Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

Summary: R. v. Cuerrier[1]

Aggravated assault/ non-disclosure/ unprotected vaginal sex

"[…] 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."[2]

Applicable law:

Section 265 of the Criminal Code

> (1) A person commits an assault when:
>
> (a) Without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> […]
>
> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of:
>
> (c) fraud

Section 268 of the Criminal Code

> (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
>
> (2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years

Court and Date of Decision

The Supreme Court of Canada issued its judgement in September 1998.

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

Parties

The Crown was the appellant before the Supreme Court and Cuerrier was the respondent.

The BC Civil Liberties Association (BCCLA), the BC Persons with AIDS Society (BCPWA), the Canadian AIDS society (CAS) and the Canadian HIV/AIDS Legal Network all intervened in this case.

Facts

In August 1992, Cuerrier was told by a public health nurse that he was HIV- positive and that he should use condoms for sex and tell his sexual partners about his HIV-positive status. He indicated he was aware of the ways in which HIV could be transmitted and said he could not disclose this is in his small community. He refused the nurse's offer to notify his sexual partners without disclosing his name.

Soon after receiving his results, Cuerrier began a relationship with KM during which, they frequently engaged in unprotected vaginal sex. Sometime either before, or within a week of, their first sexual encounter, in response to KM's questions about sexually transmitted diseases, the accused indicated he had had a number of recent sexual encounters with women who had themselves had many sexual partners. KM did not specifically ask about HIV, but the accused told her he had tested negative eight or nine months earlier and did not mention his recent positive test results. KM said at trial she knew the risks of unprotected sex, including HIV and other STDs.

In January 1993, both Cuerrier and KM had HIV tests. He tested positive, she tested negative. Both were told of Cuerrier's infection, and advised to use condoms for sex. Cuerrier said he did not want to use condoms. Until May 1994, they continued having unprotected sex for 15 months. The complainant later testified that (i) she loved Cuerrier and did not want to lose him, (ii) as they had already had unprotected sex, she felt she was probably already infected, (iii) however, she would not have had sex with Cuerrier had she known his HIV status at the outset. She tested negative at the time of the trial.

In June 1994, Cuerrier received an order from a public health nurse to inform his sexual partners of his HIV status, use condoms, and meet quarterly with a public health nurse to confirm compliance with the order.

During this same period, Cuerrier began a sexual relationship with BH. After their first sexual encounter, she told him she was afraid of diseases, but did not specifically mentioned HIV. Cuerrier did not tell her he was HIV positive. No condom was used for about half of their 10 sexual encounters. BH then discovered that Cuerrier was HIV positive and the relationship was put to an end. BH was not infected.

Proceedings

Cuerrier was charged with two counts of aggravated assaults under sections, 265 and 268 of the Criminal Code in November 1994.

To support a charge of "aggravated assault", the prosecution is required to prove that there was an "assault" at the first place -- i.e. that the respondent applied force intentionally without consent.

Because the complainants had agreed to engage in sexual intercourse with the respondent, it was necessary to show that their consent was vitiated by fraud.

At trial, the Crown argued that the consent of Cuerrier's partners to vaginal sex was not legally valid because they were unaware of his HIV-positive status. According to the prosecution, Cuerrier's non-disclosure constituted "fraud" and that fraud vitiated his partner's consent according to section 265 (3) (c) of the Criminal Code.

In first instance, Cuerrier was acquitted by the trial judge on the grounds that the prosecution had not made out the offence of assault because the complainants had consented to sexual activity.

The Crown filled an appeal against this decision before the BC Court of Appeal. The BCPWA and the BCCLA intervened to make submission against the use of criminal sanctions in this case. The five appellate justices unanimously dismissed the Crown's appeal. The majority noted that "the criminal law of assault is indeed, an unusual instrument for attempting to ensure safer sex."[3]

The Crown filled a further appeal before the Supreme Court of Canada which was heard in March 1998.

The Supreme Court allowed the appeal, decided that the accused could be tried on the two charges of aggravated assault and ordered a new trial.

The BC Attorney General later announced that it would not be proceeding with a new trial against Cuerrier.

Legal arguments and issues addressed

The Supreme Court was called upon to determine whether the fact that an HIV positive person did not disclose his serostatus could be considered as "fraud" vitiating consent to sex for the purposes of criminal law of assault (section 265(3) (c) of the Criminal Code). All of the seven judges who heard the case concluded that Cuerrier's non disclosure of his serostatus could constitute fraud vitiating consent. However, there were divided as to how define such a fraud as the traditional conception of fraud as to the "nature and quality of the act" was considered inadequate.

The majority (Cory, Major, Bastarache and Binnie JJ) set out a new harm-based approach for deciding what will constitute fraud that vitiates consent to physical contact, including sex. According to this approach, the fraud in section 265(3) (c) includes "dishonesty" (i.e. non-disclosure of important facts) that had the effect of exposing the person consenting to "a significant risk of serious bodily harm" (i.e. "deprivation").

---

[3] R. v. Cuerrier (1996), I I I CCC (3d) 261 at 282 (per Prowse JA).

The reasoning of the majority was described as follow per Cory J.:

> The first requirement of fraud is proof of dishonesty. In light of the provision of section 265, the dishonest action or behaviour must be related to the obtaining of consent to engage in sexual intercourse, in this case unprotected intercourse. The actions of the accused must be assessed objectively to determine whether a reasonable person would find them dishonest. The dishonest act consists of either deliberate deceit respecting HIV status or non-disclosure of that status… The possible consequence of engaging in unprotected intercourse with an HIV positive partner is death. In these circumstances there can be no basis for distinguishing between lies and a deliberate failure to disclose.[4]
>
> The second requirement of fraud is that dishonesty result in deprivation, 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 <u>significant risk of serious bodily harm</u>**.[5] [emphasis added]

According to the Court, "the risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet that test"[6]. Unprotected sexual intercourse could pose a significant risk of the serious bodily harm of HIV infection, and thus not disclosing HIV-positive status in that circumstances could amount to fraud that vitiates a partner's consent to have sex.

However, the Crown would still be required "to prove beyond a reasonable doubt that the complainant would have refused to engage in unprotected sex with the accused if [he/]she had been advised that he[/she] was HIV-positive"[7].

As a result of this approach, the prosecution must prove three elements to establish fraud vitiating partner's consent:

1) an act by the accused that a reasonable person would see as dishonest;
2) a harm, or a significant risk of serious bodily harm;
3) that the complainant would not have consented but for the dishonesty by the accused.

Even if the minority of the judgement did not share the same conception of fraud than the majority; a) all justices concluded that non disclosure of HIV-positive status could constitute fraud vitiating consent and b) six of seven justices explicitly declared that there must be a significant risk of HIV transmission before non-disclosure may transform otherwise consensual sex into an aggravated assault.[8]

---

[4] *Cuerrier*, *supra* note 1 at para.126-127.
[5] *Ibid,* at para. *128.*
[6] *Ibid.*
[7] *Ibid.* at para. *130.*
[8] *bid.* at para. 70, 73.

Finally, the offence of "aggravated" assault requires proving that the assault "wounds, maims, disfigures or endangers the life of the complainant." Since neither of the women had tested positive for HIV at the time of trial, and therefore no actual physical harm had occurred, the burden was on the Crown to show that the complainant's lives were endangered by the respondent's force.

The Court decided that this condition was satisfied because there was a significant risk to the lives of the complainants (HIV transmission) occasioned by the act of unprotected intercourse. According to Justice Cory, "[t]he potentially lethal consequences of infection permit no other conclusion."[9]

Comments

In *Cuerrier*, the Supreme Court was invited, for the first time, to determine whether the criminal law of assault in Canada could be applied to HIV non-disclosure cases.

The Court decided that an HIV-positive person could be convicted of aggravated assault for non-disclosure when the partner's consent to engage in sexual activities was obtained by fraud and took that opportunity to define the frame of the use of criminal law to non-disclosure cases.

According to the Supreme Court, the role of the notion of "significant risk" is central, and brings out the following consequences:

- **First, an HIV positive person can be convicted of aggravated assault even if there is no actual transmission of HIV.** Fraud is established where failure to disclose HIV status had the effect to expose the consenting partner to a significant risk of serious bodily harm. Therefore, a simple exposure to a significant risk of HIV transmission is sufficient for the application of the criminal law of assault.

- **Secondly, there is no general duty to disclose HIV-positive status under criminal law.** The Supreme Court defined the duty to disclose in relation to the "risks attendant upon the act of intercourse"[10]: the greater the risk to the complainant, the more likely it is that the accused has a duty to disclose. Cory later specified that there would be no duty to disclose in the absence of a "significant risk of serious bodily harm". As a result of this decision, a person only has a legal duty to disclose his or her HIV-positive status to sexual partners before having sex that poses a "significant risk" of HIV transmission.

- **Thirdly, an HIV- positive person has a legal duty to disclose his or her HIV-positive status before engaging in unprotected intercourse with sexual partners.** According to the Supreme Court, unprotected sex constitutes a significant risk of HIV transmission that requires disclosure.

The Supreme Court in *Cuerrier* clarified the application of criminal law to non-disclosure cases, but there are still many uncertainties. The most obvious unanswered

[9] *bid.* at para. 95.
[10] *Ibid.* at p.3.

question raised by the *Cuerrier* decision is: what constitutes a legally "significant" risk of HIV transmission?

The Court's judgement in *Cuerrier* indicates that, in Canadian criminal law, unprotected vaginal intercourse (and presumably anal intercourse) will be considered to carry a legally "significant risk" of HIV infection. What else this includes is not clear.

Indeed, according to the majority, "the nature and the extent of the duty to disclose, if any, will always be considered in the context of the particular facts presented".[11]

The organisations intervening in *Cuerrier* urged that, if the Court were to impose criminal liability for non-disclosure of HIV-positive status, this should not extend to protected sex (e.g. use of condom). The Supreme Court did not rule definitively on this question. However, the majority suggested that if a condom was used, the risk of harm might not be significant enough to warrant criminal liability. Consequently, a duty to disclose might not be required.

> 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 as significant so that there might not be either deprivation or risk of deprivation.[12]

The minority judgement of McLahin J. and Gonthier, also supports the conclusion that disclosure should not be required if protected sex is practiced.

> Again, protected sex would not be caught; the common law *pre-Clarence* required that there to be a high risk or probability of transmitting the disease (…)

In the result, six of the seven Justices who heard *Cuerrier* case have suggested, but not decided, that the person who does not disclose their HIV-positive status but who practised safer sex should not be subjected to prosecutions for non-disclosure.

In the same way, it seems logical and likely that, if condom use were accepted as lowering the risk enough that it is no longer legally significant, then the same treatment should be afforded to other low risks sexual activities as oral sex without condoms for instance. The science around HIV has also greatly evolved since *Cuerrier* in 1998. It became increasingly clear that an undetectable viral load dramatically reduces the risk of HIV transmission, but what this means for the legal duty of people living with HIV to disclose is not yet clear.

Note: For a more detailed discussion, see: R. Elliott, *After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status.* Montreal: Canadian HIV/AIDS Legal Network, 1999, online via www.aidslaw.ca/criminallaw.

---

[11] *Ibid.*
[12] *Ibid.* at para. 129.