

## **When, if ever, should one be criminally liable for infecting another person with a disease?**

In these COVID times that we live in, as governments worldwide, grapple to control the pandemic, it is tempting to reach for the ‘stick’ of criminal prosecution to punish and deter certain behaviour. Its attraction, to some, might seem binary, given the gravity of the pandemic and the lives lost. However, the myriad of complexities and nuances that criminalisation brings with it, must also be considered carefully to see if it truly is an effective deterrent/ punishment.

At the outset we must examine certain determinative factors including: the nature of the disease and methods of transmission; the mens rea; the burden of proof; consent and consequences for our society including the impact on our penal system.

### **Existing Law**

Under s.18 and 20 of the Offences Against the Person Act (1860) (‘the Act’).

*‘Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, shall be liable’<sup>1</sup>.*

Therefore, prime facie, anyone who intentionally or recklessly (where the possibility of risk is envisaged), ‘causes grievous bodily harm’ by infecting another is guilty of a criminal offence

1. Legislation.gov.uk. (2011). *Offences Against the Person Act 1861*. [online] Available at: <https://www.legislation.gov.uk/ukpga/Vict/24-25/100/section/18>

## **Nature of the disease**

Any disease, by definition, is harmful, but there is a sliding scale of harm from minor to fatal. The nature of the disease is therefore paramount when considering whether infecting another warrants criminal liability.

Measles and chickenpox remain prevalent worldwide today, especially amongst children. Over 4,000,000<sup>2</sup> are infected annually by chickenpox. Chickenpox existed in 1860 but it is hard to believe that parliament intended its transmission to be an offence. Importantly, it is easily transmittable and if passed on by children, as is the norm, millions of parents would be vicariously liable for a disease that many would rather have during childhood than in adulthood, with more severe consequences. Clearly, the transmission of such common diseases, with little to no long-term harm, should not be criminalised.

In the years since the Act was passed, our understanding of medicine and diseases has grown exponentially. Historically, if a person infected with HIV+, engaged in sexual relations with another who did not have HIV, the transmission to the non-HIV party was likely to put that person's life at risk. The law and the courts understood this and did not simply stand by. They imposed criminal liability. However, with the use of the Antiretroviral, the fatal consequence has been minimised but harm including stigma still persists. Should STDs passed on knowingly or recklessly be a criminal act? Criminalising it would have an element of deterrence, but other social consequences, dealt with below, must also be considered.

The HIV+ case of *R v. Konzani* (2005), reinforced the element of mens rea to transmission of infections. The infector knew the risk his actions could have. The judge held where (a) no precautionary measures were taken to mitigate any risk and (b) no form of consent was given to the transmission of the disease; the transmission of HIV should be deemed a criminal offence<sup>3</sup>.

2. [www.childrenshospital.org](https://www.childrenshospital.org/conditions-and-treatments/conditions/c/chickenpox). (n.d.). *Chickenpox | Boston Children's Hospital*. [online] Available at: <https://www.childrenshospital.org/conditions-and-treatments/conditions/c/chickenpox>

3. [www.bailii.org](https://www.bailii.org/ew/cases/EWCA/Crim/2005/706.html). (n.d.). *Konzani, R v [2005] EWCA Crim 706 (17 March 2005)*. [online] Available at: <https://www.bailii.org/ew/cases/EWCA/Crim/2005/706.html>.

Arguably in the case of STDs, it is relatively easier to demonstrate mens rea, in relation to the act of infection. However, it is far less clear cut in other diseases, COVID for instance.

As the world has witnessed, since the pandemic began to emerge, the nature of the disease and its transmission has challenged leading medical minds. We know that social distancing reduces infection rates, but we are on a learning curve. We know that the disease is (i) potentially fatal or life-altering (ii) transmission occurs through close proximity to another person and (iii) governments globally required symptomatic individuals to isolate. Combined, these facets impose a duty of care on individuals, to control the disease.

A year into COVID, and we have learnt that ‘super spreaders’ are often asymptomatic.

University of Bern’s research shows ‘1 in 5 coronavirus infections present no symptoms but are still contagious<sup>4</sup>. Would an asymptomatic person be reckless in assuming they are not carriers and there is zero risk of transmission? Whilst the government has shown we have a responsibility to socially-distance to protect others, how would one prove the mens rea of an asymptomatic spreader who has never taken a COVID test? It simply would not be possible. To overcome the risk of being reckless would we have to undertake daily tests like premier league footballers? The practicalities render making criminalisation too unwieldy to be effective.

## **Burden of proof**

The high standard of proof required for criminal liability, is guilt ‘beyond reasonable doubt’ The dearth of case law, illustrates the difficulty of establishing guilt beyond reasonable doubt. Furthermore, certain diseases, like COVID, are airborne. Our air is plagued with viruses and bacteria, indeed 8% of our DNA is a result of viruses in our evolution as species<sup>5</sup>.

4. Healthline. (2020). *1 in 5 COVID-19 Cases Are Asymptomatic but Can Spread the Disease*. [online] Available at: <https://www.healthline.com/health-news/20-percent-of-people-with-covid-19-are-asymptomatic-but-can-spread-the-disease>.

5. Magazine. (2021). *How viruses shape our world*. [online] Available at: <https://www.nationalgeographic.com/magazine/2021/02/viruses-can-cause-great-harm-but-we-could-not-live-without-them-feature/>.

It is an impossible task to prove who caused transmission if the virus was already in the air. Further we are not required to wear masks outdoors or in classrooms so how can we ever be certain who the transmitter or patient zero is? To make matters more complicated, the pandemic is global and borderless, which would make the task of establishing a burden of proof more challenging. Considerable time and public funds would have to be expended to establish the burden of proof. It is just not practical.

## Consent

Another dilemma is if consent should be a defence to liability. If a married couple agree to have unprotected sex, despite both parties knowing that one of them is HIV+, would the transmission of HIV still be a criminal act? The Journal of Medical Ethics states that ‘English law does not allow a person to consent to the infliction on him/herself of any harm, no matter how minor’<sup>6</sup>.

In *R v Wilson* (1996) a woman consented to her husband using a hot knife to brand his initials on her buttocks. When the doctor involved reported this to the police the husband was charged despite his wife’s consent<sup>7</sup>.

On appeal, the charges were dropped because the court’s failure to take into account the wife’s consent, may have been tantamount to a breach of Article 8 of the European Convention of Human Rights<sup>8</sup>, the right to “respect for your private life’. This may be relevant to consent when a disease is transmitted.

In a COVID scenario, if a grandfather knows that his grandson has tested positive, but nevertheless still wants to visit him, should the grandson (or his parents) have criminal

6. Chalmers, J. (2002). The criminalisation of HIV transmission. *Journal of Medical Ethics*, 28(3), pp.160–163.

7. [www.casemine.com](https://www.casemine.com). (n.d.). *REGINA v Wilson* | [1997] 1 WLR 1247 | England and Wales Court of Appeal (Criminal Division) | Judgment | Law | CaseMine. [online] Available at: <https://www.casemine.com/judgement/uk/5a8f8cc60d03e7157ecd89c>

8. [Equalityhumanrights.com](https://www.equalityhumanrights.com). (2010). Article 8: Respect for your private and family life | Equality and Human Rights Commission. [online] Available at: <https://www.equalityhumanrights.com/en/human-rights-act/article-8-respect-your-private-and-family-life>.

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liability when the grandfather contracts COVID and is hospitalised? His consent surely should exempt the child from liability.

### **Consequences for society**

Under Canadian law, individuals are required to disclose their HIV+ status before performing ‘a sex act that holds a realistic possibility of transmission’<sup>9</sup>. A survey conducted by the medical journal PLOS ONE highlights the domino effect that such laws could have on HIV. 150 HIV negative men were surveyed and at least 7% of them admitted that they would avoid testing if forced to disclose positive results<sup>10</sup>.

Criminalising STD transmissions could also result in further gender bias. In sub-Saharan Africa, upon disclosing their HIV+ status, women can face ‘persecution, oppression or even death’<sup>11</sup> and vertical transmission of HIV has hindered women from being legally allowed to start a family. If the non-disclosure of such disease is a crime, it can impinge on fundamental human rights (freedom from torture or inhuman and degrading treatment, right to start a family, protection from discrimination).

Although arguably there is an element of deterrence in criminalising the passing on of STDs, the far-reaching consequential effects on society show that there must be a better alternative than the criminal route.

Although some would argue that the threat of incarceration would deter people, even the reckless spreader, the reality is that the UK’s courts and prison system simply cannot cope with a new tranche of convicts. Nor would it help the offender deal with the underlying issues that made them act knowingly or recklessly.

There is a current backlog of over 457,000<sup>12</sup> court cases caused by the lockdown. It is not viable to further burden the Courts by prosecuting disease spreaders when there are more

9. Department of Justice Canada (2017). Fact Sheet – HIV Non-Disclosure and the Criminal Law. [online] Canada.ca. Available at: [https://www.canada.ca/en/departement-justice/news/2017/12/fact\\_sheet\\_hiv\\_non-disclosureandthecriminallaw.html](https://www.canada.ca/en/departement-justice/news/2017/12/fact_sheet_hiv_non-disclosureandthecriminallaw.html).

10. Sexual Transmission, or Realistic Possibility of Transmission, of HIV Policy Code: SEX 2. (2018). [online] . Available at: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/sex-2.pdf>

11. publications.parliament.uk. (n.d.). Improving the prison estate - Public Accounts Committee - House of Commons. [online] Available at: <https://publications.parliament.uk/pa/cm5801/cmselect/cmpubacc/244/24407.htm>

12. Covid and the courts: “Grave concerns” for justice, warn watchdogs. (2021). BBC News. [online] 19 Jan. Available at: <https://www.bbc.co.uk/news/uk-55712106#:~:text=The%20total%20criminal%20courts%20backlog>

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pressing needs. Furthermore, for criminalisation to be an effective deterrent or punishment, a mere fine would not suffice. It needs the threat of incarceration to instil fear in those who knowingly or wilfully infect others. The problem is that 68% of UK's prisons are overcrowded<sup>13</sup> with dire internal conditions, leading to grave mental health issues. Our recidivism rates are high at 75% after just 9 years of release<sup>14</sup>. It would be inappropriate to send disease spreaders to such an environment. Prison is seen as a breeding ground for crime and often the first-time offender has a chance to meet seasoned criminals and hone their criminal skills and knowledge. It does not serve society or the individual to send an infector to prison. If every person who passed on a disease had the potential to be incarcerated the burden on our courts, prisons and ultimately taxpayers would be disproportionately high.

At first blush, imposing criminal liability for infecting another might be seen as an effective way of curtailing the spread of diseases and protecting society. This is especially so given the daily death toll from the pandemic, however when the stark realities are examined closely, it is clearly not a panacea for society's ills. Instead, it is more likely to compound the situation.

There seems no justification to criminalise infecting others with common diseases that are short-lived and cause minimal harm. For more serious diseases, the spreader's mental and community outlook needs radical improvement rather than subjecting them to an ineffective criminal process. An alternative, non- criminal process, of holistic treatment embracing education, social, hygiene and community awareness with mental therapy would be more fit for purpose.

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13. The Independent. (2017). Two thirds of prisons overcrowded amid warnings UK penal system has reached "toxic" levels. [online] Available at: <https://www.independent.co.uk/news/uk/home-news/prisons-overcrowding-prisoners-ministry-justice-howard-league-a7685641.html>.

14. Travis, A. (2017). Reoffending rates top 70% in some prisons, figures reveal. [online] the Guardian. Available at: <https://www.theguardian.com/uk/2010/nov/04/jail-less-effective-community-service>

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