

SUPREME COURT OF NOVA SCOTIA

Citation: *R v. Thompson*, 2016 NSSC 134

Date: 20160524

Docket: CRANT No. 410992

Registry: Antigonish

Between:

Her Majesty the Queen

v.

Claude Allan Thompson

Restriction on Publication: S. 486.4 Identity of Complainants

Judge: The Honourable Justice Suzanne M. Hood

Heard: February 2, 4, 5, 11, 2015, September 8, 2015, January 7, 2016, in Antigonish, Nova Scotia

Oral Decision: April 14, 2016

Written Release of Oral Decision: May 24, 2016

Counsel: Darlene Oko, for the Crown
Christopher Boyd, for the Defendant

By the Court (Orally):

INTRODUCTION

[1] Claude Allan Thompson stands charged:

THAT between the 1st day of November, 2011, and the 30th day of December, 2011, at or near Antigonish, Nova Scotia, in committing a sexual assault on M.A.M. endanger the life of M.A.M. thereby committing an aggravated sexual assault contrary to Section 273(2)(b) of the Criminal Code of Canada;

AND FURTHERMORE on or between the November 1, 2011, and the December 30, 2011, at or near Antigonish, in the province of Nova Scotia, did in committing a sexual assault on R.H.H. endanger the life of R.H.H., thereby committing an aggravated sexual assault contrary to Section 273(2)(b) of the Criminal Code of Canada.

[2] There were five days of evidence in this trial in February and September of last year. There was a pre-trial application, which I heard in January of 2015 and closing arguments were made in January of 2016.

[3] A statement of admissions pursuant to s. 655 of the Criminal Code was filed with the court. I will refer to these admissions as necessary in the course of giving this decision.

[4] It is admitted that Claude Thompson was HIV-positive having been diagnosed in December 2009. He had been on anti-retroviral (“ARV”) treatment, but it is admitted that he left a voicemail message for his Ontario doctor on

November 2, 2011 advising that his anti-retrovirals had been stolen. He was not given a new prescription until December 13, 2011.

[5] It is admitted he off his anti-retrovirals for the minimum period November 2 to December 13, 2011.

[6] Claude Thompson had sexual intercourse with the two complainants sometime during the month of December 2011. The two complainants are identified as H.R.H. and M.A.M. The dates in December are in issue as is whether Claude Thompson disclosed to H.R.H. and M.A.M. that he was HIV-positive. There is also a dispute about whether Claude Thompson used a condom with M.A.M. It is not in dispute that he used a condom with H.R.H. It is also in issue whether Claude Thompson ejaculated during intercourse with H.R.H. and intercourse with M.A.M.

[7] In addition to identity and jurisdiction, both of which are admitted, the Crown says it must establish beyond a reasonable doubt that Claude Thompson's failure to disclose his HIV status was a dishonest act and there was a risk of serious bodily harm, deprivation. The latter is proven if there is a realistic possibility of transmission of the virus.

[8] This submission by the Crown is based upon what is the “test”, as referred to in *R. v. Mabior*, 2012 SCC 47 arising from a trial in 2008. In *Mabior* the Supreme Court of Canada said that once the Crown has established the above elements of the offence, a tactical burden falls upon the accused to raise a reasonable doubt by evidence of both a low viral load and use of a condom.

[9] The defendant says the *Mabior* test should be limited to the risk factors found in that case and that the risk factors in this case preclude a finding that there was a realistic possibility of transmission of HIV. The defendant therefore says acquittals must follow on the charges of aggravated sexual assault.

[10] This sets the stage for a consideration of the credibility of Claude Thompson, H.R.H. and M.A.M., especially in the context of the decision in *R. v. W.D.* because Claude Thompson testified. It also requires a consideration of the medical expert evidence and applicability of the so-called *Mabior* test in these circumstances.

[11] I therefore turn to a more detailed review of the evidence of the accused and the two complainants.

EVIDENCE

Testimony of Claude Allan Thompson

[12] Claude Thompson had been living in Ontario and it was there he contracted HIV. He testified he visited Antigonish in the summer of 2011, returned to Ontario and then moved to Nova Scotia to Antigonish in the period August/September 2011 because his children were there.

[13] He said on his way to Nova Scotia he was robbed and his anti-retroviral medication was stolen. He said he called his Ontario doctor and immediately got new medication. He also said he saw Dr. Ian Davis in Halifax on December 13, 2011, and got a prescription which he filled that day and took right away.

[14] Claude Thompson testified he has had counselling about HIV and was told to use condoms and disclose his HIV status to any sexual partner.

[15] He said he is now on anti-retrovirals and takes one pill every day with food. He said his last test for HIV showed an undetectable viral load, which test was six to seven months prior to February 2015 when he testified.

[16] It is admitted that his viral load at various times was:

- (i) September 2nd, 2010 – 119,332 copies
- (ii) December 10, 2010 – 136,441
- (iii) January 18th, 2011 – 276,343
- (iv) April 14th, 2011 – 403

- (v) June 24th, 2011 – 172
- (vi) December 13th, 2011 – 14,912
- (vii) January 24th, 2012 – 228

Claude Thompson testimony re H.R.H.

[17] With respect to H.R.H., Claude Thompson said he met her soon after he moved here in August and at first they were just friends. Subsequently he said he had a conversation with her on her deck when she asked if he had AIDS. He said he told her no, but that he had HIV. He said that conversation was “December ish” because it was close to Christmas. He said the relationship developed and just before Christmas he was at her apartment, both were drinking, and she said she wanted to have sex and asked him to get a condom. He said he returned to his apartment, got one and used it when they had vaginal intercourse. He testified that he did not believe he ejaculated. He said they did not discuss his HIV status that evening. He said he recalled that it was just before Christmas because it was a few days after he and his son had put up a Christmas tree and that was done one week before Christmas.

[18] On cross-examination, when provided information that he was incarcerated in Ontario from May 31 to August 31, 2011, Claude Thompson testified that he

therefore did not know when he met H.R.H. except that it was on a visit before he moved here.

[19] On cross-examination, he said he had sexual intercourse with H.R.H. the same night they had the discussion on her deck. He said it was the week before Christmas, but not as early as December 17.

[20] He then was referred to his 2012 statement to Cst. McPherson when he told him it was sometime between November and December. His explanation was that he was “frazzled” then but has had time to think since then because he reviewed documents and concluded when the sexual intercourse occurred.

[21] He testified that he did not know his viral load on December 13 until he received the results in January 2012.

[22] He was also referred on cross-examination to his criminal record which discloses 49 adult convictions, including 12 violent offences, 17 of breaching court orders, and 17 crimes of dishonesty.

[23] On cross-examination, he referred to his time as a boxer and said his memory is not good.

Claude Thompson testimony re M.A.M.

[24] Claude Thompson testified that she was a friend of H.R.H. and he met her through H.R.H. He said he had sex with M.A.M. “probably” a few days after sex with H.R.H. He said he was in and out of H.R.H.’s apartment that night and M.A.M. was there with H.R.H. and a male friend of H.R.H. He said he only had a beer or two, but M.A.M. was “loaded”, “hammered”, and she was flirting with him and wanted sex.

[25] He said he left the apartment somewhere between 9:30 and 11:00, had nothing more to drink, and went to sleep. Soon thereafter, 15 to 30 minutes later, there was banging on his door and M.A.M. was there. He said she said nothing but went directly to his bedroom and very quickly after that they had sex. He said he went to the living room and got a condom and used it. He said they had vaginal sex, but he did not ejaculate. He said he told M.A.M. of his HIV status.

[26] He said he did not see his daughter Brittany the next morning at his apartment.

[27] On cross-examination, Claude Thompson said he may have smoked a joint that night. Also on cross-examination when referred to his statement to Cst. McPherson, he agreed that he did tell him on that occasion “I was so fucking drunk”.

[28] On cross-examination he also said he assumed M.A.M. knew of his HIV status because of her friendship with H.R.H. and also said he did not recall if he told her about it. He said M.A.M. may not have seen him put the condom on because she may not have been facing him when he entered the bedroom.

Testimony of H.R.H.

[29] H.R.H. testified she had been living in her apartment with her two children and her boyfriend Josh but they broke up around the end of November. She said she then began hanging out with Claude Thompson quite soon after the breakup. She testified that the relationship changed quite quickly, but she had been told previously that he had AIDS. She then said she discussed it with him not long after her breakup with her boyfriend Josh, within a couple of weeks. She said they were on her deck and she asked him if he had AIDS and he said no but he did have Hepatitis C. She said she believed him with respect to AIDS but testified she did not know what Hepatitis C was. She said they had no other discussion about his medical status.

[30] H.R.H. said it was not long after that that they had sexual intercourse and it could have been the same night. She says she does not know the date they had sex.

It was within a week of their discussion and could have been less. It was before Christmas; therefore, within a few weeks of the breakup.

[31] She said Claude Thompson was at her apartment and they were drinking and watching television. She said she had a buzz on, but was not intoxicated nor was he. She said things progressed and they went to bed, but she asked him to get a condom. After he went to his apartment and got it, they had vaginal sex. She said there was nothing in the condom the next morning.

[32] H.R.H. testified Claude Thompson did not tell her that he was HIV-positive and, if he had, she would not have had sex with him. She said the first she knew of his HIV status was when Cst. MacPherson called her. She said she was shocked and scared. She said she was tested for STDs, including HIV. She had one test which was negative.

[33] She testified about her friend M.A.M. and she said she told M.A.M. she had had sex with Claude Thompson, but did not recall if she told her about her conversation with him with respect to AIDS.

[34] With respect to Claude Thompson and M.A.M., she said they were at her apartment with her and her boyfriend Lenny and they were drinking. She said Claude Thompson may have been there earlier and M.A.M. told her she wanted to

go to his apartment to sleep with him. She said that she and Lenny walked her over, and they left when Claude Thompson let M.A.M. in.

[35] She said this was after she had had intercourse with Claude Thompson but did not recall how long after, or if it was before or after Christmas. She said she was okay with respect to her state of sobriety that night but M.A.M. was feeling pretty good, getting drunk she guessed. She said M.A.M. was loud and silly, six out of ten on a scale of one to ten. She said M.A.M. did not return to her apartment until the next morning.

[36] On cross-examination, she was referred to her testimony at the preliminary inquiry on January 7, 2013, which was two years before her testimony at trial. At that time, she said the breakup with Josh was two to three weeks before Christmas. At trial, she acknowledged the breakup could have been sometime between December 4 and December 11. She was also referred to her preliminary inquiry testimony with respect to the date of her conversation with Claude Thompson and their sexual encounter. She agreed at trial it could have been very shortly before Christmas. On re-examination, she said she believed her memory was the same at the preliminary inquiry and at trial, and that she just did not know the timing of her sexual intercourse with Claude Thompson.

Testimony of M.A.M.

[37] M.A.M. testified she was a very good friend of H.R.H. and would “hang out” at her apartment. She said it was there she met Claude Thompson in the fall of 2011. She said she knew he and H.R.H. had slept together.

[38] One evening she was at H.R.H.’s apartment. Lenny was there too and Claude Thompson was in and out. She said she wanted to have sex with him. She said when the RCMP contacted her on February 17, 2012, it wasn’t a recent event but was a few months before that, but it was not Christmas because she said there was no Christmas tree at H.R.H.’s apartment.

[39] She said she was drinking and was between sober and drunk, feeling no pain, but not oblivious to events. She said Lenny and H.R.H. walked her to Claude Thompson’s apartment and when he answered the door she went almost straight to his bedroom. She said they had vaginal intercourse and he wore no condom. She said it all happened very quickly and he said nothing about his medical status. She said if she had known, she would not have had sex with him. She said the alcohol made her reckless and she had no condom, but was not concerned about pregnancy because she had an IUD for birth control. She said he did not offer to get a condom. She also said she did not recall him ejaculating.

[40] She said awoke the next to banging on the door and Claude Thompson’s daughter Brittany arrived and had a backpack with her. She believed school was

still in then, before Christmas. It is admitted in the s.655 Statement of Admissions that school in Antigonish was in session up to and including December 16, 2011.

[41] M.A.M. said that after contact with the RCMP she had a year of testing, which was stressful, and she had a fear of the unknown.

[42] On cross-examination, she said she was pretty sure it was before Christmas but was not certain. After being referred to her statement to Cst. MacPherson, she agreed she was drunk that night. She continued to disagree on cross-examination that a condom was used.

CREDIBILITY

[43] I cannot conclude that Claude Thompson is a credible witness. His evidence was full of inconsistencies and he admitted that, because of boxing injuries, his memory is not good.

[44] In spite of that admission, Claude Thompson professes to remember the exact date on which he put up a Christmas tree with his son in December 2011 and that he had sexual intercourse with H.R.H. two days after that.

[45] Examples of his poor memory abound in his evidence. In no particular order, these include:

1. the time at which he visited Nova Scotia in 2011 before moving here. He said he visited in the July/August period, but he was incarcerated from May 31 to August 31.
2. the date he moved to Nova Scotia from Ontario. He said it was still summer but his medical records show him to have been in Ontario on November 1 and the phone call he made while travelling here discloses he called his Ontario doctor on November 2 to say that his anti-retrovirals had been stolen.
3. He said he immediately got new medication after the theft, but it is admitted that he did not get a new prescription until December 13 from Dr. Davis in Halifax.

[46] There were also inconsistencies in his testimony at trial. These include:

1. Claude Thompson said his conversation with H.R.H. on her deck was “December-ish”, but later said it was December 18. In his videotaped statement to Cst. MacPherson, he said he had sexual intercourse with H.R.H. between November and December, and he did not recall when. His explanation at trial was that when he was interviewed in May 2012 he was frazzled but later had time to think about it and reviewed documents to recall the date.

2. Claude Thompson said he had no flare-ups of genital herpes but his medical records show otherwise.
3. With respect to condom usage with M.A.M., he said everything happened very quickly, but he also said he left the bedroom, went to the living room, got a condom out of a box and returned to the bedroom and put it on without M.A.M. being aware of him getting and putting a condom on.
4. With respect to whether he disclosed his HIV status to M.A.M., Claude Thompson said various things. First, he said he disclosed. Then he said he did not recall if he disclosed his HIV status and finally said he assumed she knew because he had told her good friend H.R.H. Furthermore in his statement to Cst. MacPherson, he said he did not tell her because she knew from H.R.H.

[47] Finally, I refer to Claude Thompson's lengthy criminal record which includes 17 convictions for crimes of dishonesty.

[48] Because he testified, the decision in *R. v. W.D.*, ([1991] 1 S.C.R. 742) applies. It provides that if I believe him, I must acquit him. Even if I do not believe him but have a reasonable doubt after considering his evidence in the context of all

the evidence, I must acquit him. If I cannot, on the whole of the evidence, decide whom to believe, I must find him not guilty.

[49] In light of all these things, I conclude Claude Thompson is not a credible witness. I do not believe him. Therefore, I must consider whether his evidence raises a reasonable doubt in the context of all the other evidence. I therefore must consider the other evidence, including the evidence of H.R.H. and M.A.M. and that of the experts.

[50] H.R.H. testified in a straightforward manner. She did not try to embellish her version of events and, with respect to dates, she said she could not be sure of the timing of her sexual encounter with Claude Thompson or when M.A.M. went to Claude Thompson's apartment. She admitted her breakup with her previous boyfriend could have been between December 4 and December 11. She said she had sexual intercourse with Claude Thompson before Christmas and within a few weeks of the breakup. She agreed on cross-examination it could have been shortly before Christmas, but confirmed on re-examination she could not be sure of the timing.

[51] However, she was certain that Claude Thompson did not tell her he was HIV-positive. She said if she had known, she would not have had sex with him.

[52] I find her evidence to be credible, especially since she said she was shocked and scared when Cst. MacPherson told her Claude Thompson was HIV-positive and it was only thereafter that she had testing done.

[53] Although she admitted their sexual encounter could have been shortly before Christmas, she could not be certain of the timing. All she could relate it to was the period after her breakup with Josh, which could have been as late as December 11.

[54] With respect to M.A.M. and the date of her sexual intercourse with Claude Thompson, the testimony is vague. H.R.H. could not be sure when it was, except that it was after she and Claude Thompson had sex and it could have been before or after Christmas.

[55] All M.A.M. could say was that it happened a few months before Cst. MacPherson contacted her on February 17, 2012. She recalled that it wasn't Christmas because there was no Christmas tree at H.R.H.'s.

[56] She admitted, when referred to her statement to Cst. MacPherson, that she was drunk on that night. She was not shaken in her testimony that Claude Thompson did not use a condom or that his daughter Brittany arrived the next morning. She could not be shaken in her testimony that he did not disclose his HIV

status to her and that she would not have had sex with him if he had. She also did not undergo testing until after Cst. MacPherson contacted her.

[57] I conclude M.A.M. was credible. She candidly admitted she could not be specific about the date, but did recall details about the event such as no Christmas tree, no disclosure by Claude Thompson of his HIV status, and the fact that no condom was used.

[58] Because Claude Thompson testified, this is not a simple question of believing him or believing H.R.H. or M.A.M. I must consider whether, although I do not find Claude Thompson credible, his testimony raises a reasonable doubt. It does not.

[59] I do not believe that he told H.R.H. and M.A.M. of his HIV status. His evidence in this regard does not raise a reasonable doubt on that issue, especially in the context of the testimony of both H.R.H. and M.A.M. that they would not have had sexual intercourse with him had they known.

[60] I did not believe that he recalls the specific date he had sexual intercourse with H.R.H. because he recalls the date on which he put his Christmas tree up as December 18 and that the sexual intercourse was two days thereafter, and with M.A.M. two days after that. In the context of the testimony of H.R.H. and M.A.M.,

I can only conclude he had sexual intercourse with H.R.H. sometime after December 10 at the earliest, which would be within a few weeks of her breakup with Josh, if that breakup was around the end of November. I also can only conclude that it may have occurred as late as December 23 which would be “shortly before Christmas” and within two to three weeks of the latest date for the breakup and H.R.H. and Josh, if that breakup occurred only two to three weeks before Christmas, i.e., early December. That puts the time period between December 10 and December 23.

[61] As I said above, I do not believe Claude Thompson when he testified that he had sexual intercourse with M.A.M. two days after he had sexual intercourse with H.R.H. In the context of her testimony and that of H.R.H, I can only conclude the sexual intercourse between Claude Thompson and M.A.M. occurred after the intercourse between Claude Thompson and H.R.H. That is not in dispute. Although M.A.M. told Cst. MacPherson it was a few months before their conversation, it is clear it was not as early as November and, in any event, that time period is quite imprecise.

[62] Based upon my conclusions with respect to the timing of intercourse between Claude Thompson and H.R.H., Claude Thompson and M.A.M. had sexual intercourse sometime after December 12 at the earliest and before Claude

Thompson developed a new relationship on December 31. H.R.H. could not be sure if it was before or after Christmas, but M.A.M.'s testimony was that she knows it was before Christmas because there was no Christmas tree at H.R.H.'s apartment. This narrows the timing to be between December 12 and December 23.

[63] I do not accept Claude Thompson's testimony that he used a condom with M.A.M. She says he did not and this is consistent with their sexual encounter having occurred very quickly and with both being drunk which, as M.A.M. said, made her reckless. Furthermore she said she was using an IUD for contraception and was not worried about getting pregnant.

[64] H.R.H. says Claude Thompson did not ejaculate because she found an empty condom the next morning. M.A.M. says she does not believe he ejaculated and Claude Thompson testified he did not.

[65] I conclude the evidence of Claude Thompson does not, in itself, raise a reasonable doubt in the context of the other evidence. A reasonable doubt may arise depending upon the testimony of the experts and a consideration of the case authorities.

[66] *R. v. W.D.* also provides that if I do not know whom to believe I must acquit. I conclude the evidence of Claude Thompson and the complainants does not

resolve the question of guilt or innocence, although I prefer the evidence of the two complainants where it conflicts with that of Claude Thompson.

[67] I find the following as facts:

1. Claude Thompson did not disclose his HIV status to either H.R.H. or M.A.M.
2. Claude Thompson did not use a condom when having sexual intercourse with M.A.M.
3. Claude Thompson did not ejaculate when having sexual intercourse with H.R.H.
4. Claude Thompson had sexual intercourse with H.R.H. sometime between December 10 and December 23.
5. Claude Thompson had sexual intercourse with M.A.M. sometime between December 12 and December 31.
6. It was H.R.H. who requested that a condom be used.
7. Claude Thompson did not know what his viral load was in December 2011 either before or after he recommenced his anti-retroviral treatment.

8. I have a reasonable doubt that Claude Thompson ejaculated when he had sexual intercourse with M.A.M.

The Law

[68] In *R. v. Cuerrier*, [1998] S.C.J. No. 64, the Supreme Court of Canada in 1998 set out the basic requirements to establish the offence of aggravated sexual assault by a person who is HIV-positive. Cory, J. wrote for the majority.

[69] In para. 95, he set out the two requirements the Crown must prove:

95 ... This charge requires the Crown to prove first that the accused's acts "endanger[ed] the life of the complainant" (s.268(1)) and, second, that the accused intentionally applied force without the consent of the complainant (s.265(1)(a)). ...

[70] Cory, J. was satisfied the first element was met. He then dealt at length with the issue of fraud initiating consent, concluding in para. 116:

116 In summary, it can be seen that the essential elements of fraud are dishonesty, which can include non-disclosure of important facts, and deprivation or risk of deprivation.

[71] He continued in para. 125:

125 Persons knowing that they are HIV-positive who engage in sexual intercourse without advising their partner of the disease may be found to fulfil the traditional requirements for fraud namely dishonesty and deprivation. That fraud may vitiate a partner's consent to engage in sexual intercourse.

[72] He then addressed the issue of significant risk of serious bodily harm saying in para. 129:

129 ... there must be a significant risk of serious bodily harm before the section can be satisfied. In the absence of those criteria, the duty to disclose will not arise.

[73] A further element is also required. As Corey, J. said in para. 130:

130 In situations such as that presented in this case it must be emphasized that the Crown will still be required to prove beyond a reasonable doubt that the complainant would have refused to engage in unprotected sex with the accused if she had been advised that he was HIV-positive.

[74] He then concluded in paras. 138 and 139:

138 In summary, on facts presented in this case, it would be open to the trier of fact to conclude that the respondent's failure to disclose his HIV-positive status was dishonest; that it resulted in deprivation by putting the complainants at a significant risk of suffering serious bodily harm. If that conclusion is reached, the complainants' consent to sexual intercourse could properly be found to have been vitiated by fraud. ...

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

[75] It was the latter phrase "significant risk of serious harm" that caused the Supreme Court of Canada to revisit the issue in 2012 in *R. v. Mabior*. McLachlin, C.J., wrote for the court, introducing the issue as follows in para. 3:

While *Cuerrier* laid down the basic requirements for the offence, the precise circumstances when failure to disclose HIV status vitiates consent and converts sexual activity into a criminal act remain unclear. The parties ask this Court for clarification.

[76] She then said in para. 4:

I conclude that a person may be found guilty of aggravated sexual assault under s.273 of the *Criminal Code* if he fails to disclose HIV-positive status before intercourse and there is a realistic possibility that HIV will be transmitted. If the HIV-positive person has a low viral count as a result of treatment and there is condom protection, the threshold of a realistic possibility of transmission is not met, on the evidence before us.

[77] A risk of serious bodily harm is therefore established when there is a realistic possibility of transmission of HIV.

[78] At para. 104, McLachlin, C.J. set out the Crown burden:

104 To summarize, to obtain a conviction under ss.265(3)(c) and 273, the Crown must show the complainant's consent to sexual intercourse was vitiated by the accused's fraud as to his HIV status. Failure to disclose (*the dishonest act*) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk of or causes actual serious bodily harm (*deprivation*). A significant risk of serious bodily harm is established by a realistic possibility of transmission of HIV. ...

[79] At para. 105, she referred to this as a *prima facie* case of "deception and deprivation".

[80] The first issue, then, is whether the Crown has met its burden of proving dishonesty or deception and deprivation, i.e., a *prima facie* case.

[81] I have concluded above that Claude Thompson did not disclose his HIV status to H.R.H. and M.A.M. Therefore the element of dishonesty or deception is proven. The issue in this case is whether the Crown has established deprivation.

[82] Claude Thompson is HIV-positive. He had sexual intercourse with H.R.H. and M.A.M. Dr. Shafran testified about the seriousness about HIV. He agreed on cross-examination that if one acquires HIV, it is serious and that serious bodily harm would result if one acquired HIV through transmission from a sexual partner. He also agreed it would have a significant impact on a person's health and well-being.

[83] I therefore conclude that the Crown has met its burden of establishing deprivation, that there is significant risk of serious bodily harm because there is a realistic possibility of transmission of HIV during sexual intercourse. The Crown has established a *prima facie* case.

[84] Therefore, as McLachlin, C.J. put it, a tactical burden falls to the defence to raise a reasonable doubt. In *Mabior*, the tactical burden was expressed in terms of evidence of both low viral load and condom use.

[85] The issue here is whether that test applies in this case. The Crown's position is that it does, the defence position is that it does not. In support of that position, the defence refers to the last sentence of para. 104 of *Mabior* as follows:

However the general proposition that a low viral load combined with condom use negates a realistic possibility of transmission of HIV does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those in the present case are at play.

[86] The Crown cautions against a case by case analysis of significant risk of serious bodily harm which would require the Crown to call medical evidence in each case. This was found in *Mabior* to be an onerous process which could result in conflicting judgments and an unfair process (referring to para. 69 of *Mabior*).

[87] As Campbell, P.C.J. (as he then was) said in *R. v. C.(J.T.)*, 2013 NSPC 105, in para. 82:

82 ... It follows that if there is a finding of fact that there is no realistic possibility of transmission, the test has not been met. There would be no reason to clearly state such a test if there was no intention that it be applied. That is not to embark on the case by case analysis that the Supreme Court expressly rejected. It does not involve the Crown calling expert evidence in each case to establish the risk or disputes about what viral load constitutes a significant risk. It does however permit the negating of that risk by defence evidence. ...

[88] He continued in that paragraph to refer to para. 95 of *Mabior* and the conclusion in that case that “flows from the evidence in this case”, i.e., that low

viral load and condom use precluded a realistic possibility of transmission of HIV in that case.

[89] Campbell, P.C.J., in para. 82, then referred to para. 101 of *Mabior* where the phrase “speculative possibility” of risk of transmission was used. He went on to say:

82 ... In other words, if the risk of transmission is a speculative possibility and not a real possibility, the HIV positive person should not be convicted of aggravated sexual assault based only on her or his deceit.

[90] The defence says therefore I should make a conclusion flowing from the evidence in this case and not slavishly follow the test in *Mabior* requiring both viral load and condom usage. The defence says I should consider the medical expert evidence about whether the risk of transmission is a realistic possibility or has been reduced to mere speculation.

[91] As Campbell, P.C.J. said in para. 83 of his decision:

83 ... The court [Supreme Court of Canada] did not preclude trial judges considering expert evidence to establish whether the risk of transmission in any given case was a speculative possibility rather than a realistic possibility. Otherwise there would be no need for that principled test. The combination of low viral load and condom use would be the only test to be applied.

[92] He continued in para. 85:

85 There must be a realistic possibility of transmission. It is negated by a low viral load and the use of a condom. The court does not state that that is the only

way in which it can be negated. It does not state that an expert opinion which establishes that the risk of transmission in a particular case is effectively zero is irrelevant. That would be tantamount to saying that the facts just don't matter and that a person with HIV is presumed to be infectious despite the facts.

[93] Campbell, P.C.J. considered the Ontario Court of Appeal decision in *R. v. Felix*, 2013 ONCA 415. He concluded at para. 93 that the issue in that case was whether the Crown had to offer proof of the level of risk. In that case, there was no expert defence evidence with respect to the risk of transmission. Similarly, in its companion case, *R. v. Mekonnen*, 2013 ONCA 414, the issue of viral load was not addressed. He then continues in para. 97:

97 That suggests that in both *R. v. Felix* and *R. v. Mekonnen* the Ontario Court of Appeal indeed was acknowledging that there may be cases when the prima facie case can be negated with expert medical evidence establishing the level of risk. The Crown is not obliged to present evidence to prove the risk. In the case of a person with HIV there is presumed to be a risk without further proof. Defence evidence merely of a low or even undetectable viral load may not be enough to negate that prima facie case. Neither the Supreme Court of Canada nor the Ontario Court of Appeal were suggesting that in the face of defence evidence establishing a risk of transmission that was so negligible as to approach zero, that a risk could be legally deemed to exist sufficient to meet the test of real possibility.

[94] In *Felix*, the court followed what it concluded was the test from *Mabior* and concluded the Crown had made out a *prima facie* case. It then continued in para. 57:

57 ... On the *Mabior* standard, even if the evidence had established that the appellant had a low viral load at the time of intercourse with N.S. and M.F., a realistic possibility of HIV transmission would not have been negated.

[95] Neither *C.(J.T.)* nor *Felix* are binding on me. However, I prefer and accept the approach taken by Campbell, P.C.J. in *C.(J.T.)* In my view, it is consistent with the interpretation of *Mabior* that a tactical burden may fall to the defence to raise a reasonable doubt once a *prima facie* case has been made out by the Crown. It also reflects the caveat in *Mabior* that other risk factors may result in a different conclusion than that which flowed from the evidence in *Mabior*. I agree with Campbell, P.C.J. that the Supreme Court of Canada was not instructing trial judges to ignore evidence and find a realistic possibility of transmission when such a risk was speculative or negligible.

[96] To follow *Felix* could, in my view, result in a conviction for aggravated sexual assault in circumstances where no such crime occurred because there was no significant risk of bodily harm.

THE EXPERT EVIDENCE

[97] This brings me to an analysis of the expert evidence. In my view, it makes clear that, contrary to the conclusion in *Felix*, establishing a low viral load does negate a realistic possibility of HIV transmission. I have had the benefit of testimony and reports of eminently qualified experts in the field of diagnosis and treatment of HIV.

[98] Dr. Ian Davis, Dr. Stephen Shafran, and Dr. John Smith testified by video-link as permitted by the court and agreed by counsel. Dr. Davis and Dr. Smith were called by the Crown, Dr. Shafran by the defence.

Dr. Ian Davis

[99] Dr. Davis' qualifications were admitted. He is a medical doctor with a specialty in infectious diseases and medical microbiology. He was qualified to give opinion evidence with respect to the diagnosis, management and treatment of persons infected with HIV/AIDS including the transmission and risk of transmission of HIV.

[100] Dr. Davis explained that HIV is transmitted primarily by sexual contact by bodily fluids. He said that viral load measures the replication of the virus and that if it is at an undetectable level the risk of transmission is extremely low. He said a low viral load is 1000 to 1500 copies/ml of blood. He testified that treatment with anti-retrovirals inhibits replication of the virus but does not eliminate the virus.

[101] Dr. Davis testified that the highest risk for transmission of HIV is with anal sex and the risk with vaginal sex is much lower but increases if there is ejaculation. He said the risk of transmission with oral sex is low. He pointed out that condom use decreases the risk.

[102] He said that once anti-retroviral treatment begins, there is a rapid reduction in viral load within the first week or two but it is difficult to say how much the viral load drops within the first one to two days of treatment.

[103] He reviewed the ACTG and ARTEMIS studies as did Dr. Shafran and Dr. Smith. He had reviewed Dr. Shafran's report and said he had no real issues with it.

[104] Dr. Davis testified that if a person with HIV is on anti-retroviral therapy, vaginal intercourse poses a negligible risk of transmission and that condoms are 100 percent effective against transmission.

Dr. Stephen Shafran

[105] Dr. Stephen Shafran is a certified specialist in infectious diseases. He was qualified to give expert opinion evidence regarding HIV, its diagnosis and treatment and its risk of transmission. There was no objection by the Crown to his qualifications. His CV and report are Exhibits 5 and 6.

[106] He referred to the Ugandan and ARTEMIS studies as well as the ACTG study. The former is a study over 22 months of couples, one of whom was HIV-positive and the other was not. He said the study showed that in that period there was zero transmission where the viral load was less than 1500.

[107] The ARTEMIS study, by a pharmaceutical company, dealt with the reduction in viral load and showed it decreased very quickly, i.e., by 98 percent within 14 days.

[108] The ACTG study was conducted by a publicly funded research group. It concluded that at day seven of treatment, there was a 93.1 percent reduction and by week two, 98 percent.

[109] Dr. Shafran testified that the risk factors affecting transmission are:

1. viral load, which he said was the most significant factor;
2. the amount of bodily fluids exchanged, with condom use being highly effective;
3. the type of sexual activity, with anal sex without a condom being the highest risk and oral sex being an extremely low risk;
4. active herpes increases the risk but latent herpes presents not much risk;
5. failure to ejaculate reduces the risk because of a lesser volume of bodily fluids.

[110] He said there is HIV in pre-ejaculate but it is not known if it transmits HIV.

He said it is possible but not proven.

[111] With respect to Claude Thompson, he assumed he resumed treatment with anti-retrovirals on December 13, the day of his appointment with Dr. Davis. Based upon the studies to which he referred, he estimated Claude Thompson's viral load would be 1023 within 7 days and 257 within two weeks. He said there was a 50 percent likelihood with respect to the 1023 figure and a distinct possibility that the viral load would be less than 1500 in 7 days. He said, however, he could not say what the viral load would be on December 18 or 19, but it could be less than 1500 on day 5 or 6.

[112] In response to hypothetical questions posed to him, Dr. Shafran testified as follows:

1. If there was one incident of sexual intercourse, unprotected with ejaculation, between December 18 and 24, the chances of transmission would be one in 1000.
2. With condom use, the risk would be decreased by 90 percent.
3. If there was no ejaculation, it would decrease the risk.
4. If there was oral sex only, the risk would be "pretty negligible" no more than one in 10,000.

[113] On cross-examination, he said both low viral load and condom usage are not needed because condom use does not change the risk.

[114] He said on cross-examination that, at some point before day 7 when he estimated a viral load of 1023, the viral load would be less than 1500 but he could not say whether it would be day 2, 3, 4, 5, or 6, but the closer it was to day 7 the more likely it is that it would be less than 1500. He agreed on cross-examination that he could only speculate with respect to a viral load of less than 1500 on day 5 or 6.

[115] On cross-examination, the Crown questioned Dr. Shafran about his strong views on criminalization of a person with HIV when there has been no transmission of HIV. On re-examination, however, he said he views on the subject had no effect on his mathematical analysis.

Dr. John Smith

[116] Dr. John R.M. Smith was permitted to give rebuttal evidence for the Crown. He was qualified to give opinion evidence with respect to HIV, its diagnosis and treatment, including the risk of transmission. The defence did not object to his qualifications.

[117] It is noteworthy that Dr. Smith is the doctor who testified at trial in *Mabior* in 2008, just over seven years before he testified here. The Supreme Court of Canada decision on *Mabior* was in 2012.

[118] Dr. Smith's CV and opinion on Dr. Shafran's report are Exhibits 11 and 12.

[119] Dr. Smith testified that either an undetectable viral load or condom usage would provide protection. He said at the time (2008) when he testified at the *Mabior* trial, doctors were very cautious about what he referred to as the "Swiss Statement" that if the viral load was undetectable, the risk of transmission was negligible. He said it is now accepted.

[120] He also testified that an increase in viral load can be detected within one week of someone going off their anti-retroviral therapy. He testified that with a viral load greater than 1500 there is a risk of transmission and the possibility becomes significant.

[121] His opinion was that there is a decrease in viral load after 7 days of treatment, but there are no studies with respect to days 1 to 6. He did, however, opine that it is probably that after 5 days Claude Thompson's viral load would be less than 1500.

[122] He, too, had the opinion that there should be no criminal sanctions, even if the person lies or fails to disclose, unless there is transmission of HIV. On cross-examination, he said he did not see any bias in Dr. Shafran's report because, as he put it, his testimony is scientifically accurate.

[123] On cross-examination Dr. Smith agreed with the Consensus Statement (Exhibit 7) that even with a viral load of approximately 15,000 protection is almost 100 percent if a condom is used. Also on cross-examination, he said that there is no proven transmission from pre-ejaculate and therefore a negligible risk at the maximum. He said that if the viral load is less than 1500, even without a condom, transmission is extremely unlikely and even less likely with condom usage.

Conclusion with respect to medical expert evidence

[124] There was little difference in opinion among the three experts, who are highly regarded in their field of expertise.

[125] They all agreed that a viral load of less than 1500 is low and that condoms, properly used, are 100 percent effective against transmission. I accept this evidence.

[126] With respect to the effect of anti-retroviral treatment, they said the following:

- (a) Dr. Davis said there is a rapid reduction within the first week or two, but did not put a number on the viral load at those times.
- (b) Dr. Shafran said that there is a 50 percent likelihood that Claude Thompson's viral load would be 1023 within 7 days, and a distinct possibility it would be less 1500 within 7 days.
- (c) Dr. Smith said there is a reduction in viral load after 7 days of treatment with anti-retrovirals.

[127] With respect to viral load before day 7 of treatment, Dr. Shafran said he could not say what the viral load would be on day 5 or 6, but it could be less than 1500. Dr. Smith said it was probably that it would be less than 1500 on day 5. Both agreed there were no studies with respect to viral load before day 7.

[128] Each testified with respect to the risk factors for transmission of HIV during unprotected vaginal intercourse. Dr. Davis said the risk of transmission is much lower than with anal sex. He also said if a person is on anti-retroviral therapy, vaginal intercourse poses a negligible risk of transmission. Dr. Shafran said the risk would be one in 1000 for unprotected sex with ejaculation.

[129] Dr. Smith said either an undetectable viral load or condom usage would provide protection. Even without a condom, but with a viral load of less than 1500, he said transmission is extremely unlikely and less so with condom usage.

[130] With respect to condom usage during vaginal intercourse, Dr. Davis said condoms are 100 percent effective. Dr. Shafran said the risk of one in 1000 for a person on anti-retroviral does not change with condom usage. In other words, he said both a low viral load and condom usage are not necessary to reduce the risk of transmission. Dr. Smith agreed on cross-examination that, even with a viral load of approximately 15,000, protection is almost 100 percent with condom usage.

[131] Dr. Shafran and Dr. Smith testified about the decrease in risk if there is no ejaculation. Dr. Shafran said there is HIV in pre-ejaculate, but no studies have been done to determine if it can be transmitted. He said it is possible, but not proven. Dr. Smith said there is no proven transmission and, in his opinion, the risk was negligible at the most.

[132] Based upon the testimony of the three experts, I draw the following conclusions:

1. If viral load is less than 1500, the risk of transmission is “negligible” (Dr. Davis), one in 1000 (Dr. Shafran), “extremely unlikely” (Dr.

Smith). I therefore conclude that there is not a realistic possibility of transmission if viral load is less than 1500.

2. Condom usage by a person with a viral load of less than 1500 has no effect on the risk of transmission, according to Dr. Shafran, and according to Dr. Davis makes it even more unlikely. Condom usage is almost 100 percent effective even with a viral load of approximately 15,000, according to Dr. Smith, and 100 percent effective according to Dr. Davis. I therefore conclude condom usage by a person with HIV precludes a realistic possibility of transmission of HIV.
3. It is unknown whether there can be HIV transmission from pre-ejaculate. I therefore conclude there is a reasonable doubt about the realistic possibility of transmission of HIV.
4. Viral load decreases rapidly within 7 days. By day 7 there is a distinct possibility it would be less than 1500 and could be less than 1500 on day 5 or 6 (Dr. Shafran), and is probably less than 1500 on day 5 or 6 (Dr. Smith). I therefore conclude there is a reasonable doubt that Claude Thompson's viral load was greater than 1500 on day 5 or 6 of anti-retroviral treatment.

[133] I must apply these conclusions to the facts that I have found above. It does not matter on what date Claude Thompson had vaginal intercourse with H.R.H. It is undisputed he used a condom and I found as a fact he did not ejaculate. Even if his viral load was close to 15,000, as it was determined to be on December 13, the medical evidence which I accept establishes that condom usage is almost 100 percent effective to prevent transmission of HIV.

[134] Claude Thompson has therefore raised a reasonable doubt about a realistic possibility of transmission of HIV to H.R.H. I therefore find him not guilty of aggravated sexual assault on H.R.H.

[135] I have found that Claude Thompson did not use a condom when he had sexual intercourse with M.A.M. However, I have a reasonable doubt about whether he ejaculated. HIV transmission is from bodily fluids and it has not been proven that pre-ejaculate transmits HIV. It is also possible that the sexual intercourse with M.A.M. occurred after Claude Thompson had recommenced anti-retroviral therapy. Based upon either, Claude Thompson has raised a reasonable doubt about the realistic possibility of transmission of HIV to M.A.M. Accordingly, I find Claude Thompson not guilty of aggravated sexual assault on M.A.M.

[136] However, I must consider the included offence of sexual assault causing bodily harm.

[137] Sexual assault causing bodily harm is an included offence to aggravated sexual assault. It is an offence pursuant to s.272(1)(c) of the *Criminal Code*.

[138] Fraud can vitiate consent as I have referred to above. The dishonest act, failure to disclose, has been established. The second requirement is deprivation; in this case that there was bodily harm.

[139] Bodily harm is defined in s.2 of the *Criminal Code* and includes psychological harm. Both H.R.H. and M.A.M. testified about their reaction to the news that Claude Thompson was HIV-positive. H.R.H. said she was scared and shocked, and underwent testing to determine if HIV had been transmitted to her.

[140] Between the time she knew that Claude Thompson was HIV-positive until the time she had the testing done and received the results, H.R.H. suffered psychological harm in that she did not know if she had contracted HIV.

[141] I conclude this is not harm of a trifling nature because of the seriousness of HIV as a disease. Nor was the harm of a transient nature. The psychological worry of whether she had contracted HIV continued until she had the results of the testing. This satisfies the requirement of deprivation.

[142] I conclude the consent of H.R.H. was vitiated by fraud. I therefore find Claude Thompson guilty of sexual assault causing bodily harm to H.R.H.

[143] M.A.M. testified she had one year of testing for HIV. She said it was stressful and she had a fear of the unknown, that is whether she had contracted HIV. She too suffered psychological harm within the meaning of bodily harm. The psychological harm lasted for one year and I conclude therefore it was not trifling or transient. M.A.M.'s consent was vitiated by fraud.

[144] Accordingly I find Claude Thompson guilty of sexual assault causing bodily harm to M.A.M.

Hood, J.