

GENERAL CRIME BLOG

Assault by Cough or Transferred Malady? The CPS Approach to Those Coughing on Key Workers and Others

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The CPS issued a press release on 26 March 2020¹ containing a warning from the DPP that “anyone using Coronavirus to threaten emergency and essential workers faces serious criminal charges.” This was triggered by cases of people claiming to have COVID-19 deliberately coughing at police officers and other frontline workers. Whilst such conduct is reprehensible, some may question whether coughing in someone’s direction is a proper basis for criminal charges. This article will explore the basis for such charges.

It is worth noting at the outset that a number of people have already been successfully prosecuted in such cases via public order offences and assaulting an emergency worker. For example, Darren Rafferty pleaded guilty to three counts of assaulting an emergency worker after claiming to have Coronavirus and directing coughs at police officers arresting him for another offence. He is due to be sentenced on 1 April. David Mott was jailed after pleading guilty to various offences including threatening behaviour, which arose from threatening to spit at a police officer saying that he wanted to give the officer Coronavirus. Importantly, whether the two Defendants actually had or transferred Coronavirus is immaterial.

Assault is defined as when a Defendant “intentionally or recklessly causes another to apprehend immediate unlawful violence”. The issue in relation to a cough is whether there is immediate unlawful violence. The Courts have treated “immediate” with flexibility; in *R v Ireland* [1998] AC 147 the House of Lords stated that “there is no reason why a telephone caller who says to a woman in a menacing way: “I will be at your door in a minute or two” may not be guilty of assault. That said, although the potentially fatal effects of Coronavirus are well documented one would have thought that they do not manifest so quickly that one could be said to apprehend immediate unlawful violence. Alternatively, battery (i.e. intentionally or recklessly inflicting unlawful force) is also often referred to as an assault, but it is difficult to see how a cough could be considered unlawful force. Without the full facts of Darren Rafferty’s case it is

¹ <https://www.cps.gov.uk/cps/news/Coronavirus-coughs-key-workers-will-be-charged-assault-cps-warns>

unclear whether an assault or battery was alleged, but it can be taken from his guilty plea that the above was not an issue.

As noted above, whether the Defendant was actually infectious is irrelevant. This is because only the apprehension of immediate unlawful violence is required. This was confirmed in *Smith v Chief Superintendent Woking Police Station* (1983) 76 Cr. App. R. 234 in which Kerr LJ found that where a Defendant had an intention of frightening and causing fear of some act of immediate violence, there would be intention to commit an assault.

One charge that does appear to cover coughing cases is under s.4A of the Public Order Act 1986 which can be committed if “with intent to cause a person harassment, alarm or distress” a person uses threatening or abusive behaviour thereby causing that or another person harassment, alarm or distress. This differs slightly from the threatening behaviour charge which appears to have been used in Mr Mott’s case. Threatening behaviour (per s.4 POA 1986) requires that a person uses threatening, abusive or insulting words or behaviour either: with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person; or: with intent to provoke the immediate use of unlawful violence by that person or another; or: whereby that person is likely to believe that such violence will be used; or: it is likely that such violence will be provoked. On its face this section has the same issue as assault: that there may not be sufficient immediacy of violence to prove the charge. However, it appears that this was not an issue in Mr Mott’s case.

Looking to other jurisdictions, in the USA a woman claiming that she was sick while coughing and spitting on food was charged with two felony counts of “terrorist threats”, one felony count of “threats to use a “biological agent”” and one felony count of criminal mischief.² On the one hand the use of terrorism offences emphasises the seriousness of such cases, but equally this feels disproportionate compared to the CPS’s approach, especially where there was no transmission.

It is conceivable that more serious charges may be brought if someone is actually infected by someone coughing on them. Criminality arising from the transmission of disease is nothing new, the most well-known of which is the transmission of HIV. In *R. v Dica (Mohammed)* [2004] EWCA Crim 1103 the Court of Appeal made clear that transmitting a disease that will have serious or life-threatening consequences can amount to grievous bodily harm under the Offences Against the Person Act 1861. One can foresee how infecting someone with

² <https://www.nbcnews.com/news/us-news/grocery-store-throws-out-35k-worth-food-woman-coughed-twisted-n1169401>

Coronavirus may fall into this definition. However, there may be an issue over the intent of the person coughing whereby one may not be able to prove they intended to cause grievous bodily harm, thus preventing a charge under s.18 OAPA 1861. Nevertheless, a charge of grievous bodily harm under s.20 OAPA 1861 (which does not require intent) would appear feasible. Perhaps more pressing is the issue of causation. Whereas the transmission of HIV may be more easily traced; even with social distancing, proving where one was infected with Coronavirus may be more difficult. One hopes that is not a bridge the Courts find themselves having to cross.

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