

LE COURRIER

OP-ED

April 24, 2009

[English translation]

AIDS TRANSMISSION ON TRIAL

JUSTICE ♦ *Geneva prosecutors Daniela Chiabudini and Yves Bertossa discuss two cases where people with HIV were acquitted. They analyse the consequences of the two precedent-setting decisions.*

From an interview by NICOLAS CHARPENTIER of GROUPE SIDA GENÈVE*

Geneva prosecutors Daniela Chiabudini and Yves Bertossa made submissions at Geneva's two most recent trials involving HIV-positive people who were acquitted on some or all charges brought against them. The acquittals were based on current medical knowledge about the ability of effective HIV treatment to prevent people from infecting anyone.

Could you go over your respective cases?

Daniela Chiabudini: This case got to the prosecutors' office in 2007, was investigated in 2007 and was referred to the trial court in 2007. It's about a woman who had infected a male lover in 2002 and was also charged with endangering her then husband by having unprotected sex with him whilst knowing she was HIV-positive. The woman was also charged with propagation of a human disease and aggravated infliction of bodily harm through the deception of two other male lovers, in 2004 and 2006. At the hearing of 13 January 2009, we heard the accused's doctor, an HIV specialist, who confirmed that the viral load was undetectable in her blood. Based on medical discoveries presented in 2008 and communicated to the accused in 2004, she could not have transmitted HIV (...). The court acquitted her on both charges because there was a doubt as to whether she was capable of transmitting the virus. However, she was convicted of an offence of attempt, which involved another individual at an earlier time.

Yves Bertossa: My case was about a man prosecuted for two offences of attempted infliction of serious bodily harm and one offence propagating of a human disease because he had sex with two partners without notifying them that he had AIDS. He was also prosecuted for attempted propagation of a human disease because he had sex with a female partner who had been informed of his HIV-positive status. At the hearing, the defence relied on the opinion of the Federal Commission on AIDS-related questions. Consequently, an expert, a medical examiner, was heard, and explained that the man's HIV-positive status made any sexual relations with a partner risky. In his view, despite the Federal Commission report, there was still a risk of transmission. So there were two conflicting opinions. The judge refused to suspend the proceedings to seek an opinion from another specialist. In his view, it was not his role to change the federal case law. At first instance, the accused was sentenced to 18 months of imprisonment without the possibility of early release. The accused appealed, and, at the hearing, the defence

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cited Professor Hirschel of Geneva University Hospitals, who confirmed the Federal Commission's opinion that there is no longer a risk of transmission provided certain conditions are met, such as getting anti-HIV treatment and having an undetectable plasma viral load. The expert confirmed that there was no risk of transmission. At that point, we decided to drop any charges related to a risk of transmission, since medical advancements had shown that there was no longer a risk of transmission. The appellate judges accepted the position of the prosecution and the defence, and set a new precedent, because their decision is based on new scientific elements that cannot have been known to previous judges.

“The scales of justice could reset”

Do you see any similarities between these cases and others that you're following?

YB: The law adapts to new scientific knowledge, including medical knowledge. An analogy could be drawn with DNA that can be used to exculpate someone if the DNA found at the crime scene is not his. In general, scientific advancements improve investigations and permit a finding of guilt based on scientific evidence. To my mind, this is proof that justice happens in society and is not an abstract branch.

DC: The interesting thing is that this can happen without the accused's knowledge because, in certain cases, the accused, not realizing he can no longer spread the virus, decides, for personal reasons, that he will not say anything, but is not convicted for this conduct because it is scientifically known that he cannot transmit the virus. That's a novelty.

There was a trial in the French Court of Assizes that involved a felony, as opposed an offence. In light of what we know about Swiss law, what are your thoughts?

Under Swiss law, it would be considered a felony due to the potential sentence. But I don't think the distinction between these categories is particularly important. The question is whether or not certain conduct should be prosecuted given the evolution of knowledge. In Switzerland, it's clear that there is a trend toward the decriminalization of conduct related to AIDS, or, rather, a softer line, even though we are one of the countries that prosecute the most. We don't know what the law will be in 20 or 30 years. The scales of justice could reset, or there could simply be new advancements, or different social norms.

DC: I would tend to agree that these decisions suggest a softer line. But I also remember a 2008 decision of the Federal Court that punished the “negligence” of a person who did not even realize he was HIV-positive. To my mind, that decision was extremely harsh. These two cases put more humanity back in the balance.

YB: Yes, it's a softer line, not only because of scientific advancements, but also because of the bill to reform the epidemic law. The bill would keep the offence of propagating a human disease, but only where there is malicious intent. And it would eliminate the offence of transmission through deceptive means, even though deception is a form of intent. Deception is when you know there's a risk, you don't want the risk to materialize, but you live with it and accept the idea that it might materialize, even if it's not your primary intention. The bill would also

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eliminate the possibility of conviction based on negligence. In my view, the bill would soften the law. The difficult thing will be how to interpret it.

Do you expect the epidemics law reform bill to have any further repercussions on judicial decision-making?

YB: This reform would also affect couples who have sex in full knowledge of the situation. Today, if the viral load is detectable, the HIV-positive partner can be punished. After the reform, this would no longer be possible. For example, a couple in which one partner is HIV-positive but has no detectable viral load could take the risk of having unprotected sex so they can have a baby. Both partners would be able to assume the risk. The sex would be consensual and without malicious intent. The reform would also shift responsibility for prevention to HIV-negative people ... because negligence would no longer be punishable. The principle, if I understand it correctly, is that everyone is aware of the risks of unprotected sex with a person they know little or nothing about, or a person whose sexual history they know little or nothing about. This means that it is up to each person to take responsibility and protect himself or face the consequences. I think that we've placed a lot of responsibility for prevention on the shoulders of people who have the illness, and that, with this amendment, HIV-positive and HIV-negative people would bear equal responsibility for prevention. This would be a more generalized assumption of responsibility, which, in my view, would be fairer and would avoid stigmatizing people who are HIV-positive.

Some would say that the prosecution of cases like these is no longer based on the idea of protecting public health. How would you respond?

YB: It's very difficult to assess the potential impact of criminalization on the behaviour of people who obey whatever law is in force. It's up to sociology to provide the answers. The same reasoning could apply to other criminal offences too. Nonetheless, if legislators have determined that certain conduct should be punished, the role of the justice system is to prosecute.

CD: Before the reform bill, people were punished for propagating a human disease. With the bill, an offence directly against a victim is maintained. The law will still be very harsh for injuries caused to a person. However, the line on public safety will be softer.

“The challenges are more societal than legal”

What do you see as the challenge that this type of case poses for society?

DC: I think there could be an impact on prevention if communication is done poorly. That's why we need to explain why we acquit certain people of certain “offences” that are not really offences.

YB: A distinction must be drawn between the prevention message and criminalization. The prevention message is up to politicians and associations to formulate. Criminalization does not seem to be an option where there is no longer a risk. To my mind, the challenges in these cases are more societal and political than legal. Legally, these decisions are correct.

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Subjects such as AIDS, or for that matter, immigration, taxation, delinquency, and violence, tend to attract many dogmas. These subjects are exploited by politicians, associations and others to extend the life of social conflicts indefinitely when they can instead be resolved in a reasonable way through analysis and study. We have been hearing about AIDS for decades. With each medical advancement, the subject returns to the fore because the specific case at hand is mixed up with prevention messages, differing scientific views, a variety of statutory provisions, etc. We tend to enjoy debating these subjects.

DC: This subject clearly scares people. So it might be reassuring to think that a person who is HIV-positive and does not use protection is liable to get a tough sentence. With these two judgments, we see that a person can be convicted if he or she can actually transmit the virus. This places responsibility on the partner.

YB: Personally, I find that any decision that moves in the direction of a generalized responsibility and helps “de-stigmatize” those who are ill is a good decision. We can do even better. I am saying this in my personal capacity, of course.

Would you not say that we are regulating sexual conduct?

YB: I am not certain that when legislators decided that the transmission of diseases like AIDS should be prosecuted, they were motivated by a desire to regulate sexual behaviour. I think their primary aim was to protect society from the risk of an epidemic. In the early days of AIDS, it was feared the disease would spread very quickly. I would come back to my earlier statement. Today, this rule seems somewhat outdated because the phenomenon that was feared has not materialized. Indeed, we can now ask whether it makes sense to have a rule that governs sex between responsible individuals who are aware of the risks they each must assume.

DC: I don't think that this amounts to regulation, any more than laws protecting children or punishing violent or intolerable behaviour such as rape, or sexual assault under physical or psychological threat. When sexual partners are consenting, they can do what they want. The law protects against the risk of serious physical injury.

Do you think these decisions will have an impact outside Geneva, and even abroad?

YB: In Switzerland, these cases remain part of the cantonal case law. Complainants are allotted a certain time to appeal such judgments to the Federal Court. If the Federal Court affirms the decision, it will have an effect throughout Switzerland. If not, it will remain cantonal but will nonetheless reverberate somewhat. I hope that other cantons will apply the same reasoning and adapt. As for other countries, it is up to them to adapt their case law and their legislation to medical advancements. I know that there's a scientific debate about the absence of risk where the viral load is undetectable. I know that some scientists remain doubtful. This requires the international scientific community to come to an agreement so that certain countries' justice systems can adjust their decisions and, consequently, their case law.

*The full text of this interview is available (in French) at www.seronet.info and on www.sidablog.ch/filrouge/, the Groupe sida Genève blog.