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AIDS: A Legal Epidemic?

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INTRODUCTION

AQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS)¹ may soon become as much of a legal epidemic as it is a medical epidemic. Concern over the development of this severe immuno-depressant disease began in the medical community after the identification of AIDS in 1981.² Articles were being written in medical journals concerning Kaposi's sarcoma (KS),³ pneumocystis carinii pneumonia (PCP)⁴ and other opportunistic infections⁵ included in the definition of AIDS⁶ given by the Center for Disease Control (CDC).⁷

News of the disease spread through the gay community, and soon after gay publications were printing articles on AIDS.⁸ During this same time, the news media also was quickly spreading the news of this disease.⁹ Finally, the scientific community became interested and articles on AIDS began to appear

¹This is the acronym for the terms "acquired immune deficiency syndrome" and "acquired immunodeficiency syndrome." A layman's explanation of AIDS is provided in West, *One Step Behind a Killer*, 4 Sci. 83 37 (March 1983): "Its name is Acquired Immune Deficiency Syndrome: 'acquired' to indicate its victims did not inherit it, 'immune deficiency' because the one thing they have in common is a breakdown of their immune systems, and 'syndrome' to cover the grab bag of rare but ravaging diseases that take advantage of their bodies' collapsed defenses." *Id.*; see also *Update on Acquired Immune Deficiency Syndrome (AIDS) — United States*, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 507 (Sept. 24 1982).

²DeBendictis, *AIDS Presenting Unique Challenges to Legal System*, L.A. Daily J., Sept. 17, 1983, at 1, col. 6 reprinted in part in *AIDS Presents Unique Challenges to Legal System*, 112 N.J.L.J. 22 (1983). "AIDS was first reported in the spring of 1981, although patients with diagnoses meeting the surveillance definition for AIDS were in retrospect, seen earlier." *Update: Acquired Immunodeficiency Syndrome (AIDS) — United States*, 32 Center for Disease Control: Morbidity and Mortality Weekly Rep. 688 (Jan. 6, 1984).

³*Special Report: Epidemiologic Aspects of the Current Outbreak of Kaposi's Sarcoma and Opportunistic Infections*, 306 NEW ENG. J. OF MED. 252 (Jan. 28, 1982); see *infra* notes 72-76 and accompanying text.

⁴*An Outbreak of Community-Acquired Pneumocystis Carinii Pneumonia*, 305 NEW ENG. J. OF MED. 1431 (Dec. 10, 1981); see *infra* note 71 and accompanying text.

⁵*Special Report*, 306 NEW ENG. J. OF MED. 252 (Jan. 28, 1982); see *infra* note 77 and accompanying text.

⁶The Center for Disease Control defines a case of AIDS as: "a reliably diagnosed disease that is at least moderately indicative of an underlying cellular immunodeficiency in a person who has had no known underlying cause of cellular immunodeficiency nor any other cause of reduced resistance reported to be associated with that disease." *Acquired Immune Deficiency Syndrome (AIDS) Update - United States*, 32 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 310 (June 24, 1983).

⁷"The Centers for Disease Control (CDC), [located in Atlanta, Georgia and] established as an operating health agency within the Public Health Service by the Secretary of Health, Education, and Welfare on July 1, 1973, is the Federal agency charged with protecting the public health of the Nation by providing leadership and direction in the prevention and control of diseases and other preventable conditions, and responding to public health emergencies." The United States Government Manual 1983/84 23 (July 1, 1983).

⁸See generally Gays and Acquired Immune Deficiency Syndrome (AIDS); A Bibliography 28-57 (Canadian Gay Archives Publication 7, 2d ed. 1983).

⁹*Id.* at 58-66.

in their periodicals as well.¹⁰ Books also were published¹¹ and an extensive bibliography soon developed.¹²

With this expanding coverage of AIDS in the literature, it was inevitable that the legal community would soon become involved.¹³ Nevertheless, the articles published with respect to the legal implications of AIDS have been brief — partly because the knowledge of AIDS and its possible legal implications are still in the inchoate stages.

The purpose of this comment is to provide the legal community with a comprehensive consideration of some of the major legal implications of AIDS. While the knowledge about AIDS at present is limited, it is nonetheless hoped that this comment will serve as a catalyst for other legal writers to consider the myriad legal problems involved with this serious new disease.

This comment will be divided into two major sections. First, the history, effects, and potential causes of AIDS will be explored in an effort to provide a framework for future analysis. Second, the legal implications of AIDS will be analyzed by looking at actual and potential cases based on either a *known* existence of AIDS or a *feared* existence of AIDS.

I. THE DISEASE

A. History

The first Center for Disease Control (hereinafter "CDC") report on a disease included within the definition of AIDS¹⁴ appeared in June of 1981.¹⁵ The report described the development of PCP in five young, active homosexuals in the Los Angeles area.¹⁶ The CDC noted that this occurrence was "unusual"¹⁷ and stated that: "The fact that these patients were all homosexuals suggests an association between some aspect of a homosexual lifestyle or disease acquired through sexual contact"¹⁸

Then, in early July 1981, the CDC reported that during the previous thirty months KS had been diagnosed in twenty-six homosexual men.¹⁹ Again the

¹⁰*Id.* at 1-28. The New England Journal of Medicine is one of the best sources for current medical knowledge concerning AIDS. The Journal of the American Medical Association is also a good source. The CDC's current findings can be found in their Morbidity and Mortality Weekly Report.

¹¹See generally K. CAHILL, THE AIDS EPIDEMIC (1983) and J. KASSLER, GAY MEN'S HEALTH: A GUIDE TO THE AID SYNDROME AND OTHER SEXUALLY TRANSMITTED DISEASES (1983).

¹²*Id.* at 1-66.

¹³DeBenedictis, *supra* note 2 at 1, col. 6.

¹⁴See *supra* note 8.

¹⁵*Pneumocystis Pneumonia — Los Angeles*, 30 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 250 (June 5, 1981).

¹⁶*Id.*

¹⁷*Id.* at 251.

¹⁸*Id.*

¹⁹*Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Males*, 30 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 305 (July 3, 1981).

CDC stated that this was "highly unusual."²⁰ In addition, ten new cases of PCP had been identified in homosexual men, and this seemed to suggest that the five "previously reported cases were not an isolated phenomenon."²¹ At this point, the vast majority of KS and PCP patients were homosexual men.²²

Generalized lymphadenopathy was reported in homosexual males in May of 1982,²³ and the CDC noted that the epidemiologic characteristics of the patients were similar to the homosexuals who had been diagnosed as having KS or other opportunistic infections.²⁴ The CDC's concern was evident as it stated that these cases may be related to some "other disorder that needs to be characterized further."²⁵

By June 1982, over 350 reports of KS and/or serious opportunistic infections had been received by the CDC.²⁶ Nearly eighty percent of these patients were male homosexuals or bisexuals.²⁷ Nevertheless, male homosexuals were not the only ones being affected.²⁸ There were patients who were intravenous drug users that had opportunistic infections.²⁹ Heterosexual men were also infected, but to a much lesser degree.³⁰

Then, in early July of 1982, the CDC reported cases of KS and opportunistic infections among Haitians in the United States.³¹ They noted that this occurrence in Haitians was a "new phenomenon"³² and that the immunologic findings and high mortality rate for the Haitian patients were "similar to the pattern recently described among homosexual males and IV drug abusers."³³ The CDC did not, however, go so far as to say that the occurrences were related.³⁴

In mid-July of 1982, the CDC reported that PCP was discovered in three

²⁰*Id.* at 306.

²¹*Id.*

²²*Id.* at 307.

²³*Persistent, Generalized Lymphadenopathy among Homosexual Males*, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 249 (May 21, 1982).

²⁴*Id.* at 250.

²⁵*Id.*

²⁶*Update on Kaposi's Sarcoma and Opportunistic Infections in Previously Healthy Persons — United States*, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 294 (June 11, 1982).

²⁷*Id.* 300. This percentage may have been higher because the accuracy of self-reported sexual orientation cannot be determined. *Id.* at 301.

²⁸*Id.* at 300.

²⁹*Id.* at 301.

³⁰*Id.*

³¹*Opportunistic Infections and Kaposi's Sarcoma among Haitians in the United States*, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 353 (July 9, 1982).

³²*Id.* at 360.

³³*Id.*

³⁴*Id.* at 361.

patients with hemophilia A.³⁵ Again the similarity was noted: "The clinical and immunologic features that these three patients share are strikingly similar to those recently observed among certain individuals from the following groups: homosexual males, heterosexuals who abuse IV drugs, and Haitians."³⁶ Recognizing that these similarities demonstrated a new type of illness, the CDC changed the name of the disease³⁷ in September of 1982 to acquired immune deficiency syndrome, or simply AIDS.³⁸ (The CDC had formerly referred to it as Kaposi's sarcoma and opportunistic infections in previously healthy persons.)

The spread of AIDS did not stop with the previously mentioned four high-risk groups.³⁹ In December of 1982, the CDC reported potential cases of AIDS in five infants.⁴⁰ Less than a month later, the CDC reported the cases of two females with cellular immunodeficiency whose sexual partners were males with AIDS.⁴¹

AIDS was no longer simply the "gay plague."⁴² Indeed, AIDS has been found to be present in infants,⁴³ adults,⁴⁴ men,⁴⁵ women,⁴⁶ whites,⁴⁷ minorities,⁴⁸

³⁵*Pneumocystis carinii Pneumonia among Persons with Hemophilia A*, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 365 (July 16, 1981). It was later reported that patients with hemophilia B were also getting AIDS. *Update: Acquired Immunodeficiency Syndrome (AIDS) among Patients with Hemophilia — United States*, 32 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 613 (Dec. 2, 1983).

³⁶*Pneumocystis carinii Pneumonia among persons with Hemophclia A*. CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 366 (July 16, 1982).

³⁷The CDC had formerly referred to it as Karposi's Syndrome and opportunistic infections in previously healthy persons. *Update on Acquired Immune Deficiency Syndrome (AIDS) — United States*, *supra* note 1.

³⁸*Id.* There is some confusion about who thought of the name acquired immune deficiency syndrome. Bazell, *The History of an Epidemic*, 189 NEW REPUBLIC 14 (Aug. 1, 1983). At an early stage, the disease was called GRID — gay-related immune deficiency. Gays and Acquired Immune Deficiency Syndrome (AIDS): A Bibliography, *supra* note 8, at i.

³⁹*Id.* at 508.

⁴⁰*Possible Transfusion-Associated Acquired Immune Deficiency Syndrome AIDS — California*, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 652 (Dec. 10, 1982); *Unexplained Immunodeficiency and Opportunistic Infections in Infants — New York, New Jersey, California*, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 665 (Dec. 17, 1982). Potential cases of AIDS in infants are, however, "recorded separately because of the uncertainty in distinguishing their illnesses from previously described congenital immunodeficiency syndromes." *Acquired Immunodeficiency Syndrome (AIDS) Update — United States*, *supra* note 6 at 309.

⁴¹*Immunodeficiency Among Female Sexual Partners of Males with Acquired Immune Deficiency Syndrome (AIDS) — New York*, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 697 (Jan. 7, 1983).

⁴²Ver Meulen, *The Gay Plague*, 15 N.Y. 52 (May 31, 1982). The CDC reporting on the findings of the European Region of the World Health Organization has stated that AIDS has been reported in Austria, Belgium, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Ireland, Italy, Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom. *Acquired Immunodeficiency (AIDS) — Europe*, 32 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 610-11 (Nov. 25, 1983). (The definition of AIDS in other countries may differ slightly from that used by the CDC).

⁴³*Acquired Immune Deficiency Syndrome (AIDS) Update — United States*, *supra* note 6 at 311.

⁴⁴*Id.* at 309.

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.*

homosexuals,⁴⁹ and heterosexuals.⁵⁰

Not only has the number of groups affected increased, but the total number AIDS cases is increasing geometrically.⁵¹ In 1981, an average of one case of AIDS per day was reported.⁵² By late 1982 and early 1983, the number of cases reported daily had risen to three to four.⁵³ In July of 1983, an average of over seven cases of AIDS were reported daily.⁵⁴ Between June 1981 and August 1, 1983, physicians and health departments in the United States and Puerto Rico reported 1,972 cases of AIDS.⁵⁵

Despite the spread of AIDS to virtually all segments of the population, statistics reveal some discernible patterns. As of June 20, 1983, homosexual and bisexual men accounted for seventy-one percent of the cases, intravenous drug users seventeen percent, persons born in Haiti and now living in the United States five percent, and hemophiliacs one percent.⁵⁶ The remaining six percent cannot be classified into one of these four main risk groups.⁵⁷ For about half of these remaining patients, information on these risk factors is incomplete.⁵⁸ The remaining three percent includes four groups (placed in order of decreasing frequency); “. . . patients with no identifiable risk factors, heterosexual partners of AIDS patients or persons in risk groups, recipients of blood transfusions, and KS patients with normal immunologic studies.”⁵⁹

In addition to these risk groups, other patterns are present. First, in terms of age, ninety percent of AIDS victims are between the ages of twenty and forty-nine.⁶⁰ Second, whites account for fifty-nine percent of the cases, blacks twenty-six percent, and persons of Hispanic origin fourteen percent.⁶¹ Third, women account for only seven percent of the cases.⁶² Fourth, most victims are

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Prevention of Acquired Immune Deficiency Syndrome (AIDS): Report of Inter-Agency Recommendations* 32 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 101 (March 4, 1983).

⁵²*Id.*

⁵³*Id.*

⁵⁴*Update: Acquired Immunodeficiency Syndrome (AIDS) — United States*, 32 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 389 (Aug. 5, 1983).

⁵⁵*Id.* Of these, 759 died. *Id.* As of November 21, 1983, 2,803 cases of AIDS have been reported in the United States. *Acquired Immunodeficiency Syndrome (AIDS) — Europe*, 32 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 610 (November 25, 1983). This figure is greater than all of the deaths caused by Legionnaire's disease and toxic shock syndrome combined. Macek, *Acquired immunodeficiency syndrome cause(s) still elusive*, 248 J.A.M.A. 1423 (Sept. 24, 1982).

⁵⁶*Acquired Immunodeficiency Syndrome (AIDS) Update — United States*, *supra* note 6, at 309. These four risk groups are hierarchically ordered. A case with more than one risk factor is tabulated only in the risk group listed first. *Id.*

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Update: Acquired Immunodeficiency Syndrome (AIDS) — United States*, *supra* note 2 at 688.

⁶¹*Id.*

⁶²*Id.*

reported among residents of large cities. New York has reported forty-two percent of the cases, San Francisco twelve percent and Los Angeles eight percent.⁶³

Thus, despite the reach of AIDS into many segments and areas of society, young, white homosexual and bisexual males are by far the most affected — especially those active in the large gay communities in New York, San Francisco, and Los Angeles.⁶⁴ Nevertheless, AIDS is affecting more and more people each day. The often fatal effect of AIDS accounts for the deep and growing public concern.

B. *Effects*

As mentioned earlier, AIDS includes the diseases KS, PCP, and serious opportunistic infections.⁶⁵ PCP is the most common opportunistic infection present in fifty-one percent of AIDS victims.⁶⁶ Twenty-six percent have KS without PCP, and seven percent have both PCP and KS.⁶⁷ The remaining sixteen percent of AIDS patients have some form of opportunistic infection other than KS or PCP.⁶⁸

PCP is more common than KS and is much more deadly. September 1982 figures show a mortality rate for PCP of forty-seven percent.⁶⁹ In comparison, the mortality rate is twenty-one percent for victims with KS only, sixty-eight percent for victims with both PCP and KS, and forty-eight percent for cases with other opportunistic infections.⁷⁰

Given this historical background and these grim statistics on AIDS, three questions are presented. First, just what are the effects of PCP, KS, and opportunistic infections? Second, how are these diseases transmitted? Third, why does the legal community need to know about all of this? The answers to the first two questions will be provided in the remainder of this first section. The last question forms the basis for section two, which explores the legal implications of AIDS.

PCP is a severe pneumonia and is almost exclusively limited to severely immunosuppressed patients. The effects include severe respiratory problems, weight loss and general malaise.⁷¹

⁶³*Id.* at 689. However, cases have been reported from forty-two states, the District of Columbia, and Puerto Rico. *Id.* at 688.

⁶⁴*Id.* at 688-689.

⁶⁵*Update on Acquired Immune Deficiency Syndrome (AIDS) — United States, supra* note 1 at 508. Opportunistic infections include pneumonia, meningitis and encephalitis. *Id.*

⁶⁶*Update: Acquired Immunodeficiency Syndrome (AIDS) — United States, supra* note 2 at 688.

⁶⁷*Id.* Many of those with PCP and/or KS have other opportunistic infections as well. *Acquired Immunodeficiency Syndrome (AIDS) Update — United States, supra* note 6 at 309.

⁶⁸*Id.*

⁶⁹*Update on Acquired Immune Deficiency Syndrome (AIDS) — United States, supra* note 1.

⁷⁰*Id.*

⁷¹*Follow-up on Kaposi's Sarcoma and Pneumocystis Pneumonia*, 30 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 410 (Aug. 28, 1981). PCP was first identified during World War II in severely malnourished children with failed immune systems. Gays and Acquired Immune Deficiency Syndrome (AIDS): A Bibliography, *supra* note 8 at 16

KS, named after its discoverer M. Kaposi,⁷² is a rare form of cancer.⁷³ This malignancy had previously been restricted to "elderly men of Mediterranean or Jewish ancestry and young men from equatorial Africa."⁷⁴ The symptoms may include: skin lesions, mucous membrane lesions, severe weight loss, and fever.⁷⁵ In contrast to the high incidence of death found in the young patients, KS is rarely fatal in elderly men.⁷⁶

The opportunistic infections, so named because of their predilection for immune deficient hosts, may result in fever, weight loss, fatigue, night sweats, diarrhea, and other symptoms of general malaise.⁷⁷

As the name acquired immune deficiency syndrome suggests, the AIDS victim has a diminished cellular immunity. In the normal body, a person's immune system consists of an adequate number of B-lymphocytes and T-lymphocytes.⁷⁸ The B-lymphocytes defend the body "by creating antibodies to bacteria and viruses before they have invaded the cells."⁷⁹ The T-lymphocytes provide this immune function at the cellular level.⁸⁰

In an AIDS patient, however, the T-lymphocytes are both low in number and abnormal in composition.⁸¹ There are two types of T-lymphocytes: helper T cells and suppressor T cells.⁸² The helper T cells "aid other immune cells to perform their functions, and suppressor T cells inhibit them."⁸³

AIDS patients have a low number of helper T cells, which could produce a severe suppression of the cellular immunity function.⁸⁴ This suppression would allow the opportunistic infections to become quite severe and possibly cause death, as very little immunity to such infections is present in these cells.⁸⁵

C. Cause

The most important question is: what causes the immune defects found

⁷²KS was first discovered in 1872. *Id.*

⁷³Lawrence, AIDS — *No Relief in Sight*, 122 SCI. NEWS 202 (Sept. 25, 1982). As of December 2, 1983, no cases of KS have been reported in association with hemophilia. *Update: Acquired Immunodeficiency Syndrome (AIDS) among Patients with Hemophilia — United States*, 32 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 613 (Dec. 2, 1983).

⁷⁴Macek, *supra* note 63, at 1423.

⁷⁵Kaposi's Sarcoma and Pneumocystis Pneumonia Among Homosexual Men — *New York City and California*, 30 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 305 (July 3, 1981).

⁷⁶*Follow-Up on Kaposi's Sarcoma and Pneumocystis Pneumonia*, *supra* note 71, at 409.

⁷⁷Marx, *New Disease Baffles Medical Community*, 217 SCI. 619 (Aug. 13, 1982).

⁷⁸*Id.*

⁷⁹Lieberson, *Anatomy of an Epidemic*, 30 N.Y. REVIEW OF BOOKS 17 (Aug. 18, 1983).

⁸⁰See Marx, *supra* note 77, at 619.

⁸¹*Id.* The B-lymphocytes do not appear to be affected. *Id.*

⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

in AIDS patients?⁸⁶ As of now, the etiology of AIDS is unknown.⁸⁷ Many theories have been previously put forth, but the CDC has given its view on the cause and transmission of AIDS:

The cause of AIDS is unknown, but it seems most likely to be caused by an agent transmitted by intimate sexual contact, through contaminated needles, or less commonly, by percutaneous inoculation of infectious blood or blood products. No evidence suggests transmission of AIDS by airborne spread . . . [and] casual contact offers little or no risk.⁸⁸

The above language is cautionary however. The statement says that AIDS *seems* to be transmitted by intimate sexual contact, through contaminated needles, or by percutaneous inoculation of blood or blood products.⁸⁹

The explanation of the transmission of AIDS relating to sexual contact appears to account for the presence of the disease in homosexual and bisexual males and in females whose sexual partners are in one of the high risk groups.⁹⁰ The contaminated needle theory appears to explain the presence of the disease in IV drug abusers who often share contaminated needles — exposing themselves to blood-borne agents.⁹¹ As for the blood-related portion of the definition, this would appear to account for the presence of AIDS in hemophiliacs⁹² and both infants and adults who have recently received blood transfusions.⁹³

Reports of unexplained cellular immunodeficiency and opportunistic infections in infants born to mothers in one of the risk groups have raised concern about in utero perinatal transmission.⁹⁴ As for the Haitians, little is known about the risk factors involved.⁹⁵

⁸⁶*Id.*

⁸⁷*Update: Acquired Immunodeficiency Syndrome (AIDS) Among Patients with Hemophilia — United States, supra* note 73, at 614. On April 23, 1984, Federal researchers announced that they believed that they had found the cause of AIDS — a virus they call human T-lymphotrophic retrovirus-3 (HTLV-3). This followed an announcement by researchers at the Pasteur Institute in Paris who also claim to have found the cause of AIDS — a virus they call lymphodencapthy-associated virus (LAV). Secretary of Health and Human Services Margaret M. Heckler said she thought the two viruses are probably the same. However, "It remains remotely possible that the viruses observed by French and American researchers are not the cause of AIDS, but part of it. They could be just a newly recognized opportunistic infection of the type that afflict AIDS victims." Altman, *New U.S. Report Names Virus That May Cause AIDS*, N.Y. TIMES, April 24, 1984, at 15, col. 2. Further, "Finding the cause of AIDS will not necessarily lead to any treatment of the disease soon, nor will it necessarily result in a method of prevention. But the finding led the American researchers to express the hope that a vaccine would be developed and ready for testing 'in about two years.'" *Id.* at 13, col. 5. Thus, until both the cause and cure are definitely medically established, the legal problems concerning AIDS will remain.

⁸⁸*Acquired Immunodeficiency Syndrome (AIDS) Update — United States, supra* note 6, at 311.

⁸⁹*Id.* The CDC has stated that the "evidence suggests an infectious cause." *Update: Acquired Immunodeficiency Syndrome (AIDS) among Patients with Hemophilia — United States, supra* note 73, at 614.

⁹⁰*See Prevention, supra* note 51, at 101.

⁹¹*Id.*

⁹²*Id.*

⁹³*See Prevention, supra* note 51, at 101.

⁹⁴*Id.*

⁹⁵*Id.* "Nearly all of the victims deny IV drug use and are vehement about their heterosexuality, but a deep-rooted anti-homosexual bias in Haitian culture makes sexual orientation difficult to determine . . . [further it is important to note that] Haiti is a holiday spot for American homosexuals." Seligmann, Gosnell, Coppola, and Hager, *The AIDS Epidemic: The Search for a Cure*, 101 NEWSWEEK 75, 78 (April 18, 1983).

Thus, for the most part, it appears AIDS is passed by a transmissible agent.⁹⁶ Nevertheless, medical people continue to emphasize that it does not appear that AIDS may be transmitted by airborne spread or casual contact.⁹⁷ Nor does it appear to be spread by fecal contamination of food or by insects.⁹⁸ Thus, all that can be said at this point is that the deadly disease of AIDS appears to be spread by an infectious transmissible agent through intimate sexual contact, contaminated needles, or percutaneous inoculation of blood or blood products.⁹⁹ Just what this agent is, is still unknown.¹⁰⁰

Equally upsetting is that the period of communicability is currently unknown.¹⁰¹ The CDC has stated that it is conceivable for one to be a carrier of the infectious agent which transmits AIDS.¹⁰² This carrier may give AIDS to his sexual partners without becoming ill himself.¹⁰³ Studies suggest "a 'latent period' of several months to 2 years between exposure and recognizable clinical illness and imply that transmissibility may precede recognizable illness."¹⁰⁴

Therefore, there is no known cause of AIDS, no known transmission agent and no known period of communicability. With this grim scenario, the CDC sadly states: "As long as the cause remains unknown the ability to understand the natural history of AIDS and to undertake preventive measures is somewhat compromised."¹⁰⁵ In short, without knowing the cause, it is very difficult to formulate a cure.

Nevertheless, three further points deserve mention. First, the National Institute of Health has reported that interleukin-2 (a substance extracted from blood cells) may help to restore normal immune function to AIDS patients.¹⁰⁶ Second, a recent article in the *New England Journal of Medicine* suggest that doses of gamma infection may help restore the organism fighting ability of

⁹⁶See Prevention, *supra* note 51, at 101.

⁹⁷*Acquired Immune Deficiency Syndrome (AIDS): Precautions for Clinical and Laboratory Staffs*, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 577 (Nov. 5, 1982).

⁹⁸Liberson, *supra* note 79.

⁹⁹*Acquired Immunodeficiency Syndrome (AIDS) Update — United States*, *supra* note 6, at 311.

¹⁰⁰*Id.*

¹⁰¹Seligmann, Gosnell, Coppola, and Hager, *supra* note 95, at 79.

¹⁰²*Immunodeficiency Among Female Sexual Partners of Males with Acquired Immune Deficiency Syndrome (AIDS) — New York*, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 698 (Jan. 7, 1983).

¹⁰³*Id.* Similarly, "[D]octors now believe that some people in high-risk groups who have yet to exhibit AIDS symptoms may, like Typhoid Mary, carry [the] disease and unknowingly pass it on via their blood." Chase, *Bad Blood: "Gift of Life" May Be Also An Agent of Death in Some AIDS Cases*, WALL ST. J., March 12, 1984, at 1, col 1.

¹⁰⁴See Prevention, *supra* note 51, at 102.

¹⁰⁵*Id.* at 103.

¹⁰⁶Liberson, *supra* note 79, at 18; Treichel, *AIDS: New victims but maybe a treatment*, 124 SCI. NEWS 54 (July 23, 1983). It is, however, merely a hypothesis that is being tested on some AIDS patients. Its success has not yet been established. *Id.*

an AIDS victim's immune system.¹⁰⁷ Third, many groups are publishing reports on AIDS, including the Public Health Service, the National Hemophilia Foundation, the National Gay Task-Force, the American Red Cross, the American Association of Blood Banks, the Council of Community Blood Centers, and others.¹⁰⁸ These reports include recommendations for virtually all groups who have AIDS or who may come in contact with AIDS patients. These reports are designed, in part, to help reduce the fear accompanying this new disease.

The purpose of this first section has been to inform the legal community about AIDS. At this point in this comment, it is appropriate to turn to the question: Why does the legal community need to know all of this? The answer is contained in the following section.

II. THE LEGAL IMPLICATIONS

A. Introduction

To answer the question in a sentence: "The often vehement controversy over the disease known as AIDS . . . is about to spread to the courtrooms."¹⁰⁹ The possible types of litigation appear to fall into two main classes: cases based on a *known* existence of AIDS and cases based on a *feared* existence of AIDS.

B. Known Existence of AIDS

Perhaps the most obvious type of case in this area would be the suit brought by one sex partner against the other for giving him/her AIDS.¹¹⁰ This is analogous to new cases where one sex partner sues the other for giving him/her

¹⁰⁷*Impaired Production of Lymphokines and Immune (Gamma) Interferon in the Acquired Immunodeficiency Syndrome*, 310 *New Eng. J. of Med.* 883 (April 5, 1984). This article is a very important breakthrough in the study of AIDS. Gamma interferon plays a crucial role in the cellular immune system. Normally, helper T cells produce gamma interferon to help fight intracellular pathogens. However, the AIDS victims studied had defects in gamma interferon production. The researchers state that, "[T]he failure to produce this molecule [gamma interferon] may explain why patients with AIDS are vulnerable to, unable to control, and die from opportunistic infections . . ." *Id.* at 887. Further, the article states that doses of gamma interferon may help restore the disease fighting ability of the cells in AIDS victims. These cellular experiments were conducted in vitro (in a test tube), and the success of such a procedure in vivo (in the body) has yet to be proven. The researchers admit that "[f]urther studies will be necessary to define the relative importance of the abnormality [the failure to produce gamma interferon]," but they remain encouraged that their discovery may point to a method of combatting one of the most mysterious and deadly diseases existing today.

¹⁰⁸See *Prevention*, *supra* note 51, at 102.

¹⁰⁹Appleton, *Litigation Imminent on AIDS Issues*, 5 *NAT'L. L.J.* 3 (1983).

¹¹⁰It appears that transmission from a male in one of the high risk groups to a male or female sexual partner is possible. See *supra* note 90. To date, there have been no documented cases of a female transmitting AIDS to her male sexual partner. However, the knowledge about the transmission is so limited that it would be premature to rule out this possibility. Further, no cases of lesbian transmission have been reported. *Id.*

some form of venereal disease.¹¹¹ To date, no such case has been filed by an AIDS victim.

However, it is probable that a cause of action against one's sex partner alleging the transmission of AIDS could be properly maintained.¹¹² To explore the potential viability of this new cause of action, it is appropriate to analyze some of the legal issues presented by a hypothetical suit. Let us suppose our plaintiff is alleging that the defendant, who has AIDS or who is a carrier of AIDS, has infected him/her with AIDS.

The first issue presented is: What is the legal basis for the suit? The plaintiff may have a cause of action based upon battery,¹¹³ fraud,¹¹⁴ and/or negligence.¹¹⁵ All three of these theories would require the plaintiff to prove to some degree that the defendant knew or should have known that he had AIDS. This may be difficult to prove. The defendant may not have known that he had AIDS at the time of sexual contact because medical "findings suggest a latent period of several months to two years between exposure and

¹¹¹The newer cases in this area involve the venereal disease known as herpes simplex II. Four such cases have been reported to have been filed.

The first is *Liptrot v. Basini*, No. 82-19427 (Division CM), which was filed in Broward County Circuit Court in Fort Lauderdale, Florida. This case is the first of its kind in the nation. A single woman is suing a man who infected her with herpes on a one-night stand. Mellowitz and Rojas, *Herpes: A Cause for Legal Action?*, 5 NAT'L L.J., Nov. 8, 1982, at 3, col. 1.

The second is *St. Clair v. St. Clair*, No. 82-1105-CV-W-6, (D.C. Mo. 1982) which was filed in United States District Court in Kansas City, Missouri. An estranged wife is suing her husband for one million dollars in compensatory damages and five million dollars in punitive damages for infecting her with herpes. Ostroff, *New Case of Herpes: Banker Sued by Wife*, 5 NAT'L L.J., Jan. 10, 1983, at 2, col. 4.

The third case is *Olsen v. Olsen*, a California case in which a wife is suing her husband for infecting her with herpes. Griffin, *Herpes*, 11 STUDENT LAW., May 1983, at 22, col. 3 (This article contains a brief discussion of many of the medical and legal issues involved.)

The fourth case, *Kathleen K. v. Robert B.*, has been decided. A January 18, 1983 ruling by the Second Circuit Court of Appeals "recognized that in some instances there may be a duty to warn a sex partner that one has [herpes]." Galante, *Herpes Victim Wins Appeal*, 6 NAT'L L.J. 3, Feb. 6, 1984, at 3, col. 2. It is believed that this is the first appellate decision in the country upholding a plaintiff's right to sue a transmitter of herpes. *Id.* at 3, col. 1. See *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920) (where wife was able to maintain a cause of action against her husband for infecting her with venereal disease); *Devall v. Strunk*, 96 S.W.2d 245 (1936) (where single woman was able to maintain a cause of action against the man who infected her with crab lice); *Duke v. Housen*, 589 P.2d 334 (1979) (where single woman would have been able to maintain a cause of action against the man who infected her with gonorrhea if she had filed suit prior the expiration of the statute of limitations), *reh'g denied*, 590 P.2d 1340 (1979); *cf. State v. Lankford*, 29 De. (1 Boyce) 594, 102 A.63 (1917) (where husband was convicted of battery for infecting his wife with venereal disease); *But cf. Regina v. Clarence* [1888] 22 Q.B. 23. See generally PROSSER, HANDBOOK OF THE LAW OF TORTS 105 (4th ed. 1971).

¹¹²Leonard Graff, legal director of the San Francisco-based National Gay Rights Advocates has stated: "It is entirely possible suits similar to herpes cases will evolve from AIDS." Reaves, *Aids and the Law*, 69 A.B.A.J. 1014 (Aug. 1983).

¹¹³Generally, this cause of action has been limited to criminal prosecutions in this area. However, *Crowell* may be interpreted to encompass a claim for battery. *Barbara A. v. John G.*, 145 Cal. App. 3d ____, ____, P.2d ____, 193 Cal. Rptr. 431 (1983).

¹¹⁴*Devall*, 96 S.W.2d at 245.

¹¹⁵*Duke*, 589 P.2d at 335. It would be advisable for the plaintiff to plead these theories alternatively, for it is unclear which, if any, of these theories the courts will recognize as sufficiently applicable to sustain a verdict for the plaintiff in this new type of suit. It is however, assumed that a general demurrer or motion to dismiss would not be granted by the court on the basis that the intentional or negligent transmission of AIDS does not constitute a legal cause of action; that is to say, it is assumed that such a transmission may constitute a legal cause of action — based on the current medical information available.

recognizable clinical illness."¹¹⁶ This means that transmission of the disease may occur before the carrier is aware of his condition.¹¹⁷ These problems are factual, however, and would not automatically preclude a suit such as this.

The issue of causation also will be difficult to resolve. As mentioned earlier, the CDC has not conclusively stated that AIDS may be transmitted sexually — although it appears that it can be.¹¹⁸ Also, many of the early victims were male homosexuals who had had hundreds of sexual encounters in the few years prior to their infection with AIDS.¹¹⁹ Thus, trying to sort out who was the actual "transmitter" of AIDS could prove to be quite difficult in such cases. But again, this relates to a factual issue that would go to the weight of the evidence and not to the general viability of a suit based on the infection of the plaintiff with AIDS by the defendant.

The issue of harm and damages may involve some new legal interpretations. As mentioned earlier, the harm that AIDS causes is quite severe.¹²⁰ Death is a distinct possibility.¹²¹ If death does not occur, the actual damages may still be great because AIDS patients face very high medical costs.¹²² Hospital bills in excess of one hundred thousand dollars are not uncommon.¹²³ Further, insurance coverage may be exhausted due to the catastrophic nature of the illness.¹²⁴ Medicare disability is available to AIDS victims, but there is a two-year waiting period to establish eligibility;¹²⁵ thus, many patients will not live to receive their first check.¹²⁶ Even if the patient recovers from the first bout with an opportunistic infection, the deficient immune system remains, and there is a chance that another infection will soon develop, thereby increasing costs.

If death does occur, the plaintiff's estate would have to institute proceedings, if none had been brought previously. Presumably, such an action could be brought under the state's wrongful death and/or survival statute(s).¹²⁷ Still, it would be open to a court's interpretation of whether or not an AIDS suit such as this could be included in one or both of these type statutes. Here again, there is the possibility that an AIDS suit would not be able to be

¹¹⁶See Prevention, *supra* note 51, at 102.

¹¹⁷*Id.*

¹¹⁸*Acquired Immunodeficiency Syndrome (AIDS) Update — United States, supra* note 6, at 311. Future medical developments may, indeed, prove that AIDS can be transmitted sexually. If, however, it is shown that AIDS is not transmitted sexually, then such a suit could not be maintained.

¹¹⁹*Gay America In Transition*, 102 NEWSWEEK 30 (Aug. 8, 1983).

¹²⁰See *supra* the discussion in Section I concerning the effects of AIDS.

¹²¹*Update: Acquired Immunodeficiency Syndrome (AIDS) — United States, supra* note 54, at 389.

¹²²Lieberson, *supra* note 79, at 20.

¹²³*Id.*

¹²⁴*Id.* at 20-21.

¹²⁵*Id.* at 21 (citing Bush, N.Y. NATIVE (July 18-31, 1983)).

¹²⁶*Id.*

¹²⁷One should check the applicable state statutes, if any, in order to proceed. As with other areas, analogies will have to be drawn. See generally PROSSER, HANDBOOK OF THE LAW OF TORTS, Chapter 24 (1971).

maintained.

Nevertheless, there does not appear to be any basis for excluding a case based on AIDS from the coverage of these statutes. As in previous cases normally allowed by these statutes, the AIDS victim has died as a result of some action by the defendant.¹²⁸ Therefore, despite some serious factual difficulties and the potential for changed medical knowledge, the plaintiff could probably maintain an action against the defendant for infecting him/her with AIDS.

The defendant in such an action may have several defenses. First, if the suit was for battery, the defendant could argue that by consenting to the intercourse, plaintiff was barred from suing for the resulting harm. This defense is weak, however. The Restatement 2d of Torts §892(B) states:

If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.¹²⁹

An illustration of this rule is provided in comment e to §892(B): "A consents to sexual intercourse with B, who knows that A is ignorant of the fact that B has a venereal disease. B is subject to liability to A for battery."¹³⁰ Although AIDS is not a venereal disease, an obvious analogy can be drawn. While the plaintiff in the AIDS hypothetical consented to sexual intercourse, (s)he could not be said to have consented to the possibility of acquiring AIDS. There would, indeed, be a "substantial mistake concerning . . . the extent of harm to be expected . . ."¹³¹ Clearly, if one's consent is invalidated when venereal disease is involved, consent is also vitiated when the much more serious disease of AIDS is involved.

If the cause of action is grounded on negligence, the defendant may raise the defenses of assumption of risk,¹³² contributory negligence¹³³ and/or comparative negligence.¹³⁴

The defense of assumption of the risk would be strong if the plaintiff knew that the defendant had AIDS and voluntarily chose to have sex with him/her anyway; however, such a factual situation is highly unlikely, for people do not ordinarily expose themselves to such a serious risk so easily. The theories of contributory negligence and comparative negligence may be helpful to the defen-

¹²⁸This is the basis of both wrongful death and survival statutes.

¹²⁹RESTATEMENT (SECOND) OF TORTS § 892(B) (1979).

¹³⁰RESTATEMENT (SECOND) OF TORTS § 892(B) comment e, illustration 5 (1979).

¹³¹RESTATEMENT (SECOND) OF TORTS § 892(B) (1979).

¹³²See generally PROSSER, *supra* note 127, at 439-457.

¹³³*Id.* at 416-427.

¹³⁴*Id.* at 433-439. Again, should check the law of the state and seek to draw analogies to an AIDS situation.

dant, particularly if homosexuals are involved and an anti-sodomy statute is present in the state.¹³⁵

Even if the plaintiff is able to meet the burden of proof on all of the above issues, two questions remain. First, what should the statute of limitations be for such a case; and second, when does it start to run.?

As discussed in Section I, the period between exposure and recognizable clinical illness varies from several months to two years.¹³⁶ Future medical analysis will help define this time period with more precision, but to be safe, the time period for a statute of limitations should be at least two years. This would allow some flexibility in the event of a change in medical knowledge.

As for the latter question concerning when the statute of limitations begins, there are several possibilities.¹³⁷ Given the limited knowledge concerning AIDS, it may be more equitable if the period began to run from the time the disease of AIDS is diagnosed. Admittedly, this alternative is rarely used,¹³⁸ but until more medical knowledge is available on AIDS, justice requires a liberal standard to ensure that a plaintiff's legal claims are not barred by legal rules based on outdated, erroneous, medical speculation.

Therefore, given the medical knowledge presently available, a suit by a plaintiff alleging that the defendant infected him/her with AIDS can be legally maintained. Further, the court should structure a statute of limitations that will provide the plaintiff the time in which to discover the existence of AIDS and to file suit. This is not to imply, however, that the plaintiff will always be successful; problems in proving certain factual issues may be so great as to defeat recovery in any particular case.

Even though the hypothetical AIDS case analyzed above is the most analogous to previous cases,¹³⁹ such a case will probably form only a small

¹³⁵Violation of statute may constitute per se negligence. See generally Prosser, *supra* note 127, at 190-204. Once again, analogies would have to be drawn.

¹³⁶See Prevention, *supra* note 51, at 102. Justice Rosenblatt mentions that "Its incubation period is uncertain and is variously said to range anywhere from 1 to 4 years." *LaRocca v. Dalsheim*, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (1983). (citing Andreani, *Acquired Immunodeficiency with Intestinal Cryptosporidiosis: Possible Transmission by Haitian Whole Blood*, THE LANCET 1187 (May 28, 1983); Harris, *Immunodeficiency in Female Sexual Partners of Men with the Acquired Immunodeficiency Syndrome*, 308 NEW ENG. J. OF MED. 1181 (May 19, 1983); Prevention, *supra* note 51). Despite this apparent uncertainty, the prevailing view is that of the CDC.

¹³⁷See generally Annot., 11 A.L.R.2d 277 (1950). The possibilities listed in this annotation include:

(1) period as running from time of negligence or wrong, (2) period as running from last exposure (theory of continuing negligence), (3) period as running from time disease results, (4) period as running from time disease was 'manifested', or might or should have ascertained, (5) period as running from time of knowledge of disease; time of diagnosis; discovery of causal relation, and (6) period as running from disablement.

Id.

¹³⁸*Id.* at 297.

¹³⁹Another analogy that has been argued in cases concerning AIDS occurs in the area of employment discrimination. Lawyers are arguing that laws forbidding discrimination against the handicapped and the disabled should be applied, by analogy, to cases involving AIDS victims. (The problem with this argument is that handicaps are not contagious.) Blodgett, *et al.*, 12 STUDENT LAW. 8 (Jan. 1984). See *supra* and *infra* notes 127, 134, 135, 164, 165, and 184, 194.

percentage of the future AIDS cases. In fact, the first and only legal case to date dealing with AIDS was much different than the previous hypothetical.¹⁴⁰ The case was brought by prisoners of the Downstate Correctional Facility in New York against the superintendent of the facility, Stephen Dalsheim, and the Commissioner of the Department of Correctional Services, Thomas Coughlin III.¹⁴¹ It is not surprising that the first AIDS case came from a prison, given the homosexual and IV drug user populations found in these correction facilities.¹⁴²

The prisoners, fearing the spread of AIDS, sought injunctions "against forming or maintaining [a] central AIDS program at [the] facility and against moving any inmates and employees in and out of prison until examinations are given."¹⁴³ They also sought an injunction requiring "removal of all AIDS sufferers from prison for treatment at [a] hospital."¹⁴⁴

After discussing many of the aspects of AIDS — the fear involved, the syndrome itself, and the communicability theories — the court addressed the prisoners' arguments. The court's decision included six specific holdings. First, the court held that each inmate should be handed a copy of the AIDS brochure prepared by the New York State Department of Health.¹⁴⁵ It was hoped that this procedure would reduce the incidence of prison sex.¹⁴⁶ Second, the court found that there was no evidence that any prisoner had contracted AIDS by sexual coercion.¹⁴⁷ Third, the court denied the prisoners' request to halt all traffic in and out of the prison until entrants were tested for AIDS and found not to be infected with AIDS. The court reasoned: "The relief cannot be granted, because, just as there is no known cure for AIDS, there is no known test by which to detect it."¹⁴⁸ Fourth, the court also denied the prisoners' request that

¹⁴⁰*LaRocca*, 120 Misc.2d 697, 467 N.Y.S.2d 302.

¹⁴¹*Id.* at ____, 467 N.Y.S.2d at 302.

¹⁴²*Id.* at ____, 467 N.Y.S.2d at 306.

¹⁴³*Id.* at ____, 467 N.Y.S.2d at 302.

¹⁴⁴*Id.*

¹⁴⁵*Id.* at ____, 467 N.Y.S.2d at 310.

¹⁴⁶*Id.* at ____, 467 N.Y.S.2d at 310.

¹⁴⁷*Id.* at ____, 467 N.Y.S.2d at 310. The court also held that the state had acted reasonably in segregating known AIDS victims from the rest of the prison population in an effort to reduce the possibility of transmission through sexual coercion. *Id.*

¹⁴⁸*Id.* Along with the recent discovery of HTLV-3, there is hope that such a test has been developed. Federal researchers believe that they have developed a test that can "reliably detect the virus that causes AIDS in blood that is donated for a wide variety of uses, including the treatment hemophilia . . . [Further, they expect] the test to be widely available within six months." Altman, *supra* note 87, at 13, col. 4. Other tests are also being used. Since June of 1983, The Stanford University Blood Bank has been using a T-cell test to measure a body's general resistance to disease. The test has revealed weakened immunity in every AIDS patient on whom it has been used. AIDS specialists have used the test to help diagnose AIDS. There are drawbacks, however. First, the test requires a \$250,000 cell counting machine. The test costs fifteen dollars per local donor and causes two to three percent of the donated blood to be discarded — most of which is probably AIDS free. Other tests called hepatitis-B anticore test (cost - ten to twelve dollars with a five to seven percent exclusion rate) and beta 2 microglobulin (cost - two to three dollars with a two to three percent exclusion rate) are also being used. Blood banks are resiting the tests, arguing that the cost and the loss in blood supply are too great. Chase, *supra* note 103, at 16, col. 1-2.

AIDS sufferers be removed to a civil hospital.¹⁴⁹ The court said that given today's knowledge on the transmissibility of AIDS, there is no grave danger caused to the rest of the prison population by allowing the AIDS victims in the prison to remain. Further, the court pointed out that precautions were being taken in accordance with present medical knowledge.¹⁵⁰ Fifth, the court held that there was no evidence that the state intended to establish an AIDS colony at Downstate.¹⁵¹ Thus, the prisoners' request for an injunction to prevent this was held to be moot.¹⁵² Finally, the court held that if the state decided to institute such a program at Downstate, the defendants must give thirty days public notice of their intention to do so.¹⁵³

Justice Rosenblatt's opinion was excellent for two major reasons. First, he described the current knowledge about AIDS in an accurate, clear and concise manner. Second, Rosenblatt went further and with language such as, "to the extent that current scientific knowledge allows,"¹⁵⁴ "examining the known features of AIDS,"¹⁵⁵ and "current medical evidence,"¹⁵⁶ he correctly recognized that:

The scientific knowledge and hygienic procedures with regard to AIDS may be expected to change with each new medical advance. In a month, a practice accepted today may be discarded in favor of a new approach. . . In a matter of time, the ailment may be conquered, or inhibited by tactics which are as yet unfathomed¹⁵⁷

This frank recognition that the knowledge of AIDS is rapidly growing lead Rosenblatt to adopt a cautious approach in deciding the first case ever dealing with AIDS. Not only should this case stand as legal precedent, but the cautious approach to the subject matter displayed by Rosenblatt should also set a precedent for all judges to follow in future AIDS cases, for the knowledge concerning AIDS is in its infancy and courts must allow flexibility in their decisions to accommodate later medical knowledge.

As discussed earlier, there are many potential cases which may be based

¹⁴⁹*LaRocca*, 120 Misc. at ____, 467 N.Y.S.2d at 310-311.

¹⁵⁰The procedures being followed are in accordance with CDC guidelines and are those which are followed in hepatitis B virus cases. For a list of these procedures see *Acquired Immune Deficiency Syndrome (AIDS): Precautions for Clinical and Laboratory Staffs*, 31 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 577, 580 (Nov. 5, 1982).

For a list of additional procedures for dental-care personnel, persons performing necropsies, and persons providing morticians' services see *Acquired Immunodeficiency Syndrome (AIDS): Precautions for Health-Care Workers and Allied Professionals*, 32 CENTER FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REP. 450, 451 (Sept. 2, 1983).

¹⁵¹*LaRocca*, 120 Misc. 2d at ____, 467 N.Y.S.2d at 311.

¹⁵²*Id.* at ____, 467 N.Y.S.2d at 311.

¹⁵³*Id.*

¹⁵⁴*Id.* at ____, 467 N.Y.S.2d at 304.

¹⁵⁵*Id.* at ____, 467 N.Y.S.2d at 305.

¹⁵⁶*Id.* at ____, 467 N.Y.S.2d at 307.

¹⁵⁷*Id.* at ____, 467 N.Y.S.2d at 311.

on a known existence of AIDS. For example, Airman First Class Raymond Orsini, who had AIDS, came within one day of filing suit against the Air Force for discharging him without medical benefits on the ground that the disease was proof of misconduct.¹⁵⁸ A higher review board reversed this finding of the informal medical review board and granted Orsini temporary retirement with full medical benefits.¹⁵⁹

One AIDS victim may bring suit against the State of California for refusing to give him Medi-Cal payments (that state's equivalent to Medicare) for the cost of the treatment he is receiving.¹⁶⁰ Similarly, suits by insured persons with AIDS soon may be brought to force payment for medical treatment as some insurance companies are refusing to pay because they consider the treatment experiments.¹⁶¹

Another example of potential AIDS cases was provided by the case of four technicians at KGO-TV in San Francisco. These technicians refused to participate in the taping of a show with victims of AIDS.¹⁶² They were protected against discharge and spared the necessity of a suit to get their jobs back by a labor law safeguard which prohibited discharge for refusal to accept work assignments in "life-threatening" situations.¹⁶³

An AIDS victim at Columbia University nearly went to court to get his job back.¹⁶⁴ While completing a teaching fellowship at New York University he was diagnosed as having AIDS symptoms. Columbia did not rehire him. After he acquired legal representation, the matter was settled.¹⁶⁵

Hemophiliacs and people who have received blood transfusions also may try and sue the hospital, the hospital personnel and/or the infected donor for contracting AIDS.¹⁶⁶ Similarly, intravenous drug users who get AIDS may try and sue the infected person who shared the contaminated needle.¹⁶⁷

These are just a few examples of potential cases involving a known existence of AIDS. *No matter what factual situation is presented*, it should be handled in the cautious manner displayed by Justice Rosenblatt. The key is for the courts

¹⁵⁸DeBenedictis, *supra* note 2, at 15, col. 1.

¹⁵⁹*Id.*

¹⁶⁰*Id.*

¹⁶¹Reaves, *AIDS and the Law*, 69 A.B.A.J. 1014-1015 (Aug. 1983).

¹⁶²*KGO Technicians Block A Tape Sesh On AIDS Victims*, VARIETY, June 22, 1983, at 1, col. 2.

¹⁶³*Id.* The case never went to court because KGO-TV tried to make amends by airing an AIDS workshop. Blodgett, *supra* note 139, at 8.

¹⁶⁴*Id.*

¹⁶⁵He was rehired and given back-pay. *Id.*

¹⁶⁶These suits would be based on the theory that AIDS may be passed by AIDS infected blood or blood products or by injections. See *supra* note 88 and accompanying text. Future medical knowledge may confirm or reject this theory.

¹⁶⁷These suits would be based on the unproven theory that AIDS may be transmitted by sharing contaminated needles. See *supra* note 88 and accompanying text. Future medical knowledge will affect whether or not such a suit may be maintained.

to base the decision on current medical knowledge and to recognize that the knowledge of AIDS is rapidly changing; the court decisions should retain an element of flexibility to allow for a later accommodation of new medical knowledge.¹⁶⁸

C. Feared Existence of AIDS

In contrast with the previous discussion, this subsection will be limited to those cases in which the plaintiff is bringing a cause of action that involves, in whole or in part, a *feared* existence of AIDS.¹⁶⁹ The crucial word in this section is fear. AIDS has generated fear in the medical, gay and straight communities.¹⁷⁰ Fear is understandable inasmuch as AIDS is a deadly disease with no known cause and no known cure that has affected virtually all segments of our society.¹⁷¹

The press has added to this fear with articles entitled "Battling a Deadly New Epidemic,"¹⁷² "New Disease Baffles Medical Community,"¹⁷³ "Acquired Immunodeficiency Syndrome cause(s) still elusive,"¹⁷⁴ "AIDS — No Relief in Sight,"¹⁷⁵ "One Step Behind a Killer,"¹⁷⁶ "The AIDS Panic,"¹⁷⁷ and "The Gay Plague: A mysterious immune disorder is spreading like wildfire."¹⁷⁸ As Judge Rosenblatt stated in *LaRocca*, "[N]ews reports of the potential spread of the syndrome have been enough to alarm anyone, through media characterizations of hysteria, epidemic, tragedy, lethal mystery, and the deadly spread of a phenomenon"¹⁷⁹

This fear has manifested itself in the way people are treating "potential"¹⁸⁰ AIDS victims. Some California police have demanded rubber masks and gloves when dealing with homosexuals.¹⁸¹ An immigration officer refused to touch

¹⁶⁸For example, in *LaRocca* Justice Rosenblatt granted limited relief and then dismissed, without prejudice, the remainder of the complaint. This allows the plaintiffs to renew their suit if factual changes occur in the prison and/or medical changes occur in the knowledge of AIDS. 120 Misc. 2d at ____, 467 N.Y.S.2d at ____.

¹⁶⁹This section stresses that the cases involved concern "potential" victims of AIDS. Most of this fear has centered around homosexuals. Some have gone so far as to say an element of homophobia is involved. Blodgett, *supra* note 139, at 9.

¹⁷⁰See *infra* notes 172-178.

¹⁷¹See *supra* notes 43-50.

¹⁷²Wallis, *Battling a Deadly New Epidemic*, 121 TIME 53 (March 28, 1983).

¹⁷³Marx, *supra* note 77, at 618.

¹⁷⁴Macek, *supra* note 55, at 1423.

¹⁷⁵Lawrence, *supra* note 73, at 202.

¹⁷⁶West, *supra* note 1, at 36.

¹⁷⁷Horwitz, *The Aids Panic*, HARPERS 28 (Aug., 1983).

¹⁷⁸Ver Meulen, *supra* note 42, at 52.

¹⁷⁹*LaRocca*, 120 Misc.2d at ____, 467 N.Y.S.2d at 304.

¹⁸⁰See *supra* note 169.

¹⁸¹Appleson, *supra* note 109, at 11.

the passport of a traveler, who had been to Haiti, for fear of catching AIDS.¹⁸² There have been reports that homosexuals have been told to leave restaurants, refused ambulance service, and evicted from their apartments because they have — or might have — AIDS.¹⁸³ Office workers at a trucking company required a gay male to use the bathroom outside on the loading dock because of their fear that he may have AIDS.¹⁸⁴

The area involving a feared existence of AIDS which may foster the most legal cases concerning AIDS involves employment discrimination.¹⁸⁵ (This issue was also present in cases involving a known existence of AIDS.)¹⁸⁶ Human rights agencies in California and New York have received reports from homosexuals alleging employment discrimination against them as a result of their employers' fear of AIDS.¹⁸⁷ Some of these cases have been settled out of court, but others may end up in court, soon.¹⁸⁸

One such case involves a California man who was fired from his job after his medical records were improperly leaked to his employer.¹⁸⁹ He did not have AIDS then, but it was disseminated in the community that he did have the disease.¹⁹⁰ The man received crank phone calls and his house was burned.¹⁹¹ The man's lawyer said "he will sue the county for releasing the medical information and the employer and others for slander, invasion of privacy, intentional infliction of emotional distress, and wrongful discharge."¹⁹²

Similarly, a gay flight attendant for United Airlines was fired because the airline feared that his swollen glands were a sign that he had AIDS.¹⁹³ A gay employee in a Manhattan luggage store, who took off work to go to the doctor, was fired because the "employer knew he was gay and assumed that because he had taken the day off to go to the doctor, he had AIDS."¹⁹⁴

Another situation that almost ended up in court involved a woman who tried to cut off child-visitation rights to her gay ex-husband because she was

¹⁸²A story told by NBC news correspondent Robert Bazell. Bazell, *supra* note 38, at 14.

¹⁸³DeBenedictis, *supra* note 2, at 1, col. 6.

¹⁸⁴*Id.*

¹⁸⁵*Cf.* 42 A.L.R. Fed 189 (1979) (relating to employment discrimination based on sexual lifestyle or sexual preference). "It's inevitable — there will be litigation on AIDS related discrimination." Appleson, *supra* note 109, at 3, col. 1, (quoting Abby R. Rubinfeld managing attorney for gay rights group).

¹⁸⁶See discussion in Section II dealing with employment discrimination.

¹⁸⁷Appleson, *supra* note 109, at 11, col. 1.

¹⁸⁸*Id.*

¹⁸⁹DeBenedictis, *supra* note 2, at 1, col. 6.

¹⁹⁰*Id.* at 15, col. 1.

¹⁹¹*Id.*

¹⁹²*Id.*

¹⁹³Blodgett, *supra* note 139, at 8. This case is likely to go court. The man's attorney is analogizing this case to those based on discrimination of handicapped persons. See note 157.

¹⁹⁴Blodgett, *supra* note 139, at 9. He was reinstated when he threatened to sue.

afraid her child might get AIDS.¹⁹⁵ The dispute was settled out of court with an acknowledgement by her attorney that her legal position was weak.¹⁹⁶

One case involving the fear of AIDS has been filed. It involves Texas A & M students who are seeking to have their gay students group officially recognized by the university.¹⁹⁷ A group calling themselves Dallas Doctors Against AIDS has filed an amicus brief which states that the ban on the gay group is justified because of the serious dangers of the disease AIDS.¹⁹⁸

In resolving these issues the courts must do two major things. First, the courts must recognize the high level of fear present in the community concerning AIDS and attempt to separate unfounded fears from medical fact. Here, as in the above cases involving a known existence of AIDS, the courts should proceed cautiously and should examine the current medical knowledge with an eye toward reaching both an equitable and flexible result. Second, the courts must differentiate between an alleged concern over AIDS and an outright anti-gay bias. Parties seeking to limit the rights of homosexuals may use a double-barrelled argument; they can argue that restrictions are justified for both health¹⁹⁹ and moral²⁰⁰ reasons.

Both of these arguments are based on public policy, and it is possible that they may be so intertwined as to be impossible to entirely separate.²⁰¹ Nevertheless, with the very serious health considerations involved with AIDS the courts must not allow their decisions on future AIDS cases to be easily swayed by pro-gays that fear the main, underlying reason for an opponent's argument is an anti-gay bias. The point is, whether pro- or anti-gay, people are dying and something must be done to stop it. And if that means tougher restrictions, outright bans, temporary quarantines or fewer personal rights, then so be it.²⁰²

Clearly, litigation on AIDS related issues appears imminent. But even with this long list of potential and actual suits just mentioned, some predict that these suits are only the "tip of the iceberg."²⁰³

In contrast, others recognize that litigation may not be the best alternative. Stephen Richter, head of a volunteer lawyers group helping AIDS patients in

¹⁹⁵DeBenedictis, *supra* note 2, at 1, col. 6.

¹⁹⁶*Id.*

¹⁹⁷Appleson, *supra* note 109, at 3. The case is *Gay Student Services v. Texas A & M University* No. 82-2366.

¹⁹⁸*Id.*

¹⁹⁹See discussion of the effects in Section I.

²⁰⁰Most people still do not feel that homosexuality should be considered as an accepted alternative lifestyle. This is based on a Gallup Poll reported in *Gay America in Transition*, *supra* note 119, at 33.

²⁰¹This is because of the high prevalence of AIDS in homosexuals and the apparent transmission of the disease by sexual intercourse.

²⁰²Connecticut democrat Richard D. Tulisano, cochairman of the Judiciary Committee has advocated a position which would require that AIDS victims be quarantined, but the idea is not yet in the form of legislation. *Quarantine sought for AIDS victims*, THE PLAIN DEALER (Jan. 26, 1984).

²⁰³Reaves, *supra* note 161, at 1015.

San Francisco, has commented: "This is not a field, AIDS litigation, that we are trying to make bigger than it needs to be . . . Frankly, someone diagnosed as having . . . [AIDS] has a very limited lifespan, in which litigation does not easily fit in."²⁰⁴

Similarly, it has been stated: "The problem the plaintiff is going to have, however, is that the defendant [who allegedly transmitted the AIDS] may not survive the length of the suit. You might eventually have two estates as parties to that kind of litigation."²⁰⁵

And as one lawyer stated: "The legal implications of AIDS are simple — probate."²⁰⁶ Thus, the ending of the plaintiff's life may often precede the legal ending of his case.

III. CONCLUSION

AIDS is as mysterious as it is serious. It has affected nearly all segments of the population to some degree, and the number of cases is increasing geometrically. Further, the death rate is frightening. And most upsetting, there is no known cause and no known cure. It is time for the legal community to become aware of this deadly new disease, as it is inevitable that AIDS cases will begin to be seen in the courts with increasing frequency.

The most analogous case would be one based on the venereal disease transmission cases of the past. Nevertheless, this will probably not be the most prominent type of AIDS case. The future cases will be divided between those based on a *known* existence of AIDS and a *feared* existence of AIDS.

In the former type of case, the courts should proceed cautiously and base their decisions on current medical facts. Flexibility is the key here. In the latter type of case, the courts must do two things. First, they must separate unfounded fear from medical truth. Second, they must separate outright anti-gay bias from genuine concern over the spread of AIDS. These two public policy arguments may be so intertwined as to be impossible to separate. But so long as a genuine concern about the spread of AIDS is present, courts should not be reluctant to make decisions that may abridge the personal freedoms of a few in order to save the lives of many.

ROBERT S. BURNS

²⁰⁴DeBenedictis, *supra* note 2, at 15, col. 3.

²⁰⁵Reaves, *supra* note 161, at 1014.

²⁰⁶*Id.*
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