

2) Consent and HIV Disclosure

The Court took a different, more objective approach with respect to the issue of whether a person's non-disclosure of his positive HIV status constitutes fraud that vitiates consent to unprotected sexual intercourse. In *R v Cuerrier*,¹⁸² Cory J stated that in determining whether consent was obtained fraudulently, "[t]he actions of the accused must be assessed objectively to determine whether a reasonable person would find them to be dishonest."¹⁸³ A person only had a duty to disclose if the failure to disclose presented a significant risk of serious bodily harm. The rest of the Court rejected L'Heureux-Dubé J's view that any fraud designed to induce the complainant to consent would nullify the consent. There was a concern that her view would trivialize the criminal process by allowing consent to be nullified because, for example, the accused lied about his age or his job. This approach was confirmed in *R v Mabior*,¹⁸⁴ where the Court held that consent would be vitiated where failure to disclose would cause a significant risk of harm and where the complainant would not have consented had he or she been informed. The Court interpreted the significant risk of harm standard as applying to a realistic possibility of harm. It defended such a standard as objective and appropriate for the criminal law.

In *R v Hutchinson*,¹⁸⁵ a majority of the Court extended the fraud exception to convict a man of aggravated sexual assault who deceptively poked holes in a condom with the knowledge that the complainant would not have unprotected sex. It held that pregnancy satisfied the requirement of a significant risk of harm. Three other judges also would have convicted, but on the different basis that the complainant had agreed to have sex only with a condom. These cases remain controversial with some criticizing them for extending the criminal sanction too far and others criticizing them for not extending the criminal sanction far enough. Nevertheless, they illustrate the continued policy controversies over how consent should be defined. They also suggest

that greater clarity might be achieved if Parliament more specifically addressed these issues in its definition of the prohibited act.

Parliament has defined what is meant by consent for policy reasons in other sections of the *Criminal Code*. For example, section 14 provides that people cannot consent to their death, and section 286 provides that consent is no defence to the abduction of a child. Section 150.1(1) provides that the complainant's consent is no defence to various sexual offences involving those under the age of sixteen.¹⁸⁶ This provision defines consent for the purpose of determining the *actus reus*. Section 150.1(4) addresses the accused's fault or mental element by providing that a subjective belief that the complainant was sixteen or older is not a defence "unless the accused took all reasonable steps to ascertain the age of the complainant."¹⁸⁷

¹⁸² (1998), 127 CCC (3d) 1 (SCC) [*Cuerrier*]. In *R v Esau* (1997), 116 CCC (3d) 289 at 312 (SCC), McLachlin J also stated that "[a]t issue, as elsewhere in dealing with consent, is the social act of communicating consent, not the internal state of mind of the complainant. The accused is not expected to look into the complainant's mind and make judgments about her uncommunicated thoughts. But neither is he entitled to presume consent in the absence of communicative ability." It is possible, however, that both the above statements might be characterized as relating to the *mens rea* as opposed to the *actus reus* of the offence.

¹⁸³ *Cuerrier*, above note 182 at 49.

¹⁸⁴ [2012] 2 SCR 584.

¹⁸⁵ [2014] 1 SCR 346.