



HIV & Disclosure

OHRDP Provincial Conference

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HIV & the Criminal Law

- ⌘ In Canada, our criminal law is set out in a federal statute – the Criminal Code of Canada. It applies to all provinces and territories.
- ⌘ But the administration of justice is within provincial jurisdiction. This means that who gets charged for what can vary from province to province, and so can how the matter is prosecuted.

HIV & the Criminal Law

- ⌘ The other thing to remember about the Criminal Code and the role of courts, is that the Supreme Court of Canada is our highest court. Once it has spoken on an issue, we are all pretty much stuck with it.
- ⌘ So for the criminal law to change substantively, either the federal government has to amend the Criminal Code, or the Supreme Court needs to be confronted with a different case and an opportunity to reverse itself.

HIV & the Criminal Law: An Introduction

⚔ People living with HIV can be found guilty of a criminal offence if they fail to disclose their HIV status before engaging in behaviours that pose a “significant risk of serious bodily harm” to another person.

HIV & the Criminal Law: An Introduction

- ⦿ “Serious Bodily Harm” includes risk of HIV infection.
- ⦿ “Significant risk” is where things get hazy. It definitely includes unprotected anal or vaginal sex. It may mean lower risk activities like unprotected oral sex, or protected anal or vaginal sex.

HIV & the Criminal Law: An Introduction (4)

- Transmission is not required for a conviction on assault charge.
- “Exposure without disclosure” is the crime (of assault).

HIV & the Criminal Law: An Introduction

- We are aware of approximately 104 criminal prosecutions, from 1989 to 2009.
- Approx 75% have been against HIV+ men who have had unprotected sex with women.
- HIV+ women have been charged (approx 9%).
- Approx 12% involve HIV+ men who have had sex with men.

HIV & the Criminal Law: An Introduction

- Over 55% of the cases have occurred in past 5 years.
- Approximately 47% of the cases have occurred in Ontario.
- 63% conviction rate in Canada
- No transmission of HIV in 38% of cases Canada-wide

HIV and the Criminal Law

R. v. Cuerrier

- ⦿ The leading case in Canada with respect to criminal liability for non-disclosure of HIV status is *R.v. Cuerrier*, [1998] 2 SCR 371.
- ⦿ *Cuerrier* is available on line at http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2_0371.html
- ⦿ The best source for materials about *Cuerrier* is the web site of the Canadian HIV/AIDS Legal Network www.aidslaw.ca.

HIV and the Criminal Law - *R. v. Cuerrier*

🎗 From the perspective of people living with HIV/AIDS (PHAs), the rule in *Cuerrier* is:

🎗 if you have unprotected sex and do not disclose your HIV positive status to your HIV negative partners, you have committed an assault UNLESS it can be established that the partner would have consented anyway to the unprotected sex if he or she had known in advance of the risk.

HIV and the Criminal Law - *R. v. Cuerrier*

⌘ From the perspective of the criminal lawyer, *Cuerrier* is about:

⌘ Assault (Criminal Code 265(1)): “A person commits an assault when ... without the consent of another person, he applies force intentionally to that other person, directly or indirectly.”

...continued

HIV and the Criminal Law - *R. v. Cuerrier*

- ⌘ From the perspective of the criminal lawyer, *Cuerrier* is about:

- ⌘ Consent (Criminal Code 265(3)(c)): “For the purposes of this section, no consent [to physical contact] is obtained where the complainant submits or does not resist by reason of ... *fraud*.”
 - ⌘ “fraud vitiates consent”

- ⌘ So the discrete legal issue in *Cuerrier* was: does non-disclosure of HIV-positive status constitute fraud that vitiates consent?

...continued

HIV and the Criminal Law - *R. v. Cuerrier*

⌘ Aggravated assault (Criminal Code 268): “Everyone commits an aggravated assault who wounds, maims, disfigures or *endangers the life* of the complainant.”

⌘ Although simple assault carries a maximum sentence of five years, aggravated assault can result in a maximum 14 years imprisonment.

⌘ Aggravated sexual assault (**Criminal Code s. 273**)

- “Everyone commits an aggravated sexual assault who, in committing a **sexual assault**, wounds, maims, disfigures or **endangers the life** of the complainant.”
- maximum life imprisonment.

- ***NB: Conditional sentencing no longer an option for any offence for which maximum penalty is 10 years or more.***

HIV and the Criminal Law - *R. v. Cuerrier*

⌘ In *Cuerrier*, the Court held that fraud in section 265(3)(c) means:

⌘ There must be deceit or dishonesty;

⌘ not disclosing HIV status or not telling the truth about HIV status

⌘ Harm or risk or harm as a result of the dishonesty;

⌘ trivial risks will not satisfy this element of the test - there must be “a significant risk of serious bodily harm”

...continued

HIV and the Criminal Law - *R. v. Cuerrier*

⌘ And the dishonesty “caused” the risk of harm, i.e. the person would not have agreed but for the dishonest act.

⌘ “...the Crown will still be required to prove beyond a reasonable doubt that the complainant would have refused to engage in unprotected sex with the accused if she had been advised that he was HIV-positive.”

HIV and the Criminal Law - *R. v. Cuerrier*

“To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. **Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant** so that there might not be either deprivation or risk of deprivation [ie, harm or risk of harm].”

HIV and the Criminal Law - *R. v. Cuerrier* - Defences

- ⌘ One of the key questions that arises from *Cuerrier* is what activities involving HIV exposure constitute a “significant risk”? Clearly, unprotected vaginal intercourse is, in the court’s view, in that category.
- ⌘ As treatment options improve and life expectancy of HIV+ patient increases, will HIV still be considered “serious bodily harm”?

Risk varies with sex act

Per-act risk estimates for transmission of HIV by sex act		
Sex act	Risk per act (%)	Sources
Heterosexual (combined)	0.077%, 0.056%, 0.05 – 0.1%	Boily'09, Powers'08, Mastro'96
M to F	0.08%, 0.064%, 0.08 – 0.14%	Boily'09, Powers'08, Mastro'96
M to F, vaginal only	0.076%	Boily'09
F to M	0.04%, 0.064%	Boily'09, Powers'08
Anal (combined)	0.8 – 3.2%, 0.01 – 0.1% (MSM)	DeGrutolla'89 Jacquez'94
Receptive	1.69% (hetero), 0.65%, 1.43% (MSM) 0.82% (MSM)	Boily'09 Jin'10 Vittinghoff'99
Insertive	0.11%, 0.62% 0.06% (MSM)	Jin'10 Vittinghoff'99
Oral	0 – 0.04%	Baggaley'08

HIV and the Criminal Law

Other Cases

- Significant Risk – Manitoba and Vancouver cases
- Birth and Breastfeeding
- Murder Convictions
- Attempted Murder

HIV & the Criminal Law

Manitoba Case (2008)

- HIV positive man was charged with aggravated sexual assault (and other charges) for failing to disclose his HIV status to numerous HIV negative women prior to sexual intercourse.
- Thus far, it is the most thorough of what “significant risk” means - condom use and viral load were discussed.

HIV & the Criminal Law Manitoba Case

“I am persuaded that the combination of an undetectable viral load and the use of a condom would serve to reduce the risk below what would be considered a significant risk of serious bodily harm. The facts and medical evidence in this case have brought me to the conclusion that consent would not, in this particular circumstance, be vitiated.”

HIV & the Criminal Law

Manitoba Case

- The judge found that the HIV positive man did not have a duty to disclose his HIV status if he used a condom **and** his viral load at the time of intercourse was undetectable.
- Unclear if this will become the law:
 - Other courts can still interpret “significant risk of serious bodily harm” differently.

Manitoba Case

Court of Appeal 2010

- Decision was appealed, Canadian HIV/AIDS Legal Network intervened.
- Court decided that the careful use of condom OR an undetectable viral load can reduce the level of risk below the threshold test of a “significant risk.”
- Some quotes:
 - “Significant risk means something other than an ordinary risk. It means an important, serious, substantial risk.”
 - “Legal assessments of risk in this area should be consistent with the available medical studies.”
 - “The application of the legal test in *Cuerrier* must evolve to account appropriately for the development in the science of HIV treatment.”
 - “Criminal sanctions should be reserved for those deliberate, irresponsible or reckless individuals who do not respond to public health directives and who are truly blameworthy.”

Manitoba Case

Court of Appeal 2010

- Precedent for Manitoba trial courts
- Not binding outside of Manitoba, but is likely to influence lower courts and Courts of Appeal from other provinces in Canada.
- Appealed to the Supreme Court of Canada (currently waiting for Supreme Court to decide if they will hear the case).

Quebec Case 2008

- Woman charged for failing to disclose before sex with partner. Subsequently disclosed and were partners for 4 years. Charged 4 years after incident, after partner was convicted of assaulting women and son.
- Trial judge found one unprotected sexual encounter without disclosure exposed complainant to a significant risk of HIV transmission.
- Judge did not take into account undetectable viral load, even though the medical experts testified that the risk of transmission was “very low”, “truly minimal” and “very, very low.”

Quebec Case

Court of Appeal 2010

- Based on the medical evidence, Court of Appeal concluded that sexual encounter did not expose the complainant to a significant risk of HIV transmission, because accused's viral load was undetectable.
- The level of risk is to be assessed having regard to the facts and medical evidence of each particular case.
- In this case, medical experts assessed the risk of transmission as 1 in 10,000 where the viral load is undetectable, and they characterized the risk as “very low”, “truly minimal” and “very, very low.”
- Based on science **and** one instance of unprotected sex, the Court of Appeal found no “significant risk of serious bodily harm.”
- Trial judges in Quebec are bound by the Court of Appeal's decision.
- This decision is not binding on courts outside Quebec, but is persuasive authority.
- May be appealed to the Supreme Court of Canada.

Vancouver Case (2010)

- Vancouver man charged with aggravated sexual assault in relation to three acts of unprotected sex where the accused was receptive partner.
- Judge found, based on the scientific evidence, no significant risk of serious bodily harm.
- Three incidents of unprotected anal intercourse at a risk of 4 in 10,000 per occurrence puts the risk of HIV transmission at 12 in 10,000 or 0.12%.

“Not every unethical act invokes the heavy hand of the criminal law” (Justice Lauri Ann Fenlon)

Oral Sex

- 2006 acquittal in relation to oral sex.
- 2009 conviction in relation for oral sex.
- 2010 staying of charges in relation to oral sex.

HIV & the Criminal Law

Birth and Breastfeeding

- ⌘ In 2005, a Hamilton mother of two was arrested and charged with Failing to Provide the Necessaries of Life and Criminal Negligence Causing Bodily Harm
- ⌘ The facts alleged are that she failed to provide PEP to her baby after birth, and breastfed, causing the child to seroconvert.

HIV & the Criminal Law

Birth and Breastfeeding

- The court imposed a 6 month conditional sentence (“house arrest”) and three years probation.
- Both children were apprehended by Children’s Aid Society.

Abuse/Violence

Duty to Disclose?

- There may be serious risks for HIV-positive people who disclose, including violence.
- Is there a duty to disclose in such cases?

“The nature and extent of the duty to disclose, if any, will always have to be considered in the context of the particular facts presented.” (*R v Cuerrier*).

- Not aware of any cases.

HIV & the Criminal Law

Murder Charges

- ⦿ A Hamilton man was convicted of two counts of first degree murder along with 10 counts of aggravated sexual assault, and one attempted aggravated assault, involving 11 women.
- ⦿ Charges elevated to first degree murder because death ensued from alleged aggravated sexual assault (Criminal Code ss. 230 & 231).
- ⦿ Crown's "dangerous offender" application still pending.

Attempted Murder

- May 2009 a man was charged with attempted murder for allegedly not disclosing his HIV status before having unprotected sex with another man.
- June 2009 a man was charged with attempted murder for allegedly not disclosing his HIV status.
- July 2010 a man was charged with 4 counts of attempted murder allegedly not disclosing his HIV status before having unprotected sex with another man.

Injecting And Needle Sharing

- **Is it illegal to share injection equipment without disclosing HIV?**
 - Sharing without disclosing could be a crime.
 - No cases about this.

HIV and the Criminal Law - *R. v. Williams*

⌘ In September 2003, the Supreme Court of Canada decided *R v Williams*, [2003] 2 SCR 134. (Williams is on line at http://www.lexum.umontreal.ca/csc-scc/en/pub/2003/vol2/html/2003scr2_0134.html).

HIV and the Criminal Law - *R. v. Williams*

- ⌘ Like *Cuerrier*, the *Williams* case was about an HIV-positive man who was charged under the Criminal Code with aggravated assault for having unprotected sexual intercourse with a woman.
- ⌘ But the *Williams* case was different because the man had unprotected sex with the woman both before and after he knew that he was HIV positive. In addition, she seroconverted, and it was unknown if she was already positive when he learned of his own status and failed to disclose it.

HIV and the Criminal Law - *R. v. Williams*

- ⌘ In *Williams* the Crown could not prove beyond a reasonable doubt that he endangered her life after he knew that he was HIV positive (e.g. after he had a legal obligation to disclose).
- ⌘ Instead, the Supreme Court found him guilty of attempted aggravated assault.

HIV and the Criminal Law - *R. v. Williams*

⌘ Attempt (Criminal Code 24): “Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence, whether or not it was possible under the circumstances to commit the offence.”

HIV and the Criminal Law - *R. v. Williams*

- Can someone who has not tested HIV positive be criminally charged and convicted for not disclosing?
- Can an HIV positive person be charged for failing to disclose to another positive person?

HIV and the Criminal Law - *R. v. Williams*

Knowledge vs. Awareness

⌘ “Once an individual becomes aware of a risk that he or she has contracted HIV, and hence that his or her partner’s consent has become an issue, but nevertheless persists in unprotected sex that creates a risk of further HIV transmission without disclosure to his or her partner, recklessness is established”.

⌘ Not aware of any cases.

HIV and the Criminal Law - *R. v. Williams* *Knowledge vs. Awareness*

⌘ As the Canadian HIV/AIDS Legal Network has written:

“This statement ... suggests that it is not just once a person receives a definitive diagnosis of HIV infection that they have a legal duty to disclose before having unprotected sex... When does a person become "aware of a risk" that they might be HIV-positive? What sort of past activities that might have carried a risk of HIV infection will mean that a person is aware of a risk that they have contracted HIV? How significant a risk does it have to be before ignoring it becomes "reckless"? It remains to be seen how this statement by the Supreme Court will be interpreted by prosecutors and courts in the future cases.”

HIV and the Criminal Law - *R. v. Williams*

Re-infection

- ⌘ Possibility of criminal liability for engaging in activities that put an HIV-positive person at risk of re-infection with HIV, because a re-infection may constitute serious bodily harm.
- ⌘ Depend on scientific evidence in each case.
- ⌘ Not aware of any cases.

Privacy Rights

- Many people may have serious concerns about disclosing because the partner might tell other people, or post on the internet. Although this may make it more difficult to disclose, it doesn't change the legal duty under the criminal law.
- In many circumstances, there is a legal right to privacy of health information, including information about HIV.
- However, not much can be done to stop an internet chat buddy, a sex partner or a "friend" from telling other people.
- May be able to sue, but the law is not very clear.

Contact HALCO for more information.

Criminalization of other illnesses

- Hepatitis C: charged but acquitted
- Herpes: in Feb 2010 soldier charged with aggravated assault and criminal negligence for not disclosing herpes to six women
- Hepatitis B: in Mar 2010 man sentenced to one year after pleads guilty to sexual assault and sexual assault causing bodily harm for not disclosing Hep B to two women

HIV and the Criminal Law - The Fall Out

- ⌘ Prisoners who have been convicted of *Cuerrier* or *Williams* type offences are considered to be sexual offenders.
- ⌘ Prisoners who are sex offenders are offered special “treatment” programs, that usually include group therapy where prisoners are expected to discuss the nature of their offence with other prisoners present. This inevitably results in prisoners being forced to disclose their HIV status.
- ⌘ Although participation is not mandatory, failure to participate may affect prison release programs.
- ⌘ If convicted of sex crime, likely added to sex offender registry.

HIV and the Criminal Law - The Fall Out

- ⌘ A development in Ontario that occurred after *Cuerrier* has involved press releases by police departments, identifying HIV+ accuseds and publication of their photographs.
- ⌘ These press releases have occurred pursuant to amendments to the *Police Services Act* made by the former progressive conservative government.

Reducing Risk of Criminal Liability

- The best way to minimize your risk of criminal liability is to tell your sexual partners that you are HIV+ before having sex, and get proof.

Reducing Risk of Criminal Liability

- Some other strategies of *reducing* the risk of criminal liability:
 - Use condoms (remember *Cuerrier* as well as Manitoba case).
 - Have other types of safer sex that have lower risks of passing on HIV (remember “significant risk of serious bodily harm”).
 - See your doctor regularly and work with your doctor to get your viral load as low as possible (remember that there may be HIV in other places than blood, and that test is a snapshot in time).
 - Have sex with people you know are also HIV positive (remember the *Williams* case - we have not seen any such charges, but there may be a legal duty to disclose even if the other person is HIV +, due to re-infection).

Proof of Disclosure

- **Have witnesses:** Disclose in front of someone else you trust, or in front of a group of friends who already know you are positive.
- **Create support and counselling records:** See a counsellor or support worker together. Ask the counsellor to make notes of the session. During the counselling session tell the person that you are HIV positive.
- **Double-check:** Have a friend ask the person if he/she knows about your HIV status.
- **Save on-line conversations and emails:** If you disclose over chat or by email, be clear about your HIV status. The person should acknowledge that you are HIV positive. Save and print an electronic copy.
- **Sign a document:** Get the person to sign something before sex that says that that she/he knows you are HIV positive and what that means. Put the date on it, and have the person print and sign his/her name.

Policy Issues

International Approaches

- **United Kingdom:**

- Active work by ASOs with defence lawyers and expert virologists to challenge Crown Prosecution Service (CPS) use of phylogenetic testing → show limitations and inability to prove “reckless transmission” of HIV beyond reasonable doubt
- Engaged with UK CPS to develop prosecutorial guidelines to guide conduct of investigations and decisions about whether and when to prosecute
- The UK guidelines can be found at <http://www.cps.gov.uk/publications/prosecution/sti.html>.

Policy Issues

International Approaches

- **UNAIDS:**
 - 2002 “policy options” paper: aimed to steer countries away from overly-broad application of criminal law
 - Following outbreak of problematic “model law” on HIV (including heavy, vague criminalization provisions) in West and then Central Africa, UNAIDS moving to develop clearer, shorter, and more prescriptive policy guidance for countries
 - 2008 Policy Brief issued: limit prosecutions to cases of *intentional transmission*; issue guidelines to police and prosecutors
 - The Policy Brief can be found at http://data.unaids.org/pub/BaseDocument/2008/20080731_jc1513_policy_criminalization_en.pdf.

Law Reform In Ontario

- Some HIV positive people, community activists, AIDS service organization workers and lawyers are working to change the criminal law.
- Ontario Working Group on Criminal Law and HIV Exposure (CLHE).
- CLHE can be reached at CLHE@pwateronto.org

Law Reform In Ontario

- **The Working Group has**
 - Developed a Position Statement
 - Produced Media Speaking Points
 - Held a public forum in Toronto
 - Organized a legal strategy committee with criminal defence lawyers
 - Engaged with the media
 - Undertaking a campaign for prosecutorial guidelines.



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