



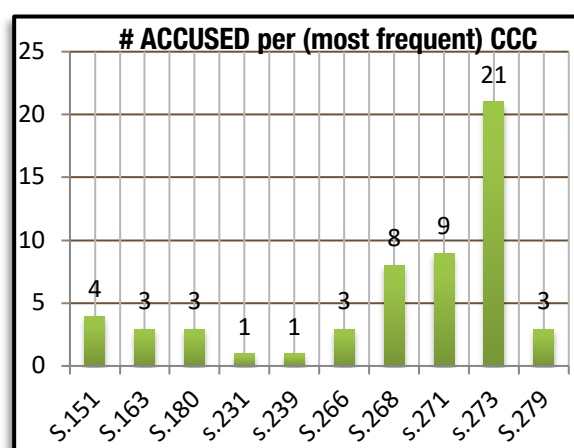
THE CRIMINALIZATION OF HIV/AIDS

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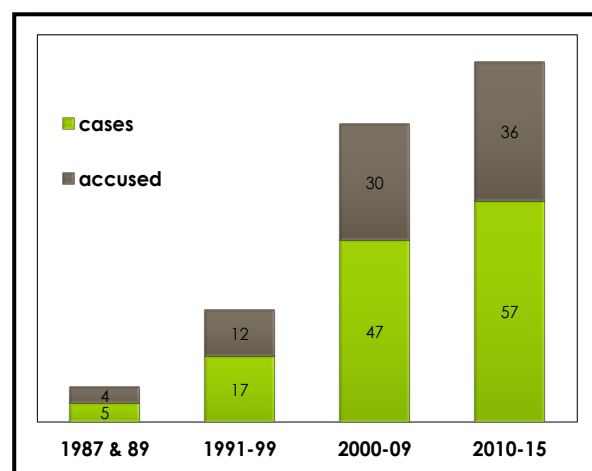
How has Canadian law evolved in terms of our understanding of sexual assault and HIV/AIDS?

We reviewed Canadian criminal cases that involved those who didn't disclose their HIV/AIDS status prior to sexual activity. We also examined current and empirically valid medical information regarding transmission rate to illustrate the evolving knowledge of the HIV/AIDS viruses.



OVERVIEW

Between 1987 and 2015 the legal consequences for non-disclosure, what constitutes “significant risk of bodily harm” and “fraud”, were tested in court. We looked at relevant cases and the Supreme Court of Canada’s (SCC) most recent judgment on these matters in *R v Mabior* [2012]. The SCC’s interpretation of current transmission rates in Canada suggests that transmission rates alone do not negate significant risk. The SCC declared that low viral load with the use of a condom do **not** constitute a significant risk and consequently not disclosing one’s HIV-seropositive status does **not** constitute “fraud” vitiating the complainant’s consent to sexual activity.



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PRE MABIOR (1998 – 2012)

In the seminal case of *R v Cuerrier* (1998), the SCC held that concealment of, or the failure to disclose one's HIV-positive status to a sexual partner, may constitute fraud thereby vitiating consent to sexual intercourse.

The court emphasized that proof of the essential element of fraud is:

- (1) Dishonesty; and
- (2) deprivation or risk of deprivation.

Both of which are required for the Crown to establish that consent to sexual relations was displaced by fraud.

R V. MABIOR (2012) SCC

The SCC revisited and clarified the significant risk test for establishing fraud vitiating consent to sexual relations.

The holding included 5 key findings:

- 1) The operative offence is now s.273 (aggravated sexual assault);
- 2) The test for consent remains valid (namely fraud vitiates consent);
- 3) Significant risk is clarified in keeping with medical evidence of risk of transmission. The wording is where there is a "realistic possibility of transmission of HIV";
- 4) Where realistic possibility exists, disclosure is required and conversely;
- 5) Realistic possibility negated if
 - accused's viral load was low; and
 - condom protection was used.

What constitutes low viral load?

With advancements in treatment options, people today can achieve a state known as having an **undetectable viral load (VL)**.

This is when a test indicates a VL **below 50 copies/mL of blood**.

The risk estimates for the sexual transmission of HIV, per sex act, range from:

- 0.5% - 3.38% for receptive anal intercourse;
- 0.06% - 0.16% for insertive anal intercourse;
- 0.08% - 0.19% for receptive vaginal intercourse (M2F);
- 0.05% - 0.1% for insertive vaginal intercourse (F2M)

IMPLICATIONS

- The Criminal Code has finally evolved to meet up with medical knowledge.
- There is drastic variation across the provinces perhaps as a result of Crown prosecutorial discretion.
- The Supreme Court's 2012 holding clarified significant risk as well as articulating the realistic possibility of transmission.