NOTICE RE: SUPREME COURT OF CANADA DECISION IN R. v. WILLIAMS

(18 September 2003)

On 18 September 2003, the Supreme Court of Canada released its unanimous decision in R. v. Williams. This is the first case on the issue of criminal liability for HIV exposure decided by the Court since its 1998 decision in R. v. Cuerrier.

The specific question raised by the case is whether a person with HIV who has unprotected sex, without disclosing their status to a sexual partner who might already themselves have been infected with the virus, can be convicted of either "aggravated assault" or simply "attempted aggravated assault". The Supreme Court decided that, on the facts of this case, only a charge of "attempted" aggravated assault could stand.

There are some aspects of the Court's decision, however, that raise some broader concerns about the direction of Canadian criminal law as it deals with conduct that risks transmitting HIV. This note sets out the facts of the case, explains the legal question that was before the Court, and then discusses these aspects of the judgment.

Facts of the case

W began an 18-month relationship in June 1991 with a woman who was eventually the complainant in this criminal case. They had unprotected sex on numerous occasions. On 15 November 1991, W learned that he had recently tested positive for HIV. The complainant received a negative test result a few days later, but it was acknowledged that she may have already been infected by that point, and at the time of testing was still in the "window period" between infection and seroconversion.

After W learned of his positive diagnosis, the relationship continued

for another year and included unprotected sex. W did not disclose to his partner either that he had been tested for HIV or that he had tested positive. He was counselled on three different occasions by two doctors and a nurse about HIV, its transmission, safer practices and his duty to disclose his HIV status to sexual partners. W did not disclose and continued to practise unprotected sex with the complainant.

The relationship ended in November 1992. In April 1994, the complainant learned she was HIV-positive.

It was accepted as fact that the complainant would never knowingly have had unprotected sex with W had she known he was HIV-positive. W also conceded that he infected the complainant with HIV. The prosecution conceded that it is quite possible that W infected the complainant before learning of his HIV-positive status.

The legal issue before the Supreme Court

At trial, W was convicted of aggravated assault and common nuisance. The Court of Appeal of Newfoundland & Labrador upheld the conviction for common nuisance, and W did not challenge his conviction on this charge. But on the charge of aggravated assault, the Court of Appeal instead substituted a conviction for attempted aggravated assault. Why?

Under Canadian law, it has been confirmed (by the Cuerrier decision in 1998) that not disclosing one's HIV-positive status before unprotected (vaginal or anal) sex amounts to "fraud" which makes a sexual partner's consent to sex legally invalid. Therefore, the physical sexual contact amounts to an assault. (In the Cuerrier case, the Supreme Court said that there was a duty to disclose one's HIV infection before engaging in any activity that posed a "significant risk" of transmitting HIV, although the Court did not define which activities would be considered to pose a significant risk).

But the offence of aggravated assault, which was the charge laid in this case, further requires that the assault "endanger the life of the complainant." In this case, the complainant might already have been infected through unprotected sex with W before he learned he was HIV-positive. Therefore, the Court agreed that it could not be proven beyond a reasonable doubt that W's conduct, after learning he was HIV-positive, endangered her life through the risk of HIV infection. The prosecution appealed the decision to the Supreme Court on this specific issue.

The Supreme Court agreed with the appeal court that W could only be convicted of attempted aggravated assault, because on the evidence, it was "likely" that the complainant was already infected with HIV through unprotected sex with W before he learned of his positive diagnosis. Therefore, the prosecution did not prove, beyond a reasonable doubt, that W had endangered the complainant's life, so W could not be convicted of aggravated assault.

However, the Supreme Court found that W did "attempt" to commit the offence, saying that he had the necessary intent to commit the assault and acted in line with that intent after knowing he was HIV-positive. The Court stated:

> "The requisite intent is established here for the period after November 15, 1991. The respondent, knowing at that time that he was HIV-positive, engaged in unprotected sex with the complainant intending her thereby to be exposed to the lethal consequences of HIV. The evidence showed that he had been fully counselled by two doctors and a nurse on all relevant aspects of the potential result of unprotected sex. ... Failure to prove endangerment of life was fatal to the prosecution in this case of aggravated assault but it is not fatal to a conviction for attempted aggravated assault. Clearly, the respondent took more than preparatory steps [toward committing the offence of aggravated assault]. He did everything he could to achieve the infection of the complainant by repeated acts of intercourse for approximately one year between November 15, 1991 [the date of his diagnosis] and November 1992 when the relationship ended. The reasonable doubt about the timing of her actual infection was the product of circumstances quite extraneous to the respondent's post-November 15, 1991 conduct."

Commentary on the Supreme Court's judgment

Two things in particular should be noted about the Court's judgment.

(1) The Court's approach to deciding when there is criminal intent

On the question of intent, the Court said that there was sufficient

intent for a conviction on an assault charge if a person acts "recklessly". Under Canadian law, a person is "reckless" if they know that their conduct risks committing a crime but they act anyway.

But what does this mean when applied to knowledge of HIV-positive status and the risk of infection? The Court said that: "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." [emphasis added]

This statement by the Court is some cause for concern. It 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, but that there might be a duty to disclose even before this point if s/he "becomes aware of a risk" that s/he might be HIV-positive.

This could become a slippery slope as courts try to decide how to apply such a standard. 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.

What this illustrates again is that the criminal law is not particularly helpful in responding to conduct that risks transmitting HIV. If the risk of criminal liability only exists once a person actually receives a positive test result, then this is a disincentive to getting tested for HIV, so that someone can plead ignorance of their status. But to expand the duty to disclose (and therefore possible criminal liability for not disclosing) beyond the case where a person actually knows they are HIV-positive, to cover a potentially wide range of situations where someone becomes aware of a risk that they have HIV, is to invite an overly-broad application of serious criminal penalties and could lead to undesirable invasions of privacy as courts scrutinize whether a person was aware that their past activities put them at risk of HIV infection.

(2) The Court's comments regarding evidence about "re-infection" in future cases

In this particular case, the facts were agreed upon between the prosecution and defence. There was some medical evidence at trial about the possibility that the complainant, even if she had already contracted HIV, could have been "re-infected" with a different, possibly drug-resistant strain of HIV by W as a result of him not disclosing his HIV infection while they continued to have unprotected sex. However, the argument that this could have endangered her life, beyond her original infection -- and that this would therefore amount to an "aggravated assault" -- was not pursued by the prosecution. However, the Supreme Court ended its judgment by expressly noting that, in future cases, this kind of medical evidence and this line of legal argument, could be pursued. The Court said that, depending on the evidence, a court might conclude that even if a person were already infected with HIV, the possibility of re-infection with another strain could represent a "significant risk of serious bodily harm" and therefore there might still be a duty to disclose.

Additional information

The Court's judgment in Williams may be found on-line (click here).

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