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Sexually Transmitted Diseases: A Courtroom Epidemic

James B. Damiano
Seton Hall Law

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INTRODUCTION

The Centers for Disease Control and Prevention (CDC) estimates that there are approximately 19 million new sexually transmitted disease (STD) infections each year. This costs the U.S. health care system over $16 billion annually and costs individuals even more in terms of acute and long-term health consequences.[1] These remarkable figures necessitate a reassessment of tort law's proper function in determining how to handle the impact on our society and legal system, that sexually transmitted diseases cause, as this costly wave of sex tort litigation sweeps across the nation. [2]

Sexually transmitted diseases remain a major public health challenge in the U.S., and the outrageous costs incurred by this epidemic are taking a heavy toll on not only the health care system, but the legal system as well. The increase in the litigation filed by plaintiffs who are seeking damages as a result of unknowingly being infected with a STD has been growing over the past twenty years, and will likely continue to grow commensurate with the proliferation of sexual disease.[3]

Despite the literature and public announcements circulated in this area outlining the seriousness and prevalence of these diseases, many individuals take little heed and are reckless in their actions, failing to take the proper prophylactic measures to avoid transmission to their

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[1] *See* http://www.cdc.gov/std/stats09/trends2009.pdf.

[2] This paper will focus on more serious diseases that are either incurable or life threatening. Curable diseases present issues of mootness and will not be addressed in this paper.

[3] Deana A. Pollard, *Sex Torts*, 91 MINN. L. REV. 769, 793-94 (2007).

sexual partners.[4] This has led to numerous instances where the courts have, in effect, been asked to attach tort liability to the natural results of otherwise knowing and consensual sexual relationships. To help shed some light on this area of tort law, the following hypothetical may be helpful in illustrating the complexities that the courts are being presented with in this area of tort litigation.

Anthony, a 21 year-old college senior gets invited to a friend's dorm to enjoy a night of wine and cheese to celebrate their upcoming graduation in May, 2009. While enjoying his wine, he sets his eyes upon Maria, a stunning young woman majoring in pre-law and aspiring to be an attorney. After obtaining some information about Maria, he approaches her and initiates a conversation with her. The conversation turns into the two of them mutually deciding to become intimate with each other.

Before initiating any sexual intercourse, Maria, who always practices safe sex, asks Anthony if he has any sexually transmitted diseases that he could infect her with. Anthony, having never been tested, but honestly and reasonably believing he did not have an STD replies, "None that I know of."[5] As a result of that discussion, they engaged in unprotected sexual intercourse. Anthony based his belief on that fact that he had very few sexual partners throughout college, and as far as he knew, his sexual partners also had very few sexual partners.[6] Maria was very conscious about the spread of disease and had been tested regularly

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[4] *See* M.A. Catchpole, *Continuing Transmission of Sexually Transmitted Diseases Among Patients Infected with HIV-1 Attending Genitourinary Medicine Clinics in England and Wales*, 312 B.M.J. 539 (1996).
In these studies, a considerable proportion of patients infected with HIV-1 and a substantial numbers of homosexual or bisexual men attending these clinics continue to practice unsafe sex despite being aware of their infection with HIV-1.

[5] Whether Anthony had a duty to "know" will be explored in Part II, *infra*.

[6] Courts have attempted to determine whether a lack of knowledge is a valid defense. *See* Part III, *infra*.

in the past, all of which testing was negative. Anthony and Maria remained friends after college, but had no further sexual relations after that one encounter.

In September, 2009, Maria began law school. However, because of her busy schedule, she had not kept up with the regular STD testing that she had in the past. In addition to her busy schedule, Maria did not feel the need to be tested because she did not have any other sexual encounters since the last one with Anthony, in May, 2009. Maria finally made some time to get tested in July, 2011. Expecting a normal result, Maria was shocked when her doctor called her and informed her that her results came back positive for herpes. Her reaction stemmed from the fact that she had no symptoms of any STD and that she hasn't had any sexual partners since Anthony.

Infuriated, Maria contacted Anthony and informed him that he gave her a sexually transmitted disease and that she would be seeking restitution for the short and long term damage this infection has, and will continue to cause her. Anthony, who was working as a paralegal for a small law firm that specialized in personal injury litigation realized that it has been over two years since they had any contact, and told Maria that she "didn't stand a chance because the statute of limitations on matters like this is two years and she waited too long!"[7] After doing some research, Maria realized that the statute did, in fact, bar actions brought after two years but wondered if there were any exceptions to the strict reading of the statute. She was nervous and began to think it may have been her fault because she was negligent for believing him and not requiring that he get tested before agreeing to engage in sexual intercourse with him. Maria was concerned and asked herself, Was it her fault? Did she assume

[7] Issues concerning the statute of limitations will be further explored in Part V, *infra*.

the risk when she had sex with him?[8] What can she do to protect herself, and where she would even begin to look to find out. Other questions were also raised, such as, should Anthony have known about his condition? and, "is it all, or any part, Anthony's fault? Lastly, Maria was concerned with the public humiliation she would bring upon herself and her family if she had to bring this lawsuit into the eyes of the public court system?[9]

To help explain some of the questions raised throughout this scenario, and to establish whether one sexual partner owes a duty to the other, the outline herein below is separated as follows:[10]

a. Part I explores recent statistical data gathered by the Centers for Disease Control and Prevention in the rapidly growing area of Sexually Transmitted Diseases in America.[11]

b. Part II explains the current negligence paradigm, and why it is the most frequently alleged claim.

c. Part III examines some of the most commonly asserted defenses. In this section, it is evident that courts are having a difficult time addressing these cases because many courts are seeing them as a case of first impression.

d. Part IV explains the overdue advances in the area of interspousal immunity and presents an argument for a more uniform approach to be applied across the country.

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[8] The defense of assumption of risk is explored in Part III, *infra*.

[9] The negative stigma associated with these diseases as well as the reluctance of Americans to get tested is explored in Part I, *infra*.

[10] This paper will simply focus on Sexually Transmitted Diseases and the tort law implications. This paper will not address any criminal liability associated with such acts, including fraudulent misrepresentation and battery, the most prevalent criminal charges in these types of cases.

[11] The data in this section applies to the nation as a whole. No specific demographic was targeted in the data provided by the Centers for Disease Control.

e. Part V addresses the various issues concerning the statute of limitations in this area and presents a basis as to why a more liberal application of the doctrine would further the goals of tort law.

In conclusion, the contention that the courts have failed to address this topic properly will be propounded, as well as how this failure has fashioned a tort law system that is unable to meet its ultimate goals.

BACKGROUND

I. A Brief Statistical Background On America's Increasing STD Rates

Sexually transmitted diseases remain a veiled epidemic in the United States that present enormous health and economic consequence to our nation and our society at large. Due to the negative biological and social stigma associated with these diseases, many Americans are reluctant to address sexual health issues, and as a result, avoid regular and proper testing.[12] This *laissez faire* attitude is the leading factor that cause Americans to remain oblivious of any disease they have been exposed to or may be carrying. This ignorance leads people to believe that this epidemic has no effect on them. However, all people have an interest in STD prevention because all communities are impacted by STDs and all individuals directly, or indirectly pay for the costs of these diseases. There are many obstacles to effective prevention efforts, which includes confronting and remedying the reluctance of American society to openly face and challenge issues surrounding STDs. It is also necessary that the court create a uniform approach to encourage more socially responsible behavior. While the process of preventing STDs must be a collaborative one, America should also utilize its court system to

[12] Similar to Anthony above, one cannot assume they do not carry a disease based solely on their prior sexual history of few partners.

initiate a successful national initiative to confront and prevent STDs, as well as to protect individuals who have been unknowingly infected by them.

To keep American's informed of this public health outbreak, every year the CDC publishes a report of national data on gonorrhea, chlamydia and syphilis. In its report,[13] the CDC based its data on state and local STD case reports from a variety of private and public sources, the majority of which come from non-STD clinic settings, such as private physicians and health maintenance organizations. CDC's surveillance report includes data on the three STDs that physicians are required to report to the agency including chlamydia, gonorrhea and syphilis, which represent only a fraction of the true burden of STDs.[14]

In 2010, a total of 1,307,893 cases of sexually transmitted chlamydia infection were reported to the CDC. This is the largest number of cases ever reported to CDC for any condition and is an increase of 5.1% compared with the rate in 2009. Rates of reported chlamydial infections among women have been increasing annually since the late 1980s, when public programs for screening and treatment of women were first established. In addition to the outrageous number of chlamydia reports, a total of 309,341 cases of gonorrhea and 13,774 cases of syphilis were reported to CDC.[15] Although seemingly low numbers in comparison to the number of sexually active Americans, from 2006 through 2010, syphilis rates increased at an alarming 134% among those aged 20 to 24 years.[16]

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[13] *Sexually Transmitted Disease Surveillance,* 2010, See www.cdc.gov/std/stats [*Hereinafter STD Surveillance*].

[14] Although these diseases are in fact curable with various antibiotics and procedures, this paper will focus only on incurable diseases. These numbers are designed to give you an accurate representation of the only diseases that physicians are required to report. Other common STDs such as human papillomavirus (HPV), genital warts, and genital herpes, are not reported to the CDC, and would not reflect an accurate number.

[15] *Id.*

[16] *Id.*

Even more startling is that the infection rates of STDs in the United States are estimated to be between fifty and one-hundred times higher than the infection rates of other industrialized nations.[17] Despite the seriousness and prevalence of these diseases, many people continue to be careless, and fail to avoid transmission to their sexual partners.[18] Until the sexual transmission of diseases is reduced, many people who have contracted sexually transmitted diseases will seek recompense in the courts from the people who infected them.[19] The transmission of a venereal disease through sexual intimacy can form the basis for tort liability between sexual partners. As with most torts, the rationales for recognizing wrongful transmission claims include "redressing the violation of important norms, compensating victims, and discouraging unsafe behavior."[20] Considering the epidemic proportions of sexually transmitted diseases, discouraging unsafe behavior under the guise of public health should be a top priority for courts in allowing these tortious transmission cases.

II. Negligence

Although many believe there is a moral and ethical duty to warn prospective sexual partners about a contagious medial condition, the essential question for the courts to consider is whether a person owes a legal duty to a sexual partner. Because there is no explicit answer from the United States Supreme Court, negligence is frequently asserted as the cause of action in cases for the transmission of a sexual disease.[21] Negligence is conduct which falls below the

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[17] David J. Mack, *Cleansing the System: A Fresh Approach to Liability for the Negligent or Fraudulent Transmission of Sexually Transmitted Diseases*, 30 U. TOL. L. REV. 647 (1999).
[18] *See supra* n. 4.
[19] *See* Mack, *supra* note17.
[20] Michelle Mekel, *Kiss And Tell: Making the Case for the Tortious Transmission of Herpes and Human Papillomavirus*, 66 MO. L. REV. 929, 948 (2001).
[21] *Id.* at 938.

standard established by law for the protection of others against an unreasonable risk of harm.[22] This conduct may consist either of an act, or an omission to act, when there is a duty to do so.[23] An example of a failure to act may include failing to inform someone whom you may transmit a disease to.[24] Although a few states have recognized negligent transmission of sexual disease since the late nineteenth or early twentieth century, courts all over the United States are now addressing this as an issue of first impression leaving to ones imagination the question of whether civil liability is appropriate for sexual disease transmission.[25]

As in any negligence action, the following four essential elements must be established by a plaintiff in an action for the negligent transmission of a sexual or venereal disease:

1. the existence of a legal duty;

2. a breach of that duty;

3. injury to the plaintiff proximately caused by the breach; and

4. damages to the plaintiff.

Obviously, where there is no legal duty, there can be no actionable negligence.[26] Therefore, a person who has a contagious STD, but abstains from any sexual activity, has no duty to disclose his or her medical condition. By definition, the infected individual has taken suitable safeguards to prevent any negligent transmission.

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[22] RESTATEMENT (SECOND) OF TORTS § 282 (1965) [hereinafter RESTATEMENT].
[23] *Id.* at cmt. A.
[24] As a practical matter, some jurisdictions allow a claim for both gross negligence as well as ordinary negligence if, under state law, gross negligence is distinct tort from ordinary negligence. This section will only discuss ordinary negligence, a valid claim in all jurisdictions, since gross negligence is not a universally valid claim.
[25] *See* Pollard, *supra* note 3, at 794.
[26] AM. JUR. 2D, NEGLIGENCE § 89 (1989).

Under the first prong, the notion of duty is founded on the responsibility each of us bears to exercise due care to avoid unreasonable risks of harm to others. In *B.N. v. K.K.*, a case where a physician who knew he suffered from genital herpes entered into a sexual relationship with a nurse without informing her of his condition, and the nurse contracted the disease.[27] The court held, that one who knew he or she had a highly infectious disease and could readily foresee the danger that the disease may be communicated to others, had a duty to take reasonable precautions by warning others or avoiding contact with them, to avoid transmitting the disease, and that a breach of this duty gave rise to a cause of action in negligence.[28] As a consequence, the infected person has a duty to take reasonable precautions whether by warning others or by avoiding contact with them to avoid transmitting the disease.[29]

Expanding on various courts opinions, Oklahoma in its 1997 decision established that an infected person may also have a duty to a third party who may become infected through a somewhat unforeseen chain of events. In *Lockhart v. Loosen*, a wife who had contracted genital herpes from her husband brought a tort action against the woman with whom her husband had engaged in an extramarital affair.[30] The wife alleged that the defendant knew that she had genital herpes when she engaged in the affair with her husband.[31] The appellate court

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[27] 538 A.2d 1175 (Md. 1988).
[28] *Id.* at 1179.
[29] *Id.*
[30] Lockhart v. Loosen, 943 P.2d 1074 (Okla. 1997).
[31] *See also* Meany v. Meany, 639 So. 2d 229 (La. 1994) In Meany, an action was brought by a former wife against a former husband for the negligent transmittal of genital herpes. There was enough evidence which led a jury to conclude that the defendant knew, or should have known that he was putting his former wife at risk of venereal disease by sexual contact where there was undisputed evidence that the defendant had contact with multiple sexual partners during a period of separation from the plaintiff. The plaintiff's first symptoms of infection occurred after reconciliation with the defendant, and when the plaintiff confronted the defendant with her diagnosis, the defendant disclosed that he had

affirmed on all advanced theories of liability except negligence where it held that an individual who knows, or reasonably should know, that he or she has a sexually transmitted disease, and who has sexual relations during the period when he or she is infectious, owes a duty to warn his or her sexual partner of the contagion.[32] The court added that such an individual also owes a duty to warn identifiable third persons with whom the individual knows the partner is copulating.[33]

In their reason, the court explained how negligence is based on the breach of a duty on the part of one person to exercise care to protect another against injury, by failing to perform, or improperly performing, such duty, as a result of which the latter sustains an injury.[34] They also explained that in the absence of such a showing, no liability can arise based on a claim of negligence. Although a seemingly low threshold, one must prove that a legal duty did exist.[35] Accordingly, people may be held liable for the negligent transmission of dangerous, communicable diseases,[36] and a cause of action thus exists for the negligent transmission of a STD.[37]

However, in *C.A.U. v. R.L.*, the Minnesota court, in an attempt to determine the defendant's liability for transmitting the AIDS virus, held that the defendant's knowledge

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experienced a problem with "dripping" for which he had sought medical attention but had failed to inform her.

[32] *Id.* at 235.

[33] *Id.*

[34] In the above hypothetical, Anthony was negligent for failing to, or improperly notifying Maria of his STD.

[35] *See* AM. JUR. 2D, NEGLIGENCE *supra* note 27, at § 82.

[36] *See* C.A.U. v. R.L., 438 N.W.2d 441, 443 (Minn. Ct. App. 1989); *see also* Duke v. Housen, 589 P.2d 334 (Wyo. 1979).

[37] McPherson v. McPherson, 712 A.2d 1043 (Me. 1998).

consisted only of what he perceived at the time of his relationship with the plaintiff.[38] In their decision, they further held that the defendant was required only that his perception be reasonable under the circumstances, as he was not expected to perceive what was not apparent to him. They found that at that time, AIDS were not prevalent and that it would not have been reasonable for the defendant to be on notice that he was at risk in transmitting the AIDS virus based on articles which he had read two years earlier in a magazine and newspaper, and the fact that he had a single homosexual experience.[39] Accordingly, the court recognized and exception and found that the defendant was not liable for transmitting the AIDS virus to his fiancée at that time.[40]

In addition to the four basic prongs that must be met for an ordinary negligence claim, some states require an additional element to have a successful claim for the negligent transmission of a STD. These jurisdictions require the defendant had knowledge, or should have known, that he or she had a contagious disease before having intercourse and transmitting the disease to his or her sexual partner.[41] The courts deem an individual to have a "reason to know" of a particular disease if he or she has information that a person of reasonable intelligence would infer that the fact in question exists, or that such person would govern his or her conduct upon the assumption that such fact exists.[42] They have found that one "should

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[38] *See* C.A.U. v. R.L., 438 N.W.2d 441, 443 (Minn. Ct. App. 1989).

[39] *Id.*

[40] *Id.*

[41] Although various states require some concealment by the defendant, this is not a requirement in all states and you will see below that there are numerous exceptions to this rule including assumption of the risk and contributory negligence to name a few.

[42] RESTATEMENT, *supra* note 22, at § 12 (1); *see also*, M.M.D. v. B.L.G., 467 N.W.2d 645 (Minn. Ct. App. 1991) The court found that a reasonable person with recurring sores on the genitals, who also has been told by a physician that a herpes culture may be advisable, should know there is a reasonable possibility that herpes has been contracted, and that such an acne-type condition on the genitals could be

know" of a certain fact if a person of reasonable prudence and intelligence would ascertain the fact in question in the performance of his or her duty to another.[43] The courts, by requiring defendants to only "reasonably believe," indicate that a person is on constructive notice when a given fact or combination of facts exists, that would cause a reasonable person to be aware of the possibility of spreading disease.[44]

Therefore, the courts have established that one who knows, or should know, that he or she is infected with a sexually transmitted disease is under a duty to either abstain from sexual contact with others, or, at least, to warn a potential sexual partner about this risk of infection before engaging in a sexual relationship with that person.[45] A breach of that duty will give rise to cause of action for tortious transmittal of the disease.[46]

Accordingly, if the defendant's conduct is a substantial factor in bringing about harm to another, the fact that the defendant neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent the defendant from being liable to the plaintiff.[47] In cases where there are issues of forseeability, a jury will often be used to determine if the harm of the defendant's acts were actually foreseeable. However, as a matter of law, when the forseeability is clear, it is often times handled by the court. Typically one who knows that he or she has highly infectious disease can readily foresee the danger that the disease may be communicated to others with whom the infected person comes into contact, and the issue of forseeability can be quickly dismissed.

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communicated to others through sexual contact, and has a duty to avoid sexual contact, or at least to inform potential sex partners about the genital sores and the physician's advice.

[43] RESTATEMENT, *supra* note 22, at § 12 (2).

[44] *Id.* at § 11.

[45] Deuschle v. Jobe, 30 S.W.3d 215 (Mo. Ct. App. W.D. 2000).

[46] Berner v. Caldwell, 543 So. 2d 686 (Ala. 1989).

[47] RESTATEMENT, *supra* note 22, at §§ 435 cmt. A, 435(1).

III. Excuse or Defense?

An issue both plaintiffs and defendants face each day is the fact that the United States has 50 states each with their own laws, rules, and regulations.[48] Because each jurisdiction is entitled to apply different rules, what may be a valid defense in one state, may only appear as an inadequate excuse in another. This section will explore various defenses as well as some asserted defenses that failed to meet the expectations of both the courts, and the jurors.

§ 1: Lack of Knowledge

Several jurisdictions have found an exception when the defendant is mistaken as to having a sexual disease.[49] In these cases, the defendant's conduct may not amount to an intentional tort.[50] This is also known as the "lack of knowledge" defense, which requires defendants to adhere to a "reasonable" standard.[51] For example, in *C.A.U. v. R.L.*, the Minnesota Court of Appeals found that a man had no duty to warn his sexual partner of the risk of infection from AIDS because his contact with his sexual partner and the spread of the disease occurred before any significant knowledge of AIDS was widespread.[52]

Similarly, in *McPherson v. McPherson*,[53] a case in which a former wife sued her former husband for negligence and assault and battery after she learned that the defendant engaged in

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[48] The cases in this section are designed to provided explanations of several common issues and asserted defenses raised in STD cases. Note that the cases in this section are not applied universally nor are they necessarily exclusive to the particular jurisdiction where the case originated.

[49] This mistake must be based on a good-faith belief.

[50] RESTATEMENT, *supra* note 22, at § 892B cmt. C.

[51] The Lack of Knowledge defense is currently the most successful to a claim for the infliction of a sexually transmitted disease.

[52] C.A.U. v. R.L., 438 N.W.2d 441, 443 (Minn. Ct. App. 1989).

[53] McPherson v. McPherson, 712 A.2d 1043 (Me. 1998).

an extramarital affair and subsequently infected the plaintiff with the human papilloma virus. Affirming the trial court's entry of judgment for the defendant, the appellate court held that, while Maine recognized a cause of action for the negligent spread of a sexually transmitted disease, the defendant, who was unaware that he was HPV-positive, was under no duty to protect the plaintiff from infection,[54] and that the plaintiff could not recover for assault and battery where her sexual relations with the defendant were consensual.[55]

§ 2: Substantial Mistake and Invalid Consent

In some instances, a defendant may disclose a disease to a plaintiff. To the contrary, a defendant may also represent that he does not have a disease by failing to disclose a disease. However, if the defendant is aware that the plaintiff's consent is given under a substantial mistake, the defendant is not entitled to rely on that consent. This can occur when the plaintiff is unaware of the extent the harm the intercourse can actually cause due to the defendant's failure to disclose a particular fact. This defense also raises the issue of invalid consent. Invalid consent occurs when an individual is induced to consent "by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation," the consent is ineffective.[56]

This was the case in *Kathleen K. v. Robert B.*, where the defendant relied on his limited representation to the plaintiff that he did not have a venereal disease. The court held that by deliberately taking advantage of a plaintiff's ignorance, the defendant takes his or her chances

[54] You will see below a different jurisdictions opinion where the facts of the case were similar, yet the outcome was entirely different.
[55] McPherson v. McPherson, 712 A.2d 1043 (Me. 1998).
[56] RESTATEMENT, *supra* note 22, at § 892B.

that the consequences that the plaintiff does not expect will occur, and the defendant becomes liable as if no consent had been given.[57] The court also noted that if the defendant knows he or she has a sexually transmitted disease, this limited representation is no defense to an action by the plaintiff to recover damages for having contracted the disease from the defendant.[58] By failing to fully disclose a disease, or the extent of a disease, a defendant surrenders his right to an informed consent defense. Similarly, courts have rejected the defense of consent when it is obtained by express fraudulent misrepresentation. Thus, it is these jurisdictions opinions that the consent to intercourse should not bar recovery for a venereal infection because the consent given goes to the act of intercourse, not to the harmful contamination.[59]

§ 3: Defendant's Duty to Warn

Recently, Iowa dealt with the defendant's duty to warn at both its Supreme Court and Appellate Court. In its Appellate Court case of *Rossiter v. Evans,* the plaintiff sued the defendant for infecting her with a sexually transmitted disease after telling her he was disease-free.[60] The plaintiff was soon thereafter diagnosed with both strains of the human papillomavirus (HPV), one of which causes genital warts and the other cell abnormalities that can lead to cervical cancer. She alleged that the defendant infected her during their 18-month relationship and failed to warn her to take appropriate steps to protect herself from infection.[61] The defendant argued that there was insufficient evidence that he had, or should have known that he had a sexually transmitted disease, and without such knowledge, had no duty to warn

[57] Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Cal. Ct. Ap 1994).
[58] *Id.*
[59] Louis A. Alexander, *Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law*, 70 CORNELL L. REV. 101, 128 (1984).
[60] Rossiter v. Evans, 08-1815, 2009 WL 5125922 (Iowa Ct. App. 2009).
[61] *Id.*

the plaintiff or otherwise protect her from the transmission of these sexually transmitted diseases.[62]

In drafting its opinion, the Iowa Appellate Court relied on its Supreme Courts opinion, which had been published earlier that year in *Thompson v. Kaczinski*, where the justices found that all that was required for an actionable claim of negligence was the existence of a duty to conform to a standard of conduct to protect others.[63] They also noted as with many negligence cases, that an actor ordinarily has a duty to exercise reasonable care when his conduct creates a risk of physical harm.[64] Relying on this opinion, the court was not persuaded by the defense offered by the defendant and the jury found that the defendant did not meet his duty of care; resulting in one of the largest verdicts of its kind.[65]

§ 4: Assumption of Risk

During consensual intercourse, absent any fraud on the part of any party, the parties involved often accept that they are equally responsible for whatever outcome may present itself. However, a frequently asserted defense in these cases is assumption of the risk.[66] In these

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[62] *Id.*

[63] Thompson v. Kaczinski, 774 N.W.2d 829, 834 (Iowa 2009).

[64] *Id.* at 834.

[65] The Iowa jury found for the plaintiff in the amount of $1.5 million. The verdict form shows that $500,000 of Rossiter's compensatory damages were for future mental pain and suffering, while the punitive damages were for Evans's willful and wanton disregard of her safety. This large verdict came due to the fact that the jury rejected a battery claim which required the plaintiff to prove Evans deliberately infected her. As mentioned above, had this case been heard in a different jurisdiction, the outcome may have been drastically different.

[66] In a typical negligence action, assumption of risk is a defense, which bars a plaintiff from recovery against a negligent tortfeasor if the defendant can demonstrate that the plaintiff voluntarily and knowingly assumed the risks at issue inherent to the dangerous activity in which he was participating at the time of his injury. Asserting this defense has obvious evidentiary problems because often times in these cases it's one party's word against the other.

actions, the plaintiff must have known the risk existed, and been able to appreciate its unreasonableness.[67] Therefore, in cases dealing with the transmission of a STD, when a plaintiff voluntarily contracts a STD from his or her sexual partner the plaintiff cannot recover for that harm.[68] For example, in *Doe v. Roe*, the court held that persons who engage in unprotected sex, at a time of prevalence of sexually transmitted diseases, assume the risk of contracting those diseases, and that those who engage in intimate relationships thus have a duty to protect themselves adequately.[69]

Similarly, when an individual infected with a sexually transmitted disease accurately informs his or her sexual partner of the affliction, and the partner understands the risk, and voluntarily consents to sexual activity, the partner has expressly assumed the risk of contracting the disease, and no liability should ensue for its transmission. Elements of the defense include the plaintiff's understanding of, and voluntary exposure to, a risk in circumstances that indicate a willingness to accept such risk.[70]

However, several courts have not accepted this defense even in cases where there is full disclosure and consent. These courts stress that public policy argues against the application of this doctrine, and these courts have distinguished between the consent to sexual activity and the consent to infection with venereal disease.[71] A Florida court denied the application of this doctrine in a case where a former wife was infected with a sexually transmitted disease by her former husband during a period of attempted reconciliation.[72] The Appellate Court held that while the issue was one of first impression in the state, consent to sexual intercourse did not

[67] RESTATEMENT, *supra* note 22, at § 496D.
[68] AM. JUR. 2D, *supra* note 26, at § 804.
[69] Doe v. Roe, 598 N.Y.S.2d 678 (N.Y. 1993).
[70] *See* Alexander, *supra* note 59, at 123.
[71] *Id.* at 124, 127.
[72] Hogan v. Tavzel, 660 So. 2d 350 (Fla. Dist. Ct. App. 1995).

establish consent to be infected with a sexually transmitted disease, and therefore could not be asserted as a defense to battery.[73]

§ 5: Contributory Negligence

It is well established that a defendant may be absolved from liability for a tort, if any negligence or recklessness involved was that of the plaintiff's, thus barring the plaintiff from recovering on the basis of his or her own contributory negligence.[74] This rule is equally applicable to a plaintiff in a case concerning the transmission of a STD. In these cases, if the plaintiff's negligence is a legally contributing cause of the plaintiff's harm, and there is no rule restricting the plaintiff's responsibility for it, the plaintiff's claim may be denied.[75]

Contributory negligence involves acting in such a way that a person of ordinary prudence would not do, or the failure to do something that a person of ordinary prudence would do, under the circumstances, to protect himself or herself from harm. Given the prevalence of sexually transmitted diseases in the general population, some may argue that a person who decides to enter into a sexual relationship should be expected to take reasonable precautions to avoid contracting the disease, at least to the point of questioning the partner in the relationship about the possibility of contracting the disease. No legal duty currently exists, however, which requires a person to question another about the state of his or her health.[76] Additionally, whether an individual takes adequate measures to avoid transmitting a disease is currently an issue for the trier of fact.[77]

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[73] *Id.*
[74] RESTATEMENT, *supra* note 22, at § 302A cmt. B.
[75] RESTATEMENT, *supra* note 22, at § 465 (1).
[76] R.A.P. v. B.J.P., 428 N.W.2d 103 (Minn. Ct. App. 1988).
[77] *Id.*

IV. Interspousal Immunity No Longer Applies To STDs

Interspousal immunity historically barred tort claims brought by one spouse against another.[78] Dating back centuries to common law, the doctrine of interspousal immunity was fashioned in accordance with the perception that a husband and wife were one legal entity, often times because it was perceived that a woman was the property of her husband. This archaic belief discouraged courts from entertaining these claims for tort against a husband or wife, finding it "morally and conceptually objectionable."[79] In addition, the courts rationale rested on the theory that allowing suits between spouses would "clog courts with trivial suits, disrupt family harmony and result in collusive claims."[80] For example, in *Bandfield v. Bandfield,* a wife sued her former husband for infecting her during marriage with an incurable sexually transmitted disease.[81] In this 1898 decision, the Michigan Supreme Court refused to permit the wife to maintain the suit, stating that such an action "would be another step to destroy the sacred relation of man and wife."[82]

However, numerous jurisdictions have revisited this issue since that time, the majority of which no longer bar sexual torts committed by ones spouse.[83] It wasn't until 1961 when the New Jersey Supreme Court ruled with the increasing minority of courts that began to abandon

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[78] *See* Alexander, *supra* note 59, at 133.

[79] Daniel M. Oyler, *Interspousal Tort Liability For Infliction Of A Sexually Transmitted Disease*, 29 J. FAM. L. 519. (1990/1991).

[80] S.A.V. v. K.G.V., 708 S.W.2d 651, 652 (Mo. 1986).

[81] Bandfield v. Bandfield, 75 N.W. 287 (Mich. 1898).

[82] *Id.* at 288.

[83] This section will deal primarily with case law from New Jersey. Although several states visited this issue prior to New Jersey, New Jersey is a pioneer in breaking the interspousal barrier that protected spouses from brining claims against one another. Since that, other states have followed suit and abandoned the defense of interspousal immunity.

complete interspousal immunity. The court, in its paramount decision, held that the surviving widow who was injured by the negligent driving of her deceased husband was entitled to bring an action against his estate.[84] In its decision, the court noted that "the negligent infliction of injury by a husband upon his wife is a wrongful act" and that "it does not lose this quality merely because the wife is prohibited by the common law doctrine from enforcing liability for her damage."[85]

Since that time, New Jersey has reached the issue of interspousal immunity on several more occasions.[86] In one instance, the court held that it was unconscionable that a person could escape liability for infecting a spouse with genital herpes or other sexually transmitted diseases by merely claiming that transmission occurred during the privileged sexual relations of marriage.[87] The court logically reasoned that the defendant-husband could not simultaneously breach his marital relationship by engaging in extramarital intercourse, and then claim marital immunity for the consequences of his intentional misconduct.[88] In these cases, the New Jersey courts traced the evolution of the interspousal immunity doctrine, where in its decisions it completely abandoned the doctrine of immunity with respect to interspousal torts with certain limited exceptions.

Within the past few decades, numerous jurisdictions have looked to New Jersey's holdings when confronting the controversial issue concerning the transmission of a sexually transmitted disease during a marriage. For example, relying on New Jersey's resolution, the New York court in its 1986 decision in *Maharam v. Maharam*, found that the plaintiff-former

[84] Long v. Landy, 171 A.2d 1 (N.J. 1961).
[85] *Id.* at 50.
[86] *See* Tevis v. Tevis, 400 A.2d 1189 (N.J. 1979); *see also* Immer v. Risko, 267 A.2d 481 (N.J. 1970); Merenoff v. Merenoff, 388 A.2d 951 (N.J. 1978).
[87] G.L. v. M.L., 550 A.2d 525 (N.J. Ch. 1988).
[88] *Id.*

wife, could seek compensatory and punitive damages from her former husband for alleged wrongful transmission of incurable genital herpes.[89] Prior to this decision, New York relied on the historical doctrine of interspousal immunity and would likely have dismissed the claim.

Simultaneously, the Supreme Court of Missouri was faced with a similar issue where a wife alleged that during the course of the parties marriage, her husband had negligently infected her with herpes.[90] Relying on New Jersey's decision, the Missouri court justices reasoned that it was not beyond the ability of the courts to, on a case-by-case basis, adjust the standard of care between married persons.[91] It is evident that by doing so, the courts can better address the claims before them before reaching any predetermined conclusions.

While in recent times interspousal immunity across the country remains far from consistent, the courts have overwhelmingly disfavored this historic doctrine. The majority of these states have based their decision on the notion that there is no reason that the types of lawsuits historically prohibited by this doctrine, would create unwarranted marital disharmony.[92]

Although interspousal immunity began as a way of encouraging spousal harmony and preventing people from having to condemn, or being condemned by their spouses, the courts have shown that despite its survival in varying forms, interspousal immunity is no longer the doctrinal monolith it once was years ago.

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[89] Maharam v. Maharam, 510 N.Y.S.2d 104 (N.Y. 1986).
[90] S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. 1986).
[91] *Id.* at 653.
[92] *See* Alexander, *supra* note 59, at 133.

V. Statute of Limitations

One of the most difficult questions presented in a case dealing with the transmission of a sexually transmitted disease has to do with the application of the statute of limitations as it relates to a plaintiff's claim for negligence.[93] Often times this defense is difficult to both prove and overcome, primarily because several venereal diseases have an incubation period and can lie dormant for an extended period of time. [94] Because of their latent effects, these diseases can remain undetected to plaintiffs for a number of years.[95] Jurisdictions have taken various approaches in interpreting these statutes; some interpreting the statute broadly and looking to the reason the statute was created, while others apply it strictly, leading to splits throughout the country.

Typically issues arise with the statute of limitations when a plaintiff simply does not bring the action in a timely manner, or miss a filing deadline.[96] In such instances, courts have typically not tolled[97] statutes of limitations in tortious transmission cases.[98] Following this strict adherence, numerous jurisdictions have found that in a claim for the negligent transmission of a sexually transmitted disease, the statute of limitations began to run at the time of injury. For example, the Texas Appellate Court found that the statute of limitations barred a wife's suit against her husband for personal injuries resulting from the husband's negligent transmission of

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[93] There are several other defenses that can be asserted by a defendant in STD transmission cases including assumption of risk and contributory negligence that will not be addressed in this paper.

[94] Nat'l Inst. of Allergy & Infectious Diseases, Nat'l Insts. of Health, Genital Herpes, at http://www.niaid.nih.gov/factsheets/stdherp.htm (last modified Mar. 2001).

[95] For example, Maria was unaware that she had contracted a disease from Anthony until after the typical two year statute of limitations.

[96] Often times, this is because there was an ongoing relationship at the time the disease was discovered and the injured party was initially reluctant to bring a claim.

[97] Tolling is a legal doctrine that allows for the pausing or delaying of the running of the period of time set forth by a statute of limitations.

[98] Statutes of limitation for tort actions vary from state to state.

genital herpes to the wife because the right to sue for negligence occurs on the date the legal injury occurs.[99]

Similarly, Wyoming found in *Duke v. Housen,* that the defendant escaped liability for negligently transmitting gonorrhea to a female friend, but only because the statute of limitations had run.[100] The court felt that the cause of action arose when the defendant first had sexual intercourse with the plaintiff. The court noted that the statute of limitations began to run at the moment the defendant introduced into the body of the plaintiff the disease of gonorrhea. The court held that there was no question that under the law that the defendant was guilty of a tortious act of negligence, and the plaintiff was injured by the transmission of the disease. However, the court felt it was the initial exchange between where the disease was placed in her body, that the statute of limitations began to run, finding no exception to the statute.[101]

In its reasoning, the court stated that statutes of limitation have long been a part of the jurisprudence of the United States,[102] finding that the statute of limitations is a pragmatic device to save courts from stale claims, and spare citizens from having to defend from these claims when memories have faded and evidence is lost.[103] Wyoming relied on its case law and held that statutes of limitation are arbitrary by their very nature and they are not judicially made but represent legislative and public policy controlling the right to litigate.[104] The court reasoned that the statutes operate against even the most meritorious of claims and courts have no right to deny their application.[105]

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[99] Flores v. Lively, 818 S.W.2d 460 (Tex. Ct. App. 1991).
[100] Duke v. Housen, 589 P.2d 334, 340 (Wyo. 1979), *cert. denied*, 590 P.2d 1340 (1979).
[101] *Id.* at 346.
[102] *Id.* at 340.
[103] *Id.*
[104] Chase Securities Corporation v. Donaldson, 325 U.S. 304, (1945).
[105] *Id.*

Likewise, the Minnesota Court of Appeals found that the two-year statute of limitations on the husband's claims were not tolled during the time when he and his wife were married.[106] In this case, a husband brought an action against a former wife, where he alleged that she had negligently, intentionally, and fraudulently infected him with genital herpes. The court held that the judgment entered in the dissolution action did not bar the husband from maintaining claims against his former wife under doctrine of issue preclusion, and by failing to do so, waived his right.

On the other hand, various jurisdictions have found that a liberal application of the statute of limitations was better suited. These courts have acknowledged that a primary purpose behind statutes of limitation is to compel the exercise of a right of action within a reasonable time, thus allowing the opposing party a fair opportunity to defend.[107] This entices litigants to pursue their causes of action diligently to prevent the litigation of stale claims and aids in weeding out stagnant and possibly frivolous or vexatious claims.

In order to equitably deal with the cases before them, these liberal courts looked to the Legislatures intention when drafting the statute. They found that the Legislature has not defined in the statute of limitations when a cause of action "shall have accrued," and the matter has therefore been left entirely to judicial interpretation and administration.[108] Therefore, these jurisdictions have found that the question at hand has changed. These jurisdictions now inquire whether, under the circumstances of the particular case, the considerations are such that a plaintiff should be regarded as having been “prevented” from filing his charges in timely fashion, and the statute of limitations tolled during that period.

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[106] R.A.P. v. B.J.P., 428 N.W.2d 103 (Minn. Ct. App. 1988).
[107] Union City Housing Auth. v. Commonwealth Trust Co., 136 A.2d 401 (N.J. 1957).
[108] Fernandi v. Strully, 173 A.2d 277 (N.J. 1961).

The Supreme Court of the United States once held that "(s)tatutes of limitations are primarily designed to assure fairness to defendants," and that the right to recovery would be "outweighed" where "a plaintiff has not slept on his rights but, rather, has been prevented from asserting them."[109] The Supreme Court further noted, "(t)he filing (of a lawsuit) itself shows the proper diligence on the part of the plaintiff which statutes of limitation were intended to insure."[110] In adherence with the Supreme Courts decision, these liberal courts began to apply the "discovery rule," a limited exception to the statute of limitations.

The discovery rule was first announced in *Fernandi v. Strully*, a medical malpractice case.[111] It provides that the statute of limitations begins to run when the injury is discovered, or in the exercise of reasonable care and diligence, the injury should have been discovered. The rule responds to the unfairness of requiring a plaintiff sue to vindicate a non-existent wrong, at a time when injury is unknown and unknowable.[112]

For example, in *Fernandi,* during the course of an operation, a medical wing nut had been negligently left in the plaintiff's abdomen. It was not discovered until more than two years thereafter, in excess of the strict reading of the statute of limitations. In its decision, the court held that the two-year statute of limitations did not begin to run until the plaintiff knew or had reason to know of the existence of the foreign object.[113]

While Fernandi, expressly confined the discovery rule to foreign body malpractice actions, subsequent decisions have gone much further and have acknowledged the relevance of the doctrine whenever equity and justice have seemed to call for its application, including those

[109] Burnett v. New York Cent. R. Co., 380 U.S. 424 (U.S. 1965).
[110] Goldlawr, Inc. v. Heiman, 369 U.S. 463, 467 (U.S. 1962).
[111] Union City Housing Auth. v. Commonwealth Trust Co., 136 A.2d 401 (N.J. 1957).
[112] *Id.*
[113] *Id.*

concerning the transmission of a sexually transmitted disease. In such cases, New Jersey courts have found it difficult to apply strictly a statutory period of limitations without considering conscientiously the circumstances of the individual case and assessing the Legislature's objective in prescribing the time limitation as related to the particular claim.[114]

When faced with applying the discovery rule to the transmission of a venereal disease, New York similarly found that the diagnosis of a wife's sexually transmitted disease, as a matter of law, constituted sufficient knowledge to trigger the discovery rule and begin the statute of limitations period for an actual claim against her husband.[115] In this case, the statute of limitations tolled until the date she was diagnosed, the first instance she knew, or had reason to know of the disease.

Although various courts have been liberal in their application of the statute of limitations, many draw a fine line in order to ensure they do not to overstep the Legislatures purpose of the statute. For example, the Tennessee Appellate Court in *Potts v. Celotex,* found that the discovery rule only applies in cases where the plaintiff does not, and cannot reasonably be expected to discover the harm giving rise to the cause of action.[116] The court explained that the rule only tolls the statute of limitations as long as the plaintiff had no knowledge of the injury to the extent that a reasonable person would not have known.[117] This requirement that a plaintiff exercise "reasonable care and diligence" is flexible, yet consistent with the Legislatures purpose for employing the statutes of limitations.

A final defense a plaintiff may raise in response to the statute of limitations is that the defendant's fraudulent behavior caused the statute of limitations to run. An example of this

[114] White v. Violent Crimes Comp. Bd., 388 A. 2d 206, 211 (N.J. 1978).
[115] Dubovsky v. Dubovsky, 725 N.Y.S.2d 832 (N.Y. 2001).
[116] Potts v. Celotex, 796 S.W.2d 678, 680 (Tenn.1990).
[117] *Id.* at 681.

occurred when a husband's failure to admit that he had infected his wife with genital herpes was in fact a false representation. The court found that the husband and wife had a confidential relationship, and the wife was entitled to rely on the husband's denial.[118] The court found that based on this relationship, the two-year statute of limitations for personal injury actions could be tolled.

These exceptions to the strict adherence of the statute of limitations are essentially rules of equity, and like so many other equitable exceptions, have been developed as a means of mitigating the often harsh and unjust results that flow from a rigid and automatic adherence to a strict rule of law. On its face, it appears inequitable that an injured person who is unaware that he has a cause of action, should be denied his day in court solely because of fraud or his ignorance, if he himself had done no wrong. However, often times, this incorrectly seems to be the result when courts strictly apply decade old rules created by the Legislature. In these cases, it may be best for public policy to encourage courts to turn to the purpose of the statute in order to determine the statute of limitations.

CONCLUSION

It seems the most successful defense across the nation is the "I did not know I had it" defense. Not only is this current negligence paradigm failing to deter irresponsible sexual behavior, but it actually discourages sexually active individuals from getting tested, because by avoiding testing, they also avoid any proof of knowledge of their disease.[119] This "caveat emptor" standard in sex tort actions that has emerged fails to discourage irresponsible sexual

[118] Beller v. Tilbrook, 571 S.E.2d 735 (Ga. 2002).
[119] *See* Pollard, *supra* note 3.

practices and has largely contributed to the major epidemic of STDs that has developed in the United States over the last thirty years.[120]

Many courts are allowing a defendant's ignorance to shield him or her from liability, in direct contradiction to the public policy designed to protect the majority as a whole. Rather than giving defendants a defense based on their own ignorance, the courts should hold these disease perpetrators accountable for their harm. By increasing the threshold that defendants must meet, and by adopting a firmer standard, courts could encourage potential disease perpetrators to be tested and behave responsibly to avoid disease transmission.[121] To reach this ultimate goal, America could use its judicial system to develop a legal standard consistent with that of its social norms.

[120] *Id.* at 770-71.

[121] Many of my opinions regarding this wave of sex tort litigations mirror that of Deana A. Pollard. *See* Pollard *supra* note 3.