R. *v.* Williams, [2003] 2 S.C.R. 134, 2003 SCC 41

Her Majesty The Queen *Appellant*

v.

Harold Williams *Respondent*

and

Attorney General of Ontario *Intervener*

Indexed as: R. *v.* Williams

Neutral citation: 2003 SCC 41.

File No.: 28873.

2002: December 3; 2003: September 18.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and Deschamps JJ.

on appeal from the court of appeal for newfoundland and labrador

Criminal law — Aggravated assault — Non-disclosure of HIV status — Accused having unprotected sexual relations with complainant during their 18-month relationship — Five months into relationship, accused learning he was HIV-positive

but failing to disclose his HIV status to complainant — Complainant likely already infected before accused learned he was HIV-positive — Whether Crown can prove endangerment of complainant's life beyond reasonable doubt — Whether accused guilty of aggravated assault — Criminal Code, R.S.C. 1985, c. C-46, s. 268(1).

Criminal law — Attempted aggravated assault — Non-disclosure of HIV status — Accused having unprotected sexual relations with complainant during their 18-month relationship — Five months into relationship, accused learning he was HIV-positive but failing to disclose his HIV status to complainant — Whether accused guilty of attempted aggravated assault — Criminal Code, R.S.C. 1985, c. C-46, ss. 24(1), 265(1)(a), 268(1), 660.

The complainant and W had an 18-month relationship beginning in June 1991. On November 15, 1991, W learned that he had recently tested positive for HIV. The complainant tested negative shortly thereafter. W kept the complainant in the dark about his HIV condition as well as the fact that he had been tested. Although W was given counselling on at least three different occasions by two doctors and a nurse about HIV, its transmission, safer practices and his duty to disclose his HIV status to sexual partners, he continued to practise unprotected sex with the complainant. It was accepted that the complainant would never knowingly have had sex with an HIV-positive person. The relationship ended in November 1992 and she tested positive for HIV in April 1994. W has conceded that he infected the complainant with HIV. Similarly, the Crown has conceded that it is quite possible that W infected the complainant before learning of his positive status. At trial, W was convicted of aggravated assault and common nuisance. The Court of Appeal upheld the conviction for common nuisance but allowed the appeal against the conviction for aggravated assault, substituting therefor a conviction for attempted aggravated assault.

Held: The appeal should be dismissed.

Where, as here, the Crown alleges an offence predicated on an aggravating consequence, it must prove the consequence beyond a reasonable doubt. An accused who fails to disclose his HIV-positive status cannot be convicted of an aggravated assault endangering life in circumstances where the complainant could already have been HIV-positive. In such circumstances, however, W was properly convicted of attempted aggravated assault.

While W acted with a shocking level of recklessness and selfishness, the Crown could not show that sexual activity after November 15, 1991 harmed the complainant, or even exposed her to a significant risk of harm, because at that point she was possibly, and perhaps likely, already HIV-positive. W's acquittal on the charge of aggravated assault must therefore be affirmed. The *mens rea* of the offence had been proven beyond a reasonable doubt, but the Crown was unable to prove an essential element of the *actus reus*, namely that W's sexual conduct, after learning that he had tested positive for HIV, risked endangering the complainant's life. The medical evidence indicates that a single act of unprotected vaginal intercourse carries a significant risk of HIV transmission. It was therefore at least doubtful that the complainant was free of HIV infection on November 15, 1991 when W first discovered, then decided to conceal, his HIV status. The complainant tested negative for HIV shortly thereafter, although the expert evidence was that at that date she may well have been infected with HIV but not yet had time to develop the antibodies that would disclose her condition in the test.

To constitute a crime, the *actus reus* and the *mens rea* or intent must, at some point, coincide. Here, however, before November 15, 1991, there was an

endangerment but no intent; after November 15, 1991, there was an intent but at the very least a reasonable doubt about the existence of any endangerment.

The focus of the crime of aggravated assault is on the nature of the consequences rather than on the nature of the assault. The same act of sexual assault by an HIV-positive accused would undoubtedly injure or put at risk many potential partners but if, because of a complainant's particular circumstances, there is a reasonable doubt that the complainant was put in harm's way by the assault charged, there is no aggravated assault. In this case, there was a reasonable doubt that the life of the complainant was capable of being endangered after November 15, 1991 by re-exposure to a virus that she had likely already acquired.

There is nothing in the evidence to suggest that the complainant, believing rightly or wrongly that she was HIV-free, consented to unprotected sexual intercourse with an HIV-positive partner. At all relevant times, the complainant believed that both she and W were HIV-free.

W stands properly convicted of attempted aggravated assault. The crime of attempt requires the Crown to establish the *mens rea* to commit the crime in question. The intent to commit the crime of aggravated assault is established for the period after November 15, 1991. As to the *actus reus*, failure to prove endangerment of life was fatal to the prosecution in this case of aggravated assault but it is not fatal to a conviction for attempted aggravated assault. Clearly, W took more than preparatory steps. He did everything he could to achieve the infection of the complainant by repeated acts of unprotected intercourse for approximately one year between November 15, 1991 and November 1992, when the relationship ended. The

reasonable doubt about the timing of her actual infection was unknown to both partners. These facts, established in the evidence, are sufficient to prove the attempt.

Cases Cited

Referred to: *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Godin*, [1994] 2 S.C.R. 484; *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570; *R. v. Cooper*, [1993] 1 S.C.R. 146; *R. v. Droste* (1979), 49 C.C.C. (2d) 52; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Leclerc* (1991), 67 C.C.C. (3d) 563; *R. v. Brodie* (1995), 60 B.C.A.C. 153; *R. v. Dewey* (1999), 132 C.C.C. (3d) 348; *R. v. Ross*, [1998] O.J. No. 3427 (QL); *R. v. Vang* (1999), 132 C.C.C. (3d) 32; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Ancio*, [1984] 1 S.C.R. 225; *United States of America v. Dynar*, [1997] 2 S.C.R. 462.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 24(1), 220, 221, 249(3), (4), 255(2), (3), 265, 267(*b*), 268, 271, 272(1)(*c*), 273(1), 430(2), 433(*b*), 463(*a*), 660.

Authors Cited

New Shorter Oxford English Dictionary on Historical Principles, vol. 1. Oxford: Clarendon Press, 1993, “endanger”.

APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (2001), 205 Nfld. & P.E.I.R. 1, 158 C.C.C. (3d) 523, [2001] N.J. No. 274 (QL), 2001 NFCA 52, upholding the accused’s conviction for common nuisance and setting

aside his conviction for aggravated assault, but substituting a conviction for attempted aggravated assault. Appeal dismissed.

Rachel Huntsman, for the appellant.

Derek J. Hogan, for the respondent.

Susan Chapman and *Dana Peterson*, for the intervener.

The judgment of the Court was delivered by

1 BINNIE J. — The question raised in this appeal is whether an accused who fails to disclose that he is HIV-positive can be convicted of an aggravated assault endangering life by engaging in unprotected sex with a complainant who, at the time of the alleged assault, could herself have been infected with HIV.

2 The respondent acted with a shocking level of recklessness and selfishness. There is no doubt that he committed a criminal assault on the complainant, and further that he was guilty of an *attempted* aggravated assault (as well as common nuisance). However, as was noted by the majority in the Court of Appeal of Newfoundland and Labrador, *aggravated* assault, as defined in s. 268(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, is an offence based on proof of certain consequences. The courts below found, and the Crown admits, that there exists a reasonable doubt that the assault in question was *capable* of causing the life-threatening consequences alleged in the indictment. The Crown is therefore unable to establish the *actus reus* of that particular offence. Its appeal in that respect should therefore be dismissed.

I. Facts

3 During their sexual affair that lasted for approximately 18 months, which began when the complainant was 18 years old, the complainant and the respondent engaged in numerous acts of vaginal intercourse and occasional fellatio. Condoms were used on occasion; however, the complainant did not take the usual precautions against pregnancy because the respondent had told her that he had had a vasectomy.

4 The relationship began in June 1991. The Agreed Statement of Facts says that "soon after", the sexual activity began. Unfortunately, there is no evidence about precisely when the first act of intercourse occurred, or the approximate frequency of sexual intercourse over the ensuing 18-month period.

5 Unknown to the complainant, the respondent attended a medical clinic in St. John's for HIV testing on October 16, 1991. It seems his name was on a list of former partners provided by an individual who had tested HIV-positive, that is to say, was shown to be infected by the Human Immunodeficiency Virus. He was told on November 15, 1991 that he too had tested HIV-positive. He was given counselling on at least three different occasions by two doctors and a nurse about HIV, its transmission, safer practices and his duty to disclose his HIV status to sexual partners. The respondent says he was devastated by the result of the test, but chose to follow none of the recommended safer practices in his relationship with the complainant, whom he kept in the dark about his HIV condition. He provided the names of two past sexual partners to the public health authorities, but not the name of the complainant. In fact, as stated, the complainant did not know the respondent had been tested.

6 The complainant took an HIV test on November 20, 1991. We do not know who or what prompted this action. She tested negative for the virus and so informed the respondent. Their sexual relationship continued for another year, terminating for unrelated reasons in November 1992.

7 In the spring of 1994, the complainant attended a program called *Skills for Success*. A guest speaker spoke on the subject of HIV and AIDS. The complainant became concerned because she was displaying some of the symptoms of HIV infection that were mentioned by the guest lecturer. This prompted her to get a second test done. She was informed that she was HIV-positive on April 15, 1994.

8 When the complainant confronted the respondent with the result of her test, he repeatedly and falsely denied that he had ever tested positive for HIV.

9 When questioned as to whether she would have had sexual relations with the respondent had she known that he was HIV-positive, the complainant's response as recorded in the Agreed Statement of Facts was: "At any point in my life, no, I would not have had sex with somebody that's HIV-positive."

10 In the Agreed Statement of Facts, the respondent concedes that he "did infect [the complainant] with HIV". As to timing, the Crown conceded that "it is possible that [the respondent] infected [the complainant] before learning of his positive status" (emphasis added).

A. *The Medical Evidence*

11 The Agreed Statement of Facts sets out, *inter alia*, the following attributes of HIV infection:

> 37. A single act of unprotected vaginal intercourse carries a significant risk of HIV transmission.
>
> 38. To date, there is no cure for HIV infection. The current approach to treatment is to use a combination of drugs to try and control the virus. Even with treatment, HIV infection can still lead to devastating illnesses with fatal consequences.
>
> . . .
>
> 40. Anti-body testing is still the primary way of testing for HIV. . . .
>
> 41. . . . between seventy to ninety percent of people develop the HIV antibodies within three months of infection. Ninety-nine point nine percent of people will test positive for the HIV antibodies within six months of infection. There have been some reports where it has taken up to a year and even one report that [it took] eighteen months.

12 Accordingly, at the time the respondent found out that he was HIV-positive, it is clear that he had already been a carrier of HIV for a significant period of time.

13 Equally, although the complainant tested negative for HIV shortly thereafter, she may well have been infected with HIV but not yet had time to develop the antibodies that would disclose her condition in the test.

14 It was therefore at least doubtful that the complainant was free of HIV infection at the time the respondent first discovered, and then concealed, his HIV status on November 15, 1991.

B. *Dr. Michael Bowmer's Evidence*

15 Dr. Bowmer, a physician with the Health Care Corporation, Infectious Diseases and Internal Medicine, in St. John's, was one of the specialist doctors who counselled the respondent. In the course of his testimony at the preliminary inquiry, Dr. Bowmer was asked whether one partner with HIV could re-infect another partner who was already infected with HIV. He responded that HIV "mutates very quickly" over a period of time and can produce in one partner a drug-resistant strain. The mutant strain might then be transferred to the other partner, thereby transmitting a drug-resistant strain of HIV to which an HIV-positive complainant had not previously been exposed, with possibly lethal consequences. Safer sex therefore continues to be important "because the resistance of one virus in one person may occur at a different rate than the resistance in another. And then the potential is that the person who is not resistant [to drug therapy] receives the resistant strain."

16 Dr. Bowmer was not called as a witness at trial, but a transcript of his evidence at the preliminary inquiry was "adopted as a part of the facts of the case". The Crown did not pursue a "re-infection" theory either at trial or on the appeal to the Newfoundland and Labrador Court of Appeal. The Crown did not put forward the possibility suggested by Dr. Bowmer that a partner who was already infected with HIV could nevertheless be re-infected with a "mutant" HIV strain resistant to drugs, possibly because Dr. Bowmer himself conceded that "we don't know enough about the virus in an individual person to know how rapidly one virus is mutating to a resistant strain". No tests were done in this respect on either the respondent or the complainant.

C. *The Court Proceedings*

17 The respondent was charged with aggravated assault, criminal negligence causing bodily harm and common nuisance. The trial judge found the respondent

guilty of aggravated assault and common nuisance but not guilty of criminal negligence causing bodily harm ((2000), 189 Nfld. & P.E.I.R. 156). On appeal, the Court of Appeal unanimously dismissed the respondent's appeal on his conviction for common nuisance ((2001), 158 C.C.C. (3d) 523, 2001 NFCA 52). A majority of the Court of Appeal allowed the appeal against conviction for aggravated assault, but substituted a conviction for *attempted* aggravated assault.

18 Wells C.J.N. would have dismissed the appeal against conviction on the charge of aggravated assault because in his view, the Crown should not be required to "do the impossible" and prove, beyond a reasonable doubt, that the complainant was not infected with HIV prior to November 15, 1991. In the present state of medical science, this can never be proven. Recognition of that uncertainty does not automatically constitute reasonable doubt as to whether the respondent, on the basis of the standard set out in *R. v. Cuerrier*, [1998] 2 S.C.R. 371, endangered the life of the complainant. In the view of Wells C.J.N., the Crown had only to prove the chance or possibility that the complainant was still HIV-free on November 15, 1991 for there to be a risk. While it can never be known whether the risk in this case was low or medium or high, in his view the key is that there was a risk. The Court, in *Cuerrier*, *supra*, specifically decided that proof of actual harm was not required. It was sufficient to prove exposure to risk.

II. Analysis

19 The exposure of an unwitting sexual partner to the risk of HIV infection, through a deliberate deception, is the stuff of nightmares, yet cases of such misconduct now regularly come before the courts.

20 There is no doubt that the respondent's conduct was criminal. He stands convicted of attempted aggravated assault (maximum penalty of seven years) and common nuisance (maximum penalty of two years).

21 The Crown is not satisfied with the conviction on *attempted* aggravated assault. The Crown's view is that the respondent should be convicted on the greater offence of aggravated assault itself.

22 The *mens rea* for aggravated assault is the *mens rea* for assault (intent to apply force intentionally or recklessly or being wilfully blind to the fact that the victim does not consent) plus objective foresight of the risk of bodily harm: *R. v. Godin*, [1994] 2 S.C.R. 484, at p. 485, and *Cuerrier*, *supra*, at para. 95. There is no dispute that, in this case, this mental element of aggravated assault has been proven beyond a reasonable doubt.

23 The central issue in this case, therefore, is whether, having charged the respondent with *aggravated* assault, the Crown was able to prove all of the requisite elements of the *actus reus* of that particular crime, which is defined in s. 268(1) of the *Criminal Code* as follows:

> **268.** (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

24 Prosecution of that particular offence, which has as its focus the *consequences* of the assault, is complicated in this case by the "window" of uncertain duration between an individual contracting HIV and the ability of the medical authorities (at least in 1991) to test for it. The respondent seeks to exploit this window

of uncertainty in two respects. Firstly, he says the complainant consented at all times during their relationship to unprotected sexual intercourse. Based on his interpretation of *Cuerrier*, *supra*, he says that her consent to unprotected sex after November 15, 1991 was not vitiated by his deception. Therefore, he argues, not only was there no aggravated assault, there was no assault at all.

25 Secondly, he says the Crown is unable to prove an essential element of the offence of aggravated assault, namely that the respondent's sexual conduct after knowing he had tested HIV-positive endangered the complainant's life. The Crown, he says, is unable to prove the *actus reus* of one of the particular offences it chose to prosecute.

26 I think the respondent's first point is based on an erroneous interpretation of *Cuerrier*, but that he is entitled to succeed, based on the Agreed Statement of Facts, on his second point.

A. *The Critical Date – November 15, 1991*

27 The most important date in this case is November 15, 1991. On that date, the respondent learned that he was HIV-positive. I do not overlook the possibility that prior to November 15, 1991 he might have anticipated at least the risk of an HIV-positive outcome, perhaps by October 16, 1991 when he was called in for the test, but we have no satisfactory proof of that. The critical date for the purpose of establishing fraud to vitiate consent (*Criminal Code*, s. 265(3)(*c*)) is when the respondent had sufficient awareness of his HIV-positive status that he can be said to have acted "intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them" (*R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R.

1299, at p. 1309). In this context, the distinction between recklessness and wilful blindness could be important:

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. [Emphasis added.]
>
> (*Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at p. 584, *per* McIntyre J.)

28 Once an individual becomes aware of a risk that he or she has contracted HIV, and hence that his or her partner's consent has become an issue, but nevertheless persists in unprotected sex that creates a risk of further HIV transmission without disclosure to his or her partner, recklessness is established.

29 In the present case, however, the Agreed Statement of Facts does not permit us to draw any firm conclusions about the state of the respondent's awareness of the danger, or even *the risk* of the danger of HIV infection prior to November 15, beyond the bare fact that he was asked to take a test. We have almost no knowledge of the circumstances.

30 Giving the respondent the benefit of the doubt, I therefore propose to use November 15, 1991 as the date when, clearly, he knew that he was HIV-positive and, moreover, had been warned by the doctors that sexual intercourse with an unprotected partner could have potentially lethal consequences for her, but nevertheless persisted.

31 For purposes of this case, it makes no difference whether the critical date is October 16 or November 15, 1991. In the Agreed Statement of Facts, at para. 46,

the Crown acknowledged that the complainant might have become infected with HIV as early as August 1991:

> . . . it is possible that [the respondent] infected [the complainant] before learning of his positive status. [The complainant]'s negative test result may have been within [the complainant]'s "window period" in that when [the complainant] was tested on November 20, 1991 her body had not yet produced the HIV antibodies which the test is designed to detect. It is possible that on November 20, 1991, [the complainant] was incubating the virus and her body had not yet made the antibody, and thereby if present, it was undetectable. It is possible that she may have been infected in August, 1991, but not tested HIV-positive on November 20, 1991.

32 The trial judge said the complainant's negative test of November 20, 1991 is "the best evidence we have of her status at that time" (para. 26), but, with respect, this statement flew in the face of all the medical evidence about the duration of "the window" of incubation between the infection and testability contained in the Agreed Statement of Facts. At the very least, there is a reasonable doubt about when she was first infected with HIV.

33 The Court of Appeal thought the evidence showed it *likely* that the complainant was infected with HIV prior to November 15, 1991. I agree.

34 Although the respondent was deceitful after November 15, 1991, the Crown concedes that it cannot show that sexual activity after that date harmed the complainant, or even exposed her to a significant risk of harm, because at that point she was possibly, and perhaps likely, already infected with HIV.

B. *The Necessary Concurrence of Intent and Endangerment*

35 To constitute a crime "at some point the *actus reus* and the *mens rea* or intent must coincide": *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 157. See also *R. v. Droste* (1979), 49 C.C.C. (2d) 52 (Ont. C.A.), at pp. 53-54. Here, however, before November 15, 1991, there was an endangerment but no intent; after November 15, 1991, there was an intent but at the very least a reasonable doubt about the existence of any endangerment. Therein lies the essence of the Crown's problem in this case.

C. *The Consent Issue*

36 The absence of consent is an essential element of any assault. I reproduce for convenience the relevant *Criminal Code* provisions:

> **265.** (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; or [Emphasis added.]

37 The meaning of consent in the assault context was recently considered by the Court in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 26-27, *per* Major J.:

> The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred . . . .
>
> Confusion has arisen from time to time on the meaning of consent as an element of the *actus reus* of sexual assault. Some of this confusion has been caused by the word "consent" itself. A number of commentators

> have observed that the notion of consent connotes active behaviour . . . . While this may be true in the general use of the word, for the purposes of determining the absence of consent as an element of the *actus reus*, the actual state of mind of the complainant is determinative. At this point, the trier of fact is only concerned with the complainant's perspective. The approach is purely subjective. [Emphasis added.]

38 There is no doubt that the complainant did not subjectively consent to unprotected sex with an HIV-positive partner. She so testified and there is no reason to doubt her. Following November 15, 1991, the respondent knew, but the complainant did not, that he was HIV-positive. Each act of unprotected sex exposed her to the lethal virus. There is nothing whatsoever in the evidence to suggest that the complainant, believing rightly or wrongly that she was HIV-free, consented to run such a risk.

39 In *Cuerrier*, *supra*, an HIV-positive accused had, as had the respondent in this case, engaged in unprotected sex with two complainants without disclosing his infection. However, unlike here, the complainants in *Cuerrier* did not become infected with HIV. Cory J. held, at para. 127:

> Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV-positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status. A consent that is not based upon knowledge of the significant relevant factors is not a valid consent.

In that case, sex with the accused had put the complainants at significant risk to their health. This was sufficient to vitiate their consent to sexual intercourse.

40 The *Cuerrier* principle, reproduced above, applies here. The complainant never consented to have sexual intercourse with a partner who was HIV-positive. As

of November 15, 1991, at the latest, he knew he was HIV-positive and she did not. The unexpected revelation to the complainant in 1994 that she might already have been infected by the respondent prior to November 15, 1991, could have had no possible retroactive effect on her mental state at the time of the relationship more than two years earlier. At all *relevant* times, she believed that *both* she and the respondent were HIV-free. That is enough to reject the respondent's argument on consent.

D. *Proof of the Consequences of an Assault Is an Essential Element of Aggravated Assault*

41 The requirements of an aggravated assault include those of the assault itself plus, as mentioned, certain listed consequences:

> **268.** (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

The prosecution must establish all of the elements of an assault *plus* the aggravating circumstance.

42 In *R. v. Leclerc* (1991), 67 C.C.C. (3d) 563 (Ont. C.A.), Lacourcière J.A. wrote for the court, at pp. 567-68:

> The case-law interpreting the sections quoted [ss. 265 and 268] makes it clear that the essential intent required for an assault, as defined, remains the same for all forms of assault, including aggravated assault. Parliament intended that the severity of the punishment should increase to reflect the more serious consequences of the assault. [Emphasis added.]

43 In *Godin*, *supra*, Cory J. stated, at p. 485, "[t]he section pertains to an assault that has the consequences of wounding, maiming or disfiguring" (emphasis

added) or (to complete the list) endangering life. "Endanger" means to "[p]ut in danger . . . put in peril . . . [i]ncur the risk": *New Shorter Oxford English Dictionary on Historical Principles* (1993), vol. 1, at p. 816. As to the focus on consequences, see generally *R. v. Brodie* (1995), 60 B.C.A.C. 153, at para. 4; *R. v. Dewey* (1999), 132 C.C.C. (3d) 348 (Alta. C.A.), at para. 9; and *R. v. Ross*, [1998] O.J. No. 3427 (QL) (Gen. Div.), at para. 23. See also *R. v. Vang* (1999), 132 C.C.C. (3d) 32 (Ont. C.A.), at para. 12.

44 Section 268(1) is only one of a number of *Criminal Code* provisions that "call for a more serious charge if certain consequences follow": *R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 966. These include criminal negligence causing bodily harm (s. 221), criminal negligence causing death (s. 220), dangerous operation causing bodily harm (s. 249(3)), dangerous operation causing death (s. 249(4)), impaired driving causing bodily harm (s. 255(2)), impaired driving causing death (s. 255(3)), assault causing bodily harm (s. 267(*b*)), aggravated assault (s. 268), sexual assault causing bodily harm (s. 272(1)(*c*)), aggravated sexual assault (s. 273(1)), mischief causing danger to life (s. 430(2)) and arson causing bodily harm (s. 433(*b*)).

45 The "aggravation" in aggravated assault thus comes from the consequences. In *DeSousa* itself, the Court held, at pp. 966-67, *per* Sopinka J.:

> No principle of fundamental justice prevents Parliament from treating crimes with certain consequences as more serious than crimes which lack those consequences.
>
> . . .
>
> The same act of assault may injure one person but not another. The implicit rationale of the law in this area is that it is acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused. . . . [Emphasis added.]

46 The same act of sexual assault by an HIV-positive accused would undoubtedly injure or put at risk many potential partners but if, because of a complainant's particular circumstances, she was not put in harm's way by the assault charged, there is no aggravated assault. By way of further illustration, the gunman who fires a shot into a sleeping figure intending to kill him is not guilty of murder if, in fact, the intended victim had already died of natural causes.

47 I therefore agree with the majority of the Court of Appeal of Newfoundland and Labrador that proof of endangerment of the complainant's life was an essential element of the prosecution's case for aggravated assault.

E. *The Contrary View of the Trial Judge*

48 In the present case, the trial judge reviewed in some detail the judgment in *Cuerrier* and acknowledged, at para. 12:

> The essence of what Cory J. wrote was that having unprotected sex with someone who is HIV-positive is inherently risky, that by its nature it endangers. The unique situation where it is not risky, where it does not endanger, is where infection has already occurred. [Emphasis added.]

Having said that, however, he found the respondent guilty of aggravated assault because

> having unprotected sex with someone who is HIV-positive is inherently risky . . . by its nature it endangers. [Emphasis added.]

49 The trial judge erred, with respect, in switching the focus from the *consequences* of the assault to the *nature* of the assault ("by its nature it endangers").

There are several provisions of the *Criminal Code* that differentiate charges on the basis of the *nature* of the assault, e.g., s. 271 (sexual assault), but s. 268 (aggravated assault) is not one of them. Under that section, the court is directed by Parliament to focus on the consequences.

F. *The Dissenting View of Wells C.J.N.*

50 Wells C.J.N., in his dissent, took a position intermediate between his colleagues and the trial judge. Unlike the trial judge, he agreed, at para. 109, that the gist of the charge lay in the consequences:

> Clearly, if the evidence established, *with certainty*, that the complainant was infected by the [respondent] (or anyone else) prior to November 15, 1991, the [respondent] could not be found guilty on the charge because, being already infected, the complainant was no longer in a condition where she could be exposed to *risk* of such infection, subsequent to the [respondent] discovering he was HIV positive. She could not become more infected. [Emphasis in original.]

51 He also agreed that the evidence raised a reasonable doubt as to whether the complainant was already infected as a result of unprotected sexual intercourse with the respondent prior to November 15, 1991, but "[b]eyond question", he said, "*it is possible* that the complainant was not infected at the time that the [respondent] learned he was HIV-positive" (para. 116 (emphasis in original)).

52 Thus, unlike Welsh J.A., he concluded that if there was a possibility that the complainant was *not* infected on November 15, 1991, then she should be considered at risk or endangerment.

53 With respect, this amounts to saying that a reasonable doubt about the existence of the consequences required by s. 268(1) enures to the benefit of the Crown. An accused would be entitled to an acquittal only if it were established that the complainant was "with certainty" (Wells C.J.N.'s words) infected with HIV on November 15, 1991. This amounts to a reversal of the onus of proof on a central element of the *actus reus* of the offence, namely that the complainant was in fact put in harm's way by the assault in question rather than by antecedent sexual activities which, while lethal, were committed without the requisite *mens rea*.

G. *The Refutation of "The Paradox"*

54 Both the trial judge and the members of the Court of Appeal expressed concern about the seeming paradox that in *Cuerrier* the accused, who did *not* infect the complainants, was held guilty of aggravated assault whereas here, the respondent, who *did* infect the complainant, was acquitted of aggravated assault. The paradox is resolved, however, when it is recognized that in *Cuerrier*, the accused was deceitful about his HIV status from the beginning of the sexual relationship whereas here, at the likely time of the complainant's HIV infection, she was freely engaging in unprotected sex with a partner who was unaware of his own HIV condition and certainly unaware that he was placing the complainant at risk. As noted in *DeSousa, supra*, at pp. 966-67:

> Conduct may fortuitously result in more or less serious consequences depending on the circumstances in which the consequences arise.

55 If the Crown wishes to allege an offence predicated on an aggravating consequence, the Crown must prove the consequence beyond a reasonable doubt.

56 There is no doubt that the complex pathology of HIV creates difficulties in a prosecution for aggravated assault. Other charges could have been laid: sexual assault, for example.

57 The differing results in *Cuerrier* and this case simply reflect the different factual circumstances. The conduct of this respondent after November 15, 1991 is no less reprehensible. The abuse of the complainant's trust, the obtaining of her consent by deceit, and the sexual activity itself are all common to both cases. The difference here is that, unknown to the respondent at the time, there was a reasonable doubt on the evidence that the life of the complainant was *capable* of being endangered after November 15, 1991 by re-exposure to a virus she had likely already acquired.

58 Section 268(1) applies to a wide variety of human activity, and its interpretation should not be skewed to accommodate the hard facts of this case. Its focus should continue to be, as in the past, on the nature of the consequences rather than on the nature of the assault.

59 I would therefore affirm the acquittal of the respondent on the charge of aggravated assault.

H. *The Conviction for Attempted Aggravated Assault*

60 The Crown was able to prove every element of the offence of aggravated assault except for one element of the *actus reus*: the endangerment of life.

61 The following provisions of the *Criminal Code* are relevant:

> **24.** (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence. [Emphasis added.]
>
> **265.** (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;
>
> **660.** Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt.

62 The crime of attempt, as with any offence, requires the Crown to establish that the accused *intended* to commit the crime in question: *R. v. Ancio*, [1984] 1 S.C.R. 225, at pp. 247-48. The requisite intent is established here for the period after November 15, 1991. The respondent, knowing at that time that he was HIV-positive, engaged in unprotected sex with the complainant intending her thereby to be exposed to the lethal consequences of HIV. The evidence showed that he had been fully counselled by two doctors and a nurse on all relevant aspects of the potential result of unprotected sex.

63 With regard to the *actus reus*, the Crown established beyond a reasonable doubt every element of a sexual assault. There was (i) physical contact inflicted by the respondent on the complainant (ii) of a sexual nature (iii) without valid consent: *Ewanchuk*, *supra*, at para. 25. In this case, the Crown alleged "simple" aggravated assault (s. 268(1)) rather than aggravated *sexual* assault (s. 273(1)). While the former is included in the latter, the maximum penalty on a conviction for attempted aggravated *sexual* assault is 14 years (s. 463(*a*)), i.e., the same as for a conviction of aggravated assault *simpliciter*.

64 Failure to prove endangerment of life was fatal to the prosecution in this case of aggravated assault but it is not fatal to a conviction for *attempted* aggravated assault. Clearly, the respondent took more than preparatory steps. He did everything he could to achieve the infection of the complainant by repeated acts of intercourse for approximately one year between November 15, 1991 and November 1992 when the relationship ended. The reasonable doubt about the timing of her actual infection was the product of circumstances quite extraneous to the respondent's post-November 15, 1991 conduct.

65 These facts, established in the evidence, are sufficient to prove the attempt. As the Court explained in the *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at paras. 73-74, *per* Cory and Iacobucci JJ.:

> An accused is guilty of an attempt if he intends to commit a crime and takes legally sufficient steps towards its commission. Because an attempt is in its very nature an incomplete substantive offence, it will always be the case that the *actus reus* of the completed offence will be deficient, and sometimes this will be because an attendant circumstance is lacking. . . .
>
> . . . The law of attempt is engaged only when, as in this case, the *mens rea* of the completed offence is present entirely and the *actus reus* of it is present in an incomplete but more-than-merely-preparatory way.

66 Here the *actus reus* of aggravated assault "is present in an incomplete but more-than-merely-preparatory way" (*Dynar*, *supra*, at para. 74). The respondent therefore stands properly convicted of attempted aggravated assault.

I. *The Medical Evidence in Future Cases*

67 This case was argued on the basis of an Agreed Statement of Facts supplemented by the transcript of Dr. Bowmer, who raised but was not really asked

to explore the potential medical consequences of unprotected sex between HIV-infected partners.

68 The Court of Appeal acknowledged the possibility of proof that "regardless of the infection, there was a significant risk to the complainant's life" (para. 45).

> This could be accomplished by, for example, evidence that the risk is increased by multiple exposures to the virus. In the absence of evidence to the contrary, the reasonable inference would be that, once an individual was infected with the virus, further exposure would not increase the risk to life. [para. 46]

69 On the facts of *this* case, however, Welsh J.A. concluded, at para. 36, that:

> There is no evidence to establish that unprotected intercourse at that stage could expose her to a significant risk of serious bodily harm.

70 Nothing in these reasons is intended to foreclose the possibility that in a future case the hypothesis raised by Dr. Bowmer could be properly explored in the evidence, and, depending on the findings of fact, lead to a different outcome with respect to a finding of endangerment.

III. Conclusion

71 I would therefore affirm the respondent's convictions for *attempted* aggravated assault and common nuisance. I would dismiss the Crown's appeal with respect to the charge of aggravated assault.

Appeal dismissed.

Solicitor for the appellant: Department of Justice, St. John's, Newfoundland and Labrador.

Solicitor for the respondent: Newfoundland Legal Aid Commission, St. John's, Newfoundland and Labrador.

Solicitor for the intervener: Ministry of the Attorney General of Ontario, Toronto.