



# **GROUPE SIDA GENEVE**

## **Swiss Cases on HIV Transmission Raoul Gasquez, jurist, Groupe sida Genève, 2010**

*This document summarizes the four main Federal Court (Tribunal fédéral) decisions regarding HIV transmission.*

### **Federal Cases**

[Translator's Note: PC = Penal Code]

#### **1. ATF 116 IV 125 (22 February 1990)**

The same acts can concurrently constitute an infliction of serious bodily harm and a transmission of a human disease.

#### Facts

Z, who knew he was HIV-positive, had unprotected sex with a young woman. He concealed his disease from her and transmitted the virus to her.

#### Law

Z was convicted of intentional infliction of serious bodily harm (s. 122 PC) and intentional propagation of a human disease (s. 231 PC) and was sentenced to four years of imprisonment.

#### Summary

1. HIV is a dangerous and transmissible human disease, just as AIDS is.
2. A person with AIDS or HIV who knows he is infected and hides his illness from a partner with whom he has had unprotected sex and to whom he has thereby transmitted the virus is not only guilty of an offence under s. 122 PC (infliction of serious bodily harm) but is also guilty of an offence against s. 231 PC (propagation of a dangerous disease).
3. Both provisions are applicable to a person who intentionally transmits HIV, and neither offence is a lesser included offence because each offence protects a distinct legal interest. Section 231 punishes offences against public health, and section 122 protects individuals' private interest in life, bodily integrity and health.



## 2. ATF 125 IV 242 (20 October 1999)

### Facts

Y, who knew he was HIV-positive, lied to his female companion about this fact and transmitted the virus to her through unprotected sex. He also had unprotected sex with another woman, who was also not aware of his disease but was not infected.

### Law

Y was sentenced to three years of imprisonment for infliction of serious bodily injury within the meaning of s. 122(3) PC, for the offence of repeated attempted infliction of bodily harm within the meaning of s. 122(3) PC in connection with s. 22(1) PC, for intentional propagation of a human disease within the meaning of s. 231(1) PC, and for the offence of repeated attempted propagation of a human disease.

The offence takes place when the disease has in fact been transmitted. The offence is an attempt if the person was merely endangered.

### Summary

1. HIV infection is objectively a serious bodily injury *per se* (endangering life) and is also a dangerous and transmissible human disease. Some legal scholars call it simple bodily harm, but the Federal Court disagrees with this characterization.

2. The accused was found to have culpable intent, not just conscious negligence, which is the state of mind he argued he had. He knew that he was HIV-positive, and that he could transmit the virus to others through unprotected sex.

## 3. ATF 131 IV 1 (27 October 2004)

This is the first time that the Federal Court addresses the question of the statistical risk of transmission (and for the moment, its decision is authoritative as to the assessment of the risk of infection, despite the advancements proposed by the 2008 Swiss Statement.) In this particular case, the Court held that an intentional transmission occurred.

The Court reviewed the case law regarding concurrent convictions for serious bodily harm and transmission of a human disease.

The HIV-positive partner cannot be found guilty of inflicting serious bodily harm through unprotected sex if the other partner has given informed consent.

## Facts

X, who knew he was HIV-positive, had unprotected sex on a regular basis with five men for three years, infecting four of them. Only one of the five partners knew that X was HIV-positive; that partner continued to have unprotected sex with X.

## Law

X was convicted of the offence of repeated attempted infliction of serious bodily harm under the Penal Code, as well as repeated attempted propagation of a human disease, and was sentenced to 3½ years of imprisonment.

## Summary

1. The accused was found to have intent. He had argued that the statistical probability of HIV infection through unprotected sex was low. The Federal Court held that even though the risk of infection is low (one in 300 unprotected sexual relations results in infection) this risk must be borne in mind with each instance of sexual contact, since it is not possible to know which instances will be more dangerous than others. Thus, X was aware of the potential mortal consequences for each of his partners even though he did not want those consequences to materialize. He was therefore found to have been criminally reckless. There is a finding of recklessness where the accused is aware of the harmful result, but nonetheless acts, or does not do what is in his power to prevent the result or attenuate its consequences, thereby showing that he is willing to live with the result even though he does not actually want it to occur.
2. It is not possible to convict an HIV-positive person for attempted infliction of serious bodily harm where his or her partner, being aware of the HIV-positive status and the risks of transmission, freely consents to have unprotected sex, and shares control over the events.
3. A person who transmits HIV through unprotected sexual relations is also guilty of propagating a human disease. The consent of the partner does not rule out a finding that the elements of the offence have been met, and does not render the act lawful.



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## 4. ATF 134 IV 193 (13 June 2008)

A person cannot be convicted of inflicting serious bodily harm through unprotected sex if the HIV-negative partner has given informed consent. ATF 131 IV 1 (27 October 2004) is affirmed.

This decision deals with the concept of acceptable risk in connection with the knowledge of, or duty to know, one's HIV status if one is having unprotected sex.

### Facts

W had unprotected sex with A, and infected him after having unprotected sex several times with B, who had told him he was HIV-positive. W did not get tested, and did not warn A of the risks of contamination.

### Summary

1. A person who is aware of concrete indications that he might be HIV-positive must abstain from having unprotected sex, so long as he cannot be sufficiently certain that he is not infected. If he acts otherwise, he endangers his partners' legally protected interests, thereby violating the general duty of care, and the danger that he creates goes beyond an acceptable degree of risk.
2. An HIV-positive person will not be guilty of negligently inflicting serious bodily harm if his partner consents to unprotected sex despite being unable to rule out the possibility that the person had a risky sexual past resulting in infection. However, guilt can attach if the partner did not receive all the information that would be important to making the decision in the particular circumstances involved.