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**At the Hands of the Heartless
Liability for Relationship Injuries in Massachusetts
In Light of Doe v. Moe¹**

Intentional Exposure of Uninformed Sexual Partners to Sexually Transmitted Diseases as a Criminal Act

Although this article deals only with the development of a civil remedy in Massachusetts for uninformed victims who find, albeit too late, that they have been intentionally exposed to sexually transmitted diseases during their most intimate moments, that is not to say that intentionally concealing a sexually transmitted disease could not also be an act criminal in nature. I suspect that with only minor changes to current criminal statutes, an action on a theory of criminal sexual battery for such intentional acts may well be sustainable, with the ability to constitutionally impose a compliment of punishments on those who perpetrate this type of harm on unsuspecting consensual sexual partners. Criminalizing such behavior would be a valid response to combat those individuals who are heartless enough to conceal and knowingly transmit diseases during an act in which we all are at our most vulnerable and one which the normal person holds as the most trusting and intimate experience one can share with another human being. There is no doubt that justice would support labeling such an offender as a Sexually Dangerous Person and mandate inclusion on the Sexual Offender's Registry List. After all, it isn't a stretch to say such behavior is a sex crime. Change to criminal culpability could be accomplished by amendments to current statutory provisions. But, though a criminal approach may serve to curtail such behavior and deter some heartache, the criminal statutes in Massachusetts at this time deal only with "The Big One" – intentional transmission of HIV. In the meantime, and until the law can catch up to the harm some people are perpetrating on others using sex, for the victims of negligently transmitted STDs, civil remedy may at least provide compensatory relief which has not been available in Massachusetts previously. Whether active concealment and intentional exposure of an innocent person to sexually transmitted diseases should rise to the level of criminal behavior is a subject for future law review.

We all know there are those among us who use loopholes in the law for their own interests. We all know of at least one such person. Active concealment of STDs is an area where intolerable and animalistic conduct exists because, until now, there has been no legal avenue for victims to pursue. Though the victims of concealment and uninformed exposure are embarrassed, intentional concealment is nothing less than sexually predatory behavior. The harm caused is profound and leaves unwitting victims thoroughly and unjustifiably injured – scarred sexually, emotionally, and socially. Tremendous tragedy is thrust upon unsuspecting partners who are guilty of nothing more

¹ John Doe vs. Mary Moe, 63 Mass.App.Ct. 516; 827 N.E.2d 240 (2005).

than expressing physical intimacy with the wrong person. The victims' lives and relationships are changed forever, and their reputations marred. There may be some new hope, however, for those who have found themselves, not only left mending a broken heart – but treating for sexually transmitted surprises bestowed by their former mate.

Does privacy protect a person who intentionally conceals STD status?

In 2005, the Massachusetts Appeals Court grappled with the tension between the general loathe of the Courts to tread into the privacy of the bedroom, and those instances where “consensual” sexual relationships result in injury for which the victim should rightfully have civil redress available.²

The subject of sexual relations, in general, is such a sensitive area of the law that the parties in the case, not surprisingly, bear pseudonym names, and although the case itself is not about transmission of sexually transmitted disease, (*it instead involves what the Plaintiff, John Doe, claims are unconsented to, overly exuberant movements of the female, Mary Moe, during sexual intercourse which resulted in penile fracture to poor John – Ouch!*), arguably, the decision has opened the door to a new wave of tort cases affording redress to **victims of the most feared of all relationship injuries at the hands of the heartless**: What do you do when you find your intimate partner has concealed a positive STD status and knowingly exposed you?

Civil Remedy for Consensual Sex Which Results in Injuries?

In Doe, the Court dealt with several issues in the context of negligence for sexual injury where the relations between the couple were consensual. Interestingly, the Doe case itself did not involve transmission of a sexually transmitted disease at all. The Court, however, introduced liability for negligent transmission of STDs to the discussion in their decision.³ Factually, the Doe case is distinguished from those involving intentional exposure to STDs. That is, from the record, the couple was involved in a “long term committed relationship,”⁴ and were engaged in an apparently particularly raucous tryst early in the morning on September 24, 1994 when Mary decided that it was time to spice things up a little for her own pleasure, and without John’s permission, changed her position on top of him. By their own admission, this would not generally be problematic since this couple often went so far as “light bondage’ during their intimate

² Id.

³ Id. @245, (Finding the general rule in this case; that there is no legal duty of reasonable care owed by the Plaintiff during consensual sexual conduct due to the lack of community values or customs defining sexual conduct which puts a jury in a situation where they cannot determine when certain sexual conduct is undertaken without reasonable care. **But specifically carving out an exception creating a duty of care in negligent transmission of sexually transmitted disease.** “We do not imply that this rule is applicable in cases alleging the negligent transmission of a **sexually transmitted disease**,” citing, McPherson v. McPherson, 1998 ME 141, 712 A.2d 1043, 1045 (Me. 1998) (Supreme Judicial Court of Maine collecting cases and noting that courts throughout the United States have recognized a cause of action based on the negligent transmission of a **sexually transmitted disease**)).

⁴ Id. @243.

relations,” except, with legs locked, Mary “landed awkwardly”⁵ on John, fracturing his penis. John slapped Mary with a suit for negligence. So much for the long term committed relationship!

In all fairness, the injuries John sustained were substantial, (from the record John suffered sexual dysfunction for which “neither medication nor counseling have been able to treat effectively.”⁶), but, should Mary be liable for causing the injuries during consensual sexual activity?. (*It is noteworthy that, since the case was argued in 2003, John had suffered from sexual dysfunction caused by this incident for nine years since the time of injury*). And, while it is clear that John could prove substantial harm in this case, the question of adequacy of harm was not one raised on appeal. Many other questions were addressed, however, which open the door for a civil action by victims in Massachusetts for intentional exposure to STDs by their “lovers.”

The threshold question reached by the Appeals Court, was “whether the application of a standard of reasonable care to private consensual sexual conduct is appropriate or even workable.”⁷ The Court felt that, as a threshold matter, if there was no duty of care, there could be no liability.⁸

Here, the Court found that “in light of our own awareness that community values on the subject of permissible sexual conduct no longer are as monolithic’ as prior precedent had suggested it,”⁹ that no Judge or jury could be “expected to resolve a claim that certain consensual sexual conduct is undertaken without reasonable care.”¹⁰ On this basis, the Doe Court concluded that “there was no duty of reasonable care owed by the defendant to the plaintiff during their consensual sexual conduct” in this case. Poor John found himself not only without Mary, but unable to enjoy his former lifestyle, or secure any compensation for his injury. I have to wonder whatever happened to Mary?

Though the decision, on the basis of this finding, seems to fly squarely in the face of sexual responsibility, the Court then went on to specifically exclude the class of cases involving negligently transmitted sexual diseases from this general rule, carving out an exception which opens the door for victims of STDs transmitted by unscrupulous

⁵ Id. @243.

⁶ Id. @243.

⁷ Id. @244.

⁸ “Before liability for negligence can be imposed, however, it must first be established that the defendant owed the plaintiff a legal duty of care.” Id. @243, HN1, citing Davis w. Westwood Group, 420 Mass. 739, 742-743, 652 N.E.2d 567 (1995); Cottam v. CVS Pharmacy, 436 Mass. 316, 320, 764 N.E.2d 814 (2002); Remy v. MacDonald, 440 Mass. 675, 676, 801 N.E.2d 260 (2004). [***6] “The existence of such a duty is a question of law,” Wallace v. Wilson, 411 Mass. 8, 12, 575 N.E.2d 1134 (1991); Davis v. Westwood Group, supra at 743, and is “to be determined by reference to existing social values and customs and appropriate social policy.” Cremins v. Clancy, 415 Mass. 289, 292, 612 N.E.2d 1183 (1993), quoting from Wallace v. Wilson, supra.

⁹ Id. @245.

¹⁰ “In the absence of a consensus of community values or customs defining normal consensual sexual conduct, a jury or judge cannot be expected to resolve a claim that certain consensual sexual conduct is undertaken without reasonable care.” Id. @245.

partners.¹¹ Based on Doe then, in sexual conduct involving a partner who is aware they carry sexually transmitted disease, there is a duty of care owed to their consensual partner which creates a liability. In these cases, harm resulting to the unwitting partner becomes compensable. The next question tackled by the Doe Court involved what standard of care to assign to those consensual sexual claims which are not foreclosed to liability as John's was.

Negligence or Recklessness?

The Lower Court in Doe had analogized the facts to an athletic event and required a heightened duty of care based on Mary's interest of privacy.¹² Because it did not find Mary's actions to be "wanton" or "reckless," the Court had allowed a motion for summary judgment in favor of Mary.¹³ The rationale used by the Court appeared to be that Mary's interest in her privacy was great, and analogous to a sporting competition in which participation involves consent, and in which there is a strong interest in not chilling the activity. Since application of the lower negligence standard would have the effect of chilling the activity, the recklessness standard should be applied. Since Mary's behavior did not rise to the level of "reckless," John was out of luck as far as recovery was concerned.

The Appeals Court in Doe created a mixed situation in cases of consensual sexual conduct. In their view, in cases where a duty of care exists in sexual conduct between people, it is the reckless standard to be applied. The Court held this specifically in cases of "negligent transmission of sexually transmitted diseases," (their term), based on two findings. First, the Court recognized in cases involving consensual sexual conduct that when there is an indifference to consequences of behavior and there is a high degree of likelihood that a substantial harm will result to another – it is the essence of wanton and reckless behavior. Therefore, recklessness is the appropriate standard for liability.¹⁴

¹¹ "We conclude, therefore, that there was no legal duty of reasonable care owed by the defendant to the plaintiff during their consensual sexual conduct...We do not imply that this rule is applicable in cases alleging the negligent transmission of a **sexually transmitted disease.**" See, e.g., McPherson v. McPherson, 1998 ME 141, 712 A.2d 1043, 1045 (Me. 1998) (Supreme Judicial Court of Maine collecting cases and noting that courts throughout the United States have recognized a cause of action based on the negligent transmission of a **sexually transmitted disease**)." Id. @245.

¹² "[T]he Superior Court judge concluded that the defendant's interest in privacy created a policy rationale sufficient to elevate the standard of care in this case to recklessness, rather than ordinary negligence. The Superior Court judge referenced the line of cases beginning with Gauvin v. Clark, 404 Mass. 450, 537 N.E.2d 94 (1989), which apply a recklessness standard to sports activities, rather than a negligence standard, because of the likelihood that a negligence standard would chill athletic competition. Although the judge found the Gauvin "chilling" rationale to be inapplicable to the present case, he determined that the alternative privacy rationale was sufficient to elevate the standard of care to recklessness." Id. @242.

¹³ "The motion judge concluded that the ordinary negligence standard was inapplicable to personal injury resulting from consensual sexual intercourse and, applying a heightened standard of recklessness, found that the defendant was entitled to summary judgment." [And] "Because the judge concluded that this elevated standard was not violated on the facts of the case, he entered summary judgment for the defendant." Id. @242.

¹⁴ "While it is inappropriate and unworkable to hold consenting adults to a standard of reasonable care in the conduct of private consensual sexual behavior, we conclude that it is appropriate that they be held to a

Secondly and more importantly, the Court felt that the reckless standard better expressed the “degree of difference in the risk and in the voluntary taking of risk.”¹⁵ That is, where one may consent to voluntarily participate in “rough” sexual activity and thereby have no remedy if they are injured through the negligence of their partner, one’s consent to sexual activity is vitiated where a sexual partner knowingly withholds the fact that they carry a sexually communicable disease.

standard that requires them not to engage in wanton or reckless conduct toward each other during such consensual sexual conduct.” *Id.* @245.

¹⁵ *“The words ‘wanton’ and ‘reckless’ are . . . not merely rhetorical or vituperative expressions used instead of negligent or grossly negligent. They express a difference in the degree of risk and in the voluntary taking of risk so marked, as compared with negligence, as to amount substantially and in the eyes of the law to a difference in kind.”* *Commonwealth v. Welansky*, 316 Mass. 383, 399, 55 N.E.2d 902 (1944). See *Cohen v. Davies*, 305 Mass. 152, 156, 25 N.E.2d 223 (1940) (*indifference to consequences distinguishes wanton or reckless behavior from negligence*). *“Since ‘the essence of wanton or reckless conduct is intentional conduct . . . which . . . involves a high degree of likelihood that substantial harm will result to another,”* *Commonwealth v. Welansky*, *supra*, citing Restatement of Torts § 500 (1934), *we believe that a fact finder is capable of recognizing such extreme conduct, impartially and without prejudice, even in the context of consensual sexual behavior.”* *Id.* @245.