

## **NCH London Essay Competition - Law**

### **Introduction - What will this essay cover?**

This essay will be asking the question whether a person should ever be criminally liable for the spread of a disease? While until 2020 and the spread of the Coronavirus this question would likely have an easy answer of no, due to the terrible circumstances of the pandemic this question ever grows in importance and has led to many around the world really considering this as a genuine idea for the future. This essay will aim to consider both sides of this argument while also thinking of the viability of this being enforced in the UK.

### **How does criminal liability work in the UK?**

For most offences in the UK an actus reus and a mens rea will be needed in order to form criminal liability meaning that the defendant is guilty of a crime. While there are some exceptions to this such as strict or absolute liability it is highly unlikely that the spread of disease could be considered a crime with strict liability (meaning the mens rea is not needed to form criminal liability.)

The actus reus is the physical element of a crime and can be in the form of an action, a state of affairs or an omission. For the purposes of this essay the most relevant way an actus reus can be formed would be through an act. One immediate issue with this is that in the UK an act must be voluntary as stated by the authority of Hill V Baxter [1958.] This means that if somebody is to sneeze or cough, which are considered involuntary

actions, it wouldn't be possible to say they have formed an actus reus and these are the main ways in which many diseases, particularly COVID-19 spread. While this could be problematic for somebody who may have a disease and who knows they have a disease to leave the house would mean that they have formed an actus reus but rather than the action being the coughing or the sneezing they may do it would instead be the fact they left the house while knowing they could spread a disease.

The mens rea is the mental element of a crime and directly translates from latin into 'guilty mind'. There are three ways in which somebody can form a mens rea by having direct intent, oblique intent and recklessness. Deciding which of these a defendant is likely to have is much more difficult than deciding how the defendant would form the actus reus as all 3 ways may apply. A defendant having the direct intent to spread a disease is unlikely but still very much possible. The way to decide whether a defendant has direct intent is to ask whether they made a decision to bring about a prohibited consequence as established by R v Mohan [1976] which means the defendant must directly intend to spread the disease to other people and cause harm. Oblique intent is a more likely way the defendant may form a mens rea as it instead tests via a virtual certainty test where two questions are asked, was the consequence a virtual certainty? And did the defendant realise the consequence was a virtual certainty? This is stated by the authority of R v Woollin [1999.] Realistically if a defendant was to leave the house after being told they have a disease, such as the coronavirus where people are told to self isolate, it would be a virtual certainty for other people to contract the disease and the defendant would not be able to say they weren't aware of this as they have been

specifically advised by a healthcare professional. Recklessness would also be a likely way in which defendants may form a mens rea as it is where a defendant realises there is a risk but then continues to take that risk anyway as stated by R v Cunningham [1957.] This explains why it would be likely that if it were to become something a defendant can be criminally liable for why recklessness would be a common mens rea as the defendant would realise they may spread a disease but it isn't necessarily certain that they would spread a disease.

### **What is the current law regarding the spread of disease?**

While in the UK there have been no cases brought against an individual for the spread of a disease like the Coronavirus which mainly transmits through the air there are laws regarding the spread of STIs. This is due to the fact that the courts recognise that transmission of a sexual infection that has severe consequences could constitute grievous bodily harm as stated by S18 and S20 of the Offences against the Person Act 1861. However to be prosecuted for this under S20 of the Offences against the Person Act 1861 the defendant must be reckless, once again relating back to the mens rea, an issue with this is that it will be hard to meet the legal standard of proof for the prosecution as they will need to prove beyond reasonable doubt the defendant were aware of the risk of transmitting the infection. This happened in the case R v Dica [2004] where the defendant infected two women with HIV and was found guilty of grievous bodily harm.

While this is not the same as the spread of a disease like the Coronavirus the law is relatively similar and there is already precedent that a new law could be built around to help prevent a similar spread of a virus as dangerous as COVID-19 in future.

### **The argument for the reform of the law:**

Now that the current UK law has been set out regarding the spread of disease it is important to consider why the reform could be advantageous to the UK. One very strong argument for this would be the protection of the public as a disease such as the Coronavirus which can spread rapidly and have severe effects will cause a significant amount of harm to the general populace. This can clearly be shown by the most recent figures suggesting there have been over 2 million deaths from the Coronavirus and 97 million cases worldwide. An easy way to combat this would to clearly be to criminalise the spread of disease as not only would it act as a way of punishing those who disregard the safety of others but it would also act as a deterrent to other infected people who feel as though there is no risk to ignoring the advice of medical professionals and spreading a disease. This method of punishing and deterring from spreading the disease can already be seen by government legislation which allows people to be fined for breaching rules around the current UK Coronavirus laws under the Coronavirus Act 2020 however up until now there has been no real proposition by the government to bring criminal charges against people with the potential to face a custodial sentence. The main issue with this so far is that the fines have not been deterring people as can clearly be seen by the significant rise in cases since they have been introduced, clearly they have been clearly ineffective but an argument that could

be made is that it would be likely that a harsher punishment like going to prison would seriously work to deter people and provide a more serious and effective punishment. By doing this not only would the current pandemic be significantly helped but any future issues with the rampant spread of disease are likely to be significantly easier to deal with as legislation is in place to prevent the spread from getting out of control like the Coronavirus.

### **The argument against the reform of the law:**

Some people may choose to argue that a sick person should not have the responsibility of not infecting others but instead that responsibility lies on those who are well around them and are capable of making a reasonable judgement. For example in reference to the idea of making the spread of STIs a potential offence the Home Office researched a reform in the paper **Home Office, Violence: Reforming the Offences Against the Person Act, 1998** and came to the conclusion that **“The Government is particularly concerned that the law should not seem to discriminate against those who are HIV positive, have AIDS or viral hepatitis or who carry any kind of disease. Nor do we want to discourage people coming forward for diagnostic tests ... because of an unfounded fear of prosecution.”** What this clearly states is that one potential unforeseen effect of legislating around the spread of disease could be that people with the disease who are already suffering will be discriminated against and have charges brought against them which could lead to many people who display some symptoms deciding to avoid being tested so as to not face prosecution. This could be particularly problematic with diseases like the coronavirus which can spread in many ways and

spread rapidly as it may reduce the number of people who are voluntarily tested and may lead to a worse spread.

**Conclusion - The criminalisation of disease spread:**

To summarise this essay whether somebody should ever be criminally liable for the spread of disease is a highly contentious topic, even before the current pandemic, with many potent arguments for both sides, however I think that with the severity of the most recent pandemic it is important to understand that some regulation through legislation will be necessary if the UK is to control the spread of future diseases like the Coronavirus to ensure an efficient protection of the public even if they may face some criticism. Not only this but the government should also focus on the blueprint they already have for criminalising disease spread through S20 and R v Dica [2004.] To make some attempt to avoid unforeseen negative effects.