

Judge-Made Criminal Law

While the Code sets out offences, judges interpret them. In doing so, judges rely on legal precedents to assist in the interpretation of provisions that are often ambiguous. We saw, in Chapter 1 (*R v. Lavallee*, page 25), how judges expanded the concept of self-defence to include the experiences of women who have been battered. In Chapter 2, we examined the process of statutory interpretation in the non-criminal context of Ontario's *Wages Act* (page 52). In this section, we will explore how judges expand definitions of crime to cover behaviour not specifically addressed by the drafters of the *Criminal Code*.

Knowingly transmitting HIV during an otherwise consensual sexual contact is an example of harm-causing activity that is not clearly covered by the Code. Various courts have struggled with the question of whether the transmission of AIDS by a person who knows that he or she is infected should be criminalized and, if so, which provision of the Code should apply.

One of the first cases to grapple with these questions was *R v. Ssenyonga*. Charles Ssenyonga knew that he had AIDS. Despite being advised by doctors and public health officials to refrain from unprotected sexual contact, he had unprotected sexual intercourse with at least three women without telling them that he was infected. Tragically, all three women subsequently contracted the virus. Uncertain as to what offence to charge Ssenyonga with, the Crown proceeded on several different charges, one of them being aggravated sexual assault. Justice McDermid was reluctant to extend the **ambit of the offence**. He observed: "The purpose of the assault provision is to control the non-consensual application of force by one person to another. What the Crown is asking this court to control is the transmission of HIV and the spread of AIDS rather than the application of force." He concluded that "the law of assault is too blunt an instrument to be used to excise AIDS from the body politic. If no other section of the *Criminal Code* catches the conduct complained of, which remains to be seen, then it is a matter for Parliament to address through legislation." ***

Ssenyonga died before the case was completed. In the end, it took a decision of the Supreme Court of Canada, *R v. Cuerrier*, to resolve the question.

ambit of the offence:

scope of a legal prohibition

The Law

In the case of *R v. Cuerrier*, the Supreme Court of Canada was required to consider the following sections of the *Criminal Code*:

- 265(1) A person commits an assault when
- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly; ...
 - (2) This section applies to all forms of assault, including ... aggravated sexual assault.
 - (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of ...
 - (c) fraud; ...
- 268(1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

Questions

1. How does a victim's consent or lack of consent affect the possibility of an accused's conviction under s. 265(1)? Explain your answer.
2. Why would the Crown choose to prosecute an HIV-positive person who has unprotected sex with another person under s. 268(1) instead of s. 265(1)?

Case HIV, SILENCE, AND SEX

R v. Cuerrier, [1998] 2 SCR 371

Facts

When Henry Cuerrier tested positive for HIV in August 1992, a public health nurse told him to use condoms every time he had sexual intercourse and to tell all prospective sexual partners that he was HIV-positive. Cuerrier rejected this advice, complaining that he would never be able to have a sex life under these circumstances.

Three weeks later, Cuerrier met KM and began a sexual relationship with her. He assured KM that he had tested negative for HIV eight or nine months earlier. The couple had unprotected sexual intercourse on a regular basis. When KM contracted hepatitis, both she and Cuerrier were tested for HIV. KM tested negative, but she was advised that Cuerrier had tested positive. For several months, KM continued to have unprotected sex with Cuerrier. She explained that she loved him and that she did not want another woman put at risk. The couple's relationship ended 18 months after it began.

Knowledge

wilfully
misleading
misrepresentation

Knowledge
wilfully
reckless

Shortly after the end of his relationship with KM, Cuerrier began another sexual relationship. He did not tell his new partner, BH, that he had HIV, nor did he regularly use condoms. When BH discovered Cuerrier's HIV-positive status, she ended the relationship. Both KM and BH testified at trial that they would never have had unprotected sex with Cuerrier if they had known that he was HIV-positive.

Consent issue

Cuerrier was charged with two counts of aggravated assault. At the time of trial, neither complainant had tested positive for the virus. The trial judge acquitted Cuerrier, and the British Columbia Court of Appeal refused to set aside the acquittals. The Crown's appeal from Cuerrier's acquittal was allowed by the Supreme Court of Canada, and a new trial was ordered.

ACTUS REUS / NO
PROOF / EVIDENCE OF ACT

Issues

Should Cuerrier be convicted of aggravated assault? Was the women's consent to engage in unprotected sex with Cuerrier true consent, or was it **vitiated by fraud**? Is consent to sexual contact fraudulently obtained when one partner fails to disclose or deliberately deceives the other about his or her HIV-positive status?

vitiated by fraud: made invalid as a result of fraud on the part of the accused

Decision

Three different Supreme Court judges wrote reasons in this case. All judges agreed that Cuerrier should be **convicted** of aggravated assault, even though this judgment required a **reinterpretation of the law**. All agreed that Cuerrier failed to obtain the **true consent** of his partners to unprotected sexual intercourse. All agreed that **failure by one partner to disclose HIV-positive status vitiated the consent** of the other partner.

Questions

1. What facts support a finding of guilt in Cuerrier's case? Are there any facts to support a finding of not guilty?
2. What is the difference between the approach taken by the Supreme Court in *Cuerrier* and the approach taken by Justice McDermid in *Ssenyonga*?

> **Cuerrier**

CHECK YOUR UNDERSTANDING

1. Give two definitions of crime.
2. Name and describe two sources of criminal law.
3. What did Justice McDermid mean when he said the law of assault is "too blunt an instrument"? Do you agree with his assessment?
4. Should judges extend the criminal law to respond to new social problems, or should they wait for a parliamentary response? Give reasons for your answer.

Ssenyonga

HIV, Silence, and Sex II

R v. Williams, 2003 SCC 41

The respondent, Harold Williams, began an 18-month relationship with his girlfriend, W, in June 1991. On November 15, 1991, he learned that he was HIV positive and, although two doctors and a nurse had counselled him on three different occasions about HIV, its transmission, safe-sex practices, and his duty to disclose his HIV status to his sexual partners, he continued to have unprotected sex with W for a year after learning about his HIV status. W did not take the usual precautions against pregnancy because Williams told her that he had had a vasectomy.

A few days after Williams's diagnosis, W took an HIV test, which was negative (she did not know about Williams's HIV status at this time). It was acknowledged that she may have been infected at that point but had not yet developed the antibodies that the test detects. The couple's relationship ended in November 1992, and W tested positive for HIV in April 1994. When W confronted him with her test results, Williams repeatedly and falsely denied that he had ever tested positive for HIV.

Williams was charged with aggravated assault and, at trial in 2000, W testified that she would never have knowingly had sex with a person who was HIV positive. Williams was convicted on the charge; he appealed the conviction to the Newfoundland and Labrador Court of Appeal where, in 2001, a majority of the court substituted a conviction for attempted aggravated assault. The Crown appealed that decision to the Supreme Court of Canada, where the appeal was heard on December 3, 2002. On September 18, 2003, the Court, in a 7-0 judgment, dismissed the Crown's appeal and upheld Williams's conviction on the lesser charge of attempted aggravated assault.

Questions

1. Check the *Criminal Code* to determine (a) the nature of aggravated assault and (b) its maximum penalty.
2. What is the *mens rea* and *actus reus* for aggravated assault?
3. Why, in this case, was November 15, 1991 a significant date and a turning point in the Supreme Court's decision?
4. What impacts would *R v. Cuerrier* (see text, pages 234-235) have on this case?
5. In its judgment, the Supreme Court stated: "While Williams acted with a shocking level of recklessness and selfishness, the Crown could not show that sexual activity after November 15, 1991 harmed the complainant W, or even exposed her to a significant risk of harm, because at that point she was possibly, and perhaps likely, already HIV positive. ... The prosecution did not prove, beyond a reasonable doubt, that Williams had endangered the complainant's life, so he cannot be convicted of aggravated assault." What is your opinion of the Court's decision? Explain, giving reasons.



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SEXUAL ORIENTATION AND GENDER IDENTITY

Volume 2, No. 2 – December 2012

Sexual Orientation and Gender Identity Section

Opposing Views on the SCC's Take on HIV Transmission

Mabior: A Supreme Failure of a Decision

*Patric Senson**

The decision in *R. v. Mabior* ("*Mabior*")ⁱ had the chance to correct the problems created in the earlier Supreme Court of Canada decision of *R. v. Cuerrier* ("*Cuerrier*").ⁱⁱ *Cuerrier* had been heavily criticized after its release as criminalizing HIV infection, and reinforcing the stigma already experienced by those living with HIV/AIDS. However, *Mabior*, rather than correcting the problems of *Cuerrier* has instead entrenched them, and has left us in a situation where it is legally better not to know your HIV status than to get regular tests – a result that flies in the face of what public health has tried to teach us.

The first place where the Court missed the mark was in its determination of the standard for what constitutes significant risk. In the Court's decision, the line in the sand has been drawn at a "low level" of HIV. However, the Court does not define what a low level actually is. Interestingly, the Court rejected the "non-detectable" standard as being too vague. This is a misunderstanding of basic scientific research. Non-detectable is a number that can be quantified. Something is non-detectable when it falls below a predetermined level, that level being dependant on the technology used for testing. In the context of HIV testing, that level is one the scientific/medical community has determined. It is not simply a random number thrown out with no basis. The Court, by deciding that a "low level" is what is required has introduced uncertainty. How low is low? That is not found in the judgment.

The decision of the Court is also extremely narrow, and, in fact, does not apply to a large number of risk situations. The Court explicitly points out that this risk assessment was for vaginal intercourse only. All other forms of sex, including all same-sex activity, or heterosexual oral or anal sex, were excluded from the Court's examination. Therefore we still have no statement on what constitutes legally acceptable sex between an HIV infected individual and another person unless they are engaged in heterosexual vaginal intercourse.

Third, this decision maintains the assumption that responsibility for sexual safety lies entirely in the hands of the HIV-infected individual. There is no requirement for the other person to protect themselves. Taken to its extreme, it gives a person carte

blanche to practice unsafe sex and then, if they get infected, have their partner charged with aggravated assault. Responsibility for sexual behaviour should be an onus placed on both parties equally.

So where are we left?

The decision in *Mabior* reinforces the stereotype of the HIV-infected person as a dangerous individual. People living with HIV/AIDS are already subject to stigmatization by society, this decision does nothing to reduce this stigma, and does nothing to encourage those living with HIV/AIDS to disclose their status to others. And, given the necessity for *mens rea*, this decision, like *Cuerrier* before it, creates a valid argument for avoiding finding out your HIV status, especially if you are engaged in higher-risk activity.

This stigma is further enhanced by the continued treatment of HIV as a disease that is somehow different from other sexual transmitted infections. In Canada today, HIV is a manageable chronic disease. It is not the death sentence of 25 years ago. It should no longer be treated as something criminal, unless we move other diseases, such as syphilis or herpes into the same category. By restricting the law to dealing with HIV the Court is sending a message that HIV infection is worse than other diseases, again increasing the stigma attached to those living with the infection.

Pierre Trudeau famously stated that the government has no place in the nation's bedrooms. Now it is time to get the police out too. If we want to encourage safer sexual behaviour then the answer is not in criminalizing activity of those infected with HIV. Rather it is in educating all people to take responsibility for their own actions. People can and will lie, and rather than counting on the state to come in and charge someone after the fact for not disclosing their HIV status, it is time to realize that protecting oneself against infection is the right way to go. After all, an infected "victim" will still be infected regardless of whether or not there is a conviction – and nothing the court has done will encourage safer behaviour.

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¹ 2012 SCC 47.

² [1998] 2 S.C.R. 371.

This is a guest post by Carissima Mathen, who is an Associate Professor in the Faculty of Law at the University of Ottawa.

Having done an initial pass of the Supreme Court decisions issued today, my main sentiment is....admiration (not least, for the unanimous opinion). I think the Supreme Court has done its utmost to consider all sides, even if I don't necessarily agree with everything it said.

First, some background. The *Mabior* 2012 SCC 47 and *DC* 2012 SCC 48 appeals presented the Court's first opportunity since 1998 to consider the difficult issue of how the law should deal with someone who fails to disclose his HIV-status to a sexual partner. In *R. v. Cuerrier* [1998] 2 S.C.R. 371 the Court in three separate opinions agreed that, in some circumstances, failure to disclose will vitiate consent. It relied on both the common law and statutory provisions around "fraud". But, in order to avoid an overbroad approach to criminal liability, the Court inserted an important caveat: any deception must pose a "significant risk of serious bodily harm".

In the intervening fourteen years, our knowledge and treatment of AIDS-HIV has advanced. AIDS is no longer a fatal illness, though it still is a profoundly serious medical condition. But medical therapy can lower a person's risk of transmitting the disease, as can the proper use of condoms. What impact, if any, should this have on the duty to disclose?

In an article, HIV, Consent, and Criminal Wrongs I co-authored with Michael Plaxton last year, I argued that the focus on "risk" is unfortunate, because it obscures a more fundamental issue: the ability of every person to decide for themselves the scope and risk of their sexual activities. Any criminal culpability, then, lies not just in exposing someone to risk of transmission, but in overriding that person's ability to choose for him or herself. The approach, I believe, is bolstered by the *Criminal Code*'s language concerning "consent", as well as by prior Supreme Court decisions in cases like *R. v. Ewanchuk* [1999] 1 S.C.R. 330 and *R. v. J.A.* 2011 SCC 28.

Today the Supreme Court of Canada decided not to jettison *Cuerrier*, as many have urged it to do (some on grounds that *Cuerrier* is too harsh, and others on the basis that it is under-protective). The essential problem the Court faced is interpreting criminal provisions crafted in general terms ("consent", "fraud"), when it is (rightly) cautious about expanding the scope of liability of its own accord. So, in *Mabior*, the Court again extolled the virtues of an "incremental" approach. In this case, that meant clarifying the *Cuerrier* standard of "significant risk of serious bodily harm" to require a "realistic possibility of transmission of HIV". In particular, the Court stated, a "realistic possibility" does not exist where a defendant had a low viral load, *and* used a condom.

In my opinion, *Mabior* is a marked improvement over *Cuerrier* both because it is much more systematic in its approach; and because it more fully considers the parameters of consent; the special nature of sexual assault; and the vital importance of safeguarding personal autonomy.

In the wake of today's decisions some persons have expressed shock that the Court was not prepared to say that condom use, alone, eliminates criminality. Given that condom use often is touted as reducing the risk of transmission to virtually zero, why would the Court have required *both* viral load and condom use before the duty to disclose may be dispensed with? I think the answer is that the Court rightly acknowledged (far more than it did in *Cuerrier*) that the failure to disclose severely affects another's personal autonomy.

Mabior does not answer all the thorny questions that surround this issue. For example, has the Court's insistence on condom use essentially placed a *de facto* obligation to disclose on women engaging in heterosexual intercourse? Assuming that the regular burden of proof applies (and there is no indication that it would not), how will such trials proceed? What will provide an "air of reality" to the two criteria? What kind of evidence will Crowns be able to adduce, and how feasible is it going to be to disprove beyond a reasonable doubt a "low viral load"? For clarification of these issues, we must await future cases, unless, of course, Parliament bestirs itself to step up to the plate. In *Mabior*, the Court has clearly signalled how far, without further statutory direction, it is willing to go.

R. v. Bear: HIV and the Construction of Risk in Criminal Law

February 7, 2017
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January 2017, a Toronto Police officer said, "he's going to spit in your face, you're going to get AIDS." The officer was referring to a detained man behind him as he admonished an onlooker for being too near the arrest, and directed the onlooker to stop recording the incident. The comment and arrest were recorded by the onlooker and reported by the press. The Toronto Police Service (TPS) subsequently rejected the officer's comment, stating that one "cannot get HIV/AIDS from spit." [1] The TPS said it would bring an outside expert in Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) to educate officers, and said that an internal investigation was underway.

The arrest, and the threat to the onlooker, appeared emblematic of the same systemic discrimination recently recognised by the Ontario Human Rights Commission in a submission to the Independent Review of Police Oversight Bodies. [2] Alexander McClelland also noted that the comment was consistent with historical and ongoing examples of discrimination effected against queer people. [3] The content of the recording has raised many concerns about police practices; however, in addition to all of this, the derogatory comment reminded me of the complicity of the legal system in justifying the invidious treatment of those with HIV. Specifically, the comment returned the case of *R. v. Bear* to memory, in which an indigenous man with HIV was convicted of attempted aggravated assault by the Manitoba Court of Appeal because he attempted to spit in a police officer's face.

In *Bear*, the accused was arrested following an altercation with store security. The accused was placed in an interview room at police headquarters as officers conducted further checks. The accused spat in an officer's face when one of the officers returned to the interview room. The accused had earlier made comments about his HIV status while being transported from the scene of his arrest to headquarters. The saliva landed in the officer's eye, and on his nose and forehead. The police officer was subsequently taken to hospital and treated with post-exposure prophylactic drugs. The officer did not contract HIV. The accused was then charged with aggravated assault pursuant to s. 268(1) of the *Criminal Code*.

The trial judge acquitted the accused of aggravated assault. He was instead convicted of simple assault. The Crown appealed to the Manitoba Court of Appeal, which overturned the trial judge's decision and substituted a conviction of attempted aggravated assault for the conviction of common assault. All of this was accomplished in the absence of evidence that HIV can be transmitted by saliva, with the court noting the expert evidence of a medical professional:

Dr. Dillon [the medical expert on HIV and AIDS] also wrote a report that was introduced into evidence. The report discussed the risk of transmission by saliva alone or by saliva mixed with blood. He wrote that saliva itself may contain HIV virus particles, but is not considered to be a risk factor for HIV transmission. There is no conclusive evidence that transmission of HIV has ever happened from any exposure to saliva alone.[4]

Despite this mere theoretical possibility of transmission, the Manitoba Court of Appeal was satisfied that the *mens rea* for the aggravated assault - the object of transmitting HIV through spit to cause significant harm - was complete. To be guilty of attempting an aggravated assault, the accused only had to possess the "intent to commit the completed offence [and have done] some act [that is] more than preparatory [...] in furtherance of [that] attempt".[5] The physical impossibility of transmitting HIV by way of spitting could not defend against an offence of attempt, because it was immaterial whether transmission was possible:

It is immaterial whether he thought his saliva alone was sufficient to do so or he thought that the blood from the cut on his lip mixed with his saliva was sufficient to do so. It is immaterial that it was not a realistic possibility to transmit HIV in this way. His spitting at the police officer coupled with his comments that he had HIV, his threats and his hiding behind the door of the interview room show a completed *mens rea* along with action that was more than preparatory. The criminal element of attempt may lie solely in the intent.[6]

In order to reach a conviction of attempted aggravated assault, the Court of Appeal had to situate the act of spitting within the jurisprudential germ line of *R. v. Cuerrier* and *R. v. Mabior*. Both these cases criminalised not only the actual transmission of HIV between sexual partners, but also the risk of transmission. In *Cuerrier*, the Supreme Court of Canada held that withholding HIV status from a sexual partner could vitiate consent and attract criminal culpability, specifically under the sexual assault provisions of the *Criminal Code*. [7] The Court held that consent would be vitiated for fraud where there was: (1) dishonesty in the accused's failure to disclose HIV status, which would be judged according to whether the reasonable person would find the person dishonest; (2) the deprivation of sexual partner's

opportunity to obtain knowledge that would have caused the sexual partner to refuse sexual relations; and (3) exposure to significant risk of serious bodily harm.[8]

What constitutes exposure to significant risk of serious bodily harm was defined later in *R. v. Mabior*, where the accused failed to disclose his HIV status to multiple sexual partners. None of the complainants acquired HIV, but nonetheless he was charged with aggravated sexual assault.[9] The Supreme Court of Canada found that the accused satisfied the first two parts of the test set out in *Cuerrier*. With respect to the third part, the Court held that serious bodily harm was "the hurt or injury that interferes with the integrity, health, or wellbeing of a person in a substantial way." [10] Actual transmission of HIV constituted serious bodily harm. Where actual transmission had not occurred, as was the case in *Mabior*, significant risk could be found where there was a realistic possibility of transmission. Realistic possibility of transmission depended upon both the degree of harm and risk of transmission, which was to be assessed on a case-by-case basis. In this case, a realistic possibility of transmission was negated because: (i) the accused's viral load at the time of sexual relations was low; and (ii) condom protection was used.

Relying on this jurisprudence, the Court of Appeal stated in *Bear* that the risk of transmission could, in certain circumstances, endanger life satisfying the legal definition of aggravated assault. This would arise whenever there was a "realistic possibility" of transmission - even outside sexual contexts - an assessment of risk to be determined on a case-by-case basis. The fact that the risk of HIV transmission was merely theoretical, a speculative risk falling far below the threshold of a realistic possibility, only accounted for a failing link in the chain of constituting elements of the offence. The virtual impossibility of transmission thereby amounted to an intervening event in the arc of the criminal act. In this way, the Court of Appeal equated the impossibility of transmission to the hypothetical case of the unsuccessful umbrella thief, discussed in *United States of America v. Dynar*, who mistakes his own umbrella from an umbrella stand intending to steal the umbrella of another person. Significantly, what the Manitoba Court of Appeal failed to appreciate was that the potential harm of losing an umbrella was speculative but could have been real but for the intervening mistake. The harm of acquiring HIV from the act of spitting was not only speculative but, as evidenced by the expert testimony, it was also imaginary.[11]

Cuerrier and *Mabior* have been subject to a surfeit of critique, but *Bear*, through the law of attempt, takes the logic of their defects to the extreme. Criminalising exposure to HIV, or the risk of transmission, does not relate to the probability of transmitting HIV. Nor does criminalisation relate to the harm posed by HIV. According to a mounting number of critics, *Cuerrier* and *Mabior* depend on exaggerated articulations of risk and of harm that fail to accord with consensus among medical experts in HIV

and AIDS.[12] In *Bear*, the risk and harm was not only overstated but imagined. The body of Bear was imagined replete with disease, so virulent that infection could extend beyond physical limits. In this way the Court of Appeal used the law of attempt as a device of metonymy, displacing the un-dangerous act of spitting and filling it with unrelated, criminal meaning.[13] The Court of Appeal extirpated Bear's humanity by isolating his HIV status and infusing his every act with its affliction, constructing him as an infectious sac of hazards to be inoculated by the legal system. The hegemony at play in *Bear* - constructing a homogeneous narrative (e.g., virulent body as significant risk and life-threatening harm) through rhetorical devices of metonymy and metaphor notwithstanding a complex panoply of constitutive features - is not different in kind from *Cuerrier* and *Mabior*, but extends the reach of criminal law, and the full weight of the corresponding penal institutions, to more bodies irrespective of actual risk and harm.

The mere theoretical possibility of transmission at play in *Bear* underscores the role of hegemony in justifying and perpetuating the criminalisation of HIV non-disclosure and transmission cases. It shows the extension of *Cuerrier* and *Mabior* to more bodies - especially Indigenous, queer, and black bodies - by totalising the condition of HIV as equivalent with their identity. As we have conversations about systemic discrimination in the Toronto Police Service - with respect to race, queers, and HIV - we should also consider how the criminal law is complicit and in desperate need of reform.