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Blood Donation: A Gift of Life or a Death Sentence?

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Dieringer: A Gift of Life or a Death Sentence?
**BLOOD DONATION: A GIFT OF LIFE
OR
A DEATH SENTENCE?**

INTRODUCTION

Acquired Immune Deficiency Syndrome (AIDS)¹ is a fear-provoking disease.² If diagnosed today, an AIDS victim can anticipate an onslaught of opportunistic infections³ that continually assault the body.⁴ Additionally, the mind may often be affected by progressive dementia⁵ which can occur with or without other physical manifestations.⁶ Death follows.⁷ The expected mortality rate⁸ for AIDS is one hundred percent.⁹ Because of this, some members of the medical profession have suggested a quick and painless means of death should be available as an alternative to the lengthy and agonizing illness which is inevitable for AIDS victims.¹⁰ "Dr. Stephen Yamell, a homosexual psychiatrist with AIDS, publicly argues that AIDS victims should commit suicide."¹¹

Anyone who has AIDS is a victim. If AIDS produces a victim then who is the perpetrator? AIDS can be transmitted through intimate sexual contact, by sharing contaminated needles, via infected blood or blood products, and through passage of the virus from infected mothers to their newborns.¹² This comment will concentrate

¹ Comment, *The Constitutional Implications of Mandatory Testing For Acquired Immunodeficiency Syndrome--AIDS*, 37 EMORY L.J. 217 (LEXIS 7) (Winter 1988). On August 1, 1985, the Center for Disease Control in Atlanta promulgated a definition of the disease that had become known as the Acquired Immune Deficiency Syndrome:

- 1) One or more of the opportunistic diseases . . . (diagnosed by methods considered reliable) and are at least moderately indicative of underlying cellular immune deficiency, and
- 2) Absence of all the underlying causes of cellular immunodeficiency (other than HTLV-III-LAV infection) and absence of all other causes of reduced resistance reported to be associated with at least one of those opportunistic diseases.

² Cleary, *Education and the Prevention of AIDS*, 16:3-4 LAW, MEDICINE AND HEALTH CARE 267, 270 (1988).

³ Comment, *supra* note 1, at LEXIS 3-4. Opportunistic Diseases: Terminal illnesses of AIDS victims. Pneumocystis Carinii Pneumonia which is a rare and virulent pulmonary disease caused by a protozoan parasite commonly found in the environment to which exposure to healthy individuals with normal immune systems has no serious consequences and Kaposi's Sarcoma which is an unusually rare cancer of the small blood vessels of the skin detected in young immunodeficient males but typically found in old men of Jewish or Mediterranean-Italian descent. *Id.*

⁴ Harris, *AIDS and the Future*, 4:2 ISSUES IN LAW AND MEDICINE 141, 145 (1988).

⁵ BLACK'S LAW DICTIONARY 387 (5th ed. 1979). Dementia: Form of mental disorder in which cognitive and intellectual functions of the mind are prominently affected; impairment of memory is early sign; total recovery not possible since organic cerebral disease is involved. *Id.*

⁶ Harris, *supra* note 4.

⁷ Weber, *AIDS and Constitutional Issues*, 14 WM. MITCHELL L. REV 575, 583 (1988).

⁸ BLACK'S LAW DICTIONARY 910 (5th ed. 1979). Mortality rate: The relative incidence of death. *Id.*

⁹ Weber, *supra* note 7.

¹⁰ Harris, *supra* note 4.

¹¹ *Id.*

¹² Weber, *supra* note 7, at 588.

on transmission through infected blood or blood products, and the blood donor. The discussion will focus on the civil and criminal liabilities of a blood donor with the AIDS virus.

However, to thoroughly understand the AIDS-infected blood donor issue and subsequent liabilities, it is imperative to understand AIDS, the disease, as well as the evolution of blood donation procedures in the United States since mid-1981.

PART I

AIDS, THE DISEASE

AIDS is the name given to a complex of health problems first reported in mid-1981 to the Center for Disease Control.¹³ AIDS is a viral disease in which persons afflicted suffer a loss of natural immunity against disease.¹⁴ This leaves the AIDS patient vulnerable to many more infections or malignancies, called opportunistic diseases, that would not otherwise be a threat.¹⁵ These opportunistic diseases eventually kill AIDS patients.¹⁶

Much of the body's immune system is located in the white blood cells, (i.e. lymphocytes).¹⁷ Lymphocytes are composed of T-cells and B-cells, the special white blood cells which jointly produce the anti-body protein that identifies and begins to destroy disease-causing organisms.¹⁸ In the discovery of the first opportunistic diseases, pneumocystis carinii pneumonia¹⁹ and Kaposi's sarcoma,²⁰ the condition was characterized by a lack of the T-4 helper cells which are essential to mounting proper immunological response.²¹ The victims of these diseases were previously healthy individuals who developed the syndrome of infection with no identifiable cause.²² One common trait of the victims was that they all were sexually active homosexual males.²³ As the number of cases increased, other identified populations "at risk" were: intravenous drug users, prostitutes, and hemophiliac patients.²⁴

¹³ Weber, *supra* note 7, at 576.

¹⁴ Weber, *supra* note 7, at 577.

¹⁵ *Id.* at 577 (citing Public Health Service, *The Public Health Response to AIDS*, 1985 AIDS INFORMATION BULL. (Nov.). Patients usually died within eighteen months of diagnosis. They suffered from a variety of physical symptoms including persistent fever, diarrhea, night sweats, dry cough, and mental deterioration.

¹⁶ Weber, *supra* note 7, at 577.

¹⁷ Comment, *supra* note 1, at LEXIS 6.

¹⁸ *Id.*

¹⁹ See *supra* note 3.

²⁰ *Id.*

²¹ Comment, *supra* note 1, at LEXIS 6.

²² Weber, *supra* note 7, at 578.

²³ *Id.*

²⁴ *Id.* (citing Center for Disease Control, *Up-date on Acquired Immune Deficiency Syndrome (AIDS)-United States*, 31 MMWR 507 (1982).

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In 1983, researchers identified the causative agent of AIDS, a retrovirus, which in May of 1986 became known as human immunodeficiency virus (HIV).²⁵

Once the HIV virus was discovered, researchers reported a range of effects of the AIDS agent, from symptomless carriers (seropositive), to Aids-related complex (ARC), to a severe life-threatening disease (AIDS).²⁶ These three diseases are characterized and identified dependent on gradations of clinical symptoms and disorders.²⁷

AIDS

The fatal phase of the disease is full-blown AIDS and is characterized by life-threatening conditions.²⁸ Opportunistic diseases and a positive test for HIV antibodies form a diagnosis.²⁹ The life-expectancy of an AIDS victim is about one year and 90% of those who contract AIDS die within two years.³⁰ By December of 1987, there were nearly 47,000 cases of AIDS reported to the Center for Disease Control in the United States.³¹ Ninety percent of the cases were in young adults between twenty and forty-nine and the population encompassed all racial and ethnic groups.³²

AIDS-Related Complex (ARC)

ARC is a lesser form of AIDS; it is infectious, but not life threatening.³³ The signs and symptoms include generalized enlarged lymph nodes, unintentional weight loss, fever, chronic diarrhea, and immunologic abnormalities characteristic of AIDS.³⁴ Individuals with ARC stand a significant chance of developing AIDS.³⁵ Over a period of two to four years, approximately one out of four ARC patients develop full-blown AIDS.³⁶ The general consensus is that all ARC patients will eventually develop full-blown AIDS and die.³⁷

²⁵ Weber, *supra* note 7, at 580-81 (citing Center for Disease Control, *Antibodies to a Retrovirus Etiologically Associated with Acquired Immunodeficiency Syndrome in Populations with Increased Incidence of the Syndrome*, 33 MMWR 377 (1984)). French researchers at the Pasteur Institute in Paris and at the National Cancer Institute independently identified the causative agent in 1983 and 1984, respectively. The French called it LAV and the Americans HTLV-III. The Executive Committee of the International Committee on Taxonomy of Viruses recommended use of name HIV or human immunodeficiency virus to replace LAV and HTLV-III.

²⁶ Weber, *supra* note 7, at 582.

²⁷ *Id.* at 583 (citing FDA Drug Bull. at 1 (Oct. 1985)).

²⁸ *Id.*

²⁹ Weber, *supra* note 7, at 583.

³⁰ *Id.* (citing Peterman, *Transfusion-Associated Acquired Immunodeficiency Syndrome*, 11 WORLD J. SURGERY 36 (Feb. 1987)).

³¹ Weber, *supra* note 7, at 582. (Citing FDA Drug Bull., Oct. 1985 at 1).

³² Weber, *supra* note 7, at 584.

³³ *Id.*

³⁴ Comment, *supra* note 1, at LEXIS 9-10.

³⁵ Calabrese, *A Guide For Living With the AIDS Virus*, CLEVELAND CLINIC FOUNDATION 6 (1988).

³⁶ *Id.*

³⁷ Weber, *supra* note 7, at 585 (citing Weller, *From Persistent Generalized Lymphadenopathy to AIDS: Who Will Progress?*, 294 BR. MED. J. 868 (1987)).

Seropositive

The largest group of individuals infected with the virus are asymptomatic carriers.³⁸ Although these individuals carry a lifelong infection with the virus in the blood stream, and other body fluids they appear totally healthy.³⁹ Preliminary studies indicate that up to ten percent of seropositive individuals may eventually develop full-blown AIDS within two years of diagnosis.⁴⁰ All seropositive individuals are capable of transmitting the disease.⁴¹ Between one and two million people in this country are seropositive, including almost one hundred percent of those with full-blown AIDS and over ninety percent of those with ARC. There are three serious implications of such prevalent seropositivity: (1) the virus may continue to destroy the immune system of seropositive persons and evolve into full-blown AIDS; (2) individuals are infectious and though asymptomatic, transmit HIV to others through sexual contact or blood; and (3) because of the poor antibody production and the mutating properties of the virus, prospects of an effective vaccine are poor.⁴²

Transmission

AIDS is not easily communicated. Transmission occurs through intimate sexual contact (both heterosexual and homosexual), by sharing contaminated needles, via infected blood products, and from infected mothers to their newborns.⁴³

More than 22,000 cases of AIDS have been reported in the United States.⁴⁴ For every patient with AIDS, there are probably six or seven with ARC; and for every patient with ARC, there are probably sixty to seventy seropositive healthy carriers.⁴⁵ Of the one to two million people in the United States now infected with the virus, researchers estimate that five to thirty percent will develop AIDS over the next five to seven years.⁴⁶ The remaining seventy to ninety-five percent, who may be totally asymptomatic, are assumed equally infectious through sexual or blood-borne routes.⁴⁷ Because seventy-three percent of those infected are homosexual/bisexual men, the virus is most frequently spread through sexual contact.⁴⁸

³⁸ Calabrese, *supra* note 30.

³⁹ *Id.*

⁴⁰ Comment, *supra* note 1, at LEXIS 10.

⁴¹ *Id.* at 11

⁴² *Id.* (citing Leonard H. Calabrese, D.O., Head of the Department of Rheumatic and Immunologic Disease Section of Clinical Immunology at the Cleveland Clinic).

⁴³ Weber, *supra* note 7, at 588.

⁴⁴ Comment, *supra* note 1, at LEXIS 11.

⁴⁵ *Id.*

⁴⁶ Weber, *supra* note 7, at 586-87 (citing Curran, Morgan, Hardy, Jaffe, Darrow, & Dowdle, *The Epidemiology of AIDS: Current Status and Future Prospects*, 229 SCIENCE 1352, 1355 (1985)) (exploring the possibility that HIV may be present in the Hepatitis B Vaccine).

⁴⁷ Comment, *supra* note 1, at LEXIS 12 (citing Leonard H. Calabrese, D.O., Head of Department of Rheumatic and Immunologic Diseases Section of Clinical Immunology at the Cleveland Clinic).

⁴⁸ Weber, *supra* note 7, at 588.

However, this comment will focus on the one percent of AIDS cases associated with receipt of blood transfusions.⁴⁹ Transmission via blood transfusions has been rare considering that three million patients receive blood every year.⁵⁰ Another 1% of the AIDS patients have hemophilia, a condition manifested by a deficiency in factor VIII, a blood clotting mechanism.⁵¹ This deficiency is treated with a blood product made from plasma pools collected from thousands of donors which greatly increases the risk of acquiring AIDS.⁵² The period between contact and becoming seropositive is between six weeks to six months.⁵³ Therefore, an infected person may be asymptomatic, either never tested and totally unaware of the infection or tested before the incubation period thereby receiving a false negative.

The remainder of this comment will concentrate on the above two percent of AIDS cases transmitted by blood or blood products. A thorough historical discussion of the blood donor system in the United States, beginning with the discovery of the AIDS epidemic, assists the courts in the decisions of subsequent litigation and may be helpful in our subsequent analysis of civil and criminal liabilities.

PART II

HISTORICAL BACKGROUND: BLOOD DONATION

Although the first cases of AIDS were diagnosed in June-July of 1981, it was not until July of 1982 that opportunistic diseases were diagnosed in hemophiliacs.⁵⁴ This raised the possibility that AIDS might be blood borne.⁵⁵ On July 27, 1982, a meeting of the Public Health Service Committee on opportunistic infection in patients with hemophilia included representatives from the following: the Center for Disease Control, the National Institutes of Health, the Food and Drug Administration, the American Association of Blood Bankers, the National Gay Task Force and other blood banking and public health organizations.⁵⁶ Although no recommendations were developed, its report indicated that AIDS may be transmitted via blood products.⁵⁷ In December of 1982 the Center for Disease Control reported a case of "Possible Transfusion-Associated AIDS" in California.⁵⁸ Because the case involved an infant who received blood platelets, and did not fit any of the previously noted high risk categories, the possibility of transmission by transfusion became the

⁴⁹ *Id.* (citing Center on Disease Control, *Up-date: Acquired Immunodeficiency Syndrome (AIDS)-United States*, 32 *MMWR* 465 (1983)).

⁵⁰ Weber, *supra* note 7, at 588.

⁵¹ *Id.*

⁵² *Id.* (citing Council on Scientific Affairs, *The Acquired Immunodeficiency Syndrome-Commentary*, 252 *J.A.M.A.* 2037 (1984)). This is accomplished by the exchange of body fluids, such as semen and blood.

⁵³ Weber, *supra* note 7, at 586.

⁵⁴ Comment, *supra* note 29, at LEXIS 13.

⁵⁵ *Id.*

⁵⁶ *Kozup v. Georgetown University*, 663 F. Supp. 1048, 1051 (D.D.C. 1987).

⁵⁷ *Id.*

⁵⁸ *Id.*

focus of the medical community's attention.⁵⁹ In January, 1983, a work group to identify opportunities for prevention of AIDS was convened, consisting of a similar representation as the hemophiliac meeting in 1982.⁶⁰ As of the meeting date, January 4, 1983, there were five reported cases of AIDS among hemophiliacs, one related to blood transfusion, and four related to blood products.⁶¹ At the meeting, it was the consensus that individuals who were members of "high risk" groups should not donate blood; however, no method was developed to achieve this end. The work group discussed the possibility of screening out male homosexuals but rejected that procedure as too "intrusive, unethical, and too prone to prejudice or persecution."⁶² The Public Health committee resolved to issue recommendations as soon as possible.⁶³

On January 13, 1983, the ARC, the American Association of Blood Bankers, and the Council of Community Blood Banks issued a "Joint Statement on AIDS Related to Transfusion."⁶⁴ The "joint statement" suggested that donor screening should include questions designed to elicit a history of night sweating, unexplained fever, unexpected weight loss, lymphadenopathy, or Kaposi's sarcoma.⁶⁵ The statement *did not* advise routine laboratory screening and explicitly stated "direct or indirect questions about a donor's sexual preference are inappropriate."⁶⁶ In March 1983, both the Public Health Service Committee and the Bureau of Biologics of the Food and Drug Administration issued their recommendations for donor screening.⁶⁷ Both recommended that before donating blood, donors be given pamphlets describing high risk groups and be given the option to self-screen and to voluntarily refuse to donate with no explanation.⁶⁸

It was not until 1984 that the medical community finally concluded that AIDS was transmissible by blood.⁶⁹ In April 1984, scientists identified the virus HIV as the cause of AIDS.⁷⁰ By May 1985, a test was developed to screen for the antibodies sensitive to the HIV virus.⁷¹ The Enzyme-linked Immunosorbent Assay (ELISA) has proven 98.6% effective in detecting exposure to AIDS.⁷² The test does not detect the virus directly, but rather detects a natural protein of our immune system created

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 1051-52.

⁶² *Kozup*, 663 F. Supp. at 1052.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Kirkendall v. Harbor Insurance Company*, 698 F. Supp. 768, (LEXIS 12216) (W.D.A.K. Oct. 21, 1988) (citing 23 TRANSFUSION, March-April 1983 at 87-88); *Kozup v. Georgetown University*, 663 F. Supp. 1048, 1052 (1987).

⁷⁰ *Kozup*, 663 F. Supp. at 1052.

⁷¹ *Id.*

⁷² *Id.* at 1052-53.

to attack the virus.⁷³ The ELISA is a highly sensitive test for detecting the antibody, but because it lacks total specificity it may give a false-positive.⁷⁴ However, when coupled with a second test, the Western Blot Analysis, the rate of detection for exposure to AIDS rises to 100%.⁷⁵

A patient who receives a blood product containing the HIV virus will likely develop AIDS.⁷⁶ As of April 6, 1987, 33,644 Americans have developed AIDS from blood transfusions.⁷⁷ In virtually all such cases the transfusion occurred before March 15, 1985, when the FDA licensed companies to sell ELISA and testing was subsequently completed on all donated blood.⁷⁸

A negative result on these tests cannot absolutely rule out infection.⁷⁹ Some authorities feel the test itself may not be sufficiently sensitive to detect all instances of HIV infection.⁸⁰ Medical experts know that some strains of the virus are different from others and that the ELISA is not responsive to all strains.⁸¹ Additionally, there is an interval of infectivity following exposure to the virus before a sufficient number of antibodies develop to result in a positive reaction on the ELISA or Western Blot.⁸² Failure to detect individuals occurs in the following situations: (1) during the period of early infection because it takes from two to twenty-six weeks to develop the antibody after infection, (2) in those very few infected individuals who seem incapable of developing antibodies that are readily detectable by currently used methods, and (3) late in the course of infection, usually an individual with severe AIDS, because it is common that individuals stop making detectable specific antibodies.⁸³ This "window" of infectivity without seroactivity may become a crucial factor in allowing dissemination of the virus.⁸⁴

Despite warnings to alert blood donors as to symptoms and to possible exposure to contact with a high risk population, there are times when ELISA reads

⁷³ *Kozup*, 663 F. Supp. at 1053.

⁷⁴ *Id.* (citing Curran, Lawrence *Acquired Immune Deficiency Syndrome Associated with Transfusions*, 310 NEW ENG. J. MED. 69,70 (1984); *Aids Transmission via Transfusion Therapy*, 8368 THE LANCET 102 (Jan. 14, 1984) cited in *Hospital and Blood Bank Liability to Patients Who Contract AIDS Through Blood Transfusions*, 23 SAN DIEGO L. REV. 875, 878).

⁷⁵ *Kozup*, 663 F. Supp. at 1053 (citing Fischinger, *Acquired Immune Deficiency Syndrome: The Causative Agent and the Evolving Perspective*, 9 CURRENT PROBLEMS IN CANCER 4 (1985); *Perspective on the Future of AIDS*, 253 J. A.M.A. 247 (L985), cited in 23 SAN DIEGO L. REV. 875, 879)).

⁷⁶ *Id.*

⁷⁷ *Kozup*, 663 F. Supp. at 1054 (citing Herman, *AIDS: Malpractice and Transmission Liability*, 58 U. COLO. L. REV. 77; 34 MMWR 1 (1985)).

⁷⁸ Calabrese, *supra* note 35, at 7-8.

⁷⁹ *Id.*

⁸⁰ Collins, *Blood Products and Tissues*, LAW AND LITIGATION REPORTER 220, 230 (1987).

⁸¹ *Id.*

⁸² *Id.* (citing Salahuddin, Gropman, Markham, Samgaharaa, Redfield, McLane, Weise, Sliski, & Gallo, *HTLV III in Symptom-Free Seronegative Persons*, THE LANCET 1418 (Dec. 22-29, 1984)); National Academy of Sciences, *Confronting AIDS* 309-313 (National Academy Press 1986).

⁸³ Calabrese, *supra* note 35, at 10.

⁸⁴ Collins, *supra* note 68.

a false negative and the virus is transmitted to an innocent blood recipient.⁸⁵ In light of this information concerning AIDS and the evolution of blood donation procedures, the following section explores the realm of civil or criminal liabilities for blood donors who are infected with the AIDS virus.

Although the incidence of contamination and transmission through blood transfusions are small in number in comparison to sexual transmission, there is a great difference in these groups. The blood recipients are a totally involuntary and innocent population. They are people who are injured in accidents, require surgery, newborn babies, pregnant mothers, or hemophiliacs. This list reflects only a small portion of the population affected, but they all have one thing in common, blind ignorance to the fact that instead of a gift of life, someone has chosen for them, a death sentence.

Early means of protection for recipients of blood products were education and self-monitoring.⁸⁶ However, education has basically been proven ineffective in deterring unacceptable behavior.⁸⁷ When such measures prove ineffective, society chooses other alternatives, such as civil or criminal liabilities.

PART III

CIVIL LIABILITIES

Tort law is the mechanism this society uses to discourage individuals from subjecting others to unreasonable risk and to provide a measure of compensation to those who have been injured by unreasonably risky behavior.⁸⁸ Americans can expect the AIDS epidemic to produce a staggering array of tort litigation.⁸⁹ The transmission of the virus through blood products represents one area where such action is likely to occur.⁹⁰ Despite the small number, recipients of HIV contaminated blood are likely to represent a disproportionately high percentage of AIDS-related torts because they are immune from social disgrace once the cause of their infection becomes public, and because hospitals and blood banks have "deep pockets."⁹¹ Although some lawsuits have been filed, the law is only now beginning to evolve in this area.⁹²

Historically, a plaintiff's causes of action for the transmission of infectious

⁸⁵ Calabrese, *supra* note 30, at 10.

⁸⁶ Cleary, *Education and the Prevention of AIDS*, 16:3-4 LAW, MEDICINE & HEALTH CARE 267, 270 (1988).
⁸⁷ *Id.*

⁸⁸ Herman, *Torts: Private Lawsuits About AIDS*, AIDS and the Law 153 (1987).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 167.

⁹² Kelly, *Negligence and Intentional Torts: Liability of Individual for Transmission of HIV*, MEDICO-LEGAL LIBRARY 149-150 (citing *McPherson M. Hudson Estate Sues: Alleged Former Lover Says Actor Hid AIDS*, WASH POST B1 (Nov. 13, 1985, case decided for plaintiff week of 2-14-89)).

diseases have varied, but usually have included negligence, battery, and fraud or misrepresentation.⁹³ Courts have found defendants liable for damages stemming from the transmission of the infectious diseases of tuberculosis,⁹⁴ typhoid fever,⁹⁵ whooping cough,⁹⁶ small pox,⁹⁷ venereal disease⁹⁸, and genital herpes.⁹⁹ The principles applied in these cases would likely apply to a case of HIV transmission.¹⁰⁰ A California appellate court, upholding a cause of action for tortious transmission of genital herpes, recognized the similarity to AIDS.¹⁰¹ Hopefully, making wrongdoers liable in tort will discourage behavior that puts others at risk.¹⁰²

Most torts have a common structure. A plaintiff must show that the defendant owed him a *duty of care*, that the defendant *breached* that duty, the breach *caused* the plaintiff injury, and that the injury caused losses compensable by money, *damages*.¹⁰³ Keeping these elements in mind, this comment will next analyze all the probable causes of action against one who donates blood despite having AIDS.

Battery

A common law action in battery consists of an: (1) intentional (2) offensive or harmful (3) unprivileged contact (4) with another person.¹⁰⁴ The requisite intent for Battery is not necessarily intent to harm but that the consequences are "substantially certain" to follow from the act. Intent may be inferred from acts which are "substantially certain" to cause infection.¹⁰⁶ From that we must presume that the defendant knew he was infected. A cause of action in battery requires the defendant to know he was infected; that he should have known is not sufficient.¹⁰⁷ Thus, in an action for battery, it may be necessary for the plaintiff to demonstrate that the contact at issue occurred after the defendant was diagnosed with AIDS, ARC, or at least tested positive for the HIV virus.¹⁰⁸ Because a person may be infected with the HIV

⁹³ *Id.*

⁹⁴ *Id.* (citing *Earle v. Kuklo*, 26 No. Super 471, 98 A.2d 107 (1953)).

⁹⁵ Kelly, *supra* note 77 (citing *Kliegel v. Aitken*, 94 Wis. 4332, 69 N.W. 67 (1896)).

⁹⁶ Kelly, *supra* note 77 (citing *Smith v. Baker*, 20 F. 709 (S.D.N.Y. 1884)).

⁹⁷ Kelly, *supra* note 77 (citing *Gilbert v. Hoffman*, 66 Iowa 205, 23 N.W. 638 (1885); *Franklin J. Botcher*, 144 Mo. App. 660, 129 S.W. 428 (1910); *Hendricks v. Butcher*, 144 Mo. App. 671, 129 S.W. 431 (1910)).

⁹⁸ Kelly, *supra* at note 77. (citing *State v. Lankford*, 29 Del. 594, 102a 63 (1917); *Crewell v. Crewell*, 180 N.C. 516, 105 S.E. 206 (1920)).

⁹⁹ Kelly, *supra* at note 77 (citing *Kathleen K. v. Robert B.*, 150 Col. App. 3d 992 (1984); *Long v. Adams*, 175 Ga. App. 538, 333 S.E. 201 (1985); *Reinke v. Lenchitz*, No. A86001967, LEXIS 1915 (Ohio App. May 18, 1988)).

¹⁰⁰ Kelly, *supra* note 77 (citing Annotation: *Tort Liability for Infliction of Venereal Disease*, 40 A.L.R. 4th 1083-1102 (1985)).

¹⁰¹ Kelly, *supra* note 77 (citing *Kathleen K. v. Robert B.*, Cal. App.3d 992, 198 Cal. Rptr. 273 (1984)).

¹⁰² Hermann, *supra* note 73, at 154.

¹⁰³ *Id.*

¹⁰⁴ RESTATEMENT (SECOND) OF TORTS § 13-18 (1965).

¹⁰⁵ Hermann, *supra* note 88, at 154.

¹⁰⁶ Kelly, *supra* note 77, at 151.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

virus, and may be contagious, but not ill, he may not have the degree of knowledge required to infer the intent to harm.¹⁰⁹

Because a blood donor has no direct contact with a recipient, it may be difficult to establish the element of contact in litigation for transmission through blood donation.¹¹⁰

Negligence

“To be stricken with disease through another’s negligence is in legal contemplation as it often is in the seriousness of consequences, no different from being struck with an automobile through another’s negligence.”¹¹¹ An infected person not only has an obligation to disclose the disease, but also to provide full and accurate information, even if he may be honestly mistaken about the facts.¹¹² The infected person has a duty to refrain from donating blood. The standard to be applied in such a case is whether the defendant “knew or should have known” of his infection.¹¹³ An argument will undoubtedly be put forth that any person in a high risk group has an affirmative duty to discover exposure to AIDS before engaging in any activity which may expose another.¹¹⁴ It may be easier to prove negligence than battery against a blood donor who transmitted the HIV virus because of the lower standard of evidence needed to establish that the defendant “should have known,” rather than that he “knew,” of the infection.

Fraud or Deceit

The elements of a tort in misrepresentation or fraud include: (1) a false representation, (2) knowledge or belief in the falsity, (3) intention to induce reliance, (4) justifiable reliance, and (5) damage from the reliance.¹¹⁵ Courts have been reluctant to extend misrepresentation beyond its original commercial context.¹¹⁶ Because a more appropriate basis for liability exists in battery and negligence, it is likely they will be the choices for causes of action rather than fraud and misrepresentation.¹¹⁷

Third Party Action

A plaintiff’s negligence action against a defendant for infecting a third person

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 152 (citing *Billo v. Allegheny Steel Co.*, 328 Pa. 97, 105, 195, A. 110, 114 (1937)).

¹¹² Kelly, *supra* note 77, at 153.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ RESTATEMENT (SECOND) OF TORTS § 525 (1977).

¹¹⁶ Kelly, *supra* note 77, at 154.

¹¹⁷ *Id.*

who then infected the plaintiff may be called a "third party action."¹¹⁸ One lawsuit so classified was filed by a husband against his wife's lover because he, the husband, had contacted genital herpes.¹¹⁹ Such actions may be brought to avoid interspousal immunity, to reach deeper pockets, or to assert the rights of a child against the third party who had infected the mother.¹²⁰

Infliction of Mental Distress

An HIV positive plaintiff, even without a diagnosis or current symptoms may have a cause of action for "fear of developing AIDS" or for future medical expenses.¹²¹ Any case law in this area has arisen regarding toxic substances such as asbestos and radiation.¹²² Courts have permitted such actions even if the plaintiff could not prove he would in any probability contract the disease as long as the fear was "reasonable."¹²³ Although the common law of torts provides the victim of contaminated blood or blood products some redress, further problems have arisen regarding such litigation in addition to the problems discussed in meeting the necessary elements of each cause of action.

If a plaintiff tests positive for HIV, but does not manifest any disease symptoms, he may not be able to prove economic damages or that he will develop symptoms.¹²⁴ Also, during the course of litigation, it is likely that the plaintiff's identity and condition will be publicized. Such publicity can result in such social problems as exclusion from housing, employment, and other discrimination.¹²⁵ Those thinking of bringing suit will also need to evaluate the chances of collecting awarded damages. A potential defendant who has AIDS, or who may develop the condition may have limited financial resources, or medical expenses which may deplete his assets.¹²⁶ Those facts will minimize his ability to pay damages.¹²⁷ Additionally, defendants probably will not be covered by insurance for such a liability as the negligent transmission of an infectious disease.¹²⁸ Due to lack of insurance, plaintiffs may opt to by-pass an individual blood donor in favor of a suit against "deeper pockets."¹²⁹ There is also the factor of the long latency period between the exposure to the virus and the manifestation of the disease to consider. For that reason it may be difficult to prove proximate cause because of the difficulty in finding the

¹¹⁸ *Id.*

¹¹⁹ *Id.* (citing *Jaffee v. Cills*, No. 84C, 02131 (Ky. Cir. Ct. 1984)).

¹²⁰ Kelly, *supra* note 77, at 154.

¹²¹ *Id.* at 156 (citing Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 83 *FORDHAM L. REV.* 527 (1984)).

¹²² *Id.*

¹²³ Kelly, *supra* note 77, at 156 (citing *In re Moorevich*, 354 Pa. Super. 520, 572, A. at 661 (1986)).

¹²⁴ Kelly, *supra* note 77, at 158.

¹²⁵ Kelly, *supra* note 77, at 157.

¹²⁶ Hermann, *Torts: Private Lawsuits About AIDS*, AIDS AND THE LAW 155 (1987).

¹²⁷ *Id.*

¹²⁸ Kelly, *supra* note 77, at 159.

¹²⁹ *Id.*

defendant and proving he was the source.¹³⁰

The long latency period and nature of the disease also make it probable that a defendant will be deceased by the time suit is brought. Due to the backlog in court dockets, the plaintiff may also be deceased. Estate suits typically do not arouse juries to award settlements, large or small.¹³¹ Long latency, necessarily involved in these suits, raises statutes of limitation issues. If the statute begins to run upon discovery of being HIV antibody positive, the case may be tried before the plaintiff develops AIDS. This releases a damages issue.¹³² However, if plaintiff assumes the statute of limitations does not run until he or she develops AIDS, he may find he has missed a filing deadline which may be triggered by knowledge of the positive HIV antibody test.¹³³

Exposure to HIV and possible development of AIDS can cause psychological injury as well as the physical pain, suffering, incapacitation and eventual death due to the opportunistic infections. As discussed, one recourse for the victim contaminated by donated blood or subsequent blood products may be a civil or tort action. However, while the variety of problems which have been reviewed beset the tort plaintiff, recognition of tort liability will make it possible for *some* victims to receive compensation for their damages.

In conjunction with civil actions, criminal sanctions have evolved for transmission of the virus, primarily in the areas of sexual acts¹³⁴ and biting or spitting,¹³⁵ a case of criminal sanctions for blood donation has also arisen in California.¹³⁶ New law is trying to evolve and additionally, plaintiffs are utilizing such old traditional statutes as murder, manslaughter, reckless endangerment, and assault.¹³⁷

PART IV

CRIMINAL LIABILITY

A generation ago the principal purpose of the criminal statutes was reformation of offenders.¹³⁸ Today, that goal seems to have broadened, and now includes

¹³⁰ *Id.* at 158.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 158-159 (citing *Large v. Bucyrus, Erie Co.*, 524 F. Supp. 285, 289 (E.D. Va. 1981) (Asbestos exposure-the limitations period begins to run when the initial injury is sustained). *But see Wilson v. Johns Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1988) where plaintiff learned he had mild asbestosis in 1973 but did not learn of mesothelioma until 1978 his cause of action for cancer did not accrue until 1978.

¹³⁴ *Chicago Daily Law Bulletin*, Jun. 19, 1987, at 3, col. 1,3.

¹³⁵ *Id.* See also, *Chicago Daily Law Bulletin*, Sept. 2, 1986, 20, col. 4; *Los Angeles Daily Journal*, Jan. 28, 1988, at 3, col.1.

¹³⁶ *Los Angeles Daily Journal*, July 21, 1987, at 15, col. 3.

¹³⁷ Schechter, *AIDS: How the Disease is Being Criminalized*, *CRIMINAL JUSTICE* 7 (Fall 1988).

¹³⁸ Robinson, *Criminal Sanctions and Quarantine*, *MEDICO-LEGAL LIBRARY* 166 (1988).

penalties intended to act as deterrents and punishments of certain acts.¹³⁹ Ostensibly, the purpose of criminal statutes dealing with AIDS includes deterrence and punishment.¹⁴⁰ However, fear of death, disease, and sex are deeply rooted in American society.¹⁴¹ When the punishment purpose is combined with pre-existing prejudices towards minorities, homosexuals, and drug users, criminal sanctions begin to suggest discrimination.¹⁴² However, whatever the purpose, criminal sanctions for transmission of AIDS are a reality.

In 1987 alone, twenty-nine bills containing criminal sanctions dealing with AIDS, were introduced in state legislatures.¹⁴³ Five states have enacted criminal statutes aimed at persons who have tested positive for HIV.¹⁴⁴ Twenty-four states have criminal statutes dealing with those who have been exposed to a sexually transmitted disease.¹⁴⁵ Although rarely used in the past there is a renewed interest in these statutes.¹⁴⁶

The new state statutes fall into three general categories as follows:

(1) Statutes mandating disclosure of HIV status,

(2) Statutes prescribing particular activities, and

(3) Statutes enhancing penalties for acts already illegal.¹⁴⁷ The statutes prescribing certain activity, such as blood donation, are based on the purposeful, willful or knowing exposure of another to the AIDS virus. Such statutes have been enacted in Alabama and Idaho.¹⁴⁸

Four major arguments have been raised against any enactment of HIV-specific criminal sanctions. First, as evidenced by the sodomy statutes, criminal statutes outlawing private consensual sexual activity are not particularly effective for deterrents.¹⁴⁹ Second, such statutes have a detrimental and invasive impact on privacy rights of HIV carriers as well as their partners.¹⁵⁰ Third, in view of the possibility that morals laws may be selectively enforced to harass persons based on their sexual orientation, there is concern that such statutes may be selectively applied.¹⁵¹ Such selective application could mislead the public into ignoring the

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Schechter, *supra* note 118.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Robinson, *supra* note 119.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Schechter, *supra* note 118, at 7.

¹⁴⁸ *Id.*

¹⁴⁹ A.B.A., *AIDS, The Legal Issues* 28 (1988).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

danger an epidemic poses to all people. Fourth, HIV specific statutes pose the same difficult proof problems as do the traditional criminal law statutes.¹⁵²

Of the old statutes, the courts may utilize murder, manslaughter, reckless endangerment, assault and statutes aimed at the transmission of infectious diseases. The probable liabilities of an AIDS infected donor will be discussed below.

Murder

Under the Model Penal Code Section 210.2, murder requires a purposeful, knowing, or reckless state of mind.¹⁵³ To act with purpose to transmit HIV, the actor must believe he or she carries the virus, can transmit it and desire to cause another person to die because of his behavior.¹⁵⁴ To act knowingly, the actor must know he or she carries the virus and that it is "practically certain" that the conduct will cause death.¹⁵⁵ To act recklessly, the actor must "consciously disregard a substantial and unjustifiable risk."¹⁵⁶ The risk must be a "gross deviation from the standard of conduct that a law-abiding person would observe in the actors situation," "an extreme indifference to the value of human life."¹⁵⁷ These standards would be difficult to prove in an AIDS donor case.

Manslaughter and Negligent Manslaughter

The states of mind required to prove manslaughter and negligent manslaughter are less stringent than those for murder, and are more likely to be established in some donor cases. To commit manslaughter an actor must act "recklessly."¹⁵⁸ It is not necessary to prove "extreme indifference to the value of human life."¹⁵⁹ The donor must be shown to have been aware of the substantial risk that he does, or might, carry the virus and that his conduct may transmit it.¹⁶⁰ For negligent manslaughter, the donor must disregard a "substantial and unjustifiable risk" where that lack of regard "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."¹⁶¹ In defense, the donor would need to prove that he had only acted negligently or recklessly by failing to: (1) submit to tests to determine the presence of the HIV status, (2) use precautions when engaged in risky conduct, or (3) abstain from risky conduct.¹⁶²

¹⁵² *Id.* (citing Draft Report of the American Bar Association Section of Criminal Justice Ad Hoc Committee on AIDS and the Criminal Justice System, 59 (March 1988).

¹⁵³ Schechter, *supra* note 118, at 8.

¹⁵⁴ *Id.*

¹⁵⁵ A.B.A., *AIDS, The Legal Issues* 24 (1988).

¹⁵⁶ Schechter, *supra* note 118, at 8.

¹⁵⁷ *Id.*

¹⁵⁸ A.B.A., *supra* note 131, at 25.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 24. See also Schechter, *AIDS: How the Disease is Being Criminalized*, CRIMINAL JUSTICE 6 (Fall 1988); Robinson, *Criminal Sanctions and Quarantine*, MEDICO-LEGAL LIBRARY 166 (1988).

¹⁶² A.B.A., *supra* note 131, at 24 (citing Model Penal Code Section 2.02 (2)(b)(i)).

Even where the requisite state of mind is shown to exist in a cause of action for murder, manslaughter, or negligent manslaughter, causation may be extremely difficult to establish.¹⁶³ Generally, proving the person from whom the deceased contracted the HIV virus will be difficult.¹⁶⁴ A major factor which compounds the problem is the delay between exposure and the production of antibodies and death.¹⁶⁵

Attempted Murder

Although attempted murder presents no causation problem because proof of death is not required, it does require proof of purposeful or knowing conduct.¹⁶⁶ This raises all state of mind issues discussed in the murder section above, and therefore, is not a viable charge.

Reckless Endangerment

Reckless endangerment, like attempted murder, does not present a causation problem, because no proof of death is required.¹⁶⁷ Reckless endangerment occurs when a person "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury."¹⁶⁸ The plaintiff is not required to prove that the defendant actually harmed the plaintiff.¹⁶⁹ Therefore, reckless endangerment is a more likely cause of action against a donor.

Assault

Assault requires the actor to attempt to cause bodily injury to another, or cause bodily injury purposely, knowingly, or recklessly.¹⁷⁰ Once again with this cause the state of mind will be difficult to prove.

State's Communicable Disease Statutes

Some states¹⁷¹ are utilizing their communicable disease statutes to threaten those who knowingly transmit the disease. Again the requisite state of mind is for the actor to know he carries the virus and be practically certain the conduct will cause death.

Despite the problems inherent in criminal sanctions for the spread of HIV, a small number of plaintiffs do attempt to litigate. Focal points seem to be in the areas

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 25.

¹⁶⁵ *Id.* (citing M.P.C. section 2.02 (2)(c)).

¹⁶⁶ *Id.* at 25-6.

¹⁶⁷ *Id.* at 26.

¹⁶⁸ *Id.* (citing M.P.C. section 210.3)).

¹⁶⁹ *Id.* (citing M.P.C. section 2.02 (2)(d)).

¹⁷⁰ *Id.* at 25.

¹⁷¹ Such states include Minnesota and Texas.

of prostitution,¹⁷² or spitting by carriers,¹⁷³ homosexual bitings,¹⁷⁴ and in one case, blood donation.¹⁷⁵ Such criminal actions raise further issues of mandatory blood testing,¹⁷⁶ AIDS in the prison system,¹⁷⁷ and privacy.¹⁷⁸ The experts are skeptical, based on the cases filed and problems with state of mind and causation, that criminal sanctions will either deter or have any significant impact on the epidemic problem.¹⁷⁹ They see criminal sanctions as a hysterical response to the fear of a deadly enemy, the HIV, and an infectious response by society based on moral and social issues, not on significant considerations.¹⁸⁰ Even if criminal sanctions prove an ineffective deterrent to transmission of the HIV virus, there are proponents of a closely related means of control, isolation, confinement or quarantine.¹⁸¹

Many states¹⁸² already have public health laws which permit authorities to impose restrictions on contagious disease carriers. Although seldom used, these laws have remained on the books and are available as a weapon against HIV.¹⁸³ The major problem in the application of these laws arises in the area of constitutionally guaranteed rights because few states have amended the quarantine laws to afford any protections prior to imposition.¹⁸⁴ As opposed to other diseases, medical uncertainty prevents quarantine from being a constitutional alternative for AIDS control. Physicians cannot determine when an AIDS carrier is infectious and no cure or vaccine is available.¹⁸⁵ Further, quarantine laws could be easily misused in response to the moral and social outrage in this country concerning AIDS, and be used in an arbitrary and overboard manner.¹⁸⁶

Quarantine, like criminal and civil sanctions, presents options to the victim whether he has been infected by sexual encounter, blood transfusion, blood products, or transfers from parent to child. However, all three measures present problems including proof of state of mind and causation, constitutionality, and appropriateness

¹⁷² Chicago Daily Law Bulletin, *supra* note 115.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Los Angeles Daily Journal, *supra* note 117.

¹⁷⁶ Chicago Daily Law Bulletin, *supra* note 115.

¹⁷⁷ Joint Committee on AIDS in the Criminal Justice System, AIDS and the Criminal Justice System (October 16, 1987).

¹⁷⁸ *Rasmussen v. South Florida Blood Service, Inc.*, 500 So.2d 533, 535 (1987).

¹⁷⁹ Chicago Daily Law Bulletin, *supra* note 134.

¹⁸⁰ *Id.*

¹⁸¹ Janus, *AIDS and the Law: Setting and Evaluating Threshold Standards For Coercive Public Health Intervention*, 14 WM. MITCHELL L. REV. 503 (1988). See *The Constitutional Rights of Aids Carriers*, 99 HARVARD L. REV. 1274 (1986).

¹⁸² Such states include Minnesota and Texas. Twenty-four states have Sexually Transmitted Disease Statutes; these states include Delaware, California, North Dakota, Oklahoma, and Tennessee.

¹⁸³ Janus, *supra* note 181.

¹⁸⁴ Boorstin, *Litigation Over Intentional AIDS Exposure Growing*, Chicago Daily Law Bulletin 3 (Friday, June 19, 1987).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* See also *Barlow v. The People*, #572249 (Super Ct. Calif. 1987); *United States v. Kazenbach*, 824 F.2d 649 (8th Cir. 1987); *United States v. Moore*, 846 F.2d 1163 (8th Cir. 1988).

in light of social and ethic norms. Additionally, the particular class of blood donors are confronted with yet another obstacle to litigation. Public policy favors an on-going voluntary blood supply; therefore, courts realize the importance of safeguarding the privacy of blood donors.

PART V

DISCOVERY - BLOOD DONOR

In the cases which have been litigated in this country, courts have been consistent in not permitting disclosure, during discovery, of the name of individual blood donors whose blood has transmitted the HIV virus.¹⁸⁷ Although the outcome has been consistent the courts have based their decisions on the constitutional right to privacy or the public policy of maintaining an on-going blood supply.

The Federal Rules of Civil Procedures, as well as state procedural rules, clearly indicate that courts have the authority to limit discovery to prevent abuse. The rules state: "For good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or an undue burden or expense."¹⁸⁸ Therefore, the trial court must balance the interests and needs of the plaintiff against the harm which may result to both the defendant and society.¹⁸⁹

A constitutional right of privacy, regarding disclosure of information, was first recognized in *Whalen v. Roe*.¹⁹⁰ In *Whalen*, the United States Supreme Court acknowledged that disclosure of a person's name or address can harm his reputation if the context of the release associates him with certain activities or characteristics.¹⁹¹ The United States Constitution does not specifically mention an inherent right of privacy, but even absent that explicit text, the United States Supreme Court has established that the right exists.¹⁹² While there are few cases which have explored the issue in an AIDS setting, the key case concerning this point is *Rasmussen v. South*

¹⁸⁷ *Rasmussen*, 500 So.2d at 533. See *Taylor v. West Penn. Hospital*, #GD87-0206, slip opinion (Ct. Common Pleas Allegheny Co., Pa. 1987); *Doe v. University of Cincinnati*, LEXIS 5317 (10th Cir. 1988); *Belle Bonfills Memorial Blood Center v. Denver*, No. 88SA45 (S.C. Col. 1988); *Mason v. Regional Medical Center of Hopkins County*, No. 87-0123-0(CS), LEXIS 8623 (1988); *Krygier v. Airwelding, Inc.*, 520 N.Y. Supp.2d 475 (1987)).

¹⁸⁸ Fed. R. Civ. P. 26c.

¹⁸⁹ A.B.A., *supra* note 131, at 21-38. Schachter, *Preventive Medicine: AIDS Education for Law Enforcement*, CRIMINAL JUSTICE 3-4 (Fall 1988); Committee Report: Aids and the Criminal Justice System: A Preliminary Report and Recommendations.

¹⁹⁰ *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

¹⁹¹ *Id.*

¹⁹² A.B.A., *supra* note 131, at 21-22, See Robinson, *Criminal Sanctions and Quarantine*, MEDICO LEGAL LIBRARY 165-175 (1987); Janus, *AIDS and the Law: Setting and Evaluating Threshold Standards for Coercive Public Health Intervention*, 14 WM. MITCHELL L. REV. 503 (1988).

*Florida Blood Service, Inc.*¹⁹³

In *Rasmussen*, the plaintiff, following an automobile accident, received fifty-one units of blood supplied by the defendant blood bank.¹⁹⁴ The plaintiff subsequently contracted AIDS and died.¹⁹⁵ A wrongful death action was filed. The plaintiff then requested discovery of the donors' names and addresses which was denied on appeal to the Supreme Court of Florida.¹⁹⁷ The court specifically addressed the issue of donor privacy concerning their sexual and medical histories.¹⁹⁸ The court considered the social ostracism associated with the disease and the consequences of disclosure to non-parties including co-workers, friends, and employers.

Further, the court stated that the threat posed goes beyond immediate discomfort to extremely disruptive or devastating.²⁰⁰ As the district court recognized, "AIDS is the modern day equivalent of leprosy. AIDS, or suspicion of AIDS, can lead to discrimination in employment, education, housing, and even medical treatment."²⁰¹ Furthermore, the court addressed society's interest in maintaining a strong volunteer blood supply.²⁰² Exclusion of blood donors since AIDS as well as the fear that donating may spread the disease, have already reduced the number of available donors; no further disincentive is needed.²⁰³ Therefore, the final decision to deny discovery depended on balancing the concern of the plaintiff against the weight of a constitutional right as well as a societal interest.

Predominantly, subsequent litigation has cited *Rasmussen* and followed its lead in protecting the identity of the blood donor.

In *Taylor v. West Penn Hospital*²⁰⁴ the plaintiff contracted AIDS following blood transfusions during open heart surgery. In seeking discovery the court provided all the general information but refused to disclose the donor name.²⁰⁵ However, the Pennsylvania court rested its decision solely on non-constitutional grounds, finding that disclosure of the blood donors' identities would inhibit blood donation.²⁰⁶

¹⁹³ *Rasmussen*, 500 So.2d at 533.

¹⁹⁴ *Id.* at 534.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 535.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 539-540.

²⁰³ *Id.*

²⁰⁴ *Taylor v. West Penn Hospital*, #GD87-0206, U.S. Dist. LEXIS (1988).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

In *Doe v. University of Cincinnati*,²⁰⁷ the court overturned the trial court's grant of disclosure. At the trial court level, emotion was strongly in favor of an AIDS victim who contracted AIDS during surgery for a malignant brain tumor.²⁰⁸ The court granted disclosure, but restricted it to the donor's name, address, and phone number.²⁰⁹ The court further required that plaintiffs and their counsel not divulge the identity of the donor, or contact him, or institute any action against him, without the court's permission.²¹⁰ The appellate court found the language in *Rasmussen* persuasive.²¹¹ The court stated that in a suit against a hospital and blood bank, the plaintiff could proceed with his case without the requested information.²¹²

In *Belle Bonfills Memorial Blood Center v. District Court for the City and County of Denver*,²¹³ the Colorado Supreme Court upheld a protective order to bar discovery of the name and address of a blood donor. In the Kentucky case of *Mason v. Regional Medical Center*²¹⁴ and in the New York case of *Krygier v. Alirio*,²¹⁵ the courts again upheld a protective order denying disclosure of donor information. However, in the Texas case of *Tarrant County Hospital v. Hughes*,²¹⁶ the court found "no constitutional right of privacy as well as no possible 'chilling effect' on the part of health care facilities to obtain a sufficient supply of blood," and discovery was permitted.²¹⁷ However, the record indicates that certain stipulations were placed on the manner and extent of any disclosure.²¹⁸ Subsequent to *Hughes*, a Texas appellate court in *Gulf Coast Regional Blood Center v. Houston*²¹⁹ upheld disclosure of blood donor information as not violative of the due process rights.

The laws remain unsettled on the disclosure issue. The prevailing view appears to protect the identity of any blood donor, which insulates the donor from litigation. The predominant theme of these new cases reflects a concerted effort to secure society's need for the volunteer blood supply at the cost of denying the AIDS victim a remedy in tort or criminal law.

²⁰⁷ *Doe v. University of Cincinnati*, LEXIS 5317 (10th Cir. December 28, 1988).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Belle Bonfills Memorial Blood Center v. Denver*, No. 88SA45 (S.C. Col. 1988).

²¹⁴ *Mason v. Regional Medical Center of Hopkins County*, No. 87-0123-0(CS), LEXIS 8623 (1988). (Plaintiff contracted AIDS through a blood transfusion following a Caesarean section. Donor's name was requested in a suit based on negligence, strict liability, and breach of implied warranties).

²¹⁵ *Krygier v. Airweld*, 520 N.Y. Supp.2d 475 (1987). (A blood bank was the defendant in a wrongful death action due to alleged exposure of plaintiff to blood infected with AIDS virus).

²¹⁶ *Tarrant County Hospital v. Hughes*, 734 S.W.2d 675 (Tex. App. 1987). (Wrongful death action due to alleged blood transfusions resulting in plaintiff becoming infected with AIDS virus).

²¹⁷ *Id.* at 680.

²¹⁸ *Rasmussen*, 500 So.2d at 539.

²¹⁹ *Gulf Coastal Regional Blood Center v. Houston*, No. 2-87-233-CV, WESTLAW (Ct. App. Tex. 1988). (Wrongful death action in which a bloodcenter sought writ of mandamus to rescind order compelling identification of blood donors. The court held: (1) there was no paramount right of privacy, and (2) disclosure would not violate donor's due process rights).

CONCLUSION

“The period of the Middle Ages had it’s Bubonic Plague, the nineteenth century it’s typhoid fever, and the mid-twentieth century the polio epidemic. Mankind eventually surmounted the problems of those diseases and in time we will prevail over AIDS.”²²⁰ However, for today, there is no vaccine and there is no cure.

In the United States, there are now approximately 1.5 million people with HIV.²²¹ Even if not one single person is newly infected with HIV from this moment forward, many people will become sick, or die, from a tragic, agonizing disease over the next five to ten years.²²²

Intensive global research is underway and experiments with promising drugs continue to be reported. Additionally, the medical community has developed the ELISA and Western Blot Tests for the detection of the virus in blood. The tests have been successful in decreasing the number of blood-transmitted HIV cases such that the majority of blood or blood product transmissions occurred before the development of those tests. However, there remain those cases where the antibodies in blood are not detected by present methods, where the donor is in the early infectious stage and has not developed antibodies, and where a donor late in his disease no longer produces detectable antibodies.

Just as AIDS research is evolving, so is the law in the area of liabilities in AIDS cases. Case law is scant, especially in the area of the AIDS infected blood donor. By analogy to other communicable diseases, the recipient of contaminated blood or blood products may be able to sue for damages based on civil tort litigation in battery, negligence, fraud, or deceit, or infliction of mental distress. However, problems arise in proving the necessary elements of a cause of action, as well as with damages issues, publicity and procedural issues.

An alternative suit may center on criminal liability. Some states are attempting to create new laws specifically directed at the HIV problem. However, like the traditional old statutes, such as murder, manslaughter, reckless endangerment and assault, the new legislation has inherent problems with the standards required for culpability. Other states are utilizing their old communicable disease statutes. But again, the state of mind required for culpability precludes certain actions.

Finally, in an attempt to control the epidemic, states have the option of quarantine. However, the old quarantine laws have not been amended to attend to constitutional protections. In an illness susceptible to discrimination and over-reaction, the medical uncertainty prevents quarantine from being an alternative

²²⁰ Messitte, *AIDS: A Judicial Perspective*, 72:4 JUDICATURE 205 (1989).

²²¹ Harris, *AIDS and the Future*, 4:2 ISSUES IN LAW & MEDICINE 141 (1988).

²²² *Id.*

method of AIDS control.

Infected blood donors remain virtually immune from civil or criminal liabilities because the courts tend to protect the blood donor's identity. The courts have approved protective orders denying discovery based on the constitutional right of privacy and the public policy of maintaining an adequate blood supply.

If the courts continue to uphold those decisions, the AIDS infected blood donor will be insulated from prosecution. However, litigation is just beginning, and much will depend on the moral, economic, political, and medical atmosphere in the future because AIDS is a fear-evoking, opportunistic, deadly disease. In this new, evolving area of the law, the legal community has a responsibility to follow and guide the progress of future legislation and case-made law.

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