

Criminal Liability and the Transmission of Covid-19

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Key Points:

- In principle, transmitting Covid-19 either recklessly or intentionally could be charged as an offence against the person under s. 18 or s.20. A person is more likely to face prosecution for transmitting Covid-19 if they know they have it.
- Coughing recklessly and not abiding by government social distancing or lockdown guidance might constitute recklessness in some circumstances following the case of *R v Dica*. If a defendant can be shown to have taken steps to control the virus, it follows that they may be less likely to be prosecuted.
- Two men have already been prosecuted for assaulting emergency workers after deliberately coughing and spitting at police officers, which indicates that the public interest would be best served by charging intentional assaults, particularly against key workers.

In these difficult and uncertain times, it is crucial that the law is clear in relation to the transmission of Covid-19. This should include understanding whether the deliberate or reckless transmission of the virus is a criminal offence.

As of 1st April 2020, the Government has not introduced any specific criminal offence regarding actual transmission of the Covid-19 virus. However, we have seen the prosecution of individuals who have threatened to by directing spits and coughs towards police officers. The prosecutions have been under the relatively new Assaults on Emergency Workers (Offences) Act 2018. Clearly then, such intentional or reckless actions can amount to an assault – but what about actual transmission?

A comparative analysis of the law in relation to the transmission of HIV may be useful. More is known about HIV than Covid-19. Both can be life-threatening and have serious consequences to a person's health. Both can cause grievous bodily harm. Whereas, an obvious point of difference is the lifelong impact and abhorrent stigma associated with HIV sufferers. An additional differentiator, which should be stressed, is that unlike HIV, Covid-19 has presented in the context of a recognised global pandemic (World Health Organization; 12th March 2020; 'WHO announces COVID-19 outbreak a pandemic').

Section 20 GBH 'Reckless' Transmission

The leading case on the reckless transmission of HIV is *R v Dica* [2004] EWCA Crim 1103, which was a prosecution for GBH under s. 20 of the Offences Against

the Person Act 1861 (*R v Dica*, paragraph 37). The defendant had consensual sexual intercourse with the complainants, knowing he was suffering with HIV. He was reckless whether they might become infected; thereby inflicting grievous bodily harm (*R v Dica*, paragraph 10). Comparatively, it would therefore seem that, for a prosecution to be brought against a person for recklessly transmitting Covid-19, that person would need to have knowledge that they had Covid-19. This is unlikely to be the case until widespread testing is available.

Whether a defendant was reckless or not is fact specific (*R v Dica*, paragraph 59). It is perhaps difficult to imagine in reality, but at least in principle, coughing recklessly and not abiding by government social distancing or lockdown guidance, therefore might constitute recklessness in some circumstances.

In *R v Dica*, there was no reason for the complainants to have suspected they were running any risk of infection or consenting to it. The defendant concealed the truth about his condition (paragraph 39). The principle in *R v Brown* (1993) 97 Cr. App. R. 44 was addressed in *R v Dica*; consent is not available to a charge of s. 18 GBH (*R v Dica*, paragraph 39). At paragraph 59, the judgment continues:

'The effect of this judgment in relation to s. 20 is to remove some of the outdated restrictions against the successful prosecution of those who, knowing that they are suffering HIV or some other serious sexual disease, recklessly transmit it through consensual sexual intercourse, and inflict grievous bodily harm on a person from whom the risk is concealed and who is not consenting to it... If however, the victim consents to the risk, this continues to provide a defence under s. 20'.

Covid-19 is a global pandemic. Its ease of transmission is well-documented in news coverage. It has obvious symptoms, whereas HIV is not infectious nor apparent in the same way. Taking the example of a hypothetical complainant who lives with someone with Covid-19, who refuses to self-isolate, it would be unlikely that the complainant would not suspect they were running any risk of infection. Ultimately, it is easier for Covid-19 to be transmitted unintentionally than HIV is, and it may not be immediately apparent that prosecuting the transmission of Covid-19 under s. 20 would be in the public interest.

It would be more difficult for a defendant to argue that a complainant would consent to an activity in which they would likely contract Covid-19, e.g. being coughed on. Conversely, the obvious difficulty remains, when in the midst of a pandemic, of how it can be proved that it was that defendant's cough specifically that caused a complainant to contract Covid-19. Irrespective of this, a prosecution under s. 20 may appear as an alternative to one under s. 18.

Section 18 GBH and 'Intentional' Transmission

In *R v Rowe* [2018] EWCA Crim 2688, the defendant was convicted of five offences of causing GBH under s. 18 and five offences of attempting to cause GBH under s. 18. *R v Dica* was relied on as authority that the transmission of HIV can amount to an offence under the Offences Against the Person Act 1861 (*R v Rowe*, paragraph 67). The court held that '...sexual partners deserve the protection of the law and protection from infection with a disease that may have lifetime consequences for them' (*R v Rowe*, paragraph 51). Likewise, members of the public deserve protection in the time of the Covid-19 pandemic.

In this case, the complainants did not know the defendant was HIV positive; he lied that he was not (*R v Rowe*, paragraph 19). He deliberately infected people, including sabotaging condoms (*R v Rowe*, paragraph 28). The prosecution did not contend that the jury could infer intention from the virtual certainty of transmission, and it was held that s. 20 could be an alternative (*R v Rowe*, paragraph 61). The messages the defendant sent to some of the complainants made it clear he knew what he was doing (*R v Rowe*, paragraph 28). A similar example in respect of Covid-19 could be envisaged where an infected person deliberately coughs in close proximity to an uninfected person and informs them they have Covid-19. Indeed, two men have already been prosecuted for assaulting emergency workers after deliberately coughing and spitting at police officers (CPS; 26th March 2020; 'Coronavirus coughs' at key workers will be charged as assault, CPS warns').

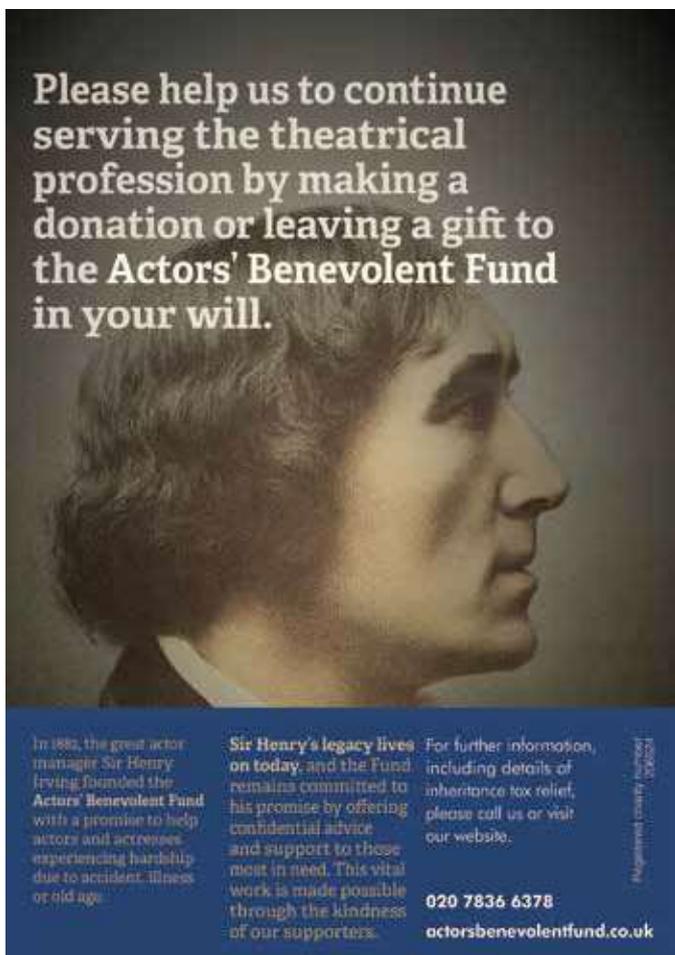
In *R v Rowe*, (paragraph 58) Hallett LJ identified the factors the defendant could have undertaken to have control over the virus. This would have allowed the complainants to decide whether to take the risk or to subsequently take medication. Hallett LJ suggested he could have regularly taken medication, used undamaged condoms and told the complainants of his HIV-positive status. Had the defendant

done this, it could have gone some way in vitiating the inference that he intended to cause GBH. This could be applied in a Covid-19 case if a person were to fail to take control over the virus by adhering to the Government's self-isolation guidance. Ultimately, if a defendant can be shown to have taken steps to control the virus, they may be less likely to be prosecuted for it. If a prosecution was brought, evidence that such steps were taken would be helpful evidence to challenge an assertion of intentional transmission.

Conclusion

In light of the authorities, in principle, transmitting Covid-19 either recklessly or intentionally could be charged as an offence against the person under s. 18 or s. 20. The level of harm caused by contracting Covid-19 from the assault would be a relevant consideration. If it was not actually contracted, an attempted assault could be prosecuted (following *R v Rowe*) but there may be difficulties proving the required intent. Ultimately, it is likely that the public interest would be deemed better served during the pandemic by charging intentional assaults and assaults against emergency workers and members of the public. It is clear from recent examples that CPS policy has already adopted this approach (<https://www.cps.gov.uk/cps/news/coronavirus-coughs-key-workers-will-be-charged-assault-cps-warns>).

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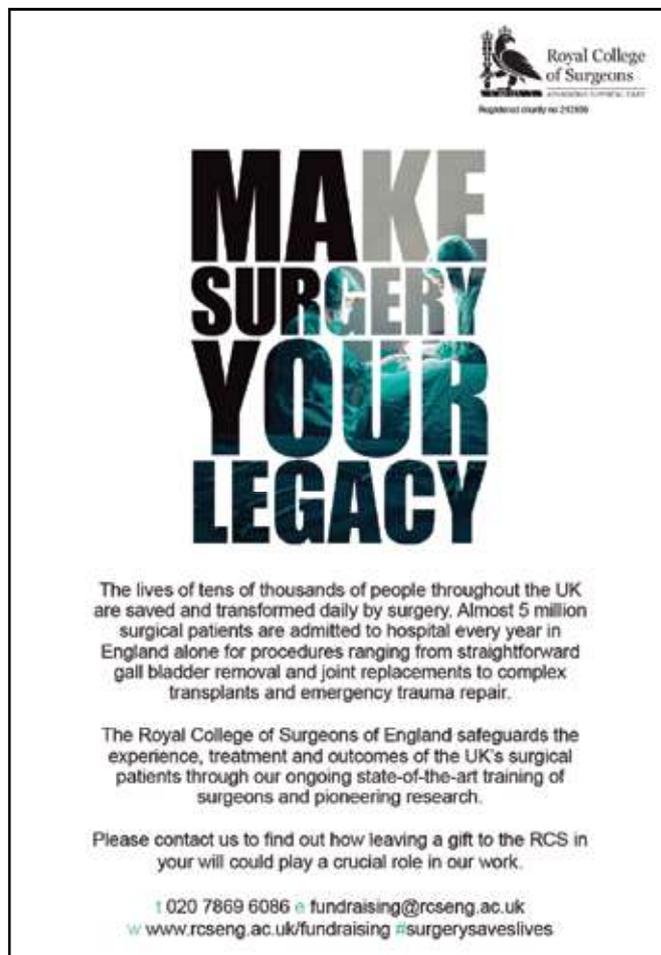
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