

Aggravated sexual assaults/ unprotected and protected sex/ undetectable viral load

“I am persuaded that the combination of an undetectable viral load and the use of condom would serve to reduce the risk below what would be considered a significant risk of serious bodily harm (...) [C]onsent would not, in this particular circumstance, be vitiated.”¹

Applicable law

The accused was convicted on six counts of aggravated sexual assault. He was also been convicted of invitation to sexual touching and sexual interference. For the purpose of this summary, we will only examine the offence of aggravated sexual assault that results from the non-disclosure of his HIV-positive status.

Section 265 of the *Criminal Code*

(1) A person commits an assault when:

(a) Without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

[...]

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

(c) fraud

Section 268 of the *Criminal Code*

(1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

¹ *Ibid.* at para. 117.

Section 273 of the *Criminal Code*

- (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.
- (2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable
 - (b) in any other case, to imprisonment for life.

Court and Date of the Decision

The judgment at trial of the Manitoba Court of Queen's Bench was delivered on July 15, 2008.

Parties

The case was brought by the Crown against an HIV-positive man. Nine women were complainants.

Facts

Mabior was diagnosed HIV positive on January 14, 2004. At the time of his diagnosis, and numerous times afterward, he was advised by a public health nurse to tell his sexual partner about his HIV status before engaging in sexual contact with them, and to always use condoms.

The accused began antiretroviral therapy (ART) shortly after his diagnosis. The therapy resulted in an undetectable viral load between early October 2004 and December 2005. From January 27, 2004 to March 31, 2006, he engaged in sexual intercourse with multiple women including each of the nine complainants without disclosing his status. Complainants reported sexual intercourse in a context of alcohol or drug use. Four of them were 17 years old at the relevant time and one was 12.

None of the complainants had been diagnosed HIV-positive at the time of the trial.

Proceedings

Mabior was charged with 10 counts of aggravated sexual assault for not disclosing his HIV positive status prior to engaging in sexual intercourse. The charge on one of the counts of aggravated sexual assault was stayed at trial.

Of the nine counts that remained, the Manitoba Court of Queen's Bench convicted Mabior on six counts of aggravated sexual assault. He was acquitted of similar charges in relation to three women.

Mabior was sentenced to 14 years' imprisonment. This total sentence also reflected his convictions for invitation to sexual touching and sexual interference.

The accused lodged an appeal before the Manitoba Court of Appeal, which was heard in February 2010. At time of publication, the appellate court's judgment was still pending.

Legal arguments and issues addressed

The Manitoba Court of Queen's Bench's decision is a decision of a court of first instance and, as such, is not widely binding. However, it remains legally significant because it is the first case since the landmark 1998 decision of the Supreme Court of Canada in *Cuerrier*² to analyze in detail the meaning of the term "significant risk". According to *Cuerrier*, non-disclosure of HIV-positive status amounts to fraud vitiating consent when it has the effect of exposing a person to a "significant risk of serious bodily harm".

To obtain a conviction for aggravated sexual assault, the prosecution is required to prove that the accused applied force intentionally to a complainant in circumstances of sexual nature. In addition, an aggravated assault requires that the assault "wounds, maims, disfigures or endangers the life of the complainant."

In the Mabior case, the court was called upon to determine:

- whether the fact that the accused did not disclose his HIV-positive status prior to sexual intercourse amounted to fraud vitiating the consent of the nine complainants and consequently, transformed consensual sex into sexual assaults. (The Court held that all of the complainants had agreed to engage in sexual intercourse with the accused.)
- whether the accused's conduct risked endangering the complainants' lives and could consequently amount to aggravated sexual assaults. (None of the complainant had tested HIV positive at the time of the trial).

In reaching her decision, the trial judge (McKelvey J.), considered whether Mabior had placed each of the complainants at a "significant risk" of HIV infection, taking into account both condom use and the accused's viral load at the time of sexual intercourse.

The court interpreted and applied the "significant risk" standard in the circumstances of the case, taking *Cuerrier* as a starting point.

The court held that in case of unprotected sex, the risk of contracting HIV met the test of significant risk of serious bodily harm in accordance with *Cuerrier*. The question that remained to be answered was whether the test is met in those circumstances where the accused had an undetectable viral load and/or a protection was used.

² *R. v. Cuerrier*, [1998] 2 S.C.R. 371 [*Cuerrier*].

The trial judge relied heavily on the evidence provided by the medical expert called by the prosecution, Dr. Smith. His evidence regarding risks of transmission, including the impact of condoms and viral load on said risks, was central in the case.³

With regarding to condom use, the medical expert's evidence was as follows:

- Studies cited specifically in his medical report put the risk of transmission per act of unprotected vaginal sex as ranging from 0.05% (1 in 2000) to 0.26% (1 in 384), which risk is lowered by the use of a condom.
- He noted that “HIV is unable to pass through good quality condoms” and “[t]here is no scientific justification to require HIV status disclosure if a condom is always used.”
- However, human error, particularly with respect to correct application and use of a condom, reduces their overall effectiveness, and use of drugs or alcohol could serve to impair the ability to follow correct condom application procedures.
- “A Cochrane review of condom effectiveness concludes that consistent use of condoms results in an 80% reduction in HIV incidence. The studies used in this review did not report on the ‘correctness’ of use.... There is enough evidence of transmission due to condom breakage or improper use to classify this activity as low (rather than negligible) risk.”
- The prosecution's medical expert variously described vaginal sex using a condom as posing a “low risk”, “very low risk” or “extremely low risk” of HIV transmission.

With regard to viral load and HIV transmission risk, the judge's ruling, the medical expert's report and the transcript of evidence at trial include the following highlights:

- The trial judge noted that, according to UNAIDS and WHO: “Research suggests that when the viral load is undetectable in blood the risk of HIV transmission is significantly reduced. However, it has not been proven to completely eliminate the risk of transmitting the virus. More research is needed to determine the degree to which the viral load in blood predicts the risk of HIV transmission and to determine the association between the viral load in blood and the viral load in semen and vaginal secretions.”
- The prosecution's medical expert testified at trial that it is an “unquestioned fact” that “infectiousness is directly proportional to viral load.” According to the medical expert, in the case of a viral load of less than 1500 copies/mL, the risk of HIV transmission is considered “low” and transmission is “extremely unusual”, and in the case of an undetectable viral load, the risk is “very low” – or, according to one expert review in 2008 by the Swiss Federal Commission on HIV/AIDS, even “negligible or possibly non-existent.”
- It was the “strong opinion” of the prosecution's medical expert that “from a scientific perspective”, there would be a “certainly very low risk” of transmission through unprotected sex by someone with undetectable viral load and no other sexually

³ Trial Transcript, volume 9; Report on HIV/AIDS by the Expert Dr. Richard Smith.

transmitted infections.

As noted above, of particular interest at trial was the Swiss statement issued in 2008 by the Swiss Federal Commission on HIV/AIDS, which states that: “an HIV-infected person on antiretroviral therapy with a completely suppressed viremia is not sexually infectious i.e. cannot transmit HIV though sexual contact.” This statement is subject to the qualifications that the successful adherence to antiretroviral therapy keeps viral load suppressed for at least six months and there are no other sexually transmitted infections. The Swiss Federal Commission estimated that the risk of HIV transmission in that case would be less than 0.001% (1 in 100,000). The prosecution introduced materials from UNAIDS, WHO to illustrate that Swiss statement was controversial. However, the prosecution’s expert maintained that “there’s been no scientific refutation; there’s been no disproof of what they said. According to the expert, while the claim of “negligible” risk has provoked controversy, there is no controversy among HIV-treating physicians that the risk is “low” in circumstances of a viral load that is undetectable or low (e.g. under 1500 copies/ml).

In Mabior’s particular case, the expert noted that his circumstances did not meet the qualifications of the Swiss Federal Statement in that he had multiple partners.⁴ However, in his opinion, between October 2004 and December 2005, the accused’s viral load was undetectable and therefore there was “a very high probability that Mr. Mabior was not infectious and could not have transmitted HIV throughout that period.” He noted that there was no evidence of STIs at that time while he had been diagnosed with Gonorrhea in 2003 and again in early 2004.

Application of the evidence to the legal threshold of “significant risk”

The judge considered that, according to expert medical evidence, even if properly used, condoms were only 80 percent effective at preventing the transmission of HIV.

With respect to the accused’s viral load, the judge accepted expert evidence that there was “a very high probability that the accused was not infectious and could not have transmitted HIV” when his HIV viral load was undetectable.

The trial judge was also satisfied that the accused was never advised by any medical professional that he could not infect a sexual partner when he had undetectable viral load and that there was no need to use condoms.

In order to establish what level of risk should be considered as a “significant risk” of HIV transmission during sex, the judge referred to the Ontario Court of Appeal’s decision in *Thornton*.⁵ In that case, a man was criminally convicted of common nuisance because he

⁴ The judge also took note that Mabior did not meet the criteria established by the Swiss Commission statement and refused to consider the findings of that Commission relevant to its decision, in that these conclusions were not in existence at the time of the offences.

⁵ *R. v. Thornton*, [1991] 1 O.R. (3d) 480, [1991] O.J. No. 25 (Ont. C.A.) (QL); affirmed at (1993), 82 C.C.C. (3d) 530, [1993] S.C.J. No. 62 (S.C.C.) (QL).

donated blood knowing that he was HIV-positive. The Court of Appeal found that the public was “endangered” even though the blood screening process was 99.3 percent effective at detecting HIV, and had detected HIV in this case.

Taking into account the potential effect of viral load and condom use on HIV transmission and interpreting expert evidence in the light of the *Thornton* case, the judge reached the following conclusions:

- Condom use alone does not sufficiently reduce the risk of HIV transmission to consider that there is no “significant risk” of transmission in cases of protected sex. Consent could be vitiated.

“...it is important to recall the evidence of Dr Smith which stated that condoms are only 80% reliable and constitute an 80% reduction in HIV incidence. Further, cases such as *Thornton* have demonstrated that a 99.3% screening safety rate was still considered to be too significant a risk in those circumstances. **I am persuaded that in those circumstances where protection was used and the accused was regarded as infectious by medical evidence, that a significant risk of serious bodily harm existed.**”⁶

- The combination of condom use and undetectable viral load reduces sufficiently the risk of HIV transmission to consider that there is no “significant risk” of transmission. Therefore, there would be no deprivation and consent would not, in this particular case, be vitiated.⁷

“(...) Dr. Smith opined that the accused could not have transmitted the disease at least between October 22, 2004 and December 28, 2005 (...) The issue of infectivity and possible transmission, even with a condom, must be considered (...) there was a “lower risk “when protection was utilized according to medical and scientific evidence. **I am persuaded that the combination of an undetectable viral load and the use of condom would serve to reduce the risk below what would be considered a significant risk of serious bodily harm. The facts and medical evidence in this case have brought me to the conclusion that consent would not, in this particular case circumstance, be vitiated.**”⁸

The trial judge then proceeded to analyze each charge of aggravated sexual assault.

Referring to the evidence at trial, she ruled that there was “a continuing risk that HIV could be passed upon sexual intercourse in all circumstances”⁹ and thus there was an endangerment of life for each of the six complainants in this case, meaning the sexual assaults would therefore amount to *aggravated* sexual assaults.

⁶ *Mabior*, *supra* note 1 at para. 116.

⁷ “Since *Cuerrier*, fraud can serve to vitiate consent and may be proven if the elements of dishonesty and deprivation are established” (*Ibid.* at para. 12).

⁸ *Ibid.* at para. 117.

⁹ *Ibid.* at para. 106.

The Court convicted the accused of aggravated sexual assault against four women because he did not use a condom during vaginal intercourse.

He was also convicted in relation to two women where he used a condom during vaginal intercourse but his viral load was above the “undetectable” threshold.

Mabior was acquitted of charges in relation to three women because his viral load was undetectable at the time of those sexual encounters and the prosecutor did not prove beyond a reasonable doubt the absence of a condom during vaginal intercourse.

Comments

As noted, this decision is significant because it is the first since *Cuerrier* to examine, in detail, the notion of “significant risk”. This case is the first in Canada to address directly the legal implications of an undetectable or low viral load. It is also the first case to include any detailed discussion by a judge of whether condom use reduces the risk sufficiently that there is no legal requirement to disclose, something that a majority of the Supreme Court had contemplated, but not definitively decided, in *Cuerrier*. (In a number of other cases after *Cuerrier*, trial judges have stated that the prosecution had to prove the sex was unprotected in order to secure a conviction, but with little or no discussion of this question.

As far as viral load is concerned, the *Mabior* decision is an important step as the Court accepted that viral load is legally relevant and, more specifically, accepted that an undetectable viral load dramatically reduces the risk of HIV transmission.

However, the court’s interpretation of the notion of “significant risk” established in *Cuerrier*, as well as the scientific evidence is largely questionable.

By relying on evidence that condom use only reduces the risk of HIV transmission by 80%, the judge considered that even when a condom is used, there is a “significant risk” of HIV transmission as long as a person is infectious (i.e., has a detectable viral load). However, this is a reduction of what was, on the evidence from the Crown’s medical expert, a per-act risk of HIV transmission that was already ranging from 0.05% (1/2000) to 0.26% (1/384). Condom use further reduces the per-act risk of transmission associated with vaginal sex by 80%, such that it then falls in the realm of 0.01% (1/10 000) to 0.052 (approx. 1/2000).

While the trial judge accepted that there was a very high probability that a person was not infectious when his or her viral load was undetectable, she stated that only a combination of undetectable viral and condom use would reduce the risk below the threshold of “significant risk”.

It appears from such reasoning that the notion of “significant risk” established in *Cuerrier* is made out where there is simply possible infectivity. This “zero risk” interpretation of the notion of “significant risk” is clearly expressed by the judge:

“(…) During those times when the viral load is undetectable in the blood, the risk of HIV transmission is reduced. However, the research has not proven that such situation completely eliminates the risk of transmitting the virus (…) I am satisfied (…) that there was a significant risk of serious bodily harm in that HIV could have been passed to S.H, in those circumstances when the accused had an undetectable viral load and engaged in unprotected sexual contact.”¹⁰

The judge justified her position on the notion of significant risk and its interpretation of the evidence by referring to the *Thornton* decision.

However, such reliance is, again, questionable. *Thornton* was a case involving blood donation, not sexual transmission, and dealt with the offence of common nuisance, not aggravated assault. Also, *Thornton* predated the judgment in *Cuerrier*, in which Cory J., writing for the majority, was clearly aware of *Thornton* (cited regarding the question of whether an assault “endangered life” and was therefore aggravated). However, he in no way relied upon it in formulating the “significant risk” test at issue, and went on to state specifically that the standard for avoiding liability is not zero risk: “Absolute safe sex may be impossible...To repeat, there must be a significant risk of serious bodily harm...In the absence of those criteria, the duty to disclose will not arise”.¹¹ He further stated that “the phrase “significant risk of serious harm” must be applied to the facts of each case in order to determine if the consent given in the particular circumstances was vitiated. Obviously consent can and should, in appropriate circumstances, be vitiated. Yet this should not be too readily undertaken. The phrase should be interpreted in light of the gravity of the consequences of a conviction for sexual assault and with the aim of avoiding the trivialization of the offence.”¹²

By suggesting that if there is any risk of transmission non-disclosure would amount to fraud vitiating consent, the Manitoba Court of Queen’s Bench’s decision dramatically and unjustifiably extends the scope of criminal liability facing people living with HIV.

By suggesting that condom use does not suffice to remove the duty to disclose, the court imposes an excessive burden on people living with HIV’s, contradicts public health messages encouraging condom use and impedes HIV prevention efforts.

This decision is a decision of a Manitoba court and, as such, is not binding on courts in other provinces and territories. It is also a decision of a lower, trial court and does not bind other courts, even in Manitoba. Finally, the Manitoba Court of Appeal may have a different interpretation of the law. At the time of publication, a decision from the appellate court was pending.

¹⁰ *Ibid.* at para. 134,137.

¹¹ *Cuerrier*, *supra* note 3 at para. 129.

¹² *Ibid.*, at para. 139.