Knowledge, Autonomy and Consent: *R. v Konzani*

By Matthew Weait
Lecturer in Law, University of Keele

Summary: *This article examines the legal an policy issues surrounding the sexual transmission of HIV in the light of the Court of Appeal's recent decision in* Konzani. *He argues that criminalisation founded on a person's reckless non-disclosure of their positive HIV status casts the net of liability too wide and risks doing more harm than good. The non-intentional transmission of HIV is better dealt with as a public health issue.*

Introduction

This note provides a brief critical account of the decision of the Court of Appeal in *Konzani*[1]. The central issue for the court in this case was whether the trial judge had misdirected the jury as to the meaning of consent, and its availability as a defence, where the defendant had been convicted under s.20 of the Offences Against the Person Act 1861 ("OAPA") for recklessly transmitting HIV to three female sexual partners. In holding that there had been no misdirection, and that both the convictions and sentence of ten years' imprisonment should stand, the court had the opportunity to revisit its earlier decision in Dica[2], and to restate and clarify both its reasoning and conclusions about the circumstances in which it is legitimate to impose criminal liability on those who transmit HIV.

Consent and the transmission of HIV before *Konzani*

The scope and availability of the defence of consent in cases involving non-fatal offences against the person are well-established, if contentious and problematic. The general rule is that consent, or an honest belief in such consent, will only provide a defence where the injury inflicted does not amount to actual or grievous bodily harm, unless that injury is sustained in certain legally recognised contexts—ones characterised by their social value or utility.[3] In cases where a defendant may,

[1] [2005] EWCA Crim 706.

[2] [2004] EWCA Crim 1103; [2004] Crim.L.R. 944. For more detailed discussions of *Dica*, see: J.R. Spencer, "Liability for Reckless Infection: Part 1" (2004) N.L.J. 384; J.R. Spencer, "Liability for Reckless Infection: Part 2" (2004) 154 N.L.J. 448; M.J. Weait, "Criminal Law and the Sexual Transmission of HIV: R v Dica" (2005) 68 M.L.R. 121; M.J.Weait, "Dica: Knowledge, Consent and the Transmission of HIV" (2004) 154 N.L.J. 826.

[3] *Brown* [1994] 1 A.C. 212. See, for a critical survey, D. Kell, "Social Disutility and Consent" (1994) 14 O.J.L.S. 121. The difficulty of establishing jurisprudentially coherent principles is apparent in the pragmatic approach of the Law Commission: See Law Commission Consultation Paper No.139 *Consent in the Criminal Law* (1995). For a recent decision on the relevance of consent in the context of sport, see *Barnes* [2004] EWCA Crim 3246; [2005] Crim.L.R. 381.

and does, raise the defence of consent he must be acquitted unless the prosecution disproves to the criminal standard either the existence of the consent, or the honest belief in it.

In *Dica* the appellant was convicted on two counts of maliciously inflicting grievous bodily contrary to s.20 of the OAPA 1861 after sexually transmitting HIV to two female partners. The guilty verdict was reached after the trial judge refused, on the basis of the decision in *Brown*[4], to allow the jury to hear evidence that those partners had, by virtue of agreeing to unprotected sexual intercourse, consented to the injury inflicted on them. In allowing the appeal and ordering a retrial, the Court of Appeal held (a) that the oft-criticised decision in *Clarence*[5] was no longer good law, and that consent to sexual intercourse should no longer be treated as implying consent to injury caused by the transmission of disease; and (b) that there was a fundamental difference between consenting to actual or grievous bodily harm (which, absent some strong public policy justification, could not provide a defence), and consenting to the risk of such harm occurring (which, as a matter of principle, could). To hold otherwise would, in its view, amount to unjustifiable interference with people's autonomy—something that should only be undertaken by Parliament if undertaken at all.[6]

Although this aspect of the judgment in *Dica* appears relatively straightforward it is rendered somewhat more complicated by the question of knowledge. Because the appellant in *Dica* had been prevented from raising the defence of consent at trial, the knowledge or otherwise of the complainants of the risk to which they were exposing themselves was not explored. This was, however, of central concern in the appeal because the judge at the subsequent re-trial would need to know how to direct the jury. In simple terms, the question the Court of Appeal had to address was this: to what extent, if at all, is a person's awareness of the risks associated with unprotected sexual intercourse relevant to the determination of whether she consented to the risk of HIV transmission?

Its answer appears, again, to be relatively straightforward. The court was keen to emphasise that although the defence of consent was available in principle, it was unlikely that a person would consent to the risk of transmission of a serious disease if she was ignorant of that risk[7], and that there could be a successful prosecution where the defendant had recklessly transmitted HIV during sex to a partner "from whom the risk is concealed"[8], and where that partner is not consenting to the risk of transmission. So although the general principle was grounded not in a complainant's knowledge of risk *per se*, but in the existence or otherwise of consent to the risk, the court recognised that such knowledge would be a significant factor in establishing the availability of the defence.

The problem with this line of reasoning should be self-evident. The court indicated that concealment by a defendant of known HIV positive status could be relevant in determining whether the complainant had consented to the risk of transmission; but in stating that the key issue was consent rather than knowledge it also countenanced circumstances where the defence of consent might be available in the absence of disclosure. It might have been thought that this concession was in

[4] n.3 above.
[5] (1888) 22 Q.B.D. 23.
[6] [2004] EWCA Crim 1103; [2004] Q.B. 1257 at [52].
[7] [2004] Q.B. 1257 at [59].
[8] *ibid.*

recognition of the fact that to conclude otherwise would—in effect—impose criminal liability as a matter of course on anyone who, knowing that he was HIV positive and that unprotected sex might result in infection, failed to disclose his HIV status prior to such with a partner. Given the court's (welcome) recognition that Parliament is better suited to determining the proper parameters of the criminal law where questions of risk-taking and individual autonomy are concerned, and that the imposition of a positive duty of disclosure could be interpreted as nothing less than law-making, such an interpretation of the court's reasoning might seem reasonable. It would, however, be wrong, as the subsequent decision in *Konzani* makes clear.

The position after *Konzani*

In *Konzani* the Court of Appeal was not, as it had been in *Dica*, concerned directly with the inter-relationship between recklessness and consent, since the appellant had admitted that he was aware of the risk of transmitting HIV to his partners. The sole issue for consideration was whether the trial judge had, on his reading of *Dica*, misdirected the jury as to the meaning of consent. The judge's direction had emphasised that the defence of consent was unavailable unless the alleged consent was "consciously" or "willingly" given. Counsel for the appellant argued that this direction was deficient because of its failure to explain that the defence was available as a matter of law where a person honestly believed that the partner to whom he had transmitted HIV had consented to the risk of transmission, even if this belief was an unreasonable one.

The court did not accept this argument. Although it agreed that an honest belief in consent would, as a general rule, provide a defence,[9] in this context "the defendant's honest belief must be concomitant with the consent which provides a defence".[10] The court expressed the view that there was a fundamental difference between running a risk (which some, at least, of the complainants' evidence suggested they were conscious of doing)[11], and *consenting* to a risk (which Mr Konzani's failure to disclose known HIV status prevented them from doing). As a result there was no legally recognised consent in respect of which Mr Konzani could have had any belief, honest or otherwise.

This is, it is suggested, faulty logic. In *Dica* the Court of Appeal had held simply that a person would have a defence if the complainant consented to the risk of transmission. 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 have unprotected sex with that person. In *Konzani*, the Court of Appeal seems to have decided that there was a need to explain in categorical terms that this is *not* how it wanted *Dica* to be interpreted. It did so by reinforcing the connection between recklessness, consent and disclosure and explaining that the allegation in *Dica* had been that the accused

[9] This is the case in the context of offences against the person. The law has now changed in the context of sexual offences so that belief in consent must now be reasonable if it is to provide a defence (Sexual Offences Act 2003).

[10] [2005] EWCA Crim 706 at [45].

[11] See the extracts of the complainants' evidence in *Konzani*, [2005] EWCA Crim 706 at [12]–[14], [19]–[20] and [25]–[28].

> "behaved recklessly on the basis that knowing that he was suffering from the HIV virus, and its consequences, and knowing the risks of its transmission to a sexual partner, he concealed his condition from the complainants, leaving them ignorant of it."[12]

This, it is suggested, is a somewhat radical interpretation of recklessness, one that extends the meaning of the concept beyond conscious, unjustifiable, risk-taking. Instead, in this context at least,[13] the court appears to be saying that recklessness comprises the additional element of non-disclosure; and because non-disclosure results in ignorance, a person infected by the non-discloser cannot consciously or willingly consent to the risk of transmission. Logically therefore, the defence is not available.[14]

The decision of the Court of Appeal in *Konzani* will satisfy those who reject the argument that people who recklessly transmit HIV should be able to rely on the defence of consent where their partner(s) are aware of the risk of transmission but to whom no disclosure has been made. However, it is suggested that those who do approve of the decision should acknowledge the fact that they are in danger of reinforcing the idea, contrary to the philosophy behind most HIV prevention campaigns, that we are not responsible for our own health. This is because in confirming that the defence is available only where there is consent to risk (or an honest belief in such consent) the court is implicitly saying that those who do not willingly consent to the risk, but who willingly choose to *run* the risk, are not to be held responsible for the consequences of doing so. Moreover, those who would identify with the court's reasoning need to recognise that this necessarily means agreeing that disclosure by a partner is the only relevant source of knowledge for the purposes of being able consciously to consent to the risk of transmission, despite the fact that there are other ways in which conscious knowledge of risk can be gained by those to whom HIV is transmitted. The question of whether such knowledge should be acknowledged in the context of reckless HIV transmission cases must therefore be addressed.

The relevance of knowledge

Where a person discloses his known HIV positive status to a partner who, in receipt of this information, agrees to have unprotected sex it is submitted that it is wrong in principle to assert that a criminal act has been committed if that partner is thereby infected. But the question of whether a partner's *non*-disclosure ought automatically to mean that a criminal act has been committed is not so easy to

[12] [2005] EWCA Crim 706 at [41].

[13] In most cases concerning non-fatal offences against the person, where recklessness is sufficient to establish liability, the presence or absence of disclosure is not an issue.

[14] This interpretation is supported by the court's approval of the Lord Chief Justice's interpretation of *Dica* in *Barnes* [2004] EWCA Crim 3246; [2005] Crim.L.R. 381. There His Lordship said, at [10], "This Court held [in *Dica*] that the man would be guilty of an offence contrary to Section 20 of the 1861 Act if, being aware of his condition, he had sexual intercourse with [the complainants] without disclosing his condition. On the other hand, this Court considered that he would have a defence if he had made the women aware of his condition, but with this knowledge because they were still prepared to accept the risks involved and consented to having sexual intercourse with him." It is worth recording that the Lord Chief Justice sat on the panel that heard the appeal in *Dica*, and that Judge L.J., who delivered the judgment in *Dica*, also delivered the judgment in *Konzani*.

sustain. The reason for this is as follows. The Court of Appeal held in both *Dica* and *Konzani* that consent to the risk of transmission should provide the person who recklessly transmits HIV with a defence. In *Konzani* the court made it clear that such consent had to be "willing" or "conscious" and that this was, in effect, not possible if the infecting partner had failed to disclose known HIV positive status at the relevant time. In its words

> "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 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."[15]

The problematic approach to autonomy is explored below. For the moment it is simply important to note that in using the language of deception the court is able to reinforce the link between (a) non-disclosure and fault (of the person who transmits HIV), and (b) non-disclosure and ignorance (of the person to whom HIV is transmitted). And in so doing it effectively denies the possibility that a person to whom disclosure is *not* made may still be sufficiently knowledgeable about the risk of transmission to warrant the conclusion that he or she did in fact consent to it.

It is important to add "effectively" as a qualification because the court in *Konzani* did in fact concede that there might arise situations in which a person may not have directly disclosed his HIV positive status, but the circumstances are such that (a) the partner to whom he transmits HIV could give a legally recognised consent, or (b), they provide the basis for a claim that he honestly believed his partner to have consented. In the words of the court:

> "By way of an 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, to be disproved by the prosecution, even if the defendant had not personally informed her of his condition. Even if she did not in fact consent, this example would illustrate the basis for an argument that he honestly believed in her informed consent. Alternatively, he may honestly believe that his new sexual partner was told of his condition by someone known to them both. Cases like these, not too remote to be fanciful, may arise."[16]

While this is may appear to be a significant concession, the court's choice of examples demonstrates its rejection of any argument based on *general* knowledge about the risks associated with unprotected sexual intercourse with a person about whose HIV status one is uncertain.[17] Both of the hypotheticals are ones where there has, in effect, been disclosure—either through context (the hospital treatment setting) or through a third party. As such, these concessions are extremely limited in their scope and suggest that even where a person adverts consciously to the

[15] [2005] EWCA Crim 706 at [42].
[16] [2005] EWCA Crim 706 at [44].
[17] For a more detailed discussion of this see M.J. Weait, "Criminal Law and the Sexual Transmission of HIV: R v Dica" (2005) 68 M.L.R. 121 at. pp.126–129.

possibility that a non-disclosing sexual partner may be HIV positive (*e.g.* because that person is aware of the partner's unsafe sexual behaviour with others, or because of a prior history of injecting drug use), such conscious advertence should not provide the person who transmits HIV to them with a defence. Voluntary disclosure of known HIV positive status to sexual partners may be the ethically defensible practice, and is a cornerstone of much HIV prevention work; but as is apparent elsewhere in the criminal law, what is ethically indefensible is not a sufficient condition for the imposition of criminal liability.[18] Legitimate criticism may be levelled at the criminalisation of the individual who transmits HIV where those who have been infected are, despite non-disclosure, well aware of the potential harm to which they may be subjecting themselves by agreeing to have sex that carries the risk of transmission.

Some commentators, including the present author, have argued that where a person is aware of the risks associated with unprotected sex and has not satisfied him- or herself that a partner is HIV negative (or free from other serious sexually transmitted infections (STIs)) the defence of consent should, in principle, be available. The reason for taking such a position is, primarily, that the transmission of HIV should be seen first and foremost as a public health issue and that everyone, not just those who are HIV positive, has a responsibility for minimising the spread of the virus. To impose criminal liability on those who recklessly transmit HIV or STIs to people who are in a position to protect themselves against infection, and elect not to, sends a message that people are, and should be, entitled to assume that their partners will ensure that transmission does not occur. The very fact that the virus has spread so dramatically in recent years among the sexually active demonstrates that this is simply not the case.

Autonomy

Given the importance of the principles at stake, the judgment of the Court of Appeal in *Konzani* is disappointing in its exploration of the justifications for the conclusion reached. Such principled justification as exists is to be found in one critical passage, referred to above, where it explains that a complainant's "personal autonomy is not enhanced if [the defendant] is exculpated when he recklessly transmits the HIV virus to her through consensual sexual intercourse". What might this mean, and what merit does it have as a justification for imposing criminal liability *via* the denial of a defence based on honest belief in consent?

Autonomy means, literally, self-government. In the context of law generally, and in the context of the law as it relates to sexual offences and offences against the person in particular, it suggests the right of a person to be free from unwarranted and unwanted physical interference. Thus the essence of rape law, in which the absence of consent is definitional of the *actus reus*, is that no legal wrong is done if consent exists, because the partner with whom a person has sexual intercourse is

[18] For example, X is married. X fails to disclose the fact that he is married to Y, with whom he has sexual intercourse. Y would not have had sexual intercourse with X had this fact been disclosed to her. Y has not been raped, because she has not been deceived as to X's identity or as to the nature of the act. X's failure to disclose is something that would have materially affected Y's decision. Y's autonomy has, it is arguable, been violated—or at the very least not respected; and yet this violation is not seen as a harm with which the criminal law should concern itself.

exercising his or her autonomy rather than having it infringed or violated; and where consent operates as a defence to a charge of assault, or causing bodily harm, it reflects the law's recognition that there exists a sphere (albeit one circumscribed by public policy considerations) in which people should be entitled to freedom from liability because to hold otherwise would result in a significant and unjustified diminution of essential human freedoms. It is of critical importance to recognise the distinction. In the former (rape) example the reason why the law does not criminalise the putative defendant is that there is no legally recognised harm committed. However in the latter (assault) example the law protects a putative defendant from criminal liability not on the basis that no recognisable harm has been caused, but because of the context in which it has taken place. It follows that in such circumstances the law is not, at least *prima facie*, concerned with protecting, or indeed "enhancing" the autonomy of the person harmed, but rather with protecting the person who harms from the imposition of unjustified liability. Put simply, it is his autonomy (in the sense of his right to be free from unwarranted interference and condemnation by the state) that the law is concerned to protect.

If the principles underpinning this argument are sound then any departure from them demands strong and careful justification. With respect, the Court of Appeal in *Konzani* not only departs from them but fails to provide any such justification. The court indicates that a complainant's autonomy is not enhanced by exculpating a person who recklessly harms her by transmitting HIV (and, by implication, that it is enhanced by denying such a defendant the right to assert an honest belief in her consent to the risk of such harm). In so doing it starts from the premise that, in the context of non-fatal offences against the person at least, it is the autonomy of the person harmed that it is the law's function to protect. However, if this were so then those who recklessly harm people should be denied the defence of consent on the basis of honest belief or otherwise, irrespective of the context in which such harm occurs; and yet case law demonstrates that this is not the case. Without explicitly acknowledging this difficulty, the court identifies the failure of a person to disclose his known HIV positive status, and the deception that is thereby practised on a partner to whom he transmits HIV, as the basis for making the distinction. The non-discloser may not assert an honest belief in his partner's consent, because the fact of non-disclosure renders her "consent" uninformed, legally nugatory, and therefore not one on which he is, or should be, entitled to rely. This line of reasoning is emphasised in the court's second reference to the autonomy of a complainant, when it states that this is

> "not normally protected by allowing a defendant who knows that he is suffering from the HIV virus which he deliberately conceals, to assert an honest belief in his partner's informed consent to the risk of the transmission of the HIV virus. Silence in these circumstances is incongruous with honesty, or with a genuine belief that there is an informed consent. Accordingly, in such circumstances the issue either of informed consent, or honest belief in it will only rarely arise: in reality, in most cases, the contention would be wholly artificial."[19]

What is to be made of the court's deployment of autonomy in this way? While it no doubt has a certain intuitive appeal, it is submitted that the consequences of this line of reasoning are such that it should be rejected.

[19] [2005] EWCA Crim 706 at [42]

The court recognised in *Dica* that people should be entitled in principle to consent to the risks associated with sexual intercourse because to deny them this right (and the correlative defence such a right provides to those who expose them to such risks) would amount to an infringement of autonomy that only Parliament should sanction. In *Konzani*, however, the court has made clear that only an informed consent, grounded in knowledge gained from direct or indirect disclosure of a partner's HIV positive status, amounts to consent for these purposes. In effect, therefore, the cumulative *ratio* of the two cases is not that a person should be entitled to consent to the risks associated with sexual intercourse, but that she should be entitled to consent to such risks as have been directly or indirectly disclosed to her. It is only in the latter context that a defendant's claim of honest belief in consent can, and should, be legally recognised. If this is indeed the *ratio*, a number of consequences follow.

First, in emphasising that it is only in the most exceptional of cases that non-disclosure to a sexual partner by an HIV positive person will be "congruent" with an honest belief, the court has, in effect, imposed a standard of reasonable belief in cases where there has been an absence of disclosure. This may be consistent with legislative developments in the law of rape, but if such is the trajectory the law should follow then it is submitted that this should be for Parliament to decide, not—with respect—the Court of Appeal. Secondly, the court has also, in effect, imposed a positive duty of disclosure on people who know they are HIV positive (and who wish to avoid potential criminal liability) before they have sex which carries the risk of transmission. Since there is no reason in principle why this positive duty should be limited to HIV (which is, for those able to access treatment at least, a manageable if life-limiting condition), it should be assumed that it applies to all those who are aware that they are suffering from a serious STI. Given that chlamydia may, if untreated in a woman, lead to infertility, that hepatitis B can lead to severe liver damage, and that syphilis—if untreated—can result in significant mental and physical impairment, it is presumably safer to assume that this positive duty now applies to all those who have been diagnosed with these, and other potentially serious, diseases who wish to avoid the possibility of prosecution and imprisonment. Thirdly, in the absence of any indication to the contrary by the court, disclosure as a precautionary principle ought presumably to be adopted by those that are infected with serious or potentially serious contagious diseases. A passenger with SARS or 'flu' may very well be aware that on a transatlantic 747 flight there could be elderly people or others with impaired immune systems (including people living with HIV). Such people's autonomy is certainly not "enhanced" if the passenger is able to assert that he honestly believed they would consent to being infected by a virus that results in their developing pneumonia; nor is it "normally protected", where, knowing that he is suffering from a condition that can cause such an effect, he conceals this information. These consequences of the court's reasoning may be thought more or less fanciful; but the point is, surely, that in using the language of autonomy so loosely, and in failing to specify precisely what the justification for, and scope of, the decision in *Konzani* is, the Court of Appeal has delivered a judgment that fails abjectly to deal with the core issues which its subject matter raises.

Concluding remarks: public health and criminal law

It is a perfectly legitimate question to ask whether, and if so in what circumstances, a person should be held criminally liable for the transmission of serious disease. The problem is that our answer to that question will inevitably depend on the assumptions we make about the role of the criminal law and the values and principles that inform it. If we start, as is commonplace, within the liberal legal tradition that emphasises autonomy, choice, individual responsibility and rationality, which treats causation as unidirectional and a matter of "common sense", and which resorts to "public policy" when confronted with hard cases, it is no wonder that the transmission of HIV by people who fail to disclose their HIV positive status to partners who are subsequently infected is constructed as a wrong that should be punished. It is also inevitable, given that criminal trials are concerned only with the finding of facts in, and the application of existing law to, the individual case, and that criminal appeals deal only with the discrete point(s) of law at issue, that the broader context of transmission is occluded and the wider social and epidemiological implications of criminalisation ignored.

Some concrete examples should serve to illustrate why the current approach of the law to the transmission of HIV is a problem. As a result of *Dica* and *Konzani* a person who, knowing his own HIV positive status, recklessly transmits HIV to a sexual partner, commits a criminal offence. He may only escape liability where the person to whom he transmits the virus gave an informed consent to the risk of transmission. The Court of Appeal in *Konzani* has indicated that such consent will, essentially, arise only where there has been prior disclosure. A number of potentially adverse consequences for public health may follow from this. First, by treating recklessness in this context simply as conscious unjustifiable risk-taking, but without clarifying whether the appropriate use of condoms negates recklessness as a matter of law, the Court of Appeal has provided no clear guidance as to whether their use will preclude the possibility of a conviction.[20] It would be useful if such clarification could be provided so that people living with HIV understand the scope of any duty they might have. Secondly, the requirement that a person knows his HIV positive status before he can be treated as reckless may have the effect of dissuading some people from having an HIV test and so accessing available medical care, advice and treatment. While it is to be welcomed that, as a matter of general principle, no liability should be incurred by people who are in fact unaware that they may transmit HIV to their partner(s), and that the alternative (of imposing liability on those who are aware (or ought to be aware) that they may be HIV positive) would cast the net of liability too widely, the courts should recognise, and deal explicitly

[20] In Brown [1994] 1 A.C. 212 Lord Templeman stated as follows: "Prosecuting counsel informed the trial judge against the protests of defence counsel, that although the appellants had not contracted Aids, two members of the group had died from Aids and one other had contracted an HIV infection although not necessarily from the practices of the group. Some activities involved excrement. The assertion that the instruments employed by the sadists were clean and sterilised could not have removed the danger of infection, and the assertion that care was taken demonstrates the possibility of infection". In other words, there is some authority for the proposition that for an HIV positive man to use a condom may be treated as awareness of the risk on his part that HIV transmission may take place; and since, by definition, any case brought under s.20 of the OAPA 1861 will be because the defendant has allegedly transmitted HIV to the complainant, the fact that he did use a condom (albeit ineffectively) may not absolve him of liability.

with, the potential public health consequences of applying the *mens rea* requirement in this way. Third, by in effect imposing a duty to disclose known HIV status prior to sex which carries the risk of transmission (which, even if prophylaxis is used, remains a possibility) the courts appear to be working on the assumption, implicitly at least, that those who are HIV positive and know this will in fact (if they behave in the rational manner upon which criminal law and the justification for punishment are premised) disclose their status to partners in order to avoid criminal liability. Moreover, as a direct result of this people may assume that sexual partners who do *not* disclose their HIV positive status are in fact HIV negative—why would they risk a criminal conviction for a serious offence by not doing so? Finally, where an HIV positive person has not disclosed prior to sex, and where transmission may have occurred, that person may be dissuaded from informing his partner of the possibility thereby preventing that partner from accessing post-exposure prophylaxis (*i.e.* intensive drug treatment that may prevent the virus taking hold) because to do so would in effect amount to confessing the commission of a serious criminal offence.

These consequences demonstrate that if we start from a set of *a priori* assumptions about the function(s) of criminal law in this context, and treat incidents of HIV transmission simply as an opportunity to apply the principles which have traditionally informed the law relating to non-fatal offences against the person, we risk doing more harm than good. UNAIDS, and many other national and international organisations have—since the early years of the HIV/AIDS pandemic—emphasised the importance of dealing with the spread of HIV as first and foremost a public health issue in which we are all implicated, and for which we are all ultimately responsible.[21] If legislators, courts, prosecutors and police, resisted the immediate temptation to treat alleged cases of HIV transmission as individualised, momentary and (potentially) blameworthy incidents; if they were willing to acknowledge and treat seriously the mass of sound empirical research which explains the reasons why people fail to disclose their HIV positive status to significant others[22]; and if they were to recognise that the use of the criminal law may serve not only to perpetuate people's anxieties about HIV, but also, critically, to have a negative public health impact, this would—I believe—better serve the public interest in the longer term.

[21] See, for example, UNAIDS, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper* (Geneva, 2002); Office of the High Commissioner for Human Rights and UNAIDS, *International Guidelines on HIV/AIDS and Human Rights* (Geneva, 1998); Canadian HIV/AIDS Legal Network and the Canadian AIDS Society *Criminal Law and HIV/AIDS: Final Report* (Toronto, 1997); Executive Committee on AIDS Policy & Criminal Law, *"Detention or Prevention?" A Report on the Impact and Use of Criminal Law on Public Health and the Position of People Living with HIV* (Amsterdam: AIDS FONDS, 2004). For the policy of the UK's National AIDS Trust see *www.nat.org.uk/natuk/policy.cfm?id=11*.

[22] See K. Greene *et al*, *Privacy and Disclosure of HIV in Interpersonal Relationships: A Sourcebook for Researchers and Practitioners* (Lawrence Erlbaum Associates, New Jersey, 2003)