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Criminalization confusion and concerns: the decade since the *Cuerrier* decision

In 1998, the Supreme Court of Canada ruled that a person living with HIV could be found guilty of aggravated assault if he or she did not disclose his or her HIV-positive status and exposed another person to a "significant risk" of HIV transmission.[1] The notorious case — *R. v. Cuerrier* — involved an HIV-positive man and two women with whom he had intimate relationships involving unprotected intercourse. At the time the ruling, which imposed full legal responsibility for HIV prevention on people living with HIV/AIDS (PHAs), raised many questions. Ten years later, many of those questions remain unanswered. In addition, a host of new issues have been added to the debate.

Introduction

Since *Cuerrier*, there has been a marked upswing in the frequency of prosecutions. More than 70 people in Canada have been criminally charged for not disclosing their HIV-positive status.

The uproar over the criminalization of HIV exposure reached a new pitch in 2008 when the trial of Johnson Aziga began in Ontario. Aziga is the first person to be tried for murder for not disclosing his HIV-positive status, after two women he allegedly infected through unprotected sex subsequently died.

Within Canada, some police forces are becoming aggressive in their pursuit of so-called "HIV criminals," and several lawsuits have been filed against police and various government authorities for failing

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AMERICAN BAR ASSOCIATION Defending Liberty Pursuing Justice

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to warn women that they might be exposed. At the same time, ever more advocates, in Canada and internationally, are becoming more vocal in expressing their apprehensions about criminalization trends.

So where are we now in terms of the law around the duty to disclose HIV-positive status? What new trends and practices are emerging in the enforcement of the duty to disclose? What progress has been made in terms of understanding the social impacts of the criminalization of HIV exposure? What opportunities exist to lever positive change in the coming months and years?

Escalating charges

Of the more than 70 people who have been charged for not disclosing their HIV-positive status in the last decade, a remarkably high number (32) were charged in the last three years (from the beginning of 2006 through to the time of this writing, February 2009).[2] Of these 32 people, 20 were charged in Ontario alone.

In addition, an increasing number of defendants are facing charges of aggravated sexual assault (which carries a maximum penalty of life imprisonment), as opposed to the lesser charges of aggravated assault or criminal negligence causing bodily harm. Furthermore, several high-profile cases involving multiple complainants and violent or exploitative circumstances have gone to trial in the last couple of years.

For example, Carl Leone pled guilty to 15 counts of aggravated sexual assault in April 2007. Five of the female complainants contracted HIV.[3] Newspapers reported that some of the complainants were given alcohol or pills before blacking out, and only discovered later that Leone had had unprotected sex with them.[4]

Clato Mabior was convicted in July 2008 of six counts of aggravated sexual assault, as well as one count each of invitation to sexual touching and sexual interference.[5] One of the complainants was only 12 years old at the time of her contact with Mabior; police said he was luring runaway girls to his home with the promise of intoxicants and a place to stay.[6]

Finally, Johnson Aziga is facing 11 counts of aggravated assault and two counts of first-degree murder for allegedly not disclosing his HIV-positive status to sexual partners.[7] As of the time of this writing, the case remains before the trial-level courts. For Aziga to be convicted of murder in these circumstances, the Crown must overcome considerable hurdles with respect to evidence and legal argument on intent and causation. But whether or not the Crown is successful, this case marks a further escalation in the legal stakes for non-disclosure of HIV-positive status.

Media frenzy

The media has taken to covering these cases with great vigour, quoting extensively from complainants about how they would never have become sexually involved with the accused had they been aware of his or her status and how they have suffered as a result of their exposure to HIV. In fact, the majority of the coverage about HIV/AIDS and people living with HIV that an average Canadian reads in the local newspaper or hears on the radio is about persons facing criminal charges for non-disclosure.

Several high-profile cases involving multiple complainants and violent or exploitative circumstances have gone to trial in the last couple of years.

The reporting on charges against one particular woman living with HIV was especially striking, involving such headlines as: "HIV woman strikes again,"[8] "Woman admits AIDS assault; petite redhead pleads guilty to trying to sexually infect CFB Borden with HIV,"[9] and "She tried to pass HIV: woman guilty of attempting to infect CFB Borden soldier."[10] Not only is this type of coverage sensational, suggesting devious

criminality, it also misrepresents the legal charges. In this particular case, the accused was charged for allegedly not disclosing her HIV status to sexual partners; intent to infect others was never alleged.

"Have you been in contact with this person?"

Police across Canada have the authority to release information to the media and the public about persons charged with of convicted of a crime, including their name, description, date of birth, address, the alleged offence(s), and other information related to the charges.[11] The use of this power has resulted in photographs of persons accused of not disclosing their HIV-positive status appearing in the media, along with their HIV status and warnings that sexual partners should seek medical advice and/or contact the police.[12]

The police issue these advisories to keep the public informed about law enforcement and judicial or correctional processes, to locate victims and witnesses to alleged crimes, and to protect the public. However, disclosing personal information about a person who is under investigation challenges the presumption of innocence.[13] It could also result in negative consequences for the accused person in terms of the person's job and personal or family relationships.

The publication of these advisories by police has arguably contributed to the stigma and discrimination experienced by people living with HIV. They fuel the media frenzy around these cases and contribute to a perception that people living with HIV pose a threat to the community at large and act in a deviant, criminal manner.

Concerned about the possible negative consequences for PHAs of the public disclosure of individuals' HIV status in media advisories, the British Columbia Person with AIDS Society (BCPWA) made formal complaints to the Vancouver Police Service Board and the Office of the Information and Privacy Commissioner for British Columbia, in June 2006 and June 2007 respectively.[14]

The complaints concerned a Vancouver Police Department media advisory of 30 March 2006. The media release included the accused's photograph, age and HIV-positive status, and stated that "[i]t is alleged that he had unprotected sex with two Vancouver men denying that he was HIV positive."[15]

In response, the Vancouver Police Board indicated that it did not find any fault in its policies on releasing information or in the specific case that was the subject of the complaint. The Board said that "[n]o less privacy intrusive investigative technique could have been employed to the same effect to identify further victims."[16]

Furthermore, the Board stated that "it was essential that the accused's HIV positive status, and his denial thereof, be disclosed. If the disclosure had not been made, others who had consensual unprotected sex with the accused would not have been able to identify themselves as victims."[17]

A duty to warn?

Within the past few years, several multi-million dollar law suits have been launched, each alleging that the PHA accused in a criminal case and various government agencies failed to warn the complainant that he or she was at risk of HIV infection. These lawsuits have emerged in the context of HIV and AIDS being reportable illnesses in every Canadian province and territory, meaning that public health authorities may be aware of a person's HIV-positive status before his or her sexual partners.

One such lawsuit was filed by the ex-husband of a woman who was found guilty of aggravated assault in January 2007 for not disclosing her HIV-positive status to him.[18] The claims in this lawsuit are far-reaching. From his ex-wife, the plaintiff is claiming $11 million in damages, alleging intentional failure to disclose her HIV-positive status, intentional negligence in transmitting HIV, fraud in securing his sponsorship for immigration to Canada, and intentional infliction of emotional distress.[19]

Several multi-million dollar law suits have been launched, each alleging that the accused in a criminal case and various government agencies failed their "duty to warn."

The suit also seeks $9 million in damages from the woman's employer (the strip club where she worked). Finally, the suit claims $13 million from the Government of Canada (including Citizenship and Immigration Canada) and a declaration that the sponsorship agreement is void. Also named in the suit are the Government of Ontario and the City of Toronto Public Health Department.

The allegations against the Governments of Canada and Ontario include negligently or intentionally

failing to warn the plaintiff of his wife's HIV-positive status; allowing him to enter into an immigration sponsorship contract without full disclosure; failing to perform their duties and engaging in a subsequent conspiracy to cover up their knowledge of her HIV-positive status and their negligence; failing to administer proper medical examinations; and complicity with the fraud perpetrated by his ex-wife.[20]

Two lawsuits have also been launched against Carl Leone. The first was filed by a woman who claims to have met Leone through an internet chat room when she was sixteen. She was allegedly infected with both herpes and HIV during their two-year relationship.[21]

In addition to suing Carl Leone, the woman is suing four members of his family and the Windsor Police Services Board for $10 million dollars. The suit alleges that each of the defendants knew, or ought to have known, that harm to her was the reasonably foreseeable consequence of their failure to warn her of Leone's HIV-positive status or to take measures to ensure her safety.[22]

A second suit by two of the other complainants in the criminal case was filed in January 2009. They each seek $10 million in damages from the Windsor Police Services Board, the Windsor Essex County Health Unit and Leone.[23] They allege that the police did not carry out a reasonable investigation when allegations were first made against Leone. They further allege that the health unit did not take steps to protect them and other members of the public, and that it failed to report Leone to the police although it knew or should have known that he was engaged in a criminal offence.[24]

Finally, a similar suit was filed in the Aziga case in August 2008. The plaintiff alleges that public health staff and police knew she was having sex with Johnson Aziga, whom they knew to be HIV-positive, but did not warn her. Her suit alleges that officials withheld the information in order to arrest him and therefore "used her for bait."[25]

These lawsuits raise important questions about whether public officials — including police, public health staff, and immigration officials — have a legal obligation to "warn" sexual partners who may be at risk of HIV infection and to report potentially criminal contact to the police.

Provincial and territorial public health laws give public health officials the authority to conduct partner notification, which involves contacting the sexual or injection-drug partners of a person infected with a sexually-transmitted infection to advise them that they may have been exposed and should seek testing.

Generally, the healthcare worker doing the notification does not reveal the name or other identifying information of the "index case."[26] Is this the full extent of notification requirements under Canadian law or, as these lawsuits assert, is there a broader "duty to warn"?

As discussed above, police have claimed legal authority to issue advisories to the public in relation to cases under investigation. Hospitals, psychiatrists, social workers and police have all been found by courts to have a duty in some circumstances to warn someone they can identify as being at risk of harm, but none of the relevant cases in Canada were HIV-related.

Moreover, it is unclear whether counsellors have a legal obligation to disclose confidential information about a client in order to prevent harm to another person. Counsellors do, however, have the *discretion* to do so where: (a) there is a clear risk of harm to an identifiable person or group of persons; (b) there is a significant risk of serious bodily harm or death; and (c) the danger is imminent.[27]

When, if at all, does this discretion becomes a legal obligation? And who carries such an obligation? What protections are (or should be) in place to ensure that such warnings are not inappropriately used and to ensure that privacy rights, and the potential harms that could result to the person living with HIV whose privacy is violated, are properly weighed in the decision-making? How the courts answer these question could have considerable impacts on public health and policing practice throughout Canada.

Continuing legal uncertainties

In *Cuerrier*, the Supreme Court of Canada addressed the question of when non-disclosure of HIV-positive status to a sexual partner may amount to a "fraud" that vitiates that partner's consent, thereby rendering the sexual intercourse a sexual assault.[28]

Specifically, Justice Cory, writing for the majority, stated that there are two elements the Crown must prove in order to establish such a fraud. First, there must be a "dishonest representation" consisting of either deliberate deceit about HIV status or non-disclosure of that status. Second, the Crown must prove that the dishonesty resulted in some "deprivation" to the complainant:

> The second requirement of fraud is that the dishonesty result in a depri-

> vation, which may consist of actual harm or simply a risk of harm. Yet it cannot be any trivial harm or risk of harm that will satisfy this requirement in sexual assault cases where the activity would have been consensual if the consent had not been obtained by fraud.… In my view the Crown will have to establish that the dishonest act (either falsehoods or failure to disclose) had the effect of exposing the person consenting to a significant risk of serious bodily harm. The risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet that test.[29]

What was not clear in *Cuerrier* is where the line should be drawn between activities requiring disclosure and those not requiring disclosure.

The majority judgment was clearly not imposing a blanket obligation on persons living with HIV to disclose their status in every sexual encounter. What was *not* clear is where the line would be drawn between activities requiring disclosure and those not requiring disclosure. For example, Justice Cory contemplated that disclosure might not be required with respect to intercourse for which a condom was used, but did not make an explicit ruling on the issue.[30]

To date, the exact contours of the criminal law in Canada regarding non-disclosure of HIV-positive status remain uncertain, particularly with regard to lower-risk practices (e.g., protected sex, oral sex) and undetectable viral load. In a handful of cases, trial courts have suggested that non-disclosure of HIV-positive status to a sexual partner would not vitiate consent because the risk of a particular activity does not rise to the level of being legally "significant."

In *R. v. Nduwayo*, the judge instructed the jury that the accused had a legal duty to disclose his HIV-positive status to his sexual partner if he had unprotected sexual intercourse, but that there was no legal duty to disclose if he used condoms at all times.[31] Similarly, in *R. v. Smith*, the judge stated his understanding that to find the accused guilty he had to satisfy himself beyond a reasonable doubt that the sex was unprotected.[32] And in *R. v. Edwards*, the judge noted that the Crown acknowledged that performing unprotected oral sex on an HIV-positive man would not trigger a legal duty to disclose.[33]

However, in a more recent Manitoba decision, the trial judge stated the law rather differently. The decision criminalized non-disclosure even when condoms were used.[34] This case was also the first to directly examine the issue of low viral load and its relevance in terms of "significant risk."

The judge ruled that *both* an undetectable viral load *and* the use of a condom would reduce the risk of transmission below the level that would be considered a "significant risk." Neither condom use nor low viral load on its own would suffice to remove the obligation to disclose one's HIV-positive status, in this judge's interpretation.[35] (As of this writing, a notice of appeal had been filed in the case, but no further steps had been taken.)

In the intervening period since the Supreme Court established the "significant risk" threshold for liability, considerable medical and scientific advances have been made in the understanding of HIV transmission and treatment. These cases epitomize the challenge courts face in keeping pace with medical and scientific advances and applying them to the diverse circumstances of individuals' real-life sexual encounters.

Protecting women

Almost two-thirds of the charges laid in relation to HIV non-disclosure in the last three years involved male defendants and female complainants, with multiple female complainants in several cases. It is not surprising, therefore, that some proponents see criminal charges as appropriate punishment for dishonest men who are selfishly putting women's health and lives at risk. But do criminal charges for non-disclosure protect women from harm?

Criminally charging a man after the fact for not disclosing his HIV-positive status to a prospective female sexual partner may punish the person for not being forthright, but it does not protect against exposure. She has already been exposed. Therefore, the only potentially protective function that criminal charges could play would be as a deterrent — namely, if someone aware of his or her HIV-positive status who otherwise would not reveal that status were compelled to do so because of the risk of criminal prosecution for not disclosing.

Yet there is little evidence to suggest much, if any, deterrent effect of this sort. In general, the deterrence value of criminal prosecutions is minimal with respect to sexual

practices — and particularly if alcohol, drugs or domestic violence are involved. The one study to date that has attempted to measure the deterrent effect of the criminal law on HIV non-disclosure to sexual partners (not a Canadian study) has found little impact. The authors concluded that they had

> failed to refute the null hypothesis that criminal law has no influence on sexual risk behavior. Criminal law is not a clearly useful intervention for promoting disclosure by HIV-positive people to their sex partners. Given concerns about possible negative effects of criminal law, such as stigmatization or reluctance to cooperate with health authorities, our findings suggest caution in deploying criminal law as a behavior change intervention for seropositives.[36]

If the objective is to protect women against HIV infection, criminal charges for HIV non-disclosure are a poor substitute for empowering women to take control of their own sexuality, ending violence against women and addressing the root causes of gender discrimination and subordination.

Criminal charges distract from the larger task of ensuring comprehensive sexual health information and services for everyone. As long as women are dependant on their partners (or on public health or the police) to disclose potential harms to them, women will never be equal or empowered in their relationships.

To be clear, men who assault or exploit women should be prosecuted with the full force of the law (notably, the conviction rate for sexual assault is extremely low in Canada). But sexual assault is already a criminal act. The offender's knowledge that he had HIV at the time of the attack may be an aggravating factor, but it is not the essence of the crime.

Furthermore, an increasing number of women in Canada are living with HIV. What are the consequences of criminally prosecuting non-disclosure for these women, including women in abusive relationships or who are economically dependent on a partner?

Criminal charges distract from the larger task of ensuring comprehensive sexual health information and services for everyone.

A recent case in Montreal is revealing in this regard. In February 2008, a woman was found guilty of aggravated sexual assault for not disclosing her HIV-positive status to her boyfriend when they began dating.[37] A few months into their five-year relationship she disclosed to him. They broke up, and the man was charged with assault following complaints of domestic violence against the woman and her son; in retaliation, he alleged that she had failed to disclose her HIV-positive status before they had had unprotected sex.

The woman testified that they had used condoms from the beginning of their relationship, but the court concluded that the couple had unprotected sex at least once prior to her disclosure.[38] In a bitter irony, he was given an absolute discharge with no criminal record despite being found guilty of assaulting her and her son.

In circumstances such as these, are women protected through the criminalization of non-disclosure and HIV exposure? And as ever more women are infected, in particular aboriginal women and women who inject drugs or whose partners use drugs, will women be protected and empowered through criminalization, or will more women find themselves behind bars?

The way forward — where to next?

Although there has been a trend in Canada over the past ten years to ever more expansive and frequent use of the criminal law in cases of HIV exposure, we have reached a moment where perhaps some significant changes can be achieved if advocates take strategic advantage of emerging opportunities. Several specific interventions may be particularly pertinent:

- Increase public information and debate on the criminalization of HIV exposure and its impacts.
- Develop a legal defence strategy, including materials for defence lawyers and expert witnesses.
- Work with Attorneys-General's offices to develop prosecutorial guidelines to limit the ongoing attempts by prosecutors to expand the scope of the criminal law.[39]
- Build a base of evidence on the impacts of criminalization of HIV exposure, including published research studies.

Canada currently has the unsettling (dis)honour of being a world leader in criminalizing HIV exposure. Perhaps in the next post-*Cuerrier* decade, we will be able to advance a more rights-based, evidence-informed approach to sexuality and HIV pre-

vention, such that criminal charges for otherwise consensual sex are no longer seen as warranted.

– Alison Symington

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[1] *R. v. Cuerrier*, [1998] 2 SCR 371.

[2] The Canadian HIV/AIDS Legal Network tracks criminal charges for HIV non-disclosure using media reports, legal databases and information received from AIDS service organizations, lawyers and people living with HIV. While such a tracking can never be completely comprehensive, the Legal Network believes its records capture most of the cases that have been brought forward in Canada. Unless otherwise noted, the observations made in this article are based on the Legal Network's tracking.

[3] "Guilty of exposing women to HIV, Ontario man faces life sentence," *Sudbury Star*, 28 April 2007, p. A8.

[4] For example, see D. Schmidt, "'I'm clean,' he told victims; some given pills and blacked out," *Windsor Star*, 28 April 2007, p. A1.

[5] *R. v. Mabior*, 2008 MBQB 201.

[6] P. Turenne, "Sex menace sentenced; HIV-infected man lured runaway girls with drugs," *Winnipeg Sun*, 11 October 2008, p. 5.

[7] D. Peat, "Accused lied about HIV, Crown says; but defence argues it wasn't murder, it was cancer," *Toronto Sun*, 21 October 2008, p. 5.

[8] T. McLaughlin, "HIV woman strikes again: cops; charged with having unprotected sex," *Toronto Sun*, 28 February 2007, p. 4.

[9] T. McLaughlin, *Toronto Sun*, 26 November 2005, p.4.

[10] Front page, *Toronto Sun*, 26 November 2005.

[11] This authority is contained in various pieces of provincial and federal legislation, including privacy legislation and police acts. See G. Betteridge and T. Katz, "Ontario: Police disclose HIV status of accused under Police Services Act," *HIV/AIDS Policy & Law Review* 9(3) (2004): 22–24.

[12] For example, in March 2007 Toronto Police Service released a photograph of Robin St. Clair in a news release, noting that she was 26 years old, charged with sexual assault, and alleging that "she deliberately failed to disclose to a sexual partner her HIV status" and that "she deliberately withheld information from other sexual partners in order to have sex with them." The news release indicated that police were releasing a picture of Ms St. Clair in an effort to encourage anyone who has had sexual contact with her to seek medical advice; and that police were seeking the public's assistance locating victims or witnesses. (Toronto Police Service, 32 Division, news release, 22 March 2007.)

[13] G. Betteridge and T. Katz.

[14] Letters on file with author.

[15] Media advisory, on file with author.

[16] Memo dated 13 December 2006, from Volker Helmuth, Director, Planning and Research Section, to Service & Policy Complaint Review Committee, Vancouver Police Board, p. 2. [on file with author].

[17] Ibid.

[18] *Whiteman v. Iamkhong et al*, Statement of Claim, Ontario Superior Court of Justice [on file with author].

[19] Ibid. at para. 4.

[20] Ibid. at para. 5.

[21] *Jane Roe v. Carl Desmond Leone et al*, Statement of Claim, 18 April 2005 [on file with author]

[22] Ibid. at paras. 28–34.

[23] T. Wilhelm, "Leone victims launch $20M lawsuit," *Windsor Star*, 29 January 2009 (online).

[24] Ibid.

[25] N. Macintyre, "They used me as HIV 'bait'; woman sues for more than $6m in damages," *Hamilton Spectator*, 13 August 2008.

[26] Canadian HIV/AIDS Legal Network, *Public Health Laws and HIV Prevention*, Criminal Law and HIV Info Sheets, 2008.

[27] *Smith v. Jones*, [1999] 1 SCR 455 (Supreme Court of Canada).

[28] *Criminal Code*, ss. 265(3)(c) and 273(1).

[29] *R.v. Cuerrier*, [1998] 2 S.C.R. 371 at para. 128.

[30] *R.v. Cuerrier*, [1998] 2 S.C.R. 371 at para. 129.

[31] *R. v. Nduwayo*, [2006] B.C.J. No. 3418 at paras. 7–8. See also: *R. v. Nduwayo*, Charge to the Jury, pp. 625–626.

[32] *R. v. Smith*, [2007] S.J. No. 166 (Sask. P.C.) at para. 59.

[33] *R. v. Edwards*, 2001 NSSC 80 at para. 6.

[34] *R. v. Mabior*, 2008 MBQB 201 at para. 116.

[35] Ibid. at para. 117.

[36] S. Burris et al, "Do criminal laws influence HIV risk behavior? An empirical trial," *Arizona State Law Journal* 39 (2007): 467.

[37] *R. c. D.C.*, District de Longueuil, Chambre criminelle, 505-01-058007-051, 14 février 2008. See also: "1 year sentence for HIV-positive woman guilty of assault; sentence to be served in community because of women's health, court says," *CBC News* (online), 9 July 2008.

[38] Ibid.

[39] For example, a Legal Guidance (for prosecutors and caseworkers) and a Policy Statement (for a more general readership) on prosecutions to the sexual transmission of infections were published in March 2008 by the Crown Prosecution Service of the United Kingdom. See Y. Azad, "Developing guidance for HIV prosecutions: an example of harm reduction?" *HIV/AIDS Policy & Law Review* 13(1) (2008): 13–19.