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HIV Criminalisation, Consent, and the Law

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(Views expressed in this talk are my own)

Scope of Presentation

- What do we mean by consent in criminal law?
- Consent and disclosure in the context of HIV transmission cases
- Non-disclosure of HIV status in the context of sexual offences
- The relevance of intoxication (alcohol / drugs)
- Impact of U=U and PrEP on consent / disclosure in criminal law context

The Central Issues

- When we consent to sexual contact with another person, or consent to the risks associated with such contact, we express our autonomy and right to self-determination.
- When we do not consent, or lack the capacity to consent, the converse is true: our autonomy is undermined, and our right to self-determination is violated.
- The wrong committed on a non-consenting person is sufficiently serious that it will generally justify severe moral censure and punishment.
- For people living with, or at risk of acquiring or transmitting, HIV or other serious STIs, consent raises some specific and difficult questions that merit consideration both by them, and those who advise and care for them.
- In particular:
 - what is the impact of U=U, and of PrEP?
 - How does alcohol and drug use impact on consent?

Definition of Consent in English Criminal Law

- The Sexual Offences Act 2003 explains that a person consents “**if he agrees by choice, and has the freedom and capacity to make that choice**”.
- This approach now generally adopted in criminal cases involving questions of consent (including HIV transmission cases)
- Sometimes the absence of consent is an element of an offence (e.g. rape and many sexual offences)
 - This means the prosecution must prove absence of consent to get a conviction.
- Sometimes consent operates as a defence (e.g. consent to the risk of infection in HIV transmission cases)
 - This means the prosecution must disprove consent if a defendant argues that consent existed at the relevant time.

Particular Problems

- Because consent exists “if a person agrees by choice, and has freedom and capacity to make that choice”, this can be especially problematic when
 - There are questions as to the complainant’s maturity and understanding
 - One or both of the parties (the defendant and / or the complainant) are intoxicated (through alcohol / drugs)
- Recent cases on gender non-disclosure also raise concerns as to the courts’ future approach to HIV non-disclosure (addressed later)

Consent in the Context of HIV

- Cases of alleged transmission are brought under the **Offences Against the Person Act 1861**, either
 - Section 20 (recklessly causing serious harm)
 - Section 18 (intentionally causing serious harm)
- Cases of alleged attempted transmission are brought under the **Criminal Attempts Act 1981** (first conviction Daryll Rowe (2017))
 - In such cases, the prosecution need to prove an intention to infect
- It is a full defence under section 20 if the complainant consented to the risk of acquiring HIV (*R v Dica*; *R v Konzani*)
- There is no defence of consent available
 - if the defendant's intention was to transmit HIV (*R v Brown* - S/M case)
 - if the defendant attempted, but failed, to transmit HIV

How is consent established?

- Consent must be “willing and conscious”
- Where the defendant argues that there was consent, this must be based on a **reasonable belief** that it existed at the relevant time (an honest but mistaken belief is insufficient)
- A defendant cannot assume that a sexual partner’s knowledge (or assumed knowledge) of HIV risk equates to their consent
 - Consenting a risk is not the same as running / taking a risk
- **Disclosure of HIV positive status to a partner does not necessarily equate to gaining the consent of a partner**, but in practice disclosure (or actual knowledge of the defendant’s status from another source) will be a pre-requisite to the defence being successful
 - NB: There is no general positive legal obligation to disclose, but those convicted may be required to do so in the future if included in the terms of a Sexual Offences Prevention Order (SOPO)

Some Issues About Consent and Disclosure

- Where the defence of consent depends on the defendant's disclosure, this will typically have to be timely and explicit
 - After the event, too late; “indirect” means disclosure unlikely to be sufficient
 - NB the problem of evidence - and reliance on credibility of parties
- A person has to have something to disclose: so an undiagnosed person who is in fact living with HIV and does transmit it to another cannot do so (in law) recklessly or intentionally (though NB “wilful blindness”)
- From a public health / sexual risk management perspective, disclosure of HIV positive status is *per se* unhelpful.
 - Disclosing that one does not know one's status, or (for someone living with diagnosed HIV) that one has, or may have detectable, viral load is more relevant.
- Unclear how prosecutors / courts would approach non-disclosure by a PLHIV with undetectable HIV - is status itself relevant to consent? (return to this)

Disclosure: Consent, HIV, and Sexual Offences

- Section 74 Sexual offences Act 2003 explains that consent exists if a person agrees by choice, and has freedom and capacity to make that choice
- What if a person fails to disclose HIV positive status prior to sexual intercourse?
- *R v B* (2006): The Court of Appeal decided that non-disclosure of HIV status (or of any other STI) did not vitiate consent - the question is whether there was consent to the intercourse.
- But a live issue *McNally v R* (2013): deception as to gender - unlawful penetration conviction upheld (same test of consent as for rape)
- What is the difference? Potential change in the law in the future



Relevance of Intoxicants

- Increasing body of research that people participating in chemsex take more risks and that they report non-consensual sex (see, e.g., Ward, C. *et al*, 2017)
- If the complainant has, at relevant time, lacks the capacity to choose whether to engage in sexual activity, **there can be no consent.**
- If the defendant has the requisite state of mind in relation to offence charged, then guilty.
- However, where the complainant has **voluntarily** consumed drink / drugs and remains capable of choosing whether to engage in the activity (and consenting to the risk), and agrees to do so, no offence committed.
- As regards the defendant - the basic rule is that **self-induced intoxication is no defence** because reasonable grounds for a belief are grounds which would be reasonable to a sober person.
 - It may provide sufficient evidence that the defendant was incapable of forming an intention to transmit (in Section 18 and attempt cases)
 - It will not enable a defendant to avoid liability in prosecutions brought under Section 20

Disclosure: Impact / Relevance of ARVs

- PARTNER study zero transmissions between HIV positive people with undetectable viral load and their partners (not on PrEP).
- PrOUD study and Ipergay study demonstrate 86% effectiveness of PrEP.
- Criminal liability under OAPA 1861 only for transmission, so extremely unlikely that those with undetectable viral load will ever be subject to charge (so no need to disclose status to ensure consent to risk of transmission?)
- In the rape case - does complainant make make fully informed choice to engage in intercourse if person with UVL does not disclose status? What is “status”?
- Would a person on PrEP who had sex with person with detectable HIV be able to claim non-consent if no disclosure by the latter?
 - Arguably not for a rape or transmission charge: they have indicated their willingness to to have sex with person who may be HIV positive
- So - availability of PrEP could significantly impact on criminalisation and, therefore, the stigma associated with HIV

Observations / Thoughts / Issues

- Availability of ARVs critical for effective treatment and prevention
- PLHIV on effective treatment - U=U
 - Depending on the approach of the courts, this would take away responsibility of having to disclose HIV status for purposes of gaining consent to risk (so as to avoid responsibility for allegations by potential complainants)
 - NB even if D cannot be the source of C's infection, if allegation made, D may still be investigated - allegations extremely distressing / disruptive, even if no prosecution or prosecution is dropped
- PrEP availability / normalisation will
 - Vastly minimise risk of HIV acquisition
 - Potentially shift disclosure burden and affirm shared responsibility in context of otherwise higher risk sexual activity
 - Reduce number / impact of allegations of transmission

Role of Nurses / Sexual Health Advisers

- Those concerned with health of patients have expressed concern about impact of providing legal information (Dodds, C. *et al* 2015)
- Nevertheless, knowledge about legal responsibilities may reduce anxiety, enable patients and clients to take control / make informed decisions
- Ensure that you are able to point people in the direction of reliable legal resources, e.g. THT's advice <https://www.tht.org.uk/hiv-and-sexual-health/living-well-hiv/legal-issues/how-law-works> and a useful recent summary: Saigal P, Weait M, Poulton M 'Criminalisation of HIV transmission: an overview for clinicians' *Sex Transm Infect* Published Online First: 02 May 2018. <http://dx.doi.org/10.1136/sextrans-2017-053456>

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HIV Justice Network: <http://www.hivjustice.net/> (excellent source of information)

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