U=U the legal context

Prof Matthew Weait

University of Portsmouth

BHIVA
British HIV Association

U = U

∩ = ∩

HIV in an era of TAsP and PrEP: Legal and Professional Issues

Matthew Weait

Professor of Law and Society

Executive Dean of Humanities and Social Sciences

University of Portsmouth

Declaration of interests relating to this presentation

- None declared

Aims of talk

- Review of the law
- Focus on the relevance of treatment as regards
  - Recklessness
  - Disclosure of HIV positive status
- Consider the impact of U=U and PReP
- Suggest some potential best practice advice options for sexual health professionals

The Law

- What has to be proven in English criminal law?
  - CAUSATION: A infected B (phylogenetic analysis – can DISPROVE but not PROVE)
  - FAULT: A intended to transmit, or was reckless as to whether transmission might occur (for attempt liability, the prosecution must prove that it was A's purpose to infect (but need not prove transmission)
    - Intention: was it A's purpose to transmit, or was it virtually certain to occur and foreseen by by A as virtually certain?
    - Recklessness: did A consciously take an unjustifiable risk that HIV might be transmitted?
  - THE ABSENCE OF A VALID DEFENCE (if raised): Consent to the risk of acquiring HIV is a full defence to a charge of reckless (but not intentional) transmission
- There is no liability for reckless exposure (though cf Scotland)
- All convictions in England and Wales bar one (Daryll Rowe) have been for reckless transmission
- Demonisation in media >


'Pure evil' of the HIV woman who infected her lover

A HEARTLESS blonde monster was jailed yesterday for deliberately infecting a lover with HIV.

Swansea HIV man Mweetwa Muleya jailed for infecting lovers

12 June 2015 | South West Wales


Mweetwa Muleya was jailed at Swansea Crown Court

A man with HIV has been jailed for seven years for infecting two women after having unprotected sex with them and not telling them about his condition.

One victim, known only as Miss B, said Mweetwa Muleya, 28, from Swansea, had destroyed her life.

He pleaded guilty to two counts of causing grievous bodily harm in May.

"The harm to these victims was of the worst kind," said Judge Huw Davies at Swansea Crown Court.

He told Muleya: "You were selfish to a degree which beggars description."

A deliberate 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. Such evidence might be confirmation that the defendant has had a preliminary diagnosis from a clinician who

Evidence that the suspect took appropriate safeguards to prevent the transmission of their infection throughout the entire period of sexual activity, and evidence that those safeguards satisfy medical experts as reasonable in light of the nature of the infection, will mean that it will be highly unlikely that the prosecution will be able to demonstrate that the suspect was reckless.

Where someone who is HIV+ is receiving treatment, one of the effects is a reduction of the amount of the virus in their system (in some cases this may result in an undetectable viral load). In these circumstances, the prospect of the infection being transmitted to another is

Although infection can occur even where reasonable and appropriate safeguards have been taken, it is also of course possible that the infection took place because the safeguards and/or their usage or application were inappropriate. However, prosecutors will need to take into account what the suspect considered to be the adequacy and appropriateness of the safeguards adopted; only where it can be shown that the suspect knew that such safeguards were inappropriate will it be likely that the prosecution would be able to prove recklessness.

To sum up so far …

- A person living with diagnosed HIV, or – in rare cases, a person who believes (correctly) they may have HIV, but this hasn't been confirmed – may be guilty of reckless transmission if they were aware that they might transmit HIV to a partner and in fact do so
- Taking reasonable precautions against transmission will make it extremely difficult to prove that the suspect was reckless
- Reasonable precautions include the use of barrier methods and adhering to anti-retroviral therapy (see also Global Consensus Statement)
- NB a person on treatment whose viraemia is detectable, and who knows this, may be found to be reckless if transmission occurs, if they did not use a condom, and if the partner did not consent to the risk

Disclosure and Consent

- Disclosure of HIV positive status to a sexual partner is not a statutory / legal obligation in English law
- Relevant when there is an allegation of reckless transmission from A to B, in the context of the defence of consent (not applicable in intentional cases)
  - If A claims that B consented to the risk of transmission, this will only be effective as a defence if the consent was "willing and conscious" (i.e. it is insufficient that B was a aware of the general risks associated with sex)
  - A "willing and conscious" consent is most likely achieved through evidence that A disclosed status to B (though NB disclosure as such is insufficient – the relevant question is whether there was consent.
  - If B in fact aware (e.g. via 3rd party), this is sufficient
  - Where consent is raised it is for the prosecution to disprove.

R v Mohammed Dica [2004]:

Consent to risk of infection is available as a defence

R v Feston Konzani [2005]

Consent must be "willing and conscious"

Disclosure (2): Issues

- Assume an allegation by B that they acquired HIV from A (who has HIV positive diagnosis, or correctly believed that they were and had deliberately closed their mind to this), that phylogenetic analysis does not exclude this possibility, and that there is other evidence to support the claim
  - If A was not on treatment, or on treatment but detectable, failure to disclose status will make it all but impossible to claim that B consented to the risk of acquisition
  - The same applies if A was on treatment, but detectable (and was aware of this)
- If A was undetectable at the relevant time, then (a) transmission risk is nil (so prosecution will not succeed, because if B has acquired HIV, it wasn't from A)
- Disclosure of HIV positive status by A if s/he was undetectable is arguably unnecessary, because such information is neither useful nor relevant to B (compare 'I don't know my status' and 'I am not sure whether I am undetectable at the moment' or 'I was undetectable when I last checked, but I've got another STI')

Disclosure (3): PrEP


PrEP anti-HIV medication user who contracted disease holds no grudge, wants to reduce stigma

Exclusive, by Mark Reddie

Updated about an hour ago

- PrEP highly effective, though not 100% so
- A person on PrEP is taking responsibility for avoiding acquisition
- It is moot (and not tested in the courts, or clear in law) whether a person living with detectable HIV needs to disclose status to a partner who they know to be on PrEP
- I think it highly unlikely that a court would be impressed by an argument by A that they ASSUMED B was on PrEP
- If an infection occurred because PrEP failed the following are possible:
  - A court might conclude that A should neverthless have been aware of the risk, and have disclosed
  - A court might conclude that B in effect was consenting to the risk of acquisition, paradoxically, by manifesting their awareness of the risk by taking PrEP (in knowledge that it is not 100% effective)

Best Practice?

- Courts generally defer to professional consensus, especially in medical and treatment matters
- My advice (personal – without prejeudice!)
  - Make sure that any advice provided to patients is clearly noted, and that they understand what has been explained to them (notes can be requested / subpoena'd by court)
  - Read (and discuss with colleagues) the CPS Guidance here
  - Read (and discuss) the Global Consensus Statement here
  - Reassure patients that minimising the risk of transmission through using barrier methods and / or adhering to treatment will almost certainly preclude a finding of recklessness
  - Advise them that if there is a risk that they may transmit to a partner, they should disclose status (and – if possible, find a way of recording that they have done this)
  - Advise them not to assume a sexual partner who consents to unprotected sex is on PrEP, and that this equates to consent to risk
  - Explain that there is no legal obligation to disclose status, that there may be no good reason to do so if they have been undetectable, but that if there is any chance at all that they may have detectable virus (e.g. treatment failure, co-infection etc), then better to dislcose and / or use barrier methods

THANK YOU! Feel free to contact me …

matthew.weait@port.ac.uk

@ProfWetpaint

References / Further Reading

Bernard, E., Geretti, A-M, van Damme, A., Azad, Y. and Weait, M. (2007) 'HIV forensics: pitfalls and acceptable standards in the use of phylogenetic analysis as evidence in criminal investigations of HIV transmission' *HIV Medicine*, 8, 382–387

British HIV Association guidelines for the treatment of HIV-1-positive adults with antiretroviral therapy 2012
http://www.bhiva.org/documents/Guidelines/Treatment/2012/hiv1029_2.pdf

BHIVA (2013) HIV Transmission, the Law and the Work of the Clinical Team
http://www.bhiva.org/documents/Guidelines/Transmission/Reckless-HIV-transmission-FINAL-January-2013.pdf

Burris S, Beletsky L, Burleson J, et al. Do criminal laws influence HIV risk behaviour? An empirical trial. Ariz St L J 200739:467-516.

Crown Prosecution Service: *Intentional or reckless sexual transmission of infection* guidance 2011.
http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/

Dodds C, Bourne A, Weait M. Responses to criminal prosecutions for HIV transmission among gay men with HIV in England and Wales. *Repro Health Matters* 2009 17(34):135-45

Dodds C, Weatherburn P, Bourne A, et al. Sexually charged: The views of gay and bisexual men on criminal prosecutions for sexual HIV transmission.
http://www.sigmaresearch.org.uk/go.php?/reports/report2009a

Dodds, C. Weait, M. Bourne, A. Egede, S. (2015) 'Keeping confidence: HIV and the criminal law from HIV service providers' perspectives', *Critical Public Health*, 25 (4): 410-426

Galletly CL, Dickson-Gomez J. HIV seropositive status disclosure to prospective sex partners and criminal laws that require it: Perspectives of persons living with HIV. *Int J STD AIDS* 2009; 20:613-618.

Galletly CL, Glasman LR, Pinkerton SD, et al. (2012) New Jersey's HIV exposure law and the HIV related attitudes, beliefs, and sexual and seropositive status disclosure of persons living with HIV. *AJPH* 2012a;102(11):2135-2140.

Galletly CL, Pinkerton SD, DiFranceisco W. A quantitative study of Michigan's criminal HIV exposure law. *AIDS Care* 2012b;24(2):174-179.

Gray, J. (2014) 'What constitutes a "reasonable belief" in consent to sex? A thematic analysis', *Journal of Sexual Aggression*, pp. 337-353. https://doi.org/10.1080/13552600.2014.900122

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

Horvath KJ, Weinmeyer R, Rosser S. (2010) Should it be illegal for HIV-positive persons to have unprotected sex without disclosure? An examination of attitudes among US men who have sex with men and the impact of state law. *AIDS Care* 2010;22(10):1221-1228

Pillay, D. and Fisher, M. (2007) 'Primary HIV infection, phylogenetics, and antiretroviral prevention', *The Journal of Infectious Diseases*, 195: 924-926

Sigma Research (2013) Keeping Confidence : HIV and the criminal law from service provider perspectives (2013): http://www.sigmaresearch.org.uk/go.php?/projects/policy/project55

Ward C, McQuillan O, Evans R (2017) 'Chemsex, consent and the rise in sexual assault' *Sex Transm Infect* 2017;**93:**A5 http://dx.doi.org/10.1136/sextrans-2017-053232.14

Weait, M. (2007) *Intimacy and Responsibility: the Criminalisation of HIV Transmission* (Abingdon: Routledge).