Offences against the (Moral) Person: HIV Transmission Offences in Australia

Annette Houlihan[1]

Abstract

HIV transmission remains a focus of criminal prosecutions in Australia, with many of these cases appearing before Victorian courts. This paper will specifically explore the Victorian prosecution of Michael Neal, who was sentenced to 18 years gaol in 2009 for HIV-related offences. This was the first Victorian prosecution that used intentional and attempt provisions. Neal was portrayed as an evil, vindictive criminal in television and newspaper reports. His monstrous culpability was compounded by the subtext of bisexuality and hedonism, but also his implied transcendence from heteronormativity to homodeviance. His sexuality was located within various esoteric, depraved and rapacious imaginations, such as sadomasochism, gay orgies and conversion parties. He became a simulacrum of the 'grim reaper' of early Australian AIDS campaigns whereby he signified an indeterminate HIV risk for multiple unknown innocents. He was both risky and culpable. This paper will explore the construction of his risky criminal identity within the socio-legal imagination of HIV transmission criminality.

Introduction

This paper will examine the Victorian case of *Crown v Michael Neal*.[2] There have been several prosecutions for HIV transmission in Australia (see Cameron and Rule 2009; Houlihan 2007, 2009). Michael Neal was charged which a plethora of offences, mostly related to HIV risk. This case is remarkable because of the lengthy sentence that was handed down, and also because it extended the prosecutorial scope for HIV to include charges relating to attempt. Previously, the issue of charging individuals for having attempted to transmit HIV was absent from Australian case law. This case also included charges for an intentional HIV-specific offence, which had not been used within previous prosecutions. Previously, prosecutions for HIV in Victoria had been limited to the *mens rea* of recklessness. The case also received substantial media coverage because of the alleged moral depravity of the defendant (Robinson 2007). This media reporting meant Neal's character was subject to attack in the court of public opinion, especially because access to the facts of the case was restricted due to suppression orders on reporting.

Neal Case

The information available on this case is scant and I have relied on a document provided by the Victorian Office of Public Prosecutions (OPP), along with newspaper court reports. The Victorian OPP document included a summary of the 46 count presentment under which the defendant was first arraigned, however I was unable to obtain any further information, including facts pertaining to the case. This case was not reported in law reports; further restrictions have been imposed on the public reporting of the case under sections of the *Public Health and Wellbeing Act 2008* (Vic) and the *Judicial Proceedings Reports Act 1958* (Vic). As this relates to HIV, there are provisions under section 133 of the

[1] Dr Annette Houlihan is a Lecturer in the School of Law at Murdoch University.
[2] I would like to acknowledge the assistance of Nicholas Lopez from the Office of Public Prosecutions Victoria in relation to the case of *Crown v Michael Neal*. I would like to thank Thomas Crofts for his detailed feedback on this paper. I also wish to thank the editors and anonymous referees for their suggestions.

ANZCCC: The Australian and New Zealand Critical Criminology Conference 2010

http://sydney.edu.au/law/criminology

The Institute of Criminology would like to thank the
University of Western Sydney as co-sponsors of the ANZCCC.

Public Health and Wellbeing Act 2008 (Vic) and section 129 of the *Health Act 1958* (Vic), now repealed, which allow for the suppression of the names of the offender, victim/s or both because this would publically disclose their HIV seropositive status.

According to the presentment, Neal was charged with 30 HIV-related offences. Neal entered a guilty plea to some counts that were not related to HIV, but entered a not guilty plea for all of the HIV-related charges. The jury returned a mixed verdict on these counts. It should also be noted that some of these counts were in the alternative. This means that if the original charge was unsuccessfully prosecuted, the prosecution could still rely on other charges in relation to the same behaviour. In the *Neal* case, count 1 related to section 19A, while count 2 was an alternative count under an attempt to commit section 19A and count 3 is a further alternative count under section 23 (reckless conduct endangering persons). These charges related to the same complainant. If the defendant was found not guilty of the head count, that being count 1 (intentionally causing a very serious disease), then count 2 of attempt was the alternative. If acquitted of that charge, count 3 was the alternative to the second count. As it happened, Neal was convicted on count 2, as count 1 was unsuccessful and this precluded the prosecution of count 3 because the second count was successful.

The jury returned guilty verdicts to 11 of the 30 charges that related to HIV and, in January 2009, Neal received a sentence of 19 years imprisonment with a non-parole period of 14 years. This is the harshest sentence handed down for an HIV-related crime in Victorian case law. Mr Neal has appealed his conviction and sentence, which is currently pending.

Intentional HIV Transmission

Neal was charged with two counts under section 19A of the *Crimes Act 1958* (Vic). This was the first time this offence had been used in the courts and it relates to intentional HIV transmission. It states:

> s19A(1) A person who, without lawful excuse, intentionally causes another person to be infected with a very serious disease is guilty of an indictable offence.
>
> Penalty: Level 2 imprisonment (25 years maximum)
>
> (2) In subsection (1), ***very serious disease*** means HIV within the meaning of section 3(1) of the *Public Health and Wellbeing Act 2008*.

Neal was found not guilty on both counts, but was convicted of two charges of attempting to intentionally cause a very serious disease in the alternative. He was also charged with another 12 counts of attempting to cause a very serious disease and convicted of six of these charges. In total, he was convicted of eight counts of attempting to cause a very serious disease.

In May 1993, section 19A was enacted through an amendment to the *Crimes Act 1958* (Vic) because of a perceived 'growing trend' in needle-bandit crimes. The then Attorney General, Jan Wade, stated in the second reading of the Crimes (HIV) Bill on 28 April 1993:

> The purpose of the Bill is to respond to escalating community concern about the use of hypodermic syringes filled with blood as weapons in cases of robberies and assault. (Victorian Government 1993)

However, there had never been any prosecutions under this provision until *Neal*. It should be noted that the application of this offence in *Neal* was in relation to sexual activity, not the use of needles as weapons as was intended through the legislation. This offence has never been used in relation to needles.

In the past, there appears to be only one instance where an individual has been charged under section 19A. In 1997, police charged a man with 80 counts of intentionally transmitting HIV. These charges were later withdrawn and he was subsequently prosecuted under section 22 (AFAO 1997:5). The magistrate found it could not be proved beyond reasonable doubt that he had intended infection

to occur. The charges related to the HIV-positive man having unprotected sex with eight people between 1989 and 1996 (Donovan 1997:9).

It is very difficult to prosecute this offence because it requires infection to occur, but also because theoretically it should be very difficult to prove beyond reasonable doubt that an individual intended to cause HIV infection. This is the highest and most stringent *mens rea* or fault element. Section 19A requires the satisfaction of intent as a necessary element of the crime. As Duff (1990:103) explains 'intention should be the most serious and legitimate kind of criminal fault'. Webster (2007:274) further explains:

> An accused acts intentionally where he or she means to do an act or bring about a result, or was aware that a particular result was a virtually certain consequence of his or her actions. Conversely, where an accused is reckless, he or she is not *certain* that the result will occur, merely that there is a *risk* that the circumstances exist or a particular result may occur.

This description explains how the *mens rea* of intent would be more difficult to apply and why recklessness would be more applicable in HIV case law. HIV infection is not a certain outcome of sexual contact, and HIV has been saturated within discourses of risk. As Rush (2009:76) explains, HIV is bound to discourses of risk which, in legal constructions, refers to an indeterminate or 'virtual space suspended between the categories of experiential conduct and realist consequences'. This description so poignantly captures the concerns of this particular case, where the imagined risks of hyper-sexuality are fused with panics about HIV serodiscordance and the Other. Michael Neal was culpable for these imagined harms by stretching the prosecutorial frame of HIV to include attempts, in order to capture those interchanges that did not result in HIV seroconversion.

Neal was not the first person convicted for the mere risk of transmitting HIV. In *DPP v F*, a jury found the defendant guilty of ten counts under section 22 of the *Crimes Act* following unprotected oral and anal intercourse. One of the three complainants was HIV negative. In *R v Dirckze*, the defendant entered a guilty plea to one count under section 23 of the *Crimes Act*. The charge related to unprotected sexual intercourse with his then wife, who did not seroconvert. She gave birth to his child, who was also HIV negative.

Attempts and HIV Transmission

A person can also be charged with attempt under section 321M of the *Crimes Act 1958* (Vic). This offence states: 'A person who attempts to commit an indictable offence is guilty of the indictable offence of attempting to commit that offence.' The penalties for attempt are set out under section 321P, but basically the defendant will receive a lesser, but comparable sentence, which is set out according to levels of punishment for each offence. For example, if an offender is convicted of an attempt to commit section 19A, they receive the sentence that corresponds to the next level down. This means the sentence is a level 2 imprisonment of 20 years maximum compared to the level 3 with a maximum penalty of 25 years as set out in section 19A.

The prosecution must prove that the commission of the offence was 'more than a merely "preparatory" act' and that the accused was 'immediately and not merely remotely connected' with the completed offence, under section 321N of the Act. Under Victorian criminal law, attempt offences have a symbiotic relationship with intent. Under section 321N(2) of the *Crimes Act 1958* (Vic), a person is guilty of attempting to commit an offence if they:

> (a) intend that the offence the subject of the attempt be committed; and
>
> (b) intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time the offence is to take place.

Further section 321N(3) states:

> A person may be guilty of attempting to commit an offence despite the existence of facts of which he or she is unaware which make the commission of the offence attempted impossible.

Although section 19A is theoretically difficult to prosecute because it relies on the most stringent *mens rea*, the linking of intent to attempt through legislation creates a crimino-legal loophole. Rather than being a stringent category of prosecution, the possibilities for prosecution are broadened through these provisions. While it may be extremely difficult to prosecute section 19A, the *Neal* case has demonstrated a widening of the application of criminal law to HIV beyond the previous scope of recklessness.

Reckless Endangerment

Neal was also charged under section 23 of the *Crimes Act 1958* (Vic). It provides:

> A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of serious injury is guilty of an indictable offence.
>
> Penalty: Level 6 imprisonment (5 years maximum).

Within Victorian case law, prosecution for HIV transmission offences has been pursued under sections 19A, 22 and 23 of the *Crimes Act 1958* (Vic) (see Rush 2009:78–85; Woodroffe 2009:68–9 for an overview and commentary of the relevant Victorian offences). Sections 22 and 23 were used in previous prosecutions, and were interchangeable until a successful appeal to the Supreme Court of Victoria in 1998. In *Mutemeri v Cheesman*, Mandie J allowed an appeal because the magistrate had erred in determining, without evidence, that there was an 'appreciable risk' of death, that being 'something more than a "mere possibility"'. The defendant was an HIV-positive African man who had unprotected sexual intercourse with a Caucasian Australian woman who did not contract HIV. He was convicted of 12 charges under section 22 of the *Crimes Act* and sentenced to six months imprisonment. The appeal resulted in the Magistrates' Court conviction being quashed and all charges dismissed.

During the appeal, questions were raised about whether the correct test of recklessness was applied. It questioned whether Mr Mutemeri foresaw that the probable outcome of his behaviour would place the complainant in danger of death. Subsequent to this decision, HIV transmission offences were no longer prosecuted under section 22 (danger of death) (Houlihan 2009:5–6). Instead, section 23 (danger of serious injury) was applied, as seen in *Neal*, where the defendant was charged with two counts of reckless conduct endangering a person as alternatives to section 19A and attempts to commit section 19A. In both instances, Neal was convicted under the alternative of attempting to commit section 19A. Therefore, the two charges under section 23 were not used. He was also charged with a further 12 counts under section 23 and convicted of three of these charges. A further six of these charges were alternative charges to attempts to commit section 19A and he was found not guilty of the remaining three charges.

Discussion

Neal is one of a few cases that relates to male same-sexuality and therefore creates socio-legal meanings about HIV within gay communities. Michael Neal was 48 years old and described as a grandfather in newspaper reports at the time he was charged (Medew 2007a). Labelling Neal as a grandfather identified him as a risk within the heterosexual community and signified his transcendence from heteronormativity (i.e. married with children) to homodeviance. The charges stemmed from men with whom Neal had engaged in unprotected sex and who claimed Neal did not disclose his HIV status. At court in 2003, it was alleged that Neal told his doctor he had engaged in unprotected sex with hundreds of men. There has not been any public comment from Neal to confirm these claims; further Neal denied all of the HIV-related charges.

Neal's hyper (perhaps rampant) sexuality was the core issue reported in the media, with various details of him frequenting beats, trawling the internet for sex partners and attending sex-on-premises venues (Hurley and Crow 2009:112–3). Hurley and Crow (2009:111) conducted a content analysis of the Neal case, which demonstrated he was inundated with negative labels. These labels included the 'grim reaper', 'a threat to the gay community', a 'sex-fiend grandpa', and an 'HIV fiend'. They also outline that Neal believed that his undetectable viral load precluded infection, but this was overshadowed by the trial judge's remarks about his risky behaviour and hyper-criminality (Hurley and Crow 2009:112).

This demonising of Neal stems from heteronormative notions and disease panics about HIV and same-sex desire (Houlihan 2011), but also from notions of homonormativity (as HIV-negative and monogamous). Many authors have discussed the legal privileging of heteronormativity over same-sex desire (e.g. Houlihan 2011; Thomson 2006), the criminalisation of male same-sex desire and legal constructions of homodeviance (e.g. Dalton 2007; Moran 1996) and the layered stigmatisation of HIV criminality (e.g. Houlihan 2009; Weait 2007). *Neal* (re)produces discourses about homodeviance, where the stigma of HIV is translated to abject HIV-positive gay men outside of 'acceptable' gay identities. Further, HIV transmission prosecutions promote the concept of seronormativity. Race (2010:13) uses this term to acknowledge the shift towards assuming another's HIV seronegative status, especially within gay communities, which have advocated modification of sexual practices upon the presumption that 'sexual partners were HIV positive'. Seronormative practices, such as the criminalisation of HIV infection, highlight how HIV-positive gay men represent the Other within gay (as well as wider) communities.

Neal was portrayed as a danger to the community through media reports and police enquiries. Neal became the subject of an intense police investigation, including undercover surveillance, but he was initially subject to public health orders. At a pre-committal hearing, the court was told that Neal was subject to orders from the Department of Human Services (DHS), which prevented him from engaging in unprotected sex or from attending 'beats' (i.e. public spaces where men have sex with other men) (Medew 2006a). The media reported that health officials had received complaints about Neal's behaviour since 2001, but they had not reported him to police because there were no legal requirements for them to do so (Medew 2007b). Magistrate Hannan ordered that Neal be remanded in custody because his non-compliance with the DHS orders coupled with the current charges made him an unacceptable risk to the community (Medew 2006b).

The case involved intense police investigation, as well as submissions to the public for the sexual partners of Neal to present themselves as potential victims. Similarly, in 2010, Queensland Police established a taskforce to locate the sexual partners of Godfrey Zaburoni, a HIV-positive African man who had travelled around Australia while employed as a circus entertainer (Australian Associated Press and Georgina Robinson 2010). In a sense, the criminal justice system advertised for complainants, which is an alarming shift from earlier HIV cases, which were reported directly by complainants.

What does this mean for the future of HIV transmission criminality? It casts the net of culpability extremely wide. Naming HIV transmission offenders as extreme dangers to the public applies scaremongering and witch-hunt tactics. The *Neal* case also rearranges the dynamics of disclosure and the ways in which access and knowledge of HIV status are enabled. Without the involvement of the police, any HIV-positive person has the rest of their life to disclose their HIV status to their sexual partners. In most cases, when people become infected with HIV they will find out their status either from their HIV-positive partner's disclosure or through HIV testing. In the cases of Neal and Zaburoni, the police have intervened by outing the two men as HIV positive,

potentially and probably creating anxieties for all their sexual partners regardless of whether or not they seroconverted.[3]

Conclusion

Criminal prosecutions for HIV transmission have gained the attention of Western media outlets in recent times, namely because these stories reframe the 'familiar discourse of "innocent victims" and "guilty others" so prevalent in early news reporting' (Persson and Newman 2008:633). The *Neal* case was a hyperbolic exercise of this narrative, which interpolated a police and community witch-hunt for real and imagined HIV 'victims'. The case is concerning because it extends the prosecutorial framework far beyond previous HIV transmission case law. This makes HIV-positive bodies even more vulnerable within criminal law.

It allows the net of culpability to be cast extremely wide to include offences of recklessness, alongside intentional and attempt offences. It creates a legal responsibility for HIV-positive people to prevent infection, bypassing the public health notion of shared/reciprocal/mutual responsibility and universal precautions for risk. Australia's response to HIV has been shaped around these concepts of risk responsibility. These policies advocate that individuals take responsibility for preventing their own infection, as well as reducing the risks of infecting others (Sendziuk 2003:106–35; Tomsen 2009:267).

References

Australian Federation of AIDS Organisations **(**AFAO**)** (2007) 'WA, Vic, NT: Criminal Charges for HIV Transmission', *HIV/AIDS Legal Link*, Australian Federation of AIDS Organisations (Sydney) **v**ol 8 **n**o 4, December 1997, 3

Australian Associated Press (2010) **'**HIV Hotline gets 22 Calls as Acrobat Godfrey Zaburoni Faces Court over Alleged Infections', *Courier Mail*, 31 May, accessed online at <http://www.couriermail.com.au/news/queensland/hiv-hotline-gets-22-calls-as-acrobat-godfrey-zaburoni-faces-court-over-alleged-infections/story-e6freoof-1225873483761>

Australian Associated Press and Robinson G (2010) 'HIV Acrobat May Have had Hundreds of Lovers: Police', *The Sydney Morning Herald*, 26 May, accessed online at <http://www.smh.com.au/national/hiv-acrobat-may-have-had-hundreds-of-lovers-police-20100526-wcjt.html>

Calliegros M (2010) 'Men Raise Concerns over HIV Acrobat', *Brisbane Times*, 27 May, accessed online at <http://www.brisbanetimes.com.au/queensland/men-raise-concerns-over-hiv-acrobat-20100527-wgjy.html>

Cameron S and Rule J (eds) (2009) 'Outside the HIV Strategy: Challenges of "Locating" Australian Prosecutions for HIV Exposure and Transmission', in *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality*, National Association of People Living with HIV/AIDS, Sydney, accessed online at <http://www.napwa.org.au/files/napwa%20monograph%2009.pdf>, 18–29

Dalton D (2007) 'Genealogy of the Australian Homocriminal Subject: A Study of Two Explanatory Models of Deviance', *Griffith Law Review*, vol 16 no 1, 83–106

Donovan P (1997) 'Court Dismisses HIV Charges', *The Age*, 15 July, 9

Duff R A (1990) *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law*, Oxford, London

[3] It was reported that it was mostly the male partners of Zaburoni's female sexual partners who called Queensland Health (AAP 2010; Calliegros 2010).

Houlihan A (2007) *(Ill-legal) Lust is a Battle Field: HIV Risk, Socio-Sexuality and Criminality*, unpublished doctoral thesis, Griffith University, Brisbane

Houlihan A (2009) '(Ill-legal) Lust is a Battlefield: HIV Risk, Socio-sexuality and Criminality', in Howard-Wagner D (ed) *W(h)ither Human Rights?*, proceedings of the 25th Annual Conference of the Law and Society Association of Australia and New Zealand, accessed online at <http://ses.library.usyd.edu.au/browse?type=author&value=Houlihan,%20Annette>

Houlihan A (forthcoming) 'When "No" Means "Yes" and "Yes" Means Harm: HIV Risk, Consent, and Sadomasochism Case Law', *Law & Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues*, vol 20

Hurley M and Croy S (2009) 'The Neal Case: HIV Infection, Gay Men, the Media and the Law', in *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality*, National Association of People Living with HIV/AIDS, Sydney, accessed online at <http://www.napwa.org.au/files/napwa%20monograph%2009.pdf>, 108–19

Medew J (2006a) 'Fears for HIV-positive Man's Partners', *The Age*, 3 June, accessed online at <http://www.theage.com.au/news/national/fear-for-hivpositive-mans-partners/2006/06/02/1148956544283.html>

Medew J (2006b) 'More Victims in HIV Infection Case', *The Age*, 3 July, accessed online at <http://www.theage.com.au/news/national/more-victims-in-hiv-infection-case/2006/07/14/1152637848012.html>

Medew J (2007a) '"Lock Him Up" Warning on HIV Man', *The Age*, 23 March, accessed online at <http://www.theage.com.au/news/national/lock-him-up-warning-on-hiv-man/2007/03/22/1174153254932.html

Medew J (2007b) 'Officials Failed to Alert Police about HIV Man', *The Age*, 21 March, accessed online at <http://www.theage.com.au/news/national/officials-failed-to-alert-police-about-hiv-man/2007/03/20/1174153063017.html>

Moran L (1996) *The Homosexuality of Law*, Routledge, New York

Persson A and Newman C (2008) 'Making Monsters: Heterosexuality, Crime and Race in Recent Western Media Coverage of HIV', *Sociology of Health & Illness*, vol 30 no 4, 632–46

Race K (2010) 'Click Here for HIV Status: Shifting Templates of Sexual Negotiation', *Emotion, Space & Society*, vol 3, 7–14

Robinson N (2007) 'Call to Axe Chief Adviser over HIV Policy', The *Australian*, 31 March, accessed online at <http://www.theaustralian.com.au/news/nation/call-to-axe-chief-adviser-over-hiv-policy/story-e6frg6nf-1111113256917>

Rush P (2009) 'HIV Transmission and the Jurisdiction of Criminal Law', in *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality*, National Association of People Living with HIV/AIDS, Sydney, accessed online at <http://napwa.org.au/files/napwa%20monograph%2009.pdf>, 74-89

Sendziuk P (2003) *Learning to Trust: Australian Responses to AIDS*, University of New South Wales Press, Sydney

Thomson M (2006) 'Viagra Nation: Sex and the Prescribing of Familial Masculinity', *Law, Culture, Humanities*, vol 2, 259-83

Tomsen, S (2009) 'Victimhood, "Sexual Deceit" and the Social Origins of the Criminalisation of HIV Transmission', *3rd Australian and New Zealand Critical Criminology Conference: Conference Proceedings*, 266–74

Victorian Government (1993), *Parliamentary Debates*, Legislative Assembly, 28 April, 1259

Weait M (2001) 'Taking the Blame: Criminal Law, Social Responsibility and the Sexual Transmission of HIV', *Journal of Social Welfare and Family Law*, vol 23 no 4, 441–7

Weait M (2005) 'Criminal Law and the Sexual Transmission of HIV: *R v Dica*', *Modern Law Review*, vol 68 no 1, 121–34

Weait M (2005) 'Harm, Consent and the Limits of Privacy', *Feminist Legal Studies*, vol 13, 97–122

Weait M (2007) *Intimacy and Responsibility: The Criminalisation of HIV Transmission*, Routledge-Cavendish, Abington

Webster A (2007) 'Recklessness: Awareness, Indifference or Belief?', *Criminal Law Journal*, vol 31, 272–86

Woodroffe M (2009) 'Criminal Transmission of HIV in Australia', in *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality*, National Association of People Living with HIV/AIDS, Sydney, accessed online at <http://www.napwa.org.au/files/napwa%20monograph%2009.pdf>, 60–73

Legislation

Crimes Act 1958 (Vic)

Health Act 1958 (Vic) (now repealed)

Judicial Proceedings Reports Act 1958 (Vic)

Public Health and Wellbeing Act 2008 (Vic)

Cases

Crown v Michael Neal (case number cr-07-00656), unreported Parsons J, County Court, 19 January 2009

DPP v F, unreported, Victorian County Court, McInerney J, 6 March 1998

Mutemeri v Cheesman (1998) 4 VR 484

R v Dirckze, unreported Victorian County Court, Anderson J, 12 August 1999