

Cynthia Fromstein is a Canadian lawyer based in the city of Toronto in Ontario. Ms. Fromstein practices criminal law exclusively. She has over twenty years of extensive trial experience in areas including domestic and sexual assaults, morality charges (indecent acts, possession of child pornography), homicide and drug charges, as well as forensic cases involving defendants with mental illness. She also has considerable experience as a defence lawyer in criminal cases for HIV non-disclosure.

As a criminal defence lawyer, what is your position regarding the use of the criminal law to deal with HIV exposure and/or transmission in Canada?

It is not an easy question to answer.

I think that, in Canada, the criminal law is widely overused with regard to HIV non-disclosure.

There are circumstances where I think the criminal law is reasonable to employ, but those are very few. They include when someone is intentionally seeking to harm other people by non-disclosure and is intentionally seeking to pass the virus onto them, but this is a very rare circumstance. And that would probably be limited again to when someone actually contracts the virus. If the criminal law has to be used, this is where I think it should be narrowed down to.

In terms of how it is used, the sentences are extremely serious. For instance, when there is not transmission of the virus the average sentence is approximately 18 months to two years per complainant. Where there is transmission of the virus, 3 years per complainant is within the sentence range. And we can see from certain sentencing decisions, the sentence gets up to 8–10–18 years where there are a number of complainants. The criminal law can be excessive in terms of how it is applied. This is also gravely concerning.

I have defended 8 to 9 cases related to HIV non-disclosure. The first one was probably one of the earlier charges in Canada. Unfortunately, I also dealt with a young man who was sentenced to a provincial jail and who died in custody because he was not treated and monitored correctly. His HIV turned to AIDS and he died. It was a pretty horrific set of circumstances that raises the issue of how serious it can be for the health of people who are suffering from HIV to be jailed.

What are some specific aspects of cases of HIV non-disclosure compared to other assault cases?¹

There are different kinds of cases for HIV non-disclosure. Some deal with a straightforward case of credibility, with someone saying “I did disclose” and someone else saying he did not disclose, so those are in many ways not too dissimilar from a regular case of sexual assault.

But in most cases the issue is whether there was ‘significant risk of HIV transmission’ since there is only a duty to disclose one’s status before engaging in sex that represents a significant risk of serious bodily harm. Then you need to get into the medical science and multiple issues come up.

I defended a case where charges involved only oral sex and no transmission, even though there are similar cases in Canada where the Crown decided we are not going to prosecute because the risk is known to be very low. I think that the prosecutor in this particular case tried to push the law and stretch the law to the point that any risk to transmit HIV is “significant”. Fortunately, the Crown decided to stay the charges before trial.²

What are the human consequences of criminal prosecutions for HIV non-disclosure, for the accused, but also for society as a whole?

When a person is charged, the police may put their face in the newspaper and broadcast “any person who had any contact with this person contact the police”, so it can be devastating to a person’s reputation.

Being charged also usually puts people living with HIV on a very strict form of bail and many of their liberties are immediately impeded. It is a very stressful situation, which can be bad for their health and general well being.

In terms of society, in my view, it exacerbates the prejudice against people living with HIV, especially given the media sensationalism around these cases. The only thing you read in the press is about this “predatory HIV person”. It makes the situation worse for people living with HIV who are already facing great discrimination and stigmatization in Canada.

What about the victims?

If someone has had sex with someone in the belief that the other person was in good health, and they were misled intentionally, I do feel for them as a victim especially if this then

¹ In Canada, a person who does not disclose his/her HIV-positive status to his/her sexual partner before having sex that represents a significant risk of HIV transmission can be prosecuted for (aggravated) (sexual) assault. See *R. v. Cuerrier*, [1998] 2 S.C.R. 371.

² To date, one man has been convicted for aggravated sexual assault in Canada for unprotected oral sex.

results in them contracting the virus. And even if they don't contract the virus, the period of concern during the wait for test results is no doubt something quite serious for them.

At the same time, I think that the criminalization of HIV non-disclosure does not help educate people on the responsibility of everyone to take care of their own health. It puts all responsibility on the person who is HIV-positive. I think there is a tendency to remove all responsibility from the partner, and many people engage in risky behaviour and turn a blind eye to the potential consequences. So I don't think that in a larger way it helps victims or people in general.

What is essential for a defence lawyer to do or to know in order to prepare a good defence in cases of HIV exposure or transmission?

I think it is very important to learn absolutely everything about the current medical science as this is something that is changing rapidly and it is something that as a lawyer you are certainly not an expert in. It is critical to have outside support to educate yourself. You really have to understand the medical science thoroughly because you need to be in a position to cross-examine the Crown's experts, and to determine who in fact is an expert. So you have to have to be up to date on developments to determine whether the proposed expert is on top of the current reports that are coming out internationally. You have to be aware of what's happening in Europe and other parts of the world. You also need to be able to discuss the science with your own expert. It is also very important to be aware of the the evolution of the medical science that has now resulted in HIV not longer being considered a death sentence.

It is essential to appreciate that you do need help from outside resources from doctors and people who have experience in working in the field of HIV, including AIDS organizations.

You also have to be on top of the law and all the cases that are coming out so you have a full understanding of what the issues are.

Finally, it is important to appreciate and understand the health challenges and the emotional challenges of people living with HIV. It is also important to understand that at some point your clients contracted HIV, and you have to have an understanding of how that can impact on someone. I think it helps you in understanding why someone might not disclose, i.e. whether they were brought up in a culture of "don't tell", or whether they are someone who is in denial because they have been diagnosed recently and really have not come to terms with it or had counselling, etc... Having an appreciation of these issues will assist you in representing your clients.

It is also helpful to be aware of the resources for your clients; I'm speaking less as a lawyer now, but it is useful to know where to refer your client for counselling, with respect to health orders³ or if any other issues come up and s/he needs to get advice or support.

³ According to the *Ontario Health Protection and Promotion Act*, Public Health can order a person living with HIV to take action, or refrain from taking certain action, so that he or she does not put another person's health at risk