

Sexual exposure to and transmission of sexually transmitted diseases: a Belgian substantive criminal law point of view¹

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Abstract

Witness the fact that throughout the world a good deal of HIV patients have been prosecuted and/or convicted for sexual HIV exposure and transmission, whether under HIV specific criminal law or under general criminal law provisions, the criminal law is increasingly used in this field. Up to now, no convictions have been reported in Belgium. Recently however, the alleged first criminal complaint was filed, charging a gay man with attempted murder for concealing his HIV positive status from his sexual partner of two years while repeatedly having practiced unsafe sex with him.

This paper aims at outlining the main findings of the first thorough study into the *applicability* of the prevailing Belgian substantive criminal law provisions to sexual exposure to and transmission of HIV and, more broadly, other sexually transmitted diseases (STDs) (specifically paying attention to *actus reus* - including causation - and *mens rea*) and the *meaning* thereof (especially having regard to punishment and criminal attempt). I will argue that there is some scope within the existing Belgian substantive criminal law provisions to address sexual STD exposure and transmission.

Key Words: STDs, sexual exposure and transmission, Belgian substantive criminal law.

1. Introduction: from hospitals to criminal courts

People have sexual needs. Though their fulfilment usually does not pose any problems, sex sometimes entails risks for the partners and even for the community. Thus, all sorts of sexual behaviour that can be called “risky” in the light of sexually transmitted diseases (STDs) and, as a result, all sorts of infections with these STDs often occur.²

Emphasizing this issue’s predominantly medical nature is holding a candle to the sun. HIV and AIDS as well as many other STDs indeed cause major public health problems all over the world:

Chronic in the patient, persistent in the population, easy to prevent in principle but not in practice, sexually transmitted diseases (STDs) present some of the greatest challenges faced by applied biological science. STDs were in fact among the first diseases to be attacked by pharmacology and to attract the interest of public-health officials. While modern medicine has reduced the societal impact of many, such as syphilis, particularly in developed countries, they still present serious problems worldwide. And today’s most notable STD, human immunodeficiency virus (HIV), the virus that causes AIDS, has become one of the greatest health threats to arise in modern times.³

Logically, a public health approach with among other things surveillance, screening, testing, education, counselling, prevention and treatment has always been of account in combating STDs.

In addition, or more accurately, *connected* to this, STDs are also of legal importance. They indeed give rise to several vital questions concerning civil law, insurance law, labour law, social security law, medical law and so forth. The present paper will take a *Belgian substantive criminal law point of view* on the sexual exposure to and transmission of STDs.⁴

This decision does not appear out of thin air. Infections with the larger part of the STDs can severely harm one’s (physical) integrity and as a rule the criminal law considers the legal good of human integrity of paramount importance. Is it any wonder then that some countries have in fact criminalized the actual sexual exposure to and/or transmission of STDs? In recent years, the enactment and use of such criminal law seems to show an upward trend. Some countries have enacted ad hoc legislation (with a scope that is frequently limited to HIV/AIDS), others use the existing “untypical” criminal law statutes. As the case may be, the criminal law can merely extend to actual transmissions or already to the risk thereof. One time, *dolus* has to be proven, another time a mere *culpa* will do. Be that as it may, prosecutions and convictions concerning the sexual exposure to and transmission of STDs

in Europe and worldwide seem to be on the march. A UNAIDS-funded report of Global Network of People Living with HIV/AIDS Europe and Terrence Higgins Trust has shown that at least one HIV patient has been prosecuted in Austria, Sweden, Switzerland, Denmark, Finland, the Netherlands, Norway, Azerbaijan, Cyprus, the Czech Republic, Estonia, France, Georgia, Germany, Hungary, Italy, Latvia, Portugal, Romania, Slovakia and the UK.⁵

Regarding Belgium, this issue is also gaining in importance. As is the case for most populations in the greater part of the world, a substantial part of the Belgian population still practices unsafe sex. Though the criminal law has up to now played a highly marginal part in combating STDs, things could be about to change. In May 2007, a homosexual man filed the first criminal complaint on this account with *constitution de partie civile* for attempted murder. The complainant himself had not been infected but argued that since his former boyfriend (the defendant) had concealed his seropositive status from him while they had repeatedly practiced unsafe sex, he had to be brought to justice. However, last January 13th the *raadkamer* of Bruges, the investigating jurisdiction of first instance, has dismissed the charges. Since an appeal has been lodged with the *kamer van inbeschuldigingstelling* in Ghent and the case is now pending, leave to inspect the judgement and preparatory documents has not yet been granted. Seeing there is barely any jurisprudence and authors have not published extensively on this topic, up to now it has not been established to what extent prevailing Belgian substantive criminal law provisions can be *applied* to the actual sexual exposure to and transmission of STDs. This paper aims at outlining some of the main findings of the first thorough (and to a large extent proactive) study in this field.⁶

2. **The applicability of some Belgian substantive criminal law provisions to sexual exposure to and transmission of STDs: a bird's-eye view**

A. Introduction

In this paper I will not discuss the bill that has been put forward in the Flemish parliament more than once and aims at amending the Flemish decree of 21 November 2003 concerning the preventative health policy.⁷ It specifically tends to criminally sanction the individual legal commitment to prevent the spread of incurable, possibly life-threatening contagious diseases. Yet, up to now this bill has not been passed. Its most recent introduction of 2 July 2008 has been lapsed by the regional elections held in Belgium on 7 June 2009.

Since Belgium *currently* seems to have no STD specific penal law, I will be focussing on the "untypical" prevailing Penal code and - due to the limited writing space - specifically on the provisions concerning assault and battery, administration of noxious substances and manslaughter, murder and

poisoning. These indeed are the penal qualifications that were mentioned by the then vice-premier and minister of Justice Laurette Onkelinx in answering a question on conscious HIV transmission that was raised in the Chamber of Deputies.⁸ From a legal dogmatic angle, the aforementioned existing criminal offences will only be analysed on account of their constitutive components as laid down in the specific penal qualifications (in other words: the *actus reus* - if need be including causation - and *mens rea*). As a consequence, causes of justification, of exclusion of guilt and of excuse will not be put on the screen.

B. Manslaughter, murder and poisoning: the odd man out in the list?

(Attempted⁹) manslaughter, murder and poisoning seem the least likely offences to be used regarding exposure to and transmission of STDs. This becomes quite clear when considering their requirements. Manslaughter, punished by twenty to thirty years' imprisonment, is a killing with the intent to kill. Murder can be circumscribed as manslaughter with the aggravating circumstance of premeditation (punished by life imprisonment). Poisoning is manslaughter with the aggravating circumstance of the employment or administration, no matter how, of substances that can more or less swiftly bring about death (likewise punished by life imprisonment).

Their core *actus reus* therefore is the killing of another human being, implying material causation between death and the material act of exposure or transmission. In accordance with the doctrine of equivalence a causal connection is established when a certain behaviour cannot possibly be thought away without this having an influence on the particular outcome. Causes do not have to be unique. On the other hand they do have to be judicially certain. Under the doctrine of adequacy, an antecedent can only be qualified as a cause of the ensuing damage if its occurrence was not completely implausible. Given a certain degree of foreseeability is required, this theory is much milder than the sheer *conditio sine qua non* principle of the doctrine of equivalence. In practice, however, the latter seems to have a dominant influence. In this respect the use and limits of phylogenetic analysis in criminal trials as evidence of responsibility for STD transmission deserves mentioning. In the complex scientific process of phylogenetic analysis, small differences in - for instance - HIV's genes are examined. Yet, given that HIV is not unique to a particular individual, such a test can only be used to rule out defendants. In and of itself, it cannot prove that transmission occurred directly between two individuals, nor does it provide information on the direction of a transmission.¹⁰

In order for the *mens rea* to be present, the defendant has to knowingly and willingly aim at realising the fatal consequence of his act (direct intent), or at the very least accept its inevitable (indirect intent) or probable occurrence (*dolus eventualis*).¹¹

C. Intentional and unintentional infliction of injury

Various criminal law provisions on the subject of infliction of injury could provide for more practicable qualifications on the subject of the actual sexual exposure to and/or transmission of STDs.

1. Assault and battery

In order for the constitutive components of assault and battery to be present, an injury (or a stroke) has to be caused intentionally (for intentional assault and battery) or by a lack of prudence or precaution (for unintentional assault and battery). The Penal code does not define the concept of injury. Hence, Belgian jurisprudence and doctrine have come to the rescue. Can thus be qualified as an injury, any internal or external harm, no matter how minor and irrespective of the way and the means applied, that is inflicted on the human body by an outside chemical or mechanical factor influencing the physical condition. The detection of disease symptoms does not seem to be required. Ergo, even the mere infection with an STD as a consequence of sex may fall within this definition. With regard to HIV, for instance, the actual infection already seems to imply the necessary harmful effect on one's physical integrity as it results in pathological changes in the organism by inducing phased immune deficiency. As for *mens rea*, intentional assault and battery require general (i.e. direct, indirect or eventual) intent.¹² Evidence for such intent can however be expected to be conclusive in rather exceptional circumstances. Unintentional assault and battery require a lack of prudence or precaution, established by comparing the act in question to the way a prudent man (*bonus ac diligens pater familias*) in that particular case properly would have acted.¹³ Consequently - and although sharply criticised - in practice, a so-called *culpa levissima in abstracto* often seems to suffice.

With regard to *intentional* assault and battery the Belgian Penal code provides for a series of relevant aggravating circumstances, amongst other things on the basis of premeditation and on the basis of the outcome of the injury (or stroke), i.e. a temporary illness or incapacity for personal labour, a seemingly incurable illness, a permanent incapacity for personal labour, the total loss of the use of an organ or a severe mutilation or unintentional death. Aside from the latter aggravating circumstance (unintentional death) - where (*should* a fatal case occur) establishing the required causal connection with the initial injury can be expected to be extremely difficult - the majority of these provisions seem to be applicable to the sexual transmission of STDs. Although being challenged, a substantial part of jurisprudence and doctrine still stands firm that aggravating circumstances on the basis of the outcome of the intentional injury (or stroke) can be applied if the potential defendant did

not want the consequences to occur and even if he did and could not foresee them.

Relating to the *unintentional* counterpart, the Penal Code separately penalizes s/he who unintentionally causes another person's death.

The above qualifications will only exceptionally be applicable to the mere exposure to STDs. An attempt to intentional or unintentional assault and battery indeed is not criminalized. Ergo, all their constitutive components will have to be fully established.

2. Administration of noxious substances

Those who cause another person to become ill or incapable for personal labour by, wilfully but without the intent to kill, administering substances that can bring about death or that can gravely damage health are liable to punishment (intentional offence), as are those who unintentionally cause another to become ill or incapable for personal labour by administering the aforementioned substances (i.e. unintentional offence).

As for *mens rea*, reference can be made to the above observations on assault and battery.

With regard to both offences' *actus reus*, Belgian legal doctrine characterizes the *administration* of the noxious substances as making one, no matter how, ingest substances that are lethal or that can severely harm health. Given these general terms, the view can be taken that these offences could apply when it comes to voluntary administration through sexual transmission of STD infected bodily fluids.¹⁴ Some of them could indeed bring about death or at the very least gravely damage health.¹⁵ In order for these offences to be committed, the law requires an - intentional or unintentional - consequence, specifically an illness or an incapacity for personal labour. Concerning for instance HIV, this certainly would be the case if the potential complainant develops AIDS. Yet, prior to that, patients generally do not feel ill. Nevertheless, since a psychological trauma that causes suffering has already been classified as an illness, and seeing that one could become traumatized in this way simply by being informed of his or her HIV-positive status, the crime could in my view be fully established, even without the manifestation of any typical AIDS symptoms. Apart from that, the intentional administration of noxious substances is also punishable if attempted. Possibly, the transmission of an STD could be designated as the manifestation of the intent to commit the misdemeanour, determining a commencement of execution. If the required illness or incapacity fails to occur, one could argue that this is solely because of circumstances beyond the perpetrator's control and that the conditions for criminal attempt have therefore been met. The mere exposure to (i.e. without an actual transmission of) an STD might also qualify as such an attempt, provided that one accepts

the exposure as the commencement of the execution of the offence. In this respect, it has to be noted that the Penal code does not prescribe any relevant benchmarks.

Commensurate with intentional assault and battery, the Penal Code contains some aggravating circumstances, specifically if the *intentional* administration of noxious substances has produced a seemingly incurable illness, a permanent incapacity for personal labour or the total loss of the use of an organ or if they have unintentionally induced death (see above).

3. STDs and the criminal law: where do we go from here?

Throughout the world, the criminal law is increasingly being used in the delicate field of sexual exposure to and transmission of STDs. Belgium too has recently seen the alleged first criminal complaint charging a gay man with *attempted murder* for concealing his HIV positive status from his sexual partner with whom he repeatedly practiced unsafe sex. The above outline of the first thorough study into the applicability of existing Belgian substantive criminal law provisions to sexual STD exposure and transmission indicates that although it is questionable whether such a behaviour could be qualified as an attempted murder, it could nevertheless fall within the range of some other criminal offences. In short, there seems to be some scope within the existing Belgian substantive criminal law provisions to address sexual STD exposure and transmission.

The key question remains whether, on this account, the criminal law should confine itself to barking rather than proceed to actual biting. In recent years, the state apparatus has become more and more interested in issues of sexual violence and exploitation. On the one hand, criminal law surely plays an important part in conveying society's indignation toward those engaging in reprehensible and life-threatening behaviour. On the other hand, several subjects for debate arise in reference to sex that carries the risk of STD transmission. First of all, it is entirely unlikely that legal intervention will ensure that most people will only have safe sex. Moreover, the question presents itself as to whether actions to which all parties involved freely and fully consent, justify invoking such a drastic response and, more broadly, whether the possible or actual sexual STD transmission should under any circumstances be criminalized, given it will probably fundamentally impede the goals of STD prevention, treatment and care. But that is another matter, relating to the question whether or not such legislation is solely constituted and/or used in a culture of fear for what many might consider "risky others".

Notes

¹ Draft paper for the 2nd Global Conference “Good sex, bad sex: sex law, crime and ethics”.

² On STDs, see D. Clutterbuck, *Sexually transmitted infections and hiv in Specialist training in...*, Edinburgh, Elsevier, 2004, 289 p.; D. Greenfield and P. Witt, “Sexually transmitted diseases (STDs) other than hiv” in C. Bryant, N. Davis and G. Geis (eds.), *Encyclopedia of criminology and deviant behavior*, III, *Sexual deviance*, Philadelphia, Brunner-Routledge, 2001, (383) 383 *et seq.*; J. Klausner and E. Hook (eds.), *Current diagnosis and treatment of sexually transmitted diseases*, New York, McGraw-Hill, 2007, 248 p.

³ P. Ross, “The challenges of STDs” in Scientific American (ed.), *Infectious disease. A Scientific American reader*, Chicago, University of Chicago Press, 2008, (117) 117.

⁴ In this paper, I will not examine *Belgian criminal procedural law* on the subject of sexual exposure to and transmission of STDs (see for instance B. Ketels, “Binnenkort verplicht testen op hiv en hepatitis B en C?”, *Juristenkrant* 2009, nr. 200, (13) 13) nor will I pursue questions concerning the substantive criminal law aspects of the area of tension between the *duty of medical confidentiality and STD partner notification* (see for instance B. Ketels and T. Vander Beken, “To breach or not to breach? Deontologische en strafrechtelijke kanttekeningen bij medisch beroepsgeheim en partner-notificatie inzake seksueel overdraagbare aandoeningen”, *Tijdschrift voor Gezondheidsrecht* 2009-10, nr. 2, (5) 5 *et seq.* as well as B. Ketels, “Geen geneesmiddelenvoorschrift zonder face-to-faceonderzoek”, *Juristenkrant* 2009, nr. 198, (1) 1 and B. Ketels and T. Vander Beken, “Hippocrates in het aidstijdperk. Arts mag partner van patient informeren over diens hiv-status”, *Juristenkrant* 2009, nr. 187, (3) 3).

⁵ See Global Network of People Living with HIV/AIDS Europe en Terrence Higgins Trust, *Criminalisation of hiv transmission in Europe. A rapid scan of the laws and rates of prosecution for hiv transmission within signatory States of the European Convention of Human Rights*, 2005, 61 p. (to be downloaded from <http://www.gnpplus.net>).

⁶ See also B. Ketels, “De strafrechtelijke context van risicovol seksueel gedrag”, *Tijdschrift voor Strafrecht* 2008, (354) 354 *et seq.*; B. Ketels, “Some criminal law reflections on the sexual transmission of hiv” in M. Cools, S. De Kimpe, B. De Ruyver, M. Easton, L. Pauwels, P. Ponsaers, G. Vande Walle, T. Vander Beken, F. Vander Laenen and G. Vermeulen (eds.), *Governance of security research paper series volume 2. Readings on criminal justice, criminal law and policing*, Antwerp, Maklu, 2009, (203) 203 *et seq.*; B. Ketels, “Who’s afraid of ... risky sex? Criminal law perspectives on sexual hiv exposure and transmission” in M. Hildebrandt, A. Makinwa and A.

Oehmichen (eds.), *Controlling security in a culture of fear*, The Hague, Boom Legal Publishers, 2009, (169) 169 *et seq.*

⁷ Voorstel van decreet (E. Tack et al.) houdende wijziging van het decreet van 21 november 2003 betreffende het preventieve gezondheidsbeleid wat betreft de individuele verplichting om de verspreiding van ongeneeslijke, mogelijk levensbedreigende besmettelijke ziekten te voorkomen, *Parl.St. VI.Parl. 2007-08*, nr. 1.781/1.

⁸ *Vr. en Antw.* Kamer 2003-04, 4 May 2004 (Vr. nr. 2673 Y. Avontroodt), where Laurette Onkelinx has confirmed that there is enough scope within existing legislation to prosecute and punish HIV transmission.

⁹ It is questionable whether sexual exposure to or even transmission of STDs could be qualified as an *attempted manslaughter, murder or poisoning*. The Penal code indeed provides that an attempted offence is committed if the intent to commit a felony or a misdemeanour has manifested itself by means of *external acts which determine a commencement of execution* and which are discontinued or do not have the intended effect, solely because of circumstances beyond the perpetrator's control.

¹⁰ See E. Bernard, Y. Azad, A.-M. Vandamme, M. Weait and A. Geretti, *The use of phylogenetic analysis as evidence in criminal investigation of HIV transmission*, 2007, 12 p. (to be downloaded from <http://www.nat.org.uk>).

¹¹ O. Michiels, "Quelques précisions sur les notions de faute, de dol éventuel et de dol *praeter-intentionnel* quand il y a mort d'homme" (note under *Corr. Verviers* 27 February 2008), *Journal des Tribunaux* 2008, (492) 492; J. Verhaegen, "Faute consciente ou intention coupable? La ligne de partage", *Journal des Tribunaux* 2001, (305) 306.

¹² According to the Penal code (i.e. article 392), the killing and infliction of injury are committed intentionally if the perpetrator aims to assault either a particular individual or someone who he runs into or encounters, even though his aim depended on any circumstance or condition and even if he has erred concerning the person who is victimized. See *Court-martial* 20 September 1988, *Pasicrisie belge* 1989, II, (23) 24: "Attendu que (...) les coups portés ou les blessures causées ont un caractère volontaire, dès lors que le comportement de l'auteur de ces coups ou blessures peut être qualifié de volontaire; Que lorsque cet auteur accepte, sciemment, comme en l'espèce, le risque de porter par son acte atteinte à l'intégrité physique d'autrui, son comportement est de nature volontaire et il importe alors peu qu'il ait ou non recherché ou souhaité ces conséquences, à savoir le fait de porter des coups ou de causer des blessures à autrui".

¹³ Court of Cassation 11 December 2002, *Verkeersrecht Jurisprudentie* 2003, 109.

¹⁴ For an erroneous non-application of the *unintentional offence* with regard to the transmission of “*la syphilis constitutionnelle*”: Court of first instance Ghent 28 May 1890, *Journal des Tribunaux* 1890, 988.

¹⁵ D. Dewandeleer, “Art. 398 t/m 410 Sw. Opzettelijk doden, niet doodslag genoemd, en opzettelijk toebrengen van lichamelijk letsel” in X (ed.), *Postal memorialis. Lexicon strafrecht, strafvordering en bijzondere wetten*, Malines, Kluwer, loose-leaf, (O 160/105) O 160/181.

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