CRIMINAL LIABILITY FOR THE TRANSMISSION OF HIV

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In *R.* v. *Dica* [2004] 3 W.L.R. 213, the Court of Appeal decided that a man who knows that he is infected with the HIV virus but who infects his unsuspecting sexual partner through unprotected sexual intercourse should be punishable for inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861. The Court did in fact quash the conviction of the accused, because the judge at the Old Bailey had not instructed the jury to decide whether or not the two infected partners of the accused had known of his infection and agreed to take the risk of contracting it themselves (this having been in dispute at the trial). Yet the case was sent for retrial, and if the next jury, properly directed, should find that his partners did not agree to take the risk of contracting the potentially fatal virus, then Dica would be properly convicted under OAPA, section 20.

Two important points of principle were decided in the Court of Appeal. First, if a person *does* consent to the risk of contracting HIV through sexual intercourse (through love of an infected partner, perhaps, or through a conscientious objection to using contraceptives) then no offence is committed by the carrier if the disease is transmitted. The trial judge, following *R.* v. *Brown* [1993] 2 All E.R. 75, had thought otherwise, and that is why (believing that there could be no defence based upon consent) he had (wrongly) instructed the jury that it did not need to decide whether Dica's victims had consented. But the cases are properly distinguishable. In *Brown*, sexual gratification was achieved through the harm itself—that is, pleasure was sought only through the pain of another; whereas the parties who have sexual intercourse will be seeking their gratification through the intercourse itself and will be hoping fervently that the harm potentially caused by the virus will *not* occur. It is not clear, however, whether this part of the decision in *Dica* should be interpreted to be (a) that the need to find a "good reason" (as first required in *Attorney-General's Reference*

(No.6 of 1980) [1981] Q.B. 715, 719 (CA) and confirmed by the House of Lords in *Brown*) for consented-to activity only applies to cases where the bodily harm is intended by the defendant, and that there need not be any good reason at all for taking a consented-to *risk* of causing serious harm, or (b) that there *still* needs to be a "good reason" for the activity even where the doer does not wish to cause bodily harm but is aware of the risk that he might do so, but it is now much easier to find that good reason, and the pursuit of sexual gratification might normally qualify.

The second important point of principle in *Dica* is that consent *to sexual intercourse* is not to be equated with consent *to the risk of contracting HIV through sex*. The latter is more difficult to establish because it depends upon an assessment of risks of possible consequences. To put it in another way: consent to sexual intercourse requires only a *general understanding* of sex; and so, provided that a woman understands that *all* sexual intercourse carries an inherent risk of pregnancy and disease, rape is not committed. But to consent to the risk of bodily harm requires a more nuanced understanding of the nature of the risk involved, and here ignorance of a fact which affects the risk from *a particular act of congress* (such as the fact that the man suffers from HIV) might negate the consent of the other. Now, almost every person who agrees to unprotected sexual intercourse surely knows that there is always, statistically, some risk of contracting HIV. Someone may unknowingly carry it without showing symptoms. A careful person might yet choose to take that risk, for it is much smaller than the risk of contracting the disease from some one who is *known* to be carrying it. The difference is so great that we might say that consent to the small risk is not at all consent to the much larger risk. That may have been the case in *Dica*: thus the retrial. But where the victim has information about her partner which would put him in a high risk category, then a jury will need to decide whether she consented to a risk of contracting the virus which was sufficiently close to the real risk. Exactly *how* close the victim's estimate of the risk of contracting HIV must be to the *actual* risk in order for her consent to be valid is a thorny question. If the (true) risk of transmission also varies between individuals, then clearly some difficult cases await us.

In fact, punishing the transmission of HIV will always be a perilous affair in practice, perhaps even more difficult than securing convictions for rape. First, there is the question of causation: to show that the victim contracted the virus *from the defendant* might lead to the sort of cross-examination of the victim's sexual habits which used to deter so many women from reporting rape. There

will be separate problems where the HIV carrier did not *know* of his infection (*i.e.*, if he had not been tested). Though he should still in law be reckless as to causing harm if he *suspected* that he had the virus, it will be surely much harder to prove beyond doubt a mere suspicion. Then a defence of consent to the risk of transmission may be run, with the difficulties outlined above. If that is not enough, the defendant may seek to avoid liability by claiming that he *believed* that his partner consented to the risk; and at common law, a mistaken belief would not need to be reasonably grounded. Here, the problems caused by mixed signals in sexual matters between men and women in rape cases might be magnified: perhaps a man will claim that by having alluded vaguely to "having had a bit of past", he thought that he made it clear that he had had a number of unprotected encounters, and that his partner thus gave consent to something like the true nature of the risk of contracting HIV from him.

One might well think these points (and others) militate against the creation of criminal liability in *Dica*. Professor A.T.H. Smith has cogently argued that the Court of Appeal may have violated all the established principles in determining whether judicial (as opposed to legislative) extension of the criminal law might be proper ([2004] Crim. L.R. at 977). The objection that the decision brings about obscurity rather than finality is correct; for example, what will be the effect upon recklessness, consent and belief in consent to the risk of communicating HIV where a condom is used? But if the worst of the problems in prosecuting HIV carriers for transmission are likely to be practical (as outlined above) rather than purely legal, then the argument is not forceful by itself—legislation would not obviously be much more effective than judicial fiat in addressing these practical problems. It is also true that Parliament has avoided opportunities of addressing the liability of the HIV carrier. But the reality is that governments, and not Parliaments, decide which legislation is to be debated, and sometimes a government refrains from confronting a problem through sheer political cowardice. Perhaps the principle *ought* to be that the courts should refrain from making new law only whilst the government of the day is already taking active consultative measures towards revising it, or has promised to do so? In that case, we might welcome *Dica* for allowing the punishment of the undoubtedly culpable and selfish carrier but only on the condition that, in view of the myriad difficulties in prosecuting such cases, it is likely to be only clear-cut cases (where the man *knows* that he has the disease *and* goes so far as to hide all signs of it from his partner) which will be pursued. It is not a perfect solution. There is

still the risk of private prosecutions, and it is not obviously proper to wish to restrict that right simply because the substantive criminal law may be wider than it needs to be. But the record of British governments in taking prompt action in clearing up controversial points of criminal law is so dire (how long did we wait for the Abortion Act 1967, and where is the legislation on euthanasia?) that waiting for Parliament is no solution at all.

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