

A CASE AGAINST MANDATORY HIV TESTING OF RAPISTS

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Some people have suggested in recent weeks that Namibian law should require mandatory HIV testing for all accused rapists, or at least for all convicted rapists. While we should be extremely sympathetic to the situation of the rape survivor who must deal with the fear of contracting HIV, mandatory HIV testing is not the best solution. This article will explain why.

There are two motivations for requiring mandatory HIV testing in cases of rape. One is to give information to the rape survivor about her risk of being infected. The other is to charge the accused rapist with additional criminal offences for exposing the rape survivor to the possibility of HIV infection. Both of these goals are reasonable ones, but they are not practical. Here are some of the main arguments against mandatory testing. (This article refers to rapists as “he” and rape survivors as “she” because this is the most common situation. But the same arguments would hold true regardless of the sexes of the people involved.)

1) Mandatory testing of the rapist will not provide accurate information to the rape survivor.

The ordinary HIV antibody test may not show evidence of HIV infection for up to six months after transmission. The period during which the test is inconclusive is often referred to as a “window period”. This means that a rapist who tests negative for HIV antibodies may have been recently infected with HIV. So, a negative test does not mean that the rape survivor can put her fears of AIDS at rest. She might still be at risk of HIV transmission. .

Similarly, if the rapist tests positive, this does not mean that the rape survivor will necessarily be infected with HIV. A positive test for the rapist can do nothing other than put her on notice that there is a definite risk of infection. This may actually increase her trauma, without giving her any useful information. Furthermore, there is nothing that she can do at this stage to lessen her risk of infection. So the confirmation that she is at risk does not really help her.

The bottom line is that the outcome of the HIV test results for the rapist do not and cannot predict whether the rape survivor will be infected with HIV. The only way that she can know whether or not she is infected is to be tested herself.

Because public misunderstandings about HIV infection are still prevalent, testing of the rapist could actually create problems for the rape survivor. For example, suppose that the rapist tests positive but the rape survivor tests negative after the requisite “window period”. The survivor, her spouse or her family may have difficulty feeling confident that she is truly HIV-free. She may be unfairly viewed as being “tainted” in some way.

2) There are other approaches which will be more helpful to the rape survivor.

The rape survivor needs reliable information about her HIV status as quickly as possible. She also needs counselling and support to help her cope with the uncertainty, and the ultimate test results. What will be more helpful to her than information about the rapist’s HIV status is immediate information and counselling by a trained health care worker, along with timely, free and anonymous testing.

There is a type of HIV testing known as polymerase chain reaction (PCR) testing which can detect the presence of HIV within days of transmission. This test is reportedly more expensive and difficult to administer than the standard HIV antibody test, which makes it impractical for widespread use. The possibility of providing such tests free of charge for rape survivors should be investigated.

The rape survivor and her family should also be provided with ongoing support relating to the question of HIV/AIDS, to help them deal with their rational or irrational fears.

3) Mandatory testing may compromise the rights of accused or convicted rapists.

Even convicted rapists have rights to bodily integrity, privacy and human dignity. While a case can be made that the circumstances of a sexual assault justify an intrusion into

the rights of the perpetrator, such a step should not be taken lightly.

If the law required testing of all *accused* rapists, before they are even put on trial for the rape, the presumption of innocence might make the intrusion harder to justify. But if the law required testing of only *convicted* rapists, the time lapse would probably mean that the rape survivor would not have any additional information about the risk of transmission until after she already had more definite information from her own test.

4) If the purpose of mandatory HIV testing is to charge the rapist with additional crimes, this might have negative consequences for the rape survivor.

In theory, criminal charges relating to HIV transmission could be cast in several different ways. For example, suppose that the goal was to charge the rapist with a new-created offence of transmitting HIV through sexual assault. It would then be necessary to show that the HIV infection was in fact transmitted as a consequence of the sexual assault. This would probably open the door to cross-examination of the rape survivor about her sexual contacts before the rape took place -- or even after the rape occurred -- because it would be in the rapist's interests to show that she might have contracted HIV from someone else.

Such cross-examination would undermine efforts to protect the rape survivor from irrelevant questions about her sexual history. And yet the rapist would probably have to be allowed to ask such questions in order to get a fair trial. As a defence, he might even argue that it is the *rape survivor* who transmitted the HIV virus to *him*.

A situation like this would also compromise the rape survivor's right to confidentiality about her own HIV status. Even if the case were heard in closed court, the other parties to the case would hear evidence about whether or not she was infected.

It would be possible to cast a criminal charge relating to HIV infection in such a way that information about the HIV status of the rape survivor would not be relevant. This would be the case if the rapist were charged with attempted murder. A rapist could also in theory be charged with some kind of reckless endangerment -- in the same way that drunken driving is illegal because it potentially endangers others even if there is no accident. But, even if this route were followed, the rape survivor might still feel compromised. For example, the survivor may fear that no one will believe that she is infection-free if the rapist is convicted on a charge relating to HIV.

No matter how the criminal aspect of HIV infection is approached, there would probably be difficult problems of proof. For example, it might be necessary to prove that the rapist *knew* that he was HIV-positive before the rape took place -- or at the very least understood that it was possible that he was infected and that the HIV virus can be transmitted through unprotected sex. This would raise the question as to whether genuine ignorance of the basic facts about HIV and AIDS would be a defence.

The complications surrounding additional criminal charges based on HIV transmission in the course of a rape seem to outweigh the advantages. If rape is treated as one of the most serious crimes in Namibia, with the heavy sentences it deserves, the consequences of rape alone will be sufficiently severe to take into account the possibility of HIV transmission.

5) Mandatory HIV testing in rape cases may lead to greater public acceptance of mandatory testing in other contexts.

Fighting against the stigma of AIDS is already an uphill battle. Accepting mandatory testing in one context may lead to mandatory testing in other less appropriate contexts. For example, would mandatory HIV testing of rapists mean that they would be isolated during their imprisonment? If so, then an argument might be made for mandatory HIV testing of all convicted prisoners. Prostitutes might be another target group. For example, in the US state of Michigan, the statute on court-ordered testing applies to persons arrested or convicted for criminal sexual assault, prostitution or intravenous drug use. The precedent of mandatory testing might be a dangerous one.

6) There is no clear basis for differentiating between HIV and other sexually-

transmitted diseases.

A rape can also be the vehicle for transmission of venereal diseases such as syphilis, as well as hepatitis B. These diseases can in some circumstances be fatal. This makes it harder to justify testing the rapist for HIV alone. It also means that such testing would probably increase negative stereotypes about HIV and AIDS.

CONTRASTING APPROACHES IN OTHER COUNTRIES

By mid-1994, 40 states in the United States had introduced provisions requiring compulsory HIV testing for accused or convicted sex offenders – with 31 statutes applying to convicted sex offenders and the remainder extending to all persons charged with a sex offence. In about half of these states, testing is required only if the crime victim requests it. Most of the state laws require that the test results be disclosed to the crime victim, and some place restrictions on the right of the victim to communicate the information to other parties. A few states require victim counselling, to make sure that the victim understands the implications of the test results.

In November 1996, the US Supreme Court decided to consider the constitutionality of mandatory HIV testing. This case will decide whether or not such testing is an unfair interference with the rights of the accused or convicted rapist. The court has not yet issued its opinion.

Canada provides an example of a different approach. There, despite strong public pressure for the introduction of mandatory HIV testing, the Minister of Justice concluded that “imposing compulsory HIV antibody testing on persons accused of sexual assault is not the most effective way of dealing with the sexual assault survivor’s concerns”.

Five reasons were given to support this conclusion: (1) Such testing does not provide timely or reliable information about the sexual assault survivor’s risks of contracting HIV infection. (2) It is a misdirected and unrealistic approach to addressing the needs of a sexual assault survivor. (3) It perpetuates the dangerous misperception that information about an assailant’s HIV status is critical to the sexual survivor’s health. (4) It does not help the survivor’s psychological recovery. (5) It sets a dangerous precedent for extending mandatory testing to others.

The Canadian government recommended that the focus should be, not on the HIV status of the rapist, but on finding practical and sensitive ways of addressing the needs of the rape survivor through counselling and other services.

It is understandable that there is a strong desire to help rape survivors in any way possible. The fear of contracting HIV must be a terrible burden on top of an experience which is already unimaginably horrifying. But the introduction of mandatory HIV testing for rapists would be a unthinking reaction which does not really make sense. We should follow the example of Canada and turn our attention to more constructive plans for dealing with HIV and rape.