HIV INFECTION AND THE LAW OF TORTS

BY

CHALI, CHITALA

Being a paper presented in partial fulfillment for the award the Degree of Bachelor of Laws of the University of Zambia.

December 2007.

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I recommend that the directed essay prepared under my supervision by Chali, Chitala entitled:

HIV INFECTION AND THE LAW OF TORTS.

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DEDICATIONS

This obligatory essay is dedicated to my parents, **MR KATONGO CHALI** and **MRS ESTHER NAKAMBA CHALI.**

ACKNOWLEDGMENTS

Being a practioner of the Christian faith and a holder of Christian values, I am constrained to proceed beyond this point minus thanking the almighty for giving me the strength, guidance and the much needed wisdom in all my endeavors.

I would like to extend my utmost gratitude to my supervisor and mentor, Mr. Kulusika for having dedicatedly and efficiently directed my work.

To my parents, thank you for having invested in me. You have always believed that I can do anything and that has really been motivational. Your respect for education has driven me this far. I APPRECIATE AND MAY THE GOOD LORD EXTEND YOUR YEARS ON EARTH SO THAT YOU MAY LIVE TO RECOVER AND SEE THE PROFITS OF YOUR INVESTMENT.

My brother Kunda, You have always been my role model. You have always supported and been willing to sacrifice anything for me in everything I do. You really make me feel safe. THANKYOU. To my brother BUJEJE, your determination to achieve your goals through hard work has been very inspirational. My kid brother, thank you for being there. You are a magnificent young man. I would also love to thank my sweet girlfriend, Namakau, for the love and support.

ABSTRACT

The human race has been hit with one of the deadliest and most dangerous viruses called the HIV. HIV is believed to have originated around 1930 in rural areas of Central Africa, where the virus may have been present for many years in isolated communities.[1] The virus probably did not spread because members of these rural communities had limited contact with people from other areas. But in the 1960s and 1970s, political upheaval, wars, drought, and famine forced many people from these rural areas to migrate to cities to find jobs. During this time, the incidence of sexually transmitted infections, including HIV infection, accelerated and quickly spread throughout Africa. As world travel became more prevalent, HIV infection developed into a worldwide epidemic. The infection of HIV brings with it a lot of social, professional, and financial constraints. It logically follows that the law ought to intervene in these issues. Chapter one goes on to give an overview of HIV and the law of torts and how the law of torts may generally be employed in various issues surrounding the infection of HIV.

There are a number of risks to seropositive people. These are both psychological and social. The psychological risks include anxiety and depression while social risks include stigmatization, discrimination and breaches of confidentiality.[2] Chapter two discusses confidentiality and HIV infection risk. Particularly, the chapter looks at the liability of a doctor or any health care professional that knew the HIV status of his patient but did not inform or warn the victim. The chapter also looks at the duty of a person to divulge his status to his or her sexual partner.

Seeing the need and importance of knowing the HIV status of a person both as a preventive and a policy measure, Chapter three discusses the legality of HIV testing. At the core of this chapter is whether an HIV test can be undertaken without the fully informed consent of the person being tested. This is done with particular reference to the law of negligence and the tort of battery. The issue of mandatory HIV testing is also considered in this chapter.

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[1] Microsoft. Encyclopedia Encarta. 2004

[2] S.kulusika. **Deliberate Transmission of HIV: The Criminal Perspective**, Zambia Law Journal. Vol. 37 of 2005, pages 107

Chapter four gives a position on whether the transmission of HIV should be criminalized by passing separate legislation or not. This is in principle done by comparing the criminal perspective to redress under the law of torts.

In chapter five, a conclusion and recommendations is drawn and given respectively.

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X v. Y (1988) 2 ALL ER 648

LEGISLATION REFERED TO

The constitution of The Republic of Zambia, chapter 1 of The Laws of Zambia

The Penal Code Act Chapter 87 of the Laws of Zambia

INTERNATIONAL INSTRUMENTS

The African charter on human and people's rights 1982

The International covenant on civil and political rights of 1966

LIST OF ABBREVIATIONS

AIDS –Acquired Immune Deficiency Syndrome

HIV - Human Immune Virus

T.B – Tuberculosis

VCT – Voluntary Counseling and Testing

ZARAN- Zambia AIDS Law Research and Advocacy Network

CHAPTER ONE

HIV INFECTION AND THE LAW OF TORTS- AN INTRODUCTORY APPRAISAL

1.1 INTRODUCTION

Liability in tort can be imposed for a diverse range of conduct, extending from negligent behavior to attacking a person's reputation or limiting a person's freedom of movement. Although most if not all the principles of tort law have had a share of application in the Zambian courts, little attention has been paid to application of these principles to issues relating to HIV/AIDS. Similarly, our legislature has done little in formulating any form of legislation relating to HIV/AIDS.

1.2 PROBLEM STATEMENT

It is indisputable that the infection of HIV/AIDS comes with adverse emotional, psychological, sociological and economic effects. Seeing that the primary aim of tort law is to compensate, it is inevitable that it should be employed in shielding and cushioning some of the problems which might arise from the infection of HIV/AIDS. It is tragically clear that there is no precise and single law to deal with the issues which surround the infection of HIV. To be particular, in Zambia the only branches of the law which have received the relevant address and attention are Employment law, Human Rights Law and Criminal law. Accordingly, there have been campaigns against discrimination of persons living with HIV in society generally, and also at places of work. Similarly, there have been debates on whether transmission of HIV should be criminalized or not; that is by

passing specific legislation. The aforesaid goes to show that to some extent people appreciate the roles which Human Rights law, Employment Law and Criminal law play in issues of HIV/AIDS.

However, there are other issues which may arise in this regard which are not subjects of the above branches of the law. For example what recourse does a person who is tested for HIV without his or her consent have? These and other issues have not been the subject of legal debate in Zambia. Therefore, this study will examine the practicability of the principles of the law of torts to various legal issues arising from the infection of HIV/AIDS.

1.3 OBJECTIVES OF THE RESEARCH

The main objective of this research is to examine the practicability of the principles of the law of torts to various legal issues surrounding the infection of HIV/AIDS.

Specific objectives will be to:

- Explain what is meant by tort and HIV/AIDS and discuss the various modes of transmission of HIV.
- Establish the link between HIV infection and the tort of battery.
- Analyze judicial decisions which have been passed concerning the study.
- Analyze principles of medical negligence in relation to the breach of confidence.
- Apply the principles of medical negligence to HIV testing.
- Establish the connection between HIV testing and the tort of battery.

- Analyze the criminalization of transmission of HIV in comparison with redress under the law of torts.
- Offer proposals for reform

.

1.4 RESEARCH QUESTIONS

-Can a doctor or any medical officer who tests a person for HIV, in public interest disclose the patient's status?

-What is the link between HIV infection and the tort of battery?

-Is a person living with HIV/AIDS under any legal obligation to divulge his HIV status to his or her sexual partners?

-Can a medical officer test a patient for HIV without the patient's fully informed consent?

-What is the legality of mandatory HIV testing?

-Should deliberate transmission of HIV be criminalized or redress should be obtained under the law of torts?

1.5 METHODOLOGY

Numerous statutes, judicial precedents, books, articles, papers, journals and other documents were examined during the course of this research. These were obtained from various libraries within Lusaka, Zambia and the Kitwe High Court library.

1.6 SCOPE OF THE STUDY

As highlighted above, this study will ascertain the relevance of tort law to issues relating to transmission of HIV and transmission itself. Suffice at this juncture to submit that this research will be narrowed down to the following branches of tort law:

(a)The obligation of confidence,

(a) The torts of battery and assault,

(b) Negligence and,

(c) The Invasion of privacy

Owing to lack of literature on HIV/AIDS law in Zambia, the study will be substantiated by literature from the US, South Africa and Canada.

Chapter one gives an overview of HIV and the law of torts and how the law of torts may generally be employed in various issues surrounding the infection of HIV.

Chapter two discusses confidentiality and HIV infection risk. Particularly, the chapter looks at the liability of a Doctor or any health care professional that knew the HIV status of his patient but did not inform or warn the victim. The chapter also looks at the duty of a person to divulge his status to his or her sexual partner.

Chapter three discusses the legality of HIV testing. At the core of this chapter is whether an HIV test can be undertaken without the fully informed consent of the person being tested. This is done with particular reference to the law of negligence and the tort of battery. The issue of mandatory HIV testing is also looked at in this chapter.

Chapter four gives a position on whether the transmission of HIV should be criminalized by passing separate legislation or not. This is in principle done by comparing the criminal perspective to redress under the law of torts.

In chapter five, a conclusion and recommendations are drawn and given respectively

1.7 HIV/ AIDS

Origin of the Virus

Using computer technology to study the structure of HIV, scientists have determined that HIV originated around 1930 in rural areas of Central Africa, where the virus may have been present for many years in isolated communities.[1] The virus probably did not spread because members of these rural communities had limited contact with people from other areas. But in the 1960s and 1970s, political upheaval, wars, drought, and famine forced many people from these rural areas to migrate to cities to find jobs. During this time, the incidence of sexually transmitted infections, including HIV infection, accelerated and quickly spread throughout Africa.[2] As world travel became more prevalent, HIV infection developed into a worldwide epidemic. Studies of stored blood from the United States suggest that HIV infection was well established there by 1978.[3]

[1] Microsoft. 2004. **Encyclopedia Encarta.**
[2] ibid
[3] ibid

While the disease was making headlines for the speed with which it was spreading around the world, the cause of AIDS remained unidentified. Fear of AIDS and ignorance of its causes resulted in some outlandish theories. Some thought the disease was God's punishment for behaviors that they considered immoral and ungodly. These early theories created a social stigma surrounding the disease that still lingers.[4]

Social perspective

Although new and effective AIDS drugs have brought hope to many HIV-infected persons, a number of social and ethical dilemmas still confront researchers and public-health officials. The latest combination drug therapies are far too expensive for infected persons in the developing world—particularly in sub-Saharan Africa, where the majority of AIDS deaths have occurred. In these regions, where the incidence of HIV infection continues to soar, the lack of access to drugs can be catastrophic. In 1998, responding to an international outcry, several pharmaceutical firms announced that they would slash the price of AIDS drugs in developing nations by as much as 75 percent.[5] However, some countries argued that drug firms had failed to deliver on their promises of less expensive drugs. Suffice to point out at this juncture that the Zambian government has to a large extent succeeded in providing HIV drugs at cheaper prices.

[4] ibid
[5] ibid

Economic burdens

For the struggling economies of some developing nations, including Zambia, AIDS has brought yet another burden: AIDS tends to kill young adults in the prime of their lives—the primary breadwinners and caregivers in families. According to figures released by the United Nations in 1999, AIDS has shortened the life expectancy in some African nations by an average of seven years.

In Africa, the disease has had a heavy impact on urban professionals—educated, skilled workers who play a critical role in the labor force of industries such as agriculture, education, transportation, and government. The decline in the skilled workforce has already damaged economic growth in Africa, and economists warn of disastrous consequences in the future.

It is also important to make mention of the fact that infection of HIV comes with serious economic burdens on the infected individual such as buying drugs, paying medical bills and the fact that he will not be able to perform as before and this may come as a tax on his income.

How HIV spreads

Scientists have identified three ways that HIV infections spread: sexual intercourse with an infected person, contact with contaminated blood, and transmission from an infected mother to her child before or during birth.

(A) Sex with an Infected Person

HIV transmission occurs most commonly during intimate sexual contact with an infected person, including genital, anal, and oral sex. The virus is present in the infected person's semen or vaginal fluids. During sexual intercourse, the virus gains access to the bloodstream of the uninfected person by passing through openings in the mucous membrane—the protective tissue layer that lines the mouth, vagina, and rectum—and through breaks in the skin of the penis. In the United States and Canada, HIV is most commonly transmitted during sex between homosexual men, but the incidence of HIV transmission between heterosexual men and women has rapidly increased.

(B) Contact with Infected Blood

Direct contact with HIV-infected blood occurs when people who use heroin or other injected drugs share hypodermic needles or syringes contaminated with infected blood. Less frequently, HIV infection results when health professionals accidentally stick themselves with needles containing HIV-infected blood or expose an open cut to contaminated blood.

(C) Mother-to-Child Transmission

HIV can be transmitted from an infected mother to her baby while the baby is still in the woman's uterus or, more commonly, during childbirth. Mother-to-child transmission accounts for 90 percent of all cases of AIDS in children.[6] Mother-to-child transmission is particularly prevalent in Africa, where the number of women infected with HIV is ten

[6] ibid

times the rate found in other regions.[7] Studies conducted in several cities in southern Africa in 1998 indicate that up to 45 percent of pregnant women in these cities carry HIV.

1.8 THE LAW OF TORTS

The preceding section of this chapter endeavored to discuss the history, the social and economic perspectives of HIV/AIDS and various means through which HIV is transmitted. This section will give an overview of the law of torts and highlight, in brief, how various means of HIV transmission might give rise to an action in tort.

A lawsuit based on a tort is a private claim under civil law; that is to say that it is a species of civil injury or wrong. The distinction between civil and criminal wrong depends on the nature of the appropriate remedy provided by law. The civil law concerning torts attempts to remedy injuries suffered by individuals or corporations by forcing the party who caused the harm to compensate the victim. In contrast, criminal law governs the relationship between the government (state) and the individual and punishes a person who acts in a way considered harmful to society as a whole. Accordingly, the **Osborn's Concise Law Dictionary**[8] defines a tort as "an act which causes harm to a determinate person, whether intentionally or not, being the breach of a duty arising out of a personal relation or contract, and which is either contrary to law or an omission of a specific legal duty or a violation of an absolute right". It is important to note that there is

[7] Microsoft. 2004. **Encyclopedia Encarta,** Opt.Cit
[8] Rutherford, L. (Ed) (1993) at page 315

no single exhaustive or standard definition of tort. Consequently, tort is usually defined by means of contrasting it with other areas of law, particularly, contract and criminal law.

Considering the adverse economic effects which the infection of the virus can cause, tort law can come in handy in cushioning some of these issues through payment of damages.

Kinds of torts

There are two chief categories of torts: intentional torts and torts resulting from negligence. The core element in an intentional tort is an intent, or purpose, to cause harm to another. The law provides that a person has intent if he or she desires to cause the consequences of his or her act, or believes that the consequences are substantially certain to result from the act. Intentional torts fall into two categories: torts against a person and torts against property.

Negligence refers to the failure of a person to exercise sufficient care in his or her conduct. Alderson J. in the case of *Blyth v. Birmingham Waterworks Company*[9] defined negligence in the following terms:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

Therefore, when a person's conduct falls below the reasonable expectation of society and causes foreseeable harm to another, the person has acted negligently. Society's expectation—known in torts based on negligence as the legal duty of care—is that an

[9] (1856) 11 Exch 781

individual act as a reasonably prudent and careful person would act in similar circumstances. A person can act negligently by doing something that a reasonable person would not do or by failing to do something that a reasonable person would do. The law does not require that the person has intent to cause harm.

Suffice to point out that as regards professionals, the law requires a professional to act based on the skill and knowledge necessary for his or her profession, rather than the typical reasonable and prudent standard applied in general negligence cases. A professional who injures a client by providing care that is below the standard for that profession commits the tort of malpractice. A physician who is not able to cure a patient has not committed malpractice. However, a physician who removes the wrong lung during a surgery has committed malpractice. Similarly, a doctor who negligently infects a patient with HIV can be found liable under negligence. It must be noted however, that the test for standard of care as regards the negligence of a medical doctor for the submitted purpose is the Bolam test.[10]

The most common torts result from negligence rather than intent. A broad variety of tort claims, such as personal injury claims based on automobile accidents, are based on a general theory of negligence. Other torts involving negligence have specific names.

[10] The Bolam test was enunciated in the celebrated case of **Bolam v. Friern Hospital Management (1957) 2 ALL ER 118** in which Mc Nair J. explained that a doctor is not negligent if he acted in accordance with practice accepted as proper by a responsible body of medical men skilled in the art.

Intentional torts are divided into torts against the person and torts against property. Torts against individuals include assault, battery, false imprisonment, malicious prosecution, and intentional infliction of emotional distress. The primary torts against property are trespass to land, trespass to chattels, and conversion.

A person commits assault when he or she causes another to fear harmful or offensive bodily contact. In a battery a person actually causes harmful or offensive bodily contact to another. If a person makes a fist and says to a bystander, "I am going to smash your face," and the bystander fears that the person will hit him or her, an assault has been committed. If the person actually hits the bystander, the person commits battery. If the bystander does not anticipate the blow, the person commits a battery but not an assault.

Therefore, intentional or willful infection of the virus may amount to an action of battery. The argument is that even though a person consents to having sex, that person does not however, consent to the reception of the virus. This is dealt with in detail in chapter two.

In this regard, issues arising from HIV infection can be dealt with on the basis of liability arising from an action in tort, drawing inspiration from the doctrine of foreseeability of harm as enunciated in *Donoghue v. Stevenson*[11]. Provided that the aggrieved party is able to advance enough arguments to vitiate consent, such as the duty of care owed to the

[11] S.kulusika. **Deliberate Transmission of HIV: The Criminal Perspective**, Zambia Law Journal. Vol. 37 of 2005, page 101.

victim by his sexual partner, the victim of HIV infection may succeed in making claims for damages.[12]

At the centre of HIV litigation is the issue of confidentiality; that is to say whether a person is under any obligation to disclose his status to his sexual partner. This issue will be looked at great length in the next chapter.

1.9 CONCLUSION

It has been shown from the foregoing discussion that the infection of HIV comes with a number of serious economic and psychological disadvantages. It is submitted that these victims in some way or another ought to be compensated in monetary form to enable them meet the economic challenges which they are likely to face owing to the infection.

[12] ibid

CHAPTER TWO

CONFIDENTIALITY AND HIV INFECTION RISK

2.1 INTRODUCTION

The boundaries of confidentiality receive the most intense scrutiny when conflict arises with the duty to inform another person who may be exposed to the risk of transmission of HIV. It indisputable that discrimination is often visited upon people who are infected with HIV. In other words, disclosure that a person has been tested at all may be significant in the way society views that individual. Similarly, the effect on a marriage where a spouse discovers that a partner has been tested for HIV infection whether the test turns out to be positive or negative can be catastrophic because of the implication of infidelity. One of the paramount issues which have attracted debate is as to whether a person infected with the virus is under any legal obligation to disclose his HIV status to his sexual partner. Also of great importance is whether a medical doctor can in public interest disclose the HIV status of a person.

In this chapter we examine the existence and scope of the legal obligation of confidence to which a patient who has been tested for HIV infection is entitled. The chapter will also look at the liability of a doctor or any health care professional that knew the HIV status of his patient but did not inform or warn the victim. The chapter will further discuss whether a seropositive individual is under a legal obligation to divulge his HIV status to his sexual partner.

Confidentiality can be described as a concept encompassing a duty that inhibits the repetition to others of knowledge about another person or entity.[13] In its very essence confidentiality entails something that is given in trust. Therefore, for confidentiality to arise, there must be a relationship between the subject to whom the knowledge pertains and the bearer of knowledge, of such a nature as to import a duty on the latter not to repeat it or repeat it only in specified circumstances or in specified conditions.[14] A number of factors determine whether knowledge carries the stamp of confidentiality. These include the nature of the knowledge, the circumstances under which it was obtained and the relationship between the person in possession of it and the subject of the knowledge.[15] The foregoing clearly shows that this obligation exists between a doctor and the patient he tests for HIV. This is so considering the very nature of this knowledge which is highly sensitive, the circumstances under which it is obtained which is usually in secrecy and the very fiduciary relationship between doctor and patient.

In two recent cases, *X v. Y*[16] and *W v. Egdell*,[17] the courts accepted that a legal obligation of confidence existed between a doctor and his patient. Similarly, in the case of *Jansen Van Vuuren*[18] the Supreme Court of South Africa upheld an appeal in a breach of confidentiality claim against a doctor who told two medical golf course companions the status of his patient.

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[13] Justice Edwin Cameron, presentation entitled **Confidentiality** at Judges Confidentiality Workshop on HIV/AIDS, Mumbai: 7-8 January 1999 at page 1.
[14] Ibid
[15] Mwamba Mutale. **Confidentiality.** Legality Journal. 2002 at page 35
[16] (1988) 2 ALL ER 648.
[17] (1989) WLR 689
[18] (1993) (4) 842 (A) 8491

Closely related to confidentiality is the concept of the right to privacy. Invasion of privacy is **a** legal term essentially defined as a violation of the right to be left alone. The right to privacy is the right to control property against search and seizure, and to control information about oneself.[19] However, public figures have less privacy, and this is an evolving area of law as it relates to the media.The concept of privacy is underpinned by two powerful ideas. The first one is that every human being is intrinsically entitled to some personal autonomy.[20] The second is the belief that respecting individuals' autonomy and thus, their privacy is a necessary condition for human flourishing.[21] The right to privacy finds recognition as international law as article 17 of the international covenant on civil and political rights of 1966. The said article is couched in the following words;

> "No one shall be subjected to arbitrary or unlawful interference with his privacy..."

Invasion of privacy is a commonly used cause of action in a legal pleading. The Zambian constitution in part III ensures that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.[22] This constitutional provision, however, only protects against searches and seizures conducted by the government. Invasions of privacy by persons who are not state actors must, therefore, be dealt with under private tort law.

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[19] Www. Wikipedia, the free encyclopedia. htm
[20] ibid
[21] ibid
[22] Article 17 of the Constitution of Zambia.

Modern tort law gives four categories of invasion of privacy:[23]

1. Intrusion of solitude - physical or electronic intrusion into one's private quarters.

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2. Public disclosure of private facts -- the dissemination of truthful private information which a reasonable person would find objectionable and this is the subject matter of our discussion. Public disclosure of private facts arises where one person reveals information which, although truthful, is not of public concern and the release of which would offend a reasonable person
3. False light - the publication of facts which place a person in a false light, even though the facts themselves may not be defamatory.
4. Appropriation -- the unauthorized use of a person's name or likeness to obtain some benefits

At common law a legally enforceable duty of confidence is said to arise when information is conveyed to another in circumstances where, by express statement, the nature of the information, or the relationship of the parties, it is implied that the confidence should be respected and the information should be used only for the purpose for which it was conveyed.[24] In the medical context, confidentiality finds its reflection in the oath formulated by Hippocrates in ancient Greece some 2400 years ago.[25] This requires doctors to treat information acquired as sacred secrets.

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[23] Www. Wikipedia, the free encyclopedia. htm
[24] Patterson. D. **Privacy, Confidentiality, HIV and the Law**. At page 134
[25] Justice Edwin Cameron. **Confidentiality** Opt. Cit

2.2 EXCEPTIONS TO THE OBLIGATION OF CONFIDENCE

A number of exceptions to the obligation of confidence can be identified some of which can be highlighted without much elaboration. For example the patients consent will negate the doctors' duty of confidentiality. Other exceptions are a bit more complex and this chapter shall endeavor to concentrate upon the following: (a) discretion to disclose in the public interest under the common law; (b) a duty to warn others.

(a) **Disclosure in the public interest**

It is now well accepted that a breach of confidence may be justified if disclosure is in public interest. The scope of this justification of lawful disclosure of confidential information is necessarily vague to take account of the many situations which might arise. The question of what is in the public interest was given judicial interpretation in the case of *Nkumbula v. Attorney- General*[26]. In this case Baron J. stated as follows:

> "what is in the public interest or for the pubic benefit is a question of balance; the interests of the society at large must be balanced against the interests of a particular section of the society or the individual whose rights or interests are in issue, and if the interests of the society at large are regarded as sufficiently important to override the individual interests then the action in question must be held to be in the public interest or for the public benefit".

Pertaining to confidentiality, Lord Goff in the case of *Attorney - General v. Guardian Newspapers*[27] aptly submitted that '... there is a public interest that confidence should be preserved and protected by law'. Lord Goff, however, qualified his statement to the effect that public interest to disclose may be outweighed by public interest in the patients' right of confidence. Therefore, the law will protect the confidential nature of any information

[26] (1972) ZR 204 (CA)
[27] (1988) 2 WLR 805, (1988) 3 ALL ER 545

concerning the HIV status of a patient unless a compelling public interest justifies disclosure. To emphasize the importance of the duty of confidentiality, the law imposes the burden of proof upon the confidant to establish some other overriding public interest.[28]

(b) Duty to warn others

The argument in the previous section concerned whether the doctor had discretion to disclose the HIV status of his patient to another, usually a spouse or a sexual partner. A related but distinct argument centers on whether the doctor has a duty to warn another who is at risk of the HIV status of his patient and so must breach his obligation of confidence to his patient.[29] The consequence of the law recognizing such a duty will be that the spouse or the sexual partner would be able to bring a tort action against the doctor for failure to warn them of their spouses or sexual partners dangerous condition.[30]

It is worthy of note that there are no Zambian authorities on this subject. Similarly, there is little authority in England; it is therefore, instructive to consider how other legal systems have approached the problem. The argument in favor of the duty to warn a spouse or sexual partner of the patient can be based upon two lines of authority which have developed in the U.S. The first group of cases deals with the liability of a doctor when a patient communicates a contagious or infectious disease to a member of his

[28] Ibid, per Lord Griffiths at page 649

[29] I restrict this discussion to spouses and sexual partners. The duty could of course be considered in relation to health carers that are at risk or to needle sharers.

[30] A. Grubb and D. Pearl., (1992) **Blood Testing and DNA profiling. Law and Policy** at page 48

family or another in typical proximity to the patient.[31] The classical case in this regard is the case of *Wojcik v. Aluminium Co of America*,[32] a physician employed by the defendant company failed to inform a workman or his wife that he was suffering from T.B. the wife subsequently contracted the diseases and both she and her husband sued the employer, who was responsible for the physicians conduct, for negligently failing to warn them of the husbands condition. The court held that the doctor owed both the wife and husband a duty to inform them. The concern here is the duty to the wife. The court relied in large measure upon the fact that it was reasonably foreseeable that the wife would be at risk from contracting a contagious disease from the husband.

It is clear that this case do support a doctor's duty to warn a foreseeable individual who is at risk of contracting a disease. It logically follows that this should certainly include HIV infection. To the contrary, Grubb and Pearl submit that a more distinction between this case and the situation of HIV is that the duty to warn was postulated in a situation where even the patient did not know of his own contagious or infectious condition. They contend that in the case of an HIV positive patient whom the doctor has warned to take care not to infect others, for example by abstaining from sexual contact, or at least practicing safer sex, the patient consciously runs the risk of infecting his sexual partners. As such the doctors warning would be the only means of protecting the sexual partner.[33] However, the second line of authority which has developed in the US provides strong support for the view that a doctor does have a duty to warn perhaps even where the patient is aware of his condition. The leading case is *Tarasoff v. Regents of the University*

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[31] **Edwards v. Lamb (1899) 45 A 480**
[32] (1959) 183 NYS 2d 351
[33] A. Grubb and D. Pearl, (1992) **Blood Testing and DNA profiling. Law and Policy** Opt. Cit

of California.[34] The plaintiff's daughter was murdered by a man called Podar, who was undergoing psychotherapy. Prior to the murder Podar had told his psychotherapist that he intended to kill the girl. The supreme court of California held that the psychotherapist, who was employed by the hospital, had a duty to warn the victim or someone, such as the parents who might have warned her. Tobriner J stated:

> 'Although ... under common law, as a general rule, one person owed no duty to control the conduct of another, nor to warn those endangered by such conduct, the courts have curved out an exception to this rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct.'

The Tarasoff decision was endorsed with a positive qualification in the subsequent case of *Gammil v. United States*[35]. The facts of this case were that the plaintiffs contracted Hepatitis from a neighbors child for whom they were babysitting. The plaintiff claimed that the mothers doctor when he diagnosed her condition owed a duty to protect the public from the spread of disease. The court rejected this wide ranging argument but accepted a more limited duty to warn. The court held that even though the risk of infection to the public was foreseeable, a doctors duty to a third party non patient must arise from a special relationship between the doctor and that third party. The court concluded:

> "A physician may be found liable for failing to warn a patient's family, treating attendants, or other persons likely to be exposed to the patient of the nature of the disease and danger of exposure... it would appear that a bare minimum the physician must be aware of the specific risks to specific persons before the duty to warn exists".

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[34] (1976) 551 P2d 334 (California Supreme Court)
[35] (1984) 727 F 2d 950 (10th Cir.)

The Gammil case goes to show the law places a duty on a doctor to warn those persons who are reasonably likely to be infected with the disease which his patient is suffering from. The author submits that this duty applies and ought to be extended to HIV cases.

2.3 Confidentiality between sexual partners

A tort action arises if it is established that the defendant owed a duty, which he or she breached, resulting in damage to the plaintiff. The question which begs an answer in this regard is as to whether a person who is infected with HIV is under any legal obligation to disclose his status to his partner. It is important to make mention of the fact that generally, a person has a right not to disclose his medical status. However, in *R. v. Cuerrier*[36], the Supreme Court of Canada upheld the conviction of a person living with HIV who engaged in unprotected sex with the complainants without divulging his HIV status. The court held that non- disclosure of HIV status, which is material consideration for engaging in sex constituted fraud on the part of the accused and vitiated consent to sex given by the complainants.

The relevance of the Cuerrier case despite it being a criminal case is that it places a legal obligation on an HIV infected person to disclose his or her HIV status to his or her sexual partner.

However, this duty will only subsist if a person knows of his HIV status. In the famous case of *Magic Johnson v. Doe*,[37] an HIV positive woman claimed she had acquired HIV

[36] (1996) BCJ No. 2229, BCCA
[37] 817 F. Supp. 1382

from Johnson during a one night stand some years earlier. The court held that in order for Johnson to be held liable, proof would be required that the defendant knew or should have known at the time of sexual encounter that he was infected with HIV. Since there was no proof that he had this knowledge, the court found that he owed the plaintiff no duty. These decisions, however, do not settle the issue of whether disclosure is necessitated in situations where an HIV positive takes reasonable measures to protect the partner through the use of condoms so that the risk of transmission is significantly reduced. The author is of the view that it does not matter whether the infection risks are reduced or not but that the infected person ought to disclose his status.

2.4 Confidentiality in the African context

There are three significant demographic differences that present themselves between HIV and AIDS in Africa on the one hand and Western Europe on the other. In Africa the pandemic is predominantly heterosexual. Secondly, most of those people who are infected are relatively poor and are mostly humbly or not educated at all. Thirdly, the infection rate is simply overwhelming.

The African challenge to confidentiality is that it is Eurocentric. This view is basically drawn from an older and even deeper critique of privacy itself. From a socialist, Marxist and communitarian point of view, the very distinction between what is private and what is public has been derived as a product of classical theory. At the core of legal submission in this regard are Bentham and his utility principle. According to Bentham, the interest of

society as a whole should override the interests of the few. In Zambia, the Supreme Court decision in the case of *Nkumbula v. Attorney General*[38] is instructive in this regard.

Suffice to point out at this juncture that the African charter on human and peoples rights, which entered into force in 1982 is equally instructive. It is easy to see that unlike the western culture, African societies tend to put more emphasis on the group rather than an individual.

2.5 CONCLUSION

The above discussion clearly shows that confidentiality as a duty is fixed by law. Therefore, there need not be an express agreement between the custodian of information and the victim. As highlighted in the first chapter, liability in tort arises when a person breaches a duty which is primarily fixed by the law and that this breach is redressible by unliquidated damages. It follows therefore that any person, in whatever capacity who discloses the HIV status of a person should be condemned in damages. It has further been established that disclosure in public interest can only be justified if there is a compelling public interest justifying disclosure. It has also been established that the law places a duty on a doctor to warn those persons who are reasonably likely to be infected with the disease which his patient is suffering from and that this duty applies and ought to be extended to HIV cases. It has further been established that an HIV positive individual is under an obligation to disclose his status to his sexual partner.

[38] (1972) ZR 204 (CA)

CHAPTER THREE

THE LEGALITY OF HIV TESTING

3.1 INTRODUCTION

There are many situations where it would be important to know an individual's HIV status. A person may be worried that he has contracted HIV from a sexual partner or through blood donation. A doctor who treats a patient whom he suspects is infected with HIV is concerned for himself and other health workers. The government may wish to know the prevalence of HIV infection in the community in order to make informed judgments regarding the appropriate public health responses to the epidemic. These examples illustrate the different reasons which may motivate HIV testing; namely the interests of an individual, the interests of the attending health care workers and the interests of society at large. It is apparent that the last two interests may conflict with the interests of the patient.[39]

This chapter is concerned with the legality of HIV testing upon a particular patient. Specifically we are concerned with the legality of HIV testing without the fully informed consent of the patient. The chapter will also look at the issue of mandatory HIV testing. It is imperative to submit at this point that although the legality of HIV testing must be considered within the framework of both civil and criminal law, it is particularly the torts of battery and negligence which is of concern here because the prospect of a criminal prosecution being brought against a doctor is unlikely.

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[39]Grubb and D. Pearl, (1992) **Blood Testing and DNA profiling. Law and Policy** at page 5

3.2 (i) The law of battery and HIV testing

A battery may be defined as the deliberate (i.e. intentional) touching of (or application of force to) another which is offensive or harmful and which is done without the consent of[40] that other. The first question which must be addressed is whether a patient who has not been informed that his /or her blood will be tested for HIV infection has sufficient information about the procedure to be performed so that his consent is valid in law.

(a)The content of a valid consent. As regards the law of battery, the patient's consent will be valid if he understands the nature and purpose and thus the quality of the touching. As Bristow J stated in *Chatterton v Gerson*[41] ... 'once the patient is informed in broad terms of the nature of the procedure which is intended and gives ... consent, that consent is real' and hence no battery will be committed. The difficulty here is to determine what information is relevant to the 'nature' (and purpose) of a touching and what information is merely collateral to it. It is clear, for example, that mistaken identity of who is doing the touching affects the nature of the touching consented to.[42] Equally, if the person who is touched is not aware of the underlying reason for the touching then the consent will not be valid. Hence, in *R. v Flattery*[43] it was held that a woman, who consents to sexual intercourse, knowing it is sexual intercourse but believing that it is being done as a

[40]ibid
[41] [1981] 1 ALL ER 257, [1981] QB 432 at p 443.
[42] R v Clarence (1888) 22 QB 23
[43] (1877) 2 QB 410

surgical operation, has not given a valid consent. In both these examples, the individual understands and consents to the physical touching but lacks any perception of the underlying quality of the touching because the underlying purpose is unknown to her.[44]

It follows from the foregoing exposition that a patient who consents to his or blood being extracted in order to test it for malaria does not consent to his blood also being tested for HIV.

Another question which begs an answer is whether it is knowledge of the insertion of a needle in the patient's vein (and its implications) or is it this knowledge plus knowledge of the underlying purpose of the procedure (i.e. HIV testing) which is vital in order for a patient to have the necessary understanding of the quality of the touching for his consent to be valid?

(b) Public policy. The answer to this question must lie in an assessment of the needs of public policy. It is this issue which is at the heart of the many cases concerned with the difficult legal task of distinguishing between essential ('nature') information and irrelevant ('collateral') information. Public policy requires that such information should be considered essential to the patient's decision and goes to the quality of the touching assented to by the patient. HIV infection is not simply another medical condition and a number of factors mark out its singular nature. First, the medical prospects for the infected individuals are horrendous when the virus attacks the immune system so as to produce drastic immune deficiency. The subsequent stages of infection will have catastrophic effects on not just the individual's physical health but also his mental health. Hence, the importance of pre-testing and counseling emphasizes the need for full disclosure to the patient.[45]

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43 Sidaway v. Bethlem Royal Hospital (1985) AC 871

[45] Grubb and D. Pearl, (1992) **Blood Testing and DNA profiling. Law and Policy,** Opt. Cit at page 5

Secondly, persons who are seropositive may be subjected to discrimination in the work place and in society generally. Even though the nature of information is confidential, as a matter of practice, this cannot always be ensured.

These grave and adverse personal and social consequences make the knowledge that a doctor is going to test an individuals HIV status so important and basic to an individuals consent to be tested that the courts should require the doctor to inform the patient of his intention.

3.3 (ii) The law of negligence and HIV testing

A doctor or any health worker owes a duty to his patient when diagnosing, treating or advising his patient. The scope of this duty is to exercise reasonable skill and care. The question for our purposes is whether a doctor, by failing to inform a patient of his intention to test blood for HIV infection, can be said to be in breach of this duty? In *Sidaway v. Governors of Bethlem Royal Hospital*[46] the House of Lords emphasized on the need for a doctor to advise his patients of the risks inherent in a medical procedure. This same rule should apply to advice and counseling pertaining to HIV testing.

Therefore, a doctor who fails to inform a patient of his intention to test his blood for HIV breaches his duty to do so. Suffice to point out at this juncture that the standard of care in this instance is that of any ordinary skilled man professing to have that special skill. It therefore, follows that any person who holds out himself as being capable of carrying out an HIV test should conform to this standard. In other words all those health workers that do blood tests for HIV bears this duty whether they are medical doctors or not.

Gostin, a legal commentator on AIDS in the US accordingly submits as follows:

[46] (1985) AC 871

> "HIV testing without knowledge or consent goes against the very purpose of the test: facilitating education and counseling. The prevailing view is that patients should be informed of the potential consequences of positive HIV test results; the possibility that the test may be falsely positive; the behavior that is desirable to help prevent further spread of HIV; the potential psychological impact; and the locations where the patient can get personal, social and financial support in copying with the burden of the disease. By neglecting to inform the patient that the test will be performed, doctors fail to provide the patient with the dignity and help that is uniformly acceptable in the practice of medicine."[47]

3.4 MANDATORY HIV TESTING

The issue of mandatory testing has raised concern in many instances. Some offences may ensure that the culpability of a person is not escaped by requiring the accused to take an HIV test. Similarly, there are certain employers who demand for the prospective employees to undergo HIV tests before they can be employed.

Mandatory testing of HIV is without doubt an invasion of persons to privacy. Invasion of privacy is a legal term essentially defined as a violation of the right to be left alone. The right to privacy is the right to control property against search and seizure, and to control information about oneself.[48]

In the case of *Chandler v. Miller (United States)*, a decision of the Supreme Court of the United States, the leading authority on mandatory testing programs. This case concerned the legality of a statute enacted by the state of Georgia which required all those aspiring

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[47]. Ibid page 7
[48] Www. Wikipedia, the free encyclopedia. htm

state offices to submit to drug testing (for illicit drugs) and certify that they had obtained negative results. Three candidates for state offices challenged the statute on the grounds that it was an unconstitutional violation of their rights to privacy. Although initially unsuccessful, the challenge ultimately succeeded before the Supreme Court.[49]

The Supreme Court confirmed that the requirement for a drug test intruded upon candidates' reasonable expectations of privacy.

This principle should also apply to the issue of mandatory HIV testing.

The following extract from the International Guidelines on HIV/AIDS and Human Rights provides a succinct explanation of the importance of protecting privacy in this context, and of the relationship between protecting privacy and protecting public health:

> "The individual's interest in his/her privacy is particularly compelling in the context of HIV/AIDS, firstly in view of the invasive character of the mandatory HIV test and, secondly by reason of the stigma and discrimination attached to the loss of privacy and confidentiality if HIV status is disclosed. The community has an interest in maintaining privacy, so that people will feel safe and comfortable in using public health measures, such as HIV/AIDS prevention and care services."[50]

3.5 CONCLUSION

This chapter has endeavored to show that testing someone's HIV status without his or her knowledge amounts to a battery in law. It has further been shown that a person or doctor who fails to inform his patient of his intention to test the patient's blood does not only batter the patient but is also liable under the law of negligence.

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[49] R. Elliot. (2002) **Criminal law, Public health and HIV Transmission**: A policy options paper for UNAIDS at page 23.

[50] Ibid.

CHAPTER FOUR

A CRITICAL ANALYSIS OF THE CRIMINISATION OF HIV TRANSMISSION

4.1 INTRODUCTION

The preceding chapters have in principle shown how liability may arise when there is infection of HIV. It has been established that infecting someone with the virus is a battery even though the victim consented to sex. The relevant consent in this instance is vitiated by the fact that the victim consented to having sexual intercourse but did not, however, consent to the reception of the virus. A lot of debate has erupted in Zambia on whether transmission of HIV should be criminalized by parliament passing a separate and specific law to address the issue or not. The importance of this issue necessitated its inclusion as a chapter of this research. This chapter will discuss the intricacies of criminalizing willful infection of HIV. It will also weigh the criminal perspective of HIV infection against redress under the law of torts.

4.2 Deliberate, Reckless or Accidental?

Before looking at the complexities of and pros of prosecuting people for infecting others with HIV, it is imperative to understand the different types of transmission that can take place. The definitions below are based on general categories and are not specific to any particular country or legal system.

Deliberate (or 'Intentional')

Most countries would consider this to be the most serious offence that can be committed. Some cases of deliberate transmission have involved individuals (both HIV+ and HIV-) who have used needles or other implements to intentionally infect others with HIV. The pointing case is the *Brian Stewart case*[51], were a medical technician from Illinois was sentenced to life in prison after deliberately injecting his son with HIV tainted blood, allegedly in an effort to kill him and avoid paying child support. Such a perpetrator would equally be held criminally liable under the Penal Code of Zambia[52]. He or she would have met the requirements of section 204 of the aforementioned Code. Kulusika submits that the prosecution will have no difficulty in establishing the fault element of an accused who stabs another person with a syringe filled with HIV contaminated blood for the intention of the accused person is to infect the victim with HIV, or to cause grievous harm, such as infecting the victim with a grievous disease which will ultimately lead to death.[53] He however, further notes that the exercise will amount to naught if the prosecution faces some obstacle in the formulation of a charge or information, or a series of charges against the accused person which arises from the absence of a statutory definition of HIV/AIDS as a crime under the Penal Code.[54]

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[51] http: //www.genornenewsnetwork. org

[52] Chapter 87 of The Laws of Zambia

[53] S.kulusika. **Deliberate Transmission of HIV: The Criminal Perspective**, Zambia Law Journal. Vol. 37 of 2005, pages 97-98

[54] Ibid, page 98

Other instances of deliberate HIV transmission have been based on seropositive people who have had sex with the primary purpose of transmitting the virus to their partner.

Deliberate transmission also sometimes takes place when a negative partner has an active desire to become infected with HIV. This is unlikely to lead to prosecution however as both parties consent.

Reckless

This is where HIV is passed on through a careless rather than deliberate act. If for example a person who knows they have HIV has unprotected sex with a negative person, but fails to inform them of the risk involved, this could be classed as reckless transmission in court. "Reckless' here implies that transmission did take place, but that this happened as part of the pursuit of sexual gratification rather than because the HIV+ person actually wanted to give their partner HIV. In *R. v Dica*[55] the Court of Appeal held that a person was reckless if, knowing that they were HIV positive, he or she transmitted HIV to a person who had not been told of the infection.

Accidental

This is the most common way that HIV is passed on. A person is generally said to have accidentally transmitted HIV if:

- They unaware that they had the virus, and therefore did not feel the need to take measures to protect their partner.

[55] http//www.baili.org./ew/cases/EWCA/crim/2004/1103.htm/

- They were aware of their HIV+ status and they used a condom during sex, but the condom failed in some way (although there is some debate over whether this should in fact be classed as a reckless act, as we shall see later).

Criminal law may serve many social purposes. It may express a collective social view that a particular behavior is wrong or be a means through which a social group obtains social validation of its views. We are here concerned with whether criminal law is an effective tool of HIV prevention. General criminological theory offers at least three main mechanisms through which criminal law is thought to have its effects: it may deter unsafe behavior by the threat of punishment; it may help convince people with HIV that risky behavior is wrong, by supporting a social norm against the behavior; or it may incapacitate through imprisonment those who have a propensity towards unsafe behavior. Despite their ubiquity, however, the actual impact of these types of laws on intimate behavior has never been established, nor have they been studied using empirical measures.

Before coming up with any legislation one must look at what is the living law, that is to say; the behavior of people in society pertaining to a particular issue. If legislation were passed criminalizing the willful transmission of HIV, the one important point for consideration would be how the legislation would work effectively in curving the spread of HIV. It must also be Bourne in mind that all legal and policy responses should conform to International Human rights norms. Policy indication must consider functions

of criminal law and assess whether and to what extent criminalization of willful infection of HIV/AIDS will contribute to the objective of preventing transmission.[56]

4.3 ARGUMENTS AGAINST CRIMINISING THE TRANSMISION OF HIV

The role of Criminal Law in society

Criminal sanctions are perceived as serving four primary functions. The first is to incapacitate the offender from harming anyone else during the term of their imprisonment. The second is to rehabilitate the offender, enabling him/her to change his/her future behavior so as to avoid harming others. The third is to impose retribution for wrongdoing—to punish for the sake of punishing. The fourth function is to deter the individual offender and others from engaging in the prohibited conduct in the future.[57]

But it is not clear that these functions will make any significant contribution to preventing HIV transmission, and they offer, at best, a limited basis for resorting to the criminal law as a policy response to the epidemic.

Firstly, imprisoning a person with HIV does not prevent them from spreading the virus, either through conjugal visits or through high-risk behavior with other prisoners. Imprisoning the person with HIV who has exposed someone to the risk of infection does very little, if anything, to prevent this harm during the period of incarceration. Far from reducing HIV transmission, imprisonment may have the opposite effect. Evidence

[56] Elizabeth Kantor, **HIV Transmission and Prevention in Prisons** [4-5] (HIV Insight 2003) (available at<http://hivinsite.ucsf.edu/InSite.jsp? page=kb 07&doc=kb

indicates that prisons are often settings in which high-risk behavior is common, in part because of lack of access to means of prevention such as condoms or clean drug-injection equipment.

Secondly, there is also little evidence to suggest that criminal penalties will 'rehabilitate' a person such that they avoid future conduct that carries the risk of transmitting HIV. Sexual activity and drug use are complex human behaviors highly resistant to blunt tools such as fines or imprisonment.[58] Other approaches are more likely to support longer-term behavioral change. Long-term changes in behavior are more likely to result from other, non-coercive interventions (e.g. counseling and support, addressing the underlying reasons for engaging in risky activities).[59]

Retribution may make us feel better but will not prevent transmission. Deterrence, rehabilitation and reformation, the principal aims of a criminal legal system, are thus not helpful tools in the fight against HIV/AIDS.

Thirdly, imposing punishment for its own sake can only be justified for conduct that is morally blameworthy, so a criminal law based on this objective could only legitimately apply to a subset of cases of HIV transmission or exposure. Whatever the merits of imposing criminal penalties as retribution, it must be understood that this is unrelated to the primary objective of preventing the transmission of HIV. Criminal law generally recognizes different degrees of mental culpability, and not all of them will justify

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[58] R. Elliot. (2002) **Criminal law, Public health and HIV Transmission**: A policy options paper for UNAIDS at page 23
57 ibid

criminal prosecution and penalties. Where to draw this line is not always clear, and will partly depend upon the seriousness of the wrongdoing. HIV-specific criminal laws would therefore create, in some sense, selective prosecution and bias.[60] As such, what needs to be criminalized is deliberate transmission of the virus.

Appealing to a desire for retribution in making policy also runs the risk of appealing to prejudice and reinforcing discrimination, particularly in the context of the heavy stigma that already often surrounds HIV/AIDS and those individuals or groups associated with it.

Existing law

It is important to make mention of the fact that even though Zambia does not have laws specifically related to transmission of HIV, such as the ones in Cambodia and Zimbabwe, there are provisions within our laws that can be applied to address the issue. To start with, a case of deliberate transmission of HIV can be prosecuted using section 204 of the Penal Code of Zambia.

A prosecutor can further use and rely on section 172 of the Penal Code which deals with common nuisance.[61] An accused person convicted under section 172 is however, liable to imprisonment for one year only.

Section 183 of the Penal Code can also be used. The said section states:

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[60] Ibid, page 23

[61] S.kulusika. **Deliberate Transmission of HIV: The Criminal Perspective**, Opt. Cit page 98

> "Any person who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life is guilty of a misdemeanor".

Given that any act can include sexual intercourse, with or without consent, this wide Section can cover sexual intercourse resulting in transmission of HIV.

It must however, be conceded that this section comes with a number of inadequacies. Firstly, the section makes no mention of willful transmission of HIV. Secondly, it Categorizes the act as a misdemeanor only meaning that the maximum penalty for a conviction that can be imposed is imprisonment of up to two years, a fine or both.

Proof

Additionally, there are difficulties with the burden of proof required in criminal law. It might appear that proof is a straightforward issue, but proving that someone has passed on HIV can be exceedingly difficult.

Firstly it needs to be proven that the accused was definitely the source of the accuser's HIV. This is normally done by comparing the DNA of the virus that A and B are infected with (using a process called polygenetic - the *Richard Schmidt case*[62] is illustrative of this submission. If they are the same (or very similar), then it is very likely that A caused B's infection. If they are different then it means B almost certainly did not acquire HIV from A, and the case would be probably be thrown out.

[62] (1998) ALL ER

Secondly, if the DNA matches, it needs to be proven that A definitely caused B's infection and not the other way round. Sometimes this can be demonstrated by how advanced each person's illness is, but this isn't always possible. Often, the only definitive proof would be a negative test on B that was performed after a received a positive test.

Finally, in cases where intentional or deliberate transmission needs to be proven, evidence needs to be found that A actively intended and wanted to infect B. Unless there is physical proof of this (e.g. a syringe filled with HIV+ material, a note, or a written confession), it can often just be one person's word against another. With cases of sexual transmission, proving intention can be virtually impossible as the very nature of sexual HIV transmission means there are no witnesses: what happens in the bedroom is essentially private. If no evidence of deliberate transmission could be found therefore, a charge of reckless or careless transmission would probably be chosen. Whether someone can be legally charged with reckless (as opposed to deliberate) transmission depends entirely on an individual country's laws and courts. In some places there is no differentiation between the two.

As the Zimbabwean Women Lawyers Association observes "since the willful transmission of HIV legislation was passed, there has been no successful prosecution. The difficulty involved is one of proving certain required elements of an offence beyond a reasonable doubt in order to obtain a conviction."[63]

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[63] Justice Kirby. 2007. ZARAN Workshop on **The Courts and Justice in the Era of HIV/AIDS**

A further setback for securing such a conviction is establishing that a person knew that he or she was HIV positive at the time of sexual intercourse. This is so because HIV testing is confidential. This is illustrated by the *Magic Johnson case*[64] where the court held that in order for Johnson to be held liable, proof would be required that the defendant knew or should have known at the time of sexual encounter that he was infected with HIV.

Consent and Disclosure

Almost all criminal convictions involving sexual transmission are brought about because an HIV+ person has failed to inform their negative partner about their status. In some cases, the positive person may have actively lied in response to a direct question in order to persuade their partner to have unprotected sex. In others, they may simply not have mentioned their condition. A prosecution involving deception might carry a more severe penalty than a simple failure to disclose, because it affects a person's choice to consent to sex.

Consent is an important issue in all criminal prosecutions. If the accused had simply not mentioned they are HIV+, then the prosecution would probably argue that they had been reckless by not disclosing their status and not informing their partner of the risks involved in intercourse. However, the defence could well counter this by saying that the balance of responsibility is 50:50, and that by agreeing to having unprotected sex, the 'victim' impliedly consented to all the risks involved, including that of HIV. This argument was used in the appeal trial of *Mohammed Dica*[65], the first person in England to be accused of

[64] 817F. Supp. 1382
[65] http//www.baili.org./ew/cases/EWCA/crim/2004/1103.htm

recklessly transmitting HIV. The English case of *R. v Konzani,*[66] offers better clarification of this. [67]The court held that a person accused of recklessly transmitting HIV could only raise the defense of consent, including an honest belief in consent, in cases where that consent was a "willing" or "conscious" consent. In other words, the court distinguished between "willingly running the risk of transmission" and "willingly consenting to the risk of transmission." This suggests that consent will only operate as a defense in all but the most exceptional of cases -- where there has already been prior disclosure of known HIV-positive status.

When discussing consent for our purposes, it is imperative to refer to the consent which is required in a rape case. "In a rape case, consent which can be described as unequivocal is a complete defence which entitles the accused person to an acquittal."[68] Consent in such cases is however, vitiated if it was obtained by fraud. Fraudulent consent in this regard may be where sexual intercourse takes place as a result of a misrepresentation as to the nature and quality of the act.[69]Consent is also be vitiated if it was obtained as a result of submission because of fear or in order to avert a greater evil.[70]

It has been held that non- disclosure of one's HIV status constitutes fraud and does in deed vitiate consent to having sexual intercourse. This is illustrated by the case of *R. v. Cuerrier*[71] where the Supreme Court of Canada upheld the conviction of a person living

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[66] ibid
[67] http//www.baili.org./ew/cases/EWCA/crim/2005/706.htm
[67] ibid

[68] S.kulusika. **Deliberate Transmission of HIV: The Criminal Perspective**, Opt. Cit at page 101
[69] **R. V. Williams (1923) 1 KB 340**
[70] S.kulusika. **Deliberate Transmission of HIV: The Criminal Perspective,** Opt. Cit at page 102
[71] (1996) BCJ No. 2229, BCCA

with HIV who engaged in unprotected sex with the complainants without divulging his HIV status. The court held that non- disclosure of HIV status, which is material consideration for engaging in sex constituted fraud on the part of the accused and vitiated consent to sex given by the complainants.

If the accused had actively deceived their partner, and told them they were negative when they were not, then the prosecution could quite easily argue that the 50:50 balance of responsibility had been taken away, making the accused more liable to prosecution.

Impact on public health initiatives

There is a danger that HIV specific criminal laws are going to contribute to stigma and may deter HIV testing, which is a benefit of possible deterrent to risky behavior.[72] Further, it will create a sense of false security as some may expect that criminal prohibition reduces risk of unprotected sex. This undermines public health message that everyone is responsible for taking measures to protect themselves against HIV.

To successfully prosecute presupposes that one should know their HIV status and they must have the intention to infect another person with the virus. The problem this raises is that in order for one to know their status they should have undergone Voluntary Counseling and Testing (VCT). Criminalizing the willful transmission of HIV would then act as a deterrent for people to undergo VCT as not knowing your HIV status would mean that you cannot be prosecuted for knowingly infecting others.

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[72] J. Contemp. (1992) **Health L. & Policy** pages 245, 272-73

Stigma and persecution

Given stigma and discrimination the risk is that criminal sanctions will be directed disproportionately at those who are socially, culturally or economically marginalized. It would seem that people with known HIV infection are invariably and purposely dehumanized and discriminated upon while a considerable number of unknown HIV carriers within the community are left free to continue to spread the infection. The case of *Marcussen v. Brandstat*[73] illustrates how such laws bring about sigma and discrimination. This is a case in which a civil suit was brought by a prisoner against prison officials for being assigned to a cell with an HIV-positive inmate, and thereby exposing him to the risk of HIV infection. *Dennis Anderson, v. Gilberto Romero and Arth*[74] is also instructive. The facts of this case were that the defendant a police superintendent of the cell house in which the appellant was placed told the guards to put the appellant in a cell by himself because he was HIV positive.

A recent survey by researchers from the Sigma research team at Portsmouth University for example, found that 90% of the HIV+ people they interviewed were critical of the growing trend for criminalization of reckless HIV transmission. Most said this was because they believed that the responsibility for protected sex should be shared, or because they thought criminalization increased the stigma they faced. A number also

[73] 836 F. Supp. 624, 626 (N.D. Iowa 1993)
[74] 1995 CO7. 877

said they believed that criminalization was a step back towards the culture of 'blame' that surrounded the early years of the epidemic.

Unconducive Environment of Remand Prisons

Further, the criminal legal machinery is not suited to be used in the fight against HIV/AIDS. It is a notorious fact that criminal trials in Zambia take a very time before they are finally disposed. As such, accused people are remanded in prisons for years. Applied to a person accused of willful infection, it must be remembered the accused is HIV positive. Considering the unconducive nature of overcrowded and overstretched remand prisons in Zambia, this will be a surest and fastest way of sending HIV positive people, who are presumed innocent until found guilty, to early graves. People living with HIV/AIDS require adequate care and nutritional needs which is not available in remand prisons. Access to ARV's is also not readily accessible in remand prisons.

4.4 REDRESS UNDER THE LAW OF TORTS

It is without doubt that the largest body of court decisions concerning HIV/ AIDS relates to claims of liability based on tort law. The earliest tort cases involving HIV/AIDS were brought by transfusion recipients and hemophiliacs against doctors, blood banks an hospitals. Similarly, there have been a number of reported lawsuits seeking compensation for sexually transmitted HIV. These are dealt with on the basis of liability arising from an action in tort, drawing inspiration from the doctrine of foreseeability of harm as enunciated in *Donoghue v. Stevenson*[75]. Hence, in *Doe v. Jackson*[76] it was held that in

[75] (1932) A.C 562
[76] 817 F. Supp. 1382 (W.D Mich. 1993)

order to sustain an action of HIV Transmission, it must be proved that that the defendant knew or should have known at the time of intercourse that he was infected with HIV. This was so because knowledge was the only factor which could satisfy the requirement of foreseeable harm.

The Jackson case shows that liability can only arise if there is knowledge of ones status. This endorses the position that a person is under an obligation to disclose his HIV status to his sexual partner. It is logical to argue that redress under the law of torts to some extent may help in deterring people from having sexual intercourse without divulging there status to their sexual partners.

Despite the above credit which has been given to redress under tort law, it comes with serious demerits when viewed from the African perspective. Statistics show that the HIV/AIDS pandemic is usually and is more prevalent among those people who might be considered as the indigent. That is to say that HIV infection is more prevalent among the poor. Consequently, a person who infects another with the virus and condemned in damages will nevertheless be unable to pay the damages.

Further, there will be no deterrence for those who pride themselves with riches in that they will easily pay the money required as damages for willfully infecting someone with the virus.

4.5 CONCLUSION

This chapter has endeavored to establish that the criminalization of transmission of HIV comes with a number of practical difficulties. Firstly, in terms of actual implementation the hustle is proving the case beyond reasonable doubt. Secondly, it has been shown from the discussion that the unconducive state of our prisons will make it a death penalty for those infected. Furthermore, there is a danger that HIV specific criminal laws are going to contribute to stigma and may deter HIV testing, which is a benefit of possible deterrent to risky behavior. It has further been shown that even though Zambia does not have laws specifically related to transmission of HIV, such as the ones in Cambodia and Zimbabwe, there are provisions within our laws that can be applied to address the issue.

Redress under the law of torts has also come out to be ineffective considering the economic state of our country. A further weak point for redress under tort law is that HIV is more prevalent among the poor who cannot afford to pay the damages.

The author is of the view that sections 172 and 183 0f The Penal Code Act, Chapter 87 of the laws of Zambia should be amended from a misdemeanor to a felony. If amended the sections would provide sufficient punishment to would be offenders and cushion some of the difficulties which new legislation might bring.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

One of the issues, which have come out prominent in all the chapters is that there is little or negligent literature on HIV/AIDS law in Zambia. Similarly, there are no decided cases on this particular branch of the law owing to lack of litigation. For example, Mushota notes and submits that ZARAN following the memorandum of understanding between ZARAN and the Legal Resources Foundation has referred thirteen cases to the legal Resources Foundation for litigation but the Legal Resources Foundation has not been able to commence action in the courts of law owing to lack of information[77].

The dissertation has brought to the fore various acts surrounding the transmission of HIV that may lead to a suit in tort. It has been established that infecting someone with the virus amounts to a battery. The relevant consent needed to evade an action for battery is vitiated by the fact that even though the victim might have consented to having sexual intercourse, he or she did not however consent to the reception of the virus.

[77] Chipo Mushota. **Litigating HIV and AIDS in Zambia**: The ZARAN LRF MoU in the ZARAN News letter; April to June 2007 at page 5

The paper has further shown that testing someone for HIV without their consent is a negligent act on the part of the medical officer and that officer should be condemned in damages. Such an act also amounts to a battery.

The paper has also looked at the obligation of confidence, which the law places on a medical officer who tests his patient for HIV. The research has particularly endeavored to establish whether a doctor can in the public interest disclose the HIV status of his patient. Relying on the decided case of *Attorney - General v. Guardian Newspapers*[78], it has been shown that public interest can only be justified if there is a compelling public interest justifying disclosure. The medical officer still nevertheless bears the duty to warn those persons whom his patient is likely to infect with the virus. This is premised on the ruling in the case of *Gammil v. United States*[79] wherein it was held that a physician may be found liable for failing to warn a patients family, treating attendants, or other persons likely to be exposed to the patient of the nature of the disease and danger of exposure, it has been submitted that a doctor is under an obligation to disclose the HIV status of his patient to those persons who he is likely to infect. Therefore, a doctor only owes this duty to specific persons and not everyone in general.

Finally, the paper has given its position on the controversial issue of criminalization of the transmission of HIV. The research has maintained a position against the passing of specific legislation to criminalize the transmission of HIV based on the arguments against

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[78] (1988) 2 WLR 805, (1988) 3 ALL ER 545
[79] (1984) 727 F 2d 950 (10th Cir)

doing so which have been advanced in chapter four. Firstly, it has been shown that it is not clear and certain that the four functions of criminal law will make any significant contribution to preventing HIV transmission. Secondly, passing such legislation will impact negatively on public health initiatives in that specific criminal laws are going to contribute to stigma and may deter HIV testing. Further, securing a conviction for HIV transmission may not be as easy as it may sound. Proving beyond reasonable doubt that the accused was definitely the source of the accusers HIV is a strenuous task. Moreover, sections 183 and 172 of the Penal Code Act can be used to cater for HIV transmission. The offences under the aforementioned provisions are however, misdemeanors and they may therefore not offer the best remedy for HIV transmission.

It has further been shown from the discussion that redress for HIV transmission can equally be obtained under the law of torts. This can be dealt with on the basis of liability arising from an action in tort, drawing inspiration from the doctrine of foreseeability of harm as enunciated in *Donoghue v. Stevenson*[80]. Provided that the aggrieved party is able to advance enough arguments to vitiate consent, such as the duty of care owed to the victim by his sexual partner, the victim of HIV infection may succeed in making claims for damages.[81] This remedy unfortunately is not as practicle and effective as it may sound due to a number of factors. Firstly, HIV/AIDS is more prevalent among the indigent in society and those with humble education or no education at all. As such even though a person may be found liable and condemned in damages, that person may still be unable to pay the damages. Secondly, this remedy does not offer deterrence for those who pride

[80] S.kulusika. **Deliberate Transmission of HIV: The Criminal Perspective**, Zambia Law Journal. Vol. 37 of 2005, page 101.
[81] ibid

themselves with riches in that they will easily pay the money required as damages for willfully infecting someone with the virus.

This dissertation has ultimately established that the existing criminal laws in Zambia or civil liability under the law of torts are inadequate in dealing with cases of HIV transmission.

5.2 RECOMMENDATIONS

Since it has been established that there seems to be little literature and no decided cases on HIV/ AIDS and the law, the following recommendations are given for consideration:

School of law

Currently, the school of law at the University of Zambia does not offer AIDS law as a course. It is recommended that the school of law should consider offering AIDS law as a course.

Zambia Institute of Advanced Legal Education (ZIALE)

The Zambia Institute of Advanced Legal Education should equally consider including AIDS law in its curriculum so as to equip up coming lawyers with the requisite knowledge for HIV litigation.

Medical institutions

Seeing that medical officers are the ones who are most prone to committing tortuous acts regarding HIV, it is recommended that the basics of AIDS law should be taught at medical training institutions.

Legal practitioners and Judges

Seminars and workshops should be conducted for legal practitioners and judges who are already in the industry so that legal knowledge can be shared looking at the dynamic nature of the law. Such seminars and workshops should equally be conducted for medical officers.

Another recommendation is as regards the criminalization of HIV transmission. Following the arguments which have been advanced against the passing of specific legislation to criminalize the transmission of HIV, it is recommended that sections 183 and 172 of the Penal Code Act should be amended from misdemeanors to felonies.
Having spelt out in Chapter Four that the prosecution may find difficulties in formulating a charge and information against a person who has been accused of deliberately infecting another with the virus, it is recommended that HIV/ AIDS should be defined as a crime in the Penal Code.

In as much as these recommendations can be implemented slowly and progressively, some recommendations such as amending section 183 should be treated as a matter of urgency so as to curb the increasing levels of deliberate and reckless HIV transmission.

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