

The Post-*Cuerrier* Fallout

Selected Legal Issues for Public
Health Related to *Cuerrier*

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Introduction

⌘ HALCO is a poverty law clinic funded by: Legal Aid Ontario pursuant to the *Legal Aid Services Act*; and by the Ministry of Health and Long-Term care.

⌘ HALCO does NOT practice criminal law so we have not been counsel on any of the criminal cases.



Introduction

⌘ However, we receive about 2300 requests for services, information and advice yearly, primarily from PHAs but also from frontline service providers, including public health.

⌘ So this presentation is intended to address some of the legal issues that we have seen that have arisen as a result of the Supreme Court's decision in *Cuerrier*.

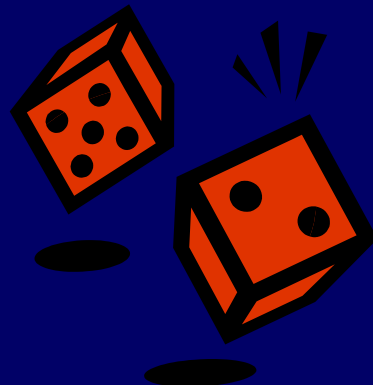


Post-*Cuerrier* Fallout Issues

1. "Do I have to call the police?" - the Duty to Warn Question
2. Consent to HIV Testing in the Post-*Cuerrier* Era
3. Media, Stigma and Police Press Releases in Ontario - Are we discouraging testing or treatment?

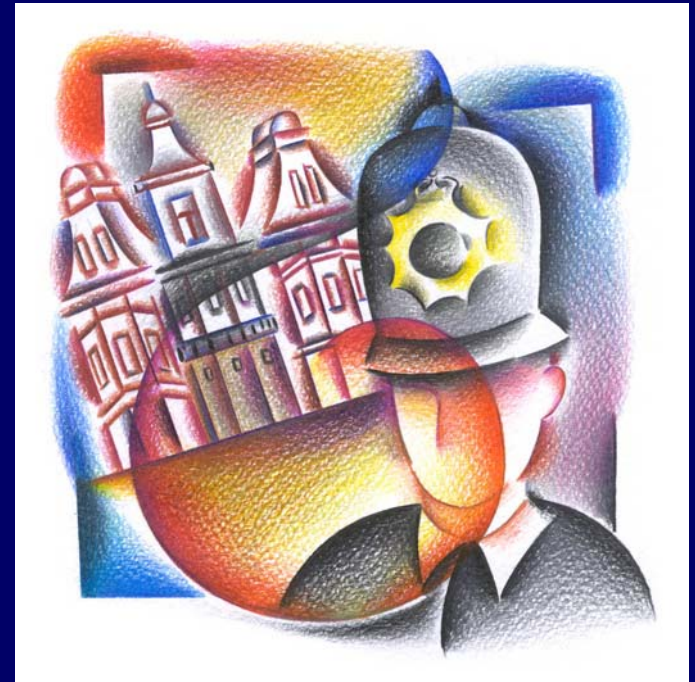
Post-*Cuerrier* Fallout Issues

⌘ One of the very first calls I received after *Cuerrier* was released, was from a public health unit asking about whether or not they had to call the police about an HIV+ patient who was believed to be putting others at risk.



Post-Cuerrier Fallout Issues

- ⌘ This issue is often referred to as "a duty to warn".
- ⌘ In Canada, in general, there is no positive obligation to call the police when one believes a crime has been committed.



Post-*Cuerrier* Fallout Issues

⌘ There are some specific statutes that create positive obligations to report things - public health legislation is one of those.



⌘ But in Canada, there is no common law obligation, outside of a specific statute, that imposes a legal "duty to warn".

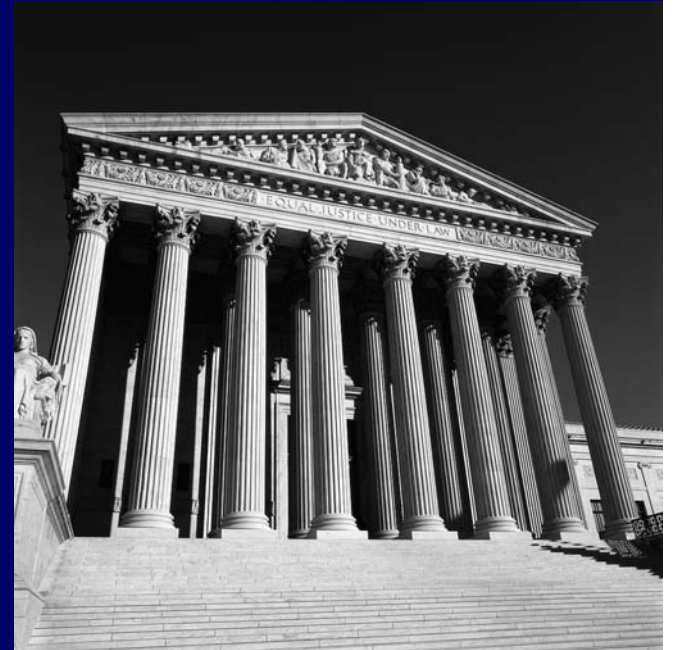
Post-*Cuerrier* Fallout Issues

- ⌘ In *Buch v. Armory Mfg. Co* the Court stated: "with purely moral obligations the law does not deal."
- ⌘ In *Gautret v. Egerton*, it was stated "no action will lie against a spiteful man who seeing another running into a position of danger, merely omits to warn him".
- ⌘ In *Horsely v. McLaren*: "It is still the modern law of negligence that, there is no general duty to come to the rescue of a person who finds himself in peril ..."

Post-*Cuerrier* Fallout Issues

⌘ So there is no positive obligation to warn strangers in danger at common law - the only positive obligations that apply to people are in statutes like Ontario's *Health Protection and Promotion Act*.

⌘ The real issue behind these questions is either "Can I disclose if I want to?" or "Can I be sued if I do or don't?"



Can I disclose if I want to?



⌘ If you live in a province where a statute does not address this issue at all, then the leading relevant case in Canada answering this question is *Smith v. Jones*.

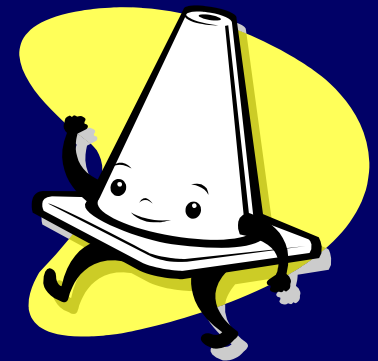
Can I disclose if I want to?

- ⌘ The Supreme Court stated there is a common law **DISCRETION** to disclose confidential information.
- ⌘ At common law the discretion to release privileged information exists if all of the following conditions are met:
 - ⌘ there is a risk of harm to an identifiable person or group
 - ⌘ the risk is imminent (urgent)
 - ⌘ the harm threatened is serious
 - ⌘ the disclosure is made in a manner designed to least impact on the rights of the patient.

Can I disclose if I want to?

⌘ In Ontario this issue has been resolved for health care personnel who provide health services due to the provisions in the new *Personal Health Information Protection Act*.

⌘ Section 40 mirrors closely the discretion to disclose confidential information in *Smith v. Jones*, and s. 70 protects health care staff who disclose in good faith and reasonably from all liability.



Can I be Sued if I Do or Don't?

- ⌘ There is really only one reported case in Canada involving a service provider and liability for not telling someone they were at risk of HIV.
- ⌘ That case is *Pitman Estate v. Bain* and a physician was held partially liable. But it involved a situation where a physician failed to tell his patient that the patient may have been exposed to HIV. It was not about failing to tell a third party non-patient of a potential risk.
- ⌘ So there really are no cases in Canada where a service provider has been found negligent for not breaching confidentiality to warn a third party.

Consent to Testing

⌘ Once again, you may live in a province which has a statute that speaks to consent for testing, or you may not, in which case the common law would apply.



Consent to Testing

⌘ In Ontario, in February 1999, the Ministry of Health sent all MOHs a notice after *Cuerrier* about the decision. It stated in part:

⌘ "Where appropriate, a counsellor may wish to discuss the *Cuerrier* decision with a client."



Consent to Testing

⌘ But consent to all medical testing in Ontario is statutorily defined in the *Health Care and Consent Act* which states that diagnostic tests are included in the definition of "treatment", there can be no treatment without consent, and for consent to be truly informed and voluntary the patient must be informed of all material risks and side effects.

Consent to Testing

⌘ So the legal question in testing becomes - is the potential and future risk of criminal liability for non-disclosure of HIV a "material risk" that must be discussed with the patient before their consent can be said to be legally valid?



Consent to Testing

⌘ The same issue arises at common law. A physician can be sued in negligence if a patient is not warned in advance of material risks that the reasonable patient would want to know in all the circumstances before consenting.



Consent to Testing

⌘ Certainly I think most people would say that a reasonable person going for HIV testing would want to know that non-disclosure of HIV+ status can result in criminal consequences. The legal question however is: is a non-medical risk, like a known risk of potential legal liability, a "material risk", or is "material risk" confined only to physical side-effects?

Consent to Testing

- ⌘ Although I think the answer to this question is yes, I am not aware of any case law in this area and it remains an open question.
- ⌘ That being said, the testing guidelines produced by the CMA make specific reference to talking to patients about risks associated with HIV testing that include non-physical or medical risks:
 - ⌘ "Some risk of losing partners and friends, or denial of employment, housing, insurance, educational and travel opportunities"



Media, Stigma Press Releases

⌘ A development in Ontario that occurred after *Cuerrier* has involved press releases by police departments, identifying HIV+ accuseds and publication of their photographs.

⌘ These press releases have occurred pursuant to amendments to the *Police Services Act* made by the former Progressive Conservative government.



Media, Stigma Press Releases

⌘ Subsection 41(1.1) of the *Police Services Act* states:

⌘ Despite any other Act, a chief of police, or a person designated by him or her for the purpose of this subsection, may disclose personal information about an individual in accordance with the regulations.





Media, Stigma Press Releases

O. Reg. 265/98 states:

2. (1) A chief of police or his or her designate may disclose personal information about an individual to any person if,
 - (a) the individual has **been convicted or found guilty** of an offence under the Criminal Code (Canada), the Controlled Drugs and Substances Act (Canada) or any other federal or **provincial Act**;
 - (b) the chief of police or his or her designate who would disclose the personal information **reasonably believes that the individual poses a significant risk of harm to other persons or property**; and
 - (c) the chief of police or his or her designate who would disclose the personal information **reasonably believes that the disclosure will reduce that risk**.
- (2) If subsection (1) applies, the chief of police or his or her designate may disclose **any personal information** about the individual that the chief of police or his or her designate **reasonably believes will reduce the risk posed by the individual**.



Media, Stigma Press Releases

O. Reg. 265/98 states:

3. (1) A chief of police or his or her designate may disclose personal information, as described in subsection (2)... to any person if the individual has been charged with... an offence under the *Criminal Code* (Canada), the *Controlled Drugs and Substances Act* (Canada) or any other federal or provincial Act.

(2) If subsection (1) applies, the following information may be disclosed:

1. The individual's name, date of birth and address.
2. The offence described in subsection (1) with which he or she has been charged...

Media, Stigma Press Releases

- ⌘ The negative and often sensationalistic stories in the media concerning the criminal cases involving HIV have had a real and negative impact on PHAs.
- ⌘ Just last week for example, I received a call from someone who had just tested HIV+ anonymously, who explicitly did not want to go for medical treatment because he was afraid that if public health knew he was HIV+, one day he might end up splashed across the news.

Media, Stigma Press Releases

⌘ So one of the side-effects of criminalisation of non-disclosure has been negative and sensationalistic stories in the media, and the side-effect of that has been an increase in feelings of stigmatisation by PHAs.



⌘ And that, I think, has implications for prevention efforts.

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