



## **TRANSMITTING CORONAVIRUS TO ANOTHER: HOW LIKELY IS A SUCCESSFUL PROSECUTION FOR GBH OR ABH?**

### **Introduction**

Over the past month, there have been reports of a number of people coughing or spitting in others' faces (or threatening to do so) whilst claiming to be infected with coronavirus. These individuals have been prosecuted for and convicted of assault or (where appropriate) assault against an emergency worker<sup>1</sup>.

These incidents are being taken very seriously: Max Hill QC, Director of Public Prosecutions, has made clear that the full force of the law will be used against offenders<sup>2</sup>, and the sentencing council has recently issued interim guidance clarifying that courts should treat threats or activity relating to transmission of coronavirus as an aggravating feature of common assault offences<sup>3</sup>.

As our response to coronavirus is rapidly evolving, could we soon see individuals who have transmitted coronavirus to others by coughing or spitting at them prosecuted for more serious offences, such as inflicting grievous bodily harm or assault occasioning actual bodily harm? This article aims to alert prosecutors and defenders to key factual disputes and evidential hurdles that will likely be faced in prosecuting or defending such cases.

### **Inflicting grievous bodily harm: section 20 OAPA 1861**

#### **Elements that need to be proved**

Let's start with the offence of inflicting grievous bodily harm under section 20. The elements that need to be proved are:

1. The complainant has suffered grievous bodily harm (defined as "really serious harm").
2. The accused inflicted that harm on the complainant.
3. The accused intended to cause some kind of bodily harm to the complainant or they were reckless as to whether such harm would be caused.
4. The harm was inflicted unlawfully.

It is well-established that the serious harm caused can be in the form of a disease.<sup>4</sup> Indeed, there have been many successful prosecutions of those who have infected their partners with sexually transmitted diseases. In theory then, a successful prosecution under section 20 for

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<sup>1</sup> <https://www.cps.gov.uk/cps/news/cps-brings-coronavirus-criminals-justice>. Those who threaten to transmit coronavirus to others could alternatively be prosecuted under section 4A of the Public Order Act 1986, for intentionally causing harassment, alarm or distress.

<sup>2</sup> <https://www.bbc.co.uk/news/uk-52052880>

<sup>3</sup> <https://www.judiciary.uk/announcements/sentencing-council-consultation-sentencing-guidelines-for-assault-and-attempted-murder/>

<sup>4</sup> R v Chan-Fook [1994] 1 W.L.R. 689; R v Dica [2004] EWCA Crim 1103

inflicting grievous bodily harm is possible where an accused is alleged to have infected a complainant with coronavirus. However, the nature of coronavirus infection presents a number of significant evidential hurdles to prosecutors. Problems arise in relation to the presence of grievous bodily harm, whether the accused inflicted that harm on the complainant and whether the accused inflicted the harm recklessly.

### **Does coronavirus infection amount to grievous bodily harm?**

It is important at the outset to consider whether coronavirus infection amounts to grievous bodily harm. The consequences of developing COVID-19 can be severe, and tragically in some instances, fatal. We know therefore that coronavirus infection has the potential to cause really serious harm.

However, this does not mean that every case of coronavirus infection amounts to grievous bodily harm. The courts have made clear that in assessing what constitutes grievous bodily harm, account has to be taken of the effect on, and the circumstances of, the particular complainant.<sup>5</sup> So, for example, if the complainant is infected with coronavirus and develops severe COVID-19 symptoms that require hospitalisation, then the harm caused could properly be described as grievous bodily harm. On the other hand, about 80% of COVID-19 patients develop mild symptoms, including fever and a dry cough, which in many cases will improve after a week<sup>6</sup>. In these cases, the harm caused would more properly be described as actual bodily harm. Whether COVID-19 symptoms amount to grievous bodily harm, actual bodily harm or below that threshold will depend on the circumstances of every case.

### **Infliction (causation)**

When it comes to infliction, in addition to showing that the accused coughed or spat in the complainant's face, the prosecution will need to prove two facts: (1) the accused was infected with coronavirus on the day of the alleged transmission, and (2) the accused transmitted the virus to the complainant. Significant evidential problems are likely to arise in relation to proving both of these facts, rendering proving causation an almost impossible task in most circumstances.

In order to prove that an accused was infected with coronavirus on the day of the alleged transmission, the accused would need to be detained and tested as soon as possible. The reason for this is that given coronavirus is highly contagious, any substantial delay would allow the defence to assert at trial that the accused may have caught coronavirus after the alleged transmission. Prompt detention and testing may prove difficult in many cases: such detention is clearly achievable where the complainant is a police officer, much less so where they are a member of the public.

Prosecutors' biggest hurdle in proving causation however will be proving that the accused transmitted coronavirus to the complainant. This is for two simple reasons. First, coronavirus is highly contagious. Second, the incubation period for coronavirus is between 1-14 days<sup>7</sup>. The combination of these factors means that there is the possibility that the complainant could have become infected from a different person, and that transmission could have taken place up to two weeks prior to, or later than, the alleged incident of coughing or spitting. Therefore, in marked contrast to cases involving transmission of sexually transmitted diseases, in all but

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<sup>5</sup> R v Golding [2014] EWCA Crim 889

<sup>6</sup> <https://www.theguardian.com/world/2020/apr/17/what-is-coronavirus-what-are-its-symptoms-and-when-should-i-call-a-doctor>; <https://patient.info/news-and-features/coronavirus-how-quickly-do-covid-19-symptoms-develop-and-how-long-do-they-last>

<sup>7</sup> <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>

the most exceptional cases it will simply not be feasible to prove that the complainant contracted coronavirus from the accused.

Ultimately then, a prosecution bought under section 20 will nearly always be deficient for lack of evidence of causation. However, there may be very limited exceptions (for example, where the complainant lives alone with the accused, has not gone outside, and the only other people they have had interaction with are emergency workers who have tested negative for coronavirus). The remedy for this prominent deficiency in the prosecution case would be to charge the accused with attempting to cause grievous bodily harm with intent.<sup>8</sup> However, as will be discussed below, proving an intention to cause grievous bodily harm in the context of coronavirus transmission would constitute another almost insurmountable evidential burden.

### **Recklessness**

Even in a case where the prosecution can prove causation, proving recklessness comes with its own problems. It is obvious that coughing or spitting in a complainant's face whilst infected with coronavirus involves a risk that the complainant will develop COVID-19. This means that the main factual dispute surrounding recklessness will be over whether the accused knew or believed that they had coronavirus at the time of the alleged transmission.

Given the (current) shortage of coronavirus tests, it is likely that an accused will not definitively know whether or not they have coronavirus. The absence of this definitive knowledge creates a challenge for the prosecution. Prosecutors would have to look at any evidence that the accused was suffering from COVID-19 symptoms at the time, as well as any evidence that the accused discussed symptoms with others or researched symptoms online. Even if such evidence could be obtained, given the nature of mild COVID-19 symptoms, it might be difficult for the prosecution to prove that the accused believed these symptoms were symptoms of COVID-19, as opposed to symptoms of a flu or common cold. This evidential burden, whilst not as demanding as proving causation, is still substantial, and could result in many prosecutions failing because of insufficient evidence of recklessness.

### **Attempting to cause grievous bodily harm with intent: section 18 OAPA 1861**

In relation to prosecutions under section 18, proving intention to commit grievous bodily harm would arguably be a tougher hurdle than proving causation. The prosecution would have to show that by coughing or spitting in the complainant's face, the accused intended that the complainant not only contract coronavirus, but develop COVID-19 symptoms severe enough to constitute grievous bodily harm. Given that it is not possible to say with confidence whether someone will develop severe COVID-19 symptoms if they are infected, evidence of intent cannot be derived from the act of coughing or spitting alone. Even if an accused accompanies the coughing or spitting with words suggesting they want the complainant to die or suffer really serious harm, the prosecution may find it very hard to disprove a suggestion by the defence that the sentiment was not intended, and that the words were spoken in the heat of the moment.

Therefore, regardless of whether the prosecution are seeking to prove an offence under section 20 or section 18, there will, in all but the most exceptional cases, be fatal deficiencies in the prosecution case. Grievous bodily harm will only be relevant when a COVID-19 patient's symptoms are really serious. On top of this, proving recklessness presents a number of hurdles. The main de facto bar to prosecution in many cases however is that due to the nature

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<sup>8</sup> The correct charge is attempted section 18 rather than attempted section 20 because if a person attempts to cause grievous bodily harm, they necessarily intend to do so.

of coronavirus infection, having to prove that the accused transmitted coronavirus to a complainant, or in the alternative that the accused intended to transmit coronavirus to a complainant, would be an almost insurmountable burden.

### **Assault occasioning actual bodily harm: section 47 OAPA 1861**

Would the prosecution have better prospects charging an accused with assault occasioning actual bodily harm? In addition to unlawfulness, three elements would have to be proved: (1) the accused assaulted the complainant, (2) the complainant suffered actual bodily harm, and (3) the assault caused the actual bodily harm.

Proving that an assault took place and that the complainant suffered actual bodily harm would not cause the prosecution much difficulty. As has already been mentioned, individuals have been convicted of assault by coughing or spitting at them, and mild symptoms of COVID-19 would constitute actual bodily harm. However, prosecutions would still likely fail except in the most exceptional of circumstances. This is, again, because of the near-insurmountable obstacle that proving causation (i.e. transmission of coronavirus) would present.

However, unlike with grievous bodily harm, overcoming the obstacle of causation by charging the accused with attempted assault occasioning actual bodily harm<sup>9</sup> may result in a reasonable prospect of successful prosecution. The key to proving that an accused intended (and so attempted) to cause a complainant actual bodily harm by coughing or spitting in their face would lie in proving that the accused knew or believed they were infected with coronavirus. Transmission of coronavirus is a very likely consequence of coughing or spitting in someone's face if you are infected, and developing at least mild symptoms of COVID-19 is a very likely consequence of coronavirus infection. Therefore, if it can be shown that the accused knew or believed they had coronavirus, then the prosecution would likely have a strong case that the accused coughed or spat in the complainant's face intending to cause actual bodily harm: the most natural interpretation of the coughing or spitting would be that the accused wanted to give the complainant coronavirus and at least mild symptoms of COVID-19. Although proving that an accused knew or believed they had coronavirus would present a significant challenge in many cases (for the reasons identified when discussing recklessness in relation to grievous bodily harm), discharging this burden would be feasible in numerous others.

### **Conclusion**

Depending on the circumstances, anyone who coughs or spits in another's face, transmitting coronavirus to them with the result that they develop symptoms of COVID-19, is guilty of infliction of grievous bodily harm or assault occasioning actual bodily harm. However, if prosecutions for these offences go ahead, there are numerous evidential pitfalls to be aware of. In all but the most exceptional cases, a prosecution under section 20, section 18 or section 47 will likely fail for lack of evidence as to causation or intent. The most realistic prospect of a successful prosecution would be where an accused is charged with attempted assault occasioning actual bodily harm, and even then the prosecution may face significant hurdles in proving that the accused knew or believed they had coronavirus.

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<sup>9</sup> This is a rare offence. In Attorney General's Reference (Nos 14, 15 and 16 of 2015) [2015] EWCA Crim 822, at paragraph 17, the Court of Appeal accepted that the offence existed in the absence of argument to the contrary. The Court of Appeal has also referenced attempted assault occasioning actual bodily harm in R v Docherty [2014] EWCA Crim 1404, R v Burgess [2012] EWCA Crim 1043 and R v Actie [1993] (1993) 14 Cr. App. R. (S.) 598.

At present, individuals who cough or spit at others, claiming to have coronavirus, have been charged with, and convicted of, assault. For now, this makes sense, as assault is significantly easier to prove in the context of coronavirus than, say, assault occasioning actual bodily harm. However, in uncertain times, the CPS will no doubt react to changing circumstances. If offences of this type proliferate despite recent convictions, or if an individual's offending is of particular gravity, then perhaps the CPS may consider charging some people with attempted assault occasioning actual bodily harm (or in extremely rare circumstances, infliction of grievous bodily harm) to ensure that justice is met and prospective offenders are deterred.

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