

Concurrent Session A: HIV/AIDS—The Role of Criminal Law in Public Health

Moderator: Dr. Brian Cornelson

HIV Family Practice Clinic, St. Michael's Hospital, Toronto

Dr. Brian Cornelson, from the HIV Family Practice Clinic at St. Michael's Hospital in Toronto, welcomed participants to the session.

Jerry Wiley

Toronto Police Services

Jerry Wiley, from Toronto Police Services, provided some background on an important court case from British Columbia known as *R. v. Cuerrier*. This case involved a man who tested positive for HIV but did not disclose this information to two women with whom he had sexual relationships. The two victims who had voluntary sex with the accused both said they would not have engaged in unprotected sex with him had they known he was HIV-positive.

The Supreme Court ruled that the accused's failure to disclose his HIV status constituted fraud and negated their consent, Mr. Wiley said. Because the Supreme Court is the highest court in Canada's legal system, its rulings are the last word on the law. "So when they have spoken, they have spoken *Cuerrier* is the law now."

Both the trial judge and the appeal judge in the *Cuerrier* case upheld the amendments to the Criminal Code, stating that nature and quality were not intended to remove the principal from the law and that the categories remained the same including nature and quality. The Supreme Court did not agree and concluded that when examining consent it was no longer necessary to consider whether fraud involved nature and quality.

Fraud, as defined by the Criminal Code, means dishonest deprivation, which applies in the *Cuerrier* case: the accused was dishonest about his HIV status, and deprivation lies in the fact that the complainants could have been infected from unprotected sex.

"Without disclosure, there cannot be true consent," Mr. Wiley commented. "The person must be consenting to have sex with a partner who is HIV-positive."

With respect to criminal law in terms of public health, the idea is to protect the public from individuals who refuse to comply. Mr. Wiley said the victim has to make a complaint to the police, who then must execute a search warrant for medical records. The Crown has to prove that the accused was aware of his HIV status and refused to disclose that information. It also must prove that the victim would not have consented to

unprotected sex had the accused made his HIV status known and that the unprotected sex had to have the effect of endangering the victim's life.

Mr. Wiley cited other cases after *R. v. Cuerrier* that went to the Supreme Court. In one, the accused had sex for awhile before finding out he was HIV-positive, and his partner became infected but didn't know exactly when. That case resulted in a conviction for attempted aggravated assault.

While all the judges on the Supreme Court agreed that what *Cuerrier* did was an offence, they differed about the definition of fraud, Mr. Wiley said. For instance, Justice Beverly McLachlin thought that Justice Peter Cory's definition of fraud was too broad and should have been more specific to sexually transmitted diseases.

Prior to the *Cuerrier* case, the legal system referred to two cases, one called *Clarence*, in England in 1888, and the other called *Bennett* in 1866. *Bennett* involved a man who had sex with his 12-year-old niece and gave her a venereal disease. The court ruled that she consented to having sex but did not consent to contracting syphilis, adding that the *Cuerrier* ruling was similar to that of *Bennett*.

Ruth Carey
HIV & AIDS Legal Clinic (Ontario) (HALCO)

Ruth Carey, from the HIV & AIDS Legal Clinic (Ontario) (HALCO), outlined the services offered by her organization. These include answering questions from people with HIV/AIDS, representing individuals at tribunals and conducting workshops for public health.

For her presentation, Ms. Carey addressed three issues—the duty to warn, consent to testing, and police press releases—because they are of concern to public health workers with respect to their HIV/AIDS patients.

Ms. Carey said the first question she remembered getting about the *Cuerrier* case was from a nurse who asked if she was obligated to call the police. While there are some statutes that create positive obligations for certain professions, there is no general obligation to report a crime, which Ms. Carey said surprises most people. Other questions that Ms. Carey said she often hears include “Can I disclose if I want to?” and, “If I do or don't disclose, can I be sued?”

She then cited a case in British Columbia involving a criminal lawyer whose client had picked up a prostitute with the intent to kill her but was stopped by police, who found the woman tied up in the back of the accused's vehicle. Because it was a first offence for the accused, his lawyer asked a psychiatrist to evaluate him.

The psychiatrist concluded that the accused was mentally ill and had been planning to eradicate Vancouver's Lower East Side of prostitutes and drugs, Ms. Carey said. The lawyer decided not to use the psychiatrist's assessment in court, but the psychiatrist was

so concerned about the case that he hired his own lawyer and brought a motion to bring this information to court.

Public health workers have the choice to disclose information about HIV/AIDS patients, Ms. Carey said. She suggested looking at the risks and harm that could be caused to third parties, and if those risks are serious, the information should be disclosed.

Ms. Carey cited another relevant case involving a patient named Pittman who had a heart problem and received tainted blood transfusions. Dr. Bain, who was looking after Pittman, found out that his patient had received infected blood but did not tell him because he thought Pittman and his wife were no longer sexually active. The doctor did not know that treatment was available at the time. The family found out that Pittman was HIV-positive after he died suddenly in the hospital. His wife also tested positive for HIV, and, as a result, the family sued the Red Cross, Bain, and the hospital.

If Bain had told Pittman about the infected blood, Pittman would have been tested, he would have told his wife that he was HIV-positive, and they could have avoided infecting her, Ms. Carey said.

With regard to consent to testing, public health workers in Ontario have to discuss the criminal implications of the Cuerrier case when talking about testing with a patient who may be infected with HIV/AIDS.

“I think a reasonable person going to testing would want to know about their criminal responsibility,” Ms. Carey said. She added that the patient also must be informed of all risks including non-medical implications such as losing family and friends, difficulties in the workplace, and so on.

Ms. Carey then discussed the issue of police press releases and the media attention that follows. In Ontario, when someone is charged, the local police issue a press release disclosing the place of work and photos of the HIV-positive person. The problem is that the press is often negative and, therefore, deters patients from getting tested and treated.

Glenn Betteridge
Canadian HIV/AIDS Legal Network

Glenn Betteridge, from the Canadian HIV/AIDS Legal Network, talked about the differences between public health and law. Public health is a special responsibility of the government, he said. With respect to public inquiries, politicians and legislators are gatekeepers, focused on the health of the population. They have powers of coercion to protect the community, powers of isolation and quarantine, and powers to order testing, which are practised in the interest of the public.

The law has more draconian powers such as the ability to remove somebody from society for a set length of time or indefinitely, Mr. Betteridge said. These powers punish people

for certain behaviours, rehabilitate and return them to society and act as a deterrent for others.

Mr. Betteridge then examined the similarities and differences between Canada and the UK. In Canada, exposure to HIV/AIDS is criminalized, and in the UK, transmission of HIV/AIDS is criminalized. In addition, the British tabloid press often makes these cases more sensational than the Canadian press.

Although the effort started later in Britain than in Canada, more people are taking on these issues from public health and the legal and general communities, Mr. Betteridge said. More research is being done on the impacts of criminalization, non-governmental organizations are speaking up on behalf of constituents, and legal academics are organizing conferences to discuss and learn more about these issues.

A small group from the University of Portsmouth conducted a behavioural study on how criminalization has affected people with HIV/AIDS. The respondents of the study said criminalization makes their lives more difficult, exacerbates the stigma, has the potential to endanger their health due to stress and anxiety and makes disclosure more difficult for them.

Britain's Crown Prosecution Service gives police the power to arrest and the Crown prosecutor the power to bring these cases to court and make convictions, said Mr. Betteridge. Crown prosecutors exercise a great degree of discretion when deciding whether to bring people to court as well as when and what kind of plea bargains or joint submissions on sentencing are allowed.

Britain has developed policy guidelines regarding whether to prosecute in cases where reckless transmission has occurred. Two tests are used when deciding to proceed with prosecution. The first is evidentiary, which determines if there is enough evidence to secure a conviction, and the second is a larger, public interest test, which determines if there are factors against prosecution that outweigh prosecution. Mr. Betteridge said the Crown Prosecution Service has asked various parties for feedback on a number of different issues including the role played by pre-testing medical advice.

The British HIV Association and the Department of Health have also undertaken their own consultations, said Mr. Betteridge. They have found that confidentiality is a major issue and that front-line workers need support and clarity around it.

"It's important as public health people and legal people ... to know what the impact is of this conundrum we've been put in by the Supreme Court's decision," Mr. Betteridge said. "It is unique that we have people from public health, the legal system, and police services engaged in this discussion together."

Questions and Discussion

One participant asked about the assumption of risk and whether or not that is taken into account in Canada. Mr. Wiley replied that a number of factors, including whether it would be in the public interest to prosecute, have to be satisfied before proceeding to trial. The Crown prosecutor screens every charge.

Another participant asked, “What has been your experience with police when they have a case and they’re making decisions about a press release? Do they go to legal advisors? How much consultation is there?”

Mr. Wiley replied that at Toronto Police Services a lot of discussion and involvement from those high up the chain of command occurs before a notice is put out. Mr. Wiley said he did not think Toronto had ever issued such a community notice, and the circumstances would have to be quite urgent and serious for that to happen.

Going back to the Cuerrier case, Ms. Carey said it is often used as a tool or weapon to threaten court action. “Sometimes it’s worth it, and sometimes there’s a risk that you will ruin someone’s life,” she said.

Conception of risk has been skewed and tends to mean different things in legal terms and public health terms, Mr. Betteridge said, adding that it might be in the public’s interest to promote the prevention of HIV/AIDS by not charging people when they use condoms.

“This law is very young Law takes a long time to evolve. There’s more grey areas than black and white,” he said.