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Opinion: What law shouldn't be saying about sex

By Robert Leckey, Special to the Gazette October 10, 2012

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Photograph by: Lysanne Larose

MONTREAL — The Supreme Court of Canada has ruled on the legal status of sexual intercourse by someone who fails to disclose that he or she is HIV-positive. It remains a serious crime, with a maximum life sentence in prison. The troubling thrust of the high court's message is that HIV-negative people have the right to engage in unprotected sex, no questions asked.

The background is that the court had to reconsider a 1998 judgment in which it determined that failing to disclose HIV status negated the consent to sex. That made it a sexual assault. It also put the partner at significant risk of serious bodily harm, making the sexual assault an aggravated one. Lower courts had later held that failure to disclose wasn't a crime where the risk of contracting HIV was low.

One thing that lowers the risk of getting HIV is use of condoms. The other is medical treatment, which can reduce an infected person's viral load to undetectable.

The novelty in last week's cases is that failure to disclose HIV status is no longer a serious crime if two conditions are satisfied: the person's viral load must be undetectable and a condom must be used.

Arguably, the court's holding means that non-disclosure is a crime unless the risk of infection is effectively zero.

Experts in criminal law and public health have pointed to many problems with criminalizing the failure to disclose HIV status.

It may discourage people from getting testing to learn their HIV status. Like many criminal laws, it may be enforced selectively. It can further disadvantage those who are already marginalized.

Moreover, criminal law is a poor tool for shaping people's conduct in intimate matters. It's a mistake to use it to set out moral or ethical guidelines. All it can do, imperfectly, is sanction reprehensible conduct.

My main concern is with the judgments' starting point. Crucially, the main issue is not about someone lying to his partner in response to a question about his health status. It is the failure to initiate disclosure, even when the other partner never asks.

The message from the court is that people have the right to engage in unprotected sex without taking any steps to find out their partner's HIV status. On that view, risk of harm only enters the picture from someone with HIV. It doesn't also arise from an HIV-negative person who has unprotected sex.

The court correctly underscored the importance of the right to give or withhold consent to sexual relations. The judges connected that right to values associated with the Canadian Charter of Rights and Freedoms, such as dignity and autonomy.

But on my reading, dignity and autonomy play out differently in these circumstances. They call for recognizing a shared responsibility around sexual relations.

A comparison with the baselines of other criminal conduct is helpful. Property crimes such as theft or destruction of property tell owners that they have the right to assume that other people won't interfere with their property. Ordinary assault tells people that they have the right to assume that others won't impinge on their bodily integrity. Such crimes occur when the criminal fails to leave another person alone.

Sex is different because people have sought out interaction with one another. They know that sex can be not only pleasurable and fulfilling, but also emotionally risky. They should also know that there are physical risks and that they can take precautions against them.

But that's not the message that the Supreme Court of Canada is sending.

Our law shouldn't be telling people to assume that unprotected sex is safe unless their partner lets them know otherwise.

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