Being Informed: The Complexities of Knowledge, Deception and Consent when Transmitting HIV

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Abstract The offence of inflicting grievous bodily harm under s. 20 of the Offences Against the Person Act 1861 has been confirmed as the most appropriate ground for convicting a reckless transmission of the HIV virus through sexual intercourse.[1] An informed consent from the victim, along with a reasonable belief in that consent from the defendant, will now suffice as a defence to such a charge.[2] However, it remains unclear how and when the victim must be informed of the relevant circumstances in order to provide consent to infected intercourse, and it is also undecided whether the defendant himself must divulge his HIV status in order to claim an honest belief in the victim's consent.[3] Additionally, the fine line of consensual activity drawn in *R* v *Brown*[4] appears to have been eroded by recent HIV transmission cases.[5] This article outlines the development in relation to s. 20 to include HIV offences; it aims to untangle the recent authorities on knowledge, deception and consent in relation to both victims and perpetrators in reckless HIV transmission cases and suggests a way forward for the law in the shape of a new offence.

Keywords Sexual offences; HIV transmission; Intention; Informed consent; Recklessness

The issue of informed consent in relation to sexual offences has been discussed at length recently, highlighting the ambiguous nature of s. 74 of the Sexual Offences Act 2003. A defendant's deceptive state of mind during the act of intercourse calls into question whether the victim's consent to sexual intercourse is properly informed. What if, on the occasion that consent to intercourse is present from both parties, one

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1 *R* v *Dica* [2004] QB 1257 at 1273, *per* Judge LJ. Subjective recklessness is necessary for a s. 20 conviction, requiring the defendant to see that he may inflict some bodily harm on the victim: see *R* v *Cunningham* [1957] 2 QB 396 and *R* v *Mowatt* [1968] 1 QB 421, affirmed by Lord Ackner in *R* v *Savage and Parmenter* [1992] 1 AC 699 at 721.

2 *R* v *Konzani* [2005] 2 Cr App R 198 at 208–9, *per* Judge LJ.

3 These quandaries arose from the decisions in *R* v *Dica* [2004] QB 1257 and *R* v *Konzani* [2005] 2 Cr App R 14, both holding that knowledge leading to an informed consent can come from any source, but if it is not from the defendant, he cannot have an honest belief in that consent. See *R* v *Dica* [2004] QB 1257 at 1265–6 and *R* v *Konzani* [2005] 2 Cr App R 198 at 208–9.

4 [1994] 1 AC 212.

5 Lord Lane CJ in *Attorney-General's Reference (No.6 of 1980)* [1981] 2 All ER 1057 at 1060 stated that consent is irrelevant if actual bodily harm is intended and/or caused. This distinction was brought into disrepute somewhat by the decision in *R* v *Dica* [2004] QB 1257 allowing 'victims' to consent to a s. 20 offence.

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party harbours a different 'intention' or 'need' to the other party, who is deceived on this matter?[6] Could this vitiate consent? The answer in relation to rape appears to be 'no', but the element of deception and the phrase 'informed consent' both combine to cause particular difficulties in HIV transmission cases, where the word 'informed' can constitute many different actions, and where 'deception' does lead to prosecution (albeit for malicious wounding).

This article will focus mainly on deception, knowledge and informed consent in relation to the transmission of the HIV under s. 20 of the Offences Against the Person Act 1861, but a discussion outlining the recent debates on informed consent in the field of sexual offences will be addressed. The recent theory suggesting that a mistake as to fact can vitiate consent holds an interesting connection to deceptive HIV cases.

When is consent 'informed' in sexual offences?

Removing the specific issue of HIV transmission from the equation for the moment, consenting to sex is not as simple as it sounds. The offence of rape in the UK places an emphasis on consent rather than force, which, as Bohlander points out, leads to the impression that rape in the UK does not require force or threats, leading to various other options when vitiating consent.[7] Section 74 of the 2003 Act states as follows:

> For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

It is difficult to decipher what exactly Parliament meant by this simple definition. The words 'choice' and 'freedom' clearly relate to the use of force, and 'capacity' is a reference to a person's sound mind capable of providing consent. Elliott and De Than argue that the real issue behind s. 74 is whether a person has the freedom and capacity to agree, because when a person is consenting to something, he is effectively agreeing to it; whether or not he had a choice really does not matter.[8] However, 'freedom' in s. 74 can also refer to the more contentious issue of deception: we are not entirely 'free' to accept a 'thing' until we know every relevant detail about that thing. Jonathan Herring was the first to canvas this idea in detail in relation to rape. He put forward the following provision:

> If at the time of the sexual activity a person:
> (i) is mistaken as to a fact; and

6 The most obvious example would be one person believing the intercourse to be a sign of love and commitment, whereas the other person views the act as a one-night stand with no further obligations.

7 Such as what we see today: misrepresentations and non-disclosure of facts. See M. Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71 JCL 412.

8 C. Elliott and C. De Than, 'The Case for a Rational Reconstruction of Consent in Criminal Law' (2007) 70 MLR 225 at 238–9, and see generally I. Dennis, 'The Sexual Offences Act' [2004] Crim LR 79.

(ii) had s/he known the truth about that fact would not have consented to it,

then s/he did not consent to the sexual activity.[9]

The difficulties with this provision are clear. According to Herring, a victim can be mistaken as to any 'fact', which will in turn invalidate her consent to sex. The list of mistaken facts could be endless; anything from the defendant's age to his future intentions with the victim (or lack of them) could be considered as mistaken facts and therefore grounds to vitiate consent. In practice this is unworkable. Hyman Gross took a practical approach to Herring's proposal, reminding us that the *act* of sex is still consented to, and that the immoral intentions of the defendant were not to be placed on a elevated moral plane for us to judge and punish.[10] Herring's proposal was also connected to instances where intercourse was for a particular *purpose*, such as a display to the victim of the defendant's plans to share a future together. If the victim was being deceived as to this purpose behind the act of intercourse, this deceptive fact would be sufficient to vitiate the victim's consent. This has been described as disrespectful to sexually autonomous persons by Gross, who does concede that s. 76 of the 2003 Act provides that the victim can be deceived as to the nature and purpose of the sexual act consented to, but that it is the victim's own prerogative to exercise scepticism when being influenced by the defendant.[11] Clearly, the chance that a defendant can be deceptive as to his intentions with the victim, or his feelings towards the victim, is causing an air of unrest to surround the ambiguous s. 74. The provisions under s. 76 regarding 'deception', 'nature' and 'purpose' do not help, creating the notion that a victim can be deceived about almost anything.

Even though Herring may have been considered by some writers to be taking the element of informed consent too far, his ideas about mistake and deception closely connect to the malicious transmission of HIV. If a victim is deceived about this fact, consent is vitiated, but not as to the act of intercourse, but to the offence of malicious wounding under s. 20 of the Offences Against the Person Act 1861.[12] All the recent case law in this area suggests that in order to consent to contracting HIV, the victim's consent must be 'informed', and the defendant must have an honest belief in such consent.[13] It will be shown that the 'informed consent' is currently the victim's responsibility and can come in many guises, and the defendant must simply believe that the victim has done her research, leaving him to bear no responsibility as an 'informant' to divulge his status.

9 See J. Herring, 'Mistaken Sex' [2005] Crim LR 511 at 517.

10 H. Gross, 'Rape, Moralism, and Human Rights' [2007] Crim LR 220 at 225. Also see Bohlander, above n. 7 at 416, who states: 'Just because the humiliation in Herring's example happens mostly to women is not a sufficient reason to criminalise it, and certainly not as rape'.

11 Gross, above n. 10 at 224.

12 *R* v *EB* [2007] 1 WLR 1567.

13 See especially *R* v *Konzani* [2005] 2 Cr App R 198 and *R* v *EB* [2007] 1 WLR 1567.

The development of s. 20 to include HIV

Section 20 of the Offences Against the Person Act 1861 provides:

> Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of an offence . . .

The harm element of s. 20 is satisfied if all the layers of the skin are broken,[14] and the terms 'wound' and 'grievous bodily harm' can include a wide range of injuries.[15]

In *R* v *Clarence*[16] the interpretation of 'inflict' in s. 20 implied an assault or a battery of which grievous bodily harm was the 'direct, immediate and obvious result'.[17] The defendant had sexual intercourse with his wife aware that he had gonorrhoea, although his wife had no knowledge of this. Transmission of infection was held not to be included within the s. 20 definition because there was deemed to be 'a crucial difference' between an immediate and necessary connection of a cut or a blow and the uncertain and delayed operation of an infection.[18] The House of Lords submitted that the consent would only be vitiated if it was obtained by fraud as to either the nature of the act, or the identity of the agent.[19] In addition, the victim was found to have consented to the infected act as intercourse during marriage in 1888 was assumed to be consensual.[20] The victim's knowledge of transmission (or rather lack of) was therefore irrelevant. The position was changed by *R* v *Clarence-Wilson*,[21] in which it was confirmed that notwithstanding the absence of an assault, infliction of grievous bodily harm under s. 20 could be committed:

> grievous bodily harm may be inflicted where the accused has directly inflicted it . . . or . . . where the accused has 'inflicted' it by doing something intentionally which . . . is not in itself a direct application of force to the body of the victim.[22]

This decision represented a major erosion of the authority of *Clarence*. The developments continued in *R* v *Chan-Fook*[23] where Lord Hobhouse LJ held that an infection resulting from an assault was an internal injury

14 This was confirmed in *Moriarty* v *Brooks* (1834) 172 ER 1419 and *R* v *M'Loughlin* (1838) 173 ER 651.
15 Grievous bodily harm is considered to be 'really serious harm' (see *R* v *Metheram* [1961] 3 All ER 200) and the totality of injuries can be combined for the term 'grievous': *R* v *Grundy* [1977] Crim LR 543.
16 (1888) 22 QBD 23.
17 Ibid. at 41, *per* Stephen J. However, compare *R* v *Martin* (1881) 8 QBD 54, in which an infliction of grievous bodily harm was upheld despite no direct battery.
18 (1888) 22 QBD 23 at 41 and 45. It was considered 'contrary to common sense' and 'an abuse of language' to describe Clarence's infected intercourse as an assault: see ibid. at 56, per Manisty J.
19 Ibid. at 44–5.
20 Described by Hawkins J in *Clarence* as an 'irrevocable privilege' until the balance was redressed in *R* v *R* [1992] 1 AC 599.
21 [1984] AC 242.
22 Ibid. at 260, *per* Lord Roskill, approving the influential Australian decision of *R* v *Salisbury* [1976] VR 452.
23 [1994] 1 WLR 689.

sufficient to meet the definition under s. 20.[24] Taking advantage of these developments, *R* v *Dica*[25] confirmed that the reckless transmission of HIV did in fact constitute an offence under s. 20. The defendant, knowing he was HIV positive, infected two women through intercourse. The women were unaware of his HIV positive status. Judge LJ concluded:

> If psychiatric injury can be inflicted without direct or indirect violence, for the purposes of section 20 physical injury may be similarly inflicted. It is no longer possible to discern the critical difference identified by the majority in *Clarence* between an 'immediate and necessary connection' between the relevant blow and the consequent injury, and the 'uncertain and delayed' effect of the act which led to the eventual development of infection.[26]

The uncertain and delayed development of infection was no longer distinguished from an immediate and direct physical harm, and *Clarence* was overruled.

When bodily harm occurs during sexual encounters, the rules regarding consent have been strict. The Court of Criminal Appeal took a strict line in *R* v *Donovan*[27] where the defendant beat a 17-year-old girl with a cane for sexual gratification:

> As a general rule, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.[28]

Similarly, *Attorney-General's Reference (No. 6 of 1980)*[29] later held that it was not in the public's interest to allow people to 'cause and/or intend to cause' each other bodily harm 'for no good reason'.[30] This dictum has inevitably been described as 'vague in the extreme' by Giles,[31] and Ormerod submits that it goes too far, claiming that the use of the phrase 'and/or' implies that an act done to another with consent is an assault even if harm is unintended or unforeseen.[32] However, Lord Lane CJ's statement drew a very clear line. Any assault and/or battery which

24 Ibid. at 694, affirmed by *R* v *Ireland and Burstow* [1997] 4 All ER 225. Lord Hope in *Burstow* described *Clarence* as a 'troublesome authority' and claimed that in the context of 'inflict' *Clarence* 'no longer assisted' (at 235).
25 [2004] QB 1257.
26 Ibid. at 1266.
27 [1934] 2 KB 498.
28 Ibid. at 507, *per* Swift J. The harm 'need not be permanent, but must . . . be more than transient or trifling'. Exceptions listed (ibid. at 508–9) include wrestling, rough and undisciplined sport or play, and the reasonable chastisement of a child.
29 [1981] 2 All ER 1057.
30 Ibid. at 1059–60, *per* Lord Lane CJ. In this case two men engaged in a quarrel in a public street resulting in actual bodily harm. Violent sexual encounters probably fall within the ambit of Lord Lane CJ's 'no good reason', but good reasons—*per* Swift J in *R* v *Donovan* [1934] 2 KB 498—included properly conducted games, sports, and surgical intervention.
31 M. Giles, '*R v Brown*: Consensual Harm and the Public Interest' (1994) 57 MLR 101 at 104–5.
32 See D. Ormerod, *Smith and Hogan Criminal Law: Cases and Materials*, 9th edn (Oxford University Press: Oxford, 2006) 626. Interestingly, in *R* v *Slingsby* [1995] Crim LR 570, Judge J ruled that simply because injury was 'caused' it was contrary to principle to treat the consensual assault as criminal.

either intends to cause harm and/or does cause harm crosses the line of non-consensual activity.

The issues surrounding sexual consent and non-fatal offences were analysed in detail in *R* v *Brown*.[33] The appellants—a group of homosexual sado-masochists—willingly and enthusiastically participated in the commission of acts of violence against each other for sexual pleasure. Consent was held to be a defence to non-sexual offences against the person such as common law assault,[34] but the difficult issue for the House of Lords in *Brown* was whether the defence of consent could be extended to cover the infliction of bodily harm in the course of homosexual sado-masochistic encounters.[35] The House of Lords ruled that sado-masochistic practices were unpredictably dangerous, degrading, violent, and injurious to individuals and harmful to society generally,[36] and although public policy was probably the main reason behind the *Brown* decision, it was apparent that the spread of diseases contributed to the rationale.[37] This makes the supposition that *Brown* only applies to homosexual behaviour doubtful.

A fine line has been drawn between common law assault and s. 47 of the 1861 Act. Consent is only a defence to the latter if the circumstances fall into a well-known exception.[38] This fine line, affirming Lord Lane CJ's dictum in *Attorney-General's Reference (No. 6 of 1980)*, appears very fragile. Might the difference between an assault and a trivial bodily harm be too fine to be put to a jury?[39]

The application of *Brown* was narrowed considerably in the light of *R* v *Wilson*,[40] and both cases were distinguished despite very similar facts.[41] It was held not to be in the public's interest to consider consensual activity between a husband and wife as a matter for criminal investigation.[42] This decision has been contested by several commentators, who argue that the rationale in *Brown* should be applied to all

33 [1994] 1 AC 212.

34 Defined by Robert Goff LJ in *Collins* v *Wilcock* [1984] 3 All ER 374 at 377 as 'an act which causes another person to apprehend the infliction of immediate unlawful force on his person'.

35 Charges of both s. 47 and s. 20 of the 1861 Act arose in this case. Section 47 requires any assault or battery to occasion actual bodily harm: any hurt which is more than transient or trifling—including bruising and abrasions—will suffice: see *R* v *Donovan* [1934] 2 KB 498 and *T* v *DPP* [2003] EWCA Crim 255. The *mens rea* is that of the assault or battery which occasioned the harm: *R* v *Savage and Parmenter* [1992] 94 Cr App R 193 at 207, *per* Lord Ackner.

36 These were the views of Lord Templeman [1994] 1 AC 212 at 235 and Lord Jauncey ibid. at 246.

37 Lord Templeman pointed out that two members of the group had died from HIV and one member had contracted the virus, and Lord Mustill noted the risk of genito-urinary infection (see [1994] 1 AC 212 at 236 and 274).

38 These were listed by Lord Jauncey in *R* v *Brown* [1994] 1 AC 212 as sports, chastisement and surgery (at 244–5).

39 Ormerod believes juries regularly make this distinction: see Ormerod, above n. 32 at 693.

40 [1996] 2 Cr App R 241.

41 Wilson burned his wife's flesh for sexual gratification and was charged under s. 47 of the Offences Against the Person Act 1861.

42 [1996] 2 Cr App R 241 at 243–4, *per* Russell LJ.

harmful sexual activities.[43] Surely this is correct? In *R* v *Emmett*[44] a heterosexual couple engaged in dangerous sexual activities leading to haemorrhages, bruising, burns, and a charge under s. 47. The Court of Appeal held that there was to be no distinction between sado-masochistic activities in heterosexual and homosexual encounters, but it is not clear just how seriously this decision has been taken. The rationale behind *Emmett* was that the injuries sustained 'crossed the line of consent' drawn in *Brown*, confirming that the line of consent in *Brown* applies not just to homosexuals, but to all dangerous sexual exploits which cause harm.[45]

Dica[46] drew an interesting line regarding consent and HIV transmission. The defendant concealed his HIV status and transmitted the HIV virus to two women. *Dica* was distinguished from the violent acts in *Brown* on the basis that Dica and his partners were not intent on spreading disease or indulging in serious violence for the purposes of sexual gratification. They are simply prepared, knowingly, to run the risk—not the certainty—of infection.[47] From one view, it seems logical that consensual acts of intercourse are not unlawful merely because there may be a known risk to the health of a participant—people may take risks. But from another view, the public policies (and the line of consent) which were so central to *Brown* do not appear to be relevant to the spread of the HIV virus. Judge LJ elaborated on the consent issue in *Konzani*,[48] in which the defendant, who knew of his HIV positive status, had consensual intercourse with three unsuspecting women, all of which contracted the HIV virus. Judge LJ declared that:

> For the complainant's consent to the risks of contracting the HIV virus to provide a defence, her consent must be an informed consent. The concealment of [HIV] 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 . . . the defendant's honest belief must be concomitant with the consent which provides a defence.[49]

It is logical that the defendant cannot hold a reasonable belief in consent if he has not divulged his status. Weait comments that the judgment in *Konzani* is a radical interpretation of recklessness going beyond conscious, unjustifiable risk-taking and requiring an additional element of non-disclosure.[50] This certainly seems to be the case at first

43 See, in particular, Giles, above n. 31 at 106–7; C. Withey, 'Biological GBH: Overruling *Clarence*?' (2003) 153 NLJ 1698 at 1701; P. Roberts, 'Consent to Injury: How Far Can You Go?' (1997) 113 LQR 27 at 28, and M. Davies, '*R v Dica*: Lesson in Practising Unsafe Sex' (2004) 68 JCL 498 at 499.

44 *R* v *Emmett*, *The Times* (15 October 1999), CA.

45 Ibid., *per* Wright J, sourced by Court of Appeal (Criminal Division): All England Official Transcripts provided by Lexisnexis.com (Butterworths).

46 [2004] QB 1257.

47 Ibid. at 1270, *per* Judge LJ. The *intentional* transmission of the HIV virus is considered to be an offence under s. 18 of the Offences Against the Person Act 1861: see *R* v *Konzani* [2005] 2 Cr App R 198 at 207, *per* Judge LJ.

48 [2005] 2 Cr App R 198.

49 Ibid. at 208–9. Consent also involves knowing the implications of HIV infection.

50 M. Weait, 'Criminal Law and the Sexual Transmission of HIV: *R v Dica*' (2005) 68 MLR 121, at 127.

glance, but it transpires further on in the judgment that the 'victim' may still provide informed consent despite the defendant's non-disclosure.[51] How? *Brown*, *Dica* and *Konzani* raise difficult questions regarding consent and knowledge. How valid is the victim's consent to a s. 20 harm, and what elements are required to make that consent informed and believable?

Transmitting HIV and the law of consent

Malicious wounding under s. 20 of the Offences Against the Person Act 1861 is not normally open to consent. The HIV virus has been placed under the ambit of s. 20 because of its seriousness, and thus the law regarding consent has been warped to fit around this development. These difficulties can be traced back to *Brown*. *Brown* has been criticised for being paternalistic and confusing,[52] temporarily placing the law of consent in a difficult quandary in relation to transmission of infection. Any conduct causing actual bodily harm for a purpose which did not fall under one of Lord Jauncey's exceptions was considered a hostile application of force and thus over the consensual threshold.[53] In the 10 years between *Brown* in 1994 and *Dica* in 2004, non-infected long-term partners of HIV carriers could not consent to unprotected sex: any unprotected intercourse which did take place would thus have been rape.[54] This was a highly objectionable outcome, and has been described as 'distasteful' and 'startling'.[55] For the foreseeable future, *R* v *EB* establishes that whilst the transmission of disease is not consented to, the act of sexual intercourse still is, and thus no rape charge will incur. Latham LJ held that where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party, any consent that may have been given to that activity by the recipient is not thereby vitiated. The act of intercourse remains a consensual act.[56] This prevents any chance of s. 74 of the Sexual Offences Act 2003—and Herring's 'mistaken sex' theory—wading into the mire to contend that if a victim is mistaken as to the nature, purpose, or a fact regarding sexual intercourse, consent to that intercourse is vitiated. Temkin and Ashworth

51 *R* v *Konzani* [2005] 2 Cr App R 198 at 208–9, *per* Judge LJ (further below).

52 According to Bamforth, *Brown* was 'based on an undesirable misconception': see M. Bamforth, 'Sado-masochism and Consent' (1994) Crim LR 661 at 664.

53 In *Brown* the House of Lords confirmed that a battery must consist of 'hostile' contact, which supposedly illustrates the intentions and attitudes of the defendant ([1994] 1 AC 212 at 260–1, *per* Lord Mustill).

54 Under s. 1(1) of the Sexual Offences Act 2003, 'A' commits rape if (a) he intentionally penetrates the vagina, anus or mouth of 'B' with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents.

55 See D. Warburton, 'A Critical Review of English Law in Respect of Criminalising Blameworthy Behaviour by HIV+ Individuals' (2004) 68 JCL 55 at 64 and *R* v *Tabassum* [2000] Crim LR 686 at 688, commentary by Professor Sir J. C. Smith. See also Davies, above n. 43 at 504; J. Herring, above n. 9 at 520–3, and R. Williams, 'Deception, Mistake and Vitiation of the Victim's Consent' (2008) LQR 132 at 149. Judge LJ in *R* v *Dica* [2004] QB 1257 did make a passing comment that it would not be considered rape if an individual was deceived into intercourse with an infected partner, but no further comment was given (at 1268).

56 [2007] 1 WLR 1567 at 1571.

provide a hypothetical situation in which a defendant deceives his victim about his HIV status, and they assert that if V gives her agreement in ignorance of a key fact, and if D knows of that ignorance and takes advantage of it, it may be concluded that V did not agree by choice.[57] *EB* clearly ignores this possibility, but a very clear line of distinction can be drawn between Herring's 'mistaken sex' principle and an instance in which a person is deceived about contracting HIV: the former relates to a basic fact changing the *purpose* of the intercourse under s. 76 (which has been argued to be implausible), but the latter really does change the *nature* of the intercourse, also under s. 76.[58]

The 'line of consent' drawn in *Brown* is still good law, and it is applied not only to homosexual activities, but to all non-fatal offences against the person. No tangible rationale was given in either *Dica*[59] or *Konzani*[60] as to why individuals can consent to contracting a potentially fatal virus under s. 20, but cannot consent to trivial harm under s. 47. Could it be that the courts did not want to get involved in the personal lives of consenting couples?[61] This is not believable considering the level of risk in *Dica* and *Konzani*. Was autonomy another reason considered by Judge LJ? He considered public autonomy a parliamentary matter in *Dica* and commented in *Konzani* that 'the public interest also requires that the principle of personal autonomy in the context of adult non-violent sexual relationships should be maintained'.[62] Should individuals exercise their voluntary choice to contract a disease? Let us say that X and Y are in a long-term relationship, but X contracts HIV through a blood transfusion. X and Y still wish to marry and spend their lives together, so Y agrees to have unprotected sex with X in the hope that she will one day conceive and give birth to a healthy baby. Because the transmission of the HIV virus is a s. 20 offence, according to *Brown* Y cannot consent, but applying *Dica* and *Konzani*, if Y is fully aware of the risk, her consent is a defence as long as it is 'informed'. To limit the risk to the general public, perhaps the law on the transmission of HIV should revert back to *Brown* allowing only married couples to consent to such a risk. Or, perhaps, the context of the harm and the attitudes of the parties could be considered when determining whether the transmission of infection counts as an exception to the general rule. For example, if V, who is in a long-term relationship, finds out that she is terminally ill she may wish to consummate her relationship with her HIV+ partner knowing that she is unlikely to experience the slow effects of the virus. This behaviour does not seem as reckless as that in *Dica* or *Konzani*.

It seems strange that the law can articulate when a person cannot consent to certain behaviour (such as fighting outside public houses),

57 J. Temkin and A. Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] Crim LR 328 at 345.
58 See further J. Elvin, 'The Concept of Consent under the Sexual Offences Act 2003' (2008) 72 JCL 519.
59 [2004] QB 1257.
60 [2005] 2 Cr App R 14.
61 As was the case in *R* v *Wilson* [1996] 2 Cr App R 241.
62 See *R* v *Dica* [2004] QB 1257 at 1271 and *R* v *Konzani* [2005] 2 Cr App R 198 at 208.

but can consent to other serious harms. Ormerod believes that we are left with three possible answers to the question 'when does an act done to P with P's consent amount to an assault?' which are: (1) when injury is caused: *Attorney-General's Reference (No. 6 of 1980)*; (2) when injury is likely to be caused (*R* v *Boyea* below); and (3) when D is aware that injury might be caused and takes the unjustifiable risk of causing it.[63] These varied options have been questioned by several writers.[64] Even if the resulting harm was unforeseen, this does little to exonerate the defendant. In *R* v *Boyea*[65] the defendant did not intend to harm his victim when they engaged in dangerous sexual activities, but because harm had been 'intended or caused'—as *per* Lord Lane CJ in *Attorney-General's Reference (No. 6 of 1980)*—the victim's consent was completely irrelevant.[66] It is submitted that if transmission of an infection occurs accidentally, unforeseeably, and with full consent to the act of intercourse, it may be unfair to place culpability on either party.

As the law currently stands, any participant can consent to contracting HIV. This suggests that the defendant must know of his HIV status, but some sufferers may either be afraid to get tested or act completely recklessly. Does the defendant's knowledge make a difference to the victim's consent? The distinction between which information is relevant for a valid and informed consent and which is not remains unclear after *Konzani*.[67]

The defendant's state of mind

A defendant's deceptive state of mind has been a controversial issue recently in relation to rape. The most innovative suggestion, by Herring, is that intercourse under false pretences is intercourse for a different purpose than that consented to, thus invalidating consent.[68] Although it has been contended that a rape conviction should not result simply because the victim was mistaken as to a simple fact, or to protect people against the disappointments and humiliations of their bad judgement,[69] the issue of deception will remain relevant as long as the laws of sexual offences in the UK are worded around the issue of informed consent

63 See D. Ormerod, *Smith and Hogan Criminal Law*, 11th edn (Butterworths: London, 2002) 532–3.

64 See, particularly, J. R. Spencer, 'Liability for Reckless Infection—Part 2' (2004) 154 NLJ 448 at 451 and A. Reed and B. Fitzpatrick, *Criminal Law*, 3rd edn (Sweet & Maxwell: London, 2006) 395, who agree that the defendant must at least be aware of the facts which make consent irrelevant before liability ensues. This is supported by *R* v *Slingsby* [1995] Crim LR 570, where it was rejected by Judge J that a defendant can be guilty when *mens rea* is absent.

65 (1992) 156 JP 505.

66 Ibid. at 513, *per* Glidewell LJ, following *R* v *Donovan* [1934] 2 KB 498. Additionally, *Boyea* did not need to foresee the injuries of his indecent assault because *R* v *Savage and Parmenter* [1992] 94 Cr App R 193 established that no *mens rea* is required for the resulting bodily harm (ibid. at 207, *per* Lord Ackner).

67 See further discussion by Elliott and De Than, above n. 8 at 244.

68 See Herring, above n. 9 at 517; Gross, above n. 10; and Bohlander, above n. 7.

69 Gross, above n. 10 at 224–5.

rather than the use of force.[70] Although it is not currently deemed reasonable to implement Herring's theory of 'mistaken sex' in relation to rape, if a victim is mistaken that her sexual partner is HIV negative when he is in fact HIV positive, and he intentionally deceives her about this fact, he is open to being convicted of malicious wounding.[71] It can be argued that in all instances where a defendant hides his HIV status, he is being deceptive, but the recent changes in the law have not placed any such responsibility on the shoulders of the defendant to inform his victim of this fact. How can the defendant harbour an honest belief in the victim's consent if he himself has not divulged his HIV status? The main issue now is: in what ways can a victim be informed, how informed does she have to be, and who can be the informant?

It has been suggested by Bronitt that an individual can be aware of a risk of infecting another without having actual knowledge of his or her own infection.[72] This may not be logical: to be 'aware' of a risk implies knowledge that one poses a risk. The work of Spencer[73] was referred to in *Dica*, who argues that liability materialises if a defendant knows he has *or may have* a grave disease and that his behaviour involves a risk of transmission.[74] Presently, the judgment of *Dica* requires the defendant to *know* he has HIV,[75] and the consensus is that this is the correct approach.[76] Weait concludes that the only way to escape liability post-*Dica* is to (a) disclose infection; or (b) never get tested.[77] This is called into question by *Konzani*.[78] Judge LJ has claimed that the ultimate question is not knowledge but consent, but he has also submitted that it is unlikely that one would consent to a risk if one were ignorant of it.[79] This is confusing. Does the victim require knowledge, and if so, to what extent?

The victim's state of mind

Many writers agree with Judge LJ in *Dica* that consent is not an issue in HIV transmission cases, the result being rape if it was.[80] However,

70 Bohlander, above n. 7 at 416 claims: 'Rape traditionally . . . involves the fact that the woman has to *endure* intercourse *against her will* because she is forced, threatened or finds herself in an exploitative situation which leaves her no choice' (emphasis in original).

71 This is because the victim must give an informed consent, and the defendant must have an honest belief in that consent: *R* v *Konzani* [2005] 2 Cr App R 198 at 208–9, *per* Judge LJ.

72 S. Bronitt, 'Spreading Disease and the Criminal Law' [1994] Crim LR 21 at 30.

73 J. R. Spencer, 'Retrial for Reckless Infection' (2004) 154 NLJ 762 at 767.

74 See J. R. Spencer, above n. 64 at 471. In addition, see J. R. Spencer, 'Liability for Reckless Infection: Part 1' (2004) 154 NLJ 384; and 'Reckless Infection in the Court of Appeal: *R v Dica*' (2004) 154 NLJ 762. Is a defendant who believes he *may* have a grave disease merely morally rather than legally responsible to protect his partner from infection?

75 [2004] QB 1257 at 1273, *per* Judge LJ.

76 See Weait, above n. 50 at 131; S. Ryan, 'Reckless Transmission of HIV: Knowledge and Culpability' [2006] Crim LR 981 at 981.

77 See Weait, above n. 50 at 130–1.

78 [2005] 2 Cr App R 198.

79 Ibid. at 208–9 and see also *R* v *Dica* [2004] QB 1257 at 1273.

80 Would a new HIV offence correct this? See particularly Warburton, above n. 55 at 66 and Weait, above n. 50 at 127.

disagreement has arisen regarding knowledge. Recent debates with regard to informed consent under s. 74 of the Sexual Offences Act 2003 have suggested instances where a defendant may face some kind of criminal reprimand for lying to his or her partner, particularly in relation to what the intercourse stood for. Herring argues that in order for a decision to carry the weight we expect of autonomy, we need to ensure that the decision-maker is aware of the key facts involved in making the decision.[81] It is an interesting idea that consent can be vitiated if the victim—if he or she had known the truth—would not have consented. Bohlander warns that Herring has gone too far, arguing that the harm that is being done to the victim by the defendant at the moment of intercourse is that she is being duped, not that she is being penetrated. The harm is thus psychological, not physical.[82] This is not the case in HIV transmission cases, however, where the defendant has been deceptive as to his HIV status resulting in harm to the victim. Of course, Gross's argument that the act of sex is still consented to regardless of any trivial mistakes made by the victim is just as relevant in HIV transmission cases as it is in rape cases—the act of intercourse itself remains unaffected despite a disease being passed. Lord Latham LJ in *R* v *EB* is correct when he states that a victim is not consenting to the disease, but she is still consenting to the intercourse: 'as a matter of law, the fact that the defendant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under section 74 . . . such consent did not include consent to infection by the disease'.[83] The issue now is to decipher what exactly the victim must know in order to provide a properly informed consent, and whether any element of deceptiveness on the part of the defendant plays a part in vitiating the consent.

Spencer states that consent to a risk of infection must presuppose full knowledge of the facts—suspecting is not enough.[84] This seems reasonable, but it would shift the evidential burden onto the victim. Can a victim provide an informed consent if her knowledge is sourced from a place other than the defendant? If 'yes', this would render the defendant's knowledge of his own HIV status irrelevant, leading to the dangerous assumption that the assailant need not divulge his status at all. The *ratio* of *Dica* was read in *R* v *Barnes*[85] to mean that a defendant who discloses his condition will have a defence if 'despite this knowledge they were still prepared to accept the risks involved and consented to having sexual intercourse with him'.[86] Coupled with Judge LJ's clear directions in *Konzani*[87] that an informed consent by the victim and an honest belief in that consent from the defendant is analogous to the

81 Herring, above n. 9 at 516.
82 Bohlander, above n. 7.
83 [2007] 1 WLR 1567 at 1571; Gross, above n. 10.
84 See Spencer, above n. 73 at 767.
85 [2005] 1 WLR 910.
86 Ibid. at 913, judgment of the court read by Lord Woolf CJ, emphasis added.
87 [2005] 2 Cr App R 198.

defendant's revelation of his status,[88] it appears initially that the defendant must be honest and open in order to accept consent. However, a loophole has appeared. Judge LJ recognised that in some instances an informed consent can be given notwithstanding the defendant's concealment, and this would remain a defence:

> By way of 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 would remain a defence, even if the defendant had not personally informed her of his condition. *Alternatively, he may honestly believe that his new sexual partner was told of his condition by someone known to them both.* No doubt [these cases] will be explored with the complainant in *cross-examination*. *Her answers may demonstrate an informed consent*.[89]

By suggesting that social interactions can produce an informed consent, Judge LJ has rejected the stipulation that the defendant must reveal his condition to hold an honest belief in the consent. This allows a defendant to be completely reckless, and places a significant burden on the victim to look into the sexual history of his or her partner before consenting. Additionally, Judge LJ believes that a victim's implied consent may only be obvious when cross-examined. How is a defendant to confirm such an illusive informed consent at the time of the act itself? It is foreseen that this loophole will be employed by numerous assailants. Whilst it is completely feasible that a victim could provide an informed consent to the risk of HIV without the defendant disclosing this information, should some responsibility not be imposed upon the defendant? Let us imagine that when X received his contaminated blood transfusion, X's doctor took Y to one side and told Y that her partner was HIV positive, but X does not disclose his condition directly to Y. According to one reading of *Konzani*, X's honest belief in Y's consent is still missing because it was not X who disclosed the information. According to another reading of *Konzani*, Y's informed consent will suffice as a defence. Is it possible that Judge LJ meant that a victim can derive his or her knowledge from any source, but the defendant must be informed—by the victim—that this knowledge exists? Should X check with Y that she is aware of his condition? It may be more logical to keep the burden on the defendant to check that the victim is aware of the situation.

As a result of both *Dica* and *Konzani*, it seems as though a person can consent to the transmission of HIV under s. 20 if those risks have been directly or indirectly disclosed to him or her by any source. Realistically, full knowledge is difficult to attain. If V's partner is not willing to divulge the true nature of his sexual health, does V have any other choice than to take a risk? Alternatively, can wilful blindness on the part of the victim suffice as knowledge? Devlin J was clearly of the view in *R* v *Roper*[90] that a wilful refusal to make inquiries was equivalent to knowledge.[91] With respect to Devlin J, the refusal to make inquiries is difficult

88 Ibid. at 208.
89 Ibid. at 209, emphasis added.
90 *Taylor's Central Garages* v *Roper* [1995] 2 TLR 284.
91 Ibid. at 288–9.

to equate with the actual knowledge derived from making such inquiries. What is slightly worrying is the seemingly low threshold to establish the defence of consent in HIV transmission cases. The defendant is not to be convicted if there was or *may have been* an informed consent by his sexual partner to the risk.[92] How *may* a victim be informed of a risk? Does a hint suffice? A 'secret understanding'?

It is submitted that *Konzani* has opened the defence of consent far too wide in relation to HIV transmission cases. A defendant has plenty of freedom to manoeuvre, while the victim has very little.

A way forward for reckless HIV transmission

The Offences Against the Person Act 1861 was not designed to discourage the spread of infectious diseases. Interestingly, an offence of administering a noxious substance under s. 23 has been suggested in HIV transmission cases instead of s. 20, but sexual intercourse is unlikely to be considered as 'administering'.[93] In its report *Legislating the Criminal Code: Offences against the Person and General Principles*, the Law Commission expressed the view that intentional or reckless transmission of disease should be capable of constituting an offence against the person.[94] A second publication, *Consent in the Criminal Law*, made a provisional proposal that precluded a defence of consent for the proposed offence of recklessly causing seriously disabling injury.[95] This approach was described as 'sensible'.[96] In 1998, the Home Office issued a Consultation Paper entitled *Violence: Reforming the Offences against the Person Act 1861*.[97] In this paper, the government had not accepted the recommendation that there should be offences to enable the intentional or reckless transmission of disease to be prosecuted. The government was particularly concerned that the law would 'discriminate against those who were HIV positive, have AIDS or viral hepatitis or who carry any kind of disease'.[98] It then proposed that the criminal law should apply only to those whom it can be proved beyond reasonable doubt had deliberately transmitted a disease intending to cause serious injury.[99] This suggestion seems to sway more towards s. 18 convictions for intentional transmission of HIV, but since it is never certain that the virus will be transmitted during intercourse, such behaviour could only ever be reckless.

92 *R* v *Konzani* [2005] 2 Cr App R 198 at 208, *per* Judge LJ, emphasis added.
93 See Bronitt, above n. 72 at 37.
94 Law Com. Report No. 218, Cm 2370 (1993), paras 15.15–15.17, available at *http://www.lawcom.gov.uk*, accessed 12 April 2010.
95 Law Com. Consultation Paper No. 139 (1995), paras 4.46–4.51, available at *http://www.lawcom.gov.uk*, accessed 12 April 2010.
96 See, particularly, Spencer, above n. 73 at 389.
97 Home Office, Consultation Paper (May 1998), available at *http://www.homeoffice.gov.uk/documents/cons-1998-violence-reforming-law/?version=1www.homeoffice.gov.uk*, accessed 12 April 2010.
98 Ibid. at para. 3.16. This rejection may be misguided—only those who are blameworthy should incur liability. For a supporting view, see Warburton, above n. 55 at 69.
99 Home Office, Consultation Paper, above n. 94 at para. 3.18. See *R* v *Dica* [2004] QB 1257 at 1271–2 for a detailed review of the reform history in this area.

An amendment to the Sexual Offences Act 2003 is the most logical way forward to close the loophole raised in *Konzani*. It seems inappropriate that the law cannot protect unknowing victims against reckless individuals who can claim an honest belief in consent simply because the victim *may* have been seen talking to an acquaintance who knew of the defendant's condition. Herring's previously discussed provision has caused controversy.[100] The result of this test would be rape, but when recklessly transmitting HIV, rape does not seem to be the appropriate tag to attach to a defendant. In *R* v *EB*[101] Latham LJ disagreed that an HIV transmission case should be decided along these lines. In this case, B transmitted HIV to an unknowing—but consenting—acquaintance.[102] Latham LJ correctly held that the act of intercourse remains a consensual act.[103] Many writers have argued that a victim who consents to intercourse is not consenting to infected intercourse, which is of a different quality, and thus a rape conviction should logically result.[104] The real issue in HIV transmission cases is not whether the consent (to the sex or to the malicious wounding) was vitiated, but whether the victim was properly informed as to the disease he or she was about to contract. Even though Herring's 'mistaken sex' theory is deemed to be unworkable, it does place a responsibility upon the defendant to be honest to his partner. In instances where this involves a simple fact, this is not so urgent, but in cases involving HIV, this is vital. Perhaps it may be best to avoid the already complex areas of consent and mistake and keep things simple by amending the 2003 Act in order to place the burden of proof on the defendant? The following provision is suggested:

> **Transmitting HIV through sexual intercourse**
> **3A.** Any person who,
> (a) knowing of their HIV positive status, or
> (b) suspects that they hold such a status,
> intentionally or recklessly engages in sexual intercourse with a second person, failing to inform that second person of their knowledge or suspicions of their HIV positive status, shall be guilty of an offence if that second person contracts HIV.

The second party must consent to the transmission once the defendant has performed his informative role. Of course, if the Sexual Offences Act 2003 was amended to cover HIV transmission through intercourse, that

100 See quote in text at n. 9 above; Herring, above n. 9 at 517.
101 [2007] 1 WLR 1567.
102 The trial judge directed the jury to consider whether the complainant had had the freedom to consent to intercourse with a man whom she did not know was HIV positive (ibid. at 1569).
103 Ibid. at 1571.
104 This is particularly in reference to the law of mistake and misrepresentation. Under s. 76 of the Sexual Offences Act 2003, if the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act, it will be conclusively presumed that the complainant did not consent to that act and the defendant did not believe that the complainant consented to that act. In *R v EB* [2007] 1 WLR 1567 it was ruled that these directions applied to acts of a sexual nature, not the transfer of disease. See particularly Williams, above n. 55 at 132–3 and Herring, above n. 9.

would mean that the definition of consent under s. 74 would become directly relevant to HIV transmission, rather than using the rules of consent under non-fatal offences.

In order to allow a 'victim' to make a free and informed consent to the HIV offence under the new s. 3A, her knowledge must not be allowed to be derived from another source other than the defendant. Perhaps s. 74 could be amended to read as follows:

> A person consents if he or she agrees by choice, and has the freedom and capacity to make that choice, from all the relevant information divulged by the accused.

Whilst maintaining the positions of *Dica* and *Konzani*, these provisions place responsibility back onto the defendant.

Conclusion

It has been decided that for an individual to consent to contracting HIV through sexual intercourse, his or her consent must be informed and the accused must have an honest belief in such consent. However, it has been shown that as a result of *Konzani*: (1) the victim's knowledge may be derived from several sources, allowing the defendant to claim an honest belief despite hiding his HIV status, and (2) the victim's informed consent may only come through in cross-examination, making it difficult for the defendant to be aware of the informed consent at the time of the intercourse. These oversights greatly reduce the defendant's burden of responsibility. Without a clear statutory offence, these 'get-out clauses' leave the door open for reckless individuals simply to 'assume' informed consent before embarking on infected intercourse. A new offence of transmitting HIV through sexual intercourse has been suggested to overcome the loophole in *Konzani* and *Dica* by allowing for a conviction where a person knows or may know he has the HIV virus and fails to tell his sexual partner. This element of disclosure is also an integral part of the defence of consent in an amended version of s. 74 of the Sexual Offences Act 2003, ensuring that the new offence places the burden of proof to disclose HIV status firmly back onto the defendant.

It remains unclear why an individual can consent to contracting a grave disease under s. 20 yet may not consent to minor harm under s. 47 of the 1861 Act. Whilst *Dica* endeavours to support the issue of autonomy by establishing that an individual can knowingly consent to the s. 20 offence of HIV transmission, several questions are raised on public policy. Why has *Dica* crossed the line of consent? Judge LJ distinguished *Dica* from *Brown* on the basis of violence and degradation,[105] but apart from the defendants' characteristics, i.e. homosexuality, the issues at hand are not *that* different. Whilst it may be true that sado-masochistic activities are more violent than 'conventional' sexual intercourse, was not the decision in *Brown* based on public policy and the spread of

105 [2004] QB 1257 at 1270: '[*Brown* was] concerned with violent crime, and the sexual overtones did not alter the fact that both parties [in *Brown* were] consenting to the deliberate infliction of serious harm or bodily injury on one participant by the other'.

disease and infection?[106] Surely an offence under s. 20 is more dangerous than s. 47 regardless of the context of the harms? Ormerod submits that the policy in *Brown* was to convict men participating in consensual sado-maschistic homosexual encounters resulting in actual bodily harm to protect society against a cult of violence with the danger of corruption of young men and the potential for the infliction of serious injury.[107] Even though the true rationale underlying *Brown* is unclear, it is highly unlikely that the activities in *Brown* were prohibited because of the sexuality of the defendants. It is more likely that the activities in *Brown* were prohibited because they were *dangerous*. Is not the spread of a potentially fatal virus dangerous? It is submitted that the trial judge in *Dica* was right to apply *Brown*, as it is not in the public's best interests to risk spreading a dangerous virus 'for no good reason'.[108] Perhaps the discussions in *Brown* should have been directed towards regulating the dangerous sexual behaviour under new guidelines as opposed to why they were already unlawful. An alternative argument bravely raised by Lord Mustill in *Brown* discussed a potential new offence under the 1861 Act in order to protect those who engaged in dangerous sexual activities.[109] Considerations for this new offence included the increasing spread of infections, matters getting out of hand between couples and groups who engage in such dangerous sexual activities, the spread of HIV as a public health matter, and the protection of young people who are easily influenced. Unfortunately, balancing personal rights against taking risks was considered to be a parliamentary matter and Lord Mustill was met with considerable dissent.[110] 'Public policy' has been applied selectively depending on the nature of the act and the characteristics of the defendants. Lord Mustill's radical suggestion in *Brown* to regulate harmful sexual activities as opposed to precluding them completely from a defence of consent was a liberal idea, one which may well have given more consideration to public policy than the actual outcome of *Brown* which was to remove the right to consent to harmful sexual activities completely. A new offence of HIV transmission within the ambit of sexual offences would provide a specific offence with its own rules on consent, thus leaving the line of consensual activity as drawn in *Brown* restricted to the field of non-fatal non-sexual offences.

106 In *R* v *Konzani* [2005] 2 Cr App R 14, Judge LJ stated 'in the public interest, so far as possible, the spread of catastrophic illness must be avoided or prevented'.

107 See generally Ormerod, above n. 63 at 536.

108 Approving the rationale of Lord Lane CJ in *Attorney-General's Reference (No. 6 of 1980)* [1981] 2 All ER 1057 at 1059–60. See further Davies, above n. 43 at 499, on why the trial judge in *Brown* was correct.

109 [1994] 1 AC 212 at 274–5. Lord Mustill rejected illegalising the acts on repugnance alone, and sought to list proper reasons why the acts should be made criminal.

110 [1994] 1 AC 212 at 235–7, 245–6 and 276, Lord Templeman, Lord Jauncey and Lord Slynn dissenting. An appeal by Brown to the European Court of Human Rights was unsuccessful because it is the right of the State to regulate acts of torture: see *Laskey, Jaggard and Brown* v *United Kingdom* (1997) 24 EHRR 39 at paras 39 and 43.