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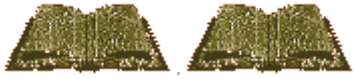 (N.B. Please increase your screen resolution to 1600 x 1200 dpi or more, for best viewing)

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FIGHTING AIDS....LEGALLY!

Legal responses to AIDS in Comparative Perspective, 1st Edition *edited by* Stanislaw Frankowski, Martinus Nijhoff, (An Imprint of Brill Academic Publishers), P.O. Box 9000, 2300 PA Leiden, The Netherlands. . . E-mail: marketing@brill.nl. ; xxii + 419 pages: ISBN 90-411-1037-2. Publication Date 28.10.1998: Price, Eur 97.50.

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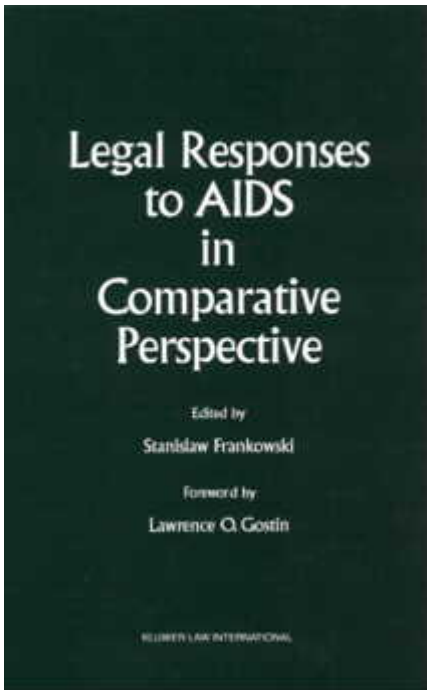

Stanislaw Frankowski, and his project

Stanislaw Frankowski, the editor of this book undertook this project several years ago, with late Professor Gene Schultz, his colleague from Saint Louis University School of Law. A number of legal luminaries from diversified countries were chosen to write on legal positions on AIDS in their countries. Ten countries were chosen representing ALL continents - US and Canada from North America, Argentina from South America, Holland, Hungary and Poland from Europe, South Africa from Africa, India and Japan from Asia and Australia from Australasia. Four principal goals were enumerated to the authors who trained their essays to meet these specific goals. The goals were (i) to describe, analyze and contrast legal responses to AIDS (ii) to explore the links between HIV related problems and other social issues such as marriage, divorce, schooling etc. (iii) limits and effectiveness of legal measures in reducing - or at least controlling - AIDS, and (iv) to reflect upon the need for a proper balance between two apparently contrasting goals - the need to protect the society from this scourge, and the need to protect the rights of the individuals with AIDS.

It seems the editor and his team of authors has succeeded in accomplishing these goals. This is the first book which deals with legal, social and political aspects of AIDS in such great detail, besides of course, covering all the above mentioned goals.

AIDS has been compared by many to the Black Plague which ravaged medieval Europe in the middle of the 14th Century. I am not much aware of the legal measures taken at that time to curb it - or whether they were ever taken or not - but in this more enlightened age, we are certainly taking medical, legal and even administrative measures to curb the growth and spread of AIDS. The book under review attempts to assess the legal situation vis-à-vis AIDS in as many as ten different countries (See accompanying box). Each chapter has been written by a legal specialist in his own country. Undoubtedly this book comes as the biggest and most authoritative compendium on legal aspects of AIDS.

About ten different socio-politico-legal aspects of AIDS are sought to be dealt with. These are (i) Legal situation regarding discrimination of AIDS sufferers (ii) Family law issues e.g. marriage,

divorce and custody of children etc. (iii) Legal issues of death and dying, such as euthanasia and assisted suicide (iv) Financing for health care (v) The patient's right to information and treatment (vi) public health measures (vii) Tort liability (viii) Criminal law and position regarding prisoners (ix) HIV testing and confidentiality and (x) Human rights, e.g. right to get jobs, right for rail travel and so on.

Each chapter is prefaced by a short history of AIDS in the writer's own country, and the current situation and statistics regarding AIDS. Such issues as political responses to AIDS, emergence of AIDS activism, changes in public attitudes, socio-political problems and responses in each country are dealt with as well.

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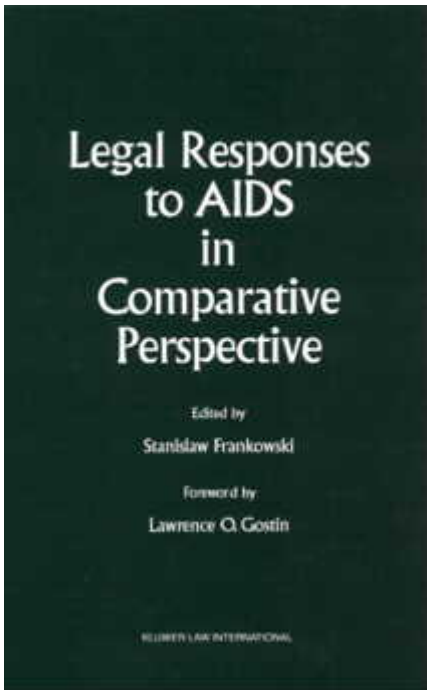
Professor Arthur S. Leonard of New York Law School sets the tone of the book in the first chapter by elaborating the legal situation of AIDS in United States. Interesting facts are given regarding discrimination of AIDS patients in US. Legislation specifically addressing problems of AIDS patients came as late as 1990, in the form of the passage of *Americans with Disabilities Act* (ADA). Till then, all cases pertaining to AIDS were decided by an older omnibus legislation *Vocational Rehabilitation Act* (VRA), which was passed in 1973. This Act prohibited unjustified discrimination against persons with physical or mental impairments by federal agencies (section 501). Interestingly neither state nor federal legislators foresaw that provisions of this Act could be invoked to include persons suffering from contagious diseases! A Florida school teacher suffering from tuberculosis was successfully able to invoke provisions of VRA [*School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed. 2d 307 (1987)]. Before this decision, the Justice department had argued that the protections of VRA would not apply if the reason for discrimination was *fear of contagion, regardless of whether that fear was objectively reasonable in the circumstances*.

However the Supreme Court Justice William J. Brennan Jr. rejected this *Contagion Theory*, and ruled that *contagious conditions that seriously impaired physical or mental health were handicaps under the law, and that the crucial question was whether an employer would be objectively justified in excluding an individual to protect the health or safety of others. Such justification could only be found if the contagious condition presented a significant risk of harm to co-workers or others*.



In 1987, a Florida elementary school teacher suffering from tuberculosis was successfully able to invoke provisions of the Vocational Rehabilitation Act to stall her dismissal. This effectively meant that AIDS sufferers could invoke these provisions equally easily. Although the Justice Department intervened in the case to present its "contagion theory", it was decisively rejected by the Supreme Court. The Justice Department was - quite understandably - embarrassed. A new law was in the offing.

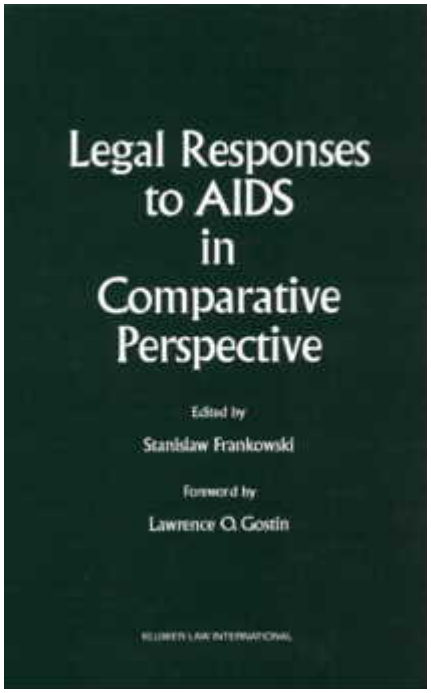
It was soon apparent that AIDS sufferers could invoke this Act too. In fact the first court ruling on an AIDS discrimination came much earlier that this - in October 1983. In this case the owner of an apartment building refused to renew the professional office lease of a doctor who treated AIDS patients. The judge observed that this refusal violated the state's disability discrimination prohibition.

The passage of ADA expanded the scope of earlier VRA. The ADA covered not only employment discrimination but also other things such as access to public transportation and other public services, as well as places of public accommodation operated by private businesses, such as theaters, hotels, restaurants, and retail sales establishments. Allowing access to public transport is interesting, in the sense that there are regions in this world, where it is not allowed to AIDS patients. On page 239 of the book, we are informed that in India, *Railways Act* has been passed in 1989 in which AIDS has been listed as a contagious disease along with other ailments. Such patients are not allowed to travel. There were vehement protests from the Union Ministry of Health and Family Welfare, but despite all objections the provisions stay.

Dr. Ralf Jürgens of Canadian HIV/AIDS Legal Network, in his chapter on Canadian legal responses to AIDS informs us that cases on AIDS discrimination have been won in Canada too. In particular he informs us of the very first Canadian court ruling on AIDS discrimination. In *Hamel v. Malaxos* [25 November 1993, no. 730-32-000370 929, Small Claims Court, Joliette (unreported)], a 25 year old man with asymptomatic HIV infection succeeded in an action against a dentist who refused to treat him because of his HIV infection. The court argued that the subjective perception of handicap is sufficient enough a disadvantage as to come within the ambit of antidiscrimination legislation.

What about family law issues such as marriage and divorce? In US, one issue that was discussed fiercely was whether HIV-infected people should be allowed to marry or not. In fact, two states Illinois and Louisiana decided that applicants for marriage licenses should be tested and advised of their test results. Those found positive were not prohibited to marry, but it was thought wise to inform them - and their spouses - of their HIV status. Interestingly while the number of marriage license applications decreased in these two states, neighboring states experienced an increase! One state - Utah - went to the extent of denying marriage licenses outright to HIV-infected people and declared such marriages void. This statute was quickly declared unconstitutional, and ultimately even the states of Illinois and Louisiana thought it wise to repeal their testing statutes too.

FAST FACTS



n Some major highlights of *Legal responses to AIDS in Comparative Perspective* at a glance:

& Gives information about ten different legal situations in ten different countries
& Each chapter written by legal luminaries of respective countries
& Each situation illustrated with latest case law
& A plethora of useful references
& First book anywhere in the world to deal with legal aspects of AIDS in such a comprehensive manner

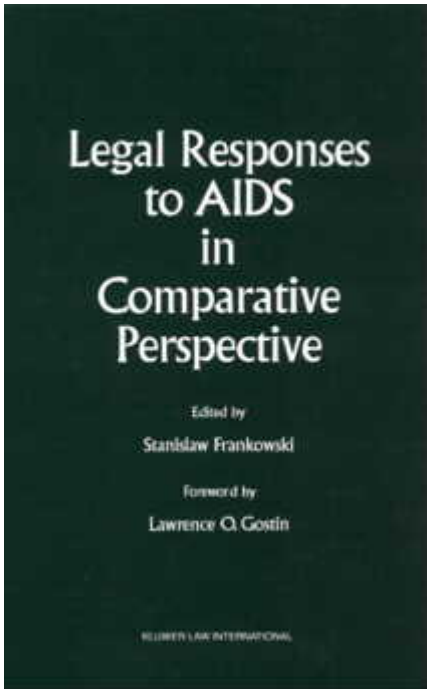
Toyoji Saito of the Konan University Faculty of Law, on page 258, informs us of the situation in Japan. HIV infection contracted through sexual contacts with a person other than one's spouse may constitute a ground for divorce (Civil Code, Art. 770). However most parties avoid the divorce proceedings for fear of future discrimination. In fact many couples when confronted with such a situation, instead of going for a divorce strengthened their ties!

Can a HIV infected woman be allowed to have a child? Hans Akveld and Dick Hessing of the Erasmus University in Rotterdam tell us of the Dutch position on page 289. The National Health Council in its December 1994 recommendations insists that a doctor should discuss the implications

of pregnancy with every HIV-infected woman. She should be advised of the risks to the child and to her, including the risk of her death. A request of abortion by the HIV infected mother has to be thoroughly discussed. Such a request has to be within the time limits set out in the *Pregnancy Termination Act*. This Act is however not explicit on the termination of pregnancy by minors.

Legal issues of Death, dying and succession present a very complicated picture. What happens when a patient with advanced AIDS refuses to receive treatment? What are the liabilities of the doctor? Can he enforce treatment? Will an enforcement of such treatment not be treated as an infringement on the patient's rights? On the other hand, if the doctor chooses not to enforce treatment, and the patient dies subsequently, can he be charged for abetting suicide? This is an interesting question, with the doctor facing problems either way.

Geoffrey Walker, Emeritus Professor of Law of the University of Queensland, clarifies the situation - as prevalent in Australia - on page 183. Under the Australian common law, a health-care provider may not perform any procedures (or even touch a patient for that matter) without the patient's voluntary consent to the specific act. Relatives or a spouse can not grant or withhold consent on behalf of an adult patient. The philosophy of informed consent is set out in the decision *Rogers v. Whitaker*, where the High Court of Australia ruled that the patient was entitled to full information about the risks of medical procedures. It also made it clear that the courts, and not the medical profession, would set the standards for adequacy of information.



In the most famous case for liability for sexual transmission, in which an HIV positive Michigan woman claimed compensation from the professional basketball player Magic Johnson for "giving" her AIDS during a "one night encounter", the court ruled that at the time of sexual union, Johnson should have known that he suffered from AIDS. Since there was no proof that he had this knowledge, he owed no liability.

The situation in Argentina is almost similar. Juan Carlos Tealdi of *Escuela Latinoamericana de Bioética* tells us of a very interesting case on page 395. In this case, popularly referred to as the Bahamondez case, a Jehovah's witness, suffering from a hemorrhage from the GIT, refused the medically prescribed blood transfusion on religious grounds. The hospital appealed, and a first

instance court authorized the procedure. This ruling was later affirmed by the Federal Court of Appeals that described the patient's refusal as tantamount to "slow suicide". Bahamondez appealed to the Supreme Court. Ironically by that time, he was already discharged from the hospital, but the Supreme court ruled that *a competent adult may not be subjected to any intervention on his body without his consent*. This is the position that exists at the other end of the world - in Australia - as we have already seen.

Perhaps the largest body of court decisions concerning AIDS relates to claims of liability based on tort law. The earliest tort cases involving AIDS were brought by transfusion recipients and hemophiliacs against doctors, hospitals, blood banks, and manufacturers of blood clotting medication. There have also been few reported lawsuits seeking compensation for sexually-transmitted HIV. In this connection, the most famous case in the US has been the one which involved the professional basketball player Earvin "Magic" Johnson (*Doe v. Johnson*, 817 F.Supp. 1382 (W.D.Mich.1993). In this case, an HIV positive Michigan woman claimed she had acquired AIDS from Johnson during a "one night stand" some years earlier. The court held that in order for Johnson to be held liable, proof would be required that Johnson knew or should have known at the time of sexual encounter that he was infected with HIV. It was argued by the woman that anybody who fell into a "risk group" for AIDS (such as promiscuous heterosexual men who did not use condoms, as Johnson professed to be), should have a knowledge of the possibility of them having AIDS, but this argument was rejected by the court.

In a similar way, the book discusses several other points of law, such as the rights of the prisoners with AIDS, criminal liability of people who have intentionally spread AIDS to others by some rash and negligent acts such as attacking others and causing bloodshed, immigration law in various countries vis-à-vis AIDS, human rights, HIV testing and confidentiality and so on. The essays are well written and present a coherent overall picture of legal position on AIDS in different countries.

I thoroughly enjoyed reading this book not only because it is well-written and brilliantly compiled, but also because it gave me information which was hard to find elsewhere. I would heartily recommend this book to medical and legal professionals who are seeking to know about AIDS legislations in various different settings. For forensic professionals like me, this book is an absolute must.

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