Case Name:
R. v. J.H.

Between
Her Majesty the Queen, and
J.H.

[2012] O.J. No. 5351

2012 ONCJ 708

Ontario Court of Justice
Toronto, Ontario

Melvyn Green J.

Heard: August 23-24, September 18, 24,
October 4, 18, 2012.
Judgment: November 9, 2012.

(59 paras.)

Counsel:

M. Scott for the Respondent/Crown.

J. Shime and C. Langdon for the Applicant/Defendant.

REASONS for RULING
(Re S. 276 Application)

MELVYN GREEN J.:--

A. INTRODUCTION

1 The defendant, J.H., is charged with one count each of sexual assault causing bodily harm and criminal negligence causing bodily harm. Both charges arise from the same transaction or series of transactions alleged to have occurred with the same complainant between March 5th and 12th of 2011.

2 At its simplest, the Crown theory is that the defendant "gave" the complainant herpes at a time he knew or had strong reason to believe that he carried the virus and without telling her about his state of infection before she consented to having sexual intercourse with him. Slightly more unpacked: The "bodily harm" attributed to the defendant's conduct is that associated with the transmission of "genital herpes" (caused, in the case before me, by the herpes virus HSV-2) through his sexual relations with the complainant. The conduct said to attract criminal liability rests, it is alleged, in the defendant's knowing or reckless misrepresentation of his positive viral status, or his failure to disclose such status, at the time the complainant agreed to engage in sex with him. This, it is further alleged, fraudulently vitiated the complainant's otherwise valid consent to sexual congress with the applicant (thus legally converting a consensual act of sexual intimacy into one of sexual assault) and/or amounted to criminally negligent conduct that, in either case, resulted in the complainant's bodily harm through contraction of the virus.

B. THE PROCEDURAL BACKGROUND

3 The charge of sexual assault causing bodily harm is an enumerated provision within the evidentiary regime - sometimes called the "rape shield" provisions - set out in s. 276 of the Criminal Code. J.H. (hereafter, the "applicant") applied for an order granting a hearing to determine whether evidence pertaining to prior sexual activity of the complainant with other sexual partners (and subsequent incidents of sexual intimacy with the complainant) is admissible at his trial. In brief oral reasons, I granted that preliminary application. A somewhat fractured s. 276 hearing followed.

4 The factual scenario that grounds this application is atypical if not unique. The course of the proceedings is also somewhat unusual. The police originally laid a charge of aggravated assault, an indictable offence. The Crown directed that a new Information be laid, at least in part, it appears, to avoid the risk of a two-stage trial should the defence elect to proceed by way of a preliminary inquiry followed by a trial in Superior Court. (In fairness, concern that the harm occasioned by the transmission of herpes may not meet the statutory definition of "aggravated assault" may also have contributed to this decision.) The Information charging aggravated assault was then replaced with one charging the two above-noted offences, and it is upon this latter Information that the applicant was arraigned. The s. 276 application was then argued and I reserved my decision. As soon became apparent, like the offence of aggravated assault the two replacement charges are also indictable-only offences. On re-attending, and with the consent of both parties, the pleas were struck and the applicant, on re-arraignment, elected trial before me in the Ontario Court of Justice. The parties also agreed to incorporate by reference all of the evidence led on the earlier s. 276 hearing, along with counsels' written pleadings and the substance of their prior oral submissions.

5 That was not quite the end of the procedural complications. The complainant was not present during the s. 276 hearing. However, a note she prepared was conveyed to Crown counsel in the course of that hearing. The document contained the name of a women's sexual health clinic and the approximate dates the complainant attended the clinic in the several years preceding and concurrent with her relationship with the applicant. Crown counsel properly disclosed this information to the defence. Defence counsel, in turn, properly indicated that he then proposed to bring a s. 278.3 motion for production of the complainant's clinical records in aid of his s. 276 application. At the request of the Crown, I appointed experienced counsel to represent the complainant at the production hearing. Given the trial issues patently in play (in particular, that of causation), the complaint's counsel effectively allowed that the relevance of narrow parts of her client's records bearing on her prior sexual encounters warranted their production to the defence. The truly

contested issues that remained were the appropriate timeframe for any production order and the extent of any production or redactions beyond those areas to which the complainant's counsel did not object.

6 On considering the factors directed by s. 278.7(2), I delivered oral reasons indicating my intention to order production of portions of the complainant's clinical records on the basis of my satisfaction that they are likely relevant to an issue at trial and that their production is necessary in the interests of justice. I then reviewed the original records and redacted them in a manner consistent with my oral ruling. Copies of the redacted clinical records were then distributed to Crown and defence counsel, subject, of course, to orders prohibiting their publication or broadcast or further transmittal and, in addition, restricting the dissemination or release of any information that might otherwise identify the complainant.

7 Supplementary representations respecting the s. 276 application ensued. Crown counsel, in the course of her submissions, proposed that the complainant's redacted clinical records be admitted as a true statement of their contents at trial, thus eliminating the need for cross-examination of the complainant on factual matters detailed in the clinical records while still permitting me to assess her credibility by comparing her testimony with the assertions attributed to her in those records. Defence counsel declined this proffer. For reasons to which I shall return, I am of the view that such stipulation would not serve as a fair substitute for testimonial examination of the complainant or adequately advance the ends of justice in this case.

8 On the completion of oral argument I again reserved to consider my determination of the s. 276 application. The complainant was scheduled to testify on October 29, 2012. To accommodate this schedule, a few days earlier I released to counsel a list of authorized areas of examination respecting the complainant's sexual activity other than that forming the subject-matter of the charges faced by the applicant. (This list, to which I have since added one narrow area of permissible examination, appears as Appendix "A" to this ruling.) A collection of procedural guidelines (attached as Appendix "B") accompanied this inventory.

9 A summary of the evidence led on this motion appears immediately below. I then turn to the reasons for my determination of the s. 276 application, as reflected in the list of authorized examination areas released to counsel. To be clear, the discussion that follows is focused on the permissible scope of the complainant's cross-examination. However, and if only by implication, this analysis impacts on the scope and limits of any evidence adduced by the applicant in aid of those issues I have found sufficiently relevant and material to permit their evidentiary advancement at trial.

C. EVIDENTIARY FOUNDATION FOR THE APPLICATION

(a) <u>The Relationship Between the Applicant and the Complaint</u>

10 The complainant and applicant were introduced through mutual friends on March 5, 2011. They arranged to meet at a bar, the defendant's workplace, two days later. They retired to the complainant's home that same evening where they engaged in unprotected sexual intercourse. The complainant alleges the applicant first advised her that he was "clean". This claim, says the defence, will be contested at trial.

11 The complainant experienced flu-like symptoms two days later and noticed a bump on the right side of her vagina the following day. On March 14, 2011 she attended a medical clinic where

she was tested for syphilis and herpes. She contacted the applicant before receiving her test results to inform him she may have contracted one of these infections. He denied ever having "anything like that".

12 On March 17th or 18th, the complainant learned that she had tested positive for Herpes Virus Simplex 2 (HSV-2). She initially thought she might have been infected by her former boyfriend who had "cheated" on her during their relationship. (She later learned that the boyfriend subsequently tested negative for the herpes virus.) According to the disclosure provided the defence, the complainant alleges the applicant noticed a lesion on his penis a week following the complainant's outbreak. Confronted about it by the complainant, the applicant protested that he "had never had anything like that before". The complainant and the applicant continued to have unprotected sex over the next several months. Their relationship ended in July 2011. In August or very early September, the complainant was informed by one or two former girlfriends of the applicant that he had told them he knew he had herpes before her first sexual encounter with him. (The defence contests the truth of these assertions.) The applicant was charged on September 2, 2011.

13 In an affidavit filed on the s. 276 application, the applicant avers that the complainant advised him that she "hated condoms", that she had been sexually intimate with a number of other men, and that she continued to engage in sexual intercourse with her former boyfriend even after learning of his infidelity. Crown counsel did not challenge any of these assertions. She asked the applicant a single question in cross-examination on his affidavit: "Do you presently suffer from HSV-2 or genital herpes?" The applicant answered:

> Not as far as I know. I have never been tested, and I have never been diagnosed with herpes of any kind. The only time I ever exhibited any kind of symptoms resembling that were about six weeks after having sex with the complainant.

(b) <u>Clinical and Epidemiological Aspects of HSV-2</u>

14 Two peer-reviewed academic papers respecting the transmission, epidemiology and clinical manifestations of genital herpes were appended to an affidavit filed by the applicant's counsel. Crown counsel elected not to cross-examine the affiant, contest the scientific propositions set out in the articles or tender any additional medical or scientific papers. In effect, and if only for purposes of the s. 276 application, the Crown accepts the expert evidence set out in the two academic papers. The current state of scientific knowledge about genital herpes is summarized in a more immediately intelligible fashion on the website maintained by the American Centers for Disease Control and Prevention (formerly, the Centers for Disease Control and, thus, generally abbreviated as the "CDC"). I accept the CDC as a neutral authoritative source. Further, the information on the CDC website respecting genital herpes is not inconsistent with that filed on this application.

15 Genital herpes is a sexually transmitted disease caused by both type 1 (HSV-1) and, primarily, type 2 (HSV-2) of the herpes simplex virus. It is a very common infection. Approximately 16% of Americans between 14 and 49 years of age (one of six) have HSV-2 (although it occurs nearly twice as frequently in women than men) and new infections occur at the rate of about one million a year. Herpes is spread by direct skin-to-skin contact, through a process known as virus shedding. Shedding can occur when a lesion comes into contact with the skin of an uninfected person. HSV-2 can also be shed when, for example, an individual experiences only mild dermatological symptoms (such as itching or tingling) that may be readily misread as benign irritations, or even absent the

appearance of any clinical manifestations. Indeed, most HSV-2 carriers - 85-90% according to one study - are not aware of their infection.

16 Persons with genital herpes may not develop clinical symptoms for many months or even considerably longer. (The filed materials do not directly address the question of the outer limits of the timeline between infection and clinical or subclinical manifestation of that infection or the likely interval between viral transmission and the first occurrence of anatomically observable indicia.) Women may develop internal symptoms that are neither visible nor felt. However, asymptomology is no bar to viral transmission through shedding. As explained by the CDC:

> Most individuals infected with HSV-1 or HSV-2 experience either no symptoms or have very mild symptoms that go unnoticed or are mistaken for another skin condition. Because of this, most people infected with HSV-2 are not aware of their infection.
>
> ...
>
> People get herpes by having sex with someone who has the disease. "Having sex" means anal, vaginal, or oral sex. HSV-1 and HSV-2 can be found in and released from the sores that the viruses cause. The viruses can also be released from skin that does not appear to have a sore. ... Transmission can occur from an infected partner who does not have a visible sore and may not know that he or she is infected.

17 One of the filed articles (P. Leone, "Reducing the risk of transmitting genital herpes: advances in understanding and therapy" (2005), 21 *Current Medical Research and Opinions* 1577) similarly notes that,

> ... studies have shown that asymptomatic viral shedding, ... in the absence of lesions, occurs in the majority of individuals diagnosed with genital herpes [and] transmission of genital herpes frequently occurs during periods of asymptomatic viral shedding.
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> ...
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> Thus, infected individuals can transmit the virus regardless of whether physical signs and symptoms are present.
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> Further:
>
> > Considered together, studies on viral shedding in patients infected with HSV-2 show that asymptomatic viral shedding ... occurs regardless of duration of infection but is most frequent during the first year after infection.

18 As regards the efficacy of physical prophylaxes, the CDC reports that,

> Correct and consistent use of latex condoms can reduce the risk of genital herpes, because herpes symptoms can occur in both male and female genital areas that are covered or protected by a latex condom. However, outbreaks can occur in areas that are not covered by a condom.
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> Passages in the earlier-noted article by Dr. Leone are to the same effect:
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> > Condom use ... significantly protected against HSV-2 acquisition among women but not among men. Shedding of virus across multiple genital sites may partly explain the suboptimal efficacy of condoms in reducing the risk of transmission of HSV-2 as condoms cover only the shaft of the penis.

(c) The Complainant's Sexual History

19 The complainant's redacted clinical records reflect routine attendance at a woman's health clinic for the purpose of "birth control and testing". The earliest referenced date for testing for sexually transmitted infections ("STIs") is January 2008. The test results at that time are reported as negative. The complainant's next attendance was in April 2009, some 15 months later. The complainant indicated that she had one "regular" and ten "casual" male "sexual partners" in the previous year. Her "risk assessment" data included reference to "unprotected" vaginal and oral sex and "tattoos/piercing". Her percentage of condom use is noted as "0". The phrase "does not use condoms" appears in a clinician's "progress notes" and the answer "no" appears next to the pre-formatted question, "How are you protecting yourself against STIs?". The complainant's "last unprotected vaginal intercourse" was that same month, April 2009. No evidence of chlamydia or gonorrhea was detected as a result of laboratory testing.

20 The lab results following further testing for chlamydia and gonorrhea in late-October 2009 were again negative.

21 The complainant next attended the clinic in June 2010. Her "risk assessment" information at that time included reference to relations with one "regular" and five "casual" male sexual partners in the previous year. The portion of the form devoted to "condom use" notes "0%" use with her "regular" sexual partner and "100%" use with her "casual" partners. A clinician's progress notes of the same attendance records "100% condom use in past year". Petechiae (small, rash-like spots) were observed on the complainant's labia minor during a physical examination. The complainant denied previously noticing their occurrence and was advised to monitor them. The lab results were again negative for chlamydia and gonorrhea, as they were yet again in February 2011.

22 The complainant re-attended the clinic on March 14, 2011. As documented in the progress notes, she presented with a "bump" that looked like a "sore" on her labia. She reported having sex with a new partner a week earlier, on March 7th, and first noticing the bump about three days after that. The clinician noted "herpes vs. ingrown hair", took a swab for STI testing, and advised the complainant to discuss the possibility of a herpes infection with her sexual partner and to follow a protocol of "100% condom use". Testing for syphilis generated a report of "no evidence of current or past infection". However, the result of HSV testing was positive, recorded as "HSV Type 2 isolated". The complainant was informed of her HSV-2 positive status on March 18, 2011. Until her attendance on March 14, 2011, there is no clinical record of the complainant ever being tested for the presence of HSV or herpes.

23 It is important to recall that the complaint's clinical records are evidence on this application only. They are not evidence at the applicant's trial nor, absent consent of the parties (and, arguably, the complainant) could they be. The issue to which I now turn is whether the applicant, in the language of s. 276(2), can adduce evidence "that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge" and, if so, employ the clinical records produced to the defence to inform the adduction of such evidence through cross-examination or otherwise.

D. ANALYSIS

(a) Introduction

24 As the applicant faces a charge of sexual assault, evidence that the complainant engaged in any sexual activity other than that grounding that specific charge is presumptively inadmissible: s. 276. A judge has the discretion to permit the receipt of such evidence where he or she determines, upon consideration of a number of specified factors, that certain statutory criteria are met. This determination is necessarily framed by the issues at trial and the evidence, as may be reasonably anticipated, bearing on them.

25 In very brief compass, the applicant claims that evidence of the complainant's sexual activity is directly relevant to two issues of critical importance to the defence and, as well, the search for truth and broader interests of justice. The first issue is whether the applicant caused the complainant's infection - that is, whether the applicant, rather than any of the complainant's former sexual partners, was the source of the genital herpes acquired by her. The second is whether the complainant's historical pattern of risk-assumption - that is, her safe-sex practice or lack thereof - casts doubt on the complainant's assertion, as necessarily advanced by the Crown, that she would not have consented to having sexual intercourse with the applicant had she first been advised of the fact or jeopordy that he was HSV-positive. In other words: assuming the applicant had herpes on March 7, 2011 and assuming he knew or suspected his positive viral status, would the complainant have consented to sexual activity with the applicant had he informed her of his true viral condition or, at least, of a risk of HSV infection? If so, or if a reasonable doubt exists in this regard, the Crown theory of sexual assault - that is, that an otherwise valid consent was vitiated by fraud - inevitably fails.

(b) The Legal Framework

26 Offences related to the protection of sexual integrity are subject to special rules of admissibility. Largely echoing the common law rule pronounced by the Supreme Court in *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321, a statutory regime now governs the adduction of evidence respecting a complainant's sexual activity other than that grounding the charges before the court in all cases where an enumerated offence is alleged. That regime, set out in s. 276 of the Code, reads as follows:

> **276.** (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(*a*) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(*b*) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(*a*) is of specific instances of sexual activity;

(*b*) is relevant to an issue at trial; and

(*c*) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(*a*) the interests of justice, including the right of the accused to make a full answer and defence;

(*b*) society's interest in encouraging the reporting of sexual assault offences;

(*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(*d*) the need to remove from the fact-finding process any discriminatory belief or bias;

(*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(*f*) the potential prejudice to the complainant's personal dignity and right of privacy;

(*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(*h*) any other factor that the judge, provincial court judge or justice considers relevant.

The applicant is charged "in respect of an offence under section ... 272" (sexual assault causing bodily harm). His trial proceedings are thus subject to this evidentiary provision.

(c) The "Twin Myths"

27 Section 276(1) renders absolutely inadmissible any non-charge based evidence of a complainant's sexual activity led "to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject-matter of the charge *or* is less worthy of belief". The inference chains that underlie these "twin myths", as they are often styled, are factually unfounded. They are premised on improper avenues of reasoning that are both discriminatory and sexist and, as a result, distort the truth-finding function of the trial process. Further explanation, if required, is forcefully provided by the Supreme Court in *Seaboyer*, *supra*, at para. 24:

> The common law permitted questioning on the prior sexual conduct of a complainant without proof of relevance to a specific issue in the trial. Evidence that the complainant had relations with the accused and others was routinely presented (and accepted by judges and juries) as tending to make it more likely that the complainant had consented to the alleged assault and as undermining her credibility generally. These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited. The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar.
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> (See, also, *R. v. Darrach* (2000), 148 C.C.C. (3d) 97 (S.C.C.), esp. at paras. 32-34.) As summarized by Professor Hamish C. Stewart in *Sexual Offences in Canadian Law* (Canada Law Book, updated June 2006, at 8-5), "evidence that is directed *solely* at supporting those inferences is therefore factually irrelevant" (emphasis added) and, perforce, inadmissible. (See, as well, *R. v. Darrach*, *supra*, at paras. 35 and 37.)

28 Evidence of sexual activity by a complainant that is not the subject-matter of the charged offences may be adduced if its purpose is other than to invite the prohibited reasoning that lies behind the twin myths and if the criteria set out in s. 276(2), as informed by a balancing of the considerations articulated in s.-s. (3), are satisfied. By way of illustration only, the admission of evidence of prior sexual conduct on the part of a complainant has been permitted to ground inferences relating to consent (or an accused's honest belief in such), credibility, bias, motive to fabricate, the nature of the relationship between the parties and, particularly in the case of children, their degree of sexual knowledge. (See *R. v. Darrach*, *supra*, and *R. v. Crosby* (1995), 98 C.C.C. (3d) 225 (S.C.C.), and Justice Michelle Fuerst, et al, *The Trial of Sexual Offence Cases*, Carswell, 2010, at 6.1.4, for further examples and the supporting jurisprudence.)

29 The prosecution's theory of causation is that the applicant is the source of the complainant's bodily harm, her herpes infection. Proof of this allegation requires the Crown to establish the transmission of the virus between the applicant and the complainant, and that it moved from the former to the latter, beyond reasonable doubt. This in turn requires the Crown to eliminate any reasonable possibility that the complainant was already infected when she first had sexual intercourse with the applicant or, put otherwise, that a sexual partner other than the applicant was the contributor of the herpes virus with which the complainant is now infected. Given the evidence

led on this application respecting, on the one hand, the transmission, epidemiology, natural history and clinical expression of herpes, and, on the other, the incidence of the complainant's prior sexual contacts and the unprotected nature of at least some of this activity, the issue of causation is a patently live one at trial.

30 Crown counsel acknowledges that evidence respecting causation, in particular evidence of "other" sexual activity involving the complainant, is not categorically prohibited by the logic of the twin myths and, accordingly, its admissibility falls to be considered under s.-ss. 276(2) and (3). Read in context, her proffer to admit the complainant's clinical records and to treat their contents as factually true reflects an even more telling, if pragmatic, concession. The remaining question, at least with respect to evidence bearing on causation, is not whether the door should be opened to permit the adduction of evidence of the complainant's prior sexual conduct but, rather, how wide.

31 The second basis of the defence application rests on the thesis that the complainant's knowledge of the applicant's viral status would have made no material difference to the exercise of her consent to sexual intimacy with him. The admission of evidence in this regard, says the Crown, runs afoul of the s. 276(1)(a) prohibition against adducing evidence of other sexual activity "to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject-matter of the charge". Expressed in somewhat more colloquial language, the inferential "myth" addressed by this prohibition is that just because someone previously had sex he or she is more likely to have done so on the occasion at issue. Adducing evidence that the complainant consensually engaged in unprotected sex with "casual" partners to invite the inference that she may have followed an equally risky course with the applicant is, says the Crown, sufficiently close to offend the intent if not the letter of the statutory rule.

32 Read literally, s. 276(1)(a) only renders evidence of the complainant's prior sexual conduct inadmissible if it is being advanced to "support an inference that, *by reason of the sexual nature of that activity*, the complainant" is more likely to have consented to the sexual act at issue before the court. This is not the reason the defence here proposes receipt of evidence of the complainant's sexual hygiene behaviour and practice. Evidence of sexual conduct with others that solicits an inference of consent to sex with a defendant is prohibited because it is simply not logically probative of the issue of consent. It may, however, be probative of the issue of whether a complainant would have consented had she been aware of her partner's positive viral status.

33 The Supreme Court of Canada addressed this very issue in *R. v. Currier* (1998), 127 C.C.C. (3d) 1. In words directly relevant to the case before me but for their reference to HIV (the precursor to AIDS) rather than, as here, HSV, Cory J., writing for the majority, commented, at para 130, that:

> In situations such as that presented in this case it must be emphasized that the Crown will still be required to prove beyond a reasonable doubt that the complainant would have refused to engage in unprotected sex with the accused if she had been advised that he was HIV-positive. As unlikely as that may appear it remains a real possibility. In the words of other decisions it remains a live issue.
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> The Supreme Court, in *R. v. Mabior*, 2012 SCC 47, at para. 104, very recently affirmed this proposition: "To summarize, to obtain a conviction [for aggravated sexual assault], the Crown must show that the complainant's consent to sexual

> intercourse was vitiated by the accused's fraud as to his HIV status". For the purposes at hand, there is no analytical distinction between HIV and HSV or between aggravated sexual assault and the offence of sexual assault causing bodily harm here charged. Indeed, the *Mabior* take-away may well be that in many if not most prosecutions for sexual assault predicated on the communication of an undisclosed STI, the central issue, if not only potentially viable defence, is whether the Crown can establish to the requisite standard that, as said in *Currier*, "the complainant would have refused to engage in unprotected sex with the accused if she had been advised that he was [STI]-positive". (See, also, *R. v. Pottelberg*, 2010 ONSC 5756 and *R. v. Boone*, 2012 ONSC 441.)

(d) The Test for Admissibility

(i) The Crown's Proffer

34 As noted earlier, Crown counsel proposed that, in lieu of cross-examination about her prior sexual activity, the complainant's redacted clinical records be admitted for the truth of their contents respecting these same events. The Crown, through this tender, effectively concedes the relevance of the substantive material contained within the records to the contested issue of causation. The applicant declined to agree to the Crown proposal. Nor, in any event, do I accept the Crown tender as an appropriate substitute for testimonial examination of the same events. I say this for the following reasons:

* First, the contents of the redacted records are not a model of clarity. Some portions appear inconsistent with others and some are facially ambiguous. To treat them as an unexaminable stipulation of the truth would almost certainly invite argument as to the meaning of potentially critical assertions, particularly if, as proposed, they are to be used to assess the credibility of the complainant.
* Second, the complainant has at no time adopted the clinical records. They contain, in some cases, what appear to be her check-marks or brief written responses to pre-formatted questions and, in others, notes of clinicians' observations, impressions or recordings of the complainant's responses to undocumented questions. There is no evidence suggesting that the complainant read let alone endorsed the clinician-created contents of these records.
* Third, the records were compiled for clinical rather than forensic purposes. The statements attributed to the complainant were not provided under oath or in contemplation of court proceedings. They were not video- or audio-taped or subject to cautions as to the importance to tell the truth or the potential consequences for failing to do so. Nor, as I understand the Crown proposal, would the complainant be subject to cross-examination about the contents of the assertions attributed to her. In short, the indicia of reliability ordinarily demanded of out-of-court-statements tendered for their substantive truth value is absent.
* Next, admission of the clinical records without the complainant having an opportunity to expand upon, clarify, qualify or explain potentially

contentious or ambiguous portions may well be unfair to her and, ultimately, frustrate rather than advance the search for truth.

* Finally, a criminal trial is not a reference or a public inquiry. Absent true agreement as to "the facts", I see no basis for imposing them on the parties or otherwise injecting them into the record. Hypotheticals are no substitute for testimonial scrutiny where, as here, credibility assessment likely plays a large role and it is facts rather than opinions that are at issue. Picasso's famous dictum - that "Art is the lie that tells the truth" - has no place in these proceedings.

(ii) Applying Sub-Sections 276(2) and (3)

35 I have already determined that the defence-proposed evidence of "other" sexual conduct of the complainant does not here offend the twin myths prohibition. As regards the examination of the complainant, what remains to be decided is the scope and detail of the questioning intended to adduce evidence of such sexual activity. This assessment is governed by the criteria prescribed in s. 276(2), as informed by the considerations set out in s. 276(3). I turn, then, to the meaning of these factors and their application in the context of the instant case.

a. Specific Instances

36 Three requirements must be met before a judicial discretion to permit adduction of a complainant's "other" sexual activity may be permitted. The first is that the proposed evidence is "of specific instances of sexual activity". Like Professor Stewart, *supra*, at 8-7, I am of the view that this provision "appears to be designed to exclude evidence of the complainant's reputation" or character. This is not the nature of the evidence targeted by the applicant. He seeks, rather, the adduction of specific instances of the complainant's sexual activity that afford a factual foundation for a defence based on the issues I have identified. Put otherwise, he seeks to adduce evidence of those specific instances when the complainant was exposed to a risk of HSV infection.

37 Reputation evidence aside, I recognize that vague allegations of a complainant's prior or subsequent sexual conduct may also lack such specificity as to time or occasion to disqualify them from receipt at trial. Clearly, s. 276 does not countenance fishing expeditions. Much, however, depends on the purpose for which the contested evidence is proposed. Reframed, the question of specificity is largely issue-driven.

38 In the immediate proceedings, for example, evidence of "other" instances of sexual activity is germane to the issues of causation and whether the complainant's consent was negatived by fraud. As regards causation, the requisite specificity is very different than is the case where, for example, a complainant's motive to fabricate or her general credibility is at issue. It is not, here, the narrative detail of the complainant's prior sexual conduct or the complex of characters and their backstories that are relevant. Given the scientific knowledge of herpes led on this application (including its incidence in the complainant's age demographic, the high rate of non-recognition, and the plausibility of a protracted period of post-infection asymptomology) and the absence of any testing for the virus before the sexual activity culminating in this prosecution, it is, here, the number of such events, the approximate dates of their occurrence and the precautionary measures, if any, taken on each occasion of sexual intimacy that are material. In these regards, and for purposes of the legitimate issues at trial, the complainant's clinical records identify with adequate specificity a number of incidents that satisfy the first criterion in s. 276(2).

39 Likewise, the issue of whether the complainant's was vitiated by fraud - of whether, in the language of *Currier*, she "would have refused to engage in unprotected sex with the accused if she had been advised that he was [STI]-positive" - is also one that turns less on the narrative details of particular episodes of sexual activity as it does evidence as to the complainant's historical pattern of unprotected sexual activity with, among others, a number of "casual" sexual partners, as documented in her clinical records.

b. Relevance to an Issue at Trial

40 Crown counsel and counsel for the complainant have both acknowledged the relevance - other than to the twin myths - of the evidence of the complainant's prior sexual activity to the issue of causation, although they urge strict boundaries on the scope of any questioning in this regard. I have earlier expressed my reasons for viewing as potentially relevant evidence bearing on the complainant's assumption of the risk of STI transmission through her pattern of sexual conduct.

41 One means of approaching the question of relevance is to consider the second charge faced by the applicant, that of criminal negligence causing bodily harm by infecting the complainant with genital herpes. Standing alone, a charge of criminal negligence causing bodily harm is not governed by the evidentiary regime set out in s. 276. Applying conventional common law principles of relevance, it would be difficult to conclude that evidence touching on alternative causal vectors of the complainant's infection is not relevant. I am of the same view with respect to evidence of STI risk-taking conduct by the complainant in the circumstances of this case.

c. Probative Value v. Prejudice

42 The third requirement listed in s. 276(2) necessitates a determination that, in the language of the provision, the proposed evidence "has *significant probative value* that is not *substantially outweighed* by the danger of prejudice to the proper administration of justice" (italics added). Unsurprisingly, the words I have italicized have attracted judicial comment. In light of constitutional concern for the protection of fair trial interests, the word "significant" has been construed as adding little of substance to the phrase it qualifies. Speaking for a unanimous Supreme Court in *R. v. Darrach*, *supra*, at para. 39, Gonthier, J. adopted the interpretation of "significant" advanced by Morden A.C.J.O. in the court below: "the evidence is not so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt". (See, also, para. 41.) On the other side of the equation, the word "substantially" has also been construed in a manner consistent with the right to a fair trial. As said in *Darrach*, at para. 40: "The adverb 'substantially' serves to protect the accused by raising the standard for the judge to exclude evidence once the accused has shown it to have significant probative value". Summarizing the purpose of s. 276, the *Darrach* court observed, at para. 43:

> Section 276 is designed to exclude irrelevant information and *only* that relevant information that is more prejudicial to the administration of justice than it is probative. [Emphasis added.]
>
> The factors listed in s. 276(3), to which I now turn, are particularly germane to the "probative value versus prejudice" requirement in the s. 276(2) calculus.

d. Subsection 276(3): The Factors to be Taken "into account"

43 Subsection 276(3) sets out an inventory of eight factors to be considered in applying s. 276(2). The last of these, at least on this application, amounts to an empty basket clause: "any other factors that the judge ... considers relevant". Two of the other factors invoke concerns that primarily if not exclusively attach to jury trials and, as a result, have little valence if any in the instant proceedings: "(d) the need to remove from the fact-finding process any discriminatory belief or bias" and "(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury".

44 Two other considerations (clauses (e) and (f)) address a complainant's, and others', right to personal privacy, dignity and security. These are legitimate concerns in cases such as the one before me. Questions pertaining to the nature and frequency of the complainant's sexual activity are inevitably intrusive and abrade a core of privacy. However, their invasiveness must be weighed against the considerations detailed in clauses (a) and (c). As to the former, I have no doubt that the applicant's fundamental right "to make full answer and defence" and, more broadly, "the interests of justice" would be advanced through adduction of evidence of "other" sexual activity by the complainant that bears on the live issues presented here. As to the latter, in my view there is more than "a reasonable prospect that the evidence will assist in arriving at a just determination of the case" - whatever that determination. While no perfect reconciliation is possible, any jeopardy to the complainant's protected interests (and that of others who may be implicated) can be at least mitigated through circumscribing the scope of her examination, close scrutiny of the propriety of any cross-examination, and ancillary orders restricting the complainant's public exposure and prohibiting, directly or indirectly, her identification and that of any persons, including the applicant, with whom she had sexual relations.

45 Although no evidence was called on the point, common sense suggests that publicization of the complainant's examination could, as addressed in the remaining clause (s. 276(3)(b)), run counter to "society's interest in encouraging the reporting of sexual assault offences". This factor forms part of the global matrix of relevant considerations. In a marginal case, it alone might tip the balance in favour of a ruling of inadmissibility. This, in my view, is not such case.

46 On considering the totality of factors outlined in s. 276(3) in determining whether adduction of evidence of the complainant's sexual activity other than that particularized in the Information may be adduced, I am satisfied that, on balance, the criteria prescribed in s. 276(2) are here met and, in particular, that the probative value of that evidence is not substantially outweighed by the danger of prejudice to the proper administration of justice.

47 The apparent circumstantial force of the close temporal nexus between the complainant's first sexual encounter with the applicant and her first herpes diagnosis underscores the importance of the applicant being afforded the opportunity to make full answer and defence by adducing evidence that may support a pre-applicant theory of causation or, alternatively, the complainant's disregard for or neglect of the health risks associated with such intimacy. As said by the Supreme Court in *R. v. Mills*, [1999] 3 S.C.R. No. 668, at para. 94 (and expressly applied to the constitutional assessment of s. 276 in *Darrach, supra,* at para. 43): "where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent".

48 The residual issue, then, is the scope of the evidence sought to be adduced.

(iii) The Scope of the Complainant's Examination*a. Introduction*

49 The determination made under s. 276(2) involves a balancing of a number of interests. In a case such as the one before me, the balancing exercise extends to describing the appropriate scope or limits of the evidence that may be adduced. Probative value, as it grows more tenuous, risks amplifying the risk of prejudice to the complainant, public policy concerns and the quest for justice. Two areas need here be addressed. The first is the appropriate timeframe for the proposed inquiries of the complainant. The second is the degree to which any questioning within that timeframe should be circumscribed.

b. The Appropriate Timeframe

50 Deciding the appropriate timeframe is complicated by the scientific evidence led on this application and, in particular, the uncertainties that attend some of the most important factors. Framed as a question, the causation issue is whether there is an empirical basis to doubt that the close temporal concurrence between the complainant's sexual intimacy with the applicant and her HSV infection is no more than a temporal coincidence? Given the evidence of latent symptomology and the frequency with which even clinically interpretable indicia of infection are misread and, on the other hand, the complainant's history of prior and unprotected sexual encounters, could her HSV-positive status have antedated her first sexual contact with the applicant? Scientific knowledge respecting the clinical dormancy of such infections and the timeline of their initial symptomatic expression would clearly assist in fixing the limits of appropriate questioning. The applicant's uncertain viral status adds a further layer or uncertainty. In most if not all analogous prosecutions founded on the transmission of HIV, there is no doubt as to the defendant being HIV-positive; the evidence led on such trials thus focuses on the defendant's awareness of his or her infection and the extent and substance of counselling, if any. That anchoring piece of the causal equation is lacking, or at least undetermined, in these proceedings.

51 As regards the just-posed scientific questions, beyond suggesting the possibility of a lengthy period of asymptomology the only medical and epidemiological papers tendered on this application are regrettably silent on these important issues. The imposition of any temporal deadline on examination of the complainant after that point in her life when she became sexually active is, thus, potentially arbitrary. Nonetheless, I think it reasonable to infer that the more remote the sexual activity the more remote the possibility of an undiagnosed or otherwise undetected genital herpes infection. Accordingly, and as regards the issue of causation, I am prepared to extend the range of permissible questions pertaining to the complainant's sexual conduct to the commencement of her clinical records documenting such activity: that is, the approximately three-year period between January 2008 and date she was first tested for the presence of the herpes virus in mid-March 2011. (As should be patent, this time range is consistent with that proposed by Crown counsel by way of her proffer.) No questions respecting any earlier sexual encounters are condoned.

52 A similar timeframe is appropriate in regard to the range of permissible questions respecting the complainant's pattern of risk assumption. The complainant's clinical records reflect a more cautious approach to sexual hygiene in the year or two preceding her herpes testing than in the previously documented interval. However, it would, in my view, be unfair to the applicant to disallow him the opportunity to test the veracity of that assertion by drawing a line at the point where the complainant self-reports using condoms with her casual sexual partners. In any event, an informed appreciation of the complainant's disposition in this regard, and the precautionary inquiries she did or did not make, requires at least the possibility of an historically more complete canvass of her sexual hygiene protocol and practice. As the complainant's continued engagement in

sexual relations with the applicant even after assuming he was the source of her infection bears on the issue of whether her consent was vitiated by fraud, her cross-examination in this one area extends to the termination of her sexual relationship with the applicant.

c. The Content of the Cross-Examination

53 The substantive scope of the questions that may be put to the complainant are a product of the contentious issues and, as regards causation in particular, the scientific scaffolding for that inquiry. Assuming that qualified expert evidence is called at the applicant's trial, that expert will inevitably be asked to express an opinion as to the possibility or degree of (un)likelihood that the complainant unknowingly carried the herpes virus *before* her first sexual encounter with the applicant. The truth-finding value and forensic utility of the expert's answer will depend on the quality of the evidence pertaining to these and likely other relevant factors that inform the predicate hypothetical. In other words, evidence that goes no further than to establish that the complainant had previously been exposed to an amorphous risk of viral exposure is of little or no assistance in calculating the quantum of that risk -- a matter that may well prove of considerable importance in addressing the ultimate issue.

54 Evidence of the complainant's failure to recognize the appearance of petechiae until advised by a clinician may also be adduced as it is potentially probative of her awareness or monitoring of clinical symptoms, and thus also bears on the question of causation.

55 As said in *Currier, supra*, "[a]s unlikely as it may appear [consent to unprotected sex with a knowingly infected partner] remains a real possibility". Accordingly, and in respect to this issue, the defendant may adduce evidence through the complainant of the sexual hygiene protocol she followed with respect to her sexual partners and, in particular, her knowledge, scrutiny and assessment of their STI-status as read against the background of whatever safe-sex counselling she received. For the same reasons, the complainant's continued unprotected sexual activity with the applicant even after learning of or suspecting that he was HSV positive is also a relevant area of inquiry.

56 As noted earlier, my conclusions as to the timeframe and compass of the areas of permissible cross-examination of the complainant are detailed in a list appended to these reasons, as are accompanying instructions by way of further guidance to counsel. Relevant questions pertaining to the complainant's awareness and the clinical detection of her petechial condition, as discussed earlier, supplement this inventory.

E. CONCLUSION

57 For the reasons previously set out, and within the limits I have imposed, the applicant may adduce evidence "that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge".

F. POSTSCRIPT

58 A personal postscript is apposite. Judges, as has often been said, do not abandon their life experience upon their appointment. Subject, always, to the governing law and professional obligations, a judge's life experience inevitably informs the daily execution of his or her judicial responsibilities. Our assessment of credibility, fairness, prejudice and reasonable doubt are, by way of examples only, spheres of discretion that are inevitably influenced by our personal understanding of human nature and our application of common sense.

59 There is no doubt that many of the areas of examination I have authorized are invasive. They deal with matters that are intimate and private. Questions in these fields may well cause embarrassment or other discomfort. As the father of adult daughters I have some personal appreciation of the likely impact of these questions. Crafting the proper balance directed by s. 276(2) must, of course, be premised on the circumstances of the case before me. I have endeavoured to exercise this task with sensitivity to the situation and sensibilities of the complainant, an essential component of the balancing exercise.

MELVYN GREEN J.

* * * * *

WARNING

The court hearing this matter directs that the following notice be attached to the file:

This hearing is governed by section 276.3 of the *Criminal Code*:

> **276.3 Publication prohibited.**-(1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:
>
> *(a)* the contents of an application made under section 276.1;
>
> (*b*) any evidence taken, the information given and the representations made at an application under section 276.1 or at a hearing under section 276.2;
>
> (*c*) the decision of a judge or justice under subsection 276.1(4), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and
>
> (*d*) the determination made and the reasons provided under section 276.2, unless
>
> (i) that determination is that evidence is admissible, or
> (ii) the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted.
>
> (2) *Offence*.- Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

The court hearing this matter:

> HAS made an order allowing the publication, broadcast or transmission of this decision or determination.

Nonetheless, pursuant to s. 486.4 any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way.

* * * * *

Appendix "A"

Re S. 276 Ruling:

Areas of Permissible Cross-Examination of the Complainant Respecting her "Sexual Activity Other than that Forming the Subject-Matter of the Charge"

1. With respect to any areas of questioning pertaining to the complainant's "other sexual activity, the time frame that may be explored is the approximately 3-year period between and March 14, 2011. The sole exception permitted is with respect to the complainant's sexual activity with the defendant, in which case otherwise appropriate questions (as directed below) may be asked pertaining to her sexual relationship with the defendant until such time as *that* relationship ended.
2. Apart from the complainant's sexual activity with the defendant, examination respecting the following areas is permitted for *each* of the identified calendar years of sexual activity (2008, 2009, 2010 and January 1 - March 14, 2011):

a. Number of sexual partners that year;
b. With respect to *each* sexual partner:

    i. Number of different instances of sexual activity that occurred (i.e., instances of sexual activity on different days);
    ii. Whether the sexual activity involved vaginal sex, oral sex or both;
    iii. Whether, with respect to each instance of vaginal sex, a condom was used and, if so, whether it was used during the entire course of any vaginal penetration;
    iv. Whether, to the complainant's knowledge, the condom broke or tore on any of the occasions when a condom was used;
    v. Whether, with respect to her sexual partner, the complainant knew (in the sense of subjective appreciation or awareness) that he:

        1. Had a sexually transmitted infection (STI) or disease or that there was a risk of such infection;
        2. If so, did she nonetheless consent to sexual activity and, if so, what if any approach to sexual hygiene did she adopt;
        3. Engaged in sexual activity with any other person(s) in the previous two years;
        4. Engaged in sexual activity with any other person(s) at any time during the course of their sexual relationship;
        5. If so, whether the complainant continued her sexual relationship with that partner and, if so, whether there was any alteration in her approach to sexual hygiene with that partner;

6. Whether the complainant made any inquiries of the STI status of her sexual partner before consenting to sexual activity with him and, if so, the nature of such inquiry and whether she conducted the inquiry before each occasion of sexual activity.

c. The method, if any other than memory, by which the complainant recalls the number of sexual partners she had that year and the number of different occasions she and each partner engaged in sexual activity.

3. As regards sexual activity with the defendant:

a. The (approximate) date the complainant's sexual relationship with the complainant ended;
b. In the period between beginning with her clinic attendance on or about March 14, 2011 and the end of her sexual relationship with the defendant:

i. The number of different occasions the complainant engaged in sexual activity with the defendant;
ii. Whether, with respect to each instance of vaginal sex, a condom was used and, if so, whether it was used during the entire course of any vaginal penetration;
iii. Whether the complainant advised the defendant of her HSV-2 positive status and, if so, when;
iv. Whether the complainant was advised by clinic personnel to always utilize a condom when engaging in sexual intercourse and, if so, when;
v. If the complainant did not consistently comply with this "condom-always" advice, why she did not do so.

4. Whether the complainant, to the best of her knowledge, was at any point tested for herpes or the herpes virus prior to mid-March 2011 and, if so:

a. When?
b. Where?
c. With what test results?

* * * * *

Appendix "B"

Re S. 276 Ruling:

Counsel Guidelines Governing the Areas of Permissible Cross-Examination of the Complainant Respecting her "Sexual Activity Other than that Forming the Subject-Matter of the Charge"

As I earlier indicated, my Ruling setting out the reasons for the compass and nature of the permitted cross-examination (or other adduction of evidence by the defence) will follow.

As to the pending examination of the complainant, I provide the following additional guidelines:

1. The areas I have identified are permissible, not mandatory. Counsel may elect not to explore some of these areas. Alternatively, counsel may be able to address some of these areas by way of generic or categorical questions rather than by asking questions about specific events or other details. The latter, if compatible with the defendant's exercise of his right to make full answer and defence, is preferred.
2. Every trial is dynamic process. As a result of direct or some portions of the cross-examination of the complainant, the areas of permissible exploration may be narrowed or otherwise revised. I intend to monitor the proceedings in accordance with the interests identified in s. 276 and, if necessary, intervene to refine the balance.
3. For reasons that I do not fully comprehend, there appears to be no statutory impediment to Crown counsel examining the complainant in chief about *any* "other sexual activity" so long as Crown counsel does not do so "by or on behalf of the accused".
4. The redacted clinical records are, of course, not evidence. They may, however, be used in the ordinary course and through appropriate means to endeavour to refresh the complainant's memory or to pursue inconsistencies should they arise. I, likely needlessly, direct counsels' attention to, in particular, ss. 10 and 11 of the *Canada Evidence Act*.
5. Other than the defendant, I see no reason to identify any of the complainant's sexual partners by their full names or through any other identifying features, particularly in view of the scope of s. 276(3)(g). Nonetheless, some means may well need to be found to distinguish one sexual partner from another during the course of her anticipated testimony. The use of first names may serve this essential purpose or, alternatively, the combination of calendar year and sequential letters with the complainant maintaining a private record of the "coding" during her testimony so as to minimize the risk of confusion. I invite counsel to propose practical solutions to this problem when the trial commences.

cp/ci/e/qljel/qlpmg