

# FAIR\$HARE

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### CASE DEVELOPMENTS

**Property Distribution:** professions (solo law practice, veterinary practice, dental center); businesses (insurance—CPA as expert, corporate receiver, loan statement "puffing," artist's paintings); pensions (percentage of future benefits, present value of vested unmaturing pension); personal property (engagement rings); fault (comparative "affairs," flagrant spending); homemakers (husband's chores); separate property (stock). **Alimony/Maintenance:** punitive, speculative income, inheritance-based. **Child Support:** applying guidelines *sua sponte*, one-half net salary. **Custody/Visitation:** anticipatory future custody change, hearsay (3-year-old's statement to doctor), visitation interference. **Agreements:** prenuptials, support. **Domestic Torts:** intentional infliction of emotional distress. **Attorneys:** opponent's time sheets. **Divorce Quiz:** court-ordered payment of contingency fee? ..... 23

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# COMMENTARY

## Nice People Get Sexually Transmitted Diseases

by Barbara Bevando Sobal\*

Times have changed. Whether we like it or not the 1990s will have to focus on sexually transmitted diseases ("STDs"). Unlike "The Wife of Bath,"<sup>1</sup> and "The Lady of Shalott,"<sup>2</sup> casual sexual encounters and multiple spouses can result in an STD and turn Prince or Princess Charming into a *deadly* toad.

STDs do not discriminate. Everyone is vulnerable. Yes, even nice people can unknowingly fall victim to the debilitating effects of an STD.

STDs have reached epidemic proportions. One out of every five sexually active adults at present has, or in the past have had, a sexually transmitted disease.<sup>3</sup> Therefore, every sexual encounter presents unknown risks,<sup>4</sup> and possible legal liabilities, not only for the sexually involved partners, but also for potential third-party defendants such as doctors, clinics and lawyers.

STDs may be transmitted intentionally, knowingly, recklessly, negligently, stupidly, unknowingly, or uncontrollably.<sup>5</sup> The key issues in an STD case are: (a) *intent*—did the defendant know that (s)he had the disease? and (b) *the infectious period*—was the defendant contagious when (s)he had a sexual encounter with the plaintiff?<sup>6</sup>

### The Most Common STDs

Knowledge of the following most common STDs (chlamydia, gonorrhea, genital herpes, syphilis, genital warts, hepatitis B, and AIDS) is imperative.

**Chlamydia.** Chlamydia, the *silent epidemic*, is the most widespread bacteria-like STD in the United States. Researchers fear that as many as 10 million Americans will contract chlamydia this year. Health regulations in 40 states require reporting. Chlamydia can be spread *without sexual contact* through household activities such as contact with towels and washcloths. Those infected with chlamydia can be *unaware* of their condition.<sup>7</sup> Chlamydia can lead to

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painful pelvic inflammation, miscarriages, sterility, and increases in the risk of ectopic pregnancies.<sup>8</sup>

A Dallas jury awarded Mrs. Stafford \$375,000 in damages as a result of her infertility caused by contracting Chlamydia from her husband. The Supreme Court of Texas held that the damages awarded by the trial court were supported by the evidence of the husband's adulterous relationships, transmittal of the disease to the wife, and evidence that the disease was the proximate cause of injury to the wife.<sup>9</sup>

**Gonorrhea.** The incidence of gonorrhea in the United States is seasonal: the highest rates occur in the late summer, the lowest rates in the late winter and early spring.<sup>10</sup> Transmission can occur *without sexual contact* by exposure to vaginal discharge and saliva.<sup>11</sup>

Complications in women include chronic pelvic inflammatory disease and the closing of the Fallopian tubes.<sup>12</sup> This disease is the major cause of sterility in women. Health regulations require mandatory reporting in all states. Victims who become sterile as a result of the willful or negligent transmission of gonorrhea can seek substantial money damages.<sup>13</sup>

A Wyoming jury awarded Ms. Housen \$1,300,000 for compensation and punitive damages based upon Mr. Duke's alleged grossly negligent infection of Ms. Housen with a venereal disease, gonorrhea. However, the Wyoming Supreme Court reversed the district court decision on the ground that the action was barred by the statute of limitations (to be discussed *below*).<sup>14</sup>

**Genital herpes.** Herpes (from the Greek root "to creep") has been known to exist for at least 25 centuries. Genital herpes simplex virus (HSV) infection is a disease of major public health importance.<sup>15</sup> Health regulations require reporting in 25 states.

Herpes is incurable. There are two types of the herpes simplex virus: HSV (type I), which causes cold sores and fever blisters; and HSV (type II), which causes genital sores and blisters. Both types now occur in the mouth and on the genitals.<sup>16</sup>

Studies have indicated that women with HSV-II have a higher incidence of cervical cancer.<sup>17</sup> Genital herpes may cause life threatening infections, mental deficiencies, and reproductive complications in women. Stress can cause recurrence.<sup>18</sup>

A New York trial court judge held, and the Appellate Division affirmed, that Mrs. Mahar-am could seek compensatory and punitive

damages from her former husband of 31 years for the alleged wrongful transmission of incurable genital herpes, based on the theories of fraud and negligence.<sup>19</sup>

\* \* \*

The California Court of Appeals held that Kathleen K. was entitled to damages based upon severe physical injury to her body as a result of contracting a dangerous, incurable disease, genital herpes; due to Robert B.'s tortious conduct in either negligently or deliberately failing to inform her that he was infected with a venereal disease.<sup>20</sup>

**Syphilis.** Because of its silent, insidious course, syphilis is known as the "great imitator" or the "great imposter." It is most often transmitted by sexual contact.<sup>21</sup> Health regulations require mandatory reporting in all states.

Syphilis is a highly contagious, destructive, deadly disease that can invade the cardiovascular system, the central nervous system, and virtually any organ of the body.<sup>22</sup> But, a client is most infectious in the early stages of the disease. A client can spread syphilis through sexual contact up to four years after acquiring the illness.<sup>23</sup>

Although syphilis is a curable disease, a client can suffer from persistent infection despite treatment. Follow-up treatment must be carefully monitored for a period of one to five years.<sup>24</sup>

**Genital warts.** Chronic condyloma (genital warts), is the number one viral STD in the United States. However, health regulations do not require reporting.<sup>25</sup> Genital warts are highly contagious human papillomavirus (HPV's) infections.

Genital warts most frequently attack the internal and external genitals. However, this viral STD has at least 45 variations and can occur in different areas of the body.<sup>26</sup> Studies have demonstrated that women with a history of genital warts may be four times more likely to develop cervical cancer.<sup>27</sup>

Safe, effective treatment for most HPV infections is not currently available. Sexual partners of clients with genital warts should be evaluated and treated if necessary.<sup>28</sup>

**Hepatitis B.** Hepatitis B (HBV), a DNA virus that affects the liver,<sup>29</sup> is a major worldwide public health problem. Health regulations require mandatory reporting in all states.<sup>30</sup>

An increased prevalence of Hepatitis B has been noted among prostitutes. However, Hepatitis B predominantly strikes male homosexuals.<sup>31</sup>

Chronic active hepatitis may progress to cirrhosis and death. In addition, there is a risk of primary liver cancer.<sup>32</sup> Treatment is ineffective.<sup>33</sup>

**AIDS (Acquired Immune Deficiency Syndrome).** Sexual contact is the primary means of contracting

the AIDS virus.<sup>34</sup> AIDS attacks the body's immune system and impairs the ability to fight disease. AIDS creates susceptibility to: (a) multiple opportunistic infections; (b) Kaposi's sarcoma (rare skin cancer) and other malignancies; and (c) pneumocystis carinii pneumonia (PCP). Exposure to STDs may trigger the dormant virus.<sup>35</sup>

A partner completely unaware of the virus is not subject to legal liability. However, if a partner suspects that he/she might have symptoms of the disease or has engaged in high-risk behavior, he/she must disclose this to any sexual partner and must take reasonable steps to prevent the transmission. A partner aware of his/her infection has a *mandatory duty* of disclosure to each and every partner.<sup>36</sup>

The landmark case involving Marc Christian, Rock Hudson's lover, sends a message loud and clear to those knowingly infected with AIDS. A Los Angeles jury awarded Marc Christian \$14.5 million in compensatory damages (\$3 million more than he sought). Rock Hudson was found guilty of outrageous conduct and of conspiracy with his secretary, Mark Miller. Mark Miller, a third party defendant, was also found liable for keeping Rock Hudson's secret in order that Christian would continue to engage in sex with Hudson.

Although Marc Christian did not test positive for AIDS, he alleged the emotional distress that he suffered in connection with developing the disease in the future.<sup>37</sup>

### The STD Client

The stakes are high in every sexual encounter. Every sexual relationship, whether it be marriage, or sex for sport, involves a risk factor. Each partner takes the risk of not only having a sexual encounter with that partner, but also with a possible "unknown army," that includes all of that partner's past sexual lovers.<sup>38</sup>

Recent research demonstrates that being infected with one or more STDs can result in the suppression of the immune system. STD infection has now been linked not only with an increased risk of getting AIDS, but also with at least six different cancers.<sup>39</sup>

As a result, STD clients all have one thing in common: the pain, anger, rage, grief and heartache associated with STDs. Not only are these clients enraged at their partner, they are furious with the legal profession, the medical profession, and other potential third-party defendants.

As an attorney representing many women suffering from an STD, I have observed how egregious these injuries are.

These injuries are not only medical (including hysterectomy in some cases), but financial as well.

The serious medical complications can even render an STD victim unable to work.

Clients also can suffer emotional and psychological complications after a curable STD, like gonorrhea or syphilis, has been successfully treated.<sup>40</sup> Emotional scars and shame can last a lifetime for clients with incurable diseases such as chronic condyloma and genital herpes. Doctors report that many patients experience stages similar to those mourning the death of a loved one: shock, emotional numbing, isolation, loneliness, depression and impotency.<sup>41</sup> And, for married couples, infection often ends in divorce.

### **Theories of Liability**

The legal consequences of STDs can include both civil and criminal liability. A client becomes a prime target for litigation when s(he) fails to warn a prospective sexual partner of having an STD. One who negligently exposes another to an infectious or contagious disease, which this second person then contracts, can be held liable in damages for his/her actions.<sup>42</sup>

An important premise is 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/she is free from venereal or other contagious diseases.<sup>43</sup>

I would like to emphasize that a cause of action must arise before the statute of limitations starts.<sup>44</sup> An STD client can seek damages for the transmission of an STD based upon the following torts: (a) negligence; (b) fraud, deceit, and misrepresentation; (c) battery; and (d) intentional infliction of emotional distress.<sup>45</sup>

**Negligence.** The traditional formula for establishing tort liability is:<sup>46</sup>

- A duty, or obligation;
- A breach of that duty. (A sexual partner inflicts injury by having sexual intercourse at a time when he/she knew, or in the exercise of reasonable care should have known, that he/she was a carrier of venereal disease<sup>47</sup>);

- A reasonably close causal connection between the conduct and the resulting injury, "proximate cause"; and

- Actual loss or damage.

In New York, the statute of limitations for negligence is three years. C.P.L.R. §214.

**Fraud, deceit, and misrepresentation.** The key point in an action for fraud is the duty to speak given the relationship of trust between the parties.<sup>48</sup> There is a fiduciary duty in intimate sexual relationships.<sup>49</sup>

Five elements are required to prove fraudulent misrepresentation:

- A deliberate misrepresentation by the diseased partner;<sup>50</sup>

- The diseased partner knew or should have known that he/she contracted a venereal disease;<sup>51</sup>

- Intent to induce the sexual partner to rely upon the misrepresentation;<sup>52</sup>

- Justifiable reliance.<sup>53</sup> (The sexual partner relied upon such representations and had sexual intercourse with the diseased partner, which he/she would not have done had he/she known the true state of affairs;<sup>54</sup>) and

- Damage resulting from the reliance; for example a painful or debilitating disease.<sup>55</sup>

In New York, the statute of limitations for fraud is six years. C.P.L.R. §213(f).

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***STD clients are furious with the lawyers, doctors and other third parties who are potential defendants.***

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**Battery.** To be liable for battery, the act must cause, and must be intended to cause, an unpermitted, offensive contact.<sup>56</sup> The test is what would be offensive to the ordinary person.<sup>57</sup>

Three elements are necessary to prove a civil battery in STD cases:<sup>58</sup>

- Intent (the deliberate intent to transfer the disease or the intent to cause the contact that causes the disease *i.e.*: sexual relations;

- Contact (an actual touching); and

- Offensive contact (a touching that offends a reasonable sense of personal dignity).

Even though both parties consent to sexual relations a battery may be committed. Consent to engage in sexual relations does not constitute consent to being infected with a sexually transmitted disease without knowledge of the diseased partner's infectious condition.<sup>59</sup>

In New York, the statute of limitations for battery is one year. C.P.L.R. §215(3).

**Intentional infliction of emotional distress.** The standard for liability based on the intentional infliction of emotional distress is outrageous conduct that exceeds the bounds usually tolerated by a decent society, which is intended to cause, and does cause, serious mental distress.<sup>60</sup> Thirty-eight states recognize this cause of action.<sup>61</sup> See, e.g., the California appellate case of *Kathleen K. v. Robert B.* in which the transmission of genital herpes gave rise to this cause of action.<sup>62</sup>

**Criminal liability.** Communication of a venereal disease to a partner can be either a misdemeanor or a felony.<sup>63</sup> The distinction is based upon the length of imprisonment and the place of imprisonment.<sup>64</sup> A *felony* is punishable by death or imprisonment for more than one year in a state prison or penitentiary.<sup>65</sup>

A *misdemeanor* is punishable by less than one year by fine, by imprisonment or both in a local jail.<sup>66</sup>

In the following states it is a misdemeanor to infect someone with a venereal disease, and the punishment ranges from a small fine to one year in the county jail: Alabama (knowledge of disease not required), Arizona (knowledge required), California (knowledge required), Colorado (knowledge required), Delaware (knowledge not required), Florida (knowledge required), Idaho (knowledge required), Louisiana (knowledge not required), Montana (knowledge required), Nevada (knowledge required), New Jersey (knowledge required), New York (knowledge required), Oregon (knowledge required), Rhode Island (knowledge required), South Carolina (knowledge required), South Dakota (knowledge not required), Tennessee (knowledge not required), Texas (knowledge required), Utah (knowledge required), Vermont (knowledge required), Wyoming (knowledge required).<sup>67</sup>

In North Dakota, infecting someone with a venereal disease is an infraction. First-time offenders can be fined up to \$500 (knowledge required). In Oklahoma, infecting someone with a venereal disease is a felony, punishable by up to five years in the state prison (knowledge of disease not required). In Washington, it is a gross misdemeanor to infect someone with a venereal disease punishable by a term in a county jail of not more than one year and/or a fine of not more than \$1,000 (knowledge required).

### **Statute of Limitations**

The statute of limitations is one of the most problematic aspects of an STD claim. As a general rule, where an injury, although slight, is sustained as a result of the wrongful act of another, and the law affords a remedy, *the statute of limitations attaches at once*. It is not required that *all* of the damages resulting from the act shall have been sustained at the time. The running of the statute *is not postponed* by the fact that damages do not arise until years later. The act itself is the basis for the action.<sup>68</sup>

With respect to STDs, the statute of limitations attaches when there has been notice of the invasion of the plaintiff's legal right, even though notice of consequences does not materialize until later.<sup>69</sup>

One statute of limitations problem occurs where the attorney's fail to include all causes of action for the transmission of an STD in the complaint. Therefore, during the first consultation, I ask my clients whether or not they have ever contracted an STD. Usually, the client is relieved that I inquired. The attorney should help the client overcome a sense of humiliation. Also remember that time on the statute of limitations clock may be ticking as attorneys discuss how to deal with STD information.

Doctors too can impose barriers to meeting the statute of limitations for an STD claim. Often doctors do not inform the client that they have an STD. This is particularly egregious if doctor knows that the patient's sexual partner has an STD.

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***The statute of limitations is one of the most problematic aspects.***

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Public health stations also create barriers to meeting the statute of limitations. Many STD patients wind up with a history of STDs but without a definite diagnosis. One spouse may be tested and treated for the disease at the clinic, and notice sent to the other spouse who, in turn, is treated *but not tested* for the disease. Doctors cover themselves by stating on the medical records that the wife was treated, for example, for the husband's problem because the wife was his sexual partner. However, without testing, the medical record does not state that the wife had an STD; and without a record of the disease, the statute of limitations goes down the drain.

### **Third-Party Defendants**

In any STD litigation, consideration must be given to the inclusion of third party defendants. The reasons vary. They could be strategic, evidentiary, availability of a "deep pocket," or the STD victim may simply want revenge.

Vulnerable third-party defendants include persons who originally transmitted the sexual disease; doctors, hospitals, and clinics who failed to report the disease; therapists or physicians with a special relationship to the parties; and attorneys who negligently failed to advise a client that a cause of action existed.<sup>70</sup> As a general principle, a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.<sup>71</sup>

Decisions have held that a doctor is liable to persons infected by his patient if he negligently fails to diagnose a contagious disease, or, having diagnosed the illness, fails to warn members of the patient's family.<sup>72</sup>

### **Conclusion**

*Time* magazine succinctly stated that, "the unsuspecting person who picks up herpes from a partner is hit with a double whammy: evidence of betrayal and a lifelong disease as a memento of the event."<sup>73</sup> However, nothing can compare to the ignorance and the betrayal imposed upon a client by the legal and

medical professions, professions which are dedicated to serving and healing.

#### NOTES

1. "A Wife of Bath did much to keep us gay; With tales of love and love charms, on the way—A lively soul, who knew the inmost art; Of how to win a spouse and hold his heart; For *she had five husbands* in her time, *Not counting scores of lovers* in her prime!" Chaucer, Geoffrey, "The Wife of Bath."
2. "From the bank and from the river; He flash'd into the crystal mirror; Tirra tirra, by the river, Sang Sir Lancelot. She left the web, she left the loom; She made three paces thro' the room; She saw the water-lily bloom; She saw the helmet and the plume; She look'd down to Camelot. Out flew the web and floated wide; The mirror crack'd from side to side; *The curse is come upon me*," cried The Lady of Shalott." Tennyson, Alfred, "The Lady of Shalott," *Poetical Works*, London, University Press, (1962) pp. 26-27.
3. Davis, Margaret L., *Lovers Doctors and the Law*, p. 12, Harper & Row, New York, Canada (1988).
4. *Id.* at p. 4.
5. Holmes, King K., *Sexually Transmitted Diseases*, p. 1102, McGraw-Hill, (1990).
6. Davis, Margaret L., *op. cit.* p. 106.
7. *Id.* at 109, 110.
8. *Id.* at 109.
9. *Stafford v. Stafford*, 726 SW 2d 14, 16 (Sup. Ct., Texas 1987); *rehearing denied*, (1987).
10. Holmes, King K., *op. cit.* p. 150.
11. Davis, Margaret L., *op. cit.* p. 106.
12. Holmes, King K., *op. cit.* p. 155.
13. Davis, Margaret L., *op. cit.* p. 106.
14. *Duke v. Housen*, 589 P.2d 334, 337, (Sup. Ct., Wyoming 1979); *rehearing denied*, 590 P.2d 1340 (Sup. Ct., Wyoming 1979); *cert. denied*, 444 U.S. 863 (U.S. Sup. Ct. 1979).
15. Holmes, King K., *op. cit.* p. 391.
16. Davis, Margaret L., *op. cit.* pp. 117, 207.
17. Mandell R., Douglas, G., Bennett, J., *Principles and Practice of Infectious Diseases*, p. 1149, Churchill Livingstone New York, London (1990).
18. Davis, Margaret L., *op. cit.* pp. 207.
19. *Maharam v. Maharam*, 123 A.D.2d 165, 510 N.Y.S.2d 104, 107 (1st Dept. 1986).
20. *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 996-97; 198 Cal. Rptr. 273 (Calif. Second Dist. Court of Appeals, 1974); *petition for hearing by the Supreme Court denied*, (1984).
21. Mandell, R., Douglas, G., Bennett, J., *op. cit.* p. 1794.
22. Davis, Margaret L., *op. cit.* pp. 211.
23. Mandell, R., Douglas, G., Bennett, J., *op. cit.* p. 1794.
24. *Id.*, at 1804, 1806, 1807.
25. Davis, Margaret L., *op. cit.* pp. 209.
26. *Id.*, at 112.
27. Mandell, R., Douglas, G., Bennett, J., *op. cit.* p. 1192.
28. *Id.*, at 1195, 1197.
29. Holmes, King K., *op. cit.* p. 453.
30. Davis, Margaret L., *op. cit.* p. 203.
31. Holmes, King K., *op. cit.* p. 457.
32. *Id.* at 458, 459.
33. *Id.* at 462.
34. Davis, Margaret L., *op. cit.* p. 164
35. *Id.* at 201.
36. *Id.* at 165.
37. *USA Today*, p. 1., February 16, 1989.
38. Davis, Margaret L., *op. cit.* p. 5.
39. *Id.*, at 5.
40. *Id.*, at 5.
41. *Id.* at 5-6.
42. *Duke v. Housen*. at 340.
43. *Kathleen K. v. Robert b.*, at 997; *see, Maharam*, at 107.
44. *Duke v. Housen*, at 340-41.
45. *See, Maharam*, at 105, 107; *Kathleen K. v. Robert B.*, at 994.
46. *See, Maharam*, at 107; *Duke v. Housen*, at 341; Keeton, Dobbs, Keeton & Owen, *Prosser and Keeton On Torts*, 5th Ed., pp. 165-66, West Publishing Co., Minnesota, (1984).
47. *Kathleen K. v. Robert B.*, at 994.
48. *Maharam*, at 107.
49. Davis, Margaret L. *op. cit.* p. 42.
50. *Kathleen K. v. Robert B.*, at 994.
51. *Maharam*, at 107.
52. Keeton, Dobbs, Keeton & Owen, *op. cit.* p. 741.
53. *Id.* at 749.
54. *Kathleen K. v. Robert B.*, at 994.
55. *See, Maharam*, at 107; Keeton, Dobbs, Keeton & Owen, *op. cit.* p. 765.
56. Keeton, Dobbs, Keeton & Owen, *op. cit.* p. 41.
57. *Id.* at 42, citing Second Restatement of Torts, §19.
58. Davis, Margaret L. p. 39.
59. *Id.* at 39, 40.
60. Keeton, Dobbs, Keeton & Owen, *op. cit.* p. 61.
61. Davis, Margaret L., *op. cit.* p. 44.
62. *Kathleen K. v. Robert B.*, at 994.
63. Davis, Margaret L., *op. cit.* p. 69.
64. La Fave, Wayne R., Scott, Austin W., Jr., *Handbook on Criminal Law*, p. 26, West Publishing Co., Minnesota, (1979).
65. *Id.*, at 26.
66. *Id.*, at 26.
67. Davis, Margaret L., *op. cit.* pp. 72-80.
68. *Duke v. Housen*, at 343, citing 51 Am.Jur.2d, Limitation of Actions, §135, p. 704.
69. *Duke v. Housen*, at 343, citing *Cristiani v. City of Sarasota, Fla.* 65 So.2d 878 (1953).
70. *See, Karp, Leonard*, "The Exploding World of Domestic Torts," 10 FAIR\$SHARE [p. 3] (April 1990).
71. *See, Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (Sup. Ct. Calif. 1976).
72. *Id.* at 425.
73. Davis, Margaret L., *op. cit.* p. 6.