

# Informed Consent and Sex

Is Disclosure of Herpes Diagnosis a Moral or Legal  
Obligation?

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# Background

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In the only herpes transmission case to be prosecuted in the UK, David Golding pleaded guilty to transmitting herpes to his girlfriend – despite the fact that it was never proven that the herpes virus was actually transmitted by him...

# Herpes Transmission

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- There is a 70% lifetime risk that an individual will catch at least one type of Herpes simplex virus (HSV), however, only 1 in 3 of these individuals will have symptoms and be diagnosed
- HSV is transmitted via skin to skin contact and can be spread during any kind of sexual act, so even when contraceptive methods may not be required, there is always a risk of HSV transmission

# Law and Herpes Transmission

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- Although there is no direct law to confirm that transmission of STIs is unlawful, the three cases I looked at are considered to amount to the offence of inflicting grievous bodily harm
- Prosecution for grievous bodily harm falls under the Offences Against the Person Act 1861, Section 20 whereby “whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour”

# Methods

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- 74 relevant sources were found through EMBASE, PubMed and LawTeacher
- Legal cases from outside of the UK and articles not written in English were excluded, and 32 of the initial sources were screened and identified as potentially relevant
- 17 journal articles, cases and websites were reviewed, and *R v Konzani [2005] EWCA Crim 706* and *R v Dica [2004] EWCA Crim 1103* concerning HIV transmission were key comparators

# Findings

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- The main deliberation point in R v Golding was whether genital herpes could be described as “really serious bodily harm”, but it also raised questions on consent in sex and whether consent can be considered informed when a participant is ignorant to any of the relevant information

# Beauchamp and Childress' model of the four principles of medical ethics

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- One major recurring theme is whether lack of knowledge of an elevated risk of contracting a particular disease is enough to make consent not 'informed'
- When focussing on herpes transmission specifically it can be broken down and considered based on Beauchamp and Childress' model of the four principles of medical ethics: autonomy, beneficence, non-maleficence and justice

# Beauchamp and Childress' model of the four principles of medical ethics

Autonomy	Beneficence and Non-maleficence	Justice
<ul style="list-style-type: none"> <li>Autonomy is a key underlying theme as the claimants all allege that they would not have engaged in, the important point here being unprotected, sex with the defendant if they "had known that he had a sexual infection"</li> <li>Whilst it is impossible to ever completely remove the risk of pregnancy and STI transmission during sexual activity, it is important to give the persons engaging in it any information possible to help inform their decision</li> </ul>	<ul style="list-style-type: none"> <li>In 'The Golding Case' the defendant said "I did not tell her because I really wanted our relationship to continue and was frightened that she would not have continued with that relationship."</li> <li>But this goes against the potential prima facie obligation of the infected person to not make others ill where this is avoidable as their duty as a member of society, which could include taking precautions to minimise the risk of transmission</li> </ul>	<ul style="list-style-type: none"> <li>The claimants in the 3 cases assumed that everyone who has an STI would disclose this information before engaging in unprotected sexual activity, but as we know this is not always the case</li> <li>In UK courts, one is considered innocent until proven guilty, but in the case of herpes transmission, there is currently not enough evidence to show when transmission occurred or from whom</li> </ul>



# Conclusion

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- To summarise, ‘The Golding Case’ is the only case regarding herpes transmission to be prosecuted in UK courts and perhaps it should remain that way
  - STI transmission, and legal cases to do with them, are problematic to UK courts due to variations in ideas concerning informed consent from a legal, medical and societal viewpoint
  - Whilst there could be a moral obligation to disclose a herpes diagnosis for consent to be informed, until there is a way to prove person to person transmission, it should refrain from being a legal requirement

# Final Points

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- Notwithstanding the technical difficulties around proving transmission of herpes, there is no basis for herpes to be criminally sanctioned in the event of unintentional transmission
- By prosecuting carriers, it is just increasing stigma and making it more likely that carriers will avoid diagnosis because they fear prosecution if they “knowingly” transmit
- This could result in some people with conditions going undiagnosed and untreated and result in an increase in prevalence of some potentially serious infections
- However, there remains scope to claim a moral obligation to inform partners before sexual contact in order to ensure that consent is “informed”

# Thank You for Listening

Any Questions?

