

HIV Criminalisation Defence Case Compendium

A resource compiled for “Lawyers for HIV and TB
justice: Strategic litigation, legal defence and advocacy training”
20-23 February 2018
Johannesburg, South Africa



HIV CRIMINALISATION CASE COMPENDIUM

© 2018 Southern Africa Litigation Centre

About the Southern Africa Litigation Centre

The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support – both technical and financial – to human rights and public interest initiatives undertaken by domestic lawyers in southern Africa. Its model is to work in conjunction with domestic lawyers in each jurisdiction who are litigating public interest cases involving human rights or the rule of law. SALC supports these lawyers in a variety of ways, as appropriate, including providing legal research and drafting, training and mentoring, and monetary support. SALC's objectives include the provision of training and the facilitation of legal networks within the region.

HIV Justice Worldwide is a growing, global movement to shape the discourse on HIV criminalisation as well as share information and resources, network, build capacity, mobilise advocacy, and cultivate a community of transparency and collaboration. The mission of HIV Justice Worldwide is to seek to abolish criminal and similar laws, policies and practices that regulate, control and punish people living with HIV based on their HIV-positive status. HIV Justice Worldwide believes that this HIV criminalisation is discriminatory, a violation of human rights, undermines public health, and is detrimental to individual health and well-being.

The Stop TB Partnership was founded in 2001 with a mission to serve every person who is vulnerable to TB and ensure that high-quality diagnosis, treatment and care is available to all who need it. Together, 1500 partners are a collective force that is transforming the fight against TB in more than 100 countries. They include international and technical organizations, government programmes, research and funding agencies, foundations, NGOs, civil society and community groups and the private sector. The Partnership operates through a secretariat hosted by UNOPS in Geneva, Switzerland and seven working groups whose role is to accelerate progress on access to TB diagnosis and treatment; research and development for new TB diagnostics, drugs and vaccines; and tackling drug resistant- and HIV-associated TB.

The AIDS and Rights Alliance for Southern Africa (ARASA) is a regional partnership of non-governmental organisations working together to promote a human rights approach to HIV/AIDS and TB in southern Africa through capacity building and advocacy. The organisation currently has 106 partner organisations representing diverse stakeholders, including networks of people living with HIV, key populations groups, women's groups, youth groups, and religious leaders. ARASA conducts its work under two programme areas: (i) Training and Capacity Strengthening (including an online training facility); and (ii) Advocacy. Both programme areas have international, regional and national components.

The Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN) was formed in 1994 and registered as a non-governmental organisation (NGO) in 2001. Their goal is to advocate for a holistic and rights-based system of service delivery in health and for the full enjoyment of the right to health by all, including the vulnerable, marginalized, and excluded populations. While originally created to protect and promote HIV-related human rights, their scope has expanded to also include sexual and reproductive health and rights, key populations, and women, land and property rights.

The Joint United Nations Programme on HIV/AIDS (UNAIDS) leads and inspires the world to achieve its shared vision of zero new HIV infections, zero discrimination and zero AIDS-related deaths. UNAIDS unites the efforts of 11 UN organizations—UNHCR, UNICEF, WFP, UNDP, UNFPA, UNODC, UN Women, ILO, UNESCO, WHO and the World Bank—and works closely with global and national partners towards ending the AIDS epidemic by 2030 as part of the Sustainable Development Goals.

Authorship and acknowledgement

This compendium was researched by Sally Cameron, an independent consultant, and written by Sally Cameron and Annabel Raw (SALC). Comments and input were graciously received from Tyler Holmes (SALC volunteer), Edwin Bernard and Michaela Clayton.

This Compendium was made possible through the generous support of the **Africa Regional Grant on HIV: Removing Legal Barriers**, as a resource for a training for lawyers from Africa "Lawyers for HIV and TB justice: Strategic litigation, legal defence and advocacy training", held in Johannesburg, South Africa from 20-23 February 2018. The Africa Regional Grant on HIV: Removing Legal Barriers aims to address human rights barriers faced by vulnerable communities in Africa, and facilitate access to lifesaving health care. The Grant is the first of its kind and covers 10 countries, including Botswana, Côte d'Ivoire, Kenya, Malawi, Nigeria, Senegal, the Seychelles, Tanzania, Uganda and Zambia. The programme is supported through a three-year grant by the Global Fund to Fight AIDS, Tuberculosis and Malaria. The United Nations Development Programme (UNDP) is the Principal Recipient of the grant and implements in collaboration with four African civil society organizations - the AIDS and Rights Alliance for Southern Africa (ARASA), ENDA Santé, KELIN, and the Southern Africa Litigation Centre (SALC) – with recognized expertise in documenting human rights violations, strategic litigation, advocacy and capacity-strengthening.

Cover Image: EL v the State courtesy of UNDP Malawi / Amos Gumulira.

Southern Africa Litigation Centre

Second Floor, President Place,
1 Hood Avenue, Rosebank,
Johannesburg, South Africa, 2196
e-mail: info@salc.org.za,
tel: +27 (0) 10 596 8538

<http://www.southernafricalitigationcentre.org>, twitter: @follow_SALC

For hard copies of the Compendium, please contact the Southern Africa Litigation Centre. Electronic copies can be found at: www.southernafricalitigationcentre.org.

CONTENTS

TERMINOLOGY AND ABBREVIATIONS	1
INTRODUCTION.....	2
HOW TO USE THE COMPENDIUM.....	2
TABLE 1: CASE LIST BY KEY ISSUE	4
TABLE 2: CASE LIST BY CATEGORY OF ARGUMENT.....	8
CASE SUMMARIES.....	12
Australia.....	12
Neal v the Queen.....	12
The Queen v Mwale	12
Zaburoni v the Queen	13
Botswana	14
Makuto v State	14
Canada	15
R v Bear	15
R v Boon & Bowland.....	15
R v Cuerrier.....	16
R v CB.....	16
R v DC	17
R v Edwards	18
R v Felix.....	18
R v JAT	19
R v JTC.....	20
R v Mabior	20
R v Mekonnen	21
R v Murphy	22
R v Nduwayo.....	22
R v Pottelberg.....	23
R v Ratt	24
R v Thompson.....	24
R v W	25
R v Wright.....	25
Denmark	26
Prosecuting Authority v Jackie Madsen	26
England (United Kingdom).....	26

R v Dica	26
European Court of Human Rights.....	27
Enhorn v Sweden.....	27
Germany	28
LG Aachen, Urteil vom 23.03.2015 - 68 Kls 1/15*	28
Kenya	29
AIDS Law Project v Attorney General and 3 Others	29
Malawi	30
EL v the State.....	30
New Zealand	30
New Zealand Police v Justin William Dalley	30
Spain	31
Case No STS 3527/11*	31
Sweden	32
B4189-03*	32
B2152-13*	33
Switzerland	33
S v Procureur Général*	33
Uganda.....	34
Namubiru v Uganda	34
United States of America (USA).....	35
Brock v State.....	35
People of the State of Michigan v A.....	35
People of the State of New York v Plunkett.....	36
Rhoades v Iowa	36
Smallwood v State of Maryland	37
State of Kansas v Robert William Richardson	38
State of Minnesota v Rick.....	38
State of Missouri v Michael L Johnson	39
State of Tennessee v Ingram	40
United States v Dacus.....	40
Zimbabwe	41
S v Semba	41
Perfect Ngwenya v the State.....	42

TERMINOLOGY AND ABBREVIATIONS

HIV criminalisation

The unjust application of the criminal law to people living with HIV based solely on their HIV status – either via HIV-specific criminal statutes, or by applying general criminal laws that allow for prosecution of unintentional HIV transmission, potential or perceived exposure to HIV where HIV was not transmitted, and/or non-disclosure of known HIV-positive status.¹

Swiss Statement

A consensus statement issued in January 2008 by the four Swiss HIV experts of the Swiss Federal Commission for HIV/AIDS, stating that HIV-positive persons on effective antiretroviral treatment and without sexually transmitted infections are sexually non-infectious.

UVL

Undetectable viral load. A person who has previously tested positive for HIV is considered to have an undetectable viral load when copies of HIV in their blood cannot be detected by standard viral load tests. Under current standard testing, this will usually mean the person has less than 50 copies of HIV per millilitre of blood (<50 copies/mL).

¹ HIV Justice Network and the Global Network of People Living with HIV (GNP+) (2016) *Advancing HIV Justice 2*, available at: <http://www.hivjustice.net/advancing2/>, at p 9.

INTRODUCTION

In countries all over the world, there have been prosecutions of people living with HIV who allegedly did not disclose their HIV status prior to sex (HIV non-disclosure), were accused of exposing others to HIV (HIV exposure), and/or were accused of transmitting HIV to others (HIV transmission). Prosecutions have also occurred for acts such as biting, spitting, scratching, and for breastfeeding. Convictions are common, including in cases where there was no proven intent to harm and no scientific evidence that transmission was possible or likely.

This HIV Criminalisation Defence Case Compendium aims to support lawyers acting for those who are alleged to have put others at risk of HIV. Based on research conducted in late 2017, it includes criminal cases from all over the world where strong defence arguments have resulted in an acquittal or reduced penalty for persons living with HIV who have been accused of HIV exposure, non-disclosure or transmission.

The Compendium is not intended to be comprehensive. It has been developed as a resource for a training of lawyers from Africa – “Lawyers for HIV and TB justice: Strategic litigation, legal defence and advocacy training” – held in Johannesburg, South Africa from 20-23 February 2018.

HOW TO USE THE COMPENDIUM

The Compendium has three sections:

1. A table classifying decisions by the key issues raised in the judgment.

In this section, cases are classified according to the key issue of relevance, for example, proof of the accused’s intent, proof of the risk of transmission, or the relevance of condom use in cases of sexual transmission or exposure. Many cases fit more than one category, so each has been placed in the category that best reflects the primary factual and legal issues.

2. A table illustrating the category of argument raised in the accused’s defence.

In this section, cases are listed alphabetically by country in a table to illustrate the type of arguments that were raised in the case, for example, whether constitutional or human rights defences or defences based on a failure to prove a certain element of the crime were raised.

The purpose of the first two sections is to help users of the Compendium to quickly navigate which cases may be relevant to read further.

3. Case summaries.

In the third section, brief summaries are given on each case, listed alphabetically by country. Cases from the following jurisdictions are detailed:

- Australia
- Botswana
- Canada
- Denmark
- England (United Kingdom)

-
- European Court of Human Rights
 - Germany
 - Kenya
 - Malawi
 - New Zealand
 - Spain
 - Sweden
 - Switzerland
 - Uganda
 - United States of America
 - Zimbabwe

Each summary includes information on the following, where available:

- key points on the decision;
- the nature of the offence of which the person was accused;
- the year of the judgment;
- the citation;
- hyperlinks to *amicus curiae* briefs, where available;
- a brief overview of the facts; and
- a summary of the decision and its relevance.

Where available, cases are hyperlinked to their associated judgment.

For purposes of uniformity, the terms “accused” and “complainant” are used in the Compendium, regardless of the state of the persons’ conviction or appeal relevant in the particular judgment.

TABLE 1: CASE LIST BY KEY ISSUE

Case	Court	Year	Key issue
Intent			
<i>Brock v State</i> , 555 So.2d 285, 288 (Ala. Crim. App. 1989)	Court of Criminal Appeals of Alabama, USA	1989	Failure to prove intention to cause serious bodily harm. Teeth not a “deadly weapon”.
Case No STS 3527/11, Supreme Court of Spain	Supreme Court of Spain	2011	Accused took recommended precautions (condom use): no specific intent to harm.
LG Aachen, Urteil vom 23.03.2015 - 68 Kls 1/15	District Court of Aachen, Germany	2015	No intent to transmit: non-disclosure motivated by fear of losing relationship. Also transmission risk: UVL, condom, withdrawal before ejaculation.
<i>Neal v The Queen</i> [2011] VSCA 172; 32 VR 454 213 A Crim R 190	Supreme Court of Victoria, Court of Appeal, Australia	2011	<i>Mens rea</i> – accused must believe that they are infectious, not merely believe they “may be” infectious. Accused must be capable of infecting the complainant. (Also: Consent.)
<i>People of the State of Michigan v A</i> , No 2009-4960 (Macomb County Ct. Mich. Cir. Ct. June 2, 2010) * <i>Amicus</i> brief	Macomb County Court, Michigan, USA	2010	No evidence of blood involvement; No evidence that accused intended to use HIV infection to do harm simply because they are HIV-positive. (Also: Biting.)
<i>Smallwood v State of Maryland</i> , 680 A.2d 512 (Md. 1996)	Court of Appeals of Maryland, USA	1996	Intent could not be inferred because it was not proven that “the victim’s death would have been a natural and probable result of the defendant’s conduct”. State must provide proof of intention.
<i>State of Kansas v Robert William Richardson</i> , No 100,445 No 100,835	Supreme Court of the State of Kansas, USA	2009	Crimes requiring specific intent must specifically prove intent: intent cannot be presumed. (Also: vagueness /overbreadth.)
<i>Zaburoni v The Queen</i> [2016] HCA 12 6 April 2016 B69/2015	High Court of Australia	2016	Lying and frequency of act does not prove intent.
Risk must be proven			
<i>R v Mekonnen</i> 2013 ONCA 414	Court of Appeal for Ontario, Canada	2013	Must prove “realistic possibility” of HIV transmission to establish a “significant risk of serious bodily harm”, not just that act occurred.
<i>Rhoades v Iowa</i> , Supreme Court of Iowa, No 12-0180 * <i>Amicus</i> brief	Supreme Court of Iowa, USA	2014	No factual basis for guilty plea as offence required medical testimony to prove risk and none presented.
<i>State of Tennessee v Ingram</i> , 2012 Tenn. Crim. App. LEXIS 887	Court of Criminal Appeals of Tennessee, Jackson, USA	2012	State failed to provide necessary expert testimony on transmission risk.
Proof of risk - use of condoms and / or undetectable viral load (UVL)			
B2152-13 (RH 2015:2), 2013	Skåne and Blekinge Court of Appeal, Sweden	2013	Insufficient risk of transmission to convict of endangering others. UVL, unprotected vaginal intercourse.
B4189-03 (NJA 2004: 20), 2004	Supreme Court of Sweden	2004	Risk of transmission with UVL recognised as “extremely low” during unprotected sexual intercourse. Consent a valid defence if low risk of transmission.

<i>New Zealand Police v Justin William Dalley</i> , District Court at Wellington, New Zealand at Wellington CRI-2004-085-009168, 2005	District Court at Wellington, New Zealand	2005	Legal duty to take “reasonable precaution” to avoid danger to life fulfilled: oral sex without a condom. Vaginal sex with a condom. Non-disclosure of status.
<i>R v CB</i> 2017 ONCJ 545	Ontario Court of Justice, Canada	2017	Reasonable risk of transmission not established. <i>Mabior</i> not restrictive to requirement of both condom use and UVL.
<i>R v Cuerrier</i> [1998] 2 SCR 371	Supreme Court, Canada	1998	To prove aggravated assault there must be a significant risk of serious bodily harm, otherwise “the duty to disclose will not arise”. Careful condom use reduces risk.
<i>R v DC</i> 2012 SCC 48 *Amicus brief	Supreme Court of Canada, Canada	2012	UVL and condom use required to preclude “realistic possibility” of transmission. Failure to use a condom was not proved beyond a reasonable doubt: speculative, hearsay evidence is insufficient.
<i>R v Mabior</i> 2012 SCC 47; 2010 MBCA 93 *Amicus brief	Supreme Court of Canada	2012	Disclosure of HIV status only required “if there is a realistic possibility of transmission of HIV”. Condom use and UVL poses no realistic sexual transmission risk.
<i>R v Thompson</i> 2016 NSSC 134	Supreme Court of Nova Scotia, Canada	2016	Condom or UVL makes risk negligible which does not satisfy requirement for proof of “realistic possibility” of transmission.
<i>R v Felix</i> 2013 ONCA 415	Court of Appeal for Ontario, Canada	2013	Fraud for sexual assault conviction requires proof of dishonesty and deprivation through proof of transmission risk – no evidence on viral load when condom used in intercourse.
<i>R v JAT</i> 2010 BCSC 766	Supreme Court of British Columbia, Canada		Risk of transmission immaterial on basis of evidence. Immaterial transmission risk does not vitiate consent or endanger life.
<i>R v JTC</i> 2013 NSPC 105	Provincial Court of Nova Scotia, Canada	2013	No risk of transmission on evidence – UVL but no condom use during sexual intercourse. Consent not vitiated because complainant “would have” consented if had known of absence of transmission risk.
<i>R v Wright</i> 2009 BCCA 514	Court of Appeal for British Columbia, Canada	2009	Viral load is relevant to determining whether there is a significant risk of harm.
<i>S v Procureur Général</i> , Court of Justice, Penal Division, Geneva February 23, 2009	Court of Justice, Penal Division, Geneva, Switzerland	2009	Swiss Statement – hypothetical risk only when UVL.
<i>United States v Dacus</i> , No. 07-0612, Crim. App. No. 20050404	United States Court of Appeals for the Armed Forces, USA	2008	Unsuccessful but minority opinion held an event is not “likely” if only a 1 in 50,000 chance of that event occurring.
Proof of risk - Oral sex			
<i>R v Murphy</i> 2013 CanLII 54139	Superior Court of Justice Ontario, Canada	2013	No realistic transmission risk during oral sex (cunnilingus) with UVL. Realistic risk of transmission established on failure to use condom despite UVL.
Proof of risk - Breastfeeding			
<i>EL v the State</i> , The High Court of Malawi Zomba District Registry, Criminal Case No. 36 of 2016	High Court of Malawi, Zomba	2016	Breastfeeding - No proof of knowledge of likelihood of transmission. “Extremely low” transmission risk through breastfeeding when on antiretroviral treatment. Rights to privacy, dignity and fair trial.
<i>S v Semba</i> [2017] ZWHHC 299 (12 November 2015)	High Court of Zimbabwe	2017	“Deliberate transmission” offence: mere exposure insufficient. Crime only applicable to sexual transmission. State must prove knowledge of real risk and intent to transmit.

Proof of risk - Biting and spitting			
<i>People of the State of New York v Plunkett</i> 971 N.E.2d 363 (N.Y. 2012)	New York State Court of Appeals, USA	2012	Teeth and saliva cannot be considered a dangerous weapon.
<i>R v Bear</i> 2011 MBQB 191	Manitoba Court of Queen's Bench Winnipeg Centre, Canada	2011	No aggravated assault when spitting – no significant risk of serious bodily harm. Risk of transmission low to negligible.
<i>R v Ratt</i> 2012 SKPC 154	Saskatchewan Provincial Court La Ronge, Saskatchewan	2012	The risk of transmission of life-threatening disease is not an aggravating factor for the purposes of sentencing.
Harm - HIV no longer life-threatening			
<i>Prosecuting Authority v Jackie Madsen</i> , 7 August 2012	Eastern High Court, Denmark	2012	HIV no longer life-threatening.
Consent			
<i>R v Dica</i> [2004] EWCA Crim 1103	Court of Appeal, England	2004	Sexual partners knowingly accepted risk of HIV transmission by consenting to unprotected sex. Consent to risk a valid defence to accused's reckless conduct.
<i>R v Pottelberg</i> [2010] ONSC 5756	Superior Court of Justice Ontario, Canada	2010	Consent valid despite non-disclosure of status because evidence that complainant would have consented had he known. No proof beyond reasonable doubt that accused and not third party infected complainant.
Disclosure			
<i>R v Edwards</i> 2001 NSSC 80	Supreme Court of Canada	2010	No duty to disclose when the proper use of condom reduces or renders the risk low. (Also: oral sex).
<i>R v Nduwayo</i> 2010 BCSC 1277	British Columbia Supreme Court, Canada	2010	No legal duty to disclose if condom used as no evidence significant risk of serious bodily harm. Condom use and other factors relevant to assessment of risk of harm, including frequency of sexual intercourse.
Accused must have been diagnosed			
<i>The Queen v Mwale</i> 08/2069, 03/04/2008 (unreported)	Geelong Magistrates Court, Australia	2008	State could not prove time of HIV infection or that complainant was not already HIV-positive at the time the accused was diagnosed. No risk of injury through HIV infection if possibility that person was already HIV-positive.
Laws overly broad / unconstitutional / violate human rights			
<i>Aids Law Project v Attorney General & 3 Others</i> [2015], eKLR, Petition No. 97 of 2010	High Court of Kenya	2015	Law unconstitutional: vague, over-broad and violation of the right to privacy.
<i>Enhorn v Sweden</i> [2005] ECHR 56529/00	European Court of Human Rights	2005	Deprivation of liberty on public health grounds must be proportionate and only as last resort.
<i>Makuto v State</i> [2000] 5 LRC 183; (2000) 3 CHRLD 151	Court of Appeals, Botswana	2000	Enhanced sentencing on basis of HIV status only constitutional and non-discriminatory if based on HIV-status at the time of the offence.
<i>State of Minnesota v Rick</i> 821 N.W.2d 610 (Minn. 2013)	Minnesota Supreme Court, USA	2013	Ambiguity in law required narrow interpretation of offence of "transfer" of communicable disease to exclude sexual transmission.
Use of evidence			
<i>R v Boon & Bowland</i> 2012 ONSC 441	Superior Court of Justice, Ontario	2012	Application granted to introduce complainants' previous sexual history into evidence to prove they would have accepted risk if disclosure had been made.

<i>State of Missouri v Michael L Johnson</i> , Missouri Court of Appeals Eastern District, No. ED103217 *Amicus brief	Missouri Court of Appeals, USA	2016	Violation of fair trial rights. Ordinary rules on admission of evidence apply (State failed to disclose evidence on time).
Sentencing			
<i>Perfect Ngwenya v The State</i> [2017] ZWBHC 59	High Court of Zimbabwe	2017	Sentence reduced on basis of complainant's shared risk in conduct and accused's personal circumstances (including health).
<i>Rosemary Namubiru v Uganda</i> , HCT-00-CR-CN---0050-2014	High Court of Uganda	2014	Sentence reduced on basis of appellant's age and HIV-positive status, no HIV transmission, no intent to harm, and policy need for Courts to impose greater legal protection on medical professionals.
<i>R v W</i> [2016] O.J. No. 3253	Ontario Court of Justice, Canada	2016	Absolute discharge granted on basis of mitigating factors (including UVL and habit of status disclosure) and reduced responsibility for not being initiator of sexual act while intoxicated

[illegible]

[illegible]

[illegible]

[illegible]

CASE SUMMARIES

Australia

Neal v the Queen

Key points

- A person must believe he / she is infectious (not believe he / she may be infectious) to be guilty of attempting to infect another person with HIV.
- It must be not reasonably possible that a complainant was aware of the risk of HIV transmission and voluntarily assumed the risk or that the accused believed that the complainant was consenting to the risk to be guilty of “reckless conduct endangering persons”.

Offence	Causing another to be infected with HIV, reckless conduct endangering a person (amongst others)
Year	2011
Court	Supreme Court of Victoria, Court of Appeal
Citation	<i>Neal v The Queen</i> [2011] VSCA 172; 32 VR 454 213 A Crim R 190

Facts

The accused was diagnosed with HIV in 2000 and advised to practice safe sex and to notify sexual partners of his HIV status. Approximately a year later his doctor advised the health department of his concern that the accused was having unsafe sex without disclosing his status. Subsequently, he was sent three letters and was subjected to four orders under the Public Health Act. The accused continued to have unprotected sex with multiple partners. For some of the period he had a UVL, telling some partners he could not transmit HIV because of his UVL. The accused was charged in relation to sex with a number of men, including sex where he did not disclose his HIV status prior to sex and/or did not use a condom, and/or removed a condom during sex. He was convicted on multiple charges in the County Court of Victoria.

Decision and relevance

The accused successfully appealed some of the charges on a number of grounds in the Supreme Court of Victoria, Court of Appeal. First, the Court found that the trial judge erred by directing the jury that to prove the accused had attempted to cause another person to be infected with HIV, the jury had to be satisfied that he “believed that he *may* be infectious” instead of believing he was infectious. Second, the Court ruled that in relation to the charge of “reckless conduct endangering persons”, the trial judge had not directed the jury of the need to establish it was not reasonably possible that the complainant was aware of the risk of HIV transmission and had voluntarily assumed the risk or, alternatively, that the applicant believed that the complainant was consenting to the assumption of the risk.

The Queen v Mwale

Key points

- State could not prove time of HIV infection or that complainant was not already HIV-positive at the time the accused was diagnosed.
- No risk of injury through HIV infection if possibility that complainant was already HIV-positive.

Offence	Reckless conduct endangering a named person
Year	2008
Court	Geelong Magistrates Court
Citation	<i>The Queen v Mwale</i> 08/2069, 03/04/2008 (unreported)

Facts

The accused and the complainant had regular unprotected sexual intercourse between 2000 and November 2004. The accused was diagnosed as HIV-positive in December 2003. The complainant was diagnosed as HIV-positive in late November 2004. The accused was charged with reckless conduct endangering a named person for having unprotected sexual intercourse with the complainant under circumstances where he knew of his HIV-positive status, and being informed of his obligation not to risk sexual transmission to a partner to whom his status had not been disclosed.

Decision and relevance

The Court upheld the accused's defence that the State had failed to prove beyond a reasonable doubt that the accused placed the complaint at risk of serious injury through HIV, because the evidence could not exclude that the complainant may already have been HIV-positive in December 2003 when the accused was diagnosed. The Court considered detailed evidence on the risk of transmission by the nature of the sexual act (vaginal intercourse), taking into account viral load and the frequency of the sexual intercourse as well as evidence on the possibility of determining when a person sero-converted. The Court held that there was indeed a reasonable possibility that the complainant was already HIV-positive by the time that the accused was diagnosed. The Court held there was no evidence to establish when either party was infected with HIV: the time of transmission or how long a person has been infected cannot be inferred from the HIV-positive test results in question. The Court therefore directed the jury to acquit the accused on insufficient evidence.

Zaburoni v the Queen

Key points

- Foresight of risk of harm is distinct from the intent to produce harm.
- The Court must be satisfied that the accused meant to produce the particular result, or that the accused had that result as his or her purpose or object at the time of engaging in the conduct.
- Lying and frequency of act does not prove intent.

Offence	Unlawfully transmitting a serious disease to another with intent to do so
Year	2016
Court	High Court of Australia
Citation	<i>Zaburoni v The Queen</i> [2016] HCA 12 6 April 2016 B69/2015

Facts

In 1998, the accused tested positive for HIV. On numerous occasions he was advised by medical staff to inform sexual partners of his HIV status and to use condoms. He was prescribed antiretroviral medication but did not take it. In 2006, he met the complainant and told her he was HIV negative. At first, they always used condoms but condom use became less common until unprotected sexual intercourse regularly took place. Their relationship ended in 2008 and approximately one year later, the complainant was diagnosed HIV-positive. The accused lied to the complainant about his HIV-positive status numerous times during and after their relationship and also had an HIV test after the complainant's diagnosis, pretending he was being diagnosed for the first time.

The accused was initially charged with two alternative charges: unlawfully doing grievous bodily harm, and unlawfully transmitting a serious disease to another with intent. In the District Court, he was found guilty of unlawfully transmitting a serious disease to another with intent. He unsuccessfully appealed the conviction to the Court of Appeal of the Supreme Court of Queensland. He appealed his conviction further to the High Court of Australia arguing his actions had not proven intent.

Decision and relevance

The prosecution had relied on two principal features of the accused's conduct to justify the inference of intention: the series of lies he told the complainant and police; and the frequency of unprotected sexual intercourse over a protracted period. The High Court upheld the appeal, finding the accused's lies were not sufficient to justify an inference of intention to transmit HIV. Instead, the Court found his lies demonstrated an intention to deceive the complainant into having unprotected sexual intercourse for his own pleasure. The Court also decided that frequent unprotected sex over many months may have been reckless but was not enough to establish an intention to transmit HIV to the criminal standard, because an alternate rational inference was that the accused engaged in unprotected sex for his own pleasure while reckless as to whether he might transmit HIV. Further, the Court clarified that foresight of risk of harm is distinct in law from the intention to produce harm, and foresight of the risk of harm, cannot be substituted for proof of an intention to cause or bring about harm. Engaging in conduct while knowing it will probably produce a particular harm is recklessness. The High Court substituted a verdict of guilty of the alternative, lesser, offence of grievous bodily harm and imposed a sentence for it.

Botswana

Makuto v State

Key points

- Enhanced sentencing on basis of HIV status only constitutional and non-discriminatory if based on HIV-positive status at the time of the offence.

Offence	Rape
Year	2000
Court	Court of Appeal
Citation	<i>Makuto v State</i> [2000] 5 LRC 183; (2000) 3 CHRLD 151

Facts

The accused was convicted of rape. Before sentencing, he was tested for HIV and was diagnosed HIV-positive (for the first time). Botswana law stated a person convicted of rape who is HIV-positive is subject to a minimum of 15 years imprisonment if unaware of his HIV-positive status at the time of the offence, and a minimum of 20 years if aware of his status at time of his offence (compared to a minimum sentence for an HIV-negative person of 10 years). The accused was sentenced to 16 years with two strokes with a light cane.

Decision and relevance

The accused appealed his conviction and sentence, amongst others, on the grounds that HIV-specific sentencing was discriminatory and unjust, contrary to the constitutional prohibition against discrimination; and, in the alternative, that the crime was also unjust and unfair in presuming that an offender who tested HIV-positive after conviction must have transmitted the virus to the victim. The Court of Appeal held that if the provision could be read to allow for an enhanced sentence on the basis of circumstances occurring after and unconnected to the commission of the offence, the

provision would be unjustifiably discriminatory and over-broad. The Court therefore preferred a constitutionally-compliant reading of the provision to only allow for enhanced sentencing of persons with HIV at the time of the rape, whether aware of their status or not. Because there was no evidence that the accused was HIV-positive at the time of the offence, the enhanced sentence was set aside and replaced with 10 years' imprisonment.

Canada

R v Bear

Key points

- No aggravated assault when spitting – no significant risk of serious bodily harm.
- Risk of transmission low to negligible.

Offence	Aggravated assault (amongst others)
Year	2011
Court	Manitoba Court of Queen's Bench Winnipeg Centre
Citation	<i>R v Bear</i> 2011 MBQB 191

Facts

The accused, a man living with HIV, was charged with spitting on a police officer's face, nose and in his eye while in detention. The accused had some wounds at the time, permitting for an inference that there may have been blood in his saliva. The police officer did not contract HIV. The accused was charged with aggravated assault for spitting in the police officer's face in an attempt to infect him with HIV, amongst other charges.

Decision and relevance

The Court accepted that the accused had intentionally assaulted the police officer by spitting in his face but refused to find him guilty of aggravated assault, which requires the accused to maim, disfigure or endanger a person's life. The Court reasoned that the State had not proved beyond a reasonable doubt that the risk of serious bodily harm was significant on the basis that the risk of HIV transmission in the case based on the evidence presented was "low to negligible".

R v Boon & Bowland

Key points

- Application granted to introduce complainants' previous sexual history into evidence to prove they would have accepted risk if disclosure had been made.

Offence	Aggravated sexual assault
Year	2012
Court	Superior Court of Justice, Ontario
Citation	<i>R v Boon & Bowland</i> 2012 ONSC 441

Facts

The accused were two HIV-positive men facing charges of aggravated sexual assault for having sexual intercourse with the complainants without disclosing their HIV status. The issue before the Court was whether the accused disclosed their HIV statuses to the complainants before engaging in the sexual acts and, had they done so, whether the complainants *would have* engaged in unprotected sexual acts with them anyway.

Decision and relevance

The accused sought an application to permit them to elicit evidence at trial on the sexual histories of the complainants. They argued that the complainants' prior conduct of engaging in casual, unprotected sex with strangers and their own sexual relationship was important to determining whether the complainants would have consented to unprotected sex had they known the accused were HIV-positive. The Court held that while the complainants had stated that they would not have had unprotected sex had they known the accused were HIV-positive, evidence of their conduct may indicate a willingness to have accepted that risk. The Court considered that the evidence suggested a pattern of casual sexual acts with each other and with strangers, including group sex. The Court considered it relevant that the complainants were knowledgeable about HIV transmission risk. It held that, in these circumstances, the evidence was of highly probative value. The Court ordered that the evidence be presented to the jury.

R v Cuerrier

Key points

- To prove aggravated assault there must be a significant risk of serious bodily harm, otherwise "the duty to disclose will not arise".
- Careful condom use reduces risk.

Offence	Aggravated assault
Year	1998
Court	Supreme Court
Citation	<i>R v Cuerrier</i> [1998] 2 S.C.R. 371

Facts

The accused, a man living with HIV, was instructed by a public health official to use a condom when he engaged in sexual intercourse and to inform prospective sexual partners that he was HIV-positive. The accused proceeded to have unprotected sexual intercourse on multiple occasions with two different women, without informing either of them that he was HIV-positive. Both women testified that they would not have had sex with him if they had known he was HIV-positive. Neither woman was infected with HIV. The accused was charged with two counts of aggravated assault. The trial judge entered a directed verdict acquitting the accused and the Court of Appeal refused to set aside the verdict.

Decision and relevance

In a final appeal to the Supreme Court, the Court stated that in the case of aggravated assault, consent to engage in unprotected sexual intercourse is vitiated by fraud when an individual knows he is HIV-positive and fails to disclose or deliberately deceives his partner about it. However, "the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or risk of deprivation." The Court reiterated that to prove aggravated assault there must be a significant risk of serious bodily harm, otherwise "the duty to disclose will not arise."

R v CB

Key points

- Reasonable doubt about possibility of transmission precludes aggravated sexual assault conviction regardless of non-disclosure of status.
- Reasonable doubt on transmission risk not only linked to viral load and condom use.

Offence	Aggravated sexual assault; sexual assault causing bodily harm
Year	2009
Court	Ontario Court of Justice
Citation	R v CB 2017 ONCJ 545

Facts

The accused had sexual relationships with three women (none of whom became HIV-positive) without disclosing his HIV status. At the time his viral load was low or undetectable. After the first relationship, his sexual partner went to the police. He was questioned but released with a requirement that he abstain from any sexual activity unless he disclosed his HIV and herpes simplex virus status or wore legally required protection. It is alleged he then went on to have sexual relationships with two women without disclosing his status or using a condom. He was charged with aggravated sexual assault for not disclosing his HIV status before engaging in sexual intercourse and with sexual assault causing bodily harm for infecting a complainant with herpes simplex virus.

Decision and relevance

In relation to the HIV-exposure charge of aggravated sexual assault, the accused argued that, given his UVL, he was not required to disclose his HIV status. The Court found that the Supreme Court's *Mabior* decision was not intended to establish an absolute and fixed rule that a low viral load and condom use was the only way to raise a reasonable doubt about the possibility of transmission. The Court held that the Crown failed to prove that the accused exposed the complainants to a significant risk of serious bodily harm, and the accused was acquitted of all charges.

R v DC

Key points

- UVL and condom use required to preclude "realistic possibility" of transmission.
- Failure to use a condom was not proved beyond a reasonable doubt: speculative, hearsay evidence is insufficient.

Offence	Sexual assault; aggravated sexual assault
Year	2012
Court	Supreme Court of Canada
Citation	R v DC 2012 SCC 48
Amicus brief	Factum of the Interveners at the Supreme Court of Canada: R v Mabior and R v DC.

Facts

The accused learned that she was HIV-positive in 1991. After commencing antiretroviral treatment, her viral load became undetectable. She did not disclose her HIV-positive status to the complainant before they first had sexual intercourse. There was a factual dispute whether a condom had been used or not – the only evidence was the complainant's testimony that a condom was not used, and the accused's testimony that a condom was used. The complainant never contracted HIV despite an enduring sexual relationship thereafter. After a break up, during which the complainant assaulted the accused and her son, the complainant went to the police. The accused was convicted of aggravated sexual assault in relation to the couple's first sexual encounter. The trial Court found she had not disclosed her HIV status and that a condom had not been used. Despite holding that neither the complainant nor the accused were credible witnesses, the Court accepted the complainant's evidence on the absence of condom use. On appeal to the Quebec Court of Appeal, the conviction was set aside on the basis of an absence of a significant risk of serious bodily harm due to the accused's UVL, irrespective of no condom use.

Decision and relevance

The Supreme Court dismissed a further appeal. The Court held that condom use was required to preclude a “realistic possibility of HIV transmission” despite the accused’s UVL. However, it dismissed the appeal and set aside her conviction on the basis of the trial Court’s error in relying on speculative evidence on the failure to use a condom based on hearsay evidence. The Court held that the Crown had failed to prove its case beyond a reasonable doubt as neither witness had given credible evidence on the use of a condom.

R v Edwards

Key points

- No duty to disclose when the proper use of condom reduces or renders the risk low.

Offence	Aggravated assault; sexual assault
Year	2001
Court	Supreme Court of Canada
Citation	<i>R v Edwards</i> 2001 NSSC 80.

Facts

The accused was charged with aggravated assault and sexual assault for not disclosing his HIV status before engaging in unprotected anal intercourse. The accused and complainant met at a bar and engaged in oral and anal intercourse. The complainant reported the accused to the police under suspicion of having stolen an item of property. During a polygraph test used in questioning the accused on the alleged stolen item (which showed him to be truthful in denying any theft) the accused noted his HIV-positive status, which information the polygraph expert conveyed to the complainant. Subsequent tests showed the complainant did not contract HIV. The complainant claimed the anal intercourse was unprotected; the accused claimed they had used a condom during intercourse.

Decision and relevance

The Court considered expert evidence that use of a condom during anal sex renders transmission risk low. The Court considered that neither party had enquired of the other’s HIV status before engaging in sexual intercourse – such an inquiry, while wise, is not a requirement of law “and human nature and circumstances, passion, etcetera, dictate against such a standard.” The Court reasoned, however, that the law does require “one who is infected to practice safe sex or make clear disclosure so there can be informed consent if unprotected sex is to be pursued.” It held on the evidence that the State had failed to prove beyond a reasonable doubt that unprotected sexual intercourse had occurred, or that the conduct endangered the complainant’s life for purposes of proving aggravated assault. It is noted that in the course of the trial, the State conceded that unprotected oral sex has a low transmission risk which would not invite charges.

R v Felix

Key points

- Fraud for sexual assault conviction requires dishonesty and deprivation, the latter requiring proof of transmission risk.
- No evidence provided on viral load at time of intercourse with condom.

Offence	Aggravated sexual assault
Year	2013
Court	Court of Appeal for Ontario

Citation *R v Felix* 2013 ONCA 415

Facts

The accused was charged with seven counts of aggravated sexual assault involving three different complainants arising from his alleged failure to disclose his HIV-positive status to the complainants prior to engaging in sexual relations. In the Ontario Court of Justice, he was convicted on five counts where he did not use a condom, acquitted of one count but convicted of the lesser charge of sexual assault where he did use a condom, and acquitted of another charge of aggravated sexual assault because the witness was deemed unreliable. He appealed his convictions to the Court of Appeal.

Decision and relevance

On appeal, the defence argued that according to the recent *Mabior* case, non-disclosure of HIV status is sufficient to establish the dishonest act requirement of fraud but it does not establish the requirement of deprivation or risk of deprivation. Only where there is a realistic possibility of HIV transmission is disclosure of HIV-positive status obligatory. Neither the Crown nor the defence had provided any evidence regarding the accused's viral load at the time of the incident of intercourse with a condom. The Court ordered a new trial on the charge of sexual assault to consider medical evidence on viral load. The other conviction appeals were dismissed.

R v JAT

Key points

- Risk of transmission immaterial on basis of evidence on frequency of anal intercourse with and without use of a condom.
- Immaterial transmission risk does not vitiate consent or endanger life.

Offence Aggravated sexual assault
Year 2013
Court Supreme Court of British Columbia
Citation *R v JAT* 2010 BCSC 766

Facts

The accused met the complainant at a Pride festival and they commenced a relationship that lasted 10 months. The accused told the complainant he was HIV-negative (despite knowing he was HIV-positive) and maintained the deception until shortly before their relationship ended, when he pretended he had just been diagnosed. At the beginning of the relationship, the couple made a safe-sex agreement that the complainant would always wear a condom when the couple engaged in anal intercourse. The complainant was always the insertive partner. The couple engaged in protected anal intercourse approximately 60 to 100 times during their relationship. HIV was not transmitted. The accused was charged with aggravated sexual assault.

Decision and relevance

The Court found that three instances of unprotected sex had occurred during the relationship. The Court referred to expert scientific evidence on transmission risk and found that three incidents of unprotected anal intercourse at a risk of 4 in 10,000 per occurrence puts the risk of transmission of HIV to the complainant at 12 in 10,000 or 0.12%. The Court found that a 0.12% risk of transmission of a virus that, while still a serious lifelong harm, is now largely treatable, did not constitute endangerment to life, and consequently did not constitute aggravated sexual assault. She also stated that a risk of transmission of HIV of 0.12% was not material enough to establish deprivation invalidating the consent of the complainant. The Court emphasised that the nature of the harm necessarily affects the threshold of significance required to establish deprivation. As the magnitude of the harm goes up, the threshold of probability that will be considered significant goes down.

R v JTC

Key points

- No realistic possibility of transmission where UVL during sexual intercourse without a condom.
- Testimony that complainant would have consented to sexual intercourse if she had known of low transmission risk.

Offence	Aggravated sexual assault
Year	2013
Court	Provincial Court of Nova Scotia
Citation	R v JTC 2013 NSPC 105

Facts

The accused had protected vaginal intercourse with the complainant. He did not disclose his HIV status and denied having AIDS or any other sexually transmitted infection. They then had sex on a number of occasions, including one instance without a condom when he did not ejaculate. There was no evidence of HIV transmission. He was charged with aggravated sexual assault for his failure to disclose his HIV status.

Decision and relevance

The Court relied on two factors before returning a not guilty verdict. First, the complainant had said that had she known the fact that he was HIV-positive, she would not have had unprotected sex with the accused. But had she known that his risk of transmitting HIV was virtually non-existent she would have consented. That is, if there were no real risk she would have consented, therefore, her consent was not vitiated by the deception. Second, he argued that the evidence confirmed that the chance of transmitting HIV during the act of sexual intercourse without a condom could be expressed as approaching zero, and consequently HIV transmission was not realistic. The Court accepted the evidence that unprotected sex with the particular accused in consideration of his viral load has “no realistic possibility of transmission of HIV”. In the absence of a risk of transmission (separate to the fact that the complainant would have consented in light of this knowledge) the accused was found not guilty.

R v Mabior

Key points

- Requirement of “significant risk of serious bodily harm” requires disclosure of HIV status only “if there is a realistic possibility of transmission of HIV”.
- Condom use and UVL poses no realistic sexual transmission risk.

Offence	Aggravated sexual assault
Year	2012
Court	Supreme Court of Canada
Citation	R v Mabior 2012 SCC 47 ; 2010 MBCA 93
Amicus brief	Factum of the Interveners at the Supreme Court of Canada: R v Mabior and R v DC.

Facts

The accused was charged with nine counts of aggravated sexual assault for not disclosing his HIV-positive status to nine women before engaging in sexual intercourse with them. None of the women tested positive for HIV. The accused was convicted on six counts. He was acquitted on three counts on the basis that sexual intercourse using a condom when viral load is undetectable does not place a

sexual partner at a “significant risk of serious bodily harm.” On appeal to the Court of Appeal, the accused was acquitted of four more counts on the basis that either low viral load or condom use could negate the “significant risk of serious bodily harm”. Two convictions remained. The Crown appealed the acquittals to the Supreme Court.

Decision and relevance

The Supreme Court relied on *R v Cuerrier*, stating that “failure to disclose that one has HIV may constitute fraud vitiating consent to sexual relations.” Fraud consisted of two components: (1) a dishonest act, including either falsehoods or failure to disclose one’s HIV status; and (2) deprivation, “denying the complainant knowledge which would have caused him or her to refuse sexual relations that exposed him or her to a significant risk of serious bodily harm.” The Court stated that the requirement of “significant risk of serious bodily harm” requires disclosure of HIV status only “if there is a realistic possibility of transmission of HIV”. The Court further held that a realistic possibility of transmission of HIV exists unless a person has both a low viral load and uses a condom. The Court rejected the Crown’s argument that all HIV-positive people should be required to disclose their HIV status to all sexual partners in all cases, observing that requirement would mean individuals “who act responsibly and whose conduct causes no harm and indeed may pose no risk of harm, could find themselves criminalised and imprisoned for lengthy periods.”

R v Mekonnen

Key points

- Must present on risk, not just that act occurred.

Offence	Aggravated sexual assault
Year	2013
Court	Court of Appeal for Ontario
Citation	<i>R v Mekonnen</i> , 2013 ONCA 414

Facts

In 2009, the accused was convicted of two counts of aggravated sexual assault in relation to two different women for not disclosing his HIV-positive status prior to sexual activity. In the first case, he was found to have used condoms when engaging in vaginal intercourse and no condoms during a single instance of oral sex. He was convicted following defence counsel’s concession that he should be convicted if sexual intercourse or oral sex was found to have occurred without disclosure of his HIV-positive status. In the second case, the accused engaged in vaginal and oral sex, with condom use disputed. The trial judge did not resolve the conflicting evidence on whether condoms were used, regarding the issue as immaterial on the state of the law at the time. The accused had a low viral load at the time of the offences: an issue which was not addressed at trial.

Decision and relevance

The accused appealed both convictions. While the appeals were pending, the Supreme Court of Canada released its decision in *R v Mabior* which redefined key issues addressed in *R v Cuerrier*. The parties agreed that *Mabior* had overtaken the original grounds of appeal. The Ontario Court of Appeal set aside the first conviction as it was based in part on defence counsel’s concession that the accused should be convicted of aggravated sexual assault if sexual intercourse or oral sex was found to have occurred and did not consider whether there had been a realistic possibility of HIV transmission (per the *Mabior* standard). The second conviction was also set aside as no evidence was provided about the risk associated with the sexual activity, and the trial judge had not resolved the conflicting evidence on whether a condom had been used: an issue which could be highly material to whether there had been a realistic possibility of HIV transmission.

R v Murphy

Key points

- Oral Sex (cunnilingus) and UVL did not establish realistic possibility of transmission.
- Despite UVL, failure to use a condom did establish realistic possibility of transmission.

Offence	Aggravated sexual assault (amongst others)
Year	2013
Court	Superior Court of Justice, Ontario
Citation	R v Murphy 2013 CanLII 54139

Facts

The accused was diagnosed with HIV in 1994 and commenced antiretroviral treatment in 2001. In 2005, her viral load was undetectable. She was accused of having sexual interactions with three complainants without disclosing her HIV status: involving oral sex (cunnilingus) without the use of a barrier, vaginal sex without a condom, and vaginal intercourse with the use of a condom.

Decision and relevance

The accused argued she had no duty to disclose her HIV status if sexual intercourse occurred without use of a condom due to her UVL. The Court held that the first step is to determine on a factual basis whether there is a realistic possibility of HIV transmission. The Court interpreted *Mabior* as moving away from an “absolute disclosure” approach, affirming that not every risk of transmission of HIV constitutes a significant risk of serious bodily harm. Regarding the oral sex-related charges, the Court held that the risk of transmission in the case was so low it did not give rise to a realistic possibility of transmission and therefore there was not significant risk of serious bodily harm. The complainants’ consent was therefore not vitiated by fraud and the accused was acquitted. The Court, however, found the accused guilty on a charge relating to vaginal sex without a condom (where failure to use a condom had been proven) despite the accused having a UVL. The Court held that a significant risk of transmission remained and the complainant’s consent was therefore vitiated.

R v Nduwayo

Key points

- No legal duty to disclose if condom used as no evidence significant risk of serious bodily harm that would constitute deprivation.
- Condom use and other factors relevant to assessment of risk of harm, including frequency of sexual intercourse.

Offence	Aggravated sexual assault
Year	2010
Court	British Columbia Supreme Court
Citation	R v Nduwayo 2010 BCSC 1277

Facts

The accused was diagnosed with HIV in 1996 and was advised to use condoms and to inform sexual partners of his status. He had consensual sexual relationships with the seven complainants between 1997 and 2003. The accused was charged with aggravated sexual assault for engaging in sexual intercourse with seven women, in many instances unprotected, and for having failed to inform them of his HIV-positive status.

Decision and relevance

The Court reasoned that fraud that vitiates sexual consent requires proof of dishonesty and that the dishonesty results in a deprivation consisting of harm. The Court held that careful use of condoms may be found to reduce the risk of harm to be insignificant, meaning there is no deprivation. In the absence of a significant risk of serious bodily harm, the duty to disclose will not arise. The Court affirmed that the analysis of the risk will be significantly informed by whether or not a condom was used, however, there are other factors as well that bear on the issue including viral load, the type of sexual activity, whether there was ejaculation and the presence of lesions or sores at the time of the exposure. The accused was convicted on five counts of aggravated assault. However, in two cases, where the complainants had sex with the accused once or twice only, were not infected, and where the evidence was inconsistent about whether or not protection was used, the Court acquitted the accused of the charges. It reasoned that there was reasonable doubt that the complainants' consent was vitiated as the court was not convinced the risk of the conduct arose to a level that could be characterised as significant. The Court noted that dishonesty of the accused in dealing with his different sexual partners with respect to carrying on different, concurrent relationships could not form the basis of a finding he was by nature dishonest and had lied about his HIV status.

R v Pottelberg

Key points

- Consent valid despite non-disclosure of HIV status because evidence that complainant would have consented to unprotected anal intercourse had he known of accused's HIV-status.
- No proof of harm: no proof beyond reasonable doubt that accused infected complainant.

Offence	Aggravated sexual assault
Year	2010
Court	Superior Court of Justice Ontario
Citation	R v Pottelberg [2010] ONSC 5756

Facts

The accused was diagnosed as HIV-positive in 2006. The accused and the complainant engaged in consensual sexual acts repeatedly between 2007 and 2008 at the home of the accused's doctor (who had diagnosed him HIV-positive). The accused did not disclose his HIV-status and the complainant did not enquire as to his HIV-status. After testing positive for HIV in 2009, the complainant contacted the accused who confirmed his HIV-positive status. The accused stated in an interview with the police that the complainant had been sexually aggressive and had not given him the opportunity to discuss use of a condom in their first sexual engagement. He stated that he had assumed the complainant was HIV-positive too and alleged that the complainant was very sexually active. The accused was charged with aggravated sexual assault for engaging in unprotected anal intercourse, the complainant's consent to which was allegedly vitiated by the accused's failure to disclose his HIV status.

Decision and relevance

On assessment of the evidence of the complainant, the Court acquitted the accused on the basis that it was not satisfied beyond a reasonable doubt that the complainant would have refused to engage in unprotected anal intercourse with the accused, had he known of the accused's HIV status. The Court considered, amongst other factors, that the complainant acknowledged that the accused had "visible signs which were consistent with someone infected with AIDS, such as skin lesions, before he initiated unprotected sexual intercourse with the accused" and nonetheless, initiated sexual activity and engaged in unprotected anal intercourse with the accused without speaking to him. The Court noted further that even though the Crown had proven beyond a reasonable doubt that the accused engaged in sexual intercourse with the complainant without a legally valid consent, it could not

prove that he endangered the life of the complainant, since there was a possibility that a third party transmitted the virus to the complainant. It noted in this respect that the complainant had engaged in unprotected sexual activity with other persons prior to his first encounter with the accused. He also engaged in unprotected sexual activity with others after his last sexual activity with the accused but before learning that he was HIV-positive.

R v Ratt

Key points

- The negligible risk of transmission of a life-threatening disease is not an aggravating factor for the purposes of sentencing.

Offence	Assault (amongst others)
Year	2012
Court	Saskatchewan Provincial Court La Ronge
Citation	R v Ratt 2012 SKPC 154

Facts

The accused was arrested for impaired operation of a motor vehicle. She was uncooperative and behaving aggressively when arrested. She spat on police officers including in one police officer's eye. She was convicted of impaired operation of a motor vehicle and assault for spitting in the police officer's eye.

Decision and relevance

On sentencing, the Crown argued for a maximum sentence to be imposed for spitting on a peace officer on the basis of the risk of transmitting a communicable disease, citing HIV as an example. The Court considered expert evidence on the "negligible risk" of HIV through spitting or saliva. The Court held that the risk of transmission of a life-threatening disease was not an aggravating factor because the accused posed no risk to the health of the police officer.

R v Thompson

Key points

- Condom or UVL makes risk negligible which does not satisfy requirement for proof of "realistic possibility" of transmission.

Offence	Aggravated sexual assault
Year	2016
Court	Supreme Court of Nova Scotia
Citation	R v Thompson 2016 NSSC 134

Facts

The accused had sexual intercourse with the two complainants without disclosing his HIV-positive status. He had been on treatment with a UVL but had missed his dosage for a few weeks, recommencing treatment shortly before the incidents. He had used a condom with one woman and did not ejaculate. He had not used a condom with the other woman but may not have ejaculated.

Decision and relevance

The Court considered whether the accused should be convicted of aggravated sexual assault which required proof of deception and deprivation, and that there is a significant risk of serious bodily harm. The Court held both of these elements to be *prima facie* established on the basis of the accused's dishonesty to the complainants and the existence of a risk of transmission of HIV through

sexual intercourse, leading the Court to determine whether the accused had discharged the “tactical burden” of raising reasonable doubt. The Court paid close attention to the testimony of expert scientific witnesses and decided their testimony was strong enough that it could deviate somewhat from the *Mabior* ruling. The Court found the accused not guilty of aggravated sexual assault in both cases because there was a reasonable doubt about a realistic possibility of HIV transmission. In the first case, condom use was held to preclude a realistic possibility of HIV transmission. In the second case (no condom use), there was reasonable doubt about whether the accused had ejaculated (and whether pre-ejaculate can transmit HIV) and reasonable doubt that his viral load was low (with low viral load presenting a negligible risk which is not a realistic possibility of HIV transmission). The Court did, however, take note of the psychological harm experienced by both women as they waited to confirm their HIV negative status, and consequently found the accused guilty of two counts of sexual assault causing bodily harm.

R v W

Key points

- Absolute discharge granted on basis of mitigating factors (including UVL and habit of status disclosure) and reduced responsibility for not being initiator of sexual act while intoxicated.

Offence	False pretences
Year	2016
Court	Ontario Court of Justice
Citation	R v W [2016] O.J. No. 3253

Facts

The accused was diagnosed as HIV-positive in 2009, four years after commencing participation in a vaccine trial. The record showed he had a UVL. The complainant and accused were heavily intoxicated when they engaged in consensual unprotected sexual intercourse, initiated by the complainant, after meeting at a party. The accused did not recall the intercourse the following day or whether a condom had been used. The complainant did not test positive for HIV. The accused pleaded guilty to the crime of false pretences for failing to disclose his HIV status to the complainant.

Decision and relevance

In a sentencing judgment, the Ontario Court of Justice considered that while the psychological effect on the complainant was significant and the accused had “an obligation over and above that of an afflicted man when engaging in intimate relationships”, mitigating factors included his youth, that he took responsibility for his healthcare, that he had shown prior willingness to disclose his HIV-positive status, and had a UVL. The Court considered these “unique and powerful mitigating circumstance” in addition to the fact that he was not the initiator of the sexual intercourse, as a factor relevant to assessment of the degree of his responsibility. The Court granted an absolute discharge.

R v Wright

Key points

- Viral load is relevant

Offence	Aggravated sexual assault
Year	2009
Court	Court of Appeal for British Columbia
Citation	R v Wright 2009 BCCA 514

Facts

The accused was HIV-positive. He engaged in sexual intercourse with three women during which he did not wear a condom. He was found guilty of aggravated sexual assault against two complainants on the basis of his failure to disclose his status, and acquitted in relation to the third complainant.

Decision and relevance

The accused appealed unsuccessfully but the case is included here because it notes the importance of viral load; a point that would later be taken up in the Supreme Court case of *Mabior*. The Court stated: "If the viral load of the accused at the time of the sexual relations is known or can be estimated, then it will be very relevant to determining whether there was a significant risk of serious bodily harm."

Denmark

Prosecuting Authority v Jackie Madsen

Key points

- HIV no longer considered life-threatening.

Offence	Wantonly or recklessly endangering life or physical ability
Year	2012
Court	Eastern High Court
Citation	Prosecuting Authority v Jackie Madsen , 7 August 2012

Facts

A man living with HIV had been convicted under Denmark's (now-suspended) HIV-specific criminal statute.

Decision and relevance

The Court acquitted the accused on the basis that HIV could no longer be considered a life-threatening illness. The accused's sentence was reduced to six months for outstanding drug-related offences.

England (United Kingdom)

R v Dica

Key points

- Sexual partners knowingly accepted risk of HIV transmission by consenting to unprotected sex.
- Consent to risk a valid defence to accused's reckless conduct.

Offence	Grievous bodily harm
Year	2004
Court	Court of Appeal, Criminal Division
Citation	R v Dica [2004] EWCA Crim 1103

Facts

The accused had unprotected sexual intercourse with two women without first disclosing his HIV-positive status. Both women were infected with HIV. The Crown did not argue that he had

intentionally sought to infect the complainants but that when he had consensual intercourse, knowing he had HIV, he was reckless in relation to whether the complainants would be infected. At his trial, the judge instructed the jury that any consent by the complainants was irrelevant and provided no defence. The accused was convicted of grievous bodily harm.

Decision and relevance

On appeal, the Court of Appeal affirmed that the accused had been reckless and noted that had the accused used protective measures “it would have provided material relevant” to assess whether recklessness had been proved. In considering whether the complainants’ consent was a valid defence to his conduct, the Court stated that for public policy reasons, consent is not a defence to the deliberate spreading of disease but it held that this does not imply that consensual intercourse is unlawful merely because there may be a known risk to the health of a participant. The Court held that there had been no intention to spread the infection, and that by consenting to unprotected sexual intercourse, the complainants had been prepared to “knowingly, to run the risk – not the certainty – of infection,” as well as other inherent risks such as unintended pregnancy. The Court found that the complainants had consented to the risk of infection with HIV when they consented to unprotected sexual intercourse. The Court argued that to criminalise consensual taking of such risks would be impractical and would be haphazard in its impact. The consent to risk provided a defence under the crime of grievous bodily harm, resulting in the conviction being quashed.

European Court of Human Rights

Enhorn v Sweden

Key points

- Deprivation of liberty on public health grounds must be proportionate and only as last resort.

Offence	N/A (Provision for order of compulsory isolation of person with infectious disease for failure to comply with measures to prevent transmission)
Year	2005
Court	European Court of Human Rights, Second Section
Citation	<i>Enhorn v Sweden</i> [2005] E.C.H.R. 56529/00

Facts

Following an HIV-positive diagnosis and the applicant’s infection of another man with HIV, a county medical officer issued instructions to the applicant under the Infectious Diseases Act including not to have sexual intercourse without first disclosing his HIV-positive status, to use a condom, and not to consume an amount of alcohol that would impair his judgement. He subsequently failed to appear for several scheduled medical appointments and the county medical officer petitioned the County Administrative Court to compulsorily confine the applicant to a hospital for up to three months. The county medical officer and a psychiatric specialist testified that the applicant was at risk of transmitting HIV due to his refusal to modify his behaviours and extensive alcohol abuse. The Administrative Court found the applicant had failed to comply with the measures prescribed by the county medical officer and ordered his compulsory confinement in a hospital for up to three months. The applicant’s confinement was repeatedly prolonged every six months; the order of confinement totalling almost seven years, during which time the accused absconded on multiple occasions, for months at a time, so that his actual confinement totalled one and a half years.

Decision and relevance

The applicant claimed his compulsory confinement violated his right to liberty and security of person under the European Convention on Human Rights. The Government argued that the applicant's confinement was lawful pursuant to the Convention, which allows for the detention of a person "for non-compliance with the lawful order of a Court or in order to secure the fulfilment of any obligation prescribed by law" and "for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants". It was common cause that the isolation orders and involuntary confinement amounted to a "deprivation of liberty". While the Court agreed that the exception to the right to liberty to prevent the spread of disease was applicable, it held that such detention must be in accordance with the principle of proportionality and is therefore justified only where "less severe measures have been considered and found to be insufficient to safeguard the individual or the public interest". The Court held that the Government had not considered less severe measures before compulsorily confining the applicant as a last resort. The Government had failed to strike the appropriate balance between public safety and the accused's right to liberty, and therefore his compulsory confinement based on the risk that he may transmit HIV violated his right to liberty and security of person.

Germany

*LG Aachen, Urteil vom 23.03.2015 - 68 KLS 1/15**

***NOTE: This summary is based on an English translation of the judgment.**

Key points

- No intent to transmit – non-disclosure motivated by fear of losing relationship.
- Transmission risk considered insufficient to justify attempted negligent assault (oral sex, sexual intercourse with a condom, and sexual intercourse without a condom where no ejaculation and UVL).

Offence	Assault; attempted assault
Year	2015
Court	District Court of Aachen
Citation	LG Aachen, Urteil vom 23.03.2015 - 68 KLS 1/15

Facts

The accused was diagnosed as HIV-positive in 2007. In 2011 the accused ceased his antiretroviral therapy against medical advice. The accused had repeated consensual sexual intercourse with a condom with the first complainant without informing her of his HIV-status. After moving in together and commencing oral contraceptive, the first complainant suggested intercourse without a condom. The accused testified that he was unable to insist on condom use, fearing he would lose the relationship if his HIV-status was revealed. The accused and first complainant thereafter engaged in unprotected sexual intercourse on multiple occasions. The first complainant subsequently tested positive for HIV in 2014, after which the relationship ended. After resuming antiretroviral therapy, the accused had unprotected sexual intercourse with the second complainant without disclosing his HIV status, but he did not ejaculate during intercourse. After confronting him about his HIV status, the accused assured her that nothing would happen as he was on treatment. The accused had protected sexual intercourse with a condom and oral sex with the third complainant. When the condom broke, he withdrew and did not ejaculate in the complainant's body. He did not inform her of his HIV status. The second and third complainants did not test positive for HIV. He was accused of

assault in relation to the first complainant and of attempted assault in relation to the second and third complainants.

Decision and relevance

The Aachen District Court accepted expert evidence to the effect that unprotected oral sex presents no demonstrable risk of HIV infection. It further considered evidence that ejaculating outside of the body reduces transmission risk and the impact of effective treatment in reducing viral load and transmission risk. With respect to the first complainant, the Court held that although the accused understood that transmission was a possibility, the evidence was that he did not believe he would infect the first complainant. The Court accepted that the accused acted with the intent to preserve his relationship and lacked the intention to infect the first complainant. He was therefore convicted of only negligent assault. With respect to the second and third complainants, the Court held that having a UVL at the time, the accused believed he was not infectious. There too the Court held that the accused had no intent to infect the complainant, and that there was no risk of transmission. He was therefore acquitted of attempted assault. On the conviction for negligent assault in relation to the first complainant, he was given a suspended sentence of 1 year and 9 months' imprisonment.

Kenya

AIDS Law Project v Attorney General and 3 Others

Key points

- Law unconstitutional: vague, over-broad and violation of the right to privacy.

Offence	Failure to take reasonable measures to prevent HIV transmission; failure to inform sexual contacts or persons sharing needles of HIV-positive status; knowingly and recklessly placing another at risk of being infected with HIV
Year	2015
Court	High Court
Citation	Aids Law Project v Attorney General & 3 Others [2015] , eKLR, Petition No. 97 of 2010

Facts

The AIDS Law Project brought an abstract challenge to section 24 of the HIV and AIDS Prevention and Control Act No. 14 of 2006 in the public interest. The provision criminalised (1) the failure of a person diagnosed with HIV to take "all reasonable measures and precautions to prevent the transmission of HIV" and the failure to inform sexual contacts of persons with whom needles are shared of one's HIV-positive status; and (2) knowingly and recklessly placing another at risk of HIV infection. The provision further empowered healthcare practitioners to inform the person's sexual contacts of their HIV status, if failing to do so themselves. The petitioner sought, amongst others, a declaration that the provision was unconstitutional.

Decision and relevance

The Court held that the provision did not meet the principle of legality for being vague and overbroad and lacking certainty "especially with respect to the term 'sexual contact'". The provision was further held to violate the right to privacy in a way that did not meet the test for justifiable limitations to rights under the Constitution. The Court, in *obiter dictum*, urged the State to review the Act as a whole.

Malawi

EL v the State

Key points

- No proof of knowledge of likelihood of transmission.
- “Extremely low” transmission risk through breastfeeding when on antiretroviral treatment.
- Rights to privacy, dignity and fair trial.

Offence	Unlawful, negligent or reckless conduct likely to spread a disease dangerous to life
Year	2016
Court	High Court of Malawi, Zomba
Citation	EL v the State, The High Court of Malawi Zomba District Registry, Criminal Case No. 36 of 2016

Facts

The accused was a breastfeeding mother living with HIV and on antiretroviral treatment (ART). She was reported to the police after breastfeeding another woman’s child at a community meeting. The child did not contract HIV and the evidence indicated that the breastfeeding was accidental and unintended. The accused did not have legal representation at her trial. The Magistrates Court recorded a guilty plea and sentenced her to nine months’ imprisonment with hard labour.

Decision and relevance

The accused appealed to the High Court arguing that the State failed to prove that a single exposure of a child to breastmilk of a woman living with HIV on antiretroviral treatment was “likely” to spread HIV; denying intent or negligence in her conduct; and arguing that the crime was unconstitutional for being vague and overbroad and violating her human rights. The High Court set aside the accused’s conviction and upheld the appeal on the basis that the State did not and could not have proved that the accused had knowledge or reasonable belief that breastfeeding was likely to spread HIV, including on the basis of expert opinion on the low risk of transmission. The Court noted concern with the violation of the accused’s rights to dignity, privacy, and the right to a fair trial, including how evidence of her HIV status had been brought before the Court. It stated further, *obiter dictum*, that laws on criminal transmission should be sensitive to issues including a lack of knowledge on how HIV is transmitted, the circumstances of accused persons, and the importance of upholding traditional standards of proof. The Court declined to rule on the constitutionality of the offence but stated that the argument that the offence was unconstitutional was “convincing”.

New Zealand

New Zealand Police v Justin William Dalley

Key points

- Legal duty to take reasonable precautions to avoid endangerment to life fulfilled.
- Oral sex without a condom; vaginal sex with a condom; non-disclosure of HIV status.

Offence	Criminal nuisance (failure to discharge duty as person in charge of dangerous things)
Year	2005
Court	District Court at Wellington
Citation	New Zealand Police v Justin William Dalley, Decision of District Court at Wellington CRI-2004-085-009168, 4 October 2005

Facts

The accused met a woman through a dating site. She performed oral sex on him without using a condom (he did not ejaculate although there was a small amount of pre-ejaculation). They then had vaginal sex using a condom, which did not break or leak. The accused had a low viral load. He was charged with criminal nuisance for failing to disclose his HIV status before oral and vaginal intercourse.

Decision and relevance

The Court accepted that the accused was under a legal duty to take reasonable precaution to avoid danger to human life because semen may endanger life if it contains HIV. The Court found, however, that the accused had not breached this duty: on the evidence, the risk of transmission during oral intercourse without a condom and in the absence of ejaculation is so low it does not register as a risk; the use of a condom during vaginal sex met the standard of taking a reasonable precaution and care. The Court reasoned that the requirement to take reasonable precautions is an objective standard that does not require absolutely “failsafe” precautions. The Court distinguished between the existence of a moral duty to disclose one’s HIV status before intercourse from the legal duty under consideration. The Court attached “significant weight” to the expert evidence and the approach of the relevant health professional bodies. The accused was acquitted of all charges.

Spain

Case No STS 3527/11*

***NOTE: This summary is based on an English translation of the judgment.**

Key points

- Use of recommended precautions (condoms) disproves specific intent to harm.
- Criminal liability distinct from behaviour that is “ethically wrong”.

Offence	Causing injury / offence causing bodily harm
Year	2011
Court	Second Chamber of the Supreme Court of Spain
Citation	<i>Case No. STS 3527/11, Supreme Court of Spain</i>

Facts

The accused was diagnosed with HIV in 1994 and began a relationship with a woman in 1996. He did not inform her he was HIV-positive. He used condoms but they broke on several occasions. The woman became pregnant and HIV-positive, as did their daughter through vertical transmission from her mother. In 2006, the woman filed private prosecution against the accused for the offense of causing injury and causing bodily harm. The accused was acquitted by the Provincial Court of Madrid; the complainant filed an appeal.

Decision and relevance

On appeal, the Supreme Court held that the accused did not have the specific intent to harm the complainant because he took recommended medical precautions by using a condom during sexual relations with her. The Court found that the fact that the accused had failed to inform the complainant of his condition might have been ethically wrong but it did not make his actions criminally wrongful. However, the Court also held that the result (the complainant becoming infected with HIV) was not only avoidable but also predictable, and the accused’s behaviour had been

careless. The Court therefore partially reversed the judgment below, finding the accused guilty of two reckless offenses and awarded civil monetary damages to the complainant.

Sweden

B4189-03*

***NOTE: This summary is based on an English translation of the judgment.**

Key points

- Risk of transmission with UVL recognised as “extremely low” during unprotected sex.
- Consent is a valid defence if low risk of transmission.

Offence	Attempted gross maltreatment or endangering another
Year	2004
Court	Supreme Court of Sweden
Citation	B4189-03 (NJA 2004: 20)

Facts

The accused was a man living with HIV who had been instructed by the National Board of Health and Welfare to disclose his status to sexual partners and not to have unprotected sexual intercourse. He was on antiretroviral therapy and had a UVL. He was charged with attempted gross maltreatment or endangerment for having protected and unprotected oral and anal sexual intercourse with 10 persons. He did not disclose his HIV-positive status to the complainants and in some cases lied about his status. In only one case was there evidence that the complainant was aware of the accused’s HIV-positive status. None of the complainants who were tested contracted HIV. The accused denied liability on the basis that he lacked an intention to harm the complainants. He argued that having a UVL, he was not at risk of transmitting HIV. The District Court convicted the accused, sentenced him to four years’ imprisonment and ordered him to pay damages to the complainants. Both the prosecution and accused appealed to the Svea Court of Appeal. The Court of Appeal confirmed the conviction and damages order but reduced his sentence to three years’ imprisonment on the basis that HIV is no longer as consequential in the light of newer treatments.

Decision and relevance

The accused appealed to the Supreme Court. The Supreme Court confirmed the accused’s convictions on nine of the charges of endangering others. The Court affirmed that the assessment of a risk of transmission is to be objectively determined on the basis of scientific evidence; the greater the potential harm, the lower the acceptable standard of risk will be to sustain a conviction. The Court reasoned that under conditions of the accused’s UVL, the risk of transmission was extremely low and there was no evidence that the accused believed his transmission risk to be higher or that he intended to transmit HIV. For this reason he was convicted of endangering others but not of attempted maltreatment. The Court, however, overturned one charge as the complainant was found to be aware of the accused’s HIV status. The Court held that consent was a valid defence under conditions where the risk of transmission was low. The accused’s sentence was reduced to one year imprisonment and the damages award was amended, taking into account the low risk of transmission.

B2152-13*

***NOTE: This summary is based on an English translation of the judgment.**

Key points

- Insufficient risk of transmission to convict of endangering others.
- UVL, unprotected vaginal intercourse.

Offence	Attempted gross maltreatment or endangering another
Year	2013
Court	Skåne and Blekinge Court of Appeal
Citation	B2152-13 (RH 2015:2)

Facts

The accused was a man living with HIV who was charged with attempted gross maltreatment or endangering others for having unprotected vaginal intercourse with four women without informing them of his HIV-status. None of the complainants were infected with HIV. Amongst his defences, he argued that having a UVL and there being no evidence of being infected with any other sexually transmitted infections at the time, his risk of transmission was so low there could be no concrete risk of transmission. The District Court convicted him of endangering others on the basis of its finding of his gross negligence. He was sentenced to one year imprisonment and ordered to pay damages to the complainants.

Decision and relevance

On appeal, the Skåne and Blekinge Court of Appeal considered that the 2004 Infection Control Act required the accused to inform sexual partners of his HIV-status before sexual engagement and to use a condom during sexual intercourse. The Court considered expert evidence that the risk of transmission during vaginal intercourse without condom use, by a person with a UVL, is very low, based on single or repeated sexual contacts. The Court considered that evidence on transmission risk when persons have a UVL had improved to warrant a departure from the Supreme Court's 2004 decision. The Court held that there was no concrete danger of transmission in the accused's case and therefore the objective requirements for proving the crime of endangering others were not met. The accused was acquitted.

Switzerland***S v Procureur Général****

***NOTE: This summary is based on an English translation of the judgment.**

Key points

- Swiss Statement – hypothetical risk only.

Offence	Attempted spread of a human disease and attempted serious bodily harm
Year	2009
Court	Court of Justice, Penal Division, Geneva,
Citation	S v Procureur Général, Court of Justice, Penal Division, Geneva February 23, 2009

Facts

The accused was diagnosed HIV-positive and began taking treatment in 1998. By 2008, he had a UVL. His doctors had assured him that he was not at risk of transmitting HIV. Two women alleged that he had not disclosed his HIV-positive status before having unprotected sexual intercourse with them. The accused claimed that one of the women was aware of his HIV status and that he did not engage in intercourse with the other. The accused was found guilty of attempted serious bodily harm and attempted spread of a human disease.

Decision and relevance

On appeal, the Court of Justice observed that recent medical research indicated that a person living with HIV who adheres to effective antiretroviral treatment, whose viral load is undetectable and who does not have other infections will not transmit HIV through sexual contact or the risk is “too low to be scientifically quantified.” The accused was acquitted of attempted serious bodily harm and attempted spread of a human disease. The Court also found that when a person, who is aware of a partner’s HIV-positive status and the risks of transmission, freely consents to having unprotected sexual intercourse, there cannot be conviction for attempted serious bodily harm. There could, however be a conviction for attempted spread of disease.

Uganda

Namubiru v Uganda

Key points

- Sentence reduced on basis of appellant’s age and HIV-positive status, no HIV transmission, no intent to harm, and policy need for Courts to impose greater legal protection on medical professionals.

Offence	Negligent act likely to spread infection of disease
Year	2014
Court	High Court of Uganda
Citation	Rosemary Namubiru v Uganda, HCT-00-CR-CN---0050-2014

Facts

The accused, an HIV-positive nurse working at a public hospital, began inserting a cannula into the hand of a two-year-old child when she mistakenly pricked her own index finger and drew blood. The accused returned the cannula to a tray and administered treatment on her finger, after which she inserted that same cannula into the vein of the child. The child’s mother asked her why she was re-using a contaminated cannula, but she dismissed the inquiry. The mother then reported the incident to management. The accused was asked to take a blood test which confirmed she was HIV-positive. The accused was convicted of a negligent act likely to spread infection of disease but appealed to the High Court of Uganda.

Decision and relevance

The High Court found sufficient evidence of criminal negligence, given the established professional standards of medicine but reversed the trial Court ruling and reduced the accused’s sentence to time already served (approximately five months). The Court cited the appellant’s age of 64 years old and her HIV-positive status; the fact the child did not contract HIV; and the policy need for courts to impose a greater degree of legal protection on medical professionals. The Court also noted that there had been no intention to harm the child.

United States of America (USA)

Brock v State

Key points

- Failure to prove intention.
- Failure to prove transmission risk.
- Teeth not a deadly weapon.

Offence Attempted murder, assault
Year 1989

Court Court of Criminal Appeals of Alabama
Citation *Brock v State*, 555 So.2d 285, 288 (Ala. Crim. App. 1989)

Facts

The accused was charged in relation to two separate incidents that occurred while he was imprisoned, including biting a prison guard during a scuffle. Regarding the bite, he was convicted of first degree assault, a lesser included offense of the original attempted murder charge. He was also convicted of second degree assault, and third degree assault.

Decision and relevance

The Alabama Court of Criminal Appeals reversed the accused's conviction for first degree assault, saying the State failed to establish the essential elements of the case because no evidence was provided that the accused's mouth and teeth were "deadly weapon[s]" as defined by Alabama statute. Moreover, the Court held that the State did not prove that the accused intended to cause serious physical harm to the prison guard. The Court noted that the State provided no evidence that HIV can be transmitted through a human bite. The Court did not believe it to be an established scientific fact that HIV could be transmitted in this way. Therefore, the Court held that there was no evidence before it that the accused intended to spread HIV through his bite. The accused was instead found guilty of third degree assault.

People of the State of Michigan v A

Key points

- No evidence of the presence of blood.
- No evidence that the accused intended to use HIV infection to do harm simply because HIV-positive (Also biting).

Offence Unlawful possession or use of a harmful device
Year 2010
Court Circuit Court, Macomb County, Michigan
Citation *People of the State of Michigan v A*, No. 2009-4960 (Macomb County Ct. Mich. Cir. Ct. June 2, 2010)
Amicus brief *People of the State of Michigan v A - Amicus* brief, Macomb County Circuit Court, Lambda Legal, Community AIDS Resource and Education Services, Michigan Positive Action Coalition and Michigan Protection and Advocacy Service, Inc.
People of the State of Michigan v A – Amicus brief, Macomb County Circuit Court, American Civil Liberties Forum

Facts

The accused, an HIV-positive man who allegedly bit his neighbour during an altercation, was charged under Michigan's anti-bioterrorism law. The prosecution argued that the accused possessed or used a "harmful biological substance" (HIV), with intent to terrorise and possibly kill another person.

Decision and relevance

The Court rejected the State's argument, concluding that there was neither evidence of blood involvement, nor evidence that the accused intended to use his HIV infection to do harm. Citing Center of Disease Control (CDC) findings that saliva is not a means of HIV transmission, the Court dismissed it as a possible biological weapon. However, the Court did agree with a previous Michigan Court of Appeals decision that HIV-infected blood is a "harmful biological substance" as defined under the state bioterrorism law because it is implicated in the transmission of HIV.

People of the State of New York v Plunkett

Key points

- Teeth and saliva cannot be considered a dangerous weapon.

Offence	Aggravated assault upon a police officer
Year	2012
Court	New York State Court of Appeals
Citation	<i>People of the State of New York v Plunkett</i> 971 N.E.2d 363 (N.Y. 2012)

Facts

The accused was indicted for attempting to bite a police officer on the finger as the officer attempted to arrest him for possession of marijuana. The accused was living with HIV and had a long history of psychiatric illness. He was charged with aggravated assault on a police officer or peace officer, which crime requires proof of the use of a deadly weapon or dangerous instrument. The State argued that the accused's teeth and saliva were dangerous weapons as required for the indictment. While pleading guilty to the crime on the basis of an agreement, the right to appeal was reserved.

Decision and relevance

The Court of Appeals vacated the accused's conviction for aggravated assault and dismissed the corresponding count on the indictment. The Court held that the accused's teeth and saliva were parts of him and could not be considered a dangerous instrument.

Rhoades v Iowa

Key points

- No factual basis for guilty plea as no medical testimony to prove risk.

Offence	Criminal transmission of HIV
Year	2014
Court	Supreme Court of Iowa
Citation	<i>Rhoades v Iowa</i> , Supreme Court of Iowa, No. 12-0180
Amicus brief	<i>Rhoades v State of Iowa</i> , Amicus brief, Supreme Court of Iowa, National Alliance of State and Territorial AIDS Directors, The Center for HIV Law and Policy, HIV Law Project (2012)

Facts

The accused was diagnosed with HIV in 1998, began receiving treatment in 2005, and was told his viral load was undetectable in 2008. Later that year, he had consensual, unprotected oral sex and

anal sex with a condom with a person he had met through a social networking site (that listed the accused as HIV negative). Upon learning that the accused may have been HIV-positive, his sexual partner went to the police who charged him with criminal transmission of HIV. Following poor legal advice, he pleaded guilty and was sentenced to 25 years in prison. The accused appealed and his prison sentence was reduced to five years' probation.

Decision and relevance

The accused filed an application for post-conviction relief, stating his trial counsel had been ineffective and should not have allowed him to plead guilty because (1) there was no factual basis for his guilty plea, and (2) counsel failed to conduct a complete investigation before the accused pleaded guilty. The application was denied by the trial Court and the Court of Appeals but the Supreme Court of Iowa reversed the lower Courts' decisions and set aside his criminal conviction. The Supreme Court held that the accused's counsel had breached an essential duty when he had permitted the accused to plead guilty where there was no factual basis to support the plea. The Court also found that the statutory requirement of "intimate contact" required that the transmission of HIV be "possible" through such contact, and consideration of that possibility required expert medical testimony. The Court decided that the initial trial had not factually proven any exposure to bodily fluids capable of transmitting HIV, and that judicial notice concerning the possibility of HIV transmission had been used despite facts being subject to reasonable dispute.

Smallwood v State of Maryland

Key points

- Intent cannot be inferred if not proven that "the victim's death would have been a natural and probable result of the defendant's conduct".
- Undertaking an act does not prove attempted murder: there must be proof of intention.

Offence	Attempted murder; assault with intent to murder
Year	1996
Court	Court of Appeals of Maryland
Citation	<i>Smallwood v State of Maryland</i> , 680 A.2d 512 (Md. 1996)

Facts

The accused was charged with, and pleaded guilty to, attempted murder for raping three women at gunpoint. The prosecution argued that because the accused was HIV-positive, knew he was HIV-positive, and had received counselling about transmission risk and the need to practice safe sex, forcing women to have sex with him showed he intended to cause their death by infecting them with HIV. The accused was convicted of attempted rape, robbery with a deadly weapon, assault with intent to murder, and reckless endangerment. The trial court also imposed a concurrent sentence for each of the three counts of attempted second-degree murder.

Decision and relevance

The accused appealed to the Maryland Court of Appeals, arguing that the fact he engaged in unprotected sexual intercourse, knowing he was HIV-positive was insufficient to infer an intent to kill. The Court found that intent could not be inferred in this case because the prosecution could not prove that the complainant's death "would have been a natural and probable result of the defendant's conduct." According to the Court, although it was possible that the complainant may develop AIDS and eventually dies as a result of the defendant's actions, it was not probable enough to infer an intent to kill to the extent, for example, that firing a gun at someone's head would be. The Court also distinguished the facts in this case from the facts in other cases in which an intent to kill by HIV transmission was upheld. Accordingly, the Court reversed the conviction on the attempted murder counts.

State of Kansas v Robert William Richardson

Key points

- Specific intent must be proven beyond reasonable doubt where an element of crime.
- Private, consensual sexual conduct is protected by the Constitution.

Offence	Exposing another to a life-threatening communicable disease
Year	2009
Court	Supreme Court of the State of Kansas
Citation	<i>State of Kansas v Robert William Richardson</i> , No 100,445 No. 100,835

Facts

The accused, an HIV-positive man on treatment, had sexual intercourse with two women without using a condom. Eight months earlier his viral load was tested and characterised as a medium viral load (at 11,700 parts per millilitre). Approximately one month later it was tested as undetectable. The accused was charged with two counts of exposing another to a life-threatening communicable disease. The trial court found him guilty on both counts and sentenced him to consecutive prison terms.

Decision and relevance

The accused appealed to the Supreme Court of Kansas, arguing that the trial court failed to treat the offence as a specific intent crime, that the crime was unconstitutionally vague, and that there was insufficient evidence to convict him. The Supreme Court held that although criminal intent is an essential element of every crime, some statutes require an additional, specific intent to be proven. The State acknowledged that the statute purports to be a specific intent crime but argued that the legislature's intended purpose was to prevent any sexual intercourse or sodomy by an HIV-positive person, even when using a condom, as some element of risk remains. The Court disagreed, stating if the legislature intended to criminalise all acts of sexual intercourse or sodomy by a person infected with HIV, it could have said so without employing specific intent language. The Court added that a person's decision to engage in private, consensual sexual conduct is protected by the United States Constitution. The Court found that the evidence was insufficient to support the allegation that the accused had engaged in sexual acts with the two complainants with the specific intention of exposing them to HIV. The Court dismissed the argument that the crime was unconstitutionally vague, arguing that on its interpretation of the State's burden of proof, the crime was sufficiently certain in defining the proscribed conduct.

State of Minnesota v Rick

Key points

- Ambiguity in law required narrow interpretation of offence of "transfer" of communicable disease to exclude sexual transmission.

Offence	Assault by communicable disease (Knowing Transfer of Communicable Disease); Sexual penetration without informing the other of a communicable disease
Year	2013
Court	Minnesota Supreme Court
Citation	<i>State of Minnesota v Rick</i> , 821 N.W.2d 610 (Minn. 2013)
Amicus brief	<i>State of Minnesota v Rick</i> , Amicus brief, Minnesota Supreme Court, American Civil Liberties Union, The Center for HIV Law and Policy, Lambda Legal, OutFront Minnesota (2013)

Facts

The accused, an HIV-positive man, had engaged in numerous occasions of unprotected anal sex with the complainant, who subsequently tested positive for HIV. The complainant testified that the accused had never disclosed his HIV-positive status, while the accused stated that he had disclosed, and denied he infected the complainant. The jury convicted the accused of assault by transferring a communicable disease, which applies to the “transfer of blood, sperm, organs, or tissue”, and acquitted him of sexual penetration without informing the other person of one’s communicable disease. The accused appealed to the Court of Appeals on his assault conviction, arguing, amongst others, that the “transfer of blood, sperm, organs, or tissue” does not apply to sexual conduct and, if it does apply to sexual conduct, the provision is unconstitutional. The Court of Appeals reversed the conviction. The State appealed to the Minnesota Supreme Court.

Decision and relevance

The Minnesota Supreme Court held that the crime of knowing “transfer” of an infectious disease was ambiguous because the word “transfer” was subject to more than one interpretation. In applying the rule of lenity in the context of the provision’s legislative history, the Court ruled that the crime should only apply to donation or exchange for value of blood, sperm, tissue or organs. As the accused’s conduct did not amount to a donation or exchange for value, his conviction was overturned.

State of Missouri v Michael L Johnson

Key points

- Violation of fair trial rights.
- Ordinary rules on admission of evidence apply (State failed to disclose evidence on time).

Offence	Recklessly infecting another with HIV; recklessly exposing another person to HIV; attempting to expose another person to HIV
Year	2016
Court	Missouri Court of Appeals
Citation	<u><i>State of Missouri v Michael L Johnson, Missouri Court of Appeals Eastern District, No. ED103217</i></u>
Amicus brief	<u><i>State of Missouri v Michael L Johnson, Amicus brief, Missouri Court of Appeals (2016).pdf</i></u>

Facts

The accused tested positive for HIV in 2013. He was accused of not disclosing his HIV-status to six sexual partners. The complainants testified that the accused never disclosed his status; the accused testified that he had disclosed his status to all of them prior to sexual intercourse, with the exception of one complainant with whom he claimed he had only had sexual intercourse in 2012, prior to his diagnosis. The accused was charged with two charges of recklessly infecting another with HIV, one charge of recklessly exposing another person to HIV, and three charges of attempting to expose another person to HIV. During the trial, the State sought to impeach the accused’s testimony by playing excerpts from recordings of phone calls he made while in pre-trial detention. In the recordings, he had stated he was “pretty sure” he had disclosed his HIV-status, the only evidence of his uncertainty as to the disclosures of his status. The existence of the 24 hours of recordings had not been disclosed to the accused until the first day of his trial, despite the discovery request having been made approximately a year and half prior. The trial court acquitted him of one of the charges of recklessly infecting another with HIV, but convicted him of all other charges.

Decision and relevance

On appeal, the Missouri Court of Appeals held “that the trial court abused its discretion by admitting excerpted recordings of phone calls Johnson made while in jail that were not disclosed to the defence until the morning of the first day of the trial”. The Court noted that the State admitted it intentionally withheld the recordings to gain a strategic advantage in the trial, a “trial-by-ambush” strategy. It held this prevented him from making a meaningful defence by depriving him of an opportunity to at least put his statements into context. The Court overturned his conviction and ordered a retrial. The Court did not consider an argument made on appeal on the constitutionality of his sentence for being grossly disproportionate.

State of Tennessee v Ingram

Key points

- State must provide expert testimony on transmission risk.

Offence	Criminal exposure to HIV (amongst others)
Year	2012
Court	Court of Criminal Appeals of Tennessee
Citation	<i>State v Ingram</i> , 2012 Tenn. Crim. App. LEXIS 887

Facts

The accused was caught robbing a house while trying to flee the scene. During a scuffle with police, including a police dog “latching on”, the accused’s face was cut and he began bleeding. It was alleged that he spat in the police officer’s face, and said something to the effect that he had HIV and hoped the police dog got AIDS. The officer testified that the accused’s saliva went into his mouth, eyes and nose. The accused testified that he had had trouble breathing following the beating and dog attack and had inadvertently coughed saliva and mucous onto the police officer’s chest and was warning the officers of his HIV status, not threatening them. He was convicted in the Shelby County Criminal Court of aggravated burglary and criminal exposure to HIV, amongst other charges.

Decision and relevance

The accused appealed only the conviction of criminal exposure to HIV, challenging the sufficiency of evidence to support conviction. He reiterated his claim that he had accidentally, not knowingly, transmitted bodily fluids and that the State had failed to establish “a significant risk of HIV . . . transmission” when he coughed on the police officer. The Court found that the accused had been combative and had knowingly spat on the police officer, however, it also found that a lay person does not have the necessary medical knowledge to determine whether spitting into the officer’s face created “a significant risk of HIV transmission” and, therefore, expert medical testimony was required, which had not been presented. The conviction for criminal exposure to HIV was reversed, however, a conviction for the lesser charge of attempting to expose a person to HIV was substituted.

United States v Dacus

Key points

- Minority judgment interprets term “likely” to preclude an event with only a 1 in 50,000 chance of occurring.

Offence	Attempted murder; aggravated assault; adultery
Year	2008
Court	United States Court of Appeals for the Armed Forces
Citation	<i>United States v Dacus</i> , No. 07-0612, Crim. App. No. 20050404

Facts

The accused, a Staff Sergeant living with HIV, was convicted of aggravated assault for “engaging in sexual intercourse with female partners other than his wife without informing them of his medical condition”. He was charged with two specifications of attempted murder. The accused entered pleas of not guilty to attempted murder but guilty to the lesser included offense of aggravated assault. He also entered pleas of guilty to two specifications of adultery and was convicted consistent with his pleas.

Decision and relevance

The aggravated assault conviction required a finding that the accused used “means or force likely to produce death or grievous bodily harm”. The Court upheld the conviction despite testimony from a medical expert, which established that the risk of transmission was “very, very unlikely,” approximately 1 in 50,000. A minority concurring opinion challenged the interpretation of the word “likely”, saying “[c]ommon sense seems to dictate that an event is not ‘likely’ for purposes of [the statute], regardless of the harm involved, if there is only a 1 in 50,000 chance of that event occurring.” The minority judgment further stated that “at a minimum I have grave doubts that the statutory element should be deemed satisfied where the statistical probability of the consequence of an act is so low as to approach being no ‘more than merely a fanciful, speculative, or remote possibility”.

Zimbabwe

S v Semba

Key points

- Actual transmission must be proven (not mere exposure).
- Provision applicable only to sexual transmission.
- *Mens rea* standard requires proof of knowledge of real risk of transmission through conduct and intention, actual or legal, to transmit HIV.

Offence	Deliberate transmission of HIV
Year	2015 (Written judgment 2017)
Court	High Court of Zimbabwe
Citation	S v Semba [2017] ZWHHC 299 (12 November 2015)

Facts

The accused was living with HIV and was mother to a 10 month-old child, whom she breastfed. She was accused by another woman of breastfeeding that woman’s child. The complainant mother and child tested negative for HIV. No evidence was presented on the accused’s viral load. The accused was legally unrepresented at her trial in the magistrates court. She argued that she had mistaken the complainant child for her own, and had breastfed the child in error. She was convicted of deliberate transmission of HIV.

Decision and relevance

On appeal to the High Court, the accused argued (amongst others) that the State had failed to prove transmission to establish the crime and, in the alternative, that the State had failed to prove that she knew or realised there was a real risk of transmission through breastfeeding. The Court interpreted the offence as being directed at sexual transmission of HIV and requiring a *mens rea* standard of an intention, actual or legal, to transmit HIV through sexual intercourse. The Court stated that the

legislature had not intended to criminalise transmission through breastfeeding. The Court stated further that there was no evidence that the accused was aware that breastfeeding would expose the child to HIV, particularly through a single exposure. The Court held that the crime did not include acts of exposure to HIV without proof of transmission occurring. The Court noted, *obiter dictum*, that there is a need to “revisit the section with view to developing proper guidelines for prosecution” as it fails to recognise advances in scientific research that would establish defences that should be recognised at law, including information contained in the Swiss Statement. The accused was acquitted and the appeal upheld.

Perfect Ngwenya v the State

Key points

- Sentence reduced on basis of complainant’s shared risk in conduct and accused’s personal circumstances (including health).

Offence	Deliberate transmission of HIV
Year	2017
Court	High Court of Zimbabwe
Citation	Perfect Ngwenya v The State [2017] ZWBHC 59

Facts

The accused and the complainant started an extra-marital relationship in 2013. The accused tested positive for HIV in June 2014. He and the complainant had unprotected sexual intercourse in September 2014. The accused did not disclose his HIV status during this time. The complainant twice tested negative for HIV in 2012, prior to her relationship with the accused. It is not indicated whether she tested HIV-positive after the relationship. The accused was convicted of deliberate transmission of HIV and sentenced to eight years’ imprisonment.

Decision and relevance

On appeal the High Court confirmed his conviction. In considering his sentence, the Court acknowledged the maximum penalty of 20 years’ imprisonment for the crime in the light of the serious consequences to a complainant. The Court however noted that where complainants engage in unprotected sexual intercourse without knowing their partners’ HIV status, particularly outside of marriage, the person is also assuming a risk. The Court took into account that the accused was a first-time offender on antiretroviral therapy and suffering from hypertension. The Court reduced his sentence to three years’ imprisonment.