

Criminalizing HIV Non-Disclosure: Using Public Health to Inform Criminal Law

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Overview

- ▶ The Science of HIV Transmission
- ▶ *Cuerrier*: Fraud and “Significant Risk”
- ▶ *Mabior*: “Realistic Possibility”
- ▶ HIV Non-disclosure post-*Cuerrier* and *Mabior*
- ▶ Non-disclosure and Public Health

The Science

- ▶ Transmission
 - ▶ How?
 - ▶ Factors that affect transmission
 - ▶ What does undetectable mean?

The Science

Sexual act	Risk of transmission
Receptive anal intercourse	1 in 72
Insertive anal intercourse	1 in 900
Receptive penile-vaginal intercourse	1 in 1,250
Receptive or insertive penile-oral sex	0 to 4 in 10,000

The Science

- ▶ Uganda: 415 heterosexual HIV-serodiscordant couples, 2 years, 89% never used condoms, limit 1,500 copies/mL
- ▶ HPTN 052: 1,763 HIV-serodiscordant couples, 97% heterosexual, 95-96% always using condoms, limit 400 copies/mL
- ▶ PARTNER: 888 HIV-serodiscordant couples, 548 heterosexual and 340 same-sex male couples, 1.5 years, no condom use, limit 200 copies/mL
- ▶ PARTNER2: 779 HIV-serodiscordant, same-sex, male couples, average of 1.6 years, 74,567 sex acts without a condom, limit 200 copies/mL

TC Quinn et al, "Viral Load and Heterosexual Transmission of Human Immunodeficiency Virus Type 1" (2000) 342:13 New England J Medicine 921.

Myron S Cohen et al, "Antiretroviral Therapy for the Prevention of HIV-1 Transmission" (2016) 375:9 New England J Medicine 830.

AJ Rodger et al, "Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner Is Using Suppressive Antiretroviral Therapy" (2016) 316:2 J American Medical Assoc 171.

Cuerrier: Fraud and “Significant Risk”

- ▶ Henry Cuerrier
- ▶ Two counts of aggravated assault
- ▶ Vaginal intercourse without a condom - 10 times and 100 times
- ▶ Neither woman contracted HIV
- ▶ No mention of Treatment or Viral Load

Cuerrier

- ▶ “[F]raud does not vitiate consent to assault unless the mistake goes to the nature of the act or the identity of the partner. Fraud as to collateral aspects of a consensual encounter, like the possibility of contracting serious venereal disease, does not vitiate consent.” - Justice McLachlin [para 25]

Cuerrier

- ▶ Deceptive and Deprivation
- ▶ “a significant risk of serious bodily harm”
- ▶ Other STI’s
- ▶ “To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation.”
[para 129]

Cuerrier

- ▶ Aggravated assault and aggravated sexual assault
 - ▶ “who wounds, maims, disfigures or endangers the life of the complainant.
- ▶ Back to the Science
 - ▶ Between 1995 and 1997, life expectancy lost -10 years.
 - ▶ Compare to 40 yo, non-smoker, 3 years if BMI 25-30, 6 years if > 30

Criminal Code, RSC 1985, c C-46, s 268(1)

Evan Wood et al, “Modern Antiretroviral Therapy Improves Life Expectancy of Gay and Bisexual Males in Vancouver’s West End” (2000) 91:2 Can J Public Health 125.

A Peeters et al, “Obesity in adulthood and its consequences for life expectancy: a life-table analysis” (2003) 138:1 Annals Internal Medicine 24.

Mabior: “Realistic Possibility”

- ▶ Clato Mabior
- ▶ 6 counts aggravated sexual assault
- ▶ Vaginal intercourse - with and without a condom - some during ART
- ▶ MBCA - undetectable viral load (below 40 copies per millilitre (mL); OR careful and consistent condom use. [para 103]
- ▶ SCC - low viral count as a result of treatment AND condom protection.
- ▶ “realistic possibility that HIV will be transmitted.” [para 4]

Mabior

- ▶ About "significant risk", some people say that virtually any risk of serious bodily harm is significant. Others argue that to be significant, the risk must rise to a higher level. These debates centre on statistical percentages. Is a 1% risk "significant"? Or should it be 10% or 51% or, indeed, .01%? How is a prosecutor to know or a judge decide? And if prosecutors, defence counsel and judges debate the point, how - one may ask - is the ordinary Canadian citizen to know? [para 16]

Mabior

- ▶ MBCA Approach
 - ▶ UVI - 1 in 1,250
 - ▶ Condom use - 80% or better
 - ▶ Risk - 1 in 10,000 [para 86]
 - ▶ OR undetectable - 1 in 100,000 to 1 in 1,000,000 [para 106]

Mabior

- ▶ SCC misinterprets MBCA
 - ▶ 1. “High Risk” Threshold [para 84]
 - ▶ 2. Condom use [para 101]
 - ▶ 3. ART effectiveness
 - ▶ “The most recent wide-scale study on this issue, relied on by a number of interveners, concludes that the risk of HIV transmission is reduced by 89 to 96% when the HIV-positive partner is treated with antiretrovirals, irrespective of whether the viral load is low or undetectable.” - McLachlin CJ [para 101]
 - ▶ [There] was a relative reduction of 96% in the number of linked HIV-1 transmissions resulting from the early initiation of antiretroviral therapy, as compared with delayed therapy. There was a relative reduction of 89% in the total number of HIV-1 transmissions resulting from the early initiation of antiretroviral therapy, regardless of viral linkage with the infected partner. - Cohen et al.

Mabior

- ▶ SCC Approach
 - ▶ ART - 89 - 96% effective
 - ▶ 1 in 1,250 for VI, no condom
 - ▶ 1 in 16,667 with ART, no condom
 - ▶ 1 in 83,333 with ART and condom

 - ▶ No explanation
- ▶ If no condom, *prima facie* case of deception and deprivation - tactical burden [para 105]

HIV Non-disclosure post-*Cuerrier* and *Mabior*

- ▶ Between 1998 and 2012, more than 130 people charged [Factum of the interveners para 6]
- ▶ 2017 DOJC review of 59 criminal cases between 1998 and 2017 (no forced sexual contact)
 - ▶ Finding of Guilt - 45 (76%) - 23 of these at trial
 - ▶ No Transmission - 26 of the 45 (58%)
 - ▶ Aggravated sexual Assault or Aggravated Assault - 85% of the 45
 - ▶ Sentencing (available for 43 of 45)
 - ▶ 5 years or more: 20 cases
 - ▶ 10-15 years - 6 cases
 - ▶ 18 years - 2 cases
 - ▶ Life - 1 case

Cases

- ▶ *Felix* ONCA in 2013 - no evidence of viral load, no transmission
- ▶ *Murphy* ONSC in 2013 - VL < 50 copies/mL, one sexual act
- ▶ *Schenkels* MBCA 2017 - 3 acts, no evidence of risk of transmission

- ▶ *JTC* in NS PrCt in 2013 - no risk if <500 copies/mL, without condom

- ▶ Guidelines in ON and BC
 - ▶ ON: [If] a person living with HIV is on antiretroviral therapy and has maintained a suppressed viral load for six months, there is also no realistic possibility of transmission. In these circumstances a failure to disclose does not result in criminal liability for exposure to HIV.

Non-Disclosure and Public Health

▶ Arbitrary

- ▶ chlamydia, gonorrhoea, syphilis, hepatitis B, hepatitis C (*Jones 2002 NBQB*), oral and genital herpes
- ▶ Hepatitis A and E

▶ Discrimination and Stigmatization

- ▶ Anal sex - “husband and wife”, OR over 18 years old and no more than two people are involved
- ▶ Even after Ontario struck down the law in 1995, police continued to charge people with anal intercourse. Between 2008 and 2014 in Ontario, 22 people were charged with anal intercourse under Section 159. Two of those were youth. More than half of those charged in Quebec were youth.

Criminal Code, s 159

Egale Canada Human Rights Trust, *The Just Society Report: Confronting the Legacy of LGBTQ2SI Discrimination in Canada*, (Toronto: Egale, 2016) at 40, online:

<www.academia.edu/26229209/The_Just_Society_Report_Confronting_the_Legacy_of_LGBTQ2SI_Discrimination_in_Canada> [].

Non-Disclosure and Public Health

▶ Discrimination and Stigmatization

▶ CBS

- ▶ Until 2013, refused to allow any man to donate blood if he had ever had sex with another man after 1977
- ▶ Still don't allow if has had sex with a man in last 3 months

▶ Charges laid

- ▶ 89% heterosexual charged vs transmission of 59% for gay men
- ▶ 36% "black" charged between 1989 and 2016 vs transmission of 18.7% "black"
 - ▶ 48% charged since 2012

Non-Disclosure and Public Health

▶ Advising Clients

- ▶ It is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act. The rule of law requires that laws provide in advance what can and cannot be done. Condemning people for conduct that they could not have reasonably known was criminal is Kafkaesque and anathema to our notions of justice. After-the-fact condemnation violates the concept of liberty in s. 7 of the Canadian Charter of Rights and Freedoms and has no place in the Canadian legal system. [para 14]

Non-Disclosure and Public Health

- ▶ Centre for Human Rights Research and Sex Workers of Winnipeg Action Coalition
 - ▶ “the law on HIV disclosure is unclear” but noted that one risked a conviction for failure to disclose unless viral load was low and a condom was used. (Jan 2018)
- ▶ *Indigenous Communities and HIV Disclosure to Sexual Partners*, by the Canadian HIV/AIDS Legal Network
 - ▶ Oral Sex?
 - ▶ Anal sex with a condom and low viral load? (Apr 2016)

Non-Disclosure and Public Health

- ▶ Canadian Coalition to Reform HIV Criminalization
 - ▶ Only charged if intentional, actual transmission
- ▶ Not charged if:
 - ▶ did not understand how the virus is transmitted;
 - ▶ disclosed their status to their sexual partner or reasonably believed their sexual partner was aware of their status through some other means;
 - ▶ did not disclose their status because they feared violence or other serious negative consequences would result from such disclosure;
 - ▶ was forced or coerced into sex; or
 - ▶ engaged in activities that, according to the best available scientific evidence, posed no significant risk of transmission, including oral sex; anal or vaginal sex with a condom; anal or vaginal sex without a condom while having a low viral load; and spitting and biting

Non-Disclosure and Public Health

- ▶ Upshur Principles 2002:
 - ▶ Harm
 - ▶ Least Restrictive Means
 - ▶ Reciprocity
 - ▶ medication costs
 - ▶ immediate free addictions treatment
 - ▶ transportation costs
 - ▶ free condoms
 - ▶ immediate access to free counselling services
 - ▶ Transparency

Non-Disclosure and Public Health

- ▶ 2018 Directive to the Director of Public Prosecutions
 - ▶ “HIV is first and foremost a Public Health issue”
 - ▶ (a) The Director shall not prosecute HIV non-disclosure cases where the person living with HIV has maintained a suppressed viral load, i.e., under 200 copies per ml of blood, because there is no realistic possibility of transmission.
 - ▶ (b) The Director shall generally not prosecute HIV nondisclosure cases where the person has not maintained a suppressed viral load but used condoms or engaged only in oral sex or was taking treatment as prescribed, unless other risk factors are present, because there is likely no realistic possibility of transmission.
 - ▶ (c) The Director shall prosecute HIV non-disclosure cases using non-sexual offences, instead of sexual offences, where non-sexual offences more appropriately reflect the wrongdoing committed, such as cases involving lower levels of blameworthiness.
 - ▶ (d) The Director shall consider whether public health authorities have provided services to a person living with HIV who has not disclosed their HIV status prior to sexual activity when determining whether it is in the public interest to pursue a prosecution against that person

Conclusion

- ▶ Report of the Aboriginal Justice Inquiry of Manitoba
 - ▶ “A significant part of the problem is the inherent biases of those with decision-making or discretionary authority in the justice system. Unconscious attitudes and perceptions are applied when making decisions. Many opportunities for subjective decision making exist within the justice system and there are few checks on the subjective criteria being used to make those decisions. We believe that part of the problem is that while Aboriginal people are the objects of such discretion within the justice system, they do not "benefit" from discretionary decision making, and that even the well-intentioned exercise of discretion can lead to inappropriate results because of cultural or value differences.”

Thank You

▶ Questions?