

## COVID-19 : a murderous virus?

*In this short article, Colin Witcher and Fiona McAddy discuss whether the deliberate act of infecting another with coronavirus, which proves fatal, could lead to a murder conviction*

Notwithstanding the seriousness of the coronavirus (COVID-19) pandemic and a global effort to fight the same, some individuals have taken it upon themselves to exacerbate the horror of the virus by spitting at others, purporting to have coronavirus. The Criminal Justice System is sadly accustomed to dealing with offences that involve threats to spread disease via bodily fluids; these offenders are often seeking to cause psychological terror and harm, rather than physical harm. However in circumstances such as this, the immediate psychological fear caused by the concern that the victim may have contracted the virus, may then be sadly outweighed by the pain and suffering of contracting the virus and subsequent death.

Data from published epidemiology and virologic studies provide evidence that COVID-19 is primarily transmitted from symptomatic people to others who are in close contact through respiratory droplets, by direct contact with infected persons, or by contact with contaminated objects and surfaces. Data from clinical and virologic studies that have collected repeated biological samples from confirmed patients provide evidence that shedding of the COVID-19 virus is highest in upper respiratory tract (nose and throat) early in the course of the disease<sup>1</sup>; that is, within the first 3 days from onset of symptoms. Preliminary data suggests that people may be more contagious around the time of symptom onset as compared to later on in the disease. Thus, it is clear that spitting per se is a method of transmitting the virus. It is therefore unsurprising that there has been national outcry from the reporting of a recent event concerning a front-line transport staff member, who contracted COVID-19 shortly after being spat upon by a member of the public, and thereafter tragically died. The same has called into question whether in such circumstances, namely that of death, the offence of murder has taken place. The crime of murder is committed where a person of sound mind unlawfully kills another person with intent to kill or cause GBH<sup>2</sup>.

This short article considers whether the offence would be made out in law, and the difficulties with such a prosecution. In summary, it is the view of the authors, that the actus reus for murder is capable of being made out, and if the comments of the

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<sup>1</sup> Wang W, Xu Y, Ruqin G, et al. Detection of SARS-CoV-2 in Different Types of Clinical Specimens. *JAMA* 2020 doi:10.1001/jama.2020.3786.

<sup>2</sup> A person of sound mind and discretion (i.e. sane) unlawfully kills (i.e. not self-defence or other justified killing) any reasonable creature (human being) in being (born alive and breathing through its own lungs) under the Queen's Peace (not in war-time); with intent to kill or cause grievous bodily harm (GBH).

offender are true, the requisite intent could be established. However, it would be very difficult to secure a conviction (in the light of available current medical evidence) as causation could not be established to the requisite standard of proof.

Before however turning to causation, we turn briefly to intention. The intent for murder is an intention to kill or cause grievous bodily harm (GBH). As such, you do not need to prove that a defendant actually wanted to terminate the life of another to secure a murder conviction. The jury only need be satisfied that the defendant intended to cause the victim really serious harm. An individual who says, "*I have the corona virus*" and then spits at another person, may well be found by a jury to have such an intent. To that end, there is ample scientific evidence readily available to the public to know the risk of the virus spread and that the virus can cause the need to be hospitalised and even kill. As such, what else can be the intent of a person who comes close enough to another person and deliberately transferred their spit? The position is analogous to the successful prosecutions for s18 GBH of those who deliberately infect others with HIV.

Issues of causation would hamper a prosecution for murder; the Crown would be required to satisfy a jury so that they were sure of the causal link between the act of spitting and the death that followed. In murder, the act or omission alleged must be a substantial cause of death, but it need not be the sole or main cause of death. It must have "*more than minimally negligibly or trivially contributed to the death*" -Lord Woolf MR in *R v HM Coroner for Inner London ex p Douglas-Williams* [1999] 1 All ER 344.

The issue of causation gives rise to a practical and obvious difficulty: where did the victim contract the virus from? Whilst it is natural to reply "from the man who spat" at the victim, that is a proposition that shall be difficult to prove. For example, could the victim have caught the disease on his or her morning commute to work? Or from an act of shopping the night before? Or from a colleague or medical staff that assisted the victim after the act of spitting? It must be borne in mind that the World Health Organization reports that studies have shown that the COVID-19 virus can survive for up to 72 hours on plastic and stainless steel, less than 4 hours on copper and less than 24 hours on cardboard. How many of those surfaces could the victim have encountered prior to the virus having been detected?

At present you cannot, as we understand the science, medically identify when or exactly how the virus was caught. As such, did the defendant spit on an already infected person? Did the defendant's spit actually result in a successful transmission? Of course, there is a further issue: was the defendant lying about being a carrier of the virus? In the absence of a test at the time of the assault how does the Crown

prove that the defendant could even have, in theory, passed on the virus to the victim?

Even if a subsequent antibody test was given to the defendant to determine whether they had ever suffered from COVID 19, it would not indicate whether at the time of the offence, he had been suffering from coronavirus, and to such a degree that he was infectious. This is a real impediment to any prosecution; any defence barrister would persuade the trial judge that the first question for the jury's route to verdict should be: "*are you satisfied so that you are sure that at the time Mr X spat at the deceased, he a) was infected with COVID 19, and b) was aware that he was infected with COVID 19 as opposed to the common cold or influenza?*" On the science and medical evidence presently available, it is unlikely that a jury could answer that question in the affirmative, and so the prosecution would fail. Even if the jury were sure that the defendant was infectious at the time of the offence and aware of the same, the route to verdict's even more problematic question "*are you satisfied so that you are sure that the victim caught COVID-19 from Mr X's spit as opposed to any other source?*" answered dispassionately would result in an acquittal.

It is important to observe that this conclusion is based on the science as we know it at present. Research into the origins, behavior and pathogenesis of COVID 19 is continuing, and the developments in the science may eradicate the current causation issues.

Notwithstanding our conclusions on the viability of a murder prosecution, it is plain that an assault has been committed in such cases. If it can be established that a defendant knew that he had coronavirus and intended to kill when he spat at the deceased, then notwithstanding causation issues, an offence of attempted murder may still be available to the Crown. To that end, whilst it cannot be shown that the assault caused the death, where there is evidence upon which a jury could safely conclude that the defendant's intent was to kill, the act of spitting was plainly an attempt to achieve such an outcome.

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