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# THE OVER-CRIMINALIZATION OF PERSONS WITH HIV

*This article argues that the Court has over criminalized HIV nondisclosure through treating all cases where there is a realistic possibility of transmission as aggravated sexual assault regardless of whether transmission of the virus takes place. It argues that there is no other context in which a remote possibility of a harm, where that harm is not realized, constitutes our most serious form of sexual assault and suggests that this over-criminalization of HIV is a result of a pattern of exceptionalism in which persons with HIV are singled out for disadvantageous treatment because of the stigma that has built up around the condition. Finally, the article notes the lengths the Court went to acquit DC in* R v DC *and suggests this reflects the Court's own discomfort with the* Mabior *test.*

## I *Introduction*

The Supreme Court of Canada judgment in *R v Mabior*[1] has enormous implications for persons with HIV, for their sexual partners, and for sexual assault generally. In this brief comment, I would like to focus on several points not made explicit in *Mabior.* I will begin, in Part II, by discussing briefly the failure of the decision to address the context of living with HIV in Canadian society.[2] In the Part III, I will discuss three interrelated issues, all of which address what form criminalization should take. First, I begin with a consideration of the fact, omitted by the Court, that the transmission of a sexually transmitted infection was, in fact, already criminalized when the amendments were made to the definition of fraud in the sexual assault provisions in 1983. Second, I examine why the Court did not consider other crimes in its analysis, either less serious forms of sexual assault or crimes that focus more directly on the risk-taking component of nondisclosure rather than on lack of consent. Finally, I close with a few comments about the new test for aggravated sexual assault and its effect of increasing the criminalization of HIV non-

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1 *R v Mabior*, 2012 SCC 47 [*Mabior*].

2 This lack of context has been particularly evident in a number of recent SCC decisions involving gendered violence including *R v Ryan*, 2013 SCC 3; *R v O'Brien*, 2013 SCC 2; and *R v JA*, 2011 SCC 28.

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disclosure. I suggest that the Court's reaction to the facts in *DC*[3] illustrates its own discomfort with the implications of the *Mabior* decision.

## II *The absence of context*

Most notable among the things not discussed by the Court in *Mabior* is the context of HIV for those who live with it. There was one reference to persons with HIV as a vulnerable group but with no elaboration.[4] There was no discussion of the difficulty of disclosing HIV in a society where people who are HIV-positive have been discriminated against in numerous ways[5] and where disclosure can trigger a domino effect of negative repercussions. Nor is there mention of the difficulty of insisting on condom use, particularly for women in relationships characterized by an imbalance of power.[6] Further, it is assumed that everyone has equal access to antiretroviral medication and to the regular viral load testing which will now be necessary to establish the new defence to liability. At the same time that HIV is decontextualized, it is also exceptionalized. There is a new variant of aggravated sexual assault that can only be committed by someone with HIV. Variations on the test may apply to other sexually transmitted infections, but the 'realistic possibility of infection' test is limited to people with HIV.[7] While it is not unusual for the Court to limit itself to the issue before it, it is unusual to isolate one form of systemic disadvantage and to use that as the basis of criminal liability. There might be legitimate reasons to distinguish HIV from other sexually transmitted infections. For example, we have developed effective ways to prevent transmission of HIV, making it less easily transmissible than most STIs. But because there are so many illegitimate reasons for singling out HIV – such as stigma and discrimination, which have

3 *R v DC*, 2012 SCC 48 [*DC*].

4 *Mabior*, supra note 1 at para 67.

5 See e.g. Valerie A Earnshaw et al, 'Stereotypes about People Living with HIV: Implications for Perceptions of HIV Risk and Testing Frequency among At-Risk Populations' (2012) 24 AIDS Education and Prevention 574; Saara Greene et al, '"Under My Umbrella": The Housing Experiences of HIV Positive Parents Who Live with and Care for Their Children in Ontario' (2010) 13 Archives of Women's Mental Health 223; Michael J Kaplan, 'HIV Stigma: Standing in the Way of an AIDS-Free Generation,' *The Huffington Post* (30 November 2012) online: Huffington Post <http://www.huffingtonpost.com/michael-j-kaplan/hiv-stigma-aids-generation_b_2218559.html>.

6 Alison Symington, 'HIV Exposure as Assault: Progressive Development or Misplaced Focus?' in Elizabeth Sheehy, ed, *Sexual Assault Law, Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 635.

7 *Mabior*, supra note 1 at para 92.

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historically driven non-disclosure prosecutions – it was incumbent on the Court to make these reasons explicit.

## III *How to criminalize non-disclosure*

### A LEGISLATIVE INTENT

Much of the Court's judgment is an attempt to determine whether Parliament intended non-disclosure of a sexually transmitted infection to constitute fraud negating consent to sexual activity. The key change to the definition of fraud took place in 1983 when the reference to fraud as to 'the nature and quality of the act' was amended to refer simply to 'fraud.'[8] Given the Court's over-arching concern with legislative intent, it is puzzling that it did not mention that, in 1983 when the definition of fraud was amended, the *Criminal Code* already contained an explicit provision criminalizing the transmission of certain serious sexually transmitted infections.[9] A specific provision had been enacted in 1919,[10] making it an offence punishable on summary conviction to communicate a venereal disease, knowingly or by culpable negligence, to another person. This provision was repealed in 1985, just a few years before the first HIV non-disclosure prosecution in Canada.[11] According to Richard Elliott, it was repealed because the transmission of a venereal disease was considered better addressed by public health rather than by criminal law and because no one had been prosecuted under the provision for over fifty years.[12]

It is possible that the repealed section was intended to deal only with cases of actual transmission of an STI, regardless of whether disclosure was made. But it seems unlikely that the transmission of our then most

8 *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, SC 1980–81–82–83, c 125, s 19.

9 *Criminal Code*, SC 1919, c 46, s 316A, as repealed by *Criminal Law Amendment Act*, SC 1985, c 19, s 42.

10 The text of the provision reads as follows: '(1) Any person who is suffering from venereal disease in a communicable form, who knowingly or by culpable negligence communicates such venereal disease to any other person shall be guilty of an offence, and shall be liable upon summary conviction to a fine not exceeding five hundred dollars or to imprisonment for any term not exceeding six months, or to both fine and imprisonment.' The section applied to syphilis, gonorrhoea, and soft chancre and there was a much outdated corroboration requirement in subsection (2).

11 *R v Summer* (1989), 98 AR 191, AJ no 784 (QL) (Alta Prov Ct).

12 Richard Elliott, *Criminal Law and HIV/AIDS: Final Report* (1996), online: Canadian HIV/AIDS Legal Network <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=30>.

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serious STIs would be punishable on summary conviction, whereas non-disclosure (with or without transmission) was intended by Parliament to be charged as aggravated sexual assault. The enactment and particularly the repeal of this section should have formed part of the analysis of legislative intent. This is not to suggest that this section is determinative of the outcome on the legislative intent behind fraud. Rather, it should inform us about how transmission of serious sexually transmitted infections was viewed before the AIDS pandemic became part of our public consciousness and should lead us to question why HIV has triggered such a uniquely punitive approach.

### B PROBLEMS WITH CHARGING HIV NON-DISCLOSURE AS AGGRAVATED SEXUAL ASSAULT

In *Mabior,* the Court phrased the issue as being whether a person who engages in sexual relations without disclosing his or her condition commits aggravated sexual assault.[13] No distinction was made between cases where the virus is transmitted and those where it is not. The Court did not consider any options for criminalization short of our most serious sexual offence of aggravated sexual assault, a crime which is punishable by a maximum sentence of life in prison.[14]

The scheme of sexual assault offences in the *Criminal Code* is tiered from 'simple' sexual assault through to aggravated sexual assault, based on the consequences or additional harm to the complainant beyond the harm of sexual assault. A sexual assault is a sexual touching without consent. An aggravated sexual assault is one in which the accused 'wounds, maims, disfigures or endangers the life of the complainant' in the course of that sexual assault. The potential life sentence for aggravated sexual assault is justified by the harmful consequences that ensue from the sexual assault, along with a heightened level of moral culpability.[15] This distinction is lost in HIV non-disclosure prosecutions. There are several problems with the Court's reliance on aggravated sexual assault, three of which I will discuss here.

First, the Court assumed, without analysis, that *any possibility* of transmitting HIV endangers life. It is true that HIV is a serious condition that

13 *Mabior,* supra note 1 at para 1.

14 Ibid at paras 1–4. See *Criminal Code,* RSC 1985, c C-46, s 273 (2)(b).

15 See e.g. *R v Henry,* 2002 BCCA 575, in which the accused's sentence of fifteen years for beating the victim with a hammer and repeatedly choking her into unconsciousness during a brutal sexual assault was upheld; *R v H(PA)* (1998) 227 AR 211 (Alta Prov Ct), aff'd (1999), 232 AR 150 (Alta CA), where the accused was sentenced to nineteen years for attacking the victim viciously and leaving her with permanent brain damage.

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can be life endangering if left untreated. But does proving a very small possibility of transmitting the virus constitute proof of actual endangerment of life beyond a reasonable doubt? Consider the facts in *DC*. Unprotected sex with DC was found to involve a risk of HIV transmission of one in 10 000, an estimate we now know was probably on the high side. Is a one in 10 000 chance that you will acquire a condition that may endanger your life the same as proof beyond a reasonable doubt of actual endangerment?

To use an imperfect analogy, we punish someone for impaired driving if we catch him or her driving while impaired. We punish the individual for impaired driving causing bodily harm or causing death only where those harmful consequences ensue. The accused bears the risk of these consequences ensuing and the penalty escalates accordingly. Because the concept of endangerment is more amorphous and involves a potential rather than an actual harm, the Court held that a 'realistic possibility' of transmitting the virus will suffice. In my view, there needs to be a stronger nexus between the non-disclosure and the endangerment to justify invoking our most serious sexual offence. That nexus should be transmission. Culpability in criminal law should depend on a combination of the mental state of the accused and the harm caused.[16] HIV may actually endanger life but, where there is no transmission, a remote possibility of acquiring it does not.

While sexual assault is not a crime that is measured by the degree of harm caused to the complainant, aggravated sexual assault is. Sexual assault is about the denial of the complainant's autonomy to choose the circumstances in which he or she will participate in sexual activity. But aggravated sexual assault applies to situations where that autonomy is negated *and* further serious harm is caused. The judgment in *Mabior* trivializes the significance of such harm when it does occur.[17]

Why is it only in the HIV context that even the slightest possibility of endangerment is sufficient to trigger our most serious sexual offence?[18] It is as if the idea of HIV is enough to endanger life. The Court acknowledged that other jurisdictions have taken a more nuanced approach,

16 *R v DeSousa*, [1992] 2 SCR 944, 95 DLR (4th) 595.

17 Under the *Mabior* test, in the unlikely event that transmission takes place even where the accused uses a condom and has a low viral load, the test would result in acquittal.

18 In *R v Hutchinson*, 2009 NSSC 51, rev'd 2010 NSCA 3, new trial, 2011 NSSC 361, aff'd 2013 NSCA 1, the Nova Scotia Court of Appeal suggested, without deciding, that a deception leading to pregnancy *could* constitute aggravated sexual assault because pregnancy can cause bodily harm and even endanger life. The Court did not suggest that every deception *where there is a realistic possibility of pregnancy* but no actual pregnancy would constitute aggravated sexual assault.

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either by prosecuting only cases where transmission takes place[19] or by prosecuting cases where no transmission takes place as a less serious offence,[20] but it dismissed these options without explanation.

Second, the Court relieved the Crown of having to prove endangerment in individual cases by presuming that endangerment was present unless a condom was used *and* the accused's viral load was low. An accused with an undetectable viral load who did not use a condom, for example, would not be able to present scientific evidence that transmission was not a realistic possibility.' As Shaffer notes, the legal test does not correspond with the scientific evidence.[21]

Finally, the Court conflated the *mens rea* for sexual assault with the *mens rea* for aggravated sexual assault. In order to prove sexual assault, the only fault requirement appears to be knowledge that one is HIV-positive.[22] While the Court noted that the potential life sentence required a high level of moral blameworthiness, it did not mention an additional *mens rea* requirement to elevate the assault to aggravated sexual assault.[23] For example, aggravated sexual assault usually requires objective foreseeability of bodily harm.[24] The *Mabior* Court did not discuss whether endangerment must be reasonably foreseeable by the accused in the HIV non-disclosure context. In overlooking this element, the Court failed to recognize the impact of the accused's knowledge on his or her culpability: for instance, might an accused who has an undetectable viral load argue that he or she reasonably believed the complainant was not endangered? There would be significant scientific evidence to support such a belief.

There is a more basic question that Symington[25] also addresses: whether sexual assault is the most appropriate crime in this context. What is the harm from failure to disclose that is being addressed by criminalization? There are two possibilities. The harm could be conceptualized as the denial of the autonomy to choose whether to engage in sexual activity with someone who is HIV-positive. Alternatively, the harm could be seen as exposing the complainant to the risk that he or she will

19 *Offences against the Person Act, 1931* (UK), 24 & 25 Geo V, c 100, ss 18, 20.

20 *Crimes Act* (NZ), 1961/43 (reprint as of June 2010) ss 145, 188, 201, online: NZLii <http://www.nzlii.org/nz/legis/consol_act/ca196182/>.

21 Martha Shaffer, 'Sex, Lies and HIV: *Mabior* and the Concept of Sexual Fraud' 63 UTLJ 466 at 472 [present issue].

22 It is not clear whether the accused must know that the complainant is not HIV-positive.

23 *Mabior*, supra note 1 at para 24.

24 *R v Ford*, 2006 NLCA 70, 262 Nfld & PEIR 165 at para 16; *R v Godin*, [1994] 2 SCR 484, 31 CR (4th) 33 at para 2.

25 Alison Symington, 'Injustice Amplified' 63 UTLJ 485 at 494–95 [present issue].

acquire HIV. Most of the Court's attention was focused on the latter concern: taking unjustifiable risks with the health of one's sexual partner. I have argued elsewhere that it might be more appropriate to charge those accused in HIV non-disclosure cases with crimes other than aggravated sexual assault that reflect the risk-taking nature of the conduct.[26] Where the virus is transmitted, for example, criminal negligence causing bodily harm reflects the lack of regard the accused had for the physical integrity of his or her partner through the test of 'wanton and reckless disregard for the lives or safety of others.' This seems to get at the heart of the wrong done in non-disclosure. When the virus is not transmitted, lesser offences such as common nuisance more realistically reflect the level of culpability involved.

Whether non-disclosure constitutes sexual assault is the question with which I struggle most deeply. Determining whether sexual assault is the appropriate offence is a very complex question, as it is important to protect the rights of persons with HIV but also important not to dilute the protections that sexual assault law provides more generally through a robust definition of consent. The HIV cases highlight the dilemma for women in particular because, as a result of their relative lack of power in sexual relationships, women have unique difficulties with disclosure and with insisting on condom use, making them vulnerable both to sexual exploitation and to prosecution when they fail to meet the *Mabior* criteria. Sexual assault, at its core, is about power and control and that power and control is often obscured in the HIV context.[27] The problem with using sexual assault to cover all non-disclosures is that it casts the net too widely. There may be cases where non-disclosure involves the objectification of one's sexual partner or the disregard of his or her sexual integrity in a manner deserving of such a label. But there will also be cases where the non-disclosure occurs in a context that is far removed from what we usually think of as the power imbalance at the root of sexual assault.[28] One might hope to rely on prosecutorial discretion in these cases, but the fact that DC was prosecuted suggests that such discretion is not always exercised cautiously. We have to question whether the dangers of casting the sexual assault net too wide outweigh the benefits, particularly when there are other crimes that can capture the most blameworthy conduct.

26 Isabel Grant, 'The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier*' (2011) 5 McGill JL & Health 7.

27 See Emily MacKinnon & Constance Crompton, 'The Gender of Lying: Feminist Perspectives on the Nondisclosure of HIV Status' (2012) 45 UBC L Rev 407 at 423–7.

28 DC's explanation for her non-disclosure, for example, was her fear that her son would be excluded from the soccer team if she disclosed her status: *DC*, supra note 3 (Factum of the Respondent at para 32).

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C THE PROPER SCOPE OF CRIMINAL LIABILITY

One puzzling dimension of *Mabior* is that it reads as if the Court, conscious of the dangers of over-criminalization, was trying to limit the scope of *Cuerrier*.[29] This view would be consistent with how the media reported the case, as though *Mabior* gives people with HIV new freedom not to disclose their HIV status.[30] For example, the Court pointed out that criminalization should be limited to 'conduct that is highly culpable – conduct that is viewed as harmful to society, reprehensible and unacceptable.'[31] The Court reasserted the legitimacy of *Cuerrier*, holding that it carved out 'an appropriate area for the criminal law – one restricted to significant risk of serious bodily harm.'[32] The Court purported to put forward a compromise suggesting that *Cuerrier* connotes a position 'between the extremes of no risk (the trial judge's test) and "high risk" (the Court of Appeal's test).'[33] It stated that the 'realistic possibility of transmission' standard 'avoids setting the bar for criminal conviction too high or too low.'[34] But the *Mabior* 'realistic possibility of transmission' test *is* essentially a no-risk test, once the Court's requirement of condoms and low viral load is factored in. The only difference from the trial judge's decision is that the trial judge required an undetectable viral load while the Court required only a low viral load. Nonetheless, only those who 'pose no risk of harm' are excluded from the net of liability.[35] The word 'significant,' from *Cuerrier*, has been lost or denuded of any content.

It is beyond dispute that *Mabior expands* the scope of criminal liability beyond *Cuerrier*. Strangely absent from *Mabior* are the passages from the majority and minority opinions in *Cuerrier* which strongly suggested that condom use would negate a 'significant risk.'[36] On this basis, many courts have held that the use of a condom alone precludes criminal liability,[37] a

29 *R v Cuerrier*, [1998] 2 SCR 371 [*Cuerrier*].

30 Kirk Makin, 'Where the Supreme Court Went Wrong on HIV Disclosure,' *The Globe and Mail* (12 Oct 2012) online: Globe and Mail <http://www.theglobeandmail.com/news/national/where-the-supreme-court-went-wrong-on-hiv-disclosure/article4610682/>; Jordan Press, 'Change to HIV Disclosure Rules Raise Alarm,' *Vancouver Sun* (6 October 2012) B1; Michelle Mandel, 'Gambling with Lives: Supreme Court's HIV Ruling a Blow to Informed Consent,' *Toronto Sun* (6 October 2012) 6.

31 *Mabior*, supra note 1 at para 19.

32 Ibid at para 58.

33 Ibid at para 84.

34 Ibid at para 87.

35 Ibid at para 67.

36 *Cuerrier*, supra note 29 at para 73, McLachlin J, Gonthier J concurring, and para 129, Cory J, Major, Bastarache, & Binnie JJ, concurring.

37 See e.g. *R v Mabior*, 2010 MBCA 93 [*Mabior* CA]; *R v Agnatuk-Mercier* [2001] OJ no 4729 (Ont Sup Ct J) (QL); *R v Edwards*, 2001 NSSC 80; *R v Smith*, [2007] SJ No 116 (SKQB) at para 59, aff'd on other grounds, 2008 SKCA 61, 310 Sask R 230; see *contra R v JT*, 2008 BCCA 463 and *R v Wright*, 2009 BCCA 514 [*Wright*]. In *Wright*, for

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position which promotes responsible behaviour and is most consistent with public health efforts. Some courts have also commented that an undetectable viral load may preclude criminal liability.[38] *Mabior* requires both condom use and a low viral load before criminal liability can be avoided.

That the Court had some discomfort with its own test is evident from the efforts it went to to bring about an acquittal for DC. On the findings of fact made by the trial judge in *DC* – that there was one episode of unprotected sex in the context of an undetectable viral load – she was rightly convicted because no condom was used. To avoid convicting DC, the Supreme Court had to reverse the finding of fact that no condom had been used, concluding that this finding was too speculative.[39] Perhaps the Court had concerns that the charges were in response to her allegations of domestic violence or perhaps DC did not fit the Court's picture of someone who should be labelled a sex offender. But what about the next DC who has one episode of unprotected sex (with an undetectable viral load) as she struggles to negotiate disclosure and then, after disclosure, enters a long-term relationship with her partner during which HIV is not transmitted? Such an accused will be properly convicted of aggravated sexual assault under the *Mabior* standard, even when, as in this case, the charges are clearly a vengeful response to being held accountable for domestic violence. Beyond justice in the individual case, we should get little comfort from DC's acquittal, as it simply distracts attention from the expansion of the test from *Cuerrier*.[40] One can only hope that other courts will have similar discomfort with the scope of the test and look for ways to avoid applying its full force in cases where there was no 'significant risk' of HIV transmission.

I began this piece by arguing that the judgments in *Mabior* and *DC* ignore the context of living with HIV in significant ways. It is the

example, the Court of Appeal held at para 39 that 'it is a question of fact in each case for the trier of fact to determine whether the use of a condom has reduced the risk of HIV transmission to a level that does not represent a significant risk of serious bodily harm.'

38 See *Wright*, ibid, where the Court acknowledged the relevance of viral load to the 'significant risk' determination even though Wright was convicted; ibid at paras 32–3; *Mabior* CA, ibid at paras 102–5; *R v DC*, 2010 QCCA 2289 at paras 98–100.

39 *DC*, supra note 3 at paras 25–8, 30.

40 Another puzzling component of *DC* is the Court's reference to the couple's having both protected and unprotected sex during their four-year relationship. I have been unable to find any indication on the record that they had unprotected sex after disclosure was made. If they did, then surely the Crown had failed to prove its case because the complainant, knowing the accused was HIV-positive, nonetheless consented to unprotected sex. This would suggest that the non-disclosure was not causally related to the complainant's consent.

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marginalization of persons with HIV that makes disclosure so difficult. Widespread criminalization increases the stigma associated with HIV and makes disclosure *more* difficult, not easier. We have made tremendous gains in treating and preventing the spread of HIV; yet, ironically, in the face of these gains we see a more punitive approach to non-disclosure which will inevitably enhance the marginalization of people living with HIV in Canada.

Non-disclosure prosecutions are an inefficient way of trying to prevent transmission, as up to 60% of transmissions take place in the early stages of the illness before the person knows that she or he has HIV.[41] Telling those who do not have access to antiretroviral medications that using a condom will make no difference in their criminal liability or telling those who do not have the power to insist on condom use that an undetectable viral load is irrelevant will not encourage responsible behaviour for those who do not feel safe in disclosing to sexual partners. The coalition of HIV groups that intervened in *Mabior* did not argue that there is no role for criminal law in HIV non-disclosure. Rather, they argued for a cautious approach, informed by science and not prejudice, that criminalizes only those who are the most culpable and only to the degree that fairly reflects their culpability. On this mandate, the Court has fallen short.

41 Bluma G Brenner et al, 'High Rates of Forward Transmission Events after Acute/Early HIV-1 Infection' (2007) 195 Journal of Infectious Diseases 951; Gary Marks, Nicole Crepaz, & Robert S Janssen, 'Estimating Sexual Transmission of HIV from Persons Aware and Unaware That They Are Infected with the Virus in the USA' (2006) 20 AIDS 1447.

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