

## Vitiating Factors of Consent: A Blog in lieu of Seminar by Ta-Va

Consent is a concept found in Canadian criminal law, and the definition used by the courts is outlined in section 273.1 of the Canadian Criminal Code.<sup>1</sup> Consent can be vitiated, or void in a number of situations, which are outlined in section 265 of the Canadian Criminal Code. Situations found under section 265 include situations where consent is acquired by fraud, through the application of force, or threat to the individual themselves, or another individual. The last situation outlined in the section involves the acquisition of consent through the use of one's status as an authority figure.<sup>2</sup> During this blog we will attempt to explain the two concepts, using two leading cases *R v Mabior*, and *R v Hutchinson*.

In *R v Mabior*, the accused was charged on nine accounts of aggravated sexual assault for not disclosing his positive HIV-status prior to having sexual intercourse with the victims. They alleged that if they were aware of his condition, they would not have had sex with him. None of them contracted HIV. In his defence, Mabior claimed that although he was aware of his condition, his duty to disclose did not arise because he had a low viral load at the time, posing no significant risk of transmission.<sup>3</sup>

The SCC clarified some issues that arose from the test set out in *R v Currier*. In the test, failure to disclose HIV may constitute fraud vitiating (impairing) consent under s. 265(3)(c) of the *Criminal Code*. Because HIV also poses a risk of serious bodily harm, the operative offence is one of aggravated assault (s.273).<sup>4</sup> The issues were related to the meaning of "significant risk"

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<sup>1</sup> *Criminal Code*, RSC 1985, c C-46, s 273.1.

<sup>2</sup> *Criminal Code*, RSC 1985, c C-46 s. 265.

<sup>3</sup> *R v Mabior*, 2012 SCC 47 at paras 5-7 [*Mabior*].

<sup>4</sup> *R v Currier*, [1998] 2 SCR 371, 62 D.L.R. (4th) [*Currier*].

and “serious bodily harm. In answering the issues, the court compounded both concepts affirming that they are interconnected. The meaning of the concepts are as follows: significant risk of serious bodily harm should be read as requiring disclosure of HIV status if there is a realistic possibility of transmission. A realistic possibility of transmission will be negated if the person uses a condom and has a low viral load as a result of treatment.<sup>5</sup>

Consequently, the SCC established that a person may be found guilty of aggravated sexual assault under s. 273 of the Criminal Code if he or she fails to disclose their HIV-positive status before sexual intercourse, and there is a realistic possibility that HIV will be transmitted.<sup>6</sup> Even though Mabior had a low viral load at the time of sexual intercourse with the victims, he was charged on 3 accounts of aggravated sexual assault because he did not wear a condom.<sup>7</sup>

*R v Hutchinson* is a great example of how the court defines consent, and handles cases that deal with the concept. *R v Hutchinson* also shows us how the concept of consent that has been ironed out by the SCC isn't unanimous, therefore the concept may be subject to change in the future. The case also dealt with vitiation of consent, more specifically the concept of fraud under section 265. The case involved a man (named Hutchinson) poking holes in the condoms his girlfriend requested he wear. After the couple's relationship ended, and his girlfriend realized she was pregnant, Hutchinson disclosed the fact that he had sabotaged the condoms. After Hutchinson disclosed his actions, the girlfriend claimed she would not have consented to intercourse if she had known the condoms were defective.<sup>8</sup>

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<sup>5</sup> *Mabior*, *supra* note 3 at para 104.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* at para 109.

<sup>8</sup> *R v Hutchinson*, 2014 SCC 19 at para 2 [*Hutchinson*].

The court had to answer two questions, one was whether or not consent was present. If they determined that it was then they had to ask if Hutchinson's actions were enough to trigger vitiation, outlined in the aforementioned section 265. The majority of the court when answering question one, first set out to define consent. The definition of consent they settled on included consent to the physical act, consent to the sexual nature of the act, and the identity of the partner.<sup>9</sup> The minority defined consent more broadly believing every feature of the physical act needed to be discussed, and consented to, including condom use.<sup>10</sup> The difference between the two is small, but has massive consequences. Basically, the majority believes it is enough to consent to a type of sex, vaginal, oral, etc., as long as there is also consent to the partner, and sexual nature of the act. While the minority needs more detail, they don't believe it is enough to agree to a type of sexual relation because that type of sexual relation could encompass a variety of different actions. So, in the end we get two definitions of consent, as of now the majority view is of course the prototype, but that could change in the future. The majority then decided that consent was present, and moved onto the second question. The minority disagreed, believing consent was not present, therefore there was no need to answer the second question dealing with vitiation.

When answering question two the court first decided fraud was the only avenue that had potential relevance. So, the court employed the test for fraud found in *R v Cuerrier*, and *R v Mabior*, expanding it in the process. The test has two steps, was there a deceitful act, and if so, did the act cause serious bodily harm, or increase the victim's likelihood of suffering serious bodily harm. Using this test the court determined that Hutchinson's actions were deceitful, and

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<sup>9</sup> *Ibid*, at paras 54-55 and 57.

<sup>10</sup> *Ibid*, at para 83.

caused serious bodily harm. The court decided that the bodily changes caused by pregnancy, were sufficiently egregious as to constitute serious bodily harm, especially if they were unwelcomed, and unwanted.<sup>11</sup> This is important because it shows us how the second step of fraud vitiating is handled, a relatively common act such as pregnancy will meet the standard. The harm doesn't need to be something rare, and fatal.

In conclusion consent as it stands in Canada involves consent to the partner you wish to engage in sexual activity with, the physical act in a general sense, and the sexual nature of the act. Even if consent is present however, it can be vitiated in a number of circumstances one of which is fraud. For a finding of fraud there needs to be deceit, and risk of serious bodily harm. The bodily harm as we seen in Hutchinson does not need to be special in nature, as pregnancy when unwanted was seen to pass the test for vitiating by way of fraud.

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<sup>11</sup> *Ibid*, at paras 67-71.

Legislation

*Criminal Code*, RSC 1985, c C-46 s. 265.

*Criminal Code*, RSC 1985, c C-46 s. 273.1.

Jurisprudence

*R v Hutchinson*, 2014 SCC 19.

*R v Mabior*, 2012 SCC 47.