The Criminal Transmission of HIV: Issues with Condom Use and Viral Load

Abstract: This article considers two issues in relation to the criminal transmission of HIV. Currently the use of condoms, and a defendant’s viral load, has not been an issue that has been raised in the courts. The article considers how the defence, prosecution and judge may deal with such evidential issues. It will discuss how an expert opinion may be utilised or discredited by counsel for the defendant and counsel for the prosecution. The article will consider how the defence can demonstrate that the defendant was not reckless and how the prosecution can establish that the defendant was actually reckless. It was also assess how the judge, in trial, may address condom use and the level of the defendant’s viral load when directing the jury. Finally it is argued that it is in the public interest to allow condom use and viral loads to be used to negate recklessness.

Introduction

Much has been written on the criminalisation of HIV transmission. The law is unequivocal in one respect, namely that an individual who is HIV+ and has consensual unprotected intercourse with another person can be prosecuted under s. 20 of the Offences Against the Person Act 1861. He will be guilty of the offence if he transmits HIV to an unsuspecting complainant. If the complainant consents to unprotected intercourse and has knowledge of the defendant's HIV status, this will act as a defence and the defendant will be able to avoid liability.

The statistical probability of transmission through safe sex, the advancement of anti-retroviral medication and the level of the defendant’s viral load signify that there are more circumstances where a defendant may be able to evade conviction or mount a successful defence. Given that these issues have not been addressed in the English
courts there may, at some point, be a case where competing viewpoints maybe raised. In the event of a victim contracting the virus, and a subsequent prosecution being made, the defence counsel could attempt to rebut the allegation that the defendant was reckless in transmitting the virus to another. This could be achieved, by adducing evidence that would assist in establishing that the defendant was using condoms or that they had a low or undetectable viral load. It is currently uncertain as to what the outcome would be in these cases and as such these areas need further elucidation.

Both the judiciary and academics have proposed that the use of condoms may mean that the defendant should not be liable. Medical studies have shown that when a defendant's viral load is at such a level that it is undetectable, it is extremely unlikely that he will transmit the virus. The viral load can be reduced by taking medication. If such evidence were to be admissible it would be left to the jury to decide whether the defendant should be guilty of recklessly transmitting the virus to another. The purpose of this paper is to assess what needs to be taken into account when evidence of condom use or low or undetectable viral load has been put before the court.

**The Role of the Prosecution and the Defence**

The prosecution, in order to secure conviction, must prove each element of the offence. It must be established that the defendant knew that he had the virus and that he still took an unjustified risk. This means that the prosecution also needs to establish that the virus came from the defendant. In order to overcome this obstacle the prosecution would require scientific evidence of the direct relationship of the virus in the defendant and in the complainant and this is achieved by phylogenetic
analysis. This is the process whereby it can be established that the defendant and
the complainant’s strains of the virus are related. The analysis attempts to match the
strain of the virus in the complainant with the strain that the defendant is carrying.
This does not mean that it is 100% accurate. Bernard et al state that phylogenetic
analysis has its limitations and that any expert giving evidence of such matters
would need to explain this to the court. For example, the strain could be attributed to
more than the two people involved in the case. The Crown Prosecution Service
(CPS) acknowledges the fears that Bernard expresses and states that such analysis
would only show that the defendant possibly transmitted the virus to the complainant
and that more evidence would be required.

The defence would need to adduce evidence that the defendant knew that using a
condom or having unprotected intercourse with a low or undetectable viral load
would reduce the risk of transmission. Raising such issues would mean that expert
opinion would be required. So in these types of cases the defendant would be
proposing that he was not reckless in his conduct as they were aware that condoms
significantly reduce the risk of transmission and this was the reason why they used
such protection. The same can be assumed of the viral load as a defendant may be
able to establish that, on the number of occasions that they were tested, the viral
load at was such a level that they could not have transmitted the virus to another.

**Condom Use**

The law surrounding condom use in sexual transmission of HIV cases is
indeterminable. There is a distinct lack of clarity as to whether condom use can
demonstrate that the defendant was not being reckless. If the defendant is aware
that consistent use of protection significantly reduces the risk would this enable him
to claim that he should not be held to account for his conduct? In the trial of Feston Konzani, the use of condoms appeared to be a pivotal issue as the prosecution, in evidence in chief, sought to establish that the defendant began to use protection with the same person and then ceased doing so. This seems to imply that the use of condoms is relevant in these types of case.12

In *R v Dica,*13 Judge LJ stated that levels of precaution may be an issue that could be left for the jury to assess whether such protection would be sufficient for the defendant to evade liability, thereby indicating that such evidence would be admissible. Further endorsement emanates from Crown Prosecution Service (CPS) guidelines where it is recognised that prophylactic measures may signify that there could be no prosecution as it would be difficult to ascertain that a person who was using precautions was being reckless.114 Emphasis is also made on the defendant ensuring that such precautions are used. Although the CPS concede that condom use may not establish reckless behaviour they do not provide any legal basis for such assertions but ultimately it is the CPS who decide whether or not to prosecute.

If the infected person is practising safe sex, then it may be difficult for the prosecution to prove that the defendant acted recklessly or intentionally in transmitting the virus. For a successful conviction under s20 OAPA 1861 the prosecution must establish that the defendant was reckless as he foresaw that he might transmit the virus and still took that risk.115 ‘Recklessness’ is best defined as unjustifiable risk-taking, and Judge LJ stated that recklessness is established ‘if he knew or foresaw that the complainant might suffer bodily harm and chose the risk that she would’116
There are potentially two schools of thought in ascertaining whether the defendant’s behaviour was reckless whilst using condoms. Firstly, it is suggested that he knew there was a risk of transmission and therefore he reduced the risk by using a condom, thereby being responsible rather than reckless in their conduct. The use of a condom establishes that the defendant is conscious that he may infect another, and as he has used precautions, it could be persuasively asserted he was not being reckless. Secondly, it is possible to stipulate that even if the defendant took precautions, the Crown, in contrast to the CPS guidelines, may still establish that the defendant foresaw harm and still took the risk and such a risk was not a reasonable one to take. Therefore he knew there was still a risk of transmitting the virus and he still decided to proceed with that awareness.

What is evident is that the use of condoms will significantly decrease the risk of infection. This can be supported by a number of medical studies in relation to female and male protected intercourse. The estimations suggest that the chance of transmission is significantly reduced by the use of precautions. This is even so when taking into account the various permutations that surround the issue. It can also be stated that there is a lack of certainty in the various meta-analysis of condom use and risk of transmitting the infection. The studies rely heavily on the accuracy of the information they have been given by the people who were being studied.

All of the studies accept that consistent and correct use of condoms will significantly reduce the risk of transmitting HIV to another. Utilising such studies may be problematic as there is no common consensus of what is the actual risk but ultimately there is still some type of risk. The estimations of reducing the risk of transmission range from 80% to 94%. These are by no means certain. For example, it is acknowledged by Pinkerton et al that there can still be a number of factors that
can increase or decrease the risk. The factors that can affect the level of risk were stated to be the number of ‘sexual contacts, frequency of condom use and the serostatus of the infected person’s partner’. It was further specified that for accuracy their study only consisted of material from studies that compared consistent condom use with inconsistent or no use. The study concluded that the use of condoms will reduce the risk by 94% for male to female transmission.

The methodology of the study was deemed to be defective by Weller as it utilised information from three sources. It was suggested that only data from people who either used condoms or did not use them should have been used. This, logically, would have provided more accurate information. Contrastingly, Hearst and Chen propose that the Pinkerton study was the most rigorous of the studies that are available as it used a number of different studies to ascertain the risk. Although the study used a number of sources this still does not take away that the accuracy of the data being questionable. Even though they advocated the Pinkerton study Hearst and Chen suggest that the risk of infection is decreased by 90%. In 1999 Weller estimated the risk would reduce to 87%. This study was based upon couples who used condoms and couples who do not use such protection. A subsequent study by Weller concluded that protected vaginal intercourse reduced the risk by 80%. Thus the two studies by Weller show inconsistent results.

Such statistics would seem to assist the defence in that the risk is significantly reduced when condoms are used. This is so even though there are differing estimates as to the risk factor. It would surely be in a defendant’s interest to raise consistent condom use as an issue that should be put to the jury and that expert opinion would be required. However, it is submitted that there are problems with the accuracy of the figures as the only measure of use of condoms is by self-reporting.
Therefore the odds of transmission could be potentially higher or lower as the studies are heavily reliant on the couples providing accurate and truthful information. As mentioned earlier it has also been recognised that the ‘effectiveness’ of condoms may be significantly altered by other factors.\(^{29}\)

The prosecution may question the accuracy of these studies for the reasons set out above. It may also be in the prosecution’s interest to use the Canadian cases, particularly as there is a lacuna in our own law on such matters. The leading case of \(R \text{ v Mabior}\)\(^{30}\) is quintessential in establishing the prosecution’s argument as to the risk posed even when condoms are used. In \(Mabior\), it was stated that condom use will only negate a charge if the defendant also has a low viral load as there would no longer be a ‘realistic possibility’ of transmitting the virus.\(^{31}\) Thus that judgment dictates that combination of factors are essential if disclosure of one's HIV status is not a requirement. It seems that unprotected or protected intercourse is now unimportant in Canada as it is no longer considered to be the demarcation line for prosecutions as a low viral must also be taken into account. This may yet be the case in England. It is submitted, however, that there can be a cogent argument constructed that is an alternative to the decision and more favourable to the defendant. Why would it be necessary to disclose that you have the virus if you have significantly reduced the risk of transmission? The use of condoms demonstrates that he is reducing the risk of transmission and being responsible rather than irresponsible. The use of condoms is also in line with public health initiatives.

**Viral load**

The World Health Organisation states that the level of an individual's viral load is one of the greatest risk factors in transmitting the virus to another person and that
reducing the level of the load can be one of the most effective ways of diminishing the possibility of HIV transmission. Another study has also clarified that the level of a person's viral load is the chief predictor in the risk of transmission.

It has been suggested that those with an undetectable viral load, who have unprotected intercourse knowing they are HIV positive, would not be considered reckless. Whether a low or undetectable viral load can be utilised by the defendant to establish that they were not reckless has not been addressed by the courts. Neither of the leading cases on the criminal transmission of HIV considered the defendant's viral load as these cases were concerned with consent. It is submitted that if the defendant has a low or undetectable viral load, he would need to be aware of its level in order to be able utilise it as an issue that the defence can put before the jury.

As previously stated the level of an individual's viral load can be a deciding factor as to whether the virus will be transmitted, the lower the load the less likely is the possibility of infecting another person. The viral load is reduced by taking antiretroviral treatment (ART) and consistent use of the medication can decrease the load to an amount where it will be undetectable. In such circumstances, the CPS acknowledge that the risk may be so significantly reduced that it can be contended that the level of the viral load can be just as effective as condom use in alleviating transmissions. This may denote that an individual's viral load would need to be taken into account when deciding whether to prosecute. This does not take away the fact that the defendant's viral load may still be an issue that is raised at trial.

It is evident that the level of the viral load is intertwined with the use of antiretroviral medication. The studies suggesting that the reduction of the viral load can also
reduce the risk of transmission may assist the defence counsel in establishing that the defendant was not reckless. Anglemyer et al found that the use of antiretroviral medication lowered the risk by at least 40% of the uninfected partner contracting the virus in comparison to the couple where the infected partner is not taking the medication.\textsuperscript{39} If the sufferer of the virus continues to take the appropriate medication the amount of copies/ml of the virus in the blood significantly decreases.\textsuperscript{40}

Other studies propose that the virus cannot be transmitted when the individual has a viral load that is undetectable. The Swiss Federal Commission for HIV/AIDS issued a statement regarding the use of ART and the transmission of HIV. It was announced that if an individual does not have another sexually transmitted disease, complies with his ART and has had an undetectable load for at least six months, they will be unable to transmit the virus.\textsuperscript{41} If the accuracy of the Swiss statement could be assumed, then an undetectable viral load is even more effective in prevention than condom use. However, the sheer complexities of adhering to the obstacles in the Swiss study may make this study inadequate for the defence counsel.

Following that study it was stated that if the viral load remains below or at 50 copies/mL, for several tests then the viral load remains undetectable 94% of the time.\textsuperscript{42} This clearly indicates that after a number of consistent results there is a high probability that the virus will remain undetectable. The same study further amplified the need for condom use where it was stated that even though the medication can reduce the viral load to inhibit the risk of transmission it should not replace protective measures.\textsuperscript{43} Wilson et al were also critical of the Swiss statement stating that it sends out the wrong public health message. However, the Swiss statement does actually state that couples should only abandon the use of protection if the HIV
negative partner agrees. There was also suggestions that there is a distinction in risk between heterosexual and homosexual couples.  

As with condom use the prosecution may need to seek guidance from other jurisdictions. The Supreme Court of Canada has clarified the position in relation to a low viral load and that alone would allow a defendant to avoid liability in non-disclosure of HIV cases. Undetectable viral loads were distinguished as it was stated there is difficulty in establishing accuracy as such they pose evidential difficulties. The case demonstrates that a low viral load in isolation is irrelevant. It is submitted that there is no authority to assist the prosecution in cases where the defendant can establish that they had an undetectable viral load. Rather interestingly the court in *Mabior* appeared to endorse medical evidence of how quickly the viral load can be reduced when the appropriate medication is taken but it still stated it could pose a realistic possibility of transmission. Other factors that may support the prosecution case would be the aforementioned study that suggested that condoms should still be used even when the levels of the viral load have been significantly reduced.

When there is an undetectable viral load it is arguable that the risk of transmission is not foreseeable and there should be no prosecutions when a load is at that level. The defence counsel could argue that it is inexplicable to contemplate that the defendant with a low or undetectable viral load would need to disclose their status when the risk of transmission is negligible or non-existent. Further support is that the Canadian Supreme Court decision is contrary to some medical evidence as it too easily discarded the Swiss statement by accepting one expert’s opinion of it. The expert stated that there was difficulty with the ‘qualifications’, required further research and that it was only based upon a review of literature.
**Directing the Jury**

When directing the jury the judge would need to explain whether the defendant was aware of the risk of transmitting the virus.\(^{52}\) This subjective awareness would need to be considered within the context of condom use and/or viral load. This is a difficult proposition for a judge to evaluate as a direction could indicate that the defendant was certainly aware of the risk hence why they took precautions and that it can still equate to being aware of reducing the risk. It would depend on the specifics of each individual case. If the issue is the viral load it would depend on whether it was low or undetectable. If the defendant has, through medical advice, been made aware of the significantly reduced risk could any direction state that they were aware that there was still a risk or could it be submitted that there was no risk? The second limb for a direction on recklessness is an objective test of whether the risk was a reasonable one to take.\(^ {53}\) As in the case of condom use it can be stated that there are persuasive arguments for either side.

**Conclusion**

As has been demonstrated the current law as to whether condom use or the level of the viral load can exonerate a defendant is uncertain. It is the complexities of such evidential issues that are rather paradoxically clear; either side in a criminal trial can provide a cogent argument. Even though there are strong contentions for either party the law should still be able adapt to an ever changing environment as was the case when prosecutions under s20 came to prominence.\(^ {54}\) As such either condom use or a low or undetectable viral load could be accommodated. It is the lack of precision, in relation to the issues, that makes it a difficult proposition for either counsel to provide clarity when advising. In fact the only way that the outcome of the case could be
predicted would be by referring to the CPS guidelines or by utilising the case law from Canada. This provides an element of an appropriate balance as one favours defence and the other assists the prosecution, but there is still uncertainty.

It is submitted that the use of condoms would demonstrate a more responsible attitude to sexual liaisons and therefore the prosecution may find it difficult to ascertain that the defendant was being reckless when the virus was transmitted. There could be one possible way of establishing reckless behaviour, in these situations, if the defendant did not use protection in the correct manner. Such a situation would be case specific and would be problematic to prove as it may be too high an obstacle to overcome. It would probably be a case of the defendant’s testimony against the complainant’s.

The various studies can be beneficial to either side as they can be interpreted in a number of ways. The statistical possibilities of reducing the risk would assist any defendant who wished to establish that he was aware of the risk and chose to reduce the risk. It is proposed that this would raise doubt in the mind of any juror. The prosecution would be assisted by identifying the deficiencies of the various studies albeit with the use of an expert opinion. It is submitted that there are distinct inconsistencies with the studies as none of them took place in laboratory conditions, they predominantly rely on the participants being open and honest in relation to their sexual activity. This would give counsel on either side the opportunity to question the accuracy of a study that the other counsel would be relying upon.
It is proposed that the law should develop so that it embraces both condom use and viral load. The use of condoms significantly reduces the risk of transmitting the virus as does the level of the viral. The use of these to negate recklessness would enable sufferers to continue to engage in sexual activity without the fear of prosecution or rejection, as they would not be required to disclose their status. Although it is conceded that morally individuals should disclose their HIV status. It is unfortunate that the English courts have not clarified the position, although it is acknowledged that some of the issues were not identified or raised at the time of Dica or Konzani. Thus it is suggested that the law before the Canadian Supreme Court decision in Mabior is the preferred approach to the criminalisation of the sexual transmission of HIV in England. This being that condom use or the level of the viral load would be sufficient. Allowing condom use to negate recklessness would promote safe sexual practices whilst being in line with public health policies initiatives. If condom use and viral load were allowed then The ultimate goal could be achieved, this being the reduction of virus being transmitted to others.

He includes she


This is the amount of HIV in individuals blood see http://www.aidsmap.com/Viral-load/page/1044622/ accessed on 26 August 2013

R v Dica [2004] EWCA Crim 1103, [2004] 3 All ER 593 at [11], per Judge LJ


13 R v Dica [2004] EWCA Crim 1103, [2004] 3 All ER 593 at [11], per Judge LJ. SEE NOTE 4

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16 R v Konzani [2005] EWCA Crim 706, [2005] 2 Cr App R 14 at [37], per Judge LJ. SEE NOTE 4


30 R v Mabior [2012] SCC 47 (available on CanLII)

31 R v Mabior [2012] SCC 47 (available on CanLII) Para 104 SEE NOTE 31


33 T

HOMAS

34 J. Chalmers, Legal Response to HIV and AIDS (Hart: Oxford, 2008) 146
1 cps

39 Antiretroviral therapy for prevention of HIV transmission in HIV-discordant couples (Review)
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42 C Combescure,1 N Vallier,2 B Ledergerber,3 M Cavassini,4 H Furrer,5 A Rauch,5 M Battegay,6 E Bernasconi,7 P Vernazza,8 B Hirschel Christophe Combescure et al ‘How reliable is an Undetectable Viral Load?’ (2009) 10 Hiv Medicine 470


Mabior (n31) at para 101
Mabior (n31) at para 102
Mabior (n31) at para 102
Mabior (n31) at para 100

Isabel. Grant, 'The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink Cuerrier' (2011) 5 McGill JL & Health 7, 11 see note 50
Mabior at para 102 SEE 31
R v g
Dica SEE NOTE 4