

9-1-1990

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Charles Fayerweather

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Recommended Citation

Charles Fayerweather, *Homeowner's Insurance Coverage of Negligent Transmission of Sexually Transmitted Disease*, 31 B.C.L. Rev. 1209 (1990), <http://lawdigitalcommons.bc.edu/bclr/vol31/iss5/4>

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HOMEOWNER'S INSURANCE COVERAGE OF NEGLIGENT TRANSMISSION OF SEXUALLY TRANSMITTED DISEASE

Every year, hundreds of thousands of Americans contract sexually transmitted diseases ("STDs") such as herpes, syphilis, gonorrhea and AIDS.¹ The Health Insurance Association has estimated that during the year 1987, large private health insurers paid \$250 million in AIDS related claims alone.² Thus far, insurance company exposure with regard to STD transmission has been limited to health insurance. Two 1988 cases, however, threaten to increase insurance company cost exposure to STD cases. The Appellate Division of the New York Supreme Court in *State Farm Fire & Casualty Co. v. Irene S. (Anonymous)*,³ and the Minnesota Court of Appeals in *North Star Mutual Insurance Co. v. R.W.*⁴ both held that homeowner's liability insurance may cover an insured homeowner's negligent transmission of an STD to a third party.⁵

In both the New York and Minnesota cases, plaintiffs alleged that the insured defendant had negligently transmitted an STD to them, and the plaintiffs sought damages for their injuries.⁶ Courts have long allowed recovery in tort for negligent transmission of STDs using general negligence standards.⁷ In recent years, courts have consistently rejected arguments that STD transmission is in some way different from other negligent acts.⁸ The New York and

¹ The Centers for Disease Control report approximately the following levels of new STD cases for 1989: AIDS, 33,000; Gonorrhea, 689,000; Syphilis, 41,000. 38 CENTERS FOR DISEASE CONTROL MORBIDITY AND MORTALITY WEEKLY REPORT 886 (Jan. 5, 1990). Approximately 300,000 or more new cases of genital herpes occur each year in the United States. D. LLEWELLYN-JONES, HERPES, AIDS AND OTHER SEXUALLY TRANSMITTED DISEASES 78 (1985).

² Freundlich & Brandt, *Now that AIDS is Treatable, Who'll Pay the Crushing Cost?*, BUS. WEEK, Sept. 11, 1989, at 115.

³ 138 A.D.2d 589, 591, 526 N.Y.S.2d 171, 173 (1988).

⁴ 431 N.W.2d 138, 141 (Minn. Ct. App. 1988).

⁵ *Irene S.*, 138 A.D.2d at 591, 526 N.Y.S.2d at 173; *R.W.*, 431 N.W.2d at 141.

⁶ *R.W.*, 431 N.W.2d at 139, 141; *Irene S.*, 138 A.D.2d at 589-90, 526 N.Y.S.2d at 172-73.

⁷ See, e.g., *Kathleen K. v. Robert B.*, 105 Cal. App. 3d 992, 997, 198 Cal. Rptr. 273, 276-77 (1984); *Long v. Adams*, 175 Ga. App. 538, 539, 333 S.E.2d 852, 854 (1985); *B.N. v. K.K.*, 312 Md. 135, 152-53, 538 A.2d 1175, 1184 (1988); *Crowell v. Crowell*, 180 N.C. 516, 518, 105 S.E. 206, 207 (1920).

⁸ See, e.g., *Kathleen K.*, 105 Cal. App. 3d at 997, 198 Cal. Rptr. at 276-77 (refusing to find a right of privacy blocking such suits); *Long*, 175 Ga. App. at 539, 333 S.E.2d at 854 (refusing to find no cause of action when the act in which the STD was transmitted was illegal).

Minnesota cases, however, were different from typical negligent transmission cases because the defendants carried homeowner's insurance policies.⁹

Typically, such policies cover liability to third parties arising out of the insured's negligent acts.¹⁰ These policies further require the insurance company to defend, on the insured's behalf, against suits that allege liability that would be covered under the policy.¹¹ In both of these cases, however, the defendant's insurance company refused to defend against the suit under the defendant's homeowner's policy. The companies reasoned that such policies do not cover negligent STD transmission and thus, there is no duty to defend against these claims.¹² Both courts disagreed with the insurance companies, citing well established principles of both negligence and insurance law to hold that, because the pleadings in these cases alleged negligence, homeowner's policies should cover the suits.¹³ The insurance companies, therefore, had an obligation to defend against such suits because the courts reasoned that negligent transmission of STDs is not fundamentally different from any other action in negligence.¹⁴

Once an insurance company is compelled to defend its insured, it must consider the defenses available to the underlying tort action.¹⁵ The insurance company may attempt to show that, despite the plaintiff's allegations, one of the essential elements of negligence was actually missing from the insured defendant's actions.¹⁶ Such an element would be, for example, a lack of duty to inform plaintiffs of the risk because the defendants were completely unaware that they were capable of transmitting an STD.¹⁷ Alternatively, the defendant might be able to show that the plaintiff had assumed the risk or was contributorily negligent, or that the defendant was not, in fact, the source of the plaintiff's injury.¹⁸ Defendants have also

⁹ See *R.W.*, 431 N.W.2d at 139, 140; *Irene S.*, 138 A.D.2d at 590, 526 N.Y.S.2d at 173.

¹⁰ See COUCH ON INSURANCE 2d § 44:287 (Rev. Ed. 1984) [hereinafter COUCH].

¹¹ See R. KEETON & A. WIDDIS, INSURANCE LAW 988 (1988).

¹² *R.W.*, 431 N.W.2d at 139, 141; *Irene S.*, 138 A.D.2d at 590, 526 N.Y.S.2d at 173.

¹³ *R.W.*, 431 N.W.2d at 141-43; *Irene S.*, 138 A.D.2d at 591, 526 N.Y.S.2d at 173.

¹⁴ *R.W.*, 431 N.W.2d at 143; *Irene S.*, 138 A.D.2d at 591, 526 N.Y.S.2d at 173.

¹⁵ See *infra* notes 160-87 & 250-62 and accompanying text for a discussion of the defenses available to an insurance company in these circumstances.

¹⁶ See *infra* notes 227-49 and accompanying text for a discussion of this category of defenses.

¹⁷ See, e.g., *C.A.U. v. R.L.*, 438 N.W.2d 441, 443 (Minn. Ct. App. 1989) (lack of duty).

¹⁸ See *infra* notes 204-05 & 213-19 and accompanying text for a discussion of these defenses.

asserted various affirmative defenses in negligent transmission of STD cases including illegality, privacy and spousal immunity.¹⁹ In recent cases, however, these defenses have met with little success.²⁰

Insurers, however, may be able to avoid involvement in cases of negligent transmission of STDs.²¹ One approach would be to exclude coverage for such suits from typical homeowner's policies in the future.²² Alternatively, insurance companies might be able to reduce the number of potential cases through educational efforts aimed at promoting "safe sex."²³

This note analyzes the validity of the New York and Minnesota holdings and discusses the possible measures that insurance companies may take to protect themselves if other jurisdictions accept these holdings. Section I examines the requirements of the underlying tort action of negligent transmission of sexually transmitted disease.²⁴ Section II discusses the liability coverage of typical homeowner's insurance policies and the insurance company's duties under that coverage.²⁵ Section III discusses the holdings of the New York and Minnesota courts in *State Farm Fire & Casualty Co. v. Irene S. (Anonymous)* and *North Star Mutual Insurance Co. v. R.W.* that homeowner's insurance may cover negligent transmission of sexually transmitted diseases.²⁶ Section IV discusses some of the defense options available to an insurance company whose insured is involved in a negligent transmission case.²⁷ Section V presents and analyzes legal and policy arguments with regard to whether other jurisdictions should follow the New York and Minnesota holdings and concludes that they should.²⁸ Section V goes on to analyze the possible responses that insurance companies may take if these rul-

¹⁹ See, e.g., *Kathleen K. v. Robert B.*, 105 Cal. App. 3d 992, 996, 198 Cal. Rptr. 273, 276 (1984) (privacy); *Long v. Adams*, 175 Ga. App. 538, 538, 333 S.E.2d 852, 853 (1985) (illegality); *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 652 (Mo. 1986) (interspousal immunity); *Crowell v. Crowell*, 180 N.C. 516, 522-24, 105 S.E. 206, 210 (1920) (interspousal immunity).

²⁰ See, e.g., *Kathleen K. v. Robert B.*, 105 Cal. App. 3d 992, 996, 198 Cal. Rptr. 273, 276 (1984) (privacy); *Long v. Adams*, 175 Ga. App. 538, 538, 333 S.E.2d 852, 853 (1985) (illegality); *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 652 (Mo. 1986) (interspousal immunity).

²¹ See *infra* notes 263-64 and accompanying text for a discussion of various methods of disengaging homeowner's insurance from this issue.

²² See *infra* note 263 and accompanying text for a discussion of such exclusions.

²³ See *infra* note 264 and accompanying text for a discussion of such educational efforts.

²⁴ See *infra* notes 31-73 and accompanying text.

²⁵ See *infra* notes 75-108 and accompanying text.

²⁶ See *infra* notes 109-37 and accompanying text.

²⁷ See *infra* notes 138-87 and accompanying text.

²⁸ See *infra* notes 188-218 and accompanying text.

ings are widely accepted, both in defending cases under current policies and prospectively.²⁹

I. THE UNDERLYING TORT ACTION

During the past century, courts have gradually come to recognize that they should apply ordinary principles of negligence to cases of disease transmission and, specifically, to STDs.³⁰ The re-

²⁹ See *infra* notes 219-66 and accompanying text.

³⁰ See Comment, *You Wouldn't Give Me Anything Would You? Tort Liability For Genital Herpes*, 20 CAL. W.L. REV. 60, 64-69 (1983) [hereinafter Comment, *You Wouldn't Give Me Anything*] (good summary of the development of this area of tort law); see also Spake, *Ardor in the Court*, 14 STUDENT LAW. 14, 18-19 (Oct. 1985); Note, *Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law*, 70 CORNELL L. REV. 101, 125-32 (1984) [hereinafter Note, *Genital Herpes and the Law*].

Courts have not made legal distinctions between the various STDs on the basis of their differing characteristics. These differences can be important from an evidentiary point of view, however. This is especially true with regard to the immediacy of appearance of symptoms of the various diseases after exposure to them.

AIDS is a viral disease. J. LANGONE, *AIDS: THE FACTS* 44 (1988). As of 1988, AIDS is spread primarily through the activities of sexually active homosexual men and users of intravenous drugs. *Id.* at 10. Once infected, antibodies to the virus can usually be detected in blood samples of the infected person within two to eight weeks. *Id.* at 11. For unknown reasons antibodies may not develop in some infected persons for up to six months or even longer. *Id.* Although antibodies are detectable, the infected person may have no other symptoms of the disease for many years. *Id.* at 48. Despite the lack of symptoms these persons can still transmit the virus to others. *Id.* at 10-11. When symptoms do eventually appear they may include: swollen glands, loss of appetite, leg weakness, fever, diarrhea, dry coughing, white sores in the mouth and cancer of the lymph system. *Id.* at 11-13. As the disease progresses, the immune system becomes increasingly ineffective. *Id.* at 14. When this occurs various opportunistic diseases take hold, including pneumonia, various infections and tuberculosis. *Id.* at 14-15. Eventually one of these opportunistic diseases results in the patient's death. *Id.* at 14. There is currently no cure for AIDS, although AZT and other expensive drugs may slow the onset of the disease. *Now that AIDS is Treatable*, *supra* note 2, at 115-16.

Like AIDS, genital herpes is an incurable viral disease. D. LLEWELLYN-JONES, *supra* note 1, at 25. Herpes is not, however, fatal but rather manifests itself in a painful initial attack and recurrent painful, but not particularly dangerous, attacks for the rest of the patient's life. Corey & Spear, *Infections with Herpes Simplex Viruses* (pt. 2), 314 NEW ENG. J. MED. 749, 750 (1986). Five to ten days after the initial infection, the virus manifests itself as itching burning blisters on the patient's genitals. D. LLEWELLYN-JONES, *supra* note 1, at 23, Corey & Spear (pt. 2), *supra*, at 750. Extreme discomfort is normal for seven to twelve days after which the blisters gradually disappear and the pain subsides. D. LLEWELLYN-JONES, *supra* note 1, at 23. Most patients suffer a second attack within a year. Corey & Spear (pt. 2), *supra*, at 750. A small percentage continue to suffer recurrent attacks after that. D. LLEWELLYN-JONES, *supra* note 1, at 23. Attacks after the initial one, however, are shorter and less painful. *Id.* Patients are definitely infectious during the attacks themselves. *Id.* In addition, patients may be able to transmit the disease while suffering no noticeable symptoms. Corey & Spear, *Infections with Herpes Simplex Viruses* (pt. 1), 314 NEW ENG. J. MED. 668, 690 (1986). The only long term health risks of herpes are an apparent increase in the risk of cervical cancer among

quirements of ordinary negligence may be summarized as duty, breach of duty, causation of injury, and actual injury.³¹ The issues of breach of duty, causation and injury are almost entirely evidentiary in nature in the context of STD cases.³² Thus, the legal debate over the cause of action has been primarily confined to the question of whether a duty exists that requires the defendant to warn of the possibility of disease transmission.³³

In the late nineteenth and early twentieth centuries, numerous state courts applied these elements of negligence to cases involving the transmission of various diseases and held that tort recovery was possible in such situations.³⁴ By 1896, the Supreme Court of Wis-

women, D. LLEWELLYN-JONES, *supra* note 1, at 24, and increased danger of death of either mother or fetus in pregnancy. Corey & Spear (pt. 2), *supra*, at 752. Drugs are available that reduce some patient's symptoms. *Id.* at 753.

Gonorrhea is a bacterial disease usually transmitted through sexual activity. Grossman & Jawetz, *Infectious Diseases: Bacterial*, in CURRENT MEDICAL DIAGNOSIS & TREATMENT 920 (S. Schroder, M. Krupp, L. Tierney, S. McPhee, eds. 1989). Symptoms usually appear three to five days after infection. D. LLEWELLYN-JONES, *supra* note 1, at 19. These symptoms usually consist of a urethral discharge and a burning sensation when urinating. *Id.* In many women, however, the infection is largely asymptomatic and can only be diagnosed through lab tests. Grossman & Jawetz, *supra*, at 920. Gonorrhea can be effectively treated with penicillin. D. LLEWELLYN-JONES, *supra* note 1, at 20. This should result in the patient being fully cured in about a week in 95% of all cases. D. LLEWELLYN-JONES, *supra* note 1, at 20; Corey & Spear (pt. 2) *supra*, at 921. Untreated gonorrhea can lead to infections that result in permanent sterility in both men and women. D. LLEWELLYN-JONES, *supra* note 1, at 20.

Syphilis is usually transmitted through sexual activity. Grossman, Jawetz & Jacobs, *Infectious Diseases: Spirochetal*, in CURRENT MEDICAL DIAGNOSIS & TREATMENT 926 (S. Schroder, M. Krupp, L. Tierney, S. McPhee, eds. 1989). In an average of three to four weeks after infection a painless lesion appears on the genitals of the infected person and lymph nodes in the area may swell. *Id.* at 928. Unless the lesion becomes infected, it will not become painful. *Id.* If treated immediately with penicillin syphilis is fully curable. *Id.* at 927.

³¹ RESTATEMENT (SECOND) OF TORTS § 281 (1977); PROSSER & KEETON ON THE LAW OF TORTS 164-65 (1984) [hereinafter PROSSER & KEETON].

³² See *infra* notes 227-49 and accompanying text for a discussion of the evidentiary issues involved in bringing such a suit.

³³ *E.g.*, Long v. Adams, 175 Ga. App. 538, 539, 333 S.E.2d 852, 854 (1985); C.A.U. v. R.L., 438 N.W.2d 441, 443 (Minn. Ct. App. 1989).

³⁴ *E.g.*, Minor v. Sharon, 112 Mass. 477, 487 (1873) (tenant contracted smallpox after landlord negligently rented infected apartment to him); Skilling v. Allen, 143 Minn. 323, 325-26, 173 N.W. 663, 663-64 (1919) (doctor negligently told mother that her daughter was not contagious with scarlet fever; mother contracted disease); Hewett v. Woman's Hosp. Aid Ass'n, 73 N.H. 556, 567-68, 64 A. 190, 194 (1906) (hospital negligently failed to warn nurse that patient had diphtheria, which nurse contracted); Kliegel v. Aitken, 94 Wis. 432, 435, 69 N.W. 67, 68 (1896) (servant contracted typhoid fever after employer negligently failed to warn that his daughter was contagious). See, *e.g.*, Smith v. Baker, 20 F. 709, 709-10 (C.C.S.D.N.Y. 1884) (tenant negligently exposed his child, who had whooping cough, to landlord's child, who contracted disease); Hass v. Tegmeier, 128 Ill. App. 280, 282-84 (1906) (doctor negligently exposed patient to smallpox); Gilbert v. Hoffman, 66 Iowa 205, 209-10,

consin in *Kliegel v. Aitken* was able to hold, as a well settled proposition of law, that defendants are liable in tort if their negligent actions cause another to contract a contagious disease.³⁵ In *Kliegel*, the plaintiff was hired to work as a servant in the defendant's home. One of the plaintiff's duties was to clean the defendant's child's sickroom. The plaintiff claimed that she was not warned that the child had contagious typhoid fever, which the plaintiff subsequently contracted.³⁶ The court reasoned that if the defendant knew, or should have known, of the risk to the plaintiff, he was obliged to inform her of that risk.³⁷ The court concluded that this case was no different from any other case of negligence even though a dangerous disease was involved rather than, for example, a dangerous piece of machinery.³⁸

In 1920, the North Carolina Supreme Court extended this proposition to a case involving negligent transmission of a sexually transmitted disease in *Crowell v. Crowell*.³⁹ The *Crowell* court held that a husband could be held liable for negligently transmitting an STD to his wife.⁴⁰ In *Crowell*, a wife brought an action for battery against her husband for fraudulently concealing that he had a sexually transmitted disease.⁴¹ The wife alleged that this concealment led her to contract the disease.⁴² Despite the fact that the complaint alleged an intentional tort, the court held that the plaintiff would be entitled to recovery on a theory of negligence, even absent a consideration of fraud or concealment.⁴³ Courts subsequent

23 N.W. 632, 634 (1885) (guest contracted smallpox after innkeeper negligently rented infected room to her); *Edwards v. Lamb*, 69 N.H. 599, 599, 45 A. 480, 480-81 (1899) (doctor negligently told plaintiff that no danger of septic infection existed in assisting him; plaintiff became infected).

³⁵ *Kliegel v. Aitken*, 94 Wis. 432, 435, 69 N.W. 67, 68 (1896).

³⁶ *Id.* at 433-34, 69 N.W. at 68.

³⁷ *Id.* at 435, 69 N.W. at 68.

³⁸ *Id.*

³⁹ 180 N.C. 516, 105 S.E. 206 (1920).

⁴⁰ *Id.* at 519, 105 S.E. at 208.

⁴¹ *Id.* at 518, 105 S.E. at 207. Many early cases involving transmission of STDs were brought as cases of criminal assault or rape with allegations that would also have qualified as civil battery. See *State v. Lankford*, 29 Del. (6 Boyce) 594, 594-95, 102 A. 63, 64 (1917) (wife alleged criminal assault when husband, who knew he had syphilis prior to marriage, married and had sexual relations with wife anyway); *State v. Marcks*, 140 Mo. 656, 677-78, 43 S.W. 1095, 1097-98 (1897) (Sherwood, J., dissenting) (The dissent's view of the facts was that plaintiff claimed rape only after contracting gonorrhea from defendant. That is, plaintiff had actually consented to the sexual contact, but not the disease risk and thus, defendant might be liable in assault, but not rape).

⁴² *Crowell*, 180 N.C. at 517, 105 S.E. at 207.

⁴³ *Id.* at 519, 105 S.E. at 208.

to *Crowell* have consistently extended the negligence cause of action to transmission of other forms of STDs including gonorrhea,⁴⁴ herpes,⁴⁵ and AIDS.⁴⁶

Some early cases involving negligent disease transmission relied on the existence of a special duty on the part of the defendant to warn the plaintiff of risk.⁴⁷ For instance, in *Kliegel v. Aitken*, the court held that the defendant had a special duty toward the plaintiff because he was the plaintiff's employer.⁴⁸ Similarly, the Supreme Court of Iowa held in the 1885 case of *Gilbert v. Hoffman* that the defendants had acted negligently by allowing the plaintiff to become a guest at their hotel when they knew that it was contaminated with smallpox.⁴⁹ The court stated that the defendants, by keeping their hotel open for business, appeared to warrant the safety of their lodgings and, thus, had an obligation to warn that the hotel was not safe.⁵⁰

Some courts, however, did not base holdings in such cases on any duty beyond that imposed on any reasonable person who poses a foreseeable risk to another. In the 1873 case of *Minor v. Sharon*, for example, the Massachusetts Supreme Judicial Court held that the defendant had violated his "plain duty of humanity" toward the plaintiffs in renting them an apartment contaminated with smallpox.⁵¹ Recent cases of STD transmission have taken a similarly broad approach, holding that a duty to disclose exists in any sexually intimate relationship where the defendant knows of danger.⁵²

⁴⁴ *E.g.*, *Duke v. Housen*, 589 P.2d 334, 339-40 (Wyo.), *cert. denied*, 444 U.S. 863 (1979).

⁴⁵ *E.g.*, *B.N. v. K.K.*, 312 Md. 135, 143, 538 A.2d 1175, 1179 (1988); *see Spake, supra* note 30, at 18-19; Comment, *You Wouldn't Give Me Anything, supra* note 30, at 60-81; Note, *Tort Liability for Genital Herpes*, 2 COOLEY L. REV. 379, 380-84 (1984); Note, *Genital Herpes and the Law, supra* note 30, at 101-140.

⁴⁶ *E.g.*, *C.A.U. v. R.L.*, 438 N.W.2d 441, 442-43 (Minn. Ct. App. 1989); *see Baruch, AIDS in the Courts: Tort Liability for the Sexual Transmission of Acquired Immune Deficiency Syndrome*, 22 TORT & INS. L.J. 165, 173-90 (1987); Comment, *Viability of Negligence Actions for Sexual Transmission of the Acquired Immune Deficiency Syndrome Virus*, 17 CAP. U.L. REV. 101, 105-15 (1987); Comment, *AIDS-Liability for Negligent Sexual Transmission*, 18 CUMB. L. REV. 691, 709-22 (1988); Comment, *You Never Told Me . . . You Never Asked: Tort Liability for the Sexual Transmission of AIDS*, 91 DICK. L. REV. 529, 534-52 (1986).

⁴⁷ *See, e.g.*, *Gilbert v. Hoffman*, 66 Iowa 205, 210, 23 N.W. 632, 634 (1885), *Kliegel v. Aitken*, 94 Wis. 432, 435, 69 N.W. 67, 68 (1896).

⁴⁸ *Kliegel*, 94 Wis. at 435, 69 N.W. at 68.

⁴⁹ *Gilbert*, 66 Iowa at 210, 23 N.W. at 634.

⁵⁰ *Id.*

⁵¹ *E.g.*, *Minor v. Sharon*, 112 Mass. 477, 487 (1873).

⁵² *E.g.*, *Long v. Adams*, 175 Ga. App. 538, 539, 333 S.E.2d 852, 854 (1985) (holding duty to be a general one based on foreseeability); *B.N. v. K.K.*, 312 Md. 135, 152-53, 538 A.2d 1175, 1184 (1988) (refusing to find duty only in marital relationship); *see, e.g.*, *Kathleen*

Until 1988, all reported attempts to recover for negligent transmission of STDs were based on the duty to disclose arising from the fact that the defendants actually knew that they had the transmittable disease.⁵³ It is an accepted principle of negligence law, however, that the court can impute knowledge of the risk to the defendant if the defendant should have known of this risk, even if the risk was actually unknown to the defendant.⁵⁴ In 1988, the Ohio Court of Appeals, in *Reinke v. Lenchitz*, used the "should have known" standard for the first time in a case of negligent transmission of an STD.⁵⁵ In *Reinke*, the court held that the defendant was not entitled to a summary judgment in his favor, in an action for negligent transmission of herpes, simply because the plaintiff was unable to present any evidence indicating that the defendant had actual knowledge that he had herpes.⁵⁶ The defendant argued that in order to state a cause of action in negligence the plaintiff would have to show that he had tested positively for herpes or at least had symptoms of the disease prior to his sexual contact with the plaintiff. The court reasoned that a defendant might be an asymptomatic carrier yet still should have discovered that he carried the disease.⁵⁷ The court noted that this might especially be the case where, as in this case, the defendant was a medical doctor. Therefore, the court held that the plaintiff had the right to attempt to show at trial that the defendant should have known that he had the disease.⁵⁸ Upon such a showing, the defendant could be held liable. Thus, the *Reinke* court, in effect, established a duty of reasonable care.⁵⁹ Not only must the defendant warn of a known danger, but the defendant must use reasonable care to discover the presence of an STD.⁶⁰

The 1989 case of *C.A.U. v. R.L.* was the first published case where a plaintiff attempted to impute knowledge of AIDS to a carrier in a sexual transmission case.⁶¹ In *C.A.U.*, the Minnesota Court of Appeals held that if the defendant should have realized

K. v. Robert B., 150 Cal. App. 3d 992, 997, 198 Cal. Rptr. 273, 276-77 (1984) (refusing to find duty only in marital relationship).

⁵³ *E.g.*, *B.N.*, 312 Md. at 138, 538 A.2d at 1177; *Crowell v. Crowell*, 180 N.C. 516, 518, 105 S.E. 206, 207 (1920).

⁵⁴ PROSSER & KEETON, *supra* note 31, at 182.

⁵⁵ *Reinke v. Lenchitz*, 42 Ohio App. 3d 163, 164, 537 N.E.2d 709, 710 (1988).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *C.A.U. v. R.L.*, 438 N.W.2d 441, 443 (Minn. Ct. App. 1989).

that he might have AIDS, he would have had a duty to disclose that fact but that in this case the defendant had no actual or imputed knowledge of the risk he posed to the plaintiff.⁶² The defendant allegedly had engaged in homosexual activities prior to his heterosexual involvement with the plaintiff. He did not tell the plaintiff that he might be an AIDS carrier. During the course of the sexual relationship between the plaintiff and the defendant, the defendant suffered from possible AIDS symptoms.⁶³ His doctor, however, failed to diagnose the cause of these symptoms as AIDS until after the sexual relationship between the parties had ended. The plaintiff contracted AIDS from the defendant as a result of their sexual relationship.⁶⁴

The *C.A.U.* court was persuaded by the plaintiff's argument that a defendant could be held liable for the transmission despite a lack of actual knowledge.⁶⁵ In this case, however, the court held that the defendant had no imputed knowledge of any potential risk to the plaintiff.⁶⁶ The court reasoned that because AIDS was not widely publicized in Minnesota at the time of, or prior to, the sexual relationship between the parties and because it was not widely known in Minnesota, at that time, that AIDS could be transmitted through heterosexual intercourse, the defendant could not be held liable.⁶⁷ Moreover, AIDS tests were not available until after the relationship had ended. The court concluded, therefore, that the defendant could not have accurately determined whether he had AIDS or not. Thus, the *C.A.U.* court required only reasonable efforts by the defendant to determine the risk posed to the plaintiff.⁶⁸

In sum, negligent transmission of STDs today requires plaintiffs to prove the same elements as any other action in negligence.⁶⁹ A duty to warn of risk exists whenever the defendant reasonably foresees injury to the plaintiff.⁷⁰ This duty exists even if the defen-

⁶² *Id.* at 442, 444.

⁶³ See *supra* note 30 for a discussion of AIDS symptoms.

⁶⁴ *Id.*

⁶⁵ See *id.* at 443.

⁶⁶ *Id.* at 444.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See, e.g., *North Star Mut. Ins. Co. v. R.W.*, 431 N.W.2d 138, 143 (Minn. Ct. App. 1988); *State Farm Fire & Casualty Co. v. Irene S. (Anonymous)*, 138 A.D.2d 589, 591, 526 N.Y.S.2d 171, 173 (1988). See *supra* notes 31-32 and accompanying text for a discussion of ordinary negligence standards.

⁷⁰ E.g., *B.N. v. K.K.*, 312 Md. 135, 138, 538 A.2d 1175, 1177 (1988), *Crowell v. Crowell*, 180 N.C. 516, 518, 105 S.E. 206, 207 (1920).

dant was not actually aware of the risk, but should have been aware of it.⁷¹ The defendant is only required to be aware of the risk of disease transmission if the risk could have been reasonably discovered.⁷² Today, defendants may not be held strictly liable for negligent transmission of an STD.⁷³ Winning a judgment for negligent transmission of an STD is clearly a real possibility. Collecting such a judgment, however, is a different matter. As with other types of tort actions the obvious course for a plaintiff's lawyer is to find a way to reach the defendants' insurer to cover judgments beyond the personal means of the defendant. One avenue that has met with success thus far is homeowner's insurance coverage for negligent transmission that occurs within the defendant's home.

II. RECOVERY FOR BODILY INJURY UNDER HOMEOWNER'S INSURANCE

Homeowner's insurance covers, among other things, injuries caused by the insured to third parties.⁷⁴ This coverage is typically limited by explicit exclusion of injuries that were "expected or intended" by the insured.⁷⁵ Such exclusion does not, however, exclude injuries caused by the negligence of the insured.⁷⁶ The overall insurance coverage includes more than just the duty of the insurance company to pay for judgments or settlements arising out of covered injuries. Typical coverage also requires the insurance company to take over the defense of the insured in any suit against the insured that alleges acts by the insured that, if proven, would be covered by the insurance policy.⁷⁷

⁷¹ See, e.g., *C.A.U. v. R.L.*, 438 N.W.2d 441, 443 (Minn. Ct. App. 1989); *Reinke v. Lenchitz*, 42 Ohio App. 3d 163, 164, 537 N.E.2d 709, 710 (1988).

⁷² See, e.g., *C.A.U.*, 438 N.W.2d at 444; *Reinke*, 42 Ohio App. 3d at 164, 537 N.E.2d at 710.

⁷³ See *C.A.U.*, 438 N.W.2d at 444. As only duty was in dispute, plaintiff in *C.A.U.* would have prevailed under strict liability.

⁷⁴ See *COUCH*, *supra* note 10, § 1:61 and; R. KEETON & A. WIDDIS, *supra* note 11, at 1142 for sample homeowner's policies.

⁷⁵ R. KEETON & A. WIDDIS, *supra* note 11, at 518-19.

⁷⁶ E.g., *Moore v. Fidelity & Casualty Co.*, 140 Cal. App. 2d 967, 971-72, 295 P.2d 154, 157-58 (1956); *Vappi & Co. v. Aetna Casualty & Sur. Co.*, 348 Mass. 427, 430-33, 204 N.E.2d 273, 276-77 (1965); *Casperson v. Webber*, 298 Minn. 93, 98-99, 213 N.W.2d 327, 330 (1973); *Barry v. Romanosky*, 147 A.D.2d 605, 606, 538 N.Y.S.2d 14, 16 (1989); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 488-89, 426 N.Y.S.2d 273, 275 (1980); *Lancaster Area Refuse Auth. v. Transamerica Ins. Co.*, 437 Pa. 493, 496, 263 A.2d 368, 369 (1970) (*per curiam*).

⁷⁷ R. KEETON & A. WIDDIS, *supra* note 11, at 988-89.

Homeowner's insurance, like other types of insurance, is a contract between the insurance company and the insured.⁷⁸ Despite any legal requirement of uniformity in such contracts, market forces have led to a "typical" form policy used with minor variation by most insurance companies.⁷⁹ Insurance companies present these policies on a take it or leave it basis to the consumer.⁸⁰ This typical policy is actually a combination of two different types of insurance: true property insurance covering damage or destruction of the insured's real and personal property, and personal liability insurance covering the insured's liability for negligent or accidental acts that occur on the insured's property.⁸¹ This note focuses only on the latter element of coverage.

Liability coverage under typical homeowner's policies includes coverage for (1) bodily injury; (2) to a person other than the insured; (3) on the insured premises; (4) caused by the activities of the insured.⁸² Bodily injury is usually defined by the policy as "bodily injury, sickness or disease . . . including death at any time resulting therefrom."⁸³ Mental distress has been held to be a bodily injury when accompanied by physical injury.⁸⁴ Significantly, for claims between husband and wife, the term "persons other than the insured" does not include the spouse of the insured because the insured party is usually defined by the policy to include the actual signatory and the signatory's relatives resident on the insured premises.⁸⁵ The "insured premises" is usually defined as the insured's residence and its surrounding lot, as well as any structures attached to it.⁸⁶

Typically, policies significantly limit this rather broad coverage. This limitation generally takes the form of an exclusion preventing recovery in the event that the insured "intended or expected" the

⁷⁸ COUCH, *supra* note 10, § 1:4.

⁷⁹ R. KEETON & A. WIDDIS, *supra* note 11, at 118-21, 128; *see*, COUCH, *supra* note 10, § 1:61 and R. KEETON & A. WIDDIS, *supra* note 11, at 1133-47 for sample homeowner's policies.

⁸⁰ COUCH, *supra* note 10, § 15:78.

⁸¹ *Id.* § 1:61; *e.g.*, COUCH, *supra* note 10, § 1:61 (sample homeowner's policy); R. KEETON & A. WIDDIS, *supra* note 11, at 1133-47 (sample homeowner's policy).

⁸² *E.g.*, COUCH, *supra* note 10, § 1:61; R. KEETON & A. WIDDIS, *supra* note 11, at 1142.

⁸³ *E.g.*, COUCH, *supra* note 10, § 44:287; R. KEETON & A. WIDDIS, *supra* note 11, at 1133.

⁸⁴ *See* *Levy v. Duclaux*, 324 So. 2d 1, 10 (La. 1975), *cert. denied*, 328 So. 2d 887, 888 (La. 1976). *But see* *Allstate Ins. Co. v. Diamant*, 401 Mass. 654, 657-60, 518 N.E.2d 1154, 1156-57 (1988) (holding that while "personal injury" includes emotional distress, "bodily injury" does not).

⁸⁵ *E.g.*, COUCH, *supra* note 10, § 1:61; R. KEETON & A. WIDDIS, *supra* note 11, at 1133.

⁸⁶ *E.g.*, COUCH, *supra* note 10, § 1:61.

bodily injury.⁸⁷ Even if the policy does not contain such an exclusion, courts may imply it on the theory that the insured should not profit by his own wrong.⁸⁸

The "expected" injury exclusion could be read to exclude insurance coverage for negligent acts on the grounds that the negligent tortfeasor's liability rests on the defendant's real or imputed ability to reasonably foresee the risks of the negligent action. Thus, in a sense, liability would rest on the fact that the defendant "expected" the injurious result.⁸⁹ Courts have generally refused to adopt this interpretation, however, holding that "foreseeability" does not negate the possibility that the injury was accidental and thus, "unexpected."⁹⁰ Even the reasonably foreseeable, but unintentional consequences of intentionally tortious acts are not held to be excluded as "intended or expected" for purposes of insurance coverage.⁹¹

An example of the distinction made by courts between foreseeability and policy exclusions for "intent" is the holding of the 1973 Supreme Court of Minnesota case of *Caspersen v. Webber*.⁹² The *Caspersen* court held that even an assault and battery could be covered by an insurance policy that excluded intentional injury if the defendant's intent was not to cause injury.⁹³ In *Caspersen* the trial court found that the defendant committed an assault and battery against a hatcheck girl in a restaurant when he intentionally pushed her out of his way in order to look for his coat. The trial court found that as a result of the defendant's intentional actions, the plaintiff had suffered more than \$29,000 in injuries. The defendant's general liability policy contained the same exclusion of coverage for injury intended by the insured that appears in the typical homeowner's policy.⁹⁴ Nevertheless, the Minnesota Supreme Court

⁸⁷ *E.g.*, *Id.*; R. KEETON & A. WIDDIS, *supra* note 11, at 1143.

⁸⁸ R. KEETON & A. WIDDIS, *supra* note 11, at 493-94.

⁸⁹ *E.g.*, *White v. Smith*, 440 S.W.2d 497, 508 (Mo. Ct. App. 1969).

⁹⁰ *E.g.*, *Moore v. Fidelity & Casualty Co.*, 140 Cal. App. 2d 967, 971-72, 295 P.2d 154, 157-58 (1956); *Vappi & Co. v. Aetna Casualty & Sur. Co.*, 348 Mass. 427, 430-31, 204 N.E.2d 273, 276-77 (1965); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 488-89, 426 N.Y.S.2d 273, 275 (1980); *Lancaster Area Refuse Auth. v. Transamerica Ins. Co.*, 437 Pa. 493, 496, 263 A.2d 368, 369 (1970) (*per curiam*).

⁹¹ *E.g.*, *Caspersen v. Webber*, 298 Minn. 93, 98-99, 213 N.W.2d 327, 330 (1973); *Barry v. Romanosky*, 147 A.D.2d 605, 606, 538 N.Y.S.2d 14, 16 (1989).

⁹² 298 Minn. at 93, 213 N.W.2d at 327.

⁹³ *Id.* at 98-99, 213 N.W.2d at 330.

⁹⁴ *Id.* at 96, 213 N.W.2d at 329; see *supra* note 87 and accompanying text for typical policy exclusions.

held that because the defendant did not act with intent to injure, only intent to push, the injury itself was unintended and thus, covered by the insurance policy.⁹⁵ Ordinary negligence, therefore, does not generally fall within the "intended or expected" exclusion to liability coverage.⁹⁶

The insurance company's obligations toward its insured begins as soon as a third party brings suit against the insured alleging injury of a type and under circumstances that would bring that injury, if proven, under the terms of the insured's policy.⁹⁷ Insurance companies could sell policies that only require them to reimburse their insureds for the costs of any judgment actually paid.⁹⁸ Out of fear, however, that insureds may bungle their own defenses or settle too readily, knowing that the insurance company will have to pay, insurance companies have sought to take full control of the defense and settlement of suits against the insured.⁹⁹ By taking exclusive control of the litigation, insurance companies have given insureds a related benefit; the insurance company takes responsibility for the cost of the litigation as well as the ultimate settlement or judgment.¹⁰⁰ This benefit is known as the insurance company's "duty to defend."¹⁰¹

Based on the duty to defend, the insurance company must defend the action and pay for the defense, even if the suit against the insured is ultimately unsuccessful, groundless or even fraudulent.¹⁰² In the event that the suit is unsuccessful the insured has no duty to reimburse the insurance company for the costs of the insured's defense.¹⁰³ The duty to defend is triggered whenever a

⁹⁵ *Casperson*, 298 Minn. at 98-99, 213 N.W.2d at 330.

⁹⁶ *See, e.g., id.*; *Moore v. Fidelity & Casualty Co.*, 140 Cal. App. 2d 967, 971-72, 295 P.2d 154, 157-58 (1956); *Vappi & Co. v. Aetna Casualty & Sur. Co.*, 348 Mass. 427, 430-31, 204 N.E.2d 273, 276-77 (1965); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 488-89, 426 N.Y.S.2d 273, 275 (1980).

⁹⁷ *R. KEETON & A. WIDDIS, supra* note 11, at 988-89.

⁹⁸ *See id.* at 376.

⁹⁹ *Id.* at 988.

¹⁰⁰ *COUCH, supra* note 10, § 51:35.

¹⁰¹ *Id.*

¹⁰² *Id.*; *see, e.g., Dillon v. Hartford Accident & Indem. Co.*, 38 Cal. App. 3d 335, 340, 113 Cal. Rptr. 396, 398-99 (1974); *Greer-Robbins Co. v. Pacific Sur. Co.*, 37 Cal. App. 540, 543-44, 174 P. 110, 111 (1918); *Colon v. Aetna Life & Casualty Ins. Co.*, 66 N.Y.2d 6, 9-10, 484 N.E.2d 1040, 1041, 494 N.Y.S.2d 688, 689 (1983); *Cordial Greens Country Club v. Aetna Casualty & Sur. Co.*, 41 N.Y.2d 996, 997, 363 N.E.2d 1178, 1179, 395 N.Y.S.2d 443, 444 (1977).

¹⁰³ *See, e.g., Hogan v. Midland Nat. Ins. Co.*, 3 Cal. 3d 553, 563-64, 476 P.2d 825, 831, 91 Cal. Rptr. 153, 159 (1970); *Allstate Ins. Co. v. Aetna Casualty & Sur. Co.*, 123 Misc. 2d 932, 933-34, 475 N.Y.S.2d 219, 221 (N.Y. Sup. Ct. 1984).

plaintiff's complaint alleges liability against an insured defendant and is based on alleged facts and circumstances, some of which, if proven, would fall within the policy coverage.¹⁰⁴ For example, a complaint alleging intentional tort must be defended if the facts could support a judgment based on negligence, even if plaintiff's pleadings do not include a negligence count.¹⁰⁵

In sum, typical homeowner's insurance will cover most suits arising out of injury that could potentially be the result of the insured defendant's ordinarily negligent actions.¹⁰⁶ Even the unintended results of intentionally tortious conduct will fall within liability coverage.¹⁰⁷ In any suit that alleges potentially covered actions by the insured, the insurance company will have an obligation to defend against the underlying tort action.¹⁰⁸ Knowing that ordinary negligence actions are usually covered by homeowner's insurance and that cases involving transmission of STDs can usually be characterized as ordinary negligence, plaintiffs and defendants have now successfully brought these legal doctrines together. Insurance companies may now be liable for the negligent transmission of STDs by their insured homeowners.

III. RECOVERY UNDER HOMEOWNER'S INSURANCE FOR NEGLIGENT TRANSMISSION OF STDs

In 1988, two cases reached state appellate courts that involved defendants who carried homeowner's liability coverage and who were sued for negligent transmission of STDs. In both *State Farm*

¹⁰⁴ *E.g.*, *American Home Assurance Co. v. Port Auth.*, 66 A.D.2d 269, 277-78, 412 N.Y.S.2d 605, 609-10 (1979); *see, e.g.*, *Hogan*, 3 Cal. 3d at 563-64, 476 P.2d at 83, 191 Cal. Rptr. at 159; *Barnstable County Mut. Fire Ins. Co. v. Lally*, 374 Mass. 602, 604, 373 N.E.2d 966, 968 (1978); *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165 (Minn. 1986); *Colon v. Aetna Life & Casualty Ins. Co.*, 66 N.Y.2d 6, 9-10, 484 N.E.2d 1040, 1041, 494 N.Y.S.2d 688, 689 (1983).

¹⁰⁵ *E.g.*, *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 275-78, 419 P.2d 168, 176-77, 54 Cal. Rptr. 104, 112-13 (1966); *Huntington v. Hartford Ins. Group*, 69 A.D.2d 906, 906-07, 415 N.Y.S.2d 904, 905 (1979). *Cf.* *Terrio v. McDonough*, 16 Mass. App. 163, 167-69, 450 N.E.2d 190, 193-94 (1983) (holding that if only intentional tort is alleged, then insurance company is not obligated to defend when plaintiff has waived right to amend complaint even if facts could support negligence).

¹⁰⁶ *See supra* notes 87-90 and accompanying text for a discussion of ordinary negligence vis-a-vis homeowner's insurance coverage.

¹⁰⁷ *E.g.*, *Casperson v. Webber*, 298 Minn. 93, 98-99, 213 N.W.2d 327, 330 (1973). *See supra* notes 91-95 and accompanying text for a discussion of this case.

¹⁰⁸ *E.g.*, *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 275-78, 419 P.2d 168, 176-77, 54 Cal. Rptr. 104, 112-13 (1966); *Huntington v. Hartford Ins. Group*, 69 A.D.2d 906, 906-07, 415 N.Y.S.2d 904, 905 (1979).

Fire & Casualty Co. v. Irene S. (Anonymous), decided by the Appellate Division of the New York Supreme Court, and *North Star Mutual Insurance Co. v. R.W.*, decided by the Minnesota Court of Appeals, insured defendants had typical homeowner's policies.¹⁰⁹ In each case the defendant asked his insurance company to defend the suits based on its duty to defend. The insurance company, in each case, refused to defend and sought a declaratory judgment affirming that refusal. The insurance companies succeeded at trial, but the declaratory judgments were overturned on appeal in both states.¹¹⁰ Both courts held that insurance companies that issue typical homeowner's policies have a duty to defend their insureds against suits alleging negligent transmission of STDs because such complaints, if proved, would be covered under the terms of such policies.¹¹¹

State Farm Fire & Casualty Co. v. Irene S. (Anonymous) arose out of a tort action brought by Irene Shapiro against Kenneth Polokoff.¹¹² Shapiro alleged that Polokoff had assaulted and raped her with the intent to transmit herpes. Alternatively, she alleged that he had intentionally assaulted her and that this assault resulted in serious injury to her.

After Shapiro filed her complaint, Polokoff gave notice to State Farm, his insurance company, of its duty to defend the suit under his homeowner's policy. Polokoff's policy with State Farm was a typical homeowner's liability policy that provided personal liability coverage for "damages because of bodily injury."¹¹³ As in most typical policies, the policy specifically excluded coverage for "bodily injury . . . which is expected or intended by the insured."¹¹⁴ State Farm refused to acknowledge any duty to defend on the grounds that the plaintiff's injuries were the result of the insured's intentional acts and, therefore, were excluded from coverage.¹¹⁵

To establish the validity of this position, State Farm filed an action for a declaratory judgment regarding its responsibility to-

¹⁰⁹ *State Farm Fire & Casualty Co. v. Irene S. (Anonymous)*, 138 A.D.2d 589, 591, 526 N.Y.S.2d 171, 173 (1988); *North Star Mut. Ins. Co. v. R.W.*, 431 N.W.2d 138, 140 (Minn. Ct. App. 1988).

¹¹⁰ *R.W.*, 431 N.W.2d at 140; *Irene S.*, 138 A.D.2d at 591, 526 N.Y.S.2d at 173.

¹¹¹ *R.W.*, 431 N.W.2d at 140; *Irene S.*, 138 A.D.2d at 590, 591, 526 N.Y.S.2d at 173.

¹¹² *Irene S.*, 138 A.D.2d at 589, 526 N.Y.S.2d at 172. The suit was initially brought as *State Farm Fire & Casualty Co. v. Shapiro*, 118 A.D. 556, 557, 499 N.Y.S.2d 170, 171 (1986).

¹¹³ *Id.* See *supra* notes 82-83 and accompanying text for parallel language in typical policy.

¹¹⁴ *Irene S.*, 138 A.D.2d at 590, 526 N.Y.S.2d at 173. See *supra* note 87 and accompanying text for parallel exclusionary language in a typical policy.

¹¹⁵ *Irene S.*, 138 A.D.2d at 590, 526 N.Y.S.2d at 173.

ward the insured in this case. The lower court entered a summary judgment affirming State Farm's decision not to defend the underlying action. The lower court held that none of the acts alleged in the complaint could possibly be described as unintended or unexpected and, therefore, they could not be covered under the policy.¹¹⁶

On appeal, Appellate Division of the New York Supreme Court reversed the lower court judgment and held that State Farm did have a duty to defend based on the actions and injuries alleged.¹¹⁷ The Appellate Court reasoned that although none of the *acts* alleged in the complaint could be considered unintended or unexpected, some of the *injuries* could be considered such.¹¹⁸ For instance, with regard to general injuries, the plaintiff alleged only that the assault was intentional, not that the injuries were the intended result.¹¹⁹ On the theory that unintended results may legally flow from intentional actions, the court denied State Farm its motion for declaratory judgment by strictly construing the intended or expected bodily injury exclusion against the insurance company.¹²⁰ Because the complaint alleged injuries that, if proved to be unintentional, as asserted by the defendant, would be covered by the policy, State Farm was obligated to defend him.¹²¹ The court acknowledged, however, that the issue of the insurance company's ultimate duty to indemnify the insured would have to await a factual determination at the trial.¹²²

Eight months later, in *North Star Mutual Insurance Co. v. R.W.*, the Minnesota Court of Appeals followed New York's *Irene S.* decision and established that in Minnesota, insurance companies have a duty to defend in suits alleging negligent transmission of STDs.¹²³ R.W., the plaintiff in the underlying tort action, alleged that she and the defendant, T.F., had voluntarily engaged in sexual intercourse in T.F.'s home during May of 1984, that T.F. knew at the

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 591, 526 N.Y.S.2d at 173.

¹¹⁸ *Id.* (citing *McGroarty v. Great American Ins. Co.*, 36 N.Y.2d 358, 364, 329 N.E.2d 172, 173, 368 N.Y.S.2d 485, 490 (1975)).

¹¹⁹ *Id.* at 589, 526 N.Y.S.2d at 172. The complaint alleged that: the defendant had intentionally assaulted the plaintiff as a result of which she sustained serious injuries; the defendant assaulted her with the intent to cause severe mental and emotional distress; or the defendant assaulted and raped the plaintiff with the intent of transmitting genital herpes. *Id.*

¹²⁰ *Id.* at 590-91, 526 N.Y.S.2d at 173.

¹²¹ *Id.* at 591, 526 N.Y.S.2d at 173.

¹²² *Id.*

¹²³ *North Star Mut. Ins. Co. v. R.W.*, 431 N.W.2d 138, 141 (Minn. Ct. App. 1988).

time that he had herpes, and that he failed to inform her of his condition.¹²⁴ R.W. alleged that as a result of T.F.'s negligence, she contracted herpes. She specified that T.F.'s acts were negligent and not intentional.

During May of 1984, T.F. was covered by a typical homeowner's policy issued by North Star Insurance.¹²⁵ Upon receipt of R.W.'s complaint, T.F. called upon North Star to undertake his defense under its duty to defend suits for damages resulting from bodily injury. North Star declined to defend T.F. on the grounds that coverage for such incidents, according to the definitions in the policy, was limited to "accidents" and that the policy excluded liability "caused intentionally . . . by any insured."¹²⁶

North Star sought and received summary declaratory judgment stating that it had no obligation to defend or indemnify T.F. in this action. North Star argued that Minnesota precedent established that an action brought in negligence is considered an action in intentional tort for insurance purposes, as a matter of law, if the action arises out of sexual misconduct. North Star contended that "the transmission of a sexual disease is *never* an accident, and the disease does not occur without *wrongful sexual conduct*."¹²⁷ North Star further argued that public policy dictates against allowing insurance coverage for sexual misconduct.¹²⁸ T.F. contended that his affirmative assertion, that he did not know at the time of transmission that he had herpes, arguably made the transmission accidental and unintentional.¹²⁹

The Minnesota Court of Appeals reversed the declaratory judgment and required the insurance company to defend the underlying action. The appeals court held that as long as there was a question with regard to whether T.F. could prove at trial that he did not, in fact, have knowledge of his condition at the time of the transmission, there remained the possibility that the act could be considered accidental and, therefore, covered under the terms of the policy. The court stated that the trial court must determine the defendant's knowledge and that until it made such a determination, the insur-

¹²⁴ *Id.* at 139, 142.

¹²⁵ *Id.* at 139, 140. See *supra* notes 82-83 & 102 and accompanying text for description of typical policy terms.

¹²⁶ *Id.* at 139, 141.

¹²⁷ *Id.* at 141 (emphasis in original).

¹²⁸ *Id.* at 143.

¹²⁹ *Id.* at 139, 140-41.

ance company had an obligation to defend if the claim was arguably within the scope of the policy.¹³⁰

The appeals court conceded that the Minnesota case law cited by the insurer established that non-consensual sexual contact created an inference of intent to cause bodily injury as a matter of law. Based on this inference, previous courts had disallowed insurance coverage for injuries resulting from non-consensual sexual acts.¹³¹ In this case, however, the court observed that the action was based on consensual sex rather than a non-consensual assault, and thus, distinguished it from the precedents cited by North Star. In reaching its holding, the court relied heavily on the explicit allegations in the complaint.¹³² The complaint described the action in terms of negligence and not intentional tort, even though the facts of the complaint certainly implied an alternative action on grounds of intentional battery.¹³³

The court completely rejected the argument that public policy considerations dictate against allowing insurance coverage for "sexual misconduct." The court indicated that if the insurance company was concerned about other insureds bearing the cost of one insured's sexual misconduct, it would be free, in the future, to exclude specifically such coverage.¹³⁴

The courts in *Irene S.* and *R.W.* have established, for the first time at the state appellate court level, that insurance companies do have an obligation to defend their insured homeowners against suits alleging transmission of STDs.¹³⁵ The *Irene S.* court outlined the possible extent of such coverage by imposing potential insurance liability even for the unintended results of intentionally tortious behavior.¹³⁶ Moreover, the *R.W.* court rejected the view that actions for negligent transmission of STDs are somehow different from other negligence actions because of their "wrongful" nature, and are, therefore, unworthy of insurance protection.¹³⁷ Given these

¹³⁰ *Id.* at 141.

¹³¹ *Id.* at 141-43.

¹³² *Id.* at 143.

¹³³ *See id.* at 142-43. Paragraph 5 of the complaint reads: "That Defendant failed to inform Plaintiff of this condition, thereby rendering null and void any consent to the sexual act on the part of Plaintiff which may have been given." *Id.*

¹³⁴ *Id.* at 143.

¹³⁵ *North Star Mut. Ins. Co. v. R.W.*, 431 N.W.2d 138, 140 (Minn. Ct. App. 1988); *State Farm Fire & Casualty Co. v. Irene S. (Anonymous)*, 138 A.D.2d 589, 590, 591, 526 N.Y.S.2d 171, 173 (1988).

¹³⁶ *Irene S.*, 138 A.D.2d at 591, 526 N.Y.S.2d at 173.

¹³⁷ *R.W.*, 431 N.W.2d at 138.

holdings, insurance companies will inevitably find themselves involved in an increasing number of STD cases. The insurance companies must therefore consider the various defenses available to them in either refusing to defend such suits or in carrying through a defense on behalf of their insureds.

IV. DEFENSES AVAILABLE TO THE INSURANCE COMPANY INVOLVED IN A NEGLIGENT TRANSMISSION CASE

When the insured is sued for negligent transmission of an STD, the insurance company has two basic levels of defense to liability for a judgment against its insured. First, the insurance company may argue that for some reason it is not, in fact, responsible to the insured under the terms of its policy. The insurance companies raised this defense in *Irene S.* and *R.W.*¹³⁸ Alternatively, or following the failure of the first set of defenses, the insurance company may simply defend the insured and attempt to defeat successfully the underlying tort action.¹³⁹ These defenses would include showing that one of the essential elements of the cause of action is missing or alternatively raising one of three affirmative defenses: illegality, privacy or interspousal immunity.

The insurance company may refuse to defend its insured against the underlying tort action only if it can show that the insurance policy would not cover the alleged tortious behavior, even if such behavior was proved to be true at trial.¹⁴⁰ For instance, if the complaint against the insured defendant alleges only intentional injury to the plaintiff, the insurer will be under no obligation to defend the suit if its policy excludes coverage for intentional injury.¹⁴¹ If, however, the plaintiff alleges any action by the insured defendant that would be covered by the policy, the insurance com-

¹³⁸ *R.W.*, 431 N.W.2d at 139, 141; *Irene S.*, 138 A.D.2d at 590, 526 N.Y.S.2d at 173. Kecton notes a constant flow of such disputes in regard to the duty to defend. R. KEETON & A. WIDDIS, *supra* note 11, at 989.

¹³⁹ See *infra* notes 160-92 and accompanying text for a discussion of the defenses to the underlying tort action.

¹⁴⁰ E.g., *Sabatinelli v. Travelers Ins. Co.*, 369 Mass. 674, 677, 341 N.E.2d 880, 882 (1976); *Pawelek v. Security Mut. Ins. Co.*, 143 A.D.2d 514, 514, 533 N.Y.S.2d 161, 161 (1988).

¹⁴¹ *Id.* But see *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276-77, 419 P.2d 168, 176-77, 54 Cal. Rptr. 104, 112-13 (1966). In *Gray*, the court held that because of liberal pleading rules, the plaintiff could, under the facts alleged, amend the complaint at any time to add negligence to the exclusively intentional tort allegations. The insurance company, therefore, must defend whenever a potential for liability exists. *Id.*

pany must defend the action.¹⁴² Failure to do so may lead to a successful suit against the insurer to reimburse the insured for costs of defense and settlement of the underlying suit.¹⁴³ The insurance company's unjustified refusal to defend may even estop the company from later claiming lack of coverage for a judgment or a settlement.¹⁴⁴

In the event that disputes arise between insured defendants and their insurance companies concerning the scope of policy coverage, courts will consider the superior bargaining power that the insurance company has because of its role in formulating the actual language of the policy.¹⁴⁵ Courts will interpret the language of the policy so as to cover risks that a reasonable insured would anticipate that such a policy would cover, even if the actual terms of the policy are ambiguous concerning that risk.¹⁴⁶

Even if the meaning of policy terms, such as "injury intended or expected," has been generally established, disputes may still arise with regard to whether the particular facts alleged fall within the policy coverage.¹⁴⁷ In a suit against the insurance company alleging liability for failure to defend, the insured carries the burden of proving, by a preponderance of the evidence, that the liability alleged in the underlying suit falls within the affirmative terms and conditions of the policy.¹⁴⁸ But, because the applicability of policy exclusions is an affirmative defense on the part of the insurance

¹⁴² *E.g.*, *American Home Assurance Co. v. Port Auth.*, 66 A.D.2d 269, 277-78, 412 N.Y.S.2d 605, 609-10 (1979); *see, e.g.*, *Hogan v. Midland Nat. Ins. Co.*, 3 Cal. 3d 553, 563-64, 476 P.2d 825, 831, 91 Cal. Rptr. 153, 159 (1970); *Barnstable County Mut. Fire Ins. Co. v. Lally*, 374 Mass. 602, 604, 373 N.E.2d 966, 968 (1978); *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165 (Minn. 1986); *Colon v. Aetna Life & Casualty Ins. Co.*, 66 N.Y.2d 6, 9-10, 484 N.E.2d 1040, 1041, 494 N.Y.S.2d 688, 689 (1985).

¹⁴³ *E.g.*, *Berke Moore Co. v. Lumberman's Mut. Casualty Co.*, 345 Mass. 66, 70-71, 185 N.E.2d 637, 639 (1962); *Brown v. State Auto. & Casualty Underwriters*, 293 N.W.2d 822, 825 (Minn. 1980); *U.S. Fidelity & Guar. Co. v. Copfer*, 48 N.Y.2d 871, 874, 400 N.E.2d 298, 299, 424 N.Y.S.2d 356, 357 (1979).

¹⁴⁴ *Keith Fulton & Sons, Inc. v. Continental Ins. Co.*, 273 F. Supp. 486, 491 (D. Mass. 1967) (applying Massachusetts law); *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 279-80, 419 P.2d 168, 178-79, 54 Cal. Rptr. 104, 114-15 (1966); *Sims v. Illinois Nat. Casualty Co.*, 43 Ill. App. 2d 184, 195, 193 N.E.2d 123, 128 (1963) (citing *Rom v. Gephart*, 30 Ill. App. 2d 199, 207, 173 N.E.2d 828, 832 (1961)).

¹⁴⁵ *See, e.g.*, *Royal Ins. Co. v. Martin*, 192 U.S. 149, 162 (1904).

¹⁴⁶ *See, e.g.*, *Columbian Ins. Co. v. Catlett*, 25 U.S. 383, 386 (1827).

¹⁴⁷ *E.g.*, *State Farm Fire & Casualty Co. v. Irene S. (Anonymous)*, 138 A.D.2d 589, 591, 526 N.Y.S.2d 171, 173 (1988).

¹⁴⁸ *E.g.*, *Royal Globe Ins. Co. v. Whitaker*, 181 Cal. App. 3d 532, 538, 226 Cal. Rptr. 435, 437 (1986); *Markline Co. v. Travelers Ins. Co.*, 384 Mass. 139, 140, 424 N.E.2d 464, 465 (1981); *Lapierre, Litchfield & Partners v. Continental Casualty Co.*, 59 Misc. 2d 20, 23, 297 N.Y.S.2d 976, 979 (N.Y. Sup. Ct. 1969).

company, the company bears the burden of proving facts that show that such exclusions apply to the liability in question.¹⁴⁹ In the context of an STD suit where the insured has typical liability coverage, therefore, the insured will carry the burden of proving that the policy was in effect at the time of the alleged injury,¹⁵⁰ and that the alleged injury was a bodily injury caused by the insured.¹⁵¹ If the insurance company refuses to defend the suit, however, it bears the burden of showing that the injury was "intended or expected" by the insured because this provision is a policy exclusion rather than an affirmative term of the policy.¹⁵²

Because of the degree of deference the courts show toward insureds in interpreting insurance policies, it can be difficult for insurance companies to fit the facts of a suit within the "intended or expected" exclusion.¹⁵³ For example, as in *Irene S.*, even the unintended results of intentionally tortious acts may be covered.¹⁵⁴ Further, even injury resulting from the commission of a crime will not necessarily be excluded; conviction of a crime may be admitted as rebuttable prima facie evidence of intent.¹⁵⁵ Conviction of a crime, however, may not constitute *per se* proof of intended or expected injury if intent to injure is not an essential element of that particular crime.¹⁵⁶ For example, in the 1965 Texas Court of Civil Appeals case of *Orkin Exterminating v. Mass. Bonding and Insurance Co.*, the insured exterminating company damaged rice in a ware-

¹⁴⁹ *E.g.*, *Searle v. Allstate Life Ins. Co.*, 38 Cal. 3d 425, 438-39, 696 P.2d 1308, 1316, 212 Cal. Rptr. 466, 474 (1985); *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986); *Facet Indus. v. Wright*, 62 N.Y.2d 769, 772, 465 N.E.2d 1252, 1254, 477 N.Y.S.2d 316, 318 (1984).

¹⁵⁰ The time and place an injury occurs is fixed at the time of the actual injury and not at the time the negligent act that resulted in the injury was committed. *E.g.*, *Remmer v. Glens Falls Indem. Co.*, 140 Cal. App. 2d 84, 88, 295 P.2d 19, 21 (1956); *American Motorists Ins. Co. v. E.R. Squibb & Sons, Inc.*, 95 Misc. 2d 222, 223-25, 406 N.Y.S.2d 658, 659-60 (N.Y. Sup. Ct. 1978). See *supra* note 45 and accompanying text for policy language.

¹⁵¹ See *supra* notes 82-83 and accompanying text for typical policy language.

¹⁵² *E.g.*, *Searle v. Allstate Life Ins. Co.*, 38 Cal. 3d 425, 438-39, 696 P.2d 1308, 1316, 212 Cal. Rptr. 466, 474 (1985); *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986); *Facet Indus. v. Wright*, 62 N.Y.2d 769, 772, 465 N.E.2d 1252, 1254, 477 N.Y.S.2d 316, 318 (1984).

¹⁵³ *E.g.*, *Thorton v. Paul*, 74 Ill. 2d 132, 151, 384 N.E.2d 335, 343 (1978); *State Farm Fire & Casualty Co. v. Irene S. (Anonymous)*, 138 A.D.2d 589, 590, 526 N.Y.S.2d 171, 173 (1988); *Orkin Exterminating Co. v. Massachusetts Bonding & Ins. Co.*, 400 S.W.2d 20, 27 (Tex. Ct. App. 1965).

¹⁵⁴ 138 A.D.2d at 589-91, 526 N.Y.S.2d at 172-73 (herpes transmitted as unintended result of intentional rape); see also *McGroarty v. Great Am. Ins. Co.*, 36 N.Y.2d 358, 364, 329 N.E.2d 172, 175, 368 N.Y.S.2d 485, 490 (1975).

¹⁵⁵ *E.g.*, *Thorton v. Paul*, 74 Ill. 2d 132, 151, 384 N.E.2d 335, 343 (1978).

¹⁵⁶ *Orkin Exterminating*, 400 S.W.2d at 27.

house when it negligently blew poison dust into the warehouse.¹⁵⁷ The court held that because there was no intent to inflict injury, even if the act was a criminal violation of health laws, the act could still be considered negligent and, therefore, covered by the insurance policy.¹⁵⁸ Similarly, transmission of STDs is a criminal violation of health laws in many states, but it is not a crime that requires intent to injure; therefore, it cannot be automatically considered "intended" under the terms of a typical policy.¹⁵⁹

If the insurance company decides to defend its insured rather than disclaim responsibility and risk eventual liability, the insurance company can assert, on the insured's behalf, a variety of defenses to the underlying tort.¹⁶⁰ The insurance company may try to demonstrate that an essential element of the negligence cause of action is missing.¹⁶¹ Beyond this, the insurance company may attempt to assert an affirmative defense for its insured based on theories such as illegality, privacy or interspousal immunity.¹⁶² These defenses have not, however, proved to be successful in recent STD cases.¹⁶³

The defendant in the 1985 case of *Long v. Adams* unsuccessfully raised the illegality defense.¹⁶⁴ In *Long v. Adams*, the Georgia Court of Appeals held that violation of a criminal statute by the plaintiff does not void the plaintiff's right to recover in tort for injury resulting from this violation.¹⁶⁵ The trial court had dismissed the plaintiff's suit against his girlfriend for negligent transmission of herpes on the theory that in Georgia, consensual sex between unmarried adults is a violation of the state criminal fornication statute.¹⁶⁶ The trial court held that a person could not maintain a

¹⁵⁷ *Id.* at 23.

¹⁵⁸ *Id.* at 27.

¹⁵⁹ *E.g.*, CAL. HEALTH & SAFETY CODE § 3353 (West 1990) (misdemeanor); N.Y. PUB. HEALTH LAW § 2307 (McKinney 1990) (misdemeanor).

¹⁶⁰ See *infra* notes 227-54 and accompanying text for a discussion of these defenses.

¹⁶¹ *E.g.*, C.A.U. v. R.L., 438 N.W.2d 441, 443 (Minn. Ct. App. 1989) (no duty to warn).

¹⁶² *E.g.*, Kathleen K. v. Robert B., 105 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984) (privacy); *Long v. Adams*, 175 Ga. App. 538, 333 S.E.2d 852 (1985) (illegality); S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. 1986) (interspousal immunity); *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920) (interspousal immunity).

¹⁶³ *E.g.*, Kathleen K., 105 Cal. App. 3d at 996, 198 Cal. Rptr. at 276 (privacy); *Long*, 175 Ga. App. at 538, 333 S.E.2d at 853 (illegality); S.A.V., 708 S.W.2d at 652 (interspousal immunity).

¹⁶⁴ *Long*, 175 Ga. App. at 541, 333 S.E.2d at 855. See Casenote, *Long v. Adams, The Dirt on the Clean Hands Doctrine*, 56 U.M.K.C. L. REV. 791, 796-800 (1988) for a more detailed discussion of this case.

¹⁶⁵ *Long*, 175 Ga. App. at 541, 333 S.E.2d at 855.

¹⁶⁶ *Id.*

private cause of action for an injury that arose while that person was committing a crime.¹⁶⁷ At one time this doctrine was recognized with respect to STD transmission.¹⁶⁸ The Georgia Court of Appeals, however, rejected the illegality argument in this case.¹⁶⁹ The court held that this defense ignored the realities of present day morals and would logically prevent unmarried women from recovering for pregnancy and childbirth expenses from unwed fathers if the pregnancy was the result of illegal consensual intercourse.¹⁷⁰ In dicta, however, the court did indicate that violation of a criminal fornication statute could possibly lead to a successful defense based on contributory negligence.¹⁷¹

Another possible defense available to the insurance company, defending its insured in a negligent transmission of STD case, is privacy.¹⁷² The illegality defense is based on the state's interference in sexual relations by criminalizing certain acts. The privacy defense, however, contends that because the state had no right to interfere with consensual sex at all, it may not oversee such behavior by allowing tort recovery for injury resulting from that behavior.¹⁷³ In the 1984 case of *Kathleen K. v. Robert B.*, heard in the California Court of Appeal, the defendant raised the defense of privacy, as guaranteed by the United States Constitution, in a suit against him for negligent transmission of an STD.¹⁷⁴ The court held that the state's interest in legitimate tort recovery for serious bodily injury outweighed any constitutional privacy interest that the defendant had in protecting his sexual acts from state scrutiny.¹⁷⁵ The defendant cited an earlier California case that had held that the state has no legitimate interest in interfering with the intimate nature of a sexual relationship by defining standards of conduct in such relationships or attaching liability to their results.¹⁷⁶ In the cited case,

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., *Deeds v. Storde*, 6 Idaho 317, 323, 55 P. 656, 658 (1898) (a wife could not sue her second "husband" for transmission of an STD because her first marriage was not legally terminated and so the second "marriage" and all sexual acts in it were illegal).

¹⁶⁹ *Long v. Adams*, 175 Ga. App. 538, 541, 333 S.E.2d 852, 855 (1985).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (quoting *Allen v. Gorton*, 100 Ga. App. 744, 751, 112 S.E.2d 368, 372-73 (1959)).

¹⁷² E.g., *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 995-96, 198 Cal. Rptr. 273, 275-76 (1984). For a more detailed discussion of this case see Note, *A Cause of Action for Genital Herpes Transmission*, 34 CASE W. RES. L. REV. 498, 509-14 (1984).

¹⁷³ *Kathleen K.*, 150 Cal. App. 3d at 995-96, 198 Cal. Rptr. at 275-76.

¹⁷⁴ *Id.* at 996, 198 Cal. Rptr. at 276.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 994-95, 198 Cal. Rptr. at 275 (citing *Stephen K. v. Roni L.*, 105 Cal. App. 3d 640, 644-45, 164 Cal. Rptr. 618, 620-21 (1980)).

the plaintiff sought damages for "wrongful birth" of a child, alleging that the child's mother had negligently represented that she was using birth control pills.¹⁷⁷ The *Kathleen K.* court distinguished the instant case from the earlier case on the grounds that more serious tortious conduct and injury was involved in *Kathleen K.* and that different policy considerations came into play.¹⁷⁸ The court, therefore, concluded that the right of privacy is not absolute and, in some cases, is subordinate to the state's fundamental right to enact laws that promote public health, welfare and safety, even though such laws may infringe upon the offender's right of privacy.¹⁷⁹

Another defense available in the underlying tort action is interspousal immunity.¹⁸⁰ At common law, husband and wife were considered to be a single legal entity and, therefore, a suit between them was illogical and forbidden.¹⁸¹ Today most states have abandoned this doctrine.¹⁸² Interspousal immunity once had a definite application as a defense in cases of transmission of STDs between husband and wife,¹⁸³ but by the 1920s courts were already rejecting this doctrine as outmoded in STD cases.¹⁸⁴ The 1986 Missouri Supreme Court decision in *S.A.V. v. K.G.V.* has continued this trend by allowing a negligent herpes transmission suit between a husband and a wife.¹⁸⁵ The Missouri court rejected arguments that allowing such suits would produce a flood of trivial cases or that it would promote marital disharmony.¹⁸⁶ The court reasoned that such arguments, based on archaic notions of marriage, had proved unfounded in states that had already abrogated the interspousal immunity doctrine.¹⁸⁷

In sum, insurance companies may try to evade their duty to defend suits alleging negligent transmission on the basis that the insured's actions are not covered by the policy. Such an evasion is

¹⁷⁷ *Stephen K.*, 105 Cal. App. 3d at 641-42, 164 Cal. Rptr. at 619.

¹⁷⁸ *Kathleen K.*, 150 Cal. App. 3d at 996-97, 198 Cal. Rptr. at 276.

¹⁷⁹ *Id.* at 996, 198 Cal. Rptr. at 276.

¹⁸⁰ *E.g.*, *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 652 (Mo. 1986); *Crowell v. Crowell*, 180 N.C. 516, 522-24, 105 S.E. 206, 210 (1920).

¹⁸¹ RESTATEMENT (SECOND) OF TORTS § 895F comment b (1977).

¹⁸² See *Price v. Price*, 732 S.W.2d 316, 319 (Tex. 1987) for a list of states that have abrogated the doctrine.

¹⁸³ *E.g.*, *Bandfield v. Bandfield*, 117 Mich. 80, 81-83, 75 N.W. 287, 287-88 (1898); *Shultz v. Christopher*, 65 Wash. 496, 497-501, 118 P. 629, 629-31 (1911).

¹⁸⁴ *Crowell*, 180 N.C. at 522-24, 105 S.E. at 210.

¹⁸⁵ *S.A.V.*, 708 S.W.2d at 652.

¹⁸⁶ *Id.* at 652.

¹⁸⁷ *Id.* at 652-53.

difficult to successfully achieve, however, because of the liberality with which courts usually interpret policies to protect insureds. If insurance companies do take on the defense of their insured, they may attempt to use the affirmative defenses of illegality, privacy or interspousal immunity. None of these has met with much success in the recent past however. This leads to the question of what additional measures insurance companies can and should take to protect themselves if the holdings in *R.W.* and *Irene S.* are widely followed, and whether other courts will, in fact, follow these holdings.

V. SHOULD OTHER JURISDICTIONS FOLLOW *IRENE S.* AND *R.W.* AND HOW COULD INSURANCE COMPANIES REACT IF THEY DO?

From a purely legal standpoint, *Irene S.* and *R.W.* should meet with acceptance in all American jurisdictions. These holdings are in complete accord with previous case law concerning both tort liability and insurance coverage.¹⁸⁸ Although policy arguments favoring rejection of these holdings can be made, such arguments are not compelling. Policy considerations for refusing to follow these holdings, such as expense to insurance companies and dangers of fraud, are outweighed by the general policy of seeking compensation for deserving victims.¹⁸⁹

Because widespread acceptance of these holdings seems likely, insurance companies must prepare to be involved in more suits for negligent transmission of STDs. Insurance companies may continue to attempt to avoid any involvement under current policies,¹⁹⁰ or they may accept their responsibility to defend these suits and use the various defenses against the underlying tort action to protect their insured.¹⁹¹ Alternatively, insurance companies may try to decrease the number of suits by specifically excluding coverage from future policies or by reducing incidents of disease transmission through educational programs encouraging "safe sex."¹⁹²

¹⁸⁸ See *supra* notes 31-142 and accompanying text for a discussion of preceding case law.

¹⁸⁹ See *infra* notes 206-18 and accompanying text for a discussion of the policy issues.

¹⁹⁰ *E.g.*, *North Star Mut. Ins. Co. v. R.W.*, 431 N.W.2d 138, 141 (Minn. Ct. App. 1988); *State Farm Fire & Casualty Co. v. Irene S. (Anonymous)*, 138 A.D.2d 589, 590, 526 N.Y.S.2d 171, 173 (1988).

¹⁹¹ See *supra* notes 227-54 and accompanying text for a discussion of the defenses to the underlying tort action.

¹⁹² The exclusion approach was explicitly suggested by the *R.W.* court. *North Star Mut. Ins. Co. v. R.W.*, 431 N.W.2d 138, 143 (Minn. Ct. App. 1988).

Irene S. and *R.W.* should be followed nationally from a legal point of view. It is well established that recovery in negligence for transmission of STDs is legally no different from any other action in negligence.¹⁹³ Attempts to distinguish negligent transmission of STDs from other negligent acts on grounds of illegality, privacy or spousal immunity have been notably unsuccessful in cases such as *Long, Kathleen K.* and *S.A.V.*¹⁹⁴ Moreover, it is similarly well established that insurance companies may, and in fact do, legally cover the ordinarily negligent actions of their insureds.¹⁹⁵ Because insurers will probably continue to offer liability insurance along with homeowner's insurance, courts will continue to face these issues.

Fortunately, other courts have the example of the New York appellate court to follow. In *Irene S.*, the New York Supreme Court, Appellate Division took the underlying tort and insurance law doctrines to their correct, maximum extensions. The *Irene S.* court was correct in basing its decision on the doctrine that even intentional torts may occur simultaneously with actions that are merely negligent.¹⁹⁶ On the basis of this reasoning, intentional torts may result in damage that is actionable either in ordinary negligence or in intentional tort.

A plaintiff may reasonably prefer to bring an action in negligence, rather than in intentional tort, because to win on intentional tort grounds the plaintiff must prove the defendant's state of mind.¹⁹⁷ In a negligence action, the plaintiff need only prove the "easier" issue of whether the defendant behaved reasonably.¹⁹⁸ In our adversarial system, plaintiffs should have the choice of the correct theory under which to pursue their claims. As long as there are reasonable grounds for a finding of ordinary negligence, an insurance company should not be able to evade its duties simply because the plaintiff has exercised his or her legal right to compose a trial strategy and chooses to press a claim in negligence, rather than intentional tort.

¹⁹³ See *supra* notes 31-73 and accompanying text for a discussion of STD negligence cases.

¹⁹⁴ See *supra* notes 137-87 and accompanying text for a discussion of these cases.

¹⁹⁵ See *supra* notes 90-96 and accompanying text for a discussion of insurance coverage of negligence.

¹⁹⁶ *State Farm Fire & Casualty Co. v. Irene S. (Anonymous)*, 138 A.D.2d 589, 591, 526 N.Y.S.2d 171, 173 (1988). See *supra* notes 91-96 and accompanying text for a discussion of cases establishing this principle.

¹⁹⁷ See PROSSER & KEETON, *supra* note 31, at 485.

¹⁹⁸ *Id.*

On this point, the Minnesota court in *R.W.* took an overly cautious approach. By considering the issue of whether the transmission of herpes was "accidental" and, therefore, covered under the terms of the defendant's policy, the court, citing Minnesota precedent, defined accidental as "unexpected, unforeseen or undesigned."¹⁹⁹ This definition must have the same functional meaning as "unexpected and unintended" in typical policies. If unforeseen were taken to mean "unforeseeable," the policy would not cover any liability because the injury would have to be foreseeable by a reasonable person to create liability in the first place.²⁰⁰

Nevertheless, the court appeared to resolve the issue of whether this occurrence was an accident by resort to the defendant's answer to the plaintiff's allegation that he knew that he had herpes.²⁰¹ In his answer, the defendant stated that he did not know that he had herpes and that the transmission was purely an accident.²⁰² Even if the court were correct in considering whether the transmission could be found to be a pure accident in the lay sense of the word, it was entirely wrong in allowing the *defendant's* pleadings to raise the issue. If courts were to use the defendant's defenses to establish the insurance company's obligations, insurance companies would be placed in an intolerable situation. Any insured could force his insurance company to defend an action against him simply by raising the defense of accident or mistake, even if the plaintiff alleges only intentionally tortious behavior. Allowing the defendant's pleading to establish the duties of the insurance company is illogical because the insurance company's duty to defend is supposed to be based on whether a judgment *could* result that would require indemnification.²⁰³ If the plaintiff's complaint alleges only intentionally tortious behavior, the insured defendant cannot be found liable for ordinary negligence, regardless of the defense raised.

Minnesota and other states will do much better to follow New York's lead and rest such judgments solely on the allegations, or lack thereof, of ordinary negligence in the plaintiff's complaint. New York's *Irene S.* decision is in accord with existing insurance case law in relying solely on the plaintiff's allegations to determine

¹⁹⁹ *North Star Mut. Ins. Co. v. R.W.*, 431 N.W.2d 138, 140 (Minn. Ct. App. 1988).

²⁰⁰ PROSSER & KEETON, *supra* note 31, at 485.

²⁰¹ *R.W.*, 431 N.W.2d at 141.

²⁰² *Id.* at 139.

²⁰³ See *supra* notes 97-105 and accompanying text for a discussion of the basis for a duty to defend.

duty to defend.²⁰⁴ In addition, it correctly recognized that the plaintiff rather than the defendant has control over the type of allegations brought.²⁰⁵

Even though other jurisdictions have good legal reasons to follow New York and Minnesota in allowing homeowner's insurance coverage of negligent transmission of STDs, there are policy arguments both for and against such holdings. Allowing such recoveries may have a substantial and unexpected impact on the profitability of insurance companies. This would be especially unacceptable if many such insurance recoveries resulted from fraud or collusion, rather than because a victim actually deserved recovery. On the other hand, insurance coverage of negligent transmission of STDs increases the chances that deserving victims will actually be compensated because insolvency of the defendant will no longer prevent such victims from recovering judgments. Moreover, defendants will have less economic incentive to conceal fraudulently their negligence because their insurance company will more likely cover a judgment against them.

The potential for litigation and substantial judgments in STD transmission cases is tremendous. In the case of herpes, for example, there are an estimated 300,000 new sufferers each year.²⁰⁶ Because the only common form of herpes transmission is through sexual contact with an infected person,²⁰⁷ and few people would willingly consent to the risk of infection, it seems likely that most of these new cases of herpes involve actionable negligence. The precise magnitude of STD cases is a matter of dispute even among experts.²⁰⁸ Suits for negligent transmission of STDs, however, raise various practical problems of proof as well as the more subjective issue of embarrassment of plaintiffs. These issues may dramatically

²⁰⁴ *E.g.*, *American Home Assurance Co. v. Port Auth.*, 66 A.D.2d 269, 277-78, 412 N.Y.S.2d 605, 609-10 (1979); *see, e.g.*, *Hogan v. Midland Nat. Ins. Co.*, 3 Cal. 3d 553, 563-64, 476 P.2d 825, 831, 91 Cal. Rptr. 153, 159 (1970); *Barnstable County Mut. Fire Ins. Co. v. Lally*, 374 Mass. 602, 604, 373 N.E.2d 966, 968 (1978); *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165 (Minn. 1986); *Colon v. Aetna Life & Casualty Ins. Co.*, 66 N.Y.2d 6, 9-10, 484 N.E.2d 1040, 1041, 494 N.Y.S.2d 688, 689 (1985).

²⁰⁵ *State Farm Fire & Casualty Co. v. Irene S. (Anonymous)*, 138 A.D.2d 589, 591, 526 N.Y.S.2d 171, 173 (1988).

²⁰⁶ D. LLEWELLYN-JONES, *supra* note 1, at 78.

²⁰⁷ *LAWYERS MEDICAL CYCLOPEDIA* § 36.18(A) (1986).

²⁰⁸ For instance, CDC data lists less than 700,000 cases of gonorrhea annually, 38 *CENTERS FOR DISEASE CONTROL MORBIDITY AND MORTALITY WEEKLY REPORT* 886 (Jan. 5, 1990), while another source puts the figure at 2.5 million. Grossman & Jawetz, *supra* note 30, at 920.

reduce the likelihood that potential plaintiffs will actually bring such actions or, if brought, reduce the likelihood of success.²⁰⁹ Nevertheless, if even a small fraction of the potential cases resulted in settlements or judgments, the effects would be considerable.²¹⁰

Another policy argument against allowing insurance coverage of damages in STD cases is the danger of collusion or fraud between the plaintiff and the defendant. Given the private nature of sexual relations, it is likely that only the plaintiff and the defendant are aware of the true circumstances surrounding the STD transmission. Even if the plaintiff and the defendant know that the transmission was truly intentional, not negligent, it will be in the plaintiff's best interest to "plead into coverage" and allege negligence.²¹¹ It would then be in the defendant's best interest to admit such negligence so that the insurance company, rather than the defendant, will pay the judgment.²¹² Despite this incentive to commit fraud, courts should not simply dismiss all cases of negligent STD transmission, including the meritorious ones, in order to eliminate the few fraudulent ones. Moreover, insurance coverage for negligent transmission of STDs may actually decrease one type of fraud that undoubtedly occurs under the present conditions. When defendants know that they will

²⁰⁹ See *infra* notes 229-45 and accompanying text for a discussion of the practical evidentiary limitations on plaintiffs.

²¹⁰ For instance, in a case of negligent transmission of gonorrhea a jury awarded the plaintiff \$1.3 million (\$300,000 compensatory, \$1,000,000 punitive). *Duke v. Housen*, 589 P.2d 334, 339-40 (Wyo. 1979). In *Duke* the appellate court vacated the jury verdict on statute of limitations grounds. As long ago as 1920 a jury in *Crowell v. Crowell* awarded \$10,000 to a plaintiff in an STD case. 180 N.C. 516, 517, 105 S.E. 206, 207 (1920). Because AIDS cases involve slow but inevitable death, awards in such cases could be much higher. This is especially true because of CDC data showing that more than 80% of AIDS deaths are of persons between the ages of twenty and forty-nine when earning potential and life expectancy are very high. Summary of Notifiable Diseases, United States, 1988, 37 CENTERS FOR DISEASE CONTROL MORBIDITY AND MORTALITY WEEKLY REPORT 10 (Oct. 6, 1989). Medical costs alone for AIDS patients average about \$18,000 annually. *Now that AIDS is Treatable*, *supra* note 2, at 118.

²¹¹ See DeBenedictis, *The Alliance*, 75 A.B.A. J. 59, 63 for a discussion of this practice among personal injury lawyers.

²¹² In the past, many suits have alleged willful and wanton negligence or intentional tort in addition to ordinary negligence, which has the advantage of allowing recovery for nominal and punitive damages as well as compensatory damages. *E.g.*, *Long v. Adams*, 175 Ga. App. 538, 538, 333 S.E.2d 852, 853 (1985); *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 652 (Mo. 1986). If insurance will not cover any recovery, it does not matter what the basis is for the judgment. Now that insurance will apparently cover ordinary negligence, many future plaintiffs would be wise to follow the example of the plaintiff in *R.W.* and specifically indicate that the suit is in negligence, and not intentional tort, to avoid the possibility of winning in intentional tort, but then being unable to collect the judgment. See *North Star Mut. Ins. Co. v. R.W.*, 431 N.W.2d 138, 139 (Minn. Ct. App. 1988).

have to pay any judgment against them out of their own pockets, they have a much greater incentive to lie concerning the true circumstances of the transmission than if insurance will cover them. If defendants are more inclined to tell the truth, plaintiffs with meritorious cases are more likely to be awarded the compensation they deserve.

Overall, allowing homeowner's insurance coverage of negligent transmission of STDs may significantly increase the likelihood that legitimate victims will be compensated. Plaintiffs currently bring suits for negligent transmission even where no insurance coverage exists.²¹³ The widespread adoption of *Irene S.* and *R.W.*, however, would probably increase the number of such suits. By making insurance money available to cover judgments for negligent transmission of STDs, New York and Minnesota have removed one major practical disincentive to bringing such a suit. Plaintiffs no longer need fear that they will be unable to collect a judgment if their successful suit forces the defendant into bankruptcy.²¹⁴ Moreover, the personal injury bar can represent such clients on a contingency fee basis with some reasonable expectation of compensation if they are successful.

Moreover, an argument exists that, as a matter of public policy, insurance should not be available to cover negligent acts because if people know that they will have to pay judgments out of their own pockets, they will be more careful and will commit fewer negligent acts.²¹⁵ Courts have reacted to this argument by judging that the benefit of having all victims compensated is greater than any benefit from reduction in negligent acts that might occur if insurance were not available to cover negligence.²¹⁶ A society that requires automobile owners to carry liability insurance for negligent acts involving their automobiles can hardly condemn voluntary personal liability coverage.²¹⁷ The general policy underlying the right of private actions in tort is that victims should be restored to the condition they were in prior to the defendant's negligence.²¹⁸ This goal of compensation is best served if liability insurance is available to com-

²¹³ *E.g.*, *Duke v. Housen*, 589 P.2d 334, 339-40 (Wyo. 1979).

²¹⁴ Of course some plaintiffs seeking revenge rather than compensation might prefer to send the defendant into bankruptcy.

²¹⁵ PROSSER & KEETON, *supra* note 31, at 585.

²¹⁶ R. KEETON & A. WIDDIS, *supra* note 11, at 376.

²¹⁷ *See id.* at 377.

²¹⁸ PROSSER & KEETON, *supra* note 31, at 6.

pensate plaintiffs for large judgments that are beyond the defendant's personal economic resources.

Public policy reasons to disallow recovery under homeowner's insurance for negligent transmission of STDs do not outweigh the benefits of allowing such recoveries. Concern about unexpected insurance company costs and potentially fraudulent suits are legitimate. These considerations, however, are outweighed by the need to ensure that real victims of negligent transmission of STDs are fully compensated for their injuries. Allowing homeowner's insurance to cover such claims increases the chances that victims will be compensated, both by creating a source of compensation from otherwise judgment proof defendants and by eliminating defendant incentives to lie about the factual circumstances of the transmission.

There appear to be no satisfactory reasons why most American jurisdictions should not follow the New York and Minnesota rulings allowing homeowner's insurance coverage of negligent transmission of STDs. Insurance companies, therefore, must be prepared to face more suits of this type in the future. How insurance companies deal with these suits will have an impact on their future profits.

Several options are available to insurance companies with regard to such suits. First, they may continue to try to avoid any obligation toward their insureds in such cases by arguing that even if insurance generally covers STD transmission cases, it does not cover the particular suit against their insured.²¹⁹ Second, insurance companies may simply defend such suits and rely on the evidentiary difficulties of plaintiffs in such suits to protect them against ultimate liability and the cost of defense.²²⁰ Third, if the plaintiff is able to carry the burden of proving the basic cause of action, the insurance company still retains the option of asserting any of the affirmative defenses available to the insured in the underlying tort action.²²¹ Fourth, if insurance companies want to avoid such suits entirely, they may specifically exclude coverage for negligent transmission of STDs in future policies. Finally, insurance companies could try to reduce the source of STD transmission suits by launching an educational campaign to promote "safe sex."

²¹⁹ *E.g.*, *North Star Mut. Ins. Co. v. R.W.*, 431 N.W.2d 138, 141 (Minn. Ct. App. 1988); *State Farm Fire & Casualty Co. v. Irene S. (Anonymous)*, 138 A.D.2d 589, 590, 526 N.Y.S.2d 171, 173 (1988).

²²⁰ See *infra* notes 229-45 and accompanying text for a discussion of the practical evidentiary limitations on plaintiffs.

²²¹ See *supra* notes 227-54 and accompanying text for a discussion of the defenses to the underlying tort action.

An insurance company will generally find it difficult to argue successfully that its policy does not cover a particular incident of transmission of an STD. First, because the typical policy covers all actions of the insured leading to liability and then specifically excludes only "expected and intended" injuries, the insured carries an easier burden of proof.²²² Second, if the insurance company seeks to avoid its duty to defend, the insured, again because of evidentiary burdens, will have a good chance of compelling a defense. This is because in a suit against the insurance company for not defending the insured, the insured is the plaintiff, and must only prove by a preponderance of the evidence that the injury complained of is alleged to have resulted from the defendant's actions.²²³ Because the cause of action for the underlying suit in negligence requires such an allegation, the insured should never have difficulty meeting this burden.²²⁴ The insurance company, however, in raising the affirmative defense of the "intent exclusion" to its duty to defend or indemnify, has the much more difficult burden of showing that the injury complained of was intended or expected by the insured.²²⁵ Unless the insurance company can show that the injury alleged was outside the scope of its coverage, it will have to defend the insured against the underlying tort action.²²⁶

Although the typical defendant in a negligent transmission of an STD suit will be able to compel his insurance company to defend him, that insurance company will probably find that it is unlikely to lose the case and, therefore, have to pay a judgment. The greatest strengths of the typical defendant's case in a negligent transmission of STD suit are the practical difficulties that the plaintiff will have in proving that the essential elements of negligence exist.²²⁷ Al-

²²² See *supra* notes 148-52 and accompanying text for a discussion of burdens of proof in STD insurance cases.

²²³ *E.g.*, *Royal Globe Ins. Co. v. Whitaker*, 181 Cal. App. 3d 532, 538, 226 Cal. Rptr. 435, 437 (1986); *Markline Co. v. Travelers Ins. Co.*, 384 Mass. 139, 140, 424 N.E.2d 464, 465 (1981); *Lapierre, Litchfield & Partners v. Continental Casualty Co.*, 59 Misc. 2d 20, 23, 297 N.Y.S.2d 976, 979 (N.Y. Sup. Ct. 1969).

²²⁴ *E.g.*, *Royal Globe Ins.*, 181 Cal. App. 3d at 538, 226 Cal. Rptr. at 437; *Markline*, 384 Mass. at 140, 424 N.E.2d at 465; *Lapierre*, 59 Misc. 2d at 23, 297 N.Y.S.2d at 979.

²²⁵ *E.g.*, *Searle v. Allstate Life Ins. Co.*, 38 Cal. 3d 425, 438-39, 696 P.2d 1308, 1316, 212 Cal. Rptr. 466, 474 (1985); *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986); *Facet Indus. v. Wright*, 62 N.Y.2d 769, 772, 465 N.E.2d 1252, 1254, 477 N.Y.S.2d 316, 318 (1984).

²²⁶ *E.g.*, *Searle*, 38 Cal. 3d at 438-39, 696 P.2d at 1316, 212 Cal. Rptr. at 474; *Henning Nelson*, 383 N.W.2d at 652; *Facet Indus.*, 62 N.Y.2d at 772, 465 N.E.2d at 1254, 477 N.Y.S.2d at 318.

²²⁷ See *supra* notes 31-73 and accompanying text for a discussion of the elements of the underlying tort action.

though, the legal element of duty is well established²²⁸ and injury is readily determinable medically, plaintiffs will have tremendous difficulty proving causation, that the defendant was the source of the injury, and breach, that the defendant did, in fact, fail to warn them and that they did not waive this warning through assumption of the risk or contributory negligence.²²⁹

The plaintiff's first evidentiary problem is proving that the defendant was the source of injury. The plaintiff must prove that the defendant could have and did cause the injury. As a threshold issue, the plaintiff will have to show that the plaintiff and defendant engaged in sexual intercourse, that the defendant had the STD at the time of that sexual intercourse, and that the plaintiff did not. Medical examinations of both parties, fortuitously close to, but prior to, the time of transmission would provide good evidence of this, but, in most cases, only the testimony of the parties will provide this evidence. In the likely event of diametrically opposed testimony, outcome of the case may hinge entirely on the subjective judgment of the jury regarding the credibility of the parties.²³⁰ Because the plaintiff carries the burden of proof on this issue, the jury should find for the defendant if it cannot decide that one party is more credible than the other, a not unlikely possibility.

Beyond simply showing what *could* have happened, the plaintiff also has the task of proving that the defendant *did* cause the injury.²³¹ The symptoms of the major STDs other than AIDS appear soon after the victim has contracted the disease.²³² Most plaintiffs, therefore, should have little difficulty determining who gave them the disease. Plaintiffs who have had multiple sexual partners during the period when the infection must have occurred, however, may

²²⁸ See *supra* notes 33-73 and accompanying text for a discussion of the duty element.

²²⁹ See *infra* notes 230-49 and accompanying text for a discussion of the practical problems of proof for plaintiffs in these areas.

²³⁰ This type of testimony also raises the issue of embarrassment as a potential bar to bringing suit for many plaintiffs. Many plaintiffs may be hesitant to discuss their sex lives in public or to have their lifestyles attacked on the stand. Many of the same issues that prompted passage of rape shield laws apply in these cases, but without the public necessity of encouraging victims to bring charges.

²³¹ See *supra* note 31 and accompanying text for the elements of negligence.

²³² For instance herpes initially manifests itself in painful sores and blisters on the genitals often accompanied by painful urination, fever and malaise. Corey & Spear (pt. 2), *supra* note 30, at 750. These symptoms begin to appear within 5 to 10 days of infection. D. LLEWELLYN-JONES, *supra* note 1, at 23. Initial gonorrhea symptoms appear within 3-5 days, but 60% of women and 20% of men develop no immediate symptoms, which may cause difficulties of proof in some cases. *Id.* at 19. Syphilis symptoms may take as long as 90 days to develop. Grossman, Jawetz & Jacobs, *supra* note 30, at 928.

have a more difficult time proving this element, especially if more than one of those sexual partners is shown to have had the STD prior to intercourse with the plaintiff.²³³ If the plaintiff in such a case can offer no specific evidence that the defendant was the source of disease, the defendant will probably be able to obtain a summary judgment.

If the case is an AIDS transmission case, the plaintiff may have a difficult time proving when the transmission occurred. Because AIDS symptoms may not appear for as long as five years after exposure to the disease,²³⁴ it will be much harder for plaintiffs in AIDS transmission cases to pinpoint the precise occurrence during which the transmission took place. Although, the problem of proof for the AIDS plaintiff with multiple sexual partners may not be any different from that of other STD plaintiffs, the statistics do not favor the AIDS plaintiff. The fact that AIDS may go undetected for a long and indeterminate period of time increases the chances that a person who has contracted it will not be able to identify the person from whom he or she contracted the disease. The fact that AIDS may go undetected for a long period of time increases the chances of greater numbers of exposures to the disease. Although the "multiple sexual partners" problem is not necessarily insurmountable for the plaintiff, the argument that the defendant was not the source of injury in such cases is a powerful defense against many plaintiffs. Plaintiffs who have had sexual relations exclusively with the defendant for a time longer than the incubation period of the STD will have the best chance of avoiding this defense.

The plaintiff must also prove that the defendant knew or should have known the risk that he or she posed to the plaintiff.²³⁵ Showing that a defendant knew or should have known that the defendant had syphilis, gonorrhea or herpes should be relatively simple. All manifest themselves with painful symptoms within a few days of contracting the disease.²³⁶ Although these diseases may become asymptomatic while remaining communicable,²³⁷ the fact that the defendant was on notice at the time that he or she originally

²³³ One commentator has made the rather bizarre suggestion that such plaintiffs could sue a number of persons from whom they could have gotten the STD on a *Sindell* market share theory. Kohn, *Conflicting Rights of Privacy and the Duty of Disclosure Between Sexual Partners*, 11 *LAW, MED. & HEALTH CARE* 264, 268-69 (1983).

²³⁴ J. LANGONE, *supra* note 30, at 11.

²³⁵ See *supra* notes 52-73 and accompanying text for a discussion of the duty element.

²³⁶ See *supra* notes 30 & 232 and accompanying text for a discussion of the symptoms.

²³⁷ Corey & Spear (pt. 1), *supra* note 30, at 690.

contracted the disease will probably satisfy the "should have known" requirement, even if the defendant had no symptoms at the actual time of transmission.

AIDS presents a more difficult situation. Most persons who contract AIDS experience no immediate symptoms of the disease.²³⁸ It may be as long as five years after contracting the disease before noticeable symptoms appear.²³⁹ During this time, the person who has contracted AIDS is an "asymptomatic carrier" capable of spreading the disease to others.²⁴⁰ During this period laboratory tests can indicate that the carrier probably has the AIDS virus, but these tests are unable to detect AIDS during the first two weeks to six months after exposure.²⁴¹ Because of this uncertainty, it would be reasonable for courts to hold that members of "high risk" groups have an obligation to warn the sexual partners of this status if they do not know whether they are, in fact, AIDS carriers.

Finally, a defendant may argue that he or she, in fact, fulfilled the duty to warn, thus destroying a vital element of the cause of action.²⁴² An explicit assumption of risk by the plaintiff should certainly provide an absolute defense for the defendant. If the defendant can show that the plaintiff was aware of and understood the risk and nevertheless voluntarily undertook it, the plaintiff will be completely barred from recovery in negligence.²⁴³ This will be true even if the defendant breached his duty to inform the plaintiff of the risk, as long as the plaintiff does learn of the risk.²⁴⁴ For example, the plaintiff may recognize that the defendant has the symptoms of an STD. As with other issues of proof, the extent of the plaintiff's consent will be largely an issue of the credibility of the parties, thereby putting the plaintiff at a disadvantage due to the burden of proof placed on the plaintiff.²⁴⁵

It may even be possible to argue that plaintiffs who engage in sufficiently high risk behavior have by implication assumed the risk

²³⁸ J. LANGONE, AIDS: THE FACTS 10 (1988).

²³⁹ *Id.* at 48.

²⁴⁰ *Id.* at 10-11.

²⁴¹ *Id.*

²⁴² See *supra* note 31 and accompanying text for the elements of negligence.

²⁴³ PROSSER & KEETON, *supra* note 31, at 480-84.

²⁴⁴ The plaintiff might learn of the risk from some source other than the defendant. For example, the plaintiff in *B.N. v. K.K.* was a nurse who might have, but apparently did not, notice that the defendant had symptoms of herpes. See 312 Md. 135, 138, 530 A.2d 1175, 1177 (1988). If such a plaintiff were to proceed to have sex after acquiring knowledge of the defendant's infection, she would assume the risk.

²⁴⁵ See *supra* notes 148-52 and accompanying text for a discussion of burdens of proof in STD insurance cases.

of the known probable consequences of such behavior.²⁴⁶ This might be the case, for example, with plaintiffs who have had multiple homosexual sex partners, never using "safe-sex" techniques.²⁴⁷ Alternatively, high risk behavior might be shown to be a form of contributory or comparative negligence that might reduce, if not eliminate, the judgment for the plaintiff.²⁴⁸ Thus far, however, courts have placed the burden of disclosure of the risk of STD transmission squarely on the defendant and have not imposed any duty to discover on the plaintiff.²⁴⁹

The Georgia Court of Appeals has suggested that violation of statute might be used to prove contributory negligence *per se* on the part of the plaintiff.²⁵⁰ Although actually an affirmative defense, contributory negligence is closely allied to assumption of the risk.²⁵¹ In the *per se* situation, the violation of statute is relevant only if the defendant can show that the statute was enacted to prevent the type of injury that occurred.²⁵² Anti-fornication statutes exist in only a few states and seem to be morals statutes rather than public health statutes.²⁵³ The more numerous anti-sodomy statutes²⁵⁴ have similar morality origins, but in light of the health risks of sodomy a better case might be made that these statutes are also intended to prevent the spread of disease. Therefore, a contributory negligence *per se* argument is more likely to succeed in cases involving negligent transmission of AIDS.

If the plaintiff establishes all of the elements of the underlying cause of action successfully, defendants will have to rely on affirmative defenses. Beyond assumption of the risk, other affirmative defenses are much less promising. Most states no longer accept the illegality defense for any type of tort.²⁵⁵ Courts are unlikely to apply

²⁴⁶ This might be analogous to the implied assumption of risk taken by engaging in other unreasonably dangerous activities. See PROSSER & KEETON, *supra* note 31, at 481.

²⁴⁷ J. LANGONE, *supra* note 30, at 11.

²⁴⁸ PROSSER & KEETON, *supra* note 31, at 232.

²⁴⁹ *E.g.*, B.N. v. K.K., 312 Md. 135, 142, 538 A.2d 1175, 1179 (1988).

²⁵⁰ Long v. Adams, 175 Ga. App. 538, 541, 333 S.E.2d 852, 855 (1985) (quoting Allen v. Gornto, 100 Ga. App. 2d 744, 751, 112 S.E.2d 368, 372-73 (1959)); see also PROSSER & KEETON, *supra* note 31, at 220-34; RESTATEMENT (SECOND) OF TORTS § 469 (1977).

²⁵¹ See PROSSER & KEETON, *supra* note 31, at 485.

²⁵² See generally RESTATEMENT (SECOND) OF TORTS § 286; PROSSER & KEETON, *supra* note 31, at 224-30 (1984).

²⁵³ *E.g.*, GA. CODE ANN. § 16-6-18 (1988).

²⁵⁴ *E.g.*, GA. CODE ANN. § 16-6-2(a) (1988); MASS. ANN. LAWS ch. 272, § 34 (Law. Co-op 1980); MINN. STAT. ANN. § 609.293 (West 1987).

²⁵⁵ PROSSER & KEETON, *supra* note 31, at 232.

the illegality defense in STD cases, as illustrated by the Georgia court in *Long v. Adams*.²⁵⁶ The privacy defense is no more likely to succeed. The *Kathleen K.* decision in California effectively argues against any constitutional privacy defense to STD transmission suits.²⁵⁷ The court's rationale was that states have a legitimate interest in interfering with intimate sexual relationships to prevent injury to their citizens, or in this case, to allow recovery for injury.²⁵⁸ Because most states do, in fact, interfere with various aspects of intimate sexual relationships by statute²⁵⁹ without running afoul of the Constitution,²⁶⁰ this decision would seem to be correct for other jurisdictions as well as for California.

As a defense to tort actions, most states have rejected interspousal immunity.²⁶¹ Even where it remains in effect, it is unlikely to be a factor in homeowner's insurance cases. The reason is that the spouse of the policy holder is not normally considered as a "person other than the insured" to whom liability payment must be made by the insurance company.²⁶² Thus, although a spouse can sue for negligent transmission of an STD, he or she cannot recover under homeowner's insurance.

Even though insurance companies have little chance of avoiding their duty to defend and indemnify insureds who are sued for STD transmission under typical liability policies, the companies can still keep their costs down. Insurance companies can avoid the expense of future cases of negligent transmission of STDs by rewriting their standard homeowner's policies.

If insurance companies do not want to provide coverage for negligent transmission of STDs in their homeowner's policies, they

²⁵⁶ 175 Ga. App. 538, 541, 333 S.E.2d 852, 855 (1985).

²⁵⁷ See *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984). See *supra* notes 172-81 and accompanying text for a discussion of the case. See Murray & Winslett, *The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships*, 1986 U. ILL. L. REV. 779, 789-97 (1986) for a further discussion of privacy issues in STD cases.

²⁵⁸ *Kathleen K.*, 150 Cal. App. 3d at 996-97, 198 Cal. Rptr. at 276.

²⁵⁹ See *supra* notes 159, 253-54 and accompanying text for examples of sodomy and fornication statutes.

²⁶⁰ The Supreme Court has explicitly allowed state interference with private consensual homosexual relations. See *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986).

²⁶¹ See *supra* notes 180-87 and accompanying text for a discussion of interspousal immunity.

²⁶² *E.g.*, COUCH, *supra* note 10, at § 1:61; R. KEETON & A. WIDDIS, *supra* note 11, at 1133 (sample policies referring to insured as including members of policyholder's household who are related).

may simply follow the suggestion of the *R.W.* court and explicitly exclude such coverage.²⁶³ Insurance companies could accomplish this end by a simple definition in the exclusions section such as: "Bodily injury within the meaning of this policy does not include sexually transmitted disease." Insurers with such exclusions might even use the exclusion as a selling point by offering slightly lower premiums for policies with these exclusions and calling these policies "safe sex" policies. This would take care of the problem suggested by the insurance company's arguments in *R.W.* that insureds should not have to pay, through their premiums, for the negligent sexual behavior of other insureds.²⁶⁴ Offering such policies would parallel the practice now used in other types of insurance. Insurers that offer health insurance market lower priced policies to those who exercise or those who do not smoke.²⁶⁵ Similarly, companies that offer automobile insurance have offered less expensive policies to those with safe driving records.²⁶⁶

Beyond accommodating those people who would like to be able to purchase the less expensive "safe sex" policies, insurance companies could also offer "high risk" policies. "High risk" policies would specifically cover transmission of STDs. Although this coverage would be expensive, people with fairly large personal assets who had reason to fear liability for transmission of STDs might be willing to pay the high premium for such coverage.

Rather than operating on the assumption that suits for transmission of STDs must continue unabated, insurance companies could also take steps to help reduce the number of these cases by educating the public. Insurance companies have had success in the past using their considerable marketing and lobbying power to increase awareness of safe driving practices and to promote safer practices in many industries. With an ever increasing economic incentive to reduce the number of potential STD suits, insurance companies have every reason to try to reduce the actual number of incidents of negligent transmission by educating both their insureds and the general public about the dangers of many sexual lifestyles and practices.

²⁶³ *North Star Mut. Ins. Co. v. R.W.*, 431 N.W.2d 138, 143 (Minn. Ct. App. 1988).

²⁶⁴ *Id.*

²⁶⁵ COUCH, *supra* note 10, at § 37:71.

²⁶⁶ M. WOODPROOF, J. FONSECA, A. SQUILLANTE, *AUTOMOBILE INSURANCE AND NO-FAULT LAW*, 272 (1974).

VI. CONCLUSION

The New York and Minnesota courts were correct in holding that coverage for negligent transmission of STDs exists under the terms of the typical homeowner's insurance policy. Other jurisdictions should follow these holdings because they are correct from both a legal and a policy standpoint. Society will be best served if such coverage is allowed because it will help to insure that more victims of negligent STD transmission are fully compensated despite the insolvency of defendants.

Because cases involving negligent transmission of STDs will probably become more common if these holdings are generally accepted, insurance companies should begin preparing to deal with the defenses of insureds sued for negligent transmission of STDs. In addition, insurance companies must consider steps to reduce their exposure to such cases entirely, either through policy exclusions, or more constructively, through educational efforts designed to reduce the total number of incidents of negligent transmission of sexually transmitted disease.

CHARLES FAYERWEATHER