Lights, Camera, Actionable Negligence: Transmission of the AIDS Virus during Adult Motion Picture Production

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by

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Introduction

The American public has recently found itself caught in a "cultural collision between lust and contagion." The insatiable desires unleashed by the sexual revolution have been met head on by the growing realities of the Acquired Immune Deficiency Syndrome (AIDS) epidemic. This clash has led to a rechanneling of sexual desires. For many Americans, sexual practices are beginning to be guided by the idea that the brain is the biggest "sex organ." Imaginative safe-sex practices are quickly becoming accepted as alternatives to "traditional" sexual activities. Adult motion pictures are one form of entertainment which have become a viable alternative to interactive sex for a substantial segment of American society.

Although the AIDS epidemic has led many Americans to appreciate the value of adult films, it has not had a dramatic effect on the adult motion picture industry. A large portion of adult motion pictures are produced without requiring performers or other members of the film crew to take precautions against exposure to the Human Immuno

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2. Id. at 78.
3. "Phone sex," "computer sex," "latex sex," and "non-insertive" sex were invented as safe alternatives. Id. at 78. "[I]n an era when AIDS has made 'safe sex' essential, many homosexuals have turned to provocative conversations on the telephone lines as a means of sexual release." Briceno, "Dial-a-Porn" Industry Battles U.S. Restrictions, N.Y. Times, Apr. 13, 1990, at B5, cols. 3, 6.
4. The term "adult motion picture" will include both film and video media. The term will also be used interchangeably with the terms "adult film," "erotic motion picture," and "erotic film." Adult motion picture is a marketing term for "hard-core" pornography. Taylor, Hard-Core Pornography: A Proposal for a Per Se Rule, 21 U. MICH. J.L. REF. 255, 259 (1988). This Note covers only the commercialized adult motion picture industry which produces nonobscene erotic films. Deviant and obscene motion pictures containing bestiality, mutilation, and child molestation, which are produced and distributed illegally, will not be included in this Note.
5. See Dworkin, Pornography is a Civil Rights Issue for Women, 21 U. MICH. J.L. REF. 55, 58, 60 (1988) (viewers include doctors, lawyers, businessmen, and politicians). Studies indicate that college graduates are more likely to view pornographic material than less educated persons. See P. Nobile & E. Nadler, United States of America vs. Sex 259 (1986); see also Hoffman, Feminism. Pornography, and Law, 133 U. PA. L. REV. 497, 516 (1985) (pornography is a product that is "widely desired and socially significant"). See generally C. See, Blue Money (1974) (viewing an adult film allows the viewer to enjoy an erotic relationship, vicariously, without experiencing any of the risks associated with such a relationship); M. Goldstein & H. Kant, Pornography and Sexual Deviance 7 (1973) ("whenever a society has a fair degree of literacy and mass communication technology, then pornography becomes a major functional alternative to prostitution").


This Note focuses on the possibility of HIV transmission during the production of an adult motion picture and the potential liability associated with such transmission. The first section will briefly discuss AIDS and the adult motion picture industry. The next section will cover the legitimization of employment relationships in the adult motion picture industry. The third section will discuss workers' compensation and as-
pects of civil litigation involving the transmission of HIV in the employment setting of an adult motion picture. This Note will conclude with suggestions on how the California State Legislature can help protect performers from exposure to HIV during film production.11

I

Acquired Immune Deficiency Syndrome: AIDS and HIV

AIDS has become one of the major public health issues of our time.12 According to the California Legislature, "The rapidly spreading AIDS epidemic . . . threatens, in one way or another, the life and health" of all persons.13 As of July 31, 1990, the number of AIDS cases reported in the United States totalled 143,286.14 Of the persons who have been diagnosed with AIDS, 87,644 have died from diseases attributable to AIDS.15 Ninety-two percent of the individuals who were diagnosed as having AIDS in 1981 have died, revealing the fact that the mortality rate of infected persons is nearly one hundred percent.16

AIDS is caused by the Human Immunodeficiency Virus.17 HIV debilitates an individual's immune system, resulting in the person's in-
ability to fight off opportunistic infections.\textsuperscript{18} The opportunistic infections, not AIDS, are what ultimately cause death.\textsuperscript{19}

HIV is transmitted when there is "[d]irect blood-to-blood or semen-to-blood contact."\textsuperscript{20} The virus is "transmitted primarily through sexual contact," with the greatest risk of transmission occurring during unprotected anal intercourse.\textsuperscript{21} A person infected with HIV may remain asymptomatic for an extended period of time, since the incubation period of the AIDS virus is three to seven years.\textsuperscript{22} Tests have been developed which can detect the presence of the HIV antibody in the blood, but after initial infection there exists a latency period of one to six months before seroconversion can be detected.\textsuperscript{23} As a result, a person may be infected and unknowingly transmit the virus even though that person tested negative for the presence of HIV antibodies.\textsuperscript{24}

\textsuperscript{18} CAL. HEALTH & SAFETY CODE § 199.46(a) (Deering 1990); King, supra note 12, at 588. The Center for Disease Control has recognized two groups of infectious diseases associated with AIDS: (1) Secondary infectious diseases: pneumocystis carinii pneumonia, chronic cryptosporidiosis, toxoplasmosis, extra-intestinal strongyloidiasis, isosporiasis, candidiasis, cytomegalovirus infection, chronic mucocutaneous or disseminated herpes simplex virus infection, progressive multifocal leukoencephalopathy, cryptococcosis and histoplasmosis; and (2) secondary cancers: Kaposi's sarcoma, and non-Hodgkins lymphoma. Classification system for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections, J. A.M.A., July 4, 1986, at 20-25.

\textsuperscript{19} I. SLOAN, supra note 17, at 1.


\textsuperscript{21} CAL. HEALTH & SAFETY CODE § 199.46(h) (Deering 1990). AIDS is also transmitted through the sharing of hypodermic needles, contaminated blood transfusions, and to a fetus during birth. Id. "Recent studies have demonstrated that the virus can be transmitted by women to their male sexual partners." CAL. HEALTH & SAFETY CODE § 199.46(i) (Deering 1990); see also CLOSEN, supra note 9, at 741 ("The AIDS epidemic is producing, and will continue to produce, significant tort liability.").


\textsuperscript{23} CLOSEN, supra note 9, at 131. See Note, supra note 9, at 69; DiMarco v. Hudson Valley Blood Serv., 147 A.D.2d 156, 542 N.Y.S.2d 521 (1989).

\textsuperscript{24} CAL. HEALTH & SAFETY CODE § 199.46(c) (Deering 1990).

\textsuperscript{25} Seroconversion is the point in time when antibodies develop in blood in response to infection or immunization. This is indicated through a serologic test. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (27th ed. 1988); see Howard, supra note 8, at 602-03; Centers for Disease Control, Recommendations for Prevention of HIV Transmission in Health-Care Settings, 36 MORBIDITY & MORTALITY WEEKLY REP. 13 (Aug. 21, 1987); Note, AIDS Liability for Negligent Sexual Transmission, 18 CUMB. L. REV. 691, 696 (1988).

\textsuperscript{26} United States Department of Health and Human Services, Surgeon General's Report on Acquired Immune Deficiency Syndrome, Oct. 1986, at 10 [hereinafter Surgeon General's Report]; see CAL. HEALTH & SAFETY CODE § 199.46(f)(2) (Deering 1990); CLOSEN, supra note 9, at 131. It has been suggested that persons who may become exposed to HIV and have
Once infected with HIV, a person may fall into one of three categories: (1) persons who are seropositive, yet remain healthy;\(^\text{27}\) (2) persons who have developed AIDS Related Complex (ARC);\(^\text{28}\) or (3) persons with active cases of AIDS.\(^\text{29}\) Ten percent of asymptomatic individuals and twenty-five percent of persons with ARC will develop AIDS within three years of infection with HIV.\(^\text{30}\)

Currently, there is no cure for HIV infection. Once a person is exposed, that person remains infected for life.\(^\text{31}\) Research indicates, however, that HIV infection is a manageable condition. Early drug intervention and treatment "can prolong life, minimize the related occurrences of more serious illnesses, reduce more costly treatments, and maximize the HIV-infected person's vitality and productivity."\(^\text{32}\) But drug treatment does not cure HIV infection. An infected person still faces a

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\(^\text{27}\) CAL. HEALTH & SAFETY CODE § 199.46(f)(2) (Deering 1990); I. SLOAN, supra note 17, at 3; see Benjamin R. v. Orkin Exterminating Co., 390 S.E.2d 814, 815 (W. Va. 1990).

\(^\text{28}\) CAL. HEALTH & SAFETY CODE § 199.46(f)(1) (Deering 1990); Surgeon General's Report, supra note 26, at 11. ARC is a syndrome of fever, persistent lymphaladenopathy, diarrhea, severe weight loss, and recurrent bacterial and viral infections. However, the carrier does not harbor any of the opportunistic infections and cancers associated with AIDS. Id. at 10-11; see Benjamin R. v. Orkin Exterminating Co., 390 S.E.2d 814 (W. Va. 1990); Muhammad v. Carlson, 845 F.2d 175 (W. Va. 1990).

\(^\text{29}\) Id. § 185. Zidovudine, aerosolized pentamidine, and ganciclovir have been used to treat HIV infection. Id. § 188. See Bahls, False Security, 18 STUDENT LAW. 42, 46 (Feb. 1990). Azidothymidine (AZT) slows the onset of AIDS in asymptomatic persons and helps ward off some of the deadly infections which kill AIDS victims. However, a dangerous side effect of AZT is destruction of bone marrow. Dideoxyinosine (DDI) blocks the reproduction of HIV and lacks the serious side effects of AZT. Ganciclovir treats AIDS-related eye infections and erythropoitin combats anemia. Id. Treatment with AZT costs about $8,000 per year. Id. at 42.
high possibility of developing a terminal case of AIDS or ARC. Until an AIDS vaccine is developed, the AIDS epidemic will continue to spread among both high and low risk groups in our society.33 "AIDS is not going to go away anytime soon."34

II
The Adult Motion Picture Industry

The adult motion picture industry has undergone many changes in recent years.35 These changes have enabled adult motion pictures to become an established part of American culture.36 Like other commercial enterprises, the adult motion picture industry will continue to change to meet the demands placed upon it by society and the legal community.

A. Background Information

In the early 1970s, the production of adult motion pictures in California was a small cottage industry.37 Producers would gather a group of performers, "shoot all week, get busted, and spend the weekend in jail."38 Performers were paid from one hundred to three hundred dollars for each production. There were no employment contracts, and performers were left with no legal recourse when conflicts arose in the course of their employment.39

In the middle of the 1970s, the industry made a move toward higher quality productions.40 These new productions enabled the industry to move into mainstream society.41 As the popularity of adult motion pictures grew, many "porn" performers became superstars.42

Although the industry experienced a steady growth during the 1970s, it has been in the last decade that it has exploded, becoming a

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33. CAL. HEALTH & SAFETY CODE § 199.46(k) (Deering 1990).
34. Bahls, supra note 32, at 46.
35. See P. NOBILE & E. NADLER, supra note 5, at 12-13; Portland v. Hoover Enter., Ltd., 306 Or. 174, 190, 759 P.2d 242, 250 (1988) (the industry has undergone continual technological as well as social change).
36. Hoffman, supra note 5, at 515; Sager, The Devil and John Holmes, ROLLING STONE, June 15, 1989, at 50, 52 (porn has become part of popular culture).
38. Id. at 48.
39. Id. at 50.
40. Chapple & Talbot, Burning Desires: Sex in America: Part 4, PLAYBOY, July 1989, at 115, 116. The leaders in this direction were the Mitchell brothers, who produced Behind the Green Door (Mitchell Bros. 1972) for $60,000 and Sodom and Gomorrah for $450,000 (Mitchell Bros. 1970). Id.
41. Id.
42. See P. NOBILE & E. NADLER, supra note 5, at 13. Adult film superstars include Linda Lovelace, Marilyn Chambers, and John Holmes. See id.; Chapple & Talbot, supra note 40, at 115; Holliday, supra note 37, at 50; see also Sager, supra note 36, at 51.
multimillion dollar business. Commentators estimate that the profits from movie ticket and video cassette sales now make the adult motion picture industry larger than the mainstream motion picture and record industries combined.

The growth of the video cassette industry has had a significant impact on the popularity of adult motion pictures. Video cassette recorders have found their way into a majority of households in the United States. Consequently, erotic films may be viewed in the privacy of the home by many who otherwise would have forgone this form of entertainment.

The increased availability of adult video cassettes at neighborhood video outlets has enabled producers to market their product to a much larger group of consumers than ever before. In 1984, an estimated fifty-four million X-rated video cassettes were rented. Adult video rentals represented twenty percent of the entire video rental business. The number of X-rated video cassettes rented annually increased to 100 million in 1986, forty percent of which were rented by women. Today, most Americans have viewed at least one adult film, probably on a video cassette.

In addition to increasing production of conventional adult films for the video market, new genres of adult motion pictures have been developed to meet the demands of the growing audience. Feminist pornography ("Fem Porn") is now produced by women for women. Generally

43. See P. Nobile & E. Nadler, supra note 5, at 13.
44. Hoffman, supra note 5, at 515 ("The industry is larger than the legitimate film and record industries combined, and the combined circulation of Playboy and Penthouse exceeds that of Time and Newsweek."); see Fuentes & Schrage, Deep Inside Porn Stars, 32 JUMP CUT 41 (1986) (it is a $5,000,000,000 sex-for-sale industry); see also Chapple & Talbot, Burning Desires: Sex in America: Part 3, PLAYBOY, June 1989, at 168 (estimates that video pornography is a $600,000,000 per year industry).
47. Taylor, supra note 4, at 258; Linz & Donnerstein, supra note 46.
48. P. Nobile & E. Nadler, supra note 5, at 13 (this figure is 20% of a $2,000,000,000 trade).
49. Scott, Book Review, 78 J. CRIM. L. & CRIMINOLOGY 1145, 1151 n.9 (1988); Chapple & Talbot, supra note 44, at 168 (1986 survey reveals that 63% of all X-rated video tapes were rented by women or couples).
50. Taylor, supra note 4, at 257.
51. These films are produced for men and depict sexual encounters between men and women. The films are intended to gratify men's sexual fantasies by depicting women as sexual objects. See Hoffman, supra note 5, at 511-13.
these films have one of two different themes. In the first, traditional sex roles are reversed such that women are dominant and men are submissive. In the second, there are neither dominant nor submissive roles. Performers portray relationships where mutual caring and affection are an integral part of the sexual experience.

Another form of erotic entertainment is "gay male" pornography. This form of erotic entertainment is produced for gay men, using gay or bi-sexual male performers. Gay male pornography makes up approximately ten percent of the adult film market.

A sub-genre of gay male porn is "Bi-Sexual" pornography. These films are produced by the same companies which produce gay male pornography and depict various explicit sexual encounters involving a mix of males only or females only with a majority of scenes depicting bisexual activity.

Adult film producers have also begun to market "safe sex" films. In these productions, a condom is worn by all male actors when engaging in sexual intercourse, anal intercourse, or fellatio. A dental dam is used when performers engage in cunnilingus. In addition to arousing the viewer, these films are intended to educate and persuade the viewer that safe sex can be erotic and enjoyable. Studies indicate that these "explicit" erotic films are an effective means of promoting safe sexual behavior.

B. Film Production

1. Hiring Practices

Adult motion picture production is not very different from that of mainstream motion picture production. Performers are frequently hired through talent agencies or casting calls placed in trade publications.

53. Chapple & Talbot, supra note 44, at 169.
54. Id.
55. Hoffman, supra note 5, at 512 n.84.
56. A dental dam is a six by six inch flat, thin piece of latex. See North, Safer Sex, GALLERY, Oct. 1987, at 76-78. "The Dental Dam is spread over the vaginal area during oral sex to create a protective barrier." Id. at 78. Dental dams are now available in several flavors. Id.
57. See Chapple & Talbot, supra note 40, at 118.
58. Id.; see Safe-Sex Version of a Pornographic Film, N.Y. Times, Mar. 10, 1988, at C7, col. 1; see also American Book Sellers v. Hudnut, 771 F.2d 323, 331 (7th Cir. 1985) (pornography is powerful speech which can shape Americans' attitudes and lifestyles).
Producers also find young women on the streets, often runaways, and pay them to perform theatrical services in the erotic motion pictures. 61 Most of their roles involve the performance of various sexual acts. 62 For their services, performers are typically paid between three and five hundred dollars per day, while leading actors and actresses often receive up to two or three thousand dollars per day. 63

Performers are often hired as independent contractors. 64 The practice of hiring performers as independent contractors is intended to reduce the producer's risk of liability. Whether performers are hired as employees or independent contractors, they must sign contracts waiving their rights to any future use of their performances. 65 The performers have no unions to protect their rights and they receive no royalties. 66

Although adult motion picture production is now legal in most jurisdictions, many perceive it as an illegal enterprise. To avoid harassment, production is often conducted as an underground operation. 67 Filming typically is on private, closed sets, and locations are frequently changed to avoid detection. 68 The actual filming is usually completed within one week. 69 Because of the tight schedule, the sex scenes are often shot in a single take. 70 These working conditions often create a situation in which the "interests and personhood" of the performers are ignored. 71


61. Smith, No Type Casting: Traci as a Virgin, San Francisco Chron., Oct. 29, 1989, at 25. The girls who are hired this way are paid about three hundred dollars to perform. Id.

62. See California v. Freeman, 46 Cal. 3d at 422, 758 P.2d at 1129, 250 Cal. Rptr. at 599.

63. D. HEBDITCH & N. ANNING, supra note 60, at 111-12; "X-Rated Past," NBC Television Broadcast, Dec. 1, 1989 (transcript available from Journal Graphics, 267 Broadway, New York, N.Y. 10108) (Samantha Foxx was paid $2,000 per day); see Sager, supra note 36, at 51 (John Holmes was paid $3,000 per day).

64. Although hired as independent contractors, a court will likely find performers to be employees of the producers. See discussion and notes concerning employment relationships, infra, notes 80-88.


66. Smith, supra note 61.

67. See P. NOBILE & E. NADLER, supra note 5, at 102.

68. Id. at 52.

69. D. HEBDITCH & N. ANNING, supra note 60, at 242-43.

70. P. NOBILE & E. NADLER, supra note 5, at 54; Chapple & Talbot, supra note 40, at 172. To accomplish the "cum shot" on cue, male performers often require off-screen stimulation by "fluff girls." Fluff girls and, to a lesser extent, "fluff boys" keep the performer sexually stimulated between takes. Id. Because unprotected sexual contact occurs, this job poses risks of HIV transmission. See also D. HEBDITCH & N. ANNING, supra note 60, at 96.

71. Hoffman, supra note 5, at 512 n.85.
2. Characteristics of Production

The nature of adult motion picture production encourages unusual and unsafe working conditions. Producers have been known to force actresses to do sexual acts "that they would really rather not do." In most of the productions, producers do not test the performers for sexually transmitted diseases and do not require that performers practice safe sex. Additionally, some producers ignore the risks associated with allowing a performer, who may be infected with HIV, to perform in a film. In these situations, the performers are faced with the greatest risk of contracting AIDS.

In March 1988, John Holmes, "The King of Porn," died from complications associated with AIDS. Holmes first tested positive for HIV in April 1986. Many in the industry knew that Holmes had been exposed, yet they allowed him to continue working until the end of 1986. Although no performer who engaged in sex with Holmes has yet to report becoming infected with HIV, the potential for infectious contact existed. As in Holmes' case, most producers take inadequate precautions to protect performers from HIV transmission. Consequently, many performers have quit the business.

III
Changing Employment Relationships

A recent decision by the California Supreme Court may lead to beneficial changes within the adult motion picture industry. On August 25, 1988, the court ruled that pandering statutes cannot be applied to situations where producers hire actors and actresses to perform in a non-obscene erotic motion picture. By ruling that it is legal to hire and pay persons to perform sexual acts for the production of a nonobscene film, the court recognized that a valid employment relationship exists between

72. West, supra note 52, at 687.
73. See Porn Actors Voice Concern Over AIDS at CES Convention, supra note 6 ("producers don't seem to be adequately concerned[. . .] not one company is taking a systematic approach to guarantee that X-rated performers are not infected"); Holliday, supra note 37, at 50; see Sager, supra note 36, at 115.
74. Sager, supra note 36, at 115; see Holliday, supra note 37, at 50.
75. Holliday, supra note 37, at 50.
76. Id.
77. See Porn Actors Voice Concern Over AIDS at CES Convention, supra note 6.
a producer of adult motion pictures and a performer. This legitimiza-

tion inevitably will lead to the development of employment relationships

between producers and performers similar to those which already exist in

the mainstream motion picture industry.

A. Parties Involved in Employment

In California, any person, natural or statutory, who "has any natu-

ral person in service" is recognized as an employer. In the television

and motion picture industries, production companies ("producers") are
generally recognized as the statutory employers of the performers. The

producers maintain complete control over the employees' work, which
includes artistic efforts and performances. In most instances, the pro-

ducers retain ultimate control over the production but entrust the direc-
tors with the responsibility to control the daily functions of the

employees.

Performers generally are recognized as employees of the production
companies, although a few courts have determined that performers are
independent contractors. An employee is defined as any person "in the
service of an employer under any appointment or contract of hire . . .
express or implied, oral or written, whether lawfully or unlawfully em-

ployed." In contrast, a person "who renders service for a specified re-

compense for a specific result, under the control of his principal as to the
result of his work only and not as to the means by which such result is
accomplished" is deemed to be an independent contractor.

B. General Employment Contracts

In the mainstream motion picture industry, producers and perform-
ers generally sign an employment contract wherein an employer/em-

79. California v. Freeman, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988), cert. den-

ied, 109 U.S. 854 (1989) (producers can legally pay performers to engage in sexual activity

for the production of an erotic film).

80. CAL. LAB. CODE § 3300 (West 1989).

81. Note, The Danger of Illusion: A Critique of Safety Regulations in the Television and

Motion Picture Industry, 6 COMM/ENT L.J. 137, 149 (1983).


83. Note, supra note 81, at 156.

84. Id. at 150; see Von Beltz v. Stuntman Inc., 207 Cal. App. 3d 1467, 255 Cal. Rptr. 755

(1989).

85. Note, supra note 81, at 150. The determination of whether a person is an employee or

an independent contractor often becomes an important issue in workers' compensation cases.


See generally I S. HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW HANDBOOK (2d


86. CAL. LAB. CODE § 3351 (West 1989).

87. Id. § 3353.
ployee relationship is specifically established. These contracts can range from the very simple, which contain only the minimum requirements of the Screen Actors Guild, to the very complex. The contracts specify the duties which the performer is expected to perform, the method and rate of pay, and conditions which may lead to contract termination.

The most important aspect of the employment contract is that it specifies the legal recourse that the parties may take when conflicts arise in connection with production. Provisions may be included which specify how and when notice may be sent, the jurisdiction in which the action may be brought, and whether the controversy may be delegated to arbitration. Most contracts also clearly state that one party’s waiver of the other party’s breach is not regarded as a waiver of all such breaches.

As law makers and law enforcement officials begin to treat production of nonobscene erotic film as a legally protected activity, producers of adult motion pictures may be more willing to bring film production “above ground.” In doing so, producers would create an environment conducive to free employment bargaining. In recent years, adult motion picture producers have begun to enter into legally sound employment contracts with performers, and compensation for performers’ services has begun to increase. This increase in bargaining power will lead to stronger employment relationships similar to those in the mainstream motion picture industry.

The inevitable result of the changes in the legal relationships between adult film producers and performers will be that performers will assert their legal rights against producers. Foreseeably, a common demand will be the enforcement of the duty to provide a safe and healthy work environment for all employees involved in the production of an adult motion picture.

88. M. Mayer, supra note 82, at 10.
89. Id. at 13.
90. Id. at 10-13.
91. Id. at 15.
92. Id. at 16.
93. See generally Smith, supra note 61. Employment contracts in the adult film industry generally are very simple. The contracts specify the employment relationship, the salary, and a waiver of theatrical rights by the performer. The contracts also include a statement that the performer is at least 18 years old. See also S. Ziplow, supra note 60, at 126.
94. Several changes are possible: (1) the formation of unions similar to the Screen Actors Guild; (2) the fact that producers may begin to pay royalties; (3) specialized treatment may be an incentive for star performers (e.g., elaborate dressing rooms, limo service). See M. Mayer, supra note 83, at 11-16.
IV

Duty to Provide a Safe Work Environment

In general, employers have a duty to provide a place of employment which is free from hazards that are likely to cause death or serious injury. This duty includes protecting workers from injurious acts of fellow employees.

A. Greater Risks Presented by Adult Motion Picture Production

Under “normal conditions” an employer need not worry about protecting employees from the transmission of HIV. Recent studies show that the virus cannot be transmitted through the type of casual contact which occurs in the “average workplace setting.” The production of an adult motion picture, however, creates a workplace which is anything but average. Performers typically engage in a variety of sexual activities, including anal intercourse. It is this very activity which medical research has shown to involve the greatest risk for transmission of HIV.

In order to provide a safe work environment, an adult motion picture producer must adequately ensure that HIV will not be transmitted between employees during production of a film. A producer may be obligated to test performers for the virus prior to allowing them to work in a film. This obligation, however, directly conflicts with California Health and Safety Code section 199.21, which prohibits discrimination on the basis of an AIDS test result. The statute prohibits an employer from obtaining any information which may be used to deny employment based on a person’s HIV status. This prohibition follows the recent legal trend of recognizing a person infected with HIV as handicapped.

An employer may, however, inquire whether an employee can perform the job for which he has been hired without risking injury to him-

95. CAL. LAB. CODE § 6400 (West 1989); see also id. § 6306.
96. See CAL. LAB. CODE § 6400 (West 1989).
97. Myers & Myers, supra note 26, at 588; Wilson & Wingo, AIDS in the Workplace, 9 J. LEGAL MED. 573, 574 (1988).
98. Eldridge, supra note 11, at 521.
99. Employers must take all reasonable actions to keep places of employment free from any condition which may cause harm to the health of employees. CAL. LAB. CODE § 6306 (West 1989).
102. H. DALTON, supra note 26, at 136.
103. Benjamin R. v. Orkin Exterminating Co., 390 S.E.2d 814 (W. Va. 1990); see Leckelt v. Board of Comm’rs, 909 F.2d 820 (5th Cir. 1990); Wilson & Wingo, supra note 97, at 577; Bahls, supra note 32, at 46.
self or others.\textsuperscript{104} When an employee’s physical condition is such that it endangers the health and safety of the employee or others, the employer may dismiss the employee.\textsuperscript{105} However, there must be a “reasonable probability of substantial harm” before an employer may take such action.\textsuperscript{106} When an adult film performer has been infected with the virus, the performer clearly presents a risk of substantial harm to other performers with whom he has sexual contact.\textsuperscript{107}

B. Protecting Performers’ Health

To protect the health of the performers, a producer must be seen as having both a right and a duty to inquire into the physical condition of all employees hired for the production of an adult film.\textsuperscript{108} The California Legislature should recognize the unique character of adult motion picture employment and provide an exemption for the adult motion picture industry in the statutes which prohibit testing by employers.\textsuperscript{109} In 1986, the United States Assistant Attorney General indicated that an employer who had a legitimate reason for ensuring that employees were not infected with the AIDS virus could legally test those employees.\textsuperscript{110}

An employer’s duty to take all reasonable precautions to ensure the safety of employees may require that a producer take precautions in addition to testing employees for HIV infection. Specifically, the Surgeon General has determined that, outside of abstinence, the most effective way to prevent the spread of AIDS is to use a condom during sexual contact.\textsuperscript{111} This may place a duty on a producer to require that a condom be used by all actors during intercourse, anal intercourse, and oral copulation.\textsuperscript{112}

C. Safe Sex Practices

The use of safe sex practices does not, however, guarantee that the virus will not be transmitted between performers. Studies have shown

\begin{itemize}
  \item 104. Wilson & Wingo, \textit{supra} note 97, at 579.
  \item 105. \textit{Id}. The Surgeon General has, in fact, stated that an employer may dismiss an employee who has been infected by the virus if the work to be performed involves anal intercourse. Koop, \textit{supra} note 8, at 491.
  \item 106. Wilson & Wingo, \textit{supra} note 97, at 580.
  \item 107. \textit{See} \textit{CAL. HEALTH & SAFETY CODE} § 199.46 (Deering 1990).
  \item 108. \textit{See} Myers & Myers, \textit{supra} note 26, at 589.
  \item 109. \textit{Id}.
  \item 110. \textit{Id.}; \textit{see} Bahls, \textit{supra} note 32, at 46.
  \item 111. \textit{Surgeon General’s Report, supra} note 26, at 10.
  \item 112. \textit{Id.}; \textit{see} Chapple & Talbot, \textit{supra} note 40, at 118; \textit{see also} North, \textit{supra} note 56, at 76, 77. The use of a dental dam during cunnilingus may also be required. \textit{Id}. 
\end{itemize}
that the use of a condom does not provide foolproof protection.\textsuperscript{113} Even if a condom is used properly,\textsuperscript{114} a possibility exists that the virus will pass through the latex if the condom was exposed to heat or light, or was handled in a rough manner, or is more than two years old.\textsuperscript{115} Consequently, if a performer does become infected with HIV during production, even though the proper precautions were used, he or she should be adequately compensated for his or her injury. Such compensation must necessarily consider whether the producer has done all that is possible given current testing technology and prevention techniques.

To date, there is no court decision as to whether the transmission of the AIDS virus between individuals creates a cause of action.\textsuperscript{116} Defendants have been held liable, however, for the transmission of other infectious diseases, including tuberculosis,\textsuperscript{117} venereal disease,\textsuperscript{118} and genital herpes.\textsuperscript{119} In addition, the similarity between genital herpes and AIDS was recognized by at least one court.\textsuperscript{120} The principles developed in these communicable disease cases most likely will be applied to a case of HIV transmission.\textsuperscript{121} This should result in courts treating HIV infection, contracted during adult film production, as a compensable injury.

\section{Workers' Compensation and Negligence Theories}

\subsection{Workers' Compensation in General}

With certain exceptions, workers' compensation benefits are intended to be the exclusive remedy available to a worker who has been

\begin{itemize}
\item \textsuperscript{113} See Koop, \textit{Physicians Leadership in Preventing AIDS}, 258 J. A.M.A. 2111 (Oct. 16, 1987); see also North, \textit{supra} note 56, at 76.
\item \textsuperscript{114} North, \textit{supra} note 56, at 77 (proper usage of a condom includes slightly unrolling the condom prior to putting it on, putting the condom on while the penis is semi-erect, squeezing any air bubbles out of the tip of the condom, and holding the rim of the condom tightly around the base of the penis immediately after ejaculation followed by immediate withdrawal); see CLOSEN, \textit{supra} note 9, at 167-69.
\item \textsuperscript{115} North, \textit{supra} note 56, at 77.
\item \textsuperscript{116} Note, \textit{Negligence as a Cause of Action for Sexual Transmission of AIDS}, 19 U. Tol. L. Rev. 923 (1988); Slind-Flor, \textit{At the Limits}, Nat'l L.J., Aug. 27, 1990, at 31, col. 1 (a "first-of-its-kind suit" by a plaintiff against his former lover for transmission of AIDS has been filed in Florida). Contrary to popular belief, the case of \textit{Christian v. Hudson}, B-042090 (1990), did not involve actual transmission of HIV, but the emotional distress of possible infection. Therefore, the case constitutes no precedential value as to maintenance of a cause of action for transmission. \textit{See} Slind-Flor, \textit{id.} at 31, col. 2.
\item \textsuperscript{117} Earle v. Kulko, 26 N.J. Super. 471, 473, 98 A.2d 107, 108 (1953).
\item \textsuperscript{120} \textit{Kathleen K.}, 150 Cal. App. 3d at 996 n.3, 198 Cal. Rptr. at 276 n.3.
\item \textsuperscript{121} Note, \textit{supra} note 25, at 709; W. DORNETTE, AIDS AND THE LAW 150 (1987).
\end{itemize}
injured in the course of employment. One of the principle exceptions to the exclusive remedy rule provides that an injured employee whose employer has failed to secure payment of compensation benefits may elect to bring a civil action directly against the employer. The nature of the adult motion picture industry has generally precluded producers from obtaining workers' compensation insurance to cover the production of a motion picture. A performer injured during the production of a film may, therefore, bring a civil action directly against an uninsured producer as if the workers' compensation law did not exist.

When an injured employee brings a civil action against an uninsured employer, "it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer." In addition, it "is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of the hazard complained of, or that the injury was caused by the negligence of a fellow servant."

B. Presumption of Negligence

The presumption of employer negligence specified in California labor law is a rule of evidence, not a "canon of pleading." To bring an action directly against the producer, the performer must plead and prove

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123. CAL. LAB. CODE § 3706 (West 1989). Employers "must 'secure' payment of benefits. This is done by insuring with an insurance carrier, which may be either an insurance company or the State Compensation Insurance Fund. Certain employers may qualify to self-insure." S. Herlick, THE CALIFORNIA WORKERS' COMPENSATION HANDBOOK 26 (7th ed. 1985). Permission to self-insure is granted by the Director of Industrial Relations. In order to qualify, an employer must deposit a bond with the state and pay fees. The employer must also be a member of the Self-Insurers' Security Fund (a non-profit mutual benefit corporation). Consent to self-insure may be revoked for good cause, e.g., insolvency, failure to maintain the bond, failure to pay the fees, and "frequent or flagrant violations of safety laws." Id. at 40. The employer's inadvertent failure to secure insurance does not preclude an action for negligence. Hicks v. Ocean Shore R.R., 18 Cal. 2d 773, 787, 117 P.2d 850, 855 (1941).

124. Interview with an adult film actress in San Francisco (Sept. 15, 1989). A possible reason for not carrying insurance is that adult film production has been seen as an illegal enterprise. See 3 G. Couch, CYCLOPEDIA OF INSURANCE LAW § 24:3 (2d ed. 1984) (an insurable interest is one which is neither illegal nor immoral); Massachusetts Bonding & Ins. Co. v. Industrial Accident Comm'n, 19 Cal. App. 2d 583, 587, 65 P.2d 1349, 1351 (1937) (workers' compensation "is not intended to cover cases where the contract of employment is unlawful for the reason that it requires the employee to perform acts constituting violations on his part of the express provisions of our penal statutes").


126. CAL. LAB. CODE § 3708 (West 1989).

127. Id.

128. Id. at 25.
that the producer did not carry workers’ compensation insurance.\textsuperscript{129} The pleadings must also allege the producer’s negligence, and contain facts sufficient to find an inference of negligence.\textsuperscript{130} To this end, the injured employee must allege facts indicating that the producer owed a duty to the employee, the producer breached that duty, the breach caused injury, and actual injury occurred.\textsuperscript{131} To allege a duty it should be sufficient for the performer’s pleadings to contain a statement that the performer was under the direction and employment of the producer when the infectious contact with HIV occurred.\textsuperscript{132}

1. \textit{Alleging Breach}

A breach of the duty to use reasonable care occurs when one’s conduct falls below the standard which a reasonable person of ordinary prudence would follow in a similar situation.\textsuperscript{133} The standard of care required is, therefore, “relative to the need and the occasion.”\textsuperscript{134} An injured performer’s pleadings must include allegations that the producer’s conduct fell below the standard required to ensure the safety of the performer. A performer may state that (1) the producer failed to discover the HIV status of the employees working on the production; (2) the producer failed to warn employees that they would be working with a person infected with HIV; or (3) the producer failed to require that the performers use safe sex practices during film production.

2. \textit{Alleging Infectious Contact—Proximate Cause}

The pleadings also must allege that the producer’s breach of duty proximately caused the injury. The performer must produce evidence that he or she had sexual contact with a performer who was infected with HIV at the time of the contact. The nature of the adult film industry may make it difficult, but not necessarily impossible, for the performer to allege the particular performance in which the contact with HIV occurred.

A performer may engage in sexual activity with an HIV-infected performer while working for one producer and then have sex with the same performer later, while working for another producer; or the per-

\begin{itemize}
\item \textsuperscript{130} Graybiel v. Consolidated Ass’n Ltd., 16 Cal. App. 2d 20, 25-26, 60 P.2d 164, 167 (1936).
\item \textsuperscript{131} W. Prosser, Law of Torts §§ 29-33 (4th ed. 1971) (elements of negligence).
\item \textsuperscript{132} See Cal. Lab. Code § 6400 (West 1989) (duty of employers to use reasonable care to prevent injury to employees).
\item \textsuperscript{133} W. Prosser, supra note 131, § 32.
\item \textsuperscript{134} Id. § 31.
\end{itemize}
former may have sexual contact with more than one HIV-infected performer. It is also possible that the performer may engage in sexual acts with an HIV-infected performer, but become infected with HIV from a source completely unrelated to the adult motion picture industry.

When the injured performer is in doubt about the actual source of HIV infection and the applicability of workers’ compensation insurance, the performer can protect himself or herself by filing both a civil action and an application for compensation with the Workers’ Compensation Appeals Board.135 Because an action brought against an employer who has failed to secure workers’ compensation insurance is, in effect, “an ordinary action for negligence,”136 an injured performer may file the civil action naming several defendants as the possible cause of the injury.137 Such a claim could include all producers whose employment exposed the performer to HIV, all performers who were infected with HIV at the time of sexual contact, and all persons unrelated to the adult film production with whom the performer was sexually intimate and who were infected with HIV at the time of sexual contact.138

California Labor Code section 5500.5 allows an employee who has been exposed to occupational disease by more than one employer to recover from any of the employers.139 In order to recover from a producer under this theory, the injured employee must show that each of the employers put “the employee in a situation of increased exposure to contagion.”140 Proving that sexual contact with an infected performer has occurred should be enough to show a situation of increased exposure.

In the ideal situation, a performer exposed to HIV will be able to prove that he or she tested negative for HIV antibodies prior to engaging in sexual intercourse with an HIV positive coworker, that he or she abstained from subsequent sexual activity, and that he or she tested positive shortly after sexual contact with the coworker.141 The nature of adult film employment will often preclude this “ideal” situation because per-

137. Summers v. Tice, 33 Cal. 2d 80, 86, 199 P.2d 1, 14 (1948); see Smith v. Cutter Biological, Inc., 911 F.2d 374 (9th Cir. 1990); Poole v. Alpha Therapeutic Corp., 696 F. Supp. 351, 355 (N.D. Ill. 1988) (Plaintiff, who contracted AIDS as a result of using blood products, could proceed on theory of alternative liability).
138. If the injured performer is also an intravenous drug user, the claim could also include any persons known to be HIV positive who had shared drug needles with the performer.
139. CAL. LAB. CODE § 5500.5 (West 1989). See S. HERLICK, supra note 123, at 157. Occupational disease includes exposure to contagion by nurses and exposure to San Joaquin Valley Fever by farm workers. Id. at 158.
140. S. HERLICK, supra note 123, at 158.
141. See Note, supra note 25, at 715.
formers often work in films on a continual basis. If the performer can show that he or she tested negative on a specific date, however, the possibility of discovering the sexual contact which transmitted the virus is considerably improved. In this situation, the pool of possible sources of the infectious contact would be narrowed. A performer may then have a reasonable chance to pinpoint the actual source of the HIV infection. At the very least, this situation would narrow the group of defendants who could be named in the complaint.

3. Proving Injury

The final element of negligence which must be proven is the injury suffered by the performer. The actual injury in a personal injury suit involving AIDS has not yet been defined. The injury could be the transmission of HIV, seroconversion, or the development of AIDS or ARC. Court decisions do, however, imply that the actual injury is the transmission of, and infection with, HIV. This implication is based on current scientific evidence concerning the percentage of seropositive persons who will eventually develop AIDS or ARC. Therefore, to allege injury, it should be sufficient to state that the performer tested positive for the presence of HIV antibodies. Under this theory, a plaintiff’s case will be partially based “on conjecture that the virus will ultimately lead to AIDS.”

4. Statute of Limitations Considerations

In addition to pleading facts sufficient to establish an inference of negligence, the performer must file the claim prior to the running of the statute of limitations. In an action by an injured employee against an uninsured employer, the statute of limitations is three years. A crucial question in a suit involving the transmission of the AIDS virus is when the statute of limitations begins to run.

142. See id.
143. Note, supra note 116, at 927.
144. Id.; see Closen, supra note 9, at 793.
146. See Note, supra note 25, at 715; see also W. Dornette, supra note 121, at 156.
147. Note, supra note 116, at 944; W. Dornette, supra note 121, at 158. See generally Slind-Flor, supra note 116, at 31, col. 2 (discussing Christian v. Hudson, where plaintiff was awarded damages even though AIDS had not developed).
149. Note, supra note 116, at 943.
Under the traditional rule, the statute of limitations begins to run at the time of the negligent act. In a suit involving the transmission of the AIDS virus, the negligent act would be the contact which exposed the performer to the virus. In many cases, however, the traditional statute of limitations rule may prove to be inequitable. The long incubation period prior to the development of AIDS or ARC may result in barring an infected person from bringing a tort action. For many people, it is the development of symptoms of AIDS or ARC that gives notice that HIV infection has occurred. In many cases this "notice" would come after the statute of limitations has already run. In this situation, the "discovery rule" would prove to be far more equitable.

The discovery rule tolls the statute of limitations until the plaintiff discovers or should have discovered the injury. The discovery rule is applied in workers' compensation cases involving occupational disease, and the statute of limitations is tolled until the actual date the injury is discovered. In a suit involving the transmission of HIV during the production of an adult film, the statute of limitations should begin to run either when the plaintiff tests positive for the virus or when the plaintiff begins to exhibit the physical symptoms of AIDS or ARC.

VI
Producers' Defenses

Once the injured performer has brought a claim against the producer, the burden of producing evidence sufficient to rebut the presumption of negligence falls upon the producer. A producer will be severely limited in pleading his or her defenses because contributory negligence, assumption of risk, and the fellow servant rule are not valid defenses in this type of action.

150. W. Prosser, supra note 131, § 30.
151. Note, supra note 116, at 943.
152. Id.; see W. Dornette, supra note 121, at 158.
154. See id.; Note, supra note 25, at 720; W. Dornette, supra note 121, at 158.
157. Note, supra note 25, at 720; see W. Dornette, supra note 121, at 158.
159. Cal. Lab. Code § 3708 (West 1989) ("It is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of the hazard complained of, or that the injury was caused by the negligence of a fellow servant.").
The producer may try to show that all reasonable precautions were taken to ensure the safety of the performers. In a situation where the producer has not tested employees for HIV infection, the producer must necessarily allege that California Health and Safety Code section 199.21 is a complete defense. Section 199.21 prohibits employers from using HIV test results to determine suitability for employment. Such a violation is a misdemeanor punishable by imprisonment, a ten thousand dollar fine, or both.

It is possible for a court to accept this argument as a defense to a claim of negligence, because an employer must take only reasonable precautions to prevent injury to an employee. But it is unlikely that a violation of a state health statute will be interpreted as being a reasonable activity. Section 199.21 is intended to serve a substantial state interest and, as of this time, no exception exists which benefits the adult motion picture industry.

The producer may also present a defense based on the theory that the HIV infection occurred outside of the employment relationship. This defense could result in complicated evidentiary issues. The producer may allege that others have exposed the injured performer to HIV and that no concrete evidence exists to prove that the transmission of HIV occurred during the producer's film production. If evidence is produced which shows that the injured performer who had sexual contact with an infected co-worker also had a sexual relationship with an infected person other than an employee of the producer, a court could require the multiple defendants to argue among themselves as to who actually infected the injured performer.

Ironically, a producer may not have a defense in the situation where performers were actually tested. When an HIV-infected performer has falsely tested negative and transmits HIV to another performer, the producer will likely be held liable. In this situation, because voluntary testing was done, a "reasonable precautions test" would certainly require retesting the performer for HIV antibodies at periodic intervals prior to allowing the performer to continue work in an adult film. See Colosi, supra note 12, at 680.

The results of a blood test to detect antibodies to the probable causative agent of acquired immune deficiency syndrome, which identifies the person to whom the test results apply, shall not be used in any instance for the determination of insurability or suitability for employment (emphasis added).

"freedom from danger . . . as the nature of the employment reasonably permits"

Note, supra note 25, at 715; W. Dornette, supra note 121, at 158.

See W. Dornette, supra, note 121, at 158.

Poole v. Alpha Therapeutic Co., 896 F. Supp. 351 (N.D. Ill. 1988); see Summers v. Tice, 33 Cal. 2d 80, 88, 199 P.2d 1, 15 (1948); Smith v. Cutter Biological, Inc., 911 F.2d 374 (9th Cir. 1990); W. Dornette, supra note 121, at 158.
to prove that they were not the actual sources of the transmission, a
court could find all defendants liable as joint tortfeasors.\textsuperscript{167}

In a suit involving multiple defendants, a producer might avoid lia-

bility by establishing that the injured performer's relationship with an
HIV infected nonemployee was of an extended duration and that sexual
contact with an infected coworker occurred infrequently.\textsuperscript{168} Current evidence suggests that the risk of HIV infection from a single sexual en-
counter is quite low,\textsuperscript{169} while the risk of infection in a prolonged
relationship is much higher.\textsuperscript{170} When such a relationship is established, a
court or jury may determine that the producer's negligence was not the
proximate cause of the HIV infection.

The final defense available to a producer is the running of the statute
of limitations. For the reasons discussed above, this defense will not be
effective for the producer if the court follows the discovery rule.

VII
Suggested Legislation

AIDS is a disease of epidemic proportions.\textsuperscript{171} Many employers, ig-

norant about the disease, discriminate against the people who have fallen
victim to it. In an effort to protect all people from such discrimination in
the work place, anti-discrimination statutes have been passed.\textsuperscript{172} When
these statutes were enacted, the focus was on protecting employees in
traditional employment settings. The adult motion picture industry,
however, is not a traditional employment setting. While HIV cannot be
transmitted through the type of casual contact which occurs in tradi-
tional work environments, the virus can be transmitted during the pro-
duction of an adult motion picture, where high risk sexual contact
frequently occurs. The potential injury which could be caused as a result
of such contact would be fatal.

An amendment to California Health and Safety Code section 199.21
which would create an exemption for the adult motion picture industry,
enabling producers to test performers for the presence of HIV anti-

bodies to determine employability, would greatly reduce the risk of HIV trans-
mition. Creating an exception of this kind would not be unprecedented.

\textsuperscript{167} See Poole, 696 F. Supp. at 356; see also W. Dornette, supra note 121, at 158.
\textsuperscript{168} Gostin, The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Lib-

\textsuperscript{169} Id. at 1022.
\textsuperscript{170} Id. at 1021.
\textsuperscript{172} Id. §§ 199.20 - .21.
In the past, the California Legislature created various exceptions to benefit members of special interest groups.\textsuperscript{173}

The California Health and Safety Code was recently amended to allow HIV testing of persons charged with sex crimes.\textsuperscript{174} The legislation further authorizes testing of persons charged with assaulting public officials.\textsuperscript{175} This amendment was adopted by the people of California\textsuperscript{176} to protect the health of the general public and government personnel who may be at risk of infection.\textsuperscript{177} In addition, the California Penal Code now authorizes the testing of persons convicted for prostitution.\textsuperscript{178}

Like prostitution, adult motion picture production is an activity where sexual contact is required for the execution of the activity. In both activities, a potential for HIV transmission exists, yet the health risks involved in adult motion picture production have been ignored by both health officials and lawmakers. Politically, mandatory HIV testing of prostitutes may be easier to accept than legislation allowing testing in the adult film industry. Requiring mandatory testing of prostitutes indicates that \textit{something} is being done to control the AIDS epidemic, while at the same time gives the impression that action is being taken to remove an undesirable element of society. Legislation allowing AIDS testing of adult film performers may, however, indicate that the lawmakers condone adult motion picture production. Because adult films are seen by many as undesirable, lawmakers who support testing in the adult film industry may face political hostility.

Today, there are vocal political movements which condemn obscenity and pornography. Nevertheless, the adult motion picture industry is firmly rooted in our society, unfortunately, so is AIDS. The presumed moral and ethical duty to rid society of pornography should give way to

\textsuperscript{173} See CAL. LAB. CODE § 3301 (West 1989).
\textsuperscript{174} Any defendant charged in any criminal complaint... with any violation of Penal Code Sections 261 [rape], 261.5 [statutory rape, victims under 18], 262 [rape of spouse], 266b [illicit relations], 266c [sex by fraud], 286 [sodomy], 288 [crime against children], or 288a [oral copulation] ... shall be subject to an order of a court... If the court finds that probable cause exists to believe that a possible transfer of blood, saliva, semen, or other bodily fluid took place... the court shall order that the defendant... provide two specimens of blood for testing.
\textsuperscript{175} Any person charged with interfering
with the official duties of a peace officer, firefighter, or emergency medical personnel by biting, scratching, spitting, or transferring blood or other bodily fluids on, upon, or through the skin or membranes of a peace officer, firefighter, or emergency medical personnel shall... be subject to an order of a court... requiring testing.
\textsuperscript{176} Proposition 96 became effective November 9, 1988. See id. § 199.95.
\textsuperscript{177} Id. § 199.95.
\textsuperscript{178} CAL. PEN. CODE § 1202.6 (West Supp. 1990).
the duty to protect all citizens from the spread of AIDS.\textsuperscript{179} Other states have already enacted legislation to prevent the spread of AIDS in adult movie houses and "peep show" emporiums.\textsuperscript{180} The California Legislature should follow this trend and extend AIDS prevention legislation to cover the production of adult motion pictures.

The California Legislature has done a great deal to prevent the further spread of AIDS,\textsuperscript{181} but it admits that much more needs to be done.\textsuperscript{182} The Legislature made the following statement:

\begin{quote}
In light of the high incidence of AIDS amongst Californians, the California Legislature must lead our country into the [twentieth century] in this effort.\textsuperscript{183} It is therefore, fitting and proper that the State of California enact uncommon and exceptional legislation in order to prevent the further spread of the AIDS epidemic.\textsuperscript{184}
\end{quote}

Legislation allowing HIV testing in the adult motion picture industry would seem to be an "uncommon and exceptional" measure which the Legislature should enact to help stop the spread of AIDS.

\section*{VIII Conclusion}

The recognition of legitimate employment relationships in the adult motion picture industry will cause an increase in civil litigation directed against producers for liability beyond that covered under general workers' compensation. One possible claim against a producer is a personal injury suit for the negligent transmission of HIV during the production of an adult motion picture. Because California prohibits employers from testing for HIV, the risk of transmission occurring during the production of an adult film is increased. Under California's workers' compensation statutes, an employer is presumed to be negligent when an employee has been injured in the course of his or her employment. As a result, liability will likely be imposed upon a producer for the transmission of HIV.

\begin{thebibliography}{99}
\bibitem{179} See Benjamin R. v. Orkin Exterminating Co., 390 S.E.2d 814, 819 (W. Va. 1990) ("AIDS is not properly a moral issue, a political issue, or a religious issue: AIDS is a public health issue"); Book Review, \textit{supra} note 59, at 708-10 (officials not wanting to use graphic illustrations of risky or safe sex practices for fear they would be too erotic have hampered AIDS education and prevention).
\bibitem{181} \textit{See CAL. HEALTH \\& SAFETY CODE §§ 140-199.99} (Deering 1990).
\bibitem{182} \textit{Id.} § 199.45.
\bibitem{183} \textit{Id.} § 199.45(s).
\bibitem{184} \textit{Id.} § 199.45(t).\end{thebibliography}
when a performer can show that exposure to the virus occurred during the production of an adult motion picture.

To help prevent such transmission from occurring, the California Legislature should enact legislation directed at the adult motion picture industry. Such legislation should require HIV testing of all adult motion picture performers, and should also require the use of safe sex practices in the production of an adult motion picture. Such measures can only be a positive step in protecting the health and safety of Californians most likely at risk in the motion picture industry, and will lead to public awareness of the need to prevent transmission of AIDS among all Californians.