SCC File No. 33976

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

— and —

CLATO LUAL MABIOR

Respondent

Factum of the Respondent, Clato Lual Mabior
(Pursuant to Rule 42 of the R*ules of the Supreme Court of Canada*)

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Part I: Overview and Statement of Facts

1. The Respondent learned of his HIV-positive status in late January of 2004.

2. Between February of 2004 and December of 2005 the Respondent had sexual relations with a number of females, including the complainants. He did not disclose his HIV-positive status to any of the complainants.

3. On July 15, 2008, McKelvey J. convicted the Respondent of six counts of aggravated sexual assault, one count of invitation to sexual touching and one count of sexual interference. The Respondent was sentenced to fourteen years of custody with time in custody noted at two and half years at double credit leaving nine years of time to serve.

4. None of the complainants tested positive for HIV.

5. The Respondent appealed his convictions to the Manitoba Court of Appeal and on October 13, 2010, the Court overturned four of his convictions for aggravated sexual assault. The Court applied the test articulated in *R. v. Cuerrier*, [1998] 2 S.C.R. 371, which held that in order for fraud to vitiate consent the dishonesty had to result in actual harm or "a significant risk of serious bodily harm."

6. The Manitoba Court of Appeal found that McKelvey J. erred in her application of the law to the facts in the Respondent's case. Where the medical evidence was that the Respondent's viral loads were undetectable and as such there was a very high probability he was not infectious, the Court of Appeal entered acquittals, as no significant risk of serious bodily harm existed. Similarly, where there was evidence of a single act of intercourse in which a condom was used, the test was likewise not met and an acquittal was entered. It is from this decision that the Appellant now appeals to this Honourable Court.

7. Dr. Smith provided expert evidence for the Crown in the Respondent's case. The Respondent's medical records indicated that his viral loads were tested in May 2004, August

2004, October 2004, December 2004, January 2005, May 2005, September 2005 and December 2005.

8. Dr. Smith reviewed those records and was able to state that the Respondent's viral load from May 2004 to October 2004 was consistent with "low but possible infectivity".[1]

9. Dr. Smith testified that after six months of antiretroviral treatment the Respondent was very likely not infectious stating:

> In my opinion there is a very high probability that Mr. Mabior was not infectious [that is, he] could not have transmitted HIV throughout this period from 6 months after initiation of antiretroviral treatment in April 2004 ([that is] October 22, 2004 till December 28, 2005 – the last date for which we have a viral load)...[2]

10. Dr. Smith's opinion did not rely on a report released in January 2008 by Switzerland's Federal AIDS Commission. In direct examination by Crown counsel the following exchange took place:

> Q. Now, that particular opinion about the viral load and levels and so on is based on the Swiss study; is that fair? Or the Swiss comment, I guess.
>
> A. The Swiss statement reinforced a general understanding in, in the HIV-treating community that the risk of HIV transmission is low if the viral load is below 1500 copies and very low if it's undetectable. So the Swiss study has just taken it a notch further in saying that it would be negligible or possibly non-existent. The Swiss statement, I should say.
>
> Q. So the Swiss statement is controversial, certainly with respect to the negligible comment.
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> A. Yes
>
> Q. And not necessarily, you say, with respect to the low risk comment.

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[1] Appellant's Record. Vol. I Tab 6 para 114.

[2] *Id*., para 115.

> A. Well, I think I think that low risk is generally accepted in the HIV-treating world. As I say, there's evidence that it's extremely unusual to transmit with a viral load of less than 1500 copies."[3]

11. Dr. Smith further testified in cross-examination to the following:

> Q. And as just a statement of scientific fact, they were able to determine that the lower the lower the viral loads, the less risk there was, correct?
>
> A. Oh, yes, that is well established. The lower the viral load, the less risk there is of sexual transmission and the less risk there is of mother to child transmission. No question about that.[4]

12. Dr. Smith's evidence with respect to condom use was: "There is no scientific justification to require HIV status disclosure if a condom is always used."[5]

Part II: Statement of Issues

13. The Manitoba Court of Appeal was correct in concluding that the Respondent's undetectable viral load or use of condoms meant that the non-disclosure of his HIV-positive status before sexual intercourse did not place the complainants at a significant risk of serious bodily harm.

Part III: Statement of Argument

14. The Respondent respectfully submits that the evidence-based approach taken by the Manitoba Court of Appeal reflects the principles underlying the decision in *Cuerrier* and is consistent with public health policies aimed at reducing the transmission of HIV. The Court's decision in *Mabior* balances the rights of HIV-positive individuals to privacy and autonomy with the need to protect the public from those who conduct themselves in a criminal manner in respect of their HIV-positive status. To strip the HIV-positive community of Canada of any and all rights

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[3] Appellant's Record Vol IVTab 2 pg 60 lines 7-25.

[4] *Id*., pg 76 lines 27-33.

[5] Appellant's Record Vol I Tab 6 para 85.

to privacy with respect to their health status and any autonomy in their sexual lives would serve only to discourage people from being tested and treated for HIV and further endanger both themselves and the public.

15. In *Cuerrier*, Cory J. stated:

> The existence of fraud should not vitiate consent unless there is a significant risk of serious harm. Fraud which leads to consent to a sexual act but does not have that significant risk might ground a civil action. However, it should not provide the foundation for a conviction for sexual assault.[6]

16. Cory J. further stated:

> The extent of the duty to disclose will increase with the risks attendant upon the act of intercourse. To put it in the context of fraud the greater the risk of deprivation the higher the duty of disclosure. 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. The nature and extent of the duty to disclose, if any, will always have to be considered in the context of the particular facts presented.[7]

17. McLachlin J. (as she was then), in her own concurring judgment cautioned against vitiation of consent based upon a failure to disclose:

> … any known risk of harm... [because of the]... potential to criminalize a vast array of sexual conduct. Deceptions, small and sometimes large, have from time immemorial been the by-product of romance and sexual encounters. They often carry the risk of harm to the deceived party. Thus far in the history of civilization, these deceptions, however sad, have been left to the domain of song, verse, and social censure. Now, if the Crown's theory is accepted, they become crimes.[8]

18. McLachlin J. (as she was then) contemplated a return to the common law pre-*Clarence* such that "... deception as to the presence of a sexually transmitted disease giving rise to serious risk or probability of infecting the complainant" could vitiate consent.[9] And later "Again,

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[6] *Cuerrier*, *supra*, para 135, Book of Authorities of Respondent ("BAR" Tab 1).

[7] *Id.*, para 127 (emphasis added).

[8] *Id.*, para 47.

[9] *Id.*, para 70.

protected sex would not be caught; the common law pre-*Clarence* required that there be a high risk or probability of transmitting the disease..."[10]

19. It is respectfully submitted that at the current time, anyone who consents to an unprotected act of vaginal or anal intercourse consents to undertaking some risk of exposure to HIV or other STIs. Reliance on disclosure by another party is not in keeping with personal responsibility for one's own sexual health or sexual autonomy.

20. The test as articulated in *Cuerrier* remains a workable test as it is one that courts have been able to apply to the facts of each case. As stated by Cory J.:

> The phrase "significant risk of serious harm" must be applied to the facts of each case in order to determine if the consent given in the particular circumstances was vitiated.[11]

21. Each case is to be determined on its facts having regard to the expert medical evidence available. In *R. v. Williams* the Court was dealing with an agreed statement of facts conceding that "[a] single act of unprotected vaginal intercourse carries a significant risk of HIV transmission."[12] That is not the evidence in the present case. The evidence is that there was no significant risk of transmission where there was a condom used or when the Respondent's viral load was undetectable.

22. It is incumbent upon the courts to assess risk in each case in light of expert medical evidence. A failure to do so would result in the criminalization of those who seek treatment or use condoms in keeping with advice from their health care providers.

23. As stated by Cory J. in *Cuerrier* :

> Obviously consent can and should in appropriate circumstances, be vitiated. Yet this should not be too readily undertaken. The phrase should be interpreted in light of the gravity of the consequences of a conviction for sexual assault and with

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[10] *Id*., para 73 (emphasis added).

[11] *Id*., para 139.

[12] *R. v. Williams* [2003] 2 S.C.R. 134 para 11, BAR Tab 4.

> the aim of avoiding the trivialization of the offence. It is difficult to draw clear bright lines in defining human relations particularly those of a consenting sexual nature. There must be some flexibility in the application of a test to determine if the consent to sexual acts should be vitiated.[13]

24. To deprive the courts of any flexibility in the application of the test in the manner in which the Appellant urges upsets the careful balance between the protection of the public and the courts' responsibility to protect the privacy rights and sexual autonomy of the HIV-positive community.

25. It is widely accepted that unprotected oral sex presents a very low risk of transmission and therefore no prosecution should arise from such an act complained of. As stated in *R. v. Edwards*, "[t]he Crown acknowledges that unprotected oral sex is conduct at a low risk that would not bring it within s.268(1) of the *Criminal Code* and had only unprotected oral sex taken place, no charges would have been laid."[14]

26. It is also widely accepted that individuals who are HIV-positive but have a very low or undetectable viral load present a very low risk of transmissibility. Dr. Smith had the following exchange with defence counsel at the Respondent's trial;

> Q… that if you meet these three criteria of taking the medicine and the medicine working to making your load levels to the undetectable point and you having no other STIs, then you fit into that category of, I believe… what would you say? That would be very low risk of infectiousness?
>
> A. Certainly very low risk, yes.
>
> Q. So if that person, on an individual basis, if he has… if that person were to have unprotected sex with somebody, from a scientific perspective, there would be a very low risk of transmission, correct?
>
> A. That, that is my strong opinion.[15]

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[13] *Id*., para 139 (emphasis added), BAR Tab 1.

[14] *R. v. Edwards*, 2001 NSSC 80 para 6, BAR Tab 2.

[15] Appellant's record Volume IV. Tab 2 pg. 78 lines 31-34, pg. 79 lines 1-8.

28. The Report of the WHO European Region Technical Consultation, in collaboration with the European AIDS Treatment Group and AIDS Action Europe, on the criminalization of HIV and other sexually transmitted infections Copanhagen 16 October, 2006 stated:

> Available evidence indicates that viral load is the chief predictor of HIV transmission, such that a reduction in viral load through the use of highly-active antiretroviral therapy (HAART) may reduce transmission even in the absence of changes to risk behaviour. Therefore, it was suggested that in the case of an HIV-positive person with a very low or undetectable viral load, the per-act risk of transmission is lowered considerably, such that unprotected sex should not be considered criminally reckless.[16]

29. Steel J. of the Manitoba Court of Appeal in her reasons for decision in this case stated:

> In the decade since *Cuerrier*, a substantial body of scientific evidence has established that successful treatment with antiretroviral therapy can dramatically reduce viral load to levels categorized as "undetectable" by current testing technologies, with a correspondingly measurable impact on lowering the risk of transmission. As indicated earlier, effective antiretroviral treatment is defined as HIV treatment that stably renders the viral load in blood undetectable (less than 40 copies per millilitre) for at least six months.
>
> Since the test in *Cuerrier* is based on a significant risk of serious harm, a trial judge must base his or her decision on what is a significant risk on the evidence adduced in front of him or her, including the medical evidence. The application of the legal test in *Cuerrier* must evolve to account appropriately for the development in the science of HIV treatment.[17]

30. The evidence with respect to viral load in this case was critical. In acquitting the Respondent of three counts of aggravated assault in respect of the complainants S.H., D.C.S., and D.H. Steel J. stated:

> With respect to the last three complainants generally from October 22, 2004, to December 28, 2005, according to Dr. Smith, there was a "high probability" that the accused was not infectious during this period. I do not see how that evidence can support a finding with respect to these complainants that the Crown has proven beyond a reasonable doubt the lack of consent arising from the presence of

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[16] Report of the WHO European Region Technical Consultation, in collaboration with the European AIDS Treatment Group and AIDS Action Europe Copenhagen, 16 October, 2006 pg. 11, BAR Tab 5.

[17] Appellant's Record Vol. 1 Tab 6 - MBCA Decision paras 103 and 104.

> a significant risk of serious bodily harm. "Significant" means something other than an ordinary risk. It means an important, serious, substantial risk. It is the opposite of evidence of a "high probability" of no infectiousness, especially given the statistical percentages referred to earlier.[18]

31. It is submitted, with respect, that it was appropriate for the Manitoba Court of Appeal to use an evidence-based analysis in concluding that the test of significant risk was not met in the Respondent's case.

32. Courts across Canada are well equipped to analyze expert medical evidence on a case by case basis in considering the guilt or innocence of an accused person. They undertake these evidentiary analyses every day in courtrooms in every Province and Territory. In that regard, the preservation of the *Cuerrier* test is required to ensure that, in the words of Steel J., "Criminal sanctions should be reserved for those deliberate, irresponsible or reckless individuals who do not respond to public health directives and who are truly blameworthy."[19]

33. The Manitoba Court of Appeal acquitted the Respondent on one count of aggravated sexual assault on the basis that a condom was used, despite the fact that his viral load was sufficient for "possible" infectivity. In doing so Steel J. stated:

> So, assuming the risk of transmission of the virus in unprotected intercourse is approximately somewhere between 0.05 percent and 0.26 percent, the consistent and careful use of good quality condoms reduces that risk by 80 percent...
>
> Given the above, I agree with the accused and the intervener that consistent and careful use of condoms can reduce the risk of transmission, not to zero, but below the level of significance. The word "significant" is not necessarily equated with quantity, but it does imply importance. See *R. v. J.A.T.* In the case of *J.A.T.*, the medical evidence indicated that the risk of transmission of HIV during three acts of anal intercourse was 0.12 percent. The court held that was <u>not</u> a significant risk so as to ground a charge for aggravated sexual assault.[20]

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[18] *Id.*, para 127.

[19] *Id.*, para 55.

[20] *Id.*, paras 86-87.

34. After a careful analysis of the evidence on the proper use of condoms and the evidence of the complainant K.G. the Court entered an acquittal on the charge of aggravated sexual assault stating:

> Given the evidence of the complainant as to the use of a condom in this particular instance and the medical evidence as to the effect of condom use on the risk of transmission I find that there was no significant risk of serious bodily harm here.[21]

35. Condom use on the risk of transmission of HIV was raised in *Cuerrier*, albeit in obiter by Cory J., who suggested that careful use of condoms might reduce the risk of transmission to below a significant level."[22] In *R. v. Edwards,* Goodfellow J. stated at para 24:

> It follows that I have a reasonable doubt, based not only on Mr. Edward's own evidence but on the totality of the evidence and conclude that the Crown has failed to establish beyond a reasonable doubt that the men engaged in unprotected anal sex. It follows that the Crown has failed to establish that the anal intercourse was not consensual in these circumstances. The Crown has also failed beyond a reasonable doubt to establish conduct "or endangers the life of x. [23]

Based on the medical evidence now available with respect to the effect of condom use on the transmissibility of HIV, judicial notice should be taken that an act of protected anal or vaginal intercourse is not sufficient to vitiate consent. As such, no criminal prosecution based upon protected acts of sexual activity should be taken.

36. The WHO, in the previously-cited paper on the criminalization of HIV and other STIs, stated:

> In particular, where precautions have been taken to lower the risk of transmission even further (e.g., condom use and other safer sex measures), criminalizing the minimal risk that remains would be even less justifiable, as well as counter productively imposing criminal penalties even on those who follow public health advice regarding risk reduction.[24]

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[21] *Id*., para 125.

[22] *Id., supra,* para 129.

[23] *Edwards, supra,* para 24, BAR Tab 2.

[24] *Supra*, pg 9, BAR Tab 5.

37. It is submitted that the Respondent was properly acquitted where condom use was in evidence regarding the single act of intercourse with the complainant K.G. as no significant risk of transmission existed.

38. An abundance of Canadian case law demonstrates that courts across the country have been able to apply the "significant risk of serious bodily harm" test in step with the medical advances in the treatment and understanding of the transmissibility of HIV.

39. It is clear that much has changed since *Cuerrier* was decided in 1998. Dr. Smith testified at the Respondent's trial: "It is now believed, with the advances thus far achieved in HIV care, many if not most persons infected with HIV who receive and are compliant with optimal care will die of a non-AIDS cause."[25]

40. The medical evidence adduced in the Respondent's case is clear; where a condom is used, there is no scientific justification to require HIV status disclosure, where viral loads are undetectable there is a very low risk of transmissibility of the virus.

41. The Respondent respectfully submits that he did not commit fraud capable of vitiating consent to sexual activity in circumstances where there was no significant risk of serious bodily harm to the complainants.

42. The criminal law should punish intentional behaviour that causes harm or carries with it a significant risk of harm. To proceed in the manner the Appellant urges would cast too wide a net over conduct that society at large may not condone, but ought not attract criminal sanctions and the further stigma associated with a criminal conviction.

43. As stated in *J.A.T.* by Fenlon J.:

> ...not every immoral or reprehensible act engages the heavy hand of the criminal law. Aggravated sexual assault is a most serious offence - a person convicted of

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[25] Appellant's Record Vol. I Tab 6 - MBCA Decision, para 63.

> this charge is liable to imprisonment for life, the harshest penalty provided for in law. Only behaviour that puts a complainant at significant risk of serious bodily harm will suffice to turn what would otherwise be a consensual activity into an aggravated sexual assault.[26]

44. It is respectfully submitted that the criminal prosecution of an aggravated sexual assault requires the presence of a significant risk of serious bodily harm. This in keeping with the principles of fundamental justice. It serves to balance the need for protection of the public together with the privacy rights of those who are HIV-positive and follow public health directives.

45. The extremely broad expansion of the criminal law that the Appellant invites the court to make is not in keeping with the principles of fundamental justice because it is disproportionate to the kind of risk required to vitiate consent.

46. The criminalization of all of HIV-positive individuals who engage in sexual activity without disclosing serostatus, regardless of the presence of significant risk of serious harm, would open the floodgates to all manner of disproportionate prosecutions. It will serve only to turn law abiding citizens into criminals regardless of their efforts to protect their partners by complying with public health advice on HIV prevention. Such a result would shock the community and serve only to further stigmatize the virus and anyone living with it.

Part IV: Submissions on Costs

47. There is no application for costs.

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[26] *R. v. J.A.T.*, 2010 BCSC 766, para 89, BAR Tab 3

Part V: Order Sought

48. The Respondent asks that this Honourable Court order that, per *Cuerrier*, (i) disclosure is not required where there is no significant risk of serious bodily harm. In the interests of clarity, the Court should confirm that (ii) oral sex, condom use, or a low or undetectable viral load, reduces the risk of transmission such that disclosure of HIV-positive status is not required prior to engaging in sexual activity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of October 2011

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Amanda Sansregret
Counsel for the Respondent

Part VI: List of Authorities

Cases	**Paragraph No(s).**
1.	
2. *R. v. Cuerrier*, [1998] 2 S.C.R. 371.	5, 14, 15, 16, 17, 18, 20, 23, 35, 39
3. *R. v. Edwards*, 2001 NSSC 80.	25, 35
4. *R. v. J.A.T.*, 2010 BCSC 766	43
5. *R. v. Williams*, [2003] 2 S.C.R. 134.	21

Report

6. Report of the WHO European Region Technical Consultation, in collaboration with the European AIDS Treatment Group and AIDS Action Europe Copenhagen, on the criminalization of HIV and other sexually transmitted infections. Available at www.euro.who.int/aids.

Part VII: Statutory Provisions

None.