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Casenotes: Torts — Causes of Action Exist for Negligence, Intentional Infliction of Emotional Distress, and Fraud for Transmission of a Sexually Communicable Disease between Unmarried Partners. *B.N. v. K.K.*, 312 Md. 135, 538 A.2d 1175 (1988)

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TORTS—CAUSES OF ACTION EXIST FOR NEGLIGENCE, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND FRAUD FOR TRANSMISSION OF A SEXUALLY COMMUNICABLE DISEASE BETWEEN UNMARRIED PARTNERS. *B.N. v. K.K.*, 312 Md. 135, 538 A.2d 1175 (1988).

Sexually transmitted diseases (STDs) have existed for thousands of years. Biblical accounts describe venereal diseases akin to the herpes simplex virus, and a herpes epidemic during the Roman Empire is well documented.¹ Within the last thirty years, however, changing attitudes and sexual behavior have resulted in a considerable increase in the number of reported cases of STDs.²

Two of the most widespread STDs in the nation today are the herpes simplex virus (HSV)³ and acquired immune deficiency syndrome

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1. Willcox, *Venereal Disease in the Bible*, 25 BRIT. J. VENEREAL DISEASE 28 (March 1949); see also Leo, *The New Scarlet Letter*, TIME, Aug. 2, 1982 at 62.
 2. Especially between 1966 and 1984, the number of reported cases of genital herpes rose dramatically. Data collected by random sample of private physicians in the United States indicates that, during that period, consultations for genital herpes increased almost fifteen-fold from 29,560 to 450,570. *Genital Herpes Infection — United States, 1966-1984*, 35 MORBIDITY & MORTALITY WEEKLY REP. 402 (June 20, 1986) [hereinafter *MMWR Genital Herpes Infection in the U.S.*]. From 1980 to 1984 alone, physician-patient consultations rose two-fold from less than 225,000 in 1980 to 450,570 in 1984, and it is estimated that there are approximately 500,000 new cases of genital herpes each year. *Id.* See also Wheeler, *The Herpes Simplex Problem*, 18 J. AM. ACAD. DERMATOL. 163-64 (1988).

Likewise, the incidence of individuals infected with the acquired immune deficiency syndrome (AIDS) virus has reached epidemic proportions in the United States. According to figures released by the Centers for Disease Control, the number of persons testing positive for the human immunodeficiency virus (HIV) in the United States as of November 30, 1989 totaled 115,158. Of this number, 68,441 have died. Center for Disease Control, *HIV/AIDS Surveillance Monthly Report* (Dec. 1989). Notwithstanding the number of reported cases of HIV infection, it is estimated that between 945,000 and 1,400,000 people are infected with HIV nationwide. *Human Immunodeficiency Virus Infection in the United States: A Review of Current Knowledge*, 36 MORBIDITY & MORTALITY WEEKLY REP. 342, 356 (Dec. 18, 1987) [hereinafter *MMWR HIV Infection in the U.S.*]. In addition, it is estimated that for every person who has developed symptoms of AIDS, there are 50 to 100 people who are asymptomatic but HIV positive. See *Legal, Medical and Governmental Perspectives on AIDS as a Disability*, 1987 A.B.A. Commission on the Mentally Disabled Rep.

In Maryland, 2011 individuals have been reported as infected with AIDS as of September 30, 1989. Of that number, 1202 individuals have died. The epidemic proportion of this disease can best be recognized by considering that as of December 31, 1988, 1491 persons tested positive for the HIV. Compare *Maryland AIDS Update* (Sept. 30, 1989) with *Maryland AIDS Update* (Dec. 31, 1988).

3. Herpes simplex is a highly contagious and incurable disease that most frequently affects the mucous membrane areas of the human body. There are two subtypes of the herpes simplex virus: HSV-1 and HSV-2. Although both types can cause facial and genital infection, “[g]enital HSV-2 infection is twice as likely to be reactivated and recurs 8 to 10 times more frequently than genital HSV-1 infection.” Corey & Spear, *Infection with Herpes Simplex Viruses*, 314 NEW ENG. J. MED. 749 (Mar. 20, 1986). Other strains of the herpes virus not classified as “simplex” include herpes encephalitis (inflammation of the brain), herpes keratitis (inflammation of the cornea), and herpes zoster (shingles). 2 J. SCHMIDT, ATTORNEYS’ DICTIONARY OF MEDICINE (MB), at H-81 to H-82 (1988 & Supp. 1989).

(AIDS).⁴ Both the public and private sectors have launched intensive efforts at the state and national levels to educate the public to the dangers of these diseases and the methods of curbing their spread.⁵ The question remains, however, what effect increased awareness, without additional measures, will have on the spread of these devastating diseases.⁶

What is clear from the number of reported cases of STDs and the efforts to educate the public is that individuals must reevaluate their sexual practices. Today, courts more frequently are defining the limits of acceptable sexual behavior. Judicial imposition of fault and the corresponding formulation of a legal remedy can further social policies, thus providing individuals with a means of redress, and, at the same time, deterring negligent or reckless conduct. The Court of Appeals of Maryland's holding in *B.N. v. K.K.*⁷ provides a remedy to persons who contract sexually transmitted diseases due to the irresponsible sexual behavior of others.

Imposition of tort liability for transmission of contagious diseases, while relatively new to Maryland, has existed for over a century in other jurisdictions.⁸ Infected plaintiffs have recovered under various theories including negligence,⁹ intentional infliction of emotional distress,¹⁰

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4. Although the exact etiology of AIDS is unknown, scientists recognize that AIDS is caused by a retrovirus known as HIV, which attacks a person's immune system and weakens or destroys his ability to ward off disease. It is for this reason that those afflicted with AIDS contract rare diseases such as *Pneumocystis carinii* pneumonia, which is the most common cause of death in AIDS patients. See generally Friedland, *The Acquired Immunodeficiency Syndrome: General Overview*, 32 INT'L J. NEUROSCIENCE 677 (1987)[hereinafter Friedland, *AIDS: General Overview*]. The three most common means of contracting the HIV are homosexual activity, the sharing of contaminated hypodermic needles by intravenous drug users, and blood transfusion. See generally *MMWR HIV Infection in the U.S.*, supra note 2, at 342-44; see also *infra* note 89.
 5. In 1988 the U.S. Department of Health & Human Services (HHS) sent a brochure to every household in the United States in an effort to educate the public about the nature and effect of AIDS and the means for its prevention and control. See *Understanding AIDS*, HHS Pub. No. 88-8404 (1988) [hereinafter *Understanding AIDS*].
 6. Results of a 1982 random telephone survey of 2363 people conducted for ABC News and *The Washington Post* indicate that not only are people more aware of the recent increase in STDs, but also that they are changing their sexual behavior as a result. Aral, Cates & Jenkins, *Genital Herpes: Does Knowledge Lead to Action?*, 75 AM. J. PUB. HEALTH 69 (1985).
 7. 312 Md. 135, 538 A.2d 1175 (1988).
 8. Infection with non-sexually transmitted disease often was the basis of liability. See, e.g., *Earle v. Kuklo*, 26 N.J. Super. 471, 98 A.2d 107 (1953) (tuberculosis); *Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663 (1919) (scarlet fever); *Hendricks v. Butcher*, 144 Mo. App. 671, 129 S.W. 431 (1910) (smallpox); *Kliegel v. Aitken*, 94 Wis. 432, 69 N.W. 67 (1896) (typhoid fever).
 9. Several courts have imposed liability on a negligence theory. See, e.g., *Duke v. Housen*, 589 P.2d 334, 340 (Wyo.) ("One who negligently exposes another to an infectious or contagious disease, which such other person thereby contracts, can be held liable in damages for his actions.") (citations omitted), cert. denied, 444 U.S. 863 (1979). Negligence served as an alternate basis of liability in *Crowell v. Crowell*, 180 N.C. 516, 519, 105 S.E. 206, 208 (1920) ("[A]side from the question of assault, it is a well-settled proposition of law that a person is liable if he negligently

fraud,¹¹ and assault or battery.¹²

A cause of action in negligence is based upon the existence of a duty, breach of that duty, causation—both factual and legal—and damage.¹³ In the context of a sexually transmitted disease case, the existence of a duty is defined by the ability of the person knowingly infected with the disease to foresee that his partner may become infected as a result of his act or omission.¹⁴ The relationship between partners to an intimate sexual encounter, and the interest of the state in protecting its citizens from the spread of STDs, also gives rise to a duty on the part of one knowingly infected with an STD to abstain from sexual relations, or to advise an intimate partner of the risk of contracting the disease.¹⁵

exposes another to a contagious or infectious disease.”) (citing *Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663 (1919)).

10. During the last two decades, an increasing number of jurisdictions have adopted the tort of intentional infliction of emotional distress. *ATLA L. REP.* 203-07 (June 1988). The Court of Appeals of Maryland recognized this cause of action in *Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (1977). See also *infra* notes 26-29 and accompanying text. More recently, this tort has served as a basis for liability in suits involving sexually transmitted disease. See *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).
11. *De Vall v. Strunk*, 96 S.W.2d 245 (Tex. Civ. App. 1936) (defendant infected plaintiff with crab lice after obtaining plaintiff's consent to have sexual intercourse upon a fraudulent promise of marriage).
12. *Cromwell*, 180 N.C. at 520, 105 S.E. at 209. Assault or battery has also served as a basis for criminal liability. See, e.g., *State v. Lankford*, 29 Del. (6 Boyce) 594, 102 A. 63 (1917) (husband guilty of assault and battery for transmitting syphilis to his wife).
13. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* 164-65 (5th ed. 1984) [hereinafter *PROSSER & KEETON*].
14. See *Kathleen K.*, 150 Cal. App. 3d at 995-96, 198 Cal. Rptr. at 275; see also Comment, *AIDS — Liability for Negligent Sexual Transmission*, 18 *CUMB. L. REV.* 691, 707 (1988) [hereinafter Comment, *AIDS Transmission*]; Comment, *You Wouldn't Give Me Anything, Would You? Tort Liability for Genital Herpes*, 20 *CAL. W.L. REV.* 60, 65 (1983) [hereinafter Comment, *Tort Liability for Herpes*]. Because of the highly contagious nature of STDs such as herpes and AIDS, the foreseeability of injury may extend to innocent third parties such as spouses and unborn fetuses. See *Mussirand v. David*, 45 Ohio St. 3d 314, 544 N.E.2d 265, 272 (1989) (“If one negligently exposes a married person to a sexually transmittable disease without informing that person of his exposure, it is reasonable to anticipate that the disease may be transmitted to the married person's spouse.”). For a general discussion of third party actions, see Comment, *The Consequences of an Uninformed Ménage A Trois Extraordinaire: Liability to Third Parties for the Nondisclosure of Genital Herpes Between Sexual Partners*, 29 *ST. LOUIS U.L.J.* 787, 808-10 [hereinafter Comment, *Herpes: Liability to Third Parties*].
15. *R.A.P. v. B.J.P.*, 428 N.W.2d 103, 106-08 (Minn. Ct. App. 1988). A duty to disclose one's infected condition may exist even when the disease is in a latent or asymptomatic state. Although some studies suggest that genital herpes can be transmitted only during active outbreaks of the disease (*i.e.*, open, oozing sores), other studies suggest that genital herpes can be transmitted at times when the disease is neither visible nor producing symptoms. Compare W. WICKETT, *HERPES: CAUSE AND CONTROL* 17 (1982) with Wheeler, *The Herpes Simplex Problem*, *J. AM. ACAD. DERMATOL.* 163, 165 (Jan. 1988); see also Mertz & Corey, *Genital Herpes Simplex Virus Infections in Adults*, in *UROLOGIC CLINICS OF NORTH AMERICA: SYMPOSIUM ON SEXUALLY TRANSMITTED DISEASE* 111 (R. Berger,

To constitute a breach of duty in a negligence action for transmission of an STD, the plaintiff must prove that the defendant knew or should have known he was infected with an STD and that he either failed to abstain from conduct likely to transmit the disease, or, at the very least, failed to inform the plaintiff of the risk of contracting the disease.¹⁶

The third, and arguably most difficult, element a plaintiff to a negligence action must prove is that the defendant's act or failure to act was the proximate cause of the injury sustained.¹⁷ Two separate, but related causes must be proved: factual cause and legal cause.¹⁸

In the context of STDs, the plaintiff's infection will likely be linked to some type of sexual contact.¹⁹ Therefore, a plaintiff in a monogamous relationship can easily prove that "but for" the defendant's negligence in failing to recognize and disclose the nature of his infection, the plaintiff would never have contracted the disease.²⁰

Legal causation is often defined by the defendant's ability to foresee adverse effects of his act or omission.²¹ The levels of foreseeability will differ depending on the status of the defendant. If, for example, the defendant experiences recurrent outbreaks of herpes, the extent of foreseeability is broad. If, however, the defendant is unaware of his condition, or, unaware that his paramour is involved in other promiscuous relation-

M.D., ed. 1984). Consequently, notwithstanding whether a person believes or has been advised that he is incapable of transmitting the disease, he may have a duty to disclose his condition at all times. Comment, *Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law*, 70 CORNELL L. REV. 101, 121 (1984) [hereinafter Comment, *Genital Herpes and the Law*]; see also *infra* note 31.

16. PROSSER & KEETON, *supra* note 13, at 164.

17. *Id.* at 165.

18. *Id.* at 263-80; see also *Cutlip v. Lucky Stores, Inc.*, 22 Md. App. 673, 689-90, 325 A.2d 432, 441-42 (1974).

19. The transmission of AIDS, unlike that of other STDs, often occurs without any physical contact whatsoever. Nonetheless, the plaintiff may sufficiently satisfy the factual cause element. See *infra* note 20 and accompanying text.

20. Problems may arise, however, when the plaintiff has had sexual relations with two or more partners. In such a case, the plaintiff will bear the additional burden of proving that the sexual conduct of the defendant was the cause of transmission of the disease. Consequently, a plaintiff must inquire into the medical conditions of all partners during the approximate time of the initial outbreak.

Given the epidemic proportion of individuals infected with STDs, see *supra* note 2, it is possible that a plaintiff's inquiry will result in a finding that more than one partner was infected with the same disease. In such an event, traditional tort law concepts will not deem the plaintiff incapable of recovery merely because the true tortfeasor cannot be identified with particularity. *Maharam v. Maharam*, 123 A.D.2d 165, 171, 510 N.Y.S.2d 104, 108 (1986). Instead, the burden will shift to the defendants to prove that their actions were not the cause-in-fact of the plaintiff's injury. See *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948).

Medical advances in DNA fingerprinting may provide a plaintiff with the ability to identify with particularity the partner who transmitted the infection at issue, whether it be herpes or AIDS. See Comment, *Herpes: Liability to Third Parties*, *supra* note 14, at 809-10.

21. W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* 244 (4th ed. 1971) [hereinafter PROSSER ON TORTS].

ships and the infection originating from the defendant is transmitted to others, the foreseeability is very low and may negate liability.²²

The final element of a prima facie negligence action is proof that the plaintiff sustained actual injury or damage.²³ A showing that the plaintiff is infected with an STD is sufficient to satisfy the injury element of the tort.²⁴

Upon proof of both the defendant's intentional or reckless nondisclosure of the presence of an STD and the plaintiff's subsequent infection, the plaintiff may recover under one or more causes of action for intentional tort. All intentional torts require that the plaintiff prove the defendant had actual knowledge that his act or omission would result in harm.²⁵

Within the last fifteen years, Maryland has expressly recognized the tort of intentional infliction of emotional distress.²⁶ The plaintiff must prove four elements: (1) the defendant's conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous;²⁷ (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe.²⁸ Recovery for intentional infliction of emotional distress normally is limited to injuries which involve no physical contact between the parties. Courts recognize, however, the validity of such an action in the context of STDs.²⁹

22. The participation of the defendant's paramour in promiscuous relations with third parties is a supervening act that may relieve the defendant of liability. See Restatement (Second) of Torts § 441 (1965). For a comprehensive discussion of third party issues arising from the transmission of venereal diseases, see Comment, *Herpes: Liability to Third Parties*, *supra* note 14, at 801.

23. PROSSER & KEETON, *supra* note 13, at 165.

24. Long v. Adams, 175 Ga. App. 538, 540, 333 S.E.2d 852, 855 (1985).

25. PROSSER & KEETON, *supra* note 13, at 36. For this reason, a plaintiff may desire to bring an alternative claim for negligence to avoid the possibility of not meeting the burden of proving the defendant's intent to harm or his actual or imputed knowledge of the contagious nature of the infection. Under a negligence theory, the plaintiff need only prove that a reasonable person, similarly situated, would have recognized both the existence and possibility of transmitting the disease. See *Brown v. Ellis*, 236 Md. 487, 497, 204 A.2d 526, 530-31 (1964); see also *infra* note 31.

26. *Harris v. Jones*, 281 Md. 560, 566, 380 A.2d 611, 614 (1977).

27. The court will make an initial determination whether the alleged acts constitute extreme and outrageous conduct. Upon an affirmative finding, the court will submit the case to the jury to determine whether to impose liability. *Id.* at 569, 380 A. 2d at 615.

28. *Id.* at 566, 380 A.2d at 614 (citing *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974)).

29. Long v. Adams, 175 Ga. App. 538, 333 S.E.2d 852 (1985); *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 996-97, 198 Cal. Rptr. 273, 276 (1984). At least one commentator has recognized an inconsistency in permitting claims for intentional infliction of emotional distress for genital herpes transmission. His rationale for denying such an action is based on the clear presence of physical contact in STD cases. See Note, *Kathleen K. v. Robert B.: A Cause of Action for Genital Herpes Transmission*, 34 CASE W. RES. L. REV. 498, 518 (1984) [hereinafter Note, *Genital Herpes Transmission*]. Instead, the author suggests, as does comment b to § 46 of the Restatement (Second) of Torts, that "emotional distress is more properly an item

To state a claim for fraud in Maryland, the plaintiff must allege the following five elements: (1) that a representation made by the defendant was false; (2) that either the falsity of such representation was known to the defendant or the misrepresentation was made with such reckless indifference to the truth as to impute such knowledge to him; (3) that the misrepresentation was made for the purpose of defrauding the plaintiff; (4) that the plaintiff not only relied upon the misrepresentation, but also had the right to rely upon it with full belief of its truth, and that he would not have done the thing from which damage resulted if the misrepresentation had not been made; and (5) that the plaintiff suffered damage directly resulting from the misrepresentation.³⁰

Three forms of fraudulent misrepresentation exist in the context of liability for transmission of an STD.³¹ First, the transmitter may offer an intentional, affirmative representation that he is free from disease, knowing that he is infected.³² Second, the transmitter may offer a negligent, affirmative misrepresentation, such as when a person, who has experienced symptoms that should put him on notice that he is diseased, in-

of damages flowing from the injury itself." Note, *Genital Herpes Transmission*, *supra* at 518-19 (citing RESTATEMENT (SECOND) OF TORTS § 46 comment b (1965)).

30. See *Suburban Properties Mgmt, Inc. v. Johnson*, 236 Md. 455, 460, 204 A.2d 326, 329 (1964). Although courts traditionally have limited the tort of misrepresentation to commercial settings, RESTATEMENT (SECOND) OF TORTS § 525 comment h (1977), there are a limited number of cases imposing liability for fraud resulting in physical injury to an innocent victim in a noncommercial setting. See, e.g., *Maharam v. Maharam*, 123 A.D.2d 165, 510 N.Y.S.2d 104 (1986) (recognizing wife's claim for fraud against husband who had infected her with herpes); *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 994, 198 Cal. Rptr. 273, 274 (1984) (similar); see also 31 ATLA L. REP. 203, 206 (June 1988); Comment, *Genital Herpes and the Law*, *supra* note 15, at 130-32.
31. An essential element of fraudulent misrepresentation is scienter on the part of the defendant. This requires the plaintiff to prove that the defendant's subjective intent was to mislead the plaintiff through a representation the defendant knew to be false. Proof of actual intent to deceive is paramount. PROSSER & KEETON, *supra* note 13, at 741. Regarding scienter, it is unclear whether an intention to mislead for the establishment of scienter includes a partner's representation based upon an uncertain belief that he is free from disease. Some courts have found the scienter element satisfied when a defendant asserts a fact which he has no knowledge to believe is true. *Harris v. Delco Products Co.*, 305 Mass. 362, 25 N.E.2d 740 (1940); see generally Keeton, *Fraud: The Necessity for an Intent to Deceive*, 5 UCLA L. REV. 583, 592-93 (1958).

When the plaintiff is lacking sufficient facts to establish the defendant's intent to deceive, an alternative theory of recovery may be found in a cause of action for negligent misrepresentation. Hence, a defendant, who honestly but erroneously believes himself to be free from disease, and who infects an innocent victim who relied on his representation, will be deemed negligent if he failed to exercise reasonable care in ascertaining the facts relied on in making his representation. See *Alice D. v. William M.*, 113 Misc. 2d 940, 450 N.Y.S.2d 350 (1982). For a comprehensive discussion of deceit and negligent misrepresentation, see Note, *Genital Herpes Transmission*, *supra* note 29, at 519-29.

32. *Kathleen K.*, 150 Cal. App. 3d at 994, 198 Cal. Rptr. at 274, involved such an affirmative misrepresentation of fact.

forms a partner that he is free of disease.³³ Finally, the transmitter may offer no information whatsoever to a partner regarding his infection, when, in fact, he knew of his infected condition.³⁴

The leading case in the area of tort liability for the sexual transmission of disease is *Kathleen K. v. Robert B.*³⁵ In that case, the plaintiff stated viable causes of action sounding in negligence, battery, intentional infliction of emotional distress and fraud against a defendant who infected her with genital herpes.³⁶ In reaching its decision, the California Court of Appeals relied on the reasoning of a prior California Court of Appeals ruling, *Barbara A. v. John G.*,³⁷ in which the court held that a plaintiff who seeks damages for severe injury to his own body may state a valid cause of action against the person who caused the injury.³⁸

The *Kathleen K.* court dismissed the precedential value of *Stephen K. v. Roni L.*,³⁹ in which the court refused to "encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy [by] supervis[ing] the promises made between two consenting adults as to the circumstances of their private sexual conduct."⁴⁰

In distinguishing the court of appeals' holding in *Stephen K.*, the *Kathleen K.* court noted that the policy concerns at issue in a "wrongful birth" action (such as *Stephen K.*) involve the birth of a healthy child, where no physical injury is sustained by either parent.⁴¹ Thus, the court expanded its prior holding in *Barbara A.* by recognizing all four of *Kathleen K.*'s causes of action. Since the decision in *Kathleen K.*, a flurry of suits have been instituted upon similar legal theories for the transmission of STDs, and appellate courts entertaining such claims have consistently ruled in the plaintiffs' favor.⁴²

33. Note, *Genital Herpes Transmission*, *supra* note 29 at 522-23. If the transmitter has made an affirmative misrepresentation that he is free from disease, the plaintiff may plead in the alternative that the defendant acted either intentionally or negligently, allowing the trier of fact to determine the truth of such allegations. *Id.* See also *supra* notes 25 & 31.

34. See, e.g., *Maharam*, 123 A.D.2d at 170, 510 N.Y.S.2d at 107. In this case, the wife made out a claim for actionable fraud against her husband, who had infected her with herpes after concealing that he had the disease. The court concluded that the marital relationship imposed a duty upon the husband to alert his wife that he was infected with the disease. *Id.* See also Note, *Genital Herpes Transmission*, *supra* note 29, at 523-29.

35. 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

36. *Id.* at 994, 198 Cal. Rptr. at 274. The California court provided few facts in its opinion, noting only that the plaintiff contracted genital herpes by way of sexual intercourse with the defendant. *Id.* at 993-94, 198 Cal. Rptr. at 274.

37. 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

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

39. 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980).

40. *Id.* at 644-45, 164 Cal. Rptr. at 620.

41. 150 Cal. App. 3d at 995, 164 Cal. Rptr. at 275.

42. See *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. Ct. App. 1988); *Maharam v. Maharam*, 123 A.D.2d 165, 519 N.Y.S.2d 104 (N.Y. App. Div. 1986); *S.A.V. v. K.G.V.*, 708 S.W.2d 651 (Mo. 1986) (en banc); *Long v. Adams*, 175 Ga. App. 538, 333 S.E.2d 852 (1985).

In *B.N. v. K.K.*,⁴³ the plaintiff, Ms. N., was employed as a nurse at Johns Hopkins University Hospital. For four months, Ms. N. was involved in an intimate relationship with the defendant, Dr. K., a physician at the hospital. During their relationship, the couple engaged in sexual intercourse at a time when Dr. K. knew he was experiencing an active outbreak of genital herpes. Ms. N. neither was aware of Dr. K.'s condition, nor did she have any reason to suspect that he was infected with the herpes virus.⁴⁴ As a result of their sexual contact, Ms. N. contracted genital herpes.⁴⁵

On a question certified by the United States District Court for the District of Maryland,⁴⁶ the Court of Appeals of Maryland held that, upon a proper factual showing, Maryland recognizes causes of action for negligence, for fraud, and for intentional infliction of emotional distress arising from the sexual transmission of a dangerous, contagious, and incurable disease such as genital herpes.⁴⁷

The court of appeals, in recognizing Ms. N.'s actions for negligence, fraud, and intentional infliction of emotional distress, noted that traditional tort and criminal law concepts frequently have been applied to impose liability for transmission of contagious diseases.⁴⁸

The court addressed each of the three causes of action individually. Its discussion of negligence focused on the transmitter's duty and on foreseeability.⁴⁹ The court concluded that everyone bears the responsibility to exercise due care to avoid unreasonable risk of harm to others.⁵⁰

43. 312 Md. 135, 538 A.2d 1175 (1988).

44. *Id.* at 138, 538 A.2d at 1177.

45. *Id.* at 138-39, 538 A.2d at 1177.

46. The issues presented by the plaintiff's complaint were certified pursuant to the Maryland Uniform Certification of Questions of Law Act, MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601 to -609 (1984). The certified question was: "Does Maryland Recognize A Cause of Action for Either Fraud, Intentional Infliction of Emotional Distress, Or Negligence Resulting From the Sexual Transmission Of A Dangerous, Contagious, and Incurable Disease, Such As Genital Herpes?" 312 Md. at 137-38, 538 A.2d at 1176. All facts asserted in the plaintiff's complaint were assumed sufficient for the purpose of ruling on the certified question. *Id.* at 138, 538 A.2d at 1177.

47. *Id.*, 538 A.2d at 1176. The plaintiff's complaint contained four counts: fraud, intentional infliction of emotional distress, negligence, and assault and battery. *Id.* at 139, 538 A.2d at 1177. Because of a limitations problem, the plaintiff's assault and battery count was not before the court of appeals. *Id.* at 139 n.1, 538 A.2d at 1177 n.1. Moreover, the court entertained the causes of action in a different order than they were presented for consideration. The reason for this, apparently, was the court's need to establish the duty element for the plaintiff's fraud count. Survey, *Developments in Maryland Law, 1987-88: Torts*, 48 MD. L. REV. 844, 848 n.50 (1989); see also *supra* note 46.

48. 312 Md. at 139, 538 A.2d at 1177. See, e.g., *Smith v. Baker*, 20 F. 709 (S.D.N.Y. 1884) (whooping cough); *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).

49. 312 Md. at 141-42, 538 A.2d at 1178.

50. *Id.* at 141, 538 A.2d at 1178; see also *Moran v. Faberge*, 273 Md. 538, 543, 332 A.2d 11, 15 (1975).

In defining the duty owed to the plaintiff, the court relied on the *Restatement (Second) of Torts* § 435(2), which defines the realm of legal causation.⁵¹ Thus, liability would attach only "if it appears highly likely that the conduct in question should have brought about the harm."⁵² Liability would not attach, however, if "it appears 'highly extraordinary' that the negligent conduct should have brought about the harm."⁵³

The application of negligence concepts to a sexual transmission situation implies that a person infected with a disease such as genital herpes has a duty to disclose his illness to all who are likely to be injured. As the court of appeals stated, "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."⁵⁴ In the context of sexually transmitted diseases, liability rests in the transmitter's duty to exercise due care so as not to injure another.⁵⁵ Accordingly, for a court to find a defendant liable for transmission of a sexually communicable disease, the defendant, at very least, must recognize that he is diseased in some manner.⁵⁶ In the absence of such knowledge, or, in the absence of a reason on the part of the transmitter to know of his infection, liability would not attach.⁵⁷

51. That section of the Restatement provides: "The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm." RESTATEMENT (SECOND) OF TORTS § 435(2) (1965).

52. 312 Md. at 142, 538 A.2d at 1178.

53. *Id.* at 141-42, 538 A.2d at 1178 (quoting *Henley v. Prince George's County*, 305 Md. 320, 334, 503 A.2d 1333, 1340 (1986)).

54. *Id.* at 142, 538 A.2d at 1179.

55. See Note, *Genital Herpes Transmission*, *supra* note 29, at 513.

56. *Id.* at 514; see also *Cook v. Cook*, 32 N.J. Eq. 475, 480 (1880).

57. People are presumed, however, to have a basic level of knowledge or common sense. See Note, *Negligence—Knowledge—Minimum Standard of Knowledge—Duty to Know*, 23 MINN. L. REV. 628, 633-37 (1939). Thus, if a defendant has open, oozing genital sores, he should be deemed to possess the requisite knowledge, whether or not he is aware that it is genital herpes. Note, *Genital Herpes Transmission*, *supra*, note 29, at 514-15.

In *C.A.U. v. R.L.*, 438 N.W.2d 441 (Minn. Ct. App. 1989), the Court of Appeals of Minnesota dealt with a cause of action for negligent transmission of the AIDS virus by a man who allegedly had engaged in homosexual activity. The defendant's

knowledge only consisted of what he perceived at the time of [his] relationship [with the plaintiff], coupled with his memory and experience, concerning the transmission of AIDS. It is required only that [the defendant's] perception be reasonable under the circumstances, and he is not expected to perceive what is not apparent.

Id. at 443. Looking at the information available to the general public at the time the parties ended their sexual contact, the spring of 1985, the court determined that it was not reasonable for the defendant to have constructive knowledge that he might have AIDS or was capable of transmitting the disease to his fiancée. *Id.* at 444. In the spring of 1985, the local news indicated only that (1) few persons in Minnesota had contracted AIDS, (2) AIDS was associated primarily with homosexuals and intravenous drug users, and (3) there was a belief that AIDS was transmitted

In addressing Ms. N.'s negligence count, the court noted that Ms. N. was a "clearly identified potential victim" of Dr. K.'s infection.⁵⁸ Ms. N. alleged that Dr. K., knowing he had active herpes—a highly contagious, sexually transmitted disease—had sexual intercourse with her.⁵⁹ Thus, Dr. K. owed a duty to Ms. N.⁶⁰

Ms. N.'s complaint sufficiently established that Dr. K. breached his duty to her by infecting her with a serious, painful, and incurable disease while having knowledge that the disease was active and in a highly contagious state.⁶¹ The court held that Ms. N. stated a cause of action in negligence under Maryland law because she alleged facts showing that Dr. K. owed her a duty to take reasonable precautions,⁶² that Dr. K. breached that duty by failing to warn Ms. N. of his condition, and that Ms. N. contracted genital herpes which was proximately caused by Dr. K.'s failure to warn or take precautions.⁶³

The court of appeals next addressed the viability of Ms. N.'s action for intentional infliction of emotional distress.⁶⁴ After stating the elements of that tort,⁶⁵ the court applied the facts alleged by Ms. N. to those elements. Because Dr. K. knew he had active herpes, recognized the dangerous, contagious, and incurable nature of the disease, and engaged in sexual intercourse with Ms. N., the court of appeals deemed his conduct intentional or reckless.⁶⁶

After considering the characteristics of genital herpes,⁶⁷ the court easily concluded that transmission of the disease was substantially cer-

through blood or semen. Furthermore, there was no publicly available AIDS test. *Id.* Presumably, the court would not reach the same conclusion today given the manner in which the public has been inundated with information about AIDS and its transmission. See *supra* notes 5-6.

58. 312 Md. at 143, 538 A.2d at 1179.

59. *Id.* at 138-39, 538 A.2d at 1177.

60. *Id.*

61. *Id.* at 143, 538 A.2d at 1179.

62. It is unclear from the court's holding in *B.N.* when such a legal duty on the part of one infected with an STD actually arises. In the case of genital herpes, the duty may arise only when it is active, and thus transmittable. *But see infra* note 15. In the case of AIDS, however, the duty to disclose may always be present simply because the disease is transmittable even when there is no manifestation of physical symptoms. *Understanding AIDS, supra* note 5, at 5.

63. 312 Md. at 143, 538 A.2d at 1179. For a comprehensive listing of law review commentaries discussing the applicability of negligence principles to the transmission of genital herpes, see *id.* at 143-44, 538 A.2d at 1179.

64. *Id.* at 144-49, 538 A.2d at 1179-82.

65. See *supra* notes 13-34 and accompanying text.

66. 312 Md. at 144, 538 A.2d at 1180. Because the facts presented by Ms. N. irrefutably established scienter on the part of Dr. K., it was not difficult for the court to find the facts alleged sufficient to establish fraud. In the future, courts will confront the more difficult burden of defining the bounds of negligent misrepresentations in the STD context. See *supra* note 31.

67. The court noted that: "Genital herpes is a contagious, painful, and incurable disease that is spread by sexual contact. It is an infectious disease that endangers public health." 312 Md. at 139-41, 538 A.2d at 1177-78; see also *supra* notes 2-3.

tain to produce severe emotional distress⁶⁸ and that Dr. K.'s conduct was extreme and outrageous.⁶⁹ The court also noted that if the facts of Ms. N.'s complaint could be established as alleged, then "[t]he causal connection between the wrongful conduct and the emotional distress is apparent"⁷⁰

Although the court relied on cases from other jurisdictions to support a cause of action for intentional infliction of emotional distress,⁷¹ it emphasized that a plaintiff may recover only upon a showing that *severe* emotional distress resulted.⁷² Nonetheless, by stating that "[t]he nature of the conduct itself may provide evidence of the severity of the distress,"⁷³ the court allows the trier of fact to analyze the defendant's conduct in addition to the plaintiff's injury. Giving *B.N. v. K.K.* a broad reading, one can conclude that the court has eliminated the severity element of the tort in favor of a consideration of the objective physical condition, rather than the subjective mental state, of the plaintiff.⁷⁴

The court of appeals next addressed the viability of Ms. N.'s cause of action for fraud, deceit, or intentional misrepresentation,⁷⁵ and noted that liability may exist for physical harm caused by a fraudulent misrepresentation.⁷⁶ Ms. N. alleged that Dr. K. concealed the existence of genital herpes, rather than asserting that he was free from disease. The court then determined whether Dr. K. had a duty to inform Ms. N. of his

68. The court noted, however, that emotional distress need not produce total physical or emotional disablement to be severe. *Id.* at 148, 538 A.2d at 1181. Not only had Ms. N. alleged the painful and incurable aspects of genital herpes, but the court *sua sponte* added that:

[The disease] is associated with the development of cervical cancer, with the dangers of miscarriage and premature delivery during childbirth, and with a high mortality rate for children, born of mothers who have the disease, who thereby contract herpes at birth. Furthermore, one who has the disease should at a minimum refrain from sexual relations while the disease is in its active stages.

312 Md. at 145, 538 A.2d at 1180 (footnote omitted).

Furthermore, the court recognized the cold reality that a person with genital herpes "may be deprived of most normal sexual activity, marriage may be virtually out of the question, and vaginal childbearing may be practically ruled out." *Id.*

69. *Id.* at 144-45, 538 A.2d at 1180.

70. *Id.* at 147, 538 A.2d at 1181.

71. *Id.* at 148, 538 A.2d at 1182 (citing *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984) and *Long v. Adams*, 175 Ga. App. 538, 333 S.E.2d 852 (1985)).

72. 312 Md. at 148-49, 538 A.2d at 1182.

73. *Id.* (footnote omitted).

74. The court did make an effort, however, to distinguish transmission of genital herpes from "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* at 146, 538 A.2d at 1181 (quoting *Harris v. Jones*, 281 Md. 560, 567, 380 A.2d 611, 614 (1977)). Thus, the court appears to have continued in its resolve to prevent the unbridled application of the tort of intentional infliction of emotional distress.

75. 312 Md. at 149, 538 A.2d at 1182.

76. *Id.* at 150, 538 A.2d at 1182 (citing RESTATEMENT (SECOND) OF TORTS §§ 554, 557A (1977)).

disease, noting that "concealment cannot be the basis of an action in deceit if there is no duty to speak."⁷⁷ In determining whether a duty existed, the court looked to the confidential nature of the relationship between Ms. N. and Dr. K.⁷⁸

The court refused to conclude that only a marital relationship imposes a duty upon a partner to disclose that sexual relations are likely to transmit a contagious disease. Instead, the court described the nature of a confidential relationship as "whether one party justifiably placed confidence in the other and whether the other accepted the placement."⁷⁹ Quoting *Kathleen K.*, Judge Adkins, speaking for the court, stated "a certain amount of trust and confidence exists in any intimate relationship."⁸⁰ Thus, "an ongoing 'intimate boyfriend-girlfriend relationship' may give rise to a duty to speak under circumstances" like those alleged by Ms. N.⁸¹

Not only did the court refuse to limit liability to married individuals, but also the court dismissed the need for any confidential relationship.

Dr. K. had a general tort duty, at the least, to disclose his condition before engaging in intercourse with [Ms. N.] . . . That is, whether the relationship between Ms. N. and Dr. K. was "confidential" in the eyes of the law or whether it was not, it was a relationship which had to make Dr. K. aware that to engage in sexual intercourse with Ms. N. without disclosing his condition would be highly likely to produce severe harm to a readily and clearly identifiable person.⁸²

By eliminating the need for a confidential relationship, the court opened the door to fraud claims brought by anyone infected by a knowing carrier of a dangerous, contagious, and incurable STD such as genital herpes, so long as the transmitter could foresee infecting another with the disease.

Because the certified question presented to the court of appeals in *B.N. v. K.K.* was limited to the facts and issues presented in Ms. N.'s complaint, the court left unanswered how Maryland courts would treat (1) suits brought for the transmission of other STDs such as AIDS, (2) intentional tort actions for assault and battery,⁸³ and (3) the applicability

77. 312 Md. at 151, 538 A.2d at 1183.

78. *Id.*

79. *Id.*

80. *Id.* at 153, 538 A.2d at 1184 (quoting *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 997, 198 Cal. Rptr. 273, 276-77 (1984)).

81. *Id.* at 153, 538 A.2d at 1184.

82. *Id.* (citation omitted). This statement emphasizes the court's focus on foreseeability. It is the *relationship* as sexual partners between the plaintiff and the defendant which makes it foreseeable to the defendant that severe harm may result to the plaintiff from sexual intercourse. Therefore, any sexual partner is a foreseeable victim. The nature of the relationship, beyond the sexual relationship, is immaterial to the imposition of liability.

83. See *supra* note 46.

of the various defenses to both negligence and intentional tort actions for transmission of STDs.

The question presented to the court of appeals was not limited to genital herpes; rather it dealt with the "Sexual Transmission Of A Dangerous, Contagious, and Incurable Disease, *Such As Genital Herpes*."⁸⁴ Although the court of appeals was willing to impose liability for the transmission of herpes between two heterosexual partners, it is unclear how Maryland courts would respond to a suit for transmission of a potentially less visible disease such as AIDS. It is possible that upon a showing of intentional conduct, a court easily could apply existing common law precedent to find a defendant to possess the requisite degree of knowledge and intent for liability to be imposed.⁸⁵

More problematic for the courts, however, are negligence cases in which the plaintiff has not alleged the defendant's actual knowledge of his condition. Instead, a negligence claim may be grounded upon the proposition that a reasonable person should have known of his infected condition and should have warned his partner of the risks of having sexual relations.⁸⁶ Whether the defendant's actions were reasonable is a question for the fact finder.⁸⁷

In determining whether a defendant owed a duty to the plaintiff, it is unclear to what extent a court may deem the defendant to possess the requisite knowledge. Diseases have various levels of symptomatic indication, requiring varying levels of investigation to identify their presence. A person infected with the AIDS virus may transmit the disease while he possesses no physical manifestations.⁸⁸ Yet, medical research has shown

84. 312 Md. at 138, 538 A.2d at 1176 (emphasis added).

85. Actual or implied knowledge by a defendant of his ability to transmit a disease is directly tied to his ability to ascertain his infected condition. In many instances, physical symptoms are the primary means of gaining such knowledge.

86. See generally Comment, *AIDS Transmission*, *supra* note 14.

87. RESTATEMENT (SECOND) OF TORTS § 285(d) (1965). The medical facts to be weighed in this regard are frequently too complex for a jury to evaluate in the absence of expert testimony. Even with the aid of expert testimony, uncertainties in the medical and scientific communities on the issue of the time between exposure to the HIV virus and the date when physical symptoms or even antibodies to the virus develop are significant. Compare Friedland, *AIDS: General Overview*, *supra* note 4, at 681 (time period between exposure to the HTLV-III virus and seroconversion is one to six months) with Darrow, Lui & Rutherford, *A Model-Based Estimate of the Mean Incubation Period for AIDS in Homosexual Men*, 240 SCIENCE 1333 (June 3, 1988) ("the mean incubation period for AIDS in homosexual men is 7.8 years . . . , which is close to the estimate of 8.2 years for adults developing transfusion-associated AIDS."). See also Imagawa, *et al.*, *Human Immunodeficiency Virus Type 1 Infection in Homosexual Men Who Remain Seronegative for Prolonged Periods*, 320 NEW ENG. J. MED. 1458 (June 1, 1989). Thus, the credibility of the expert will be an important ingredient in the jury's determination.

88. *Understanding AIDS*, *supra* note 5, at 5; see also Haseltine, *Silent HIV Infections*, 320 NEW ENG. J. MED. 1487, 1488 (June 1, 1988) (There is "the sobering possibility that HIV-1 infections may be transmitted by blood and organ donors who are silently infected.").

that certain groups are at a higher risk of being infected.⁸⁹ The question of duty, therefore, may hinge on whether a person falling within one of these high risk groups possesses the requisite degree of knowledge of his potential condition.⁹⁰

It is unclear from the court's opinion in *B.N. v. K.K.*, and from case law in other jurisdictions, whether mere high risk activity is sufficient to put a defendant on notice that he may be infected with an STD. Common sense dictates that such activity may be the legal equivalent of a physical manifestation of a disease, and thus requires a defendant to warn his sexual partner of possible transmission.⁹¹ Given the dangerous, contagious, and incurable nature of AIDS, and the danger to public health, there is no reason why a court, confronted with a claim for tortious transmission of AIDS, should not apply traditional tort concepts in the same manner as in genital herpes cases to find a defendant liable.

In Maryland, a battery is the consummation of an unlawful attempt to cause a harmful or offensive contact with another person or to cause an apprehension of such a contact.⁹² The defendant's intent to do harm is not an essential element of battery.⁹³

A cause of action in battery brought for the transmission of a sexually communicable disease is problematic due to the consensual nature of sexual relations.⁹⁴ The plaintiff's consent to the initial act of sexual in-

89. Former Surgeon General of the United States, C. Everett Koop, M.D., Sc.D., has stated that the following activities constitute "risky behavior":

Sharing drug needles and syringes. Anal sex, with or without a condom.
Vaginal or oral sex with someone who shoots drugs or engages in anal sex.
Sex with someone you don't know well (a pickup or prostitute) or with someone you know has several sex partners. Unprotected sex (without a condom) with an infected person.

Understanding AIDS, *supra* note 5, at 3.

90. Whether a sexual partner who is not at high risk and is not infected with an STD has a corresponding duty to ask his partner whether the partner is a member of a high risk group, or at very least, to request permission to inspect a partner's body for signs of STD infection, is an issue which suggests possible contributory negligence, and, in some jurisdictions, comparative negligence. Although these defenses may successfully be employed in a given case, discussion of their use is beyond the scope of this Note. For a discussion of the issues surrounding both defenses, see Comment, *AIDS Transmission*, *supra* note 14, at 719; Note, *Genital Herpes Transmission*, *supra* note 29, at 529-31.

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

92. *Continental Casualty Co. v. Mirable*, 52 Md. App. 387, 398, 449 A.2d 1176, 1183, *cert. denied*, 294 Md. 652 (1982); see also RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965).

93. "The gist of the action is not hostile intent on the part of the defendant, but the absence of consent to the contact on the plaintiff's part." *Ghassemieh v. Schafer*, 52 Md. App. 31, 38-39, 447 A.2d 84, 88 (1982)(citation omitted). Moreover, "[t]he concepts of negligence and battery are not mutually exclusive." *Id.* at 40, 447 A.2d at 89 (citation omitted). Thus, an individual is not foreclosed from bringing causes of action for both battery and negligence. *Id.* at 42-43, 447 A.2d at 89-90.

94. Consent to the invasion of the plaintiff's interest usually vitiates the existence of a battery because the defendant's act is no longer wrongful. PROSSER ON TORTS, *supra* note 21, at 101. The defendant's privilege is lost, however, if the act to which

tercourse, however, should not preclude a subsequent action for battery upon ascertaining the true character of the defendant's act, *i.e.*, the transmission of an infectious disease.⁹⁵ Instead, this problem is avoided by "conceptualizing the physical contact between plaintiff and defendant as two separate touchings: one, the sexual touching, which was within the plaintiff's consent, the other, contamination with the [STD], which was not due to the plaintiff's ignorance of the disease."⁹⁶ Additionally, a defendant's fraudulent concealment of the risk of infection with a venereal disease may vitiate the plaintiff's consent to sexual intercourse.⁹⁷ This reasoning was applied in *Kathleen K.*⁹⁸

Maryland courts easily can overcome any problems presented by the consent defense to a battery action arising from the transmission of an STD by following the lead of *Kathleen K.* By distinguishing the consensual contact of sexual intercourse from the contact resulting in the transmission of the venereal disease, Maryland courts can safeguard the public health rather than punish the plaintiff for engaging in sexual relations. Just as courts impose no duty on a plaintiff to anticipate the negligence of the defendant, Maryland courts should not impute consent to a plaintiff for infection with a disease absent some readily identifiable signal given by the defendant,⁹⁹ or his condition, that suggests the presence of such a risk.¹⁰⁰ Upon a proper factual showing, it appears that Maryland courts

the plaintiff was exposed deviated substantially from the act to which the plaintiff originally consented. In such a case, the defendant will be deemed to have exceeded the plaintiff's consent. *See* *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905), *overruled on other grounds*, *Genzel v. Halvorson*, 248 Minn. 527, 80 N.W.2d 854 (1957); *see also* PROSSER & KEETON, *supra* note 13, at 118-19.

95. Closely analogous to the issue of consent in a battery action for the transmission of an STD is the doctrine of informed consent. Under that doctrine, the plaintiff typically alleges that a physician or other health care provider failed to disclose potential risk, however slight, of a particular procedure, and therefore deprived the plaintiff of the opportunity to deny treatment, which he would have done had he known of the risk. For an excellent discussion of informed consent, *see* *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977); *see also* Note, *Court of Appeals of Maryland Adopts Doctrine of Informed Consent*, 8 U. BALT. L. REV. 114 (1978).
- Although most jurisdictions treat informed consent cases as negligence actions, a minority of courts have allowed recovery upon a battery theory. *See generally*, Schultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219 (1985).
96. Note, *Genital Herpes Transmission*, *supra* note 29, at 511-12, n.114 (citing *State v. Lankford*, 29 Del. (6 Boyce) 594, 595, 102 A. 63, 64 (1917)).
97. *See* *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 997, 198 Cal. Rptr. 273, 276-77 (1984); RESTATEMENT (SECOND) OF TORTS § 892B, illustration 5 (1979) (Where "A consents to sexual intercourse with B, who knows that A is ignorant of the fact that B has a venereal disease B is subject to liability to A for battery."); Note, *Genital Herpes Transmission*, *supra* note 29, at 511-12.
98. 150 Cal. App. 3d at 997, 198 Cal. Rptr. at 276-77.
99. Courts and commentators have not yet expressed an opinion on the scope of "readily identifiable signal" for the purpose of finding a plaintiff contributorily negligent in engaging in sexual relations with the defendant. *But see supra* note 57.
100. In the context of genital herpes, the presence of open, oozing genital sores may serve as a sufficiently reliable signal. *See* Note, *Genital Herpes Transmission*, *supra* note 29, at 514 and accompanying text. An individual infected with AIDS, on the other

could implement existing tort principles and the rationale of other jurisdictions to recognize a cause of action in battery for the transmission of any sexually transmitted disease.¹⁰¹

In addition to the issues presented by a battery action for transmission of an STD, the limited nature of the certified question also denied the court of appeals the opportunity to address possible defenses to the causes of action before it.¹⁰² A defendant may introduce several defenses to an action for intentional or negligent transmission of a sexually transmitted disease. A defendant could raise defenses such as assumption of the risk, the right of privacy, statute of limitations, implied notice, interspousal immunity, or illegal sexual conduct.

Assumption of the risk is a defense used by a defendant who alleges that the plaintiff, aware of the risk associated with the sexual contact at issue, nevertheless proceeded to the plaintiff's detriment. In Maryland, a defendant must establish three elements before the plaintiff is deemed to have assumed a risk of injury. "The defendant must show that the plaintiff (1) had knowledge of the risk of danger, (2) appreciated the risk and (3) voluntarily exposed himself to it."¹⁰³ Upon proof by a defendant that the plaintiff assumed the risk, the plaintiff is deemed to have abandoned his right to maintain an action.¹⁰⁴

A primary issue involving the assumption of the risk defense in the context of a suit for the transmission of an STD is whether the plaintiff possessed the requisite knowledge of the likely effects associated with the sexual contact with the defendant.¹⁰⁵ If the defendant can prove that the plaintiff was fully aware of the risk, the assumption of risk defense may succeed. If, on the other hand, the defendant merely asserts that the plaintiff should have known of the existence of the defendant's condition and the possibility of being infected, it becomes a question of fact whether the plaintiff was in a position whereby he should have recognized the dangerous consequences of contact with the defendant.

It is questionable whether a defendant successfully can employ the implied assumption of risk defense to a negligence action for infliction of an STD. Individuals are under no duty to anticipate the negligent conduct of others,¹⁰⁶ and "[t]he only way such a duty to anticipate could

hand, may live for several years without any physical manifestations of the infection. *Understanding AIDS*, *supra* note 5, at 5.

101. *B.N. v. K.K.*, 312 Md. at 139 n.2, 538 A.2d at 1177 n.2 (citing *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920)).

102. *See supra* note 47.

103. *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 630, 495 A.2d 838, 843 (1985) (quoting *Stancill v. Potomac Elec. Power Co.*, 744 F.2d 861, 866 (D.C. Cir. 1984) (footnote omitted)).

104. *Pfaff v. Yacht Basin Co.*, 58 Md. App. 348, 355-56, 473 A.2d 479, 483 (1984) (citations omitted).

105. *See Comment, Herpes—A Legal Cure—Can the Law Succeed Where Medicine has Failed?*, 61 J. URB. L. 273, 284-85 (1984) [hereinafter *Comment, Herpes—A Legal Cure*].

106. Note, *Genital Herpes Transmission*, *supra* note 29, at 530.

arise would be if the danger of herpes were widespread and a large segment of the general public could recognize the physical manifestation of a herpetic outbreak."¹⁰⁷

Courts may not take the same approach when confronted with a cause of action for the transmission of an STD such as AIDS. Following years of constant warnings from the government, medical community, and media, members of designated "high risk groups" may find themselves unable to claim that they were unaware of the particular risks of engaging in high risk activities.¹⁰⁸ Furthermore, the present stigma associated with AIDS and the socially unacceptable means by which the virus can be communicated may cause courts to "interfere less" with the personal choices of the partners, which, in turn, may cause the courts to take a different approach in ruling on the applicability of implied assumption of risk.

As AIDS becomes more commonplace in the heterosexual community,¹⁰⁹ the question remains whether courts will apply implied assumption of risk to cases involving transmission of the AIDS virus between non-monomorous heterosexual partners. The relationship between the parties is an important factor in defining the risk assumed.¹¹⁰ Nevertheless, parties to a "one night stand," who arguably expect little from the relationship and one another, should be held to the same high duty of accountability. The needs of society in protecting itself from the devastating effects of STDs should cause courts to disallow any inference that plaintiffs should not expect defendants to act reasonably.

Genital herpes is one of the more visible venereal diseases.¹¹¹ Others such as gonorrhea¹¹² and AIDS, however, are less easily identifiable, and one infected with either of these diseases may be more likely to attribute the symptoms to other, more common causes such as the flu or simple skin irritation.¹¹³ This gives rise to the more fundamental question of whether any physical symptom suggesting possible infection with a communicable disease creates a duty on the part of the defendant to

107. *Id.*

108. See generally *Understanding AIDS*, *supra* note 5; see also *supra* note 89.

109. See generally *MMWR HIV Infection in the U.S.*, *supra* note 2, at 344.

110. PROSSER & KEETON, *supra* note 13, at 481.

111. *But see* Wheeler, *The Herpes Simplex Problem*, *supra* note 2, at 163, "[A] significant percentage of persons who have seropositive results for herpes simplex virus are not aware of having had clinical herpetic infections. Their infections have been either asymptomatic or subclinical, not diagnosed, ignored, or misdiagnosed."

112. Gonorrhea is a contagious viral infection producing symptoms in the genital mucous membranes of men and women. The typical male symptoms include discharge from the penis and painful urination. In women, the labia and urethral canal become irritated and tender. The most profound symptoms may appear shortly after infection and then subside. *TABER'S CYCLOPEDIA MEDICAL DICTIONARY G-29 to G-30* (11th ed. 1970). Even upon dissipation of symptoms, an individual may remain infectious for several weeks. *Id.*

113. Symptoms commonly associated with AIDS Related Complex (ARC), a condition where the HIV antibody is present in the blood but where the symptoms associated with full blown AIDS are absent, can be as mild as a slight temperature, diarrhea,

warn a partner of the possibility that the symptoms are linked to an STD.¹¹⁴

A defendant faced with a suit for transmission of an STD also may assert a right to privacy as a defense. The right to privacy protects individuals from unwarranted government intrusion into their personal lives.¹¹⁵ Although defendants sued in tort for transmitting an STD have asserted the right to privacy defense, courts consistently have denied its sufficiency on the ground that while "the constitutional right to privacy normally shields sexual relations from judicial scrutiny, it does not do so where the right to privacy is used as a shield from liability at the expense of the other party."¹¹⁶ Other courts reason that public policy considerations of community health outweigh the privacy interest that may be violated.¹¹⁷ In light of the court of appeals' rationale for placing liability on the defendant in *B.N. v. K.K.*, it is probable that Maryland courts would deny the use of a right to privacy defense in favor of more fundamental considerations of public health and welfare.¹¹⁸

A defense that invariably may present itself for use in tort actions is the running of the statute of limitations. The issues surrounding the statute of limitations defense are as problematic in the context of sexually transmitted diseases as they are in medical malpractice and products liability actions involving toxic drugs or chemicals, in which the statute of limitations may run even before the defendant becomes aware of the injury inflicted upon him.¹¹⁹ In Maryland, as in many other states, a plaintiff alleging personal injury arising out of the tortious conduct of another generally must bring suit within three years of the injurious conduct.¹²⁰

The defendant's successful use of the statute of limitations defense will depend upon which theory the court relies on to start the running of

weight loss, and swollen glands. Friedland, *AIDS: General Overview*, *supra* note 4, at 682.

A first episode of genital herpes is characterized by "fever, headache, malaise, and myalgias. Pain, itching, dysuria, vaginal and urethral discharge . . . are the predominant local symptoms." *Infections with HSV (Part II.)*, *supra* note 3, at 750; *see also* Comment, *Herpes: Liability to Third Parties*, *supra* note 14, at 795-96.

114. One commentator takes the argument one step further and proposes that an infected individual who warns his partner of the danger of contracting an STD, but fails to explain to his partner the potential health consequences of the disease, should be deemed negligent in failing to advise in this regard. Comment, *Herpes—A Legal Cure*, *supra* note 105, at 284-85.

115. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

116. *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 385, 193 Cal. Rptr. 422, 433 (1983).

117. *R.A.P. v. B.J.P.*, 428 N.W.2d 103, 108 (Minn. Ct. App. 1988) (those afflicted with sexually communicable diseases are in the best position to prevent their spread, and the public's interest in preventing the spread of incurable diseases justifies some invasion into personal privacy); *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 996-97, 198 Cal. Rptr. 273, 276 (1984).

118. For further discussion of the issues surrounding the right to privacy in the context of STDs, see Comment, *Genital Herpes and the Law*, *supra* note 15, at 138-39; Note, *Genital Herpes Transmission*, *supra* note 29, at 531-32.

119. PROSSER & KEETON, *supra* note 13, at 165-68.

120. MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1984).

the statute. Some jurisdictions hold firm to the rule that the statute of limitations begins to run at the time of the negligent act or omission, which in the context of the transmission of an STD is the sexual contact itself.

In jurisdictions following the discovery rule, the statute will not begin to run until the plaintiff either knew or should have known of the defendant's negligent conduct. Although there is no written opinion discussing the applicability of a statute of limitations defense to an action for the transmission of a venereal disease, there is ample common law precedent addressing the statute of limitations issues in other contexts to justify a court's application of the discovery rule in an STD case.¹²¹

The statute of limitations should not present a serious problem in an action for transmission of genital herpes, since physical symptoms of HSV infection manifest themselves within a short time after initial exposure.¹²² In AIDS transmission cases, however, it is quite possible that physical symptoms will not manifest themselves for many years. Several scientific studies suggest that the time between the date of initial HIV exposure and the date symptoms appear which are significant enough for an individual to suspect that he has AIDS can range from four and one half to eight years.¹²³ Also unresolved is the question whether the presence of HIV antibodies, without actual manifestation of physical symptoms, constitutes sufficient injury to commence the running of the statute of limitations.¹²⁴ It is plausible that mere knowledge of the presence of the antibody in one's blood is sufficient notice that a partner's negligence was the source of exposure.¹²⁵

121. See PROSSER & KEETON, *supra* note 13, at 167 nn. 23-24.

122. "The incubation period [for HSV] ranges from 1 to 26 days (median 6 to 8 days)." Corey & Spear, *Infections with Herpes Simplex Viruses* (Part II.), 314 NEW ENG. J. MED. 686, 690 (March 13, 1986). At least one study suggests, however, that the herpes simplex virus cervicitis, which afflicts a large portion of women with HSV-II of the external genitalia, can be transmitted through vaginal excretion "without evidence of genital lesions." Corey, Adams, Brown & Holmes, *Genital Herpes Simplex Virus Infections: Clinical Manifestations, Course, and Complications*, 98 ANNALS OF INTERNAL MED. 958, 961 (1983).

123. Friedland & Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED. 278, 278 (July 30, 1987); *but see supra* note 87. Although the HIV antibody may develop in the blood much sooner than the appearance of physical symptoms, it is questionable whether a plaintiff would have the requisite knowledge of his exposure in the absence of conclusive test results. See *C.A.U. v. R.L.*, 438 N.W.2d 441 (Minn. Ct. App. 1989).

124. One commentator has suggested that the presence of the HIV antibodies is sufficient to constitute an actionable injury, and that the development of full-blown AIDS is not necessary. Comment, *AIDS Transmission*, *supra* note 14, at 715-16. One can draw analogies from this reasoning to support a contention that the seroconversion is an injury for the purpose of commencing the running of the statute of limitations.

125. *Id.* As courts expand the gamut of actionable wrongs, the plaintiff must remain keenly aware that sustaining even the slightest injury may commence the running of the statute of limitations. A plaintiff infected with HIV, who has not developed the physical symptoms associated with AIDS, may suffer emotional damage upon learning of his infected condition out of fear that the full effects of the disease will inevitably develop. In an analogous context, courts in several jurisdictions have allowed

One theory upon which a defendant may rely to negate tort liability on limitations grounds is that of implied notice of infection. Similar to an implied assumption of risk defense,¹²⁶ the defendant alleges that the prevalence of STDs in the United States, and more specifically, in a particular city,¹²⁷ constitutes sufficient notice to an individual involved in non-monogamous sexual relations of the possibility of becoming infected with a venereal disease. A homosexual defendant who infects a partner may argue that the plaintiff was implicitly aware of the high risk of infection at the time of sexual contact because homosexual activity is known to be "risky behavior."¹²⁸ It remains to be seen whether courts are willing to preclude recovery for a partner's tortious conduct by imputing such knowledge of infection to the plaintiff.

For many years, the doctrine of interspousal immunity precluded liability of one spouse for the intentional or negligent infliction of harm to the other spouse.¹²⁹ In *Crowell v. Crowell*,¹³⁰ the Supreme Court of North Carolina summed up the rationale behind allowing interspousal suits for transmission of an STD when it stated:

Many laws have become obsolete, even when not changed by statute and the Constitution, as this has been, and no principle of justice can maintain the proposition in law, or in morals, that a debauchee, as the defendant admits himself to be can marry a virtuous girl, and, continuing his round of dissipation, keep up his intercourse with lewd women, contracting, as he admits, venereal disease, communicate it to his wife . . . subjecting her to humiliation, and ruining her physically for life, . . . yet be ex-

recovery for fear of future health effects related to exposure to toxic chemicals. See *Herber v. Johns-Manville Corp.*, 785 F.2d 79 (3d Cir. 1986) (recovery allowed for fear of contracting asbestosis despite absence of physical injury); see generally Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 *FORDHAM L. REV.* 527 (1984).

In the context of HIV infection, the fear of future adverse health effects may be that full-blown AIDS will develop. Baruch, *AIDS in the Courts: Tort Liability for the Sexual Transmission of Acquired Immune Deficiency Syndrome*, 22 *TORT & INS. L.J.* 165, 173 (1987). In genital herpes cases, the fear of future adverse health effects may be the fear associated with the increased risk of developing cervical cancer. Chuang, Daniel, Perry, Ilstrup & Kurland, *Incidence and Trend of Herpes Progenitalis: A 15-Year Population Study*, 58 *MAYO CLIN. PROC.* 436, 440 (July 1983); see also *supra* note 68.

126. See *supra* notes 106-16 and accompanying text.

127. According to a 1987 report of the Centers for Disease Control, "the prevalence of HIV antibody among intravenous (IV) drug users varies markedly by geographic region." The report, which incorporates the results of 90 independent studies in 53 cities across the United States, concludes that HIV infection among IV drug users "range[s] from 50% to 60% in New York City, northern New Jersey, and Puerto Rico to predominantly below 5% in most areas of the country other than the East Coast." *MMWR HIV Infection in the U.S.*, *supra* note 2, at 2.

128. See *supra* note 89.

129. For a discussion of the history and current state of the law on interspousal immunity, see generally *Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983).

130. 180 N.C. 516, 523, 105 S.E. 206, 210 (1920).

empted from all liability by the assertion that he and his wife are one, and that . . . he owes no duty to her of making reparation

More recently, the Court of Appeals of Maryland abrogated the doctrine of interspousal immunity in suits for outrageous intentional torts¹³¹ and negligence actions,¹³² and the Maryland General Assembly sealed the fate of interspousal immunity by providing that a married woman may sue her husband for any tort committed against her.¹³³ In light of existing law, a defendant cannot successfully make use of the interspousal immunity defense.

Also related to implied assumption of risk in cases involving transmission of STDs such as herpes and AIDS is the theory that a court should not impose liability for transmission of a disease contracted during illegal sexual conduct.¹³⁴ Courts more frequently are imposing liability for transmission of disease between unmarried persons,¹³⁵ and legislatures are modifying and repealing statutes prohibiting fornication and adultery.¹³⁶ However, Maryland has not legalized such "risky behavior" as sodomy,¹³⁷ oral sex,¹³⁸ prostitution,¹³⁹ or intravenous drug use.¹⁴⁰

Early cases involving transmission of STDs evidenced courts' unwillingness to impose liability on a defendant for negligence arising from "immoral" sexual conduct.¹⁴¹ In recent years, however, courts have minimized the illegality defense, at least where the illegal conduct alleged by the defendant is premarital sexual relations.¹⁴² While the decision in *B.N. v. K.K.* demonstrates the court of appeals' conformance with ex-

131. *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978); see also Note, *Maryland Abrogates Interspousal Immunity in Cases of Outrageous Intentional Torts*, 8 U. BALT. L. REV. 584 (1979).

132. *Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983).

133. MD. FAM. LAW CODE ANN. § 4-204(7) (1984); see also Note, *Maryland Abrogates Interspousal Immunity in Negligence Cases*, 13 U. BALT. L. REV. 390 (1984).

134. See Comment, *Genital Herpes and the Law*, *supra* note 15, at 135-36.

135. See, e.g., *Kathleen K.*, 150 Cal App. 3d 992, 198 Cal. Rptr. 273 (1984). But see *Neville v. State*, 290 Md. 364, 382 n.17, 430 A.2d 570, 579 n.17 (1981) for a discussion of state regulation of sexual conduct of unmarried adults.

136. See Comment, *Genital Herpes and the Law*, *supra* note 15, at 137 n.213.

137. See, e.g., MD. ANN. CODE art. 27, § 553 (1987).

138. See, e.g., *id.* § 554.

139. See, e.g., *id.* § 15(g).

140. See, e.g., *id.* § 276.

141. *Deeds v. Strode*, 6 Idaho 317, 55 P. 656 (1898). In *Deeds*, a woman, believing herself to be divorced from her first husband, remarried, contracted a venereal disease from her second husband, and brought suit. After suit was filed, the defendant discovered the plaintiff was not legally divorced, and he asserted illegality as a defense to the plaintiff's suit. The court agreed with the defendant's asserted defense and dismissed the plaintiff's action because the injury "could scarcely have arisen but for the illegal relations existing between the parties" *Id.* at 323, 55 P. at 658.

142. But see *Zysk v. Zysk*, — Va. —, 387 S.E.2d 466 (1990) (holding that because fornication is illegal, one may not receive damages for herpes resulting from participating in the act of fornication).

isting precedent in other jurisdictions, it is unclear how Maryland courts will deal with transmission of STDs through illegal conduct such as intravenous drug use and homosexual activity. The limits of socially accepted behavior may influence the limits of the illegality defense.

In *B.N. v. K.K.*, the Court of Appeals of Maryland recognized causes of action for negligence, fraud, and intentional infliction of emotional distress resulting from the sexual transmission of a dangerous, contagious, and incurable disease such as genital herpes. Through its holding in *B.N. v. K.K.*, the court of appeals has brought Maryland law in line with that of the majority of jurisdictions confronted with similar issues of liability for the transmission of STDs.

Given the ever increasing health problems posed by the growing number of Maryland citizens infected with STDs, including AIDS, it is reasonable to conclude that, upon a proper factual showing, Maryland courts would apply the same legal principles applied in *B.N. v. K.K.* to similar actions for assault and battery and for the transmission of AIDS. In the meantime, citizens can feel more secure that recompense will be afforded to those affected by irresponsible sexual behavior.

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