Suit No. 33976

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA)

BETWEEN:

HER MAJESTY THE QUEEN,

APPELLANT,

- and -

CLATO LUAL MABIOR

RESPONDENT.

FACTUM OF THE APPELLANT
MANITOBA PROSECUTION SERVICE

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Part I – Overview and Statement of Facts

A. Overview

1. In January, 2004 the Respondent was diagnosed as HIV-positive. Subsequently, over a period of approximately two years, the Respondent, engaged in unprotected – or effectively unprotected – sex with a series of women and young girls. One was twelve years old. He did not tell any of them that he was HIV-positive. In one case, he lied about it when asked. With the exception of the twelve year old, they all testified that had they known he was HIV-positive, they would not have had sex with him. He was convicted of six counts of aggravated sexual assault (as well as invitation to sexual touching and sexual interference in relation to the twelve year old.) On October 13, 2010, the Manitoba Court of Appeal overturned four of these convictions, holding, *inter alia*, that where a condom is used, there is no obligation to disclose HIV-positive status. Similarly, where blood tests taken weeks before and/or after the fact reveal a low viral load on the part of the Accused, disclosure is not required. It held that these conclusions were compelled by this Honourable Court's decision in *R. v. Cuerrier*, [1998] 2 S.C.R. 371, which required a "significant risk of serious bodily harm."

2. The Appellant respectfully submits that this reflects a misunderstanding of the compromise reached in *Cuerrier*, which aimed to prevent "petty" prosecutions based on minor issues. While real progress has been made in the fight against HIV, it nevertheless remains an incurable, life-altering potentially fatal disease. It is thus not a minor or "petty" issue – on the contrary, it remains one of the "significant relevant factors" that this Honourable Court held in *Cuerrier* must be disclosed in order for consent to be valid.

3. Moreover, the Manitoba Court of Appeal's conclusions rely on the statistical likelihood of infection and are thus practically and conceptually problematic. An act's dangerousness cannot be defined purely in terms of the mathematical likelihood that it will result in death or bodily harm. This has never been how criminal law operates. There are too many variables involved that make such a statistical approach impracticable and, in many cases unfair. It also

runs contrary to this Honourable Court's recent jurisprudence concerning the role and significance of consent in sexual matters.

4. By failing to disclose the presence of HIV, the Respondent exposed each of his partners to the chance of infection. Neither condom use or a low viral load means that the virus will not be transmitted. He gave them no chance to protect themselves or even choose whether they wanted to be exposed to such a risk. Pursuant to *Cuerrier*, this vitiated any consent to sexual activity. The Respondent's convictions should therefore be restored.

B. Statement of Facts

5. The Respondent was diagnosed as HIV-positive on January 14, 2004. He was thoroughly advised by doctors and nurses as to the potential outcomes of unprotected sexual intercourse. He was also told that he should use an unexpired latex condom every time he had sex and that he had to tell all sexual partners about his HIV-positive status. He was placed on antiretroviral therapy in April of 2004 and his viral loads were checked every three to four months.[1]

6. Between February of 2004 and December of 2005, the Respondent had sexual intercourse with many different women in two different cities in Manitoba. Many of the encounters were preceded by alcohol and/or drug use. The incidents in Winnipeg occurred in the Respondent's home on Sherbrook Street. His home was frequented by underage Aboriginal girls, who were often drawn there by easy access to alcohol and drugs and a place to stay. Three of the complainants were there for those purposes.[2]

7. The Respondent never advised any of the complainants that he was HIV-positive, and in one case lied about his status when asked. All the complainants testified that had they known he was HIV-positive, they would not have willingly had sexual intercourse with him.[3]

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[1] Appellant's Record Vol. 1 Tab 6 – MBCA Decision paras. 7, 12.
[2] *Id.*, paras. 6, 134.
[3] *Id.*, paras. 9, 148.

8. He met the first complainant, M.P., in February of 2004 in Brandon, Manitoba. Between February and April of 2004, they engaged in sexual intercourse on about 10 or 11 occasions. While condoms were sometimes used, there was unprotected sex on a number of occasions.[4]

9. The second complainant, K.R., had sexual intercourse with the Respondent between April and November of 2004, also in Brandon. She and the Respondent used condoms every time they had sex. However, on three or four occasions the condom broke during intercourse. Sexual activity was halted and a new condom was applied.[5]

10. The complainant, K.G., had sexual intercourse one time with the Respondent in June of 2004, again in Brandon. Although she was intoxicated at the time they had sex, she was "pretty sure" that a condom was used.[6]

11. By February of 2005 the Respondent had moved to Winnipeg and was living in a house on Sherbrook Street. Many vulnerable underage Aboriginal girls frequented this house because of the alcohol and drugs provided by the Respondent and other men.[7]

12. The Respondent met the complainant, S.H., at his home and between February and April of 2005, they had sexual intercourse for about one month on a daily basis. Initially, during the first week of their relationship a condom was used. However after the first week the complainant asked the Respondent if he "had an STD or if he had anything" and he responded "no." Because the complainant was on birth control at the time, they engaged in sex without a condom for the remaining three weeks of their relationship.[8]

13. The Respondent had sexual intercourse with the fifth complainant, D.C.S., commencing in August of 2005, when D.C.S. was 12 years old and a ward of Child and Family Services. She would visit his residence for easy access to alcohol. They had sex approximately 10-15 times

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[4] *Id.*, paras. 29, 30, 119.
[5] *Id.*, para. 121.
[6] *Id.*, para. 123.
[7] *Id.*, para. 134, Appellant's Record Vol. 1 Tab 3 – Trial Judge's Decision para. 162.
[8] Appellant's Record Vol. 1 Tab 6 – MBCA Decision para. 128.

over the course of several months. She is the only complainant who continued to have sex with the Respondent after learning from a third party that he was HIV-positive.[9]

14. In December of 2005 the Respondent commenced sexual relations with the final complainant, D.H, who was 17 years old. She engaged in sexual intercourse with the Respondent on several occasions, sometimes without a condom.[10]

15. Each of the complainants was tested after learning about the Respondent's status. To date, none of them has been diagnosed as HIV-positive.

C. The Medical Evidence

16. At the trial, medical evidence was called with respect to HIV and AIDS generally as well as the Respondent's specific medical file and viral loads during the relevant time period.

17. The evidence of Dr. Richard Smith established the following:

- HIV is an incurable, lifelong infection.
- If left untreated, HIV progresses to AIDS, and AIDS results in death.
- For those who become infected, HIV is a life altering disease both physically and emotionally.
- Individuals with HIV must take medications every day and the condition is potentially lethal if they do not have access to treatment or fail to take their medications.
- Even with treatment, HIV infection can still lead to devastating illnesses and death.
- The sexual transmission of HIV has been widely studied. The rates of transmission vary widely from study to study. Factors affecting the rates

[9] *Id.*, paras. 33, 34, 35, 131-132.
[10] *Id.*, paras. 134, 135.

include the type of sex act, the individual's viral load and other infections associated with other illness.

- The risk is cumulative. The risk of transmission increases depending on the number of times an infected person has intercourse with a partner.

- Risk of HIV transmission for unprotected sexual intercourse ranges from 0.05 per cent (1 in 2000) to 0.26 per cent (1 in 384). Transmission probabilities cannot be measured with exact precision.[11]

18. Dr. Smith testified that proper use of condoms reduces but does not eliminate the risk of transmitting HIV. He referred to one study that found that consistent use of condoms resulted in an 80% chance of reduction of HIV incidence.[12]

19. Dr. Smith testified that the proper use of condoms entails the following:

- The condom must be used before the expiry date on the package. If no expiry date is present, then it must be used within five years of the manufacture date.

- The condom must be taken out of the package carefully. It should not be opened with the teeth or cut open as that may damage the condom.

- The condom must be stored in cool temperatures.

- The condom must not be squished or sat on.

- The condom must be made of latex. Animal membrane condoms allow HIV to pass through.

- The condom must be correctly applied, which includes squeezing air out of the tip of the condom and rolling it completely down the shaft of the penis.

- Lubricant made out of specific materials must be used (no petroleum products, Vaseline or oils).

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[11] *Id.*, paras. 60-64, 74-76.
[12] *Id.* para. 83.

- If there are any problems with the condom during intercourse, the condom must be replaced.

- When removing the penis from the vagina, the condom should be held around the base of the penis to prevent spillage.

- Both parties should be sober as the ability to optimize the use of a condom will be impaired if either is under the influence of drugs or alcohol.[13]

20. There was no evidence suggesting that the Respondent had used condoms properly on the occasions when he had used them. For example, there was no evidence respecting the age of the condoms, how they were applied or removed, whether the condoms were latex or not, how they had been stored prior to use or what, if any, lubricants were used.

21. On the contrary, the evidence suggested that during the relevant time period, the Respondent did not engage in proper condom use. He contracted gonorrhea on two occasions during this time period and was named as a contact with respect to someone who had chlamydia.[14]

22. Dr. Smith also testified that the risk of HIV transmission varies with the viral load of the person already infected with HIV. The lower the viral load, the lower the chance of infecting another person. When the viral load is below approximately 40 "copies," it is described as "undetectable" and the risk of HIV transmission is significantly reduced, although not eliminated.[15]

23. He cautioned, however, that a viral load test reflects only the subject's viral level at "a moment in time." Viral loads can spike depending on a host of factors including, a missed dosage of medication, a common infection, a sexually transmitted disease, the female partner's use of oral contraceptives or a Vitamin A deficiency.[16]

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[13] *Id.*, para. 91.
[14] *Id.*, paras. 94, 95.
[15] *Id.*, para. 98.
[16] *Id.*, paras. 110-113.

24. Dr. Smith reviewed the Respondent's medical records, which reflected tests taken every 3-4 months. He testified that initially the Respondent's viral load counts were consistent with "probably low but possible infectivity." However, after six months of treatment (between October 22, 2004 and December 28, 2005) Dr. Smith said that there was a "very high probability that [the Respondent] was not infectious" and that there was a "very low risk of infectiousness." While he acknowledged that a spike in viral load was possible, he stated that it was unlikely in this case.[17]

25. Dr. Smith's evidence relied heavily on a report released in January 2008 by Switzerland's Federal AIDS Commission. That report suggested that people with HIV do not risk transmitting the virus provided they adhere to antiretroviral therapy, their viral load has been suppressed for six months and they do not have any sexually transmitted diseases. The Respondent, who had twice had gonorrhea and was named as a contact for chlamydia, did not meet these criteria.[18]

26. As well, the report was meant for couples in a stable relationship where both partners were aware of the presence of the virus and chose to assume the risks involved in sexual activity. Again, the Respondent did not meet these criteria. He was not in a stable relationship with one sexual partner, but moved rapidly from one partner to another, sometimes having multiple sexual partners during the same time period. He concealed his infection from all of them.[19]

27. Finally, as Dr. Smith acknowledged, there was controversy surrounding the Swiss Statement. The World Health Organization, The US Centre for Disease Control and Prevention, UNAIDS, and the San Francisco Department of Health were of the view that more research was needed to determine the degree to which the viral load in blood predicts the risk of HIV transmission and the association between the viral load in blood and the viral load in semen and vaginal secretions. These organizations all stressed that an undetectable viral load was not a safe

[17] *Id.*, paras. 114-117.
[18] *Id.*, paras. 108-110.
[19] *Id.*, paras. 109-110.

sex strategy.[20] In fact, Dr. Smith was alarmed at the idea that an individual in the Appellant's position would have casual sexual intercourse without protection.[21]

D. The Learned Trial Judge's Ruling

28. McKelvey J. of the Manitoba Court of Queen's Bench delivered her judgment on July 15, 2008. She convicted the Respondent of six counts of aggravated sexual assault in relation to the complainants mentioned above, and also of invitation to sexual touching and sexual interference in relation to the 12 year old complainant, D.C.S.

29. McKelvey J. applied *Cuerrier,* and found that the Respondent had had unprotected sexual intercourse with each of the six complainants, thereby exposing them to the potentially lethal consequences of transmission of HIV. In the result, each of their lives was endangered.[22]

30. With respect to the issue of consent, she found that the Respondent had not disclosed his HIV status to any of the complainants and that the first prong of the test for fraud vitiating consent, namely dishonesty, was proven. With respect to the second prong of the test, deprivation or the "significant risk of serious bodily harm," she held that even considering the Respondent's low viral load, the evidence was clear that the virus could still be passed at any time. A low viral load was not a guarantee against infection. Nor were condoms. Given the unreliable evidence of condom use and the medical evidence that condoms were only 80% reliable in any event, she held that the obligation to disclose remained even where condoms were used. In the case of one complainant, however, she found that the combination of the Respondent's low viral load and the use of condoms reduced the risk of infection to the point

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[20] At the XVII International AIDS Conference in Mexico City in August 2008, the President of the Swiss Federal AIDS Commission stated that the statement was "misinterpreted by some to mean that treatment should replace condoms as a prevention strategy." He apologized for the title of the statement i.e. "HIV positive people with no other STI's and on effective antiviral therapy do not transmit HIV sexually" stating that it was "misleading and I apologize for that." Aidsmap: Swiss Statement that 'undetectable equals uninfectious' creates more controversy in Mexico City. Edwin J. Bernard, August 6, 2008 http://aidsmap.com/en/news/CB3AEAB0-8910-4B75-A6B1-3AEBB1413D2A.asp. See also the response to the Swiss Statement from The University of New South Wales, Sydney, Australia July 29, 2008, "A Dangerous Precedent for HIV", http://unsw.edu.au/news/pad/articles/2008/jul/David_Wilson.html.

[21] *Id.,* para. 111; Record of Appellant Vol. 1 Tab 3 Trial Judge's Decision para. 72; Vol. 4 p. 107 lines 8-31, p. 114 lines 13-33, p. 162 lines 14-34, p. 163 lines 1-16; Vol. 5 Tab 2 p. 129-130, Tabs 3, 4, 5, 6.

[22] Record of Appellant Vol. 1 Tab 3 Trial Judge's Decision paras. 99-106.

where there was no longer a significant risk of serious bodily harm. In those factual circumstances, fraud did not vitiate consent.[23]

E. The Manitoba Court of Appeal

31. On October 13, 2010 the Manitoba Court of Appeal overturned four of the convictions for aggravated sexual assault.

32. Steel J.A. wrote for the Court that McKelvey J. had made two errors in assessing the risk of harm. First, she had overstated the *Cuerrier* test, effectively requiring that there be no risk of transmission. On the contrary, Steel J.A. held, "six of seven justices in *Cuerrier* explicitly declared that there must be a significant or high risk of HIV transmission before [disclosure is required]." She expressed this risk purely by reference to the statistical likelihood that the virus would be transmitted. Using this statistical approach, she found that a low viral load can reduce the risk of transmission below the threshold where disclosure is required.[24]

33. Second, and further to that, she held that McKelvey J. had misapprehended the risk of transmission in the case of condom use. Overruling McKelvey J.'s findings, the Manitoba Court of Appeal held that condom use will generally reduce the risk of transmission to the point where disclosure is not required.[25]

34. In applying the significant risk test to the six complainants, the Manitoba Court of Appeal held as follows:

- The Respondent was guilty of aggravated sexual assault with respect to M.P. because he had had unprotected sex with her between February 2004 and April 2004, when his viral counts were such that the risk of transmission was "probably low but possible infectivity." Therefore, a significant risk of harm existed.

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[23] *Id.*, paras. 111-116, 142-144.
[24] Appellant's Record Vol. 1 Tab 6 MBCA Decision para. 65, 127.
[25] *Id.*, paras. 65, 80, 123.

- Similarly, the Respondent was guilty of aggravated sexual assault against K.R. when he had sexual relations with her between April 2004 and November 2004. (His viral load did not test within the "undetectable" range until October 2004.) While a condom was used, it broke on three or four occasions. At that point it had been incumbent on the Respondent to tell the complainant about his HIV-positive status so she could attend for treatment if she chose.

- The Respondent was not guilty of the offence concerning K.G. because, the complainant testified that she was "pretty sure" the Respondent used a condom. Therefore, the risk was not legally significant. [26]

- Respecting the last three complainants, S.H., D.C.S., and D.H., unprotected sexual intercourse with them occurred between October 2004 and December 2005. During that time the Respondent's viral load was below the level of detection and there was a "high probability" that the Respondent was not infectious. Therefore, there was not a significant risk of bodily harm and the Respondent had not been required to disclose his HIV status.[27]

35. The Manitoba Court of Appeal rejected the Crown's suggestion that "consent" in this context should be interpreted in accordance with the principles emphasized in this Honourable Court's decision in *R. v. Ewanchuk,* [1999] 1 S.C.R. 330, that is, respect for the complainant's physical dignity and autonomous will in relation to sexual activity. It acknowledged the impact of its ruling on women affected by the behavior of the Respondent and those like him, but held that *Ewanchuk* was not the law in this area. Rather, *Cuerrier* applied and compelled acquittals based on viral load and condom use. It invited this Court to consider revisiting the test in *Cuerrier* in order to consider these issues.

[26] *Id.*, paras. 119-125.
[27] *Id.*, paras. 127-137.

Part II – Issues

36. Did the Manitoba Court of Appeal err in concluding that the Respondent's low viral count or use of condoms meant that his failure to disclose his HIV-positive status before sexual intercourse did not place the complainants at a significant risk of serious bodily harm?

The Attorney General of Manitoba was granted leave to appeal to this Honourable Court by Order dated May 5, 2011, pursuant to s. 693(1)(b) of the *Criminal Code*.

Part III – Argument

37. The Appellant respectfully submits that the statistics-based approach adopted by the Manitoba Court of Appeal does not reflect the principles underlying the decision in *Cuerrier* and is inconsistent with this Honourable Court's further jurisprudence in the areas of HIV transmission and sexual assault. Moreover, it gives rise to a host of logistical concerns, including the very ones identified in *Cuerrier*. A purposive reading of *Cuerrier*, on the other hand, avoids these concerns, maintains the importance of consent as repeatedly recognized by this Honourable Court and provides clear guidance to HIV-positive individuals as to their obligations.

A. R. v. Cuerrier

38. This Court first confronted the issue of failure to disclose HIV-positive status in 1998. The Accused in *Cuerrier* had had mostly unprotected sex with two women without disclosing that he was HIV-positive. He was charged with aggravated assault but directed verdicts of acquittal were entered on the basis that the women had consented to the acts in question, though they both testified that they would not have done so had they known that the Accused was HIV-positive. The Crown appealed, first to the British Columbia Court of Appeal and ultimately to this Court.

39. This Court characterized the issue as one of consent, and held that without this disclosure, information that constituted a pre-condition for true consent was being withheld. Writing for the majority, Cory J. stated unequivocally:

> Without disclosure of HIV status, there cannot be true consent. The consent cannot simply be to have sexual intercourse. Rather, it must be consent to have intercourse with a partner who is HIV-positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status.[28]

[28] *R. v. Cuerrier, supra,* para. 127 (emphasis added). *See also id.*, para. 108 ("A principled approach consistent with the plain meaning of [s. 265(3)(c)] and an appropriate approach to consent in sexual assault matters is preferable.") (emphasis added). *See also R. v. Williams,* [2003] 2 S.C.R. 134, para. 39.

40. McLachlin J. (as she then was), wrote concurring reasons but agreed with the majority on this point. She found that basic Canadian values required the disclosure of this kind of information:

> It is unrealistic, indeed shocking, to think that consent given to sex on the basis that one's partner is HIV-free stands unaffected by blatant deception on that matter. To put it another way, few would think that the law should condone a person who has been asked whether he has HIV, lying about that fact in order to obtain consent.[29] To say that such a person commits fraud vitiating consent, thereby rendering the contact an assault, seems right and logical.[30]

41. Similarly, L'Heureux-Dube J., who also prepared concurring reasons, wrote that individuals enjoyed the right to determine under what conditions another may invade their bodily integrity, and that gaining consent to sex by withholding information about HIV status represented "the violation of the complainant's physical dignity in a manner contrary to her autonomous will[.]"[31]

42. The Court's reasoning was based on *Criminal Code* s. 265(3)(*c*), which provides that consent to physical contact (including sexual contact) cannot be based, *inter alia*, on fraud.[32] While unanimous that failure to disclose HIV status qualified, the Court was divided on the issue of how best to prevent the trivialization of the criminal law through claims that consent was fraudulently induced by misrepresentations as to age, professional status, promises as to future affections, etc. As Cory J. observed, "some limitations on the concept of fraud as it applies to s. 265(3)(*c*) are clearly necessary or the courts would be overwhelmed and convictions under the sections would defy common sense."[33]

43. Cory J. proposed distinguishing between such "petty prosecutions" and serious cases meriting criminal sanction by looking at the risk of harm. Where there was "a significant risk of

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[29] Like the Respondent in this case, the accused in *Cuerrier* had lied to one of the complainants about his HIV status. *See Cuerrier, supra,* para. 79.
[30] *Cuerrier, supra,* para. 66 (emphasis added).
[31] *Id.,* paras. 19, 22.
[32] The section states that "for the purposes of [s. 265], no consent is obtained where the complainant submits or does not resist by reason of . . . fraud."
[33] *Cuerrier, supra,* para. 135.

serious harm," a criminal conviction was appropriate.[34] This distinction, he wrote, provided "a reasonable balance between a position which would deny that the section could be applied in cases of fraud vitiating consent and that which would proliferate petty prosecutions by providing that any fraud which induces consent will vitiate that consent." [35]

44. Potential HIV infection, he held, was not "petty" and was an appropriate matter for prosecution. Rejecting policy-based arguments that controlling HIV was a matter best left to health experts and that prosecution would unduly stigmatize those living with HIV, he stated:

> The risk of infection and death of partners of HIV-positive individuals is a cruel and ever-present reality. Indeed, the potentially fatal consequences are far more invidious and graver than many other actions prohibited by the *Criminal Code*. The risks of infection are so devastating that there is a real and urgent need to provide a measure of protection for those in the position of the complainants.[36]

45. Moreover, Cory J. observed, a disclosure requirement backed by the deterrent effect of the criminal law would allow individuals to take appropriate precautions to protect themselves against the risk of infection: "It may well have the desired effect of ensuring that there is disclosure of the risk and that appropriate precautions are taken."[37]

46. Cory J. recognized that this placed a burden on HIV-positive individuals that other community members did not have. Yet, he observed, "[s]urely those who know that they are HIV-positive have a fundamental responsibility to advise their partners of their condition and to ensure that their sex is as safe as possible."[38] Given the serious consequences of infection, this "fundamental responsibility" was not overly onerous and was a matter of basic decency:

> The failure to disclose HIV-positive status can lead to a devastating illness with fatal consequences. In those circumstances, there exists a positive duty to disclose. [39]

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[34] In these cases, he held, deprivation (the second element of fraud) would be present as the complainant would have been exposed to harm or the risk of harm. *See id*, para. 128.

[35] *Id.*, (emphasis added). *See also id,* paras. 137 and 139 (reiterating that the test should not be so broad as to "trivialize a serious offence.").

[36] *Id.*, para. 142.

[37] *Id.*, para 142.

[38] As he and McLachlin J. (as she then was) both pointed out, however, prior to the decision in *R. v. Clarence* (1888), 22 Q.B.D. 23 (Eng. Q.B.), the common law recognized that fraudulent deception as to the risk of infection from venereal disease could vitiate consent to sexual activity. *See Cuerrier, supra*, paras. 61, 119-122.

[39] *Id.*, paras. 127, 144.

47. The duty to disclose also followed from the increased recognition of the role of consent in sexual matters. As Cory J. observed, the *Criminal Code* had steadily evolved to match society's attitudes towards complainants' abilities to control their bodies. A broadened understanding of fraud based on the "true nature of the consent" was appropriate: "A consent that is not based upon knowledge of the significant relevant factors is not a valid consent." As described above, consent obtained by lying or withholding information about HIV status was thus not "true" consent.[40]

48. Cory J. surmised briefly in *obiter* that "the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation."[41] If that were the case, the obligation to disclose would not arise. He did not explain, however, how this might occur, or what he meant by "reduce the risk of harm."[42] He did not explain how condom use – which might reduce the risk of transmission but would not affect the consequences of infection if it occurred – would make the risk of harm less "significant," nor did he indicate to what degree this risk would have to be reduced before withholding information about HIV status would be permissible.[43]

49. McLachlin J. (as she then was) was concerned that Cory J.'s reliance on the "significant risk of serious harm" was vague and impracticable and represented too drastic an expansion of the common law. As she observed:

> When is a risk 'significant' enough to qualify conduct as criminal? In whose eyes is 'significance' to be determined – the victim's, the accused's or the judge's? What is the ambit of 'serious bodily harm'? . . . The criminal law must be certain. If it is uncertain, it cannot deter inappropriate conduct and loses its *raison d'etre*. Equally serious, it becomes unfair. People who believe they are acting within the law may find themselves prosecuted, convicted, imprisoned and branded as criminals. [44]

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[40] *Id.*, paras. 105-108, 123, 127.
[41] *Id.*, para. 129 (emphasis added).
[42] Nor, for that matter, did he explain what he meant by "the careful use of condoms." As the medical evidence in this case demonstrates, effective condom use entails a number of strict requirements, most of which the Respondent did not follow. *See* Appellant's Record Vol. 1 Tab 6 MBCA decision, paras. 91-96.
[43] The Court did not elaborate in *Cuerrier* as to the risks of infection during, *e.g.*, unprotected sex, nor was any evidence led in this regard. The Manitoba Court of Appeal observed in this case that it ranges from .05 percent to .26 percent, depending on which study one looks at. *See* Appellant's Record Vol. 1 Tab 6 MBCA Decision, paras. 75-77.
[44] *Cuerrier, supra,* para. 48 (emphasis added). *See* also *id,* para. 69.

50. Rather than expand the common law definition of fraud to cover all cases where deceit led to significant risk of serious harm, therefore, McLachlin J. would have prevented trivial claims by limiting the expansion to cases involving sexually transmitted disease. This represented the common law prior to the decision in *R. v. Clarence, supra*, and was thus less of a drastic change than that contemplated by the majority. McLachlin J. explained her rationale for distinguishing between cases where consent was vitiated by deceit as to venereal disease and those where it was vitiated by deceit as to "other inducements" (promises of marriage, gifts, etc.):

> Consent to unprotected sexual intercourse is consent to sexual congress with a certain person and to the exchange of bodily fluids from that person. Where the person represents that he or she is disease-free, and consent is given on that basis, deception on that matter goes to the very act of assault. The complainant does not consent to the transmission of diseased fluid into his or her body. This deception in a very real sense goes to the nature of the sexual act, changing it from an act that has certain natural consequences (whether pleasure, pain or pregnancy) to a potential sentence of disease or death. It differs fundamentally from deception as to the consideration that will be given for consent, like marriage, money or a fur coat, in that it relates to the physical act itself. It differs, moreover, in a profoundly serious way that merits the criminal sanction. [45]

51. For McLachlin J., therefore, sexual activity that carried "a potential sentence of disease or death" was qualitatively different from ordinary sexual activity. Withholding information in this regard was so "profoundly serious" as to affect the very nature of the act itself. This distinguished it from other forms of deceit that only affected the compensation, either material or emotional, that the complainant was led to believe might follow the act.

52. McLachlin J. wrote that "protected" sex would not qualify under her test because "the common law pre-*Clarence* required that there be a high risk or probability of transmitting the

[45] *Id.*, para. 72 (emphasis added).

disease."[46] She did not explain what "protected" sex entailed,[47] or what she meant by a "high risk or probability of transmitting the disease." Nor did she explain how this test would differ from the majority's requirement of "a significant risk of serious harm." Nor did she explain how, given the risks associated with even "protected" sex, the nature of such activity was qualitatively different from "unprotected" sex.

53. In L'Heureux-Dube J.'s view, the risk of transmitting the disease was less important than the violation of the complainant's right to determine the conditions of interference with her physical dignity:

> The essence of the offence . . . is not the presence of physical violence or the potential for serious bodily harm, but the violation of the complainant's physical dignity in a manner contrary to her autonomous will.[48]

54. In her view, Parliament's 1983 amendments to the sexual assault provisions demonstrated the intention to significantly broaden the kinds of fraud that could vitiate consent in relation to sexual assault. They aimed "much more broadly at modernizing and sensitizing the law's approach to sexual offences" by, *inter alia*, placing an increased focus on the importance of consent. Frivolous claims of vitiated consent were better addressed by rigorous application of the causation requirement than by restricting or minimizing this importance.[49]

55. All three Justices thus agreed that HIV was a condition that required disclosure and that failing to do so could vitiate consent. Where they disagreed was as to how to frame the test in a way that captured situations like the Accused's, but did not lead to "trivial" or "petty" prosecutions.

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[46] *Id.*, para. 73. She referred in this regard to *R. v. Sinclair* (1867), 13 Cox C.C. 28, 29, in which the Court had held that "If he knew that he had such a disease, and that the probable consequence would be its communication to the girl, and she in ignorance of it consented to the connection, and you are satisfied that she would not have consented if she had known the fact, then her consent is vitiated by the deceit practiced upon her, and the prisoner would be guilty of assault" (emphasis added). It is not clear, with respect, what the *Sinclair* Court meant by "probable consequence" or that this necessarily translated into a "high risk or probability of transmitting the disease." More importantly, no evidence was led in *Cuerrier* in relation to transmission rates for either protected or unprotected sex. McLachlin J. (as she then was) wrote that her proposed extension of the law only applied to unprotected sex, where there was "a high risk of infection." In fact, as the Manitoba Court of Appeal observed, the rate of HIV transmission for unprotected sex is a small fraction of a percent, perhaps as low as .05 percent.

[47] *See* footnote 41, *supra.*

[48] *Id.*, para. 19.

[49] *Id.*, paras. 20-22.

B. Case Law Since Cuerrier

56. Since the decision in *Cuerrier*, developments have taken place in the treatment of individuals living with HIV. As described above, antiretroviral therapy has reduced the likelihood of transmission of the virus and prescription drug "cocktails" have increased the life expectancy of infected individuals.[50] The extent of these developments is a matter of continuing scientific debate, however several facts are clear. No treatment has eliminated the risk of infection through sexual contact and no cure for HIV has been discovered. It remains an uncurable, potentially fatal and life-altering disease transmissible through sexual intercourse. Moreover, infection rates continue to climb, particularly in vulnerable segments of society. Aboriginal women in particular – like a number of the complainants in this case – are increasingly the "new face" of HIV infection in Canada.[51]

57. Nevertheless, a number of trial and provincial appellate courts, including the Manitoba Court of Appeal, have relied on statistical data concerning individuals' "viral loads" to conclude that where there is a reduced chance of transmitting the virus (either because of low viral load, condom use or some combination of both), the "significant risk of serious bodily harm" referred to by Cory J. does not exist, and disclosure is therefore not required.

58. These attempts to define "significant risk" by reference to statistical likelihood of transmission have been difficult. Results have been inconsistent. In perhaps the most striking example, the British Columbia Court of Appeal held that sufficient risk of serious bodily harm existed for a committal on aggravated sexual assault where medical evidence estimated the rate of HIV transmission as 1.5 in 10,000.[52] When that same case went to trial, however, the British Columbia Supreme Court found that the medical evidence showed the probability of infection to be almost ten times higher (as high as 12 in 10,000), but nevertheless acquitted the accused on the basis that this risk was "not material enough to establish deprivation invalidating consent."[53]

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[50] *See* Appellant's Record Vol. 1 Tab 6 MBCA Decision para. 63.
[51] *Id.*, para. 64; *See also* Grant, Isabel "The Boundaries of the Criminal Law: the Criminalization of the Non-disclosure of HIV" (2008), 31 Dalhousie Law Journal 123 at p. 125.
[52] *R. v. J.T.*, 2008 BCCA 463.
[53] *R. v. J.A.T.*, 2010 BCSC 766.

59. In *R. v. Wright*, the British Columbia Court of Appeal held that average rates of transmission – which it identified as approximately ½ of one percent – constituted sufficient evidence of significant risk to justify committal to stand trial.[54] In *R. v. Jones*, on the other hand, the New Brunswick Court of Queen's Bench held that a 1.0 percent to 2.5 percent risk of transmission of the Hepatitis C virus through anal intercourse did not constitute a significant risk.[55]

60. And in *R. v. Edwards,*[56] *R. v. Nduwayo*[57] and *R. v. Nduwayo*,[58] courts seem to have simply assumed that disclosure of HIV status was not required if a condom was used, presumably because this was sufficient to remove the significant risk of serious bodily harm.[59]

61. Most recently, in *R. v. C.(D.)*,[60] the Quebec Court of Appeal followed the decision of the Manitoba Court of Appeal in this case and concluded that where an accused's low viral load made the rate of transmission 1.0 in 10,000 (.01 percent), significant risk of serious bodily harm had not been made out. Like the Manitoba Court of Appeal, the court expressed some concern about this conclusion, but held that it was compelled by the language of *Cuerrier*.[61]

62. Meanwhile, this Honourable Court has maintained a different approach to the risk of HIV transmission. In *R. v. Thornton*, the accused was charged with donating his blood to the Red Cross, knowing that he was HIV-positive and failing to disclose this information. He was charged with nuisance endangering life and appealed his conviction to the Ontario Court of Appeal. He argued, *inter alia*, that the Crown had not proved that his conduct actually endangered the lives or health of the public because the Red Cross screened for HIV-positive blood in order to prevent it from getting into the blood supply.[62]

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[54] *R. v. Wright*, 2009 BCCA 514. The Manitoba Court of Appeal identified these average transmission rates as being much lower – between .05 percent and .26 percent. As discussed below, scientific consensus on these matters is difficult to ascertain.
[55] *R. v. Jones*, 2002 NBQB 340.
[56] 2001 NSSC 80.
[57] 2006 BCSC 1972.
[58] 2010 BCSC 1277.
[59] In fact, as the Manitoba Court of Appeal observed, condom use reduces, but does not remove, the risk of HIV transmission. *See* Appellant's Record Vol. 1 Tab 6 paras. 70-71, 86.
[60] 2010 QCCA 2289. The Attorney General of Quebec has sought leave to appeal this decision to this Honourable Court.
[61] *Id.*, paras. 99-101, 121.
[62] (1991) 3 C.R. (4th) 381, paras. 21 *et seq.* (Ont. C.A.).

63. The Ontario Court of Appeal specifically rejected this line of argument. While the screening process was 99.3% effective, it observed, "it is not perfect." Human error and/or material failure in the screening process left open the possibility that the virus could be transmitted through donated blood like that of the accused. By knowingly offering HIV-positive blood, the accused had "obviously put potential recipients and health care workers at risk[.]"[63]

64. It was thus irrelevant that the statistical likelihood of transmission was low. The "catastrophic" consequences of transmission meant that a serious risk existed if there was any chance that the virus could be transmitted:

> When the gravity of the potential harm is great – in this case, 'catastrophic' – the public is endangered even where the risk of harm actually occurring is slight, indeed, even if it is minimal.[64]

65. This Honourable Court dismissed the accused's further appeal and affirmed the conviction without speaking directly to this issue.[65]

66. Similarly, in *R. v. Williams*, the accused had a sexual relationship with the complainant for five months before learning he was HIV-positive. He then concealed this information from the complainant and continued to have sex with her for another year until their relationship ended. She later tested positive for HIV. The accused conceded that he had passed on the virus to the complainant, but the Crown conceded that he might have done so before he knew that he was HIV-positive, and, thus, before he had the necessary *mens rea* for the offence.

67. This Honourable Court observed that:

> The exposure of an unwitting sexual partner to the risk of HIV infection, through a deliberate deception, is the stuff of nightmares, yet cases of such misconduct now regularly come before the courts.[66]

68. The Court also unanimously held that the accused's failure to disclose his HIV-positive status (after he discovered it) had vitiated the complainant's consent to sex with the accused.

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[63] *Id.*, paras. 24, 26 (emphasis added).
[64] *Id.*, para. 27.
[65] *R. v. Thornton*, [1993] 2 S.C.R. 445.
[66] *R. v. Williams*, [2003] 2 S.C.R. 134, para. 19 (emphasis added).

Citing *Cuerrier*, Binnie J. reiterated that "without disclosure of HIV status there cannot be a true consent." Even though the complainant might already have been infected with the virus, she nevertheless maintained the right to control the conditions under which she was willing to engage in sexual activity with the accused. His deception had denied her this right and, thus, had vitiated her consent: "True consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status. A consent that is not based upon knowledge of the significant relevant factors is not a valid consent."[67]

69. The accused's HIV-positive status was one such 'significant relevant factor,' even though the Crown had explicitly conceded that it could not prove that the accused had knowingly exposed the complainant to a 'significant risk of harm.'[68] Nevertheless, Binnie J. held, "the *Cuerrier* principle . . . applies here." Consent, he observed, was an entirely subjective consent: it turned exclusively on the complainant's state of mind. The evidence was clear that the complainant had not –and would not have – consented to sex with an HIV-positive partner, and therefore the accused could not rely on her consent as a defence to his actions.[69]

70. Binnie J. referred in this regard to *R. v. Ewanchuk*, a case in which this Honourable Court had strongly emphasized the critical role of consent in relation to sexual assault:

> Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. . . . The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, 'every man's person being sacred and no other having a right to meddle with it in the slightest manner.[70]

71. By withholding information about his HIV status, the accused had denied the complainant this control in a significant way. It did not matter that the Crown could not prove when the complainant became infected with the virus and, thus, whether she had actually been exposed to a significant risk of harm. The accused had violated the complainant's right to

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[67] *Id.*, para 39 (emphasis added), quoting *R. v. Cuerrier, supra,* para. 127.
[68] *Id.*, para. 34.
[69] *Id.*, paras. 37-38, 40.
[70] *R. v. Ewanchuk,* [1999] 1 S.C.R. 330, para. 28 (emphasis added).

choose whether to have sex with an HIV-positive person. She had not consented to that and the accused was therefore properly convicted of assault.[71]

72. Because of the unusual circumstances of the case, however, he could not be convicted of aggravated assault. By exposing the complainant to HIV infection, he had endangered her life. By intentionally failing to disclose that he was HIV-positive, he had demonstrated *mens rea*. But the Crown could not prove that these events had happened at the same time. As Binnie J. observed, "before [the date the Respondent discovered he was HIV-positive], there was an endangerment but no intent; after [that date], there was an intent but . . . a reasonable doubt about the existence of any endangerment. Therein lies the essence of the Crown's problem in this case."[72] The inability to establish contemporaneity made a conviction for aggravated assault impossible. Instead, the Court held, the accused was properly convicted of attempted aggravated assault, since he had knowingly taken significant steps to endanger the life of the complainant, though the evidence did not allow a conclusion as to whether he had succeeded in doing so.[73]

73. This Honourable Court's emphasis of the importance of consent was reiterated again in *R. v. J.A.*[74] This was not an HIV case. Rather, the accused had, with the complainant's consent, choked her into unconsciousness during sexual activity and performed a sex act on her while she was unconscious. The legal issue raised by the case was whether consent for the purposes of sexual assault required the complainant to be conscious throughout the sexual activity in question. By a 6-3 margin, this Honourable Court held that it did, and that the accused had committed a sexual assault, even though the complainant had consented "in advance" to his actions.

74. "The consent of the complainant," the majority held, "must be specifically directed to each and every sexual act[.]"[75] This was, per *Ewanchuk*, an entirely subjective inquiry concerned exclusively with the complainant's state of mind at the time of the sexual act in question. The complainant had to be given the ability to decide, at each and every point of

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[71] *R. v. Williams, supra* para. 60. It stands to reason, given the nature of the case, that a sexual assault conviction would have been appropriate had the Crown proceeded in that manner. *See, e.g., R. v. Hutchinson*, 2010, NSCA 3.
[72] *Id.*, para. 35.
[73] *Id.*, paras. 60-66.
[74] 2011 SCC 28.
[75] *Id.*, para. 34. *See also id.*, para. 42 ("[T]he complainant must consciously consent to each and every sexual act.").

sexual activity, whether and on what terms she was willing to engage in this behaviour. As the Chief Justice wrote:

> Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is . . . not consensual within the meaning of the Criminal Code.[76]

75. Unconsciousness, even if induced consensually, left the complainant unable to evaluate whether or not she wanted to consent to additional sexual activity. It meant she could not change her mind partway through and withdraw her earlier consent, a right guaranteed, *inter alia*, by *Criminal Code* s. 273.1(2)(e). It also left partners unable to satisfy their obligation to take reasonable steps to ensure consent. Thus, it was a bar to consensual sexual activity:

> Parliament requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point.[77]

76. There was no bodily harm, or even risk of bodily harm, at issue in the appeal. Indeed, the reasons of the majority made it clear that the decision did not turn on the vitiation of consent as a result of bodily harm.[78] On the contrary, the decision followed from the interference with the complainant's ability to "consciously evaluate whether she was consenting."[79]

77. Therefore, while some trial and provincial appellate courts have minimized the significance of meaningful consent in favour of a statistical analysis of the likelihood of HIV transmission, the jurisprudence of this Honourable Court reflects the opposite approach. This Court has upheld the rejection of a similar statistics-based argument on the basis that the catastrophic implications of transmission outweighed the relative unlikelihood that it would occur (*Thornton*). Indeed, it has found that failure to disclose HIV status can vitiate consent even in the absence of a significant risk of harm (*Williams*). And it has emphasized the inviolable nature of the principle of meaningful, conscious consent in matters of sexual integrity (*Ewanchuk* and *J.A.*). As the majority observed in *J.A.*:

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[76] *Id.*, para. 66 (emphasis added).
[77] *Id.*, para. 3.
[78] *Id.*, para. 21.
[79] *Id.*, para. 66.

> The jurisprudence has consistently interpreted consent as requiring a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act.[80]

78. It is against this jurisprudential backdrop that the Manitoba Court of Appeal's decision that a low viral load and/or the use of a condom can replace a complainant's right to disclosure of a partner's HIV-positive status must be weighed.

C. The Manitoba Court of Appeal's Decision

79. Steel J.A. found that the question of "substantial risk of serious bodily harm" consisted essentially of the statistical likelihood that the virus would be transmitted. Comparing rates of transmission as described in the trial evidence and in a number of other cases, she concluded that proper condom use could reduce the statistical likelihood of transmission to between .01 percent and .052 percent. This risk, she held, was below the "level of significance" and therefore meant that where condoms were used, disclosure was not necessary.[81] Similarly, where an accused's viral load suggested that the statistical likelihood of transmission was low at the time of intercourse, the Crown could not prove that a substantial risk of serious bodily harm existed and the accused could not be convicted.[82]

80. The Appellant respectfully submits that this statistics-based approach to the issue is problematic in a number of ways. As an initial matter, it does not reflect the way criminal law analyzes risky or dangerous behaviour. An individual who closed his eyes and fired a loaded gun in a crowded room could not escape conviction on the basis that given, *e.g.*, the size of the room compared to the amount of space that was actually occupied by people, statistically

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[80] *R. v. J.A., supra,* para. 44 (emphasis added).

[81] As discussed above, "proper" condom use requires a number of demanding conditions – *see* para. 19 *infra.* Steel J.A. held that this seemed to represent an "ideal" situation and suggested that even if these conditions had not been met, "reasonably proper condom use, as opposed to perfect condom use [still] reduces the risk level to below a significant risk of harm,"(Appellant's Record Vol. 1 Tab 6 MBCA Decision, paras. 91-92). Indeed, she overturned the Respondent's conviction in relation to one of the complainants (K.G.) solely on the basis of her testimony that while she was intoxicated, she was "pretty sure" that a condom had been used. No more detail was provided and no evidence was led in relation to compliance – "reasonably proper" or otherwise – with any of the conditions for proper condom use. (*Id.*, paras. 123-125.) With respect, apart from the other problems with this approach, it is unclear what authority Steel J.A. might have relied on for this conclusion. Neither the cases she relied on nor the medical evidence in this case provided any data in terms of the effectiveness of improperly used condoms or the likelihood of transmission where they are not used properly.

[82] *Id.*, paras. 127-137.

speaking, the chances of death or serious injury were relatively low. Certain acts are dangerous in and of themselves because they create the chance that someone could be hurt or killed. It does not matter that the chance of this occurring is small – the law aims to stop people from taking that chance. This was precisely the holding in *Thornton*:

> When the *gravity* of the potential harm is great – in this case, 'catastrophic' – the public is endangered even where the risk of harm actually occurring is slight, indeed, even if it is minimal. [83]

81. There is nothing about withholding information about HIV-positive status that differentiates it from other behaviour in this regard or singles it out for special treatment. The danger associated with criminal conduct is not assessed based on the mathematical percentage chance that injury or death will actually occur. If it were measured that way, any number of clearly dangerous activities might not qualify (*e.g.* reckless driving, Russian roulette, etc.).

82. In *Thornton*, the Red Cross screened all donated blood for HIV with an accuracy rate of well over 99 percent. The Court rejected claims that this meant that the accused's failure to disclose had not placed other people in danger. As the Court observed, "very good" is not the same as "perfect." The test could still fail, either because of human error or 'material failure.' Concealing the presence of the virus was therefore still dangerous. These dangers are equally present in relation to both condom use and antiretroviral therapy used to lower an individual's viral load.

83. In order for condoms to be effective, they must be applied and used properly. In order for antiretroviral drugs to be effective, they must be taken correctly and consistently. Using condoms improperly reduces their chance of preventing infection. An accused who forgets to

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[83] *Thornton, Ont. C.A. supra,* para. 27 (emphasis added). This discussion in *Thornton* concerned the issue of endangerment, not whether the accused's actions had created a substantial risk of serious bodily harm. The Manitoba Court of Appeal suggests that advances in "optimal care" for those infected with HIV mean that an accused may place a complainant at substantial risk of serious bodily harm while not endangering her life. (*See* Appellant's Record Vol. 1 Tab 6 MBCA Decision paras. 141-146). With respect, the evidence in this regard remains clear: left untreated, HIV is a deadly infection, leading inexorably to the development of AIDS and then to death. (*Id.*, para. 62.) A complainant who contracts HIV from an offender who fails to disclose his status is left unaware of her situation. Indeed, this is part of what makes the offence so serious. She does not know to seek treatment for herself or to guard future partners from further transmission of the virus. She is thus unlikely to receive the "optimal care" contemplated by the Manitoba Court of Appeal and her life, like that of anyone she goes on to unknowingly infect, is thus endangered.

take his medication on a given day may become resistant to the medication, affecting its ability to suppress the virus.[84] The opportunity for human error affects both condom use and antiretroviral drug therapy and makes withholding information about the potential for HIV infection a dangerous act of concealment, just as it was in *Thornton*.

84. Moreover, just as "material failure" could defeat the screening process in *Thornton*, so too, condoms can break even if applied properly. They broke in this case. In the case of one complainant, they broke three or four times. It is unrealistic to suggest that she was not exposed to a significant risk of harm simply because condoms were used in the first place.[85] Similarly, an accused whose viral load is generally low may experience viral load fluctuations depending on a number of varied and unpredictable factors as innocuous as vitamin A deficiency and/or the presence of an oral contraceptive. As the Manitoba Court of Appeal observed:

> [I]t is difficult to know one's viral load at a particular point in time and to ensure it remains undetectable. Common infections, STD's and treatment issues can lead to fluctuations in a person's viral load. HIV-positive people with apparently undetectable viral loads can experience occasional spikes in viral load or may develop viral resistance.[86]

85. Thus, neither taking drugs nor using condoms removes the risk of transmission. Just as in *Thornton*, withholding information about potential HIV infection remains a dangerous act, regardless of the percentage chance that the virus will be transmitted. It creates an unnecessary risk to the complainant and anyone else she may then unknowingly expose to the virus.[87]

86. Further to that, as indicated above, the statistical likelihood of transmission for even

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[84] See Appellant's Record Vol. 1 Tab 6 MBCA decision, para. 112.

[85] The Manitoba Court of Appeal suggests (at para. 97) that in cases of condom breakage, no harm is done because "a non-HIV partner can successfully be treated with drugs for one month so long as treatment starts within 72 hours." So long as disclosure of HIV status is made immediately after the condom breaks, therefore, the complainant has not been exposed to a significant risk of serious bodily harm. This presupposes, however, (i) that the breakage is discovered; (ii) that the complainant is in a position to receive treatment within 72 hours and, most significantly; (iii) that the treatment is successful. None of these, with respect, can be taken for granted. Moreover, it does not address the severe psychological harm inflicted on a complainant who, after finding out that she has been unwittingly exposed to HIV, must then take invasive prophylactic drugs for a month and then wait – perhaps indefinitely – to find out whether the virus will appear. *R. v. McCraw*, [1991] 3 S.C.R. 72.

[86] Appellant's Record Vol. 1 Tab 6 MBCA Decision, para. 112 (emphasis added).

[87] As discussed above, this Honourable Court reached a similar conclusion in *R. v. Williams, supra*.

unprotected sexual intercourse is (according to the Manitoba Court of Appeal) only a small fraction of one percent. When condoms are used, the likelihood is a smaller fraction of one percent. Making criminal liability turn on which side of such a narrowly defined line an individual accused falls is arbitrary and unfair. The Manitoba Court of Appeal's observation (at para. 87) that "the word 'significant' is not necessarily equated with quantity but it does imply importance" does not explain why a .26 percent risk of transmission (unprotected sex) is 'important' and a .05 percent risk of transmission (protected sex) is 'unimportant.' Indeed, Steel J.A. found that the risk of transmission in unprotected sex might also be as low as .05 percent, depending on what scientific authority one accepts.[88]

87. This lack of conceptual clarity results in a test for liability that violates the "fundamental principle" highlighted by McLachlin J. (as she then was) in her concurring reasons in *Cuerrier*:

> Furthermore, the criminal law must be clear. I agree with the fundamental principle . . . that it is imperative that there be a clear line between criminal and non-criminal conduct. Absent this, the criminal law loses its deterrent effect and becomes unjust.[89]

88. The miniscule statistical distinctions contemplated by the Manitoba Court of Appeal make it impossible – even on the Court's own terms – to articulate this 'clear line' of responsibility. What is the acceptable degree of risk, and why? Respecting the complainants, M.P. and K.R., in this case, the Manitoba Court of Appeal upheld the Respondent's convictions where his viral load count was such that there was "probably low but possible" infectivity. In relation to the complainants, S.H., D.S.C. and D.H., however, it overturned convictions and entered acquittals because there was "high probability" that the Respondent was not infectious. This loose use of terms reinforces concerns about arbitrariness even more and, as discussed

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[88] *See* Appellant's Record Vol. 1 Tab 6 MBCA decision, paras. 75, 86. The lack of scientific consensus in this regard is another significant problem with adopting a test for criminal liability based on statistical likelihood of transmission. As the Manitoba Court of Appeal observed, "the rates of transmission vary considerably from study to study, depending on a number of factors . . . So transmission probabilities cannot be measured with exact precision." (*Id.*, para. 74 (emphasis added).) Criminal courts are not well placed to adjudicate between differing scientific estimates of rates of transmission. Guilt or innocence should not turn on which of these estimates a particular court happens to receive or accept. Until some consensus emerges as to relative likelihoods of transmission, even discussion of a statistics-based test is, with respect, premature. At this point, the only thing that all the scientists agree on is that neither condoms nor low viral loads remove the risk that a complainant will be unknowingly infected with HIV.

[89] *R. v. Cuerrier, supra,* para. 69.

below, makes it impossible for HIV-positive individuals to identify their obligations under the law.

89. Worse, as McLachlin J. observed, it leads to injustice. Two individuals may commit exactly the same act – engaging in sexual intercourse without disclosing their HIV-positive status. Their moral blameworthiness may be identical. Both may have knowingly concealed this information in order to increase their chances of sexual success. Yet according to the Manitoba Court of Appeal, if one had a likelihood of transmission of .04 percent and the other a likelihood of transmission of .06 percent, one could be convicted and the other acquitted. Again, this is simply not how the criminal law operates. Criminal responsibility turns on the application of principle and the moral culpability of offenders, not miniscule differences in statistical estimates.

90. Similarly, what will a court make of two accused, both with low statistical likelihoods of transmission, where both fail to disclose but one passes the virus to a complainant while the other does not? On what basis could the court distinguish between them? How could the law seek to hold one responsible for consequences that it had held were so unlikely that there was no need to warn the complainant about them?

91. The law cannot give with one hand and take with the other. Having specifically advised members of the HIV-positive community that if they use condoms and/or have a low viral load, they need not disclose, it is not at all clear that an accused could be prosecuted, even where his deliberate failure to disclose resulted in the infection of one or more unwitting complainants.[90] This is, to paraphrase the language in *Williams*, "the stuff of nightmares."[91]

92. The Appellant respectfully submits that a focus on percentage chances of transmission thus misses the point and leads to arbitrary and shocking results. The virus may pass during intercourse, or it may not. The accused cannot control this. By failing to disclose his HIV status,

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[90] The Manitoba Court of Appeal refers to McLachlin J.'s *obiter* comments in *Cuerrier* and suggests that an accused in this situation might be charged with criminal negligence causing bodily harm. (*See* para. 157.) With respect, it is difficult to see how the Crown could establish that the accused had been negligent at all. He would have done everything that the law required him to do and would have failed to disclose in circumstances where the Court had specifically stated that disclosure was not required because there was no significant risk of harm.

[91] *R. v. Williams, supra*, para. 19. *See* further discussion in this regard below.

he conceals the fact that the virus is present and may be transmitted. This, with respect, places the complainant at significant risk of serious bodily harm.

93. There are also serious practical concerns raised by the Manitoba Court of Appeal's approach. As observed above, it is impossible at any given moment to identify the percentage chance of a given individual's infectivity. There are simply too many variables that can affect this determination. Condoms' effectiveness is affected by their manufacture, their age, their storage and their use. The degree to which antiretroviral therapy can control an accused's viral load can vary with a missed dose of medication, common infection, STD's, the complainant's use of oral contraceptives or even a shortage of vitamin A. A low viral load on one day does not mean that it will be low on another day. Nor does a lab test result always mirror what will happen when a complainant is involved. In short, there is simply no way to know at the time that counts – that is, the time of intercourse – what the chances are that the virus will be passed on or where on the continuum of likelihood of transmission an accused happens to fall.[92]

94. An HIV-positive individual wondering whether he has to disclose will thus have no idea what side of the line he is on and whether or not he is required to disclose. This places HIV-positive individuals in an untenable situation *vis-a-vis* the criminal law. Even if it were possible in principle to identify an acceptable range of risk at which disclosure was not required (*e.g.*, the .01 percent to .052 percent range suggested by the Manitoba Court of Appeal), this is of no help to an individual who does not know whether he falls within that range or outside of it.

95. HIV is not like diabetes, at least not yet. There is no way to quickly test viral load and receive a contemporaneous result. An accused's viral load – and with it, his likelihood of transmission – can fluctuate from time to time and even from complainant to complainant. It is unfair and, with respect, unworkable, to make the requirement to disclose subject to the same unpredictable fluctuations.

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[92] Counting backwards from tests taken in laboratories weeks or months after the fact, as the Manitoba Court of Appeal did in this case (*see* paras. 128-137), is speculative and inappropriate given the gravity of the matter at issue. As the Manitoba Court of Appeal conceded, viral load numbers fluctuate and can spike unexpectedly. An Accused's viral load at the time of intercourse may have shifted by the time he is tested weeks or months later.

96. As McLachlin J. (as she then was) observed in *Cuerrier*, people are entitled to clear direction as to their obligations. Looking back with hindsight and attempting to determine *ex post facto* what the accused's statistical likelihood of transmission was may be useful from a medical perspective, but it provides no assistance in prescribing codes of behaviour, the traditional role of criminal law.

97. Moreover, it understates the significant risk posed to the community by actions like those of the Respondent. The dangers of concealing the risk of HIV infection extend far beyond the individual accused and complainant. A complainant who unwittingly contracts HIV then goes on to unknowingly place all future partners at risk, who do the same to their future partners, and so on. Medical science suggests that the initial period of infectivity – before any signs appear that might lead a complainant to seek medical attention and, thus, discover that she had been infected – is when an unwitting complainant is most likely to pass the virus on to others. In fact, "as many as two thirds of all HIV transmissions occur before the infected individual knows that he or she is infected."[93]

98. This is not a hypothetical concern. HIV infection is rising in Canada among particularly vulnerable groups, including the Aboriginal population.[94] Whatever the success rate in society as a whole in combating HIV transmission, these communities remain at risk and are under increasing threat. The Respondent kept a house in which young Aboriginal girls were supplied with alcohol and drugs. He slept with several of these girls, exposing them – and anyone else they then went on to sleep with – to the risk of infection. Whatever comfort low statistical rates of transmission may provide in an individual case, they are of little assistance when considered across the breadth of a whole community. All they do in that context is help predict how quickly the disease can be expected to spread – they do nothing to actually stop that advance.[95]

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[93] Grant, Isabel, "Rethinking Risk: the Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions", (2009) 54 McGill L.J. 389, p. 399 (emphasis added).

[94] *See* para. 56 and footnote 50, *infra*.

[95] As the majority observed in *Cuerrier*, the criminal law has a legitimate and important role to play in protecting the public health and the welfare of the community. *See, e.g.*, para. 141 ("[T]he criminal law does have a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to comply with public health orders to abstain from high risk activities.").

99. Most seriously, the statistics-based approach adopted by the Manitoba Court of Appeal is markedly inconsistent with this Honourable Court's body of jurisprudence emphasizing the importance of consent in the context of sexual assault. As L'Heureux-Dube J. wrote in *Ewanchuk*, "Having control over who touches one's body, and how, lies at the core of human dignity and autonomy."[96] This principle has been steadily reinforced over the 13 years since *Cuerrier* and is rightly characterized as a "fundamental" feature of Canadian law.[97]

100. Denying a complainant the ability to decide for herself whether – and, if so, how[98] – she is willing to subject herself to the risk of HIV infection goes against everything this fundamental right stands for. No one else is entitled to make this decision for her. The fact that an accused uses condoms or takes medication to reduce his risk of infection does not change the basic truth: despite our best medical efforts to date, sexual intercourse with an HIV-positive individual continues to carry the chance that the virus will be transmitted. If transmission occurs, the consequences for the complainant are permanent, incurable, life-altering and potentially fatal. As Steel J.A. observed, while people are often now able to live longer after infection, the physical and psychological impact of HIV infection remains overwhelming. At best, it is still a life sentence. At worst, it is a death sentence.

101. The choice whether to assume this risk must, it is respectfully submitted, lie with the person assuming the risk, not the person imposing it. Both *Ewanchuk* and *J.A.* make it clear that consent and the freedom of complainants to control the terms under which any other person has access to their bodies are paramount considerations in assessing claims of sexual assault. Absent a clear and conscious choice by the complainant to accept the sexual activity in question, an offence has been committed:

> The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, 'every man's person being sacred, and no other having a right to meddle with it, in [even] the slightest manner. . . . It follows that any intentional but unwanted touching is criminal.[99]

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[96] *R. v. Ewanchuk*, *supra*, para. 28.
[97] *R. v. J.A.*, *supra*, paras. 1, 68.
[98] Some forms of sexual activity can carry higher risks of transmission than others. A complainant who is apprised of her partner's HIV infection is then able to decide what activities she is prepared to engage in and what precautions she feels are necessary to manage the risk. A complainant from whom this information is withheld, on the other hand, has no opportunity to participate in this process.
[99] *R. v. Ewanchuk, supra,* para. 28 (per L'Heureux-Dube J.) (emphasis added).

102. Indeed, in *J.A.*, these principles were so important that they required a conviction even where the accused had acted within the scope of the complainant's consent, albeit consent she had given before having been rendered unconscious.[100] Even this "consent in advance" did not provide a defence because the right to control one's sexual autonomy was so important that it simply could not be surrendered to another, even voluntarily:

> The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity.[101]

103. The Manitoba Court of Appeal's approach requires complainants to surrender this control to individuals like the Respondent. It allows prospective sex partners to determine on behalf of complainants whether they should accept the risk of HIV infection. The simple act of using a condom or taking medication accomplishes what the complainant's advance consent in *J.A.* could not: namely, removing the need for "actual, active consent" on the part of the complainant.

104. The Appellant submits that this cannot be correct, and that "actual, active consent" requires that complainants be made aware that HIV is present and may pass as a result of sexual activity. A complainant from whom this information is concealed is simply not in a position to provide consent. As the majority held in *Cuerrier*, "True consent cannot be given if there has not been a disclosure by the Accused of his HIV-positive status. A consent that is not based upon knowledge of the significant relevant factors is not a valid consent."[102]

105. The Manitoba Court of Appeal's rule for disclosure does not require 'true consent.' On the contrary, it replaces the ability to make informed decisions about one's own body with someone else's faith that a condom will not break or otherwise fail or that a low viral load will

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[100] The difference in moral blameworthiness between the accused in *J.A.* and the Respondent, who the trial judge described as a "sexual predator" that enticed young women in vulnerable circumstances through the use of alcohol and drugs and withheld information about his HIV status in order to pursue his sexual aims, is obvious. If J.A.'s conduct required the sanction of a sexual assault conviction, surely so too, with respect, does that of the Respondent.

[101] *R. v. J.A., supra,* para. 66 (emphasis added).

[102] *R. v. Cuerrier, supra*, para. 127 (emphasis added).

prevent transmission of the virus.[103] With respect, this is not what this Honourable Court intended in *Cuerrier*, and it is contrary to the several clear statements of principle it has made in cases since.

106. Moreover, it will not always work. *A fortiori*, neither condoms nor low viral loads will always prevent infection. Saying that the statistical likelihood of transmission is low is simply another way of saying that in at least some cases, transmission is expected. That is, some women will become infected with HIV having been knowingly denied any opportunity to protect themselves. This is simply irreconcilable with the criminal law's historical role in protecting safety and bodily integrity. It is particularly irreconcilable with *Ewanchuk*'s explicit recognition of the fundamental right to sexual autonomy and control over one's own body.[104]

107. Seen in this context, the Manitoba Court of Appeal's observation that in some cases, low viral loads may make sex with an infected partner as safe as flying in an airplane misses the point.[105] Passengers on an airplane are aware of the risks they are facing. Complainants in cases like the Respondent's, however, are being deceived. They do not know what risks they are facing and, thus, they are not in a position to provide the "true consent" contemplated by this Honourable Court. While not perfect, a closer analogue, the Appellant suggests, is medical treatment, where doctors are required to disclose risks before acquiring informed consent.[106]

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[103] To use the Russian roulette analogy introduced earlier, it allows the infected party to gamble not with his own life, but with that the complainant. The obvious injustice inherent in this situation is not remedied by simply requiring that the revolver in question have a large number of chambers so as to reduce the likelihood of discharge of the bullet.

[104] One writer, cited by the Manitoba Court of Appeal, who advocates allowing non-disclosure when condoms are used admits freely that "I recognize that this view interferes with the right of individuals to make their own choices about the degree of risk that they are willing to accept in sexual activity. There may be a small number of potential complainants who acquire the virus and yet do not have access to the criminal justice system under this model because a condom was used. Having said this, however, criminal prosecution after the fact does little to undo any harm caused by the failure to disclose." Grant, "Rethinking Risk", *supra*, p. 400. With respect, whether prosecution after the fact can undo the harm caused by a crime is not the point. This is not the goal of prosecution. It is, rather, to denounce, deter and prevent situations where complainants are lied to and then exposed to the risk of a fatal disease. The idea that complainants could be deceived, infected with HIV and left without criminal recourse would shock the community and reduce public confidence in the administration of justice.

[105] Appellant's Record Vol. 1 Tab 6 MBCA Decision, para. 108.

[106] *See R. v. J.A., supra*, para. 55. As McLachlin C.J.C. observes, consent to sexual activity is not exactly the same as consent to medical intervention. That being said, however, the nature of the considerations that apply make it even more important that consent to sexual activity is informed and thus "true." As McLachlin C.J.C. notes, medical practitioners benefit from special statutory legal protections that do not exist in the area of sexual activity. Even so, "[s]urgical interventions are usually carefully planned, and appropriate consent is assured by consent forms and waivers – all to the end of limiting the risk of abuse." (*Id.*) Informed consent is required where a medical procedure may result in serious harm or death. It is no less important where sexual activity may do so.

Absent such informed consent, interference with a patient's bodily integrity is an assault. There is no reason, with respect, why the same reasoning should not apply here.

D. The Correct Interpretation of Cuerrier

108. The Appellant respectfully submits that there has been a misunderstanding of the nature of the "compromise" reached in *Cuerrier* leading to the requirement of significant risk of serious bodily harm. The debate in *Cuerrier* was not about the relative fairness of requiring disclosure by those who are HIV-positive, nor to whether this constituted an inappropriate criminalization of HIV. Those arguments were unanimously rejected by this Honourable Court and have been unanimously rejected every time they have come back before the Court since.[107] The debate between disclosure and protection of privacy has been decided, and this Honourable Court has come down strongly on the side of disclosure.

109. With respect, this is appropriate given the severe consequences of infection and the relatively minor nature of the burden imposed. The Respondent's sexual freedom has not been affected. He is free to have sexual intercourse with anyone he pleases (except those who, like the complainant, D.C.S., are too young to consent to such behaviour). All that is asked is that he, and others with HIV, inform their prospective partners in order to ensure fully informed consent. As Cory J. observed in *Cuerrier*, this is a matter of basic human decency:

> Surely those who know they are HIV-positive have a fundamental responsibility to advise their partners of their condition and to ensure that their sex is as safe as possible.[108] It is true that all members of society should be aware of the danger and take steps to avoid the risk. However, the primary responsibility for making the disclosure must rest upon those who are aware they are infected. In these circumstances it is, I trust, not too much to expect that that infected person would advise his partner of his infection.[109]

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[107] *See R. v. Thornton, supra*; *R. v. Williams, supra*. *See also* Grant, "Rethinking Risk," *supra*, pp. 391-392 ("The Supreme Court of Canada has considered this issue and upheld criminalization on three occasions without a single dissenting voice.")

[108] Cory J.'s use of the word "and" further suggests that, contrary to the Manitoba Court of Appeal's conclusion, he did not intend for condom use or other safe sex techniques to substitute for disclosure, notwithstanding his earlier *obiter* comments. *See also Cuerrier, supra*, para 142 ("[Criminal sanctions] may well have the desired effect of ensuring that there is disclosure of the risk and that appropriate precautions are taken." (emphasis added)).

[109] *R. v. Cuerrier, supra,* para. 144 (emphasis added).

110. McLachlin J. (as she then was) agreed, holding that "[i]t is unrealistic, indeed shocking, to think that consent given to sex on the basis that one's partner is HIV-free stands unaffected by blatant deception on that matter. To put it another way, few would think the law should condone a person who has been asked whether he has HIV lying about that fact in order to obtain consent." [110]

111. The real issue in *Cuerrier*, with respect, was jurisprudential, not normative. The Court was concerned about undue expansion of a fraud-based cause of action in the area of sexual assault. It did not want "petty prosecutions" based on unfulfilled promises of fur coats, marriage, etc., as this would trivialize the criminal law and subject the courts to frivolous and inappropriate claims.[111] This is the context in which the issue of HIV disclosure must be weighed. Does the use of condoms or antiretroviral drugs make the prospect of HIV infection a "petty prosecution"?

112. The answer lies, the Appellant submits, in the majority's observation that valid consent requires 'knowledge of the significant relevant factors."[112] Where information is not relevant and significant to a complainant's decision whether to consent to sexual intercourse, it need not be disclosed. Prosecution on the basis of failure to share such trivial information would, to use Cory J.'s language, be "petty." But where information is objectively significant and relevant to this decision – *e.g.*, where it involves the risk of serious illness or death – disclosure is necessary and non-disclosure and deception can vitiate consent.

113. This test resolves the issues raised by this appeal and is consistent with the concerns identified in *Cuerrier* while also maintaining the principles at issue in *Ewanchuk* and *J.A.* It is also consistent with the approach taken in *Thornton* and *Williams*. Promises as to consideration given for consent (marriage, fur coats, etc.), as McLachlin J. (as she then was) observed in *Cuerrier*, are different in a "profoundly serious way" from threats to one's safety or bodily

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[110] *Id.*, para. 66 (emphasis added).
[111] *See Cuerrier, supra*, para. 137 ("The standard is sufficient to encompass not only the risk of HIV infection but also other sexually transmitted diseases which constitute a significant risk of serious harm. However, the test is not so broad as to trivialize a serious offence.").
[112] *Id.*, para. 127 ("A consent that is not based upon knowledge of the significant relevant factors is not a valid consent.").

integrity and would be unlikely to satisfy the objective requirement of relevance, let alone that of significance.[113] As Cory J. observed:

> Fraud which leads to consent to a sexual act but which does not have that significant risk might ground a civil action. However, it should not provide the basis for a conviction for sexual assault. The fraud required to vitiate consent for that offence must carry with it the risk of serious harm.[114]

114. HIV, on the other hand, does "carry with it the risk of serious harm." Notwithstanding the real progress made in combating HIV over the last 14 years, it is not realistically possible to deny that the prospect of infection remains a relevant and highly significant factor in the choice whether to engage in sexual relations, whether or not condoms are used and no matter what an Accused's viral load may be. Even Steel J.A. admitted that "everyone would want to be told that a potential partner was HIV positive."[115] And that "[m]ost people would agree that there [is] a moral and ethical obligation to disclose that information."[116]

115. Cory J. wrote in *Cuerrier* that "[t]he failure to disclose HIV-positive status can lead to a devastating illness with fatal consequences. In those circumstances, there exists a positive duty to disclose"[117] While we are much farther along in combating HIV than when these words were written, they are no less true today than they were then. He further advised that "[t]he phrase ["significant risk of serious bodily harm"] should be interpreted in light of the gravity of the consequences of a conviction for sexual assault and with the aim of avoiding the trivialization of the offence." Deception as to the presence of HIV is no less "trivial" now than it was then. Advances in condoms and drug therapies have not reduced the risk of infection to the point where requiring disclosure "trivialize[s] . . .the offence" of sexual assault.

116. Similarly, as McLachlin J. (as she then was) wrote:

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[113] *Id.*, para. 72. Indeed, as L'Heureux-Dube J. pointed out, they may not even establish causation. *See id.*, para. 21.
[114] *Id.*, para. 135.
[115] *See* Appellant's Record Vol. 1 Tab 6 MBCA Decision, para. 156.
[116] *Id.*
[117] *Cuerrier, supra* para. 126. *See also id.* ("The possible consequence of engaging in unprotected intercourse with an HIV-positive partner is death.") This remains true, even if intercourse is protected. As recognized in *Thornton, supra,* human error and the risk of material failure mean that individuals in these situations are always at risk.

> Where the person represents that he or she is disease-free, and consent is given on that basis, deception on that matter goes to the very act of assault. The complainant does not consent to the transmission of diseased fluid into his or her body. This deception in a very real sense goes to the nature of the sexual act, changing it from an act that has certain natural consequences (whether pleasure, pain or pregnancy) to a potential sentence of disease or death.[118]

117. This, too, is as true now as it was in 1998. While McLachlin J. (as she then was) would at that time have limited fraud-based liability to cases involving unprotected sex, the Appellant respectfully submits that the principles underlying her reasons support a broader conclusion, which is also more consistent with this Court's post-*Cuerrier* jurisprudence. Both protected and unprotected sex carry the risk of "transmission of diseased fluid" into the body of the complainant. McLachlin J. (as she then was) appeared to believe that unprotected sex was much more dangerous than protected sex, writing that "protected sex [should] not be caught: the common law pre-*Clarence* required that there be a high risk or probability of transmitting the disease."[119] In fact, neither protected nor unprotected sex has a "high risk or probability" of transmission – in both cases, the risk of transmission is well under one percent – but in both cases the risk is there, and deception on that issue "goes to the nature of" the act, and, therefore, of the consent.

118. This was effectively the holding in *Williams*, where Binnie J. found that the Accused's failure to disclose his HIV-positive status had vitiated consent even where the Crown conceded that it could not establish significant risk of serious bodily harm. This did not matter, because the presence of the HIV virus was a "significant relevant factor" in the decision whether to consent. Because the Accused did not disclose, the complainant was denied the chance to decide whether to take the chance that she might become infected. This interference with her autonomy on such an important issue was enough to vitiate consent:[120]

> The complainant never consented to have sexual intercourse with a partner who was HIV-positive. . . At all relevant times, she believed that both she and the

[118] *Id.*, para. 72 (emphasis added).
[119] *Id.*, para. 73.
[120] *Williams, supra*, paras. 36-40. This case involved unprotected sex, but this was not the basis of the Court's finding that consent had been vitiated. On the contrary, the Crown conceded that it could not prove significant risk of serious bodily harm. The basis for vitiating consent was, rather, that the presence of HIV was an important factor in the decision to consent. Having been deceived in that regard, the complainant was not in a position to provide a valid consent.

> Respondent were HIV-free. That is enough to reject the Respondent's argument on consent.[121]

119. Even a complainant who might already have been infected had the right to know that consenting to sex exposed her to possible transmission of HIV. This Honourable Court was not concerned with the statistical likelihood of transmission any more than the Ontario Court of Appeal was in *Thornton*. On the contrary, the Crown conceded that it may not even have been possible to infect the complainant since she might have already had the virus. This was not the point. Whatever her situation, she was still entitled to know that her prospective partner was carrying HIV. It was a "significant relevant factor" in the decision whether to consent. Without this disclosure, it was not a valid consent. Surely other women who are demonstrably not infected at the time deserve the same consideration. As per *Ewanchuk,* this is a basic question of the right to control one's own body.

120. It may eventually come to pass as medical advances continue that HIV becomes a disease of the past, like cholera or smallpox. A vaccine may be developed that eliminates the risk of transmission altogether. If and when that day comes, the issue of disclosure can be revisited. Until then, the need for clarity in the criminal law, the right of HIV positive individuals to clear guidance as to their obligations and, most fundamentally, the right of complainants to respect of their sexual autonomy and bodily integrity require that HIV-positive individuals disclose their status to prospective partners so that complainants – in conjunction with their partners – can work out how best to confront the risks attendant in such a situation. The Manitoba Court of Appeal's approach fails, with respect, in all three of these areas and this Honourable Court's assistance is necessary.

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[121] *Id.*, para. 40.

Part IV – Costs

121. There is no application for costs.

Part V – Order Sought

122. For the reasons set out above, this Honourable Court should clarify that (i) that per *Cuerrier*, disclosure is required in relation to "significant relevant factors" and that failure to disclose in this regard can vitiate consent; (ii) that notwithstanding advances in medical technology, the presence of HIV remains a "significant relevant factor" in relation to the decision to engage in sexual intercourse; and thus that (iii) valid consent requires disclosure of HIV status, regardless of whether condoms are used and regardless of the Accused's viral load. The appeal should be allowed and the convictions overturned by the Manitoba Court of Appeal should be restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Part VI – List of Authorities

CASES | **Paragraph No.**

LEGISLATION

OTHER MATERIAL