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THE PROSECUTION OF NON-DISCLOSURE OF HIV IN CANADA: TIME TO RETHINK *CUERRIER*

Isabel Grant *

The author of this article argues that Canada's current approach to the criminalization of HIV transmission is deeply flawed and cries out for clarification. The article first considers the risk of transmission of HIV under various conditions, as determined by recent scientific studies, and concludes that HIV is not easily transmissible through sexual activity. It next examines several crucial factors that contribute to the significance, or lack of significance, of sexual activity by HIV-positive individuals, concluding that the current law creates a "numbers game" for triers of fact. The article then proceeds to a comparative analysis of other Commonwealth countries, demonstrating that Canada is unique in the scale of its prosecution of HIV transmission, as well its reliance on assault, sexual assault, and murder-related charges. The article concludes by examining several specific problems with the *Cuerrier* test, and proposes future directions which the Supreme Court could consider.

L'auteure de cet article suggère que l'approche canadienne courante de criminalisation de la transmission du VIH est défectueuse et demande d'être. L'article considère d'abord le risque de transmission du VIH sous plusieurs conditions telles que déterminées par des études scientifiques récentes pour conclure que le VIH ne se transmet pas facilement par l'activité sexuelle. Ensuite, l'auteure examine plusieurs facteurs cruciaux qui déterminent l'importance ou l'insignifiance de l'activité sexuelle d'un individu séropositif. Elle en conclut que le droit courant crée un jeu de nombre pour les juges de faits. L'article procède ensuite à une analyse comparative avec d'autres pays du Commonwealth pour démontrer que le Canada en ce qui a trait au nombre de ses poursuites relatives à la transmission du VIH, ainsi que pour sa tendance à fonder de telles actions sur des accusations de voies de fait, d'agression sexuelle et de meurtre. L'article se termine en examinant plusieurs problèmes propres au test de *Cuerrier* et propose certaines directions que la Cour suprême pourrait considérer ultérieurement.

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Introduction

Canada has witnessed one of the highest levels of prosecution for the non-disclosure of HIV status to one's sexual partners of any developed country in the world. We also have the dubious distinction of being the only country to witness first-degree murder convictions in a non-disclosure case where two of the complainants died of AIDS.¹ This paper examines the role of the courts in this process, tracing some of the current problems back to the Supreme Court of Canada's decision in *R v Cuerrier*.² Specifically, this paper considers how *Cuerrier* has been interpreted in subsequent cases in light of the scientific developments in the field of HIV/AIDS and suggests an alternative, more restrained approach to prosecuting these offences.

The Supreme Court of Canada in *Cuerrier* held that not disclosing one's HIV-positive status to a sexual partner could constitute fraud which would vitiate consent to sexual activity, provided there was a *significant risk of serious bodily harm* to the complainant.³ At the time of *Cuerrier*, when highly active antiretroviral treatments (HAART) for HIV were in their infancy, HIV almost inevitably led to AIDS and premature death; therefore, the risk of transmission of HIV was always going to be considered a significant risk of serious harm. Further, because the Court held that this risk "endangered life" even where the virus was not transmitted, a finding of aggravated assault was made out. The way in which the Court used sexual assault to build the elements of aggravated assault in *Cuerrier* opened the door to charges of either aggravated assault or aggravated sexual assault in the vast majority of subsequent cases. Not every jurisdiction takes such an expansive approach to criminalization. As will be discussed below, England and Wales, for example, only criminalizes intentional or reckless transmission of the virus.

More than 10 years after *Cuerrier*, certain dilemmas in prosecuting non-disclosure of one's HIV-positive status cry out for clarification by Canada's highest court. Can juries continue to make decisions about the level of risk on a case-by-case basis without further elaboration by appellate courts as to the significant risk standard? Triers of fact are given no standards to follow, just numbers and probabilities from which they must determine the significance of

¹ See discussion in *R v Aziga*, 2010 ONSC 3683, [2010] OJ No 2763 (QL) (Johnson Aziga was convicted by a jury of "two counts of first degree murder, ten counts of aggravated sexual assault, and one count of attempted aggravated sexual assault" at para 2).

² *R v Cuerrier*, [1998] 2 SCR 371, 127 CCC (3d) 1 [*Cuerrier* cited to SCR].

³ This formulation will be referred to as the "*Cuerrier* test" in this paper.

the risk. Leaving this assessment in the hands of juries inevitably creates uncertainty about how thresholds of risk are applied, resulting in inconsistent outcomes and a lack of clarity in the law.⁴ What are the justifications for criminalizing non-disclosure where the virus is not actually transmitted? Should we be using two of our most serious offences against the person in cases where no bodily harm is caused? If the virus is not transmitted, how much risk is significant enough to justify serious criminal liability? If, for example, the risk of transmission is 1 in 10,000, can we really say that life is endangered?

The *Cuerrier* Court could not have foreseen all the possible factors that play into determining whether a risk of serious bodily harm is significant. Nor did it foresee the extent to which *any* threat of transmitting HIV would come to be seen as significant in future cases. In this paper, I will argue that the way courts have interpreted *Cuerrier* has left us with too broad and too uncertain a test for criminalization of non-disclosure. It will be argued that it is time for a new approach to non-disclosure prosecutions, an approach that takes into account the rapid scientific developments that have changed our understanding of, and ability to treat, HIV, and that distinguishes between cases in which the virus is transmitted and those in which it is not. It will be argued that the record of HIV prosecutions in Canada is a disturbing one, and that it is essential that we find a way to prosecute only the most flagrant and serious cases that involve an ongoing pattern of non-disclosure. Two recent appellate decisions have signalled a more cautious approach to criminalization, although both explicitly urged reconsideration by the Supreme Court of Canada.⁵

Part I of this paper sets out a brief summary of the literature on rates of sexual transmission of HIV to demonstrate both that HIV is not easily transmissible through sex and that we have the means to reduce these rates even further. Part II then examines recent developments in the case law to demonstrate how lower courts have interpreted the significant risk of serious bodily harm test. I examine each of the factors with which judges and juries have been confronted in assessing the degree of risk in a particular case and discuss the difficulties inherent in applying a legal standard to statistical probabilities. Part III provides a brief review of three other Commonwealth jurisdictions,

⁴ Even within a province there can be inconsistency: *R v Wright*, 2009 BCCA 514, 287 BCAC 1, 256 CCC (3d) 254 [*Wright*]; *R v JAT*, 2010 BCSC 766 [*JAT*]. There is also inconsistency between provinces, compare *Wright*; *R v DC*, 2010 QCCA 2289 [*DC (CA)*].

⁵ *R v Mabior*, 2010 MBCA 93, 258 ManR (2d) 166, [2011] 2 WWR 211, leave to appeal to SCC granted, 33976 (5 May 2011) [*Mabior (CA)*]; *DC (CA)*, *ibid*, leave to appeal to the Supreme Court of Canada has been granted, 34094 (26 August 2011).

demonstrating that the expansive Canadian approach is not the only option for dealing with non-disclosure. From this analysis, I move on to argue in Part IV that the significant risk of serious bodily harm test has not served us well in Canada, in part because lower courts have ignored the caution expressed by the Supreme Court of Canada in *Cuerrier*, and in part because the test fails to distinguish between levels of culpability and levels of harm. The result has been the over-criminalization of persons with HIV who have not disclosed their HIV-positive status to their sexual partners, a development that contributes to the demonization of persons with HIV. I have elsewhere reviewed the arguments for and against criminalization.⁶ In this paper, I accept that some level of criminalization is virtually inevitable in Canada. However, it is not too late to re-assess Canada's aggressive approach and to rethink the *Cuerrier* test.⁷ Part V argues that aggravated assault and aggravated sexual assault should be reserved for the most serious cases, in which transmission of the virus takes place and there is a pattern of non-disclosure demonstrating a reckless disregard for the consequences to others. Where prosecution is necessary in cases involving no transmission of the virus, less serious offences—such as common nuisance or (sexual) assault—are more appropriate than a serious consequence crime. Prosecutions should not be undertaken where a condom was used consistently, or where there is clear evidence of an undetectable viral load.

While *Cuerrier* applies to any sexually transmitted infection, there are only a handful of Canadian cases involving charges outside the context of HIV.⁸

⁶ Isabel Grant, "The Boundaries of the Criminal Law: The Criminalization of the Non-disclosure of HIV" (2008) 31 Dal LJ 123 at 172 [Grant, "The Boundaries of the Criminal Law"].

⁷ Indeed, leave to appeal has been granted in two recent cases: *Mabior (CA)*, *supra* note 5 and *DC (CA)*, *supra* note 4.

⁸ See *R v Jones*, (2002) NBQB 340, [2002] NBJ No 375 (QL) [*Jones*] (where the accused was acquitted because the risk of transmission of hepatitis C was too low); "Man with Hepatitis B Jailed for Sexual Assault" *CBC News* (3 March 2010) online: CBC News <www.cbc.ca/news/canada/prince-edward-island/story/2010/03/03/pei-hepatitis-women-sexual-assault.html>; Megan Gillis, "Soldier Banned from Sex Unless He Warns of Herpes" *Ottawa Sun* (18 February 2010) online: Ottawa Sun <www.ottawasun.com/news/ottawa/2010/02/18/12937306.html> (accused charged with six counts of aggravated sexual assault and six counts of criminal negligence causing bodily harm); "Redoubling Global Efforts to Support HIV/AIDS and Human Rights" (2010) online: HIV/AIDS Policy and Law Review <www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1775> (an Ontario case where a man was

The criminalization of nondisclosure is really about HIV/AIDS, a condition that has been stigmatized, and its victims marginalized, since its emergence in North America just decades ago. Throughout the legal analysis, we must ask ourselves why our criminal justice system has taken such an extraordinarily harsh approach in this context, but not with illnesses that are much more easily transmitted.

I. The Risk of Sexual Transmission of HIV

Before examining the factors that contribute to significant risk, it is useful to establish the general risk of sexual transmission of HIV. Contrary to public opinion, HIV is not generally an easily transmissible virus through sexual activity. The following estimates on the risk of sexual transmission are approximate and do not take into account factors that alter the risk in individual cases. Furthermore, the results from different studies vary considerably, so they should not be taken as being definitive. Estimated risk and the methodology used to measure it are topics of ongoing debate within the field.⁹

In a systematic review and meta-analysis, one study found that for unprotected anal intercourse, where the insertive partner is HIV-positive, there is an average 1 in 71 per-act probability that the receptive partner will contract HIV.¹⁰ Few studies have considered the per-act risk of transmission for unprotected anal intercourse where the receptive partner is HIV-positive. One study found the per-act risk to be as low as 1 in 1,666,¹¹ but that study was excluded from the meta-analysis due to methodological concerns.¹² For vaginal intercourse, the average risk in high-income countries has been identified by a meta-analysis as 1 in 1,250 per act that a man will transmit the virus to his female

convicted of assault and sentenced to 12 months in prison for not disclosing that he carried the herpes virus).

⁹ Marie-Claude Boily et al, "Heterosexual Risk of HIV-1 Infection per Sexual Act: Systematic Review and Meta-analysis of Observational Studies" (2009) 9:2 *The Lancet Infectious Diseases* 118 at 126-127.

¹⁰ Rebecca F Baggaley, Richard G White & Marie-Claude Boily, "HIV Transmission Risk Through Anal Intercourse: Systematic Review, Meta-Analysis and Implications for HIV Prevention" (2010) 39 *International Journal of Epidemiology* 1048 at 1048, 1051.

¹¹ Eric Vittinghoff et al, "Per-Contact Risk of Human Immunodeficiency Virus Transmission Between Male Sexual Partners" (1999) 150:3 *American Journal of Epidemiology* 306.

¹² Baggaley, White & Boily, *supra* note 10 at 1050.

partner, and 1 in 2,500 that a female partner will transmit the virus to her male partner.¹³

It has been estimated that the use of condoms in sexual activity further reduces the above risks by an average of 80%.¹⁴ Since this figure includes improper and inconsistent use, studies examining the risk associated with protected intercourse have found that the risk is even lower. According to the expert in *R v JAT*, the risk during anal intercourse where the insertive partner is HIV-positive drops to 1 in 1,666 when a condom is used.¹⁵ Other studies have found that with condom use, the risk of transmission in vaginal sex decreases to 1 in 10,000 for the woman¹⁶ and 1 in 20,000 for the man.¹⁷

Furthermore, there is consensus among experts that the lower the viral load, the lower the risk of transmission. An undetectable viral load (identified as below 40 copies per millilitre of blood by many HIV/AIDS treatment guidelines) has been estimated to reduce the risk of transmission to, at most, 1 in 8,620 for male-to-female vaginal transmission.¹⁸ Where a viral load is suppressed as a result of HAART, the risk of transmission has been found to be reduced by 92%.¹⁹ The risk that accompanies an undetectable viral load is so low that, in 2008, leading experts in Switzerland stated that the virus is essentially impossible to transmit (absent other risk factors).²⁰ The combined effect

¹³ Boily, *supra* note 9 at 118.

¹⁴ Susan C Weller & Karen Davis-Beatty, "Condom Effectiveness in Reducing Heterosexual HIV Transmission" (2002) 1 Cochrane Database of Systematic Reviews at 2.

¹⁵ *JAT*, *supra* note 4 at para 29.

¹⁶ Steven D Pinkerton & Paul R Abramson, "Effectiveness of Condoms in Preventing HIV Transmission" (1997) 44:9 Social Science & Medicine 1303 at 1310.

¹⁷ Carol L Galletlyn & Steven D Pinkerton, "Toward Rational Criminal HIV Exposure Laws" (2004) 32:2 Journal of Law, Medicine & Ethics 327 at 328.

¹⁸ David P Wilson et al, "Relation Between HIV Viral Load and Infectiousness: A Model-based Analysis" (2008) 372:9635 The Lancet 314 at 315, table 1 (this represents a worst-case estimate, and there is a 95% chance that the true likelihood of transmission is even less likely than 1 in 8,620).

¹⁹ Deborah Donnell et al, "Heterosexual HIV-1 Transmission After Initiation of Antiretroviral Therapy: a Prospective Cohort Analysis" (2010) 375:9731 The Lancet 2092.

²⁰ Pietro Vernazza et al, "Les personnes séropositives ne souffrant d'aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle" (2008) 89:5 Bulletin des médecins Suisses 165 online: Aide Suisse contre le SIDA <www.aids.ch/f/hivpositiv/pdf/SAZ_f.pdf> (this finding was

of the above-cited research is that if the HIV-positive person has an undetectable viral load and a condom is used, the risk of transmission is infinitesimally low.

The risk of sexual transmission is also affected by a number of other variables including whether the infected partner has other sexually transmitted diseases and whether a man, engaged as the insertive sexual partner, is circumcised.²¹

II. The Nature of Significant Risk

Since *Cuerrier*, courts have been faced with the need to assess the nature of the risk of HIV transmission in the particular activity in question. Factors not contemplated in *Cuerrier*, such as viral load and the type of sexual activity, have come to play a significant part in such prosecutions. Yet different expert witnesses rely on different numbers, as our knowledge of sexual transmission risks is far from precise. The following section examines some of the factors that judges and juries consider in their calculations of whether the accused created a significant risk of serious bodily harm to the complainant.

A. Condoms

The one factor that decreases the risk of harm that was anticipated in *Cuerrier* was condom use. Justice Cory, writing for the majority, made a fairly strong statement—albeit in *obiter*—suggesting that careful condom use might negate fraud:

To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. *Yet the careful use of condoms might be found to so reduce the risk*

based on monogamous relationships, adherence to HAART, and the absence of other sexually transmitted infections; this statement caused significant controversy, largely due to the fear that it would encourage risk-taking behaviour). Testimony based on this statement caused a Geneva court to find that an accused man posed no risk: Cour de la justice (chambre pénal), Geneva, 23 February 2009, [2009] ACJP 60 (an English translation of the judgment is available online: AIDSLEX <www.aidslex.org/site_documents/CR-0066E.pdf>).

²¹ Robert C Bailey et al, “Male Circumcision for HIV Prevention in Young Men in Kisumu, Kenya: A Randomised Controlled Trial” (2007) 369:9562 *The Lancet* 643; Helen A Weiss et al, “Male Circumcision and Risk of HIV Infection in Sub-Saharan Africa: A Systematic Review and Meta-Analysis” (2000) 14:15 *AIDS* 2361.

*of harm that it could no longer be considered significant so that there might not be either deprivation or a risk of deprivation.*²²

Justice McLachlin (as she then was) explicitly stated in her concurring minority judgment that her test for fraud negating consent to sex would not apply to protected sex because there must be a high risk or probability of transmitting the disease to warrant criminalization.²³ The Court in *Cuerrier* was conscious of the dangers of over-criminalization and stressed the gravity of the consequences of a conviction and the importance of not trivializing the offence.²⁴

Some courts have interpreted *Cuerrier* to mean that only unprotected sex is criminalized. In *R v Agnatuk-Mercier*, both counsel agreed that the Crown had to prove that the alleged intercourse was unprotected.²⁵ In *R v Edwards*, the trial judge made an even stronger statement in favour of only criminalizing unprotected sex:

It is not for a trial judge to expand what constitutes a criminal act. Such a determination is for the Legislature or the Supreme Court of Canada in its interpretation of Legislation. The gay community and its leaders vigorously urge the practice of safe sex, not abstinence. If the failure to disclose a contagious disease before engaging in 'protected' sex is to be a criminal offence, it is for the Legislature to so define such activity.²⁶

In the highly-publicized case of football player Trevis Smith, the trial judge took the same approach: "I have to go on and satisfy myself beyond a reasonable doubt that if he did have sex that that sex was unprotected sex."²⁷ In *R c DC*, the trial judge determined that the crucial question for the vitiation of consent was whether the intercourse was protected or unprotected.²⁸

²² *Supra* note 2 at para 129 [emphasis added].

²³ In fact, transmission is never "probable" in the sense of more likely than not from a few acts of unprotected intercourse. Professor Ferguson interprets *Cuerrier* as holding that disclosure is not required in the context of protected sex: Gerry Ferguson, "Failure to Disclose HIV-Positive Status and Other Unresolved Issues in *Williams*" (2004) 20:1 CR (6th) 42 at 48.

²⁴ *Supra* note 2 at paras 132, 137.

²⁵ [2001] OJ No 4729 (QL).

²⁶ 2001 NSSC 80 at para 25, 194 NSR (2d) 107, 50 WBC (2d) 255 [*Edwards*].

²⁷ *R v Smith*, [2007] SJ No 116 (QL) (SKQB) at para 59, aff'd on other grounds 2008 SKCA 61, 310 Sask R 230 [*Smith*].

²⁸ 2008 QCCQ 629, JE 2008-515 [*DC* (CQ)].

Some courts have gone out of their way to narrow the scope of Justice Cory's statement in *Cuerrier*. In an appeal from a committal to stand trial, *R v JT*, the British Columbia Court of Appeal stated that *Cuerrier* had not established that only unprotected sex gives rise to the duty to disclose.²⁹ Focusing on Justice Cory's use of the word "might" in the paragraph quoted above, Justice Donald stated, "I think the language acknowledges that it is a question of evidence whether in any given prosecution the risk is significant," implying that conviction could be possible even if a condom was used.³⁰ In *R v Wright*, the British Columbia Court of Appeal cited *JT* in finding that it is a question of fact whether condom use reduces risk below the significant level required to vitiate consent.³¹ In a puzzling variation, an Ontario court acquitted an accused of aggravated sexual assault when the Crown was unable to prove that the intercourse was unprotected, but the accused was instead convicted of the included offence of sexual assault.³² The judge held that the lack of disclosure vitiated consent, without ever considering whether there was a significant risk of serious bodily harm, as required by the *Cuerrier* test.³³

Other courts have simply ignored the question of condom use. In *R v Mekonnen*,³⁴ the Court disregarded the fact that the three acts of vaginal intercourse between the accused and the complainant all involved the use of a condom. The accused and the complainant met in a hotel on three occasions and engaged in three acts of *protected* intercourse and one instance of fellatio that may or may not have been protected. The judge gave no weight to the fact that a condom was used during the three acts of vaginal intercourse. According to the judge, counsel agreed "that if I find that Mr. Mekonnen had sexual relations with [the complainant] without telling her that he was HIV positive then the case is made out."³⁵ The accused was convicted of aggravated sexual assault for three acts of protected intercourse where the virus was not transmitted. In *R c Parenteau*, although there was conflicting evidence about condom

²⁹ 2008 BCCA 463, 288 BCAC 1, 256 CCC (3d) 246 [*JT*].

³⁰ *Ibid* at para 19.

³¹ *Wright*, *supra* note 4 at para 39.

³² *R v Felix*, 2010 ONCJ 322, [2010] OJ No 3371 (QL).

³³ *Ibid* at paras 71-72.

³⁴ 2009 ONCJ 643, [2009] OJ No 5766 (QL) [*Mekonnen*].

³⁵ *Ibid* at para 40.

use, the judge stated that the sole issue was whether or not the accused had disclosed his status before the first occasion of intercourse.³⁶

The trial and appeal decisions in *R v Mabior*,³⁷ a complicated case involving multiple complainants, several of whom were teenagers, highlight the different approaches taken by courts regarding the question of condom use. The trial judge held that condom use alone was insufficient to reduce the risk to a level that was not significant. *Mabior* was complicated by the fact that the accused did not appear to use condoms consistently (he had a sexually transmitted infection) or carefully (there was evidence of condoms falling off and sex while both partners were highly intoxicated). Relying on expert evidence that condoms are only 80% reliable and only reduce HIV transmission by 80%, the trial judge found that consent is still vitiated if a condom is used by an HIV-positive person whose viral load is detectable: only the combination of an undetectable viral load and the use of a condom preclude liability. I have suggested elsewhere that this may have resulted from the trial judge's misapprehension about the 80% figure.³⁸ While condoms may be only 80% reliable, it does not follow that there is a 20% risk of transmission when a condom is used. As was discussed above, the risk of transmission is extremely low for protected sex and almost non-existent when a condom is combined with an undetectable viral load. It is noteworthy that none of the complainants in *Mabior* has tested positive for HIV.

The Manitoba Court of Appeal took a more restrained approach, recognizing that "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."³⁹ The Court of Appeal held that the trial judge was wrong to hold that any risk of harm is significant and erred in failing to identify the baseline risk before assessing an 80% reduction of that risk. The risk of transmission the trial judge should have considered was not 20%, but 20% of "an already small baseline figure."⁴⁰ Thus, the risk of protected sex

³⁶ 2010 ONSC 1500 at para 6, [2010] OJ No 1795 (QL) (the accused was ultimately acquitted because the trial judge found neither the accused nor the complainant to be a credible witness).

³⁷ 2008 MBQB 201, 230 ManR (2d) 184, 78 WCB (2d) 380 [*Mabior* (QB)].

³⁸ Isabel Grant, "Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions" (2009) 54:2 McGill LJ 389 at 398 [Grant, "Rethinking Risk"].

³⁹ *Mabior* (CA), *supra* note 5 at para 55.

⁴⁰ *Ibid* at para 88.

was between 1 in 2,000 and 1 in 10,000.⁴¹ The Manitoba Court of Appeal found that “consistent and careful use of condoms”⁴² or “reasonably proper condom use”⁴³ reduces the risk below significance. The Court of Appeal set out 10 criteria for assessing the “careful use of condoms,” recognizing that all 10 criteria constitute an “ideal” and are unlikely to be met in any given case.⁴⁴ Furthermore, the Court of Appeal clarified that if a condom breaks during sexual activity, the accused must disclose his or her status immediately so that the HIV-negative partner can take prophylactic measures to decrease the likelihood of becoming HIV-positive.⁴⁵ Applying this test to the facts, the Court of Appeal considered the nature of the condom use with each complainant (finding “a fair amount of recklessness” on the part of the accused)⁴⁶ to determine its impact on the significance of the risk for each charge. In developing this “careful use of condoms test,” the Court of Appeal attempted to give substance to Justice Cory’s *obiter* comment that condom use might reduce the risk of harm below significance. The Manitoba Court of Appeal began the process of determining the standard that must be met for condom use to reduce the risk below the significant level. The Court of Appeal recognized, however, that it will be difficult for the Crown to prove that condom use on a particular occasion was not careful enough:

It is the Crown’s obligation to prove its case beyond a reasonable doubt. To achieve the goal of careful and consistent condom use, as described by Dr. Smith, involves a complex series of steps. The inquiry as to whether there was careful and consistent use of a condom in a particular instance of sexual activity is likely to be an unrealistic endeavour given that the sexual acts at issue will often have occurred some time ago, in conjunction with the use of drugs and/or alcohol, and the participants may be young and unaware of how to properly use a condom. As an example, where disclosure of the accused HIV-positive status occurs sometime after the sex act, the actual condom is unlikely to

⁴¹ *Ibid* at para 89.

⁴² *Ibid* at para 87.

⁴³ *Ibid* at para 92.

⁴⁴ *Ibid* at para 91.

⁴⁵ It should be noted that this did not prevent criminal liability in a 2009 Ontario case. The accused disclosed her status immediately after the condom ripped on the second occasion of protected intercourse. She pled guilty to two counts of sexual assault. See “Toronto Woman gets House Arrest for Failing to Disclose HIV Status to Man” *Canadian Press* (20 November 2009).

⁴⁶ *Mabior* (CA), *supra* note 5 at para 96.

be available for examination and testing, so how is the Crown to prove that it did not meet the standards prescribed by Dr. Smith, particularly where it was the accused who provided and applied the condom?⁴⁷

No court in Canada has yet been faced with a case in which a condom was used but the virus was nonetheless transmitted. In such a rare case, it would be necessary for the trier of fact to examine the nature of condom use on the facts to determine if it was reasonably careful. In cases in which a condom was used and no transmission took place, it is likely that courts will assume that condom use was reasonable, in the absence of evidence suggesting otherwise.

Other jurisdictions have taken a clearer position on condom use. In California, for example, the HIV-specific offence explicitly only criminalizes unprotected sex.⁴⁸ In the New Zealand case *Police v Dalley*, the accused was charged with criminal nuisance for having protected sex without disclosure.⁴⁹ The District Court of Wellington held that the use of a condom constituted “reasonable precautions and care” and thus the accused was acquitted.⁵⁰ The reasoning in that case reflects the New Zealand public health strategy focus on condom use rather than disclosure.

I have argued elsewhere that non-disclosure prosecutions should not be pursued in the context of protected sex,⁵¹ in part because of the importance of the public health message that encourages condom use for everyone, and not just by the HIV-positive person. Focusing on condom use is a more effective public health response than relying on disclosure, as disclosure itself offers no protection. The assumption behind disclosure is that if the accused discloses his or her status, the parties will not engage in unprotected sex.⁵² In this scenario, disclosure is a proxy for safer sex or abstinence. However, a large number

⁴⁷ *Ibid* at para 151.

⁴⁸ *California Health and Safety Code* § 120291.

⁴⁹ *Police v Dalley*, [2005] NZAR 682 (DC) [*Dalley*].

⁵⁰ *Ibid* at para 39.

⁵¹ Grant, “Rethinking Risk”, *supra* note 38 at 400; Grant, “The Boundaries of the Criminal Law”, *supra* note 6.

⁵² Catherine Dodds et al, “A Telling Dilemma: HIV Disclosure Between Male (Homo)sexual Partners” (London: London School of Hygiene and Tropical Medicine, 2004) online: Sigma Research <www.sigmaresearch.org.uk/files/report2004e.pdf> (the authors conclude that it is not clear how disclosure impacts on subsequent sexual behaviour when dealing with men having sex with men).

of transmissions take place before the HIV-positive partner knows that he or she is infected, and one's level of infectivity is high during the initial period after infection.⁵³ Thus, reliance on disclosure is not an effective means of curbing transmission. Such reliance assumes that the HIV-positive partner has accurate information about his or her HIV status, which is often not the case.⁵⁴ Placing a burden on everyone, and not just the HIV-positive person, to reduce the risk of transmission (through, for example, insisting on condom use), will more effectively decrease the risk of transmission of HIV.⁵⁵ The legal system should encourage this public health message rather than undermine it.

B. Viral Load

Since the trial decision in *Mabior*, the courts have increasingly considered viral load in assessing the degree of risk presented by an accused. I have argued elsewhere that viral load should not be taken into account until our understanding of how it affects rates of transmission has developed.⁵⁶ However, it is clear that courts must now confront this issue, both because the degree of risk is being assessed on a per-case basis, and because we are seeing an increasing number of cases where the accused's viral load was undetectable. Our understanding of viral load has evolved; if courts do not consider viral load, they will develop a distorted perception of the risk posed by HIV-positive individuals. Nevertheless, a focus on viral load is not unproblematic because of

⁵³ Bluma G Brenner et al, "High Rates of Forward Transmission Events After Acute/Early HIV-1 Infection" (2007) 195:7 *Journal of Infectious Diseases* 951; Gary Marks, Nicole Crepaz & Robert S Janssen, "Estimating Sexual Transmission of HIV from Persons Aware and Unaware That They are Infected with the Virus in the USA" (2006) 20:10 *AIDS* 1447.

⁵⁴ See Donald C Ainslie, "AIDS and Sex: Is Warning a Moral Obligation?" (2002) 10:1 *Health Care Analysis* 49. In Canada it is estimated that 26% of people living with HIV do not know their status; this number is estimated as high as 35% for heterosexual persons with HIV (Public Health Agency of Canada, "Summary: Estimates of HIV Prevalence and Incidence in Canada, 2008" (Ottawa: PHAC, 2009) online: PHAC <www.phac-aspc.gc.ca/aids-sida/publication/survreport/estimat08-eng.php>).

⁵⁵ I recognize, of course, that not everyone is in a position to insist on condom use. For example, women in abusive relationships, sex trade workers, or people in relationships of unequal power may well be unable to safely insist on condom use.

⁵⁶ Grant, "Rethinking Risk" *supra* note 38.

disparate access to the necessary medical evidence.⁵⁷ Not every HIV-positive person has access to ongoing medical care or the ability to keep regular appointments. It is also important to note that not every HIV-positive person has access to, or is able to tolerate, antiretroviral treatment.

Effective combination antiretroviral treatment, available since the mid-1990s, has improved to such a degree that it is now possible to reduce the level of the virus in a person's blood to undetectable levels. This does not mean that the virus is not present, but rather that the levels are so low that current tests cannot detect it in the blood.⁵⁸ Our understanding of what this means for HIV transmission has also evolved since HAART first became available. As outlined above, scientists now believe that a low or undetectable viral load makes transmission of HIV from an infected person to his or her sexual partner extremely unlikely. We also now know that HIV is most transmissible when the viral load is high. Some studies have found that as many as half of new HIV transmissions take place in the acute stage of the infection when the viral load is as high as 1.26 million copies per millilitre of blood,⁵⁹ before the individual knows that he or she is HIV-positive.⁶⁰ HAART medications have also been found to increase life expectancy of those infected with HIV. One study estimated that a person can expect to live into their early 60s after diagnosis at the age of 20 if they begin taking combination therapy immediately.⁶¹ Other research has rated HAART's effects higher still; under some conditions life expectancy was found to be almost normal.⁶² Expert evidence in *Mabior* stated

⁵⁷ See e.g. *Wright*, *supra* note 4 at para 33, in which there was no evidence regarding the accused's viral load at the time of the sexual activity. The court in *Wright* essentially put the burden on the accused to establish a low viral load.

⁵⁸ The virus may still be detectable in other bodily fluids, such as semen.

⁵⁹ Maria J Wawer et al, "Rates of HIV-1 Transmission per Coital Act, by Stage of HIV-1 Infection, in Rakai, Uganda" (2005) 191:9 *Journal of Infectious Diseases* 1403 at 1408.

⁶⁰ Marks, Crepez & Janssen, *supra* note 53; Brenner et al, *supra* note 53 (Marks and his colleagues found that, adjusting for population size differences in the groups, the rate of transmission of HIV was 3.5 times higher in the group that was unaware of their HIV status than in the group that knew they had HIV).

⁶¹ Antiretroviral Therapy Cohort Collaboration, "Life Expectancy of Individuals on Combination Antiretroviral Therapy in High-Income Countries: A Collaborative Analysis of 14 Cohort Studies" (2008) 372:9635 *The Lancet* 293 at 297.

⁶² Charlotte Lewden et al, "HIV-Infected Adults With a CD4 Cell Count Greater Than 500 Cells/mm³ on Long-Term Combination Antiretroviral Therapy Reach Same Mortality Rates as the General Population" (2007) 46:1 *Journal of Acquired Immune Deficiency Syndrome* 72.

that “many if not most persons infected with HIV who receive and are compliant with optimal care will die of a non-AIDS cause.”⁶³ These numbers are just estimates, however, as the medications have not been available long enough to evaluate their long-term impact with certainty.

The first case to deal with viral load was *R v McKenzie*.⁶⁴ The judge dismissed viral load as a “fragile defense,” pointing out that “[a]ll it reveals is the state of the blood tested on the day in question, not two weeks earlier, not two weeks later ... To rely on slips of paper from a lab seems fraught with hazard.”⁶⁵ The trial judge in *Mabior* expressed the same concern and required condom use *combined* with an undetectable viral load to reduce the risk below significant levels.⁶⁶

In *Wright*, the accused appealed his conviction on two counts of aggravated sexual assault.⁶⁷ One of his arguments was that there was no evidence that he had a significant viral load at the time of the offence, and thus that there was insufficient evidence that he presented a significant risk of serious harm. The British Columbia Court of Appeal rejected this argument, holding that the jury was entitled to rely on the average rate of risk presented by the expert testimony, despite some evidence that the accused was taking antiretroviral medications at the time. The Court of Appeal did acknowledge the relevance of viral load, stating “this does not mean viral loads are irrelevant to the determination of criminal liability. If the viral load of the accused at the time of the sexual relations is known or can be estimated, then it will be very relevant to determining whether there was a significant risk of serious bodily harm.”⁶⁸

The Court of Appeal further held that it was up to the accused to introduce evidence about his own viral load. Denying that it was imposing a burden of proof on the accused, the Court stated that it is “a tactical decision for the accused to make on the basis of his assessment of the Crown’s case.”⁶⁹ Thus, the Crown need not lead evidence of viral load in each case to prove that the risk

⁶³ *Mabior* (CA), *supra* note 5 at para 63.

⁶⁴ *R v McKenzie*, (9 March 2006), Windsor (Ont Sup Ct Just), Donohue J cited in Isabel Grant, “Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions”, Case Comment, (2009) 54:2 McGill LJ 389 at 402.

⁶⁵ *Ibid.*

⁶⁶ *Mabior* (QB), *supra* note 37.

⁶⁷ *Wright*, *supra* note 4.

⁶⁸ *Ibid* at para 32.

⁶⁹ *Ibid* at para 33. Note that the Manitoba Court of Appeal expressly agrees with this passage: *Mabior* (CA), *supra* note 5 at para 105.

is significant, but an accused may meet expert evidence about risks of transmission with specific information about his or her own viral load, which will make the risk assessment more precise and individualized to the accused. The result is that an undetectable viral load will constitute a defence if established by the accused, but the starting point, in the absence of evidence, is that the accused has a detectable viral load. There is no discussion in *Wright* of the standard of proof that must be met by the accused in this regard, or whether it is just a practical evidentiary burden. The judgment is probably a reaction to the heavy burden the Crown would face if required to prove a detectable viral load at the time of the alleged non-disclosure, thus rendering prosecution difficult where no evidence on viral load is available. Yet, if the risk of transmission in many cases is minimal, given the increasing number of HIV-positive individuals on HAART,⁷⁰ perhaps we need to re-think our assessments of risk. This also raises questions about what the starting point should be where there is no evidence of viral load: should we assume that an individual had a detectable viral load? Is evidence of the use of antiretroviral medication sufficient to negate this assumption?

The Manitoba Court of Appeal's decision in *Mabior* echoed the trial judge's concern that viral load reflects "a moment in time," and highlighted the fragility of evidence of viral load:

If a person were to miss a dose of this medication, at some point, after 72 hours, an individual could become resistant to the medication, although it is uncertain how long this might take since it depends on an individual's metabolism. So, it is difficult to know one's viral load at a particular point in time and to ensure it remains undetectable. Common infections, STDs 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.⁷¹

Nevertheless, the Court of Appeal acknowledged that, given its impact on transmission rates, viral load cannot be ignored.⁷² The Court of Appeal went on to look at the evidence regarding the accused's viral load for each of the counts on the indictment to determine whether the risk was significant enough

⁷⁰ See e.g. Julio SG Montaner, "Association of Highly Active Antiretroviral Therapy Coverage, Population Viral Load, and Yearly New HIV Diagnoses in British Columbia, Canada: A Population-based Study" (2010) 376:9740 *The Lancet* 532.

⁷¹ *Mabior* (CA), *supra* note 5 at para 112.

⁷² *Ibid* at para 102.

to warrant criminal liability. The Court of Appeal accepted expert evidence that a spike in viral load between tests was unlikely given the accused's apparent compliance with antiretroviral therapy.

In *DC*, two medical witnesses testified at trial that the risk of a male contracting HIV from his HIV-positive female partner during vaginal intercourse is about 1 in 1,000, and, if the female's viral load is undetectable (as it was in this case), 1 in 10,000.⁷³ The judge nonetheless convicted the accused of aggravated assault and sexual assault because he found that the risk was sufficient for endangerment of life, even though the activity in this case was statistically very low-risk: on average, the virus would be transmitted only once in every 10,000 acts of intercourse. The trial judge did not apply the significant risk of serious bodily harm test to the consent analysis as required by *Cuerrier*. The Québec Court of Appeal overturned the conviction, finding that the undetectable viral load and low risk of transmission did not reach the threshold of significant risk of serious harm and, thus, that non-disclosure did not vitiate consent:

À la réflexion, j'estime qu'en l'espèce, le risque de transmission du VIH était si faible qu'il ne constituait pas « un risque important de préjudice grave » pour le plaignant et qu'en conséquence, le fait pour l'appelante de ne pas avoir informé ce dernier de son état de santé ne peut pas avoir vicié son consentement à une relation sexuelle non protégée.⁷⁴

The *Cuerrier* test forces courts and juries to weigh in on the developing science of viral load and its impact on transmission rates. It also presents a dilemma: accused persons who have access to antiretroviral medication and viral load test results will be more likely to get an acquittal than those who do not.⁷⁵ This also raises difficult questions about culpability. Is the degree of risk strictly a matter of whether the *actus reus* has been established, or is the accused's knowledge of his or her viral load and the impact that viral load has on the risk of transmission also relevant? If an accused with an undetectable viral load had no idea that it was relevant to transmission, he or she could nonetheless be acquitted because the *actus reus*—a significant risk of serious bodily harm—would

⁷³ *DC (CQ)*, *supra* note 28 at para 179 (where the female's viral load is undetectable, and a condom is used, the risk was reported to be 1 in 50,000).

⁷⁴ *DC (CA)* *supra* note 4 at para 100.

⁷⁵ In *Wright*, *supra* note 4 at para 33, for example, in the absence of clear evidence as to viral load the accused's viral load was presumed to be detectable, despite some evidence that the accused was taking antiretroviral medication. The accused had developed serious side effects consistent with that medication.

not be present. A more difficult case arises if the accused wrongly believed that his or her viral load rendered them non-infectious. The non-disclosure cases to date have said very little about the fault component of these very serious crimes and how fault relates to the significant risk of serious harm requirement.⁷⁶ The only explicit fault requirement discussed in these cases has been knowledge of one's HIV-positive status, and in *Williams*, the Supreme Court suggested that being "aware of the risk" that one is HIV-positive is sufficient to establish recklessness.⁷⁷ Little attention has been paid to whether the bodily harm was reasonably foreseeable in the circumstances.⁷⁸ It is certainly arguable that such harm is not foreseeable where a condom is used carefully, where the accused has an undetectable viral load, and, especially, where both are true.

C. Nature of Sexual Activity

We are now aware that different sexual activities, all other factors being equal, have very different risk levels. Oral sex, for example, is considered low risk. In *Edwards*, the Crown acknowledged that charges would not have been laid for oral sex alone.⁷⁹ Nevertheless, in *R v Aziga*, the accused was convicted on one count of aggravated sexual assault on the basis of unprotected oral sex alone where the virus was allegedly transmitted.⁸⁰

Unprotected anal intercourse is commonly acknowledged to be a high risk activity. However, the risk for an HIV-negative *receptive* partner is significant-

⁷⁶ The trial judge in *Mabior* considered the accused's mental state with respect to his viral load: "even if the accused had been told that his viral load was under control, that does not translate to knowledge that his ability to transmit the disease was low. ...The accused did not know that he could not transmit during this timeframe" (*supra* note 37 at para 133). It is unclear from the judgment what impact this had on the judge's finding that consent had been vitiated, and it was not discussed by the Court of Appeal.

⁷⁷ In *R v Williams*, 2003 SCC 4 at para 28, [2003] 2 SCR 134 [*Williams*] the Court did not address foreseeability of harm: "Once an individual becomes aware of the risk that he or she has contracted HIV, and hence that his or her partner's consent has become an issue, but nevertheless persists in unprotected sex that creates a risk of further HIV transmission without disclosure to his or her partner, recklessness is established."

⁷⁸ *R v Godin*, [1994] 2 SCR 484 imposes an objective standard of fault for the consequences.

⁷⁹ *Edwards*, *supra* note 26.

⁸⁰ *R v Aziga*, (1 April 2009) CR081735 at 71-74 (Charge to jury).

ly greater than the risk for an HIV-negative *insertive* partner. In *R v JT*,⁸¹ the accused failed to disclose his HIV-positive status to his male partner. The two engaged in anal intercourse and the HIV-positive accused was always the receptive partner. Evidence at the preliminary inquiry indicated that the risk of transmission in this particular case was approximately 1.5 in 10,000 for each act of unprotected intercourse. The accused was ordered to stand trial and sought to quash the committal on the basis that the Crown failed to provide any evidence of a significant risk of serious harm because the risk of transmission to an insertive partner is so low. The Canadian HIV/AIDS Legal Network intervened and argued that non-disclosure should not be criminalized where the infected individual uses a condom *or* where the risk is equally low for some other reason, such as low viral load or the role of each partner in the sexual activity:

The Intervenors ask that this Honourable Court clarify that, as a matter of Canadian law, non-disclosure of HIV-positive status to a sexual partner does not constitute a criminal offence where the risk is reduced through the use of a condom for penetrative anal or vaginal sex or in analogous circumstances where the risk is comparably low or lower than that benchmark.⁸²

The British Columbia Court of Appeal rejected the argument that *Cuerrier* set a benchmark and held that risk must be assessed in individual cases. The Court of Appeal noted that anal intercourse without a condom is a high risk activity without assessing whether the infected individual is the receptive or insertive partner, a fact which has been found to alter the risk considerably.⁸³

When this case went back to trial on its merits, the trial judge found that the risk was between 1.5 in 10,000 (according to the expert at the preliminary inquiry) and 4 in 10,000 (according to the expert at trial) for each act of unprotected intercourse. The risk is cumulative, such that if there were (as found by the trial judge) three acts of unprotected sex, the risk would be between 4.5 and 12 in 10,000. The expert evidence also suggested that the risk of an HIV-positive receptive partner passing on the virus to the non-infected insertive partner was approximately the same as the risk of *protected* sex where the insertive partner is HIV-positive. The respective roles of the parties involved in sexual activity were thus as significant as whether a condom was used. The trial judge held that this risk was not significant enough to meet the *Cuerrier* test and acquitted the accused.

⁸¹ *JT*, *supra* note 29.

⁸² *Ibid* at para 16.

⁸³ See e.g. Baggaley, White & Boily, *supra* note 10.

Clearly, if courts are looking at viral load and condom use as relevant to risk, the type of sexual activity involved must be part of the equation, as it has a similarly significant impact on the level of risk.

D. The Numbers Game

The movement away from using protected intercourse as the clear dividing line between criminal and non-criminal conduct—and the emergence of factors such as viral load—has led to a more individualized (some might say *ad hoc*) approach to risk analysis. By and large, courts have increasingly relied on expert evidence to provide them with numerical assessments of the risk of transmission associated with specific conduct. This carries with it all the problems associated with reliance on expert witnesses. Depending on the availability of experts to the Crown and the defence, courts hear different evidence and receive different evaluations of risk. Some experts are unwilling to estimate the specific risk of the conduct of a particular accused, while others are willing to provide an individualized probability of transmission. At the retrial of *R v Nduwayo*, the expert witness declined to provide a numerical assessment of risk, instead asking the court, “[i]s that a risk you would like to take?”⁸⁴ The figures provided to the courts for the average risk vary as research and scientific knowledge of transmission develops. Finally, once provided with a numerical estimate of risk, courts have come to different decisions as to what figure is “significant.”

It is left to triers of fact to digest sometimes conflicting expert evidence and then assess whether a particular risk of bodily harm is significant. It is not unusual for triers of fact to have to evaluate risks like 4 in 10,000,⁸⁵ or 1 in 200.⁸⁶ Do these numbers really inform our assessment of whether someone should be convicted of one of our most serious crimes? Should it matter whether the risk materialized?

In *R v Jones*,⁸⁷ where the accused was charged after failing to disclose that he had hepatitis C, a risk of transmission of 1 in 100 to 2.5 in 100 was found to be below the level required to constitute a significant risk:

⁸⁴ *R v Nduwayo*, 2010 BCSC 1277 at para 136, [2011] BCWLD 1457, [2010] BCJ No 1787 (QL).

⁸⁵ *JT*, *supra* note 29.

⁸⁶ *Wright*, *supra* note 4 at para 24.

⁸⁷ *Jones*, *supra* note 8.

For Hepatitis ‘C’ in monogamous heterosexual couples, the risk of transmission is less than 1%. The risk increases for those engaging in anal sex to between 1-2.5% ... I find that in the case of Hepatitis ‘C’ the risk of contracting it through unprotected sex is so low that it cannot be described as significant. Therefore, the positive duty to disclose does not arise.⁸⁸

This conclusion was probably influenced by the description of the risk as “very low” by experts.⁸⁹ In addition, because the disease is blood-borne and only sexually transmitted if there is blood-to-blood contact, the risk likely appeared more remote to the judge than the percentage figure indicates. In *Jones*, the expert compared Hepatitis C with HIV and said that, by contrast, the risk of transmitting HIV is high.⁹⁰ In fact, the risk of 1-2.5 in 100 deemed insignificant in *Jones* is on par with—or higher than—the risk identified as significant in any of the HIV transmission cases for similar sexual activities.

In *DC*, the trial judge convicted the accused of aggravated assault and sexual assault notwithstanding a risk of 1 in 10,000. The trial court essentially found that any risk of transmission, however remote, is sufficient because the potential harm is seen as so great. The Québec Court of Appeal recently overturned this finding and acquitted the accused because the risk of transmission was so low as to be insignificant.⁹¹ The facts of *DC* highlight the potential for problematic exercise of prosecutorial discretion, particularly in charging decisions. After the accused disclosed her HIV positive status to the complainant, the couple continued their relationship for four years, engaging in protected sex. It was not until after the relationship ended, and the complainant was convicted of assaulting the accused in separate proceedings, that he went to police about the one alleged incident of unprotected sex that had taken place four years earlier. The accused was charged with aggravated assault and sexual assault even though the virus was undetectable and the risk of transmission was approximately 1 in 10,000.⁹² This case demonstrates why prosecutorial guidelines are essential in this context. What is to be gained in prosecuting this woman for one isolated incident of non-disclosure, followed by disclosure and ongoing protected sex, especially where the risk of transmission was so low?

⁸⁸ *Ibid* at paras 26, 33.

⁸⁹ *Ibid* at para 23.

⁹⁰ *Ibid* at para 25.

⁹¹ *DC* (CA), *supra* note 4.

⁹² *Ibid*.

DC also raises the problem of disclosure for women in potentially abusive relationships.⁹³

In *Mabior*, as discussed above, the trial judge found that even with the use of a condom, someone with a detectable viral load represented a significant risk to his sexual partner. She relied on expert evidence that condoms reduce the risk of transmission by 80%, but without examining the ramifications of that figure for the numerical assessment of risk.⁹⁴ The Manitoba Court of Appeal corrected this error, acknowledging that the trial judge's finding that any risk of transmission is too high was inconsistent with the *Cuerrier* test. The Court of Appeal also acknowledged the discrepancies between the numbers that different courts have assessed as significant; nevertheless, "it was not seriously disputed ... that unprotected sexual intercourse with an individual with an unrepresed viral load constitutes a significant risk of serious bodily harm even though, from an absolute statistical point of view, the risk is small."⁹⁵

Wright highlights the different ways in which experts assess risk and the resulting problems when courts rely on such numerical analyses. In *Wright*, the expert witness did not identify particular factors most relevant in assessing the risk of transmission, focusing instead on the wide range of circumstances included in the average calculations of risk.⁹⁶ He refused to estimate the specific risk for the conduct undertaken by the accused and relied on averages, stating that "the risk of HIV infection by a woman from vaginal intercourse with a male who is HIV-positive is between 0.1% and 1.0%; so the experts generally say the risk of transmission is 0.5%."⁹⁷ While stressing the unreliability of re-

⁹³ See Patricia Allard, Cecile Kazachkine & Alison Symington, "Criminal Prosecutions for HIV Nondisclosure: Protecting Women from Infection or Threatening Prevention Efforts?" in Jacqueline Gahagan, ed, *Women and HIV Prevention in Canada: The Past, The Present and the Future: Implications for Research, Policy and Practice* (Toronto: Canadian Scholars' Press, forthcoming in 2012) [Copy on file with author]; Alison Symington, "HIV Exposure as Assault: Progressive Development or Misplaced Focus?" in Elizabeth Sheehy, ed, *Sexual Assault Law, Practice & Activism in a Post-Jane Doe Era* (Ottawa: University of Ottawa Press, forthcoming in 2011) online: University of Ottawa <www.ruor.uottawa.ca/en/handle/10393/19876>.

⁹⁴ *Mabior* (QB), *supra* note 37 at para 116. See also Grant, "Rethinking Risk," *supra* note 38.

⁹⁵ *Mabior* (CA), *supra* note 5 at para 154.

⁹⁶ *Wright*, *supra* note 4 at paras 26-27.

⁹⁷ *Ibid* at para 8.

porting on condom use, he testified that condoms reduce the transmission risk to 1 in 10,000.⁹⁸

Although the expert in *Wright* acknowledged that a low viral load can reduce the risk of transmission between 100 and 1,000 times, he stated that viral load is only one of many factors that feed into the average risk of 1 in 200.⁹⁹ This contrasts significantly with experts in other cases who are willing to assess the particular risk more precisely, and to identify the specific factors they consider most influential in altering risk.¹⁰⁰ The jury in *Wright* found that the average risk of 0.5% was significant enough to warrant criminal liability.

In contrast with *Wright*, the expert at the preliminary hearing in *JT* identified three central factors in the rate of HIV transmission: the type of sex act, viral load, and co-infection with other illnesses.¹⁰¹ As stated above, the expert at trial estimated the risk to the complainant at 4 in 10,000 per act of unprotected intercourse, for a cumulative risk of 12 in 10,000 for three acts of unprotected sex over the course of their relationship.¹⁰² The trial judge found that a risk of 12 in 10,000 was not significant enough to negate consent.¹⁰³

The cases reveal, at best, the lack of precision in assessing risk and, at worst, blatant inconsistency regarding the acceptable level of risk. The trial decision in *JAT* and the appellate decisions in *Mabior* and *DC* reflect a growing awareness that not every risk of transmission warrants criminal liability; some risks are too remote to meet the *Cuerrier* test. Nonetheless, there is still the potential in Canada for cases that extend criminalization beyond its appropriate reach. The statistical estimates offered by experts concerning condoms, viral load, circumcision, and various sexual practices will continue to confound judges and juries, and may never offer the level of precision necessary to discharge the “beyond a reasonable doubt” burden in criminal law.

⁹⁸ *Ibid* at para 11.

⁹⁹ *Ibid* at para 27.

¹⁰⁰ See e.g. *JT*, *supra* note 29.

¹⁰¹ *Ibid* at para 9.

¹⁰² *Ibid* at paras 29-31.

¹⁰³ Empirical data reveals men involved in heterosexual sex have a higher rate of prosecution: Eric Mykhalovskiy, Glenn Betteridge & David McLay, *HIV Non-disclosure and the Criminal Law: Establishing Policy Options for Ontario* (Toronto: Ontario HIV Treatment Network, 2010) at 12 online: CATIE <www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf>.

III. What Can We Learn from Other Jurisdictions?

Not all jurisdictions have taken the approach that non-disclosure constitutes fraud negating consent to sexual activity. In fact, in England and Wales, New Zealand, and Australia, transmission or exposure in the context of non-disclosure is not dealt with as a sexual offence, but rather as an offence involving bodily harm.¹⁰⁴ The purpose of the following brief review is to demonstrate alternatives to the regime in Canada by highlighting aspects of the law in each jurisdiction.

A. England and Wales

There are an estimated 86,500 people living with HIV in the United Kingdom.¹⁰⁵ As of October 2010, there have been approximately 17 prosecutions in England and Wales. Fifteen accused were men and two were women. Thirteen of 17 accused were convicted, 11 of those convictions resulted from guilty pleas. Three of the prosecutions involved men having sex with men; the other 14 involved heterosexual transmission.¹⁰⁶

In England and Wales, the criminal law punishes intentional and reckless transmission of HIV. Non-disclosure of one's HIV-positive status does not vitiating consent to sex, and individuals convicted for intentional or reckless transmission are rarely treated as sex offenders.¹⁰⁷ Transmission is prosecuted

¹⁰⁴ Switching to offences focusing on bodily harm still leaves open the potential for overcharging with offences such as murder and attempted murder. See e.g. Adam McDowell, "Public safety trumps privacy in Ottawa HIV case" *The National Post* (27 July 2010) [Copy archived with *MJLH*] (charges against an Ottawa man include two counts of attempted murder along with several counts of aggravated sexual assault; attempted murder is a difficult charge to prove because an intent to kill—and not mere recklessness—must be established).

¹⁰⁵ Health Protection Agency, *HIV in the United Kingdom: 2010 Report* (2010) 4:47 Health Protection Reports 1, online: <www.hpa.org.uk/hivuk2010> [*UK HPA Report*] (A quarter of these are undiagnosed).

¹⁰⁶ National AIDS Trust, "Criminal Prosecution Case Table" (October 2010), online: <www.nat.org.uk> [NAT, "Case Table"].

¹⁰⁷ In England and Wales, it remains open on sentencing to issue offenders with a Sexual Offence Prevention Order, as was done in two cases, pursuant to the *Sexual Offences Act 2003* (UK), 2003 c 42, s 104. See NAT, "Case Table", *ibid*; *R v Hornett*, [2009] EWCA Crim 1742.

under one of two provisions of the *Offences Against the Person Act, 1861*.¹⁰⁸ Section 18 of the *Act* criminalizes intentional infliction of harm:

18. Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person ... with intent ... to do some ... grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable ... to be kept in penal servitude for life ...

Because of the difficulty of proving that someone actually intended to transmit HIV through sex (as opposed to intending to have unprotected sex), no charges under section 18 have proceeded to trial.¹⁰⁹ A person could theoretically be charged with attempted intentional transmission where no transmission occurs, but there are currently no such cases; again this is probably due to the high fault requirement. The cases thus far have all proceeded under section 20, which criminalizes the reckless infliction of bodily injury:

20. Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or Instrument, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable ... to be kept in penal servitude ...

The maximum sentence for this offence is five years imprisonment.¹¹⁰ The most important fact to note is that only cases that involve actual transmission are prosecuted under this provision.

In 2008, the Crown Prosecution Service in England and Wales published policy guidelines for prosecuting sexual transmission of an infection.¹¹¹ These guidelines are not legally binding but rather provide direction to prosecutors

¹⁰⁸ *Offences Against the Person Act, 1931* (UK), 24 & 25 Geo V, c 100 ss 18, 20.

¹⁰⁹ Catherine Dodds et al, "Responses to Criminal Prosecutions for HIV Transmission Among Gay Men with HIV in England and Wales" (2009) 17:34 *Reproductive Health Matters* 135 at 137. See also NAT, "Case Table", *supra* note 106.

¹¹⁰ *Penal Servitude Act, 1891* (UK), 54 & 55 Geo V, c 69, s 1(1); *Criminal Justice Act, 1948* (UK), 11 & 12 Geo V, c 58, s 1(1). The general sentence for many crimes was set out in the *Penal Servitude Act*; these sentences were modified by the *Criminal Justice Act*, which replaced penal servitude (hard labour) with mere imprisonment.

¹¹¹ The Crown Prosecution Service, "Policy for Prosecuting Cases Involving the Intentional or Reckless Sexual Transmission of Infection", online: CPS <www.cps.gov.uk/publications/prosecution/sti.html> ["England Crown Policy"].

regarding which cases should be prosecuted. The guidelines demonstrate that England and Wales take a much more cautious approach to prosecuting these offences than does Canada. For example, the prosecutorial guidelines suggest that only a sustained course of conduct warrants a charge of reckless transmission:

It will be highly unlikely that the prosecution will be able to demonstrate the required degree of recklessness in factual circumstances other than a sustained course of conduct during which the defendant ignores current scientific advice regarding the need for and the use of safeguards, thereby increasing the risk of infection to an unacceptable level.¹¹²

According to the guidelines, recklessness is not about non-disclosure (although consent may be raised as a defence by asserting that disclosure was made), rather, it involves assessing the accused's behaviour against the medical advice he or she received. The following passage suggests that the use of safeguards, such as a condom, might also negate recklessness. Condoms are not raised directly in the guidelines, but one can infer that prosecution should only be initiated for unprotected sex:

Evidence that the defendant took appropriate safeguards to prevent the transmission of the infection throughout the entire period of sexual activity, and evidence that those safeguards satisfy medical experts as reasonable in light of the nature of the infection, will mean that it will be highly unlikely that the prosecution will be able to demonstrate that the defendant was reckless.¹¹³

The guidelines go on to suggest that if the accused believed that the safeguards were reasonable, recklessness will be hard to establish:

Although infection can occur even where reasonable and appropriate safeguards have been taken, it is also of course possible that the infection took place because the safeguards and/or their use or application were inappropriate. However, prosecutors will need to take into account what the defendant considered to be the adequacy and appropriateness of the safeguards adopted; *only where it can be shown that the defendant knew that such safeguards were inappropriate will it be likely that the prosecution will be able to prove recklessness.*¹¹⁴

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid* [emphasis added].

These requirements, if followed, suggest that protected sex is extremely unlikely to lead to prosecution in England and Wales.¹¹⁵

Because only cases of actual transmission are prosecuted, causation is a critical issue. The Crown must prove that the complainant acquired the virus from the accused. Prior to 2006, phylogenetics was often used to support causation. Phylogenetics is a scientific technique that determines whether the strain of the virus carried by the complainant is the same as, or similar to, the strain carried by the accused. This evidence has prompted some accused to enter guilty pleas and has sometimes been misunderstood as providing proof of causation.¹¹⁶ Phylogenetics, however, shows the genetic similarity between viruses but provides no evidence of the direction of transmission (i.e. who transmitted the virus to whom). In a 2006 case, the accused was acquitted because phylogenetics was found to be inadequate to prove causation.¹¹⁷ Since this case, there have been no successful prosecutions where the accused has pled not guilty; there have been five guilty pleas and three acquittals.¹¹⁸

English prosecutorial guidelines reflect the inconclusive nature of phylogenetics:

However, scientific and medical evidence will only ever form part of the case against the defendant. We must build up a strong factual case around the scientific and medical evidence in order to satisfy the evidential test in the Code. This is because scientific and medical evidence of this nature is not as precise as, for example, evidence of DNA matches.¹¹⁹

The two leading cases in England and Wales are *R v Dica*¹²⁰ and *R v Konzani*,¹²¹ both of which were decided before the prosecutorial guidelines were developed. *Dica* was convicted at his second trial of one of two counts of reck-

¹¹⁵ It is possible that a prosecution could take place where a condom was used if the virus was still transmitted, but I have been unable to find any such cases.

¹¹⁶ EJ Bernard et al, "HIV Forensics: Pitfalls and Acceptable Standards in the Use of Phylogenetic Analysis as Evidence in Criminal Investigations of HIV Transmission" (2007) 8:6 HIV Medicine 382 at 386.

¹¹⁷ Michael Carter, "Prosecution for Reckless HIV Transmission in England Ends With Not Guilty Verdict" (9 August 2006) online: AIDSmap <www.aidsmap.com/page/1424549/>.

¹¹⁸ NAT, "Case Table", *supra* note 106.

¹¹⁹ "England Crown Policy", *supra* note 111.

¹²⁰ *R v Dica*, [2004] EWCA Crim 1103 at para 39, [2004] Crim LR 944 [*Dica*].

¹²¹ *R v Konzani*, [2005] EWCA Crim 706, [2005] 2 Cr App R 198 [*Konzani*].

lessly inflicting grievous bodily harm, contrary to section 20 of the *Offences Against the Person Act, 1861*. Both of the female complainants were HIV-positive. Dica's original conviction was overturned on appeal because the trial judge had erred in disallowing the defence of consent to the risk of potential harm flowing from sexual activity. Out of a desire to avoid criminalizing the consensual taking of risks, the English Court of Appeal found that consent could operate as a defence in the context of reckless transmission, if the complainant consented to the risk of infection (even though non-consent was not, strictly speaking, an element of the offence). While disclosure is not the only way to show consent, it is the most likely way to raise the defence.¹²² The Court of Appeal also stated that if a condom had been used, it would have gone to the assessment of recklessness by the trier of fact. The Court of Appeal in *Dica* also suggested that liability applies to those who "know that they are suffering HIV or some other serious sexual disease,"¹²³ suggesting it is not sufficient to know that one could be HIV-positive.¹²⁴

Konzani was convicted of three counts of recklessly inflicting grievous bodily harm on three female complainants, all of whom had contracted HIV. Konzani argued that by engaging in unprotected intercourse with him, the complainants impliedly consented to any possible attendant risks, including the risk of contracting HIV. The English Court of Appeal rejected this argument on the ground that consent must be informed.¹²⁵

It is clear that criminalizing only actual transmission will greatly reduce the number of prosecutions. Further limits on prosecution established by the prosecutorial guidelines, such as the use of reasonable safeguards, have resulted in a relatively low level of prosecution in England and Wales as compared to Canada. As demonstrated in the following section, New Zealand has taken a slightly different approach.

¹²² As Weait points out there may be other ways that a person has knowledge of an accused's HIV status without disclosure. Furthermore, he would argue that there is always the risk of acquiring HIV in unprotected sex and that the complainant is equally responsible for failing to use a condom: Matthew Weait, "Criminal Law and the Sexual Transmission of HIV: *R v Dica*" (2005) 68:1 Mod L Rev 121. See also Matthew Weait, "Taking the Blame: Criminal Law, Social responsibility and the Sexual Transmission of HIV" (2001) 23:4 J of Soc Welfare & Fam L 441.

¹²³ *Dica*, *supra* note 120 at para 59.

¹²⁴ Because *Dica* did in fact know his HIV-positive status, it wasn't strictly necessary for the Court to decide this point.

¹²⁵ *Konzani*, *supra* note 121 at para 42.

B. New Zealand

As of 2009, there were an estimated 2,500 people living with HIV in New Zealand.¹²⁶ As of December 2008, there have been at least seven prosecutions for non-disclosure with six convictions; all the accused have been men.¹²⁷ In New Zealand, there are three potential levels of liability, depending on fault and whether transmission occurred. Section 201 of the *Crimes Act, 1961* criminalizes the intentional transmission of a disease and is applicable where HIV is intentionally transmitted:

- (1) Every one is liable to imprisonment for a term not exceeding 14 years who, wilfully and without lawful justification or excuse, causes or produces in any other person any disease or sickness.¹²⁸

There have not been any successful prosecutions for intentional sexual transmission under this section because of the high fault requirement.¹²⁹

Where the virus is recklessly transmitted, section 188 is the most likely charge:

- (2) Everyone is liable to imprisonment for a term not exceeding 7 years who, with intent to injure anyone, or with reckless disregard for the safety of others, wounds, maims, disfigures, or causes grievous bodily harm to any person.

The courts have held that non-disclosure in the context of unprotected vaginal intercourse satisfies the recklessness criterion.¹³⁰ The New Zealand Court of Appeal in *Mwai* held that infection with HIV constitutes grievous bodily harm because of the seriousness of the resulting disease and its consequences, but limited the ambit of grievous bodily harm to infection with serious diseases.¹³¹

¹²⁶ UNAIDS, “New Zealand”, online: UNAIDS
<www.unaids.org/en/regionscountries/countries/newzealand/> .

¹²⁷ Global Criminalisation Scan, “New Zealand”, online: GCS
<www.gnppplus.net/criminalisation/index.php?option=com_content&task=view&id=244&Itemid=47> .

¹²⁸ (NZ), 1961/43 [*Crimes Act* (NZ)].

¹²⁹ Amelia Evans, “Critique of the Criminalisation of Sexual HIV Transmission” (2007) 38:3 *Victoria U Wellington L Rev* 517.

¹³⁰ *R v Mwai*, [1995] 3 NZLR 149 (CA) [*Mwai*].

¹³¹ *Ibid* at 153.

Where sex, without disclosure, does not result in transmission of the virus, the much less serious offence of criminal nuisance (section 145) is utilized, which carries a maximum sentence of one-year imprisonment:

(1) Every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual.¹³²

The Court of Appeal in *Mwai* found that the legal duty in question is the common law duty not to expose others to foreseeable harm.¹³³ There is also a statutory duty set out in section 156. Although *Mwai* did not decide whether or not the statutory duty also applies, subsequent decisions have considered the legal duty in light of the language of section 156.¹³⁴

[E]very one who has in his charge or under his control anything whatever ... which, in the absence of precaution or care, may endanger human life is under legal duty to take reasonable precautions against and to use reasonable care to avoid such danger
...¹³⁵

If one takes “reasonable precautions” or uses “reasonable care” to avoid the harm, the accused will not be guilty of criminal nuisance. In *Police v Dalley*, the Court of Appeal held that use of a condom is a reasonable precaution.¹³⁶ On a charge relating to oral sex without a condom, the trial judge also held that, because the risk involved in oral sex without ejaculation is so low, the accused satisfied the reasonable care criterion even without taking any precautions. Thus, criminal nuisance does not encompass every instance of non-disclosure of one’s HIV-positive status; there must be a sufficient level of risk to warrant criminalization.

¹³² *Crimes Act* (NZ), *supra* note 128 s 145.

¹³³ *Mwai*, *supra* note 130 at 156.

¹³⁴ *Dalley*, *supra* note 49 at 683-84.

¹³⁵ *Crimes Act* (NZ), *supra* note 128.

¹³⁶ *Dalley*, *supra* note 49.

C. *Australia*

There were an estimated 20,000 people living with HIV in Australia in 2009.¹³⁷ The Global Criminalisation Scan states that as of February 2010, 28 prosecutions had been undertaken in Australia, and 15 people had been convicted.¹³⁸ The *NAPWA Monograph* estimates slightly lower numbers, with 22 prosecutions undertaken, 12 convictions, and 3 additional instances where charges were dropped as of September 2009.¹³⁹ There has been a notable increase in prosecutions since 2007, particularly in the states of South Australia and Victoria. As in New Zealand, all accused have been male.¹⁴⁰

The criminal law in Australia is under the jurisdiction of each state or territory. The law of all nine jurisdictions, with the exception of Victoria, provides that consent is not valid if given as a result of misrepresentation or fraud as to the nature of the sexual intercourse. Nevertheless, Australia has not labeled non-disclosure as fraud that vitiates consent to the sexual act, a position that avoids imposing the label “sex offender” on a person convicted of non-disclosure.¹⁴¹

¹³⁷ UNAIDS, “Australia”, online: UNAIDS <www.unaids.org/en/regionscountries/countries/australia/>.

¹³⁸ The Global Criminalisation Scan, “Australia”, online: GCS <www.gnpplus.net/criminalisation/index.php?option=com_content&task=view&id=254&Itemid=70>.

¹³⁹ *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (2009), online: National Association of People Living with HIV/AIDS <www.napwa.org.au> [*NAPWA Monograph*]

¹⁴⁰ Australasian Society for HIV Medicine, “Guide to Australian HIV Laws and Policies for Health Care Professionals: Criminal Law”, online: ASHM <www.ashm.org.au/HIVLegal/Default.asp?PublicationID=2&ParentSectionID=P2&SectionID=342> [ASHM, “Guide to Australian HIV Laws and Policies”].

¹⁴¹ The offence of fraud has been discussed in Australia: *R v Reid*, [2006] QCA 202, 1 Qd R 64, 162 A Crim R 377 [*Reid*]. McPherson JA, in dissent, suggested that to meet the statutory requirement that the act be ‘unlawful’, the offence of fraud under s 408C(1)(e), *Criminal Code 1899* (Qld) could be applied. He echoed *Cuerrier* when he said, at para 20: “[i]nducing someone to have unprotected intercourse with him by falsely representing that he was not HIV positive, while knowing that he was, seems to me to fall within the ambit of this provision. It hardly need be said that infecting someone with HIV involves causing a detriment to him or her.” This suggestion was not taken up by the High Court of Australia, which refused leave to appeal on the grounds that certain exceptional “features of the evidence at trial that make this an unpromising case for this Court’s intervention” (*R v Reid*,

Only three of the nine Australian jurisdictions criminalize exposure without transmission, and of those jurisdictions, two states apply different criminal offences for exposure and for transmission.¹⁴² The remaining six jurisdictions do not prosecute exposure where no transmission has occurred.

In Victoria, where most of the prosecutions have taken place, “conduct endangering life”¹⁴³ is charged if transmission occurs, and “conduct endangering persons”¹⁴⁴ is charged if transmission does not occur:

22. A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence. Penalty: Level 5 imprisonment (10 years maximum).

23. A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of serious injury is guilty of an indictable offence. Penalty: Level 6 imprisonment (5 years maximum).¹⁴⁵

Early cases distinguished between these offences by assessing the risk of potential harm;¹⁴⁶ however, both offences were charged in cases of non-transmission until 1998, when the accused in *Mutemeri* successfully challenged the assertion that exposure without transmission constituted a risk of

2006 HCATrans 666, online: AusLII <www.austlii.edu.au/au/other/HCA/Trans/2006/666.html>).

¹⁴² *Crimes Act 1958* (Vic), ss 22-23 [*Crimes Act* (Vic)]; *Criminal Law Consolidation Act 1935* (SA) s 29 [*CLCA* (SA)]; *Criminal Code* (NT), ss 174C, 174D [*Criminal Code* (NT)]. I am assuming for the purposes of this paper that the legislation in the Northern Territory allows for criminalization of mere exposure although there have been no cases to date clarifying this interpretation

¹⁴³ *Crimes Act* (Vic), *ibid* s 22.

¹⁴⁴ *Ibid* s 23.

¹⁴⁵ *Ibid* ss 22-23.

¹⁴⁶ *R v B* (3 July 1995), unreported judgment (Vic SC (Crim Div)), Teague J established that exposure without transmission of HIV was insufficient because the offence in s 22 required an “appreciable danger of death,” rather than death being a “remote” or “mere” possibility (cited in *Mutemeri v Cheesman*, [1998] 4 VR 484 at 489, 100 A Crim R 397 [*Mutemeri* cited to VR]). The judge found that the risk of transmitting HIV through unprotected anal intercourse, estimated in that case to be 1 in 200 or less, was remote. In a subsequent case, *R v D* (1 May 1996), unreported judgment (Vic SC), Hampel J agreed with the holding in *R v B* that the risk should be an “appreciable” one (cited in *Mutemeri* at 489).

death.¹⁴⁷ Mutemeri was initially convicted of 12 counts under section 22 for having unprotected sex with a woman who did not contract HIV. On appeal, the Supreme Court of Victoria found that the magistrate was not entitled to find, without evidence, that the accused's conduct exposed the complainant to an appreciable risk of death.¹⁴⁸ Justice Mandie in *Mutemeri* formulated the test as follows: "In addition to the subjective intent to engage in the conduct coupled with recklessness as so defined, ... [there must be] the objective intent of the reasonable person ... which involves realisation by a reasonable person that the conduct would (or might) place another in danger of death."¹⁴⁹ Justice Mandie also commented that he had "some doubt as to whether the offence created by section 22 of the *Crimes Act* is properly to be construed as applicable to cases other than those where a person is exposed to the risk of a death of some immediacy or imminence."¹⁵⁰

South Australia is the only Australian jurisdiction where the same offence is charged regardless of whether transmission occurred or not. This is in large part due to judicial formulation of the test for endangerment of life. The offence is set out in section 29 of the *Criminal Law Consolidation Act 1935* (SA):

29. (1) Where a person, without lawful excuse, does an act or makes an omission—
- (a) knowing that the act or omission is likely to endanger the life of another; and
 - (b) intending to endanger the life of another or being recklessly indifferent as to whether the life of another is endangered, that person is guilty of an offence.¹⁵¹

In *R v Parenzee*,¹⁵² the first case in South Australia to consider the non-disclosure of HIV, the Supreme Court rejected the accused's argument that "likely" in paragraph 29(1)(a) should be interpreted to mean more probable than not, thus creating a threshold of risk for culpability. Chief Justice Doyle found that the risk should be a real or substantial threat to life.¹⁵³ Justice Bleby

¹⁴⁷ *Mutemeri*, *ibid.*

¹⁴⁸ *Ibid* at 484, 491.

¹⁴⁹ *Ibid* at 491.

¹⁵⁰ *Ibid* at 493.

¹⁵¹ *CLCA* (SA), *supra* note 142 s 29.

¹⁵² *R v Parenzee*, [2008] SASC 245 [*Parenzee*].

¹⁵³ *Ibid* at paras 73, 79 (dissenting in the result but on different issues).

pointed out that “the object of the likelihood [is] endangering life. It is not causing death nor is it, in this case, the likelihood of the victims contracting HIV.”¹⁵⁴ He rephrased the test as follows: “life is endangered if it can be said that it is a reasonable possibility that death will ensue as a result of that unprotected act of sexual intercourse.”¹⁵⁵ Despite these different formulations of the test, all three judges agreed that there was evidence on which the jury was entitled to find that engaging in unprotected sexual intercourse exposed the complainants to sufficient risk, whether transmission occurred or not.

The issue of condom use is a relevant consideration in the three Australian jurisdictions that criminalize exposure without transmission (Victoria, South Australia, and the Northern Territory). As no charges have been laid for non-disclosure where condoms were used—and no charges have been laid in the Northern Territory at all—the effect of condom use on culpability has not been clearly addressed. Nevertheless, in passing, judicial decisions have referred only to unprotected sex as culpable.¹⁵⁶ This approach accords with the Australian public health message emphasizing protected sex, which has been remarkably successful in preventing the spread of HIV.¹⁵⁷

Few courts in Australia have had occasion to confront numerical assessments of risk. Where they have done so, they have considered the numerical risk to be low. In *R v B*, one of the first cases tried in Victoria, the judge found that the risk of transmitting HIV through unprotected anal intercourse, estimated in that case to be 1 in 200 or less, was remote.¹⁵⁸ In *R v D*, a risk of 1 in 1,000 to 1 in 2,000 was also seen as insufficiently high.¹⁵⁹

¹⁵⁴ *Ibid* at para 152.

¹⁵⁵ *Ibid* at para 155.

¹⁵⁶ See e.g. *R v Kuoth* [2010] VSCA 103 (“the appellant had been ordered ... to divulge his HIV positive status to any sexual partners and to use condoms during sexual intercourse. The fact that so soon afterwards he proceeded to disobey both aspects of that order is, of course, reflected in the charges which were laid” at para 5). For a South Australian example, see *Parenzee*, *supra* note 152 at para 18 where the trial judge charged the jury that “[t]he following elements must be proved beyond reasonable doubt. Firstly, the accused did an act or acts, namely, that he had unprotected sexual intercourse.”

¹⁵⁷ *NAPWA Monograph*, *supra* note 139 at 19.

¹⁵⁸ *R v B*, *supra* note 146 at para 5.

¹⁵⁹ *R v D*, *supra* note 146 at para 5. Victorian cases no longer turn on the assessment of risk, as different offences are charged for transmission and exposure.

D. Comparing Canada to England and Wales, New Zealand, and Australia

When one compares Canada to England and Wales, New Zealand, and Australia, several facts stand out. Perhaps most notable is the high number of prosecutions in Canada compared to the other jurisdictions. Over 100 prosecutions have been documented in Canada as compared to 17 in England and Wales, 7 in New Zealand, and between 22 and 28 in Australia.

The other striking difference—which is likely related to the first—is that in England and Wales, and in six of Australia’s nine jurisdictions, cases are only prosecuted if transmission of the virus has occurred. In New Zealand and two Australian jurisdictions (Victoria and the Northern Territory), a different offence is used depending on whether the virus is transmitted. In New Zealand, for example, the relatively minor offence of criminal nuisance is used where no transmission takes place, subjecting the accused to a maximum one year of imprisonment. Of all the jurisdictions considered in this paper, South Australia is the only one which has taken the Canadian approach of punishing exposure and transmission with the same offence.¹⁶⁰ In Canada, the same charge of aggravated (sexual) assault is typically used regardless of the nature of the deception, whether the virus is transmitted, or whether there is an isolated incident of non-disclosure or an ongoing course of non-disclosure. It is also notable that Canada is the only jurisdiction of those discussed that explicitly labels the accused as a sex offender due to the non-disclosure. In all other jurisdictions, the offence is characterized as the infliction of bodily harm, and not as non-consensual sexual contact.¹⁶¹ These jurisdictions reveal that the *Cuerrier* approach is by no means the only way to address the criminalization of non-disclosure. In fact, the current Canadian approach is anomalous when compared to other Commonwealth jurisdictions.

The assessments of risk that have accompanied the criminalization of exposure without transmission in Canada have led some courts to find liability where the risk involved was extremely small. In Canada, a risk as low as 1 in

¹⁶⁰ Only one case in South Australia (*Parentee*, *supra* note 152) held that both exposure and transmission are captured under the offence of “acts endangering life or creating risk of serious harm” (*CLCA* (SA), *supra* note 142 s 29). Regardless, no charges have yet been successfully prosecuted for exposure alone, although some cases are pending.

¹⁶¹ Although in England and Wales this does not rule out a Sexual Offence Prevention Order (*Sexual Offences Act*, *supra* note 107).

10,000 has been found to constitute significant risk of bodily harm.¹⁶² Contrast this with the risks of 1 in 200¹⁶³ and 1 in 1,000 to 1 in 2,000 found to be insufficient for criminal liability in the Australian state of Victoria.¹⁶⁴ Although the assessment of risk is a question of fact in each case, it is striking that Canadian judges have reacted so harshly to risks that are too low to justify criminalization elsewhere.

IV. Is *Cuerrier* the Problem?

While some of the trial judgments to date leave room to find that any risk of transmitting HIV is sufficient to ground liability, the Manitoba Court of Appeal in *Mabior*, the Québec Court of Appeal in *DC*, and the trial decision in *JAT* reflect a movement towards limiting criminal liability to cases involving a real, quantifiable “significant risk of serious harm.” Nevertheless, the potential for over-criminalization remains because the definition of such a risk continues to be elusive.

In her concurring minority judgment in *Cuerrier*, Justice McLachlin predicted the difficulties of applying the “significant risk of bodily harm” test:

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”? Can a bright line be drawn between psychological harm and bodily harm, when the former may lead to depression, self-destructive behaviour and in extreme cases suicide? The criminal law must be certain. If it is uncertain, it cannot deter inappropriate conduct and loses its *raison d’être*. Equally serious, it becomes unfair. ... Finally, Cory J.’s limitation of the new crime to significant and serious risk of harm amounts to making an *ad hoc* choice of where the line between lawful conduct and unlawful conduct should be drawn. This Court, per Lamer C.J., has warned that making *ad hoc* choices is properly the task of the legislatures, not the courts...¹⁶⁵

The problems Justice McLachlin identified have been played out in the application of *Cuerrier* and invite a critical re-examination of that case. Studies also indicate that there is uncertainty amongst persons with HIV as to what behav-

¹⁶² *DC* (CQ), *supra* note 28 although this finding was recently reversed on appeal (*DC* (CA), *supra* note 4). See *Mabior* (CA) *supra* note 5.

¹⁶³ *R v B*, *supra* note 146 at 489.

¹⁶⁴ *R v D*, *supra* note 146 at 489.

¹⁶⁵ *Supra* note 2 at para 48.

ious is criminal and what their legal responsibilities are with respect to disclosure.¹⁶⁶

There are at least two broad categories of problems relating to *Cuerrier*. First, every case of non-disclosure will inevitably be prosecuted as, at a minimum, aggravated assault or aggravated sexual assault. There is no room for lesser levels of culpability even where no bodily harm is done to the complainant or where there is only one isolated incident of non-disclosure. Second, *Cuerrier* creates uncertainty about what kinds of harm are sufficient both to negate consent and to endanger life. Because these cases have become so dependent on expert evidence and individual risk assessment, it is difficult to predict outcomes in particular cases. Even courts of appeal are wary of making definitive statements regarding viral load or condom use, leaving it to triers of fact to assess whether the level of risk is significant.¹⁶⁷ Thus, there is a troubling lack of predictability in an area of the law that cries out for certainty.

A. Reconsidering Aggravated (Sexual) Assault

Many HIV non-disclosure cases involve charges of aggravated sexual assault, although others, including the two leading cases from the Supreme Court of Canada,¹⁶⁸ involve charges of aggravated assault. It is difficult to determine how these charging decisions are being made for virtually identical conduct. This disparity may arise in part because the Court in *Cuerrier* characterized the underlying assault as a sexual assault. Thus, the addition of the aggravating circumstance logically leads to a charge of aggravated *sexual* assault, even though *Cuerrier* involved aggravated assault.

Aggravated sexual assault carries a maximum life sentence, whereas the maximum for aggravated assault is 14 years.¹⁶⁹ This is complicated further by the fact that aggravated sexual assault is a designated offence under section 490.011(1) of the *Criminal Code*, for the purpose of Canada's sex offender registration law,¹⁷⁰ whereas aggravated assault is not. This distinction has existed only since 15 December 2004, when *SOIRA* came into force, and thus

¹⁶⁶ Mykhalovskiy, Betteridge & McLay, *supra* note 103 at 12.

¹⁶⁷ *Mabior* (CA), *supra* note 5; *DC* (CA), *supra* note 4.

¹⁶⁸ *Cuerrier*, *supra* note 2; *Williams*, *supra* note 77.

¹⁶⁹ *Criminal Code*, RSC 1985, c C-46, ss 268(2), 273(2).

¹⁷⁰ *Sex Offender Information Registration Act*, SC 2004, c 10, proclaimed in force 15 December 2004, SI/2004-157, (2004) C Gaz II, 2021 [*SOIRA*].

cannot fully explain the blurring of these two offences in the HIV cases.¹⁷¹ While the distinction between the offences could now provide a reason for charging aggravated sexual assault (and for using aggravated sexual assault charges as a vehicle for plea bargaining down to aggravated assault), the sex offender registry does not appear to explain how and why these offences have come to be used interchangeably. It is true, however, that most, though not all recent cases appear to involve charges of aggravated sexual assault.

This paper assumes that both these charges will continue to be laid until the Supreme Court or Parliament directs otherwise. The following discussion focuses on the endangerment of life component, which is common to both of these aggravated assault offences. To simplify the discussion in this section, I use the term “aggravated assault,” but with the awareness that, in many cases, aggravated sexual assault is charged.

Aggravated assault is the most serious form of assault in Canadian law. It applies to an accused who wounds, maims, disfigures, or endangers the life of the complainant in the course of an assault. Prior to the HIV transmission cases, endangerment of life applied primarily to assaults that resulted in serious physical harm—harm more significant than that covered by assault causing bodily harm.¹⁷² Aggravated assault is a consequence crime; it requires a low level of fault because of the seriousness of the harm caused. The *actus reus* has been described as “an assault (the act)—a consequent endangering of the life of the complainant (the result).”¹⁷³ In *R v Creighton*, the Supreme Court of Canada endorsed the interpretation of endangerment as a *harm* that results from the assault.¹⁷⁴ Prior to *Cuerrier*, there was conflicting case law on whether endangerment of life can be established when there is no bodily harm to the victim. Although courts often stated that, in theory, endangerment of life could occur without any physical harm being caused, such statements were usually made in context of cases where serious harm had been caused and thus were not necessary for the decision.¹⁷⁵ This issue was addressed in *R v De Freitas*,¹⁷⁶ where

¹⁷¹ See e.g. *Cuerrier*, *supra* note 2; *Williams*, *supra* note 77. Both cases predated the sex offender registry.

¹⁷² See e.g. *R v APP*, 2008 ONCJ 196, 77 WCB (2d) 117 (a boy set fire to a girl’s breasts causing third degree burns; the mild scarring and possible nerve damage constituted bodily harm but was insufficient to warrant an aggravated assault conviction).

¹⁷³ *R v L(SR)* (1992), 11 OR (3d) 271, 76 CCC (3d) 502 (ONCA) [*L(SR)*].

¹⁷⁴ [1993] 3 SCR 3, citing *L(SR)*, *ibid* with approval.

¹⁷⁵ An exception to this can be found in *R v Melaragni* (1992), 75 CCC (3d) 546, 17 WCB (2d) 148 (Ont Gen Div) where the court held that the accused shooting two

the accused had attempted, unsuccessfully, to stab a police officer with a knife. He was acquitted of aggravated assault. The Manitoba Court of Appeal held that:

The use of a weapon in an assault will almost always create a risk of the victim being wounded, maimed or disfigured or his or her life endangered. Yet the legislation does not place an assault with a weapon in the category of aggravated assault. For this to happen, the risk must become reality. The victim must actually be wounded, maimed or disfigured or his or her life endangered. 'Endangers the life of the complainant' is thus, in my view, intended to be as much a consequence of the assault as 'wounds, maims or disfigures.'

...

Most assaults with a weapon have such potential at their inception, but do not qualify as an aggravated assault because the potential is unrealized when the assault ends.¹⁷⁷

The Court of Appeal in *De Freitas* did acknowledge that there could be instances where endangerment may be proven in the absence of harm. In particular, the Court of Appeal agreed with the examples from the trial decision in *R v Melaragni*:

For example, if D. and V. are standing on a 20th-floor balcony and D. pushes V., causing V. to go over the railing, but V. miraculously holds on and is rescued before falling, can it be doubted that D.'s common assault endangered the life of V.? In this example, D. has assaulted V. and the assault has endangered V.'s life even though V. suffered no bodily injury. The same could be said if D. pushed V. into a busy intersection in the face of oncoming vehicular traffic. Assuming that an alert motorist was able to avoid striking V., can it be doubted that V.'s life was endangered?

bullets into the driver's seat of a car where the victims were located could constitute aggravated assault even though the only injury caused was a small scratch to one victim. For a discussion of these cases see Ferguson, *supra* note 23 at 52-55 who takes the opposite view to the one expressed in this paper.

¹⁷⁶ *R v De Freitas*, [1999] 7 WWR 643 at para 12, 134 ManR (2d) 78 (CA) [*De Freitas*].

¹⁷⁷ *Ibid* at paras 12, 14.

In my opinion, the assaults in those examples qualify as aggravated assaults because endangerment to life is the consequence of the completed assault.¹⁷⁸

In *Cuerrier* it was assumed, without careful analysis, that bodily harm is not required to establish endangerment of life because the risk of contracting HIV was always sufficient. Justice Cory held that “it is not necessary to establish that the complainants were in fact infected with the virus. There is no prerequisite that any harm must actually have resulted.”¹⁷⁹ Following *Cuerrier*, the Manitoba Court of Appeal in *Mabior* explicitly stated that endangering life can occur “without any bodily harm actually occurring to the victim.”¹⁸⁰ *Cuerrier* changed the focus of aggravated assault by shifting the emphasis for endangerment from actual harm to risk of harm, even where no bodily harm to the complainant is caused. Endangering life was taken out of the context of assaults that wound, maim, or disfigure, and put into the context of harm that may not actually materialize.¹⁸¹ Convicting someone who has not transmitted HIV of either of these serious consequence crimes may be overreaching the appropriate boundaries of both aggravated assault and aggravated sexual assault.

I am not suggesting that aggravated assault can never be established in the absence of bodily harm. If a person is pushed into oncoming traffic but miraculously escapes harm, the endangerment of life is direct and immediate. The endangerment of life in the non-disclosure context is much more tenuous. First, the virus must be transmitted; this is never more likely than not. Second, given our improved treatment of HIV/AIDS and life expectancies that approach normal, the endangerment of life becomes tenuous even where the virus has been transmitted. As the *Mabior* expert witness report stated, most

¹⁷⁸ *Ibid* at paras 13-14, citing *Melaragni*, *supra* note 175.

¹⁷⁹ *Cuerrier*, *supra* note 2 at para 95.

¹⁸⁰ *Mabior* (CA), *supra* note 5 at para 140.

¹⁸¹ The associated words rule of statutory interpretation, *noscitur a sociis*, states that “when two or more terms linked by ‘and’ or ‘or’ serve an analogous grammatical and logical function within a provision... [t]his parallelism invites the reader to look for a common feature among the terms. This feature is then relied on to resolve ambiguity or limit the scope of the terms.” Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 227. Thus it could be argued that the words “endanger life” should be read in light of the words that precede it, wounding or maiming, both of which require some actual harm. The counter-argument is the presumption against tautology: Parliament does not include unnecessary language (Sullivan at 210-213).

HIV-positive people who comply with treatment will die of a cause unrelated to AIDS.¹⁸² Where there is no transmission, the endangerment is simply too remote.

There are also compelling public policy reasons to be cautious about over-prosecution of non-disclosure¹⁸³ which do not apply to *situations* where someone is pushed off a balcony or hurled into oncoming traffic. This is not to trivialize the psychological harm to the complainant when he or she learns of the accused's HIV status. However, the harm is much greater where the complainant contracts HIV than where he or she does not. It is the increased harm that warrants labelling the assault "aggravated."

Even in *R v Williams*, in which the Supreme Court of Canada declined to find aggravated assault because it was not proven that the virus had been transmitted *after* the accused learned of his infection, the Court recognized that aggravated assault focuses on the consequences of the crime, not on the assault itself:

Section 268(1) applies to a wide variety of human activity, and its interpretation should not be skewed to accommodate the hard facts of this case. Its focus should continue to be, as in the past, on the nature of the consequences rather than on the nature of the assault.¹⁸⁴

I would argue, therefore, that aggravated assault charges should be limited to cases in which the virus is transmitted. While this is open to the criticism that transmission may be largely a matter of chance, we often differentiate degrees of culpability in criminal law by the harm caused: an assault may become manslaughter if the victim dies, even though the *mens rea* remains the same.

The *Cuerrier* analysis conflates sexual assault with aggravated sexual assault. A significant risk of serious bodily harm is required to negate consent and thus prove the crime of sexual assault. Yet once the Crown proves sexual assault, it automatically proves aggravated sexual assault as well. This is because the test for endangerment of life is virtually identical to the test for estab-

¹⁸² See e.g. Antiretroviral Therapy Cohort Collaboration, "Causes of Death in HIV-1-Infected Patients Treated With Antiretroviral Therapy, 1996-2006: Collaborative Analysis of 13 HIV Cohort Studies" (2010) 50:10 *Clinical Infectious Diseases* 1387 at 1390; *Mabior (CA)*, *supra* note 5 at para 63.

¹⁸³ See Grant, "The Boundaries of the Criminal Law", *supra* note 6; Grant, "Rethinking Risk" *supra* note 38.

¹⁸⁴ *Supra* note 77 at para 58.

lishing fraud.¹⁸⁵ In the HIV non-disclosure context, these tests are so similar they almost always overlap. Thus, every sexual assault of this nature will constitute aggravated sexual assault because it will endanger life. The *Cuerrier* test renders conviction for lesser-included offences unlikely. There is no room for gradations of blameworthiness, as envisioned by the existence of the two offences.

Currently, accused persons are charged with one of two aggravated assault offences, virtually interchangeably. The cases run a wide gamut of culpability. In *R v DC*, there was one act of unprotected intercourse before the accused disclosed her HIV-positive status to the complainant two months after meeting him.¹⁸⁶ Several weeks after the disclosure, the complainant reinitiated contact and continued the relationship with the accused for four years. The relationship ended badly, and charges were subsequently laid for that one act of unprotected intercourse four years earlier. The accused's viral load was undetectable at the time of the unprotected intercourse, and the risk that she would transmit the virus to the complainant was stated to be 1 in 10,000. The complainant did not contract HIV, yet the accused was convicted of aggravated assault and sexual assault. By contrast, in *R v JML*,¹⁸⁷ the accused deliberately misled the complainant and went so far as to fabricate a laboratory requisition form indicating that he was HIV-negative when, in fact, he knew that he was HIV-positive. In *R v Nduwayo*, the virus was transmitted to several complainants, including one who became pregnant.¹⁸⁸ In another Ontario case, Carl Leone transmitted HIV to five complainants, and exposed a further ten sexual partners to the risk of contracting HIV.¹⁸⁹ Although differences in culpability can be taken into account in sentencing, I would argue that the most serious offence should be reserved for the most serious cases involving transmission in the context of a sustained course of conduct, such as those demonstrated by Leone and Nduwayo. Furthermore, it is time to consider whether *sexual* assault is the most appropriate charge in these cases or whether the focus should be on the harm caused by transmission and not the sexual nature of the activity that was the vehicle for transmission. An offence like unlawfully causing bodily harm, found in section 269 of the *Criminal Code*, might better capture the nature of the offence and, as a hybrid offence, has a more reasonable range of penalties

¹⁸⁵ *JAT*, *supra* note 4.

¹⁸⁶ *DC* (CQ), *supra* note 28.

¹⁸⁷ 2007 BCPC 341.

¹⁸⁸ *Supra* note 84.

¹⁸⁹ "Criminal Law and HIV Transmission or Exposure: Seen New Cases" (2008) 13:1 HIV/AIDS Policy and Law 50 at 51.

to reflect the varying culpability found in these cases.¹⁹⁰ Alternatively, criminal negligence causing bodily harm, in section 221, is another option which focuses on the *consequence* in the context of wanton or reckless disregard for the life or safety of the complainant.¹⁹¹

It is difficult to extract a requirement that there be a pattern of non-disclosure from the elements of aggravated assault and its minimal definition of fault. It is here that the English experience with prosecutorial guidelines is instructive. Prosecutorial guidelines should rule out prosecuting cases like *DC*, where there is one isolated act of non-disclosure, followed by years of responsible sexual behaviour, and no transmission. Rather, prosecution should focus on cases like *Leone* or *Nduwayo*, where there is a clear pattern of reckless disregard for the potential harm to one or more complainants and a likelihood that such behaviour will persist without the intervention of criminal law.¹⁹²

B. Certainty

Since *Cuerrier*, we have seen inconsistency in the case law, with different courts and juries giving different meaning to “significant risk.” As predicted by Justice McLachlin in *Cuerrier*, the significant risk threshold has not been precise enough for consistent judicial application, and there is insufficient certainty to guide individual behaviour.

In the earlier cases, courts appeared to use the significant risk test to distinguish between protected and unprotected sex, but even this line was not drawn consistently.¹⁹³ *Mekonnen* sidestepped the entire issue and did not consider risk, convicting the accused of aggravated sexual assault, though condoms were used consistently.¹⁹⁴ Later cases continue to misapply the test. In *Mabior* and *DC*,¹⁹⁵ the trial judges equated significant risk with *any* risk.¹⁹⁶ While the-

¹⁹⁰ *Supra* note 169. The maximum sentence for unlawfully causing bodily harm is 10 years (on indictment) and 18 months (on summary conviction). One of the difficulties with unlawfully causing bodily harm in this context is the requirement from *R v DeSousa* of an underlying unlawful act [1992] 2 SCR 944 [*DeSousa*].

¹⁹¹ *Ibid.*

¹⁹² As I have argued elsewhere, it is also essential that public health options be exhausted before there is resort to the criminal law (Grant, “The Boundaries of the Criminal Law”, *supra* note 6).

¹⁹³ See e.g. *Edwards*, *supra* note 26.

¹⁹⁴ *Supra* note 34 at paras 9, 40, 52, 58.

¹⁹⁵ *DC* (CQ), *supra* note 28.

se cases have both been reversed on appeal, even the appellate judgments invite uncertainty:

... no comprehensive statement can be made about the impact of low viral loads on the question of risk. Each case depends on the facts regarding the particular accused, and each case will depend on the state of the medical evidence at the time and the manner in which it is presented in that particular case.¹⁹⁷

Recent cases have interpreted *Cuerrier* to mean that it is for the trier of fact to assess risk in each case, even where the intercourse was protected or where other circumstances rendered the risk extremely low. This has resulted in unpredictability in the application of the law and possible over-extension of *Cuerrier*. In *JT*, the British Columbia Court of Appeal rejected the argument that *Cuerrier* set a benchmark level of risk and held that risks must be assessed in each individual case, even where condoms were used or other circumstances rendered the risk below that posed by protected sex.¹⁹⁸ In *JAT*, the trial decision after *JT*, the judge sought a balanced approach:

A significant risk means a risk that is of a magnitude great enough to be considered important. ... There are two components to the proof of significant risk of harm. There must be significant risk, and the potential consequences must be serious bodily harm. ... It is no longer the case that all people infected with the virus will eventually develop AIDS and die prematurely. This is important because the nature of the harm necessarily affects the threshold of significance required to establish deprivation. As the magnitude of the harm goes up, the threshold of probability that will be considered significant goes down.¹⁹⁹

Aware of the uncertainty inherent in the *Cuerrier* test, the Manitoba Court of Appeal in *Mabior* suggested that the Supreme Court of Canada consider revisiting the law in this area:

Again, with respect to viral loads, the ability to show that an accused had a common infection or an STD at the time of sex that might have led to a spike in the viral load may very well prove

¹⁹⁶ *Mabior* (QB), *supra* note 37 at para 134. This error was pointed out by the Manitoba Court of Appeal: *Mabior* (CA) *supra* note 5 at paras 10, 19.

¹⁹⁷ *Mabior* (CA), *supra* note 5 at para 113 cited with approval in *DC* (CA), *supra* note 4 at para 113.

¹⁹⁸ *JT*, *supra* note 29.

¹⁹⁹ *JAT*, *supra* note 4 at paras 56, 77-78.

elusive. In light of these concerns and the developments in the science, the Supreme Court may wish to consider revisiting the test in *Cuerrier* to provide all parties with more certainty.²⁰⁰

Since it is a matter for the trier of fact, judges may leave it to juries to decide whether or not the use of a condom negates the significant risk of bodily harm. Juries must, first, assess the risk of protected sex from expert evidence, which may vary somewhat from case to case; second, they must determine whether that risk is sufficiently serious to negate consent. This could lead to the problematic situation where protected sex is criminalized for one individual and not for another, or in one jurisdiction and not in another.

One of the justifications offered for the criminalization of non-disclosure of HIV status is that it deters non-disclosure and encourages persons who are HIV-positive to act responsibly in sexual activity.²⁰¹ But given the jurisprudence, it is impossible to advise someone who is HIV-positive as to their legal responsibility. While the simplest position would be to say one must always disclose, this does not appear to be the current state of the law. How would a lawyer or public health official answer questions such as: (i) “Do I need to disclose if I use a condom?”; (ii) “Can non-disclosure result in criminal liability if I have an undetectable viral load?”; or (iii) “What if the sexual activity we are engaging in is low risk?” The courts interpreting *Cuerrier* have not reached a consensus on these questions, and persons with HIV are left with uncertainty, thus undermining the deterrence rationale.²⁰²

C. *Cuerrier* and Over-Criminalization

Lower courts often adopt the test from *Cuerrier* without question. What tends to get lost from that decision is the Supreme Court’s concern that criminalization be approached with caution, most clearly recognized by Justice McLachlin:

The broad extensions of the law proposed by my colleagues may also have an adverse impact on the fight to reduce the spread of HIV and other serious sexually transmitted diseases. Public health workers argue that encouraging people to come forward for testing and treatment is the key to preventing the spread of HIV and similar diseases, and that broad criminal sanctions are

²⁰⁰ *Mabior* (CA), *supra* note 5 at para 152. The Québec Court of Appeal in *DC* echoed this request (*supra* note 4 at para 121).

²⁰¹ See Grant, “The Boundaries of the Criminal Law”, *supra* note 6.

²⁰² Mykhalovskiy, Betteridge & McLay, *supra* note 103 at 11.

unlikely to be effective. Criminalizing a broad range of HIV related conduct will only impair such efforts. Moreover, because homosexuals, intravenous drug users, sex trade workers, prisoners, and people with disabilities are those most at risk of contracting HIV, the burden of criminal sanctions will impact most heavily on members of these already marginalized groups. The material before the Court suggests that a blanket duty to disclose may drive those with the disease underground.²⁰³

Justice McLachlin's fears about the uneven application of the law to certain populations were prescient, although not all the groups she identified have been singled out thus far. A recent Ontario study has shed light on the demographics surrounding prosecutions for non-disclosure.²⁰⁴ Not surprisingly, 91% of those charged in Canada for failing to disclose their HIV status are men. Seventy-two percent of the charges laid are for men not disclosing their status to women. Overall, 65% of all Canadians charged are men alleged to have not disclosed to female sexual partners, although the authors note that there has been a recent trend towards charging men who have sex with men.²⁰⁵ At 38% of all accused, Caucasian men still form the majority of those charged. Thirty-three percent of the cases involved black accused. However, race cuts across different types of prosecutions. Black men account for almost 50% of heterosexual men who have been charged since 2004, while the majority of the same-sex cases involve Caucasian men.

Contrary to Justice McLachlin's expectations, gay and bisexual men appear to be under-represented in terms of accused persons, given the prevalence of HIV in those populations. The Ontario study's authors suggest that gay and bisexual populations may have a greater acceptance of HIV-related risks than do the women who accuse heterosexual sexual partners of non-disclosure. The authors further suggest that gay men "may also be less inclined than female complainants to understand themselves to have been 'victimized' or to proceed with complaints to the police in circumstances in which non-disclosure has occurred."²⁰⁶ Some have argued that non-disclosure prosecutions have the potential to push gay men towards more casual sexual encounters where prosecution

²⁰³ *Cuerrier*, *supra* note 2 at para 55.

²⁰⁴ Mykhalovskiy, Betteridge & McLay, *supra* note 103 at 43.

²⁰⁵ *Ibid* at 11. See also Adam McDowell, *supra* note 104.

²⁰⁶ Mykhalovskiy, Betteridge & McLay, *supra* note 103 at 43.

is less likely and disclosure is not expected by the parties involved.²⁰⁷ Police officers and prosecutors may also take a different approach to laying charges when complaints are received from gay men as opposed to heterosexual women. Society may be more likely to see women as victims of predatory men, whereas gay men are more likely to be seen as complicit in the acquisition of the virus. The gendered basis of sexual assault in the HIV nondisclosure context is complicated because of the higher proportion of male complainants than in sexual assault generally and because of the potential for certain groups of women to be targeted for prosecution.

The authors of the Ontario study note that there has been a significant jump in the number of prosecutions since 2004. They describe the data as follows:

While our data support the claim that cases are increasing over time, they do not indicate a gradual increase. Rather, they show a long period of relative inactivity, with only a few criminal cases per year (with the exception of 1999 the year following the *Cuerrier* decision), followed by a sharp increase in annual cases in 2004 that is sustained until 2009. Rather than a criminalization creep, the trend in criminal cases follows a two-phase process involving a long period of inactivity followed by a sustained increase.²⁰⁸

The authors identify 104 cases in which 98 accused persons were charged with criminal offences relating to non-disclosure. During the first 14 years for which data are available, the number of cases ranged from zero to six per year. In 2004, the number went up to nine and peaked in 2006 at 16. Approximately 65% of all criminal cases have occurred between 2004 and 2009.²⁰⁹ Thus, while our ability to manage HIV has improved, and while our understanding of the risks involved with different types of sexual activity has grown, there has still been an increase in the rate of non-disclosure prosecutions. The study also points out that in at least 38% of all convictions across Canada, there is no allegation that HIV was transmitted. In 22% of the cases, transmission was alleged, and in 18% of the cases some complainants were infected while others were not. For the remaining 22% the authors were unable to determine wheth-

²⁰⁷ See e.g. Gary Marks, Scott Burris & Thomas A Peterman, "Reducing Sexual Transmission of HIV From Those who Know They are Infected: The Need for Personal and Collective Responsibility" (1999) 13:3 AIDS 297.

²⁰⁸ Mykhalovskiy, Betteridge & McLay, *supra* note 103 at 13.

²⁰⁹ *Ibid* at 44.

er transmission took place.²¹⁰ It is likely that the unknown category includes both cases of transmission and non-transmission, suggesting that in more than 40% of the cases, no bodily harm was done to the complainant. At the same time, there is an emerging body of social science evidence that suggests that the criminalization of non-disclosure does not necessarily shape the behaviour of those who are HIV-positive.²¹¹

In *Cuerrier*, Justice Cory wrote about the importance of protecting people from “high-risk” sexual behaviours.²¹² Couple this with his statement that protected sex would probably not create a significantly serious risk, and one sees that the Court did not intend to criminalize all risk. The trial judge in *JAT* recognized that *Cuerrier* did not intend to criminalize every exposure, and she pointed out the impact of scientific advances in HIV medication on the decision in *Cuerrier*. She was not satisfied “that a [12 in 10,000] risk of transmission of the virus that, while still a serious lifelong harm, is now largely treatable, constitutes endangerment to life. It follows that the Crown had not proved aggravated sexual assault.”²¹³ She based her decision, in part, on recent advances in treatment for HIV using antiretroviral medications:

HIV is no longer synonymous with AIDS and premature death. According to Dr. Murphy, those living with HIV who receive treatment have a normal life expectancy. These projections are necessarily based on extrapolation because antiretroviral drugs have only been available since 1987. Dr. Murphy was confident, however, that this is a realistic projection given that the drugs used to treat HIV have become increasingly less toxic and more targeted since their development 23 years ago.²¹⁴

The trial judge concluded by noting that the accused’s conduct was reprehensible but not criminal, echoing the exhortation from *Cuerrier* to approach criminalization cautiously:

I should not be taken to condone the behaviour of the accused.
He had a moral obligation to disclose his HIV-positive status to

²¹⁰ *Ibid* at 44.

²¹¹ See e.g. Scott Burris et al, “Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial” (2007) 39 *Ariz St LJ* 467.

²¹² *Cuerrier*, *supra* note 2 at para 141.

²¹³ *JAT*, *supra* note 4 at para 58.

²¹⁴ *Ibid* at para 22. The extended life expectancy of HIV-positive persons was also recognized in *Wright*, *supra* note 4 at para 9, but was not applied to remove culpability in that case.

his partner and to give the complainant the opportunity to assume or reject the risk involved in sexual activity with the accused, no matter how small. But 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 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. In my view, a risk of transmission of HIV of 0.12% falls short of that standard.²¹⁵

While the appellate decisions in *Mabior* and *DC*—and the trial judgment in *JAT*—demonstrate a positive trend towards a more cautious approach to criminalization, the significant risk of serious bodily harm test still allows for unpredictability and inconsistency.

V. Future Directions

It is time to rethink *Cuerrier*. A serious consequence crime is not appropriate where the virus is not transmitted. The experience of England and Wales, Australia, and New Zealand offer at least two options for consideration in Canada. First, we could adopt the English position (also followed in six Australian jurisdictions) where prosecutions are undertaken only if the virus has been transmitted. In England and Wales, for example, exposure without transmission is criminalized only where there is an actual intent to transmit the virus and there have been no such cases to date. Such an approach would remove the difficulty that surrounds issues of condom use and viral load, shifting the focus from risk to actual harm. There has never been a prosecution in Canada where the virus was transmitted despite condom use or in the context of an undetectable viral load. Only prosecuting cases involving transmission would be a major departure from the *Cuerrier* approach in Canada, but it could cut our rate of prosecution by as much as 40%. The concern with this approach is that it may not capture those who repeatedly expose their partners to risk without disclosure, but who have, fortuitously, not transmitted the virus.

This is why the second approach, used in New Zealand and two Australian states, is more appropriate for Canada. The New Zealand approach recognizes that causing serious harm to an individual warrants a more serious offence than cases in which no harm is caused. Where no transmission has occurred, a less serious offence, such as simple (sexual) assault or common nuisance is more appropriate than aggravated (sexual) assault. Common nuisance was some-

²¹⁵ *JAT*, *ibid* at para 89.

times utilized in pre-*Cuerrier* prosecutions.²¹⁶ Common nuisance in section 180 of the *Criminal Code*, with a maximum sentence of two years, is a close match to the New Zealand nuisance offence.²¹⁷ Conviction for common nuisance would not label the individual a sex offender and would reflect the approach taken in other jurisdictions examined in this paper that treat non-disclosure as an offence related to bodily harm rather than to sexual assault. In New Zealand, the practice of charging a less serious offence with a maximum sentence of one year where transmission does not occur, and the explicit provision that reasonable safeguards will negate liability, provide for a cautious and more nuanced approach to criminalization than the blanket application of aggravated assault or aggravated sexual assault that occurs in Canada.

Under Canadian law it is acceptable to convict persons who cause more severe harm of a more serious offence, even if they have the same mental state as those who do not cause harm. Gradations of offences would acknowledge that the transmission of HIV to the complainant matters. The Supreme Court of Canada has acknowledged the legitimacy of punishing offences with the same level of fault more seriously if they lead to a particular harm:

Conduct may fortuitously result in more or less serious consequences depending on the circumstances in which the consequences arise. The same act of assault may injure one person but not another. The implicit rationale of the law in this area is that it is acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused. This is reflected in the creation of higher maximum penalties for offences with more serious consequences. Courts and legislators acknowledge the harm actually caused by concluding that in otherwise equal cases a more serious consequence will dictate a more serious response.²¹⁸

²¹⁶ In fact, common nuisance was the first charge ever laid in a Canadian non-disclosure case where transmission occurred. See *R v Summer*, (1989) 98 AR 191, AJ No 784 (QL) (Alta Prov Ct), aff'd 68 Alta LR (2d) 303, 99 AR 29, 73 CR (3d) 32, [1989] AJ No 820 (CA) (two of the complainants tested positive for HIV and Summer was sentenced to 1 year of imprisonment).

²¹⁷ In cases with multiple counts, sentences would likely be made consecutive thus creating the potential for sentences longer than two years.

²¹⁸ *DeSousa* supra note 190 at 966-967.

Recognizing the additional harm to the complainant where the virus is transmitted may warrant an aggravated assault charge.²¹⁹ In my view, we should limit liability for such a serious offence to cases where it can be proven that the accused transmitted the virus to the complainant. While it is true that this position requires causation to be proved the Crown should have a heavy burden in proving this very serious charge.

Furthermore, it is questionable whether all cases of non-disclosure should give rise to criminal liability. Prosecutors need to be cautious in their exercise of discretion before laying charges for isolated acts of non-disclosure where no transmission occurs. The English prosecutorial guidelines are instructive here. They provide that the level of fault or recklessness required will only be met where there is an ongoing course of non-disclosure. Similarly, where reasonable precautions are taken, criminal charges are not appropriate: reasonable careful use of a condom should preclude prosecution. It may be necessary to clarify what careful condom use includes, as the Manitoba Court of Appeal in *Mabior* has begun to do. That Court, for example, stated that where a condom breaks or falls off it is the same as if no condom were used and immediate disclosure is required.²²⁰ Similarly, it is arguable that where tests indicate that the accused's viral load was undetectable and the virus was not transmitted, criminal prosecution is not appropriate.

The changes proposed here would require either legislative action, which seems unlikely, or a reconsideration of *Cuerrier* by the Supreme Court of Canada. With the changing picture of HIV/AIDS in Canada and increased understanding of transmission risks, *Mabior* and *DC* provide the Supreme Court with an excellent opportunity to begin this process.

Conclusion

It is important to bear in mind that every accused person in these cases is a member of a highly stigmatized and disadvantaged group in Canadian society. This is not intended to justify non-disclosure but rather to suggest that criminalization must be approached with great caution because of the danger of further marginalizing persons with HIV.

²¹⁹ As stated above, I believe a nonsexual offence like unlawfully causing bodily harm, or even aggravated assault, better reflects the nature of the harm where the virus is transmitted than aggravated sexual assault.

²²⁰ *Mabior* (CA) *supra* note 5 at para 97. Compare "Toronto woman gets house arrest for failing to disclose HIV status to man" *Canadian Press* (20 November 2009) (Robin Lee St Clair disclosed her status immediately after a condom broke during sex, and pled guilty to sexual assault).

The current law is not functional. The *Cuerrier* test does not help to draw manageable lines regarding who should be subject to criminal liability and who should not. It does not provide a clear standard that leads to predictable results, and the approach to endangerment has resulted in a trend towards over-criminalization of individuals who do not transmit the virus. The law should encourage behaviour that reduces the risk of HIV transmission, such as the use of condoms and low-risk sexual practices. Over-reliance on disclosure shifts the focus away from the consequences that we are trying to avoid. It also assumes that the accused knows his or her HIV status and that his or her sexual partner will withhold consent once disclosure takes place. The consistent use of condoms and maintenance of an undetectable viral load are more effective means of curbing sexual transmission than relying on disclosure and a subsequent denial of consent. The law in Canada must both support effective public health messages by encouraging risk-reducing behaviour and recognize the actual harm caused by transmission of HIV by reserving the most serious offences for cases where the most severe harm has been caused.

Canada has taken an extremely harsh approach to prosecuting non-disclosure of HIV-positive status. No distinction is made between cases in which the virus is transmitted and those in which it is not. It is time to rethink this blanket approach. While both the approach taken in England and Wales (of only prosecuting cases where transmission results), and that of New Zealand (where a much less serious offence is charged if no transmission results) are preferable to the Canadian approach, I would argue that the New Zealand approach is most suitable for Canada. Aggravated assault offences should be reserved for cases where the virus has been transmitted. Where there is a pattern of non-disclosure, and no transmission, less serious criminal offences are more appropriate. The Canadian approach to date—uncertain, inconsistent, and out of step with other Commonwealth jurisdictions—cries out for reconsideration.