

CITATION: R. v. Boone and Bowland, 2012 ONSC 441
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SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Her Majesty the Queen, Applicant

and

Steven Boone and Noel Bowland, Respondent

BEFORE: The Honourable Mr. Justice D.J. Gordon

COUNSEL: A. Rajna, for the Crown

S. Reid, for the Respondent, Steven Boone

C. Fromstein, for the Respondent, Noel Bowland

HEARD: November 30, December 1, 2011

PRE-TRIAL RULING NO. 2
ADMISSIBILITY OF EVIDENCE AS TO OTHER
SEXUAL ACTIVITY OF THE COMPLAINANTS

[1] Steven Boone and Noel Bowland are charged with two counts of aggravated sexual assault on K.D. and C.S. on March 28, 2010. Mr. Boone faces an additional count pertaining to C.S. on March 27, 2010. The alleged offences are said to have occurred in the City of Kitchener.

[2] The defendants and the complainants are gay men. They engaged in consensual sexual acts. The defendants are diagnosed as HIV positive. The primary issues at trial, as I understand the case, will be:

- a) whether the defendants disclosed their HIV positive status to the complainants in advance; and

- b) whether the complainants would have participated in unprotected sexual acts had they been aware of the defendants' status.

Application

[3] The defendants seek a ruling, pursuant to section 276, *Criminal Code*, permitting them to elicit evidence at trial as to the sexual activity of the complainants as hereafter particularized.

Hearing

[4] The application was heard on the dates specified above. In addition to the defence affidavit, text messages of the complainants were tendered in evidence. Transcripts of the complainants' testimony of the preliminary hearing were filed.

Anticipated Evidence at Trial

[5] For the purpose of this application, and having regard to the evidence tendered on the preliminary hearing, it is anticipated the complainants will testify at trial that:

- a) the defendants did not disclose their HIV positive status prior to the sexual acts; and
- b) had they been made aware of such status, they would not have engaged in unprotected sexual acts with the defendants.

[6] At this point, it is unknown as to whether the defendants will testify. Regardless, I understand their position will be contrary to the evidence of the complainants. In result, the credibility of the complainants will be a significant factor for the jury to consider in assessing the evidence.

Request for Cross-Examination

[7] The complainants are not compellable witnesses on this application by virtue of section 276.2(2). The proposed evidence results from the complainants' testimony at the preliminary hearing and their text messages. The text messages were obtained by Crown counsel and disclosed to defence counsel in the usual manner.

[8] Defence counsel seek permission to cross-examine the complainants on the following areas:

K.D.'s references in his text messages to C.S. regarding a sexual encounter with "Michael" or "Mike" on March 26 and/or 27, 2010, as a clear prior inconsistency with his sworn evidence that he had abstained from sex from the beginning of March to March 28, 2010.

A single, prior incident of consensual sexual relations between K.D., C.S. and Boone in September, 2009

K.D.'s references in text messages to C.S. about "Romanian" and setting something up with "Romanian"

The history of group sexual activity between the complainants and other men in or around March 2010, including:

- arranging a meeting with Romanina
- meeting "Karlo"
- planning for group sexual activity with the Applicant Boone in

September 2009

The history of condom use of each of the complainants and their male sexual partners (including each other), from September, 2009 to March 28, 2010

The sexual relationship between K.D. and C.S. in the two years leading up to March 28, 2010, including K.D.'s knowledge of C.S.'s syphilis diagnosis and his sexual practices with C.S. in light of this diagnosis.

[9] Crown counsel concedes there is an inconsistency regarding "Michael" and, as such, cross-examination is appropriate. He opposes the application pertaining to the other matters.

Text Messages

[10] The following text messages were identified by defence counsel as relevant to this application and the issues at trial:

i) March 26, 2010

1. At 9:06 p.m.: [From K.D. to C.S.]: OK preton is here not but ii have a boy coming over at 9:30 so any chance u could be sooner othersie hell meet u halfway
2. At 10:54 p.m.: [From K.D. to C.S.]: This hot guy from Stratford ive wanted forever...im out for drinks with him now
3. At 10:56 p.m.: [From K.D. to C.S.]: 30mmmmi really want him tho
4. At 11:15 p.m.: [From K.D. to C.S.]: His name is Michael...

ii) March 27, 2010

1. At 3:19 a.m.: [From K.D. to C.S.]: Wow after waiting almost 2 years he was totally worth the wait...fuck man that was really HOT
2. At 2:57 p.m.: [From K.D. to C.S.]: Hah funny thing about mike last night is that his ex was telling me how great he is but I never expected that good tho like he worked me over everywhere
3. At. 6:08 p.m.: [From K.D. to C.S.]: Haha and Romanian just left

iii) March 28, 2010

1. At 11:30 a.m.: [From K.D. to C.S.]: Ohhh. i thought u were not that much of a fan of his...lol bring him over...I could use a bit of fun [smiley face with raised eyebrows]
2. At 11:37 a.m.: [From K.D. to C.S.]: OK well I guess ill jump in the shower in anticipation of what might happen lol but knowing u u'll be greedy bum lol
3. At 12:35 a.m.: [From C.S. to K.D.]: just got to know your buddy some more. Pretty cool guy. I ready to go I think haha

4. 12:47 p.m. [From K.D. to C.S.]: I'll msg him and see what he say but he really is fresh foreign mean lol
5. 1:57 p.m. [From K.D. to C.S.]: Sounds cool Frustrating watching porn
6. 2:30 p.m. [From K.D. to C.S.]: Haha well u start ill just follow ur lead...u know same as usual...
7. 2:38 p.m. [From K.D. to C.S.]: Please u bring used up trash excluding the one cuz hes not bad lol
8. 5:29 p.m. [From K.D. to C.S.]: Are you seeing karlo today then?
9. 5:43 p.m. [From K.D. to C.S.]: Damn...I wanted to go to that one with u
10. 5:48 p.m. [From K.D. to C.S.]: U should totally postpone till tomorrow
[smiley face with tongue sticking out]

iv) March 31, 2010

1. 6:19[From K.D. to C.S.]: OK so did you still want me to set up something with Romanian cause he just msg me

[11] Crown counsel refers to other text messages sent by the complainants, following a message received by C.S. from Mr. Boone later in the evening of March 28, 2010. Mr. Boone indicated he was then at a bathhouse in Toronto, "being my usual pos.cum slut self". C.S. took this message to mean Mr. Boone was HIV positive. The text messages of the complainants are as follows:

- | | |
|-------------------|--|
| C.S. to Mr. Boone | "R u fucking kidding me?!?!" |
| C.S. to Mr. Boone | "I think im gonna be sick." |
| C.S. to Mr. Boone | "Why the fuck would I touch u knowing that ... im sorry u r" |
| C.S. to Mr. Boone | "Omfg, its illegal not to tell someone" |

C.S. to K.D. “Fml, fml, fml, fml they were poz ...”

K.D. to C.S. “R u FUCKIN kidding me don’t fuckin say that r u serious”

K.D. to C.S. “Fml, fml, fml why didn’t they fucking tell us ... OMFG ... I
wanna fuckin kill someone”

K.D. to C.S. “WTF is wrong with that ... seriously I’m pissed like what the
fuck do we do now?”

[12] These messages are said to indicate how shocked the complainants were on receiving disclosure after the sexual encounter.

The September 2009 Encounter with Mr. Boone

[13] K.D. had arranged to meet and stay with Mr. Boone in Ottawa, using an online matching service. K.D. asked C.S. to accompany him. At the preliminary hearing, K.D. indicated he and C.S. were interested in a possible three way sexual encounter with Mr. Boone.

[14] K.D. did not participate in much physical activity with Mr. Boone as his asthma prevented such occurring. C.S. testified as to staying at Mr. Boone’s residence and having a “wonderful time” that weekend. The complainants made reference to some discussion with Mr. Boone regarding health status.

K.D. and C.S.

[15] The complainants are good friends. They are also sexual partners

[16] C.S. testified as to a diagnosis of syphilis in September 2009. The precise timing of this event, relative to the encounter with Mr. Boone that month, was not explored at the preliminary hearing. It appears K.D. was aware of his friend’s health status.

[17] Treatment took place following the diagnosis with regular check-ups thereafter. C.S. indicated a recurrence of syphilis was detected in March 2010, with treatment occurring on March 31, 2010. Having provided that date, C.S. was less than clear as to whether the diagnosis and treatment were before or after the encounter with the defendants on March 27 and 28, 2010.

[18] K.D. said he was aware of his friend's recurrence of syphilis and, specifically that C.S. likely had syphilis on March 28, 2010 but under treatment at that time. He went on to acknowledge "a risk" but believed C.S. had just returned from the clinic and his impression was the medication had taken properly and he was "clean" at that point.

[19] The various dates of the diagnosis and treatment in September 2009 and March 2010, along with testing in between, were not reported with accuracy. If these matters are relevant to the issues, it is presumed Crown counsel has obtained the medical records of C.S. and disclosed same to defence counsel.

Law

[20] Section 276, *Criminal Code*, provides as follows:

276. EVIDENCE OF COMPLAINANT'S SEXUAL ACTIVITY – (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272, or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

(2) IDEM – In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant

has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge, or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

- (a) is of specific instances of sexual activity;
- (b) is relevant to an issue at trial; and
- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) **FACTORS THAT JUDGE MUST CONSIDER** – In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law;
- (h) any other factor that the judge, provincial court judge or justice considers relevant.

[21] Section 276, in essence, codifies the principles enunciated in *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.).

[22] The prohibition is not absolute but, rather, is intended to exclude evidence where it is being tendered to suggest one of the twin myths:

- (a) that a complainant is more likely to have consented to the sexual activity; or
- (b) is less worthy of belief

by reason alone of the sexual nature of the prior conduct. See *Seaboyer*, at paras. 22-27; and *R. v. Darrach* (2000), 148 C.C.C. (3d) 97 (S.C.C.), at para. 32.

[23] Parliament intended to exclude certain inferences arising out of or suggested from the sexual nature of the activity, as opposed to inferences arising from other potentially relevant features of the sexual conduct: see *Darrach* at para. 35.

[24] Cross-examination of a complainant may be permitted with respect to a prior inconsistent statement even where that statement is linked to a prior consensual contact between the complainant and the defendant: see *R. v. Crosby* (1995), 98 C.C.C. (3d) 225 (S.C.C.), at para. 12.

[25] In this case, there is no issue the complainants consented to participation in unprotected sexual acts with the defendants. The prosecution is founded, in part, on the alleged non-disclosure by the defendants of their HIV positive status. The Crown relies on section 265(3)(c), *Criminal Code*:

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
...

- (c) fraud.

[26] The obligation is on the person infected with HIV to make clear disclosure so that there is informed consent: see *R. v. Currier* (1998), 127 C.C.C. (3d) 1 (S.C.C.), at para. 123; and *R. v. Edwards*, [2001] N.S.S.C. 80 at para. 19.

[27] As discussed in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 26-30 and 61, consent pertains to the complainants' subjective state of mind and involves a matter of credibility where the jury is to take into account the totality of the evidence, including any ambiguous conduct.

[28] In *Currier*, at paras. 125-130, Cory J. reviewed the concept of fraud as it relates to consent in the sexual assault context, saying:

125 Persons knowing that they are HIV-positive who engage in sexual intercourse without advising their partner of the disease may be found to fulfil the traditional requirements for fraud namely dishonesty and deprivation. That fraud may vitiate a partner's consent to engage in sexual intercourse.

126 The first requirement of fraud is proof of dishonesty. In light of the provisions of s. 265, the dishonest action or behaviour must be related to the obtaining of consent to engage in sexual intercourse, in this case unprotected intercourse. The actions of the accused must be assessed objectively to determine whether a reasonable person would find them to be dishonest. The dishonest act consists of either deliberate deceit respecting HIV status or non-disclosure of that status. It cannot be forgotten that the act of intercourse is usually far more than the mere manifestation of the drive to reproduce. It can be the culminating demonstration of love, admiration and respect. It is the most intimate of physical relations and what actions and reactions led to mutual consent to undertake it will in retrospect be complex. It would be pointless to speculate whether consent would more readily follow deliberate falsehoods than failure to disclose. The possible consequence of engaging in unprotected intercourse with an HIV-positive partner is death. In these circumstances there can be no basis for distinguishing between lies and a deliberate failure to disclose.

127 Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV-positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status. A consent that is not based upon knowledge of the significant relevant factors is not a valid consent. The extent of the duty to disclose will increase with the risks attendant upon the act of intercourse. To put it in the context of fraud the greater

the risk of deprivation the higher the duty of disclosure. 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 to disclose, if any, will always have to be considered in the context of the particular facts presented.

128 The second requirement of fraud is that the dishonesty result in deprivation, which may consist of actual harm or simply a risk of harm. Yet it cannot be any trivial harm or risk of harm that will satisfy this requirement in sexual assault cases where the activity would have been consensual if the consent had not been obtained by fraud. For example, the risk of minor scratches or of catching cold would not suffice to establish deprivation. What then should be required? In my view, the Crown will have 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. The risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet that test. In this case the complainants were exposed to a significant risk of serious harm to their health. Indeed their very survival was placed in jeopardy. It is difficult to imagine a more significant risk or a more grievous bodily harm. As Holland, *supra*, at p. 283, wrote:

The consequences of transmission are grave: at the moment there is no “cure”, a person infected with HIV is considered to be infected for life. The most pessimistic view is that without a cure all people infected with the virus will eventually develop AIDS and die prematurely.

129 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. To repeat, in circumstances such as those presented in this case, there must be a significant risk of serious bodily harm before the section can be satisfied. In the absence of those criteria, the duty to disclose will not arise.

130 In situations such as that presented in this case it must be emphasized that the Crown will still be required to prove beyond a reasonable doubt that the complainant would have refused to engage in unprotected sex with the accused if she had been advised that he was HIV-positive. As unlikely as that may appear it remains a real possibility. In the words of other decisions it remains a live issue.

[29] In result, the Crown must prove beyond a reasonable doubt that:

- a) the element of dishonesty is established through the defendants deliberate dishonesty as to their HIV-positive status, or non-disclosure of that status prior to the complainants providing consent;

- b) deprivation, in the sense of exposure to harm or significant risk of serious bodily harm; and
- c) the complainants would have refused to engage in unprotected sex with the defendants had they been advised of their HIV positive status.

[30] Counsel referred to *R. v. Pottelberg*, 2010 ONSC 5756. Bryant J. acquitted the defendant on a charge of aggravated sexual assault. The complainant had engaged in unprotected sexual activity with other persons before and after the encounter with the defendant. The third element required determination, having regard to the complainant's other sexual activity.

[31] *Pottelberg* differs from the case at bar on the facts but involves the same issues. In his ruling on the section 276 application, Bryant J. made reference to the credibility issue pertaining to the complainants. He permitted cross-examination regarding specific events.

[32] The within application addresses (a) and (c) above and the defendants ability to make full answer and defence.

[33] As I understand the current state of medical science, an HIV infection is now treatable in the sense of control. It is no longer fatal, as it was at the time of *Currier*, provided treatment is obtained. Nevertheless, for the purposes of this application, it is presumed that exposure to HIV remains a significant risk of serious bodily harm.

Position of the Defendants

[34] The defence seeks to illicit evidence concerning the first and third elements of fraudulently obtained consent noted above, identified as the issues for trial at the outset of these reasons.

[35] As to whether the defendants disclosed their HIV-positive status, or reasonable doubt as to same, credibility is clearly an issue. The text messages prior to the sexual encounter are said to be of importance on this issue.

[36] The prior conduct of the complainants in engaging in casual, unprotected sex with strangers, and their own sexual relationship, is said to be important in determining whether they would have refused to engage in unprotected sex with the defendants had they known of the HIV-positive status.

Position of the Crown

[37] Save for cross-examination regarding Michael, the Crown opposes the introduction of the evidence. The evidentiary inquiry is said to offend section 276, irrelevant and, at best minimally probative. Crown counsel refers to request herein as a “fishing expedition”.

[38] Further, the prejudicial effect to the administration of justice in terms of distorting the focus of the trial and the privacy of the complainants is said to far outweigh any probative value.

Discussion

[39] The complainants, as with most of the gay community, are well aware of the risk of exposure to sexually transmitted infections, particularly HIV. Risk was explored at the preliminary hearing and, indeed, it will be a focus at trial. As a result of their knowledge as to risk, the complainants regularly attend for medical testing. They understand there is a lag time, said to be 12 weeks, between sexual contact and the infection being detected.

[40] The evidence of the complainants at the preliminary hearing when combined with their text messages suggests a pattern of casual sexual acts with each other and with strangers, including group sex. Risk associated with unprotected sex, in these circumstances, becomes important. In my view, this pattern presents a significant challenge to the prosecution in meeting the evidentiary requirement, particularly on the third element.

[41] The complainants testified they would not knowingly engage in sexual activity with someone that was or could be HIV-positive. Such a response is expected. Their conduct, however, may well say otherwise or, at least, indicate a willingness to accept the risk.

[42] The defence must be allowed to address the complainants' conduct in terms of risk at trial. Restricting cross-examination to the actual events that are the subject matter of the charges would, in my view, give the prosecution an unfair advantage. Further, it would restrict the ability of the jury in arriving at a just verdict.

[43] This case is not about consent. Rather, it is whether consent was vitiated by fraud. Credibility of all witnesses will be important.

[44] The evidence on this application is incomplete. The defence is limited in what can be tendered as the complainants are not compellable witnesses.

[45] The proposed evidence, in my view, meets the threshold to allow presentation at trial. It is relevant to the issues or essential elements and, in this regard, is capable of raising a reasonable doubt. The evidence is highly probative. Prejudice to the administration of justice is not of concern in this case.

[46] Having regard to the factors set out in section 276(3), I am of the view:

- a) the evidence pertains to the issues in dispute and is necessary so that the jury may render a just verdict;
- b) the evidence specifically addresses risk and, as identified in the caselaw, is not concerned with the sexual component of the activity;
- c) it follows, then, that the jury can be directed to focus on the issues and purpose of the evidence so that there is no concern as to the twin myths, bias or discriminatory belief;
- d) similarly, sentiments as to prejudice, sympathy or hostility can be avoided;
- e) the complainants testified at some length as to intimate sexual acts and communicate in like manner, hence the concern as to their personal dignity and privacy is not an overriding concern;
- f) similarly, the complainants' right to personal security and the full protection and benefit of the law is not impacted.

[47] Further, it is clear from the text communication between the complainants, they have an understanding of legal matters pertaining to sexual encounters. Such has likely occurred from the information assembled in the gay community and their interests in health and legal issues. In this regard, the proposed evidence does not hinder reporting of sexual assault offences. Indeed, a determination of the issues in this case will assist in the knowledge made available to the gay community.

[48] Lastly, I am satisfied that, with input from counsel, an appropriate limiting instruction can be delivered to the jury so that the concerns in section 276 are avoided.

Specific Instances of Sexual Activity

- i) **Michael**

[49] At the preliminary hearing, K.D. stated he had not engaged in sexual activity from the beginning of March until the events on March 28, 2010. His answers were in response to counsel's inquiry as to regular medical testing.

[50] The text messages from K.D., previously described, suggest otherwise. It appears there was a sexual encounter with Michael on March 27, 2010. This inconsistency invites cross-examination. Crown counsel concedes such is appropriate. I agree.

ii) The September 2009 Encounter

[51] To some extent, the September 2009 encounter with Mr. Boone is part of the narrative. It involves the original meeting and, thus, what led to the March 2010 events. The evidence is also suggestive of the complainants' interest in group sex and, in particular, addresses risk and how health is discussed or ascertained. These latter points are of particular interest on the issues at trial.

iii) Romanian

[52] The text messages regarding Romanian also indicate an interest in group sex and is closely connected in time to the events in this case. Risk is of obvious concern.

iv) **Karlo**

[53] The information set out in the text messages regarding Karlo is brief. Nevertheless, when considered within the context of other events involving the complainants, is again suggestive of group sex and brings into play the question of risk.

v) **Group Sex With Other Gay Men**

[54] The three prior headings specifically involve group sex either occurring or anticipated. In addition to risk, as discussed, planning for such events is of interest, with particular reference on protection.

vi) **Condom Use**

[55] A discussion of risk involves, in part, the practice of condom use for protection. This topic was introduced at the preliminary hearing, specifically regarding the event in question and the initial use of a condom by C.S. Other events, then, are pertinent in addressing precautions, if any, when the participants are strangers or involve first encounters. There is an obvious interest, in terms of the issues, in protection.

vii) **Relationship of the Complainants**

[56] The syphilis diagnosis of C.S. is a significant matter. As previously mentioned, the timing of the initial diagnosis and recurrence was not clearly addressed at the preliminary hearing in terms of either the September 2009 encounter with Mr. Boone or the March 2010 events with Mr. Boone and Mr. Bowland.

[57] Syphilis is treatable, if detected. It can be the basis of an aggravated sexual assault charge.

[58] C.S. did refer to treatment on March 31, 2010. This, if accurate, is after the events in question. K.D. claims to have been aware of his friend's status. There is some inconsistency between C.S. and K.D. in terms of what, if anything, was discussed with the defendants as to health status.

[59] K.D. also acknowledged there could have been a risk associated with his friend's health status although he understood C.S. was "clean". It is not clear as to how such a conclusion was made.

[60] K.D. and C.S. were sexual partners. Hence, sexual encounters between them and with others necessitates a detailed examination of the syphilis diagnosis, disclosure and protection.

Summary

[61] Neither the gay lifestyle nor the sexual activity of the complainants are of interest in this trial. Rather, the focus is on risk associated with their conduct. The defence refers to this as a "non-sexual aspect". I agree. It is very specific.

[62] Given the evidentiary burden of the prosecution on the essential elements of the charges, the evidence the defence seeks to introduce is highly relevant and probative. The pattern of sexual encounters with strangers, as previously discussed, addresses the issues in this case and specifically the credibility of the complainants.

[63] The jury is entitled and, in my view, must hear this evidence so that a just verdict is rendered. As stated, an appropriate limiting instruction will focus the jury on the use of the evidence and, thereby, prevent the twin myths arising.

[64] Prejudice to the administration of justice would occur if this evidence was excluded.

[65] The application is granted.

D.J. Gordon J.

Released: January 20, 2012