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VIRUS TRANSMISSION, DECEPTION AND THE CRIMINAL LAW

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This article sets out some of the matters we discussed in our Libertas Chambers online lecture on 18 March 2021. It considers the current state of the English criminal law in relation to deception and the transmission of a virus through sexual intercourse with particular reference to the decisions in *R v Lawrance* [2020] EWCA Crim 971 and *R v Rowe* [*2018*] *EWCA Crim 2688*. Largely we consider the law in relation to deception and HIV but, over the last 12 months of lockdown, the lottery of transmission is now more generally understood which make the issue of criminalisation of viral transmission acutely important. *Rowe* concerned the alleged intentional transmission or attempt to transmit HIV by a male who deceived partners as to his HIV status charged as an offence against the person. *Lawrance* concerned a lie about a vasectomy charged as a sexual offence. It is likely there is a policy not to define pregnancy as harm but it is not otherwise clear why HIV remains characterised as serious harm, certainly now that it is treatable, at least in jurisdictions where effective treatment is available and accessible.

On the face of it, the reasons for criminalising those who culpably infect, or who are ostensibly willing to risk infecting, others with a virus centre on the harmful impact of the disease on individuals and populations and the need to deter risk-taking behaviour in the interests of public health. However, certainly in the context of HIV, legal scholars, clinicians, virologists, and epidemiologists, along with civil society and international organisations, have long advocated against what they see as the unjust and ineffective use of the criminal law. Although there is widespread consensus among anti-criminalisation advocates that while the most egregious and morally blameworthy conduct (deliberately, purposefully, infecting another person with HIV) may legitimately be criminalised, this is the only justifiable circumstance. However, there are problems with alleged intentional transmission and deliberate attempts to infect

which remain unresolved, certainly in the context of transmission through sexual intercourse where the definition of harm and prosecutorial approaches can further stigmatise those who live with HIV.

The reasons why the Global Commission on HIV and the Law found all other cases do not justify the use of the criminal law can be summarised as follows.

(i) There is scant evidence that criminalisation is effective on public health grounds (as a general or individual deterrent against practising unsafe sex) and some growing evidence that it is ineffective and counterproductive. A significant proportion of new HIV infections result from sexual activity between those who were previously negative and those who are positive but undiagnosed (and therefore not on treatment and potentially more infectious). Because criminal liability generally only applies to those who know their positive status, and can therefore be held *morally* responsible, it is incapable of being an effective prevention tool against transmission in this context.

(ii) Overly broad criminalisation reproduces and reinforces negative stereotypes through (frequently inaccurate and sensationalist) press coverage of trials and convictions. This contributes to the stigma associated with HIV, which in turn creates obstacles to prevention and treatment and undermines the right to the highest attainable standard of physical and mental health and wellbeing.

(iii) There are countless examples of cases in which the criminal law has been used, even where the defendant took reasonable precautions and there was no transmission, or where there was no risk of infection, to impose extremely harsh sanctions; and cases where police, prosecutors, lawyers, and courts have failed to understand the scientific evidence adduced to support allegations of, and convictions for, transmission. There is, in addition, evidence that criminalisation disproportionately impacts women, people from minority ethnic communities, and those from socially marginalised groups and is discriminatory in its application.

Finally, in an era of effective treatment where this is available and accessible, there looms the prospect of criminal liability for serious sexual offences where a person living with HIV is undetectable and presents no risk to a partner, but fails to disclose their status or lies about it when asked. We have no real clarity from the Court of Appeal on what constitutes deception for the purposes of

determining the parameters of consent – all we know is that it is a continuum and, presumably, will turn on the facts of the particular case. Which provides little, if any, comfort.

Criminal law in the liberal tradition takes as its ideal model subject the rational, cognitively aware, autonomous, person. This is what has been referred to by Professor Nicola Lacey as the "responsible subject of law"[1]. Such a person is presumptively free to make her own (lawful) choices and, in a quasi-contractual way, to determine the limits and scope of interaction with other "responsible subjects".

Central to this model is the idea of consent. The fundamental principles with which we are concerned are how deception can impact on consent to the act of sexual intercourse and to the consequence of viral transmission. Here there are two distinct situations.

1. The first is liability for causing another to become infected with HIV or attempting unsuccessfully to infect them. In this case we are concerned with the relevance of deception as to, or non-disclosure of, HIV status to liability under offences against the person and attempts legislation.

2. The second is liability, or potential liability, for sexual offences – such as rape – where we are concerned with the relevance of deception and non-disclosure of HIV status to the question of consent to sexual penetration.

Although these are distinct areas of criminal liability, they are inter-related, and becoming increasingly so.

Viral Transmission and offences against the person

In England and Wales reckless transmission (where the Defendant was aware of the risk of transmission and the risk materialised) is prosecuted under section 20 of the Offences Against the Person Act 1861 and intentional transmission is prosecuted under section 18. In this jurisdiction, there is no liability merely for exposing someone to the risk of infection (though there is if a deliberate attempt

[1] Lacey, Nicola. "In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory." *The Modern Law Review*, vol. 64, no. 3, 2001, pp. 350–371.

to transmit is proven). Crucially, following the judgments in *R v Mohammed Dica* [2004] EWCA Crim 1103 and *R v Konzani* [2005] EWCA Crim 706, there is no criminal liability for recklessly causing serious harm where a person who has acquired HIV consented to the risk of being infected. However, such consent must, following *Konzani*, have been "conscious and willing", and the Defendant's belief in consent, where consent is denied, must be "honest" rather than merely reasonable.

How, then, do deception and non-disclosure operate in cases of alleged transmission?

The first thing to point out is that where HIV has been transmitted and there has in fact been consent, it is far less likely that a case will ever reach the investigatory or prosecuting authorities. The more common case is where someone discovers that they are HIV positive, believes that it was a particular person who is the source of their infection and was not aware of their partner's status.

Leaving aside for the scientific complexities associated with determining whether it was in fact the partner who was the source of their infection, a key question concerns the relevance of the partner's failure to disclose their status or their deceit when asked about it. And the simple answer to this question is that such failure or deceit will prevent the partner from successfully claiming the defence of consent. Although, as mentioned, there is, in English law, no positive duty to disclose, the failure to do so will, in the typical case, be inconsistent with any assertion that there was an honest belief that there was consent, especially where the complainant asserts that they would not have engaged in the activity which carried the risk of transmission had they known the truth.

This much is well-settled, and the scenario set out is, with some variation, the standard HIV criminalisation narrative. What is more of a challenge is the relevance and significance of effective anti-retroviral treatment (ART). The scenario concerned with the operation and availability of the defence of consent has to be distinguished from the question of whether or not there is evidence or proof of recklessness.

This distinction is important, because the defence of consent will only be relevant if there is proof of fault in the first place. A defendant who is not reckless, i.e. one who did not consciously take an unjustifiable risk of transmitting HIV, does not need the defence of consent to avoid liability. Suppose, for example, the defendant knew their HIV positive status, used a condom according to manufacturer's instructions, and the condom failed – resulting in a transmission. It would be open to a jury to conclude that a defendant may have been aware of the risk of transmission but that the precautions taken to prevent it were objectively reasonable. This may not be how a jury would in fact evaluate the defendant's behaviour (especially since the evaluation will only arise in the event that the risk in fact materialised, precautions were in fact inadequate, and physical harm has in fact been caused); but it is open to them.

This is crucial now that scientific studies have established beyond question that a person with an undetectable viral load cannot pass on HIV to a sexual partner and there are two material issues:

(i) First, a person with an undetectable viral load will not, because they cannot pass the virus on, be criminally liable for a transmission offence. This does not mean that they will not be subject to criminal investigation if an allegation is made. Criminal convictions are only a small sub-set of investigations and prosecutions, and the latter are serious matters. Even if a person is not in fact charged, the disruption and stigma are real.

(ii) Second, in jurisdictions where exposure liability exists, or where (as in Canada, for example) mere non-disclosure of status can convert otherwise consensual sexual activity into an assault or aggravated sexual assault, the question arises as to whether disclosure of HIV status per se is something that should be expected or required. The reason for this is that, for those who are undetectable, the disclosure of status does not, arguably, provide any materially relevant information for a sexual partner. Put another way, because there is no risk of physical harm and because there is, therefore, no interference with or violation of the partner's autonomy, there is no justification for criminalisation.

Viral Transmission and sexual offences.

Non-disclosure has been considered in the commission of a sexual offence in the context of HIV transmission. Here, the question of whether or not HIV is in fact, or could be, transmitted is essentially irrelevant. The issues on a charge for sexual offending are not the actual or potential causing of physical harm but whether the mere fact of HIV non-disclosure renders otherwise consensual sexual activity non-consensual and therefore unlawful. This, in turn, requires us to determine whether the fact of a person's HIV status per se is sufficiently material to the question of whether a potential complainant's consent was "willing and conscious".

As far as England and Wales is concerned, for the time being at least, the law is clear. Failure to disclose HIV status does not, of itself, convert otherwise consensual sexual intercourse into rape. The transmission of sexually transmitted diseases is generally viewed as not connected to the act of intercourse itself but it is recognised that it can be a consequence.

In *R v EB* [2006] EWCA Crim 2945, the Court of Appeal considered whether an undisclosed HIV status could vitiate consent. The court ruled that it did not. The act of sexual intercourse remained consensual. In *EB* there had been no active deception as the complainant had not asked the question. The Court stated categorically:

"Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act. However, the party suffering from the sexual transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include consent to infection by the disease."

This decision cements the departure from the 'knowing deception' approach of previous cases (such as *Devonauld* [2008] EWCA Crim 527 and *R (on the application of F) v DPP* [2013] EWHC 945 (Admin)), concluding that the deception was as to the 'risks or consequences associated with' the sexual act which was insufficient to make the deception legally relevant to the issue of consent. However, the so-called "gender fraud" cases remain concerning. For example, in

McNally [2013] *EWCA* Crim 1051, the appellant pleaded guilty to six counts of assault by penetration contrary to s.2 of the SOA 2003 accepting the complainant had been deceived as to gender. The CA held that a "common sense" view should be taken as to what kinds of deception may vitiate consent. The CA said that deception as to gender may affect a person's freedom to choose whether or not to engage in a sexual encounter but deception as to HIV may not. The case law in this area has not been rendered any more clarity following *Lawrance* where deception as to a vasectomy did *not* deprive the victim of their freedom or capacity to choose to have sex with him.

It is extremely difficult to square the decision in *Lawrance* with *McNally* and indeed in *Assange* where deception as to use of a condom was held capable of vitiating consent. The court in *Lawrance* held that the determinative question was whether the deceit 'was sufficiently closely connected to the performance of the sexual act, rather than the broad circumstances surrounding it.' It also disapproved of comments made by the court in *McNally* that a distinction should be drawn between passively withholding relevant information (eg failing to mention HIV status) and actively lying (e.g. stating that one of HIV negative). The Court of Appeal indicated that deception was a spectrum and that there is no bright line between active and passive deceit.

So where does that leave us?

The Common sense and sufficiency of connection tests

Section 74 specifies consent as an agreement by choice and s76 presumes a lack of consent for some deceptions but, what that means is still not entirely clear. In *R v Linekar* [1995] 2 Cr App R 49, a refusal to pay £25 previously offered for sex was held not to be a deception which went to the nature / purpose of the act at all but was a 'secondary motive for [the] agreement'. However, D plainly knew that the money was core the agreement so what of 'common sense' as a protection for sex workers? Conversely, in *R (F) v DPP* [2013] 2 Cr App R 21, a conviction for rape was upheld where consent was only given on the basis that the husband would withdraw before ejaculation. This was approached in a '*common sense way*'. In *R (Monica) v DPP* [2019] QB 1019, a deception as to identity by an undercover police officer was not treated as a cases of impersonation. Again, the court referred to '*common sense'* but the women concerned plainly took the view that identity was core to their agreement. So,

viewed through the CA lens of '*common sense*', what is *sufficiently fundamental* as to vitiate consent is being approached on a case by case basis which allows for inhibited freedom of choice but with no clear test as to what will be considered to be legally relevant nor how the public are meant to know what is lawful and what is not.

Lessons from R v Rowe

The decision in *Rowe* leaves the situation all the more complex. Transmission or attempted transmission of HIV was through sexual intercourse where no relationship was long term, the expert evidence was the chance of transmission was not particularly high, the clinical evidence was that D knew these statistics and there was evidence he was trying to control his viral load with alternative remedies. He lied about his status and, despite the transient nature of his relationships, his promiscuity was used as evidence of intention. The court did not change Lord Judge's classification of HIV as serious harm, despite it being a treatable illness. It did not seek to approach the policy for non -stigmatisation of those living with HIV as relevant in the same way as the law has progressed to decriminalise trafficked persons who commit crime and it specifically rejected the idea of explaining the difference between taking sexual risks and intention. The underlying policy seems to be that viral transmission is, in principle, a consequence of an act of sexual intercourse but viral control is not a condition of consent and being a man with a penis is a condition of consent but pregnancy is not a consequence capable of criminalisation.

Conclusion

This leaves us with no clear limit to the criminal law on viral transmission but some guidance on what might be charged, particularly where there is deception. Following *Lawrance* it seems deception as to potential for transmission would not be charged as a sexual offence (deception as to risk of harm not nature or purpose of the act) but, the jurisprudence is less developed as to when viral transmission should it charged at all. Policy is limited to what is said to be the most egregious offences but common sense does not tell us which ones they are and Mr Rowe's acceptance that he was high risk but not intentional were rejected. If the limits of the application of law is not certain and clear there is real potential for over-criminalisation of the general public in the context of deception and sexual intercourse either because the law is not clear on what

conditions vitiate consent nor which consequences are sufficiently fundamental to be unlawful. The threat of prosecuting people for deliberately transmitting the virus may also add to people's fears. For instance, people could be worried about the legal implications and delay discussion or treatment. In Australia in *Zaburoni* v The Queen [2016] HCA 12, the High Court of Australia has taken a different approach stating that a person's awareness of the risk that his or her conduct may result in harm does not … support the inference that the person intended to produce the harm – so the conduct was deemed reckless and not intentional, despite intercourse being with a long -term partner where the risks were high. This seems to have more 'common sense' than England and Wales but Mr *Zaburoni* remains convicted or reckless offences, despite the clear conclusions of the Global Commission that such conduct should not be criminalised. In *Rowe*, *Zaburoni* was not followed. Overall, the approach of the English court of Appeal seems to be that any risk taking by a complainant is irrelevant, pretending to be a man is material and multiple transient partnerships can be evidence of intention rather than risk.   Complainants who are otherwise deceived are left to voluntarily assume risk. Despite the attempt to create a distinction between conduct and consequences, there remains a danger that partners who transmit a virus will be faced with investigations based on the fact of transmission and an inference that non transmission was a condition of consent.