



Criminal Prosecution for HIV Transmission

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January 2008



Prosecutions to date England and Wales

Twelve prosecutions in England and Wales for reckless transmission since 2003:

- ⦿ nine heterosexual transmission/three homosexual
- ⦿ ten resulting in convictions/two acquittal
- ⦿ all convicted got custodial sentences
- ⦿ defendants – five migrant men (four African, one EU), five white British men, two white British women



Legal background

Offences Against the Person Act 1861

- ⚡ Section 20 'Inflicting bodily injury with or without a weapon' – applies to reckless transmission
- ⚡ All prosecutions to date have been under Section 20, maximum sentence of five years



How is recklessness defined?

To be considered 'reckless' you:

- Ⓡ Need to know you are HIV positive
- Ⓡ Need to understand risk of transmission
- Ⓡ Need to engage in behaviour which carries a risk of transmission
- Ⓡ Need to infect sexual partner with HIV

(Defined by two Court of Appeal judgements – R v Dica and R v Konzani)



Who is responsible?

You might think that uninfected people are responsible for protecting their own health through 'safer sex' and condoms

But the law says responsibility lies with the person who is living with HIV

Someone does not have to have intended their sexual partner to get HIV to be charged for reckless transmission - the issue is that they did not try to stop it happening



What about consent?

- Ⓡ 'Consent' of sexual partner to risk of infection is a defence
- Ⓡ BUT it is not enough for your partner to understand in general terms the risk of HIV infection from unprotected sex – that is not 'consent' in law
- Ⓡ The person infected has to have been **told** of the defendant's HIV positive status before sex if a condom is not used

Condoms



- ⦿ Using condoms and trying to stop HIV being passed on is seen as a sign that you are not being 'reckless'
- ⦿ From the cases brought to court so far it seems you can't be prosecuted if you have used condoms for sex 100% of the time
- ⦿ If you tell your partner you have HIV and they decide to go ahead with unprotected sex and become infected as a result then you can not be prosecuted (they had consented)

Oral Sex

- Ⓡ No prosecutions involving oral sex to date
- Ⓡ Risk of infection from oral sex much lower than anal or vaginal sex therefore a successful prosecution involving only oral sex is unlikely
- Ⓡ To be completely safe from prosecution it's advisable to tell partners about your status before oral sex or use a condom

Viral load

- Ⓡ What about if you have an undetectable viral load (still have HIV in your blood but in quantities too low to measure)?
- Ⓡ Levels of HIV in semen or vaginal fluids may be higher than those shown in a blood test and viral load can vary from one day to another
- Ⓡ **It is still possible to infect others, so the risk of prosecution is still there**



Proving transmission

- ⓧ The crime is **infection**, not simply risk-taking behaviour
- ⓧ If you have HIV and have unprotected sex but the other person does not get HIV then **no crime has been committed**
- ⓧ The Crown needs to prove beyond reasonable doubt that the defendant infected the complainant
- ⓧ Police have often incorrectly assumed that the person diagnosed first was the person infected first
- ⓧ Defendants may well have pleaded guilty because they 'felt guilty' – but that's not the same thing. CPS have accepted that evidence of responsibility for transmission is also necessary
- ⓧ 'Phylogenetic analysis' has been misused in early cases – see 'HIV Forensics' [NAT, NAM et al] on what scientific evidence can and cannot prove

Confidentiality issues



- ⦿ Medical records are confidential information between the patient and physician
- ⦿ However, when the police and courts are involved, medical confidentiality can be overridden
- ⦿ Police must obtain either a search warrant or a court order to obtain and use medical records
- ⦿ British HIV Association (BHIVA) have published draft guidance for healthcare staff that stress that health professionals should only surrender confidential medical records if they are given a court order (www.bhiva.org)



Implications for guilty pleas and sentencing

- ⦿ Sentences to date have all have been custodial and 78% have been over three years (maximum is five years)
- ⦿ It is possible to have up to one third off a sentence for a guilty plea 'at the first reasonable opportunity'
- ⦿ BUT a defendant will not always know whether they were responsible for the complainant's infection so should resist any pressure to plead guilty too early



What to do if you are accused of passing on HIV

- 🚫 As a first step contact THT Direct (0845 1221 200) who will be able to refer you to an experienced solicitor
- 🚫 Get advice for a solicitor before signing anything – e.g. documents that remove your right to confidentiality around medical records
- 🚫 Do not enter a ‘guilty’ plea without proper advice
- 🚫 Keep in touch with THT or another HIV organisation for ongoing support and advice



Points to consider

The courts may consider the vulnerability of the accused, which could have impacted on their ability to disclose their status, for example:

- ⦿ Dependency on a sexual partner for migration status
- ⦿ Economic dependence on a partner
- ⦿ Fear of violence on disclosure
- ⦿ Fear of loss of confidentiality and / or blackmail

Note, these factors may have more impact on sentencing than the verdict.



How to avoid prosecution

- Ⓡ Disclose your HIV status to your sexual partner so they are aware of any risk – HIV services can provide you with support about how to manage disclosure to a partner
- Ⓡ Tell a trusted third party that you have told your partner about your status

And / or

- Ⓡ Always use a condom

Crown Prosecution Service (CPS) Policy and Guidance



- ⚡ CPS are drawing up guidelines on prosecuting cases involving the reckless transmission of STIs including HIV
- ⚡ They have carried out a thorough consultation process with relevant stakeholders including the National AIDS Trust and THT
- ⚡ Guidance is expected to be published in the first quarter of 2008
- ⚡ Positive indications that the guidance will stress that prosecutions will be rare and hard to prove



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