



A Sexual Harm? HIV Transmission, ‘Biological’ GBH and Ancillary Sentencing Provisions in England and Wales

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Abstract

This article examines the scope and meaning of ‘sexual harm’ within the context of ancillary sentencing orders in England and Wales. It argues that the statutory definition provided in the Sexual Offences Act 2003, recently replicated in the Sentencing Act 2020, does not extend to the transmission of sexually communicable infections and that, subsequently, it is inappropriate for Sexual Harm Prevention Orders to be imposed with the aim of preventing transmissions of sexually transmitted infections (STIs). It suggests that recent case law reinforces this point and that the questions this raises reflect the broader need for further scrutiny of the aims and purposes of sentencing, and criminalisation more generally, in instances of STI transmission.

Keywords

Sexual Harm Prevention Orders, sexually transmitted infections, pt 2 Sexual Offences Act 2003, sexual behaviour, sentencing

Introduction

The continued criminalisation of human immunodeficiency virus (HIV) transmission, along with the limited use of the criminal law in instances where other sexually transmitted infections (STIs) are passed between sexual partners, remains a contentious legal issue. In the decade and a half since *Dica* and *Konzani*, which firmly established the application of ss 18 and 20 of the Offences Against the Person Act 1861 (‘OAPA 1861’) in transmission cases,¹ there has been extensive debate surrounding the overall use

1. *R v Dica* [2004] EWCA Crim 1103; *R v Konzani (Feston)* [2005] EWCA Crim 706.

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of the criminal law in this area and the nature and adequacy of consent as a defence.² Alongside this, there has also been considerable debate over the impact of condom usage and, more recently, the impact of pharmaceutical prevention techniques, in the form of Pre-Exposure Prophylaxis ('PrEP') and the use of treatment as a form of prevention ('TasP').³

The issue of how to effectively sentence in STI transmission cases has also been a point of contention. Phillips and Sukthankar have argued that, taking into consideration the typical theoretical justifications for punishment as then encapsulated in the Criminal Justice Act 2003 s 142, it is difficult to justify custodial sentences in reckless transmission cases.⁴ These issues have been further complicated by the relatively recent developments of *Rowe*, which became the first case to result in a conviction for intentional transmission under OAPA 1861, s 20.⁵ In addition, leaving aside intentional transmission cases such as *Rowe*, *Burris* and *Weait* have highlighted the moral arguments against using the criminal law in this area. They point out that unevenly distributing responsibility for preventing HIV transmission onto predominantly those living with HIV does little to aid in the public health goal of lowering transmission rates,⁶ particularly when the deterrent effect of the criminal law in this area is questionable.⁷

In addition to these moral and theoretical arguments, this piece suggests that there are practical concerns around the statutory sentencing framework which remain underexplored. It argues that sentencing provisions reveal implicit assumptions underpinning the use of the criminal law as a response to STI transmission. It explores the proper limits of certain sentencing provisions in light of the unusual evolution of the criminal law in this area. It does so by analysing the development and implementation of the Sexual Harm Prevention Order ('SHPO') and the associated framework found in the Sexual Offences Act 2003 ('SOA'), recently replicated by ss 343-358 of the Sentencing Act 2020. It argues that, as others have addressed in the context of the SHPO's predecessor the Sexual Offence Prevention Order ('SOPO'),⁸ under the current statutory framework SHPOs are not appropriate in STI transmission cases owing to the limited definition of 'sexual' harm.

2. See, generally, JR Spencer, 'Liability for Reckless Infection Pt 1' (2004) 154 NLJ 384; M Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish, Abingdon 2007); S Ryan, 'Risk-Taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV Within a Justifiable Approach to Criminal Liability' (2007) 28 *Liverp Law Rev* 215; L Cherkassky, 'Being Informed: The Complexities of Knowledge, Deception and Consent When Transmitting HIV' (2010) 74 *JCL* 242; GR Mawhinney, 'To Be Ill or to Kill: The Criminality of Contagion' (2013) 77 *JCL* 202; A Clough, 'Conditional Consent and Purposeful Deception' (2018) 82 *JCL* 178; S Ryan, "'Active Deception" v Non-Disclosure: HIV Transmission, Non-Fatal Offences and Criminal Responsibility' [2019] *Crim LR* 4.
3. See, generally, D Hughes, 'The Criminal Transmission of HIV: Issues With Condom Use and Viral Load' (2014) 54 *Med Sci Law* 187; C Ashford, 'Bareback Sex, Queer Legal Theory, and Evolving Socio-Legal Contexts' (2015) 18 *Sexualities* 195; J Brennan, 'Stealth Breeding: Bareback Without Consent' (2017) 8 *Psychol Sex* 318; M Weait, 'Limit Cases: How and Why We Can and Should Decriminalise HIV Transmission, Exposure and Non-Disclosure' (2019) 27 *Med L Rev* 576.
4. M Phillips and A Sukthankar, 'Imprisonment for Non-Intentional Transmission of HIV: Can It Be Supported Using Established Principles for Justifying Criminal Sentencing?' (2013) 89 *Sex Transm Infect* 276. Phillips and Sukthankar focus exclusively on the s 142 theoretical justifications which, as a reviewer of this paper highlighted, does not address the custody threshold test at that time found in s 152 of the Criminal Justice Act 2003 assessing seriousness. As Ashworth and Player point out, both the custody/community threshold tests and the proportionality principle effectively set the boundaries on the 'pursuit' of s 142 aims, without negating the need for these principles to be considered. See, A Ashworth and E Player, 'Criminal Justice Act 2003: The Sentencing Provisions' (2005) 68 *MLR* 822, 826.
5. *R v Rowe* [2018] EWCA Crim 2688.
6. S Burris and M Weait, 'Criminalisation and the Moral Responsibility for Sexual Transmission of HIV', *Third Meeting of the Technical Advisory Group on the Global Commission on HIV and the Law* (2012).
7. See, C Dodds, A Bourne and M Weait, 'Responses to Criminal Prosecutions for HIV Transmission Among Gay Men With HIV in England and Wales' (2009) 17 *Reprod Health Matters* 135.
8. See the discussion by Weait, Azad, Power and others in EJ Nicholls and M Rosengarten (eds), 'Witness Seminar: The Criminalisation of HIV Transmission in the UK', *Disentangling European HIV/AIDS Policies: Activism, Citizenship and Health (EUROPACH)* (2019) at 41–42.

In the first section, this article charts the social and political context surrounding the development of SOPOs in the early 2000s and the more recent reformulation of these provisions in the mid-2010s. As part of this discussion, it will demonstrate the continued relevancy of SOPO case law as well as highlight the Parliamentary Process surrounding the repeal and replacement of SOPOs in 2014. In the second section, it will discuss the case of *Marangwanda*,⁹ an atypical example of a transmission case relating to an infection other than HIV, where an SOPO was imposed. The particularities of *Marangwanda* have been noted before, most prominently in the Law Commission's 2015 Report into the Offences Against the Person Act.¹⁰ This section argues that, in light of the recent reforms outlined in the first section, the potential rationales which may justify the Court's approach in *Marangwanda* no longer apply. Consequently, and in light of recent case law that has re-emphasised the limitations of SHPOs in application to risks of 'sexual harm as set out in the statutory language',¹¹ the third section questions how transmission offences should be framed and highlights some of the issues that remain unresolved in light of the lack of clarity in this area. This article then concludes by arguing that, notwithstanding the decision in *Marangwanda*, the transmission of sexually communicable infections is not a 'sexual harm' for sentencing purposes.

A Short History of SHPOs

SOPOs were introduced by New Labour via the SOA 2003 to replace the Sexual Offender Orders (SOOs) found in the Crime and Disorder Act 1998. Both SOPOs and the older SOOs reflect the shift in New Labour's crime and punishment policy, drawing on the 'broad political rhetoric of risk management and increased public protection' of the period,¹² towards addressing non-criminal behaviour thought to be 'indicative of risk' through preventative measures.¹³ As such, SOPOs were never positioned as a sentence in their own right but instead could be granted alongside a sentence or following the application of a Chief Constable in order to reduce the risk of future offending.¹⁴

As Shute notes, SOOs were subject to criticism on the grounds that they provided the courts with potentially wide-ranging powers to restrict behaviour, even where the behaviour indicative of risk did not constitute a criminal offence.¹⁵ This possibility continued under SOPO provisions after the SOA 2003 reforms, with the explanatory notes to that act giving an example where:

An offender has a conviction for sexual activity with a child and has been released after his term of imprisonment. Following his release he behaves in a way that suggests he is likely to offend again, for example by loitering around schools or inviting children back to his house.¹⁶

In between the introduction of SOOs and their reform to SOPOs, the first pieces of case law continued to develop the use of preventative orders. *B v Chief Constable of Avon & Somerset* highlights how the courts interpreted Parliament's intentions in the introduction of SOOs:

Parliament might have decided to wait until, if at all, the offender did offend again and then appropriate charges could be laid on the basis of that further offending. Before 1998 there was effectively no choice but to

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9. *R v Marangwanda (Peace)* [2009] EWCA Crim 60.
 10. The Law Commission, 'Reform of Offences Against the Person Act' (Law Com No 361, 2015) 142, fn 67.
 11. *R v Parsons; Morgan* [2017] EWCA Crim 2163 [5].
 12. A McAlinden, 'The Governance of Sexual Offending Across Europe: Penal Policies, Political Economies and the Institutionalization of Risk' (2012) 14 *Punishm Soc* 166, 173.
 13. S Shute, 'The Sexual Offences Act 2003: (4) New Civil Preventative Orders: Sexual Offences Prevention Orders; Foreign Travel Orders; Risk of Sexual Harm Orders' [2004] Crim LR 417, 421; see, also, S Kingston and T Thomas, 'The Sexual Risk Order and the Sexual Harm Prevention Order: The First Two Years' (2018) 65 *Probat J* 77, 78.
 14. A Ashworth, *Sentencing and Criminal Justice* (CUP, Cambridge 2015) 392.
 15. See Shute (n 13) 422.
 16. Explanatory Notes to the Sexual Offences Act 2003 at para 211.

act in that way. But the obvious disadvantage was that, by the time the offender had offended again, some victim had suffered. The rationale of section 2 was, by means of an injunctive order, to seek to avoid the contingency of any further suffering by any further victim. It would also of course be to the advantage of a defendant if he were to be saved from further offending. As in the case of a civil injunction, a breach of the court's order may attract a sanction. But, also as in the case of a civil injunction, the order, although restraining the defendant from doing that which is prohibited, imposes no penalty or disability upon him. I am accordingly satisfied that, as a matter of English domestic law, the application is a civil proceeding, as Parliament undoubtedly intended it to be.¹⁷

The decision of the High Court in *B* also made clear that those subject to SOOs were entitled to orders being 'clear and readily intelligible in its terms, specific as to time and place, and *no wider than was necessary to restrain the particular harm* which it was feared the appellant might cause'.¹⁸

Media Focus: Public Debate on Sexual Risk Order Provisions

Alongside the progression from SOOs to SOPOs to SHPOs, the redevelopment of Risk of Sexual Harm Orders (RSHOs) into Sexual Risk Orders (SROs) should also be noted. The RSHO was initially conceived of as a tool to address child 'grooming' risks and other sexual risks to children.¹⁹ Critics of the RSHO, and subsequently of the SRO, have pointed out that much of the behaviour which can qualify an individual for an SRO is likely to constitute an offence in its own right.²⁰ Where it is not, SROs might attract similar criticism to other preventative orders in that they can potentially impose a broad range of restrictions on those not convicted of any criminal behaviour.²¹

RSHOs were, like SOPOs, subject to reform as part of the Anti-Social Behaviour, Crime and Policing Act 2014, which expanded the use of SROs to harms not directed at children.²² The Chief Constable applying for the order must have reasonable cause to believe that the order is necessary, and the defendant must have done an act of a sexual nature, in order for the application to be valid.²³ SROs have been subject to both academic and media critique, particularly in relation to sweeping restrictions upon defendants.²⁴

The rationale behind discussing SROs here is that, by way of contrast to SHPOs, SROs are (some might suggest, overly) broad in scope in respect of the harm(s) they can be imposed to prevent. Notwithstanding the definition in s 122B, which defines harm in the context of SROs as physical or psychological harm caused by the defendant doing an act of a sexual nature, the scope of SROs seems broad to say the least. Home Office guidance highlights that 'act of a sexual nature' is not defined in the legislation and '*intentionally* covers a broad range of behaviour' that may 'in other circumstances and contexts, have innocent intentions'.²⁵ Although the qualifying behaviour necessary for an order to be made must fall within acts of a sexual nature, the Act is, in fact, unclear about whether the harm that it intends to prevent must fall within this definition as well.

17. *B v Chief Constable of Avon & Somerset Constabulary* [2001] 1 WLR 340 [25].

18. *Ibid* [32] (my emphasis).

19. See, Kingston and Thomas (n 13) 79.

20. S Craven, S Brown and E Gilchrist, 'Current Responses to Sexual Grooming: Implication for Prevention' (2007) 46 *Howard J Crim Justice* 60, 67; Kingston and Thomas (n 13) 80.

21. See, Ashworth (n 14) 393.

22. Sexual Offences Act 2003 s 122A; SM Easton and C Piper, *Sentencing and Punishment: The Quest for Justice* (4th edn OUP, Oxford 2016) 34.

23. *Ibid* s 122A.

24. See, Kingston and Thomas (n 13) in particular at 85–87; see, also, 'More than 50 Sexual Risk Orders Imposed on Men by Police Forces' *Sky News* (22 September 2016) <<https://news.sky.com/story/more-than-50-sexual-risk-orders-imposed-on-men-by-police-forces-10588142>> accessed 25 June 2020.

25. Home Office, 'Guidance on Part 2 of the Sexual Offences Act 2003' (2018) 46 (my emphasis).

If the arguments relating to the application of SHPOs below are correct, and they are not suitable in order to prevent the risk of STI transmission, then SROs may remain open to courts as an alternative. Certainly, this article does not advocate for SROs to be used in this way. Instead, by shifting discussion to that debate, it aims to bring similar levels of scrutiny to the use of preventative orders in STI transmission cases as has been seen in some public discourse over the use of SROs. Arguably, were SROs used for the purpose of preventing the transmission of sexually communicable infections, it would be entirely possible that such orders could be used without the subject of the order having been found guilty, or potentially even suspected of, transmitting an infection to another. The serious moral concerns that this should warrant, particularly in the context of overly zealous police officers continuing investigations into people living with HIV for non-disclosure, even where there was never a risk of transmission,²⁶ would arguably be a strong argument against the use of SROs in this way and support the general argument that criminalisation is an ineffective response to STI transmission.

Reform: Parliament and the Anti-Social Behaviour, Crime and Policing Act 2014

Subject to the development through case law, discussed in the next section, SOPOs remained in place following the 2003 Act until, during the 2010–15 Conservative–Liberal Democrat Coalition Government, the Association of Chief Police Officers commissioned the Davies Review.²⁷ This contributed, in part, to the reforms included in the Anti-Social Behaviour, Crime and Policing Act 2014.²⁸ The new orders were introduced into what became s 103A SOA 2003 and allowed the court to make an order where:

- (a) the court deals with the defendant in respect of—
 - (i) an offence listed in Schedule 3 or 5, or
 - (ii) a finding that the defendant is not guilty of an offence listed in Schedule 3 or 5 by reason of insanity, or
 - (iii) a finding that the defendant is under a disability and has done the act charged against the defendant in respect of an offence listed in Schedule 3 or 5,
- and
- (b) the court is satisfied that it is necessary to make a sexual harm prevention order, for the purpose of—
 - (i) protecting the public or any particular members of the public from sexual harm from the defendant, or
 - (ii) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the defendant outside the United Kingdom.²⁹

The, then, Policing and Criminal Justice Minister Damian Green, who led the debate on the reforms which replaced SOPOs with SHPOs, explained that the new order enabled the courts to ‘impose an order for the purposes of protecting the public in the UK and/or children or vulnerable adults from sexual harm’.³⁰ In the statutory notes accompanying the amendment to ss 103 and 104, it explains that the standard of harm required to make the order necessary was being downgraded from serious sexual harm to sexual harm,³¹ something echoed in subsequent judgments addressing SHPOs.³²

26. See the discussion by Azad and Power in Nicholls and Rosengarten (n 8) 30–31.

27. For a detailed discussion of the Davies Review, its impact on the Anti-Social Behaviour, Crime and Policing Act 2014 and its critics, see Kingston and Thomas (n 13).

28. Kingston and Thomas (n 13) 83.

29. Sexual Offences Act (n 22). ss 345–346 of the Sentencing Act 2020 now effectively replicates much of this provision.

30. HC Deb 14 October 2013, Vol 568, Col 474.

31. See Explanatory Notes to the Anti-Social Behaviour, Crime and Policing Act 2014 at para 266.

32. *R v Parsons; Morgan* (n 11) [3]; see, also, Ashworth (n 14) 389.

When introduced, SOPO provisions explained that:

“[p]rotecting the public or any particular members of the public from serious sexual harm from the defendant” means protecting the public in the United Kingdom or any particular members of that public from serious physical or psychological harm, caused by the defendant committing one or more offences listed in *Schedule 3*.³³

As amended, a specific definition of sexual harm was given in s 103B:

“sexual harm” from a person means physical or psychological harm caused—

- (a) by the person committing one or more offences listed in Schedule 3, or
- (b) (in the context of harm outside the United Kingdom) by the person doing, outside the United Kingdom, anything which would constitute an offence listed in Schedule 3 if done in any part of the United Kingdom.³⁴

The explanatory notes to the Anti-Social Behaviour, Crime and Policing Act 2014, discussed above, do explain the introduction of sch 5: ‘*Subsection (1)* introduces Schedule 5. This makes amendments to Part 2 of the Sexual Offences Act 2003, which provides for the use of civil orders to prevent sexual harm’.³⁵ However, no alternative definition of sexual harm is given, either in relation to sch 5 or generally, other than those which link to the s 103B definition.

Sentencing versus Risk Reduction: Development Through Case Law

This section addresses the major case law covering the use of SOPOs and SHPOs since their introduction in the 2003 Act. The main aim of this section is to highlight the limitations introduced by the courts to govern the use of SOPOs and their continued relevance under the new SHPO framework. As outlined above, the most significant change brought about by the Anti-Social Behaviour, Crime and Policing Act 2014 was to downgrade the relatively high requirements of a ‘serious sexual harm’ necessary for an SOPO to be ordered, to only requiring risk of a ‘sexual harm’. Consequently, the restrictions imposed by the courts pre-2014, where they do not relate to the severity of the harm the order aims to prevent, arguably have continuing relevance under the new regime.³⁶

R v Smith and Others was decided on appeal in 2011 under SOPO provisions³⁷; it involved four separate appellant cases all addressing the scope of SOPOs.³⁸ The Court of Appeal (CoA) restated the three-part test which had been put forward in *Mortimer*,³⁹ derived from *Collard*⁴⁰:

- i. Is the making of an order necessary to protect from serious sexual harm through the commission of scheduled offences?
- ii. If some order is necessary, are the terms proposed nevertheless oppressive?
- iii. Overall are the terms proportionate?⁴¹

33. Sexual Offences Act (n 22) s 106 (as enacted, my emphasis).

34. Ibid s 103B (as amended). This provision is now, in practical terms, replicated in the Sentencing Act 2020, s 344(1).

35. Explanatory Notes to the Anti-Social Behaviour (n 31) at para 263.

36. *R v Parsons; Morgan* (n 11) [3]; *R v McLellan (James); R v Bingley (Carl)* [2017] EWCA Crim 1464 [40].

37. *R v Smith and Others* [2011] EWCA Crim 1772.

38. For commentary, see AA Gillespie, ‘Terms of a Sexual Offences Prevention Order: *R v Smith* [2011] EWCA Crim 1772’ (2011) 75 JCL 462.

39. *R v Mortimer* [2010] EWCA Crim 1303.

40. *R v Collard* [2004] EWCA Crim 1664.

41. *R v Smith and Others* (n 37) [8].

Several further points made in *Smith* are worth emphasising. Firstly, Hughes LJ highlights the secondary nature of the orders discussed here,⁴² demonstrating that SHPO provisions need to be interpreted through the aim of reducing the risk of harm rather than punishing the offender *per se*.⁴³ Secondly, and critically, the judgment explicitly addresses the distinction between ‘serious sexual harm’ and ‘serious harm’ with reference to the definition provided in sch 3 of the 2003 Act.⁴⁴

The Continued Relevance of Smith and Older SOPO Case Law

The continued relevance of *Smith* and other pre-2014 cases can be seen both in case law which has emphasised that the 2014 reforms primarily dealt with downgrading the level of harm necessary for an order to be imposed and in the continued use of *Smith* when underlining that SHPOs must be necessary and workable.⁴⁵ However, this is not to suggest that there have not been developments in how SHPOs are imposed.

The more recent use of SHPOs has, in particular, demonstrated that orders must be placed in a broader social context, particularly as it relates to the conditions which can be imposed on defendants. *Smith* and *Parsons and Morgan* both highlight that blanket bans on Internet usage are likely to be overly oppressive in modern society.⁴⁶ *McLellan* also highlights that indefinite SHPOs should not, other than in very limited circumstances, be made and that the general principle that any sentence not be made for any longer than is necessary should be applied.⁴⁷ This principle has subsequently been applied in *Stannard*⁴⁸ and *Thursby*.⁴⁹

Preventing a ‘Sexual Harm’

Having demonstrated how recent case law on SHPOs continues to emphasise that an order must be *necessary* to prevent a sexual harm, this section returns to the statutory language and argues that transmission of an STI is beyond the meaning of *sexual harm* in this context. The section then goes on to discuss the decision of the CoA in *Marangwanda* where preventing the transmission of gonorrhoea was considered to be a sexual harm for this purpose. It then considers whether a counterargument could be made that despite both the general statutory language applicable in the case, and the specific nature of the facts in *Marangwanda*, it nevertheless is possible to interpret STI transmission as a sexual harm. This counterargument is ultimately rejected and, with all possible respect to both the Court in *Marangwanda* and the drafters of the relevant legislation and statutory guidance, it is argued that the approach taken in respect of sch 5 creates unnecessary confusion over the role of SHPOs and when they can be imposed.

Home Office Guidance

As stated earlier, the explanatory notes for the 2014 Act outline one example of a situation where a defendant might be issued with an SHPO in response to non-criminal behaviour, following a prior conviction for a qualifying offence. Statutory guidance issued by the Home Office in 2018 may provide additional insight into the justification for the inclusion of sch 5 offences as qualifying offences. The guidance states that:

42. Ibid [3].

43. Ashworth (n 14) 392.

44. *R v Smith and Others* (n 37) [7].

45. *R v Jose Sepulveda-Gomez* [2019] EWCA Crim 2174.

46. *R v Smith and Others* (n 37); *R v Parsons; Morgan* (n 11).

47. *R v McLellan (James); R v Bingley (Carl)* (n 36) [2 (ii)–(iii)].

48. *R v John Aubrey Stannard* [2018] EWCA Crim 313.

49. *R v Thursby (Neil David)* [2019] EWCA Crim 958.

[I]n addition to the sexual offences listed in Schedule 3, an SHPO may be made in relation to a defendant with a conviction, caution or finding for an offence listed in Schedule 5 of the 2003 Act. These offences are primarily violent offences, including the offence of murder, but it remains possible that in some instances these offences may be sexually motivated.⁵⁰

As such, the intention of Parliament in including sch 5 appears to be to capture situations where the offender is convicted only of a violent offence, but where this conviction suggests a risk that future offences of a sexual nature, as defined in the statutory language, may be committed. For instance, where a murder or other violent offence include a sexual dimension, but separate sch 3 charges are not brought, the intention appears to be to enable the court to respond to the risk that the sexual motivation will lead to the commission of future *sexual* offending.

Where, for instance, a murder clearly includes a sexual dimension but only a murder charge is brought, there is a certain logic to allow an SHPO to prevent the commission of subsequent sexual offending. However, the guidance also emphasises that ‘it is not possible to take out an SHPO in relation to a violent offender if there is only a risk of the offender committing a violent crime’.⁵¹

Marangwanda

As noted above, *Marangwanda* is one of a limited number of cases of biological grievous bodily harm (GBH) that does not relate to HIV transmission and is, therefore, notable for a number of reasons.⁵² It highlights the continued use of GBH provisions in response to what is, arguably, a less serious infection compared to HIV or herpes,⁵³ when the availability of treatment options is taken into consideration.

Background. *Marangwanda* began as a case involving two charges of sexual activity with a child.⁵⁴ The defendant’s partner had two children—both aged under 10, and both from a previous relationship—who presented with symptoms of gonorrhoea. The older of the two children subsequently alleged that they had been sexually assaulted by the defendant. The defendant’s case at trial was that he did not have gonorrhoea, only thrush, and therefore could not be the source of the infection. At the defendant’s first trial in Newcastle in 2007, the jury could not reach a verdict and the case was therefore listed for retrial. Before the retrial, counsel in the case reached an agreement that the defendant would enter a plea on two GBH charges, on the basis of reckless transmission. This was agreed and the written basis of plea was drafted to state that:

Such transmission was carried out not in any way by means of any sexual contact, direct or indirect. Such transmission was likely to have been occasioned in circumstances where the Defendant, after having touched himself and then failing to apply the proper hygiene standards, has then gone on to touch the children in an ordinary way. The Defendant would, on occasion, be involved in the daily care of the two young Complainants. This would include assisting with washing, dressing and general supervisory activities with the same.⁵⁵

The defendant was sentenced on 29 June 2007 to two years’ imprisonment, with the Recorder recommending deportation. The defendant was also disqualified from working with children, subject to the provisions in the Criminal Justice and Court Services Act 2000, s 26, and an SOPO was made.

50. Home Office (n 25) 38.

51. *Ibid.*

52. For discussion of other non-HIV-related prosecutions, see J Roebuck, ‘Criminal Liability for Transmission of Herpes Simplex Virus’ (2014) 78 JCL 294; and, also, K Dunphy, ‘Herpes Genitalis and the Philosopher’s Stance’ (2014) 40 J Med Ethics 793.

53. *R v Golding (David)* [2014] EWCA Crim 889.

54. Sexual Offences Act (n 22) s 9(1)–(2).

55. *R v Marangwanda (Peace)* (n 9) [5].

Appeal. The defendant appealed the conviction on the basis that:

- a. It was not medically possible for gonorrhoea to be transmitted in the way described in his plea, and,
- b. Even if it were, the defendant did not act recklessly in any event, and/or,
- c. Even if it were, that behaviour could not be classified as criminal, and,
- d. In any event, the defendant's plea was involuntary as a result of pressure from defence counsel.

Expert evidence on the first ground had been considered in detail during the original trial and the CoA reiterated three points made by the defence expert. Firstly, it was claimed that it was not possible for gonorrhoea to be transmitted through wholly ordinary contact such as the sharing of towels. Secondly, it was emphasised that gonorrhoea is easily transmitted through genital contact. Finally, the expert evidence indicated that transmission of the kind described by the defendant, via unwashed hands, was highly unlikely but not inconceivable.⁵⁶ This position appears to be, generally, supported by scientific research which indicates that the non-sexual transmission of gonorrhoea is possible⁵⁷ but is highly unlikely in paediatric gonorrhoea cases.⁵⁸

On the basis that transmission was medically possible, albeit improbable, the first, second and third grounds of appeal were all unsuccessful. The final ground does not appear to have been advanced at the appeal hearing. However, underlying these issues is the fact that, during the course of sentencing during the retrial, prosecution counsel were quite transparent that 'if it appears to [the Judge], or indeed anyone who were to hear about it, [that the plea] seem to be something of a fudge, undoubtedly it is', but that it was done in order to prevent the need for the complainants to give evidence again.⁵⁹

Sentence. The particularities of *Marangwanda* and the 'fudge' that appears to have taken place in reaching the plea may go some way to explaining why the sentencing in this case is particularly complex. Had the defendant been convicted of the initial charge then the SOPO might have been more readily drafted to reflect the harm which the court may have had in mind when sentencing the defendant. However, I now turn to the sentencing decision in the case to highlight why the case is so demonstrative of the challenges of sentencing in biological GBH cases. Addressing the SOPO, the CoA judgment reads:

So far as the Sexual Offences Protection Order is concerned, the necessary criteria provided in section 104 of the Sexual Offences Act 2003 are met. *The section 20 offences are Schedule 5 offences* and so the order can be made providing the court is satisfied it is necessary for the *purposes of protecting the public or any particular member of the public from serious sexual harm from the defendant. The transmission of gonorrhoea is clearly serious sexual harm as defined in section 106(3) of the Act.* In the judgment of this court, a Sexual Offences Prevention Order is appropriate in the case of a person who has the care of young children, who is prepared to act recklessly and *so subject those children to the risk of the transmission of a sexual disease.* It is also particularly important to bear in mind that the court making such an order is *not only concerned with the facts of the offence which prompts the making of the order but also all matters of background concerning the appellant*, which are relevant to assessment of the risk of further offending.⁶⁰

56. Ibid [9]–[10].

57. F Goodyear-Smith, 'What Is the Evidence for Non-Sexual Transmission of Gonorrhoea in Children After the Neonatal Period? A Systematic Review' (2007) 14 *J Forensic Leg Med* 489.

58. S Whaitiri and P Kelly, 'Genital Gonorrhoea in Children: Determining the Source and Mode of Infection' (2011) 96 *Arch Dis Child* 247.

59. *R v Marangwanda (Peace)* (n 9) [10].

60. Ibid [16] (emphasis added).

As noted above, the original statutory language found in s 106 defines serious sexual harms with specific reference to the offences listed in sch 3 of the Act. With all respect to the Court in *Marangwanda*, here this does not appear to be the case.⁶¹ The Court itself highlights that s 20 offences are sch 5 offences and through reference to, then, s 106 relies on a definition of serious sexual harm which only captures sch 3 offences.

Confusion over this point can be readily explained through the unusual nature of the statutory framework, which allows SHPOs to be made in response to either a sch 3 or 5 offence but only in order to prevent one found in sch 3. This framework has remained in place through the reform of SOPOs to SHPOs.

The emphasis on protecting children from the risk of transmission in the *Marangwanda* judgment might be seen as an attempt to introduce a potential sch 3 offence, as it could be argued that the transmission of a sexual infection to children necessitates a sexual act with a child, which would be a sch 3 offence. However, considering that the court accepted the plea on the basis that it was possible to transmit gonorrhoea on a non-sexual basis, this appears doubtful.

Clearly this is an unusual case, and the recognition that the outcome involved a significant ‘fudge’ might be used to justify the decision that the CoA reached in this case. The continued relevance of SOPO case law under the new regime, alongside the relative lack of case law in this area, however, also justifies additional consideration of *Marangwanda* and what it perhaps suggests about the criminalisation of STI transmission in England and Wales.

Could These Harms Nevertheless Be Sexual?

One counterargument to my claims about *Marangwanda* might be that it is nevertheless possible for transmission of a sexually communicable disease to be dealt with by way of a sch 3 offence and, therefore, it is a legitimate use of the SHPO provisions to prevent the commission of that offence. Above, I discuss how, in *Marangwanda*, this could potentially be used to keep within the s 106 (now s 103B) definition by focusing on the risk of sexual activity with a child, although I consider this argument relatively weak considering the court’s focus on the transmission of gonorrhoea as a serious sexual harm in its own right. Indeed, as the CoA states in *Parsons and Morgan*, building on *Smith*, SHPOs should not impose multiple conditions on a defendant ‘just in case’ he commits an offence of a different kind, although it would be open to them to do so.⁶²

The Court also emphasised that the use of SHPOs was limited to instances of ‘sexual harm as set out in the statutory language’,⁶³ although there was little additional guidance on this point. In addition to STI transmission cases, other limitations to the existing statutory language have also been noted. Harris has recently pointed out that what is sometimes termed ‘revenge pornography’ is not found in sch 3 or sch 5.⁶⁴ This, he argues, is indicative of a broader issue with prescriptive, list approaches, where there is ‘a risk of omitting an offence in error, and [where] there is little scope for a purposive approach to construction in order to remedy such a defect’.⁶⁵

Beyond the issues addressed in *Marangwanda*, however, the issue of whether the courts could respond to biological GBH as something other than a sch 5 offence remains a particularly complex example of where a list approach such as this may flounder. As noted above, there is a long-standing debate over whether biological GBH cases could also be prosecuted as rape or some other SOA 2003 charge, both of which would be within sch 3.

61. The point made by the Law Commission (n 10) 142.

62. *R v Parsons; Morgan* (n 11) [71].

63. *Ibid* [5].

64. L Harris, ‘Sentencing: *R. v Jones* (Christopher Wyn) Court of Appeal (Criminal Division): Hamblen LJ, Sir John Royce and the Recorder of Redbridge (HH Judge Zeidman QC): 5 July 2018; [2018] EWCA Crim 1733’ (2019) 1 Crim LR 58, 60.

65. *Ibid* 60.

Many of the arguments in favour of expanding the role of the SOA 2003 to cover what, to date, have been OAPA 1861 cases have focused on the distinction between non-disclosure of HIV (or other STIs) and active deception on the part of the defendant.⁶⁶ Such arguments should be assessed with the logic of *Dica* and *Konzani* in mind. One of the potential justifications for the approach of the appellate courts in those cases is that, whatever the moral arguments in favour or against disclosure in all cases, the criminal law should only intervene where (reckless) transmission has taken place, or where intentional transmission has taken place or been attempted. Where, through condom use, TasP or PrEP, there is no/negligibly low transmission risk, the courts appear reluctant to extend the reach of the criminal law on this basis.⁶⁷ If the courts are applying SHPO provisions by constructing STI transmission as a sexual harm, then they are in fact jettisoning this distinction and opening thousands of those living with HIV, in particular, to potential SOA charges, with less consideration given to the transmission risk that they pose to others (which in undetectable viral load cases is absent). Ashworth has emphasised that ‘the rationale for most preventative orders... must be found in public protection. A rationale that could lead to over-broad restrictions if not restrained by some proportionality standard’.⁶⁸ This latter eventuality should be a legitimate concern in STI transmission cases, where negligible or theoretical risks may result in disproportionate restrictions.

Although HIV and other STI transmission might be conceptualised of as a sexual harm in the public consciousness, these have not, to date, been responded to as such in English criminal law. Given that the courts continue to emphasise that SHPOs can only be made to where necessary to protect the public, or a member of the public, from ‘sexual harm as set out in the statutory language’,⁶⁹ it is surprising that such orders have been made seemingly to reduce the risk that (albeit it sexual) transmission of a communicable disease takes place.

This might be attributed to the piecemeal development of the criminal law governing STI transmission in *Dica* and *Konzani*, and latterly in *Rowe*, as well as in *Assange* and other cases.⁷⁰ Clearly, Parliament could not foresee the route that the courts would take in these cases when it introduced the SOPO in 2003. That being said, any argument that the courts should be entitled to go beyond the statutory language and make SHPOs in order to prevent what is clearly *not* a sexual harm within the statutory definition should carry little weight in light of the multiple opportunities that Parliament has had to correct the omission of ‘biological’ GBH from the definition of sexual harm, most notably through the Anti-Social Behaviour, Crime and Policing Act 2014.

SROs might be used to some effect as an alternative. SROs are not limited by the same statutory language as SHPOs and can be made in response to a single act of a sexual nature provided the order is necessary.⁷¹ The arguments against the overuse of SROs, however, remain applicable to their use in HIV/STI transmission cases. Without going into further discussion about the criminalisation of HIV/STI transmission *per se*, as that issue deserves more attention than it can be given here, it is worth considering what the aim of sentencing in STI transmission cases should be.

SHPOs are intended to serve a non-punitive function, which is emphasised by the focus on orders being necessary to prevent future offending and not being oppressive. If used in HIV transmission cases, SHPOs might be seen as an attempt to achieve some specific deterrence and rehabilitation where little

66. A Sharpe, ‘Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent’ [2014] Crim LR 207; B Simpson, ‘Why Has the Concept of Consent Proven So Difficult to Clarify?’ (2016) 80 JCL 97; Ryan, “‘Active Deception’ v Non-Disclosure (n 2).

67. D Hughes, ‘Condom Use, Viral Load and the Type of Sexual Activity as Defences to the Sexual Transmission of HIV’ (2013) 77 JCL 136.

68. Ashworth (n 14) 393.

69. *R v Parsons; Morgan* (n 11) [5].

70. K Laird, ‘Criminal Law Review Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003’ [2014] Crim LR 492.

71. Easton and Piper (n 22) 34.

otherwise exists. But, Phillips and Sukthankar question whether any specific rehabilitation programme intended to prevent recidivism by HIV+ defendants could ever be effective, taking into consideration the significant role chance plays in transmission cases, and note that certainly no successful programme for this presently exists.⁷² Indeed, the very low numbers of convictions for this kind of case mean that the development of such a programme would likely take many years.

Others have noted that the knowledge requirements imposed in some jurisdictions result in a situation where the bodies of those living with HIV are constructed as inherently ‘criminal and suspect’.⁷³ Although the rationale behind SHPOs is to be found in public protection, achieving this in a proportionate manner arguably entails making an assessment of the specific risk of recidivism by a given defendant. In practical terms, this may be especially difficult in STI transmission cases, where establishing that there is valid ‘clinical judgment’ for the order, in terms of reducing the risk of subsequent harm, may be challenging.⁷⁴ As Kelly and HHJ Picton have suggested, necessity issues in relation to SHPOs are likely to be determined at first instance level and in such circumstances it may be difficult to determine the necessity of these orders in an individual case, given the challenge of determining whether it is the order, the sentence to which it is typically attached, or some other factor (or combination of factors) which serve to prevent recidivism by a specific defendant.⁷⁵ As such, the use of SROs and SHPOs in transmission case should be challenged, if only because of the significant legitimisation it might give to the stigmatisation of people living with HIV, the criminalisation of transmission already being highly problematic in this respect.⁷⁶

In the Law Commission’s 2015 Report on Reform of Offences Against the Person, the use of SOPOs in transmission cases was discussed, although, as the report notes, reform to SHPO provisions had already taken place and was waiting to fully come into force.⁷⁷ The CPS response highlighted concern over the use of SOPOs as a general tool for promoting safer sexual activity, while the response from Northumbria University highlighted that using SOPOs had no effect other than to impose a criminal sanction in an area where criminal sanctions were already possible.⁷⁸ Indeed, depending on how the order is phrased, an SHPO relating to biological GBH is likely to either replicate the existing law—focused on instances where transmission occurs—or reflect a major expansion of the law by requiring disclosure irrespective of transmission risk. In the latter case, this clearly has the potential to construct those living with sexually communicable diseases as inherently suspect and risky people.

The applicability of SHPOs in biological GBH cases is indicative of a broader question concerning how the law addresses HIV and other STI transmission; that is, should this be as a sexual offence raising further questions about the limits of the criminal law where transmission risk is negligible or impossible? Or, should the law continue to treat these as offences against the person? Or, alternatively, should the law look beyond criminal sanctions in these cases and question why HIV transmission continues to be a concern when medical advancements mean that people living with HIV should be able to live long, ordinary, lives, with no possibility of transmitting HIV to others.⁷⁹

Lisa Power and Yusuf Azad of the HIV Justice Network and National AIDS Trust, respectively, appear to have argued that antisocial behaviour orders (ASBOs) were the more appropriate order in HIV transmission cases under the older SOPO provisions, to limited success.⁸⁰ Their argument—that ASBO

72. Phillips and Sukthankar (n 4) 277.

73. A Houlihan, ‘Risky (Legal) Business: HIV and Criminal Culpability in Victoria’ (2011) 4 *IJLSE* 305, 308.

74. I am grateful to comments by an anonymous reviewer which pushed me to develop this point and from whom I adopt the use of the phrase “clinical judgment” for this purpose.

75. R Kelly and HHJ Picton, ‘Sexual Harm Prevention Orders and Necessity’ (2020) 5 *Crim LR* 411, 419–28.

76. Weait, *Intimacy and Responsibility* (n 2); M Weait, ‘Unsafe Law: Health, Rights and the Legal Response to HIV’ (2013) 9 *Int J Law Context* 535.

77. Law Commission (n 10) at para 6.66.

78. *Ibid* at para 6.67.

79. B Haire and J Kaldor, ‘HIV Transmission Law in the Age of Treatment-as-Prevention’ (2015) 41 *J Med Ethics* 982.

80. Nicholls and Rosengarten (n 8) 42.

provisions were more appropriate in the context of HIV transmission—appears to have followed a similar logic to the argument that I have made here.⁸¹ Power also emphasises her view that the use of SOPOs was indicative of the courts' interest in the sexual dynamic of HIV transmission, even when cases were being brought under the OAPA,⁸² something which the analysis of SHPOs above continues to support.

Concluding Remarks

I have attempted to demonstrate how older SOPO case law continues to have relevance in the age of SHPOs and that, as a result, the decision of the CoA in *Marangwanda* has a continued relevancy to the current sentencing framework. On the basis of the statutory language and other guidance, the CoA may have overstepped the mark in *Marangwanda*. Although the offence the defendant was convicted of qualified him for an SOPO, the limitations found in the relevant sentencing legislation arguably prevented the use of SOPOs for the prevention of future offences of the same category.

As discussed above, this particularity has been noted elsewhere, but the changes seen in the sentencing framework surrounding and following the introduction of SHPOs offer new grounds for evaluating the limitations Parliament has included on the use of ancillary orders in this way. Furthermore, the reiteration of the limits of 'the statutory language' seen in *Parsons and Morgan*⁸³ demonstrates that *Marangwanda* is no longer good law in this respect. As shown above, the relevancy of this decision goes far beyond the scope of this individual case and is indicative of a broader question about how Parliament and the courts have responded (or not responded) to the issue of STI transmission.

Elsewhere, I have noted how the distinction between sch 3 and sch 5 may also have implications for the use of other non-punitive ancillary sentencing orders, specifically those relating to the sex offenders register, in HIV transmission cases.⁸⁴ Through the analysis presented here, I have highlighted how the piecemeal development of HIV/STI transmission law, the inaction of Parliament and perhaps the sex-centric focus of the courts in STI transmission cases may have resulted in an unstable and potentially unworkable sentencing framework. If the law is going to continue to criminalise the transmission of HIV and other STIs, how to effectively sentence these offences, and the role of ancillary orders within this, must be more proactively addressed.

Based on the present statutory language, and the clear opportunity Parliament had in the Anti-Social Behaviour, Crime and Policing Act 2014 to amend the earlier language found in the 2003 Act, the transmission of sexually communicable infections does not appear to be, whatever public perception may or may not exist, a 'sexual harm'—at least for sentencing purposes.

Acknowledgement

The author would like to thank all those who attended the conference for comments, questions and feedback and to thank Professor Chris Ashford, Laura Graham and Christopher Mitford for comments and guidance as this piece was developed.

81. However, they have also recognised that ASBO provisions may also be unworkable where, for instance, the defendant and their sexual partner continue to cohabit.

82. See Nicholls and Rosengarten (n 8) 42.

83. *R v Parsons; Morgan* (n 11) [5].

84. C Giles, 'Daryll Rowe's Sentence Could Change the Law's Approach to HIV Transmission' *The Conversation* (19 April 2018) <<https://theconversation.com/daryll-rowes-sentence-could-change-the-laws-approach-to-hiv-transmission-95307>> accessed 25 June 2020.

Author's Note

An earlier version of this article was presented at the Northumbria University Faculty of Business and Law Winter Conference 2019.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship and/or publication of this article.

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