

Protected vaginal sex/ condom use / unprotected oral sex

“The risk of transmission of the virus as a result of oral intercourse without a condom (...) is so low it does not register as a risk.”²

“The risk of transmission of the virus where the male is HIV positive and does not use a condom is relatively low.”³

“Condoms are 80%-85% effective, thus significantly reducing the risk.”⁴

Facts

Mr. Dalley was charged with criminal nuisance⁵ for not disclosing his HIV-positive status before having oral intercourse and vaginal intercourse.

Mr Dalley and the complainant met through an Internet dating site. Mr. Dalley performed oral sex on the complainant and she then performed oral sex on him without using a condom. Mr. Dalley did not ejaculate during oral sex, although the complainant said there was a “tiny bit” of pre-ejaculation leakage. They later performed protected vaginal sex by using a condom.

Applicable law

According to the law in New Zealand, “every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual.”⁶ (Emphasis added)

The legal duty which it was alleged Mr Dalley breached was that set out in Section 156 of the Crime Act which provides that “everyone who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, operates, or maintains anything whatever, which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against

¹ *New Zealand Police v. Dalley*, [2005] 22 C.R.N.Z. 495

² *Ibid.* at para. 39

³ *Ibid.* at para. 44

⁴ *Ibid.* at para. 45

⁵ Section 145 of the Crimes Act 1961

⁶ *Ibid.*

and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.” (Emphasis added)

Legal issues

The issues then were these:

- (1) Was Mr Dalley under a duty pursuant to s156 Crimes Act 1961?
- (2) If so, did he breach that duty?
- (3) If so, is he guilty of criminal negligence under s145?

Judgement

The Court considered that the HIV virus present in semen may endanger human life and thus decided that a person living with HIV has a legal duty to take reasonable precautions and care to avoid such danger according to Section 156 of the Crimes Act.

Regarding oral sex

- Based on the evidence that “the risk of transmission of the virus as a result of oral intercourse without a condom is not zero because it is biologically possible, but it is so low that it does not register as a risk.”⁷ the judge considered that Mr Dalley took reasonable care and precautions to avoid HIV transmission. (Emphasis added)
- Therefore, Mr. Dalley could not be guilty of criminal nuisance because he had not omitted to discharge a legal duty

Regarding protected vaginal sex

- The judge considered the scientific evidence before him regarding the per-act risk of HIV transmission associated with vaginal sex when a condom is used.
- According to such evidence:

“The risk of transmission of the virus where the male is HIV-positive and does not use a condom is relatively low. The prosecution say that it is approximately 5.57%. The defence put the risk at even lower, 4 different trials putting the risk between 8-20 per 10,000 exposures; other sources putting it at 0.1%. The evidence of the defence was extensive, comprehensive and persuasive on this point.”⁸

“Condoms are 80%-85% effective, thus significantly reducing the risk which, even using the prosecution figures, is low. Condoms are not guaranteed not to fail, - either by a manufacturing defect or a user problem.”⁹ There was no

⁷ *New Zealand Police v. Dalley supra* note 1 at para. 39

⁸ *Ibid.* para. 44

⁹ *Ibid.*, para. 45-46

evidence that the complainant, who put the condom on, did not put it correctly.

- The judge also relied on public health concerns and noted that “so far as public health needs are concerned, the steps necessary to prevent the transmission of HIV can be met without the requirement for disclosure. In other words, the use of a condom for vaginal intercourse is considered sufficient.”¹⁰
- On the basis of the evidence, the judge found that Mr. Dalley took reasonable precautions and care.
- Therefore, Mr. Dalley could not be guilty of criminal nuisance because he had not omitted to discharge a legal duty

Mr. Dalley was acquitted on both charges

¹⁰ *Ibid.* at para. 47