

Summary: R. v. V. (22 November 2019), Ottawa, Court File No. 0411-998-17-51-27 (O.C.J., Boxall J.)

Acquittal in the case of a potentially low viral load despite no condom use

In November 2019, the Ontario Court of Justice acquitted a man accused of HIV non-disclosure after the Crown was unable to prove a “realistic possibility” of HIV transmission beyond a reasonable doubt. Shortly after receiving his HIV diagnosis, the accused engaged in condomless oral, vaginal, and anal sex on two occasions without disclosing his HIV status to the complainant. Both instances of sex occurred within a four-day time span. The accused was not yet on treatment, but his viral load was measured at 1300 copies/ml on the day following the first instance of sex. However, the accused’s exact viral loads were unknown for the days on which the sexual encounters occurred. Based on the expert evidence presented, the court accepted that the accused’s viral load may have ranged anywhere from 425 to 3900 copies/ml on those dates. No transmission was alleged in this case.

The main issue before the court was whether there was a “realistic possibility” of HIV transmission — the legal threshold set by the Supreme Court in *Mabior* — given the lack of condom use and the uncertainty about the accused’s viral load on the dates in question. In *Mabior*, the Supreme Court stated that condom use *plus* a low viral load (less than 1500 copies/ml) can negate the “realistic possibility” of transmission. Thus, in these circumstances, non-disclosure does not amount to aggravated sexual assault.

At the same time, the *Mabior* decision left the door open for the common law to evolve based on advances in science, as well as the specific medical evidence before the courts in non-disclosure cases. The court in the current case acknowledged that the science had indeed progressed since *Mabior*, citing the 2018 federal prosecutorial directive¹ as proof of such advances. As such, the court determined that it was appropriate to base its decision on the medical evidence of transmission risk presented in this case, rather than strictly applying the *Mabior* condom/low viral load standard. The court also reiterated that, as per *Mabior*, the burden falls on the Crown to prove a realistic possibility of transmission beyond a reasonable doubt, and that there is no onus on the accused to show zero risk of transmission.

The defence’s expert, Dr. Shafran, described the risk of transmission when the HIV-positive partner’s viral load is between 200 to 1500 copies/ml as “negligible to none.” Dr. Shafran testified that transmission in this viral load range would be an “extremely rare event.” Though the court still had a reasonable doubt as to the actual level of risk in the facts at hand, the court stated that it was “clearly a very low risk.” While a “very low risk” may still be too high for a complainant, Judge Boxall reiterated that “the Supreme Court of Canada did not set the level of risk for a criminal prosecution at anything above zero or at a risk acceptable to the complainant.” There must be a *realistic possibility* of transmission, not merely a *risk* of transmission. As a result, the court found that the Crown had failed to prove beyond a reasonable doubt that a realistic possibility of HIV transmission existed in this case, and thus, the accused was acquitted.

¹ The federal directive imposed limits on HIV non-disclosure prosecutions in circumstances beyond those imposed in *Mabior*. The federal directive can be found [here](#).

This case represents a significant development in HIV non-disclosure jurisprudence post-*Mabior*. It shows that a low viral load and a condom are not always both required to negate a realistic possibility of transmission. Importantly, it emphasizes that the trial judge must consider the medical evidence in each case to determine whether the Crown has proven a realistic possibility of transmission. This decision suggests that, depending on the evidence presented at trial, a low viral load can negate a realistic possibility of transmission, even if no condom is used. Ultimately, this case demonstrates that the *Mabior* standard is not static and that it can and should evolve to keep pace with the science.