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Anger Management: Charlie Sheen's Ex-Fiancée Sues Over Sheen's Failure to Disclose HIV Status

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This is not a traditional love story. Scottine Ross and Charlie Sheen first met because Charlie had asked a friend to get Scottine to his house—so he could pay her $10,000 for sex. After she begrudgingly signed a non-disclosure agreement, promising not to reveal anything about the encounter, he gave her an envelope full of cash, and they had sex. They had a sex a few more times before falling in love, dating, getting engaged, and pursuing what might appear to a neutral observer to be a stormy, painful, and destructive relationship.

According to Scottine, the whole relationship began with a lie—or at least the failure to disclose one very important fact: that Charlie was HIV positive. She has recently filed a lawsuit seeking damages for this and other alleged misconduct. He has countered, among other ways, with the claim that any dispute between them must be arbitrated in a confidential proceeding, rather than in open court. Their sexual encounters were supposed to be kept private. What does the law have to say about these claims?

***Ross v. Sheen*: Scottine's Complaint**

According to the **complaint (http://documents.latimes.com/scottine-ross-complaint-against-charlie-sheen/)** recently filed in a California court, Charlie Sheen did a lot of things for which Scottine has every right to be angry. The allegations run the gamut from physical abuse to forcing her to have an abortion to putting a hit on her ex-husband to wantonly exposing her to HIV without her consent. For these and other alleged wrongs, she seeks money damages.

Let's focus just on the failure-to-disclose claim. One fact at the root of this claim—that Charlie learned that he was HIV positive at least four years ago—is undisputed. Charlie publicly revealed his HIV status just a few weeks ago, in November 2015, in a live interview with *The Today Show*'s Matt Lauer and in an **open letter (http://www.today.com/health/charlie-sheens-open-letter-hiv-positive-diagnosis-t56451)** posted on the show's website.

He came forward, according to the letter, to avoid paying off more people ("desperate charlatans") to keep his secret—to whom he has apparently already paid millions. As he wrote:

> In and around this perplexing and difficult time, I dazedly chose (or hired) the companionship of unsavory and insipid types. Regardless of their salt-less reputations, I always lead with condoms and honesty when it came to my condition. Sadly, my truth soon became their treason, as a deluge of blackmail and extortion took center stage in this circus of deceit.
>
> Locked in a vacuum of fear, I chose to allow their threats and skullduggery to vastly deplete future assets from my children, while my "secret" sat entombed in their hives of folly (or so I thought).

But according to Scottine's complaint, her sexual encounters with him included neither condoms nor honesty. She alleges that the first pricey encounter required her to sign away her right to disclose any information during the evening, but did not include any disclosure by Charlie of his status. Rather, she claims, she deduced his status only after

their fifth sexual encounter, after discovering HIV medications in his bathroom. (Another long-term, live-in girlfriend said more or less the same thing—that although she had been in a sexual relationship with him for a year, she learned of his HIV status "when everyone else did" on the *Today Show*).

This discovery prompted a real "heart-to-heart" conversation for the couple. She claims that had she known his status before their first encounter, she never would have entered a sexual relationship with him, for fear of contracting HIV. But, by the time she found out, she had fallen in love with him. And after the discovery of his condition, he promised her he was in it for the long haul and would marry her. They decided to stay together—and to continue having unprotected sex—"like a normal couple," she explains in her complaint. She took HIV-prevention drugs throughout the rest of their relationship and has never tested positive for the virus herself.

She is suing, however, for the failure to disclose prior to those first five sexual encounters. According to her logic, had she known at the outset, the relationship would never have begun. And had it never begun, she never would have fallen in love with him and been exposed to HIV. Her claims are styled as "sexual battery" and "intentional infliction of emotional distress," both types of tort claims that, if proven, could result in an award of money damages.

Charlie, for his part, wants her lawsuit thrown out of court. He claims that the non-disclosure agreement requires all disputes be settled in arbitration rather than in court. And he further claims that they recently reached a settlement agreement that also prevents her from airing her claims in court.

Sexual Privacy

Strong norms of privacy surround two things at issue here: health and sexual history. It would not be a stretch to say that people, in most circumstances, have the right to be quiet about such matters—perhaps even to lie about them.

Sex also raises another kind of privacy—the notion of a constitutional right to privacy that gives individuals not only the right to keep their sex lives secret, but also the right to engage in the sexual activity in the first place. For most of American history, states have tried to keep a tight leash on sexual activity. It was sanctioned only within marriage, and only with a reproductive purpose. Now the government never had, of course, complete control. But a cluster of criminal laws was supposed to work in tandem to confine sex to its proper place—and between proper people. Those laws prohibited fornication (sex by unmarried persons); sodomy (sexual contact between people of the same gender or oral-genital contact between people of different genders); bestiality; incest; adultery; and, at

least in some states, the use of contraception. It also did—and does—prohibit prostitution. These laws were part and parcel of a system that enforced a moral code.

The greatest blow to this system was the development of a constitutional right to privacy, which restricted the government's right to interfere with certain aspects of personal life. In ***Lawrence v. Texas (https://supreme.justia.com/cases/federal/us/539/558/)*** (2003), the Supreme Court found protection in the Due Process Clause for the right of adults to conduct consensual personal relationships "in the confines of their homes and their own private lives." The Court imposed limits right off the bat, noting that the case before it (involving consensual same-sex sodomy) "does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution." This language was designed to leave some room for continued state regulation of sex.

Lies Between Sexual Partners

A significant premise of the Supreme Court's ruling in *Lawrence* is that sex is quintessentially a private activity, one protected in part *because* it is so private. And, as criminal bans on sexual activity in public make clear, the law actively seeks to keep it private. Nonetheless, there are circumstances in which keeping one's sexual history a secret is a crime, or at least a basis for civil liability. Concealing a sexually transmitted disease, especially an incurable one, from a prospective sexual partner is one such situation.

Philippe Padieu, a Texas man who had been diagnosed with HIV in 2005, was charged with six counts of aggravated assault with a deadly weapon—his infected body. When his physician gave him the bad news about his own HIV status, Padieu was warned about the risk of transmission to others and about the need to either abstain from sex or use a barrier method of contraception. But Padieu ignored those warnings, having unprotected sex with six women, all of whom later tested positive for HIV. Worse, Padieu knew that he had infected some of the women before he had slept with all six—and yet he continued to have unprotected sex without informing any of his partners about his status. He was eventually stopped by a posse of women, two of his former partners who, after discovering they had been infected with the HIV virus, set out to identify and warn all his other victims. He was convicted and sentenced to a total of seventy years in prison for keeping his sexual history—and its consequences—to himself. His crime was not transmission, but concealment. His conduct illuminates the challenge of the "secret malady"—most people "endeavor[] to keep their sexually-transmitted infections from the social world," but "secrecy nurtures disease because it provides an environment conducive to the spread of infection."

Texas did not have a specific statute related to the transmission of sexually transmitted infections (STIs). But many states now do, and many of these laws were passed during the early years of HIV, when it had no known treatment or cure. A whole host of criminal laws were passed specifically to target intentional transmission of HIV, especially when the carrier concealed his or her status. Congress adopted the Ryan White Comprehensive AIDS Resources Emergency Act of 1990, which gave states an incentive to criminalize transmission of the HIV virus by offering federal aid in return. The HIV-specific laws were adopted during this same era. Some criminalize all sexual acts between an HIV-positive person and an HIV-negative person—a so-called status offense. But others focus on the trade-off between one person's privacy and the other person's informed consent. Those statutes only criminalize sexual encounters that are not preceded by disclosure of the HIV-positive person's status, and which thus deprive the other person of the choice whether to proceed or abstain in the face of a known risk.

The criminal laws that discourage transmission—at least transmission without consent—are reinforced by tort law, which is what Scottine Ross is invoking in her civil lawsuit. Courts have routinely held that a person who knowingly transmits an STI, particularly one that causes significant harm, can be sued for damages. The causes of action vary depending on the state and the circumstance, but assault, battery, infliction of emotional distress, fraud, misrepresentation, and negligence have all been used successfully in this context. The idea of a duty to disclose had its origins in the transmission of other kinds of infectious disease. In 1896, for example, the Wisconsin Supreme Court affirmed a jury's verdict holding a father liable for sending a servant to care for his sick child first without informing her that the child had typhoid fever and then, after the servant discovered the truth, falsely reassuring her that the disease was not contagious. It was not a stretch to apply a similar principle to the transmission of venereal disease, given that intimate partners, in a relationship of unusual trust, have a greater obligation to disclose potentially dangerous risks.

Modern tort law makes clear that a person has the right to know about the health of a sex partner, and a person with an infectious disease has a duty to avoid infecting others. In a case by a man against his former wife, who he alleged had failed to disclose that she had genital herpes before they began a sexual relationship or before they married, an appellate court in Minnesota held that people with genital herpes "have a duty either to avoid sexual contact with uninfected persons, or, at least, to warn potential sex partners that they have herpes before sexual contact occurs." The wife in that case argued that a duty to disclose her herpes infection constituted "an undue invasion of the law into the most private aspects of personal life." And although the court recognized both the personal difficulties faced by someone with an incurable and difficult disease, that person is "in the best position to control the spread of the disease." Thus, the court concluded,

"[o]n balance, we believe that society's interest in preventing the spread of a dangerous, incurable disease justifies some intrusion into personal privacy."

Other courts have held that single people have the same duty to disclose STIs as married people. In a California case, ***Kathleen K. v. Robert B. (http://law.justia.com/cases/california/court-of-appeal/3d/150/992.html)*** , a woman sued a former sexual partner who, she alleged, had affirmatively misrepresented his STI status and infected her with genital herpes. He argued that the constitutional protection for privacy meant the court could not get involved in the private sexual matters of consenting adults. But, the court reasoned, the right of privacy "is not absolute" and must cede to the government's interest in protecting "the health, welfare and safety of its citizens." Protecting an unsuspecting person from herpes is a sufficiently strong interest to outweigh any intrusion into the infected person's privacy. Robert also argued that he had no duty to disclose because he and Kathleen were not in the kind of trust relationship that required honesty. The court disagreed, however, concluding that all intimate relationships involve "a certain amount of trust and confidence" and require truth in advertising.

California law also criminalizes the knowing transmission of infectious disease—a misdemeanor if the exposure is willful, a felony if the disease is HIV and the transmission is undertaken with the specific intent to infect the other person. Knowingly exposing someone to HIV can also be the basis for a penalty enhancement for violent sexual offenses or prostitution.

***Ross v. Sheen*: A Sordid Mess**

What will happen between Scottine and Charlie is anyone's guess at this stage. The only undisputed facts are that he does have HIV—and that he knew that before his first sexual encounter with her. But whether she also knew is a matter of dispute, and that's a critical fact. Certainly if she can prove she did not know, she might well have a good case against him. And if others come forward with similar claims, his liability may be potentially more extensive. And criminal enforcement is not out of the question.

As for his insistence that her claim cannot be aired in court because of the non-disclosure agreement (which he has told reporters he makes all his sexual partners sign), this seems like a weak argument. Basic contract law says that contracts cannot be premised on illegal consideration, and he seems to concede that the agreement was part of a deal in which he paid her $10,000 for sex. Even in the permissive age in which we now live, prostitution remains against the law. Scottine is probably free to shout from the rooftops about the messy and abusive relationship she had with Charlie Sheen.

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