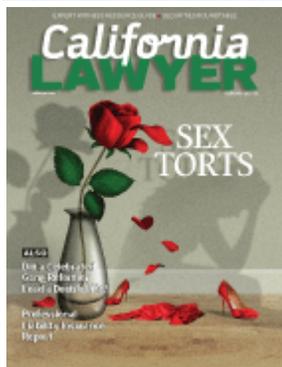


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Features

## Dangerous Liaisons

Sex torts expose careless lovers to million-dollar liability.

February 2011

by Matthew Heller

In February 16, 2005, Patricia Behr went to her doctor's office in Palm Springs for the second time in a week. A nurse practitioner recorded notes in the usual lifeless, matter-of-fact prose favored by medical professionals. Behr, the notes stated, was going through a "new business partner/boyfriend break up" and experiencing stress related to her online company. As far as the 52-year-old's physical health, there was a "recurrent lesion above clitoris—itch." The nurse practitioner prescribed a blood test.

Three days later, the test came back positive for herpes simplex virus type II (HSV-2), a sexually transmitted virus that causes the treatable disease known as genital herpes. But the diagnosis would turn out to be anything but matter-of-fact: It would turn out to be worth about \$6.75 million.

That was the amount of damages a Riverside County Superior Court jury awarded Behr in January 2009—possibly a record in an STD transmission case heard by a jury. Thomas Redmond, the defendant, was that "new business partner/boyfriend," a wealthy hair-care entrepreneur 20 years her senior who was romantically involved with Behr for about nine months. After an eleven-day trial, the jury found he was negligent in failing to inform Behr before they had sex that he was infected with genital herpes, concluding that his negligence was a "substantial factor" in causing her harm (*Behr v. Redmond*, No. INC052881 (Riverside Super. Ct. jury verdict Jan. 29, 2009)).

The award included \$2.75 million in punitive damages. "Redmond exposed Behr to an incurable sexually transmitted disease and did not take any precautions to protect her health and safety," Behr's attorney, Shaun M. Murphy of Slovak Baron & Empey in Palm Springs, wrote in one brief. "The evidence showed that Redmond's conduct was outrageous and despicable."

Among other things, the jury was told that Redmond had been diagnosed with genital herpes some 25 years before he began dating Behr but, despite his "vast financial resources," he did no research into the disease, taking medication only when he had an outbreak of lesions, and preferring not to wear a condom during sex because he found it uncomfortable. In fact, he was almost nonchalant about his affliction, Murphy says. "His attitude was, it couldn't kill you, so he didn't care."

To judge from the plaintiff's case, Redmond—the divorced founder of Aussie hair care products and a confirmed HSV-2 carrier—is the personification of sexual irresponsibility. And the verdict against him may demonstrate the benefit of using the courts both to exact a measure of justice from those who deliberately or negligently infect others with a sexually transmitted disease and, in a broader sense, to protect the public health at a time of rampant STD infection. "The question is, how long are you going to allow people to continue to put their heads in the sand?" asks Murphy.

According to the Centers for Disease Control, approximately 65 million Americans—excluding those with the human immunodeficiency virus (HIV) that causes AIDS—have an incurable sexually transmitted disease. Another 19 million Americans become infected each year, with half of them contracting lifelong diseases. About one-quarter of American adults are infected with the genital herpes virus, which can remain inactive in the body for long periods. Only when the virus reactivates does the body exhibit symptoms, such as a nasty itch or blisters.

The anecdotal evidence, at least, shows that juries—and some judges—in "sex tort" cases have a low tolerance for sexual misconduct. In another of Murphy's recent cases, a Los



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Angeles jury awarded \$2.49 million to a woman who claimed that her husband, a Beverly Hills real estate investor, infected her with genital herpes (*Saadian v. Saadian*, No. BC394034 (Los Angeles Super. Ct. jury verdict Nov. 3, 2010)). A year earlier, an Iowa appellate court upheld a \$1.5 million jury award against a dentist for infecting a woman with human papillomavirus (HPV) during their affair after telling her he was STD-free (*Rossiter v. Evans*, 2009 WL 5125922 (Iowa Ct. App.)).

Courts have flexed their muscles before in response to public health threats ranging from tuberculosis to smallpox. "The power to quarantine individuals in order to protect the public from disease or illness is a clearly established power of the states," says a 2007 "bench guide" on state public health law issued to advise Florida judges in the event of pandemic influenza. In 1973 a federal appeals court affirmed the power of a Denver trial judge, under a local ordinance, to force a prostitute to choose between taking penicillin for an STD or remaining in jail (*Reynolds v. McNichols*, 488 F.2d 1378 (10th Cir. 1973)). More recently, quarantine orders against HIV-infected prisoners have also been upheld.

Typically in such cases, a public health official will ask a court to enforce a statute against a noncompliant individual. Sex tort cases, however, are completely different: The litigation is between private actors, with courts applying common law, notes Linda L. Chezem, a former Indiana judge who is now a public health law professor at Purdue University. "It seems to me that the courts ... are establishing a policy of personal liability for a failure to take adequate precautions to not transmit [an STD]," she says. "Enough of these cases could result in [changing] public policy."

In California, the state Supreme Court adopted the constructive knowledge standard in the case of a woman who alleged her husband had reason to know he was infected with HIV because he had engaged in unprotected sex with a series of men before and during their marriage (*John B. v. Superior Ct.*, 38 Cal. 4th 1177 (2006)). "[L]imiting tort defendants to those who have actual knowledge they are infected with HIV would have perverse effects on the spread of the virus," the court warned. "If only those who have been tested are subject to suit, there may be 'an incentive for some persons to avoid diagnosis and treatment in order to avoid knowledge of their own infection.'" A judge later awarded the plaintiff \$12.5 million in damages after a bench trial (*Bridget B. v. John B.*, No. BC271134 (Los Angeles Super. Ct. tentative ruling Nov. 21, 2008)).

But some lawyers and legal scholars doubt that courts are the right place to fashion rules of sexual responsibility. "More lies have been told about what goes on in the bedroom than about any other subject," says Donald A. Garrard of Garrard & Davis in Santa Monica, who represented the defendant in *John B.* "Factually, they are 'he-said, she-said' cases." And Garrard questions how jurors reach their verdicts. "Most people resort to their own experiences. Their personal baggage is what decides the case."

Robert M. Frisbee of Phoenix, Redmond's trial attorney, has called the jury verdict against his client an "obvious injustice." The jury's thought process, Frisbee wrote in a brief, was "Too bad for him that he took [Behr] on exotic trips, bought her fancy clothes, and treated her like Cinderella. We're going to make her rich because [the] defendant is, we don't like him, and we have the power to do it."

The case is now on appeal, with a team of attorneys from Greines, Martin, Stein & Richland in Los Angeles representing Redmond. "He feels very sincerely wronged and exposed in a most unfair fashion," says name partner Kent L. Richland, who believes the case gives the Fourth District Court of Appeal in Riverside an opportunity to avert another unwarranted extension of sex tort law.

On appeal, Redmond's lawyers contend that early in the relationship he told Behr he had genital herpes, and she had sex with him anyway. "[W]e have found no case anywhere in the United States in which a court has upheld a judgment for tortious transmission of a sexually transmitted disease where the defendant disclosed he had a sexually transmitted disease and, despite this disclosure, the plaintiff willingly engaged in unprotected sex with him," according to an opening brief written by Michael Anthony Brown, who is co-counsel for the appellant along with Richland and Robin Meadow. "In fact, in California such disclosure precludes a plaintiff from establishing necessary elements of the causes of action ... at issue in this case: negligence, concealment, battery, and intentional infliction of emotional distress."

With their often tawdry testimony, cases like *Behr v. Redmond* might seem like mere fodder for supermarket tabloids. And genital herpes, for all the discomfort it causes, is different from HIV and hepatitis C—both fatal, sexually transmitted diseases. Readily available drugs such as Valtrex or its generic version can prevent the recurrence of herpes symptoms.

But the relative benignity of genital herpes hasn't stopped scholars and others from producing a torrent of treatises about transmission cases, with titles ranging from "Herpes Breeds New Legal Epidemic: Fraud and Negligence Suits" and "Kiss and Tell: Making the Case for the Tortious Transmission of Herpes and Human Papilloma-virus" to "Consequences of an Uninformed MÃ©nage À Trois Extraordinaire: Liability to Third Parties for the Nondisclosure of Genital Herpes Between Sexual Partners." The debate is serious, centering on a legal issue close to the lives of millions of Americans: how to balance protecting of the public's health with individual privacy rights and sexual freedom.

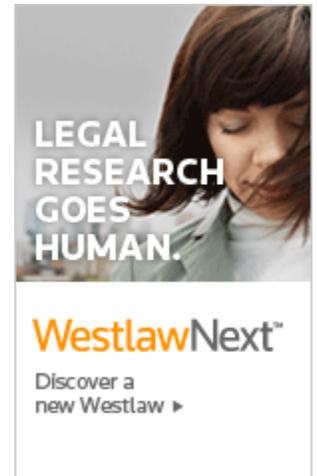
Deana Pollard-Sacks, a professor at the Thurgood Marshall School of Law at Texas Southern University in Houston, coined the term *sex tort* to describe any cause of action alleging tortious transmission of an STD, or tortious behavior committed during a sexual act. She has called for nothing less than strict liability to be applied in sex tort cases—that is, anyone who infects another person with an STD must pay the costs of the injury even if the carrier didn't know he or she was infected. The "negligence paradigm," she argued in a 2007 *Minnesota Law Review* article, is "unpredictable, inefficient and often extremely embarrassing for the parties involved" and discourages sexually active people from getting tested. Strict liability, she said, "more powerfully deters sexual disease transmission and more accurately expresses social values."

Behr's attorney Murphy doesn't go quite that far, but he says imposing a duty on people to get tested for STDs is worth discussing. "We've got 60 million people infected, and some people still want to say, 'I should be able to sleep with whomever I want and not even find out if I'm infected,'" Murphy says. Requiring people to be tested, he agrees, "is better than being ignorant."

Since the loosening of sexual mores in the 1960s and 1970s, many courts have abandoned the "caveat emptor" approach to sexual conduct, agreeing with public health advocates that tort law should encourage people to be sexually responsible and punish those who are not. In California, the Second District Court of Appeal ruled that a woman could sue her partner for either negligently or deliberately failing to inform her that he was infected with genital herpes. "The right of privacy is not absolute," wrote the court, "and in some cases is subordinate to the state's fundamental right to enact laws which promote public health, welfare and safety, even though such laws may invade the offender's right of privacy." (*Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 996 (1984).)

Five years later, in the sensational fear-of-AIDS suit brought by movie star Rock Hudson's former lover, a Los Angeles jury awarded \$21.75 million (eventually reduced to \$5.5 million) to Marc Christian, even though he had tested negative for HIV.

Courts have routinely found liability in cases where the defendant, like Hudson, had actual knowledge of STD infection. "When a disease such as herpes is almost exclusively spread through sexual contact," the Missouri Court of Appeals held in 2000, "it is foreseeable that one's sexual partner is susceptible to the contagion if the infected partner is aware he has the disease or suffers from symptoms of the disease." (*Deuschle v. Jobe*, 30 S.W. 3d 215, 219 (Mo. Ct. App. 2000).)



But actual knowledge is notoriously difficult to prove in STD cases. Plaintiffs lawyers have found the constructive knowledge standard more amenable—in *Rossiter*, for instance, the Iowa appeals court upheld the jury's finding that even if the defendant did not know, he *should* have known that he carried HPV (2009 WL 5125922 at \* 3).

But what, exactly, constitutes constructive knowledge? Can it be determined on a case-by-case basis, or should the courts fashion a bright-line rule? Defense attorney Garrard insists that a history of having promiscuous or unprotected sex, for example, is not sufficient evidence of constructive knowledge. Any discussion of liability would begin only if the defendant had "symptoms from which a reasonable person could not avoid the conclusion that something was wrong."

In a case in which a Michigan woman accused basketball legend Earvin "Magic" Johnson of infecting her with HIV, a federal judge refused to impose "a duty to disclose a 'high risk' lifestyle prior to sexual conduct [that] theoretically puts a sex partner 'at risk.'" As a matter of law, U.S. District Judge Richard A. Enslin asked, "[W]hat is 'high risk' activity? Who is in this 'high risk' group? How should 'high risk' be defined?" He found that liability in this area "would open a door better left closed." (*Doe v. Johnson*, 817 F. Supp. 1382, 1393 – 1394 (W.D. Mich. 1993).)

The strict liability standard proposed by Texas Southern's Pollard-Sacks would remove the uncertainty over constructive knowledge. But Matthew Seth Sarelson, a Miami attorney who has written about sex torts for the *George Mason Law Review*, contends, "Every single personal injury lawsuit has the same problems the professor is talking about. Does that mean you have strict liability for all torts? Isn't this true for car accidents, slip-and-falls, animal bites, medical malpractice?" Sarelson also is dubious about establishing a duty to test for STDs. "Are you being held responsible not because you transmitted a disease, but because you didn't get tested? I'm not aware of a lawsuit where the premise was, 'You were not tested for a disease.' And for STD transmission, how often should a person get tested to avoid liability?"

On a more fundamental level, Sarelson believes that sex tort cases set judges adrift in perilous waters. "The proponents of these lawsuits are asking the judiciary to play the role of a public health agency," he says. "Judges can't do that. It's not their job. Even with the best intentions, they won't create a system that will actually prevent disease transmission."

Redmond, a multimillionaire who was living in Minnesota, and Behr, a divorced mother of four, first met in 2001. They began a sexual relationship in October 2003 after Redmond flew by private jet to Palm Springs to have lunch with Behr for their first date. At the time, he was 71 and she was 51.

The couple appeared to grow close. Redmond trusted Behr enough to invest between \$100,000 and \$130,000 in her start-up business, which they called RedBehr Furniture. In an email message Behr sent the following June, she told Redmond he was "such an incredible friend, mentor, partner, a man of your word and much more. You have given me so much, so many wonderful memories, I will never be able to thank you enough." But less than two weeks later, he broke off the romantic relationship, saying he did "not mix personal relationships with business."

Redmond first raised the issue of cutting his funding for the company in a February 2005 email. Less than a week later, Behr sought treatment for a lesion on her genitals, which cultured positive for HSV-2. Redmond's financial support continued until May 2005; she sued him the following August, alleging battery, intentional infliction of emotional distress, negligence, negligent infliction of emotional distress, concealment, intentional misrepresentation, and declaratory relief (as to ownership of a 2004 BMW Redmond claimed he'd only lent to her).

Throughout the litigation, Redmond never denied knowing that he was infected with genital herpes. The key dispute was *when* he disclosed his infection to Behr. She testified that while she was staying at his Scottsdale, Arizona, home in February 2004, Redmond said, "I need to tell you that I have herpes. I've had it for a long time, about 30 years. And I think I'm having an outbreak, so we can't have sex." The next day, however, "he told me he was wrong. He wasn't having an outbreak," Behr testified. "He's had this for so long he knew, and it was OK, we could have sex." Experts testified, however, that carriers can transmit HSV-2 even when they have no active lesions.

Redmond insisted that he told Behr he had herpes *before* they had sex for the first time, in October 2003. But even if Redmond had waited four months into the relationship to tell her, his lawyers contend, Behr's lawsuit should fail because she cannot prove he infected her prior to the February 2004 disclosure. For one thing, Behr's own medical expert, Dr. Stanley Bierman, testified that an initial herpes outbreak in women normally occurs within three months of exposure to the HSV-2 virus, and a year would be at the "outside end" of the medically recognized incubation period. If Behr didn't experience her first outbreak until February 2005, Redmond's attorneys argue, then it's unlikely she contracted herpes from him during the time he allegedly failed to disclose his infection.

"Neither Bierman nor Redmond's expert, Dr. Jeffrey Richardson, testified to a reasonable medical certainty that Behr contracted herpes from sexual contact that occurred *before* Redmond informed Behr he had the virus," Redmond's defense team says in his appeal.

At the trial, Behr testified that in fact she suspected she had herpes as early as March 2004, when she noticed a lesion in her genital area, even though she did not seek medical attention at the time. A month later, she testified, she tried to talk to Redmond about her suspicions during a trip they took to Spain, but he had been acting aloof and she had no confirmation yet that she was infected.

The jury found for Behr on all her claims, awarding her \$2.5 million for future medical expenses, \$500,000 for past pain and suffering, \$1 million for future pain and suffering—and ownership of the BMW. The punitive damages award followed two days later. Although the verdict form did not require the jury to determine whether Behr had been infected before or after Redmond's disclosure in February 2004, Murphy says the panel certainly didn't believe that the defendant told her anything at the outset of their sexual relationship.

The jury rejected Redmond's theory that Behr sued him out of spite because she was a spurned woman—or, as trial attorney Frisbee once described the plaintiff, a "lifestyle prostitute." On appeal, however, Redmond's Greines Martin defense team continues to argue that the jury based its verdict on emotion rather than evidence. "This was a typical [sex tort] case where the defendant was quite well off, and by virtue of that may be not sympathetic to the jury," says Richland. "It's more difficult for someone who has a privileged life to defend these cases. The plaintiff is the underdog and is able to extract sympathy from a jury by virtue of that alone."

In a discussion at the firm's Wilshire Boulevard offices last fall, Richland, Meadow, and Brown wrestled with the broader issues that sex tort cases entail. "What are people going to do in a relationship?" Richland asks. "Do you need to get a signed waiver before you have sex with someone? You start to look at the most sensitive parts of life in legal terms. That's one of the troubling aspects of these cases."

Requiring people to get tested for STDs, he says, would be "a really, really serious change in policy" affecting how people live their lives. "It strikes me that it could be a slippery slope. Any of us at any point in time may have a communicable disease."

Meadow adds, "Mr. Murphy is perfectly right to say, 'We've got to have a way to protect people from this.' But there are a lot of things we'd like to be able to protect people from. At least in our kind of society, there are things we just don't do."

With the Behr appeal pending, Murphy won the jury award in the *Saadian* genital herpes case. The Los Angeles trial judge had allowed Murphy to present evidence about defendant George Saadian's extramarital activities—including his patronage of Web-based escort services and sexually explicit websites—to support an inference that he should have known he was at risk for contracting genital herpes. Defense counsel objected strenuously to some of this evidence, arguing that the theory that "sleeping with prostitutes means you knew you would get herpes finds no support in the law." Murphy is currently representing two other women who have accused sexual partners of infecting them with HSV-2.

Sex tort law continues to develop—and may be headed in even more controversial directions. Last May, for example, a New York justice ruled that a man could sue the alleged source of his wife's genital herpes infection—a psychiatrist with whom she had been having an affair—for indirectly infecting him. "[T]he potential for harm to the married person who becomes infected and the spouse of the married person who thereafter becomes infected is the same," Justice Nicholas Colabella stated (*Levine v. Werboff*, 2010 WL 3068926 (Westchester Sup. Ct. trial order filed May 21, 2010)).

Redmond's co-counsel Meadow, for his part, says the "case-by-case" approach to sex tort law—whatever its inadequacies—may still be preferable to "a blanket rule that simply says everybody has to do x or y. Maybe some day we'll evolve to a point where we can have such a rule. But I don't think we're anywhere near understanding these situations well enough to make those kinds of policy decisions."

In the meantime, Meadow is happy to see STD transmission cases decided by juries. "The jury system does fail us in many situations, but by and large jurors do the right thing."

But did the jury do the right thing in Patricia Behr's case against Tom Redmond? "Not in that case," Meadow replies. "The jury went completely off the rails."

*Matthew Heller is a Los Angelesbased freelance writer and editor of On Point, a legal news website.*



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