

AIDS AND THE LAW

WILLIAM H.L. DORNETTE, M.D., J.D.

Editor

Department of Legal Medicine
Armed Forces Institute of Pathology
Washington, D.C.

Wiley Law Publications

JOHN WILEY & SONS

New York • Chichester • Brisbane • Toronto • Singapore

Chapters 1, 3, and 7 were prepared by officials of the United States Government as part of their official duties.

Copyright © 1987 by John Wiley & Sons, Inc.

All rights reserved. Published simultaneously in Canada.

Reproduction or translation of any part of this work beyond that permitted by Section 107 or 108 of the 1976 United States Copyright Act without the permission of the copyright owner is unlawful. Requests for permission or further information should be addressed to the Permissions Department, John Wiley & Sons, Inc.

Library of Congress Cataloging-in-Publication Data

Dornette, William H.L. (William Henry Lueders),
1922-
AIDS and the law.

(Medico-legal library)
"Wiley law publications."
Bibliography: p.
Includes index.

1. AIDS (Disease)—Law and legislation—United States. I. Title. II. Series. (DNLM: 1. Acquired Immunodeficiency Syndrome—United States—legislation. WD 308 D713a

KF3804.A54D67 1987 344.73'0321969792 87-6264
ISBN 0-471-85740-8 347.304321969792

Printed in the United States of America

10 9 8 7 6 5 4 3

AIDS AND THE LAW

To
Frances, Frances Way, Stuart, and Betty

FOREWORD

The acquired immune deficiency syndrome (AIDS) is an epidemic that has already killed thousands of people, mostly young, productive Americans. In addition to illness, disability, and death, AIDS has brought fear to the hearts of most Americans—fear of disease and fear of the unknown. Initial reporting of AIDS occurred in the United States, but AIDS and the spread of the AIDS virus is known to be an international problem. Today, those practicing high-risk behavior who become infected with the AIDS virus are found mainly among homosexual and bisexual men, and male and female intravenous drug abusers. However, heterosexual transmission is expected to account for an increasing proportion of those who become infected with the AIDS virus in the future.

AIDS is an infectious disease. It is contagious, but cannot be spread in the same manner as a common cold or measles or chicken pox. It is contagious in the same way that sexually transmitted diseases, such as syphilis and gonorrhea, are contagious. AIDS is *not* spread by common everyday contact but by sexual contact. There is great misunderstanding resulting in unfounded fear that AIDS can be spread by casual, non-sexual contact. This misunderstanding and associated fear in turn have caused much controversy and litigation. One of the purposes of this book is to educate lawyers, physicians, and lay persons in the laws as they affect those exposed to or infected with the AIDS virus. Through such educational efforts, it is hoped that these fears will be dispelled, much of the controversy resolved and the litigation forestalled.

AIDS can also be spread through the sharing of intravenous drug needles and syringes used for illicit drugs. The vast majority of Americans are against illicit drugs. As a health officer I am opposed to the use of illicit drugs. As a practicing physician for more than forty years, I have seen the devastation that follows the use of illicit drugs—addiction, poor health, family disruption, emotional disturbances and death. I applaud the president's initiative to rid this nation of the curse of illicit drug use and addiction. The success of his initiative is crucial to the health of the American people and will also help reduce the number of persons exposed to the AIDS virus.

Some Americans have difficulties in dealing with the subjects of sex, sexual practices, and alternate lifestyles. Many Americans are opposed to homosexuality, promiscuity of any kind, and prostitution. At the beginning of the AIDS epidemic many Americans had little sympathy for people with AIDS. The feeling was that somehow people from certain groups “deserved” their illness. Let us put those

feelings behind us. We are fighting a disease, not people. Those who are already afflicted are sick people and need our care as do all sick patients. The country must face this epidemic as a unified society. We must prevent the spread of AIDS while at the same time preserving our humanity and intimacy.

Washington, D.C.
April 1987

C. EVERETT KOOP, M.D., SC.D.
Surgeon General

PREFACE

Few Americans today are unaware of the problems that are being generated by the spread of the virus that causes acquired immune deficiency syndrome, or AIDS as this affliction is commonly known. What began in the early 1980s as a disease afflicting primarily homosexual men and IV drug abusers has spread to the heterosexual population and to persons of all ages, including newborn children. What is not generally known is the potential magnitude of this problem. Conservative projections indicate that in just a few years the disease will have reached epidemic proportions, straining the capacity of our health care delivery system to cope with the growing number of cases. The Public Health Service* estimates that by the end of 1991 a cumulative total of more than 270,000 Americans will have developed AIDS, and over half of these individuals will have succumbed to this syndrome.

The spread of this infection has led to a plethora of controversies. Considering the litigious climate of today, it should come as no surprise that many of controversies have spawned litigation. These disputes revolve about three seeming or real civil wrongs—the shock and harm of having been infected with the virus, the stigma of being infected, or the fear of becoming infected.

Recognizing the many legal ramifications that are and will be forthcoming as the infection spreads, several of us at the Armed Forces Institute of Pathology early in 1986 conceived the idea of presenting a symposium on these legal issues which do and are expected to affect United States citizens. The symposium was held on October 4, 1986. It was jointly sponsored by the Surgeon General, United States Public Health Service, the Armed Forces Institute of Pathology, and the Registries of AIDS Pathology and Legal Medicine, American Registry of Pathology. Each speaker prepared a formal manuscript covering his or her respective topic. The manuscripts were drafted specifically for publication in this book and are not transcripts or proceedings of the symposium. Each has been updated to the extent possible during the interval between the symposium and the typesetter's deadline.

The purpose of this book is two-fold. Any time medical problems develop into legal issues, members of these two learned professions come face to face. Often each knows very little about the other's work. Those who are neither physicians nor lawyers generally may be completely in the dark. This book explains the medical

* *National Academy of Sciences Institute of Medicine, Confronting AIDS 8* (National Academy Press, 1986).

background of infections with the AIDS virus and the associated legal issues to members of both professions and to non-professionals as well.

The second purpose is somewhat more ambitious. Much litigation could be prevented if all persons became more familiar with their own legally recognized rights and, just as importantly, the legally recognized rights of others. It is our hope that those reading this book will gain a much better insight into the rights of persons on both sides of disputed issues. Then, by acting in consonance with the law, they will be able to circumvent much of the controversy and litigation that appear to be fomenting at the present time.

Much has been written in scientific publications and the lay press about the steps to be taken to minimize further spread of the virus. The Centers for Disease Control have developed guidelines directed toward this end, for such activities as day-to-day living, health care delivery, dental practice, and child care. Those recommendations pertinent to the subjects (e.g., education, health care delivery, employment) covered in this book are contained in the appendixes. While these recommendations do not in and of themselves set the standard of care, they would buttress strongly the opinion of a witness testifying as to that standard.

This book is our first effort at reviewing what is certain to become a major source of litigation in the years to come. Comments from readers are encouraged and will be most welcome. Considering both the advances in medicine and the evolution of common and statutory law, it is to be expected that a second edition will be needed in the not too distant future. It is the intent of the editor and authors to keep abreast with the changing climate in law and medicine as it affects those infected with or exposed to the AIDS virus and to revise this material accordingly.

The material contained in this book has been reviewed by the Director of the Armed Forces Institute of Pathology, who has determined that it meets the accepted professional standards of the Institute and that it contains no material that warrants disapproval for security or policy reasons.

The opinions expressed by the editor and authors are their own and are not to be construed as reflecting those of the Armed Forces Institute of Pathology, the Department of the Army, or the Department of Defense.

Washington, D.C.
April 1987

WILLIAM H.L. DORNETTE

CONTRIBUTORS

Charles J. Cooper, J.D.
Assistant Attorney General
Office of Legal Council
U.S. Department of Justice
Washington, D.C.

Gwendolyn Gregory, J.D.
Staff Council
National School Boards Association
Arlington, Virginia

James D. Henry, J.D.
Associate Solicitor for Civil Rights
U.S. Department of Labor
Washington, D.C.

Russel P. Iuculano, J.D.
Legislative Director
American Council of Life Insurance
Washington, D.C.

Kathryn Kelly, J.D.
Partner, Crowell & Moring
Washington, D.C.

Thomas J. Lynch
Executive Vice President
Begg, Inc.
Washington, D.C.

Abe M. Macher, M.D.
Director, Collaborative Center for
the Study of AIDS Pathology
Co-Registrar, Registry of AIDS
Pathology
American Registry of Pathology
Armed Forces Institute of Pathology
Washington, D.C.

Raymond C. O'Brien, J.D., D. Min.
Associate Professor
The Catholic University of
America, School of Law
Washington, D.C.

David Robinson, Jr., J.D.
Professor of Law
George Washington University
Washington, D.C.

Patricia A. Wagner, J.D.
Associate, Taft, Stettinius &
Hollister
Cincinnati, Ohio

Barry P. Wilson
Vice President for Public Affairs
Blue Cross and Blue Shield of the
National Capital Area
Washington, D.C.

ACKNOWLEDGMENTS

The preparation of this book involved the dedicated work of a number of professionals that began with the decision to offer a symposium on this subject in October 1986. Special thanks are owed Robert McMeekin, Robert Karnei, Dave Armitage, Elgin Cowart, and Paul Klein and for their support and in helping plan and present a successful symposium. Quite obviously, neither the symposium nor this book would have been possible without the speakers, who not only made the symposium a success but also worked long hours in preparing the individual chapters. Each of them is owed a special debt of gratitude. The editor acknowledges with appreciation the help of Wanda McIlwain, for typing manuscripts for the appendixes and several of the chapters, and Susan Yellen and Beverly Payne, for the tedious task of checking the citations. Appreciation is also due Wiley Law Publications, especially Ed MacGuire for his enthusiastic support of this publication, and Mary Hope for invaluable editorial work. Finally, I would like to thank my son Stuart. He helped me establish contact with Wiley Law Publications, and he also interested me in Lisa/MacIntosh computer ownership, without which neither the symposium nor the book would have come off as smoothly as they did.

W.H.L.D.

SUMMARY CONTENTS

Chapter 1	The Medical Background	1
Chapter 2	Introduction to the Law	15
Chapter 3	AIDS in the Workplace	31
Chapter 4	Educating the Infected Child	47
Chapter 5	Housing the AIDS Victim	75
Chapter 6	AIDS and the Family	85
Chapter 7	Discrimination against the Handicapped	141
Chapter 8	Negligence and Intentional Torts	149
Chapter 9	Criminal Sanctions and Quarantine	165
Chapter 10	AIDS and the Criminal Justice System	177
Chapter 11	Health Insurance	195
Chapter 12	Life Insurance	203
Chapter 13	Blood Products and Tissue Transplants	219
Chapter 14	Overview of Health Care Issues	243
Chapter 15	Confidentiality Issues	249
Appendixes		257
Table of Cases		357
Index		367

DETAILED CONTENTS

Chapter 1 The Medical Background

Abe M. Macher, M.D.

RECOGNITION OF AIDS

§ 1.1 Introduction

THE IMMUNE SYSTEM

§ 1.2 Definition

§ 1.3 Innate or Natural Immunity

§ 1.4 Acquired Immunity

§ 1.5 —Cell Mediated Immunity

§ 1.6 Immunization

§ 1.7 Immune Deficiencies

§ 1.8 —Congenital Immune Deficiency

§ 1.9 —Pharmacological Immune Deficiency

§ 1.10 —Acquired Immune Deficiency

ATTACK ON THE IMMUNE SYSTEM

§ 1.11 Overview

§ 1.12 Human Immunodeficiency Virus

§ 1.13 —Epidemiology

§ 1.14 AIDS-Related Complex

ACQUIRED IMMUNE DEFICIENCY SYNDROME

§ 1.15 Definition

§ 1.16 Opportunistic Infections

§ 1.17 —Fever of Unknown Origin, Weight Loss, and Malaise

§ 1.18 —Diffuse Pneumonia

§ 1.19 —Diarrhea

§ 1.20 —Neurologic Disorders and Retinitis

§ 1.21 —Kaposi's Sarcoma

§ 1.22 —Lymphomas

§ 1.23 The Future

Chapter 2 Introduction to the Law

William H.L. Dornette, M.D., J.D.

§ 2.1 Overview

§ 2.2 Sources of Laws

- § 2.3 —Common Law
- § 2.4 —Interrelationship of These Laws
- § 2.5 Contracts
- § 2.6 —Health Care Delivery Contract
- § 2.7 —Duties of Patients

TORT LAW

- § 2.8 Definition
- § 2.9 Concept of Negligence
- § 2.10 *Res Ipsa Loquitur*
- § 2.11 Setting the Standard of Care
- § 2.12 —Role of Voluntary Standards-Making Organizations
- § 2.13 —Legal Status of Voluntary Standards
- § 2.14 —Recommendations of Official Agencies
- § 2.15 —Courts as a Source of Standards-Setting
- § 2.16 The Changing Standard of Care
- § 2.17 Intentional Torts
- § 2.18 —Abandonment
- § 2.19 —Assault
- § 2.20 —Battery
- § 2.21 —Breach of Confidence
- § 2.22 —Defamation
- § 2.23 —False Imprisonment
- § 2.24 —Fraud
- § 2.25 —Intentional Infliction of Emotional Harm
- § 2.26 —Invasion of Privacy
- § 2.27 —Negligent Infliction of Emotional Harm
- § 2.28 Damages in Cases Involving Intentional Torts
- § 2.29 Civil or Criminal Sanctions
- § 2.30 Overview of Chapters 3 through 15

Chapter 3 AIDS in the Workplace

James D. Henry, J.D.

- § 3.1 Introduction

MEDICAL BACKGROUND

- § 3.2 Nature of the Disease
- § 3.3 Signs and Symptoms of AIDS
- § 3.4 AIDS-Related Complex
- § 3.5 Antibody Seropositivity
- § 3.6 Transmission of AIDS

LEGAL ISSUES

- § 3.7 Equal Employment Opportunities for AIDS Victims
- § 3.8 The Rehabilitation Act—Who Is Protected?
- § 3.9 The Rehabilitation Act—Who Is Covered?
- § 3.10 Department of Justice Opinion
- § 3.11 Employer Defenses
- § 3.12 What Is a Recognized Hazard?
- § 3.13 Conclusion

Chapter 4 Educating the Infected Child

Gwendolyn H. Gregory, J.D.

- § 4.1 Introduction

RIGHTS OF PERSONS INFECTED WITH HIV

- § 4.2 Two Important Federal Statutes
- § 4.3 —Education for All Handicapped Children Act
- § 4.4 —Section 504 of the Rehabilitation Act of 1973
- § 4.5 *Arline versus School Board of Nassau County*
- § 4.6 Department of Justice Opinion on Employees with AIDS
- § 4.7 Section 504 and Students with Communicable Diseases

CASES INVOLVING STUDENTS WITH AIDS

- § 4.8 Ryan White Case
- § 4.9 New York School Board Case
- § 4.10 —Decision to Admit Children with AIDS
- § 4.11 —Composition and Procedures of the Original Four-Member Panel
- § 4.12 —Safeguards for Other Children
- § 4.13 —Confidentiality
- § 4.14 Testing Employees and Students for HIV Antibodies

RIGHTS OF CO-EMPLOYEES AND OTHER STUDENTS

- § 4.15 State Communicable Disease Laws
- § 4.16 Potential Tort Liability
- § 4.17 Right to Know versus Right to Confidentiality
- § 4.18 —Student Confidentiality Issues
- § 4.19 Conclusion

Chapter 5 Housing the AIDS Victim

Thomas J. Lynch

INTRODUCTION

- § 5.1 Nature of Residential Real Estate

STATUTORY ADMONITIONS AGAINST DISCRIMINATION

- § 5.2 Federal Statutes
- § 5.3 State Statutes
- § 5.4 —Virginia
- § 5.5 —Maryland
- § 5.6 —District of Columbia

SALE OF RESIDENTIAL REAL ESTATE

- § 5.7 Obligation of Broker to Prospective Buyer
- § 5.8 Condominiums
- § 5.9 Cooperatives

RENTAL OF RESIDENTIAL PROPERTY

- § 5.10 Duty of Landlords to Maintain a Safe Premises
- § 5.11 Duties of Rental Agents
- § 5.12 Rights of Other Tenants

REMEDIES

- § 5.13 Statutory Causes of Action
- § 5.14 Damages
- § 5.15 Suspension or Revocation of Broker's License
- § 5.16 Conclusion

Chapter 6 AIDS and the Family
 Raymond C. O'Brien, J.D., D.Min.

INTRODUCTION

- § 6.1 A Fourteenth Century Calamity Today
- § 6.2 The AIDS Problem
- § 6.3 What Is a Family?
- § 6.4 International Consequences of AIDS

ECONOMIC ISSUES: FAMILIES IN GENERAL

- § 6.5 Single Parents
- § 6.6 Employment and Spousal Suits
- § 6.7 Insurance and Support
- § 6.8 Living Wills, Durable Powers of Attorney, and Testamentary Issues
- § 6.9 Pension and Social Security
- § 6.10 Nonmarital Contracts

MARITAL ISSUES: HUSBAND AND WIFE

- § 6.11 Suits for Annulment
- § 6.12 Infectious Diseases and Torts
- § 6.13 Divorce—Grounds
- § 6.14 —Alimony and Support
- § 6.15 Spousal Abuse

CHILDREN'S ISSUES: FEAR OF THE UNKNOWN

- § 6.16 Spectrum of Child Abuse
- § 6.17 Adoption and Foster Care
- § 6.18 Custody
- § 6.19 Visitation
- § 6.20 Involuntary Termination of Parental Rights
- § 6.21 Problems in School

UNANSWERED ISSUES: RIGHTS OF PERSONS DETERMINED BY LEGISLATION OR COURTS?

- § 6.22 What Is Compelling?
- § 6.23 Privacy and Its Limits
- § 6.24 Responsibility of Professionals
- § 6.25 Conclusion

Chapter 7 Discrimination against the Handicapped

Charles J. Cooper, J.D.

- § 7.1 Introduction
- § 7.2 Analysis of Section 504 of the Rehabilitation Act
- § 7.3 Application of Section 504—To Asymptomatic Carriers
- § 7.4 —To AIDS Victims
- § 7.5 Fear of Contagion—Is Contagiousness a Handicap-Based Stereotype?
- § 7.6 —Is the Fear Genuine?
- § 7.7 Medical Basis for Opinion
- § 7.8 Conclusion

Chapter 8 Negligence and Intentional Torts

Kathryn Kelly, J.D.

LIABILITY OF INDIVIDUAL FOR TRANSMISSION OF HIV

- § 8.1 Introduction
- § 8.2 Causes of Action—Battery
- § 8.3 —Negligence
- § 8.4 —Fraud or Deceit
- § 8.5 Third Party Actions
- § 8.6 Common Defenses—Violation of Statute or Against Public Policy
- § 8.7 —Consent, Assumption of the Risk, Comparative Negligence
- § 8.8 —Invasion of Privacy
- § 8.9 Damages Issues

PRACTICAL PROBLEMS

- § 8.10 Publicity
- § 8.11 Discovery Issues