IN THE DISTRICT COURT
AT WELLINGTON

CRI-2004-085-009168

NEW ZEALAND POLICE
Informant

v

JUSTIN WILLIAM DALLEY
Defendant

Hearing: 10 August 2005

Appearances: Mr Stone for Informant
Dr Stevens QC and Mr Hay for Defendant

Judgment: 4 October 2005

RESERVED DECISION OF JUDGE S E THOMAS

Charge

[1] Mr Dalley is charged that on or about 14 May 2004 in Wellington, he committed a criminal nuisance by omitting to discharge a legal duty, namely:

> (1) Before having oral intercourse informing the complainant that he was HIV positive knowing that such omission would endanger the complainant's health; and

(2) Before having vaginal intercourse informing the complainant that he was HIV positive knowing that such omission would endanger the complainant's health.

Issues

[2] Mr Dalley has been charged under s145 of the Crimes Act 1961 which provides:

> **145 Criminal nuisance**
>
> (1) Every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual.
>
> (2) Every one who commits criminal nuisance is liable to imprisonment for a term not exceeding one year.

[3] The legal duty which it is alleged Mr Dalley breached is that set out in s156 which provides:

> **156 Duty of persons in charge of dangerous things**
>
> Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, operates, or maintains anything whatever, which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.

[4] The issues then are these:

(1) Was Mr Dalley under a duty pursuant to s156 Crimes Act 1961?

(2) If so, did he breach that duty?

(3) If so, is he guilty of criminal negligence under s145?

Facts

[5] The facts of the case are relatively simple and in large part undisputed, the only real evidence of the events being given by the complainant in this matter.

[6] The complainant had met Mr Dalley through an Internet dating site. After having chatted via the Internet for a month or so, they arranged to meet sometime in April 2004. (I note that the charge alleges the event took place on or about 14 May 2004 but, as there is no issue about this, I do not consider the discrepancy in the dates material). They met in the Diva Bar, Wellington and decided that they would have sexual relations on another occasion. That took place the following day at the complainant's house. They had some non-alcoholic drinks and smoked a marijuana joint between them. Mr Dalley performed oral sex on the complainant. She then performed oral sex on him without using a condom. Mr Dalley did not ejaculate during the oral sex although the complainant said there was a "tiny bit" of pre-ejaculation leakage.

[7] They then decided to have vaginal intercourse. The complainant took a condom from the side of her bed. An issue then arises with her evidence. In her evidence in chief the complainant said that she then asked Mr Dalley whether he should wear a condom and his reply was:

> "Don't need to, don't have anything."

Her response was:

> "Well you don't know what I've got."

[8] She said that she was sure about those words. However, in cross-examination after the complainant had been asked about the extent to which she had smoked the cannabis cigarette and was reminded of the time lag between the events in question and the date when she made a statement to the police, she changed her evidence on this point. The complainant had been contacted by the police in November 2004 and made a statement to the police on 24 November 2004, some 7 months after the event. Her statement to the police included the comment in issue. In cross-examination she first said that she was absolutely positive that those were

the words he used. She accepted in cross-examination that in November 2004 she had found out about Mr Dalley's condition and was in shock and she said she did not want to remember what had happened. She then said that she could not remember what Mr Dalley's reply was when she produced the condom. She said she had been going to use one regardless of whatever he had said and that she did not give him an opportunity to comment but simply told him that a condom would be used. She acknowledged that he could have said that he wanted to wear a condom but she could not recall that. Her recollection on this point was tested comprehensively in re-examination by Mr Stone. However, the complainant maintained her changed position that he had not said anything at all when she produced the condom.

[9] I assessed the credibility of the complainant as high. She was calm and, other than on this point, consistent in her evidence. She was articulate and co-operative. Most importantly, I consider that she was honest in that she was open to considering the points put to her in cross-examination. I accept her explanation for the change in her story – that when she was first approached by the police in November 2004, she was in shock upon learning that she had had sexual relations with an HIV positive person. I accept that, when she was taken through the events on the evening in question in some detail in cross-examination, she admitted to herself that she was not positive about the words in issue and was truthful when she said that Mr Dalley had not made any comment at all because she had simply produced the condom and told him that it would be used. I find therefore that Mr Dalley made no comment when the condom was produced.

[10] The complainant's evidence then was that she put the condom on Mr Dalley. She considers herself experienced in putting condoms on men and took care to make sure it went on correctly. Mr Dalley wore the condom throughout vaginal intercourse and he ejaculated. The complainant took care when removing the condom and confirmed that it had not broken.

[11] There is no dispute that Mr Dalley was HIV positive at the time he had intercourse with the complainant. This was accepted by Mr Dalley at the status hearing into the charges. When Dr Blackmore gave evidence for the police, he confirmed after Mr Dalley gave him permission to answer the question, that he had

been providing ongoing outpatient care for Mr Dalley since November 2003. Evidence for the defence was given by Dr Meech, who noted that Mr Dalley had his viral load tested in November and December 2003, it being about 5,400 copies in November and 4,500 in December. That is considered a low viral load and is referred to later in this decision.

[12] Finally the complainant confirmed that on no occasion had she had any discussion with Mr Dalley about HIV. She said that, had she known he was HIV positive, she would not have agreed to have sexual intercourse with him. The complainant and Mr Dalley did not meet again.

[13] Evidence was also given by Detective Constable Matthew Cleaver. Following taking a statement from the complainant in November, he contacted and arrested Mr Dalley. Mr Dalley gave a statement. He in large part confirmed the evidence given by the complainant in this matter. He noted that he carried condoms with him all the time. When the words in issue were put to him, he denied them completely, saying they were absolute rubbish, complete lies and asked why she was doing this.

Evidence

[14] Medical evidence was given by two doctors for the police and one doctor for Mr Dalley.

[15] Dr Blackmore is a fellow of the Australasian College of Physicians and the Australasian College of Pathologists. Currently he works at Wellington Hospital and his speciality is infectious diseases and microbiology. That involves providing inpatient and outpatient care for persons living with AIDS. He was asked about the standard type of discussion and advice given to HIV patients to inform them about minimising the risk of transmission of HIV. He confirmed that the advice is relatively consistent between patients. He said that the themes of the discussions relate to minimising the risk of transmission, explaining when the risk of transmission is very low and when it is high. He confirmed that included discussion about the use of condoms. He said that anal and vaginal intercourse are regarded as

much higher risk than oral intercourse. In cross-examination he noted that vaginal intercourse without using a condom carried a risk of transmission of the virus of approximately 5.7%. That the risk is 8-20 per 10,000 exposures was put to him but, as he had not seen the relevant paper, he said he could not comment. He confirmed that condoms are estimated as approximately 80% effective. He agreed that oral intercourse without a condom carries virtually no risk of transmission of HIV although noted that would be tempered by the oral hygiene of the other party.

[16] Dr Margaret Sparrow then gave evidence for the Police. She is a fellow of the Australasian College of Sexual Health Physicians and a registered specialist with the New Zealand Medical Council in sexual health medicine. Her evidence related to a study undertaken by the Family Planning Association, the results of which were published in 1994. The primary focus of the study was breakage and slippage of condoms. The study involved just over 500 clients and approximately 3,700 events. The study reported an incidence of 10.9% of slips or breakages or leakage of condoms. In cross-examination she confirmed that those in the group who reported particular problems were generally younger and less experienced in length of time with using condoms. The study also noted that oral or anal intercourse carried a higher risk of breakage or slippage than vaginal intercourse. When lower incidents of problems were put to her as noted in another study, Dr Sparrow commented on the difficulty of comparing one study with another because of the potential difference in methodology employed, the experience, age and other factors concerned with the participants.

[17] Dr Sparrow noted the caution on the packet of condoms of the type used by the complainant and Mr Dalley. The words are:

> "Use a condom only once. Non-vaginal use of condoms may increase the risk of them slipping or being damaged. No method of contraception can provide 100% protection against pregnancy, HIV or sexually transmitted infections."

[18] The only evidence of the defence was that of Dr Meech. He is a member of the Royal Australasian College of Physicians, has lectured in communicable diseases in London, was a senior lecturer in medicine at the University of Otago and is currently a specialist with Health Care in Hawkes Bay. Amongst other

memberships, he was a member of the Advisory Committee to the New Zealand Department of Health on communicable disease control and the Chairman of the Advisory Committee on AIDS to the Minister of Health between 1985 and 1988. He was on the National AIDS Council between 1988 and 1994. He was Chairman of the Infectious Diseases Advisory Committee to the Ministry of Health from 1996 until recently and is currently Chairman of the AIDS Medical and Technical Advisory Committee, having held that position since 1995. He was author of the first report on AIDS in New Zealand to the Minister and Department of Health in 1985 and a second report in 1986.

[19] So far as oral intercourse where an HIV positive man does not use a condom is concerned, Dr Meech gave evidence of a Spanish study which took place over a period of 10 years and reported no cases of transmission. He said that transmission is biologically plausible. Therefore the risk is not zero, but it is so low that it does not register as a risk. The best guess estimates put the risk as somewhere around a 1 in 10,000 to 1 in 20,000 risk. I note that the issue of the other party's state of oral hygiene and the potential impact on transmission rates in this regard was not put to Dr Meech in cross-examination.

[20] Dr Meech also gave evidence as to the risk of transmission of HIV infection as a result of vaginal intercourse without a condom where the male is HIV positive. His evidence was that the risk of transmission is between 8-20 per 10,000 exposures, noting that other sources put that figure at .1% i.e. a 1 per 1,000 risk. He explained that is an average figure and is subject to variables. Of the biological variables, the most important is viral load, which is a measure of the amount of the virus that is present in the blood. His evidence was that people who have become recently infected within the first three months of their infection have a high viral load in excess of 100,000 copies of HIV per mil of plasma. Their infection rate is over 500 times higher than it is when a person has been infected for longer than 3 months and has a stable and low viral load. Viral load is not constant throughout the course of infection. It is high very early on, then drops after approximately 3-6 months and is relatively stable over a number of years until the immune system starts to deteriorate when the viral load again rises. Dr Meech noted that the second major biological variable is the presence of a congruent sexually transmitted infection, noting that all

recognised sexually transmitted infections can increase the transmission rates of HIV. Dr Meech was then asked about the impact of a low viral load on the risk of transmission of 8-20 per 10,000 exposures (being the risk for sexual intercourse by an HIV positive male without the use of a condom). Dr Meech noted that he would expect that to be at the lower end, more like 8-10 per 10,000 exposures. The impact of low viral load on transmission rates was not put to Dr Blackmore.

[21] Dr Meech's evidence was that international studies noted a figure of 87% protection as far as male to female transmission was concerned where the male used a condom. Dr Meech calculated that the risk of an HIV positive man transmitting the virus when a condom is used and vaginal intercourse takes place is 1 in 20,000.

[22] Dr Meech then gave evidence about the effectiveness of condoms noting that there are two sorts of failure, a manufacturing defect and user failures. Storage of the condom is important; non-exposure to excessive heat or other physical conditions that may cause deterioration in the latex; use within the expiry date; risk when opening the packet to avoid nicks in the latex membrane; how the condom is put on; any use of lubrication noting that only water-based lubrication is effective. He confirmed the evidence of Dr Sparrow that younger, inexperienced people seemed to have more problems. He referred to a study held in 2000 involving 180 participants which noted a breakage rate of 0.4% – 2.3%; slippage of 0.6% - 1.3% and combined breakage and slippage of 1.6% – 3.6% overall. He noted that the figures in Dr Sparrow's study were much higher than he would expect in contemporary studies as far as breakage and slippage are concerned.

[23] Finally Dr Meech was asked about advice given to people who are diagnosed as being HIV positive. He said the information he would routinely give is that the person should not engage in behaviours that will result in transmission of the virus. That is that they should not donate blood, they should not share drug injecting equipment and that they should use a condom each time they have a sexual experience and that the condom should be applied before any genital contact takes place. He noted that instruction is generally given as to the application of condoms and that the whole routine of how to use a condom is generally gone over. He noted it is not his practice routinely to give any statement around disclosure. He pointed to

the Australasian College of Sexual Health Physicians Contact Tracing Manual for sexually transmitted infections. That has a section on advice to be given to someone about prevention of transmission of HIV infection. While it gives precise information with respect to the prevention of transmission of infection through behavioural modification, it does not mention disclosure. The manual is published by the Australasian Society for HIV Medicine and developed in conjunction with the Australasian College of Sexual Health Physicians and the Australian National Council on AIDS. New Zealand physicians have had input. Dr Meech gave evidence that the manual is the closest he can point to as being a blueprint for action of an Australasian nature. There is a recommendation that a condom is used but no recommendation that an HIV person should disclose his or her status to a sex partner. He noted that the advice on use of a condom for oral sex has changed. It is now considered in the category of low risk and the advice is that a condom or dental dam could be used. It is not put in terms of hard advice but put forward as a possibility.

[24] Dr Meech was asked to give evidence as to the AIDS Foundation attitude on disclosure. He confirmed that the issue of disclosure had been considered but the AIDS Foundation was concerned that disclosure raises issues of stigmatisation and discrimination. He said the question was whether the public health need can be met without disclosure and that most people are convinced that the public health need i.e. the steps necessary to prevent the transmission of HIV, can be met without the requirement for disclosure. The concern is that, if disclosure of status is an outcome of testing, that might well have a very significant negative impact upon the number of people coming forward for testing. The primary objective is the prevention of transmission of HIV from a public health perspective and Dr Meech's evidence was that that can be achieved without disclosure by the regular use of condoms. He noted that the decision as to engage in sexual activity is a mutual decision and the onus of responsibility does not lie with the person who is HIV infected only. Rather, it is the responsibility of both parties.

Police submissions

[25] Mr Stone, for the police, made oral submissions. He noted that there was no denial from the defence that the duty under s156 exists. His submission was that the duty was not discharged by use of a condom. Rather, the duty to take reasonable precautions included the requirement for Mr Dalley to disclose to the complainant his status as HIV positive.

[26] Mr Stone noted that the sexual activity was not part of an ongoing relationship but was as a result of a casual connection which occurred as a result of use of the Internet.

[27] Mr Stone referred to the fact it was the complainant who provided the condom. He submitted that, although the evidence was that the risk of transmission of HIV was small, it was nevertheless a risk and that condoms can fail. In Mr Stone's submission, Mr Dalley was under a duty not to expose the complainant to any degree of risk that had not been wholly accepted and if he had, then he was guilty under s145. Mr Stone addressed the evidence of Dr Meech on disclosure by noting that his position came from a public health perspective which has the purpose of encouraging testing and treatment of HIV. He said that did not address specific duties that exist between individuals. Mr Stone pointed to two decisions which in his submission were relevant – *R v Mwai* [1995] 3 NZLR 149, a decision of the Court of Appeal and *R v Dica* [2004] 3 ALL ER 593, a decision of the English Court of Appeal. Mr Stone pointed to the emphasis in both cases on informed consent.

[28] In short, the police case was that Mr Dalley, knowing full well of his condition and the need for precautions, sought and met a partner through the Internet for the purpose of sexual activity. That resulted in a duty on him to take reasonable precautions which include that the other party should not take a risk in ignorance.

Defence submissions

[29] Dr Stevens for the defence also made oral submissions only.

[30] Dr Stevens also referred to the *Mwai* decision in support of the defence position. He referred to the duty contended by the Crown in that case in terms of s156 which was to use reasonable precautions and reasonable care by using a condom if engaging in sexual intercourse. His submission was that informed consent was not relevant.

[31] Dr Stevens considered that the issue of disclosure arose in the context of s145. He referred to the decision of the Supreme Court of Canada in *R v Cuerrier* (1998) 2 R.C.S. 371. Dr Stevens referred to the majority decision that there must be a significant risk of serious bodily harm before the duty to disclose will arise. However, he agreed that that discussion was in the context of a consideration of fraud (page 432).

[32] Dr Stevens then referred to a decision of the Supreme Court of Nova Scotia, *R v Edwards* (2001) NSSC 80. He pointed to the acknowledgement by the Crown in that case that unprotected oral sex is conduct at a low risk that would not bring it under the relevant provision of the Canadian Civil Code (which related to aggravated assault). In that case, the Crown acknowledged that, had unprotected oral sex only taken place, no charges would have been laid. He pointed to the comment in that case that, if failure to disclose a contagious disease before engaging in protected sex is to be a criminal offence, it is for the legislature to so define such activity (paragraph 25).

[33] A consideration of the Canadian cases led Dr Stevens to conclude that, in his submission, before it can be said that Mr Dalley was under any duty under s156, the Court must find that there was a significant risk activating that duty. Dr Stevens then referred to the evidence as to whether it had been established that there was a significant risk. He agreed with the comments in the *Edwards* decision, which were also made in the *Dica* case that, if disclosure is to be an obligation, then it is for Parliament to decide.

Analysis

1. Was Mr Dalley under a duty pursuant to s156 Crimes Act 1961?

[34] The *Mwai* case considered the duty under s156 of the Crimes Act. That case concerned failure to disclose to the complainants that the appellant was infected with the HIV virus when he had not used a condom on any relevant occasion. The Court of Appeal held that the duty under s156 is merely no more than a particular aspect of the more general common law duty not to engage in conduct which one can foresee may expose others to harm. The Court of Appeal found that there was a strong argument that the statutory duty was established on the facts of that case but in any event the general duty at common law plainly applied.

[35] I adopt the reasoning of the Court of Appeal in the *Mwai* case and conclude that Mr Dalley was under a duty. I do not accept the submission of Dr Stevens that, for the duty to apply, there must be a significant risk. His submissions on that point relied on the Canadian case of *Cuerrier* which concerned whether non-disclosure of HIV status can constitute fraud vitiating a partner's consent to sexual intercourse. It was in the context of a consideration of that question, that there was a discussion as to the duty to disclose and the issue then arose as to how significant was the risk of transmission of the virus. I do not consider that relevant to whether there was a duty under s156. The words of s156 are clear. Where anyone has under his charge or control anything which, in the absence of precaution or care, "may endanger human life" he is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger. There is nothing in those words which implies that there must be a significant risk of the danger. Clearly the HIV virus present in semen may endanger human life and accordingly the duty applies.

2. If so, did he breach that duty?

Oral intercourse

[36] Did Mr Dalley breach the duty under s156 to take reasonable precautions against and to use reasonable care to avoid endangering human life by having unprotected oral intercourse with the complainant?

[37] There was no real dispute between the experts as to the low risk of the transmission of the virus as a result of oral sex without a condom. The police witness, Dr Blackmore, accepted that the risk was virtually none. He tempered that by saying that the risk for a partner with bad oral hygiene would be higher. This was neither put to the defence expert, Dr Meech, nor was there any evidence about the state of oral hygiene of the complainant.

[38] In any event the evidence of the complainant was that there was no ejaculation, only a "tiny bit" of pre-ejaculation fluid.

[39] The risk of transmission of the virus as a result of oral intercourse without a condom is not zero because it is biologically possible, but it is so low it does not register as a risk. In any event Mr Dalley did not ejaculate. On the basis of those 2 factors I find that reasonable precautions against and reasonable care to avoid such danger were taken by Mr Dalley.

Vaginal intercourse

[40] Was the use of a condom sufficient to constitute reasonable precautions against and reasonable care to avoid the transmission of the HIV virus?

[41] In the case of *Mwai* the Crown formulated the duty under s156 on the basis that reasonable precautions and reasonable care required that the appellant in that case use a condom if engaging in sexual intercourse. There was a discussion as to whether it would be more appropriate to see the duty as one to disclose the condition. However, that conversation was in the context of a failure to use a condom and therefore related to a potential argument that there would be no duty if a sexual

partner consented to the risk. However, as the evidence in this case established, there is a significantly greater risk associated with unprotected sexual intercourse than protected. While not the issue in that case, the implication of the *Mwai* decision is that reasonable precautions and reasonable care require the use of a condom.

[42] The English decision of *Dica* is also of limited relevance. It concerns a charge of inflicting grievous bodily harm. Much of the case concerned a consideration of consent and whether consent would provide a defence to the charge. The English Court of Appeal were referred to the cases of *Mwai* and *Cuerrier* and noted that, while the cases were of interest, the Court was concerned to decide the law in their jurisdiction only. The same applies in this case. The relevant law is that set out in the Crimes Act 1961 and, while the overseas cases are of interest, they are not directly relevant.

[43] It seems to me that most people would want to be told that a potential sexual partner was HIV positive. There may well be a moral duty to disclose that information. There is however a difference between a moral duty and a legal duty, the legal duty in this case being to take reasonable precautions against and use reasonable care to avoid transmitting the HIV virus. I note that the duty at common law is essentially the same – to take reasonable steps. (*R v Lunt* (2003) 20 CRNZ 681).

[44] The expert evidence was relatively consistent. The risk of transmission of the virus where the male is HIV positive and does not use a condom is relatively low. The prosecution say that it is approximately 5.75%. The defence put the risk at even lower, 4 different trials putting the risk between 8-20 per 10,000 exposures; other sources putting it at .1%. The evidence for the defence was extensive, comprehensive and persuasive on this point.

[45] Condoms are 80%-85% effective, thus significantly reducing the risk which, even using the prosecution figures, is low. Condoms are not guaranteed not to fail – either by a manufacturing defect or a user problem.

[46] In this case a condom was used. It was produced by the complainant but the fact is that a condom was used. The complainant put it on and there was no evidence that she had not put it on correctly.

[47] The evidence was that, so far as public health needs are concerned, the steps necessary to prevent the transmission of HIV can be met without the requirement for disclosure. In other words, the use of a condom for vaginal intercourse is considered sufficient.

[48] I consider that I must attach significant weight to the approach of the relevant health professional bodies in this area. There was no evidence to suggest that experts in the area consider that prevention of the transmission of HIV requires disclosure. Added to that is the evidence of relatively low risk of transmission when a condom is used when vaginal intercourse takes place.

[49] The duty under s156 is to use "reasonable" precautions and care. The duty is not to take failsafe precautions. Reasonableness is an objective standard. On the basis of the evidence, I find that in the circumstances Mr Dalley did take reasonable precautions and care.

3. If so, is he guilty of criminal nuisance under s145?

[50] I have found that Mr Dalley took reasonable precautions in respect of both charges. Accordingly he cannot be guilty of criminal nuisance because he had not omitted to discharge a legal duty.

Decision

[51] For the reasons given both charges are dismissed.

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Judge S E Thomas
District Court Judge

Signed at am/pm on 2005