operates as a handicap.[96]

The Wisconsin Supreme Court has also pointed out its use of federal decisions to interpret what constitutes discrimination.[97] Federal decisions also indicate that under certain circumstances a person with an infectious condition would be protected from employment discrimination.

In *Arline v. School Board of Nassau County*,[98] the Eleventh Circuit Court of Appeals reversed the decision of the trial court and determined that an elementary school teacher who was discharged for suffering from recurrent tuberculosis had her rights violated under the Vocational Rehabilitation Act of 1973.[99] After reviewing the legislative history of the Act, the

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93. *Id.* at 398, 215 N.W.2d at 446. The court stated that "it is our opinion that handicap as used in § 111.32 (5), Stats., must be defined as including such *diseases* as asthma which make achievement unusually difficult." *Id.* (emphasis added).

94. 14 Fair Empl. Prac. Cas. (BNA) 344 (Wis. Cir. Ct., Dane Co. 1976).

95. *Id.* at 345.

96. *Id.*

97. The Wisconsin Supreme Court recognized the similar structure and purpose of Wisconsin's FEA to the Federal Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967). *Boynton Cab*, 96 Wis. 2d 396 at 411, 291 N.W.2d at 855.

98. 772 F.2d 759 (11th Cir. 1985).

99. Vocational Rehabilitation Act, ch. 16, 87 Stat. 357 (1973) (codified as amended at 29 U.S.C. § 701 (1978)).

court noted that there was no indication in the statute or legislative history that contagious or infectious diseases were excluded from coverage. Since tuberculosis impaired the teacher's working ability, it was a handicap within the meaning of the statute.[100] It appears from the purpose of the statute, a liberal construction, Wisconsin and federal case law regarding handicaps, and an agency finding, that ARC and fullblown AIDS would be considered handicaps within the meaning of the FEA.

B. Seropositive Individuals as Handicapped

A new problem arises when considering if seropositive individuals may be considered handicapped under the FEA.[101] The Wisconsin Supreme Court has held that since seropositive individuals are asymptomatic, they do not have an "injury, deterioration or lessening that could impede a person's normal functioning in some manner and preclude the full and normal use of one's sensory, mental or physical faculties."[102] By definition, seropositive individuals are presently perfectly healthy. They only possess an increased risk of developing AIDS or ARC in the future.[103]

The language used by the court appears to track only the definition of "handicapped" found at Wis. Stat. § 111.32(8)(a). It does not mention Wis. Stat. § 111.32(8)(c) which states that a handicapped individual is also one who "[i]s perceived as having such an impairment."[104]

In *American Motors Corp. v. Labor & Industry Review Commission*,[105] the Wisconsin Supreme Court had to determine whether a four-foot, ten-inch woman who applied for and was denied a job on an AMC assembly line was handicapped within the meaning of the statute. AMC readily ad-

100. *Arline*, 772 F.2d at 764. The court looked at the language of the statute and its construction under 45 C.F.R. § 84.3(j)(2). *Arline*, 772 F.2d at 763.

101. *See supra* note 74 and accompanying text. The issue of seropositivity was never decided in *Racine Educ. Ass'n*, No. 8650279. Whether it is considered a handicap by the Wisconsin Department of Industry, Labor and Human Relations would depend on which classification of handicap under WIS. STAT. § 111.32(8), AIDS is placed. *See supra* note 83 and accompanying text.

102. *American Motors*, 119 Wis. 2d at 713, 350 N.W.2d at 123 (1984).

103. *See supra* note 23 and accompanying text.

104. WIS. STAT. § 111.32(8)(c) (1983-84).

105. 119 Wis. 2d 706, 350 N.W.2d 120 (1984).

mitted that the woman was not hired because the company doctor believed that her small stature would adversely affect her work performance.[106]

At first glance, one would believe that AMC did not hire her because the company perceived her to have "a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work."[107] According to the court though, this is not true. Her short stature is merely an inherent limitation or deviation from the norm.[108] Since shortness is not a handicap, a perception of shortness cannot be a perception of a handicap.[109] Employers are, therefore, free to discriminate based on this physical trait. Given the liberal, rather than restrictive, interpretation of the statute that the legislature established, this is a somewhat strained analysis.

Whether or not seropositiveness is perceived as a handicap depends on which way the court believes an employer would view the seropositive individual. If the court says that a seropositive individual is perceived as having AIDS (a real handicap), then the individual is perceived as having a handicap. If the court believes that the individual is perceived as merely having a positive test to a virus, exposure to the virus is not a handicap because it does not truly impair or disable a person. Since it is not perceived as a handicap, employers can discriminate against the present or prospective employee. Following the rationale of *American Motors*, the latter is the course the court should take based on its prior decisions.

If the court follows Justice Abrahamson's analysis, which is a much more logical approach, seropositive individuals would be considered handicapped.[110] Common sense tells us

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106. *Id.* at 708-09, 350 N.W.2d at 121. The medical director had given the complainant a ten minute physical. Part of this physical consisted of the complainant touching her toes, lifting her arms above her head and stretching her arms to the side. Based on this examination, the medical director recommended the complainant not be hired because she was too small to perform the job.

107. WIS. STAT. § 111.32(8)(a) (1983-84).

108. *American Motors*, 119 Wis. 2d at 713, 350 N.W.2d at 123-24. The court stated that "[a]ll persons, given their individual characteristics and capabilities, have inherent limitations on their general ability to achieve or to perform certain jobs. . . . However, such inherent limitations or deviations from the norm do not automatically constitute handicaps." *Id.* at 713, 350 N.W.2d at 123-24.

109. *Id.* at 716, 350 N.W.2d at 125.

110. *Id.* at 719-20, 350 N.W.2d at 126 (Abrahamson, J., dissenting).

that the employer would not be hiring the individual because the employer believes the seropositive individual would be impaired in his or her job performance. This is exactly what the statute is designed to prevent. A seropositive individual would, therefore, be considered handicapped for the purposes of the statute under this interpretation.

C. *Proof that an Employer's Discrimination is on the Basis of a Handicap*

The third element in establishing a discrimination case based on a handicap is that the employer cannot justify his discrimination under the Act.[111] Once the claimant has demonstrated that he or she was refused employment because of a handicap, the burden of proof shifts to the employer to justify the refusal. The employer must show that "[the complainant] was physically unable to efficiently perform the duties of [the position applied for] at the standard set by [the employer]."[112] Contained within this burden of proof are two analytically distinct points: (1) is the complainant able to perform the duties of the job; and (2) would hiring the complainant be hazardous to the safety of the complainant, co-workers or the public.[113]

As to the first element, the courts have determined that this language relates to the complainant's *present* ability to perform the duties of the job.[114] The courts have construed this to mean that even though the prospective employee might have some medical or physiological condition which may lead to later disqualification, a mere speculation that the employee may in the future be unable to fulfill certain job functions or may present special expenses to the employer due to the possibility of incurring work-related injuries is not sufficient to justify present discrimination. In the case of seropositive individuals, this means they would not fall within the excep-

111. *See supra* note 79 and accompanying text.

112. *Boynton Cab.*, 96 Wis. 2d at 408, 291 N.W.2d at 856.

113. *Id.*; Bucyrus-Erie Co. v. Department of Indus., Labor & Human Relations, 90 Wis. 2d 408, 423, 280 N.W.2d 142, 149 (1979).

114. *See* State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985); Chrysler Outboard Corp. v. Wisconsin Dep't of Indus., Labor & Human Relations, 14 Fair Empl. Prac. Cas. (BNA) 344 (Wis. Cir. Ct., Dane Co. 1976).

tion. They presently have no disabilities that would inhibit their job performance.

A more questionable result occurs when ARC victims are considered. These individuals are borderline cases. They may be suffering from one of the symptoms of the disease to a degree where they cannot perform a job.[115] If an ARC victim recovers from a bout of illness, though, he or she may be able to satisfactorily perform the job again for some time before the symptoms of the disease again keeps the victim from performing his or her duties.

These individuals must be evaluated on an individual case-by-case analysis.[116] It appears that at times these individuals will be healthy enough to work and, therefore, not fall within the exception. However, in the near future they would again fall within the exception due to a new illness.

Fullblown AIDS victims, with little doubt, would fall within the exception. They would likely be bedridden, weak and suffering from a serious infection.[117] Even light clerical work would seem out of the question for someone who is in the advanced stages of terminal cancer or suffering from insane delusions.[118]

The next issue in determining whether those ARC victims who are presently able to work and whether seropositive individuals are within the exception to discrimination is the safety hazard they pose.[119] The two standards imposed by the statute are the reasonable probability and the rational relationship tests.[120] The Wisconsin Supreme Court has described the burden of proof the employer must meet to satisfy the exception:

> If the evidence shows that the applicant has a present ability to physically accomplish the tasks which make up the job duties, the employer must establish to a *reasonable*

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115. *See supra* note 24 and accompanying text.

116. WIS. STAT. § 111.34(2)(b) (1983-84).

117. *See supra* note 26 and accompanying text.

118. Cancer and mental insanity often accompany the final stage in the AIDS spectrum. *Clinician's Guide, supra* note 5, at 3, *reprinted in* AIDS AND THE LAW 37 (1986).

119. *See supra* notes 20-22 and accompanying text.

120. *See infra* notes 131-32 and accompanying text. In light of federal warnings dealing with those employed in the health care and food services industries, perhaps these would also receive special treatment. *See* WIS. STAT. § 111.34(2) (1983-84); *Aids in the Workplace, supra* note 17, at 683-84, *reprinted in* AIDS AND THE LAW 51-52 (1986) (demonstrating a reasonable relationship is applied to all other jobs).

> *probability* that because of the complainant's physical condition, employment in the position sought would be hazardous to the health or safety of the complainant or to other employees or frequenters of the place of employment.[121]

Due to a change in the statute,[122] the employer may now also consider if the prospective employee not only poses a present threat, but whether or not it is reasonably probable that the employee will pose a safety threat in the future as well.[123] No cases have yet interpreted this change in the statute.

In light of a recent report put out by the Center for Disease Control,[124] it appears that the individual with ARC and seropositive tests should pose no safety hazards in an ordinary work environment. According to these latest findings, there is no factual evidence to suggest that the AIDS virus can be spread by casual contact.[125] This means that both the general public and co-workers should have nothing to fear from someone who has been exposed to the AIDS virus.

A new problem arises due to the consideration of safety hazards posed in the future. Although there appears to be no reason to fear exposure to the virus itself from casual work place contact, those with ARC not only suffer from the AIDS virus, but also from the infectious diseases associated with the depressed immune system.[126] Some of the secondary diseases might be more contagious than actual AIDS, and pose an added health threat.[127] They are illnesses which can be spread by casual contact and might pose a "reasonable probability" of a safety hazard.

Further, since a substantial number of those who test positive for the AIDS virus will progress either to ARC or full-

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121. *Boynton Cab*, 96 Wis. 2d at 409, 291 N.W.2d at 856 (quoting *Bucyrus-Erie*, 90 Wis. 2d at 424, 280 N.W.2d at 150).

122. WIS. STAT. § 227.20(1) (1973) was repealed by 1975 Wis. Laws 414, 523 (eff. Sept. 1976). WIS. STAT. § 227.20(1)-.20(9) was created by 1975 Wis. Laws 414, 525.

123. WIS. STAT. § 111.34(2)(b) (1983-84).

124. *See generally AIDS in the Workplace*, *supra* note 17, *reprinted in* AIDS AND THE LAW (1986).

125. *Id.* at 682.

126. AIDS AND THE LAW 129 (1986).

127. Hepatitis B (HBV), a disease that afflicts many AIDS victims, has a higher risk of being transmitted than does AIDS. *AIDS in the Workplace*, *supra* note 17, at 683, *reprinted in* AIDS AND THE LAW 51 (1986).

blown AIDS within two or three years, these individuals face an increased risk of also developing the secondary contagious illnesses.[128] Whether this increased risk is equivalent to a "reasonable probability" of posing a safety hazard is difficult to determine due to the newness of the disease. It does not appear that medical studies have yet determined this. A possible solution would be to let these people work until evidence proves otherwise or their condition progresses to a stage where it is obviously ill-advised to allow them to work any longer. The individual case-by-case analysis promulgated by the statute should allow for the flexibility necessary to allow this. Policy reasons would also argue against excluding these individuals from the work force. If the number of ARC and seropositive individuals is as high as predicted, the loss of these individuals from the work force could have severe effects on the economy.[129]

The other consideration in regards to safety is for the safety of the afflicted individual's own health.[130] In the work environment, not only could the victim pass the AIDS virus to others, but co-employees could pass their illnesses to him. The AIDS victim's weakened immune system will enhance this possibility.[131] On this topic the Wisconsin Supreme Court has stated: "We do not believe that the legislature when proscribing discrimination against those physically handicapped intended to force an employer into the position of aiding a handicapped person to further injury, aggravating the intensity of the handicap or creating a situation injurious to others."[132] Again, the question is, is there a reasonable probability of this occurring? The answer is also, once again, that medical evidence is not yet available to make this determination.

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128. *See supra* notes 20-26 and accompanying text.

129. Allowing AIDS victims to work might be required if there are many victims as some experts predict. The loss of workers would otherwise adversely affect the economy. AIDS AND THE LAW 125 (1986).

130. WIS. STAT. § 111.34(2)(b) (1983-84). *See generally* Samens v. Labor & Indus. Review Comm'n, 117 Wis. 2d 646, 664-68, 345 N.W.2d 432, 439-42 (1984); *Boynton Cab*, 96 Wis. 2d at 409-16, 291 N.W.2d at 856-60.

131. *See supra* note 16.

132. *Bucyrus-Erie*, 90 Wis. 2d at 423, 280 N.W.2d at 149-50.

The rational relationship test provides a lighter burden of proof placed on an employer who has a higher "special duty of care" such as common carriers.[133] To meet this burden, the employer must only prove that its policy of not hiring a handicapped person was "not the result of an arbitrary belief lacking in objective reason or rationale. . . . [I]t is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice."[134] It would seem that such an increased risk to someone's health occurs when there is any contact with an AIDS victim.

Although this standard has only been applied to a common carrier and an electric company groundman, perhaps it would be placed on health care and food service positions when dealing with an AIDS victim.[135] Health care workers particularly will have close contact to many people who are in a weakened state of health due to a prior illness. Food handled by AIDS victims will be ingested directly into bodies of a consumer. It can be argued that both industries owe a high duty of care to third parties who rely on them for vital services. The health of others is entrusted to them. If these two industries were encompassed within the industries falling under the rational relationship test, it appears discrimination would be possible because of the slight increase in risk the hiring of an AIDS victim would cause.[136]

The last discrimination issue in employment deals with the right to all the benefits of the job including insurance coverage. Until 1982, an employer could exclude or restrict a

133. WIS. STAT. § 111.34(2)(c) (1983-84); *see Samens*, 117 Wis. 2d at 663-64, 345 N.W.2d at 439 (the court determined that an electric company groundman was included in this exception); *see also Boynton Cab*, 96 Wis. 2d at 409-19, 291 N.W.2d at 856-61 (rational relationship test applied to cab driver).

134. *Boynton Cab*, 96 Wis. 2d at 415, 291 N.W.2d at 859 (quoting Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863-65 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975)).

135. *AIDS in the Workplace, supra* note 17, at 682-86, *reprinted in* AIDS AND THE LAW 50-54 (1986). The report deals with the transmission of AIDS from patients to health care workers describing the risks associated with that contact.

136. *Id.* If medical experts did not believe that there was at least a slight increased risk, it seems there would be no need to promulgate special safety procedures for health care workers and others who work closely with AIDS patients.

handicapped employee from life or disability insurance.[137] This form of discrimination has been removed. The employer now must contribute the same amounts to the fringe benefits of a handicapped person as any other employee.[138] This includes life and disability insurance.[139]

V. INSURANCE

The rising incidence of AIDS raises the issue of the right of an individual to procure insurance and under what conditions.[140] Since group insurers do not perform individual evaluations of future policyholders, an AIDS victim under a group plan might have no difficulty procuring insurance. The financial effect of insuring an AIDS victim will be spread among the group.[141] The employer will pay for the increased costs of this occurrence by a related increase in his insurance premiums.[142] Likewise, having AIDS will not affect someone who already has insurance. It will be treated as any other illness for purposes of paying claims.[143] The group that will be affected to the greatest degree are insurance underwriters issuing new policies. The concern of these underwriters and this

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137. WIS. STAT. § 111.32(5)(f) (1973), *repealed by* 1981 Wis. Laws 334 (Aug. 4, 1982).

138. WIS. STAT. § 111.322(1) (1983-84).

139. These two forms of insurance will probably be the main concern of most AIDS patients due to the high cost of medical care treatment. It currently costs approximately $100,000 to pay for the hospitalization of an AIDS patient. AIDS AND THE LAW 125 (1986).

140. *See generally* White Paper, *The Acquired Immunodeficiency Syndrome & HTLV-III Antibody Testing* (Nov. 25, 1985), *reprinted in* AIDS AND THE LAW 399 (1986) (citations following in this paper will be to *AIDS and the Law*) (submitted by the American Council of Life Insurance) [hereinafter White Paper]; *Report to the Life Insurance (A) Committee of the National Association of Insurance Commissioners on Acquired Immunodeficiency Syndrome* (Dec. 10, 1985), *reprinted in* AIDS AND THE LAW 411 (1986) (citations following in this paper will be to *AIDS and the Law*) (submitted by the American Council of Life Insurance) [hereinafterCommittee Report]; M. HODGSON & E. MCDONOUGH, AIDS AND INSURANCE (1986), *reprinted in* AIDS AND THE LAW 389 (1986) (citations following in this paper will be to *AIDS and the Law*) [hereinafter M. HODGSON & E. MCDONOUGH].

141. White Paper, *supra* note 140, at 404; M. HODGSON & E. MCDONOUGH, *supra* note 140, at 394.

142. M. HODGSON & E. MCDONOUGH, *supra* note 140, at 393.

143. White Paper, *supra* note 140, at 404; M. HODGSON & E. MCDONOUGH, *supra* note 140, at 393.

section is the disparity in the risk posed to the premium paid.[144]

The ultimate concern, of course, is who is going to pay for the cost of caring for AIDS victims. The ultimate answer to this question, at least, may inevitably be the general population regardless of how this issue is resolved.

This issue creates a conflict of interest between members of high risk groups, insurance companies and the general public. High risk group members fear exclusion from life and health insurance.[145] If these AIDS patients do not have insurance or personal resources to cover the medical costs, they may be forced to turn to a public assistance program such as Medicaid.[146] The general public would probably like to see this discouraged since they will bear the costs through tax dollars. Insurance companies, of course, do not want to insure these individuals who pose a high risk of large claims.

The issue of who will pay is unique in Wisconsin due to a statute which presently prohibits insurance companies from administering or inquiring about the results of an AIDS antibody test.[147] This leaves the insurance companies only with less accurate and more subjective ways to test the individual's risk of acquiring AIDS.[148]

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144. White Paper, *supra* note 140, at 404; *see also* Committee Report, *supra* note 140, at 418.

145. Exclusion from coverage may be the only viable alternative that insurance companies possess. *See infra* notes 165-67 and accompanying text.

146. M. HODGSON & E. MCDONOUGH, *supra* note 140, at 391.

147. WIS. STAT. § 631.90 (1986). This prohibition against using the HTLV-III test might be removed by the end of 1986. *See infra* note 158.

148. White Paper, *supra* note 140, at 406.

> [T]o accurately assess the level of risk, which an applicant presents, an underwriter may ask the applicant additional questions directed specifically at the AIDS risk, have the applicant physically examined and look for indications of treatment for other sexually transmitted diseases. In addition, the underwriter will be alert to unexplained signs and symptoms that may suggest impaired immunity and will want to be sure that the insurance applied for actually fits the applicant's financial picture.

Id. at 406-07.

At least one Wisconsin insurer will be asking its high risk life insurance applicants to undergo T-cell testing. The Milwaukee J., July 28, 1986, at 3D, col. 4. This method of testing, while permissible in Wisconsin, is less reliable than HTLV-III testing and can fail applicants who have T-cell abnormalities that are not caused by exposure to the HTLV-III virus. *Id.* at col. 5.

A. Nature of the Industry

When trying to resolve these conflicts, it is important to keep in mind the nature of the insurance industry. "Insurers are in the business of the acceptance of risks in return for compensation paid by the insured in the form of the policy premium."[149] The resulting policy is a contract into which the parties voluntarily enter. It may contain whatever provisions to which the parties agree so long as the provisions are not against public policy or prohibited by law.[150] To determine the terms of this voluntary contract, the insured will make representations to the insurer to enable the insurer to decide whether he will accept the risks and at what premium. With life insurance, these rates will be determined as accurately as possible through actuarial tables.[151] Although the insurance industry receives special regulation under the law, basic contract principles still apply. The parties are free to agree as to what losses or classes of losses will be covered and which excluded. Likewise, the contract could be voided for an intentional misrepresentation of a material fact.[152]

B. Identifying High Risk Individuals

Due to the increased risk of death and immense medical bills incurred by AIDS victims, insurance companies are naturally attempting to identify high-risk individuals.[153] Using traditional techniques of health questionnaires and physical examinations, insurance companies are presently attempting to screen prospective policyholders who might develop AIDS or ARC.[154] These are the individuals of greatest concern to the industry. It is the great number of asymptomatic seropositive individuals that pose the greatest risk to the insurance industry in the future. Seropositive individuals might not only

149. 1 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 1:22, at 37 (rev. ed. 1984).

150. *Id.*, § 1:5, at 10.

151. Due to the newness of this disease and the uncertainty regarding the effects of exposure to the virus, data on which to base these actuarial tables might not yet be available. *See supra* notes 19-25 and accompanying text.

152. WIS. STAT. § 631.11 (1983-84); *see* Eisenberg v. Continental Co., 48 Wis. 2d 637, 180 N.W.2d 726 (1970); Kelly v. Madison Nat'l Life Ins. Co., 37 Wis. 2d 152, 154 N.W.2d 334 (1967).

153. *See supra* notes 25-27 and accompanying text.

154. White Paper, *supra* note 140, at 403-04.

know that they are a member of a high risk group while the insurance company does not, they might also have been tested positive for exposure to the AIDS virus.[155] This could make an almost fifty-fifty chance that they will develop AIDS or ARC.[156] The risk a seropositive individual presents is, therefore, significantly higher than that presented by a normal policyholder.

Naturally, insurance companies would like to avoid insuring policyholders who pose such high risks. One of the most effective ways to screen these individuals is by antibody exposure testing.[157] The criticisms of this policy are threefold. First, the tests do not diagnose AIDS. They merely indicate exposure to the virus. Perhaps eighty percent of those who are exposed will never develop an AIDS symptom, yet will be denied coverage.[158] Second, since the tests were designed for blood banks, the tests are over sensitive and produce a high rate of false positives.[159] Third, to protect their insurability, many individuals may be discouraged from being tested if they are required to disclose the results.[160]

The counterarguments to these objections are that even though one who has been exposed to the AIDS virus may never actually develop the disease, he still poses a great risk of developing AIDS.[161] It is this risk upon which his premium is based. Merely because someone is an overweight, middle aged male who smokes does not necessarily mean he will develop heart disease. He does stand a much greater risk, though, than someone who is twenty years younger and in good physical condition. Consequently, the middle aged male will pay a

155. "Past experience shows that many individuals who receive a positive HLTV-III test result immediately seek insurance coverage." M. HODGSON & E. MCDONOUGH, *supra* note 140, at 396.

156. Taking the upper range of estimates for acquiring ARC or AIDS once an individual tests positive, there is a 44% likelihood of reaching these two stages. *See supra* notes 23 & 25 and accompanying text.

157. *See supra* notes 20 & 21 and accompanying text.

158. M. HODGSON & E. MCDONOUGH, *supra* note 140, at 395. The authors cite B. Schatz, C. Heimann & W. Warner, *AIDS and Insurance: Legal and Policy Considerations* (article submitted to the National Association of Insurance Commissioners partly on behalf of the National Gay Rights Advocates), *reprinted in* AIDS: LEGAL ASPECTS OF A MEDICAL CRISIS 571 (Law Journal Seminar — Press 1986).

159. M. HODGSON & E. MCDONOUGH, *supra* note 140, at 395.

160. *Id.*

161. *See supra* notes 23-25 and accompanying text.

higher premium consistent with the higher risk he presents.[162] The same should be true for someone who has been exposed to the AIDS virus.

Secondly, although there is presently a high rate of false positives, the accuracy of these tests is improving.[163] Further, the insurance practice is to repeat the antibody test and if it is again positive, to finally administer an even more accurate test.[164] Only if all three are positive would the individual be considered seropositive.

The last argument for utilizing these tests is that they provide the most accurate, objective means available for evaluating risks on an individual basis.[165] If the test was not administered, insurers would attempt to evaluate applicants on more subjective, less accurate criteria. This greater inaccuracy might lead to greater unfairness. Applicants of average risk might be rejected because of their appearance of being a high risk group member.[166]

C. *Wisconsin*

The Wisconsin legislative response to the issue of these tests has been to disallow their use for purposes of extending insurance coverage or determining insurance rates.[167] For the underwriting of individual insurance policies this is conditional. If the state epidemiologist and insurance commissioner certify the reliability of a screening test in the future, insurance companies will be able to implement them.[168]

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162. *See, e.g.*, White Paper, *supra* note 140, at 405 (analogy is made between insurance industry's treatment of individuals with coronary heart disease (CHD) and AIDS).

163. Message, *supra* note 4.

164. White Paper, *supra* note 140, at 403. The more accurate test is the Western Blot Test. *See generally* Message, *supra* note 4.

165. White Paper, *supra* note 140, at 407; M. HODGSON & E. MCDONOUGH, *supra* note 140, at 396.

166. White Paper, *supra* note 140, at 407. A hemophilia patient is cited as an example. Since blood donations are presently screened, if the patient does not have AIDS presently, the chance of acquiring the disease is remote. Consequently, the patient's insurance premiums would reflect this. *Id.*

167. WIS. STAT. ANN. § 631.90 (West 1986).

168. *Id.* A programming and planning analyst with the state insurance commissioner's office has predicted that the insurance commissioner will approve the HTLV-III test after a recent draft report by a state epidemiologist that the HTLV-III test is reliable. This approval of the test could occur by the end of 1986. The Milwaukee J., July 28, 1986, at 3D, col. 1.

The fact that the legislature altered the statute to provide for the use of these tests if their accuracy is established might evidence the legislative intent.[169] The statute does not say that an insurer cannot discriminate against someone who has been exposed to AIDS or is a member of a high risk group. It says insurers cannot discriminate based on these test results unless the accuracy of the tests is verified. This would seem to indicate a concern for the accuracy of the tests, not a concern with discriminating against high risk individuals. If this is the case, perhaps the law is justified. Otherwise, the purpose of the statute would appear to deny the insurer the best, most accurate means available to assess the risks.[170]

The failure to allow an insurer to determine the risks does not only go against the principles of insurance, but also against the existing laws of Wisconsin. When interpreting Wisconsin's law against unfair discrimination in charging insurance rates, a past Wisconsin Attorney General wrote that "[t]o charge persons of unequal expectation of life the same premium would be a palpable discrimination."[171]

Clearly, this is the case with someone who has been exposed to the virus and someone who has not and is not a high risk group member. To prohibit discrimination against the latter, this Attorney General's opinion would seem to require the assessment of a higher premium against the former.

To determine at what rate these standards should be set, any reasonable method is permissible with only a few exceptions.[172] The exceptions, noticeably, do not contain sex, sexual orientation or past medical tests. Consideration of the rating method statute also reveals factors at which insurance companies may look to determine rates.[173] Consideration of the past and of trends may be utilitzed. As already discussed, the past has shown the high risk that seropositive individuals

169. WIS. STAT. ANN. § 103.15 (West 1986).

170. White Paper, *supra* note 140, at 403-04.

171. 1910 Op. Att'y Gen. 433 (Wis. Dec. 14, 1908) (discussion of the difference in the rate charged to a 16 year old man and to a 20 year old man).

172. *See* WIS. STAT. § 625.12(2) (1983-84). The statute states that "[r]isks may be classified in any reasonable way for the establishment of rates and minimum premiums, except that no classifications may be based on race, color, creed or national origin." *Id.*

173. *Id.*; *see also* WIS. STAT. § 628.34 (1983-84).

pose, and the present trend is that this number is doubling each year.[174]

D. Alternatives Available to the Insurance Industry

If insurance companies are not presently permitted to utilize these tests in screening applicants, they may have to later rely on defenses to claims made by AIDS victims. One of the more obvious would be that the claimant misrepresented or failed to disclose a material fact.[175] Since the present statute would not allow the insurance companies to consider antibody test results for any aspect of insurance coverage, the duty to inform the company of the test results would not exist. This defense would therefore not be available. The only material misrepresentation that could occur is if the patient were already at the ARC or AIDS stage and was trying to obscure the symptoms of the disease from doctors in a medical exam.

The second alternative of the insurance company would be to rely on an exclusion clause.[176] This clause could exempt preexisting diseases or exempt from coverage liability from AIDS for a number of years after coverage commences.

There are a number of problems in doing this. Due to the long incubation period,[177] it would be nearly impossible to determine if the disease existed at the time coverage commenced. This problem would be especially pronounced if testing were prohibited. At least, by using the tests, one could say for certain they did *not* have the disease prior to a certain date.

The second problem involves determining when the disease, as a condition, comes into existence. It is not yet known whether the virus is present and active when the antibody test

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174. *See supra* note 27 and accompanying text.

175. WIS. STAT. § 631.11 (1983-84); Nolden v. Mutual Beneficial Life Ins. Co., 80 Wis. 2d 353, 259 N.W.2d 75 (1977); Kelly v. Madison Nat'l Life Ins. Co., 37 Wis. 2d 152, 154 N.W.2d 334 (1967).

176. *See, e.g.*, Jones v. Sears Roebuck & Co., 80 Wis. 2d 321, 259 N.W.2d 70 (1977). Exclusion clauses are generally valid. 10 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 41:378, at 444 (rev. ed. 1982).

177. *See supra* notes 19-23 and accompanying text. Medical experts have not yet determined precisely how long the virus incubates. It seems to vary with the individual. *AIDS in the Workplace, supra* note 17, at 682-83, *reprinted in* AIDS AND THE LAW 50-51 (1986).

is positive.[178] Even if the test prior to insurance coverage was positive, it does not mean the person has the disease. The person is not really considered to have ARC or AIDS until the symptoms start to manifest themselves. This would probably not occur until after coverage has commenced. Arguably, even a positive test prior to insurance coverage does not fulfill the burden the insurance company bears of proving the condition existed prior to commencement of insurance coverage.[179]

Third, due to the various diseases that attack an AIDS victim, it might be difficult, if not impossible, to tell whether a claim is made by a non-AIDS victim with a simple infection, or whether the claim is being made by someone who acquired the infection due to their weakened immune system.[180] Tests would have to be done to nearly every patient submitting a claim to see if they had AIDS or just a simple infection. Insurance companies bear the burden of proof with any exclusion.[181] Without these tests, this difficult task may be impossible.

The only solution for insurance companies seems to be a blanket exclusion for AIDS.[182] This would end many of the difficulties associated with screening policyholders. This, of course, would result in AIDS victims not having insurance coverage when they need it the most. As with the disease, there are no easy answers.

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178. *Clinician's Guide*, *supra* note 5, at 2, *reprinted in* AIDS AND THE LAW 36 (1986).

179. *See Nolden*, 80 Wis. 2d 353, 259 N.W.2d 75.

180. *See supra* notes 24-26 and accompanying text. The non-AIDS victim might suffer from one of the diseases associated with AIDS such as hepatitis but not actually have AIDS. How the insurance company distinguishes an AIDS victim with hepatitis from a non-AIDS victim is where the problem arises. This is especially true if the insurance company is unable to use an antibody screening test.

181. *See* La Porte Motor Co. v. Firemen's Ins. Co., 209 Wis. 397, 245 N.W. 105 (1932); Milonczyk v. Farmers Mut. Fire Ins. Co., 200 Wis. 255, 227 N.W. 873 (1929).

182. A total exclusion for AIDS would also avoid a problem posed by WIS. STAT. § 632.76(2) (1983-84). This statute prohibits insurance companies from reducing or denying coverage for a preexisting condition if the policy has been in effect for at least two years. WIS. STAT. § 632.76(2)(a) (1983-84).

VI. CONCLUSION

AIDS poses a threat not only to an individual's health but also to his legal rights. The law must adapt and be interpreted to insure that justice is done for all parties concerned.

In the area of torts this means compensating the injured party. Traditional tort causes of action that have recently been applied in other jurisdictions in analogous situations support this contention.[183] When these cases and *Kliegel* are viewed together, it is clear that the balance of rights in Wisconsin should weigh heavily in favor of a victim's right to recover.

The solutions are not so apparent when dealing with AIDS in the workplace. The rights and needs of an AIDS victim must be considered in light of safety concerns and the victim's ability to do the job.[184] Further complicating this issue is the Wisconsin Supreme Court's determination of what constitutes a disability. The court should rectify its decision in *American Motors* and carry out the legislative intent of the FEA.[185] Being classified as disabled would afford to AIDS victims the essential rights needed to contribute to and exist in society.

One area where a special exception should not be made is in procuring insurance. AIDS is by its nature a disease. The nature of insurance is a voluntary agreement to accept a risk.[186] The nature of the two should be recognized and remain intact. There are other solutions to the problem of paying for AIDS that are more just and do not result in one segment of society effectively being forced to bear an unfair burden. The legislature should realize this and the scientific accuracy of the new antibody screening tests by allowing insurers to implement these tests in assessing risks.

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183. *See supra* notes 48-50 and accompanying text.

184. *See supra* notes 113, 119-36 and accompanying text.

185. *See supra* notes 105-10 and accompanying text. The legislature expressly calls for a broad and liberal interpretation of what constitutes a handicap. WIS. STAT. § 111.31(3) (1983-84). The court's decision in American Motors Corp. v. Labor & Indus. Review Comm'n, 119 Wis. 2d 706, 350 N.W.2d 120 (1984) was clearly a restricted and strained interpretation of this statute.

186. *See supra* notes 149-52 and accompanying text.