

CORPORATE **Counsellor**
TILLEKE & GIBBINS*Is having sex a crime?*

That depends on the angle you are looking at it from. In some countries, having consensual sex could be a criminal offence. Consider the situation where a man infected with Aids intentionally has unprotected sex with a woman without informing her that he is HIV positive.

Would this be a crime in Thailand?

Under the Thai Penal Code, to prove that a person has committed an offence, the plaintiff must show that the two main elements of a criminal offence were present. The two main elements of a criminal offence (other than offences of strict liability) are the physical carrying out of a prohibited act and the mental element of a guilty mind or intention.

Section 59 of the Penal Code provides as follows: "A person shall be criminally liable only when such person commits an act intentionally, except in the case where the law provides that such person must be liable when such person commits an act by negligence, or except in the case where the law clearly provides that such person must be liable even though such person commits an act unintentionally. To do an act intentionally is to do an act consciously and at the same time the doer desired or could have foreseen the effect of such doing..."

In addition, it is also an offence to attempt to carry out an offence, per Section 80 of the Penal Code which provides that "whoever commences to commit an offence, but does not carry it through, or carries it through but does not achieve its end, is said to attempt to commit an offence..."

In this case, it is commonly known that Aids is a collection of symptoms caused by the HIV virus, which is transmitted through direct contact of a mucous membrane or the blood stream with a bodily fluid containing HIV. Sexual intercourse is one of the ways in which the HIV virus can be transmitted.

The information above, and the fact that there is no known cure for Aids, is widely known to the public. In addition, those infected with HIV or Aids are also provided with such specific information at the time of diagnosis. Therefore, if the man knew that he had Aids when he had sex with the woman, he desired or could have foreseen the effects of his action. Although the result of the action that is the subject of the offence (death)

is not immediate, since it takes time to develop from HIV infection to Aids, she was already infected with the HIV virus and would inevitably die as a result.

In order to prove the physical carrying out of the act, it would be necessary to prove the following evidence:

- ◆ The man knew he had HIV/Aids.
- ◆ The man did not tell the woman he had HIV/Aids.
- ◆ The man and woman had sex.
- ◆ The woman did not have HIV before having sex with the man.

Establishing such evidence is not as cut and dried as it seems because there are not likely to be any witnesses to the man and woman having sex. In addition, the woman may not have been recently tested for HIV prior to having sex with the man, and evidence as to previous sexual relations and other contact that could result in her catching HIV may need to be adduced to show that she could not have caught HIV elsewhere.

Proof of the mental element of intention will require disclosure of the man's medical record to establish that he knew he had HIV and had sex with the woman without telling her he had HIV. The Thai Constitution protects doctor-patient confidentiality, but the public prosecutor could request the judge to subpoena the medical records. The judge is likely to agree to the public prosecutor's request on public policy grounds, as it is in the public interest.

If the woman is alive when the complaint is filed with the court, the man would be convicted with the offence of attempt to murder. If she was no longer alive at the time the complaint is filed, the conviction would be murder. However, if the man dies during the trial, the case would be dismissed.

The latest statistics on the world epidemic of Aids and HIV published by UNAids/WHO in November 2007 show that more than 25 million people have died of Aids since 1981. For all those who catch the virus it is a tragedy, but those who catch it through intentional or reckless transmission by an infected person could be the victims of murder or attempted murder.

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