You WOud'n't Give Me Anything, Would you? Tort Liability for Genital Herpes

William S. Donnell
COMMENT

You Wouldn’t Give Me Anything, Would You?
Tort Liability for Genital Herpes

INTRODUCTION

An estimated ten to twenty million Americans suffer from the incurable, highly contagious disease known as genital herpes.\(^1\) People who have herpes are spreading it accidentally and intentionally at an epidemic rate.\(^2\) Genital herpes has been linked to birth defects,\(^3\) cervical cancer,\(^4\) urinary complications,\(^5\) and varying degrees of psychological and emotional distress.\(^6\)

There is a dearth of case law concerning civil liability for trans-


2. There are an estimated 200,000 to 500,000 new cases of genital herpes each year. *Scarlet Letter*, supra note 1, at 62. The estimated number and rate of consultations with physicians for genital herpes infections increased markedly from 1966 to 1979. The rate at which patients consulted fee-for-service, office-based physicians for genital herpes infections increased almost nine-fold from 3.4 per 100,000 consultations in 1966 to 29.2 per 100,000 in 1979. *Genital Herpes Infection—United States, 1966-1979*, 31 MORBIDITY AND MORTALITY WEEKLY REPORT 137 (1982).

3. The overall risk of neonatal herpes has been estimated to be about ten percent in infants born to mothers with symptomatic genital herpes after thirty-two weeks of gestation, and about fifty percent if the virus is present at delivery. The overall mortality rate in neonatal herpes is sixty to seventy percent, and fewer than twenty percent of patients survive without significant complications. These complications include severe infection of the infants liver, adrenal glands, lungs, brain, and other organs. One half of these infants have clinical evidence of central nervous system involvement. Oxman, *Genital Herpes*, in MEDICAL AND MICROBIOLOGY AND INFECTIOUS DISEASE 1218, 1223 (Braude ed. 1981) [hereinafter cited as Oxman].

4. Evidence has linked genital herpes infection with cancer of the cervix. Cancer of the cervix is more frequent in women of lower socioeconomic classes. The occurrence of this cancer is low in celibate women and increased in women who have intercourse at an early age and multiple sex partners. Also, the herpes virus is more common in patients with cancer of the cervix in comparison to control groups. Genital herpes is acquired in the second and third decades of women, and cancer of the cervix appears in the forth and fifth decades. These observations are consistent with the hypothesis that genital herpes may initiate a process that results in cancer following a latent period of several years. At present, it cannot be stated with certainty whether genital herpes causes cervical cancer. However, the association appears valid. R. Noble, *Genital Herpes Virus Infections*, in SEXUALLY TRANSMITTED DISEASES: GUIDE TO DIAGNOSIS AND THERAPY 69, 75 (2d ed. 1982) [hereinafter cited as Noble].

5. *Id.*

6. The feelings range from hatred of the opposite gender to shame and feeling like a leper. See generally *Scarlet Letter*, supra note 1, at 63, 64; *You Wouldn't Give Me Anything, Would You?*, THE WASHINGTONIAN, Sept. 1982, at 175 [hereinafter cited as *Give Me Anything*?]; *Herpes Simplex II: Incurable Venereal Disease Epidemic*.
mission of venereal disease. In addition, the medical and social nature of genital herpes creates a new situation. Unlike other common venereal diseases, such as syphilis and gonorrhea, genital herpes is an incurable virus.\textsuperscript{7} Genital herpes knows no social boundaries and is prevalent even among the most affluent classes of American society.\textsuperscript{8} Because of the recent outspokenness of those suffering from genital herpes,\textsuperscript{9} and public awareness concerning the disease, the social stigma attached to revealing one's self as infected has diminished.\textsuperscript{10} These factors combine to make legal actions seeking redress for genital herpes inevitable. Several lawsuits have already been filed.\textsuperscript{11} These lawsuits transform what was once merely a social problem into a legal issue as well. Practitioners and the courts will be faced with the question of whether a person inflicted with genital herpes has a valid legal cause of action, and if so, under what circumstances.

This Comment will discuss whether the courts should find a le-

\textsuperscript{7} See generally Oxman, supra note 3. Syphilis and gonnorhea are bacterial and, if detected, can usually be cured with antibiotics such as penicillin. The fact that they are curable bacterial sexually transmitted diseases makes them quite distinct from genital herpes. Jedson, Sexually Transmitted Diseases: How Shifting Patterns Will Affect Your Practice, Mod. Med., Oct. 1982, at 62.

\textsuperscript{8} Genital herpes is not a disease confined to the lower socioeconomic classes of America. A Time magazine article relates the laments of infected attorneys, a psychotherapist, a real estate salesman and a university professor. Scarlet Letter, supra note 1, at 62-66.

\textsuperscript{9} Id. at 66.

\textsuperscript{10} Group therapy sessions, television and radio talk shows, and the print media are addressing the issue nationwide. See generally Scarlet Letter, supra note 1; Simplex II, supra note 6; Give Me Anything?, supra note 6.

\textsuperscript{11} See, e.g., Liptrot v. Basini, No. 82-19427 (Fla. Cir. Ct., Broward County filed Sept. 1982). Plaintiff Susan Liptrot has sued defendant Basini for $5,000 compensatory, and $100,000 punitive damages for fraudulently concealing his genital herpes infection from her, causing her to contract the disease. Liptrot alleges that defendant Basini knew he had genital herpes, but fraudulently represented to her that he did not have any sexually communicable diseases. Plaintiff claims to have relied on defendants false claim, and engaged in sexual intercourse. She claims to have noticed a sore on defendants genitals the next day, and to have contracted genital herpes two days later. See also Olson v. Olson, No. 567066-6 (Cal. Super. Ct., Alameda County filed Dec. 21, 1982). Plaintiff Marietta Olson has sued her husband Rex Lee Olson for compensatory and punitive damages alleging negligence, battery, and fraud, for the transmission of genital herpes. The complaint is form pleaded and exposes no other facts. See also St. Clair v. St. Clair, No. DR82-3962 (Mo. Cir. Ct., Jackson County filed Dec. 27, 1982). Plaintiff Joanne N. St. Clair has sued her husband J. Wesley St. Clair for $1,500,000 in conjunction with a divorce action, for causing her to be exposed or infected for a lifetime with herpes. More of these cases are scheduled to come to trial before publication. On January 3, 1984 in Ottumwa, Iowa, a 68 year-old woman received a default judgment from her ex-husband for intentionally infecting her with genital herpes. The damages were compensatory and based on evidence of physical injury, embarrassment, and humiliation. Mormann v. Mormann, No. CL 2021 (Iowa Dist. Ct., Wapello County filed June 28, 1983). [A copy of each complaint is on file in the offices of California Western Law Review].
gal duty to warn or take preventative measures to prevent the spread of genital herpes. After summarizing the medical background, the Comment will shift its focus to an analysis of possible theories of tort liability available to the injured plaintiff. Specifically, this Comment will examine causes of action in negligence, battery, and fraud. After a brief survey of possible affirmative defenses, it will be concluded that analogous case law concerning contagious diseases, common law tort theory, and public concern over the spread of genital herpes mandate the recognition of a legally enforceable duty.

I. MEDICAL BACKGROUND

The existence of the herpes virus has been known for more than two thousand years. In its genital form, herpes is an acute inflammatory herpes simplex virus infection of the sexual organs. It is transmitted through sexual contact with a herpes carrier. The incubation period after contact is generally from two to seven days. Genital herpes in the female causes painful vesicles and ulcers of the vulva and vagina, which may extend to the buttocks and thigh areas. The cervix is also usually infected and there is often a profuse watery vaginal discharge. In the male, the lesions of genital herpes are similar to those of the female, but appear on and around the penis, and on the buttocks and thighs. In both males and females the primary infection usually includes urinary retention, sometimes requiring catheterization. These

12. It is said that herpes caused such a terrible epidemic in Rome that the Emperor Tiberious banned kissing. In eighteenth century France, genital herpes was so common among prostitutes that it was termed a vocational disease of women. Yet it was not until the 1940's that herpes was found to be a virus, and not until the late 1960's that researchers isolated two types of herpes. Scarlet Letter, supra note 1, at 62; Oxman, supra note 3, at 1218.

13. Scarlet Letter, supra note 1, at 62; Oxman, supra note 3, at 1218. Genital herpes is only one of the herpes simplex viruses. Herpes simplex infections are most commonly referred to as fever blisters or chancre sores. This Comment deals only with the sexually transmitted, or genital herpes, generally referred to medically as Herpes Simplex II. Herpes Simplex I can be transmitted to the genital area through oral sex.

14. Although experiments have kept the herpes virus alive up to seventy-two hours on an inanimate surface, such as a toilet seat, this manner of transmission is not considered a reasonable risk. See Give Me Anything?, supra note 6, at 176; see also Scarlet Letter, supra note 1, at 66.

15. Oxman, supra note 3, at 1219.

16. Id.

17. Id.

18. Id. at 1220.

19. A catheter is a rubber tube inserted through the urethra to drain the bladder. DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 230 (26th ed. 1981). See Harris, Herpes Genitalis, in Recent Advances in Sexually Transmitted Diseases 261, 263 (1981) [hereinafter cited as Harris].
symptoms are often accompanied by fever, headaches, and general malaise.\textsuperscript{20}

The primary infection symptoms and pain generally last from ten to fourteen days, with healing of the lesions in three to five weeks.\textsuperscript{21} Once the virus has infected the body, “it’s your virus for life.”\textsuperscript{22} When latent, genital herpes recedes to the sacral ganglia near the base of the spine.\textsuperscript{23} In the subsequent attacks the symptoms recur with varying frequency and intensity,\textsuperscript{24} but usually subside within approximately a week.

The virus can be asymptomatic\textsuperscript{25} in both men and women. The risk of transmission when the virus is not manifested is unknown.\textsuperscript{26} Some experts estimate the chance of asymptomatic transmission as low as one in one hundred,\textsuperscript{27} while others estimate a much greater risk.\textsuperscript{28} When left untreated, the virus can lead to a myriad of complications including: infant deaths,\textsuperscript{29} blindness,\textsuperscript{30} lesions on the hand and face,\textsuperscript{31} and many emotional and psychological problems.\textsuperscript{32}

\textsuperscript{20} Oxman, \textit{supra} note 3, at 1220.
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Battling An Elusive Invader}, \textit{TIME}, Aug. 2, 1982, at 68. “What makes it unique is that unlike influenza and other viruses, it [genital herpes] survives in the human body long after an attack has subsided.” \textit{Id.}
\textsuperscript{23} The virus withdraws to the sacral ganglia nerve cells, which are beyond the body’s immune system. As a result, the virus is beyond the reach of the immune system and enters a latent stage. \textit{Id.} The sacral ganglia is a mass of nerve cells located near the base of the spine. \textit{DORLAND’S ILLUSTRATED MEDICAL DICTIONARY} 538 (26th ed. 1981).
\textsuperscript{24} Some persons suffer more than one attack a month, while others may go years without a recurrence. Certain situations are said to be associated with recurrences. Among these are stress, sexual activity, and fever. Recurrences generally take place at the same site, and in some instances, multiple lesions may be present. \textit{Noble, supra} note 4, at 74.
\textsuperscript{25} Asymptomatic means without subjective evidence of the disease.
\textsuperscript{26} \textit{Noble, supra} note 4, at 73; see also Oxman, \textit{supra} note 3, at 1223.
\textsuperscript{27} \textit{See} \textit{Me Anything?}, \textit{supra} note 6, at 176.
\textsuperscript{28} See San Diego Union, Oct. 15, 1982, § A, at 25, col. 1 (predicting possibility to be as high as thirty percent of the time). \textit{But see}, Corey, \textit{The National History of Genital HSV}, \textit{THE HELPER}, March 1982, at 2 (“probability appears small”) [hereinafter cited as Corey]. (The Helper is available through the American Social Health Association in Palo Alto, California); see also \textit{Noble, supra} note 4, at 75 (stating patients are thought to be non-infectious when the sores have healed).
\textsuperscript{29} Oxman, \textit{supra} note 3, at 1223 (indicating infant deaths occur in about fifty percent of child births when a child passes through an infected birth canal).
\textsuperscript{30} Touching an infected area and transmitting the virus to the eye can result in damage or blindness. Ocular Herpes is the most common cause of infectious blindness in the United States. \textit{See} \textit{Blough, HSV in the Eye}, \textit{THE HELPER}, March 1982, at 5 (describing ocular herpes).
\textsuperscript{31} Herpes labitis and stomatitis. \textit{See} Oxman, \textit{Herpes Stomatitus}, in \textit{MEDICAL AND MICROBIOLOGY AND INFECTIOUS DISEASE} 860, 868 (Braude ed. 1981) [hereinafter cited as Oxman II] (the herpes virus may be spread by touching the active virus and then the mucous membrane of the eye or mouth).
\textsuperscript{32} \textit{See} Oxman, \textit{supra} note 3; \textit{Scarlet Letter, supra} note 1; Harris, \textit{supra} note 19.
The severity of the consequences of herpes infection gives rise to a serious legal question: How can a victim of this virus obtain redress for the physical, emotional, and psychological harm caused by the transmitter? Morally, it seems liability should flow freely from the transmitter to the victim. However, ours is a society of laws, and tort liability for genital herpes has yet to be tested by the courts.

II. THEORIES OF TORT LIABILITY

A. Negligence

Negligence is a broad, convenient term employed to label conduct beneath the standard insisted on by society. However, the negligence case is governed by more specific rules. The elements necessary for a cause of action in negligence are: (1) a duty of care on the part of the defendant, (2) a breach of that duty, (3) cause in fact and proximate cause, and (4) actual loss or damage. Each element will be discussed in the context of one person transmitting genital herpes to another.

1. Duty. A typical dilemma for a herpetic is when, or whether to, disclose his condition to a potential sex partner. Most of those referred to and interviewed in recent publications who knew they had genital herpes recognized a moral and ethical duty to warn their potential partner of their contagious condition. Some, however, felt differently. One sufferer was quoted in a recent Time magazine cover story: "When I first got it, I wanted to pass it on to everyone for vengeance until everyone had it and it became normal." Time also reported a midwestern woman who claims to have infected seventy-five men in three years and a Phil...
TORT LIABILITY FOR HERPES

Philadelphia man who brags of infecting twenty women. \(^{40}\)

Since genital herpes is caused by sexual contact, \(^{41}\) the moral duty of a herpetic would seem to be either to abstain from sex or to disclose the condition to a potential sex partner. \(^{42}\) The courts have yet to decide whether this moral duty is also a legal duty.

Whether a person owes a legal duty to another is the essential question in negligence—whether the plaintiff's interests are entitled to legal protection from the defendant's conduct. \(^{43}\) However, it should be recognized the term duty is not sacrosanct in itself. It is only an expression of the total of those considerations of policy which have led the law to say that a particular plaintiff is entitled to relief. \(^{44}\)

The principle policy considerations in determining duty are:

\[
\text{... the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.} \(^{45}\)
\]

In weighing these policy considerations, the primary consideration in determining whether a new duty should be imposed upon a defendant is "the extent of the burden to the defendant and consequences to the community of imposing a duty..." \(^{46}\) The courts have recognized a legal duty to warn of possible infection from other contagious disease in several relationships. These include husband and wife, \(^{47}\) doctors and those who are likely to have contact with a diseased patient, \(^{48}\) hospitals and patients who

40. Id.
41. \textit{See} Oxman, \textit{supra} note 3, at 1219. Although the virus may remain alive on an inanimate object, the chance of transmission without sexual contact is not reasonably possible. The virus must come into direct contact with a mucous membrane or cut, and there must be sufficient concentration of the virus. \textit{See also} \textit{Give Me Anything}, supra note 6, at 176 (denying the myth of transmission from toilet seats or towels).
42. \textit{See generally} \textit{How, Where, When}, \textit{supra} note 33, at 1, 2 (discussing the disclosure dilemma).
44. \textit{See Prosser on Torts}, \textit{supra} note 36, at 332-33.
46. Id.; \textit{see also} Coulter v. Superior Ct., 21 Cal. 3d 144, 153, 577 P.2d 669, 674, 145 Cal. Rptr. 534, 539 (1978).
47. Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920) (husband gave wife venereal disease).
may come into contact with other diseased patients, landlord and tenant, and employer and employee.

In the 1920 case *Crowell v. Crowell*, a woman successfully sued her husband for "wrongfully and recklessly" infecting her with a "loathsome" venereal disease. In *Crowell*, the defendant husband had contracted a venereal disease extramaritally, concealed the fact, and transmitted it to his wife. In affirming a ten thousand dollar judgment, which included punitive damages, the North Carolina Supreme Court stated "[I]t is a well-settled proposition of law that a person is liable if he negligently exposes another to a contagious or infectious disease."

Although the complaint in *Crowell* alleged negligence, fraud, and assault, the court stated the defendant would have been liable in negligence, independent of the assault or fraudulent concealment. In finding the defendant had breached his duty, the *Crowell* court relied heavily on the marital relationship, and especially on the fact that the wife was virtuous and the husband candidly adulterous. Other courts in this period denied liability for infection of venereal disease from husband to wife because of interspousal immunity, and the doctrine of in pari delicto neither of


51. Crim v. International Harvester Co., 646 F.2d 161 (5th Cir. 1981). In *Crim*, an employer failed to warn employees of the danger from "valley fever." "Valley fever" is a lung disease contracted from the dust in the Southwest. The plaintiff, an auto dealer, was invited to defendant's Arizona test track to test drive new vehicles. Plaintiff contracted the disease while on the trip. *Id.* at 162.

52. 180 N.C. 516, 105 S.E. 206 (1920).

53. *Id.* at 517, 105 S.E. at 207.

54. *Id.* at 518, 105 S.E. at 208 (quoting Skilling v. Allen, 143 Minn. 323, 173 N.W. 663 (1919)).

55. *Crowell*, 180 N.C. at 518, 105 S.E. at 208.

56. For example, Judge Lane in *Crowell* stated, in reference to the woman's subordinate role in the marital relationship, "The origin of such treatment was perhaps natural in the economic conditions of a barbarous age when superior physical force made the wife the slave of the husband. But those conditions have passed. . . . Wives are no longer chattels." *Id.* at 520, 105 S.E. at 210.

57. *Id.* at 518, 105 S.E. at 208.

58. See, e.g., Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898) (venereal disease); Shultz v. Christopher, 65 Wash. 496, 118 P. 629 (1911) (venereal disease).

59. For an excellent example of chauvinistic judicial side-stepping, see Deeds v. Strode, 6 Idaho 317, 55 P. 656 (1898). In *Deeds*, the plaintiff, a woman, had been separated from her first husband for seven years. She filed for and received a divorce, which this court later found void for lack of jurisdiction. Plaintiff later married de-
which would be applicable today in most jurisdictions.

The duties and obligations of the marital relationship played a major role in finding a legal duty in these cases. However, the principle considerations in finding a legal duty to warn in a genital herpes suit: foreseeability of harm, moral blame of defendant's conduct, the extent of the burden to the defendant, and a policy of preventing future harm would be present regardless of marriage. Further support for this inference is found in the recent Wyoming case, Duke v. Housen.

In Duke, the plaintiff, a female college student, met the defendant on April 4, 1970. On the same night and early the next morning the plaintiff engaged in sexual intercourse with defendant. On April 8, plaintiff began a trip by truck with defendant from New York to Denver, "engaging on and off in acts of sexual intercourse with defendant along the way." On April 21, 1970, defendant broke off the relationship with plaintiff, and informed her for the first time that he had gonorrhea, and that now she probably had it as well. Plaintiff later developed serious complications and sued the defendant in Wyoming where he resided.

The trial court awarded plaintiff over one million dollars in compensatory and punitive damages based on defendant's alleged grossly negligent infection of plaintiff with venereal disease. On appeal, the Wyoming Supreme Court vacated the trial court judgment on the basis of an expired statute of limitation. However, the court did state that plaintiff's claim was within the principle of

60. See, e.g., Hack v. Hack, 433 A.2d 859 (Pa. 1980); "[W]e conclude that interspousal tort immunity is premised upon outdated theories unsupported by today's social conditions and public policy and hence has no justification in contemporary society." Id. at 868. The following states retain the common law doctrine of interspousal tort immunity: Delaware, District of Columbia, Florida, Georgia, Hawaii, Louisiana, Mississippi, Montana, Ohio, Oregon, Tennessee, Utah, and Wyoming. The remaining states have either modified or abrogated the old common law rule. Id. at 869.

62. Id. at 338.
63. Id.
64. Id.
65. Id.
66. Id. at 339.
67. Id. at 339-40.
68. The court in Duke held that the statute of limitations of the state where the tort took place, New York, applied. The court found that New York's three year statute of limitation had expired on April 20, 1973. Duke filed suit on April 19, 1974,
tort, and that one who negligently exposes another to an infectious or contagious disease can be held liable for damages.69

The trial court in Duke found that defendant had breached his legal duty to warn plaintiff, although no special relationship existed.70 The Wyoming Supreme Court intimated that but for the statute of limitations plaintiff had a valid cause of action.71 The legal duty to warn of a sexually contagious disease that would have been upheld in Duke, absent the expired statute of limitations, represents an enlightened approach. The burden which a legal duty to warn would place on the herpetic defendant is minimal when weighed against the potential pain and suffering genital herpes may cause the plaintiff.72

In some states, statutes provide that knowingly exposing one's self or another to an infectious disease, or having intercourse while knowingly infected with a venereal disease are misdemeanors.73 When the plaintiff falls within the class of persons the statute intended to protect, and liability will further the goals of the regulation, a majority of courts hold that an unexcused violation would be conclusive on the issue of negligence.74 These statutes are intended to prevent the spread of venereal and contagious diseases.75 The plaintiff in a genital herpes suit would be one whom

69. Id. at 347.
70. Id. at 340.
71. Id. at 338.
72. Id. at 340.
73. CAL. HEALTH & SAFETY CODE § 3353 (Deering 1982) states:
Except in the case of the removal of an afflicted person in a manner the least dangerous to the public health, any person afflicted with any contagious, infectious, or communicable disease who willfully exposes himself, and any person who willfully exposes another person afflicted with such disease, is guilty of a misdemeanor.
74. See, e.g., Madison v. Deseret Livestock Co., 574 F.2d 1027 (10th Cir. 1978) (where statute is designed to protect life, limb or property); Barthel v. Illinois Cent. Gulf R.R. Co., 74 Ill. 2d 213, 384 N.E.2d 323 (1978); see also RESTATEMENT (SECOND) OF TORTS § 285 (1965), PROSSER ON TORTS, supra note 36, at 200.
75. See People ex rel. Krohn v. Thomas, 133 Misc. 145, 231 N.Y.S. 271 (Sup. Ct. 1928). Referring to New York's venereal disease statutes, the Krohn court held: the article was enacted for the "benign purpose of protecting the public against the ravages of venereal diseases" and it should therefore receive a "liberal interpretation." Id. at 147, 231 N.Y.S. at 275.
the statute intended to protect. California courts hold that such a breach of statute creates a presumption of negligence which may be rebutted by showing adequate cause. This presumption would resolve the issue of a legal duty.

Whether a legal duty will exist in a negligence suit for genital herpes will depend upon the circumstances of each case. The case law concerning contagious diseases, criminal statutes concerning contagious diseases, and public concern over the spread of genital herpes warrant a policy of imposing a legal duty upon the herpetic to warn potential sex partners or to take preventative measures to prevent transmission of the virus.

2. Breach of Duty. In the absence of overriding policy considerations such as breach of statute, or strict liability, foreseeability of risk is of primary importance in establishing duty. In order to show that a defendant in a genital herpes suit breached his duty, plaintiff must show that defendant knew, or should have known, of the possibility of transmitting the virus and failed to warn plaintiff or take preventative measures. If a herpetic was unaware of his own infection, or transmitted the virus while asymptomatic and without reason to know of the risk, he could not have breached his duty to warn. If there is no way of being aware of the risk, there could be no duty.

The risk of asymptomatic transmission, however, is unlikely. A male whose virus is active probably will show some manifesta-
tions, such as lesions or tenderness. He may not have known the sores were genital herpes or contagious. However, if he was aware something was wrong it would be up to the jury to determine whether he should be held to that knowledge. Although women have been found to harbor an active genital herpes virus asymptomatically, the possibility of transmission absent some manifestation of the sores is unknown.

The majority of transmissions occur when there is some manifestation of the virus. However, plaintiff's proof would not be limited to the presence or absence of lesions at the time of sexual contact. Any circumstantial evidence, such as a previous diagnosis or an admission to another could be used to show that defendant was aware, or should have been aware, of the infectious condition. Once the plaintiff has established that the defendant should have foreseen the risk, breach of duty would be established by the failure to warn or take preventative measures.

3. Causation. Having established that the defendant breached his duty, plaintiff must next prove causation. The law recognizes two separate categories of causation: cause-in-fact, and proximate cause or legal cause. Cause-in-fact is a question of fact determining whether defendant's conduct actually caused the plaintiff's injury. Proximate or legal cause is a policy question of whether the law will extend liability for the conduct to the consequences which have in fact occurred.

The plaintiff must prove by a preponderance of the evidence

87. Id.
88. Duke v. Houen, 589 P.2d 334 (Wyo. 1979) (the defendant claimed to have been cured of gonorrhea at the time of sexual contact with the plaintiff but, the jury found he should have known of the possibility of transmission and held him liable). Id. at 339-40. See also PROSSER ON TORTS, supra note 36, at 150.
90. Oxman, supra note 3, at 1224; NOBLE, supra note 4, at 73.
91. Id.
92. Circumstantial evidence would be as valid as direct evidence in establishing that defendant knew or should have known of the existence of genital herpes. See generally Elba Wood Prods., Inc. v. Brackin, 356 So. 2d 119 (Ala. 1978); Ned v. Hertz Corp., 356 So. 2d 1074 (La. Ct. App. 1978) (causation provable by circumstantial evidence). See also E. CLEARY, MCCORMICK ON EVIDENCE § 13, at 29 (2nd ed. 1972) [hereinafter cited as MCCORMICK ON EVIDENCE].
93. For example, the defendant may have complained about the sores to a third party.
94. See supra note 36 and accompanying text (outlining elements of negligence).
that defendant's conduct was the cause of the injury. A person with an active sex life and multiple sex partners may have more difficulty proving causation than one in a monogamous relationship. The more sexual partners a person has had in the preceding few weeks, the more potential sources of plaintiff's virus, and possible defendants.

Due to the medical intricacies of genital herpes infections and transmissions, plaintiffs will rely heavily on expert medical testimony. The medical experts have ruled out non-sexual transmission and have established the usual incubation period to be from two to fourteen days. These factors will allow most plaintiffs to trace back their sexual activities to establish the source of the infection. Methods of discovering the presence of the virus antibodies through blood tests even when not active, will further aid plaintiff in discovering the origin of the injury.

Proximate or legal cause is not a question of actual causation. Proximate cause is a flexible concept designed to effectuate varied policies as to who should be responsible for harm suffered. In a genital herpes suit, once breach of duty and actual causation have been established, proximate cause will have little impact on a one-on-one claim. However, proximate cause may be an issue where more than two parties are involved. For example, if A transmits genital herpes to B who subsequently transmits it to C, A's act would be an actual cause of C's injury. Whether A's act was the proximate cause of C's harm is a question of law for the courts to decide.

Prosser suggested that proximate cause when used to limit liability should be determined by the following factors: (1) causation in fact, (2) apportionment of damages, (3) liability for unforeseeable consequences, (4) intervening causes, and (5) shifting responsibility. Only the first involves a question of actual cause and


99. See Mccormick on Evidence, supra note 93, § 13, at 29. (Where the subject matter is difficult to understand, the courts rely on the opinion of experts).

100. The presence of the herpes antibodies can be determined by a simple blood test. See Nahmias, Diagnosis of Viral Disease, Hospital Practice, April 1982 at 49, 60 (discussing blood tests for herpes virus).

101. See Reynolds, Limits on Negligence Liability: Palsgraf at 50, 32 Okla L. Rev. 63 (1979) [hereinafter cited as Reynolds].


103. The liability question would have been answered in establishing a breach of duty.

104. But for A's transmitting genital herpes to B, C would not have contracted it.

105. Prosser on Torts, supra note 36, at 244.

106. Id. at 249-60.
effect. The others are intertwined with the question of duty, and should not be discussed in terms of causation. Thus, in terms of extended liability for the transmission of genital herpes, the court should consider whether the defendant had a duty to that plaintiff, for example, A to C. In determining that duty, foreseeability would play a dominant role. If A should not have foreseen B's transmitting genital herpes to C, B's act would be a new tort, or a superceding cause of C's injury. A's act would not be the legal cause of C's harm.

The ability of courts to limit liability based on foreseeability is well illustrated by the "open car" cases. The prototype case is the suit against the defendant who negligently leaves his keys in the ignition. The car is stolen and the thief injures plaintiff. The majority of courts hold that although the defendant was negligent and should have foreseen the theft, defendant could not have foreseen that the thief would negligently harm plaintiff. An analogous situation arises with genital herpes. A should foresee that B will have sexual contact with someone else after contracting genital herpes from A. However, A should not be held to foresee B's negligent transmission of genital herpes to another. If the courts follow this reasoning liability will be limited to that person to whom defendant actually transmitted the genital herpes.

4. Injury. The final element of plaintiff's prima facie case in negligence is injury. Plaintiff must prove that he has suffered some loss or damage. The physical injury suffered by those who have genital herpes will differ in degree and duration for each individual. Some may encounter mild discomfort with in-

107. See id. at 250.
108. Id. at 224-25.
109. Id. at 249-50.
111. The Restatement (Second) of Torts defines superceding cause as follows: A superceding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.
113. See Richards v. Stanley, 43 Cal. 2d 60, 66, 271 P.2d 23, 27 (1954) (risk of theft was foreseeable, but that thief would be negligent was not). See also Danne, Liability of Motorist Who Left Key In Ignition For Damage or Injury Caused by Stranger Operating the Vehicle, Annot., 45 A.L.R. 3d 787 (1972).
114. See supra note 113.
115. See PROSSER ON TORTS, supra note 36, at 143.
117. See Oxman, supra note 3, at 1224; NOBLE, supra note 4, at 76; Scarlet Letter, supra note 1, at 64.
frequent recurring attacks, others may suffer painful fluid filled clusters accompanied by fever and general malaise as often as twice a month. Many suffer serious psychological as well as physical harm.

For most herpetics, the emotional trauma far outweighs the physical discomfort. "Herpes has cost me thousands of dollars, the loss of two wives (and children), and great emotional and mental distress. I am presently unemployed, indirectly because of herpes. It has effectively destroyed my life." Time magazine reported that herpetics go through states similar to those mourning the loss of a loved one. These feelings include, "shock, emotional numbing, isolation and loneliness, sometimes serious depression and impotence." For the genital herpes plaintiff there will always be some physical injury, therefore the emotional distress will be parasitic, and if proven can be compensated as an injury.

B. Intentional Torts

If plaintiff can establish that defendant acted intentionally he may want to pursue a cause of action in battery or fraud. The intent required in a genital herpes suit is not only the intent to transfer the disease, it may also be the intent to cause the contact which causes the disease. When defendant knows he has genital herpes and knows that the probability of transmitting it is...
great, the act of sex which results in the contraction of genital herpes may constitute an intentional tort.127

1. Battery. The elements necessary to prove a civil battery are: (1) intent, (2) contact, and (3) offensive contact.128 In the 1917 case of State v. Lankford,129 Lankford was found guilty of criminal assault and battery for transmitting syphilis to his wife. The court in Lankford held:

A wife in confiding her person to her husband does not consent to cruel treatment, or to infection with a loathsome disease. A husband, therefore, knowing that he has such a disease and concealing the fact from his wife, by accepting her consent, and communicating the infection to her, inflicts on her physical abuse, and injury, resulting in great bodily harm; and he becomes, notwithstanding his marital rights, guilty of an assault, and indeed, a completed battery.130

The court went on to state, “If the accused knew he was infected with syphilis, and his infection was unknown to his wife, the intent to communicate the disease to her by having sexual intercourse with her, may be inferred from the actual results.”131

Although Lankford was a criminal prosecution for battery, the standards for civil and criminal battery are essentially the same.132 The factual situation in Lankford would satisfy the required elements of a civil battery action.133 The jury found the requisite intent, and offensive contact.134 If plaintiff in a genital herpes suit can show that defendant knew he had the disease at the time of sexual contact, Lankford provides a persuasive argument for recovery through battery.

2. Fraud. A plaintiff who justifiably relies on the misrepresentation of a defendant who claims to be free of genital herpes, or knowingly withholds that information, may bring a suit in fraud.135 The elements of fraudulent misrepresentation are: (1) a
representation known by defendant to be false, (2) made for the purpose of inducing plaintiff to act in reliance thereon, (3) which plaintiff does rely on, and (4) acts to his injury.\textsuperscript{136} Because of the defendant's intent to deceive, the plaintiff may not be barred by his own negligence.\textsuperscript{137} Thus, if plaintiff reasonably relied on defendant's misrepresentation the defense of contributory negligence may not apply.\textsuperscript{138} However, if the reliance was not justified the plaintiff would be held to have assumed the risk.\textsuperscript{139}

In a genital herpes suit, nondisclosure by the defendant which resulted in plaintiff contracting the disease could be brought under negligence or fraud. If the plaintiff chose fraud, he must show that the defendant actually knew of his infectious condition and withheld that information with the purpose of inducing plaintiff to have sex.\textsuperscript{140} In negligence, plaintiff would only have to show that defendant knew, or should have known, of the infectious condition and failed to warn.\textsuperscript{141}

If the defendant lied to the plaintiff, claiming that he did not have genital herpes and plaintiff consented to sex on the basis of that claim, the plaintiff may sue in fraud.\textsuperscript{142} Again, the plaintiff must show that the defendant actually knew he was infected and made the statement with the intent of inducing plaintiff to have sex.\textsuperscript{143}

In Crowell v. Crowell,\textsuperscript{144} the plaintiff claimed that the defendant knew he was infected, knew of the infectious nature of his disease, concealed such knowledge from plaintiff, and infected her.\textsuperscript{145} The Crowell court found such concealment was a sufficient tort to justify both compensatory and punitive damages.\textsuperscript{146}

Because fraud is an intentional tort,\textsuperscript{147} the plaintiff may be able

\textsuperscript{137} \textit{RESTATEMENT (SECOND) OF TORTS} § 545A comment b (1965).
\textsuperscript{138} "He is in other words not required to exercise the care of the reasonable man for his own protection." \textit{RESTATEMENT (SECOND) OF TORTS} § 545A comment a (1965).
\textsuperscript{139} \textit{Id.} at comment b. The reliance could not be justified in a genital herpes suit if the plaintiff knew defendant had herpes.
\textsuperscript{140} See supra note 136 and accompanying text (discussing elements of battery).
\textsuperscript{141} See supra notes 36-44 and accompanying text (discussing duty and elements of negligence). Of course the plaintiff would plead both and rely on negligence if unable to show actual knowledge and intent.
\textsuperscript{142} See supra note 137 and accompanying text.
\textsuperscript{143} Defendant's knowledge would be necessary to infer the intent. See supra notes 128-29.
\textsuperscript{144} 180 N.C. 516, 105 S.E. 206 (1920).
\textsuperscript{145} \textit{Id.} at 518, 105 S.E. at 208.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} See \textit{PROSSER ON TORTS}, supra note 36, at 385.
to recover punitive damages.148 The difficulty in maintaining a fraud cause of action is proving the defendant had actual knowledge of the disease and made the misrepresentation with the purpose of inducing plaintiff to have sex.149 However, if the plaintiff can show actual knowledge, the intent may be inferred by the jury.150

The plaintiff's decision to sue under negligence, or the intentional torts of battery or fraud should depend upon the defendant's subjective knowledge. If plaintiff cannot show that the defendant actually knew he had genital herpes, but that he should have known, plaintiff should sue in negligence. If plaintiff can show that defendant knew he had the disease, plaintiff can sue in battery or fraud.

III. REMEDY

Compensatory damages awarded in negligence cases are aimed at returning the victim, as much as possible, to his condition prior to the injury.151 If sufficiently proved, the victim of an unintentional tort may have three paths of recovery: loss of earnings and diminution of earning capacity, medical and other expenses, and mental pain and suffering.152 Each may occur in the future as well as in the past, but all must be proved at the time of trial.153

A herpetic will experience the first symptoms of the disease within a few weeks of the sexual contact with the carrier.154 The statute of limitation for a personal injury cause of action varies from state to state.155 Because of the potential for future damages this limitation of time in which to show damages may present problems for the herpetic plaintiff.

In California, a plaintiff will have one year from the first injury

148. See, e.g., Frick v. Abell, 198 Colo. 508, 602 P.2d 852 (1979) (police officers beat plaintiffs); Banks v. Dawkins, 339 So. 2d 566 (Miss. 1976) (punitive damages are allowed where defendant knowingly shot plaintiff); see also Punitive or Exemplary Damages for Assault, Annot., 123 A.L.R. 1115 (1939).

149. This would require an admission or diagnosis of defendant's infection to prove subjective knowledge.

150. See supra note 133 and accompanying text (jury inferred intent to transmit syphilis).

151. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); see also, D. Dobbs, Remedies 540 (1973) [hereinafter cited as Dobbs].

152. If defendant's conduct is sufficiently "outrageous", punitive damages may be awarded in negligence, see infra notes 166-69 and accompanying text (discussing punitive damages in negligence).

153. See Dobbs, supra note 151, at 540.

154. See Oxman, supra note 3, at 1220; Noble, supra note 4, at 73.

in which to file a complaint. Because of the unpredictable recurrent nature of herpes, the plaintiff will not fully know the potential future loss at that time. For example, a female herpetic may know that the mortality rate for infants born to actively herpetic mothers is about fifty percent if expensive special precautions are not taken. She will not know, however, if she will have an active case near the time of birth. The defendant would argue that such future loss is purely conjectural, and should not be compensated.

Even though the actual complications may be impossible to predict, anxiety about the future course of an injury, such as worry about whether a dog bite will lead to rabies or a burn to cancer, is a recognized element of pain and suffering. A California appellate court decision, Coover v. Painless Parker Dentist, allowed damages to the victim of x-ray burns for the potential increase of cancer over the objections of defendant that the damages were conjectural and uncertain. The Coover court stated the necessity of constantly watching and guarding against cancer was an obligation and a burden that the defendant had no right to inflict upon the plaintiff. The genital herpes plaintiff, whose incurable disease causes constant worry over future outbreaks and possible complications, certainly has an analogous argument. In fact, anxiety over possible future complications such as birth defects, lost relationships, and embarrassment may be the most damaging aspect of genital herpes for many sufferers.

Punitive, or exemplary damages, are aimed at punishing the wrongdoer and serving as a warning to others. The plaintiff in a genital herpes suit for negligence may be awarded punitive damages if he can show that the defendant acted with malice, or willful disregard for the rights of the plaintiff.

156. CAL. CIV. PROC. CODE § 340 (Deering’s 1973).
157. The precautions involve close monitoring through pap smears and vaginal inspections, and a possible caesarean section to avoid the infected birth canal. See Oxman, supra note 3, at 1223.
158. The jury may not award damages based on mere speculation. Although there cannot be mathematical precision, the jury must have a reasonable basis of computation. See Petrovich v. United States, 421 F.2d 1364 (Ct. Cl. 1970); Eshkenazi v. Las Fabrics, Inc., 360 So. 2d 430 (Fla. App. Ct. 1978) (fact of damage must be beyond speculation).
162. Id. at 115, 286 P.2d at 1053.
163. Id.
164. See Scarlet Letter, supra note 1.
166. The shades of “outrageousness” which a jury should find before awarding
to show malice does not require that the defendant consciously intended to transmit genital herpes to the plaintiff. In tort law, "intended" consequences comprise not only those results the actor desires but also those which he knows, or should know, are substantially certain to result from his conduct.\textsuperscript{167} Even if the plaintiff did not actually intend to transmit the disease, malice may be inferred if he was, or should have been, substantially certain it would be transmitted.\textsuperscript{168}

Battery and fraud are by their nature intentional and should allow instructions for punitive damages.\textsuperscript{169} If punitive damages are allowed the jury may consider defendant's wealth in order to provide sufficient deterrence or punishment.\textsuperscript{170} To show that defendant's conduct was sufficiently outrageous to allow punitive damages in any cause of action for genital herpes, the plaintiff must show that defendant had actual knowledge of the disease.\textsuperscript{171}

IV. DEFENSES

A. Negligence

The common defenses to negligence actions include assumption of the risk and contributory negligence or reduction of liability through comparative negligence.\textsuperscript{172} These defenses would be


\textsuperscript{168} Id.

\textsuperscript{169} See, e.g., Rodgers v. Bryan, 82 Ariz. 143, 309 P.2d 773 (1957); see also Punitive or Exemplary Damages for Assault, Annot., 123 A.L.R. 1115 (1939) (punitive damages for battery); Wedeman v. City Chevrolet Co., 278 Md. 524, 366 A.2d 7 (Ct. App. 1976) (where fraud is involved, an instruction on exemplary damages is considered proper).


\textsuperscript{171} A defendant could not manifest malice, or intent to transmit genital herpes if he did not know he had it.

\textsuperscript{172} Most states have abolished the rule denying any recovery by the plaintiff who is guilty of contributory negligence and have replaced it with some form of comparative negligence. McConnell, Comparative Negligence: Coping with the Changes, 1981 TRIAL LAW. GUIDE 526.
available to the defendant in a genital herpes suit.

For assumption of the risk to apply the plaintiff must understand the risk involved, and undertake it entirely, freely, and voluntarily. The plaintiff would be unable to recover if the defendant could show that plaintiff knew of defendant’s genital herpes but consented to sex nevertheless. This consent may be express or implied. However, since there probably will be no conclusive evidence of a knowing consent by the plaintiff the issue will go to the jury. Since juries are notoriously unfavorable to the defense, the percentage of cases in which the plaintiff has actually been barred from recovery by his assumption of the risk is quite small. This could prove harmful to the conscientious defendant who warned the plaintiff, but could not prove it.

The standard applied to the plaintiff in assumption of the risk is a subjective one. Plaintiff’s failure to conform to the objective standard of ordinary care would not be assumption of the risk, but contributory negligence. If the plaintiff is negligent in not seeking to discover whether his partner has genital herpes his recovery would be barred in a contributory negligence state and proportionately lessened in a comparative negligence state. For example, suppose A met B at a bar or social event, engaged in sexual intercourse with B that evening and contracted genital herpes. If A knew of B’s infection, A assumed the risk. If B lied and told A there was no infection, A might have a cause of action in fraud. But if A did not ask, and B did not warn, it would be a question of fact whether A was also negligent, thereby reducing or barring


174. For example, if plaintiff saw defendant’s sores and recognized them as herpes, or if defendant told plaintiff of the herpes, there would be no breach of duty; see supra notes 37–82.


176. Unless the consent was preserved mechanically, or more than the litigating parties were present at the time.

177. See Prosser on Torts, supra note 36, at 447.

178. Id.

179. However, it could be argued that one who would consent to sex knowing of the risk involved would not bring suit.

180. Plaintiff must know and volunteer to take the risk. See supra note 174.


182. In a modified comparative negligence state, the plaintiff would not recover if his fault was over fifty percent. See, e.g., Avery v. Wadlington, 186 Colo. 158, 526 P.2d 295 (1974); Lambertson v. Cincinatti Corp., 312 Minn. 114, 257 N.W.2d 679 (1977).
B. Intentional Torts

The defenses of contributory negligence and assumption of the risk would not apply to the genital herpes suit in battery or fraud. Contributory negligence is not a defense to intentional torts. Assumption of the risk could not apply to the fraud cause of action since the essence of fraud is the plaintiff not knowing of the risk involved. The defendant in a battery suit may argue that genital herpes is a common consequence of sex, and that the plaintiff in consenting to sex is assuming the risk of infection.

C. Statute of Limitations

The remaining affirmative defense for either negligent or intentional infection of genital herpes is the statute of limitations. In California the plaintiff must bring suit within one year of the injury, unless the action is brought for fraud. Genital herpes will manifest itself within three weeks of the sexual contact. If the plaintiff fails to bring an action within one year, he will be barred from recovery. In *Duke v. House*, although the plaintiff was aware of the injury, she did not develop serious complications and bring suit until the statute had expired. The majority of courts hold that the statute of limitations begins when there has been notice of the invasion of a legal right of the plaintiff, even though notice of its consequences does not materialize until later. The statute of limitations may have harsh consequences for the herpes plaintiff. However, statutes of limitations are arbitrary by their very nature and do not discriminate between the just and unjust claim. They are a reflection of the legislative policy

---

183. See *Prosser on Torts*, supra note 36, at 433. Where the plaintiff's act is also negligent, it will be weighed against the defendant's act.
185. Fraud requires that plaintiff be deceived. Plaintiff could not knowingly assume and be deceived at the same time. See supra note 174 and accompanying text.
186. But cf. *State v. Lankford*, 29 Del. (6 Boyce) 594, 102 A. 63 (1917); see also text accompanying notes 32-36.
189. See *Oxman, supra* note 3, at 1219.
191. Id. at 339.
193. It may be argued that the legislatures should provide an extended statute of
controlling the right to litigate. 194

CONCLUSION

Genital herpes is a growing social problem in the United States. The effect on an individual's mental, social, and physical well-being can be devastating. With the first lawsuits filed, genital herpes has been transformed from merely a social problem to a legal one as well.

A plaintiff who is wrongfully inflicted with genital herpes may proceed with a cause of action in negligence, battery, or fraud. The cause of action the plaintiff chooses will depend on the circumstances of each case. If the defendant acted unintentionally but negligently, the plaintiff may sue in negligence. If the plaintiff can establish the defendant acted intentionally he may pursue battery or fraud causes of action as well. Further, if the plaintiff can prove the defendant acted with malice or intent, he may be able to recover punitive damages.

Regardless of which avenue of redress the plaintiff may choose, this Comment suggests, case law concerning contagious and venereal disease, misdemeanor statutes, public policy, and concern over the spread of genital herpes clearly support recovery for the wrongfully inflicted plaintiff.

The recognition of a legal duty to warn or take measures to prevent transmission of genital herpes will allow, at a minimum, the victim to recover monetary restitution, and should help deter the spread of genital herpes as well as other sexually transmitted diseases. The herpetic who is aware of legal liability will be more likely to inform his potential sex partner of the risk of infection. The purpose of the law of torts is to afford a compensation for injuries sustained by one person as a result of the conduct of another. 195 Unless recovery is allowed when there is a violation of a right, the violations will continue with impunity and that which is wrong will come to be regarded as something right. 196

William S. Donnell

limitation in the case of genital herpes suits, but until there is a legally recognized right, to do so would be premature.

196. DOOLEY, supra note 78 vol. 1, at 6.