

## A CASE AGAINST MANDATORY HIV TESTING OF RAPISTS

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Suggestions have been put forward in some quarters that Namibian law should require mandatory HIV testing for all accused rapists, or alternatively for convicted rapists. While we are extremely sympathetic to the situation of the rape survivor who must deal with the fear of contracting AIDS, we believe that mandatory HIV testing is not the best solution.

### 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 extended to those arrested or indicted for a sex offence. In about half of these states, the 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 ensure that the victim understands the implications of the test results. In November 1996, the US Supreme Court decided to consider a case concerning the constitutionality of mandatory testing; the opinion has not yet been issued (*State in the Interest of J.G.*, cert. granted 7/11/96).

Canada provides an example of a different approach. There, despite strong public pressure for the introduction of mandatory testing, the Minister of Justice accepted a 1994 report of a Working Group of the Interdepartmental Committee on Human Rights and AIDS which 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 facilitate the survivor’s psychological recovery; and (5) it sets a dangerous precedent for extending mandatory testing to others, particularly pregnant women and sex workers. The Working Groups suggested that the focus should be, not on the perpetrator’s HIV status, but on finding practical and sensitive ways of addressing the needs of the sexual assault survivor through counselling and other services. (Canadian HIV/AIDS Policy & Law Newsletter, Issue 1, Number 3).

### THE ARGUMENTS AGAINST MANDATORY TESTING

#### **1) Mandatory testing may provide misleading information to the rape survivor which will not be in his or her best interests.**

The ordinary HIV antibody test may not show evidence of HIV infection for up to six months after transmission. This fact has several implications. Firstly, a rapist who tests negative for HIV antibodies may have been recently infected with HIV. Thus, a negative test does not definitely prove that the rape survivor has no danger of contracting HIV.

Secondly, even if the rapists tests positive, the chances of becoming infected through a single sexual encounter are relatively small (according to the US National Crime Victim Centre). The chance of infection being passed is increased if there are severe physical injuries, or if there have been repeated assaults, but a positive test for the rapists can do nothing other than put the rape survivor on notice that there is a definite risk. The bottom line is, that no matter

what the outcome of the HIV test results for the rapist, the rape survivor can only know whether or not he or she is infected by being tested him- or herself.

Thirdly, because public misunderstandings about HIV infection are still prevalent, the testing may lead to ungrounded fears. For example, if the rapist tests positive and the rape survivor tests negative after the requisite “window period”, the survivor, the spouse or the family may have difficulty in feeling confident that the survivor is truly HIV-free.

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

The rape survivor needs, above all, reliable information about his or her HIV status as quickly as possible, and counselling and support in coping with the uncertainty and the ultimate test results. It would be most helpful to the rape survivor to receive immediate information and counselling by a trained health care worker, along with timely, free and anonymous testing.

Furthermore, according to the Canadian HIV/AIDS Legal Network, 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 expensive and difficult to administer, but the possibility of providing such tests for rape survivors should be investigated.

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

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

Depending on how such additional charges were cast, they might make it necessary for the prosecutor to show that the HIV infection was in fact transmitted as a consequence of the sexual assault. If so, this may 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. Such a development would undermine the efforts to exclude such evidence on the grounds of irrelevancy. It would also compromise the rape survivor’s right to confidentiality about her own HIV status, at least with respect to the other parties to the case. The accused rapist might even allege as a defence that it is the *rape survivor* who transmitted the HIV virus to *him*.

If information about the HIV status of the rape survivor is not necessary to the prosecution of the case (for example if the charge were something along the lines of “reckless endangerment”), the rape survivor might still feel compromised. For example, the survivor may fear that no one will believe that he or she is infection-free if the rapist is convicted on a charge relating to HIV.

**4) Additional criminal charges based on intentionality or reckless indifference to the possibility of HIV transmission may present difficult problems of proof.**

The potential difficulties of showing that HIV infection resulted from the rape have already been mentioned. Even if it were not necessary to show that the virus was in fact transmitted in the course of the sexual assault, it might still be necessary to prove that the rapist *knew* that he or she was HIV-positive before the rape took place – or at the very least understood that it was possible that he or she was infected and that the HIV virus can be transmitted through unprotected intercourse.

Would genuine ignorance of well-known facts about HIV/AIDS be a defence? What level of knowledge could be “reasonably” assumed in Namibia at present? The problem of the appropriate *mens rea* is not insurmountable, but it does present a complex question.

**5) Mandatory testing may compromise the rights of the accused or convicted rapist.**

Even convicted rapists have rights to bodily integrity, privacy and human dignity. While we believe that a case can be made that the circumstances of a sexual assault would warrant an intrusion into the rights of the perpetrator, such a step should not be made lightly.

If the law required testing of all accused rapists prior to trial, the presumption of innocence might make the intrusion into the rights of the accused harder to justify – and if the law required testing of only convicted rapists, the time lapse (even with the case on the “fast track”) would probably mean that the rape survivor would not have any additional information until the “window period” had virtually elapsed anyway.

**6) 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 lead to their being isolated or treated differently during their incarceration? If so, then an argument might be made for mandatory 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 (Act 471 of 1988, as amended through 1994). The precedent of mandatory testing might be a dangerous one.

**5) 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, or hepatitis B. Such diseases can in some circumstances be fatal. Testing for HIV alone would thus increase its public stigma and possibly perpetuate misunderstandings about HIV and AIDS.

A few relevant documents retrieved from the Internet, including a short bibliography, are attached.

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