

Liability for Transmission of HIV and Other Sexually Transmitted Diseases in Washington

by June K. Campbell

In July 2010, the White House published an ambitious strategy to “undertake a more coordinated national response to the HIV [human immunodeficiency virus] epidemic.” While public concern on the issue has waned in recent years, approximately 56,000 people are diagnosed with new HIV infections in the United States each year. The report notes that unless bold actions are taken, the United States faces “a new era of rising infections, greater challenges in serving people living with HIV, and higher health care costs.” The Centers for Disease Control and Prevention (CDC) followed in September 2010 with a report that 19 percent of men who have sex with men (MSM) in 21 major U.S. cities were infected with HIV, and nearly half (44 percent) were unaware of their infection.

The proposed national strategy includes participation by state and local government, people living with HIV, and others. The legal community can play a role in helping the United States “become a place where new HIV [or STD] infections are rare.”

This article outlines current state statutory and common-law principles applied to the transmission of HIV and other sexually transmitted diseases and discusses the inadequacies in current statutory law in achieving the goal of reduction of new HIV infections.

Of course, HIV is just one of many sexually transmitted diseases (STDs). While the devastating health consequences of HIV are well known, the lifelong health impacts of other STDs may be overlooked. The legal rights of an individual newly infected with an STD and the legal liability of the person who transmitted the disease are infrequently discussed or litigated in Washington.

Washington law provides civil liability for an individual who knowingly transmits or exposes a sexual partner to an STD. For transmission of HIV, criminal liability may also apply. In addition, common-law tort concepts may be used in Washington to hold individuals liable for damages caused by transmission of an STD.

Public health concerns

In 2009, STDs comprised more than 74 percent of communicable diseases or conditions required to be reported to public health authorities in Washington. In addition to HIV, well-known reportable STDs are chlamydia, gonorrhea, syphilis, genital herpes simplex, and human papilloma virus. Between 2003 and 2007, the Department of Health reported 570 new HIV diagnoses in Washington state per year. The actual number of people in Washington living with STDs is likely much higher than reported to the Department of Health. Some STDs have no symptoms, and some produce symptoms that may be mistaken for other conditions. Infected individuals may not seek treatment and may not be tested.

In 1988, responding to emergence of the AIDS epidemic, the Legislature enacted the AIDS Omnibus Act, which became part of RCW 70.24. Provisions of the Act apply to both HIV and other STDs. Under the Act, both the

government and private citizens have the authority to hold individuals legally accountable for activity that places others at risk for exposure to STDs.

Healthcare providers must notify public-health authorities of positive test results for reportable STDs. The required notification includes not only the diagnosis, but also the name, address, telephone number, and date of birth of the infected person. While there are provisions to protect confidentiality, it is not absolute.

State and local health agencies have the authority to examine and counsel individuals reasonably believed to be infected or exposed to an STD. These agencies have the authority to issue orders requiring individuals to submit to testing and counseling as well as restraining conduct, such as sexual contact with others, that could endanger the public. Failure to comply with such orders is a gross misdemeanor. Non-compliance may lead to civil commitment, as dangerous conduct following a cease-and-desist order allows health officers to bring an action in superior court to detain the non-compliant individual.

Washington law requires disclosure of STD status to sexual partners

Under RCW 70.24.140, a person infected with an STD (other than HIV), confirmed by laboratory testing, is legally required to disclose his or her status to a new partner before engaging in sexual intercourse with that person. An aggrieved person has a right of action in superior court and can obtain the greater of actual damages or \$1,000 for any negligent violation, or the greater of actual damages or \$10,000 for each intentional or reckless violation. Additional damages include attorney fees, costs, or other relief (such as an injunction), as the court may deem appropriate. RCW 70.24.140 does not require that an aggrieved person actually become infected as a result of the sexual contact; the lack of disclosure is the violation.

By mandating disclosure before sexual contact, RCW 70.24.140 is similar to the common-law concept of battery. RCW 70.24.084 encourages an infected individual to disclose his or her status, thus providing a prospective new sexual partner the options of either not engaging in sexual contact with the infected individual at all or taking precautions to avoid becoming infected.

Shortcomings of RCW 70.24.140

However well-intended RCW 70.24.140 might be, it is not likely to achieve the goal of preventing STD transmission. First, HIV is specifically exempted from the disclosure requirements. This exclusion is inconsistent with the legislative purpose of the Acquired Immune Deficiency Syndrome (AIDS) Omnibus Act, and was not contained in the original version of the Act in the Senate. However, HIV became specifically excluded from RCW 70.24.140 at the time of adoption. In 1988, there were few treatments for HIV. At that time, the medical community believed that legally requiring HIV disclosure might not only discourage people from seeking HIV counseling and testing but increase discrimination against those carrying the disease. Because the chapter places emphasis on confidentiality and counseling “it was assumed a greater societal good could be accomplished by excluding HIV from the disclosure requirement.” Other professionals believed that “it was prudent for all persons to assume their partner might be HIV-infected, and therefore up to them to protect themselves.”

These rationales are arguably no longer appropriate. Better treatments have led to steady increases in the number of people who are living with HIV/AIDS. Current treatments can “lower the amount of the virus circulating in a person’s body, thereby reducing their risk of transmitting HIV to others.” Because early treatment is more effective, individuals at risk for HIV also benefit from early testing. Disclosure of HIV status allows potential sexual partners to make choices to limit the risk of contracting HIV themselves. One Regional AIDS Service Network, established under the Omnibus Act, has found the exclusion unreasonable, “contrary to public health recommendations, as well as common sense.”

Second, many people may be carriers of STDs and not know it because they have not had symptoms and have never been tested. A test may not be positive until some months after the individual has become a carrier of an STD. Under the statute, individuals with a possible STD that has not yet been confirmed by laboratory testing are not required to disclose their status to a potential new partner. Further, as the statute refers only to “sexual intercourse” (not defined in the statute), it excludes all other sexual contact that could transmit STDs.

Finally, as the form of the disclosure is not specified, there may be evidentiary problems for both parties, as typically there will not be independent witnesses to corroborate the parties’ testimony regarding disclosure or lack of disclosure of STD status before sexual contact.

Criminal liability for transmission of HIV

The disparate treatment of HIV and other STDs is not confined to RCW 70.24.140. A person infected with HIV can be guilty of a felony assault in certain situations for transmitting the virus. A person who “administers, exposes, or transmits to, or causes to be taken by another person ... the human immunodeficiency virus” is guilty of assault in the first degree if the virus is transmitted with the intent to inflict great bodily harm. Individuals responsible for transmission of other STDs are not subject to felony assault charges. The distinction has been upheld.

However, data from the Centers for Disease Control and other studies have shown that intentional HIV transmission is atypical and uncommon. A recent study concluded that HIV-specific laws “do not influence the behavior of people living with HIV” in those states where HIV laws exist. Criminal laws may even “make people less willing to disclose their status by making people feel at even greater risk of discrimination.” Thus, the exclusion of HIV from RCW 70.24.140 is not ameliorated by the existence of a criminal law making intentional transmission of HIV a felony. HIV transmission is more likely to be reduced by promoting knowledge between partners before contact than by the threat of criminal prosecution after the conduct has occurred. Although the criminal statute may satisfy notions of retributive justice, legislators should “reconsider whether existing laws continue to further the public interest and public health.”

Common law theories of liability

Individuals who infect others with STDs may be liable to their partners under common-law tort theories. Courts in other states have recognized causes of actions based on theories of battery, negligence, fraud or misrepresentation, and intentional infliction of emotional distress. These common-law remedies are available to both unmarried and married partners.

Under a negligence theory, the elements of duty and breach are established by showing that the defendant knew or should have known that he or she was infected with an STD that could be transmitted to a new sexual partner, and failed to disclose such STD to the new partner. A defendant’s lack of knowledge of his or her STD status typically poses a bar to recovery under common-law theories of negligence and battery. Similarly, in cases alleging intentional infliction of emotional distress, liability often hinges on the defendant’s knowledge of the infection.

However, knowledge does not necessarily mean that a person must have a medically confirmed STD. Individuals who engage in sexual contact with others have a duty to not act carelessly in a way that could transmit an STD, such as failing to seek treatment for obvious symptoms of an STD. In a Minnesota case, the court held that “the careless failure to recognize an outbreak, or the careless failure to inform a partner about such a possibility can be considered conduct below the acceptable standard.”

In situations where a defendant is without symptoms or knowledge of exposure to an STD, a legal duty is less clear. For instance, one court has stated that there is no duty to warn a sexual partner merely because the individual is a

member of a high-risk group. The minimum level of knowledge required to have a duty is either actual knowledge of the STD, having symptoms associated with the STD, or actual knowledge that a prior partner was diagnosed with the STD. In fact, a Washington court has held in a negligent infliction of emotion distress case related to STD exposure that a person has no legal duty to his or her spouse to disclose extramarital sexual relations.

Also, a plaintiff must show proximate causation, which may be the most difficult element in such cases. Because individuals may be carriers of some STDs without having symptoms, a plaintiff may have acquired the STD at issue before the subject sexual contact. STD testing also typically does not determine when an individual contracted the STD. In fact, due to the range of incubation periods needed to trigger positive results, even a plaintiff's prior negative test results may not be sufficient. As a result, the plaintiff's prior sexual and medical history is usually at issue in cases involving STD transmission. The privacy of the parties to the action, as well as prior sexual partners of both parties, may not be protected.

On the other hand, a defendant in such a case will have an uphill battle arguing that the plaintiff consented to the sexual contact and therefore there should be no liability. For instance, courts have rejected defenses of consent in situations in which individuals engaged in consensual unprotected sexual contact without informing their sexual partners of their HIV status.

A higher standard of liability?

With widespread dissemination of information concerning the risks of transmission of STDs in sexual education classes at multiple grade levels and in private and public medical clinics, a higher standard of liability for those who know they are at high risk of having an STD may now be more appropriate. Extending constructive knowledge to cover individuals who engage in high-risk behavior could encourage more testing and disclosure to new partners, reducing transmission of STDs. In fact, some suggest going even further, adopting strict liability for STD transmission to others.

One of the challenges mentioned in the 2010 White House report is reducing the number of people living with HIV who are unaware of their status. Studies have estimated that 21 percent of people with HIV are unaware of their status, and that those who are unaware of their status are more likely to engage in risky behaviors associated with HIV transmission. Since 2006, the CDC has recommended that screening for HIV infection be performed routinely for all patients ages 13–64 in all healthcare settings. Adopting a stricter standard of tort liability may therefore have a beneficial impact of increasing testing while decreasing risky behavior.

Sexual health education curriculum

Without knowledge of the legal responsibilities and rights associated with sexual contact in Washington, the provisions of the AIDS Omnibus Act are unlikely to be effective in reducing the transmission of STDs. If individuals are not aware of the criminal and civil liability for transmitting an STD, the law cannot effectively deter risky behavior.

Although Washington has placed a high emphasis on sexual education, sexual health education requirements do not currently include education concerning legal duties of disclosure of STD status or legal consequences of transmitting a STD to others. HIV education is “limited to the discussion of the life-threatening dangers of the disease, its spread, and prevention.” Under the mandatory 2005 Guidelines for Sexual Health Information and Disease Prevention adopted under the Healthy Youth Act, there is no mention of educational requirements concerning the legal consequences associated with transmitting or exposing a partner to an STD. Although sexual health education may vary by districts and might include some coverage of this issue, a statewide policy curriculum may be better suited to ensure that students in Washington receive information about the legal consequences of failure to disclose STD status and transmission of STDs.

Education about STD laws could encourage more testing and more disclosure of STD status as individuals learn that they have a legal obligation to disclose the information and risk potential liability if they fail to do so. Further, individuals could have more confidence to inquire about their partners' status, knowing that they have a legal right to the information. As stated in the White House report, success depends on the commitment of all parts of society, including the legal community, to truly achieve a society where new HIV/STD infections are rare.



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