

R. v. Cuerrier, [1998] 2 S.C.R. 371 (snapshot):

L'HEUREUX-DUBÉ J. (concurring in result)-- This appeal must determine whether the accused's misrepresentation as to his HIV-positive status can nullify the complainants' apparent consent to sexual intercourse so as to bring the sexual activity in question within the scope of the *Criminal Code* offence of aggravated assault. I have read the different reasons of my colleagues, Justices Cory and McLachlin, and although I agree with the result that they both reach, I disagree with the respective routes that they take to reach that result [reversing the Court of Appeal and the trial judge, who had entered a directed verdict acquitting Cuerrier]....

Since Parliament has, through the assault provisions, granted broad protection to individual autonomy and physical integrity in order to guard everyone's right to decide under what conditions another may touch them, it is not for this Court to narrow this protection because it is afraid that it may reach too far into the private lives of individuals. One of those private lives presumably belongs to a complainant, whose feeling of having been physically violated, and fraudulently deprived of the right to withhold consent, warrants the protection and condemnation provided by the *Criminal Code*.

MCLACHLIN J. (Gonthier J. concurring)-- The respondent Cuerrier stands charged with aggravated assault contrary to s. 268 of the *Criminal Code*, R.S.C., 1985, c. C-46. The charges were based on allegations that Cuerrier had unprotected sexual intercourse with two women whom he misled regarding his HIV-positive status. The Crown alleges that this constituted fraud that vitiated the women's consent and converted consensual sexual intercourse into assault....

My colleagues L'Heureux-Dubé J. and Cory J. propose new rules which would criminalize dishonestly obtained sex in a wide variety of circumstances. I sympathize with their goals. The venereal disease of HIV and the AIDS it causes are the cause of terrible suffering and death. The wrong done to a person who is deceived into having unprotected sexual intercourse by a lie about HIV status can be inestimable. However, I respectfully find the approaches they advocate are too broad, falling outside the power of the courts to make incremental changes to the common law. I propose a narrower extension limited to failure to disclose venereal disease....

The first issue in this case is whether Parliament, in enacting s. 265(3) of the *Criminal Code*, intended to criminalize deceptive sexual conduct. If it did not, a second issue arises: whether the change sought is one the courts may properly make.

CORY J. (Major, Bastarache and Binnie JJ. concurring)-- Is a complainant's consent to engage in unprotected sexual intercourse vitiated by fraud when her partner knows he is HIV-positive and either fails to disclose or deliberately deceives her about it? If the consent is fraudulently obtained in those circumstances can s. 268 (aggravated assault) of the *Criminal Code*, R.S.C., 1985, c. C-46, be applicable? Would the application of the *Criminal Code* endanger public health policies pertaining to the disease of AIDS? Those are the issues that must be considered on this appeal....

In summary, an individual who knows he is HIV-positive and has unprotected sexual intercourse without disclosing this condition to his partner may be found guilty of

contravening the provisions of s. 265 of the *Criminal Code*. The section provides protection by way of deterrence for those in the position of the complainants. This section like so many provisions of the *Code* is designed to protect society and this protective role must be recognized and enforced. It is right and proper for Public Health authorities to be concerned that their struggles against AIDS should not be impaired. Yet the *Criminal Code* does have a role to play. Through deterrence it will protect and serve to encourage honesty, frankness and safer sexual practices. If the application of the *Criminal Code* really does impede the control of AIDS it will be for Parliament to determine whether the protection afforded by the *Code* should be curtailed in the interests of controlling the plague solely by public health measures.

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§ 265. (1) A person commits an assault when

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

...

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

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

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) fraud; or

(d) the exercise of authority.

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

(2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.