IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***R. v. J.A.T.,*** 2010 BCSC 766

Date: 20100507
Docket: 24375
Registry: Vancouver

Regina

v.

J.A.T.

Ban on Disclosure: ss. 486(3), 486.4(1) C.C.C.

An order has been made in this case directing that the identity of the complainant or a witness and any information that could disclose the identity of the complainant or a witness should not be published in any document or broadcast in any way pursuant to ss. 486(3) and 486.4(1) of the *Criminal Code*

Before: The Honourable Madam Justice Fenlon

Oral Reasons for Judgment

Counsel for the Crown:	B. McCabe
Counsel for the Defence:	J. Gratl
Place and Date of Trial:	Vancouver, B.C. April 12-16, 19-23, 2010
Place and Date of Judgment:	Vancouver, B.C. May 7, 2010

[1] **THE COURT:** J.A.T. is charged with one count of aggravated sexual assault of M.L. between September 1, 2003 and June 30, 2004, contrary to s. 273(1) of the *Criminal Code*. The charge arises out of a failure of the accused to disclose his HIV-positive status to the complainant during their 10-month relationship. The major issue in this case is whether the nature and frequency of the sexual encounters put the complainant at a significant risk of contracting HIV.

1. Nature of the Offence Charged

[2] Section 273(1) provides:

> Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

[3] The detailed elements of this offence are set out at para. 9 of *R. v. Mabior*, 2008 MBQB 201. The charge of aggravated sexual assault to be made out in this case turns on the Crown proving first, that the accused's actions endangered the life of the complainant, and second, that the accused intentionally applied force without the complainant's consent to engage in the sexual activity in question.

[4] The Crown must prove all of the elements of the offence beyond a reasonable doubt.

[5] The Crown alleges that Mr. T. endangered the life of the complainant by exposing him to the risk of HIV infection through five occasions of unprotected anal intercourse. The Crown also contends that the complainant's consent to these sexual acts was not legally effective because it was obtained by fraud. The accused knew he was HIV-positive but told the complainant that he was HIV-negative.

[6] The defence says that the Crown has failed to prove two essential elements of the offence alleged. First, the defence says that the Crown has not proved that the complainant's life was endangered because there was only one unprotected sexual encounter which should not give rise to a significant risk of HIV transmission. Second, the defence contends that the Crown has failed to prove that the complainant's consent was obtained by fraud because the complainant did not rely on the accused's misrepresentation about his HIV status and because there was no detriment to the complainant given the very low risk of transmission of HIV on the facts of this case.

[7] Before turning to a consideration of whether the Crown has proved each of the elements of the offence, I will set out the undisputed facts.

[8] The accused and the complainant met in Toronto at the 2003 Gay Pride Festival. They were involved in a romantic and sexual relationship from the end of June 2003 until the end of April 2004. At the beginning of their relationship, the complainant was a resident of Vancouver and the

accused was a resident of Toronto. The complainant was visiting Toronto when they met at a party and had a protected sexual encounter. When the complainant returned to Vancouver the next day, the two began an intense long-distance telephone relationship that lasted over the next two months. The complainant visited the accused in Toronto in late July 2003 to ensure that "their connection was physical and to ensure that there was no obstacle to a longer-term relationship."

[9] The accused moved to Vancouver at the end of August and cohabited with the complainant from the beginning of September 2003 until the end of April 2004. The accused and the complainant engaged in protected anal intercourse approximately 60 to 100 times from the day they met until their relationship ended. While not conceding that anal intercourse with a condom cannot give rise to a significant risk of harm, the Crown does not rely on these protected sexual encounters to establish the elements of the offence in this case.

[10] The accused was always the receptive partner on every occasion of anal intercourse. The complainant was always the insertive partner.

[11] On their second meeting in Toronto in July of 2003, the accused and the complainant entered into a safe-sex agreement to the effect that the complainant would always wear a condom when the couple engaged in anal intercourse. That agreement was confirmed the day after their first occasion of unprotected intercourse.

[12] The accused knew he was HIV-positive when he first met the complainant. He misrepresented the results of his most recent HIV test, telling the complainant at the end of July 2003, on the complainant's second visit to Toronto, that he had recently tested negative. The accused sustained this misrepresentation throughout his relationship with the complainant and extended it on March 11, 2004, when the accused pretended to receive a positive HIV test result for the first time that day. The complainant learned only after their relationship ended that the accused knew his HIV-positive status before their relationship began.

[13] Dr. Murphy was the accused's family physician after his move to Vancouver. She told the accused to get on with telling his partner about his HIV status but, in the meantime, to "have safe sex with a condom." The accused received the same advice from his treating physician in Toronto, who also told him that if the condom broke, he must tell his partner of his HIV status immediately.

[14] The viral loads of the accused during the relevant period were in the range of 12,000 to 30,000 particles of HIV per millilitre of plasma. The complainant did not contract HIV and remains HIV-negative.

2. The Nature of HIV

[15] When left untreated, HIV is the cause of Acquired Immune Deficiency Syndrome ("AIDS"). Before the development of highly effective antiretroviral therapy, which suppresses HIV to viral

loads below the level of detection, a diagnosis of HIV led inevitably to AIDS and premature death. The medical evidence at trial given by Dr. Murphy, a family physician with more than 20 years of experience in the treatment and diagnosis of HIV, established that the vast majority of people with HIV are expected to live a normal lifespan as long as they continue to receive treatment.

[16] Despite these advances, there remain risks and side effects associated with long-term treatment. A small percentage of people do not respond to treatment. At this time, there is no cure for HIV. Once infected with HIV, a person is infected for life.

[17] The fundamental question is whether the risk of transmission of the virus in the particular circumstances of this case constitutes a significant risk of harm. Answering that question goes to the elements of lack of consent and endangerment of life, both of which must be proved to establish aggravated sexual assault. I turn now to whether the Crown has proved the elements of the offence.

3. Has the Crown Proved Aggravated Sexual Assault?

[18] In this case, the Crown alleges that the assault was an aggravated assault because the complainant's life was endangered by the act of unprotected anal intercourse with the accused, who is HIV-positive. The complainant did not become infected with HIV, but there is no requirement that harm must actually have resulted from the assault for that assault to be aggravated. A significant risk of serious harm suffices.

[19] *R. v. Cuerrier*, [1998] 2 S.C.R. 371, was an appeal from a directed verdict of acquittal. The accused in that case was charged with aggravated assault in relation to two complainants with whom he had engaged in acts of unprotected sexual intercourse. Writing for the majority of the Supreme Court of Canada, Cory J. found that the accused's actions had endangered the lives of the complainants because they had been exposed to the risk of HIV infection. Cory J. did not expressly address the likelihood of transmission of the virus on the facts of that case, focusing instead on the magnitude of the potential harm. Mr. Justice Cory addressed, in a single paragraph, the Crown's obligation to prove that the accused's acts endangered the lives of the complainants:

> Like the Court of Appeal and the trial judge I agree that the first requirement was satisfied. There can be no doubt the respondent endangered the lives of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse. The potentially lethal consequences of infection permit no other conclusion. Further, it is not necessary to establish that the complainants were in fact infected with the virus. There is no prerequisite that any harm must actually have resulted. This first requirement of s. 268(1) is satisfied by the significant risk to the lives of the complainants occasioned by the act of unprotected intercourse.

[20] Although Mr. Justice Cory did not refer to the frequency of the sexual contact, the accused in the *Cuerrier* case had engaged in sexual intercourse with one complainant on about 100

occasions, in most instances without a condom. With respect to the second complainant, the accused had engaged in 10 acts of intercourse, four or five of which were without a condom.

[21] Advances in research and treatment have been made since *R. v. Cuerrier* was decided in 1998. Much has been learned about the nature of HIV, how it is transmitted, and how it should be treated. It is incumbent on the Court to take that knowledge into account in assessing, in any given case, whether the complainant's risk of contracting HIV was sufficiently significant to establish endangerment to his or her life. That assessment necessarily includes a consideration of both the nature of the harm involved and the likelihood of its occurrence.

[22] HIV is no longer synonymous with AIDS and premature death. According to Dr. Murphy, those living with HIV who receive treatment have a normal life expectancy. These projections are necessarily based on extrapolations because antiretroviral drugs have only been available since 1987. Dr. Murphy was confident, however, that this is a realistic projection given that the drugs used to treat HIV have become increasingly less toxic and more targeted since their development 23 years ago.

[23] The drugs used to treat HIV continue to have side effects which can make an HIV-positive person more susceptible to heart, liver, and kidney problems. However, Dr. Murphy noted that new classes of drugs are in development and that the side effects associated with future classes of drugs are expected to be even less marked than they are today.

[24] In short, HIV, while still a deadly virus, can generally be treated and held in check. Treatment reduces the number of viral particles per millilitre of blood to undetectable levels. There is a correlation between decreased viral load and decreased risk of transmission of HIV. Dr. Murphy said that in more than 20 years of treating patients with HIV, she and her colleagues have never seen a case of transmission of HIV where viral loads were undetectable, although this is theoretically possible. (I note, so that the facts of this case are clear, that the accused's viral loads were not at undetectable levels; they were at what would be considered significant levels.)

[25] Dr. Murphy said that even with a high viral load, a condom reduces the risk to a safe level. If the condom breaks, the non-HIV partner can be treated prophylactically with drugs for one month as long as treatment starts within 72 hours.

[26] With respect to the risk of transmission of HIV, Dr. Murphy stated that HIV is "not the easiest virus to transmit." She described a continuum of risk of transmission from low (oral sex) to high (intercourse without a condom). Her description of intercourse without a condom as a “high-risk” activity must be understood in this context to mean higher risk in relation to other forms of sexual interaction.

[27] Dr. Mathias is a specialist in infectious diseases who has studied the transmission of HIV since the virus was identified. He testified that for sexual transmission of HIV to occur, viable virus

at certain concentrations has to come into contact with receptor cells which will replicate the viral RNA.

[28] Receptor cells are found in the epithelium. Receptor cells are present where absorption or secretion occurs. Dr. Mathias said that there are no receptors in the glans of the penis, but transmission can occur from the receptive HIV-positive partner to the insertive partner because fluid can travel 5 cm up the urethra and there are receptor cells within one to two centimetres of the urethra opening. He confirmed that anal fluid can carry HIV.

[29] Taking into account the accused's viral load, (which had not been suppressed by treatment because the accused's doctors had not yet deemed it necessary to prescribe antiretroviral drugs), the fact that the complainant was uncircumcised, (which increases risk of transmission), and the fact that the accused was the receptive HIV-positive partner and the complainant was the insertive HIV-negative partner, Dr. Mathias was of the opinion that the risk of transmission of HIV to the complainant was 4 in 10,000 per incident of anal intercourse. Dr. Mathias said that the risk of transmission where the insertive partner is HIV-positive and wearing a condom is 6 in 10,000. He agreed that the risk associated with protected sexual intercourse where the HIV-positive partner is the insertive partner is greater than the risk of unprotected anal intercourse where the receptive partner is HIV-positive, as in the case at bar.

[30] Neither Dr. Murphy nor Dr. Mathias had direct clinical experience with HIV transmission from an HIV-positive receptive partner to an HIV-negative insertive partner, although Dr. Mathias said he is aware that studies have reported it occurring.

[31] Dr. Mathias acknowledged that the risk of transmission of 4 in 10,000 per unprotected act of anal intercourse is his best educated estimate of the risk, taking into account the particular circumstances of the accused and complainant. The odds are per act, and the risk is cumulative; one act carries a risk of transmission of HIV of 4 in 10,000; two acts carries a risk of 8 in 10,000; three acts carries a risk of 12 in 10,000, and so on. Accordingly, the risk of transmission in this case depends on the number of times that the accused and complainant engaged in anal intercourse without a condom. I turn now to that question.

(a) How Often did the Accused and Complainant Engage in Anal Intercourse Without a Condom?

[32] The accused says there was only one occasion of unprotected intercourse on New Year's Day, 2004, after the couple had attended an after-hours club and consumed significant amounts of ecstasy and crystal meth as well as some GHB and ketamine. The accused says their judgment was impaired, and he did not even know a condom was not being used by the complainant. The accused says further that when the complainant told him the next day what had happened, they immediately acknowledged it was a bad idea and renewed their commitment to only engage in protected sexual relations.

[33] The accused also denies any sexual encounters between New Year's Day and January 24, 2004, the day the complainant decided to abstain from sexual relations until the accused underwent an HIV test. The accused says the complainant had a sore back which precluded intercourse during that period.

[34] I do not accept the accused's evidence in relation to the number of unprotected sexual encounters. His testimony on this point was inconsistent, and he appeared to be filling in details to bolster his evidence. For example, he said that he did not see the complainant's genitals at any time during more than two hours of sexual interaction on New Year's Day, even though he acknowledged that one of the positions they used involved the accused being on his back facing the complainant who was above him.

[35] The accused also said that he could not feel whether a condom was being used, although he acknowledged that he would guide the complainant's penis into him with his hand.

[36] Further, the accused asserted that he did not see the complainant's genitals during any of their sexual encounters over their 10-month relationship. In cross-examination, however, when asked how he knew that the complainant used a condom in compliance with their safe-sex agreement, the accused said that he would, of course, have to see the genitals of the complainant at some point during any sexual encounter.

[37] The accused also said that “99% of the time” he saw the complainant walk to the bathroom with the condom on to take it off and dispose of it. That evidence is inconsistent with the accused's testimony that the complainant would always take off the condom in bed and ejaculate on him to complete the sexual encounter. The accused had no explanation for this discrepancy in his evidence.

[38] Disbelieving the accused's version of events in relation to the number of unprotected sexual encounters is not the end of the inquiry I must make. It is up to the Crown to prove that the unprotected sexual encounters occurred. Based on the evidence of the complainant, the Crown alleges there were five acts of anal intercourse in which a condom was not used: December 13, 2003; January 1, 2004; and three more dates between January 1 and January 24, 2004. The accused admits that one act of unprotected sexual intercourse occurred on New Year's Day. I must decide on the evidence whether the Crown has proved the four other incidents of unprotected anal intercourse alleged.

[39] The complainant testified that, as the insertive partner, he had always used a condom until the evening of December 13 when, after celebrating the end of his student work placement, he and the accused attended an after-hours club, used ecstasy, and subsequently engaged in unprotected anal intercourse. The complainant's evidence about the date of that first unprotected sexual encounter is inconsistent:

(a) "around the end of December," stated in a two-page typed statement made in late 2005;

(b) "I think it was around the end of November," stated during an interview with Detective Hartman on December 27, 2005;

(c) "I'll admit, like, a lot of the times that we did it was like around New Years and stuff, but it was after a really big party, the New Year's party, and we were under the influence of Ecstasy or something," stated during an interview with Detective Hartman on December 27, 2005.

(d) "The first time was -- I don't exactly remember the exact date, but I know it was after my exams which was the beginning of December," stated during the preliminary inquiry;

(e) "I went home and I looked through my transcripts and the police transcripts. I don't really recall saying that I had exams that term. I do remember saying that I was involved in a co-op work term placement that term," stated during the preliminary inquiry;

(f) "First or second week of December," handwritten note made by the complainant in the margin of his two-page typed statement approximately two weeks before trial; and

(g) "December 13," stated during trial testimony.

[40] In light of this evidence, I find that the Crown has not proved that it is probable that an incident of unprotected anal intercourse occurred in December prior to the incident on New Year's Day.

[41] With respect to the incidents alleged to have occurred in January after New Year's Day, the complainant said that between January 3 and 24, 2004, he and the accused had anal intercourse two to three times per week or six to nine times in total, half of which were unprotected. In effect, the complainant says there were three to five incidents of unprotected anal intercourse in that period and that all occurred when he and the accused were sober.

[42] The complainant told Detective Hartman on December 27, 2005, that in total, including New Year's Day, "there was a couple of times we didn't use protection." He explained that he used the term “a couple” in the colloquial sense and did not intend to convey “two”, just as defence counsel said, "I have a few questions for you," and then cross-examined the complainant for more than a day.

[43] K.L. shared an apartment with the accused and the complainant in Vancouver. She testified

that the complainant told her in the last week of January 2004 that he and the accused had unprotected sex "sometimes." She knew that the accused was HIV-positive and had agreed to "keep his secret" on the basis that the accused said he would always use a condom. When K.L. found out that the accused had engaged in unprotected intercourse with the complainant, she was furious and left the accused a note saying that they had to talk. They met, and she confronted the accused with what the complainant had told her. She described the accused's reaction as "pure shame." She said that he hung his head and ultimately said, "At least if he has it, we can deal with it together." K.L. said that was the end of her friendship with the accused.

[44] K.L.'s evidence was vague on dates and some sequencing: for example, the date she made a phone call to the complainant's mother to warn her that the accused was "not what he seemed to be." The accused says K.L. should not be believed because of her lack of recall and because she had reason to be angry with the accused for telling her boyfriend that she had cheated on him.

[45] I found K.L. to be a truthful witness, and I accept her evidence in relation to both her conversation with the complainant and her conversation with the accused. Her evidence that the complainant told her in January 2004 that he and the accused had unprotected sex "sometimes" supports the evidence of the complainant that he used the phrase “a couple of times” loosely. K.L.’s description of the accused's reaction when she confronted him with having unprotected sexual relations with the complainant is also inconsistent with the accused's evidence that there had been only one encounter on New Year's Day which he did not even realize had occurred until the complainant advised him of it the next day.

[46] The defence says that the complainant's evidence about the number of unprotected sexual interactions should not be believed for three reasons: first, because the complainant's evidence about the frequency of anal intercourse in January of 2004 is implausible in light of the back injury that he had experienced at the gym on December 30 and aggravated through dancing and sexual activity on New Year's Eve.

[47] Second, the defence says that the complainant's evidence about the incidents of unsafe sex in January is at odds with the safe-sex agreement the couple had entered into. The complainant acknowledged that nothing had occurred to change his motivation for entering into the condoms-only agreement and abiding by it. The defence therefore says that the complainant should not be believed when he says he and the accused departed from that agreement in January.

[48] Third, the defence argues that the complainant's evidence should not be believed because he admitted that he prepared extensively before giving evidence at trial. While the defence acknowledges that it is normal for a witness to review material to refresh his recollection before testifying, the defence asserts that the complainant's preparations were significantly more

elaborate. He reviewed documents with the intention of identifying and reconciling contradictions, wrote hypothetical questions to himself, and made a list of six errors he had made while being interviewed by Detective Hartman.

[49] The complainant testified that these efforts assisted him in "forming memories" which the defence asserts demonstrates that much of the complainant's testimony is a hypothetical reconstruction of what happened constrained by the need to avoid inconsistency and motivated by his sense of having been betrayed by the accused.

[50] While the complainant was a particularly careful witness who seems to have prepared for trial as if studying for an exam, I found him to be generally truthful and straightforward. Although his dates were not always accurate, on the substantive events and their sequence, his evidence was largely unshaken.

[51] The complainant's evidence with respect to frequency of unprotected sexual incidents in January was, not surprisingly, based on their “usual” frequency of sexual intercourse during their 10-month relationship of two to three times per week, about half of which he said took place without a condom. The complainant testified that, in the months between learning on March 24, 2004, that the accused had tested positive for HIV and receiving confirmation that he, the complainant, was HIV-negative, he had replayed every incident of unprotected sex over and over in his mind. He acknowledged that his back was painful as of New Year's Day and that he was affected by that pain until about January 4 but said that he was fine as soon as he started taking Naproxen.

[52] In these circumstances, I find it unlikely that the parties had any sexual interactions during the first week of January after New Year's Day. The evidence established that the frequency of sexual interaction had gradually decreased since October 2003, and I therefore find it probable that the complainant and the accused engaged in the lower end of the complainant's range of sexual contacts. He said that he and the accused engaged in two to three sexual acts per week, or four to six acts between January 7 and January 24, half of which were unprotected.

[53] Based on this evidence, and the evidence before me as a whole, I find it is probable that two incidents of unprotected anal intercourse occurred in January 2004 in addition to the incident on New Year's Day, for a total of three.

(b) Has the Crown Proved Endangerment?

[54] From the complainant's point of view, any risk of contracting HIV is too great because any sexual encounter could be “the one”, whether the odds are 1 in 100 or 1 in 10,000. But that is not the measure of harm that must be established by the Crown. Only a significant risk of harm to the complainant will suffice.

[55] As Cory J. noted in *Cuerrier* at para. 132:

> Aggravated assault is a very serious offence. Indeed, a conviction for any sexual assault has grave consequences. The gravity of those offences makes it essential that the conduct merit the consequences of conviction.

[56] A significant risk means a risk that is of a magnitude great enough to be considered important. This is not a rigid standard capable of scientific application, but in the context of the criminal law, the Court must be convinced beyond a reasonable doubt that there was a significant risk of serious harm. Three incidents of unprotected anal intercourse at a risk of 4 in 10,000 per occurrence puts the risk of transmission of HIV to the complainant at 12 in 10,000 or 0.12%.

[57] Section 268(1) of the *Code* provides that an aggravated assault occurs when the accused "wounds, maims, disfigures, or endangers the life of the complainant." A person convicted of aggravated sexual assault is subject to a penalty of up to life in prison and will be registered in the sex offender registry. As Cory J. said in *Cuerrier*, "the conduct must merit the consequences of the conviction."

[58] I am not satisfied that a 0.12% risk of transmission of a virus that, while still a serious lifelong harm, is now largely treatable, constitutes endangerment to life. It follows that the Crown has not proved aggravated sexual assault.

4. Has the Crown Proved Sexual Assault?

[59] I must now consider whether the Crown has proved the lesser included offence of sexual assault. The main issue in relation to that offence is whether the complainant consented to the sexual encounters in issue.

[60] It is trite law that "if the act of intercourse or other sexual activity was consensual, it could not be assault": *Cuerrier*, para. 132. The complainant in this case consented to engage in unprotected anal intercourse with the accused, which must include consent to the application of the force inherent in that activity. But the Crown contends that the consent of the complainant was not legally valid because it was obtained by fraud. In order to establish fraud, the Crown must prove two constituent elements: dishonesty and deprivation.

(a) Proof of Dishonesty

[61] As Cory J. noted in *Cuerrier* at para. 126:

> The first requirement of fraud is proof of dishonesty. In light of the provisions of s. 265, the dishonest action or behaviour must be related to the obtaining of consent to engage in sexual intercourse, in this case unprotected intercourse. The actions of the accused must be assessed objectively to determine whether a reasonable person would find them to be dishonest. The dishonest act consists of either deliberate deceit respecting HIV status or non-disclosure of that status. [Emphasis added.]

[62] The accused admitted that he deliberately lied about his HIV status. He knew in April 2003, two months before meeting the complainant, that he was HIV-positive. Nonetheless, he told the complainant on their July 2003 visit that he had tested negative for HIV a few weeks earlier. I find that he did so because he wanted to enter into a romantic relationship with the complainant and was afraid that the complainant would not do so if aware of the accused's HIV status.

(b) Proof of Deprivation

[63] The second requirement to establish fraud is proof that the accused's dishonesty resulted in deprivation, which may consist of actual harm or simply a risk of harm. The Crown contends that the accused's deception resulted in deprivation because the complainant relied on the accused's lie about his HIV status, engaged in unprotected anal intercourse with the accused, and was thereby exposed to the risk of contracting HIV. I will address reliance and risk of harm in turn.

(i) Reliance

[64] The complainant was completing his last year of his undergraduate degree in chemistry when he met the accused. He had planned for many years to apply to dentistry school and wrote the Dental Aptitude Test and applied to dentistry school during the parties' relationship. The complainant was consistently in the top 5% of his university program and, while not certain that he would be accepted, knew he had a very good chance of reaching his goal. The complainant was accepted into dentistry school in February 2003, a few months before discovering that the accused was HIV-positive.

[65] The complainant said that there is a serious ethical question as to whether a person who is HIV-positive should practice dentistry. He also said that he does not want to contract HIV because of the health issues, but also because of the serious stigma associated with the disease and the difficulty that creates for future romantic relationships.

[66] When the accused pretended to get a test for HIV in March 2004 and disclosed his true status, the complainant's evidence about his reaction was in complete accord with the evidence of the accused about that event. The complainant was shocked, cold, and withdrawn for about an hour. In the months that followed, he and the accused engaged in only one or two protected sexual encounters. They ended their relationship four to six weeks after the disclosure.

[67] The accused said that the complainant told him on the July 2003 visit to Toronto, when they discussed using condoms during their sexual encounters, that the complainant had no problem being with an HIV-positive person. The defence contended that the complainant's acceptance into dental school subsequently changed that “warm and compassionate approach” to those living with HIV.

[68] The defence also contended that the complainant did not rely on the deception because he

knew that there was a risk of contracting HIV from the accused even though the accused said he had tested negative. The complainant acknowledged that he used condoms for the first four months or so of their relationship because of his fear of contracting HIV or other sexually transmitted diseases. He acknowledged that he was aware that a negative test for HIV can be a false negative and that people who have HIV are capable of deceiving others about their status because of the stigma associated with disclosure.

[69] The complainant stated that in September and October 2003, he was “not ready to rely on what [the accused] had told [him] and continued to wear condoms.” In cross-examination, the complainant further acknowledged that nothing had changed before he and the accused began having unprotected anal intercourse in the sense that the complainant did not have medical proof that the accused was HIV-negative.

[70] The defence also argued that the complainant did not rely on the accused's deception about his HIV status because the complainant knew the accused probably had HIV. The accused said that on the July 2003 visit of the complainant to Toronto, the accused told him that he (the accused) had been drugged and raped by two men during the previous year's Gay Pride Festival, his assailants had not used condoms, there was blood; subsequently, the accused had developed a serious illness and had been advised to get tested, but was afraid to confirm what he suspected. As the accused put it, "I gave the complainant 62 of the 63 connect-the-dots, so he should have known" that there was every likelihood that the accused was HIV-positive.

[71] I do not accept this evidence. It is most improbable that the accused would lie about his HIV status and, in the same conversation, effectively tell the complainant that he was HIV-positive.

[72] I find that the complainant did rely on the accused's deception. They had been together for about six months before their first unprotected sexual encounter. While the complainant was aware of a theoretical risk that the accused could be HIV-positive, that is markedly different from knowing that the accused was HIV-positive.

[73] The complainant said that he would not have engaged in unprotected anal intercourse with the accused if aware of the accused's HIV-positive status. I accept that evidence.

[74] Having considered all of the evidence, I find that the complainant, who presented as a careful, meticulous, and controlled person, relied on the accused's deception that he was HIV-negative and would not have agreed to engage in unprotected anal intercourse with the accused if he had known the truth about the accused's HIV status.

(ii) Risk of Harm

[75] I turn now to proof of deprivation of the complainant, which may consist of actual harm or, as in this case, a risk of harm. This risk of harm is, of course, the risk of contracting HIV. I begin

with Mr. Justice Cory's analysis in *R. v. Cuerrier* at para. 128:

> The second requirement of fraud is that the dishonesty result in deprivation, which may consist of actual harm or simply a risk of harm. Yet it cannot be any trivial harm or risk of harm that will satisfy this requirement in sexual assault cases where the activity would have been consensual if the consent had not been obtained by fraud. For example, the risk of minor scratches or of catching cold would not suffice to establish deprivation. What then should be required? In my view, the Crown will have to establish that the dishonest act (either falsehoods or failure to disclose) had the effect of exposing the person consenting to a significant risk of serious bodily harm. The risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet that test. In this case the complainants were exposed to a significant risk of serious harm to their health. Indeed their very survival was placed in jeopardy. It is difficult to imagine a more significant risk or a more grievous bodily harm. As Holland, *supra*, at p. 283, wrote:
>
> > The consequences of transmission are grave: at the moment there is no "cure", a person infected with HIV is considered to be infected for life. The most pessimistic view is that without a cure all people infected with the virus will eventually develop AIDS and die prematurely.
>
> [Emphasis Added.]

[76] It follows that deprivation (and lack of consent) will be established only where the complainant was exposed to a "significant risk of serious bodily harm." This is the same phrase used to describe what must be proved to establish that an assault was aggravated because it endangered a complainant's life. In my view, the two standards are the same. It follows that in a case in which lack of consent is to be established by demonstrating that the complainant was unknowingly exposed to a significant risk of harm, failure to prove endangerment of life under s. 273(1) effectively precludes a finding of the lesser included offence of sexual assault. I will nonetheless continue with the analysis I have begun, although to do so is somewhat repetitive.

[77] There are two components to the proof of significant risk of harm. There must be a significant risk, and the potential consequence must be serious bodily harm. Despite the advances in treatment, the defence acknowledges that HIV continues to be a serious harm, but it is less serious than it was when *R. v. Cuerrier* was decided. It is no longer the case that all people infected with the virus will eventually develop AIDS and die prematurely.

[78] This is important because the nature of the harm necessarily affects the threshold of significance required to establish deprivation. As the magnitude of the harm goes up, the threshold of probability that will be considered significant goes down.

[79] Mr. Justice Cory recognized, in *R. v. Cuerrier*, that there may be situations in which the risk of contracting HIV might be reduced to the point that the risk of harm would no longer be significant. He gave, as an example, the careful use of condoms. He also stated, in para. 139:

> 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. It is difficult to draw clear bright lines in defining human relations particularly those of a consenting sexual nature. There must be some flexibility in the application of a test to determine if the consent to sexual acts should be vitiated. The proposed test may be helpful to courts in achieving a proper balance when considering whether on the facts presented, the consent given to the sexual act should be vitiated.

[80] I note parenthetically that the difficulty inherent in applying the standard of "significant risk" in the context of the criminal law was addressed with considerable prescience by Chief Justice McLachlin in her dissenting reasons for judgment at para. 48 of *R. v. Cuerrier.*

[81] As I have earlier stated, the facts of this case involve an HIV-positive receptive partner and three proven acts of unprotected anal intercourse with a probability of transmission of HIV to the complainant of 0.12%. While that risk may well be too high from the perspective of the complainant, the test is not a subjective one. Viewed objectively, is a probability of infection of 12 in 10,000 sexual encounters, or just over 1 in 1,000, significant enough to found a conviction for the serious offence of sexual assault in relation to what would otherwise constitute consensual sexual activity?

[82] In assessing whether the risk of transmission in this case was a significant one, I have considered other cases dealing with assault charges based on failure to disclose HIV status.

[83] In *R. v. Williams*, 2001 NFCA 52, the accused and the complainant had an 18-month relationship. The complainant tested HIV-positive before trial. One of the main issues in that case was whether the accused had infected the complainant before the accused became aware that he had HIV. The agreed statement of facts included an agreement that "a single act of unprotected vaginal intercourse carries a significant risk of HIV transmission." This case is of little assistance because the agreement made it unnecessary for the Court to address the degree of risk of transmission necessary to constitute a significant risk of harm.

[84] In *R. v. Mabior*, the accused was charged with having both protected and unprotected sexual encounters with several complainants. In addressing whether endangerment of life had been proved in relation to aggravated sexual assault, McKelvey J. adopted the language of Cory J. in *R. v. Cuerrier* and held that "the potentially lethal consequences of unprotected sexual contact leave room for no other conclusion than that endangerment of life has been substantiated." He also referred to the language of the Ontario Court of Appeal in *R. v. Thornton* (1991), 82 C.C.C. (3d) 530 at 531:

> When the gravity of the potential harm is great, in this case "catastrophic", the public is endangered even where the risk of harm actually occurring is slight, indeed even if it is minimal.

[85] McKelvey J. addressed the issue of risk of transmission more precisely when considering whether the Crown had proved a lack of consent because of the deprivation occasioned by the

significant risk of harm of HIV transmission. He held that if the viral loads of the accused can be detected, sexual intercourse, whether with or without a condom, is enough to establish a significant risk of serious bodily harm. Where the accused's viral loads were below the level of detection and a condom was used, he did not find a significant risk. The learned trial judge in that case used language that suggested that a possibility of infection sufficed to establish a significant risk of harm.

[86] In *R. v. Wright*, 2009 BCCA 514, a decision of the British Columbia Court of Appeal, the jury had before it evidence from a specialist in HIV that the risk of transmission was 0.5%, or 5 in 1,000. The accused appealed his conviction in part on the basis that this did not amount to a significant risk of harm and the judge should therefore have directed a verdict of acquittal. The Court of Appeal held that there was some evidence upon which a jury properly instructed could have concluded that the risk of HIV transmission constituted a significant risk to the complainant of serious bodily harm.

[87] The criminal law does not usually deal with such finely calibrated evidence as statistical probabilities, but whether the evidence consists of facts or numbers, the evidence causes the scales of justice to settle either at a point where a judge or a jury no longer has a reasonable doubt or at a point that falls short of that, whether by millimetres or by much.

[88] Whether an offence has been proved beyond a reasonable doubt will, of course, depend upon all of the evidence in a particular case. In my view, a risk of transmission of HIV of 0.12% is not material enough to establish deprivation invalidating the consent of the complainant.

[89] In reaching this conclusion, I should not be taken to condone the behaviour of the accused. He had a moral obligation to disclose his HIV-positive status to his partner and to give the complainant the opportunity to assume or reject the risk involved in sexual activity with the accused, no matter how small. But not every immoral or reprehensible act engages the heavy hand of the criminal law. Aggravated sexual assault is a most serious offence -- a person convicted of this charge is liable to imprisonment for life, the harshest penalty provided for in law. Only behaviour that puts a complainant at significant risk of serious bodily harm will suffice to turn what would otherwise be a consensual activity into an aggravated sexual assault. In my view, a risk of transmission of HIV of 0.12% falls short of that standard.

[90] Accordingly, I find the accused not guilty of aggravated assault and not guilty of the lesser included offence of sexual assault.

The Honourable Madam Justice L. A. Fenlon