

## **SOMETHING CATCHY: NURSING HOME LIABILITY IN THE SENIOR SEXUALLY TRANSMITTED DISEASE EPIDEMIC**

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*Old people still have sex. This topic is largely avoided, or else treated as a source of base comedy, but the growing incidence of sexually transmitted disease among the elder population necessitates substantial, mature discussion. Elders are often under-educated about the risks of unprotected sex, and many do not even understand the diseases to which they are inadvertently exposing themselves.*

*Although various state and federal regulations address the problem of disease and infection in nursing homes and similar communities, few cases have been decided regarding sexually transmitted illnesses. In order to combat a real and growing problem among our elder population, we must increase sex education for elders and begin to hold nursing homes civilly liable for the spread of infection among their populations. The combination of education and enforced liability would lead to a more comprehensive, proactive approach, ensuring the health and comfort of our elder population.*

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## I. Introduction

As the clock struck nine, Vera shuffled down the hallway. She could feel a tingling running up her spine from excitement and anticipation. Really, the tingling was from the friction of her slippers on the thick, dark carpet, but she was in too much haste to notice. Vera stole a furtive glance back at the door to her room as it slowly creaked shut, and she froze with fear and anticipation as she waited to make sure none of the staff noticed her out of bed. As she neared George's door, she gently slipped down one hand over the handle while she undid the ties on her blouse with the other. She quietly slipped in, carefully closing George's door, before shyly whispering:

"George, you awake?"

"Yes," George answered, "come on over." George sat awake on top of his adjustable bed in his flannel pajama shirt and trousers.

"Come here, you," he coaxed ever so gently as Vera slipped in bed alongside him. They were panting from the suspense. This was the first time since they met in the common area that they were entirely alone; George's roommate had passed away the day before. They looked into each other's eyes as they grasped each other's hands tightly. With the slightest hint of trepidation, George put his arm around Vera; the two leaned in and . . .

Elder intimacy is often summarily ignored in the United States.<sup>1</sup> When elder sexuality is addressed, it is often treated as a source of comedy instead of a pressing matter of public health and safety.<sup>2</sup> As one study put it, "[a]geism is . . . evident in the media's association of youth and beauty with sexual attractiveness, which consequently positions older people as 'sexless' and undesirable."<sup>3</sup> Indeed, elder sex has been depicted in popular comedic television shows, from the swingers retirement community in *Bob's Burgers*,<sup>4</sup> to

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1. Jocelyn Angus & Patricia Reeve, *Ageism: A Threat to "Aging Well" in the 21st Century*, 25 J. APPLIED GERONTOLOGY 137, 138 (2006).

2. *Bob's Burgers*, *infra* note 4; *Scrubs*, *infra* note 5; *Parks and Recreation*, *infra* note 6.

3. Laura Tarzia et al., *Dementia, sexuality and consent in residential aged care facilities*, 38 J. MED. ETHICS 609, 609 (2012).

4. *Bob's Burgers: It Snakes a Village* (20th Century Fox television broadcast Mar. 24, 2013) (detailing how a retired couple moved to Florida to live in a community that turned out to be a swinger community).

the delayed diagnosis of syphilis of an elder patient on *Scrubs*,<sup>5</sup> to the epidemic of sexually transmitted diseases (STD, STDs) amongst the elder residents of Pawnee in *Parks and Recreation*.<sup>6</sup> But, while the issue is important enough that it is being taken up by commentators and pundits,<sup>7</sup> even then the treatment can be whimsical and glib, aimed more at a political punch line than anything else.<sup>8</sup>

Despite the flippant approach taken by pop culture to issues surrounding elder intimacy,<sup>9</sup> sex and sexuality are increasingly important concerns for those who engage in elder care.<sup>10</sup> As America “grays” with aging baby boomers, elder service industries—among them the nursing home industry—are expanding rapidly to meet demand.<sup>11</sup> At the same time, the senior population is a breeding ground for an array of sexually transmitted diseases.<sup>12</sup> For instance, rates of infection are on the uptick for human immunodeficiency virus (HIV),<sup>13</sup> for chlamydia, and syphilis.<sup>14</sup>

Increased elder sexual activity and increased transmission rates of sexually transmitted diseases among older Americans have created problems in nursing homes. The spread of sexually transmit-

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5. *Scrubs: My Cold Shower* (NBC television broadcast May 3, 2007) (focusing in part on the continued misdiagnosis of an elder patient before finally concluding she had syphilis).

6. *Parks and Recreation: Sex Education* (NBC television broadcast Oct. 18, 2012) (describing an outbreak of sexually transmitted diseases in the elder population of Pawnee, Indiana).

7. *Real Time with Bill Maher: Episode 306* (HBO television broadcast Feb. 7, 2014) (focusing on the rampant sex lives of older Americans in the closing monologue).

8. *Id.*

9. *Bob's Burgers*, *supra* note 4; *Scrubs*, *supra* note 5; *Parks and Recreation*, *supra* note 6.

10. *See generally* Tarzia, *supra* note 3.

11. *Total Number of Certified Nursing Facilities*, HENRY J. KAISER FAMILY FOUND. <http://kff.org/other/state-indicator/number-of-nursing-facilities/> (last visited Sept. 8, 2014) (finding from 2003 to 2011, the number of certified nursing facility beds in the United States rose more than 66,000 to 1.65 million beds).

12. *Senior Sex (Cont.)*, MEDICINENET, [http://www.medicinenet.com/senior\\_sex/page4.htm#am\\_i\\_too\\_old\\_to\\_worry\\_about\\_safe\\_sex](http://www.medicinenet.com/senior_sex/page4.htm#am_i_too_old_to_worry_about_safe_sex) (last visited Sept. 8, 2014).

13. *HIV Among Older Americans*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/hiv/risk/age/olderamericans/index.html> (last visited Sept. 8, 2014).

14. Ezekiel J. Emanuel, *Sex and the Single Senior*, N.Y. TIMES, Jan. 19, 2014, at SR8.

ted diseases is particularly prevalent in such settings,<sup>15</sup> and nursing homes are woefully under-addressing these issues.<sup>16</sup> With the fourth-largest number of nursing homes of any state, Illinois is no stranger to these problems.<sup>17</sup>

When two elder nursing home residents<sup>18</sup> engage in sexual intercourse, and one—knowingly or unknowingly—spreads a sexually transmitted disease to the other, can the nursing home be found liable for the injury to the recipient elder? Nursing homes assume a certain amount of responsibility for elders in their care through the terms of admission contracts, as well as under various state and federal regulations; at the same time, elders remain adults capable of consent. The potential liability nursing homes face from the transmission of sexually transmitted diseases between residents is a novel question, and this Note seeks to address this uncertain exposure.

Specifically, this Note will argue that nursing homes should be found liable for the transmission of sexually transmitted diseases between residents. At the heart of this Note is the contention that current practices in nursing homes are not meeting the standard of care imposed on them, because they fail to account for the sexual health and wellbeing of their residents. Consequently, preventing the spread of sexually transmitted diseases between residents is at least partly the duty of the nursing home, and residents ought to hold the nursing homes accountable in cases where that duty is breached.

Nursing homes are regulated at both federal and state levels. Because tort law varies drastically from state to state, this Note will focus on the Omnibus Budget Reconciliation Act of 1987 (OBRA), the federal standard nursing homes must meet.<sup>19</sup> Additionally, this Note will analyze Illinois nursing home regulations, as Illinois has a unique approach to nursing home liability in addition to OBRA.<sup>20</sup>

First, Section II of this Note will discuss elder physical intimacy, the rise in sexually transmitted diseases in the elder population,

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15. Emanuel, *supra* note 14.

16. Tarzia, *supra* note 3.

17. *Total Number of Certified Nursing Facilities*, *supra* note 11. In 2011, Illinois had 779 homes, or about five percent of all homes in the United States.

18. This Note's discussion of nursing homes uses the definition set forth in 42 U.S.C. § 1396r(a) (2012).

19. 42 U.S.C. § 1396r (2012).

20. F. Robert Radel, II, Esq., *Nursing Home Litigation: An Overview of a Rapidly Evolving Area of Practice*, BUTLER PAPPAS (Jan. 2001), <http://www.butlerpappas.com/1410>.

and how those factors combined with societal factors create troubles for nursing homes. Section II will also describe the current legal climate, both nationally and in Illinois, for negligent transmission of sexually transmitted disease claims, and for negligent medical care claims. Section III will consider various theories of liability under OBRA and Illinois' state statutory regulations, build a case for negligence on the part of nursing homes in negligent transmission cases involving their residents, and analyze the role and impact medical privacy has on such claims. Finally, Section IV will conclude with potential means by which nursing homes can protect themselves and improve their residents' health and well-being.

## II. Background

The potential liability nursing homes face as a consequence of elder intimacy is a result of a systemic failure to adequately address five distinct concerns: (1) though it is often ignored, Americans remain intimate into their elder years;<sup>21</sup> (2) elders' behaviors and tendencies reflect the attitudes toward safe sex they held in their younger years, so sexually transmitted diseases are increasingly common among people age fifty and older;<sup>22</sup> (3) various corollaries to aging further exacerbate the rising prevalence of sexually transmitted diseases among the fifty-plus population;<sup>23</sup> (4) elder intimacy is frequent in nursing homes, but woefully under-addressed in elder care;<sup>24</sup> and (5) the legal claims underlying claims against nursing homes, while more recent to tort law, are firmly present.<sup>25</sup> It is nestled into such a confluence that

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21. Becca Levy et al., *Exclusion of Elderly Persons from Health-Risk Behavior Clinical Trials*, 43 PREVENTIVE MED. 80, 81 (2006).

22. Marni Jameson, *Seniors' Sex Lives are Up—and So Are the STD Cases*, ORLANDO SENTINEL, Apr. 10, 2011, [http://articles.orlandosentinel.com/2011-04-18/health/os-seniors-stds-rise-20110416\\_1\\_std-cases-syphilis-and-chlamydia-seniors](http://articles.orlandosentinel.com/2011-04-18/health/os-seniors-stds-rise-20110416_1_std-cases-syphilis-and-chlamydia-seniors).

23. *HIV Among Older Americans*, *supra* note 13.

24. Angela Haupt, *Condom Use Lowest...Among Adults Over 40?*, U.S. NEWS (Oct. 4, 2010), <http://health.usnews.com/health-news/family-health/sexual-and-reproductive-health/articles/2010/10/04/condom-use-lowest-among-adults-over-40>.

25. See generally *Berner v. Caldwell*, 543 So. 2d 686 (Ala. 1989); *Meany v. Meany*, 639 So. 2d 229 (La. 1994); *McPherson v. McPherson*, 712 A.2d 1043 (Me. 1998); *People v. Jensen*, 586 N.W.2d 748 (Mich. Ct. App. 1998); *Endres v. Endres*, 968 A.2d 336 (Vt. 2008).

nursing homes face the dangers of liability when consenting elders engage in potentially harmful conduct—namely intercourse with the risk of disease transmission—while in the homes' care.

As a matter of scope, this Note does not seek to delve into issues of elders' capacities to consent to sexual intercourse in nursing homes or, more broadly, to intimacy in all of its forms. Though it is certainly a matter of first concern when analyzing matters pertaining to elder sexuality,<sup>26</sup> questions remain even if participants of a sexual union are well and able to consent.

#### A. Elders Remain Sexually Intimate

Though the frequency with which elder Americans engage in intimate behaviors is often ignored,<sup>27</sup> and though popular imagination may suggest otherwise, intimacy and sexuality does not necessarily wane with age.<sup>28</sup> Elders engage in a wide variety of sexual activities, ranging from emotionally intimate to sensually arousing and orgasmic.<sup>29</sup>

According to a federally-funded study conducted and published by the *New England Journal of Medicine*, Americans continue to engage in vaginal intercourse, oral sex, and masturbation well into their elder years.<sup>30</sup> The study surveyed more than three thousand individuals aged fifty-seven to eighty-five, and a significant portion of

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26. For a broader discussion of sexual consent laws in relation to the capacities of elderly individuals, see generally Stephanie L. Tang, *When "Yes" Might Mean "No": Standardizing State Criteria to Evaluate the Capacity to Consent to Sexual Behavior for Elderly With Neurocognitive Disorders*, 22 *ELDER L.J.* 449 (2015). See generally Melissa C. White, *The Eternal Flame: Capacity to Consent to Sexual Behavior Among Nursing Home Residents with Dementia*, 18 *ELDER L.J.* 133 (2010). The author argues that nursing home residents suffering from dementia and seeking to engage in intimate relations ought to be met by their nursing homes with increased training and education for staff, other residents, and family members, coupled with a system for limited capacity determinations. *Id.*

27. Sarah L. Jameson & Carol A. Eliadi, *The Significance of the Missed Assessment: HIV/AIDS in the Older Adult*, *RN JOURNAL*, <http://rnjournal.com/journal-of-nursing/the-significance-of-the-missed-assessment-hiv-aids-in-the-older-adult> (last visited Sept. 8, 2014).

28. One study's breakdown of the correlations between various activities in which elders engage. See Judy G. Bretschneider & Norma L. McCoy, *Sexual Interest and Behavior in Healthy 80- to 102-Year-Olds*, 17 *ARCHIVES OF SEXUAL BEHAV.* 109, 122 (1988).

29. *Id.* at 115–16.

30. Stacy Tessler Lindau et al., *Study of Sexuality and Health Among Older Adults in the United States*, 357 *NEW ENG. J. MED.* 762, 762 (2007).

these elders confirmed their engagement in sexual activity.<sup>31</sup> Among the fifty-seven to sixty-four age bracket, seventy-three percent responded affirmatively to having sex.<sup>32</sup> That figure dropped to fifty-three percent in the sixty-five to seventy-four age bracket, and to twenty-six for the seventy-five to eighty-five age bracket.<sup>33</sup>

Not only is sexual activity among elder Americans commonly reported, but it is also somewhat regular; one national sample performed by Joseph Catania, et al., found that the average frequency of elder sexual activity is two to four times per month.<sup>34</sup> That same study found that older adults may have more than one partner; “[b]etween 2.5% and 3% of older Americans had two or more sexual partners in the previous year.”<sup>35</sup>

Another study, performed by Judy Bretschneider and Norma L. McCoy, surveyed elders from ages eighty to 102.<sup>36</sup> In their 202-person sample, twenty-nine percent of the 100 men were married, as were fourteen percent of the 102 women.<sup>37</sup> Twenty-five percent of women and fifty-three percent of men admitted to having a regular sex partner.<sup>38</sup> The survey found that twenty-nine percent of men and ten percent of women had sexual intercourse at least on an “often” basis, while thirty-eight percent of men and seventy percent of women were not having sex at all.<sup>39</sup> Sixty-three percent of men and thirty percent of women had sex in their elder years;<sup>40</sup> sixty-two percent of men and twenty-seven percent of women characterized the sex they were having as “moderate” or “great.”<sup>41</sup>

Additionally, the National Survey of Sexual Health and Behavior, performed by the Center for Sexual Health Promotion at Indiana

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31. *Id.*

32. *Id.*

33. *Id.*

34. See Susan Letvak & Dianne Schoder, *Sexually Transmitted Diseases in the Elderly: What You Need to Know*, 17 J. GERIATRIC NURSING 156, 156 (1996).

35. *Id.*

36. Bretschneider & McCoy, *supra* note 28, at 123.

37. *Id.* at 112.

38. *Id.* at 126.

39. *Id.* at 117.

40. *Id.* at 125. Masturbation rates for elders were even higher (seventy-two percent of men and forty percent of women), and touching or caressing without sex was the most common (eighty-two percent of men and sixty-four percent of women). *Id.*

41. *Id.* at 117.

University, followed 5,865 adolescents and adults ages fourteen to ninety-four.<sup>42</sup> This study determined that about half of men above the age of sixty engaged in vaginal intercourse, with the largest proportion of elder men that engage in intercourse reporting a few times a month to weekly.<sup>43</sup> By comparison, about thirty-five percent of women over age sixty engaged in vaginal intercourse, with the largest proportion of elder women that engage in intercourse reporting a few times a month to weekly.<sup>44</sup>

### 1. How So Many Elders Remain So Sexually Active

While sex and intimacy take multiple forms, the mass proliferation of performance-enhancing drugs has become central to the sex lives of many senior citizens.<sup>45</sup> Performance-enhancing medications like Viagra have enabled older men to regain erections lost to impotence.<sup>46</sup> For instance, in a federally-funded study, one in seven men admitted to using Viagra or another substance to boost performance.<sup>47</sup>

Erectile Dysfunction Syndrome is considered an impairment under the Americans with Disabilities Act,<sup>48</sup> thereby improving elder

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42. Michael Reece et al., *Background and Considerations on the National Survey of Sexual Health and Behavior (NSSHB) from the Investigators*, 7 J. SEXUAL MED. 243, 244 (2010).

43. Michael Reece et al., *Sexual Behaviors, Relationships, and Perceived Health Among Adult Men in the United States: Results from a National Probability Sample*, 7 J. SEXUAL MED. 291, 299 (2010).

44. Debby Herbenick et al., *Sexual Behaviors, Relationships, and Perceived Health Status Among Adult Women in the United States: Results from a National Probability Sample*, 7 J. SEXUAL MED. 277, 284 (2010).

45. See Christopher A. Julka, *A New Sexual Revolution?: Viagra as Pandora's Box for the Elderly*, 7 ELDER L.J. 409, 416 (1999).

46. *Erectile Dysfunction: Viagra and Other Oral Medications*, MAYO CLINIC (June 6, 2012), <http://www.mayoclinic.org/diseases-conditions/erectile-dysfunction/in-depth/erectile-dysfunction/art-20047821>.

47. Marilyn Marchione, *Sex and the Seniors: Survey Shows Many Elderly People Remain Frisky*, N.Y. TIMES, Aug. 22, 2007, <http://www.nytimes.com/2007/08/22/health/22iht-22sex.7216942.html?pagewanted=all&r=0>. Interestingly enough, though older men rely on sexual aids, greater percentages remain sexually active at all ages compared to women. The study also noted that more women were widowed, and thus lacked a partner. *Id.*

48. Travis Tygart & Anthony R. Ten Haagen, *The Americans with Disabilities Act, The United States Anti-Doping Agency, and the Effort Toward an Equal Opportunity: A Case Study of the United States Anti-Doping Agency v. George Hartman Matter*, 2 HARV. J. OF SPORTS & ENTMT'L. L. 199, 214 n. 99 (2011). ("42 U.S.C. § 12102(2)(B),



access to performance pharmaceuticals through wider coverage in compliance with the statute.<sup>49</sup> Additionally, under President Clinton, Medicaid was extended to cover Viagra.<sup>50</sup> Performance enhancement drugs designed to treat erectile dysfunction are commonplace in America's medicine cabinets, and are key to the sexual enjoyment of many elder men and, through them, women.

## 2. Elders Not Currently Having Sex Wish They Were

Elders' desires and imaginations also continue to include sexual content.<sup>51</sup> In Texas, a survey of 250 residents across fifteen nursing homes revealed the extent to which sex permeates elders' lives.<sup>52</sup> Twice as many home residents wished they had engaged in sexual intercourse in the last month as those who had; eight percent answered affirmatively to having sex, and seventeen percent wished they had.<sup>53</sup> A survey published in the *Journal of Clinical Geriatrics* found that of sixty-three physically-dependent nursing home residents, ninety percent answered that they had "sexual thoughts, fantasies, and dreams."<sup>54</sup> In the Bretschneider and McCoy study, eighty-eight percent of men and seventy-one percent of women fantasized or day-dreamed intimate thoughts.<sup>55</sup> Clearly, sex remains an integral part of life as Americans age. In that same study, sixty-six percent of men and thirty-eight percent of women claimed that the sexual part of their lives was of average or greater importance than in the past.<sup>56</sup>

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which explicitly indicates that one who suffers from impaired 'reproductive functions' is disabled within the meaning of the Act.")

49. Julka, *supra* note 45, at 430-31.

50. *Id.*

51. Anthony Cirillo, *Sex in Nursing Homes*, ABOUT.COM, <http://assistedliving.about.com/od/caringforclients/a/sex-in-nursing-homes.htm> (last visited Sept. 8, 2014).

52. *Id.*

53. *Id.*

54. *Id.*

55. Bretschneider & McCoy, *supra* note 28, at 125.

56. *Id.* at 113.

**B. Elder Attitudes Toward Sex Contribute to the Increasing Prevalence of Sexually Transmitted Diseases Among Older Americans**

Having sex is not a guarantee that a sexually transmitted disease will be passed on to the uninfected partner. Indeed, there are many ways in which to practice safe sex. The next question, therefore, is how and why elder physical intimacy and sexual intercourse is linked to the spread of sexually transmitted diseases at an increasing rate. Older Americans tend to express their sexuality in ways that resemble their younger days, rather than with the care and awareness being taught to today's younger generations.<sup>57</sup> A confluence of factors leave elder Americans vulnerable and at increased risk for contracting a sexually transmitted disease, including: lack of condom use,<sup>58</sup> prevailing societal attitudes during current seniors' childhoods,<sup>59</sup> the elimination of risk of pregnancy,<sup>60</sup> and a lack of public health education for their generation.<sup>61</sup>

The rate at which older Americans contract sexually transmitted diseases is rapidly increasing.<sup>62</sup> According to 2008 figures from the Centers for Disease Control and Prevention (CDC), the rate of transmission for sexually transmitted diseases among men over forty increased by six new cases per 10,000 men; up from merely half that in 1996.<sup>63</sup> The leader of the Center's study, Dr. Anupam B. Jena,<sup>64</sup> remarked on the rise of sexually transmitted diseases in older adults, "younger adults have far more [sexually transmitted disease]s than older adults, but the rates are growing at far higher rates in older

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57. *Prevention Challenges*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Feb. 20, 2007), <http://www.cdc.gov/hiv/topics/over50/challenges.htm>.

58. Frederik Joelving, *Viagra-Popping Seniors Lead the Pack for STDs*, REUTERS (Jul. 6, 2010, 12:04 PM), <http://www.reuters.com/article/2010/07/06/us-viagra-stds-idUSTRE6652HP20100706>.

59. Emanuel, *supra* note 14.

60. *Id.*

61. *Id.*; Marchione, *supra* note 47.

62. Jameson, *supra* note 22.

63. Joelving, *supra* note 58.

64. Assistant Professor of Health Care Policy and Medicine at Harvard Medical School and an assistant physician and professor in the Department of Medicine at Massachusetts General Hospital. ANUPAM B. JENA, MD, PHD, HARV. MED. SCH., <http://www.hcp.med.harvard.edu/faculty/core/anupam-jena-md-phd> (last visited Sept. 8, 2014).

adults.”<sup>65</sup> The CDC found that, “[i]n 2005, persons aged [fifty] and over accounted for: 15% of new HIV/AIDS diagnoses; 24% of persons living with HIV/AIDS . . . 19% of all AIDS diagnoses; 29% of persons living with AIDS . . . [and] 35% of all deaths of persons with AIDS.”<sup>66</sup>

HIV is not the only disease making its way through the nursing home population with increased rapidity. In recent years, the statistics for elder rates of infection for chlamydia and syphilis have mirrored the rates of the twenty to twenty-four-year-old age bracket.<sup>67</sup> Among Americans age sixty-five and older, the rate of chlamydia infection rose thirty-one percent, compared to a thirty-five percent increase among Americans in their early twenties.<sup>68</sup> Similarly, the syphilis rate for seniors increased fifty-two percent, and rose sixty-four percent for young people.<sup>69</sup>

The sharp rise in the prevalence of sexually transmitted diseases often correlates with lifestyle choices involving physical intimacy.<sup>70</sup> In fact, one study found that men who use erectile dysfunction drugs are more likely to have a sexually transmitted disease, particularly HIV, both before and after use of those drugs. The prevalence of diseases in those patients suggests of risk factors inherent to users of erectile dysfunction medication, rather than to the use of the drug itself.<sup>71</sup> However, being infected is insufficient to explain transmission,

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65. Joelving, *supra* note 58.

66. HIV/AIDS AMONG PERSONS AGED 50 AND OLDER (Feb. 2008), *available at* [http://www.cdc.gov/hiv/pdf/library\\_factsheet\\_HIV\\_among\\_PersonsAged50andOlder.pdf](http://www.cdc.gov/hiv/pdf/library_factsheet_HIV_among_PersonsAged50andOlder.pdf).

67. Emanuel, *supra* note 14.

68. *Id.*

69. *Id.*

70. Heterosexual sexual conduct and intravenous drug use among older Americans are the predominant spreaders of sexually transmitted diseases. Mark Cichocki, *Senior Citizens and HIV Over 50*, ABOUT.COM (July 16, 2007), <http://aids.about.com/cs/aidsfactsheets/a/seniors.htm>. Some elders, generally poorer and with less social support, receive sexually transmitted diseases through injection drug use, or through smoking crack cocaine and then engaging in risky behaviors while high. Drug use accounts for about 16% of the overall HIV/AIDS burden in the 50+ age bracket. *Prevention Challenges*, *supra* note 57.

71. *See generally* Anupam B. Jena et al., *Sexually Transmitted Diseases Among Users of Erectile Dysfunction Drugs: Analysis of Claims Data*, 153 ANNALS OF INTERNAL MED. 1 (2010). Not only does the use of erectile dysfunction drugs seem to correlate with males assuming increased risk of transmission, but Susan Waysdorf suggests that, as older women become more sexually active, particularly in retirement communities, while uninformed about the risks of contracting HIV, that the risk factor for women, “[i]ncreases in proportion to the increased use of

as there are means, aside from abstinence, to reduce the risk of exposure through sexual activity.

### 1. A Lack of Elder Condom Use

Rising transmission rates raise an obvious question: what is the condom usage rate for elder Americans? One study found that fifty-year-olds were six times less likely to use condoms than men in their twenties.<sup>72</sup> The National Survey of Sexual Health and Behavior found that in the sixty-to-sixty-nine age bracket, 5.8 percent of the past ten vaginal intercourse events included use of a condom for men, and 9.2 percent for women;<sup>73</sup> those rates dropped for participants ages seventy and older to 5.4 percent and 1.9 percent for men and women, respectively.<sup>74</sup> Combined, about twenty percent of men and twenty-four percent of women over fifty reported using a condom in their last intercourse event.<sup>75</sup> The survey also found that, comparing sex between partners in a relationship and singles, a greater percentage of both men and women ages sixty to sixty-nine used condoms while single than with partners in a relationship.<sup>76</sup> However, while those elders were more likely to use condoms with casual partners, the rates of condom usage remained generally low,<sup>77</sup> and condom use declined in men once they reached seventy.<sup>78</sup> AARP, Inc.'s<sup>79</sup> "Sex, Romance, and Relationships" survey found that only seven percent of men and nine percent of women responded "[y]es, all the time" to condom usage in sexual intercourse, and thirty-seven percent of men and forty-eight

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Viagra among older men, producing an unexpected consequence of the widely used and touted drug." Susan L. Waysdorf, *The Aging of the AIDS Epidemic: Emerging Legal and Public Health Issues for Elderly Persons Living with HIV/AIDS*, 10 *ELDER L.J.* 47, 55-56 (2002).

72. Joelving, *supra* note 58.

73. Michael Reece et al., *Condom Use Rates in a National Probability Sample of Males and Females Ages 14 to 94 in the United States*, 7 *J. SEXUAL MED.* 266, 270 (2010).

74. *Id.*

75. Vanessa Schick et al., *Sexual Behaviors, Condom Use, and Sexual Health of Americans Over 50: Implications for Sexual Health Promotion for Older Adults*, 7 *J. SEXUAL MED.* 315, 323 (2012).

76. Reece, *supra* note 73.

77. *Id.*

78. *Id.*

79. Formally known as the American Association of Retired Persons.

percent of women use condoms “[r]arely or not at all.”<sup>80</sup> For respondents that used condoms, condom use was higher when the respondent was not married.<sup>81</sup>

## 2. Explanations for Low Condom Usage Rates Among Elders

In the face of rising rates of transmission for sexually transmitted diseases, why then is condom usage so low? The attitudes with which elders approach intimacy and sexual activity have a direct effect on the ways in which they spread diseases about the population.<sup>82</sup> Elders often do not think of engaging in protected sex, largely due to the prevailing norms during the era in which they became sexually active.<sup>83</sup> Eli Coleman, director of the Program in Human Sexuality at the University of Minnesota Medical School, remarking on safe sex and condom use among older Americans, suggests that elders are less informed than their children on how to practice safe sex.<sup>84</sup> With respect to condoms, Coleman notes, “[t]hey also think of their grandmother’s old-fashioned condoms and know nothing about the availability of them now or how to use them.”<sup>85</sup>

Central to the lack of use of protection amid elder intimacy is the dissociation between the sex they are having and sexually transmitted diseases. Michael Reese, director of the Center for Sexual Health Promotion at the University of Indiana, remarked, “[t]o many older Americans, [sexually transmitted disease]s are something soldiers returning from war picked up from a prostitute. They’re not acknowledged as such a social epidemic.”<sup>86</sup>

Many older adults operate under the false assumption that using condoms during sexual intercourse is unnecessary. They believe condoms are merely useful for preventing pregnancy, a health conse-

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80. LINDA L. FISHER ET AL., AARP, SEX, ROMANCE, AND RELATIONSHIPS 30 (2010).

81. *Id.*

82. Carrie Gann, *Sex Life of Older Adults and Rising STDs*, ABC NEWS (Feb. 3, 2012, 7:30am) <http://abcnews.go.com/blogs/health/2012/02/03/older-people-getting-busy-and-getting-stds/>; *Older Americans 'not practising safe sex'*, TELEGRAPH (Oct. 5, 2010), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8042859/Older-Americans-not-practising-safe-sex.html>.

83. Gann, *supra* note 82.

84. *Id.*

85. *Id.*

86. *Older Americans*, *supra* note 82.

quence no longer of concern for post-menopausal women.<sup>87</sup> Many women are also unaware that as they age, their post-menopausal vaginas tend to thin and dry, increasing the ability to tear and exposing them to a greater chance of infection.<sup>88</sup> Furthermore, elders that are sexually active often are overlooked by public health campaigns to increase condom usage,<sup>89</sup> since these campaigns have largely been targeted toward younger generations.<sup>90</sup> Since many elders were in relationships or married during the times when they might have been targeted by a public health message, they ignored the messages outright in the belief that they did not apply to monogamous partnerships.<sup>91</sup>

Nowhere is the deficiency in elder recognition of safe sex and disease transmission more poignant than in analyzing human immunodeficiency virus and acquired immune deficiency syndrome (HIV/AIDS) awareness. Many older Americans know less about HIV/AIDS than younger generations and have never been properly educated in their later years on HIV risks and prevention.<sup>92</sup> Lastly, many older people that are aware of HIV believe it only affects younger people.<sup>93</sup>

### C. Factors External to Elders' Perspectives on Intimacy Aggravate the Rise in Rates of Transmission

While seniors face numerous risks in engaging in unprotected sexual activity as the result of personal attitudes, beliefs, and practices, the narrative thus far fails to account for extrinsic causes of the spread of sexually transmitted diseases. Certain societal trends exacerbate the effects of elders' attitudes toward sex, and further expose unassuming seniors to sexually transmitted diseases. These trends focus both on individual parties to a sexual event, and on how health service providers interact with elders.

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87. Haupt, *supra* note 24.

88. *Prevention Challenges*, *supra* note 57.

89. *Id.*

90. Haupt, *supra* note 24.

91. *Id.*

92. *HIV, AIDS, and Older People*, NAT'L INST. ON AGING (Oct. 17, 2013), <http://www.nia.nih.gov/health/publication/hiv-aids-and-older-people>.

93. *Older People and HIV*, AIDS INFONET (June 29, 2013), [http://www.aidsinfonet.org/fact\\_sheets/view/616](http://www.aidsinfonet.org/fact_sheets/view/616).

## 1. Which Elders are Engaging in Sex

Increasingly, elders are finding themselves single during the later stages of their lives, and the freedom that accompanies being single exposes them to greater sexual opportunity.<sup>94</sup> Older Americans are also healthier compared to prior generations of elders, and thus are living longer.<sup>95</sup> This means that some elders are outliving their partners.<sup>96</sup> Also, with the increase in the divorce rate, many older people are newly single and are now on the “prowl.”<sup>97</sup> Older Americans are now living without a partner longer than ever. In addition, they tend to miss important health messages about sexually transmitted diseases and safe sex. These two factors increase the likelihood that older Americans will contract a sexually transmitted disease.<sup>98</sup>

## 2. Interactions with Health Services

The barriers elders encounter in fully realizing the risks they face in their sexual choices are also reinforced in the contemporary health establishment.<sup>99</sup> Stereotypes about elder intimacy are pervasive, and demonstrate a profound disconnect between popular conceptions of elder intimacy and the actual occurrences in the older segments of the population.<sup>100</sup>

Doctors and nurses often fail to consult elder patients about HIV, as they do not view it as a risk;<sup>101</sup> one study of doctors in Texas

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94. Joelving, *supra* note 58.

95. *Id.*

96. *Older People*, *supra* note 93.

97. *Id.*

98. See Emanuel, *supra* note 14.

99. See PAMELA DECARLO & NATHAN LINSK, WHAT ARE HIV PREVENTION NEEDS OF ADULTS OVER 50?, CTR. FOR AIDS PREVENTION STUDIES (1997), available at <http://caps.ucsf.edu/uploads/pubs/FS/pdf/over50FS.pdf>.

100. “Our attitudes about AIDS and the aging reflect the beliefs we have built up about how people behave in their second half-century: Old people are no longer interested in sex; If they are interested, no one’s interested in them; If they do have sex, it’s within a monogamous, heterosexual relationship; They don’t do drugs; and If they ever did, it’s so long ago it doesn’t matter.” Laura Engle, *Old AIDS, BODY POSITIVE* (1998), available at <http://www.thebody.com/content/art30967.html>.

101. DECARLO & LINSK, *supra* note 99.

found that for patients older than fifty, doctors rarely or never asked about HIV/AIDS or discussed ways to reduce risk of exposure.<sup>102</sup>

Furthermore, HIV/AIDS is often misdiagnosed in elder patients because the symptoms of infection resemble those of normal aging, including fatigue, confusion, and weight loss.<sup>103</sup> Medical professionals' inability or unwillingness to investigate their elder patients' sexual health only exacerbates the severity of the unchecked spread of sexually transmitted diseases among elders.

**D. Elder Intimacy, Laden with Sexually transmitted Diseases, has Spilled Into the Nursing Home Population and is Largely Ignored**

It is foolish to think that, with the large percentage of sexually active older Americans, none of them are having sex in nursing homes. To the contrary, elder intimacy and sexuality is regularly found in nursing homes.<sup>104</sup> However, many nursing homes attempt to ignore the sexual activity between residents.<sup>105</sup> Sex in nursing homes is so prevalent that Dr. Ezekiel Emanuel commented, "[R]etirement communities and assisted living facilities are becoming like college campuses. They cram a lot of similarly aged people together, and when they do, things naturally happen."<sup>106</sup>

Indeed, the majority of elders in the study conducted by Bretschneider and McCoy responded that living in a retirement home was not a hindrance to their sex lives.<sup>107</sup> And along with sex come the diseases transmitted through sexual activity.<sup>108</sup> Insofar as risky sexual behaviors are prevalent in nursing homes, the homes ought to be more cognizant of the legal risks arising from the spread of sexually transmitted diseases among residents.

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102. *Id.* Doctors rarely or never asked patients over fifty about HIV risks 40% of the time, whereas for patients under thirty they rarely or never asked only 6.8% of the time. *Id.*

103. *Prevention Challenges, supra* note 57.

104. Emanuel, *supra* note 14; Alyssa Gerace, *Booze, Sex and STDs in Senior Living Facilities*, SENIOR HOUSING NEWS (Feb. 8, 2012), <http://seniorhousingnews.com/2012/02/08/booze-sex-stds-in-senior-living-facilities/>.

105. Here & Now, *Nursing Home Encourages Residents To Have Sex*, WBUR (Aug. 1, 2013), <http://hereandnow.wbur.org/2013/08/01/nursing-home-sex>.

106. Emanuel, *supra* note 14.

107. Sixty-three percent of elders. Bretschneider & McCoy, *supra* note 28, at 114.

108. Haupt, *supra* note 24.



## E. Underlying Legal Claims

Two distinct legal issues are central to successfully analyzing the liability nursing homes face from the spread of sexually transmitted diseases between residents: (1) whether the transmission of an STD from an infected individual to an uninfected individual is actionable, and (2) whether a nursing home has a duty of care to the individual resident that encompasses maintaining the health of its residents.

### 1. Transmission as a Tort

Many states have recognized that the knowing transmission of an STD from an infected individual to an uninfected individual is illegal and actionable.<sup>109</sup> In one case before the Supreme Court of Vermont, a husband cheated on his wife, contracted Human Papillomavirus (HPV), and transmitted it to her.<sup>110</sup> The Court found that if the husband had actual or constructive knowledge that he had an STD, he had a duty not to transmit the STD to a sexual partner through exercising ordinary care to avoid transmission.<sup>111</sup> A decade before the Vermont case, the Supreme Judicial Court of Maine determined that a cause of action existed for negligent transmission of an STD as a matter of first impression.<sup>112</sup> In another case, a Michigan Court of Appeals found a statute criminalizing the knowledgeable dissemination of HIV to uninformed victims constitutional.<sup>113</sup> Illinois has enacted a statute that makes the intentional spreading of HIV illegal,<sup>114</sup> and has recognized legal theories regarding HIV transmission in civil liability.<sup>115</sup>

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109. See generally *Berner v. Caldwell*, 543 So. 2d 686 (Ala. 1989); *Meany v. Meany*, 639 So. 2d 229 (La. 1994); *McPherson v. McPherson*, 712 A.2d 1043 (Me. 1998); *People v. Jensen*, 586 N.W.2d 748 (Mich. Ct. App. 1998); *Endres v. Endres*, 968 A.2d 336 (Vt. 2008).

110. *Endres*, 968 A.2d at 336.

111. *Id.*

112. *McPherson*, 712 A.2d at 1043. The Supreme Court of Alabama has also recognized negligent infection, *Berner*, 543 So. 2d at 686, as has the Supreme Court of Louisiana, *Meany*, 639 So. 2d at 229.

113. *Jensen*, 586 N.W.2d at 752.

114. Criminal Transmission of HIV, 720 ILL. COMP. STAT. 5/12-5.01 (2013); see *People v. Russell*, 630 N.E.2d 794 (Ill. 1994) (holding that the statute was not vague and did not violate state or federal first amendment rights).

115. Illinois courts have entertained multiple cases on negligent infliction of emotional distress arising from a fear of having contracted HIV. See generally

Interestingly, while the Supreme Court of California also recognizes negligent transmission as an actionable offense, in *John B. v. Superior Court* the Court performs a balancing test between a husband's constitutional right to privacy and his wife's right to discover information pertaining to her alleged infection at the hands of her husband under a reason-to-know standard.<sup>116</sup> The Court concluded that the wife's good cause for making inquiry into her husband's medical records through discovery was sufficient to overcome doctor-patient privilege.<sup>117</sup> If a negligent transmission case comes before an Illinois court, the Court may or may not choose to follow suit.<sup>118</sup>

## 2. The Tort of Negligent Care

Courts across the country have found that a nursing home takes on a responsibility of reasonable care if it receives notice of prior activity informing the home as to the extent of the danger a resident posed to the health and safety of others.<sup>119</sup> Illinois courts are among them.<sup>120</sup> The Federal Nursing Home Reform Act (FNHRA)<sup>121</sup> requirement that nursing homes have a plan to prevent the spread of disease between residents,<sup>122</sup> and the FNHRA requirement that nursing homes must perform assessments of their residents that include checking for medical problems,<sup>123</sup> together with the Court's position reflecting notice in instances of an established duty, suggest that homes with knowledge of the sexually transmitted diseases of their respective residents ought to be treated as having notice.

Once a duty is established, the court must determine whether or not the nursing home breached its duty of care towards its plaintiff resident.<sup>124</sup> Nursing homes are not said to ensure residents' safety.<sup>125</sup>

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Majca v. Beekil, 701 N.E.2d 1084 (Ill. 1998); Natale v. Gottlieb Mem'l Hosp., 733 N.E.2d 380 (Ill. App. Ct. 2000); Doe v. Noe No. 1, 707 N.E.2d 588 (Ill. App. Ct. 1998); Doe v. Surgicare of Joliet, Inc., 643 N.E.2d 1200 (Ill. App. Ct. 1994).

116. *John B. v. Superior Court*, 137 P.3d 153 (Ca. 2006).

117. *Id.*

118. See *infra* text accompanying notes 168–77.

119. *Mast v. Magpusao*, 180 Cal. App. 3d 775 (3d Dist. 1986); *Associated Health Sys., Inc. v. Jones*, 366 S.E.2d 147 (Ga. Ct. App. 1988).

120. *Bezark v. Kostner Manor, Inc.*, 172 N.E.2d 424 (Ill. App. Ct. 1961).

121. 42 U.S.C. § 1396r (2012).

122. *Id.* at § 1396r(d)(3)(A).

123. *Id.* at §§ 1396r(b)(3)(A)(iv), (b)(3)(C).

124. "It is true, of course, that in any negligence action, the plaintiff bears the burden of proving not only that defendant was under a duty and breached it, but

That being said, if a nursing home is on notice of a danger to the health and well-being of its residents, breach by omission is certainly possible. A duty confers a positive obligation on a nursing home to act or intervene by exercising reasonable care to avoid injury to residents,<sup>126</sup> and by doing nothing (thereby breaching),<sup>127</sup> nursing homes directly place their residents in harm's way. Sexual health deserves to be considered like other kinds of health, and a duty of care ought to reflect that.

### III. Analysis

Nursing homes must abide by regulations at the federal level, as well as regulations enacted and enforced by the state in which the home is located. Federal regulation of nursing homes derives from the Omnibus Budget Reconciliation Act of 1987 (OBRA), whereas states individually enact laws that enforce OBRA standards and impose additional restrictions and obligations.<sup>128</sup> This section will first consider OBRA, and then move on to discuss potential liability under the Nursing Home Care Act in Illinois.<sup>129</sup> This section will then address the standard of care in nursing homes as it pertains to the negligent allowance of transmission. Finally, this section will examine medical privacy as it pertains to advancing claims against nursing homes.

#### A. Liability Under OBRA

Passed in 1987, OBRA includes FNHRA, which establishes nursing home responsibilities toward residents, as well as resident

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also that defendant's breach of duty proximately caused plaintiff's injuries." *Heastie v. Roberts*, 877 N.E.2d 1064, 1089 (Ill. 2007). *See generally* *Walski v. Tiesenga*, 381 N.E.2d 279, 282 (Ill. 1978) ("One element of a cause of action for medical malpractice is proof of the standard of care by which the defendant physician's conduct is to be measured. As this court recognized in *Borowski v. Von Solbrig*, the appellate decisions in this State have held that the plaintiff in a medical malpractice action generally must establish the standard of care through expert testimony. The plaintiff must then prove that, judged in the light of these standards, the doctor was unskillful or negligent and that his want of skill or care caused the injury to the plaintiff.") (citations omitted).

125. *Bezark*, 172 N.E.2d at 426.

126. *Mast v. Magpusao*, 180 Cal. App. 3d 775, 778 (3d Dist. 1986).

127. *Heastie*, 877 N.E.2d at 1089.

128. *Radel*, *supra* note 20.

129. 210 ILL. COMP. STAT. 45/1-101 to 3A-101 (2013).

rights.<sup>130</sup> The two relevant subsections are “Requirements relating to provision of services”<sup>131</sup> and “Requirements relating to residents’ rights.”<sup>132</sup> Both of those subsections outline obligations that must be undertaken by nursing homes with respect to their residents.

Under section 1396r(b) of FNHRA, a nursing home is obligated to provide care of a sufficiently high standard to promote “maintenance or enhancement of the quality of life of each resident.”<sup>133</sup> In supporting that quality of life, a home must, “[p]rovide services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident . . .” in accordance with an individualized plan.<sup>134</sup> A plain reading of the statute suggests that a nursing home has an obligation to, within reason, keep its residents in good health. Also, a nursing home must know the health status and medical problems of each of its residents as part of its assessment upon admission to the home, and at least once per year thereafter.<sup>135</sup> Thus, a properly-diagnosed sexually transmitted disease ought to be part of a nursing home’s medical records, and be something that a nursing home would take into account when fulfilling the obligations laid out in the statute.

Additionally, nursing homes are obligated under FNHRA to have a plan in place to prevent the spread of infection, “[a] nursing facility must—(A) establish and maintain an infection control program designed to provide a safe, sanitary, and comfortable environment in which residents reside and to help prevent the development and transmission of disease and infection . . .”<sup>136</sup> This provision does not specify what kinds of infections are covered. Again, a plain reading of the statute suggests that any infection being spread about a nursing home would require the home to invoke its plan to avoid residents becoming infected en masse. Thus, if a sexually transmitted disease was spreading and a nursing home ignores the spread or does nothing to curb the disease’s advances, the home is in violation of its statutory obligation to contain the spread.

Section 1396r(c) sets forth the rights nursing home residents maintain upon admission that cannot be abridged or contracted

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130. 42 U.S.C. § 1396r(b) (2012).

131. *Id.*

132. *Id.* at § 1396r(c).

133. *Id.* at § 1396r(b)(1)(A).

134. *Id.* at § 1396r(b)(2).

135. *Id.* at §§ 1396r(b)(3)(A)(iv), (b)(3)(C).

136. *Id.* at § 1396r(d)(3)(A).

away.<sup>137</sup> Sections 1396r(c)(1)(A)(iii)–(iv) reserve the rights of privacy and confidentiality, and those rights extend to the medical records nursing homes maintain.<sup>138</sup> Thus, a nursing home invested in protecting the health of its residents from the spread of sexually transmitted diseases would be unable to use the medical records and diagnoses of an infected patient seeking to engage in intercourse or other high-risk behaviors against that individual; violating a resident's confidentiality and privacy by telling another resident of the former's health status is impermissible. Therefore, protecting uninfected residents' health is a key responsibility of a nursing home, but may be curbed by the rights of the patients who are infected.<sup>139</sup>

### B. Liability Under the Nursing Home Care Act

The rights and responsibilities outlined in FNHRA are only a portion of the relevant controlling law in the state of Illinois for nursing home residents seeking recourse against the facilities in which they contracted sexually transmitted diseases. The Nursing Home Care Act (NHCA)<sup>140</sup> established a strict liability standard for nursing homes in Illinois for harm caused to residents of nursing homes by the home's staff under intentional tort and negligence theories. Under the NHCA, "The owner and licensee are liable to a resident for any intentional or negligent act or omission of their agents or employees which injures the resident."<sup>141</sup>

Filing under the NHCA provides a unique pathway in Illinois law to seek remedy for injury acquired as the result of residency in a nursing home.<sup>142</sup> A doctor's affidavit is not required to accompany a complaint for malpractice since it allows complainants to file without an affidavit pursuant to the Healing Arts Malpractice Act.<sup>143</sup> Furthermore, under the NHCA, strict liability relies on an ordinary negli-

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137. *Id.* at § 1396r(c).

138. *Id.* at § 1396r(c)(1)(A)(iii)–(iv).

139. How Illinois courts would decide to weigh this issue is yet to be seen. *See infra* Part III.D; *John B. v. Superior Court*, 137 P.3d 153 (Ca. 2006). FNHRA was not controlling in this California case, and the added statutory protection may produce a different outcome.

140. 210 ILL. COMP. STAT. 45/1–101 to 3A–101 (2013).

141. *Id.* at 45/3–601.

142. 735 ILL. COMP. STAT. 5/2–622 (2013).

143. *See generally Eads v. Heritage Enterprises, Inc., et al.*, 787 N.E.2d 771 (Ill. 1994).

gence standard, meaning that expert testimony is not required to establish merit to a cause of action in the wake of an injury.<sup>144</sup>

Like its federal counterpart, the NHCA requires privacy and respects a patient's rights as a resident in a home.<sup>145</sup> But as a result of the avenues opened through the construction of a strict liability standard, this Note suggests that if a nursing home is aware of a resident's sexually transmitted disease, and it remains uninvolved in the protection of another resident who is putting him or herself at risk through sexual activity without proper protection, then the home's owner and licensee may be liable for the injury that the unknowing elder sustains by contracting an illness.

### C. Building an Argument for Negligence: Standard of Care and Employees' Actions

To date, no reported cases exist wherein a nursing home resident contracted a sexually transmitted disease through intimate sexual conduct with another resident at his or her nursing home, and then sued the home or its owners or licensees.<sup>146</sup> This holds true for all U.S. jurisdictions.<sup>147</sup> What follows is a construction of negligence, followed by a demonstration that the underlying claim that a plaintiff resident could bring against the resident responsible for transmitting the disease is feasible.

As the NHCA relies on an ordinary negligence standard,<sup>148</sup> the Illinois Supreme Court has clearly stated that a negligence cause of action consists of a duty owed that is breached, proximately causing injury.<sup>149</sup> Therefore, in such a cause of action, a potential plaintiff would have to demonstrate that the nursing home had a duty of care that encompassed maintaining the health of its residents, that the nursing home breached that duty in allowing a resident to contract a sexually transmitted disease, and that the breach proximately caused an injury.

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144. *See Myers v. Heritage Enterprises, Inc.*, 820 N.E.2d 604, 609 (Ill. App. Ct. 2004).

145. 210 ILL. COMP. STAT. 45/2-105 (2013).

146. After extensive searching over multiple drafts, no such case emerged.

147. *See Myers*, 820 N.E.2d at 604.

148. *Id.*

149. *Jones v. Chicago HMO Ltd. of Illinois*, 730 N.E.2d 1119, 1129 (Ill. 2000).

A nursing home undertakes a duty of reasonable care under FNHRA and NHCA<sup>150</sup> that is reflected in the contract between a new resident and a nursing home.<sup>151</sup> Furthermore, a duty can represent a level of obligation beyond what is usual or customary.<sup>152</sup> It is therefore entirely reasonable that an appropriate standard of care—one that satisfies FNHRA, NHCA, and contractual obligations between residents and their respective nursing homes—is not reflected in the current practice or standard of care, where elder intimacy and sexuality is ignored.<sup>153</sup> Sexual health is an integral part of elders' lives,<sup>154</sup> and deserves recognition in the standard of care.

The NHCA establishes certain prohibitions on employee behavior that constitute breaches of the duty of reasonable care.<sup>155</sup> The statute declares that any owner, operator, or agent, “[s]hall not abuse or neglect a resident,”<sup>156</sup> and residents have an express right to sue for violations of their statutory rights.<sup>157</sup> Neglect is defined by the statute as, “a facility’s failure to provide, or willful withholding of, adequate medical care, . . . personal care, or assistance with activities of daily living that is necessary to avoid physical harm, mental anguish, or mental illness of a resident.”<sup>158</sup> While evidence of an injury is not in

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150. 42 U.S.C. § 1396r(b)(1)(A) (2012). That the Nursing Home Care Act includes strict liability language assumes a duty exists. 210 ILL. COMP. STAT. 45/3–601 (2013).

151. For example, in the standard contract between residents and Bel-Wood Nursing Home in Peoria County, the contract states: “[T]he COUNTY will furnish the room, board, towels and linens, nursing care, and such personal care services as may be reasonably necessary for the health and safety of RESIDENT. The COUNTY will exercise reasonable care towards RESIDENT and fulfill all of its duties to RESIDENT under the ACT.” Bel-Wood County Nursing Home, *Contract Between Residents and Bel-Wood Nursing Home*, PEORIA COUNTY, <http://www.peoria-county.org/download?path=/belwood%2FResidentAgreement.pdf> (last visited Sept. 8, 2014).

152. *Stogsdill v. Manor Convalescent Home, Inc.*, 343 N.E.2d 589, 610 (Ill. App. Ct. 1976).

153. *Here & Now*, *supra* note 105.

154. *Bretschneider & McCoy*, *supra* note 28, at 113.

155. 210 ILL. COMP. STAT. 45/2–107 (2013).

156. *Id.* at 45/2–107 (2013).

157. *Eads v. Heritage Enterprises, Inc.*, 757 N.E.2d 107, 110 (Ill. App. Ct. 2001), *aff'd*, 787 N.E.2d 771 (Ill. 2003).

158. 210 ILL. COMP. STAT. 45/1–117 (2013).

itself sufficient to show breach,<sup>159</sup> breach is a question of fact that relies on a showing of a deviation from the standard of care,<sup>160</sup> and the standard for nursing home care ought to encompass adequate sexual health services.<sup>161</sup>

### 1. Setting the Standard of Care

As the rate of infection of sexually transmitted diseases is on the rise in nursing homes,<sup>162</sup> a reasonable standard of care should weigh the costs to seniors' health, and their pocketbooks, from contracting sexually transmitted diseases against the costs of preventive medicine and responsible care.<sup>163</sup> The Department of Health and Human Services reported that in 2011–2012, 2.2 million Medicare beneficiaries received screenings for sexually transmitted diseases, and more than sixty-six thousand received HIV tests.<sup>164</sup> In 2011, Medicare issued a decision memo articulating that Medicare would standardize cover-

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159. *Flinn by Brogan v. Four Fountains, Inc.*, 536 N.E.2d 89, 90 (Ill. App. Ct. 1989) (“Nothing in the express language of the Act, itself, purports to impose a presumption of fault.”).

160. *Sekerez v. Rush Univ. Med. Ctr.*, 954 N.E.2d 383, 396 (Ill. App. Ct. 2011) (“[A] plaintiff must establish: (1) the proper standard of care; (2) a deviation from that standard; and (3) an injury proximately caused by the deviation from that standard of care.”) “The standard of care requires the defendant to act with ‘the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances.’” *Id.* (citing *Longnecker v. Loyola University Medical Center*, 891 N.E.2d 954 (Ill. App. Ct. 2008)).

161. Sexual health is outside the realm of what is historically considered for cases of neglect. Stephen C. Buser and Harriet A. Hamilton, *Overview of Illinois Nursing Home Litigation*, 88 ILL. BAR J. 316, 318 (2000) (“Typical neglect cases are those in which the resident developed pressure ulcers, suffered malnutrition or dehydration, wandered away from the nursing home and suffered injuries, was administered medication to the point of chemical restraint, or fell.”).

162. Gerace, *supra* note 104.

163. A classic formulation for breach of duty of care in negligence is the Hand Formula for calculus of negligence, derived from *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d. Cir. 1947). The test weighs the probability of an event, multiplied by the magnitude of the damage inflicted by the event transpiring, against the cost to remedy the flaw that gave rise to that event. *Id.*

164. Emanuel, *supra* note 14. Screening and counseling for sexually transmitted diseases was the eighth-most popular concern for which older Americans sought medical help. *Id.* The number of enrollees who used screening and counseling services was about the same as all colonoscopies for the 2011–2012 time period, for instance. *Id.*



age for screening and counseling for sexually transmitted diseases.<sup>165</sup> Medicare's conclusion that it is within the health interests of seniors to provide screening and counseling for sexually transmitted diseases ought to serve as a fairly strong indicator that the standard of care is moving to encompass sexual health.

## 2. Ageism is Obstructing the Standard of Care

While the medical community is gradually embracing the centrality of sex and sexuality in the phenomenology of aging, a broader acceptance of elder intimacy is being hindered. Ageist attitudes are obstructing acceptance of elder intimacy.<sup>166</sup> Broadly speaking, elder care facilities and institutions struggle with elder sexuality,<sup>167</sup> as staff members can hold socially-constructed negative attitudes that impact their perceptions of an appropriate standard of care.<sup>168</sup> Even when nursing home staffs theoretically affirm the importance of allowing residents a full expression of sexuality and sexual rights, they balk when actually faced with instances of elder intimacy and sexuality.<sup>169</sup>

Elder care providers, nursing homes included, should not be profiling seniors based on their age, nor making assumptions concern-

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165. Louis Jacques et al., Screening for Sexually Transmitted Infections (STIs) and High-Intensity Behavioral Counseling (HIBC) to Prevent STIs (CAG-00426N) (Nov. 2011), CMS, <http://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=250>.

166. Petra Rattue, *Consensual Sex in Elderly Care Homes—Ageism and Safety Concerns*, MED. NEWS TODAY, June 25, 2012, <http://www.medicalnewstoday.com/articles/247036.php>.

167. Tarzia, *supra* note 3, at 610.

168. *Id.* Current perceptions are subject to change though, and, slowly, a fuller appreciation of elder intimacy is entering nursing homes. "While some recent evidence suggests that the attitudes of staff towards residents' sexuality may have improved, and some facilities even support and encourage residents' sexual behaviour, these are the exception rather than the rule, and many facilities still struggle to practically address sexual issues or proactively ensure that the environment is conducive to sexual expression." *Id.* at 610; Cirillo, *supra* note 51.

169. Gerace, *supra* note 104. "The biggest issue I have seen in assisted living and skilled nursing facilities is the conflict between what a family member or caregiver hypothetically believes about how they will respond and how they actually respond when an issue occurs," she says. "Most people agree that they will support residents' rights to choose and engage in any behavior as long as it's not harmful to themselves or others." *Id.*

ing their health and wellbeing accordingly.<sup>170</sup> The standard of care should not bow to discriminatory assumptions.

#### D. Medical Privacy in Nursing Homes

As noted earlier, California's *John B. v. Superior Court* suggests that the ultimate privacy of one's medical records in tort claims is not necessarily preserved.<sup>171</sup> In instances where residents of nursing homes infect each other, and a harmed resident sues, would the medical records of the resident who transmitted the disease be discoverable if Illinois follows suit?

At the federal level, pursuant to The Health Insurance Portability and Accountability Act of 1996 (HIPAA),<sup>172</sup> the Code of Federal Regulations instructs holders of medical information to uphold privacy and confidentiality.<sup>173</sup> But federal law is only one level of regulation protecting resident records.

In Illinois, the NHCA provides a guarantee of medical privacy for nursing home residents.<sup>174</sup> Under § 45/2-105, "[e]very resident's case discussion, consultation, examination and treatment shall be confidential and shall be conducted discreetly . . ." <sup>175</sup> Illinois' Medical Patients Rights Act (MPRA) also establishes privacy for medical records under state law.<sup>176</sup> The law explicitly extends to nursing homes,<sup>177</sup> guaranteeing privacy and confidentiality to the extent allowed by law.<sup>178</sup> Furthermore, residents have the right to treatment without waiving privacy and confidentiality under the MPRA.<sup>179</sup> Since a waiver cannot be solicited in consideration for treatment, nursing homes

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170. Angus & Reeve, *supra* note 1.

171. See Section II.E.1.

172. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

173. 45 C.F.R. § 164.500-164.534 (2013); 42 C.F.R. § 483.10 (2013).

174. 210 ILL. COMP. STAT. 45/2-105 (2013).

175. *Id.*

176. 410 ILL. COMP. STAT. 50/0.01-99 (2013).

177. *Id.* at 50/2.03 ("Health care provider" means any public or private facility that provides, on an inpatient or outpatient basis . . . [health] services, including . . . skilled nursing homes, extended care facilities, intermediate care facilities . . .).

178. *Id.* at 50/3(a).

179. *Id.* at 50/3(d).

cannot make a medical privacy and confidentiality waiver part of intake procedures.<sup>180</sup>

While it would be a violation of federal and state law to inform a resident of another resident's (and potential sex partner's) sexually transmitted disease,<sup>181</sup> any number of interventions (infra Section IV) would address the matter and would prevent the home from breaching its duty to the at-risk resident.

#### IV. Recommendations

Nursing homes in Illinois are currently exposed to the risk of suits for breached duties of care arising from a lack of adequate attention to sexual health and should be incentivized to find means by which to mitigate or avoid litigation. At the heart of the movement to recognize and address elder sexuality and intimacy is the principle that sexual expression is a fundamental human right that does not fade with age.<sup>182</sup> Luckily, there are numerous interventions focusing on (1) seniors, (2) nursing homes (and their staff), and (3) policy that can help cure the problems of STD transmission among elder residents in nursing homes.

##### A. Interventions Focused on Seniors

One of the most obvious sets of solutions centers on working to better educate older Americans on sex. Creating a sex-positive<sup>183</sup> environment in nursing homes would cure the deficiencies in sexual health knowledge endemic to older Americans.<sup>184</sup> By interacting with seniors in open and frank settings, vital information can be disseminated fairly easily.<sup>185</sup> Additionally, seniors can get involved. For instance, one particularly proactive group of seniors in Florida created

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180. *Id.*

181. 42 U.S.C. § 1396r(c)(1)(A)(iii)–(iv) (2012); 210 ILL. COMP. STAT. 45/2–105 (2013).

182. Tarzia, *supra* note 3, at 609.

183. Carol Queen & Lynn Comella, *The Necessary Revolution: Sex-Positive Feminism in the Post-Barnard Era*, 11 COMM. REV. 274, 278–79 (2008).

184. Emanuel, *supra* note 14.

185. Ana Veciana-Suarez, *Sex & the Senior Citizen: Teaching About Condoms to the Social Security Crowd*, MIAMI HERALD (Aug. 12, 2013), <http://www.miamiherald.com/2013/08/12/3558557/sex-the-senior-citizen-teaching.html>.

*Sex & The Senior*, a claymation video about the dangers seniors face in having unprotected sex.<sup>186</sup> The video sought to spread safe sex awareness messages in an unconventional way.<sup>187</sup>

## B. Interventions Centering on Nursing Homes

Nursing homes can take individual or home-wide approaches to increasing awareness of the risks of unsafe sex, satisfying a duty of care. On a more individual basis, various policy interventions could serve to better inform and protect nursing home residents from contracting STDs. One solution is simply to ask residents identified through medical assessments as infected with a sexually transmitted disease to give permission to the nursing home to, privately and tactfully, inform a potential sex partner of the risks of transmission.<sup>188</sup>

While this cannot be accomplished via contract,<sup>189</sup> it can be pursued on a case-by-case basis, with sensitivity and privacy.

On a slightly grander scale, another potential policy might be to structure nursing homes with built-in rules that give deference to sex as a core component of the elder experience. The Hebrew Home in New York, for example, incorporates into its functioning an acknowledgement of—and support structure for—elder intimacy.<sup>190</sup> At The Hebrew Home, senior intimacy is encouraged, safe sex is a consistent theme, and nursing home staff proactively facilitate the creation of a private environment for intimate senior residents.<sup>191</sup> Even if nursing homes stop far short of the Hebrew Home model, any increase in acknowledgment of elder sexuality is an improvement over the status quo.

## C. Policy Interventions

While interventions focused on seniors and nursing homes could benefit elder nursing home residents in profound ways, policy interventions have the potential for the most far-reaching positive

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186. *NBC News* (NBC television broadcast Oct. 18, 2012) (reporting on the production of a claymation video on the dangers of unprotected sex).

187. *Id.*

188. Cirillo, *supra* note 51.

189. 410 ILL. COMP. STAT. 50/3(d) (2013).

190. Cirillo, *supra* note 51. Regarding, specifically, the Hebrew Home, for example.

191. *Id.*

consequences for individuals and the population as a whole. Proper public health interventions can cure stereotypes about elder intimacy, or lack thereof, as well as inform elders of ways in which they can protect themselves. Additionally, public health interventions would help advance every other initiative to decrease risks arising from elder intimacy, as all parties would be better informed.

One public health intervention focuses on the role that medical professionals play in promulgating health safety information. It is essential that medical professionals cure their erroneous assumption that elder Americans do not engage in sexual behaviors, as that assumption prevents them from raising sexual wellness issues with those patients. In one study, only twenty-two percent of women and thirty-eight percent of men past the age of fifty reported discussing sex with a doctor.<sup>192</sup> An article published in the *Journal of Gerontology Nursing* suggests that doctors ought to make sexual histories an integral component of data collection for elder patients.<sup>193</sup> Also, since elders are so often misdiagnosed,<sup>194</sup> the article suggests that doctors must be better aware of the array of ways HIV presents in order to provide a proper diagnosis.<sup>195</sup>

Nursing home workers should also consider adjusting their approaches to elder sexuality through increased sex positivity and sensitivity. The Royal College of Nursing (RCN) describes the overall goal of creating a space where sexuality can take place without hiding behind closed doors, “[c]are home service providers should develop policies which support the rights of all the people who live, visit or work in the care home, and these policies should be developed in consultation with key stakeholders.”<sup>196</sup> RCN goes on to discuss how organizational systems should include an acknowledgement of the participants to the system, focusing on their lives and histories and finding ways to shape policies to reflect the free choices those participants are entitled to make.<sup>197</sup> This is key in that employees’ compassion in understanding and working with elders can help make elders

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192. Marchione, *supra* note 47.

193. ML Talashek et al., *Sexually Transmitted Diseases in the Elderly—Issues and Recommendations*, 15 J GERONTOL. NURS. 33, 33 (1990).

194. *Prevention Challenges*, *supra* note 57.

195. Talashek, *supra* note 193.

196. See generally HAZEL HEATH, OLDER PEOPLE IN CARE HOMES: EX, SEXUALITY AND INTIMATE RELATIONSHIPS, ROYAL COLL. OF NURSING 6 (2011), available at [http://www.rcn.org.uk/data/assets/pdf\\_file/0011/399323/004136.pdf](http://www.rcn.org.uk/data/assets/pdf_file/0011/399323/004136.pdf).

197. *Id.*

feel more comfortable and help bring sensitive issues to the forefront.<sup>198</sup>

All health and care workers should also be engaged in conversations with elders about sex safety, focusing particularly on prophylaxis. Of all prevention methods, condom usage is central to curbing the spread of sexually transmitted disease. Resources like the Center for Disease Control (CDC) provide ample information on the benefits of condom usage in preventing or reducing transmission of harmful pathogens through sexual activity.<sup>199</sup> By teaching lessons about safe sex, elders are enabled to make better choices about their sex lives.<sup>200</sup> There also exists a variety of resources aimed at helping primary care providers initiate and improve on interviewing and screening patients in obtaining a sexual history.<sup>201</sup> If care providers are more adept at identifying and discussing sexual history and potential exposure to sexually transmitted diseases, they can improve the effectiveness and accuracy of screenings.<sup>202</sup>

With better screening, training, and education, elders can approach sex in a safer fashion, and protect themselves from the risks of sexually transmitted diseases. It is in the interest of nursing homes to take advantage of the numerous low-cost interventions available to protect their residents from the spread of sexually transmitted diseases. By engaging in preventive and educational practices, nursing homes will fulfill obligations arising from their duty of care.

## V. Conclusion

As the baby boomers age into retirement and nursing home living, an increasingly large percentage of the population is being exposed to greater risks for contracting sexually transmitted diseases.<sup>203</sup>

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198. *Id.*

199. See generally CONDOMS AND STDs: FACT SHEET FOR PUBLIC HEALTH PERSONNEL, CTRS. FOR DISEASE CONTROL AND PREVENTION, available at [http://www.cdc.gov/condomeffectiveness/docs/Condoms\\_and\\_STDS.pdf](http://www.cdc.gov/condomeffectiveness/docs/Condoms_and_STDS.pdf).

200. See Veciana-Suarez, *supra* note 185; Corey Kilgannon, *Greatest Generation Learns About Great Safe Sex*, N.Y. TIMES (Feb. 14, 2007), <http://www.nytimes.com/2007/02/14/nyregion/14sex.html>.

201. RICHARDS, BONNIE ET AL., SCREENING, DIAGNOSIS, AND TREATMENT OF SEXUALLY TRANSMITTED DISEASES IN PRIMARY CARE SETTINGS 4 (2012).

202. *Id.*

203. Emanuel, *supra* note 14; *Senior Sex (Cont.)*, MEDICINENET, [http://www.medicinenet.com/senior\\_sex/page4.htm#am\\_i\\_too\\_old\\_to\\_worry\\_about\\_safe\\_sex](http://www.medicinenet.com/senior_sex/page4.htm#am_i_too_old_to_worry_about_safe_sex) (last visited Sept. 8, 2014).

While individual seniors certainly bear responsibility for their transmissions of sexually transmitted diseases to one another,<sup>204</sup> seniors who contract with nursing homes for their continued wellbeing are entitled to a certain standard of care<sup>205</sup> that ought to include protection from the contraction of sexually transmitted diseases.

Nursing homes should be cognizant to the risks sexually transmitted diseases pose to their residents and should take into account the exposure to liability for breaching a duty arising from federal and state regulations and through contract. There is a wide array of senior-oriented,<sup>206</sup> nursing-home-oriented,<sup>207</sup> and policy-oriented<sup>208</sup> interventions that, if enacted individually or collectively, would greatly improve the health outcomes of nursing home residents seeking to physically express intimacy with one another. If nursing homes move to protect themselves from liability, they will improve access to knowledge and resources for elders, a mutually beneficial outcome.

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204. See generally *Berner v. Caldwell*, 543 So. 2d 686 (Ala. 1989); *Meany v. Meany*, 639 So. 2d 229 (La. 1994); *McPherson v. McPherson*, 712 A.2d 1043 (Me. 1998); *People v. Jensen*, 586 N.W.2d 748 (Mich. Ct. App. 1998); *Endres v. Endres*, 968 A.2d 336 (Vt. 2008).

205. 42 U.S.C. § 1396r(b)(1)(A) (2012); 210 ILL. COMP. STAT. 45/3-601 (2013).

206. *Veciana-Suarez*, *supra* note 185; *Emanuel*, *supra* note 14; *NBC News*, *supra* note 181.

207. 410 ILL. COMP. STAT. 50/3(d) (2013); *Cirillo*, *supra* note 51.

208. *Veciana-Suarez*, *supra* note 185; *CONDOMS AND STDs: FACT SHEET*, *supra* note 199; *Kilgannon*, *supra* note 200; *HAZEL HEATH*, *supra* note 196, at 7; *Talashsek*, *supra* note 193; *Prevention Challenges*, *supra* note 57; *RICHARDS*, *supra* note 201.

