

## HIV AND SHARED RESPONSIBILITY: A CRITICAL EVALUATION OF *MABIOR* AND *DC*

Kevin Rawluk\*

### I. Introduction

This paper will critically evaluate the Supreme Court of Canada's (SCC) recent decisions in *Mabior*<sup>1</sup> and *DC*.<sup>2</sup> These cases concern an HIV positive person's obligation to disclose his or her status before engaging in sexual intercourse. More fundamentally, these cases illustrate how myths and misunderstandings continue to inform sexual assault law.

In *Mabior*, the Court held that an HIV positive individual has to disclose that status before sexual intercourse if there is a "realistic possibility that HIV will be transmitted."<sup>3</sup> The obligation is entirely on those living with HIV. There is no corresponding duty to ask about HIV status.<sup>4</sup> The Court's decision in *DC* is significant because it implicitly sanctions revenge prosecutions that could discourage those with HIV from leaving abusive relationships or otherwise exercising their personal autonomy to end relationships.

I will argue that the SCC's decisions in *Mabior* and *DC* are flawed because of their focus on risk of harm and their failure to recognize joint obligations to ask about and to disclose HIV status. It should not matter whether HIV non-disclosure exposed the complainant to a risk of harm; instead the focus should be on whether non-disclosure deprived the complainant of her right to choose how to exercise her sexuality.<sup>5</sup> This paper argues for an autonomy-based approach to the knowing non-disclosure of HIV status. While a unilateral disclosure obligation can be defended, it does little to combat the stigma surrounding HIV/AIDS and assumes an impoverished view of human agency and sexual integrity. The preferable approach is one based on shared responsibility. The law should impose a parallel obligation to ask partners about their HIV status. This duty to ask operates alongside the duty

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\* Articling Student 2013-2014, Crown Law Office – Criminal. Juris Doctor 2013 – Osgoode Hall Law School. The author would like to thank Krista Gallant for her help in developing this paper.

<sup>1</sup> *R v Mabior*, 2012 SCC 47, [2012] SCJ No 47 [*Mabior*].

<sup>2</sup> *R v DC*, 2012 SCC 48, [2012] SCJ No 48 [*DC*].

<sup>3</sup> *Mabior*, *supra* note 1 at paras 4, 91, 104.

<sup>4</sup> *Ibid* at paras 61-65.

<sup>5</sup> See generally Carissima Mathen & Michael Plaxton, "HIV, Consent and Criminal Wrongs" (2011) 57 *Crim LQ* 464 [*HIV and Criminal Wrongs*].

to disclose. Courts will not uphold *either* duty in situations where it would be unreasonable to do so.

This paper begins by critically evaluating the SCC's decisions in *Mabior* and *DC*. I will explain why *Mabior's* focus on risk of transmission is flawed. I will argue that an autonomy-based approach is more consistent with the policy underlying the criminalization of (sexual) assault and the jurisprudence on consent. I will conclude by explaining why parallel obligations to ask about and to disclose HIV status are preferable to a unilateral disclosure obligation.

## II. HIV and risk: Discussion of *Mabior* and *DC*

Section 265(3)(c) of the *Criminal Code* provides that “no consent is obtained where the complainant submits or does not resist by reason of...fraud.”<sup>6</sup>

In *Cuerrier*, the SCC held that the failure to disclose HIV status to a sexual partner could constitute fraud, vitiating consent.<sup>7</sup> To vitiate consent to a sexual activity, the Crown has to prove that:

1. the accused lied about or failed to disclose his HIV status;
2. the complainant would not have consented to the sexual activity had she known about the accused's HIV positive status; and
3. the accused's dishonesty exposed the complainant to a “significant risk of serious bodily harm.”<sup>8</sup>

The SCC was asked to reconsider *Cuerrier* in *Mabior* and *DC*.<sup>9</sup>

### (i) *R v Mabior; R v DC*

In *Mabior*, the accused had sex with nine complainants without disclosing his HIV positive status. The accused told one of the complainants that he did not have any sexually transmitted infections. There was evidence that the accused had a low viral load and used condoms inconsistently. None of the complainants contracted HIV. Eight of them testified that they would not have had sex with the accused had they known about his HIV status.<sup>10</sup>

The trial judge and Manitoba Court of Appeal came to different conclusions about what constitutes a “significant risk of serious bodily harm” under *Cuerrier*. The trial judge held that an HIV positive individual does not have to disclose when his or her viral loads are undetectable *and* a condom is used.<sup>11</sup> The Court of Appeal disagreed and held that an HIV positive individual does not have to disclose when he or she has a low viral load *or* a condom is used.<sup>12</sup>

<sup>6</sup> *Criminal Code*, RSC 1985, c C-46, s 265(3)(c) [*Criminal Code*].

<sup>7</sup> *R v Cuerrier*, [1998] 2 SCR 371 at paras 124-125, [1998] SCJ No 64 [*Cuerrier*].

<sup>8</sup> *Ibid* at paras 124-130. See also *Mabior*, *supra* note 1 at para 12.

<sup>9</sup> *Mabior*, *supra* note 1 at para 13.

<sup>10</sup> *Ibid* at paras 5-9.

<sup>11</sup> *R v Mabior*, 2008 MBQB 201 at paras 113-117, 134-137, [2008] MJ No 277.

<sup>12</sup> *Mabior*, *supra* note 1 at para 9.

The SCC affirmed that an individual can be found guilty of aggravated sexual assault for not having disclosed his or her HIV positive status before intercourse.<sup>13</sup> While recognizing that *Cuerrier* has been subject to criticism, the Court concluded that its focus on the risk of harm is correct.<sup>14</sup> The Court decided to keep the general approach under *Cuerrier* but attempted to clarify when HIV non-disclosure would create a “significant risk of serious bodily harm.”<sup>15</sup> The Court held that this requirement is met and disclosure is required if there is a “realistic possibility” that HIV will be transmitted.<sup>16</sup> An HIV positive person does not have to disclose before *vaginal intercourse* where he or she has a low viral load *and* a condom is used because then there is no realistic possibility of transmission.<sup>17</sup>

In *DC*, the accused and complainant had sex on one occasion before she disclosed her HIV positive status.<sup>18</sup> The accused’s viral load was undetectable at that time.<sup>19</sup> The accused claimed that a condom was used, while the complainant said that it was not. After disclosure, the two entered into a four-year relationship. They lived together and had protected and unprotected sex. The complainant did not contract HIV. In December 2004, the accused tried to end the relationship. The complainant refused to leave the family home and assaulted the accused and her son when they tried to pick up their belongings. The complainant was convicted of assault. In February 2005, the complainant went to the police about the accused’s initial non-disclosure. The accused was charged with sexual assault and aggravated assault.<sup>20</sup>

The trial judge convicted the accused on both charges because he found that a condom was not used during the relevant sexual encounter.<sup>21</sup> The Quebec Court of Appeal overturned the convictions and held that there was no significant risk of serious bodily harm because the accused’s viral load was undetectable at the time.<sup>22</sup>

The SCC applied *Mabior* and would have restored the conviction on the basis that an HIV positive person needs to disclose unless his or her viral loads are low *and* a condom is used. However, the trial judge erred in concluding that a condom was not used. Accordingly, the Crown’s appeal was dismissed.<sup>23</sup>

### (ii) Discussion

*Mabior* effectively (re)introduces implied or constructive consent into Canadian sexual assault law. In *Ewanchuk*, the SCC held that the absence of consent is determined by the complainant’s subjective state of mind.<sup>24</sup> The Court unequivocally rejected that there could be implied consent to sexual touching.<sup>25</sup> These

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<sup>13</sup> *Ibid* at para 4.

<sup>14</sup> *Ibid* at paras 13, 57-58.

<sup>15</sup> *Ibid* at paras 60, 81-82.

<sup>16</sup> *Ibid* at paras 91-92.

<sup>17</sup> *Ibid* at paras 94-104.

<sup>18</sup> *DC*, *supra* note 2 at para 9.

<sup>19</sup> *Ibid* at paras 2, 29.

<sup>20</sup> *Ibid* at paras 4-7.

<sup>21</sup> *Ibid* at para 15.

<sup>22</sup> *Ibid* at para 2.

<sup>23</sup> *Ibid* at paras 29-30.

<sup>24</sup> *R v Ewanchuk*, [1999] 1 SCR 330 at paras 26-27, [1999] SCJ No 10 [*Ewanchuk*].

<sup>25</sup> *Ibid* at paras 31, 87, 103.

holdings were recently affirmed in *JA*.<sup>26</sup> In his dissenting opinion in *JA*, Justice Fish emphasized that the law governing consent is meant to protect personal autonomy. It should not be used to undermine personal autonomy by limiting an individual's freedom to choose whom to have sex with and under what circumstances. Simply put, the law should not make the choice for an individual about which sexual activities he or she will consent to.<sup>27</sup> Instead of protecting personal autonomy, *Mabior* deems consent where judicially defined thresholds of harm are not met.

Contrary to *Ewanchuk* and *JA*, *Mabior* implies or imputes consent to the complainant where there is no realistic possibility that HIV will be transmitted. If there is no realistic possibility of transmission, it does not matter that the accused's fraud induced the complainant's consent. *Mabior* will allow courts to find that a complainant legally "consented" to sex with an HIV positive person, while simultaneously finding that she did not actually consent.<sup>28</sup> In situations where a condom was used during vaginal intercourse and the accused had a low viral load, the complainant's subjective consent is rendered legally irrelevant. In this way, the Court's approach in *Mabior* is comparable to that in *Cuerrier*. Elizabeth Sheehy and Christine Boyle analogized the latter to "telling a person who has been subjected to a non consensual surgical procedure that even though she would not have consented to it, the procedure did not do her any harm."<sup>29</sup>

In addition, the Court's insistence on condom use means that the disclosure obligation bears more heavily on women. Indeed, the rule in *Mabior* may have created a "de facto" disclosure obligation for women in heterosexual relationships.<sup>30</sup> While men with low viral loads can choose to wear condoms and avoid disclosing, women with low viral loads have to convince their male partners to use a condom or be forced to disclose. Women are not always in a position to require condom use. The same can be said for men in some homosexual relationships. In some situations, those with HIV may be subjected to violence if they insist on condom use or if they disclose.<sup>31</sup> *Mabior* asks these people to choose between a risk of immediate violence and a risk of criminal prosecution for aggravated (sexual) assault. If the Court is going to insist on condom use, it should provide the accused with a defence where it is established that he or she did not require condom use or disclosure because of a reasonable fear of violence.<sup>32</sup> The problem with the Court's analysis in *Mabior* is that it severed legal principles from social context and failed

<sup>26</sup> *R v JA*, 2011 SCC 28 at paras 45-47, 57, [2011] 2 SCR 440 [*JA*].

<sup>27</sup> *Ibid* at para 72.

<sup>28</sup> Addressing *Cuerrier*: Elizabeth Sheehy & Christine Boyle, "Justice L'Heureux-Dubé and Canadian Sexual Assault Law: Resisting the Privatization of Rape," in Elizabeth Sheehy, ed, *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004) 247 at 263 [*Adding Feminism to Law*].

<sup>29</sup> *Ibid* at 265.

<sup>30</sup> Carissima Mathen, "R v Mabior; R v DC," *Slaw* (October 5, 2012), online: <<http://www.slaw.ca/2012/10/05/r-v-mabior-r-v-dc>>.

<sup>31</sup> Samantha Ryan, "Risk-Taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability" (2007) 28 *Liverpool LR* 215 at 239-241 [*Risk-Taking and HIV Transmission*]. See also Emily MacKinnon & Constance Crompton, "The Gender of Lying: Feminist Perspectives on the Non-Disclosure of HIV Status" (2012) 45:2 *UBC L Rev* 407 at 440-441 [*Gender of Lying*].

<sup>32</sup> *Risk-Taking and HIV Transmission*, *supra* note 31 at 239-242.

to consider the issues in light of the gendered power imbalances in sexual relationships.

As an application of *Mabior*, the SCC's reasons in *DC* do not add very much to the substantive discussion around HIV non-disclosure and consent. However, *DC* is more important for what the Court does not say. The Court failed to comment on charge screening and whether the Crown should have proceeded with this prosecution in the first place. This omission implicitly sanctions revenge prosecutions that could discourage those with HIV from leaving abusive relationships or otherwise exercising their personal autonomy to end relationships.

The Crown should not have proceeded with the prosecution in *DC*. The "victim" did not seem to be complaining about the one time he was unknowingly exposed to HIV. His complaint appeared to be about punishing the accused for ending their relationship and for reporting his domestic violence to the police. The complainant did not report the accused's non-disclosure once he found out about it. He came forward after a four-year relationship with the accused had ended. During that relationship he had protected and unprotected sex with the accused, even though he knew about her HIV positive status. The complainant only came forward after he was convicted of assaulting the accused and her son when she tried to end the relationship. Even the trial judge saw that there was an "aura of vengeance" around the complaint.<sup>33</sup>

The Crown's decision to prosecute was not supported by charge screening principles. The facts in *DC* should have led the Crown to conclude that the chances of conviction were too low to justify proceeding.<sup>34</sup> The Crown had to prove that, notwithstanding the subsequent four year sexual relationship, the complainant would not have consented to the initial sexual encounter had he known about the accused's HIV status.<sup>35</sup> On these facts the Court should have emphasized the importance of charge screening in situations of HIV non-disclosure and cautioned that the threat of criminal prosecution should not become a way to keep vulnerable people in unwanted relationships.

*Mabior* and *DC* leave important questions for those living with HIV unanswered. After *Mabior*, it is clear that a person has to disclose his or her HIV positive status before vaginal intercourse unless he or she has a low viral load and a condom is used. However, the Court failed to provide any such guidance with respect to oral or anal sex.<sup>36</sup> The Court also failed to clarify an HIV positive person's disclosure obligations where he or she has a low viral load and a condom is used but breaks during vaginal intercourse. Thus, for many living with HIV, the uncer-

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<sup>33</sup> *DC*, *supra* note 2 at paras 4-7, 9, 12.

<sup>34</sup> In Quebec, like in Ontario, the Crown can only proceed with charges if the evidence satisfies an objective threshold related to the probability of conviction. In Ontario, there has to be a "reasonable prospect of conviction." See Ontario, Ministry of Attorney General, *Crown Policy Manual*, "Charge Screening" (March 21, 2005) at 1-2. The charge screening standard in Quebec is even more stringent. See Québec, Directeur des poursuites criminelles et pénales, "Accusation – Poursuite des Procédures" (March 31, 2009) at § 6. See also Steven Penny, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Markham: LexisNexis Canada Inc, 2011) at 449-450.

<sup>35</sup> *Cuerrier*, *supra* note 7 at para 130. See also *Mabior*, *supra* note 1 at paras 12, 104.

<sup>36</sup> Canadian HIV/AIDS Legal Network, "HIV non-disclosure and the criminal law: An analysis of two recent decisions of the Supreme Court of Canada" (2012) at 1, 8, online: <<http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=2083>>.

tainty caused by *Cuerrier*'s requirement of "significant risk of serious bodily harm" continues to persist.

### III. HIV and shared responsibility: The duty to ask and the duty to disclose

#### (i) HIV non-disclosure should vitiate consent where it induces consent

The assault provisions in the *Criminal Code* are meant to protect and promote an individual's personal autonomy by recognizing his or her right to control who has access to their body and under what circumstances.<sup>37</sup> It follows that fraud should vitiate consent under section 265(3)(c) of the *Criminal Code*, where the accused's dishonesty has the effect of negating the complainant's autonomous will and inducing her into physical contact that she would not have otherwise consented to.<sup>38</sup>

In *Mabior*, the SCC affirmed that the focus should be on the risk of harm in determining whether non-disclosure of HIV status vitiates consent.<sup>39</sup> *Mabior* held that non-disclosure could vitiate consent where there is a "realistic possibility of transmission of HIV."<sup>40</sup> As Justice L'Heureux-Dubé explained in her concurring reasons in *Cuerrier*, focusing on the risk of harm misses the point and resurrects discredited myths and understandings of sexual assault:

Limiting the definition of fraud in the sexual assault context ... [to where there is a risk of harm] is to potentially fall into the same trap as those people who believe that rape in the absence of physical "violence," where the complainant just froze and did not fight back or was unconscious, is not a serious crime. The essence of the offence [of assault] ... is not the presence of physical violence or the potential for serious bodily harm, but the violation of the complainant's physical dignity in a manner contrary to her autonomous will. That violation of physical dignity and personal autonomy is what justifies criminal sanction, and always has, irrespective of the risk or degree of bodily harm involved.<sup>41</sup>

In *Cuerrier*, Justice L'Heureux-Dubé proposed an autonomy-based approach for determining when fraud vitiates consent under section 265(3)(c) of the *Criminal Code*. In her view, the Crown must prove that:

1. the accused acted in an objectively dishonest manner;
2. the complainant would not have consented to the physical contact absent the dishonesty; and

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<sup>37</sup> *Cuerrier*, *supra* note 7 at paras 11-12, 15. See also *Ewanchuk*, *supra* note 24 at para 28.

<sup>38</sup> *Cuerrier*, *supra* note 7 at para 16.

<sup>39</sup> *Mabior*, *supra* note 1 at paras 58, 93

<sup>40</sup> *Ibid* at paras 91, 104.

<sup>41</sup> *Cuerrier*, *supra* note 7 at para 19.

3. the accused was aware that his dishonesty would induce the complainant to consent to the physical contact.<sup>42</sup>

Although the principles behind Justice L'Heureux-Dubé's test are sound, I would clarify the first element. The first requirement should read "whether a reasonable person would have realized that the [concealed or misrepresented] fact was important to the complainant's decision to agree to the physical contact."<sup>43</sup> If the reasonable person would have realized that it was, lying about that fact or failing to disclose it would be objectively dishonest.

In *Cuerrier*, the rest of the Court was concerned that Justice L'Heureux-Dubé's broad conception of fraud would overextend the criminal law. Justice L'Heureux-Dubé's approach expands criminal liability for fraudulent (sexual) assault, but not past its proper limits. The subjective-objective elements of the test serve as important constraints on its potential scope. If a reasonable person would have realized that the concealed or misrepresented fact was important to the complainant's decision to engage in the sexual activity and the accused actually knew that it was, I fail to see any reason as to why criminal liability should not attach when that fraud causes the complainant to consent to something that she otherwise would not have.

This understanding of fraud is consistent with the need to protect personal autonomy that underlies the criminalization of assault<sup>44</sup> and the Court's approach to consent in *Ewanchuk*, which "ties consent not to objective and external legal standards of what society will accept as consent, but to the complainant's subjective and perhaps idiosyncratic perceptions."<sup>45</sup> *Mabior* fails to adequately protect a person's right to choose whom to have sex with and under what circumstances, and cannot be reconciled with *Ewanchuk*.

For these reasons, Justice L'Heureux-Dubé's model should determine when fraud vitiates consent and when an HIV positive individual has to disclose his or her status to a sexual partner.

(ii) *Shared responsibility is preferable to unilateral disclosure obligation*

It is possible to defend *Mabior*'s one-sided disclosure obligation on HIV positive individuals. Sexual assault is seen as "wrong" because it "objectifies" the victim. The perpetrator treats the victim as an object to be used, rather than as an autonomous being in charge of her own sexuality and with her own goals, needs and desires.<sup>46</sup> Carissima Mathen and Michael Plaxton argue that HIV non-disclosure results in this same kind of objectification:

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<sup>42</sup> *Ibid* at para 16. Hamish Stewart attempted to reconcile the SCC's reasoning in *Cuerrier*, *R v Williams*, 2003 SCC 41, [2003] 2 SCR 134 and *Ewanchuk* and essentially proposed Justice L'Heureux-Dubé's test for when fraud should vitiate consent. See Hamish Stewart, "When Does Fraud Vitate Consent? A Comment on *R v Williams*" (2004-2005) 49 Crim LQ 144 at 155-157 [*When Does Fraud Vitate Consent*].

<sup>43</sup> *When Does Fraud Vitate Consent*, *supra* note 42 at 155-156.

<sup>44</sup> Hamish Stewart, *Sexual Offences in Canadian Law*, loose-leaf (Release No 9, July 2012), (Aurora, Ont: Canada Law Book, 2004), ch 3 at 3-20 [*Sexual Offences in Canadian Law*].

<sup>45</sup> Kent Roach, *Criminal Law*, 4th ed (Toronto: Irwin Law, 2009) at 97.

<sup>46</sup> *HIV and Criminal Wrongs*, *supra* note 5 at 481.

To automatically proceed on the basis that one's partner is not invested in her own health and well-being, and is therefore willing to make herself sexually available in spite of obvious risks ... effectively denies that one's partner has any *meaningful* autonomy in *any* sphere, not just in the instant sexual context.<sup>47</sup>

Thus, there is a strong argument that HIV non-disclosure is like any other sexual assault. Accordingly, the burden for preventing this type of assault should fall solely on the potential perpetrator.

However, the emphasis on personal autonomy that animates Justice L'Heureux-Dubé's model does not fit comfortably with a unilateral disclosure obligation. To the extent that *Mabior* engages with questions of personal autonomy, it is focused on the use of one person by another.<sup>48</sup> This ultimately finds expression in its affirmation of a one-sided disclosure obligation. While the language of a person being deprived of his or her sexual autonomy by the fraud of another is compelling, it is based on a particular conception of autonomy and sexuality that may not be entirely accurate or desirable. In her concurring opinion in *Cuerrier*, Justice McLachlin was sensitive to this dynamic and held that "the equation of non-disclosure with lack of consent oversimplifies the complex and diverse nature of consent."<sup>49</sup>

There is another approach to autonomy that is equally consistent with the *Ewanchuk/JA* consent principles. Autonomy is not only about how others use us for their own ends. Autonomy is also based on how we use our own agency. In my view, recognizing that HIV positive and negative individuals have shared agency in intimate encounters better promotes personal autonomy and sexual integrity than a unilateral disclosure obligation. This shared agency can find legal expression in parallel obligations to ask about and to disclose HIV status. I will refer to these joint obligations as the shared responsibility model.

In *Cuerrier*, the SCC did not seriously question whether it would be appropriate to impose some type of legal obligation on individuals to ask about their partner's HIV status. While the majority emphasized that everyone needs to take responsibility for their own health, it went on to hold that the disclosure responsibility "cannot be lightly shifted to unknowing members of society who are wooed, pursued and encouraged by infected individuals to become their sexual partners."<sup>50</sup>

In *Mabior*, the SCC engaged with the issue in a manner that requires critical reflection. When considering the "active misrepresentation approach" to HIV non-disclosure, Chief Justice McLachlin, writing for the Court, touched on one of the central issues underlying any recognition of a duty to ask: why should it matter whether the complainant asked? From the complainant's perspective, what matters is that she would not have consented to sexual relations had she known about the accused's HIV positive status. The Chief Justice seems rightly concerned with disadvantaging some complainants who because of trust, naivety, fear or some other

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<sup>47</sup> *Ibid* at 483 [emphasis in original].

<sup>48</sup> See e.g. *Mabior*, *supra* note 1 at para 48.

<sup>49</sup> *Cuerrier*, *supra* note 7 at para 49.

<sup>50</sup> *Ibid* at para 144.



reason did not ask their partner about his or her sexual health.<sup>51</sup> In my view, these concerns are less about recognizing a duty to ask and more about signalling the need for caution in determining the scope and effect of that legal obligation.

There are three main reasons why the shared responsibility model is preferable to *Mabior's* unilateral disclosure obligation. First, the one-sided disclosure obligation is based on a troubling view of sexual autonomy. Second, the shared responsibility model will help reduce the stigma surrounding HIV/AIDS. Finally, recognizing joint obligations will encourage people to take ownership of their own sexual practices. I will address each of these points in turn.

A one-sided disclosure obligation risks reinstating dangerous myths and gender stereotypes by reducing all individuals to passive participants in the sexual encounter who lack the agency to take steps to protect their own health. This impoverished view of sexual autonomy runs counter to the goal of empowering individuals, contributes to gender inequality and undermines the subjective consent standard.<sup>52</sup>

The shared responsibility model overcomes many of these shortcomings by taking the agency of both partners in the sexual encounter more seriously. HIV negative individuals can have as much or as little agency as HIV positive ones in sexual relationships. Accordingly, the law should give relevance to what each partner does or does not do.

The stigma surrounding HIV/AIDS still exists in Canada. In a 2012 survey, 48 percent of respondents said that they would not be comfortable drinking from the same restaurant glass as someone with HIV and 24 percent said they would not be comfortable with even wearing a sweater that was once worn by someone with the infection.<sup>53</sup> In addition, 36 percent of the respondents said that they would not be comfortable with their child attending the same school as someone with HIV.<sup>54</sup>

The unilateral disclosure obligation exacerbates this stigma. It places all of the blame for exposure or transmission on HIV positive individuals and constructs them as irresponsible, dangerous and subversive.<sup>55</sup> The one-sided obligation creates an “us versus them dichotomy” that reinforces the social “undesirability” of HIV and by extension, the “undesirability” of those living with it.<sup>56</sup>

In contrast, a parallel legal duty to ask helps combat stigma by shifting the discourse away from blame and towards mutual responsibility. A focus on mutual responsibility will help break down the “us versus them” mentality. Joint obliga-

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<sup>51</sup> *Mabior*, *supra* note 1 at para 65.

<sup>52</sup> Richard Elliott & Alison Symington, “*Mabior* and *DC*: Is Criminal Law the Answer to Non-Disclosure?” *The Court* (February 7<sup>th</sup>, 2012), online: <<http://www.thecourt.ca/2012/02/07/mabior-and-d-c-is-criminal-law-the-answer-to-non-disclosure-part-2/>>.

<sup>53</sup> Ekos Research Associates, *2012 HIV/AIDS Attitudinal Tracking Survey* (October 2012) at 66, online: <[http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/public\\_health\\_agency\\_canada/2012/072-11/report.pdf](http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/public_health_agency_canada/2012/072-11/report.pdf)>.

<sup>54</sup> *Ibid* at 66.

<sup>55</sup> *Gender of Lying*, *supra* note 31 at 434; Isabel Grant, “The Boundaries of the Criminal Law: the Criminalization of the Non-disclosure of HIV” (2008) 31 *Dalhousie LJ* 123 at 163; Alison Symington, “HIV Exposure as Assault: Progressive Development or Misplaced Focus?” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 635 at 653-654 [*HIV Exposure as Assault*].

<sup>56</sup> Matthew Cornett, “Criminalization of the Intended Transmission or Knowing Non-Disclosure of HIV in Canada” (2011) 5 *McGill JL & Health* 61 at 72.

tions also make clear that the law is not trying to criminalize disease, but rather trying to protect an individual's right to determine who he or she wants to have sex with and under what circumstances.

The shared responsibility model also encourages individuals to take ownership of their own sexual practices, which brings the criminal law more in line with public health initiatives designed to limit the spread of HIV and other sexually transmitted infections. *Mabior* sends the message that HIV negative individuals do not have to take steps to protect themselves against HIV. They can safely rely on their partners to either disclose or take the necessary precautions themselves. The problem with this approach is that one quarter of those with HIV do not know about their infection.<sup>57</sup> The one-sided disclosure obligation creates a dangerous "false sense of security."<sup>58</sup> The shared responsibility model dislodges this false sense of security by requiring individuals to ask their partners about their HIV status. It makes clear that individuals need to take responsibility for their own sexual health.

#### **IV. Courts will not enforce the duty to ask or the duty to disclose where it would be unreasonable to do so**

I have argued that *Mabior* should have recognized parallel obligations to ask about and to disclose HIV status. This shared responsibility model is based on the idea that people can and should take ownership of their sexual practices. However, it would be a mistake to assume that everyone is able to exercise that degree of personal autonomy. The duty to ask and the duty to disclose cannot be severed from social context and must be considered in light of the lived realities of women. Violence against women remains a "serious and pervasive" problem.<sup>59</sup> In some relationships, asking about the status of a partner's sexual health or disclosing HIV status can lead to violence.<sup>60</sup> The difficult issue is trying to accommodate this social context with the important ends served by the parallel duties.

Courts should not enforce either the duty to ask or the duty to disclose in situations where it would be unreasonable to do so. The test of reasonableness strikes the proper balance between a standard that is so high that the exception will have no practical significance and a standard that is so low that it trivializes these important obligations. Courts should not enforce unreasonable obligations. The party that raises the exception must prove it on the balance of probabilities. These claims should generally only succeed where the party did not ask or disclose because of a reasonable fear of violence. However, this exception is not limited to situations involving violence. For instance, it would be unreasonable to enforce these duties on a developmentally delayed individual who is incapable of appreciating them. In such a situation, it would not matter that there was no fear of violence.

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<sup>57</sup> Canadian HIV/AIDS Legal Network et al, *Factum of the Interveners, R v Mabior; R v DC* (SCC #33976/34094) at para 16.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Sexual Offences in Canadian Law*, *supra* note 44, ch 1 at 1-1.

<sup>60</sup> *Risking Taking and HIV Transmission*, *supra* note 31 at 239, 241; *Gender of Lying*, *supra* note 31 at 434; Jacqueline Gahagan & Christina Ricci, *HIV/AIDS Prevention for Women in Canada: A Meta-Ethnographic Synthesis* (Halifax: Department of Health Promotion, School of Health and Human Performance, Dalhousie University, 2011) at 34.

## V. The failure to ask about HIV status will not preclude a conviction, but it can be considered

The remaining question is what happens when an individual does not ask about and his or her partner does not disclose HIV positive status before engaging in sexual relations.

One approach is to hold that non-disclosure will not vitiate consent where the complainant did not ask the accused about his HIV status. In situations of HIV non-disclosure, the court is being asked to legally override consent on the basis that the complainant would not have given it had she known. It is arguable that if the complainant knows that she will not have sex with an HIV positive person under any circumstances, but does not ask the accused about his status, she has no basis for claiming that her apparent consent should be vitiated. In other words, if HIV status is important enough to vitiate her consent, it should be important enough for her to ask about.

The major advantage of this approach is that it will give real teeth to the duty to ask, ensuring that individuals discharge that obligation and its benefits are realized. There is no point in recognizing joint obligations if legal consequences only attach to the failure to disclose. However, this approach will also have a number of negative consequences. This approach seems to use notions of sexual autonomy to sanction victim blaming. It would deny complainants the protection of the law because of their failure to ask and thus sends the message that they were responsible for their own victimization. In addition, this approach turns autonomy on its head by punishing complainants for not exercising their freedom in certain ways. Finally, I am concerned that making the failure to ask determinative would further discourage complainants from coming forward. It is estimated that 91% of sexual assaults go unreported.<sup>61</sup> It is unlikely that complainants will report these sexual assaults and endure the ordeal of trial if they know that there will not be a conviction unless the Crown can prove that they asked or their situation satisfies a narrow legal exception.

The better approach is to make the failure to ask relevant, but not determinative of whether HIV non-disclosure vitiates consent. The approach should be similar to that taken towards consent. In *Ewanchuk*, the majority held that the absence of consent is determined by the complainant's subjective state of mind. However, the complainant's conduct can be considered in assessing her claim that she did not subjectively consent. If the trial judge believes the complainant, her conduct is irrelevant.<sup>62</sup> Similarly, the failure to ask should only be a factor in assessing whether: (i) a reasonable person would have known that HIV status was relevant to the complainant's decision to engage in the sexual activity; (ii) the complainant would still have consented had she known about the accused's HIV positive status; and (iii) the accused was aware that non-disclosure would induce the complainant's consent.<sup>63</sup> Thus, even if the complainant did not ask about HIV

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<sup>61</sup> Canadian Centre for Justice Statistics, *Sexual Assault in Canada 2004 and 2007* (Ottawa: Statistics Canada, December 2008) at 8.

<sup>62</sup> *Ewanchuk*, *supra* note 24 at paras 26-27, 29.

<sup>63</sup> These factors should determine whether there is fraud vitiating consent under section 265(3)(c) of the *Criminal Code*. See Part III(i) of this paper.

status, it would still be possible for the trier of fact to find that the accused's non-disclosure constitutes fraud, vitiating consent.

## **VI. Counter argument: Joint obligations improperly shift the criminal law's focus**

The strongest argument against the shared responsibility model is that it improperly shifts the focus of the criminal law from the actions of the accused to those of the complainant.

The question of whether the complainant asked is arguably not very different from questions centred on whether she resisted. It should not matter whether the complainant asked, just as it does not matter if she resisted.<sup>64</sup> The criminal law should be concerned with the accused's behaviour, not the complainant's.<sup>65</sup>

There is no easy answer to this criticism. In my view, there is a need to treat HIV non-disclosure differently because of the immense stigma surrounding seropositive individuals. While the shared responsibility model has given legal relevance to the actions of complainants, the failure to ask does not absolve those living with HIV of their disclosure obligations. Indeed, the ultimate focus remains on whether the accused, irrespective of whether he was asked, should have disclosed under the circumstances.

While the failure to ask informs that consideration, it is not determinative and is only one factor to consider. In addition, the shared responsibility model has a number of advantages over *Mabior's* one-sided disclosure obligation. The shared responsibility model promotes sexual autonomy and important health initiatives, while combating the stigma surrounding HIV/AIDS. Although this answer is not entirely satisfactory, I think that, on balance, the benefits of the shared responsibility model justify looking at HIV non-disclosure slightly differently.

This paper has only considered whether there should be a parallel obligation to ask about *HIV status*. I leave open the difficult question of whether there should be a similar obligation to ask about other sexually transmitted infections. While HIV exceptionalism may create additional stigma, equally troubling is expanding the way that the criminal law can properly consider the complainant's conduct in determining guilt.

## **VII. Conclusion**

The SCC's decisions in *Mabior* and *DC* are disappointing. The Court resurrected the doctrine of implied consent in sexual assault law, created a gendered disclosure obligation, severed the issues from social context, and left an unacceptable amount of uncertainty in the criminal law. The fundamental flaw with *Mabior* is its unilateral disclosure obligation, which is tied to the risk of harm. In affirming the appropriateness of this one-sided obligation, the Court showed that it has a shallow understanding of autonomy, consent, and the policy underlying the crimi-

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<sup>64</sup> *R v MLM*, [1994] 2 SCR 3 at para 2, [1994] SCJ No 34.

<sup>65</sup> *HIV Exposure as Assault*, *supra* note 55 at 656.

nalization of sexual assault. The criminal law should recognize joint obligations to ask about and to disclose HIV positive status. These joint obligations promote a realistic and empowering view of sexual autonomy, bring the criminal law in line with important public health initiatives, and help combat the stigma surrounding HIV/AIDS.