

Do judges understand HIV?

A review of court transcripts from cases involving HIV transmission

I cannot imagine a greater degree of grievous bodily harm than infecting a person with a virus of this nature.
Lynch J, January 2004

Background

Between October 2003 and January 2009, 16 people in England and Wales went to court after being charged with Grievous Bodily Harm for having infected another person with HIV (11 straight men, of which 4 were Black Africans, 3 gay men and 2 straight women).¹ 12 have been convicted and 4 acquitted.

Method

NAT (National AIDS Trust) recently acquired transcripts of parts of the trials for 13 of these individuals in England and Wales for research and archive purposes.² This study reviews those transcripts for evidence of the understanding of HIV amongst judges, prosecution and defence counsels.

Summary

HIV is discussed almost exclusively in clinical terms in the transcripts. However, judges' descriptions of HIV are generally out of date, seeing HIV as a fatal disease with highly complex, arduous and/or purely palliative treatments. Unprotected sex is often believed to lead inevitably to transmission of HIV and there is general astonishment by all parties in court, judge, defence and prosecution counsels, that gay men ever have unprotected sex.

The main sources of Judges' information about HIV, apart from the beliefs they bring to the court, are statements made by prosecution, medical reports and evidence from expert witnesses. Defence counsels rarely challenge prosecution statements about the impact of HIV infection.

Conclusion

The most significant source of information for judges and the courts on HIV comes from expert witnesses, generally clinicians. The 2008 Crown Prosecution Service Policy and Guidance on prosecution emphasises the importance of medical and scientific evidence in each case.

Providing information at the request of the court is an opportunity to ensure the courts receive both specific information about either defendants or complainants but also good quality information about HIV itself. The basics about HIV transmission, the current life expectancy of people with HIV, the tolerability and effectiveness of treatment all need to be included for the courts to gain a very basic understanding of HIV, and the implications of infection and treatment.

What judges need to know

- HIV is a treatable condition and no longer a terminal illness
- The life expectancy of people with HIV is now measured in decades and close to normal
- The difference between HIV and AIDS
- HIV treatment is extremely effective
- Treatment can involve as little as one pill per day
- HIV treatment need not ruin a person's quality of life
- HIV treatment reduces the infectivity of the individual
- Many current treatments have significantly fewer side-effects
- Transmission of HIV is not inevitable even after repeated unprotected sex with an infected person
- Unprotected intercourse in gay or straight relationships are not unusual events.

Findings

Life expectancy

In general, judges still believe that HIV is a terminal illness with an arduous and unproven treatment regime. While this may have had some justification in the first few years of anti-retroviral therapy, HIV is now a chronic treatable condition with the majority of patients taking only a few pills per day.

On average, [the expert witness] said, those who acquire an infection become seriously ill in seven or eight years and then you add on an average of 18 months before death. (Philpot J, October 2003)

...[her] prognosis is uncertain but it is bleak. (Lynch J, April 2004)

For... the lives of these young women thereby to be very substantially curtailed. (Fox J, May 2004)

It is not too dramatic to say that you have condemned your victim to the likelihood of an early death, knowing that she was the mother of two small children. (Astill J, March 2005)

Notwithstanding the fact that she's presently well, it's clear from the medical information before me that the prognosis that she has at the moment is of course only immediately over the next six months and then beyond that over the next few years; one can't go beyond that. (Stokes J, April 2005)

Her life expectancy has been curtailed in consequence. (Cottle J, December 2005)

The result is that the unfortunate L and her family are living with a ticking time bomb. They have no idea how this is going to develop and their fears are eloquently set out in the statements of her brothers. (Lewis J, November 2006)

The recently published studies in the Lancet and JAMA³ show that the gap in life expectancy between people with HIV on successful treatment and people without HIV is now only a few years but this information on the long-term success of HIV treatment had been around for a number of years before this. Brian Gazzard was quoted in January 2005 saying, 'My personal view is that most people on HAART will have a normal lifespan'⁴ and Dr Stephano Vella at the International AIDS Conference in Toronto August 2006, 'HIV is a chronic disease, if patients stay on their medicines they will live a normal lifetime'. At the BHIVA Autumn Conference in 2006 data was presented from the mortality audit that highlighted, '[i]t is becoming increasingly likely, if you live in the UK, and are diagnosed and under care, HIV will not be the cause of your death'.⁵

Knowledge of the impact of treatment

There is significant confusion about treatment and judges refer to HIV treatment as being extremely arduous or purely as a palliative measure. At the time of the first court case in October 2003 treatments were well known to be highly effective and with improved side-effect profiles.⁶ Although Atripla was not available for all of the past 6 years throughout that time it has also been possible to use combinations with a very low pill burden (e.g. Nevirapine +Truvada, 2 pills taken once a day).

One cannot help but be deeply sympathetic to Mr Konzani for the disease he suffers now irrevocably and to the young women, five of them in total, from whom you have all heard, all of whom suffer this terrible affliction, but there is nothing that can be done about that now except to alleviate their symptoms as modern science might assist. (Fox J, May 2004)

Each woman... has suffered the florid effects of the infection, and manages to control her life, but only with very frequent and heavy medication, and that on a permanent basis. (Philpot J, November 2003)

Now [the complainant] has to live the rest of her life with the knowledge that she is HIV positive with all the concomitant concerns that brings and the constant drug treatment she has to undergo. (Stokes J, July 2005)

The huge impact of effective HIV treatment has generally been missed or poorly understood. There was very little understanding about the success of HIV treatment. Some did not understand the difference between HIV and AIDS or what a sero-conversion illness was.

If a person has the virus which is controlled by a cocktail of drugs now available and then stops taking the drugs, a seroconversion illness can return. (Astill J, March 2005)

[the complainant] has begun anti-retroviral treatment and her type of HIV is susceptible to all such types of treatment... [but]... nobody knows whether this will develop or not into full-blown AIDS. (Lewis J, November 2006)

Only in one case did the defence counsel state that HIV is a chronic treatable condition, with effective treatments and that medications do not inevitably ruin an infected person's quality of life.

over the years the treatments for the HIV virus have become (a) more and more successful and (b) less complex once it is diagnosed... and fortunately enough, albeit it has had a significant impact upon the complainant, she has... managed to have a further child who's not HIV positive, and she's managed to get her life, physically, certainly, back on to an even keel after being... diagnosed in 2000/2001, physically subsequent to then it has been controlled. And there's not been a suggestion within her victim impact statement that she's had a difficulty as a result of HIV. She may have had some psychological difficulties that have followed, but no physical difficulties that are subsequent to the time in 2000. (Defence Counsel, November 2008)

These comments from Defence Counsel were not well received by the judge at the time, and while sentencing he commented, *you have infected two people with the HIV virus, they have both developed AIDS, and most particularly so far as the complainant in this case is concerned, the consequence have been devastating both physically and psychologically; and I have read, with concern, the victim impact statement from her.* (Woolmer J, November 2008)

Unprotected sex does not mean inevitable transmission

The view is taken that unprotected sex will lead almost inevitably to transmission of HIV.

I simply say now that you demonstrated a cynical disregard for the consequences of your acts, consequences which you really appreciated were likely to follow. (Astill J, March 2005)

Initially because your knew of your condition you ensured it was not a sexual relationship. It then became a sexual relationship where you did use a form of protection but then you stopped using it and inevitably... she contracted that same condition. (Stokes J, July 2005)

In 2001 a study in Uganda, looking at the impact of viral load on infection rates in sero-discordant heterosexual couples, found that with an average duration of two years follow-up just over a fifth, (22%) of the HIV negative partners became infected.⁷ A Spanish study in 2005 looking at the impact of treatment on rates of partner infection amongst heterosexuals found that of couples who had been together even before treatment was available only 11% of partners of people with HIV were infected.⁸

Although the studies had a different aim both demonstrate that even within relationships where people are having unprotected sex the majority of partners do not become infected with HIV.

Only in one male-to-male transmission case was the judge persuaded that a sero-discordant relationship would not inevitably lead to infection of the HIV negative partner. Initially telling the jury that, 'the likelihood is that [the complainant] was uninfected as [the ex-partner] is fortunately still HIV negative' but after defence counsel used evidence supplied by a clinician the judge changed this advice to 'one shouldn't assume that [the complainant] was negative, because... [his ex-partner] had been uninfected'. (Binning J, August 2006).

Sex between men

There appears general astonishment that gay men do not discuss HIV before having sex and that they ever have unprotected sex.

One contested case in August 2006 concerned the alleged transmission between two men and parts of their sexual histories were brought out in evidence. Prosecution and Defence Counsels and the judge however, showed a marked lack of knowledge of gay men's sexual behaviour. The 2006 Gay Men's Sex Survey (GMSS) showed that just over half of the respondents living in London, where the complainant and defendant lived, said they had had unprotected anal intercourse in the previous year but unprotected sex between men astonished the court.

...in some ways the risk taking beggars belief, (Binning J)

The lack of discussion about HIV amongst gay men prior to sex appears "extraordinary" to the court but the majority of gay men (70%) surveyed in 2005 stated they had had sex with another man without knowing his HIV status and almost a third said that it was unprotected anal intercourse (29% of men diagnosed with HIV, 30% of those previously tested negative for HIV and 27% of men never tested for HIV).⁹

It would be the easiest thing in the world, wouldn't it, for him to have mentioned to any of those sexual partners, before exposing them recklessly to the risk of infection with the HIV virus, that he was in fact HIV positive but he chose not to do so. (Prosecution Counsel)

One of the most extraordinary things about this case... is that unprotected sexual intercourse with people you meet on the first night, either never see again or go into some sort of relationship with, there is no conversation at all about risk. It is not just between these two it seems to be the norm. (Defence Counsel)

It doesn't seem to be terribly customary [amongst this group of gay men]... I suppose it might spoil the romantic style of the evening if you just popped into the equation, 'I've got HIV'. (Binning J)

1 See <http://www.nat.org.uk/Our-thinking/Law-stigma-and-discrimination/Criminal-prosecutions.aspx> for a full list of the trials in the UK.
2 The archive includes transcripts from 14 trials and 2 Appeal Court judgments from England and Wales and 2 High Court judgments and 1 Diet from Scotland. There are also copies of interviews with complainants and defendants that appeared in Positive Nation or Positively Women magazine. One of the English trials was about the transmission of Hepatitis B and not HIV and one Scottish trial was for transmission of both HIV and Hepatitis C.
3 Baskaran et al. (2008) Changes in the risk of death after HIV seroconversion compared with mortality in the general population, JAMA 300:51-59 and The Antiretroviral Cohort Collaboration, (2008) Life expectancy of individuals on combination therapy in high income countries, The Lancet 372:293-299
4 AIDS Treatment Update 143
5 AIDS Treatment Update 162
6 HIV Medicine 4 Suppl. 1, 1-41
7 Quinn CT et al. Viral load and heterosexual transmission of human immunodeficiency virus type 1. New England Journal of Medicine 342 (12): 921-929, 2000
8 Castilla J et al. Effectiveness of highly active antiretroviral therapy in reducing heterosexual transmission of HIV. Jol Acquired Immune Deficiency Syndrome 40: 98-101, 2005
9 Hickson et al (2007) Consuming Passions, p20. available at www.sigmaresearch.org

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Who we are

NAT is the UK's leading charity dedicated to transforming society's response to HIV. We provide fresh thinking, expert advice and practical resources. We campaign for change.

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