1-1-1984

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HERPES: A BASIS FOR TORT ACTION IN CALIFORNIA

I. INTRODUCTION

Genital herpes has emerged from relative obscurity to become a major public health problem in the United States during the last decade. It is estimated that twenty million Americans now have genital herpes and available information indicates that half a million new genital herpes infections develop yearly.¹ This disease is incurable, and treatment is still in a developmental stage.² The National Institute of Allergy and Infectious Diseases describes genital herpes as a lifelong, recurrent disease which carries with it not only serious intermittent discomfort, but also an intangible burden of anxiety about future childbirth and cancer. They state, additionally, that it represents a serious intrusion into normal sexual and marital functions.³

Herpes is caused by two closely related viruses — both of which may cause genital herpes.⁴ The outward signs of herpes are blister-like sores which may itch and burn and be quite painful. The initial sores may last several weeks before the virus enters a dormant phase from which it may recur. Herpes is highly infectious when active lesions are present. The prevailing opinion, however, is that the disease can be transmitted only by direct contact with infectious cells

¹ Leo, The New Scarlet Letter, TIME, Aug. 2, 1982, at 62. See also U.S. DEPT OF HEALTH AND HUMAN SERVICES, SEXUALLY TRANSMITTED DISEASES—1980 STATUS REPORT 233 (1980) (estimating that 15% to 20% of Americans currently suffer from genital herpes and that 600,000 new cases occur yearly) [hereinafter cited as SEXUALLY TRANSMITTED DISEASES].

² See, e.g., Treichel, Acyclovir Counters Recurrent Herpes, 122 SCI. NEWS 214 (1982). In the spring of 1982, the Food and Drug Administration approved acyclovir ointment for the treatment of herpes. Research indicates that its use reduces new sore formation and shortens the healing time for patients suffering both the initial and recurrent disease. Id. See also D. Haupt, Cosmo’s Update on Herpes—Paths to a Possible Cure, COSMOPOLITAN Jan. 1983, at 126.

³ SEXUALLY TRANSMITTED DISEASES, supra note 1, at 233.

⁴ See R. HAMILTON, THE HERPES BOOK 21 (1980). Traditionally herpes simplex virus type 1 (HSV-1) caused nearly all cases of herpes found about the mouth and herpes simplex virus type 2 (HSV-2) caused lesions below the waist. HSV-1 is increasingly being found as the virus causing genital herpes. As Dr. Richard Hamilton states, “Today, in the so-called sexual revolution years; the number of cases in which the virus types are cultured from unexpected sites has jumped to between 10 and 15 percent.” Id. at 22.
which are present in the sores.  

A small number of recently filed cases have focused attention upon the question of whether a tort cause of action lies against one who transmits genital herpes to another.  One California case which was dismissed by the trial court for failure to state a cause of action was reversed by the Second District Court of Appeal.  The court indicated that the defendant's tortious conduct in either negligently or deliberately failing to inform the plaintiff that he was infected with venereal disease was such as to bring the plaintiff's injury within the scope of injuries for which the court may provide relief.  It remains to be seen whether the rationale of the Second District Court of Appeal will prevail in California.

Although the common law recognized a cause of action against one who infected another with a contagious disease, suits have rarely been brought when the contagious disease was a sexually transmitted one. A plaintiff was most likely reluctant to bring a suit which would focus public attention upon his contraction of a venereal disease. Furthermore, a plaintiff historically encountered the doctrines of spousal immunity, contributory negligence and assumption of risk which operated to bar his recovery.

These doctrines have been abrogated in California and this comment will analyze whether the California courts should recognize a cause of action based upon the transmission of genital herpes.

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5. Id. at 8-9. See also AM. SOCIAL HEALTH ASS'N, Some Questions and Answers About Herpes (1983) [hereinafter cited as Questions and Answers]. But cf. SEXUALLY TRANSMITTED DISEASES, supra note 1, at 139 (suggesting that research is necessary to determine whether an infected but asymptomatic sex partner is as likely to transmit HSV-2 as is a person with overt genital disease); Leo, supra note 1, at 66 (acknowledging that two U.C.L.A. researchers reported that the herpes virus can live on towels and toilet seats for a period of time).


7. In Kathleen K. v. Robert B., 150 Cal. App. 3d 992, 198 Cal Rptr. 273 (1984), the court reversed the trial court's dismissal of a cause of action based upon negligence, battery, intentional infliction of emotional distress and fraud. The complaint alleged that the defendant had inflicted injury upon the plaintiff by having sexual intercourse with her at a time when he knew or should have known that he was a carrier of venereal disease.

8. Id.


10. Although facial herpes lesions may be the source of an infection of genital herpes, it is not the purpose of this comment to analyze resulting liability for such transmission. The discussion herein is limited to a defendant who has an outbreak of genital herpes which he
Although the facts and circumstances of each individual case will be determinative of the action to be brought, possible actions include negligence, assault and battery, misrepresentation, loss of consortium, and the infliction of emotional distress.

II. HISTORICAL BASIS OF AN ACTION FOR THE INFLICTION OF CONTAGIOUS DISEASE

An English court originally indicted a mother for carrying her child who was infected with smallpox along a public highway. The court noted that no person with such a disease should be exposed so as to endanger the health and lives of the King's subjects.11 This rationale has been expanded to provide for civil liability, and the general principle has been established that a person who negligently exposes another to an infectious disease, which the other thereby contracts, is liable for damages.12 In order to show such negligence, it was traditionally necessary to prove that the defendant knew of the presence of the disease.13 Where this requirement was met, liability has been imposed upon defendants who exposed others to whooping cough, typhoid fever, smallpox, and tuberculosis.14

Genital herpes, syphilis and gonnorhea are infectious and contagious.16 Additionally, they share the stigma of being a disease which is sexually transmitted. Although genital herpes has only recently become a major source of public health concern, syphilis and gonnorhea have plagued mankind for centuries.

The law has recognized the detrimental effect of being accused of having a venereal disease.16 The imputation that a person has a

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13. Id.
14. See Earle v. Kuklo, 26 N.J. Super. 471, 98 A.2d 107 (1953) (reversed dismissal of a suit brought against a tubercular landlord by a tenant who contracted tuberculosis); Hendricks v. Butcher, 144 Mo. App. 671, 129 S.W. 431 (1910) (held that one who is infected with smallpox owes a duty to everyone to conduct himself so as not to communicate the disease); Kligel v. Aitken, 94 Wis. 432, 69 N.W. 67 (1896) (affirmed judgment against defendant who failed to disclose that his daughter was ill with typhoid fever when employing plaintiff to care for the child); Smith v. Baker, 20 F. 709 (1884) (liability imposed upon a defendant who took his children, when they had whooping cough, to a boarding school thereby exposing others to the disease).
15. An infectious disease is one caused by the entrance, growth and multiplication of micro-organisms in the body. A contagious disease is one transmitted from one person to another by mediate or immediate contact. Earle v. Kuklo, 98 A.2d 197 at 108 (1953).
16. "[S]lander may be committed by an imputation of the present existence of an infec-
loathsome disease is actionable even without proof of actual damages.17 If recovery is deemed just in an action for defamation when one imputes that another has a venereal disease, it seems to follow that the law would readily recognize an action for damages against a party who actually caused another to contract such a disease. Few cases, however, have dealt with the transmission of venereal disease.18

III. TRADITIONAL BARRIERS TO BRINGING SUIT BASED UPON THE CONTRACTION OF A SEXUALLY TRANSMITTED DISEASE AND THE ABROGATION OF SUCH BARRIERS IN CALIFORNIA

Originally, several doctrines imposed nearly insurmountable barriers upon the bringing of a tort action by one who contracted a sexually transmitted disease from another. These barriers have been severely eroded, if not destroyed, in California, and the possibility of successfully maintaining such an action has been significantly improved. The contraction of a sexually transmitted disease has been traditionally associated with immorality and incurability. Ostracism from the community was a real possibility for those who admitted having such a disease,19 and suffering in silence may well have been the easier cross to bear. Furthermore, in the forties, penicillin and related antibiotics emerged to treat syphilis and gonorrhea and thus reduced the incentive to bring suit. Genital herpes, however, remains incurable.

A. Social Values

The birth control pill spawned a sexual revolution in America in the sixties. The California legislature has endorsed the view that consensual sexual activity between adults should not be subject to penal sanctions and has deleted from the penal code statutes forbidding fornication, adultery, and homosexual practices except as they

18. See Duke v. House, 589 P.2d 334 (1979) (plaintiff who contracted gonorrhea from defendant barred from recovery because the statute of limitations had run); De Vall v. Strunk, 96 S.W. 2d 245 (1936) (reversed dismissal of cause of action for the infliction of "crabs" based upon misrepresentation); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920) (upheld suit for damages by wife who contracted venereal disease from her husband); State v. Lankford, 29 Del. (6 Boyce) 594, 102 A. 63 (1917) (affirmed conviction of husband who infected his wife with syphilis).
19. See W. Prosser, supra note 17, at 756-57.
relate to a lack of consent or capacity to consent. Although acceptance of such practices is not universal, the legislature's action indicates that a large number of California citizens no longer believe that such activities should be subject to legal condemnation. In conjunction with a growing permissiveness regarding sexual relationships, society's disapprobation of those who contract venereal disease has lessened. An atmosphere which is conducive to bringing an action based upon the contraction of a sexually transmitted disease, such as genital herpes, is more prevalent in California than in most other states.

B. Spousal Immunity

The common law barred suits of one spouse against the other. Although states recognized that the infection of a wife with a venereal disease by her husband was tortious, those applying the common law rule held that a wife could not sue for such a tort upon her person.

Originally, the California courts followed the common law and refused to allow a tort action to be maintained between a husband and wife. In 1962 the California Supreme Court abandoned the rule of interspousal immunity for both intentional and negligent personal torts thus eliminating the absolute bar to such actions against a spouse.

C. Contributory Negligence

At common law, if a plaintiff was found to be contributorily negligent, he was denied recovery unless the defendant had the last
clear chance to avoid the injury.\textsuperscript{26} Contributory negligence is conduct on the part of the plaintiff which falls below the standard of care he is required to exercise for his own protection.\textsuperscript{27} It is likely that a reasonable person would realize that his chance of contracting venereal disease would be significantly increased if he engaged in sexual intercourse outside a marital relationship. His conduct in doing so would thus be tantamount to contributory negligence and he would be denied a remedy for any resultant injury.

In addition, contributory negligence could easily be established through the use of fornication and adultery statutes, widely in effect for many years, which prohibited persons from engaging in sexual relations without benefit of marriage.\textsuperscript{28} Evidence of a violation of a statute was treated in various ways by different states.\textsuperscript{29} But regardless of the violation’s evidentiary effect, in the case of venereal disease the illicit sexual act in which a plaintiff participated was likely to result in a finding of contributory negligence and thus a bar to recovery.

In a sweeping change of California negligence law, the California Supreme Court in \textit{Li v. Yellow Cab}\textsuperscript{30} abrogated the doctrine of contributory negligence. In its place the court adopted a system of comparative negligence in its “pure” form. The court stated that “in all actions for negligence . . . the contributory negligence of the person injured . . . [should] not bar recovery, but the damages awarded [should] be diminished in proportion to the amount of negligence attributable to the person recovering.”\textsuperscript{31}

If a plaintiff contracts genital herpes and is found to be negligent in engaging in the sexual act which placed his health at risk, his negligence should no longer bar his recovery. Rather, the jury would need to determine the percentage of fault attributable to each party and deny the plaintiff recovery for only those damages to which his negligence contributed. The California Supreme Court’s adoption of

\begin{enumerate}
\item[26.] \textit{Restatement (Second) of Torts} \textsuperscript{\textsection} 467 (1965). It appears that if the defendant knew he had a venereal disease and the plaintiff was unaware of such fact, the defendant had the last clear chance to avoid sexual contact likely to result in injury to the plaintiff. However, in the past the courts may have been unwilling to apply this doctrine where a plaintiff’s conduct was perceived to be immoral and against the interest of the community in protecting and strengthening the family relationship.
\item[27.] \textit{See} W. \textsc{Prosser}, \textit{supra} note 17, at 416-17.
\item[28.] \textit{See supra} note 20 and accompanying text.
\item[29.] A violation of a statute may result in a finding of negligence per se, a rebuttable presumption of negligence or mere evidence of negligence. \textit{See} W. \textsc{Prosser}, \textit{supra} note 17, at 200-01.
\item[30.] 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
\item[31.] \textit{Id.} at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.
\end{enumerate}
comparative negligence has opened the door to suits where a plaintiff's conduct is a substantial factor in the cause of his injury.

D. Assumption of the Risk

The doctrine of assumption of the risk also frustrated pursuance of a suit by a plaintiff who contracted a venereal disease. Traditionally, assumption of the risk required a subjective finding that the plaintiff had actual knowledge of the specific risk, comprehended the magnitude of the danger, and voluntarily encountered it. Many courts, however, adopted a more objective standard and denied the plaintiff's assertions of ignorance when the risk should have been quite clear and obvious. More than likely, the risk of contracting venereal disease in a non-marital sexual encounter was, or should have been, within the knowledge of the plaintiff, and the fact that he voluntarily encountered such a risk would relieve the defendant of a duty of reasonable conduct toward the plaintiff, who could not subsequently recover damages.

In *Li*, the California Supreme Court also addressed the status of assumption of the risk. The court distinguished between a reasonable and unreasonable assumption of the risk and held that where a plaintiff unreasonably undertakes to encounter a specific known risk posed by the negligent conduct of a defendant, such conduct is a form of contributory negligence and is merged into the general assessment of liability in proportion to fault. In *Gonzalez v. Garcia*, the Second District Appellate Court expanded upon the definition of "unreasonable". It found that where there is a reasonably safe alternative open, the plaintiff's free choice of the more dangerous way is unreasonable and is thus merged into the doctrine of comparative negligence.

There is a reasonably safe alternative to placing oneself in a position wherein one would be likely to contract genital herpes. As the herpes virus is transmittable only when lesions are present, in order to avoid contracting the disease one must avoid sexual activity with a partner who has an active outbreak of the disease. To fail to
ascertain whether one's anticipated sexual partner has a contagious outbreak of genital herpes, or to engage in sexual activity knowing the other is infectious, is an unreasonable assumption of the risk and thus a form of contributory negligence which must be assessed in determining comparative fault.

The Li court indicated that a reasonable assumption of the risk would bar an action. The Gonzalez court, in finding an unreasonable assumption of the risk, pointed out that there was no waiver of duty, agreement, or other element present in the case which was not a variant of contributory negligence. This suggests that such elements would bar suit. It appears, therefore, that if a party knows that another has an active outbreak of genital herpes, understands the risk of engaging in sexual activity under such circumstances, and agrees to relieve his sexual partner of responsibility regarding the transmission of the disease, that party could not subsequently institute an action under California law.

IV. CALIFORNIA TORT ACTIONS AVAILABLE FOR THE CONTRACTION OF GENITAL HERPES

Except where a plaintiff waives the defendant's duty to exercise due care, he may now bring several tort actions based upon the contraction of genital herpes from another. The determination of which causes of action should be alleged will be dependent upon the facts and circumstances of each case.

A. Negligence: The Breaching of a Duty to Abstain from Sexual Activity When One has a Contagious Outbreak of Genital Herpes

Section 1714 of the California Civil Code provides that "[e]veryone is responsible . . . for an injury occasioned to another by his want of ordinary care . . . in the management of his . . . person . . ." The courts have, however, found exceptions to this codification of negligence, and as the court stated in Richard P. v. Vista Del Mar Child Care Services, "[T]he real basis of negligence is not carelessness, but behavior which society . . . views as involving unreasonable risk of harm to others." Liability is imposed only if the gravity and likelihood of the danger outweigh the utility of the con-

itchy, tingling feeling) and lasting until the sores are completely healed. Id. at 89-91.
38. 75 Cal. App. 3d at 881, 142 Cal. Rptr. at 507.
41. Id. at 866, 165 Cal. Rptr. at 373.
duct involved. The California courts have, nevertheless, increasingly found a duty on the part of defendants to exercise due care. The courts have based the imposition of liability on both common law and statutory principles.

1. Common Law Principles

Applying common law principles, the California Supreme Court in Rowland v. Christian stated that an exception should not be made to the general principle stated in Civil Code section 1714 unless such a finding was clearly supported by public policy. The Rowland court outlined considerations which must be balanced before departing from the principle of holding a defendant liable for the injury he occasioned to a plaintiff.

a. Foreseeability of the Risk

In Weirum v. RKO General, Inc., the California Supreme Court indicated that of the several factors enumerated by the Row-


43. See Comment, The Death of Palsgraf: A Comment on the Current Status of the Duty Concept in California, 16 SAN DIEGO L. Rev. 793 (1979) (concluding that the California Supreme Court has brought about a sweeping re-evaluation of tort law resulting in a system which is pro-plaintiff and pro-recovery) [hereinafter cited as Comment, The Death of Palsgraf]. See also Levy & Ursin, Tort Law in California: At the Crossroads, 67 CALIF. L. Rev. 497 (1979) (arguing that the court is continuing to expand the incidence of tort liability).

44. See, e.g., Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).


46. Id. at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100. The courts have invoked public policy considerations in denying a plaintiff a remedy when the protection of institutions was deemed more important than the plaintiff's right to a recovery. See comment, The Death of Palsgraf, supra note 40, at 807-08. See also Richard P. v. Vista Del Mar Child Care Serv., 106 Cal. App. 3d 860, 165 Cal. Rptr. 370 (1980) (affirmed dismissal of action against an adoption agency which placed a child who later developed emotional and developmental problems); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976) (affirmed dismissal of suit brought against school district for the alleged failure to educate the plaintiff).

47. 69 Cal. 2d at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100. The court stated:

A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are 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.

48. 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).
land court, the primary consideration was that of the foreseeability of the risk.\textsuperscript{49}\ Herpes is a highly infectious disease when it is in an active phase. Upon contact with tissue the virus easily penetrates the surface cells and becomes established.\textsuperscript{50}\ Consequently, a person who engages in sexual relations during an active outbreak of genital herpes runs a substantial and foreseeable risk of transmitting the disease to his sexual partner.\textsuperscript{51}

Likewise, one who transmits genital herpes to another could reasonably anticipate that such party would subsequently infect a third party. The California courts have addressed the issue of a superseding intervening cause as a "problem [relevant in determining] the duty of the defendant to protect the person injured against the particular intervening cause."\textsuperscript{52}\ In the absence of a special relationship between the parties, the common law imposed no duty upon a defendant to control the conduct of a third person so as to prevent him from causing harm to another.\textsuperscript{53}\ Courts have indicated that a defendant is entitled to assume that others will not act negligently.\textsuperscript{54}\ The \textit{Weirum} court, nevertheless, held that a defendant could be held liable "[i]f the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction . . . does not prevent the actor from being liable for the harm caused thereby."\textsuperscript{55}\ A party who contracts genital herpes from a defendant and subsequently transmits it to a third party is not reacting to the defendant's initial negligence, but is, rather, engaging in

\textsuperscript{49} Id. at 46, 539 P.2d at 39, 123 Cal. Rptr. at 471.

\textsuperscript{50} R. Hamilton, \textit{supra} note 4, at 5. Even if a condom is used, the risk of transmission is considerable. As the virus is smaller than the pores of a condom, it may pass through and infect the other party. Id. at 93. Furthermore, the lesions may not be confined to the immediate area protected by a condom and the chance of contacting infectious cells remains high.

\textsuperscript{51} The common law required that a defendant know that he was infected with a disease before imposing liability upon him for the transmission of the disease. The adoption of comparative negligence, however, should preclude the necessity of such a finding. Whether a defendant knew or should have known that his disease was contagious is an element to be considered in apportioning fault. Dr. Hamilton states that generally the infection is easily recognizable and only in rare cases is it undetectable. See R. Hamilton, \textit{supra} note 4, at 90-91.


\textsuperscript{53} See Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 435, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976).

\textsuperscript{54} 237 Cal. App. 2d at 195, 46 Cal. Rptr. at 686 (stating that "when a third person becomes aware of danger, or should, if he acted reasonably, be aware of it, a defendant has a right to assume that he will act reasonably and will not be held liable for the intervening act").

\textsuperscript{55} 15 Cal. 3d at 47, 539 P.2d at 40, 123 Cal. Rptr. at 472 (emphasis added).
autonomously negligent conduct. Such conduct should operate to break the chain of causation and leave the defendant owing a duty only to plaintiffs who directly contract the disease from him, with the possible exception that he would remain liable to the known spouse of a sexual partner.

b. Certainty of Injury

The Rowland court required that courts analyze the degree of certainty that the plaintiff suffered an injury. Although it might be suggested that genital herpes is nothing more than cold sores in the wrong place, the weight of authority is to the contrary. The ulcerations which are symptomatic of genital herpes may be painful, prolonged, and subject to frequent recurrence. The psychosexual disruption that accompanies genital herpes may be associated with lifelong alterations in social and sexual behavior and may result in severe depression.

Women are subject to additional concerns. Those infected with genital herpes are at least six times more likely to develop cervical cancer than the general female population. Pregnant women who develop genital herpes are two to three times more likely to suffer spontaneous abortions or premature delivery, and infants who contract the virus during delivery have a mortality rate of sixty-five percent. One half of those who survive suffer from mental retardation and/or blindness. Although genital herpes is rarely fatal to adults, it may have a devastating effect upon their physical, social, and mental well-being.

Courts are further directed by the Rowland decision to establish the closeness of the connection between the defendant’s conduct and the injury suffered. Dr. Richard Hamilton, a specialist in the treat-

56. Although liability for the contraction of genital herpes should be imposed upon a defendant only in regard to a plaintiff who directly contracts the disease from him, a defendant may also owe a duty to a plaintiff’s spouse for loss of consortium or infliction of emotional distress. See infra notes 93-99 and accompanying text.
57. See infra notes 93-100 and accompanying text.
58. See Leo, supra note 1, at 65.
59. See Sexually Transmitted Diseases, supra note 1, at 135.
60. See R. Hamilton, supra note 4, at 112.
61. See Sexually Transmitted Diseases, supra note 1, at 136.
62. See R. Hamilton, supra note 4, at 10-11. As herpes is highly infectious, it is easily spread by autoinoculation. If transferred to the face, in a small number of cases it may travel to the brain and result in herpes encephalitis—a potentially fatal disease. See id. at 119-23. Additionally a common problem complicating kidney transplants is that antirejection treatment reactivates the herpes virus. Unopposed by immune factors, the virus is able to become a rapidly escalating general infection which may prove fatal. See id. at 124-26.
ment of sexual disorders, states that "[s]ince the virus is transmissible only when lesions are present, those wishing not to spread [herpes] need only curtail direct contact during times of active outbreaks." If a defendant fails to curtail such contact and the plaintiff thereby contracts the disease, the defendant’s conduct is directly connected with the plaintiff’s injury.

Such conduct on the part of the defendant is also morally blameworthy. There is a right of all people to be secure in their health and safety, and a defendant who transmits genital herpes to another has acted in a manner indicating a reckless disregard of the rights of another. His conduct should be viewed by the courts as being morally reprehensible.

c. Community Considerations

Courts should also look at the policy of preventing future harm. Genital herpes is epidemic and, in order to prevent further spread of the disease, infected parties must be discouraged from engaging in conduct which results in its transmission. The recognition of a legal duty to abstain from sexual activity during an active outbreak of genital herpes and resultant liability for breach of such duty would undoubtedly "chill" such conduct. Not to recognize such a duty would have the opposite effect. As Justice Garst noted in Harris v. Trojan Fireworks, "[W]hen one is rendered immune from the natural and foreseeable consequence of his conduct, a substantial incentive to act in a responsible manner is removed." It is imperative, therefore, that the courts impose a duty upon one who has a contagious outbreak of genital herpes to act in a responsible manner so as to not cause injury to another.

The courts should also balance the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise due care. Although abstention from sexual activity during an outbreak of genital herpes is not an insubstantial burden

63. Id. at 9. See supra note 35. The American Social Health Association suggests a similar rule. They state that "[w]hen any sign of recurrence is noticed—itching, burning, tingling, or sores—one should prevent the affected area from coming in contact with another person." See Questions and Answers, supra note 5.


65. Dr. Hamilton states that "[s]ince each new person with recurrent herpes is able to infect any number of others, the unchecked epidemic will grow in a geometric fashion, continually broadening its base and growing ever more rapidly." R. HAMILTON, supra note 4, at 25.


67. Id. at 177, 174 Cal. Rptr. at 464 (Garst, J., concurring).
to a defendant, the benefit to the community in protecting and preserving the health and safety of its citizens far outweighs the burden imposed upon a contagious defendant.

The recognition of a cause of action based upon the transmission of genital herpes might result in a burden to the community in that the courts will be inundated by a flood of litigation. However, this is not likely to result for several reasons. It is suggested that liability be delimited so as to impose a duty upon the defendant only in regard to those plaintiffs who directly contract the disease from him. Furthermore, there will remain a great deal of personal reticence on the part of plaintiffs to bring suits whereby the most intimate details of their private lives would be subjected to public scrutiny. Likewise, the difficulty of proving the allegation is another factor which will substantially curtail any possible flood of litigation.\(^6\)

The recognition of a cause of action based on the negligent infliction of genital herpes also carries with it the possibility of abuse and the potentiality of fraudulent claims. The California Supreme Court addressed this issue in *Dillon v. Legg*\(^6\) and emphasized that compensation should not be denied to those who have actually suffered serious injury through the negligence of another merely because of the possibility of encouraging fictitious claims.\(^7\) It was noted that courts have a basic responsibility to decide the merits of each individual case, rather than to sweep away a class of cases "using the broad broom of 'administrative convenience'. . ."\(^1\) The last factor suggested by the *Rowland* court is the availability, cost, and prevalence of insurance. The California Supreme Court in *Coulter v. Superior Court*\(^7\) seemingly dismissed the importance of this consideration in a passing remark. The court noted that insurance coverage, although increasingly costly, would doubtlessly be made available by insurance companies to protect defendants upon whom liability was imposed.\(^7\) Likewise, insurance may be made available for herpes sufferers if liability is imposed upon those who transmit

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\(^6\) By its very nature, the transmission of genital herpes does not often lend itself to eyewitness accounts. A plaintiff who has had a number of sexual partners may find it difficult to convince a jury that he is suffering from an initial contraction of the disease and not a recurrence. A sexually promiscuous plaintiff will find it difficult to show that a particular defendant was the party who infected him with genital herpes.

\(^7\) 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

\(^1\) *Id.* at 736, 441 P.2d at 918, 69 Cal. Rptr. at 78.

\(^7\) 72. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

\(^7\) 73. *Id.* at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539.
genital herpes.

The answer to the criteria enunciated in *Rowland* indicates that an exception should not be made to the expression of public policy favoring compensation to victims of negligent acts found in section 1714 of the California Civil Code. An analysis of additional California statutes provides a further basis for imposing liability upon a defendant who infects another with genital herpes.

2. *Statutory Support*

A presumption of negligence arises in California when a statute is violated. Section 3353 of the Health and Safety Code provides that "any persons afflicted with any contagious, infectious, or communicable disease who wilfully exposes himself [to another] . . . is guilty of a misdemeanor." Since genital herpes is contagious, infectious, and communicable, a defendant who engages in sexual activity during an active outbreak of the disease exposes himself to another.

The statute requires, however, that such exposure be wilful. Wilful misconduct in civil actions traditionally required that a defendant have actual or constructive knowledge of both the danger to be apprehended and the probability that such peril would result in injury. He must have then failed to act in a manner so as to avoid the danger. It would appear that a defendant with an infectious outbreak of genital herpes would have at least constructive knowledge of the peril involved as well as knowledge of the high probability that sexual activity would result in the transmission of the disease. In disregarding this knowledge and persisting in sexual conduct, his action would be wilful.

A violation of section 3353 can directly result in a plaintiff contracting herpes. The transmission of this contagious disease is exactly the type of injury which the statute was designed to prevent as the section comes under the heading of Communicable Disease Prevention. Furthermore, a person suffering the injury is a member of the class which the statute was adopted to protect as the primary pur-

74. Section 669 of the California Evidence Code provides: "The failure of a person to exercise due care is presumed if . . . [h]e violated a statute . . .; [t]he violation proximately cause[d] . . . [a]n injury . . . which the statute . . . was designed to prevent; and . . . [t]he person suffering . . . the injury . . . was one of the class of persons for whose protection the statute . . . was adopted." CAL. EVID. CODE § 669 (West Supp. 1983). See Holdych, *The Presumption of Negligence Rule in California: The Common Law and Evidence Code Section 669, 11 FAC. L.J. 907 (1980).

75. CAL. HEALTH & SAFETY CODE § 3353 (West 1979) (emphasis added).

pose of the Health and Safety Code is "the preservation of the public health and safety, including the health and safety of persons . . . ." It appears, therefore, that both common law principles and section 3353 indicate that a duty should be imposed upon a defendant to abstain from sexual contact with another when he has a contagious outbreak of genital herpes.

B. Assault and Battery: An Offensive Touching Absent Effective Consent

A cause of action for the contraction of genital herpes may also lie in battery. A civil battery action may be brought upon a showing that the defendant acted with wanton, wilful, or reckless disregard of a plaintiff's rights. Courts have recognized, however, that intent is the essential element of the offense when the offensive touching occurs in the course of an otherwise lawful act. When a party actually intends to transmit genital herpes to another, he commits a battery upon that person.

Intent may also be inferred in that every person is presumed to intend the natural and probable consequences of his acts. The Delaware appellate court in State v. Lankford, finding a completed battery, stated that 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 . . ."

78. The California legislature has indicated a specific concern regarding the transmission of venereal disease. Section 3198 of the Health and Safety Code provides that any person who "exposes any person or infects any person with any venereal disease; or any person infected with a venereal disease in an infectious state who knows of such a condition and who . . . has sexual intercourse, is guilty of a misdemeanor." Cal. Health & Safety Code § 3198 (West 1979). Technically, genital herpes is a form of venereal disease and the term is being replaced by the more accurate one of "sexually transmissible disease." See R. Hamilton, supra note 4, at 184. On its face, section 3198 would appear to raise a presumption of negligence on the part of a defendant who infected another with genital herpes.

Herpes, however, did not become a source of public health concern until 1965. See R. Hamilton, supra note 4, at 26. In 1957 the legislature defined venereal disease. Cal. Health & Safety Code § 3001 (West 1979). Although the definition does not include genital herpes, the fact that herpes was not a health concern at the time the statute was passed indicates that the legislature did not specifically intend to exclude it from the definition. Therefore, the broader § 3353 should apply with additional force since there is evidence of legislative intent to halt the spread of sexually transmittable diseases.

80. Id.
81. See Leo, supra note 1, at 64 (indicating that persons may actively seek to transmit the disease).
83. 29 Del. 594, 103 A. 63 (1917).
may be inferred from the actual results.”

Consent is a defense to an allegation of battery, and a defendant may argue that the plaintiff consented to the sexual intercourse which constituted the touching. However, where the plaintiff did not have knowledge of the defendant’s infectious state, it does not follow that in consenting to intercourse the plaintiff also consented to being infected with genital herpes.

When a defendant has an active outbreak of herpes, the probability that he will transmit the disease is extremely high. The inherent risk involved in the sex act under such circumstances must be made known to potential partners in order that they may make an informed decision as to whether they shall proceed in sexual relations with the defendant. If the defendant fails to divulge this risk, he has failed to obtain effective consent and is liable in battery.

C. Fraudulent Deceit: A Wilful Deception

If the elements of fraud can be maintained, an action may be brought for deceit. Section 1709 of the California Civil Code provides that “[o]ne who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers.”

One who enters into a sexual relationship knowing, and without disclosing, that he has a contagious outbreak of genital herpes, deceives the other person and seeks through his silence to induce the other to place himself in a position involving the risk of injury. The law requires disclosure of information when the parties are in a confidential relationship. Such a legal relationship exists between a

84. *Id.* at 596, 103 A. at 64.
85. Prosser, in illustrating effective consent, states that a plaintiff who willingly engages in a boxing match consents to a defendant striking him; however, he does not consent to being hit with brass knuckles which is the same invasion by an act of a different character. *See W. Prosser, supra* note 17, at 103.
86. *See generally 34 CAL. JUR. 3d Fraud and Deceit § 4 (1977).*

[T]o establish a cause of action for fraud or deceit based on misrepresentation . . . the plaintiff must show that the representation was as to a material fact; that it was false and known to be false by the party making it or else made recklessly, or without reasonable grounds for believing its truth; that the representation was made with [the] intent to induce the other party to do or refrain from doing . . . some act; that it was relied upon by the other party, . . . [who] was ignorant of the falsity of the representation and reasonably believed it to be true; and that he thereby suffered . . . injury.

*Id.* at § 6.
87. CAL. CIV. CODE § 1709 (West 1973).
88. *See CAL. CIV. CODE § 1710 (West 1973).* Section 1710 provides that deceit may be
husband and wife, but not between parties who have no other special relationship.\textsuperscript{89} Silence, therefore, may support an allegation of fraudulent concealment in cases involving spouses, but not where a marital relationship does not exist.\textsuperscript{90}

Where a person untruthfully and affirmatively assures another that he does not have a contagious outbreak of genital herpes, a more classic case of misrepresentation may arise. A person who has an infectious case of genital herpes is unlikely to have any grounds to believe that he is free of contagious infection due to the character of the disease.\textsuperscript{91} Furthermore, courts will most likely find that knowledge of the existence of contagious genital herpes in another is a material fact in determining whether one will engage in sexual relations. If the plaintiff can establish that he relied upon an affirmative misrepresentation and thereby suffered injury, the defendant should be found liable for fraudulent deceit.\textsuperscript{92}

\textquotedblleft[t]he suppression of a fact, by one who is bound to disclose it . . . .	extquotedblright\ Id. (emphasis added). \textit{See 34 CAL. JUR. 3d Fraud and Deceit \S 27 (1977) (enumerating examples of relationships giving rise to such a duty).}

\textsuperscript{89.} \textit{Id.}

\textsuperscript{90.} Prosser states that \textquoteright\textquoteleft\text{there has been a rather amorphous tendency on the part of most courts to find a duty of disclosure in cases where the defendant has special knowledge . . . not [available] to the plaintiff . . . .}' W. \textsc{Prosser}, \textit{supra} note 17, at 697. In a case of genital herpes, however, an inspection of a partner's genitals would generally reveal the presence of infection.

\textsuperscript{91.} \textit{See supra} note 51.

\textsuperscript{92.} In Stephen K. v. Roni L., 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980), the court refused to impose liability for misrepresentation upon an unwed mother who had falsely represented to the child's father that she was taking birth control pills. The court held that \textquoteleft\textquoteleft\text{as a matter of public policy the practice of birth control . . . is best left to the individuals involved, free from any governmental interference.}' \textit{Id.} at 645, 164 Cal. Rptr. at 621 (emphasis added). The court appears to rely upon the fact that birth of a child is the natural result of consensual sexual intercourse and it also recognized that requiring the mother to pay monetary damages may have the effect of reducing her financial ability to support the child. \textit{Id.} at 643, 164 Cal. Rptr. at 619.

The \textit{Roni} holding should be limited to cases regarding a misrepresentation as to contraceptive measures taken. The public policy issues supporting this holding are not applicable to cases where a defendant transfers genital herpes to a plaintiff. The contraction of an incurable disease is not the natural result of sexual activity. Furthermore, the potential detrimental effects to an innocent third party of imposing liability upon the defendant are not present.

The court in Kathleen K. v. Robert B., in reversing a lower court decision dismissing a cause of action based on the transmission of genital herpes, stated that public policy considerations regarding parental obligations were absent from such a case and thus dismissed the \textit{Roni} rationale. The court in a unanimous opinion stated that \textquoteleft\textquoteleft\text{[t]he right of privacy is not absolute, and in some cases is subordinate to the state's fundamental right to enact laws which promote public health, welfare, and safety, even though such laws may invade the offender's right of privacy.}' 150 Cal. App 3d 992, 198 Cal. Rptr. 273 (1984). \textit{See supra} note 7.
D. Loss of Consortium: A Spouse's Right to Protection of the Marital Relationship

In *Rodriquez v. Bethlehem Steel Corp.*, the California Supreme Court held that a spouse has a cause of action for loss of consortium against a defendant who negligently or intentionally injured the other spouse. Using a foreseeability analysis, it found that one who negligently injures an adult should statistically expect that the injured person is married and thus foresee that a spouse will be adversely affected by the injury. This element of marital foreseeability, however, does not carry over to the population engaging in sexual relations with parties to whom they are not married and the likelihood that such parties are single is substantial. It is thus unreasonable to impose liability for loss of consortium upon a defendant who does not know that his sexual partner is married. However, where there is knowledge of a marital relationship, a defendant should reasonably anticipate resulting harm to the spouse and should be held liable to that party.

The court in *Molien v. Kaiser* found that either physical injury or an impairment of a spouse's mental health could result in the loss of companionship, affection, and sexual enjoyment. Injury to a spouse, however, must be sufficiently serious and disabling to raise the inference that the conjugal relationship is more than superficially or temporarily impaired.

Genital herpes is an incurable, lifelong disease, subject to unpredictable recurrence. It is, furthermore, necessary to refrain from engaging in sexual activity during all periods of active outbreak to insure against transmitting the disease to one's spouse. A total deprivation of a spouse's right to sexual enjoyment may also occur in that either sex may reject sexual behavior upon contracting genital herpes. The disease, therefore, may result in periodic or permanent impairment of sexual-marital functions. Additionally, an infected party may suffer severe depression resulting in a loss to the spouse of companionship, affection, society, and moral support.

Whether the degree of harm suffered by a plaintiff's spouse is

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94. Id. at 400, 525 P.2d at 680, 115 Cal. Rptr. at 776.
95. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (holding that the spouse of a patient misdiagnosed as having a venereal disease could maintain an action against the diagnosing hospital when such a diagnosis resulted in a break down of his marriage).
96. See id. at 932-33, 616 P.2d at 823, 167 Cal. Rptr. at 841.
97. E.g., Leo, supra note 1, at 62-66.
98. Id.
sufficiently severe so as to give rise to a cause of action for loss of consortium is a matter of proof. Under the requisite facts and circumstances, however, a spouse should be able to maintain an action for such loss in his own right.

E. Infliction of Emotional Distress: A Spouse's Right to Mental and Emotional Tranquility

When a defendant has knowledge that a plaintiff is married and, nevertheless, infects him with genital herpes, a cause of action may arise in the non-infected spouse for the infliction of emotional distress. The Molien court, finding that a physician could be held liable for the erroneous diagnosis of syphilis, held that the defendant's tortious conduct was directed to the spouse as well as to the plaintiff. The California Supreme Court stated that it was predictable that an erroneous diagnosis of such a disease would produce marital discord and emotional distress to the spouse.99

One who transmits genital herpes to a married person may, likewise, predict with relative certainty that transmission will result in anxiety, suspicion, and hostility in the marital relationship.100 As genital herpes is normally transmitted through sexual relations, its occurrence is a strong indication of marital infidelity. Such a revelation may lead to a severe disruption, or even dissolution, of a marriage resulting in foreseeable emotional distress to the innocent spouse. Whether the defendant's conduct actually caused such distress depends upon the facts of each individual case. If the circumstances warrant, a spouse should be able to maintain a cause of action for the infliction of emotional distress.

V. CONCLUSION

The novelty of a case should not operate to defeat recovery if general tort principles are applicable. The common law has long recognized that an action lies against one who infects another with a contagious or infectious disease. Although, initially, spousal immunity, contributory negligence, and assumption of the risk operated to preclude recovery in cases involving sexually transmitted disease, these doctrines have been abrogated in California. In addition, the

99. 27 Cal. 3d at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.
100. See Leo, supra note 1, at 63-64. The author of The New Scarlet Letter writes that "[i]n a monogamous relationship, the unsuspecting person who picks up herpes from a partner is hit with a double whammy: evidence of betrayal and a lifelong disease as a momento of the event." Id.
sexual revolution of the sixties has provided a social climate more conducive to the bringing of such actions.

The imposition of a duty to abstain from sexual relations when one has a contagious outbreak of genital herpes is supported by both common law and statutory principles. The Rowland court indicated that an injured plaintiff should be allowed a remedy unless recovery was clearly against public policy. The considerations enumerated in Rowland strongly suggest that liability should be imposed upon a defendant who transmits genital herpes. Section 3353 of the Health and Safety Code, likewise, establishes a standard of due care to not expose another to contagious disease. Furthermore, by finding a duty to abstain from sexual conduct during periods of active outbreak, the court will not only provide a remedy for injured citizens, but will also curtail the rapid spread of genital herpes.

Whether a plaintiff brings suit in negligence, battery, or deceit will depend upon the facts of the case. Whether there is a cause of action for loss of consortium or infliction of emotional distress on the part of a plaintiff's spouse is also dependent upon the circumstances. Nevertheless, these causes of action should be recognized by the California courts, and the jury, as fact finder, should determine the merits of each individual case. A plaintiff who contracts genital herpes from a defendant should be allowed to seek a remedy for the permanent injury which he has sustained, and society should be assured that a defendant who threatens one's health and safety will be held liable for the injury which he has caused.

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