Northern Disclosure

Canadian Supreme Court upholds criminalizing HIVers for consensual sex.

February 1, 1999 By Arthur S. Leonard

The uproar over Nushawn Williams, who allegedly infected many girls and young women in rural New York with HIV in 1997, reignited a national debate over criminalizing HIV transmission. Politicians under pressure to “do something” to protect the public are quick to promote laws making it a crime for people who know they have HIV to expose or infect others to the virus. Advocates argue that such legislation does little as a deterrent, while it undermines the message that each HIVnegative individual should protect himself or herself by practicing safer sex.

General criminal-assault statutes may already apply in cases where the HIV positive have condomless sex without disclosure. But some prosecutors, concerned about the difficulty of proving the intent to injure required by such laws, pursue passage of more specific statutes such as a Michigan law that makes it a felony for people who know they have HIV to have penetrative sex without disclosing first.

But what sense does it make to prosecute an HIV positive person for having unprotected sex even when the virus is not transmitted?

Canada’s Supreme Court weighed in on this question last September, in R. v. Cuerrier. Prosecutors brought aggravated-assault charges against Henry Cuerrier for having sex with two women and without using a condom or disclosing his serostatus. So far, both women test negative. Should Cuerrier be held criminally liable for “exposing” them to HIV?

Canada’s aggravated-assault law applies to nonconsensual sex only. Cuerrier’s sex partners consented to sex. But consent is not valid if obtained by fraud, and the prosecutor argued that Cuerrier obtained consent fraudulently—by failing to disclose his status. Disagreeing, a trial court and the British Columbia Court of Appeal dismissed the charges.

But the Canadian Supreme Court unanimously reversed the decision, holding that Cuerrier should incur criminal penalties. The court ruled that people with HIV have a legal duty to disclose their status to get valid consent to unprotected sexual intercourse. Justice Peter deCarteret Cory wrote that “the failure to disclose HIV positive status can lead to a devastating illness with fatal consequences. In those circumstances, there exists a positive duty to disclose. The nature and extent of the duty…will always have to be considered in the context of the particular facts

presented.” Cory intimated that had Cuerrier used condoms with his partners, or had he been infected with a less serious condition such as gonorrhea, this duty might not have applied.

That the women were apparently not infected was irrelevant. It was enough for the prosecution 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.” This decision not only places the burden of negotiating informed consent entirely on the HIV positive but ignores uninfected people’s responsibility to protect themselves. Canadian AIDS advocacy groups argued that a better—and less punitive—public health strategy would be to teach everybody safer-sex techniques and how to feel as comfortable as possible when discussing them with sexual partners.

Cory disagreed, contending that because Cuerrier rejected a nurse’s safer-sex and disclosure advice on the grounds that it would destroy his sex life, this case “provides a classic example of the ineffectiveness of the health scheme.” Cory also argued that imposing criminal penalties would not deter people from getting tested, insisting they are motivated to take advantage of combination therapy. Finally, Cory refuted assertions that the court’s decision would stigmatize people with HIV in general because only those who would be so irresponsible as to have sex without disclosing their serostatus would, he claimed, bear a stigma.

This was the first decision by any nation’s highest court to find such a duty, but there are similar decisions elsewhere, including in the United States. In August, the Michigan Court of Appeals upheld the conviction of Brenda Lee Jensen for “exposing” sex partners to HIV, and HIV positive people have been sentenced to prison in other states under similar circumstances.

AIDS advocates continue to argue that public education would do more to stop transmission than automatic criminalization, but they are facing an increasingly punitive U.S. legal and political system. Politicians seem no more ready to embrace a rational policy in the war on HIV than in the failed war on drugs.

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