

HIV infection and criminal cases. An analysis of the legal situation.

By Professor Madeleine Leijonhufvud.

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Questions concerning criminal liability in connection with HIV infection arise for the National Board of Health and Welfare in Sweden (Socialstyrelsen) as a result of the provisions contained in the Swedish Communicable Diseases Act on the duties of doctors and communicable disease control physicians providing treatment when there is good reason to suppose that a person carrying a dangerous illness is not following the rules of conduct laid down for him/her. Questions also need to be answered in relation to the rules on confidentiality under the Public Access to Information and Secrecy Act which apply within health and medical care. An exception from that confidentiality applies in the case of information to the office of the public prosecutor, a police authority or any other authority which must intervene against an offence if a term of imprisonment of at least one year is prescribed for the offence in question. In order to carry out an assessment regarding confidentiality, it is therefore necessary to be able to assess how a court would regard the act and how it would be classified. A brief report is given below on how Swedish criminal law governs acts which involve transmission of HIV infection through sexual intercourse or which entail a risk of such transmission.

Swedish law lacks criminal provisions specifically aimed at acts which cause contagious illnesses to be transmitted from one person to another. Nevertheless, the Swedish Criminal Code contains several provisions which may apply to such conduct. The Communicable Diseases Act previously contained a special provision providing penalties for those who had sexual intercourse despite the fact that they suffered from venereal disease. However, when the rules of the Communicable Diseases Act were made applicable to HIV infection in 1985, that provision was repealed. There was considered to be a risk of the threat of punishment deterring those suffering from the illness from going to a doctor. The government bill stressed that the repeal of the special penalty provision did not mean that sexual intercourse with venereal disease would be exempt from punishment in future. Reference was made instead to the penalty provisions contained in chapters 3 and 13 of the Swedish Criminal Code.

When the current Communicable Diseases Act was established, it was not considered that there was any reason to reinsert a similar penalty provision. The previous Communicable Diseases Act also prescribed fines for persons in breach of instructions issued to them concerning isolation and restrictions in their activities. The current Communicable Diseases Act contains no corresponding rule which punishes offences against rules of conduct.

Some central criminal law issues e.g. questions concerning adequate causation, effects of consent and sanctions, were raised when a number of cases concerning acts involving

transmission or a risk of transmission of HIV infection were heard in the courts in the 1990s. The question of the *intent* of the perpetrator's conduct presented particular difficulty.

Swedish criminal law contemplates various types of intent. The most common form of intent associated with acts involving transmission or a risk of transmission of HIV infection was so-called *eventuellt uppsåt* ["possible intent", *dolus eventualis*]. This was the minimum requirement for the act to be judged as *murder, manslaughter, assault and battery* or *attempts to commit such offences*. A decision by the *Högsta domstolen* (HD) [Supreme Court] in 2002 concerning a completely different kind of act introduced a new way of establishing the lower limit for deliberate acts (NJA 2002 page 449). Instead of possible intent, which is founded on a hypothetical assessment, the decisive element was considered to be whether the perpetrator *remained indifferent to the realization of the risk*. This judgment was referred to in the government bill on the Communicable Diseases Act.

Furthermore, the government stated that if no intent existed it may be appropriate to convict for offences committed through negligence (*causing bodily injury or illness, assault or creating danger to another*). The necessary subjective condition of negligence exists when the perpetrator fails to understand but should understand that a certain effect will or could occur. With regard to acts entailing transmission or a risk of transmission of an HIV infection, it was stated that, when judging the question of what may be considered to be normal care, the courts attached importance to the advice and rules of conduct given to guard against the spread of infection. Significance has also been apportioned to what rules of conduct were issued and what other information was provided when assessing whether a particular perpetrator may be considered to have acted negligently in a particular case.

Creating danger to another exists when one person, through gross negligence, exposes another to danger to life or danger of serious bodily injury or serious illness. The government states that HIV infection is considered as a serious illness within the meaning of the provision. The danger of illness must have been concrete and an assessment as to whether a person could actually have been infected must be made in the particular case.

The government also touched upon the question of the meaning of *consent* by the person against whom the act is committed. According to case law, consent eliminates liability for injury only if that injury is slight. Even when the offence in question is one of negligence which involves violence against a person (*causing bodily injury or illness and creating danger to another*), the scope for considering that consent has the effect of discharging from liability is extremely limited. Nevertheless, consent should be taken into consideration when deciding the punishment value of the act and may serve to justify a less severe punishment than that prescribed for the offence.

Further penal provisions which it was stated could be considered related to offences involving public danger were *spreading poison or a contagious substance* (which requires intent) and *careless handling of poison or contagious substance*. In both cases liability requires that someone should have caused serious danger to several persons' life or health, e.g. by transmitting or spreading a serious illness. Attempted offences are also penalised.

In three decisions which related to acts committed before the extremely important antiretroviral therapy began to be used in the second half of the 1990s, the question of when so-called possible intent could be considered to exist became the subject of divided opinions either in the Court of Appeal or in the Supreme Court. A *precedential Supreme Court decision* was issued in 2004 in a judgment which proved to be significant far beyond these specific criminal cases. The case, NJA 2004 page 176, was used, in addition to the case referred to above, NJA 2002 page 449, as a basis for a general change in the way that the lower limit for intent was established in Swedish law. The minimum requirement for intent is now that it should be possible to prove indifference, i.e. in the case of an effect in the form of injury or risk of injury that the perpetrator had remained indifferent to the possibility of that injury or risk actually occurring (“likgiltighetsuppsåt”).

In the case in question, a man born in 1976 was prosecuted for attempted aggravated assault. The description of the act included unprotected sexual intercourse – oral and anal – with 10 different men on a total of over 250 occasions. The defendant, S.H., denied liability on the grounds that his virus levels were so low that there was no specific danger of spreading infection. He had been receiving treatment with “braking medicines” for most of the period to which the prosecution related.

The Supreme Court stated that the view of the risk of infection depended, among other things, on what treatment methods were available. The use of so-called “braking medicines” had opened up completely new possibilities of preventing HIV infection leading to death through the development of AIDS. Nevertheless, the Supreme Court stated, as far as the government was concerned this development had not been considered a reason for any more fundamental change or differentiation in how HIV infection was treated in law. The illness was still classified as a socially dangerous illness and was subject to the special rules deriving from that classification. Neither had any change been made in the general rules of conduct which were regularly issued to people with HIV infection.

In the light of this, it could not be considered that sufficient reason existed at that point to arrive at any conclusion other than that previously enshrined in case law, that sexual intercourse in breach of general rules of conduct on the use of condoms should be considered as unacceptable risk-taking. This applied regardless of the fact that a corresponding conclusion could not be reached when an HIV-positive person obeyed the rules of conduct and used a condom, even though the risk of infection in some such cases could be higher than when a person without a detectable quantity of viruses had unprotected sexual intercourse.

The Supreme Court then passed on to the question of *mens rea* (intent or just negligence?). If any intent existed, the man would be convicted of attempted assault. In the case of negligence, the man would be convicted of creating danger to another, with a reservation for the fact that consent might have the effect of discharging from liability. S.H. had engaged in sexual intercourse knowing that this would involve a danger of transmitting HIV infection. The question was, what was required in addition to this to enable it to be considered that intent existed? The Supreme Court found that hypothetical possible intent was not a suitable or even possible way to specify the lower limit for intent in more detail. Instead, the Supreme Court decided to examine the so-called *likgiltighetsuppsåt* [indifference intent]. Such intent was not considered to have been proved.

In the light of the low risk, many convincing reasons must be required in order for it to be considered as proved that S.H. was indifferent within the meaning referred to here. No circumstances indicating that S.H. could have been indifferent have been presented in the case, other than the large number of incidences of sexual intercourse,. Nevertheless, the risk must be assessed in relation to each individual incidence of sexual intercourse and repeated risk-taking, which, for example, is not uncommon in the context of traffic casualties, does not in itself permit the conclusion that a person was also indifferent to the realization of the risk. Moreover, the preliminary investigation carried out in the case does not even permit the view that an appreciable risk would have existed that at least some of S.H.'s partners would have become infected. Nothing has emerged other than the fact that S.H. was in general concerned about the plaintiffs' welfare. No use of violence or other similar conduct took place. The investigation does not therefore support any conclusion other than that S.H. engaged in sexual intercourse confident that no transmission of infection would take place. It has therefore not been proved in the case that S.H. acted with intent to transmit HIV infection to his partner in each or any of the incidences of sexual intercourse.

S.H. was convicted of creating danger to another in the case of plaintiffs 1–9 and sentenced to one year's imprisonment. One plaintiff had known that the man was HIV positive and nothing indicated that he did not realise the extent of the risk of transmission of infection that actually existed. Nevertheless, in sexual intercourse with plaintiff no. 10, that risk was still extremely low even though S.H. was no longer taking medicine and as a consequence had certain minor quantities of detectable virus in his blood. The Supreme Court therefore found that consent must be considered to have had the effect of discharging from liability and the prosecution was dismissed in this part of the case.

After the Supreme Court judgment of 2004, a number of cases of unprotected sex between an HIV-positive person and one or more other people have been heard in the courts. In several of these cases, the person in question has been convicted of crime with intent – completed assault if an infection was transmitted and attempted assault if no infection was transmitted. Intent in the form of indifference intent (“likgiltighetsuppsåt”) has been considered to have been proved in several cases in which the HIV-positive person was married to or cohabiting with the plaintiff. In one case it was considered as proved that a crime of intent had been committed against the defendant's two children, to whom she gave birth and whom she breast-fed without informing of her infection. Prison sentences of several years have been handed down.

The legal situation in Sweden with regard to HIV-positive persons who have unprotected sex and/or fail to inform their partners of the infection is highly unclear. This is despite the fact that there is one Supreme Court case which must have been intended to have had a precedential effect. Assessments in the courts vary considerably and it is not possible to discern any clear criteria for assessment. The choice between liability for a crime of intent (aggravated assault if infection is transmitted, attempted aggravated assault if no infection is transmitted) and liability for an offence involving negligence (causing illness if infection is transmitted, creating danger to another if no infection is transmitted) does not appear to be systematically durable and consistent. The sentences vary enormously, from 1 year's imprisonment (e.g. in

the Supreme Court judgment of 2004) to 7 years' imprisonment and expulsion. This latter penalty was handed down in Supreme Court case NJA 1995 page 119, in which the defendant was convicted of spreading a contagious substance, an aggravated offence, and aggravated assault and attempted aggravated assault. The man had engaged in unprotected sex with five women, infecting two of them. The classification of attempted spread of a contagious substance was not cited in the 2004 Supreme Court case despite the fact that the case involved over 200 cases of unprotected sex with 9 different men. It therefore appears to be no longer current.

With regard to the significance of consent from (an informed) partner, it was argued in the 2004 Supreme Court judgment that the significance of consent should be assessed on a case-by-case basis when it related to liability for creating danger to another. Consent can therefore serve as a ground for discharge from liability when an HIV-positive person has unprotected sex but when it cannot be shown that the person in question had any indifference intent. Nevertheless, the extent to which this applies is not clearly established.

Assessment of intent continues to cause a great deal of concern. To carry out an assessment afterwards of whether, at the moment when the act was committed, an HIV-positive person was indifferent to whether the infection was transmitted to his or her partner is no easier than assessing, in accordance with the earlier model for verifying intent, whether he or she would have committed the act if he or she had been sure that the infection would have been transmitted. If any difference has arisen, it is probable that more cases now end up "above the threshold".

What is difficult to understand from reading the judgments is that the defendant in the 2004 case would have taken more care with his many more or less casual sexual partners' health than the woman in the judgment of the Court of Appeal for Skåne and Blekinge of 29/06/2007 did with the health of her spouse and her own children. Another aspect is that the breach of confidence involved may appear particularly severe when a person closely related to the perpetrator is exposed to danger of infection because he/she, unlike a casual sexual partner, has no reason whatsoever to be suspicious. Indifference intent, as the Supreme Court has defined it, is rather going in the "wrong" direction in these cases since situations in which breach of confidence is greatest are judged to be less severe than those in which the plaintiff had good reason to be careful but was not.

It is impossible to escape the conclusion that the assessment of intent is affected by whether or not an infection was transmitted. There is good reason to question whether the Supreme Court would have looked so benignly on the defendant's acts in the 2004 case if one or more of the plaintiffs had been infected. This is not a satisfactory legal situation since it is almost a question of chance as to whether the parties are infected or not. It is impossible for the HIV-positive person to assess this and for him or her the situation may be compared to Russian roulette.

To sum up, the legal situation must be considered clearly unsatisfactory. It is extremely difficult to predict what assessment will be arrived at in a particular case. The compilation of judgments indicates that there is an extremely wide variation in assessments and penalties.

One particular question concerns the situation applying when an act of the type discussed here is **committed outside Sweden**. In that case, a Swedish court is required to have what is referred to as *jurisdiction*, i.e. the right to hear the case. The main rule with regard to offences by Swedish citizens or foreigners who have their place of residence in Sweden is that Swedish courts have jurisdiction. However, if the act is committed abroad, so-called *dubbel straffbarhet* [double criminality] is, as a rule, required to exist: the act must be punishable also under the law of the place where it was committed. If double criminality exists, a Swedish court may not in any case impose a penalty which is considered to be more severe than the severest penalty prescribed for a corresponding act in the place where the act was committed.

Jurisdiction always exists in the most serious crimes, those for which the minimum punishment under Swedish law is four years' imprisonment or more. This applies to murder and manslaughter and attempted murder and attempted manslaughter, as well as to certain sexual offences, namely aggravated rape, gross sexual exploitation of a person in a dependent position and aggravated child rape. Since 2005, a number of different kinds of sexual offences against young people have been made punishable in Sweden, regardless of the place where the act in question was committed, if the offence was committed by a Swedish citizen or a foreign citizen with residence in Sweden. If the victim of the offence has not yet reached the age of eighteen a Swedish court always has jurisdiction when the act constitutes rape, sexual coercion or aggravated rape or aggravated sexual coercion, sexual exploitation of a dependent person or gross sexual exploitation of a dependent person, child rape, sexual exploitation of a child, gross exploitation of a child for sexual posing, procuring or gross procuring and attempts at any of these offences. The requirement for double criminality remains with regard to purchase of a sexual service, both from a person under the age of eighteen and from an adult. Nevertheless, it may be supposed that the offence, when it is a question of purchase of a sexual service, can be connected with Sweden to a sufficient extent in order for it to be considered as an offence committed in – and therefore punishable in – Sweden. This applies as soon as any stage of the criminal conduct takes place in this country. If a Swedish citizen has offered payment for a sexual service by letter or e-mail from Sweden and the sexual act takes place abroad, it may be supposed that the act is judged to be a purchase, or a least a punishable attempt at a purchase of a sexual service in Sweden. A Swedish court can then judge this offence or, in less serious cases, a Swedish prosecutor issue an order of summary punishment.

It is not sufficient, to answer the question of whether an act abroad may be prosecuted in Sweden, for there to be a punishment provision in the law of the place where the act was carried out which, in accordance with its wording, is applicable to a case such as this case in question. It must be clearly established that a court in the place where the offence was committed would really convict a person of such an act and that, for example, there is no so-called ground for freedom from liability that would be applicable or any requirement relating to subjective coverage that would not be fulfilled. The court must investigate the material situation concerning criminal liability in the country in question under circumstances such as those of the case in question. Is it normal to decree a waiver of prosecution in cases of this type? Is the case dealt with in practice under a system other than that of criminal law? What penalties are normally imposed and at what level of punishment?

One country whose regulations may be of interest in this context is **Denmark**. The special Danish law on venereal disease was repealed in 1988. At that time it was declared in *Folketinget* [the Danish Parliament] that serious cases of spreading infection could be punished, according to the circumstances, in accordance with certain provisions contained in chapter 25 of the *straffeloven* [Danish Criminal Code]. A prosecution in accordance with section 252 of that chapter, in which a man had unprotected sexual intercourse with a large number of women despite the fact that he was aware that he was HIV-positive, was nevertheless dismissed by the Danish Supreme Court in a case in 1994. In order to close what was perceived as a loophole in the law, a second part of that section was then formulated. After a review in 2001 which included a widening of the criminalised area, section 252 part 2 prescribes up to 8 years' imprisonment for those who recklessly cause danger of infection with a life-threatening or incurable illness. A third section states that the Minister of Justice, after a discussion with the Minister of Health, will establish which illnesses are to be included in part 2. At present only HIV/AIDS is included.

A reckless course of action, thus, is required for liability. According to the doctrine, this requirement means that sexual intercourse is not punishable after informed consent. On the other hand, an isolated incidence of sexual intercourse can fulfil the requirement, for example if the partner is a minor or it is a question of rape. The act must involve intent, also as to what is considered to constitute the recklessness of the course of action.