NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAME AND IDENTIFYING PARTICULARS OF THE APPELLANT REMAINS IN FORCE

IN THE COURT OF APPEAL OF NEW ZEALAND

CA793/2010
[2012] NZCA 82

BETWEEN	KSB Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 30 August and 6 September 2011

Court: Glazebrook, Arnold and Ellen France JJ

Counsel: J M Miller and K Lau for Appellant
A D Barnett and L Rice for Respondent
D B Collins QC Solicitor-General and P D Marshall for Attorney-General as Intervener

Judgment: 12 March 2012 at 10 a.m.

JUDGMENT OF THE COURT

A We answer the first question on the case stated "yes" and the second question "no". The appeal is allowed.

B Costs are reserved.

REASONS OF THE COURT

(Given by Ellen France J)

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Introduction

[1] The appellant sought compensation from the respondent for mental injury which she suffered after she learnt that her partner, with whom she had had unprotected sex, was HIV positive. He had not disclosed this fact to her during their relationship. Although the appellant did not become infected, she has suffered post traumatic stress disorder as a result of the experience. The appellant's former partner was convicted of criminal nuisance for failing to disclose that he was HIV positive (s 145 of the Crimes Act 1961).

[2] The appellant's claim for compensation was treated as an application for cover for mental injury caused by certain criminal acts under s 21(1) of the Accident Compensation Act 2001 (the 2001 Act). Section 21(2) of the 2001 Act relevantly provides cover for mental injury suffered by a person as a result of any "act" which is "within the description of an offence listed in Schedule 3" of the 2001 Act. Schedule 3 lists a number of crimes, most of which are sexual in nature (including sexual violation), by reference to the relevant sections in the Crimes Act. It does not refer to s 145 of the Crimes Act.

[3] The respondent declined cover on the basis the causative events were not an offence within the description in Schedule 3. On review, the respondent's decision

to decline cover was upheld on the basis of the High Court decision in *CLM v ACC*.[1] In that case, Randerson J upheld the decision to decline cover in relation to materially identical facts.[2]

[4] The appellant in the present case appealed unsuccessfully to the District Court but was granted leave to appeal to the High Court.[3] When the matter came to the High Court, Joseph Williams J agreed the appeal should be dismissed in light of Randerson J's judgment in *CLM v ACC*, and granted leave to appeal to this Court.[4] Joseph Williams J stated two questions of law, namely:[5]

> (a) Whether the failure of the appellant's partner to disclose his HIV status to the appellant vitiates her consent to sexual intercourse so as to constitute a sexual violation or indecent assault for the purposes of cover for mental injury under s 21, and ... Schedule [3] to the Accident Compensation Act 2001; and
>
> (b) Whether, in addition to establishing that the appellant did not consent, it is also necessary to establish that the appellant's partner did not believe that the appellant consented to the relevant sexual connection and that he had no reasonable grounds for such belief in the case of sexual violation.

[5] As the matter was initially argued, the primary issue arising from these questions was whether s 21 of the 2001 Act allowed a different interpretation of what comprised an offence to that in the criminal law. On the appeal to this Court, the Attorney-General sought and was granted leave to intervene. The submissions filed on behalf of the Attorney-General raised a further issue, namely, whether non-disclosure of HIV positive status prior to engaging in unprotected sex could vitiate consent in the criminal law. We address both issues.[6]

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1 *CLM v ACC* [2006] 3 NZLR 127 [*CLM* HC judgment].

2 Leave to appeal was granted by the High Court on one question: *CLM v ACC* HC Wellington CIV-2005-485-893, 2 August 2006. This Court reserved a further question for the substantive appeal: *CLM v ACC* CA160/06, 12 December 2006 [*CLM* CA leave judgment]. The appeal did not proceed.

3 *KSB v ACC* DC Wellington 231/2008, 22 September 2008.

4 *KSB v ACC* HC Wellington CIV-2009-485-78, 3 June 2010.

5 At [9].

6 There is no challenge to other parts of the appellant's case such as the diagnosis of post traumatic stress disorder.

Cover for mental injury

[6] At the time the appellant's claim was lodged (1 October 2004), the question of her cover was dealt with under s 21 of the 2001 Act.

Section 21 of the 2001 Act

[7] Section 21(1) provides that a person has cover for mental injury where the injury was suffered on or after 1 April 2002, the mental injury is caused by an act performed by another person, and the act is of a kind described in s 21(2).

[8] Section 21(2)(c) provides that s 21(1)(c) applies to an act that "is within the description of an offence listed in Schedule 3". As at 1 October 2004, Schedule 3 was in the following format:[7]

> **Cover for mental injury caused by certain acts dealt with in Crimes Act 1961**
>
> **Section**
>
> 128 Sexual violation
>
> ...
>
> 135 Indecent assault on woman or girl
>
> ...
>
> 201 Infecting with disease

The Schedule was subsequently amended in 2005 to reflect the changes to ss 128 to 142 of the Crimes Act. Those changes are not significant for present purposes.

[9] Reference should also be made to s 21(5), which states as follows:

> For the purposes of this section, it is irrelevant that —
>
> (a) no person can be, or has been, charged with or convicted of the offence; or
>
> (b) the alleged offender is incapable of forming criminal intent.

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[7] The current version of Schedule 3 is set out in full in the Appendix.

Is it necessary to prove absence of consent and absence of reasonable belief in consent?

[10] We first set out the relevant submissions before discussing the language and purpose of s 21 and what that means in terms of coverage for the appellant.

The competing contentions

[11] The appellant's primary position is that in order to be eligible for cover under s 21, the appellant need only establish the requisite harm has resulted from an act of intercourse. It is not necessary to show that the act was non-consensual or that there was an absence of reasonable belief in consent. Mr Miller's submission for the appellant under this head is that the wording of s 21 allows of a different interpretation to that applying in the criminal law context.

[12] Mr Miller emphasises two points. First, the no-fault nature of the accident compensation scheme with the resultant focus on assisting the injured claimant. Under that scheme, matters such as the mental state of the wrongdoer should be of little concern. Secondly, Mr Miller says the wording used in the Act is significant. His focus is on the requirement that the "act" fall within the description of the offence. Again, he submits, this suggests that it is not necessary to satisfy all the elements of the listed offence. Mr Miller makes an associated submission, namely, that the legislature could have easily used different wording, for example, by referring to the mental injury caused by an offence committed by the offender. Mr Miller sees s 21(5) as supporting his submission because it suggests an approach different from that necessary to establish the offence under the criminal law is to be applied.

[13] Finally, Mr Miller submits there is no need for concern his approach will open the floodgates to claims of this nature. That is because the claimant will still have to satisfy the need for a mental injury and show a causal link with some form of conduct by the offender that brings it within the wording.

[14] The respondent's argument is that, in the ordinary and natural meaning of the words used, all of the elements of the offence, including both a lack of consent and of reasonable belief in consent, must be present. Mr Barnett for the respondent submits that s 21 requires that the act constitute an offence and it is not an offence without all of the elements.

[15] Mr Barnett contends that the respondent's approach is consistent with the fact that the 2001 Act makes provision for only very limited cover for mental injury. He says there are a multiplicity of cases excluded which, in principle, it might otherwise thought fairly should be covered but that is not the approach taken in the 2001 Act. In his submission, where it is intended plain words in s 21(2) are to be departed from, that is expressly provided for in s 21(5). Section 21(5)(b), which applies "for the purposes of" s 21, is otherwise redundant.

Discussion

[16] The starting point is the language used. The act must be one "within the description" of one of the listed offences. The relevant listed offence in this case is sexual violation by rape. Sexual violation is defined in s 128(1) of the Crimes Act as including rape. Person A rapes person B if person A has sexual connection:[8]

> (a) without person B's consent to the connection; and
>
> (b) without believing on reasonable grounds that person B consents to the connection.

[17] The elements of sexual violation by rape are identified by Somers J in *R v Cook* in these terms:[9]

> The elements of the crime are intercourse, want of consent by the woman or a consent vitiated in one of the ways set out in s 128(1)(b) to (e), and an intention by the accused to have non-consensual intercourse which includes a state of mind that is indifferent to the existence or non-existence of consent. All three elements are required to be proved by the Crown to the normal criminal standard. The third relates to the state of mind of the accused, the first two relate to the physical act and an accompanying circumstance, the negative fact of absence of consent or the positive fact of

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8 Section 128(2).

9 *R v Cook* [1986] 2 NZLR 93 (CA) at 97.

> consent and the way it was procured. That negative fact, or in the case of consent the positive fact and its extortion, must be shown to have existed at the time of penetration of the woman by the man. The consent referred to in para (a) is a real, genuine, or true consent and may be conveyed by words or conduct or both. The consents referred to in paras (b) to (e) are also of that character but are vitiated by the features mentioned.

[18] The reference to the "act" in s 21 captures the first two elements, that is, the actus reus of the offence. These elements must be present for cover to be available. That approach would apply equally well to the other listed offences in Schedule 3. It cannot be said that consensual sexual intercourse is an act within the description of sexual violation by rape. Accordingly, we do not accept Mr Miller's contention that it is not necessary to show that the act of sexual intercourse was non-consensual. In our view, an absence of consent must be shown. The same view was reached by Randerson J in *CLM v ACC*.[10]

[19] A similar approach was discussed in a different context in *R v Te Moni*.[11] That case dealt with the phrase "caused the act or omission that forms the basis of the offence" in the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CPMIP Act). In terms of s 9, a court may not make a finding of fitness to stand trial unless satisfied on the balance of probabilities that the evidence is sufficient to show that the defendant "caused the act ... that forms the basis of the offence" with which the defendant is charged.

[20] An issue in that case was whether that phrase meant that the s 9 inquiry was limited to proof that the defendant committed the physical acts that formed the basis of the offence (in that case rape), as opposed to proving all elements of the offence, including the mental element. This Court noted that there was some indication in the parliamentary debates relating to the Bill which became the CPMIP Act that the former may have been what was envisaged by Parliament. However, the Court went on to note that the approach did not appear to set "a sufficiently high threshold" to meet the objective of s 9 which is "to ensure that a court has made a finding of criminal culpability before the sanctions which can apply to a person who is unfit to

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10 *CLM* HC judgment at [23].
11 *R v Te Moni* [2009] NZCA 560.

stand trial can be imposed on that person".[12] Further, the Court suggested that it could not be the case that all that needed to be established for the purpose of s 9 in the context of a charge of sexual violation by rape was penetration, because that begged the question as to whether the act was lawful or unlawful. Finally, the point was made that:[13]

> Non-consensual penetration is qualitatively different from consensual penetration: they are different acts. For the purposes of the present case, we consider that the determination under s 9 must be whether non-consensual penetration took place.

Similar considerations apply here.

[21] Our view of the language used in s 21(2)(c) is reinforced by s 21(5). From 1963 onwards a provision in similar terms has been a feature of the relevant legislation. Hence, since the Criminal Injuries Compensation Act 1963 it has been irrelevant whether or not a person was convicted of the offence in issue.[14] The legislation since 1963 has also made it plain the fact that no one has been charged with the offence or that the alleged offender has no ability to form the requisite criminal intention is irrelevant.[15] Such provisions are necessary only because of the link to what comprises an offence in terms of the criminal law.[16]

[22] As to whether the purpose of the 2001 Act supports our interpretation of s 21,[17] the purpose provision of the 2001 Act states the objective is to "enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing

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12 At [79].

13 At [81].

14 Criminal Injuries Compensation Act 1963, s 17(6); Accident Compensation Act 1972, s 105B(2) (this section was inserted into the 1972 Act in 1974); Accident Compensation Act 1982, s 2, definition of "personal injury by accident", para (a); Accident Rehabilitation and Compensation Insurance Act 1992, s 8(4); and Accident Insurance Act 1998, s 40(4)(a).

15 Criminal Injuries Compensation Act 1963, s 17(2); Accident Compensation Act 1972, s 105B(3); Accident Compensation Act 1982, s 2, definition of "personal injury by accident", para (a); Accident Rehabilitation and Compensation Insurance Act 1992, s 8(4); and Accident Insurance Act 1998, s 40(4)(b).

16 Hon J R Hanan in introducing the Criminal Injuries Bill explained that an application to the Crimes Compensation Tribunal could be made even though, for example, there was an acquittal. He continued, "In other words, there is often a difference between a civil claim and evidence to support a criminal conviction": (22 October 1963) 337 NZPD 2631.

17 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

personal injury ...".[18] That does not assist particularly in the present interpretation exercise. Rather, Mr Miller's strongest argument in terms of the overall statutory scheme and purpose is his reliance on the victim focus of the accident compensation regime.[19] That suggests, as Mr Miller argues, that the mental status of the wrongdoer is not critical. However, the impact of the victim focus has to be considered in light of other features of the statutory scheme.

[23] The first point we note is that the 2001 Act provides only limited cover for mental injury.[20] As Randerson J said in *CLM v ACC*, Parliament has deliberately extended cover to include mental or nervous shock "in a limited way" and always by reference to specified offences.[21]

[24] Some provision for compensation for mental injury suffered as a result of criminal offences has been made since the enactment of the Criminal Injuries Compensation Act 1963.[22] The Accident Compensation Amendment Act 1974 brought cover for personal injuries suffered as a result of criminal acts within the scope of the general accident compensation regime.

[25] The formulation used in the 2001 Act, referring to an act within the description of a listed offence, has been used consistently in the predecessor provisions to s 21 dating back to 1963.[23] For example, s 17(1) of the Criminal Injuries Compensation Act gave the Crimes Compensation Tribunal set up under that Act a discretion to award compensation to any person injured or killed by any "act or omission ... which is within the description of any of the offences" set out in the

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18 Accident Compensation Act 2001 [the 2001 Act], s 3.

19 By contrast, under the Criminal Injuries Compensation Act 1963, the conduct of the victim was a relevant factor: s 17(3). That aspect has not been a feature under the no-fault accident compensation statutes.

20 As Mr Barnett submits, the 2001 Act excludes cover for mental injury with three limited exceptions, namely: mental injury suffered because of physical injuries; mental injury which is work-related; and mental injury suffered in the circumstances set out in s 21 (see: definition of "personal injury" in s 26).

21 *CLM* HC judgment at [19].

22 See Randerson J's discussion of the accident compensation statutes in *CLM* HC judgment at [14]–[16].

23 See also Accident Compensation Act 1972, s 105B(2); Accident Compensation Act 1982, s 2, definition of "personal injury by accident", para (a); Accident Rehabilitation and Compensation Insurance Act 1992, s 8(3); and Accident Insurance Act 1998, s 40(2)(c). Slightly different formulations were used in s 2(1) of the Accident Compensation Amendment Act 1974, which amended the 1972 Act, and in 1982.

Schedule to the Act.[24] "Injury" or "injured" in that statute was defined as meaning actual bodily harm, and included pregnancy and mental or nervous shock.[25] A "victim" was defined as a person injured or killed by any act or omission "within the description" of any of the specified offences.[26]

[26] The range of specified offences in the 2001 Act is more limited than that in 1963. The Criminal Injuries Compensation Act included violent crimes such as murder and manslaughter in addition to sexual offences such as rape and indecent assault.[27] Section 201 of the Crimes Act, infecting with disease, has been a specified offence since 1963.[28] The list changed a little in 1998 with the addition of s 194 of the Crimes Act, assault on a child,[29] and the two, new, offences relating to female genital mutilation (ss 204A and 204B of the Crimes Act).

[27] There has, accordingly, been a consistent approach whereby cover is linked to a limited number of specified offences.

[28] The second point we make is that Mr Miller's approach is not consistent with the contraction of cover in this area since 1992. As noted in *Medical Law in New Zealand*, before 1992 "mental consequences unaccompanied by any physical injury" were included in the phrase "personal injury by accident" and came within the scope of cover.[30] The mental consequences for which there was cover "included lesser mental states (such as grief, humiliation, distress and mental suffering)".[31] The Accident Rehabilitation and Compensation Insurance Act 1992 cut back the

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24 Where the victim was killed, compensation could be paid to the victim's dependants: Criminal Injuries Compensation Act 1963, s 17.

25 Criminal Injuries Compensation Act 1963, s 2(1), definition of "injury".

26 Criminal Injuries Compensation Act 1963, s 2(1), definition of "victim".

27 Criminal Injuries Compensation Act 1963, Schedule.

28 Criminal Injuries Compensation Act 1963, Schedule; Accident Compensation Amendment Act 1974, s 105B(2); Accident Compensation Act 1982, s 2, definition of "personal injury by accident", para (a); Accident Rehabilitation and Compensation Insurance Act 1992, Schedule 1; and Accident Insurance Act 1998, Schedule 3.

29 Schedule 3 provides: "For the purposes of this schedule, section 194 ... must be regarded as relating only to situations where a female sexually assaults a child under 14 years old".

30 J Manning "Treatment Injury and Medical Misadventure" in P D G Skegg and R Paterson (eds) *Medical Law in New Zealand* (Thomson Brookers, Wellington, 2006) 679 at 684; see also S Todd "The Court of Appeal, Accident Compensation and Tort Litigation" in R Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oxford, 2009) 151 at 177–178.

31 Manning at 684.

cover for mental injury in particular by linking it to mental injury suffered as a result of physical injuries or specified criminal acts.[32] The definition of "mental injury" was also tightened up.[33]

[29] Taking account of the wording of s 21, the limited number of offences in Schedule 3, and the overall statutory scheme, it is not conceivable that Parliament intended to provide cover for mental injury resulting from consensual sexual intercourse. This was the view reached in this Court's leave decision in relation to *CLM v ACC*.[34]

[30] The remaining issue with respect to s 21 relates to the third element of rape, namely, the absence of reasonable belief in consent.[35] On this aspect, we take a different view from that of Randerson J. In *CLM v ACC*, Randerson J concluded that all elements of the offence had to be present including the absence of a reasonable belief in consent. As this Court suggested in granting leave to appeal on this issue in *CLM v ACC*, policy considerations support the view cover is available whether or not there is an absence of reasonable belief in consent. The Court put the argument in this way:[36]

> From the complainant's perspective non-consensual sexual connection has occurred. If the complainant suffered nervous shock as a consequence, the acquittal of the perpetrator on the ground that he had a reasonable belief that the complainant consented seems, as a matter of principle, to have little relevance to the complainant's position. As the existence of reasonable belief on the part of the perpetrator is unlikely to reduce the complainant's trauma it is not clear why it should be determinative of the question of cover.

[31] The Court went on to note that it was another issue whether the language of the 2001 Act provided cover in such circumstances. We consider the 2001 Act can be read in this way given the victim focus we have discussed. There are also

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32 Accident Rehabilitation and Compensation Insurance Act 1992, s 4(1).

33 As noted in *ACC v D* [2008] NZCA 576 at [25], cover for the facts of *Accident Compensation Corporation v E* [1991] 2 NZLR 228 (HC); aff'd [1992] 2 NZLR 426 (CA) and of *Mitchell v Accident Compensation Corporation* [1991] 2 NZLR 743 (HC); aff'd [1992] 2 NZLR 436 (CA) was omitted. In *ACC v E*, cover was available for the mental consequences of an accident although there was no physical injury. The impact of *Mitchell v ACC* was that no specific external event had to be identified as giving rise to the injury.

34 *CLM* CA leave judgment.

35 *CLM* HC judgment at [23].

36 *CLM* CA leave judgment at [11].

practical considerations supporting this view. Mr Barnett advises that as a matter of practice if, on the face of it, the act is not consensual in the sense required by the criminal law, the respondent makes no inquiry about the reasonable belief of the assailant. Absent criminal proceedings, it would generally not be practical to do so. Indeed, Mr Barnett says that in the vast majority of claims of this nature, the assailant is not named let alone communicated with by the respondent. Essentially then for these policy and practical reasons, we consider that reasonable belief in consent is irrelevant for these purposes. Accordingly, where intercourse is non-consensual, the other party's reasonable belief in consent is no bar to accident compensation coverage.

[32] As we have indicated, these conclusions are not the end of the matter because the appellant argues, in the alternative, that consent was vitiated in this case by the failure of the appellant's partner to disclose that he was HIV positive. That requires a consideration of the position under the criminal law.

Does non-disclosure of HIV vitiate consent?

[33] Section 128A of the Crimes Act sets out a number of circumstances in which allowing sexual activity does not amount to consent. The circumstances include sexual activity where the complainant is so affected by alcohol or drugs that he or she cannot consent or is affected by an intellectual impairment. Section 128A relevantly continues:

> ...
>
> (6) One person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is.
>
> (7) A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality.
>
> (8) This section does not limit the circumstances in which a person does not consent to sexual activity.
>
> ...

[34] The question is whether consent is vitiated in this case with the effect that cover would be available. This requires consideration of subss 128A(7) and (8).

The submissions

[35] The appellant submits we should adopt the Canadian approach reflected in *R v Cuerrier*.[37] The Supreme Court of Canada in *Cuerrier* concluded that failure to disclose HIV positive status may vitiate consent to sexual intercourse. The appellant says that approach is consistent with the fact that consent must be "full, voluntary, free and informed".[38] The distinction drawn between consent to the act and the risks associated with the act is a dichotomy that is not appropriate when the initial invasion of the victim's autonomy is the critical act. Mr Miller suggests this Court could either view the failure to disclose in the present case as giving rise to a mistake about the nature and quality of the act (s 128A(7)) or a matter coming within s 128A(8). The former subsection applies, he argues, because the appellant has not given informed consent. Even if the risk of infection is small, the consequences associated with it are so great that this changes the nature of the act.

[36] The Attorney-General as intervener submits that non-disclosure of HIV status should not vitiate consent to sexual activity. The respondent endorses the submissions made on behalf of the Attorney-General.

[37] Dr Collins QC says only frauds that directly concern the harms related to the offence with which the accused is charged are capable of vitiating the victim's apparent consent to that harm. There is accordingly a distinction between criminal offences which seek to protect society and its members from the risk of serious physical harm and sexual offences. Failure to disclose HIV status may be relevant in the first class of offences but not to sexual offences.

[38] Dr Collins submits that this approach is supported by the weight of international authority and settled New Zealand law. Any change to that position is a matter for Parliament, especially given the delicate questions of public and social

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37 *R v Cuerrier* [1998] 2 SCR 371 (SCC).
38 *R v Cox* CA213/96, 7 November 1996.

policy involved. Reliance is also placed on the practical difficulties arising from the application of *Cuerrier*, particularly in determining where the line is to be drawn. Finally, Dr Collins says that the current law is capable of adequately punishing what occurred here. The Solicitor-General refers in this respect to s 145(1) (criminal nuisance), s 188(2) (wounding with intent to cause grievous bodily harm), and s 201 (infecting with disease) of the Crimes Act.

The position in other jurisdictions

[39] The position in other jurisdictions is helpfully canvassed by Randerson J in *CLM v ACC*. As he noted, apart from *R v Cuerrier*, the common law jurisdictions have not yet recognised that failure to disclose HIV status can vitiate consent in relation to rape or other sexual offences.[39]

The English cases

[40] The English cases initially focused on s 20 of the Offences Against the Person Act 1861 (UK). That section provides:

> 20. Inflicting bodily injury, with or without weapon – 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 misdemeanour and been convicted thereof shall be liable ... to imprisonment ... for not more than five years.

[41] The approach in the United Kingdom for many years was as set out in *R v Clarence*.[40] Mr Clarence infected his wife with gonorrhoea after consensual intercourse at a time when he knew, but she did not, that he was suffering from that disease. His convictions of an offence under s 20 of the 1861 Act and an offence of assault occasioning actual bodily harm were set aside on appeal. The Court held that Mrs Clarence had not been deceived as to the nature of the act but rather as to the associated risk of contracting gonorrhoea. Stephen J, with whom most of the Judges in the majority agreed, explained why this deception had not vitiated consent:[41]

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39 *CLM* HC judgment at [28]–[63].
40 *R v Clarence* (1889) 22 QB 23 (Court of Crown Cases Reserved).
41 At 44–45.

> ... the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act. ... I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done. ...
>
> The woman's consent here was as full and conscious as consent could be. It was not obtained by fraud either as to the nature of the act or as to the identity of the agent. The injury done was done by a suppression of the truth. It appears to me to be an abuse of language to describe such an act as an assault.

[42] The defendant in *R v Dica*[42] was charged with two counts of inflicting grievous bodily harm contrary to s 20 of the 1861 Act. He knew he was HIV positive and had unprotected sexual intercourse with two women, both of whom were subsequently diagnosed as HIV positive. At the end of the prosecution case, the trial Judge ruled that it was open to the jury to convict the defendant of the charges and whether the women knew of his condition was irrelevant since they did not have the legal capacity to consent to such serious harm. The defendant was convicted. His appeal against conviction was allowed and a retrial ordered.

[43] As Dr Collins submits, in *Dica* the Court of Appeal of England and Wales retreated somewhat from *Clarence* for the purposes of s 20. However, the Court went on to say that the complainants had consented to intercourse and so the appellant was not guilty of rape. Judge LJ summarised the Court's conclusion as follows:

> [59] The effect of this judgment in relation to section 20 is to remove some of the outdated restrictions against the successful prosecution of those who, knowing that they are suffering HIV or some other serious sexual disease, recklessly transmit it through consensual sexual intercourse, and inflict grievous bodily harm on a person from whom the risk is concealed and who is not consenting to it. In this context, *Clarence* ... has no continuing relevance. Moreover, to the extent that *Clarence* suggested that consensual sexual intercourse of itself was to be regarded as consent to the risk of consequent disease, again, it is no longer authoritative. If however, the victim consents to the risk, this continues to provide a defence under section 20. Although the two are inevitably linked, the ultimate question is not knowledge, but consent.

Accordingly, the trial Judge should not have withdrawn the issue of consent from the jury.

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[42] *R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257.

[44] The next case we discuss, *R v Konzani*,[43] also arose under s 20 of the 1861 Act. The appellant knew he was HIV positive and repeatedly had unprotected sexual intercourse with the three complainants without telling them of his HIV status. Each of the three contracted the HIV virus. The appellant was charged with inflicting grievous bodily harm contrary to s 20. At trial the appellant said that, because infection with the virus might be one possible consequence of unprotected sexual intercourse, the complainants had consented to the risk of contracting the virus from him. In the alternative, the appellant said he had an honest, even if unreasonable, belief that the complainants had consented to the risk. The trial Judge directed the jury that, before the consent of the complainants could provide the appellant with a defence, it had to be an informed and willing consent to the risk of contracting the disease. The Judge declined to leave to the jury the issue of reasonable belief. The appellant was convicted and appealed against his conviction.

[45] Judge LJ delivering the decision of the Court of Appeal, said there was an important distinction between taking a risk of the various, "potentially adverse and possibly problematic consequences of sexual intercourse, and giving an informed consent to the risk of infection with a fatal disease".[44] The Court continued:

> [42] The recognition in *Dica* of informed consent as a defence was based on but limited by potentially conflicting public policy considerations. In the public interest, so far as possible, the spread of catastrophic illness must be avoided or prevented. On the other hand, the public interest also requires that the principle of personal autonomy in the context of adult non-violent sexual relationships should be maintained. If an individual who knows that he is suffering from the HIV virus conceals this stark fact from his sexual partner, the principle of her personal autonomy is not enhanced if he is exculpated when he recklessly transmits the HIV virus to her through consensual sexual intercourse. On any view, the concealment of this fact from her almost inevitably means that she is deceived. Her consent is not properly informed, and she cannot give an informed consent to something of which she is ignorant. Equally, her personal autonomy is not normally protected by allowing a defendant who knows that he is suffering from the HIV virus which he deliberately conceals, to assert an honest belief in his partner's informed consent to the risk of the transmission of the HIV virus. Silence in these circumstances is incongruous with honesty, or with a genuine belief that there is an informed consent. Accordingly, in such circumstances the issue either of informed consent, or honest belief in it will only rarely arise: in reality, in most cases, the contention would be wholly artificial.

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43 *R v Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App R 14.

44 At [41].

[46] In 2006, in *R v B*,[45] the Court of Appeal dealt with a defendant who was HIV positive and was charged with raping the complainant contrary to s 1 of the Sexual Offences Act 2003 (UK). By that point, the relevant provisions included s 74 of the 2003 Act which provides that, for the purposes of the relevant part of the 2003 Act, "a person consents if he agrees by choice, and has the freedom and capacity to make that choice". In addition, s 76(2)(a) provides that consent is vitiated when the defendant "intentionally deceived the complainant as to the nature or purpose" of the relevant act.

[47] The defendant in *R v B* had not told the complainant of his HIV status. His defence at trial was that the complainant consented. He was convicted. On appeal, Latham LJ set out the law in this way:

> [17] Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act. However, the party suffering from the sexually transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include consent to infection by the disease.

The Court concluded that s 76(2)(a) was inapplicable.

[48] Finally, we refer to *R v Jheeta*.[46] The appellant in that case pretended to be various police officers. He sent text messages to the complainant directing her to have sex with him. The Court of Appeal said s 76(2)(a) did not apply because the complainant had been deceived as to the situation in which she found herself but not as to the nature or purpose of intercourse.

Canada

[49] The Supreme Court of Canada in *R v Cuerrier* was dealing with ss 265 and 268 of the Canadian Criminal Code (the Criminal Code). Those sections relevantly provide:

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45 *R v B* [2006] EWCA Crim 2945, [2007] 1 WLR 1567.
46 *R v Jheeta* [2007] EWCA Crim 1699, [2008] 1 WLR 2582.

265.(1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

...

(2) This section applies to all forms of assault, including sexual assault,

... .

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force ...;

(b) threats or fear of the application of force ...;

(c) fraud; or

(d) the exercise of authority.

...

268.(1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

[50] Up until 1983, in Canada consent to sexual intercourse was vitiated when it was obtained by "false and fraudulent representations as to the nature and quality of the act".[47] The amendments to the Criminal Code in 1983 saw those words replaced by consent obtained by "fraud". The offences of rape and indecent assault were subsumed within the new assault provisions.

[51] In *Cuerrier*, the respondent was charged with two counts of aggravated assault under s 268 based on his having endangered the complainants' lives by exposing them to the risk of HIV infection through unprotected sexual intercourse. The issue before the Supreme Court of Canada was whether the sexual activity had taken place without the consent of the complainants. The Crown argued that while the complainants had consented to unprotected sexual intercourse, that consent was vitiated because it was obtained by fraud. The complainants gave evidence that if they had been informed about the respondent's HIV status they would not have agreed to unprotected sexual intercourse with him.

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[47] Canadian Criminal Code, s 143.

[52] The majority of the Court, in a judgment delivered by Cory J, concluded that for an accused to conceal, or fail to disclose, his or her HIV positive status can constitute fraud which may vitiate consent to sexual intercourse for the purposes of ss 265 and 268 of the Criminal Code. The approach taken by the majority was, essentially, that Parliament intended the definition of commercial fraud to apply, subject to some limitations. The majority considered there was a positive duty to disclose. On the majority's approach, the Crown would have to establish that the failure to disclose had the effect of exposing the complainant to a "significant risk of serious bodily harm".[48] The risk of getting AIDS as a result of unprotected sexual intercourse would meet that test. The second judgment was delivered by L'Heureux-Dubé J. Her Honour took the view that any deceit inducing consent would suffice so long as there was a causal link between the fraud and the submission to the act. Finally, McLachlin J, delivering the judgment for herself and Gonthier J, took a narrower view. On the approach of McLachlin and Gonthier JJ, fraud vitiated consent to contact where there was a deception as to the sexual character of the act; deception as to the identity of the perpetrator; or deception as to the presence of a sexually transmitted disease giving rise to serious risk or probability of infecting the complainant.

Australia

[53] As Dr Collins notes, the limited Australian authority on the issue adopts a similar approach to that in England. In *Papadimitropoulos v R*,[49] the defendant deceived the complainant into believing that they were married. On this basis the complainant consented to sexual intercourse and the defendant was convicted of rape. The High Court of Australia unanimously allowed his appeal. It held that the complainant's consent to the "physical fact of penetration" was not vitiated by the defendant's fraud. She had not been deceived as to the nature and character of the act. The Court said that:[50]

> ... carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is

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48 At [128] and see [129].
49 *Papadimitropoulos v R* (1957) 98 CLR 249 (HCA).
50 At 261.

> about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.

[54] In *R v Mobilio*,[51] the Court was dealing with the complainants' consent to transvaginal ultrasound examination. The consent was not vitiated by the fact that the examinations had been performed for the defendant's sexual gratification. The act which occurred was that for which consent had been given. The Court said that a mistake as to the purpose of an act did not detract from the fact that the act to which the woman consents is no different and has no different effects on her body.

[55] Some Australian states have enacted specific offences to cover the conduct that took place in *Papadimitropoulos* and *Mobilio*.[52] New South Wales has also criminalised the non-disclosure of HIV status to one's sexual partner, although similar provisions in other states have been repealed.[53]

The United States

[56] In the United States a number of states have enacted legislation dealing expressly with the potential transmission of HIV and sexual offences. Isabel Grant notes that 29 states have enacted legislation criminalising various forms of transmission and/or exposure to HIV.[54] However, there has been considerable criticism of this legislation in part because of concerns it does not assist in preventing the spread of HIV and in part because it overstates the seriousness of the disease given the quality of treatment now available. A possible change in approach in the United States has been signalled with the release of a white paper calling for an end to state laws that make transmission of HIV a crime.[55]

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51 *R v Mobilio* [1991] 1 VR 339 (VSCA).

52 For example, Crimes Act 1900 (ACT), s 67(1)(g); Crimes Act 1900 (NSW), s 61HA(5)(b).

53 Public Health Act 1991 (NSW), s 13.

54 Isabel Grant "The Boundaries of the Criminal Law: the Criminalization of the Non-disclosure of HIV" (2008) 31 The Dalhousie Law Journal 123 at 172–173. See also Lambda Legal "HIV Criminalization: State Laws Criminalizing Conduct Based on HIV Status" (7 December 2010) Lambda Legal: making the case for equality; The Center for HIV Law and Policy *Ending and Defending Against HIV Criminalization: State and Federal Laws and Prosecutions: Vol 1* (1st ed, Fall 2010).

55 National HIV/AIDS Strategy for the United States (July 2010) and see HR3053. REPEAL (Repeal Existing Policies that Encourage and Allow Legal) HIV Discrimination Act introduced to Congress in September 2011. Grant also discusses criticism of such legislation on the basis that it isolates out one disease as singularly unmanageable: 174.

The New Zealand position

[57] The reference to the vitiating effect of a deception as to the nature and quality of the act has been part of New Zealand law since the Criminal Code 1893. Section 191(1) of the Code defined rape as non-consensual intercourse between a man and a women other than his wife; or intercourse with consent which has been extorted by threats or fear of bodily harm; or intercourse with consent obtained by impersonating the woman's husband; or intercourse with consent obtained "by false and fraudulent representations as to the nature and quality of the act". The same wording was used in the Crimes Act 1908.[56]

[58] In Sir George Finlay's report on the Crimes Bill 1957, the author noted in relation to the proposed cl 137 that the Bill would omit the word "fraudulent" in relation to a representation about the nature and quality of the act.[57] Sir George continued:

> It must be borne in mind that the expression "nature and quality of the act" is limited to the physical aspects. See [*Cordere*] 12 Cr. App. Reps. at p. 27.
>
> ...
>
> It might be thought that there is a gap in the definition of rape as contained in the clause in the light of the judgment in the Australian case of [*Papadimitropoulos*]. There, the consent of the woman was obtained by inducing her to believe that an entirely fictitious marriage ceremony was a valid marriage. Misled by her belief in the validity of the marriage, the woman consented to sexual intercourse and her consent was held to preclude the possibility of her so-called husband being convicted of rape. Upon consideration, it was thought better not to include such circumstances in the definition of rape and so a special clause has been introduced making any such proceeding a separate offence. See Cl. 145.[58]

[59] The Crimes Act 1961 as enacted retained the reference to a "false and fraudulent representation as to the nature and quality of the act".[59] Section 137 of

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56 Section 211(1)(d).

57 G Finlay *Report on the Crimes Bill 1957* (published by the Department of Justice in 1982, along with the explanatory note to the Crimes Bill 1959) at 56– 57.

58 Glanville Williams *Textbook of Criminal Law* (2nd ed, Stevens & Sons, London, 1983) states that Stephen J's rule in *Clarence* as to "the nature of the act" was intended to limit the doctrine of vitiation of consent, not to permit the courts to expand it: at 565.

59 Section 128(1)(e).

the 1961 Act made it an offence to induce sexual intercourse by a false representation of marriage, however this offence has since been repealed.[60]

[60] Section 128 of the 1961 Act was amended with effect from 1986 as part of the rape law reform and a new s 128A inserted. The new s 128A provided a list of matters not amounting to consent and the list was expressly not exhaustive.[61] It appears that there were several options raised before the select committee considering the Bill. First, not providing any definition of consent, leaving the issue to be resolved on a case by case basis as a question of fact. This approach was favoured by the New Zealand Law Society. Secondly, an exhaustive definition, or, finally, the partial definition approach adopted in the Bill.[62] Section 128A(2)(b) as enacted relevantly provided that the matters that do not constitute consent included:

> The fact that a person consents to sexual connection by reason of –
>
> (i) A mistake as to the identity of the other person; or
>
> (ii) A mistake as to the nature and quality of the act.

Section 128A(3) provided that the section did not limit the circumstances in which there was no consent.

[61] The current formulation, which provides that a person does not consent to sexual activity if he or she allows the act because "he or she is mistaken about its nature and quality," was enacted as part of the Crimes Amendment Act 2005.

[62] The thrust of the New Zealand authorities on the meaning of the nature and quality of the act is accurately summarised in *CLM v ACC* in which Randerson J said that those authorities:

> [71] ... have accepted mistake as to the identity of the offender and mistake as to the nature and quality of the acts involved but without exploring the limits of mistakes of that kind.

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60 See Crimes Amendment Act 2005, s 7.

61 Crimes Amendment Act (No 3) 1985. See the discussion in W Young *Rape Study: a discussion paper of law and practice: Vol 1* (Department of Justice, Wellington, 1983) at 85–92 of various legislative options.

62 At the second reading of the Bill, Geoffrey Palmer MP noted the section was "not exhaustive" of the circumstances where a person may not consent, and said it would be "unwise to predict all of them": (13 August 1985) 465 NZPD 6267.

A brief description of some examples of New Zealand cases illustrates the position.

[63] In *R v Pearson*,[63] the defendant agreed to procure a miscarriage for the complainant. Instead, he made a digital internal examination but refused to do anything further whilst keeping the complainant's money. He was charged with, among other counts, indecent assault and obtaining consent by a false and fraudulent representation. In upholding the conviction on the indecent assault charge, Denniston J said that any of the defendant's actions outside of what was necessary to procure a miscarriage were done without the complainant's knowledge or consent. In finding the defendant guilty of obtaining consent by fraud, the Judge said that the complainant's consent had been obtained by something which "but for the consent would have been an indecent assault by a false representation of the nature and character of the act".[64]

[64] In *R v Moffitt*,[65] the 22 year old complainant had been in a car accident and had various health issues, including abnormal cervical cells that had been treated. She consulted the defendant, who was a clairvoyant and tarot reader. He advised her that her "sexual colours" were wrong, that she had "hang-ups" over sex and would not have a successful relationship unless those hang-ups were removed. In one session he told her that she could remove her hang-ups by taking off her clothes. The complainant had faith in the defendant's clairvoyant skills and believed that her "sexual aura" was wrong and so removed her clothes. The defendant then inserted his fingers into her vagina. She said she had consented believing the defendant had powers to help her sexual problems and that he could assist in a possible diagnosis of cancer. The defendant was charged with sexual violation by unlawful sexual connection. The Judge directed the jury as follows:[66]

> A mistake as to the nature and quality of the act can be brought about by a false representation. ... If, and of course this is much contested and a matter for you to decide, but if the accused falsely told (the complainant) that if he put his fingers into her vagina he could tell if she was alright, if the laser treatment had been successful, and he could also do something about her

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63 *R v Pearson* (1908) 11 GLR 139 (SC).
64 At 139.
65 *R v Moffitt* CA382/93, 22 November 1993.
66 At 6–7.

> sexual aura, if that is what occurred and she agreed to his doing so because of what she had been told, that is not consent.

[65] After conviction, on appeal, the defendant complained that the Judge had not left the defence of mistaken belief in consent to the jury. This Court agreed with the trial Judge that this could not be an issue on the facts as both the complainant and defendant agreed she had consented to the actions. The issue was whether her consent was vitiated by a mistake as to the nature and quality of the act. This Court upheld the direction and the conviction.

[66] Convictions for indecent assault were also upheld in *R v Ibrahim*[67] where the appellant had rubbed the complainant's breasts and genitalia. The appellant held himself out as a doctor. The complainant consented to the touching in the belief it was treatment for her sore back and neck.

[67] The position as to consent in New Zealand is also summarised by Randerson J in *CLM v ACC* as follows:

> [71] ... the concept of informed consent is well established as part of New Zealand law. For example, in *R v Cox* (CA213/96, 7 November 1996), the Court of Appeal referred to a requirement for "full, voluntary, free and informed" consent ... .

[68] Randerson J went on to note that this Court had considered the limits of consent to physical assault in *R v Lee*.[68] His Honour cited the following excerpt from that case on informed consent:[69]

> [309] Cases such as *Konzani* and *Mwai* suggest that any consent must also be informed. We do not consider that there is anything intrinsically unfair or contrary to principle in such an approach. Normally, if the scope of the activity is understood by the person consenting, then the person will be assumed to have been consenting to any risks of that activity. Where, however, there is a known information imbalance about the risks involved between those giving and seeking consent it does not seem unreasonable to require the person seeking consent to correct that imbalance. This requirement may, however, be limited to cases where the risk is major because of the very serious consequences if it does eventuate (such as with unprotected sex and HIV).

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67 *R v Ibrahim* CA352/98, 17 December 1998.
68 *R v Lee* [2006] 3 NZLR 42.
69 *CLM* HC judgment at [72].

[69] *R v Mwai*[70] concerned charges under the Crimes Act pursuant to s 188(2) (causing grievous bodily harm), s 145 (criminal nuisance) and s 201 (infecting with disease). The appellant had unprotected sexual intercourse with several women but did not tell them he was infected with HIV. Two of the women became infected with the virus. This Court said that grievous bodily harm includes really serious psychiatric injury. The Court also upheld the appellant's conviction under s 145.

[70] Randerson J considered that these observations from *Lee*, whilst obiter in terms of sexual cases, suggested there may be "some willingness to move towards something similar to the majority approach in *Cuerrier* but focussing on a lack of informed consent rather than fraud or deception".[71]

Discussion

[71] It is apparent that in England and in Australia a narrower approach has been adopted to the meaning of nature and quality than the appellant contends for. As *Adams on Criminal Law* suggests:[72]

> In referring to "nature and quality" of the act, the question is usually whether the complainant agreed to the conduct that is the subject of the charge. If they did, it is irrelevant that they would not have done so if they had been in possession of the full facts ... .

[72] The authors of *Adams* acknowledge that it is arguable that a complainant who consents to an act of unprotected sexual intercourse "unaware that his or her partner is infected with the HIV virus and that there is a significant risk of transmission" is mistaken as to the nature and quality of the act.[73] However, the authors state that the better view is that the mistake in such cases is not as to the quality of the act, namely, the intercourse, but rather as to the consequences, that is, the risk of infection or harm, "which is the actus reus of a different offence" such as criminal nuisance.[74] This view essentially reflects the approach advocated by Dr Collins. As we have

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70 *R v Mwai* [1995] 3 NZLR 149 (CA).
71 *CLM* HC judgment at [73].
72 B Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA128A.06(2)].
73 Ibid.
74 Ibid.

indicated, the position has not been fully tested in the criminal law context in New Zealand.

[73] While the phrase "nature and quality" or its equivalents have been interpreted more narrowly in other jurisdictions, we find the reasoning of McLachlin and Gonthier JJ in *Cuerrier* compelling. Essentially, we agree with McLachlin J that:

> [72] ... Consent to unprotected sexual intercourse is consent to sexual congress with a certain person and to the transmission of bodily fluids from that person. Where the person represents that he or she is disease-free, and consent is given on that basis, deception on that matter goes to the very act of assault. The complainant does not consent to the transmission of diseased fluid into his or her body. This deception in a very real sense goes to the nature of the sexual act, changing it from an act that has certain natural consequences (whether pleasure, pain or pregnancy), to a potential sentence of disease or death. It differs fundamentally from deception as to the consideration that will be given for consent, like marriage, money or a fur coat, in that it relates to the physical act itself. It differs, moreover, in a profoundly serious way that merits the criminal sanction.

[74] In other words, we agree that unprotected sexual intercourse with a person who has not disclosed his or her HIV status changes the nature and quality of the act because of the associated risk of serious harm. We share McLachlin J's view that:

> [66] ... It is unrealistic, indeed shocking, to think that consent given to sex on the basis that one's partner is HIV-free stands unaffected by blatant deception on that matter. To put it another way, if you would think the law should condone a person who has been asked whether he has HIV, lying about that fact in order to obtain consent. To say that such a person commits fraud vitiating consent, thereby rendering the contact an assault, seems right and logical.

[75] There is force in the reasoning of McLachlin and Gonthier JJ that the majority approach in *Cuerrier* (the application of the commercial law approach to fraud) is too broad. It would require disclosure of virtually any known risk of harm potentially capable of vitiating consent. The problem with that is that it restricts the ability of the court to exclude some risks as acceptable. Further, the proposed limitation, significant risk of serious bodily harm, introduces difficulties of its own. We agree that certainty as to what comprises criminal behaviour and what is on the other side of the line is important.

[76] Similar problems arise on the approach taken by L'Heureux-Dubé J which would apply if there is any deceit inducing the sexual act. As McLachlin J says, this approach contemplates the possibility that the "handshake or social buss" will be criminalised.[75] It is also imprecise and open to uncertainty.

[77] Dr Collins submits that the approach in *Cuerrier* is explicable by the changes in the Criminal Code and, in particular, by the insertion of the "fraud" category. However, that change, while relevant, was not determinative in the judgment of McLachlin and Gonthier JJ. The other factor influencing McLachlin and Gonthier JJ was the appropriateness of what was seen as an incremental change which had the effect of returning the law to the position as it was prior to *Clarence*. Prior to *Clarence*, as the cases we now discuss illustrate, the common law accepted that deception about a sexually transmitted disease with a high risk of infection amounted to fraud vitiating consent to sexual intercourse.

[78] In *R v Bennett*, the defendant was charged and convicted of the indecent assault of his 13 year old niece.[76] The two had gone to visit relations and occupied the same bed for two nights during this visit. The complainant was not aware that the defendant had done anything to her. However, it was proved the defendant had on both nights given alcohol to the complainant before they went to bed, and the complainant recollected nothing that happened during the night. A week later, the complainant was found to be suffering from a venereal disease.

[79] Willes J told the jury that if the complainant did not consent to sexual connection with a diseased man, and a fraud was committed on her, the defendant's act would be an assault by reason of such fraud. That was because, the Judge said:[77]

> ... if the prisoner, knowing that he had a foul disease, induced his niece to sleep with him, intending to possess her, and infected her, she being ignorant of his condition, any consent, which she may have given, would be vitiated, and the prisoner would be guilty of an indecent assault.

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75 At [52].
76 *R v Bennett* (1866) 4 F & F 1105, 176 ER 925.
77 At 1106.

[80] *Bennett* was applied by Shee J in *R v Sinclair*.[78] That case involved a 12 year old complainant. She said the defendant "meddled with her" and that she resisted. But she did not scream or cry out and complained four days later. She subsequently contracted gonorrhoea, which the defendant also had.

[81] The Judge told the jury that if the defendant knew he had gonorrhoea, that the probable consequence would be giving it to the complainant, and if the jury was satisfied that the complainant would not have consented if she had known of the accused's disease, her consent would be "... vitiated by the deceit practised upon her, and the prisoner would be guilty of an assault, and if he thus communicated the disease, of inflicting upon her actual bodily harm ...".[79]

[82] As McLachlin J noted, the common law also recognised deceit as to identity as capable of vitiating consent and classed the belief that an act was a medical procedure, rather than a sexual act, as in the category of mistakes as to the nature and quality of the act.[80]

[83] In *Mobilio*, these types of cases were said to reflect their different context. The Court put it in this way:[81]

> Convictions of rape have been upheld in cases where, through deception, the woman did not know that the insertion of the man's penis ... was a sexual act, but believed it to be an act of medical treatment or bodily improvement. Such cases are to be understood on the background of a degree of ignorance and naivety by some women as to sexual matters in earlier days that seems incredible today.

[84] That may be so, but these cases nonetheless support the proposition that a mistake as to the "nature and quality" is not limited solely to mistakes about the physical act.[82]

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78 *R v Sinclair* (1867) 13 Cox CC 28.

79 At 29.

80 In *R v Dee* (1884) 14 LR Ir 468, the complainant consented to sexual intercourse with the defendant thinking he was her husband. In *R v Flattery* (1877) 2 QBD 410, the complainant consented only because she thought the act was a necessary medical procedure.

81 At 349.

82 D Stuart *Canadian Criminal Law: a treatise* (4th ed, Carswell, Toronto, 2007) suggests that nature and quality "seems designed to refer to more than the physical act": at 572. Stuart suggests that all that is needed for a wider interpretation is a "different attitude": at 572 footnote 101.

[85] We accept that the early legislative history of what is now s 128A gives force to Dr Collins' submission that in using the phrase "nature and quality" in the context of rape cases, it was envisaged the phrase would have the same meaning as it does in the context of insanity. Dr Collins relies on the use of the phrase "nature and quality" in the Royal Commission's draft Criminal Code of 1879.[83] Clause 207 defined rape as including carnal knowledge without consent by a man of a female who is not his wife. The matters vitiating consent included "falsely and fraudulently misrepresenting the nature and quality of the act". Clause 22 of the draft code dealt with the defence of insanity. It relevantly defined insanity as involving a disease affecting the mind to such an extent as to be incapable of appreciating "the nature and quality of the act or that the act was wrong". Dr Collins makes the point that the phrase "nature and quality" remains in the definition of insanity in s 23 of the Crimes Act and has been interpreted as referring to the physical act and does not distinguish between its physical and moral aspects.[84]

[86] However, the more recent expansion of s 128A to make the list of matters in the section non-exhaustive is consistent with our approach. It also appears to us that the general thrust of the rape law reform with its emphasis on the need for informed consent, is consistent with our interpretation of the phrase "nature and quality".

[87] This approach also fits with that taken by this Court in *Lee* as to where the line is to be drawn between personal autonomy and the intervention of the criminal law. There the Court accepted that there was an ability to consent to the intentional infliction of harm short of death. However, where grievous bodily harm was intended, the Court said there may be policy reasons for criminalising such conduct despite consent.

[88] Randerson J in *CLM v ACC* said that while failure to disclose HIV status could not be said to go to the "nature" of the act, it arguably goes to the "quality" of

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83 *Royal Commission's Draft Criminal Code (Criminal Code (Indictable Offences) Bill 1879) (UK).*

84 See *R v Cordere* (1916) 12 Cr App R 21 and *Willgoss v R* (1960) 105 CLR 295 at 300 (CA); and see *Adams on Criminal Law* at [CA23.14]. Stuart in *Canadian Criminal Law* says that in the context of s 16 of the Canadian Criminal Code, the insanity defence, the phrase now refers to moral, "not merely physical characteristics": at 573.

the act.[85] The Court of Appeal of England and Wales in *R v Tabassum*[86] drew a distinction between nature and quality in the context of a case where the complainants were consenting to touching for medical purposes. That was the purpose of the defendant but the complainants mistakenly believed he had medical qualifications. That distinction does not appear to have found favour and we do not see it as a helpful one in this case.[87]

[89] Dr Collins points to more recent Canadian cases which, although they do not depart from *Cuerrier*, in his submission illustrate some of the issues of practical application arising under that approach.[88] The issues that have arisen in cases since *Cuerrier* relate to the threshold of "significant risk of serious bodily harm" referred to by Cory J in *Cuerrier* and whether that is met in cases where there is a reduced chance the virus will be transmitted because of low viral load, condom use or a combination of both. The impact of antiretroviral therapy in reducing the likelihood of transmission is also part of the equation. (The majority in *Cuerrier* suggested careful condom use might reduce the risk of harm so that it was no longer seen as significant but left the point open.[89] McLachlin J said use of a condom would mean there was no fraud.[90])

[90] To illustrate the impact of these matters, it is helpful to consider *R v Mabior*. The appellant in that case had been convicted of sexual offending including aggravated assault. The charges arose from consensual intercourse both protected and unprotected between the appellant and six complainants. The appellant did not inform the complainants of his HIV status. None of the complainants contracted HIV but five said they would not have had sexual intercourse if told of the appellant's HIV status. Over some of the period, the appellant had antiretroviral therapy. The evidence was that this led to his viral loads becoming undetectable.

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85 At [76].

86 *R v Tabassum* [2000] 2 Cr App R 328.

87 See, for example, the criticism by Professor Sir John Smith [2000] Crim LR 686 at 688 and the discussion in C Gallivan "Fraud Vitiating Consent to Sexual Activity: Further Confusion in the Making" (2008) 23 NZULR 87.

88 *R v Hutchinson* [2010] NSCA 3, 251 NSR (2d) 331; *R v Mabior* [2010] MBCA 93, 258 Man R (2d) 166; and *R v C* [2010] QCCA 2289. We understand the Supreme Court has recently heard appeals in *Mabior* and *C*.

89 At [129].

90 At [73].

[91] On appeal, the Court set aside some of the convictions after a close analysis of the impact of careful condom use[91] and of low viral load on the risk of transmission. The convictions were set aside on the basis the Crown had not met the "significant harm" threshold. Steel JA noted some of the issues the application of *Cuerrier* raised as follows:

> [151] At the very least, issues of condom usage and viral load raise difficulties of proof perhaps not contemplated or even known when the Supreme Court developed the test in *Cuerrier*. The scientific evidence provides only general propositions or benchmarks, whereas judicial determination of individual cases is, of necessity, fact-specific. ... 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. ...
>
> [152] 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 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.
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> [153] At present, however, *Cuerrier* is the law in Canada. The trial judge incorrectly interpreted and applied the test arising from *Cuerrier* and erred in her understanding of the relevant evidence at trial. Specifically, she erred in ruling that a combination of both undetectable viral load and the use of a condom would be required to escape criminal liability.

[92] Undoubtedly, as these cases illustrate, issues of application will arise. However, whether consent has been vitiated in a particular case is a question of fact. We do not have to go beyond the present factual situation, which involves unprotected sexual intercourse and non-disclosure of HIV status.

[93] The concerns expressed by Dr Collins about the approach we favour and the view that change should be left to Parliament are articulated by Judge LJ in *Dica*. Judge LJ made the point that risks have always been taken by adults consenting to sexual intercourse and society has not thought to criminalise those who willingly

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[91] Steel JA at [86] referred in this context to the medical evidence about the risk of transmission with condom use adduced in *Police v Dalley* (2005) 22 CRNZ 495 (DC) where the defendant was acquitted of criminal nuisance despite non-disclosure because he had worn a condom.

accept those risks. Judge LJ also discussed the problems of criminalising such consensual risk taking including the practicalities and the "haphazard nature of its impact".[92] His Honour said further that the process:

> [51] ... would undermine the general understanding of the community that sexual relationships are pre-eminently private and essentially personal to the individuals involved in them. And if adults were to be liable to prosecution for the consequences of taking known risks with their health, it would seem odd that this should be confined to risks taken in the context of sexual intercourse, while they are nevertheless permitted to take the risks inherent in so many other aspects of everyday life, including, again for example, the mother or father of a child suffering a serious contagious illness, who holds the child's hand, and comforts or kisses him or her goodnight.
>
> [52] ... interference of this kind with personal autonomy, ... may only be made by Parliament.[93]

[94] Judge LJ referred to the various points made by the organisations given leave to intervene in *Dica*. Those included "the complexity of bedroom and sex negotiations" and the unreality of a legal expectation that people will be "paragons of sexual behaviour" at such a time, or to "set about informing each other in advance of the risks or to counsel the use of condoms".[94] There was also a concern about the "significant negative consequences of disclosure of HIV, and that the imposition of criminal liability could have an adverse impact on public health" because those who should take medical advice might be discouraged from doing so.[95]

[95] Similar policy considerations were also discussed by Randerson J in *CLM v ACC*.[96] Randerson J said that the time may have come for some limited change, perhaps along the lines suggested by McLachlin J. However, unlike us, he did not have the benefit of submissions on behalf of the Crown.

[96] The academic commentary in this area similarly discusses matters such as the balance to be struck between personal autonomy and the imposition of criminal

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92 At [51].

93 In this context, the Court discussed the various proposals for law reform in this area which include: Law Commission for England and Wales *Non-Fatal Offences Against the Person* (No 218m 1993); *Law Commission Consultation Paper No 139: Consent in the Criminal Law* (1995); and Home Office *Violence: Reforming the Offences Against the Person Act 1861* (1998).

94 At [54].

95 Ibid.

96 *CLM* HC judgment at [79]–[80].

sanctions, the inter-relationship with public health issues, and how the line is to be drawn between what is the subject of the criminal law and what is not.[97]

[97] As we have said, we consider that the approach taken by McLachlin and Gonthier JJ reflects the statutory scheme. It is also sufficiently confined to strike an appropriate balance in terms of the policy considerations referred to above. The exact boundaries of a mistake as to "nature and quality" is for another day in the context of a criminal case with appropriate evidence. We add that difficult issues of retrospectivity may also be raised. They too will have to be dealt with as they arise.

[98] Accordingly, we have concluded that in the present case where there has been unprotected sexual intercourse without disclosure as to HIV status, the appellant's consent was vitiated by a mistake as to the nature and quality of the act (s 128A(7)). In the alternative, we would have concluded that the present case fell within s 128A(8). That would be consistent with the focus on the need for consent to be informed and the more recent legislative history.

Result

[99] For these reasons, the failure of the appellant's former partner to disclose his HIV status to her vititated her consent to sexual intercourse so as to constitute a sexual violation for the purposes of cover for mental injury under s 21 and Schedule 3 to the 2001 Act. Further, it is not necessary to establish that the appellant's former partner did not believe that the appellant consented to the relevant sexual connection and that he had no reasonable grounds for such belief in the case of sexual violation. We accordingly answer the first question on the case stated "yes" and the second question "no". The appeal is allowed.

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97 For example, S Bronitt "Spreading Disease and the Criminal Law" [1994] Crim. LR 21; D Ginn, "Can Failure to Disclose HIV Positivity to Sexual Partners Vitiate Consent? *R v Cuerrier*" (2000) CJWL 235; and see C Mathen and M Plaxton "HIV, Consent and Criminal Wrongs" (2011) 57 CLQ 464, at 464, where the authors note that one of the consistent criticisms in the commentary is that "the blunt instrument of criminalization is ill-suited to what is essentially a public health concern"; compare J R Spencer QC "Liability for reckless infection (Parts 1–3)" (2004) 154 NLJ 384–385, 338, 471.

[100] If there is any question about costs, counsel are to file memoranda within 20 days of the release of this judgment. Costs are reserved.

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APPENDIX

Schedule 3

Cover for mental injury caused by certain acts dealt with in Crimes Act 1961

s 21(2)

Section	
128	Sexual violation
128B(1)	Sexual violation
129	Attempt to commit sexual violation
129A	Inducing sexual connection by coercion
129(1)	Attempted sexual violation
129(2)	Assault with intent to commit sexual violation
129A(1)	Inducing sexual connection by threat
129A(2)	Inducing indecent act by threat
130	Incest
131	Sexual intercourse with girl under care or protection
131(1)	Sexual connection with dependent family member
131(2)	Attempted sexual connection with dependent family member
131(3)	Indecent act with dependent family member
132	Sexual intercourse with girl under 12
132(1)	Sexual connection with child under 12
132(2)	Attempted sexual connection with child under 12
132(3)	Indecent act on child under 12
133	Indecency with girl under 12
134	Sexual intercourse or indecency with girl between 12 and 16
134(1)	Sexual connection with young person under 16
134(2)	Attempted sexual connection with young person under 16
134(3)	Indecent act on young person under 16
135	Indecent assault
138	Sexual intercourse with severely subnormal woman or girl
138(1)	Exploitative sexual connection with person with significant impairment
138(2)	Attempted exploitative sexual connection with person with significant impairment
138(4)	Exploitative indecent act with person with significant impairment
139	Indecent act between woman and girl
140	Indecency with boy between 12
140A	Indecency with boy between 12 and 16
141	Indecent assault on man or boy
142	Anal intercourse
142A	Compelling indecent act with animal
194	Assault on a child, or by a male on a female. For the purposes of this schedule, section 194 of the Crimes Act 1961 must be regarded as relating only to situations where a female sexually assaults a child under 14 years old.
201	Infecting with disease
204A	Female genital mutilation
204B	Further offences relating to female genital mutilation