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

Summary: *R. v. Wright*[1]

Aggravated sexual assault/ non-disclosure/ unprotected vaginal sex/ viral load/ condom use

If the viral load of the accused at the time of the sexual relations is known or can be estimated, then it will be very relevant to determining whether there was 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 273

> (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.
>
> (2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable
>
> […]
>
> (b) in any other case, to imprisonment for life.

[1] *R. v.Wright*, 2009 BCCA 514 [*Wright*].
[2] *Ibid*. at para. 29,32.

Court and Date of Decision

The Court of Appeal for British Columbia issued its judgement on November 19, 2009.

Parties

Wright was the appellant before the British Columbia Court of Appeal and the Crown was the respondent. There were three female complainants in the Wright case.

The Canadian HIV/AIDS Legal Network and the British Columbia Persons with AIDS Society (BCPWA) jointly intervened in this case.

Facts

In February 1998, Wright was informed by his doctor that he was HIV positive. That physician referred him to an infectious disease specialist. After three years, the family physician also referred Wright to a neurologist because of his peripheral neuropathy, a condition known to be a side effect of the antiretroviral treatment.

With respect to his medical situation, Wright stated that he had taken antiretroviral medication since being diagnosed in 1998, except for a period of one and a half years. That period covered the time that he had sex with each of the complainants. Wright testified that he saw an HIV specialist (different from the infectious disease specialist), who told him that he did not need to take antiretrovirals because his viral load was undetectable. He could not recall the name of this doctor.

Wright engaged in sexual intercourse with the three complainants, P.S., D.C. and C.N., during the years 2004, 2005, and 2006. Each one testified that Wright failed to disclose his status and that they had sex with him without a condom.

According to Wright, he had been forthright with his sexual partners since learning about his HIV status in 1998. His evidence was that he told each of the complainants about his HIV-positive status before engaging in sexual contact with them. He also testified that with respect to his sexual intercourse with D.C, she had given him a condom and that he had worn it during sexual intercourse.

D.C. testified that she had sex with Wright only one time. She stated that he had ejaculated during vaginal intercourse, and she knew this because she later felt his ejaculate on her leg. She stated that she knew that Wright had not used a condom because she had taken one out of her bag and put it on the floor; the condom was still there after they had engaged in intercourse. She stated that she would not have had sex with Wright had she known that he was HIV-positive.

P.S. testified that Wright had ejaculated a few times while they were having intercourse. In cross-examination, she stated that they did not use a condom, but agreed that the only basis for saying that he had ejaculated was that she had “gotten wet a few times” and that he had gone to the bathroom after intercourse, presumably

to clean himself up. She stated that she would not have had sex with Wright had she known that he was HIV-positive.

C.N. testified that she had unprotected sexual intercourse with Wright. She stated that she would not have had sex with Wright had she known that he was HIV-positive. However, in cross-examination, she agreed with the suggestion that she had known that he was HIV-positive and had sex with him anyway.

Proceedings

Wright was charged with three counts of aggravated sexual assault under sections 265 and 273 of the Criminal Code for not disclosing his status before having sex.

To support a charge of "aggravated sexual assault", the Crown is required to prove that there was an "assault" — i.e. that Wright had applied force intentionally to the complainants without their consent. Because the complainants had agreed to engage in sexual intercourse with the respondent, the Crown argued that the consent of each of the three complainants to sexual intercourse was vitiated by Wright's fraud: having engaged in unprotected vaginal sex without disclosing his status, Wright dishonestly exposed the complainants to a "significant risk of serious bodily harm", and therefore, according to the Supreme Court of Canada's earlier decision in *Cuerrier*,[3] had committed the offence of assault.

Wright made an application for a directed verdict of acquittal on the basis that the Crown had not led any evidence as to his viral load and thus, did not prove beyond a reasonable doubt that sexual intercourse represented a significant risk of HIV transmission. That application was dismissed.

In February 2008, Wright was found guilty of aggravated sexual assault against complainants P.S. and D.C. He was acquitted of aggravated sexual assault against C.N.

Wright filed an appeal against the trial level decision before the BC Court of Appeal. The Canadian HIV/AIDS Legal Network and the BCPWA jointly intervened to make submissions regarding the question of the appropriate scope of criminal sanctions for HIV non-disclosure.

The three appellate justices unanimously dismissed Wright's appeal. In April 2010, the Supreme Court of Canada denied leave to appeal this decision.

Legal arguments and issues addressed

The Court of Appeal for British Columbia was called upon to consider the following four grounds of appeal, the first two of which are the most relevant and are discussed below:

[3] *R. v. Cuerrier*, [1998] 2 S.C.R. 371 [*Cuerrier*].

(1) That the judge should not have dismissed the application for a directed verdict;
(2) That the judge should have instructed the jury that, if it had a reasonable doubt as to whether Wright had worn a condom during sexual intercourse with D.C., they were required to acquit him on that count;
(3) That judge should have instructed the jury to disregard Dr. Conway's testimony concerning the unreliability of reports from HIV-infected persons in assessing the appellant's credibility; and
(4) That the judge should not have effectively told the jury that Dr. Conway was of the opinion that any exposure to the HIV virus through sexual contact created a significant risk of serious bodily harm.

1- <u>The Dismissal of the Directed Verdict and the viral load issue</u>

Wright made an application for a directed verdict on the basis that the Crown had not proved beyond a reasonable doubt that there was a significant risk of transmission because it had failed to produce evidence specifically about the accused's viral load.

The defence relied on the evidence of the Crown's expert that showed that undetectable viral load can dramatically reduce the risk of HIV transmission.

According to the expert, the average risk of transmission for unprotected vaginal intercourse is approximately 0.5%. He also stated that undetectable viral load can reduce the risk of transmission by 100 to 1,000 times and referred to a statement issued in 2008 by the Swiss Federal Commission on HIV/AIDS that concluded that the risk of transmission by a person with an undetectable viral load could fall to approximately 1 in 100,00 (or 0.001%).

The defence pointed out that according to Dr. Conway, 75% of HIV-infected people receive the maximum benefit of antiviral medication in Canada and the accused had been on antiretrovirals in 2001. Therefore, there was a reasonable probability that his viral load was at the low category of risk of transmission between 0.001% (risk of transmission where viral load is undetectable) and 0.5% (average estimate of the risk of transmission in case of vaginal unprotected sex), and thus that he did not expose the complainants to a significant risk of HIV transmission. The defence's argument was based on the premise that the 0.5% estimate did not apply to people receiving treatment and thus having a low viral load.

The Court of Appeal rejected this reasoning. First, the Court rejected the premise that the 0.5% risk applies only to persons with HIV that have not received treatment. It stated instead that the 0.5% average estimate provided by Dr Conway was "a composite average taking into account all of the factors that can affect the risk of transmission, including the factor of treatment"[4], and thus low viral load.

Curiously, the Court added that "even if [it] [was] mistaken in [its] interpretation of Dr Conway's evidence, it is an interpretation the jury could reasonably have given to the evidence."[5]

[4] *Wright, supra* note 1 at para. 26.
[5] *Ibid*. at para. 27.

Secondly, the Court considered that the medical expert's estimate of a 0.5% per-act risk of transmission was sufficient evidence to prove, beyond a reasonable doubt, that there was a significant risk of HIV transmission. It found that in the absence of specific evidence on the accused's viral load, an average estimate of the risk of transmission for unprotected vaginal sex based on "average viral loads" could be sufficient evidence of a significant risk of HIV transmission. It further justified its reasoning by explaining that it was open to the jury to conclude in this case that the accused was not receiving treatment at the relevant time or did not benefit from such treatment.

The Court added that the accused can adduce evidence as to his own viral load to support the inference that a risk of transmission was less than "significant" and expressly stated: "If viral load of the accused at the time of the sexual relations is known or can be estimated, then it will be very relevant to determining whether there was a significant risk of serious bodily harm" (emphasis added).[6]

The Court concluded that in this case, the judge did not err in dismissing the appellant's application for a directed verdict.

2- The Use of a Condom with D.C.

With respect to one complainant, the accused argued that, given the medical expert's evidence that the use of a condom could reduce the risk of transmission to 0.01%, Wright argued that if there was a reasonable doubt as to whether a condom was worn with the complainant D.C., there was a reasonable doubt as to whether he exposed her to "a significant risk of serious bodily harm". He referred to the statement made by Justice Cory in *Cuerrier,* that "…the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant…"[7]

However, the Court of Appeal refused to accept that condom use would automatically preclude criminal liability in case of non-disclosure, stating that it is a question of fact in each case whether the use of a condom reduces the risk of harm below the level of significant risk, thereby removing the requirement to disclose.

To support its conclusion, the Court of Appeal cited the case of *R. v. J.T,* in which it had previously held that:

> *Cuerrier* laid down a proposition of law: a significant risk of substantial harm will vitiate consent when combined with deceit. It did not, in my opinion, purport to prescribe for all cases what facts will determine the significance of the risk.[8]

Thus, the judge did not err in leaving it to the jury to determine whether potential use of a condom in the sexual intercourse with DC raised a reasonable doubt as to whether there had been a significant risk of serious bodily harm.

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[6] *Ibid*. at para. 32.
[7] *Cuerrier, supra* note 3 at para. 129.
[8] *R. v. J. T*, 2008 BCCA 463.

Comments

The decision of the BC Court of Appeal provides additional guidance for the application of the test of a "significant risk of serious bodily harm" established in *Cuerrier* and may therefore have an important impact on the application of the criminal law in Canada to HIV non-disclosure.

A defence based on viral load?
The Court's decision is one of the first in Canada to deal with the question of viral load and its impact on the assessment of the risk of transmission.

Science has evolved since *Cuerrier* and it became clear that undetectable viral load dramatically reduces the risk of HIV transmission. This is why the defence argued that in the absence of specific evidence on the accused's viral load, it could not be proved beyond a reasonable doubt that unprotected sex represented a significant risk of HIV transmission.

The Court of Appeal rejected this argument stating that in the absence of specific evidence regarding the accused's viral load, an average estimate of the risk of transmission could be sufficient to prove a "significant risk". There is no need for the Crown to provide specific evidence on the accused's viral load.

However, it is open to the accused to introduce evidence about his own viral load and the Court recognised that if viral load at the relevant time is known or could be estimated, it would be very relevant to the determination of criminal liability.

The Court therefore acknowledged that viral load should have an impact on criminal liability. It refused to put the burden of proof of a detectable viral load onto the Crown but seemed to allow a "viral load defence" when the accused's viral load is undetectable and thus, reduces the risks of transmission.

No automatic "condom defence"
The decision of the BC Court of Appeal on the issue of condom use raises more concerns. *Cuerrier* had left this matter open by stating that it "might" be enough to reduce the risk below a "significant" risk. (In that case, the charges were based on allegations of unprotected vaginal sex; the majority of the Court did not need to rule definitively on the significant of condom use since it was not directly at issue on the facts of that case.) Since *Cuerrier*, Canadian Courts have not clarified the law as regard to condom use. Several decisions have suggested that there is no duty to disclose before engaging in protected sex but at least one other reported decision *(Mabior)* has suggested that the use of condom was not sufficient.

The BC Court of Appeal refused to accept that condom use would automatically remove requirement to disclose. Instead, the Court ruled that it is a question of fact in each case to determine whether the use of condom has reduced the risk of HIV transmission below the "significant risk" threshold.

As a result, this decision leaves considerable uncertainty in the law for people living with HIV. Practically, it makes it impossible to know in advance whether engaging in

protected sex without disclosing one's status will constitute an offence or not. It will be for the trial judge or jury to decide, in each case, whether the use of a condom sufficiently reduced the risk of transmission.

Such a decision may lead to great unfairness in the application of the law, as one person may be convicted for failing to disclose prior to protected sex while another may be acquitted.

In *Cuerrier*, Justice McLachlin had raised this concern in her criticism of the "significant risk" test set out by Justice Cory for the majority:

> When is a risk significant enough to qualify conduct as criminal? In whose eyes is "significance" to be determined – the victim's, the accused's or the judge's? The criminal law must be certain. If it is uncertain, it cannot deter inappropriate conduct and loses its raison d'être. Equally serious, it becomes unfair. People who believe they are acting within the law may find themselves prosecuted, convicted, imprisoned and branded as criminals. Consequences as serious as these should not turn on the interpretation of vague terms like "significant" and "serious."[9]

By saying that the use of condom would not automatically remove the duty to disclose, the Court also obliges, *de facto*, people living with HIV to disclose their status even when they use a condom if they want to avoid any risk of prosecutions. In *Cuerrier*, the Supreme Court made it clear that people living with HIV don't have a general duty to disclose given that such duty only exists when there is a significant risk of HIV transmission. But, by refusing to draw the line between protected and unprotected sex the Court of Appeal may have imposed, *de facto*, a general duty to disclose HIV positive status before engaging in sexual intercourse.
Requiring (even indirectly), to disclose HIV positive status *in addition to* practicing safer sex is an unnecessarily burdensome on people living with HIV, particularly given the challenges of disclosure, including stigma, discrimination and fear of rejection in their personal relationships.

Finally, the Court's interpretation of the prosecution's evidence on HIV risks of transmission is questionable and the Court itself recognises that it may be mistaken. The Court states that an average estimate of 0.5% risks of transmission for unprotected vaginal sex includes factors like antiretroviral treatment and thus, undetectable viral load. Such reasoning is surprising given that 0.5% is already a high estimate for unprotected vaginal sex. Indeed, the value of 0.1% per act is more commonly cited as the risk of HIV transmission during unprotected vaginal sex and recent analysis of existing published studies has provided a male to female estimate of 0.08% per act in the absence of antiretroviral treatment.[10] It is therefore doubtful that the 0.5% average estimates could take into account the fact that undetectable viral load achieved by treatment can reduce the risk of transmission by 100 to 1000 times.

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[9] *Cuerrie*r, supra note 3 at para. 48.
[10] M. C. Boily, R. Baggaley, B. Masse, et al., "Heterosexual risk of HIV-1 infection per sexual act: systematic review and meta-analysis of observational studies", *Lancet Infectious Dis*., 9(2) (2009): pp.118-29

But such reduction was presented by the Crown expert who referred to a Swiss statement that concluded that, the risk of transmission by a person with an undetectable viral load could fall to 1 in 100,00 (or 0.001%) in some circumstances. The Court expressly stated that “even if [it] was mistaken in [its] interpretation of Dr Conway’s evidence, it is an interpretation that the jury could reasonably have given to his evidence.” The Court therefore accepts misinterpretation of scientific evidence that may be erroneous, thus contributing to misconceptions around HIV and the risks of transmission.

It is also very regrettable that a Court of Appeal can admit that the determination of criminal liability may be based on erroneous interpretation of experts’ evidence on the sole ground that it is left to the jury to decide a case.