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CONSENT, KNOWLEDGE AND PRECAUTION: A CRITICAL ANALYSIS OF THE CRIMINALISATION OF THE RECKLESS TRANSMISSION OF HIV AND OTHER SERIOUS DISEASES

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Abstract

This article examines the criminalisation of the reckless transmission of disease in England and Wales. The defence of consent to bodily harm and the principle of informed consent are crucial to the foundations of this discussion. This defence gives an HIV infected party freedom to behave recklessly and rely on the knowledge of the victim as a defence for their reckless behaviour. The criminal recklessness of an HIV infected party has also been argued to be negated by the careful use of precautionary measures during sexual activity. This means that an infected party can engage in sexual activity in the absence of full disclosure of their condition to their sexual partner. This promotes neither honesty nor openness. In fact, it encourages deceit and dishonesty. The current law on the reckless transmission of disease remains unclear. However, careful analysis of the legal and moral debates surrounding reckless transmission of disease will aid discussion about the future development of this area of law.

Keywords: HIV, Consent, Recklessness, Knowledge, Disease, Wilful Blindness

Introduction

Since the landmark case of *R v Dica*² in 2004, it is now accepted that the most appropriate ground for convicting the reckless transmission of the HIV virus is under section 20 of the Offences Against the Person Act 1861.³ Since *Dica*, there has been extensive academic debate surrounding the rationality of including transmission of disease within the OAPA 1861. The case of *R v Clarence*⁴ was the leading case for over a century on the issue of whether transmission of

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² [2004] Q.B. 1257.

³ For the purposes of this article the Offences against the Person Act 1861 will be referred to as 'OAPA 1861'.

⁴ (1888) 22 Q.B.D. 23.

disease represented an offence under the OAPA 1861. *Clarence* had sexual intercourse with his wife knowing that he was infected with gonorrhoea. He transmitted the disease and was convicted under section 20 of the OAPA 1861. *Clarence* appealed and his conviction was quashed. Stephen J considered the act of infecting someone with gonorrhoea was different from a violent blow or cut described in the statutory definition of section 20 of the OAPA 1861.⁵

In the more recent case of *R v Dica* the defendant who knew he was HIV positive had unprotected sexual intercourse with two women, both of whom contracted the virus. In *Dica* Judge L.J. stated that 'if psychiatric injury [as seen in *Ireland* and *Burstow*⁶] can be inflicted without direct or indirect violence... physical injury may similarly be inflicted'⁷ in the absence of direct or indirect violence. *Dica* therefore ruled that transmitting disease is to cause physical injury and can be inflicted with or without direct or indirect violence. *Clarence* was consequentially overruled and it was commented in *Dica* that, 'if that case [*Clarence*] were decided today the conviction under section 20 would be upheld⁸'.

In analysing the development of this area of law, the first issue is the availability of the defence of consent. This will be followed by an analysis of the defendant's and the victim's knowledge of infection, and what possible effects this may have on criminal liability. Next to be addressed is the relatively recent academic discussion of whether or not criminal liability is absolved where precaution is used during sexual activity. It is also clear that debate about the criminalisation of reckless transmission of disease takes place within a broader policy framework, which seeks to protect the public and promote openness and honesty, but also to discourage the stigmatisation of those suffering from diseases such as HIV.

1 The Principle of 'Informed Consent'

The case of *R v Konzani* held that if the defendant has unprotected sexual intercourse with the complainant and recklessly transmits the HIV virus, consent will only be available as a defence if the victim has given 'informed consent' to the risk. In *Konzani*, Judge LJ said:

If an individual who knows that he is suffering from the HIV virus conceals this stark fact from his sexual partner, the principle of her personal autonomy is not enhanced if he is exculpated when he recklessly transmits the HIV virus to her through consensual sexual

⁵ Statutory definition of Section 20 OAPA 1861 'Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person'

⁶ [1997] 3 W.L.R. 534.

⁷ [2004] EWCA Crim 1103, Judge LJ at para.30.

⁸ Ibid.

intercourse. On any view, the concealment of this fact from her almost inevitably means that she is deceived. Her consent is not properly informed, and she cannot give an informed consent to something of which she is ignorant.⁹

The principle of informed consent has been discussed at great length by various academics. Cherkassky suggests that an individual is not free to make a choice until he or she knows every single detail about the conduct to which he or she is consenting.¹⁰ Herring suggests that consent would be vitiated 'if at the time of the sexual activity a person is mistaken to the fact; and had s/he known the truth about that fact, would not have consented to it'.¹¹ However, on this basis consent would be absent where the defendant was untruthful about certain attributes such as, his infected status, his age, his wealth or his future intentions. If the victim was to say that she would not have consented to sexual intercourse had she known the defendant had no intention of a future relationship, under Herring's theory the defendant would be liable for rape. Hyman Gross takes the view that sex is still consented to, and that the immoral intentions of the defendant should not be placed on an elevated moral place for us to judge and punish.¹² Moreover, Herring's principle of informed consent is simply not practical. This is because it could lead to an increase in the number of rape charges, in cases where consent is currently legally valid, despite the immoral intentions of the defendant.

The Court of Appeal in *Konzani* also felt it important to distinguish between running a risk and consenting to running that particular risk. It was noted that the prosecution must establish that the complainant, 'did not willingly consent to the risk of suffering the infection, in the sense of her having consciously thought about it at the time and decided to run it'.¹³ Also, if at any point the complainant thought about the risk of contracting HIV, yet decided to take the risk, the appellant should be acquitted.

Konzani also illustrates that even in the absence of disclosure from the defendant himself, the victim may have still given informed consent to the risk of transmission of disease. This could arise where the victim, unknown to the defendant, was made aware of the defendant's condition

⁹ [2005] EWCA Crim 706, Judge LJ at para.42.

¹⁰ Cherkassky, L., 'Being Informed: the complexities of knowledge, deception and consent when transmitting HIV', (2010) 74(3) *Journal of Criminal Law* 242 at p.243.

¹¹ Herring, J., *Great Debates in Criminal Law*, (2015), at p.109

¹² Gross, H., 'Rape, Moralism, and Human Rights', (2007) *Criminal Law Review* 222 at p.225.

¹³ [2005] EWCA Crim 706, Judge LJ at para.35.

by a third party.¹⁴ The knowledge of the victim and the defendant will be examined in detail in due course. However, in *Konzani* there was no evidence to support an argument that the appellant honestly believed that any of the three complainants gave informed consent to the risk of contracting HIV. *Konzani*'s supposed belief amounted to no more than an assertion that the defendant expected the law to treat the victim's agreement to unprotected intercourse as consent to the risk of infection; this is a mere mistake of law.¹⁵ As a result of this, the jury concluded that none of the complainants 'willingly' or 'consciously' consented. Therefore, the Court of Appeal was entirely correct in rejecting the defendant's appeal on this point.

In conclusion, the law remains that when two individuals engage in unprotected sexual intercourse, both of whom agree to take the risk of infection, 'informed consent' to the risk of serious bodily harm will be a defence. If the defendant fails to disclose his infected status and infects his sexual partner the defendant will not be liable for rape. But he will be liable under section 20 of the OAPA 1861 if informed consent is not found. Informed consent will remain a controversial issue because of the different levels of risks undertaken by different types of relationships and sexual activities. Issues regarding whether informed consent based solely on the knowledge of the victim, without the full disclosure of the defendant will be addressed shortly. For now, *Konzani* is the leading authority on informed consent and the reckless transmission of disease.

2 Knowledge, Recklessness and Wilful Blindness

The level of knowledge the defendant and the victim have plays an important factor in the criminalisation of the reckless transmission of disease. How can an individual be found criminally liable for transmitting a disease that he had no idea he was carrying? What if the defendant knew that he *may* be HIV positive, but fails to get himself tested? The victim's knowledge also raises key points for discussion. What if the victim had learnt that her sexual partner was HIV positive from a third party unbeknown to the defendant, yet turned a blind eye to the risk of contracting the disease? In these circumstances, should the victim hold some responsibility for the transmission of disease? Questions similar to these have been raised by case law and numerous academics and will now be critically analysed and discussed. First, it is important to understand

¹⁴ Ibid, Judge LJ at para.44.

¹⁵ Pedain, A., 'HIV and responsible sexual behaviour', (2005) 64(3) *Cambridge Law Journal* 540 at p.542.

the legal meaning of recklessness. This is crucial because an individual cannot be found liable for recklessly transmitting a disease without the required level of criminal recklessness.

i) Knowledge of the defendant

Where transmission of disease occurs the defendant must be proved to have acted recklessly. If the defendant was not aware of his HIV positive status he may not be found to have acted recklessly because there was a lack of foreseeability of harm. However, what level of knowledge must the defendant have of his own HIV status to be considered criminally reckless for the transmission of disease?

It has long been established that the defendant must have some knowledge of his HIV status in order to be reckless in transmitting it. However, it is left unclear whether or not this needs to be 'actual knowledge',¹⁶ or if other levels of knowledge will also allow liability to be imposed. Weait suggests that in order to be subjectively reckless in the transmission of disease, the defendant must have actual knowledge of his HIV positive status. Weait submitted that 'a subjective approach to recklessness must mean an awareness of the risk of causing some degree of bodily harm, for which a necessary condition is a person's actual knowledge of their HIV positive status'.¹⁷ Spencer on the other hand is certain that criminal liability for the reckless transmission of disease should not be restricted to actual knowledge of the defendant's status. Spencer submitted his so called 'illuminating conclusion'.

to infect an unsuspecting person with a grave disease you know you have, or may have, by behaviour that you know involves a risk of transmission, and that you know you could easily modify to reduce or eliminate the risk, is to harm another in ways that is both needless and callous. For that reason, criminal liability is justified unless there are strong countervailing reasons. In my view there are not.¹⁸

In the case of *Dica*, the level of knowledge the defendant had was not discussed in depth because it was proved that the defendant knew he was HIV positive. Judge L.J. made reference to

¹⁶ Actual knowledge of HIV positive status refers to the defendant having been given a medical diagnosis after a blood sample test. This will give the defendant certainty that he is HIV positive rather than a mere suspicion.

¹⁷ Weait, M., 'Criminal Law and the Sexual Transmission of HIV: *R v Dica*', (2005) 68 (1) *Modern Law Review* 121 at p.131.

¹⁸ Spencer, JR., 'Liability for Reckless Infection: Part 2', (2004) 154 *New Law Journal* 448 at p.471.

Spencer's 'illuminating conclusion'¹⁹ on recklessness mentioned above. This appears to indicate that the court in *Dica* was prepared to accept Spencer's broader interpretation of the level of knowledge required for reckless transmission of disease. Spencer's broader interpretation includes actual knowledge and knowledge that the defendant *may* be infected. However, in Judge L.J.'s concluding comments he appears to favour a narrower approach:

knowing that they are suffering HIV or some other serious sexual disease, recklessly transmits it through consensual sexual intercourse, and inflicts grievous bodily harm on a person from who the risk is concealed and who is not consenting to it.²⁰

Confusion arises as Judge L.J. fails to mention that the defendant can have knowledge that he *may* be HIV positive, he only makes reference to the defendant *knowing* he is HIV positive contrary to Spencer's broader approach, suggesting that the narrower approach should be followed.

Weait contends that Judge L.J.'s use of the word '*knowing*' in his concluding comments was a rejection of Spencer's 'illuminating conclusion'.²¹ Further, Weait and Azad add that acceptance of Spencer's 'illuminating conclusion' could be somewhat discriminatory. It could infer that members of high prevalence groups (such as, homosexual men, injecting drug users and people from sub-Saharan Africa) ought to suspect that they are, or may be HIV positive, when in fact they might have no idea of their HIV status.²²

The case of *Barnes*²³ makes reference to the decision in *Dica* and whether or not knowledge should be restricted to actual knowledge. Lord Woolf, stated 'this court held that the man would be guilty of an offence...if being *aware* of his condition, he had sexual intercourse with them without disclosing his condition'.²⁴ The crucial point to note is the use of the word "*aware*". Lord Woolf appears to have adopted the narrow approach of knowledge, as there is no mention of the defendant being aware that he *may* be carrying the HIV virus. In the case of *Konzani* it was stated

¹⁹ [2004] Q.B. 1257, Judge, LJ at para.55.

²⁰ Ibid, Judge, LJ at para.59.

²¹ Weait, 'Criminal Law and the Sexual Transmission of HIV: *R v Dica*', at p.131.

²² Weait, M., and Azad, Y., 'The Criminalisation of HIV Transmission in England and Wales: Questions of Law and Policy', (2005) 10 *HIV/AIDS Policy & Law Review* p.6.

²³ [2005] 1 W.L.R. 910.

²⁴ Ibid, Lord Woolf at para.10.

that 'if an individual who *knows* that he is suffering from the HIV virus conceals this stark fact'.²⁵ Again, there is no mention of the defendant's knowledge that he *may* be HIV positive.

Weait and Azad, in their 2005 *HIV/AIDS Policy and Law Review*²⁶ article appear to make the assumption that the lack of discussion about the defendant's knowledge in *Dica* and *Konzani*, indicates that the only type of knowledge that will be accepted is 'actual knowledge'. Ryan contends that the lack of discussion in the cases of *Dica* and *Konzani* was because both defendants had actual knowledge of their HIV positive status. Therefore, it can be argued that the courts did not need to discuss whether anything less than actual knowledge would have sufficed.²⁷ In addition, it is important to note the unreported case of *R v Adaye*.²⁸ In this case the defendant was strongly advised by his doctor that he may be HIV positive. The defendant failed to get himself tested²⁹ and his new partner contracted the HIV virus. *Adaye* pleaded guilty to the reckless transmission of disease and was sentenced to six years imprisonment. Judge Lynch in *Adaye* was reported by the media as stating that the defendant, 'knew it was highly likely, if not certain, that [he was] HIV positive'.³⁰ This suggests that actual knowledge is not the only level of knowledge required to be criminally liable for reckless transmission of disease. A broader degree of knowledge similar to Spencer's previous suggestion appears to have been applied in this case.

However, the legal weight and strength of the case of *Adaye* must be questioned. According to Dodds et al,³¹ none of the legal complexities in *Adaye* had been reported. It is also unclear if there was any scientific evidence that the HIV strain³² of the complainant was the same as the

²⁵ [2005] EWCA Crim 706, Judge LJ at para.42.

²⁶ Weait and Azad 'The Criminalisation of HIV Transmission in England and Wales: at p.5.

²⁷ Ryan, S., 'Reckless transmission of HIV: knowledge and culpability', (2006) *Criminal Law Review* 981 at p.984.

²⁸ *The Times*, 10 January 2004.

²⁹ This is known as the 'willful blindness' (discussed below).

³⁰ HIV bigamist jailed for infections, *BBC News*, 12 January 2004
<http://news.bbc.co.uk/1/hi/england/merseyside/3389735.stm>.

³¹ Dodds, C., et al., 'Grievous Harm: Use of the Offences against the Person Act 1861 for Sexual Transmission of HIV', (2005) Project Report. Sigma Research p.26-27.

³² There are many different strains of the HIV virus, some more popular in particular countries than others, the most popular HIV sub-type in the UK is Sub-type B.

defendant's. In addition to this, it has been widely reported in the media³³ that *Adaye*'s first wife³⁴ contacted *Adaye* in 2002 to inform him of her HIV positive status. This would suggest to some the assumption that *Adaye* was also HIV positive. This assumption should not have been made because *Adaye* had never been tested. Dodds et al referred to these reports as 'erroneous' and that apparently the judge in the trial ordered that newspapers correct this misinformation, yet there is no evidence that any correction was ever published.³⁵ All considered, *Adaye* remains useful in the sense that it gives commentators an idea of how the courts may react to similar circumstances found in *Adaye*. Admittedly the validity of the case is questionable, but there is little else available to satisfy the inquisitiveness of this discussion.

Further legal guidance on the level of knowledge required by the defendant can be found in the CPS guidelines on the reckless transmission of disease. Here, it is stated that 'it is possible that, on rare occasions, a person can know that he or she is infected without undergoing the necessary medical tests'.³⁶ This provides substantial evidence that actual knowledge is not in fact necessarily required and is a question for the jury to decide so the consistency of this approach may vary. The CPS also state that, 'those who choose not to be tested will not necessarily avoid prosecution, if all the circumstances point to the fact that they knew they were infected'. This contributes further evidence that actual knowledge is not required and knowledge can be found by alternative means other than medical testing.

ii) Wilful Blindness

The case of *Adaye* also raises another issue; the 'wilful blindness' of the defendant. In the context of reckless transmission of disease, the case of *Adaye* suggests that when a defendant knows he is at high risk of carrying the HIV virus yet decides not to get himself tested, this will be equivalent to actual knowledge. If the narrow approach to knowledge was used in *Adaye*, the defendant would not have been criminally liable because he failed to get tested. Although not widely

³³ Bigamist passed HIV recklessly, *The Guardian*, 13 January 2004
<http://www.theguardian.com/uk/2004/jan/13/southafrica.aids>.

³⁴ *Adaye* had bigamously married two women, the first remained in South Africa, whilst he married and infected another woman living in the UK.

³⁵ Dodds, 'Grievous Harm: Use of the Offences against the Person Act 1861 for Sexual Transmission of HIV', pp.26-27.

³⁶ The Crown Prosecution Service '*Intentional or Reckless Sexual Transmission of Infection*'
http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/.

considered by academics, the concept of wilful blindness in relation to reckless transmission of disease has shown some signs of acceptance. Spencer explains that by imposing liability only where actual knowledge is established discourages those who think that they *may* be infected, from getting themselves tested.³⁷ Whereas, imposing liability on those with knowledge that they *may* be HIV positive could actually encourage people to get themselves tested. However, Chalmers believes this is unlikely to have any effect on testing because of the lack of understanding of the law by the general public.³⁸ Sullivan, agrees that wilful blindness should equate to actual knowledge. Sullivan opines that a person who is wilfully blind to their HIV status is just as morally blameworthy as those with actual knowledge of their status.³⁹ This is true to a certain extent. In *Adaye* it seems that the defendant was virtually certain he was HIV positive and could arguably be just as blameworthy as a defendant with actual knowledge. Conversely, there are a number of reasons why reckless transmission of disease should not be based on wilful blindness of the defendant.

Imposing liability for the reckless transmission of disease based on wilful blindness could be seen as widening the offence too far. Turner suggests that if actual knowledge is not required, then every individual who has ever had unprotected sex and who has not received a negative HIV test result, would potentially be liable.⁴⁰ This is an alarming point as those who genuinely have no knowledge they are HIV positive could be caught in the net of criminal liability if they have previously engaged in unsafe sex. In response, Chalmers attempted to narrow this broad position by suggesting that liability should only be imposed where there is a serious risk of being HIV positive.⁴¹ This may not be the most practical approach. The level of seriousness could never be accurately measured for the reason that the risk of HIV transmission varies between different sexual activities.

The CPS offer useful guidance in relation to whether wilful blindness equates to knowledge for the transmission of disease. Referred to as 'closing of the mind' the CPS state that 'a deliberate

³⁷ Spencer, 'Liability for Reckless Infection: Part 2', at p.471.

³⁸ Chalmers, J., 'The Criminalisation of HIV Transmission', (2002) 28 *Journal of Medical Ethics* 160 at p.161.

³⁹ Sullivan, G.R., 'Knowledge, Belief and Culpability', in Shute, S., and Simester, A., *Criminal Law Theory: Doctrines of the General Part*, (2002), at p.213.

⁴⁰ Turner, A., 'Criminal Liability and AIDS', (1995) 7 *Auckland University Law Review* 875 at p.889.

⁴¹ Chalmers, 'The Criminalisation of HIV Transmission', at p.162.

closing of the mind by not undergoing testing may be a factor that a jury can take into account when deciding the question of the defendant's knowledge'.⁴² The CPS also offer circumstances where closing of the mind may be found. First, where the defendant has been given a preliminary diagnosis and fails to undertake the confirmatory test. Second, where the defendant shows symptoms associated with the sexual infection which must lead to the defendant knowing of his condition. Finally, where a defendant knows that a previous sexual partner has been diagnosed with a condition, this could be evidence of the defendant knowing he is infected. These examples are similar to those discussed earlier for establishing knowledge. However, in the context of wilful blindness the CPS make it clear that these examples may only be relied upon in exceptional cases, to prove wilful blindness as actual knowledge.

This leads to the next argument that wilful blindness should not equate to actual knowledge. It would be unclear when an individual becomes wilfully blind. Does an individual become wilfully blind after one unprotected sexual encounter or ten unprotected sexual encounters? It would be difficult, if not impossible to pinpoint exactly when one becomes wilfully blind to having knowledge of their HIV positive status.

The final and perhaps the most effective argument, questions the legal practicality of imposing liability in the absence of actual knowledge. Ryan raised the point that for a successful charge under section 20 of the OAPA 1861, the defendant must have been proved to have transmitted the disease. But how can it be proved that the defendant transmitted the disease when there is no medical evidence to prove that the defendant is HIV positive? The Court could order a compulsory blood test to establish whether or not the defendant is HIV positive at the time of the trial. However, this fails to prove that the defendant was HIV positive at the time the complainant accused the defendant of transmitting the disease.⁴³ This strongly suggests that the defendant should have actual knowledge of his HIV positive status, and that wilful blindness should not be sufficient.

It remains unclear whether a defendant can be found criminally liable where he does not have actual knowledge of his HIV status. Weait, provides an interesting summary of the current law

⁴² The Crown Prosecution Service '*Intentional or Reckless Sexual Transmission of Infection*' http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/.

⁴³ Ryan, 'Reckless transmission of HIV: knowledge and culpability', at p.988.

post *Dica*. In order to avoid liability for the reckless transmission of disease, first the defendant should disclose his HIV status to his sexual partner, this will undoubtedly establish informed consent. Alternatively, the defendant should avoid finding out for sure his HIV status, so he cannot be held to be reckless.⁴⁴ However, if Spencer's 'illuminating conclusion' or wilful blindness is accepted by the courts, Weait's latter suggestion may not be effective. Case law such as *Dica* and *Konzani* has been little help in answering this question. Rather, they have prompted a desperate examination of the wording and interpretations undertaken by the court. In addition to academic speculation, *Adaye* appears to offer useful guidance⁴⁵ as to what can be expected in future cases deciding the knowledge of the defendant and his HIV status.

iii) Knowledge of the victim

Moving onto the victim's state of knowledge this discussion will be directed from the victim's point of view and the level of knowledge the victim has about the defendant's HIV status. The case of *Barnes* recognised the rationale in *Dica* when applying the defence of consent. Lord Woolf acknowledged that where the defendant discloses his condition to the woman, he will have a defence if the woman was still prepared to accept the risks involved and consented to having sexual intercourse with him.⁴⁶ Weait disagrees with the rationale in *Dica* by arguing the following point.

[the victim] may be ignorant of a partner's HIV status in the sense that this has not been disclosed to them by him, but to deny the defence if there is in fact knowledge of the risk, and a willingness to accept it, would be tantamount to saying that the person infected bears no responsibility for their own sexual and physical health.⁴⁷

This argument was presented by Weait when referring to a case in Cyprus with similar facts to *Dica*. Weait argues that where the infected party denies a HIV positive status, the law ignores the victim's responsibility for her own sexual health. It allows the defendant to hold all legal responsibility on something which he could have lied about. Therefore, even when asked by the victim and the defendant tells the victim he is HIV negative, the victim is still partly at fault because of her willingness to take the risk. Weait submitted, in relation to the victim, the law ignores their

⁴⁴ Weait, 'Dica: knowledge, consent and the transmission of HIV', at p.827.

⁴⁵ Although it could be argued that *Adaye* may only be useful for future case law where the defendant pleads guilty for the reckless transmission of disease.

⁴⁶ [2005] 1 W.L.R. 910, Lord Woolf at para.10.

⁴⁷ Weait, 'Criminal Law and the Sexual Transmission of HIV: *R v Dica*', at p.128.

risk-taking, their irresponsibility and legitimates their gullibility.⁴⁸ Not surprisingly this approach has led to strong criticism.

Spencer finds this argument 'astonishing' and questions if it is in fact gullible to trust a person with whom you are in love when they tell you, they are HIV negative.⁴⁹ Spencer therefore fails to see how the blame can be put on a victim who asks her husband if he is HIV positive, and accepts the reply to the negative. Weait rejects Spencer's comment that his previous argument is 'astonishing'. Weait states 'to punish the person who infects another, where that other is in a position to avoid infection and elects to run the risk, simply serves to reinforce the predominant view that HIV/AIDS is someone else's problem'.⁵⁰ *Konzani* appears to have followed *Dica* in that full disclosure is required in order to achieve informed consent from the victim.⁵¹ Judge L.J. added the following criteria.

By way of example, an individual with HIV may develop a sexual relationship with someone who knew him while he was in hospital, receiving treatment for the condition. If so, her informed consent, if it were indeed informed, would remain a defence... Alternatively, he may honestly believe that his new sexual partner was told of his condition by someone known to them both.⁵²

These comments have effectively widened the scope of informed consent, which can now be found in the absence of full disclosure. Cherkassky believes, that allowing social interactions to establish informed consent contradicts the notion that the defendant must disclose his infected status. Without the need for full disclosure the defendant can act recklessly. This 'places a significant burden on the victim to look into the sexual history of his or her partner before consenting'.⁵³ Concerns arise from the possible lack of responsibility imposed upon the defendant and the lack of incentive to disclose his HIV status. It is at least arguable that in some circumstances where it is so obvious to the victim that the defendant is HIV positive, consent to the risk could be found in the absence of full disclosure. However, honesty and openness should be encouraged, the comments in *Konzani* appear to give the defendant an unjustifiable means to

⁴⁸ Weait, M., 'Taking the blame: criminal law, social responsibility and the sexual transmission of HIV', (2001) 23(4) *Journal of Social Welfare and Family Law* 441 at p.452.

⁴⁹ Spencer, 'Liability for reckless infection – part 2', at p.448.

⁵⁰ Weait, 'Criminal Law and the Sexual Transmission of HIV: *R v Dica*', at p.129.

⁵¹ [2005] EWCA Crim 706, Judge, LJ at para.42.

⁵² Ibid, Judge, LJ at para.44.

⁵³ Cherkassky, 'Being Informed: The Complexities of Knowledge, Deception and Consent when Transmitting HIV', at p.254.

escape criminal liability, especially if the defendant was unaware of the victim's knowledge of his HIV positive status.

Weait welcomes Judge L.J.'s comments in *Konzani* and also proposes that it is wrong to allow the only source of knowledge of the defendant's condition to be through direct disclosure from the defendant himself as there may be a number of different sources of knowledge.⁵⁴ For example, the victim being aware that the defendant's previous partner was HIV positive, or that the defendant belongs to a group with a high prevalence of HIV infection. Nevertheless, Weait believes that the examples given by Judge L.J. are too limited as both rely on some form of disclosure. Either through visible disclosure whilst the victim is at hospital with the defendant, or the reliance of the disclosure from a third party. Weait then heavily criticises the criminalisation of an individual who infects another person, in the absence of disclosure, where the contracting individual was still aware of the potential harm to which they are subjecting themselves to. Weait claims that informed consent is given by the very act of engaging in unprotected sexual intercourse; 'it is at least arguable that a person who agrees to have unprotected sex with a person about whose HIV status they are uncertain consents to the risk of transmission, by the very act of agreeing to having unprotected sex with that person'.⁵⁵ Such an argument holds valid legal basis on the part that there are always risks involved when engaging in unprotected sexual intercourse. However, these risks are more likely to be associated with contracting more common curable STI's and possibly unwanted pregnancy. The risk should not be related to the considerably less common HIV virus. Therefore, it should not be submitted that by way of engaging in unprotected sexual intercourse the victim has automatically consented to the risk of contracting the HIV virus.

Cooper and Reed raised the following question; if the defendant recklessly or intentionally infects the victim through an act of sexual intercourse, why should his criminal liability depend upon the state of mind of the victim? Cooper and Reed argue that when the defendant recklessly or intentionally infects the victim he is acting with moral blameworthiness, moral culpability, and is arguably deserving of the stigma of a criminal conviction. It seems somewhat illogical to absolve

⁵⁴ Weait, M., 'Knowledge, autonomy and consent: *R. v Konzani*', (2005) *Criminal Law Review* 763 at p.766.

⁵⁵ *Ibid* at p.765.

the defendant from liability simply because the victim has acquired knowledge of the defendant's condition, from a source other than the defendant.⁵⁶

The current degree of knowledge required by the victim in order to establish informed consent appears to have been burst wide open by comments in *Konzani*. Weait agrees with the broad approach mentioned in *Konzani* and in addition to this Weait would like to see even more responsibility placed on the victim's shoulders. This seems hard to come to terms with because, by not disclosing his infected status, the defendant has been deceptive and positively concealed his condition. This in law should not be overseen just because there may or may not have been other means available for the victim to gain knowledge of the defendant's positive HIV status. Finally, it should not be agreed upon that an unsuspecting victim who contracts a life threatening disease should share the same responsibility, as a result of the criminally reckless actions of another.

3 Precaution and Disclosure

i) Precaution as a defence in England and Wales

The current English law criminalises an individual under the OAPA 1861 who recklessly transmits the HIV virus to an unsuspecting sexual partner but it has been held that where an individual discloses his condition to the complainant, who then gives an informed consent to the risk of transmission of disease, the defendant may avoid liability.⁵⁷ In recent academic discussion, it has been suggested that there may be an alternative approach to absolving a defendant's liability. It has been argued that taking precaution with the use of condoms, undergoing medical treatment and taking part in low risk activities may also act as a defence.

Chalmers indicated that the use of condoms among serodiscordant⁵⁸ couples has been found to reduce the annual HIV incidence by 69%⁵⁹. Condom use as a defence can be seen as a public health initiative to prevent the transmission of HIV as it can significantly reduce the risk of transmission and promote safe sex practices. There has been both judicial authority and academic discussion to suggest that condom use is a defence to the reckless transmission of

⁵⁶ Cooper, S., and Reed, A., 'Informed Consent and the Transmission of Sexual Disease: Dadson Revivified', (2007) 71(5) *Journal of Criminal Law* 461 at p.464.

⁵⁷ *R v Dica* [2004] EWCA Crim 1103, *R v Konzani* [2005] EWCA Crim 706.

⁵⁸ A couple where one of the two are infected with the HIV virus and the other is not.

⁵⁹ Chalmers, 'The criminalisation of HIV transmission', at p.162.

HIV. Uncertainty arises when establishing whether or not the disclosure of the defendant's positive status is required alongside the practice of safe sex. There is currently no case law available where the use of a condom has been considered a defence for the reckless transmission of disease. This is not to say that the defence has not been discussed by the courts.

In *Dica*, notable comments were made suggesting that the use of a condom could possibly be a defence. Judge L.J. stated 'if protective measures had been taken by the appellant that would have provided material relevant to the jury's decision whether, in all the circumstances, recklessness was proved'.⁶⁰ Judge L.J. in *Dica* suggested that if precautions were taken (such as the use of a condom) this could potentially lower the risk of transmission to a level where recklessness cannot be found by the jury. This should not be interpreted as an automatic defence for the reckless transmission of disease, but merely something for the jury to consider.

Looking back at Judge L.J.'s example of the hypothetical Roman Catholic couple, who due to their religious beliefs cannot use contraception the final sentence states 'at the peril of criminal sanctions, [should the couple] choose between bringing their sexual relationship to an end or violate their consciences by using contraception?'⁶¹ This appears to suggest that if the Roman Catholic couple were to break their religious beliefs and practice safe sexual intercourse, the use of a condom would excuse any risk of recklessly transmitting HIV.

In *Konzani*, the defendant was held to be reckless because he failed to use contraception every time he had sexual intercourse with the three complainants.⁶² The court therefore failed to give any indication of the effect the use of a condom would have on a defendant's criminal liability. This leaves the current law open to the possibility that even where a condom is used during sexual intercourse the defendant can still be found criminally liable for transmitting disease. The CPS shed some light in their prosecution guidelines.⁶³ The CPS suggest that it is highly unlikely that a suspect will be found reckless if the suspect took appropriate safeguards during their relationship. If it can be shown that the suspect knew he was not using adequate safeguards against the transmission of disease, recklessness will be found. The court in *Dica* and the CPS both suggest

⁶⁰ [2004] EWCA Crim 1103, Judge LJ at para.11.

⁶¹ *Ibid*, Judge LJ at para.49.

⁶² This was admitted by the defendant, see [2005] EWCA Crim 706, Judge, LJ para.4.

⁶³ Crown Prosecution Service '*Intention or Reckless Sexual Transmission of Infection*' http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/.

that when precautions are taken, liability may not be found. However, it can be argued that the risk that remains present when using condoms is still sufficient to find the defendant criminally reckless.

In order to prove recklessness for the purposes of criminal liability, the prosecution must prove that the defendant took an unjustifiable risk. If the risk can be considered justifiable, recklessness cannot be proved. When calculating whether or not a risk is justifiable the factors that can be taken into account are the likelihood of harm, and the precautions used by the defendant. All sexual activity is likely to carry some risk, hence the argument that the law should only be concerned with activities that pose a high risk.⁶⁴ Equally, the risks involved with unprotected sexual intercourse can be significantly reduced by practicing safe sex, even to a point where the risks are considered insignificant.

It has been found that vaginal sexual intercourse with a condom lowers the risk of HIV transmission to as low as 1 in 10,000⁶⁵ for the female partner and 1 in 20,000 for the male partner.⁶⁶ Harker and Wright suggest that this medical evidence should be a strong indication that where precautions are taken, the risk of transmitting HIV should be too low for criminal liability to be imposed.⁶⁷ Hughes proposes that when precautions are used the defendant is being responsible, not reckless in his conduct.⁶⁸ Ryan adds, the aim of any sort of measure taken against those who spread HIV is to prevent the further spread of HIV. It would be counterproductive to punish those who take precautionary steps to avoid spreading the disease.⁶⁹ These may be valid points, however, it does not address the issue that the victim is still being subjected to a slight degree of risk. Bronitt is of the view that 'notwithstanding preventative

⁶⁴ Harker, K., and Wright, E., 'The HIV stigma: duty or defence', (2015) 4(1) *UCL Journal of Law and Jurisprudence* 55 at p.66.

⁶⁵ Pinkerton, S., and Abramson, P., 'Effectiveness of Condoms in preventing HIV transmission', (1997) 44 *Social Science and Medicine* 1303 at p.1310 – the figure 1 in 10,000 is described here as 0.0001.

⁶⁶ Galletly, C., and Pinkerton, S., 'Toward Rational HIV Exposure Laws', (2004) 32 *Journal of Law, Medicine and Ethics* 327 at p.328.

⁶⁷ Harker, K., and Wright, E., 'The HIV stigma: duty or defence', (2015) 4(1) *UCL Journal of Law and Jurisprudence* 55 at p.66.

⁶⁸ Hughes, D., 'Condom Use, Viral Load and the Type of Sexual Activity as Defences to the Sexual Transmission of HIV' (2013) 77 *Journal of Criminal Law* 136 at p.140.

⁶⁹ Ryan, S., 'Risk-taking, Recklessness and HIV transmission: Accommodating the reality of sexual transmission of HIV within a justifiable approach to criminal liability', (2007) *Liverpool Law Review* 215 at p.229.

measures, the person transmitting the disease could nevertheless foresee a risk (however insubstantial or remote) that the disease may be passed on by his or her conduct'.⁷⁰ Furthermore, Bronitt argues that although precautions may make infected sexual intercourse 'safer', there is still no method of completely eliminating the risk and therefore recklessness should still be found.

ii) Moral and Legal Duty of Disclosure

In English law, if a HIV positive individual uses prophylactic measures (such as, a condom), does he have any legal or moral obligations to disclose his HIV status? Or is the risk sufficiently low that he does not have a legal duty to disclose his status before engaging in sexual activity? The duty of disclosure alongside the use of condoms has sparked much academic debate in English law. The moral based argument that there should always be a duty to disclose is well supported. Prosecuting counsel in the trial of *Konzani* illustrated this point to the jury. The prosecutor stated that HIV 'is at the top of the list of things you would want to be told by a prospective sexual partner, isn't it, I am HIV positive. Have sex with me and you're taking your life, or putting your life in very substantial risk indeed'.⁷¹ Weait believes that the prosecution in *Konzani* ignored the legal basis in which they should have been prosecuting. First, they presented to the jury that transmitting the HIV virus results in imminent mortality, which is not the case, especially with proper medical treatment. Secondly, the prosecutor assumed that the victim had not consented to contracting the virus. When in legal terms it is not the infection that is consented to, it is the *risk* of infection. Finally, the prosecution ignored the fact that it is only certain kinds of sexual activity that carry a risk of transmission. Weait believes that the Crown prosecutor in *Konzani* failed to present a legal case against the defendant before the jury.⁷² However, the legality of the case which the prosecution puts before the jury was inevitably going to be questioned. The key points that remain are that three women are now infected with the deadly HIV virus, as a result of *Konzani's* failure to disclose his condition and use precautionary measures. It was decided correctly that the three victims could not have given informed consent without disclosure, leading to the 10-year sentence of imprisonment imposed on Feston Konzani.

⁷⁰ Bronitt, S., 'Spreading disease and the criminal law', (1994) *Criminal Law Review* 21 at p.30.

⁷¹ Weait, M., *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (2007) p.188-189.

⁷² Quoted in Weait, *Intimacy and Responsibility*, p.189.

It is believed by some⁷³ that the disclosure of HIV positive status comes with potential risks that greatly outweigh the minimal risk imposed upon the uninfected party. The stigma and discrimination that can be associated with disclosure means that disclosure is not always as straightforward as it may seem.⁷⁴ Disclosure may come with the admission of sexual infidelity, rape, or drug use⁷⁵ not to mention the risk that others may be informed of the individual's HIV positive status.⁷⁶ There are also concerns that disclosure may lead to personal violence especially in cases with female infected parties. Judicial support of these arguments comes from the case of *Dica* where Judge L.J. stated that 'there are significant negative consequences of disclosure of HIV'.⁷⁷ The potential negative impacts of disclosure have led to the opinion that disclosure should only be necessary in cases of deliberate risk taking during unprotected sexual intercourse.⁷⁸ In addition to this, when the sexual activity is protected and the risk is low, 'it is possible to act in a responsible and morally justifiable way without forewarning'.⁷⁹ The emotional and psychological burden that comes with disclosing an infected status can be recognised with understanding. Greater concern should be placed on the uninfected party whose personal sexual health has been decided upon by someone other than themselves.

One's sexual health is generally a personal matter. The proposal that one's sexual health can effectively be decided upon by another person is immoral and unjust. This is well supported by Bruner who upholds that withholding information about one's HIV infection from a sexual partner is morally disrespectful because everyone is entitled to make his or her own decisions about sexual risks.⁸⁰ The use of precaution does not destroy the right of personal autonomy an uninfected person has, regardless of the minimal risk involved. The suggestion of one sided risk

⁷³ Ryan, S., 'Disclosure and HIV transmission', (2015) *Journal of Criminal Law* 395; Harker and Wright, 'The HIV stigma: duty or defence', 55.

⁷⁴ Ryan, 'Disclosure and HIV transmission', at p.401.

⁷⁵ Harker and Wright, 'The HIV stigma: duty or defence', at p.72.

⁷⁶ Ryan, , 'Disclosure and HIV transmission', at p.401.

⁷⁷ [2004] EWCA Crim 1103, Judge LJ at para.54.

⁷⁸ Grant, I., 'Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Non-Disclosure Prosecutions', (2009) 54 *McGill Law Journal* 389 at 400.

⁷⁹ Bennett, R., et al, 'Ignorance is bliss? HIV and moral duties and legal duties to forewarn', (2000) 26 *Journal of Medical Ethics* 9 at p.12.

⁸⁰ Bruner, D., 'High-risk sexual behaviour and failure to disclose HIV infection to sex partners: how do we respond?', (2004) 19(1-2) *Aids and Public Policy Journal* 11 at p.20.

taking decisions has been considered 'ethically indefensible',⁸¹ as it does not allow the opportunity for the sexual partner to decide what level of risk is acceptable to them. Field and Sullivan agree that the use of precautions ought not to be a sufficient defence unless the infected person has informed his partner of his condition.⁸² It is also fair to assume that even protected intercourse with a HIV positive individual is something that most uninfected people would shy away from.⁸³ This may be seen as discriminatory in nature, however, it still remains a personal choice of the uninfected party. Gostin and Hodge add that, 'while a partner is free to consent to or refuse sex, that choice is meaningless unless it is made with reasonable knowledge of the risks'.⁸⁴ Stein encourages a sympathetic view of the infected individual and that disclosure may mean that a desired sexual encounter will not happen.⁸⁵ This argument is absurd and defies any respect for the personal autonomy of the uninfected partner. It places the sexual gratification of the infected partner above the health and wellbeing of the uninfected partner. An argument that has no legal or moral stand in this discussion. Chalmers raises the argument that short of abstinence, condom use is the best way to prevent the spread of HIV.⁸⁶ Condoms have been a hugely significant factor in the prevention of the spread of HIV. However, for the infected individual the only other choice apart from disclosure should indeed be abstinence. The argument that disclosure compromises an infected individual's rights to sexual freedom⁸⁷ is wholly rejected. It is submitted that the personal autonomy rights of the uninfected individual greatly outweigh the sexual gratification of the infected person.

It could be unreasonable to suggest that all non-disclosure cases are due to cowardice or prioritizing one's own sexual needs over another's health. It is understood that disclosure may come with undesired social and emotional difficulties and that not all non-disclosers are sexual

⁸¹ Ciccarone, DH., et al 'Sex without disclosure of positive HIV serostatus in a US probability sample of persons receiving medical care for HIV infection', (2003) 93(6) *American Journal of Public Health* 949 at p.950.

⁸² Field, M.A., and Sullivan K.M, 'AIDS and the Criminal Law', (1987) 15 *Law Medicine and Health Care* 46 at p.53.

⁸³ Warburton, D., 'A Critical Review of English Law in Respect of Criminalising Blameworthy Behaviour by HIV+ Individuals', 68 (2004) *Journal of Criminal Law* 55 at p.65.

⁸⁴ Gostin, L., and Hodge, J., 'Piercing the veil of secrecy in HIV/AIDS and other sexually transmitted disease: theories of privacy and disclosure in partner notification', (1998) 5(9) *Duke Journal of Gender Law and Policy* 9 at p.67.

⁸⁵ Stein, M., et al 'Sexual Ethics: Disclosure of HIV-Positive Status to Partners', (1998) 158 (3) *Archives of Internal Medicine* at pp.255-256.

⁸⁶ Chalmers, 'The criminalisation of HIV transmission', at p.160.

⁸⁷ Ryan, 'Disclosure and HIV transmission', at p.401.

pariahs.⁸⁸ However, regardless of the minute risk of transmission that may come with protected sexual intercourse, the sexual partner must surely be entitled to a choice as to whether that small risk is taken. The Law Commission state ‘consent to intercourse implies consent to the normal level of risk, and in the cases with which we are concerned (use of condom) the level of risk is no more than normal, and may be less’.⁸⁹ This may be true and there is no doubt there is a moral duty of disclosure, however the legal duty is not so easily decided. The risk of transmission remains extremely low during protected sexual intercourse, this may in fact legally negate recklessness. The conflict between legal and moral duties to disclose is a conflict which legality is more likely to prevail. However, one would hope that an infected individual would place the health and autonomy of their sexual partner on a higher pedestal than their own sexual desires.

Conclusion

There is no doubt that the current law on the reckless transmission of disease lacks certainty and clarity. The willingness to consent to a potentially life threatening risk, the state of mind of both the defendant and the victim and the precautionary measures taken, are examples of crucial considerations to be made before criminal liability is imposed. The defence of consent remains a contentious issue which the criminal law has struggled to set a firm grasp upon. As the current law stands, where an individual transmits a serious disease to his sexual partner the defendant will not be charged with rape. Rather the defendant will be charged with inflicting grievous bodily harm with the defence of consent available, if such consent was informed. Maintaining personal autonomy has been a recurring theme throughout this discussion. Knowledge and disclosure have been the main areas for this debate. The required knowledge of the defendant appears to be moving away from ‘actual knowledge’, as does the knowledge of victim appear to be moving away from direct disclosure.

It is argued that it is unjustified to convict individuals who do not have actual knowledge of their HIV infection. This approach fails to convict those who should know they are at high risk of being infected, and have the means to reduce that risk. It is unfortunate that Judge L.J. in *Dica* omitted to mention the possibility that the defendant can have knowledge that he *may* be HIV positive and still be criminally liable. This should not be seen as a victory for those who support actual knowledge being the only form of knowledge that is relevant in this context. The defendant in *Dica*

⁸⁸ Ibid at p.403.

⁸⁹ Law Commission, *Reform of Offences Against the Person: A Scoping Consultation Paper*, Consultation Paper No 217 (2014) at para 6.92.

knew he was HIV positive so the discussion of knowledge was inadequate and somewhat unhelpful. The case of *Adaye* and the acceptance of wilful blindness by the CPS suggest actual knowledge of HIV infection may no longer be required. A concept that Weait⁹⁰ and Spencer⁹¹ clash over. It is submitted that Spencer's 'illuminating conclusion' on the defendant's knowledge shows positive signs of future judicial acceptance. Acceptance that will be pleasantly welcomed, therefore broadening the net of liability for those who deliberately fail to get themselves tested.

The required knowledge of the victim shows far more judicial precedent and support. *Konzani* ruled that in the absence of full disclosure informed consent can still be found.⁹² This was welcomed by Weait,⁹³ yet he remains unsatisfied and requires an even broader approach. Weait contends that informed consent for transmission of disease should be found by every person who engages in unprotected sexual intercourse and lacks knowledge of their HIV negative status.⁹⁴ Weait seems to want to restrict the scope of liability imposed against the defendant and transfer the burden of responsibility to the victim. This would be an unjustifiable shift of responsibility. There should only be one way in which informed consent is created: where the defendant fully discloses his HIV positive status and the victim chooses to continue with sexual activity. *Konzani* was wrong to suggest that there can be other means of disclosure as it has given even more reason for the defendant to keep his condition hidden or escape liability. It is accepted that there are some cases where disclosure may not be an option. For example, where violence is feared. However, the criminal law provides other safeguards for such circumstances. Disclosure from the defendant should be encouraged because the infected party has a strong moral duty of protection towards his or her sexual partner. A duty that should be recognised and respected with openness and honesty.

The use of precaution further confuses the principle of disclosure and recklessness. The case of *Dica*⁹⁵ and the CPS⁹⁶ show positive guidance that the use of a condom will act as a defence. It has

⁹⁰ Weait, 'Criminal Law and the Sexual Transmission of HIV: *R v Dica*', at p.131.

⁹¹ Spencer, 'Liability for Reckless Infection: Part 2', at p.471.

⁹² [2005] EWCA Crim 706, Judge LJ at para.44.

⁹³ Weait, 'Knowledge, autonomy and consent: *R. v Konzani*', at p.771.

⁹⁴ *Ibid* at p.765.

⁹⁵ [2004] EWCA Crim 1103, Judge LJ at para.11.

⁹⁶ Crown Prosecution Service '*Intention or Reckless Sexual Transmission of Infection*' http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/.

been argued to be counterproductive to punish those who take precautionary measures to minimise the risk of transmission.⁹⁷ This argument can be accepted to some extent but only in circumstances where there is disclosure of infection. Disclosure effectively creates an informed consent. Unprotected sexual intercourse with a HIV positive partner is never advised, but the use of a condom, disclosure and consent can be accepted as a defence. It is disagreed that using a condom justifies the lack of disclosure. It is of the utmost importance that the uninfected partner is fully informed as to whether precautionary measures are used and the level of risk they are putting themselves at.

The issues of consent, knowledge, disclosure and precaution are all closely linked. The discussion of one will always need consideration of the other. The defence of consent is the only recent legally certain aspect of transmission of disease. *Dica* and *Konzani* have created the defence of informed consent. *Konzani* widened the defence to include non-disclosure leaving the victim exposed and at risk. Whilst different academics agree or disagree with the comments made in *Konzani* one thing is true. The defendant's responsibility for the sexual health of his sexual partners has been reduced dramatically. In light of recent developments in this area of the law, 'a defendant has plenty of freedom to manoeuvre, while the victim has very little'.⁹⁸

⁹⁷ Ryan, 'Risk-taking, Recklessness and HIV transmission: Accommodating the reality of sexual transmission of HIV within a justifiable approach to criminal liability', 215.

⁹⁸ Cherkassky, 'Being Informed: The Complexities of Knowledge, Deception and Consent when Transmitting HIV', at p.255.