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'Active Deception' versus Non-Disclosure: HIV transmission, Non-Fatal Offences and Criminal Responsibility.


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‘Active Deception’ versus Non-Disclosure: HIV transmission, Non-Fatal Offences and Criminal Responsibility

Recently, in the criminal law of England and Wales, attention has focused on whether a distinction can or should be made between active deception and non-disclosure. This discussion has arisen in the context of deception, consent under section 74 of the Sexual Offences Act, 2003 and potential liability for a sexual offence. The foundation for this emerging distinction can be found in \( R \) \( v \) \( EB \), a case concerning a charge of rape where the defendant had not disclosed his HIV+ status to the complainant.\(^1\) The Court of Appeal held that failure to disclose HIV+ status prior to engaging in consensual sexual intercourse would not invalidate consent given to sexual activity; although it would prevent consent operating as a defence to a charge under the Offences against the Person Act 1861 if transmission of HIV occurred.\(^2\) \( R \) \( v \) \( EB \) has since been interpreted as finding that non-disclosure of HIV positive status is not analogous to active deception;\(^3\) and as leaving open the question whether an overt lie in response to a direct question regarding HIV status would invalidate consent under section 74. It being generally assumed in the subsequent commentary that active deception of this nature would negate consent.\(^4\) Later cases such as \( Assange v Sweden \) \(^5\), \( R(on application of F) v DPP \) \(^6\) and \( R v McNally \) \(^7\) have similarly been portrayed as turning upon a finding of active deception as opposed to passive deception or non-disclosure; with only active deception resulting in criminal liability.\(^8\) Whilst this may not, in fact, be the truest representation of these decisions;\(^9\) it appears that however tenuous the foundations for the

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\(^1\) \( [2006]\) EWCA Crim 2945; \( [2007]\) 1 Cr. App. R. 29.
\(^2\) \( [2007]\) 1 Cr. App R. 29 at [17] and [21]. Consent in such circumstances did not include consent to infection with a disease.
\(^5\) \( [2011]\) EWHC 2849 (Admin); \( [2011]\) 108 (44) L.S.G. 17.
\(^6\) \( [2013]\) EWCA 945 (Admin); \( [2013]\) 2 Cr. App. R. 21.
\(^7\) \( [2013]\) EWCA Crim 1054; \( [2013]\) 2 Cr. App. R. 28.
\(^8\) See A. Sharpe, “Expanding Liability for Sexual Fraud through the concept of “active deception”: A Flawed Approach” \( [2016]\) 28(1) I.C.L. 28 for a critique of this approach to liability.
\(^9\) A fuller exploration of these cases is beyond the scope of this article; however it is possible to view \( Assange \) and \( R(F) \) as involving conditional consent where a deliberate breach by the accused of a clear condition for consent (i.e. wearing a condom or withdrawing before ejaculating) meant that the free agreement and/or choice aspects of consent under section 74 of the Sexual Offences Act 2003 were violated. It is also worth
distinction between active and passive deception may be, it is a distinction that has started
to take hold. For instance, in McNally Levenson L.J. refers to the concept of active deception
and cites Assange as a case where active deception was considered. Commentators such
as Alex Sharpe and Amanda Clough have written, quite scathingly it is admitted, about the
fact that criminal liability in sexual fraud cases now turns upon a finding of active deception.

It is in the context of HIV transmission and liability for an offence against the person that this
paper seeks to explore whether a distinction should be drawn between active deception and
non-disclosure of HIV+ status. To date little attention has been given to this distinction, or
non-disclosure has been equated with lying. On the rare occasion where the distinction has
been recognised as potentially morally relevant, any significance in legal terms has been
rejected:

“In law it matters not whether he lies about his status, or simply fails to disclose it.
There may be a moral distinction between the two, and one which might be reflected
in the degree of punishment, but it is not a legally relevant distinction.”

noting that in Assange the High Court stated that it was “arguable” that a deception existed; making it difficult
to claim that its ultimate finding that consent was vitiated turned upon the existence of an active deception. McNally, whilst admittedly more problematic, could also be explained as a case where there is deliberate
decision by the accused of a key aspect of the complainant’s consent. The Court of Appeal found that the
complainant chose to have sexual encounters with a boy and that the defendant deliberately ignored the basis

10 [2013] 2 Cr. App. R. 28 at [21].
11 See A. Sharpe, “Expanding Liability for Sexual Fraud through the concept of “active deception”: A Flawed
178.
12 It is recognised that many of the arguments presented here could potentially apply to other sexually
transmitted infections. It is further recognised that sexual transmission of other infections have been
prosecuted – for example R v Golding [2014] EWCA Crim 889. However the focus here will be on HIV
transmission only. The reason for this is three-fold. Firstly, it is HIV transmission that has been the subject of
the majority of academic commentary and case-law. Secondly, the author feels it is inappropriate to make
assumptions that issues surrounding HIV and the difficulties associated with it, are directly applicable to other
STIs. Thirdly, the author does not wish to encourage a wider application of the criminal law and therefore
wishes to confine the arguments here to the specific context of HIV transmission during consensual sexual
activity.
14 As per M. Weait, “Taking the Blame: criminal law, social responsibility and the sexual transmission of HIV”
Offences Against the Person Act 1861 for Sexual Transmission of HIV, Sigma Research 2005, 17 consider that
there may be a moral distinction to be made between “keeping quiet and seeking to deceive, however in its
In opposition to these views it will be argued that the drawing of a distinction between active and passive deception as to HIV+ status, in the context of consensual high risk sexual activity, can be justified on a principled basis and that such a distinction should be afforded relevance when considering criminal liability for HIV transmission.\(^\text{15}\) A central tenet of this argument is that consent to the risk of infection can exist despite non-disclosure by the infected individual and that non-disclosure, in and of itself, does not warrant criminal sanction.\(^\text{16}\)

This paper will first set out the current law in relation to HIV transmission and liability for an offence against the person, highlighting the way in which the prevailing approach to recklessness, belief in consent and informed consent shapes criminal liability around the fact of non-disclosure by the HIV+ individual. This it is recognised makes the drawing of a distinction between active and passive deception currently somewhat futile, as a finding of non-disclosure will generally lead to criminal liability. However, it is suggested that the present over-emphasis on disclosure results in an unjustifiably broad approach to criminal liability. The varied reasons for non-disclosure of HIV status will be discussed and a more considered approach to disclosure will be put forward; one which weighs the rights and interests of both parties to a sexual encounter and recognises the role of mutual responsibility in this context.\(^\text{17}\) Active deception, as distinct from non-disclosure, will be examined. It will be argued that active deception as to HIV status requires a rebalancing of rights and interests and accordingly warrants a different legal response. Whilst recognising a need for responsibility by all parties when engaging in high risk sexual activity more generally, active deception, it is argued, shifts the balance in favour of responsibility for transmission of HIV

\(^{15}\) The emphasis throughout this paper is on consensual high-risk activity such as unprotected vaginal and anal sex.

\(^{16}\) As will be seen in the later discussion of Dica and Konzani, the author argues for a different approach to informed consent than that set out in those cases and believes that in the context of consensual high risk sexual activity, consent to the risk of transmission of HIV may be found in a far greater range of circumstances than those identified by the Court of Appeal in Konzani despite non-disclosure by the HIV+ individual. For a contrary argument that the concept of informed consent as per Dica and Konzani is insufficient see D. Hughes, “Did the Individual Consent to the Risk of Harm? A Comparative Jurisdictional Analysis of Consent in Cases of Sexual Transmission/Exposure to HIV” (2018) 82(1) J.C.L. 76.

being attributed primarily to the infected person, and thereby warranting a criminal response. Finally, approaches to defining active deception will be considered.

**Current Law – Non-disclosure, Active Deception and HIV transmission**

The current law in England and Wales regarding criminal liability for reckless HIV transmission in the context of consensual sexual activity derives principally from the cases of *R v Dica* and *R v Konzani*. A person is guilty of inflicting grievous bodily harm under section 20 of the Offences against the Person Act, 1861 if, ‘knowing’ of their HIV positive status, they recklessly or intentionally transmit HIV to another who does not consent to the risk of transmission. The issue of active deception regarding HIV positive status has not been expressly considered in the case-law on reckless transmission of HIV to date. In *Dica*, the Court of Appeal considered the case on the basis of both concealment by the defendant and, in the alternative, if the complainants were aware of the defendant’s HIV+ status. In *Konzani*, there was no allegation that Konzani had expressly lied about his condition and there was no detailed consideration of the manner of Konzani’s deception, the Court simply stated that “the honest truth was that the appellant deceived” the complainants. Recklessness and ultimately criminal liability in *Konzani* hinged upon the fact of unprotected sexual intercourse, combined with non-disclosure of HIV-positive status (which seemed to equate to deception) and a lack of informed consent.

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18 [2004] 2 Cr. App. R. 28 and [2005] 2 Cr App R 14. The case of *Daryll Rowe* (Lewes Crown Court, 15 November 2017) is the first case of intentional transmission in England and Wales. Rowe was charged with 5 counts of causing GHB with intent under s18 of the Offences Against the Person Act 1861 and 5 counts of attempting to cause GBH with intent.

19 Whilst the Court of Appeal in both *Dica* and *Konzani* refer to ‘knowing’ one’s status, it seems that actual knowledge is not required. The Crown Prosecution Guidelines, *Intentional or Reckless Sexual Transmission of Infection* state that it is possible a person may know they are infectious without having undergone the necessary medical tests for HIV diagnosis. See [https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection](https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection). It has also been argued that suspicion that one may be HIV+ would also be sufficient. See J.R. Spencer, “Reckless infection in the Court of Appeal: R v Dica” (2004) 154 N.L.J. 762.

20 At least not in the UK –although it is arguable that the Court in *Konzani* [2005] 2 Cr. App. R. 14 equated non-disclosure with active deception when it stated that concealment of HIV+ status almost inevitably meant that the sexual partner was deceived. The distinction between active deception and non-disclosure has been considered in Canadian cases on HIV transmission and this will be discussed later in the paper.


Close examination of the current legal position on consent and honest belief in consent reveals the extent to which liability turns upon the issue of disclosure.\textsuperscript{24} In \textit{Dica}, the Court’s recognition of a possible consent defence in situations of non-disclosure\textsuperscript{25} was significantly diluted by its concluding remarks that the decision would enable the successful prosecution of individuals who transmit HIV to those “from whom the risk is concealed”.\textsuperscript{26} The emphasis placed on disclosure is again evidenced in the case of \textit{R v Barnes (Mark)} where Lord Woolf stated that a person would be guilty of an offence if, being aware of their condition, they have sexual intercourse without disclosing the fact of their infection.\textsuperscript{27} Attempts to construct consent to the risk of transmission from a sexual partner’s general knowledge of risks associated with high risk sexual activity have met with resistance (especially when non-disclosure has been a feature of the case). In \textit{Konzani}, the appellant argued that by consenting to unprotected sexual intercourse with him the complainants were impliedly consenting to all known risks. It is worth noting in this regard that all 3 complainants during cross-examination admitted to being aware of the risk of infection with sexually transmitted diseases.\textsuperscript{28} The Court in \textit{Konzani} insisted that consent could only provide a defence where it was “informed” and rejected the argument that one implicitly consents to the risk of infection by consenting to unprotected sexual intercourse.\textsuperscript{29} Judge L.J. stated that concealment of HIV+ status (i.e. non-disclosure) almost inevitably meant that one’s partner was deceived and consent given in such circumstances was not fully informed.\textsuperscript{30} A distinction was to be made, 

\textsuperscript{24} M. Weait suggests there is an “effective” duty to disclose – see “Knowledge, Autonomy and Consent: R v Konzani” [2005] Crim. L.R. 763, 767. See also V. Munro, “On Responsible Relationships and Irresponsible Sex – Criminalising the Reckless Transmission of HIV R v Dica and R v Konzani” (2007) 19 Child and Family Law Quarterly 112 who highlights that consent and reasonable belief in consent are inextricably linked with whether disclosure by the infected individual has occurred.

\textsuperscript{25} [2004] 2 Cr. App. R. 28 at [59]. Judge L.J. by stating that the ultimate question “was not knowledge but consent” seemed to recognise that consent to risk of transmission might be possible notwithstanding non-disclosure by HIV+ individual.


\textsuperscript{27} [2004] EWCA Crim 3246; (2005) 1 Cr. App. R. 30 at [10].

\textsuperscript{28} Albeit none testified that they had specifically considered the risk of HIV infection at the time intercourse took place. For detailed consideration of the case and testimony of the complainants see M. Weait, \textit{Intimacy and Responsibility}, 37 – 83.

\textsuperscript{29} [2005] 2 Cr App R 14, at [41]. Contrast this position with the view expressed by Bennett et al “that it can be assumed that any consent given to, say, “high-risk” sexual activity includes consent to the background risk of HIV infection without specific information about the particular sexual partner in question”. See R. Bennett, H. Draper & L. Frith, “Ignorance is Bliss? HIV and moral duties and legal duties to forewarn” (2002) 26 Journal of Medical Ethics 9, 11.

\textsuperscript{30} [2005] 2 Cr App R 14, at [42].
according to the Court, between “taking a risk of the various, potentially adverse and possibly problematic consequences of sexual intercourse, and giving an informed consent to the risk of infection with a fatal disease”. 31

This reasoning is somewhat problematic; it could be argued that “consent to a risk naturally includes consent to the harm if the risk comes to fruition”. 32 A further difficulty with the court’s reasoning in Konzani is that it equated non-disclosure by the defendant with ignorance of the risk on the part of the complainant. These are not the same. As Weait has argued: “a person from whom a risk is concealed is not necessarily ignorant of it”. 33 Indeed, the testimony of all 3 complainants revealed some awareness of possible risks associated with unprotected sexual intercourse. Whether this was enough to amount to an informed consent required far greater consideration by the court. It was also made clear in Konzani that a failure to disclose would be detrimental to an honest belief in consent defence; such a failure was deemed “incongruous with honesty, or with a genuine belief that there was an informed consent”. 34 Not only was non-disclosure used to deprive Konzani of a defence, it also formed part of the prosecution case for establishing recklessness on the part of the accused. 35 Indeed, so focused is the law on disclosure that even the examples provided by the court of when informed consent might be possible despite non-disclosure by the person infected, are in fact situations where some form of disclosure occurs, either through context (because the parties meet in hospital where the HIV+ individual is being treated), or through a third party. 36 It is suggested that the current over-emphasis on disclosure is unjustifiable and results in an overly broad approach to criminalisation of HIV transmission. 37

31 [2005] 2 Cr App R 14 at [41].
32 Per G. Mawhinney, “To be ill or to kill: the criminality of contagion” (2013) 77(3) J.C.L 202, 206. See also M. Weait, “Knowledge, Autonomy and Consent: R v Konzani” [2005] Crim. L.R. 763 at 765: “it is at least arguable that a person who agrees to have unprotected sex with a person about whose HIV status they are uncertain consents to the risk of transmission by the very act of agreeing to have unprotected sex”.
33 M. Weait, Intimacy & Responsibility, 178. See further S. Ramage, “The Criminal offence of causing infection of HIV virus”, (2008) Criminal Lawyer 2, 6 who argues that “a party might be informed of the risk of contracting HIV through casual sexual intercourse, as she or he is commonly informed of the risk of contracting thrush, venereal diseases or Hepatitis B or C”.
34 [2005] 2 Cr. App. R. 14 at [42].
35 M. Weait, Intimacy & Responsibility, 179-180 describes this as a “radical interpretation of recklessness.”
37 M. Weait, Intimacy & Responsibility, 190 states the approach taken by the courts is one whose “limitations and potential for injustice are substantial”.
A Balanced Approach to Disclosure

Non-disclosure of HIV+ status to sexual partners is a contentious and emotive subject. Given that the moral case for disclosure to sexual partners is very strong; it is not surprising that the current approach to criminal liability has given such a central role to disclosure by the infected individual. It will however be suggested that a more nuanced understanding of disclosure is needed and that criminalisation of HIV transmission in cases of non-disclosure by the infected partner is not always warranted or appropriate in the context of consensual high risk activity. A proper understanding of the reasons and motivation for non-disclosure, and a fair and considered approach to balancing the rights and interests of HIV+ individuals with the rights and interests of their sexual partners, provide the basis for the argument advanced here.

The moral turpitude of the person who does not disclose is complex; and it is wrong to assume that all instances of non-disclosure are the result of a cowardly, selfish or calculated decision. The difficulties surrounding disclosure and the possible risks associated with it, including rejection, abandonment, exposure, discrimination and possibly violence, have been well documented and should not be underestimated. Often the decision to engage in sexual activity is not a rational, calmly calculated one but rather a decision made in the heat of the

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40 See M. Shaffer, “Sex, Lies and HIV: Mabior and the Concept of Sexual Fraud” (2013) U.T.L.J. 467, 469 who notes that deceptions about HIV can provoke different moral responses: “there is a vast difference in blameworthiness of a person who routinely engages in high risk sexual activity without informing their sexual partners of the risk and a person who engages in one act of unprotected sexual intercourse with a person they were beginning to form a relationship with.”

41 See M. Weait, Intimacy & Responsibility, 193 who argues that “not disclosing may – under certain conditions, for some people – be appropriately understood as either a responsible or reasonable course of action.” For a more critical take on non-disclosure of HIV+ status see G. Mawhinney, “To be ill or to kill: the criminality of contagion” (2013) 77(3) J.C.L 202.

moment, under the influence of alcohol/drugs and when emotions are running high. In such circumstances opportunities for disclosing, or good intentions about disclosing, can quickly evaporate. Non-disclosure here may more properly be viewed as negligent as opposed to intentional or reckless. Furthermore, studies have shown that some HIV+ individuals choose to engage in low risk activity or use precautions as an alternative to disclosure; thereby seeking to act responsibly and avoid transmission. It is doubtful whether non-disclosure in such circumstances can be viewed as reckless, especially considering that such risk reduction strategies have been given tacit approval both in law and in public health guidance. So whilst it is not denied that there may be instances of non-disclosure which may seem more culpable than those outlined above; it is contended that the issue of criminal liability for non-disclosure in the context of consensual sexual activity, requires a measured consideration of the various rights, interests and responsibilities involved.

The case for requiring disclosure is frequently based upon the autonomy interests of the sexual partner. It being argued that disclosure allows for an informed autonomous choice to be made about whether or not to run the risk of infection with a serious disease. Failure to disclose, so the argument goes, prevents the sexual partner from exercising their autonomy.

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44 See M.A. Schlitz & Th. G.M. Sandfort, “HIV-positive people, risk and sexual behaviour” (2000) 50 Social Science & Medicine 1571, 1575 who note that “many HIV positive individuals act responsibly and use protection but, like all humans, are fallible”.
46 The Crown Prosecution Guidelines, *Intentional or Reckless Sexual Transmission of Infection* state that the proper use of precautions will render a finding of recklessness highly unlikely. See https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection. BHIVA/BASHH guidelines suggest that use of precautions, even in cases of non-disclosure, will protect from liability – see M. Poulton, M. Phillips, *HIV Transmission, the Law and the Work of the Clinical Team*, 2013
47 Fear that disclosure would mean that a desired sexual encounter would not happen for example. Or the reckless pleasure seeker referred to by G. Mawhinney, “To be ill or to kill: the criminality of contagion” (2013) 77(3) Journal of Criminal Law 202, 203.
in a meaningful way. Such reasoning is broadly in line with the Court of Appeal’s approach to informed consent in Konzani where it was stated that a complainant’s “personal autonomy is not enhanced” if the defendant is exculpated when he recklessly transmits the HIV virus to her through sexual intercourse having concealed his condition. The Court further found that the protection of the complainant’s autonomy required the rejection of an honest belief in consent defence when disclosure had not been made. However, as indicated above, the reasoning in Konzani has significant shortcomings. It rests upon the assumption that the person infected is the sole source of knowledge regarding risk of HIV transmission. It overlooks the fact that the sexual partner may be fully aware of the various risks associated with different types of sexual activity even without disclosure by the infected partner. It improperly gives full responsibility for transmission to the infected individual, ignoring the role the sexual partner plays in acquiring the disease by willingly engaging in high-risk activity. As Weait has observed, this is an area where mutual responsibility should be recognised; after all transmission would not have occurred ‘but for the other person’s willingness to accept that risk’. Indeed it could be argued that respecting an individual’s autonomy means respecting their decision to engage in sexual activity in which they risk harm to themselves. This argument was recognised in Dica, with the Court finding that a denial of

51 [2005] 2 Cr. App. R. 28 at [42]. See M. Weait, Intimacy & Responsibility, 182-185 for a critique of the approach taken by the court to the issue of autonomy. Whilst recognising its “intuitive appeal” Weait, at 183, contends that this reasoning fails to take account of the fact that in the context of offences against the person and consent as a defence the “law is not, at least prima facie, concerned with protecting, or indeed ‘enhancing’ the autonomy of the person harmed, but rather with protecting the person who harms from the imposition of unjustified liability.”
52 For some commentators a person’s knowledge of their HIV+ status is enough to impose an obligation to disclose – see G. Mawhinney, “To be ill or to kill: the criminality of contagion” (2013) 77(3) J.C.L 202. Consider further the argument noted by M. Cornett, “Criminalization of the Intended Transmission or Knowing Non-Disclosure of HIV in Canada” (2011) 5(1) McGill Journal of Law and Health 61: “because the diagnosed individual has the most complete information with respect to his condition and its potentially serious effects if transmitted, it is he who bears the ultimate burden of disclosure.”
53 Of course difficulties arise in the context of long-term relationships when the sexual partner has no cause to suspect that by engaging in unprotected intercourse with their partner they are engaging in high-risk activity. A means of dealing with this type of situation will be discussed later in the paper.
this right would amount to an infringement of a person’s autonomy. Finally, it fails to give sufficient weight to the autonomy and privacy interests of the HIV+ individual which are clearly infringed by a requirement to disclose their HIV status. In light of the potential for stigma and discrimination, an infected individual has strong reasons for seeking to protect the confidentiality of their medical diagnosis. Furthermore, whilst it may be argued that it is the infected person’s actual knowledge of their status that tips the balance in favour of placing greater responsibility on them, it is questionable whether this responsibility can only be met through disclosure (as opposed to using precautions or engaging in low risk activity). Of course the HIV+ person’s rights of autonomy and privacy are not absolute and must be balanced against the rights and interests of their sexual partner and take account of the risk of serious harm involved.

When conducting this balancing exercise it is suggested that account should be taken of the likelihood of the risk of transmission, as this would enable a more measured approach towards disclosure to be adopted. For example, it is argued that when the risk of transmission is low, an obligation to disclose would be a disproportionate interference with a HIV+ person’s rights to autonomy and privacy. As recognised by the Law Commission, requiring disclosure in all cases effectively means that once a person has been diagnosed as

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59 Consideration of the serious nature of harm requires recognition that HIV is a serious lifelong condition but one that is no longer a death sentence. It also requires the seriousness of the harm to be weighed against the social utility of the activity involved and the likelihood of the harm occurring. See further A. Norrie, “Subjectivism, Objectivism and the Limits of Criminal Recklessness” (1992) 12 O.J.L.S. 45.
60 See S. Ryan, “Risk-taking, Recklessness and HIV Transmission: Accommodating the reality of sexual transmission of HIV within a justifiable approach to criminal liability” (2007) 28 Liverpool Law Review 215, 229-233 for discussion of relevance to be given to likelihood of risk occurring. See also D. Baker, “The Moral Limits of Consent in Criminal Law” (2008) 12 New Criminal Law Review 93 at 107 who suggests that the mental element for criminalisation in the context of HIV transmission “would require that the harmdoer knew there was a real risk (i.e., a high degree of endangerment as opposed to low-level endangerment) or harm transpiring”.
61 Risk may be low due to use of precaution, type of sexual activity engaged in (i.e. oral sex) or low viral load and consistent adherence to ART regime. See further D. Hughes, “Condom Use, vital load and the type of sexual activity as defences to the sexual transmission of HIV” [2013] J.C.L. 136.
HIV+ they are duty bound to warn others, however insignificant the risk of transmission may be.\textsuperscript{62} This places too little weight on the rights and interests of HIV+ people to privacy and sexual expression. Moreover, given that the level of risk under consideration here is the same, or may be less, than the level of risk associated with intercourse more generally; and that consent to intercourse implies consent to the normal level of risk, it seems unfair to insist upon disclosure.\textsuperscript{63} As Bennett, Draper and Frith have argued: “when the risk is low it is possible to act in a responsible and morally justifiable way without forewarning”.\textsuperscript{64} A similar approach is taken in the CPS Guidelines, \textit{Intentional or Reckless Sexual Transmission of Infection}, in relation to the use of precautions. The guidelines provide that recklessness, which it states only arises in circumstances where the suspect has not informed the complainant of his/her infectious status, may be difficult to establish when precautions have been used.\textsuperscript{65} Therefore, whilst recognising the sexual partner’s competing rights to autonomy, it is suggested that in cases of low risk of transmission, the autonomy and privacy interests of those infected should prevail.\textsuperscript{66}

When it comes to high-risk activity\textsuperscript{67} the strength of the argument for disclosure increases significantly.\textsuperscript{68} The heightened risk of serious harm could be said to trump the privacy and autonomy interests of the person infected. Yet, whilst recognising the force of this view, it is argued that to require disclosure in all instances of high-risk sexual activity goes too far.\textsuperscript{69} As

\begin{itemize}
  \item R. Bennett, H. Draper & L. Frith, “Ignorance is Bliss? HIV and moral duties and legal duties to forewarn” (2002) 26 Journal of Medical Ethics 9, 12.
  \item The Crown Prosecution Guidelines, \textit{Intentional or Reckless Sexual Transmission of Infection} available at https://www.cps.gov.uk/legal-guidance/intentional-or-reckless-sexual-transmission-infection. The Guidelines make clear that disclosure would be required if safeguards ceased to be effective.
  \item See V. Tadros, “Recklessness, Consent and the Transmission of HIV” [2000] Edinburgh Law Review 371, 377 who suggests that “Given the value of sexual privacy, it is important that the law is restricted to an appropriate degree and in the appropriate way”.
  \item J. Flaherty, “Clarifying the Duty to forewarn in HIV Transference Cases” (2008) 54 Criminal Law Quarterly 60 argues that “a significant risk of harm in a sex act awakens the duty to disclose one’s HIV positive status”.
\end{itemize}
previously argued disclosure by the infected sexual partner of their HIV+ status is not the only way in which a person may gain knowledge about potential risks associated with sexual activity. It is asserted here that when a person with knowledge of such risks willingly engages in high risk sexual activity, they are in fact consenting to such risks.\textsuperscript{70} In such situations responsibility for transmission is rightfully shared between the sexual partners and criminal sanction for the person who has transmitted the infection is not justifiable.\textsuperscript{71} It is also worth noting that for some people engaging in high-risk sexual activity, disclosure of HIV+ status is potentially dangerous and the ability to negotiate safer sex is limited or non-existent.\textsuperscript{72} Non-disclosure in such circumstances could be viewed as less culpable, or possibly even excusable if one weighs the level of risk of transmission against the risks associated with disclosure and/or safer sex negotiation, insistence upon condom use or refusal of sexual activity.\textsuperscript{73}

Before considering active deception it is useful to summarise the points advanced here regarding disclosure. Firstly, non-disclosure does not necessarily prevent a sexual partner from making an informed choice. Secondly, to require disclosure in all circumstances fails to adequately balance the rights and interests of those infected with the rights and interests of their sexual partners. Thirdly, disclosure should not be required when someone has taken precautions or is otherwise exposing someone to a low risk of transmission. Fourthly, even where a high risk of transmission exists, issues of autonomy and responsibility do not make an incontestable case for obligatory disclosure by the HIV+ person; and fifthly, non-disclosure, even in case of high risk sexual activity, may sometimes amount to reasonable risk-taking or

\textsuperscript{70} It is recognised that this view runs contrary to the rulings in \textit{R v Konzani} [2005] 2 Cr. App. R. 14 and \textit{R v EB} [2007] 1 Cr. App r. 29 as previously discussed.

\textsuperscript{71} M. Weait, “Criminal Law and the Sexual Transmission of HIV: R v Dica” (2005) 68(1) M.L.R. 121, 128 says to do otherwise would “be tantamount to saying that the person infected bears no responsibility for their own sexual and physical health.”


\textsuperscript{73} See further S. Ryan, “Risk-taking, Recklessness and HIV Transmission: Accommodating the reality of sexual transmission of HIV within a justifiable approach to criminal liability” (2007) 28 Liverpool Law Review 215; and M. Weait, \textit{Intimacy & Responsibility}, 193. The Law Commission has also recognised there are many factors of a non-medical kind that may be regarded by a jury as excusing a decision not to disclose the fact of infection, or even a decision to lie about it. See Law Commission, \textit{Reform of Offences Against the Person} Law Com No. 361 2015, p.156.
be deemed excusable.\textsuperscript{74} In short, the mere fact of non-disclosure should not form the substantive foundation for criminal liability if transmission of HIV occurs during consensual high risk sexual activity.

\textbf{In defence of an Active Deception/Non-Disclosure Distinction}

Whilst domestic courts have not yet considered whether a distinction should be drawn between active deception and non-disclosure in the context of liability for HIV transmission, Canadian Courts have grappled with this issue directly. The initial view expressed by Cory J in Cuerrier was that there could be “no basis for distinguishing between lies and a deliberate failure to disclose” given that the possible consequence of having unprotected intercourse with a HIV+ person was death.\textsuperscript{75} In Mabior, the Canadian Supreme Court recognised that the adoption of such a distinction would do much to remedy the issue of uncertainty by making clear that a person would only be liable for criminal prosecution if they made a positive representation or lied in response to a direct question.\textsuperscript{76} It further acknowledged that this distinction would help address the issue of over-criminalisation by precluding those who inadvertently or negligently failed to disclose their HIV+ status from criminal liability.\textsuperscript{77} The Supreme Court ultimately refused to endorse the adoption of a positive misrepresentation approach. It made reference to the difficulty of distinguishing between active deception and passive deception by non-disclosure; and rejected the idea that there was a principled distinction between active and passive deception finding that “Fraud is fraud, whether induced by blatant lies or sly deceit”.\textsuperscript{78} Similar concerns regarding the validity of the distinction have been expressed in the commentary on domestic sexual fraud cases. It being suggested that the active/passive distinction cannot be justified on a principled basis, that the distinction is an inadequate means of setting the parameters for criminal liability and that the


\textsuperscript{75} [1998] 2 S.C.R. 371 at [126]. It is worth noting the use of the word deliberate here. It could be argued that this is akin to intentional non-disclosure which could be distinguished from negligent non-disclosure.

\textsuperscript{76} [2012] 2 S.C.R. 584 at [62]. The Supreme Court referred to an “active misrepresentation approach” which consisted of a clear misrepresentation or a lie in response to a direct question.

\textsuperscript{77} [2012] 2 S.C.R. 584 at [62].

\textsuperscript{78} [2012] 2 S.C.R. 584 at [64-65] per McLachlin C.J.
distinction is prone to analytical collapse and may lead to over-criminalisation. In contrast to these views it is suggested that a distinction can validly be made between active and passive deception in the context of HIV transmission; and that active deception when combined with engagement in high risk sexual activity requires a different weighing of rights and interests from the one outlined above for non-disclosure.

It is contended that the distinction may be justified by reference to the principle of autonomy. It has frequently been argued that non-disclosure evidences the same lack of respect for a sexual partner’s autonomy as lying. However, as argued above, mere non-disclosure of HIV+ status does not necessarily infringe individual autonomy nor preclude the making of an informed choice. In the absence of an express lie the risk of transmission should be borne jointly in the context of consensual high risk sexual activity. On the contrary, active deception clearly undermines the autonomy of the sexual partner and their ability to make a reasoned choice. In the words of Alexander and Sherwin: “a successful lie distorts the reasoning process of the person lied to, displacing his will and manipulating his action for the speaker’s ends”. The lie interferes with the deliberation process in which someone weighs up risks and makes decisions about their course of conduct. In the particular context of active deception as to HIV+ status it is argued that such deception “skews the divergence between the perceived and actual risk of unprotected intercourse” and deprives sexual partners “of their autonomy over the level of risk they were prepared to tolerate”. Sharpe takes issue with the claim that active deception infringes autonomy to a greater degree, on the grounds that it rests upon an assumption that the source of a person’s knowledge or ignorance matters; when all

that really matters according to Sharpe is what someone knows. Yet what Sharpe overlooks is the very fact that what someone knows and is basing their future actions on has been shaped by an active deception, a lie, which fundamentally alters in a detrimental way their basis for knowledge and their effort to take responsibility for their own sexual health.

A further reason for differential treatment is that lying or actively misleading, as distinct from non-disclosure, demonstrates greater culpability. As outlined above, non-disclosure is not necessarily sufficiently blameworthy to deserve criminal sanction. Active deception in relation to HIV status however may be considered more blameworthy and therefore deserving of prosecution if transmission occurs. Limited support for this claim is taken from the widespread recognition in criminal law of the moral difference between acts and omissions; with the former considered more culpable than the latter. However, it is the fact that active deception evidences a more culpable state of mind upon which support for the making of this distinction is mainly based. Indeed it is difficult to see how a claim of consent by the sexual partner to run the risk of infection, or honest belief that such consent existed, could be sustained in the face of proof of active deception.

In cases of non-disclosure, the HIV+ individual offers no “warranty” and it could be argued that the sexual partner, by failing to make enquiries before engaging in high risk activity, or by making an assumption as to HIV status, bears some responsibility if transmission occurs. On the other hand, an express lie

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85 Also worth noting that Sharpe’s argument rests on an assumption that the victim has a right to know about the defendant’s HIV status. Such an absolute right is not recognised here.
86 Although where concerns for physical safety are a real issue for the HIV+ individual and where their ability to insist upon use of precautions is limited, a different approach to active deception may be required – see S. Ryan, “Disclosure and HIV transmission” (2015) 6 J.C.L. 395.
87 Recognised that Sharpe rejects this view arguing “of course lying is a more active form of deception than non-disclosure. But this does not, of itself, demonstrate greater culpability”. A. Sharpe, “Expanding Liability for Sexual Fraud through the concept of “active deception”: A Flawed Approach” (2016) 28(1) J.C.L. 28, 35. Sharpe refers to the responsible active deceiver and the irresponsible non-discloser to support her view – however it is suggested that there are flaws in this reasoning which will be highlighted in this piece.
89 Judge LJ in Konzoni made similar comments but in relation to non-disclosure [2005] 2 Cr App R 14, at [42].
that one does not have HIV “implies a personal warranty of truth” by the liar.\textsuperscript{91} The lie has normative force and the listener is justified in believing what the asserter has said to be true.\textsuperscript{92} In such a situation any risk-taking arguably becomes the sole responsibility of the deceiver and criminal sanction can therefore be justified. Sharpe’s concern that by adopting this distinction a responsible active deceiver (i.e. one who used condoms or had a low viral load but lied as to HIV status) would be punished; whereas the more culpable non-discloser (i.e. the person who engaged in high risk activity without disclosing) could avoid sanction, fails to take due account of the mens rea required for the offence of reckless infliction of grievous bodily harm.\textsuperscript{93} Recklessness would be difficult to establish where precautions had been used and liability for transmission under the approach being proposed here would require both a finding of active deception and recklessness.

Of course, even if one accepts the defence of an active deception/non-disclosure distinction on the grounds of autonomy and culpability advanced here; the question whether this distinction is sufficiently robust so as to be workable in practice and avoid analytical collapse has yet to be answered. It is accepted from the outset that identifying what constitutes an active deception is no easy task and that this task is further complicated by the fact that what counts as a disclosure may be equally opaque. As noted by Lazzarini, Bray and Burris, the line between sex with disclosure and sex without disclosure is often unclear:

“Research on sexual behaviour suggests that individuals and couples often rely on signalling or assumed consent, so that subjectively someone who suggests condom use may believe he has signalled his infection, and that other party’s willingness to engage in unprotected sex means consent to exposure”.\textsuperscript{94}

\textsuperscript{91} See S. Green, “Lying, Misleading and Falsely Denying: How Moral Concepts Inform the law of Perjury, Fraud and False Statements” (2001) 53 Hastings Law Journal 157, and R.M. Chisholm & T.D. Feehan, “The Intent to Deceive” (1977) 74 Journal of Philosophy 143, 151. Some may argue caveat emptor or caveat amator (let the lover beware); in other words that sexual partners know that lovers tell lies and accordingly they should not place any faith in such an assertion. However it is suggested that given the risk of serious physical harm which HIV transmission poses, express lies as to positive status are distinguishable from the ‘common or garden lies’ that are associated with seduction and do not attract criminal liability.


\textsuperscript{93} A. Sharpe, “Expanding Liability for Sexual Fraud through the concept of “active deception”: A Flawed Approach” (2016) 28(1) J.C.L. 28, 35.

An obvious starting point for the concept of active deception is with the definition of a lie. Isenberg’s definition of a lie will be adopted here: “a statement made by one who does not believe it with the intention that someone else shall be led to believe it”. According to this definition it is not possible to lie by omitting to make a statement; therefore passive lies (i.e. non-disclosure) are excluded.

It is recognised that many would object to the exclusion of silence from the concept of active deception advanced here, especially considering that the criminal law has punished silence/failure to disclose information in other contexts. This argument will be dealt with briefly given both limitations of space and the argument previously advanced that there are valid reasons for making a distinction between silence and lying in this particular context. The criminal law tends to punish a failure to disclose where a legal duty to disclose information exists. No legal duty to disclose HIV+ status exists currently in UK law. It could of course be argued that in the context of sexual relationships a ‘fiduciary relationship’ exists between the parties which in turn gives rise to a legal duty. For some the relationship would have to have elements of exclusivity and relative permanence before disclosure could be required, such as James Slater’s ‘relationship of trust’. For others disclosure would be required in the context of any sexual activity. There are, it is submitted difficulties with either approach. The former brings with it difficulties of definition, as to what constitutes a relationship of trust, and the potential for prejudice (allowing people to make moral assessments of relationship types and

97 For example R v Silverman [1988] 86 Cr. App. R. 213 and R v Ray [1974] AC 370 - although these cases were decided under the old law regarding property offences which have been substantially reformed under the Fraud Act 2006. This has led to some commentators questioning why property is better protected than sexual autonomy. See J. Herring, “Mistaken Sex” (2005) J. Crim L. 511 and P. Alldridge, “Sex, Lies and the Criminal Law” (1993) 44 Northern Ireland Legal Quarterly 250.
98 For example section 3 Fraud Act 2006.
100 See J. Flaherty, “Clarifying the Duty to forewarn in HIV Transference Cases” (2008) 54 Criminal Law Quarterly 60, 75 who argues “there is a fiduciary type relationship between the person with the virus and a prospective sexual partner. This is so irrespective of whether the two are in a trust relationship like a marriage”. Flaherty however limits this duty to situations of high risk of transmission. See also L. Cherkassky, “Being Informed: the complexities of knowledge, deception and consent when transmitting HIV” (2010) 74(3) J.C.L. 242 who argues for disclosure to all partners.
determine those deemed worthy of protection).\textsuperscript{101} It also fails to protect the expressly misled casual partner which given the arguments as to autonomy and culpability above is not appropriate. The latter imposes an absolute legal duty to disclose but fails to account for difficulties associated with disclosure and notions of mutual responsibility.

However, whilst it is recognised that confining the concept of active deception to express lies would make the distinction between active deception and non-disclosure far easier to maintain;\textsuperscript{102} it is recognised that such an approach to active deception would be too narrow. Therefore it is suggested that the concept should be expanded so as to include what will be referred to here as positive misrepresentations (which remain distinct from silence).\textsuperscript{103} Positive misrepresentation could however be approached from a very broad perspective. Adrian Lynch has previously recognised that it could be said that the "very act of presenting oneself for sexual union carries with it an implied representation that one is free from sexually transmitted disease or that one is unaware that one has such a disease".\textsuperscript{104} This, it is respectfully submitted, goes too far. Yet it seems possible that someone may, either through words, conduct or half-truths, none of which involve a direct lie as to HIV status, actively deceive a sexual partner. Indeed it could be argued that in both \textit{Dica} and \textit{Konzani}, whilst there was no overt lie concerning HIV status, there was more than simple non-disclosure. In \textit{Dica}, one of the complainant’s (L), claimed that the defendant told her there was no need for condoms as she could not become pregnant.\textsuperscript{105} Given that Dica was aware of his HIV-positive status at the time this statement was made, and knew and understood how HIV was transmitted, it could be contended that there was more than simple non-disclosure in this instance. An exchange between Konzani and LH after unprotected sexual intercourse, in which LH claims to have said “I hope you haven’t got any diseases”; to which Konzani replied “Don’t be stupid” despite knowing his HIV+ status, could be interpreted as a positive misrepresentation that the defendant was disease free. In both cases, statements made by

\textsuperscript{102} Any evidential difficulties in establishing the presence or absence of an active would be no greater than those normally experienced in criminal cases.
\textsuperscript{103} This could include gestures such as a nod or shake of the head, and/or half-truths. See further L. Alexander & E. Sherwin, “Deception in Morality and Law” (2003) 22(5) Law and Philosophy 393.
the HIV+ individual would have led the sexual partner to believe wrongly, that that they were not being exposed to a risk by engaging in unprotected intercourse. It is difficult to see on what ground statements such as these could be distinguished from a direct lie regarding HIV+ status. In particular, Konzani’s deceptive dismissal is very similar to an active lie and Konzani would have known that his sexual partner’s willingness to continue to engage in unprotected sexual intercourse was dependant on his apparent assurance that he was disease free. In both instances the positive misrepresentations undermined the autonomy of the sexual partner and demonstrated a higher level of culpability on the part of the HIV+ individual than simple non-disclosure would have done. It therefore seems right that the meaning given to active deception should be extended beyond express lies so as to capture equally deceptive and culpable misrepresentations.

It is recognised however that once the concept of active deception extends beyond direct lies, the danger of analytical collapse of the distinction or slippage between non-disclosure and active deception is at its greatest. Indeed this has been a key criticism of the distinction in the context of gender fraud cases where it has been argued that the courts have tended to “translate non-disclosure into active deception”; which in turn has been said to lead to over-criminalisation.\(^\text{106}\) Whilst not seeking to downplay the difficulty in properly defining active deception, the reality in the context of HIV transmission is that the risk of over-criminalisation stems from the current over-emphasis on disclosure and the tendency to equate non-disclosure with active deception. In other words, it is the failure to strive to identify an active deception, as opposed to over-creativity in finding active deception that is the problem. In this regard it is worth noting that whilst the Canadian Supreme Court in \textit{Mabior} ultimately rejected a positive misrepresentation approach, it was confident that trial judges could be relied on to “untangle” complicated factual scenarios and determine if a positive

\(^{106}\) See \textit{Wilson} (2013) Unrep as referenced in A. Sharpe, “Expanding Liability for Sexual Fraud through the concept of “active deception”: A Flawed Approach” (2016) 28(1) J.C.L. 28 where it was said that the “deception lay in not disclosing.” Sharpe has suggested that the reason for slippage in gender fraud cases is unacknowledged cis-sexism – a factor not applicable in this context. Of course there is the danger that in the context of HIV transmission the laws understanding of risk and tolerance of risk is viewed through either a heteronormative lens or a disease free normative lens which may lead to slippage between non-disclosure and active deception.
misrepresentation had been made.\textsuperscript{107} It is possible to infer from this that such an approach is not necessarily unworkable. Therefore, despite the complexity of attempting to distinguish between active deception and non-disclosure, it is argued that in light of the reasoned and principled grounds upon which such a distinction can be justified, it is right that we strive to develop a coherent concept of active deception. Such a concept should extend somewhat beyond express lies so as to include deceptive dismissals or misleading statements or gestures, but care must be taken not to over-stretch the concept to the point of analytical collapse.

Before concluding on active deception it is useful to highlight that a separate focus on justifiability of risk-taking may help to ensure appropriate punishment of culpable behaviour whilst at the same time reducing the temptation to translate non-disclosure into active deception. For example, one of the concerns regarding active deception is that it appears to place an unfair burden on the sexual partner to ask the right question in order to be afforded the protection of the law.\textsuperscript{108} This concern particularly applies in the case of longer term relationships where a sexual partner would be unlikely to ask a direct question about their partner’s HIV status if unaware of their partner’s infidelity or other high risk behaviour.\textsuperscript{109} Whilst it might be tempting to try to classify acts, gestures or even silence of such an HIV+ individual as positive misrepresentations, when this would involve straying far from the normal meaning given to this term; it is suggested that the better approach in these cases would be to focus on the justifiability of risk-taking. It being difficult for the HIV+ partner in such cases to argue that their continued risk taking was either consensual or not reckless. This would protect the unknowing sexual partner whilst at the same time avoiding any over-extension of the concept of active deception and thereby allowing the distinction between active and passive to remain coherent.

\textsuperscript{107} [2012] 2 S.C.R. 584 at [64].
\textsuperscript{108} See A. Clough, “Conditional consent and purposeful deception” (2018) 82(2) J.C.L. 178, 189 who argues: “the active deception approach is flawed if the victim must first know the right question to ask.”
\textsuperscript{109} McLachlin C.J. recognised this concern in \textit{R v Mabior} [2012] 2 S.C.R. 584 at [65], observing that it did not seem appropriate that “the trusting wife who does not ask a direct question as to HIV status of her partner be placed in a worse position than the casual date who does”. 20
Conclusion

It is recognised that sexual infections are factors that might reasonably lead a person to refuse consent. Yet when a person chooses to engage in high risk sexual activity, such consent should it is argued, in the absence of active deception, be taken to include consent to all risks associated with such conduct. The current law on reckless transmission of HIV adopts an overly simplistic view that non-disclosure of HIV+ status in the context of consensual high risk sexual activity is sufficiently culpable so as to attract criminal liability. Furthermore, the present law fails to properly weigh the rights and interests of all parties. It is hoped that by seeking to distinguish between active deception and non-disclosure of HIV+ status more appropriate parameters for criminal liability may be identified. Such an approach would, it is submitted, allow a better balance to be struck between the rights and interests of HIV+ individuals and their sexual partners. In the context of consensual high risk sexual activity, sole responsibility for transmission can only justifiably be placed upon the HIV+ individual when they have intentionally undermined the autonomy of their sexual partner by lying or misleading as to their HIV+ status. This approach has the added advantage that it addresses concerns of over-criminalisation by confining criminal prosecution to the most culpable cases of transmission.\textsuperscript{110} Finally the adoption of such a distinction would correlate to public health messages about individual responsibility for sexual health and which prioritises safer sex over disclosure.\textsuperscript{111}

\textsuperscript{110} M. Weait, “Criminal law and the Sexual Transmission of HIV: R v Dica” (2005) (68(1) M.L.R. 121, 130 gives as an example of the most egregious behaviour where a person knows their HIV+ status and lies about it.