

CRIMINALISING SICKNESS?

Liability for the Transmission of disease

Professor J.R. Spencer, QC

University of Cambridge

WYNG-Hatton Lecture Series

16 September 2014

Sir Matthew Hale, 1609-1676



Ms. 4012

HISTORIA
PLACITORUM CORONÆ.

THE
HISTORY
OF THE
Pleas of the Crown,

By Sir MATTHEW HALE Knt.
sometime Lord Chief Justice of the
Court of King's Bench.

Now first published from his Lordship's Original Manu-
script, and the several References to the Records examin-
ed by the Originals, with large Notes.

By SOLLOM EMLYN of *Lincoln's-Inn* Esq;

To which is added
A Table of the Principal Matters.

In Two Volumes.

VOL. I.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of
Edward Sayer, Esq;) for F. OYLES over-against *Grays-Inn* in
Holborn, T. CLAWDWARD at the Half-Moon between the Two
Temple-Gates in *Fleet-Street*, and C. DAVIS in *Pater-noster-row*.
M DCC XXXVI.

Moriendi mille figura.

A man infected with the plague, having a plague sore running upon him, goes abroad, this is made felony by the statute of 1 *Fac. cap. 31.* but is now discontinued (*f*); but what if such person goes abroad to the intent to infect another, and another is thereby infected and dies? whether this be not murder by the common law might be a question, but if no such intention evidently appear, tho *de facto* by his conversation another be infected, it is no felony by the common law, tho it be a great misdemeanor, and the reasons are,

1. Because it is hard to discern, whether the infection arise from the party, or from the contagion of the air, it is God's arrow, and
2. Nature prompts every man, in what condition soever, to preserve himself, which cannot be well without mutual conversation.
3. Contagious diseases, as plague, pestilential fevers, small-pox, &c. are common among mankind by the visitation of God, and the extension of capital punishments in cases of this nature would multiply severe punishments too far, and give too great latitude and loose to severe punishments.

Offences Against the Person Act 1861

s.20

“Whosoever shall unlawfully and maliciously wound or inflict grievous bodily harm upon any person, either with or without any weapon or instrument, shall be guilty of an offence, and being convicted thereof shall be liable to imprisonment for a term not exceeding five years.”

OAPO (Hong Kong) s.19

“Any person who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for 3 years.”

S.20 (S.19) – continued

“... unlawfully and maliciously wounds or inflicts any grievous bodily harm ...”

inflicts = causes

maliciously = “intentionally or recklessly”

recklessness = “advertent negligence”

R v Clarence (1888)

“... Millions of men and women must have infected their consorts with VD without being prosecuted. Perhaps the court in *Clarence* merely disliked bringing the marital bed into the criminal law. At the present day there is a recognised policy against prosecuting for infectious disease, because of the risk that prosecutions may inhibit people from seeking advice or reporting contacts ... At the same time, it was unfortunate that the solution found by the court involved a general narrowing of the scope of section 20.” (Glanville Williams, 1983)

- Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles*, 1993 (p.33)
- Home Office, *Violence: Reforming the Offences Against the Person Act*, 1998
- “The Government is particularly concerned that the law should not seem to discriminate against those who are HIV positive, have AIDS or viral hepatitis or who carry any kind of disease. Nor do we want to discourage people coming forward for diagnostic tests ... because of an unfounded fear of prosecution.”

Change of direction

- *R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257
- *R v Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App R 14
- *R v Golding* [2014] EWCA Crim 889 (14 May 2014)



LIVE

BBC NEWS CHANNEL



Last Updated: Tuesday, 14 October, 2003, 14:08 GMT 15:08 UK



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HIV man guilty of infecting lovers

A man diagnosed with HIV has been found guilty of "callously" infecting two women with the virus in a landmark legal case.

The jury at Inner London Crown Court found 37-year-old Mohammed Dica guilty of two counts of "biological" grievous bodily harm on Tuesday.



Dica said both women knew he was HIV positive

Father-of-three Dica, from Mitcham, south-west London, had told police both women knew of his condition before they had sex.

But the court heard he told his first victim he had undergone a vasectomy and pursued the second victim, a mother of two, repeatedly telling her he loved her and wanted her to have his children.

Reckless Trials?

Transmission of HIV and the Criminal Law

A Public Meeting

Two men have recently been convicted for infecting women with HIV. Another is awaiting trial
These cases have received national coverage and there has been significant support for the prosecutions in the media

Serious questions about law, health, race and sexuality are being ignored and overlooked

What are the implications for health promotion policies?
Will the convictions encourage people not to get tested?
How was it possible to convict under section 20 of the OAP Act?
Do the prosecutions represent an explicit change of policy by the CPS?
Why are the 1998 Home Office proposals being ignored?
Are asylum seekers being targeted just by the media or by law?

If you are concerned by these trials and are interested in developing a co-ordinated response with lawyers, health campaigners, immigration and asylum advisers, academics and activists, please join us

***Tuesday 30 March 2004
5.30pm – 8pm
Room 541, Birkbeck College, University of London, Malet Street, London
WC1***

For more information contact:
Daniel Monk (d.monk@bbk.ac.uk) or **Matthew Weait** (weait@hotmail.com)

'Predator' who gave women HIV gets 10 years

Judge says he hopes sentence will be a deterrent as musician is jailed

David Ward

A man who infected three women with HIV by having unprotected sex with them was jailed for 10 years yesterday for causing them grievous bodily harm.

Teesside crown court heard that Feston Konzani, a 28-year-old musician, did not tell the women he had the virus.

He admitted infecting the women in Middlesbrough between 2000 and 2003 but denied causing them grievous bodily harm. A jury of eight men and four women took less than three hours to find him guilty of all three charges.

The women were a 15-year-old virgin whom he kept prisoner at his home in Middlesbrough, a 27-year-old student who had a child by him, and a 26-year-old voluntary worker.

rural village and invited him back to his official residence, where a gay relationship developed.

In 1998 Mr Henderson, 38, paid for Konzani to fly to Britain in the hope they could continue their relationship. When he arrived at Gatwick Konzani claimed asylum on the grounds that he was gay and that homosexuality was illegal in Malawi.

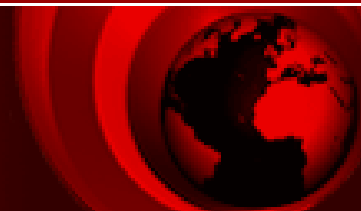
He was sent to Middlesbrough by the immigration service, embarked on a string of affairs and was arrested in 2003 and accused of inflicting GBH.

"No matter what the outcome of this case, it is a tragedy for the women involved and our thoughts must be with them and their families," Detective Sergeant Ted Allen of Cleveland police



LIVE

BBC NEWS CHANNEL



Last Updated: Thursday, 17 March, 2005, 13:58 GMT



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HIV man loses conviction appeal

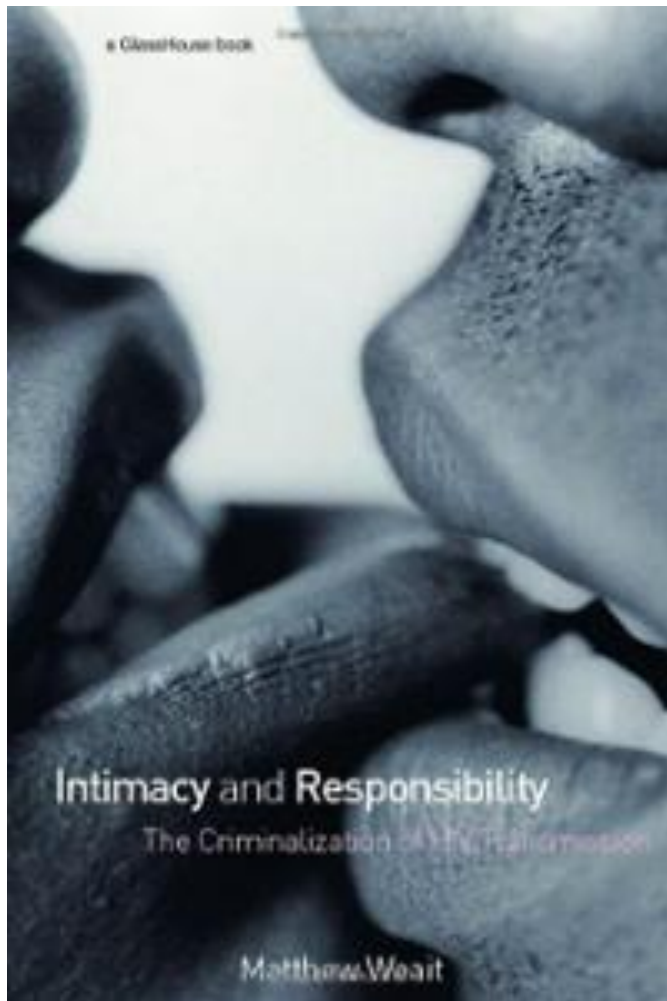
An asylum seeker who infected three women with HIV by having unprotected sex knowing he had the virus has lost his appeal against conviction.

Feston Konzani, who lived on Teesside, was jailed for 10 years last May.



Konzani infected three women with HIV

His lawyer Timothy Roberts, QC had claimed at the Court of Appeal that the convictions were "unsafe" because of "two legal errors".



Matthew Weait

Dr Matthew Weait BA, MA, MPhil, DPhil is Professor of Law and Policy in the School of Law at Birkbeck College, University of London and Pro-Vice-Master. [Wikipedia](#)

Born: August 24, 1963 (age 51)

Education: [University of Oxford](#)



Neutral Citation Number: [2014] EWCA Crim 889

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Northampton Crown Court
HHJ Fowler
T20100442

Case No: 201105243 C2

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2014

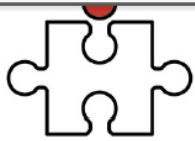


Before:

LORD JUSTICE TREACY
MR JUSTICE BEAN
and
HIS HONOUR JUDGE LAKIN

Between:

Regina
- and -
David Golding



Herpes Viruses Association

Registered charity 291657

41 North Road London N7 9DP

CONTACT: HVA office: 020 7607 9661

Marian Nicholson: 07914 704437

Nigel Scott: 07794 218556

mail: info@herpes.org.uk

twitter: @HerpesUk

8 May 2014 – IMMEDIATE RELEASE

Herpes case: “We are appalled at the court’s failure to overturn the guilty verdict. Herpes virus transmission should not be in the legal arena at all.”

Accountant, Lancashire, 2 years ago

"Herpes Viruses Association said his sentence was outrageous and compared case to prosecuting children for giving their friends chicken pox" Rubbish. If you knowingly infect someone it's a completely different thing. He didn't have to have sex with her knowing he would infect her. It's an infection that can't be cured - it's with you forever. And it's not right at all that some people think they should demand that you put up with it for life because THEY consider it trivial. If a rapist considers attacking his victim trivial we don't let him off. If a poisoner doesn't actually kill someone we don't let them off. There'd be a lot less illness in the world if we stopped saying it's ok to be reckless and infect people with whatever you've got. Unknowingly passing something on isn't a crime. Knowing that there's a good chance you're infecting someone but you're going to do it anyway should be.

Three possibilities ...



Specifically
criminalise

Treat normally: prosecute if
general law applies

Specifically
decriminalise

Decriminalisation ?

- “keep the criminal law out of the bedroom”
- “unfair to discriminate against the sick”
- “it demonises certain illnesses”
- “it is unduly burdensome to the sick”
- “the [so-called] victim is the one to blame”
- “partners won’t insist upon precautions”
- “carriers will avoid testing or treatment”
- “education, not punishment, is the answer”

Two important limitations:

- “Recklessness” has an *objective element*
- Informed consent is a defence

Crown Prosecution Service Guidelines

“These offences are highly sensitive. To ensure consistency of approach, details of all cases (see below for information to be supplied) in which charges of intentional or reckless sexual transmission of infection are being considered must be sent to the Director's Principal Legal Advisor (PLA). This is in order to allow the PLA to oversee charging decisions being made in these cases and to provide advice in appropriate cases. Accordingly, the PLA must be notified prior to any decision being communicated to the police.”

Italian Criminal Code, art. 554 (now repealed)

“A person who, being infected by syphilis and concealing his condition, performs on another acts likely to carry the risk of infection, is punishable, if infection results, with imprisonment of between one and three years.

The same penalty applies to a person who, being infected with gonorrhoea and concealing his condition, performs on another the acts mentioned in the previous subsection, if infection occurs and serious injury results from it.

In either case the defendant is prosecuted on the complaint of the victim.

Articles 583, 584 and 585 apply if the defendant acted with the intention of causing infection.



Benito Mussolini.

Nr.209.

“Normal treatment”: any special problems?

- “God’s arrow” – problems of causation
- “But D’s behaviour is just as blameworthy, even where V is lucky and doesn’t catch the disease!”
- *Should* there be general criminal liability for needlessly exposing other persons to serious danger?

Criminal liability for exposure to risk:

English law: specific offences (e.g. Health and Safety legislation).

France: a general offence. Criminal Code, Article

223-1: “The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation is punished by one year's imprisonment and a fine of €15,000.”

Germany and The Netherlands: conscious risk-takers can be prosecuted for attempt.

“een aanmerkelijke kans” – “a significant chance”

Udo Schuklenk

Professor

PhD (Monash). Ontario Research Chair in Bioethics

Specialization: Bioethics, Applied Ethics, Public Health Ethics, Research Ethics, Publishing Ethics

Office: Watson Hall

Office Hours: N/A

Phone: (613) 533.6000 ext. 77035

E-mail: udo.schuklenk@gmail.com

Website: <http://www.udo-schuklenk.org/>

Blog: <http://ethxblog.blogspot.com/>



Udo has taught at universities in Germany, Australia, the UK and South Africa before coming to Queen's. He has written or co-edited five books and authored or co-authored some 100+ publications in peer reviewed journals and anthologies. He's a Joint Editor-in-Chief of *Bioethics* and *Developing World Bioethics*. Udo's main research interests are in the areas of public health issue and infectious disease control. His most recent journal contributions include papers in the *American Journal of Public Health* on mandatory HIV testing and the *Journal of medical ethics* on religious symbols in doctors' rooms.

Conclusions?

- “... It seems to me that it is the opponents of criminalisation who have to prove their case.”
“The reason for this is that the criminal law’s deterrent effect has been demonstrated time and again...”
“If an argument is made that in a specific context (e.g. where sex is involved) the deterrent effect does not work, empirical evidence must be produced” [Udo Schüklenk, *International Journal of Law in Context*, 2008, 277-283]

“sending a signal”

