THE YOUNG ATTORNEY
1992

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The Editorial Committee would like to extend its sincere gratitude to all the contributors, advertisers and other persons involved in the production of this magazine, without whose invaluable support, this publication would not have been possible.
We would also like to say a special thank you to the Principal Mr. William Roper, whose generosity is greatly appreciated.

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THE YOUNG ATTORNEY 1992

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*Excerpts from –
The Everyman Dictionary of Quotations and Proverbs.
1988 Chancellor Press, London.

HIV INFECTION AND AIDS IN THE BAHAMAS: MEDICO-LEGAL ETHICS AND PUBLIC POLICY CONSIDERATIONS

By Alfred M. Sears, Esq. Attorney-at-Law

INTRODUCTION

This article, originally presented to the Grand Bahama Medical-Dental Association in Freeport on the 14th March, 1992, examines the medico-legal ethics and public policy issues related to the high prevalence of HIV infection and AIDS in the Bahamas.

In 1990 the Bahamas was ranked second in the world, next to Bermuda, while the United States was ranked sixth that year in terms of cumulative prevalence. However, knowing the number of people who have developed AIDS is not very helpful, since it does not reveal the extent of HIV infection in a population.[1]

The World Health Organization (WHO) estimates that of the 8-10 million adults and one million children infected with HIV world-wide, more than one million adults and 500,000 children have developed AIDS. By the year 2,000, WHO projects, conservatively, that world-wide there will be a cumulative total of about 30-40 million HIV infections in men, women and children resulting in 12-18 million AIDS cases. It is also expected that there will be 10-15 million children orphaned by the year 2000. This selective/qualitative population loss will have major socio-economic consequences.

The AIDS pandemic, has generated pervasive and irrational fears (even among medical/dental professionals), stigmatization and discrimination, an environment in which medico-legal ethics are best tested.

For small developing countries like the Bahamas where there is a high prevalence of HIV infection and AIDS, it is imperative that there be effective harmonisation of public health strategy, the legal system, professional and social groups and the private sector to promote prevention and deliver humane treatment, without sacrificing the human rights of those infected. Healthy HIV carriers have an important contribution to make to the economic, social and cultural development of our society and do not pose a threat of infecting others through casual contact. There are profound public policy, legal, ethical and development considerations implicated in how we address this issue. This article therefore will examine the response of the public health establishment, the Government, the private sector and assess the economic, social and psychological costs of the epidemic to the Bahamian society, families and individuals. There will be an analysis of the legal and ethical duties and obligations of doctors, dentists and other health care professionals with respect to treatment, testing, medical confidentiality and informed consent.

The issue of discrimination against HIV infected individuals in medical service, insurance and employment will also be addressed. Finally, some public policy recommendations will be offered as a means to promote further public discussion and, hopefully, informed public policy on this urgent issue.

HIV/AIDS

The standardise for Disease Control (CDC) define AIDS as "a disease moderately predictive of a defect in the cell-mediated immunity, occurring in a person with no known cause for diminished resistance to that disease".

Those who develop AIDS are vulnerable to unusual infections and cancers that do not generally pose a threat to anyone whose immune system is intact. At present there is no known cure for AIDS.

TRANSMISSION OF HIV/AIDS IN THE BAHAMAS

The transmission routes in The Bahamas, according to epidemiological data, are primarily through heterosexual sexual contact, cocaine/drugs addiction, transmission from mother to child either across the placenta or during delivery.

Standardise for Disease Control studies of health care workers,[2] nonsexual household contacts,[3] and insect bites[4] all support the conclusion that HIV is not transmitted by casual contact or insect bites.

It is unclear how efficiently HIV is transmitted by a particular route if an individual is exposed. However, the most efficient route of transmission of the virus appears to be blood transfusion because of the large dosage of the virus transfused. Between 60 and 100 percent of blood transfusion recipients became infected if donors either tested positive for antibodies or HIV or became antibody positive for AIDS.[5]

The second most efficient transmission route of the HIV virus is perinatal transmission. Studies suggest that the probability of HIV transmission from mother to infant ranges from 30 to 50 percent who have symptoms of HIV infection during pregnancy or who show evidence of immunosuppression.

The dominant risk for transmission of the HIV virus in The Bahamas is Free Base non IV cocaine/drug abuse. Unlike in the United States where IV drug abuse is prevalent in some urban centres, in The Bahamas drug abuse is related to cocaine and alcohol. This unique epidemiological aspect of AIDS in The Bahamas was first noted by Dr. Perry Gomez in a pioneering study in 1989 which showed that AIDS in The Bahamas is "mainly a heterosexual disease where the contributing factors are non IV use of Free Base Cocaine (crack), Haitian immigration and promiscuity."[7]

For both men and women the ages of highest prevalence range from 20 to 50 years of age. The skills, experience and energy this

group brings are a company's most important assets. This demographic aspect of AIDS in The Bahamas has profound implications for national economic productivity, support of families and general creativity of the society.

The ages of least prevalence are the ages of 5 to 18. While this group offers the best hope for prevention through education, there are a number of aspects of contemporary Bahamian culture which put this segment at risk.

The first risk factor is the pervasive emphasis on material acquisition and conspicuous consumption of Bahamian culture. This pressure often leads young school girls to date older men, who may be infected, for material benefits. Ironically, older men may intentionally target young school girls on the rationale that they are more likely to be uninfected by the HIV virus.

The second risk factor of teenagers is the widespread sexual abuse of children and incest in Bahamian families. In 40% of these cases the abuser was either a member of the family or a close friend, usually male.

Legal action was taken against only 5 perpetrators of the abuse. Of these two (2) were imprisoned and three (3) were released after a brief period of detention. Many of the mothers of these children were not willing to prosecute the perpetrators because of their economic dependence upon these men.

Therefore, the combined risks of the exploitation of young school girls and the significant incidence of sexual abuse provide a tremendous challenge for family life and AIDS prevention education in The Bahamas.

An interesting aspect of the heterosexual transmission is the high prevalence of AIDS among non-Bahamians in The Bahamas, predominantly Haitian nationals, bearing in mind that The Bahamas does not screen visitors, contract workers and applicants for Bahamian visas for HIV infection.[8]

The least efficient route of transmission is accidental needle stick injuries or cuts with sharp objects. The health care worker may be exposed to the HIV virus by virtue of their occupation. Studies among health care workers exposed to the virus by this route provide information on the risk of HIV infection by this avenue.

These suggest that the risk of transmission from needle stick exposure is less than 1 percent and probably closer to 0.5 percent.

Clearly, the number of exposures to the HIV virus will invariably increase the risk of transmission to health care workers in The Bahamas though at present, the risk to health care workers in The Bahamas contracting the HIV virus from their patients is negligible especially since all patients are treated as a potential HIV or Hepatitis B carrier at the hospitals in The Bahamas.[9]

PUBLIC HEALTH RESPONSE IN THE BAHAMAS

According to Dr. Vernell Allen, the Chief Medical Officer, the public health policy in the Bahamas is to encourage voluntary testing with counselling and intensive education for prevention.

AIDS AND LEGAL ISSUES

In The Bahamas there is no case law as yet dealing with the legal rights, duties, and conflicts involving AIDS.[10] There are a number of statutory provisions however dealing with AIDS.

The Sexual Offences Act, 1991, Section 8 (2) imposes a criminal penalty of five (5) years, upon conviction, for a person infected with the HIV virus who has sexual intercourse with someone with the other person's consent but without disclosing the fact of the infection to the other person.

However, it is a complete defence if the other party knew of the infection or had reasonable cause to believe, before the sexual intercourse, that the accused was infected. Moreover, the complainant's evidence must be corroborated in some material particular implicating the accused. It is interesting to note that since its enactment there have not been any prosecutions under this law. The criminal justice system is a poor mechanism for dealing with public health matters. It is adversarial and in matters of HIV transmission requires evidence involving intrusions into intimate matters.[11]

While it may be politically expedient to pass such laws, as a response to the AIDS epidemic the public is given a false sense of security and may drive the disease underground.[12]

Under the Health Services Rules, section 46, AIDS was included as a notifiable disease whereby any physician or other person having knowledge of the disease must report to the Ministry of Health the full name, age, sex, exact address, occupation and place of employment of the infected person. Section 52 (b) of the same Regulations calls for the absolute isolation of the person infected with AIDS even though the HIV virus is not transmitted through casual contact.

This unfortunate aspect of Regulations perhaps reflects a confusion between the terms "infectious" and "contagious" diseases and poor legal drafting.

However, the Health Services Regulations and the Sexual Offences Act seem to suggest ambivalence at the level of public policy makers whether AIDS should be addressed as a criminal matter or as a matter of public health policy.

In contrast, the public health establishment has responded differently in New York State and Britain. In the case New York State Society of Surgeons v. Axelrod[13] The New York State Commissioner of Health refused a request by the New York State Society of Surgeons to place the HIV infection on the list of communicable and sexually transmissible disease.

The New York State Court of Appeal affirmed the Health Commissioner's exercise of discretion on the grounds that the placement of HIV infection on this list would trigger statutory provisions relating to isolation and quarantine, reporting, mandatory testing and contract tracing, provisions which, for public health reasons, may not be appropriate in this case.

The Court reasoned that given the possibility of discrimination in housing, employment and health care, given the safeguards of voluntary testing and universal precautions recommended by the CDC, the Institute of Medicine and the National Academy of Sciences, there is no reasonable justification for listing HIV infection as a communicable or sexually transmissible disease.

Similarly, in Britain, the Public Health (Infectious Diseases) Regulations 1985 (SI 85/434) did not make AIDS a notifiable disease, with a limited exception, because it would have placed unwarranted restriction on travel on public transport, education and enfringe the human rights of HIV infected persons.

1. INFORMED CONSENT AND HIV TESTING

The taking of blood from a patient can only justifiably be for the reasons to further the patient's care. In the case of Murray v. McMurchy[14] the courts have established that where the need for testing could have been foreseen before the patient became

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unconscious there is no justification for delay until the patient cannot refuse. It is unlikely that an unforeseen or unforeseeable need to test for HIV infection would arise in the normal treating situation where the doctor would have already obtained pertinent information prior to treatment.[15] What constitutes "informed consent"? Mr. Justice Blackmun of the United States Supreme Court in the case Planned Parenthood defined the "informed" component of the term as "giving of information to the patient as to just what would be done and as to its consequences."[16] Informed consent is considered an ethical requirement either as part of the fiduciary duty of the physician or as part of the autonomy rights of the patient.

Article 21 of the Bahamas Constitution states: "Except with his consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises."

Under subsection (2) (a) an exception to the right of privacy is made for the reasonable requirements of public health. However, Dr. Vernell Allen, the Chief Medical Officer of The Bahamas, states, in accordance with the CDC and WHO guidelines, that there is no reasonable medical or public health necessity for mandatory testing for HIV in The Bahamas.[17]

Therefore, if some doctors and dentists test patients without obtaining informed consent, it is not only illegal and unethical but there is also no public health requirement to do so.

The practice of unconsented HIV testing, if it does occur, exposes doctors and dentists to criminal (battery) and civil (negligence and fraud) liability and may destroy the trust between doctor and patient. Also, the result of a sero-positive test, in the absence of informed consent and counselling, could have catastrophic consequences for the patient.

2. DOCTORS' DUTY TO TREAT[18]

Do physicians and dentists have an ethical duty to treat HIV patients despite the negligible risk of infection? Factors which contribute to the reluctance of doctors and dentists to treat AIDS patients are several. Firstly, some express fear of contagion. Secondly, some fear that non HIV patients will shun their practice if they treat AIDS patients. Thirdly, some insist that they do not know enough about HIV infection and are too busy to learn. Fourthly, some have antipathies to the groups of highest risk - formerly Haitians and cocaine addicts. Consequently, many HIV infected persons do not have a continuous relationship with a treating physician.

Doctors in The Bahamas have a statutory duty to render treatment to any patient needing treatment. Section 15 (b) of the Medical Act states it shall be improper conduct if a person registered under this Act:

> "in any institution, being a person engaged within or about that institution, in the practice of medicine or surgery, and acting in concert with any other person so engaged, refused without reasonable excuse to render treatment to any patient needing treatment. . ."

There is also a professional code in the medical profession known as the Hippocratic Oath, codified in 400 B.C., and is often administered as part of the graduation ceremonies at medical schools which imposes an affirmative duty upon doctors to treat.

However, there is no statutory duty to treat patients imposed by the Dentist Act and Regulations or Nurses Act. However, like physicians, there are common law duties because it is a relationship of trust and of contract.

Thus, doctors have a duty to see patients irrespective of the disease, then make a clinical judgment whether to treat with medicine, surgery or refer to a specialist.[18]

The fact that exceptions are recognised for immunosuppressive and pregnant health care workers suggest that doctors are not obliged to take risks that exceed some moderate standard.

Thus, Bahamian doctors, dentists, nurses and other health care workers accepted a duty not to refuse treatment of HIV patients as members of their profession, unless cumulative risks of such treatment exceed the standard level of risk that limits that duty to treat. As the prevalence of AIDS in The Bahamas increases, as expected, the Bahamian courts will have to address the issue of whether it is intentional infliction of emotional distress and breach of statutory and common law duties to refuse treatment or services to a person with AIDS, or to a close relative who has sought the services on behalf of a person with AIDS.

3. PATIENT CONFIDENTIALITY

Confidentiality is a widely recognized implicit warranty of fairness in clinical situations and constitutes a technically and morally essential element of efficient medical and dental care.

If breaches of confidence occur, they do so necessarily after the communication and therefore retroactively introduces unfairness into the clinical encounter - a confidential relationship.[19] The use of computer files and medical data bases have created new threats to the confidentiality of medical records. However, the loss of medical confidentiality will result in discrimination against AIDS patients and the disease going underground where it may spread more rapidly.

Under the Health Rules, section 46, there is a duty to report the sero-positive status of a patient to the Ministry of Health. Under the Sexual Offences Act, section 8 (2), there is an affirmative duty upon an HIV infected person to inform a prospective sex partner of the infection, but in the context of the AIDS pandemic is there a similar duty upon the patient to inform a treating physician, dentist or medical technician?

This issue was addressed in the case of Boulais v. Lustig in California wherein the Petitioner, a surgical technician, accidentially cut by a doctor during a surgical procedure filed a suit in July 1991 against an HIV positive patient who she said intentionally concealed her infection in order to receive elective cosmetic surgery to improve the appearance of her breast at the Breast Center. The Petitioner sought monetary and punitive damages on charges of **fraud** and both **intentional and negligent infliction of emotional distress**[20]

4. DUTY OF HIV INFECTED DOCTORS TO INFORM PATIENTS?

Does a sero-positive doctor or dentist have an affirmative duty to disclose his/her status to a patient before an invasive procedure? This issue was dramatically addressed in the Wolgemuth case, a multi-count class action suit filed June 24th 1991 in a Pennsylvania trial court charging the Hershey Medical and Harrisburg hospitals with corporate negligence and vicarious liability for possible AIDS exposure to patients, their spouses and children caused by an obstetrics-gynecology

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resident who had tested HIV positive. The plaintiffs accused the hospitals of negligence, vicarious liability, corporate negligence, lack of informed consent, loss of consortium and intentional infliction emotional distress.

The Petitioners asserted that prior to their treatment by Dr. Doe, some of which included invasive procedures, they were denied a choice of informed consent regarding the fact that their "treating physician was carrying HIV. . . the possibility of contracting HIV is a significant material risk which a reasonable person would need to know in order to make an informed decision and information concerning this complication is material to patients in order for them to give informed consent. . ."[21]

Similarly, in 1991 in the case William v. American Dental Network el al the Petitioners sued a dentist, Dr. Ronald D. Marasco, and his employers with intentional infliction of emotional distress, negligent retention of an employee and dental malpractice and sought compensation for any medical costs Marasco's patients may incur as a result of their exposure. Dr. Marasco replied by invoking the privilege of confidentiality in connection with each claim regarding his alleged AIDS infection.[22]

In response to this trend of patient litigation, some hospitals in the United States have started to restrict the surgical priveleges of HIV infected surgeons.

In the case of Estate of William Behringer v. The Medical Center at Princeton, et al. a New Jersey court found that a Princeton hospital had appropriately barred an AIDS infected physician from surgical privileges. The court held that New Jersey's strong policy of patients' rights, weighed against the doctor's individual right to perform an invasive procedure as a part of his profession requires that the patients' rights must prevail.

The court stated further that at a minimum the physician must withdraw from performing any invasive procedure which would pose a risk to the patient. The court reasoned that where the ultimate harm is death, even the presence of a low risk of transmission justifies the adoption of a policy which precludes invasive procedures when there is any risk of transmission.

This is a complex issue which needs further study in The Bahamas to determine how to balance the interests of the patient with that of the doctor. If a surgeon discloses his sero status to a patient, it is fair to assume that, without proper confidentiality safeguards for the medical or dental surgeon, that surgeon's practice would be destroyed in this small community. Whereas, a doctor has a professional duty of confidentiality of the medical records and treatment of patients, patients have no such duty.

COSTS

The social costs for The Bahamas where there is mainly heterosexual transmission will be magnified as women and children become more vulnerable both as AIDS casualties and as AIDS survivors.

The direct economic costs of the epidemic will cause The Bahamas to make choices concerning who gets care and who does not and at which level of the system.

The overall effect of these choices will affect development as scarce resources are diverted from other areas to health. Also, there are high costs involved in the acquisition of drugs and personnel.

The indirect costs associated with the loss of income and decrease in productivity in the workplace are estimated to be twice to six times the direct costs.[23]

There are also coping costs by individuals, families and communities in response to the effect of the disease on family members.

DISCRIMINATION RELATED TO AIDS

Epidemics threaten the ties that bind communities. In The Bahamas the AIDS epidemic has resulted in widespread abandonment of infected infants and children especially during the early days of the epidemic. There are frequent deaths of young parents who leave grandparents with modest means to raise grandchildren.[24]

Insurance companies refuse coverage to HIV positive applicants and some insurers have terminated their group health insurance schemes. These discriminatory practices fuel an irrational fear of AIDS.

The demographic projections of the incidence of AIDS in The Bahamas is that it will continue to manifest itself in all socio-economic sectors of Bahamian society, as doctors, lawyers, hotel workers and other groups have already died from the disease.[24] Therefore, AIDS is not limited to any particular social or economic sector of society.

The majority of HIV infected persons are healthy carriers of the virus; over time some will develop AIDS or other HIV related conditions or remain healthy (asymptomatic carriers). It is estimated that 90% of the 5-10 million HIV infected persons worldwide are in the economically productive age group. Therefore, it is natural that questions are raised about the implications of HIV/AIDS for the workplace.

According to the World Health Organization, protection of the human rights and dignity of HIV infected persons, including persons with AIDS, is essential to the prevention and control of HIV and AIDS. WHO recommends that healthy workers infected with HIV should be treated the same as any other worker.[25]

The employer has a duty to provide a safe work environment for employees. As employers attempt to balance this general duty with the rights of HIV infected employees, it should be noted that the current medical consensus is that the HIV virus cannot be transmitted through casual contact (shaking hands, sharing a drinking glass, using the same washroom, etc.). However, the fear, gossip and panic surrounding the virus can create a public relations problem for a company or the fear among employees may erode worker productivity.

In this environment of fear and uncertainty, Bahamian employers, in cooperation with the respective trade unions, are advised to formulate a written AIDS policy for employees to alleviate fear and to educate. Such a policy should give employees general information about how the disease is transmitted, testing, confidentiality and safety precautions.

Employers must provide strict medical confidentiality of all employees' medical records and always obtain the informed consent (preferably in writing) of employees for any HIV testing. According to W.H.O., pre-employment HIV/AIDS screening as part of an assessment of fitness to work is unnecessary and should not be required.[26]

To avoid future legal liability for wrongful dismissal and fear among employees which could drive the disease underground, employers in the Bahamas can best serve their legal and business

interests by educating their employees about prevention and to recognize that normal interaction with HIV infected co-workers does not put them at risk. HIV infected workers should be allowed to work as long as medically fit for available and appropriate work.

In the work-place AIDS education/awareness campaigns, as part of the human resource development investment by Bahamian companies, should be preventive rather than reactive to avoid costly corporate disaster occasioned by fear, rumour, panic and disruption at the work-place.

Such a campaign by Bahamian employers would avoid discrimination, dampen prejudice among employees and encourage anyone infected with the HIV virus to report it and look to the company for support. Moreover, as Bahamian corporate citizens, employers would contribute to curbing the spread of AIDS by providing information to employees and enhance the public profile of the enterprise. Finally, such a campaign would minimise the possibility of incurring liability with respect to the management of AIDS and minimise the financial costs of providing medical support for an employee who becomes infected with the HIV virus or develops AIDS.

RECOMMENDATIONS

1. Need For Human Rights/Anti-Discrimination LAW

The discrimination against HIV infected persons provides us with an opportunity to examine whether our Constitution, with its broad statements of rights and numerous derogation clauses, should be supplemented with a more specific Human Rights or Anti-discrimination Law. With respect to prohibiting discrimination against HIV infected individuals, such a law would represent a public policy response which incorporates scientific knowledge into social policy. Such a law should be based upon the fundamental assumption that society wishes to treat people as free individuals unimpaired by other's irrational beliefs and attitudes in their decisions about jobs and services. Such decisions should be based on sound medical evidence applied in a fair and equal manner.

The test should be whether the HIV infected person is otherwise qualified to do the job, and if so qualified the employer should reasonably accommodate the infected employee. The essential dignity and equality of all persons, based on the norm of no discrimination, would be enhanced.

It is in the national interest of The Bahamas to utilise all capable persons to ensure maximum productivity and development. Discrimination which deprives the society of the contribution of HIV infected but otherwise qualified citizens undermines the progress of the society as a whole.

2. Leadership Of Medical/Dental Professional Associations

The stress manifested by some health care workers in response to the AIDS epidemic illustrates the need to once again negotiate the function of these professions in democratic society which promotes the equality and dignity of all persons. There needs to be clear professional codes of standard dealing with issues such as the duty to treat, national health insurance and anti-discrimination in the delivery of health care services.

3. establishment Of An Hospice

The establishment of an hospice based on an alternative care philosophy to provide humane care for those in need of chronic care should be undertaken as a joint public/private sector endeavour.

4. Establishment Of National Health Insurance Scheme

The refusal of the private insurance industry to provide coverage for HIV infected persons means that those who develop AIDS and require chronic care will not have coverage. The demands for such care would put an intolerable stress and costs on the Bahamian family and public facilities. From a public policy perspective, the central issue is whether the cost of health care for AIDS patients and others at high risk for illness will be broadly distributed or borne by those who become sick, and by their friends and families. The moral issue is one of justice.

Insurance carriers fear that those persons at risk for AIDS will seek large amounts of life insurance coverage, thus potentially endangering a company's solvency and its ability to pay other claims. However, there is no solid information yet on the potential impact of AIDS on insurance companies' solvency or on future premium rates. More frightening though is the substantial risk to individuals who are screened; the information produced may be accessible to employers and others with no legitimate public health interest.

Those who are denied life insurance coverage may also be denied loans, mortgages, and other forms of credit.

A national health insurance scheme would be ideal for chronic health care needs by spreading the cost to the entire working population rather than the current situation where the burden rests almost entirely upon the public hospitals and the families of the patients.

CONCLUSION

Needless to say, in preparing for this presentation, I have been educated and sensitized and I trust that these ideas will prompt meaningful discussion and, I hope, effective social action in response to this disease which threatens our survival as a society and civilization. ❑

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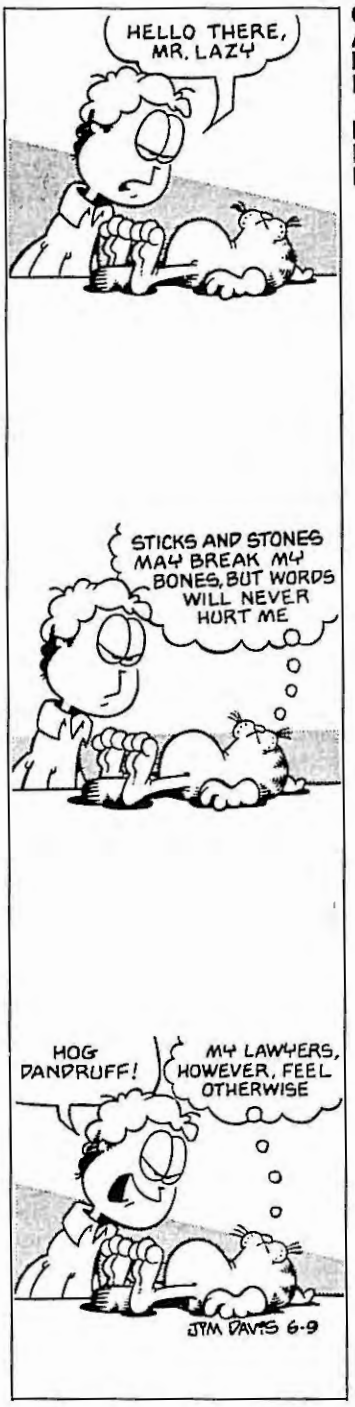

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