

**When Should “Yes” Mean “No”? Informed Consent to Sexual Activity,
Mistake, and the Role of the Criminal Law**

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“Deceptions, small and sometimes large, have from time immemorial been the by-product of romance and sexual encounters.”¹

“The criminal law ... does not ... characterize conduct of this kind as a sexual assault: not all liars are rapists. There must be something more.”²

¹ *R v Cuerrier* [1998] 2 SCR 371 (SCC) at [47] per McLachlin J.

² *R v Saint-Laurent* (1993) 90 CCC (3d) 291 at [82] per Fish J.A.

Introduction

The law has traditionally been reluctant to criminalise the use of deception in sexual relationships.³ As such, consent to sexual activity given on the basis of a ‘mistake’⁴ is still normally regarded as valid and genuine consent, even when the mistake is brought about by a “sleazy”, “immoral” or “egregious” deceptive inducement.⁵ The guiding principle thus appears to be *caveat amator*, or ‘lover beware’.⁶

The common law has recognised two limited exceptions to this general principle. When the victim is mistaken about either the identity of her⁷ sexual partner, or the fundamental nature of the act that she is consenting to, the law does not recognise her consent as valid or legally transformative.⁸ The Crimes Act 1961 reflects this position. When sexual activity is allowed on the basis of a mistake as to who the other person is, or a mistake about the ‘nature and quality’ of the act, no consent is deemed to exist, *prima facie* turning the act into the serious offence of sexual violation.⁹ Mistakes not falling into those categories, including, for example, those about a sexual partner’s financial status, marital status or sexual health, have not traditionally been seen to

³ Jonathan Herring “Mistaken Sex” [2005] Crim LR 511 at 511: “Throughout history, people have used all manner of deceptions to persuade others to have sex with them. And some things never change. If you wish you can buy a book entitled *Romantic Deceptions: the Six Signs He’s Lying* which might assist in ascertaining whether you are a victim of this all too common practice. Yet the law has traditionally been reluctant to criminalise the use of deception in sexual relations.”

See also *R v Cuerrier*, above n 1, at [47] per McLachlin J: “Deceptions, small and sometimes large, have from time immemorial been the by-product of romance and sexual encounters. They often carry the risk of harm to the deceived party. Thus far in the history of civilization, these deceptions, however sad, have been left to the domain of song, verse and social censure.”

⁴ In this dissertation, the term ‘mistake’ is used generally to describe a lack of knowledge on the part of a sexual partner as to a particular fact (usually, the HIV-status of the other sexual partner). The term ‘mistake’ is used in s 128A(7) of the Crimes Act 1961 and, similarly in that context, the focus is on the victim’s state of mind. In practice, the mistake of one sexual partner will usually be brought about by deception on the part of the other (in the form of an outright lie or a failure to disclose a particular fact, for example).

⁵ Alan Wertheimer *Consent to Sexual Relations* (Cambridge University Press, Cambridge, 2003) at 193.

Wertheimer notes: “we may think it sleazy if a male lies about his marital status, affections or intentions in order to get a particular woman into bed, but many do not think that this is a particularly serious matter”.

See also Stephen Schulhofer *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press, Cambridge (Mass), 1998) at 112: “good reasons are seldom offered for the law’s refusal to protect sexual autonomy from even the most egregious deceptive inducements.”

⁶ Wertheimer, above n 5, at 193. See also Herring, above 3, at 511: “The guiding principle appears to be: *caveat amator*.”

⁷ For the sake of simplicity and consistency it will be assumed that the ‘victim’ (the person ‘giving’ consent and labouring under a mistake) is female, while the ‘offender’ (the person ‘seeking’ consent and has usually brought about the mistake in the victim’s mind) is male. This is, of course, not always true.

⁸ *R v Clarence* (1889) 22 QB 23 (Court of Crown Cases Reserved) at 44 per Stephen J: “The only sorts of fraud which so far destroy the effect of a woman’s consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act. There is abundant authority to show that such frauds as these vitiate consent both in the case of rape and in the case of indecent assault. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done.”

⁹ Crimes Act 1961, ss 128A(6), 128A(7), 128. “Prima facie”, because the offence of sexual violation also requires an ‘absence of a belief in consent on reasonable grounds’ on the part of the accused.

vitate or negate an otherwise valid consent.¹⁰ In 2012, however, the Court of Appeal radically and abruptly departed from this largely settled position.

In *KSB v ACC*, the appellant had claimed ACC compensation for mental injury suffered upon finding out that her former partner, with whom she had had unprotected sexual intercourse, was HIV positive.¹¹ The Court of Appeal held that the non-disclosure of HIV-positive status prior to unprotected sexual intercourse vitiated the appellant's consent, turning what was otherwise consensual sexual activity into the serious criminal offence of sexual violation - rape.¹² The Court of Appeal reached its conclusion on the basis that:¹³

1. Non-disclosure of HIV status prior to unprotected sexual intercourse gives rise to a mistake about the 'nature and quality' of the sexual act and thus vitiates consent (s 128A(7) Crimes Act); and
2. In the alternative, allowing unprotected sexual intercourse in ignorance of HIV status does not amount to valid consent, consistent with the focus on the need for consent to be 'informed' (s 128A(8) Crimes Act).

While the Court of Appeal inaccurately described the legal position as "not...fully tested",¹⁴ non-disclosure of HIV (and other serious sexually transmitted diseases) has never been seen to vitiate consent to sexual activity in New Zealand; instead, such conduct has been considered a 'breach of duty' amounting to the offence of criminal nuisance (s 145 Crimes Act).¹⁵ The Court of Appeal departed from the settled approach to both the 'nature and quality' of a sexual act and the concept of 'informed' consent to sexual activity, and in doing so imposed a novel duty to disclose HIV status not previously recognised in New Zealand.¹⁶ *KSB v ACC* is thus considered to have radically changed the substantive criminal law on sexual offending.¹⁷

The issues that faced the Court in *KSB* raise fundamental questions about the proper role of the criminal law in regulating deceptive and risky sexual behaviour; specifically whether a mistake about a serious sexually transmitted disease should provide an exception to the traditionally tight circumscription of the circumstances in which a mistaken "yes" is deemed to mean "no". The

¹⁰ *R v Clarence*, above n 8, at 43 per Stephen J: "It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification." See also, Herring, above n 3, at 512: "Other mistakes not falling into the above categories, such as whether the defendant was married, rich or loving will not negate consent."

¹¹ *KSB v Accident Compensation Corporation* [2012] NZCA 82.

¹² *KSB v ACC*, above n 11, at [99].

¹³ *Ibid*, at [98].

¹⁴ *Ibid*, at [72].

¹⁵ See *R v Mwai* [1995] 3 NZLR 149 (CA).

¹⁶ Simon Connell "ACC infects the criminal law?" (2012) 4 NZLJ 135 at 136.

¹⁷ Dr Chris Gallavin "Fraud vitiating consent" (2012) 5 NZLJ 156 at 156.

central thesis of this dissertation is that the non-disclosure of HIV status *should not* vitiate consent to an otherwise consensual sexual act and turn it into the serious criminal offence of sexual violation.

Chapter I discusses how, prior to *KSB*, the Courts in New Zealand and in other jurisdictions have traditionally approached the question of consent to sexual intercourse and what mistakes or deceptions might go to the ‘nature and quality’ of the act and vitiate consent.

Chapter II then examines in detail the Court of Appeal’s reasoning in *KSB v ACC* and suggests that the decision was unsatisfactory, particularly in respect of its implications for the criminal law relating to sexual violation. It also argues that such a radical change to the law relating to sexual violation was preferably a matter for Parliament to address.

Chapter III argues that for fundamental reasons of principle underpinning the criminal law, the non-disclosure of HIV (or other sexually transmitted diseases) should not vitiate consent and turn consensual sexual intercourse into sexual violation by the party not making the relevant disclosure.

Chapter IV proposes some possible amendments to the Crimes Act 1961 and the Accident Compensation Act 2001 which would be a preferable and more proportionate way to criminalise non-disclosure of serious sexually transmitted diseases, and to provide ACC cover for mental injury that results from such conduct.

I Sexual violation, consent, and the non-disclosure of HIV status

A Overview

This Chapter examines the concept of the ‘nature and quality’ of a sexual act, and the idea of ‘informed’ consent to sexual activity, in relation to the offence of sexual violation. It also addresses the various approaches of New Zealand (before *KSB*), England, Australia and Canada to the non-disclosure of HIV status prior to sexual activity. Until the Court of Appeal’s decision in *KSB v ACC*, the position under the criminal law had been clear, well understood, and largely consistent with comparable jurisdictions.

B Sexual Violation

Sexual offences are contained in Part VII of the Crimes Act 1961. Sexual violation is the most serious sexual offence.¹⁸ Section 128 defines sexual violation as the act of sexual connection¹⁹ without consent²⁰ and without a reasonable belief in consent²¹. Depending on how the sexual connection is effected, sexual violation amounts either to rape (s 128(2)) or unlawful sexual connection (s 128(3)).²²

¹⁸ See AP Simester and WJ Brookbanks *Principles of Criminal Law* (Brookers, Wellington, 1998) at 539. Sexual violation carries a maximum period of 20 years imprisonment, and the imposition of a sentence of imprisonment is mandatory unless, having regard to the circumstances of the person convicted and the circumstances of the offence, the court thinks that the person should not be sentenced to imprisonment (Crimes Act s 128B).

¹⁹ Crimes Act, s 2: *Sexual connection* means (a) connection effected by the introduction into the genitalia or anus of one person, otherwise than for genuine medical purposes, of (i) a part of the body of another person; or (ii) an object held or manipulated by another person; or (b) connection between the mouth or tongue of one person and a part of another person's genitalia or anus; or (c) the continuation of connection of a kind described in paragraph (a) or paragraph (b).

²⁰ Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) [“Adams looseleaf”] at CA128.03. Absence of consent is an essential element of the offence and must be proved by the prosecution.

²¹ *Ibid*, at CA128.04. Sexual violation is committed if a person does one of the prohibited acts “without believing on reasonable grounds” that the other person consents. This is “a mixed subjective and objective mens rea formula”. Assuming that the defendant’s act was intentional, a defence of absence of mens rea is now available only if the defendant actually believed the other person consented, and only if such belief was based on “reasonable” grounds.

²² Crimes Act, s 128. Section 128(2) provides: “person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis, (a) without person B's consent to the connection; and (b) without believing on reasonable grounds that person B consents to the connection.” Section 128(3) provides: “person A has unlawful sexual connection with person B if person A

C Consent

1. *Factual consent*

Black's Law Dictionary defines consent as an "agreement, approval or permission as to some act or purpose".²³ This definition expresses what might be described as *factual* consent.²⁴ However, the criminal law does not consider every purported agreement, acquiescence or submission to a sexual act (*factual consent*) as amounting to valid, transformative consent in law (*legal consent*).²⁵ As Alan Wertheimer asserts, "the important question is not what consent 'is', but the conditions under which consent is...*transformative* in the relevant way".²⁶ If "no means no", we still need to ask when "yes means yes".²⁷

2. *Legal consent ("real, genuine or true" consent)*

Courts have said that consent must be "full, voluntary, free and informed" to be "real, genuine or true" consent (*legal consent*).²⁸ Because the law of rape cannot seek to curb all incursions into autonomy,²⁹ however, not every single misunderstanding of the situation, or lack of information, or application of pressure, or degree of coercion will render a particular consent invalid:^{30 31}

A workable notion of sexual autonomy appears to require compromises and "balancing", the kind of chore that lawyers and academics often regard as the technical problem of "line-drawing". But the problem is neither simple nor unimportant.

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

²³ *Black's Law Dictionary* (9th ed. 2009), "consent". The Crimes Act does not define 'consent'.

²⁴ Whether some expression of agreement, acquiescence or permission was present *in fact* (as opposed to the activity being obviously non-consensual at the time).

²⁵ Gavin Dingwall "Addressing the boundaries of consent in rape" (2002) 13 KCLJ 31 at 31: "Intuitively there are scenarios where an individual clearly does consent to have sexual intercourse just as there are scenarios where consent is obviously not present, where, for example, an individual submits to sexual intercourse because he or she has been physically overcome to such an extent that he or she can offer no effective resistance. But between these two extremes there are a variety of intermediary scenarios where, even though the facts may not be in dispute, the circumstances make it debatable whether consent was present. The jurisprudential task in each of these intermediary scenarios is to determine whether the "consent" that was given is in fact "real" and should therefore be regarded as legally transformative."

²⁶ Wertheimer, above n 5, at 119. (Original emphasis).

²⁷ Dingwall, above n 25, at 31.

²⁸ See *R v Cook* [1986] 2 NZLR 93 (CA), *R v S* (T233/91) (1992) 9 CRNZ 490 (HC), *R v Cox* CA213/96, 7 November 1996, *R v Herbert* CA81/98, 12 August 1998.

²⁹ Jennifer Temkin *Rape and the Legal Process* (2nd ed, Oxford University Press, New York, 2002) at 97.

³⁰ Robertson "Adams looseleaf", above n 20, at CA128A.07

³¹ Schulhofer, above n 5, at 15.

As illustrated, while the notion of legal consent might be *thought* to be relatively unproblematic, it is, in fact, a complex area of law.³²

3. *Vitiating circumstances*

Even if consent is seemingly “full, voluntary, free and informed”, if it is given in one of the circumstances set out in section 128A of the Crimes Act, it is deemed not to amount to legal consent. The section specifies various circumstances where allowing sexual activity does not amount to consent,³³ including where an agreement to a sexual act is given on the basis of a mistake about the ‘nature and quality’ of that act (s 128A(7)). The section is not exhaustive (s 128A(8)):³⁴

Allowing sexual activity does not amount to consent in some circumstances

(1) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

(2) A person does not consent to sexual activity if he or she allows the activity because of—

(a) force applied to him or her or some other person; or

(b) the threat (express or implied) of the application of force to him or her or some other person; or

(c) the fear of the application of force to him or her or some other person.

(3) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.

(4) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

(5) A person does not consent to sexual activity if the activity occurs while he or she is affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity.

(6) One person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is.

(7) *A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality.*

(8) *This section does not limit the circumstances in which a person does not consent to sexual activity.*

(emphasis added)

³² See *R v Barker* [2009] NZCA 186 at [101] per Hammond J.

³³ Section 128A represents a codification of the common law, which saw three possible ‘types’ of circumstance vitiate an apparent consent: mental incapacity or impairment, fear and certain types of mistake.

³⁴ Crimes Act, s 128A.

D *The New Zealand approach prior to KSB v ACC*

1. *A mistake about the ‘nature and quality’ of a sexual act*

Since *R v Clarence*, the common law has confined an understanding of the ‘nature and quality’ of a sexual act to an understanding of its sexual character.³⁵ Thus, when the victim does not understand that the act they are submitting to is sexual in nature (believing it is a medical procedure, for example) there is no agreement to sexual intercourse. In such cases, the law deems there to be no consent at all, because the act consented to is not the act done,³⁶ and because in such cases, the mistake goes to the “very root of the transaction”.³⁷ It follows that if the victim *does* understand the ‘nature and quality’ of the act agreed to in this sense, it is irrelevant that they would not have consented to it if they had been in possession of the full facts.³⁸ This approach has yielded consistent results in relevant New Zealand and comparable English cases.

In *R v Flattery*, the defendant induced the victim to have sexual intercourse by falsely representing he was carrying out a medical procedure.³⁹ Her consent was held to be invalid and the defendant was convicted of rape.⁴⁰ Similarly, in *R v Williams*, a fraudulent choirmaster had sexual intercourse with a 16-year old on the pretext it was a medical operation to improve her singing.⁴¹ The Court held that, because she had consented thinking that the act was a surgical operation, her consent was ineffective and the appellant was properly convicted of rape.⁴²

R v Tabassum involved fraudulent breast examinations conducted by the appellant who falsely professed to have medical qualifications and training.⁴³ The Court held that since the

³⁵ See *R v Clarence*, above n 8.

³⁶ *Ibid*, at 44 per Stephen J: “I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done. Consent to a surgical operation or examination is not a consent to sexual connection or indecent behaviour.”

³⁷ Temkin, above n 29, at 104. Temkin argues that in such cases, the fraud goes to the very root of the transaction because the victim has been deprived of the choice of whether or with whom to have sexual intercourse. She argues that the same cannot be said of other frauds, because the victim is at least agreeing to sexual relations with the particular man, albeit that she has been deceived.

³⁸ Robertson “Adams looseleaf”, above n 20, at CA128A.06, referring to *Papadimitropoulos v R* (1957) 98 CLR 249 (HCA).

³⁹ *R v Flattery* (1877) 2 QBD 410.

⁴⁰ *Ibid*, at 414.

⁴¹ *R v Williams* [1923] 1 KB 340 (CA).

⁴² *Ibid*, at 347 per Hewart CJ.

⁴³ *R v Tabassum* [2000] 2 Cr App R 328.

complainants were consenting to touching for medical purposes, there was consent to the nature of the act but not to its quality, and thus there was no true consent.⁴⁴

In *R v Moffitt*, the appellant (who described himself as a tarot reader and psychic), had placed his fingers in the complainant's vagina.⁴⁵ The Court of Appeal agreed with the trial judge, that if the accused falsely told the complainant that by placing his fingers in her vagina he could assist her with her sexual problems and tell if she was alright, and if the complainant agreed on this basis, there was no true consent, on the basis of a mistake about the 'nature and quality' of the act.⁴⁶

By limiting the factors which can operate to vitiate consent to mistakes about the 'nature and quality' of the act in the manner described above, the law has, since *R v Clarence*, ignored surrounding circumstances, including the risk of infection or harm of the act consented to. In *R v Clarence*, Clarence had unprotected sex with his wife when he knew he was suffering from gonorrhoea (then a fatal disease).⁴⁷ She was unaware of his diseased status and contracted the disease as a result of the intercourse. Clarence was convicted of an assault upon his wife occasioning actual bodily harm, and of unlawfully and maliciously inflicting upon her grievous bodily harm. On appeal, the majority of the Queen's Bench Division held that Mrs Clarence had *not* been deceived as to the nature of the act but rather as to the associated risk of contracting gonorrhoea, and thus her consent to sexual intercourse was still considered to be valid.⁴⁸

Thus, in New Zealand prior to *KSB*, a mistake regarding a serious sexually transmitted disease (including HIV) was considered to go to the risk of infection or harm, rather than the 'nature and quality' of the act:⁴⁹

Arguably a complainant who consents to an act of unprotected intercourse unaware that his or her partner is infected with the HIV virus is mistaken as to the nature and quality of the act...

The better view, however, is that the mistake in such cases is not as to the "quality" of the act complained of (ie the intercourse) but rather as to the risk of infection/harm – which is the actus reus of a different offence.

(Emphasis added).

⁴⁴ Ibid, at 337-338 per Rose LJ.

⁴⁵ *R v Moffitt* CA382/93, 22 November 1993.

⁴⁶ Ibid, at 6 – 8 per Holland J.

⁴⁷ *R v Clarence*, above n 8.

⁴⁸ Ibid, at 44 per Stephen J: "The woman's consent here was as full and conscious as consent could be. It was not obtained by any fraud either as to the nature of the act or as to the identity of the agent."

⁴⁹ B Robertson (ed) *Adams on Criminal Law 2010 Student Edition* (3rd ed, Brookers, Wellington, 2010) ["Student"] at 231.

2. *'Informed' consent to sexual activity*

'Informed consent' is a concept commonly associated with medical law.⁵⁰ Professor Skegg explains, generally: "while competent lawyers have long realised that not all apparent consents are effective in law, the use of the expression 'informed consent' does serve to remind all concerned that an uninformed consent may not suffice for a particular legal...purpose."⁵¹ The Medical Council of New Zealand has described 'informed consent' as follows:⁵²

Informed consent is an interactive process between a doctor and patient where the patient gains an understanding of his or her condition and receives an explanation of the options available including an assessment of the expected risks, side effects, benefits and costs of each option and thus is able to make an informed choice and give their informed consent.

The difficulties in requiring that consent to sexual activity be 'informed' in this manner are readily apparent. Sexual relations are not engaged in on a detached doctor-patient type basis with duties of care and disclosure owed by one party to the other. The criminal law would be unworkable in practice if it required human passion and physical intimacy to be preceded by total disclosure or medical-level explanation by each party to the other of the risks, side effects, benefits and costs of that sexual activity.

Nevertheless, a number of cases *have* said that consent to sexual activity must be "full, voluntary, free and *informed*".⁵³ Whether 'informed' consent goes beyond the need for a basic "understanding of the situation" is unclear,⁵⁴ as the relevant cases show.

⁵⁰ In the context of medical law, informed consent is defined as "a patient's knowing choice about a medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical community would give to a patient regarding the risks involved in the proposed treatment or procedure (*Black's Law Dictionary* (9th ed. 2009), "informed consent").

For an assessment of the operation of informed consent in English Medical Law, see generally PDG Skegg "English Medical Law and 'Informed Consent': an Antipodean Assessment and Alternative" (1999) 7 *Medical Law Review* 135.

⁵¹ *Ibid*, at 137.

⁵² Medical Council of New Zealand "Information, choice of treatment and informed consent" (2011) Medical Council of New Zealand <<http://www.mcnz.org.nz/assets/News-and-Publications/Statements/Information-choice-of-treatment-and-informed-consent.pdf>>

⁵³ See above n 28.

⁵⁴ *R v Isherwood* CA182/04, 14 March 2005 at [35].

In *R v Cox*, the appellant was charged with multiple counts of sexual offending against three complainants, all under the age of 12 at the time of the offending.⁵⁵ Regarding whether a consent given by a complainant of that age could be considered ‘informed’, the Court reasoned:⁵⁶

(S)ave in such exceptional and rare circumstances... (a child of ten or eleven)... will not, simply because of her age and stage of sexual development, understand the significance of the act. In that sense, therefore, *any consent she may purport to give will not be a legal consent because it will not be either rational or informed.*

(Emphasis added).

R v Herbert involved an appeal against sentence by the appellant, who had been found guilty of rape against a 14 year-old victim.⁵⁷ The emphasis on appeal was on the issue of consent. The jury was asked to consider whether the victim, because of her young age, “understood the significance of the act” and therefore “rationally *and on an informed basis* gave consent”.⁵⁸

R v Lee addressed the issue of consent in relation to an exorcism that resulted in the death of the woman it was performed upon.⁵⁹ The Court of Appeal considered there was nothing “intrinsically unfair or contrary to principle” in requiring that consent must be ‘informed’ in situations where the activity consented to is likely to cause grievous bodily harm.⁶⁰ The Court considered that generally, where the scope of such an activity is understood, a person “will be assumed to have been consenting to any risks of that activity”. However it also suggested, more problematically, that where there is a “known information imbalance about the risks involved between those giving and seeking consent” it might not be unreasonable to require the person seeking consent to correct that imbalance.⁶¹ The Court considered that such a requirement may be limited to cases where the risk is major because of the very serious consequences, such as with unprotected sex and HIV.⁶²

In contrast, in *R v Barker*, the majority of the Court of Appeal found very real difficulty with the operation of the doctrine of ‘informed’ consent in New Zealand criminal law.⁶³ *Barker* involved bondage, discipline and sadomasochism activities undertaken by Barker against three young

⁵⁵ *R v Cox*, above n 28.

⁵⁶ *Ibid*, at 8 per Tompkins J.

⁵⁷ *R v Herbert*, above n 28.

⁵⁸ *Ibid*, at 4 per Anderson J. (Emphasis added).

⁵⁹ *R v Lee* [2006] 3 NZLR 42.

⁶⁰ *Ibid*, at [309].

⁶¹ *Ibid*.

⁶² *Ibid*.

⁶³ *R v Barker*, above n 32.

female complainants, resulting in Barker's conviction on counts of injuring with intent and wounding with intent. In examining consent as a defence to assault generally, the majority described as "problematic" the suggestion in *Lee* that there might in some cases be a requirement for informed consent.⁶⁴ Hammond J considered that a full-blown doctrine of informed consent would raise "very significant doctrinal and practical difficulties", inappropriate in the criminal law.⁶⁵ Hammond J regarded the doctrine of informed consent as being "neither entirely straightforward, nor a 'pure' articulation of what it is for consent to be authentic," and considered that a blanket judicial doctrine of informed consent in the criminal law would be inconsistent with the necessity for judges to know what the law is with a real degree of particularity in criminal trials.⁶⁶

Although *Cox* and *Herbert* are cited as authority for the proposition that "true, real or genuine consent" must be 'informed' consent,⁶⁷ it is suggested that they might be appropriately limited to their specific context: the inability of a young person to appreciate the "significance" of the sexual act they are participating in. Furthermore, despite the Court of Appeal's suggestion in *Lee*, *Barker* raises doubt as to the desirability of a doctrine of 'informed' consent in New Zealand criminal law at all. Certainly, none of *Cox*, *Herbert*, *Lee* or *Barker* are authority for the proposition that 'informed' consent requires disclosure of specific facts, such as STD status, between consenting adults of full capacity.

3. CLM v ACC

The issues that faced the Court of Appeal in *KSB* were specifically addressed in *CLM v ACC*, a High Court decision preceding *KSB* on almost identical facts.⁶⁸ The appellant's partner had unprotected sexual intercourse with the appellant without disclosing his HIV-positive status to her, and he was subsequently convicted of criminal nuisance. The appellant did not contract HIV but suffered Post-Traumatic Stress Disorder as a result of the experience.⁶⁹ She sought cover for her mental injury under the then Accident Rehabilitation & Compensation Insurance Act 1992 ("the 1992 Act"). The 1992 Act limited the provision of cover for mental injury to a number of

⁶⁴ *Ibid*, at [107].

⁶⁵ *Ibid*, at [111].

⁶⁶ *Ibid*, see [109]-[112].

⁶⁷ Robertson "Adams looseleaf", above n 20, at CA128A.07.

⁶⁸ *CLM v Accident Compensation Corporation* [2006] 3 NZLR 127 (HC).

⁶⁹ *Ibid*, at [2].

offences listed in Schedule 1, including sexual violation. Criminal nuisance, however, was not included in the Schedule, and as a result ACC declined cover for the appellant.⁷⁰

The ACC decision was appealed to the District Court. The appellant's case on appeal was that she could not have given a valid consent unaware of her partner's HIV positive status, so the act amounted to sexual violation.⁷¹ In the District Court, Judge Ongley concluded that, because of the traditional and consistent interpretation of 'nature and quality' as *not* including consequences that flow from intercourse such as pregnancy and disease, failure by the appellant's former partner to disclose his HIV-positive status did not amount to a fraudulent misrepresentation as to the 'nature and quality' of the act and thus did not vitiate consent to sexual intercourse.⁷²

In the High Court, in a well-reasoned judgment, Randerson J agreed. He did accept, in a general sense, that the non-disclosure of HIV status *might be relevant* to either the 'quality' of a sexual act, or the issue of informed consent.⁷³

While a failure to disclose HIV status could not be said to go to the "nature" of the act of sexual intercourse, it may be arguable that it goes to the "quality" of the act. Sexual intercourse with a person suffering from a deadly disease may quite readily be regarded as something wholly different in quality from having sexual intercourse with a person who does not suffer from that condition. Alternatively, a failure to disclose may go to the issue of informed consent as the Court of Appeal suggested in *Yong Bum Lee*.

However, he concluded that the law in New Zealand did not presently extend to the proposition that non-disclosure of HIV status vitiates consent to sexual intercourse.⁷⁴ He based his conclusion on a number of important considerations:

1. All the significant and leading cases in the area except *Cuerrier* involved convictions for non-sexual offences, and, in the case of *Cuerrier*, the offence of aggravated assault in the Canadian Criminal Code embraced both sexual and non-sexual assault in the same provisions;⁷⁵

⁷⁰ Ibid, at [6].

⁷¹ Ibid, at [9].

⁷² Ibid, at [12].

⁷³ Ibid, at [76].

⁷⁴ Ibid, at [82].

⁷⁵ Ibid, at [77].

2. There were difficulties in drawing the line between the non-disclosure of important facts and those which might be regarded as trivial, and similarly between non-disclosures, deliberate lies and misrepresentations;⁷⁶
3. Courts should be cautious before taking radical steps to extend the scope of the criminal law rather than leaving the task to Parliament, which has the ability to assess the social and other consequences of such a change much more readily than the courts;⁷⁷
4. The proposition before the Court would involve the introduction of a positive duty to disclose which, to date, had not formed part of New Zealand law, as well as other difficult and possibly controversial social policy changes;⁷⁸
5. The Court's task was to interpret s 8(3) of the 1992 Act outside the context of criminal proceedings. The Court thus lacked the wider view of criminal matters that the Crown could offer.⁷⁹

Randerson J was not prepared to contemplate such a significant change to the law in the context of the proceedings in *CLM*, and dismissed the appeal.⁸⁰

E Jurisdictional approaches to the non-disclosure of HIV status

1. New Zealand

In cases of unprotected sexual intercourse without disclosure of HIV, rather than being considered to vitiate consent, the lesser offence of criminal nuisance⁸¹ has been utilised.⁸² Where the conduct is more serious, the offences of wounding with intent⁸³ or infecting with disease⁸⁴ are considered to be appropriate.⁸⁵ It is noted that, in this context, there have not been any successful

⁷⁶ Ibid, at [79].

⁷⁷ Ibid, at [80].

⁷⁸ Ibid.

⁷⁹ Ibid, at [81].

⁸⁰ Ibid, at [82].

⁸¹ Crimes Act, s 145(1) - every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual.

⁸² See *R v Mwai*, above n 15, and *Police v Dalley* (2005) 22 CRNZ 495 (DC).

⁸³ Crimes Act, s 188(2) - Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to injure anyone, or with reckless disregard for the safety of others, wounds, maims, disfigures, or causes grievous bodily harm to any person.

⁸⁴ Crimes Act, s 201 - Every one is liable to imprisonment for a term not exceeding 14 years who, wilfully and without lawful justification or excuse, causes or produces in any other person any disease or sickness.

⁸⁵ See Isabel Grant "The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink Cuerrier" (2011) 5 McGill J L & Health 9 at 36 – 37.

prosecutions under the latter two sections, possibly because of the high fault requirements and associated difficulties of proof.⁸⁶ These offences are further discussed in Chapter 3.

2. *England*

In England, the failure of a sexual partner to disclose his or her HIV status does not vitiate consent to sexual intercourse.⁸⁷ As in New Zealand, deception or a mistake regarding a serious sexually transmitted disease is not regarded as going to the ‘nature and quality’ of the act, but instead relates to the risk of infection or harm.⁸⁸ On this basis, the appropriate charge in such situations is inflicting bodily injury under s 20 of the Offences Against the Person Act 1861 (“OATP Act”).⁸⁹

In *R v Dica*, the appellant failed to disclose his HIV positive status to two complainants prior to unprotected sex.⁹⁰ Judge LJ held that the complainants’ consent to sexual intercourse did not equate to consent to the risk of infection, and on that basis there was no consent sufficient in law to provide the appellant with a defence to a charge under s 20 of the OATP Act. Nevertheless, because the victims in the case consented to sexual intercourse, Judge LJ found that the appellant could not be guilty of rape.⁹¹

In *R v Konzani* the appellant failed to disclose his HIV positive status to a number of sexual partners prior to having unprotected sexual intercourse with them (from which they contracted the HIV virus).⁹² Judge LJ delivered the judgment of the court, and, applying *Dica*, concluded that while Konzani’s sexual partners had not consented to the transmission of the HIV virus, they

⁸⁶ *Ibid*, at 36.

⁸⁷ See *CLM v ACC*, above n 68, at [41] per Randerson J: “it is important to recognise however that none of the English cases has decided that a failure of a sexual partner to disclose HIV status vitiates consent for the purposes of rape and indecent assault”.

⁸⁸ Robertson “Adams looseleaf”, above n 20, at CA128A.06: “In *R v Clarence* the Court held, overruling previous authority to the contrary, that deception/mistake as to infection with a sexual disease carrying a high risk of transmission did not go to the nature of the act agreed to and accordingly could not vitiate the consent to sexual intercourse. Consistent with this authority, English courts have held that, since the mistake in such cases is not as to the “nature and quality” of the act complained of (i.e. the sexual activity) but rather as to the risk of infection/harm, the appropriate charge in such situations is causing or attempting to cause grievous bodily harm”.

⁸⁹ See *R v Dica* [2004] QB 1257 (CA) and *R v Konzani* [2005] EWCA Crim 706.

⁹⁰ *R v Dica*, above n 89.

⁹¹ *Ibid*, at [39] per Judge LJ.

⁹² *R v Konzani* [2005] EWCA Crim 706.

had consented to sexual intercourse. Konzani's failure to disclose his HIV status did not change this.⁹³

That approach was confirmed in *R v B*.⁹⁴ The appellant, who was HIV positive, was convicted of raping the appellant. The Court of Appeal found that the appellant's HIV status had no relevance to the complainant's consent to sexual intercourse, confirming that *Dica* reflected the correct legal position: "where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. *The act remains a consensual act.*"⁹⁵

3. *Australia*

The criminal law in Australia varies by State. None have taken the position that non-disclosure of HIV status vitiates consent to sexual intercourse.⁹⁶ Instead, the limited Australian authority on the issue adopts a similar approach to that in England.⁹⁷ In *CLM*, Randerson J noted that the Australian position recognises that, fundamentally, consent to a sexual act means consent to the physical act itself.⁹⁸

Papadimitropoulos v R involved an allegation of rape by a woman after she had sexual intercourse with a man she believed to be her husband.⁹⁹ The couple had undergone a fraudulent marriage ceremony, which the defendant knew to be a sham. The High Court of Australia held that the defendant could not be guilty of rape, and his fraud did not vitiate the complainant's consent, noting: "(such frauds) must be punished under other heads of the criminal law or not at all: they are not rape".¹⁰⁰ The Court found:¹⁰¹

Carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual

⁹³ Ibid, at [41] per Judge LJ.

⁹⁴ *R v B* [2006] EWCA Crim 2945.

⁹⁵ Ibid, at [17] per Latham LJ. (Emphasis added).

⁹⁶ See Grant, above n 85, at 38. She notes: "The criminal law in Australia is under the jurisdiction of each state or territory. The law of all nine jurisdictions, with the exception of Victoria, provides that consent is not valid if given as a result of misrepresentation or fraud as to the nature of the sexual intercourse. Nevertheless, Australia has not labeled non-disclosure as fraud that vitiates consent to the sexual act, a position that avoids imposing the label 'sex offender' on a person convicted of non-disclosure."

⁹⁷ *KSB v ACC*, above n 11, at [53].

⁹⁸ *CLM v ACC*, above n 68, at [63].

⁹⁹ *Papadimitropoulos v R* (1957) 98 CLR 249 (HCA).

¹⁰⁰ Ibid, at [261].

¹⁰¹ Ibid.

the inducing causes cannot destroy its reality and leave the man guilty of rape.

The categories of mistake seen to affect the validity of consent to sexual intercourse in Australia have been described as “fairly circumscribed”.¹⁰²

4. Canada

In 1998 the Supreme Court of Canada adopted a “harsh” and “aggressive” approach to the non-disclosure of HIV status.¹⁰³ In *R v Cuerrier*, it held that not disclosing one’s HIV-positive status to a sexual partner could constitute fraud which would vitiate consent to sexual activity, provided the requirements of fraud – dishonesty and deprivation – were fulfilled,¹⁰⁴ and there was a significant risk of serious bodily harm to the complainant.¹⁰⁵

The facts of *Cuerrier* are similar to those of *CLM* and *KSB*. *Cuerrier* tested positive for HIV, and subsequently had sexual relationships with two women, in which he neither disclosed his HIV status nor used condoms. Both women later discovered his HIV status, and although neither contracted the virus, they testified that had they known of *Cuerrier*’s HIV status, they never would have had consented to the sexual activity.¹⁰⁶ *Cuerrier* was charged with two counts of aggravated assault based on his having endangered the lives of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse.¹⁰⁷ The argument before the Supreme Court centred on whether the sexual activity had taken place without the consent of the complainants. The Crown contended that their consent was not legally effective because it was obtained by fraud.¹⁰⁸ The *Cuerrier* decision thus focused on the proper interpretation of “fraud” in the Canadian Criminal Code.¹⁰⁹

The Canadian Parliament amended the Canadian Criminal Code in 1983. The old offences of ‘rape’ and ‘indecent assault’ were redefined as ‘sexual assault’, and a new consent provision,

¹⁰² *CLM v ACC*, above n 68, at [63].

¹⁰³ See Grant, above n 85, at 11 and 59.

¹⁰⁴ See *R v Cuerrier*, above n 1, at [126] - [129].

¹⁰⁵ *Ibid*, at [125].

¹⁰⁶ *Ibid*, at [78] – [82].

¹⁰⁷ *Ibid*, at [83].

¹⁰⁸ *Ibid*, at [87].

¹⁰⁹ *Ibid*, at [97].

applying to all types of assault was adopted.¹¹⁰ Prior to 1983, the Criminal Code rape provision stated: “a male commits rape when he has sexual intercourse with a female person...with her consent if the consent is obtained by false and fraudulent representations as to the *nature and quality* of the act”.¹¹¹ In contrast, the current provision (in force at the time of *Cuerrier*) provides: “A person commits an assault when...without the consent of another person, he applies force intentionally to that other person, directly or indirectly” and “for the purposes of this section, no consent is obtained where the complainant submits or does not resist *by reason of fraud*.”¹¹²

The majority of the Court, in a judgment delivered by Cory J, held that the change in wording provided evidence of Parliament’s intention to move away from the rigidity of the common law requirement that fraud must relate to the nature and quality of the act.¹¹³ Cory J held: “it should now be taken that for the accused to conceal or fail to disclose that he is HIV-positive can constitute fraud which may vitiate consent to sexual intercourse.”¹¹⁴ He reasoned:¹¹⁵

True consent cannot be given if there has not been a disclosure by the accused of his HIV - positive status. A consent that is not based upon knowledge of the significant relevant factors is not a valid consent.

L’Heureux-Dube J delivered her reasons in a separate judgment. She agreed that the change in statutory wording evidenced Parliament’s clear intention to move away from the “unreasonably strict common law approach” to the vitiation of consent.¹¹⁶ L’Heureux-Dube J approved of the analysis provided by the authors of *Mewett & Manning on Criminal Law*, who argue that the change in statutory wording was crucial and entailed a “fundamental shift in the scope of operative fraud.”¹¹⁷ However, she disagreed with the majority’s formulation that fraud must be accompanied by a significant risk of serious bodily harm, finding it “unjustifiably restrictive”.¹¹⁸

¹¹⁰ *Ibid*, at [100].

¹¹¹ Criminal Code, RSC 1970, c. C-34, s. 244. (Emphasis added).

¹¹² Criminal Code, RSC 1985, c. C-46, s 265. (Emphasis added).

¹¹³ *R v Cuerrier*, above n 1, at [105] per Cory J: “both the legislative history and the plain language of the provision suggest that Parliament intended to move away from the rigidity of the common law requirement that fraud must relate to the nature and quality of the act. The repeal of statutory language imposing this requirement and its replacement by a reference simply to fraud indicates that Parliament’s intention was to provide a more flexible concept of fraud in assault and sexual assault cases.”

¹¹⁴ *Ibid*, at [124].

¹¹⁵ *Ibid*, at [127].

¹¹⁶ *Ibid*, at [3] per L’Heureux-Dube J.

¹¹⁷ *Ibid*, at [8], citing AW Mewett and M Manning *Mewett & Manning on Criminal Law* (3rd ed. 1994), at p. 789.

¹¹⁸ *Ibid*, at [19].

She noted that the Court should not narrow Parliament's intention to grant broad protection to individual autonomy and physical integrity.¹¹⁹

While agreeing with the majority about the overall result in the case, McLachlin J did not consider that Parliament intended to radically broaden the crime of assault through the omission of the "nature and quality" wording.¹²⁰ In a separate judgment delivered on behalf of Gonthier J and herself, McLachlin J considered that the broad changes proposed by L'Heureux-Dube J and Cory J represented a complete departure from the established common law position, effectively amounting to a new crime, rather than incremental development of the law.¹²¹ She noted that the majority's proposed extension of the law was both sweeping and unprecedented, and that no courts in Canada or legislatures in other countries had gone so far.¹²²

After examining the traditional interpretation of the phrase 'nature and quality', McLachlin J considered it unrealistic that consent to sex given on the basis that one's partner was HIV-free could stand unaffected by blatant deception.¹²³ In a passage which heavily relied on by the Court of Appeal in *KSB v ACC*,¹²⁴ McLachlin J reasoned:¹²⁵

Consent to unprotected sexual intercourse is consent to sexual congress with a certain person and to the transmission of bodily fluids from that person. Where the person represents that he or she is disease-free, and consent is given on that basis, deception on that matter goes to the very act of assault. The complainant does not consent to the transmission of diseased fluid into his or her body. *This deception in a very real sense goes to the nature of the sexual act, changing it from an act that has certain natural consequences (whether pleasure, pain or pregnancy), to a potential sentence of disease or death.* It differs fundamentally from deception

¹¹⁹ Ibid, at [22]: "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*."

¹²⁰ Ibid, at [34] per McLachlin J.

¹²¹ Ibid. Approaching the matter from the conviction that the criminalization of conduct was a serious matter, McLachlin J noted: "Clear language is required to create crimes. Crimes can be created by defining a new crime, or by redefining the elements of an old crime. When courts approach the definition of elements of old crimes, they must be cautious not to broaden them in a way that in effect creates a new crime. Only Parliament can create new crimes and turn lawful conduct into criminal conduct. It is permissible for courts to interpret old provisions in ways that reflect social changes, in order to ensure that Parliament's intent is carried out in the modern era. It is not permissible for courts to overrule the common law and create new crimes that Parliament never intended."

¹²² Ibid, at [53]. McLachlin J considered: "what we know about the spread of HIV and other venereal diseases suggests that thousands of people engage in just such conduct every day. Henceforward, if the sweeping changes suggested are accepted, these people will be criminals, subject to investigation, prosecution and imprisonment. Literally millions of acts, which have not to date been regarded as criminal, will now be criminalized. Individual liberty will be curtailed. Police, prosecutors, the courts and the prisons will be dramatically affected. Such a change, if it is to be made, is best made by Parliament after full debate as to its ramifications and costs."

¹²³ Ibid, at [65]-[66].

¹²⁴ *KSB v ACC*, above n 11, at [73].

¹²⁵ *R v Cuerrier*, above n 1, at [72].

as to the consideration that will be given for consent, like marriage, money or a fur coat, in that it relates to the physical act itself. It differs, moreover, in a profoundly serious way that merits the criminal sanction.

(Emphasis added)

McLachlin J therefore favoured a return to the “pre-*Clarence* position”, under which the common law recognised that deception as to sexually transmitted disease carrying a high risk of infection constituted fraud, vitiating consent to sexual intercourse.¹²⁶

R v Cuerrier was largely confirmed in *R v Mabior*.¹²⁷ The respondent in *Mabior* was charged with nine counts of aggravated sexual assault after he had unprotected sexual intercourse with nine complainants without disclosing his HIV positive status. The Supreme Court confirmed the validity of the *Cuerrier* approach in principle and impact, in particular agreeing that the change in statutory wording mentioned above evidenced Parliament’s intent that “fraud” should be read more broadly than it had been in the past.¹²⁸ The Court noted the uncertainty that had arisen from the ‘significant risk of suffering serious bodily harm’ test in *Cuerrier* and varied the test, requiring disclosure only where there is a “realistic possibility of transmission of HIV”.¹²⁹ In *Mabior*, the Court found that a low viral load without a condom still required disclosure, however the combination of a low viral load and the use of a condom meant that there was no realistic possibility of transmission and thus no disclosure required.¹³⁰

F Conclusion

Before *KSB*, the position in New Zealand regarding the non-disclosure of HIV status was clear and consistent with comparable jurisdictions other than Canada.¹³¹ The notion that a victim’s ‘mistake’ about a sexual partner’s HIV status could vitiate consent to sexual intercourse was not something that the criminal law recognised. The Court of Appeal’s conclusion to the opposite in

¹²⁶ *Ibid*, at [67] and [73].

¹²⁷ *R v Mabior* 2012 SCC 47, (2012) 352 DLR (4th) 619.

¹²⁸ *Ibid*, at [40].

¹²⁹ *Ibid*, at [84].

¹³⁰ *Ibid*, at [94].

¹³¹ And, as has been discussed, Canada’s departure from the settled position was justified on the substantial broadening of the statutory wording from ‘nature and quality’ to ‘fraud’.

KSB v ACC, addressed in the next chapter, was thus a sudden and drastic departure from what had hitherto been settled practice.¹³²

¹³² Joanna Manning "Criminal responsibility for the non-disclosure of HIV-positive status before sexual activity" (2013) 20 JLM 493 at 501 - 502.

II KSB v ACC

A Overview

In this Chapter, it is argued that the Court of Appeal's reasoning in *KSB* is not persuasive, and that the decision as a whole gives rise to an undesirable degree of uncertainty in an area of law where clarity is paramount. It is also argued that *KSB* was not an appropriate case in which to make such significant changes to the substantive criminal law, and that the better forum for such change would have been Parliament.

B KSB v ACC

1. District Court¹³³

The appellant (KSB) sought cover for mental injury after learning that the man (Dalley) with whom she had a 4-month sexual relationship had not disclosed to her that he was HIV positive. The two had engaged in unprotected sexual intercourse during their relationship, and the appellant later became “highly distressed” and developed Post-Traumatic Stress Disorder (“PTSD”) upon learning of her former partner’s HIV status, although she *did not* contract the HIV virus as a result of the sexual activity.¹³⁴ Dalley was convicted of criminal nuisance for failing to disclose his HIV-positive status prior to engaging in unprotected sexual intercourse.¹³⁵

The appellant’s claim for compensation was dealt with as an application for cover for mental injury under s 21(1) of the Accident Compensation Act 2001 (“the 2001 Act”). Section 21(2) of the 2001 Act provides cover for mental injury suffered by a person as a result of any act within the description of an offence listed in Schedule 3 of the Act. Schedule 3 lists a number of crimes, most of which are sexual in nature (including sexual violation), by reference to the relevant

¹³³ *KSB v ACC* DC Wellington 231/2008, 22 September 2008.

¹³⁴ *Ibid.*, at [4].

¹³⁵ *Ibid.*

sections in the Crimes Act. It does not refer to criminal nuisance (s 145).¹³⁶ On this basis, ACC declined to grant KSB cover.

In the District Court, counsel for the respondent (ACC) argued that the facts of the case were “on all fours” with *CLM v ACC*, and as such the Court was bound by the determination in that case.¹³⁷ Judge Beattie accepted the Court *was* bound by *CLM*, with no “wriggle room”, and thus found that the appellant was not entitled to cover for her mental injury.¹³⁸ Nevertheless Judge Beattie granted leave to the appellant to appeal to the High Court.¹³⁹ In the High Court, leave to appeal to the Court of Appeal was granted.¹⁴⁰

2. *Court of Appeal*

In the Court of Appeal, the two questions of law were stated as follows:¹⁴¹

1. Whether the failure of the appellant’s partner to disclose his HIV status to the appellant vitiates her consent to sexual intercourse so as to constitute a sexual violation or indecent assault for the purposes of cover for mental injury under s 21, and Schedule 3 to the Accident Compensation Act 2001; and
2. Whether, in addition to establishing that the appellant did not consent, it is also necessary to establish that the appellant’s partner did not believe that the appellant consented to the relevant sexual connection and that he had no reasonable grounds for such belief in the case of sexual violation.¹⁴²

¹³⁶ *Ibid*, at [2] – [5].

¹³⁷ *Ibid*, at [6] and [10]. Counsel for the appellant accepted that the District Court was bound by the High Court decision in *CLM* but indicated his ultimate goal was to have the matter heard by the Court of Appeal.

¹³⁸ *Ibid*, at [10].

¹³⁹ *Ibid*, at [13].

¹⁴⁰ *KSB v ACC* HC Wellington CIV-2009-485-78, 3 June 2010.

¹⁴¹ *KSB v ACC* at [4].

¹⁴² Before examining whether the non-disclosure of HIV status could vitiate consent, the Court of Appeal addressed whether all elements of the offence – including a lack of reasonable belief in consent – needed to be established in order to find cover for the appellant (at [30]). After examining the language and purpose of the Accident Compensation Act 2001, the Court took a different view from that of Randerson J in the *CLM v ACC* (who concluded that all elements of the offence had to be present including the absence of a reasonable belief in consent). The Court noted: “We consider the 2001 Act can be read in this way given the victim focus we have discussed. There are also practical considerations supporting this view. Mr Barnett advises that as a matter of practice if, on the face of it, the act is not consensual in the sense required by the criminal law, the respondent makes no inquiry about the reasonable belief of the assailant. Absent criminal proceedings, it would generally not be practical to do so. Indeed, Mr Barnett says that in the vast majority of claims of this nature, the assailant is not named let alone communicated with by the respondent. Essentially then for these policy and practical reasons, we consider that reasonable belief in consent is irrelevant for these purposes. Accordingly, where intercourse is nonconsensual, the other party’s reasonable belief in

The Attorney-General was also granted leave to intervene, and submitted one further question: whether non-disclosure of HIV positive status prior to engaging in unprotected sex could vitiate consent in the *criminal law*.¹⁴³

(i) Submissions

The appellant submitted that the approach of the Supreme Court of Canada in *Cuerrier* should be adopted.¹⁴⁴ The appellant argued that the failure to disclose in the present case should either be viewed as giving rise to a mistake about the ‘nature and quality’ of the act (s 128A(7)), or a matter coming within s 128A(8) consistent with the need for consent to be ‘informed’.¹⁴⁵

The Attorney-General and the respondent (ACC) submitted that non-disclosure of HIV status should not vitiate consent to sexual activity.¹⁴⁶ The Attorney-General argued that such an approach was supported by the weight of international authority and settled New Zealand law, and that any change to the settled position, because of the delicate questions of public and social policy involved, was a matter for Parliament.¹⁴⁷

(ii) Reasoning

Despite noting the clearly established and unobjectionable position – that the ‘mistake’ in cases of non-disclosure of HIV status does not go to the ‘nature and quality’ of the act but rather to the consequential risk of infection or harm – the Court of Appeal described the position as “not fully tested in the criminal law context in New Zealand”.¹⁴⁸

In what has been described as a “radical change in direction”,¹⁴⁹ the Court of Appeal came to the conclusion that unprotected sexual intercourse with a person who has not disclosed his or her HIV status changes the ‘nature and quality’ of the act because of the associated risk of serious harm.¹⁵⁰ The Court favoured the minority reasoning of McLachlin and Gonthier JJ in *Cuerrier*,

consent is no bar to accident compensation coverage.” Not central to the issues discussed in this dissertation, this aspect of *KSB* will not be considered further.

¹⁴³ *KSB v ACC* at [5]. (Emphasis added).

¹⁴⁴ *Ibid.*, at [35].

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, at [36].

¹⁴⁷ *Ibid.*, at [38].

¹⁴⁸ *Ibid.*, at [72].

¹⁴⁹ Manning, above n 32, at 493.

¹⁵⁰ *KSB v ACC*, above n 11, at [73] and [74].

that deception as to HIV status “in a very real sense goes to the nature of the sexual act, changing it from an act that has certain natural consequences (whether pleasure, pain or pregnancy), to a potential sentence of disease or death”.¹⁵¹

The Court of Appeal found the change in wording from “nature and quality” to “fraud” in the Canadian Criminal Code (discussed in the previous Chapter) to be “relevant” but “not determinative” of the Canadian Supreme Court’s decision.¹⁵² It regarded the expansive approach taken to ‘nature and quality’ to be consistent with the expansion of s 128A to make the list of matters non-exhaustive, the “general thrust” of rape law reform, and the emphasis on the need for informed consent.¹⁵³ The Court considered that its approach struck an appropriate balance between personal autonomy and the intervention of the criminal law.¹⁵⁴

The Court noted some of the practical issues that had arisen in Canada since *Cuerrier*, including in the interpretation of the “significant risk of serious bodily harm” test and the possible effects of a low viral load, condom use and/or antiretroviral therapy on the level of risk. While it considered that similar “issues of application” would inevitably arise, the Court declined to discuss the application of its reasoning beyond the factual situation before it.¹⁵⁵

The Court of Appeal noted a number of concerns expressed elsewhere (including by Judge LJ in *Dica* and Randerson J in *CLM*) about the approach it favoured:¹⁵⁶

1. Since adults consenting to sexual intercourse have always taken risks, criminalisation of such private risk-taking “would undermine the general understanding of the community that sexual relationships are pre-eminently private”, and that if such an approach was to be favoured, “it would seem odd that this should be confined to risks taken in the context of sexual intercourse”.¹⁵⁷
2. Criminalisation of consensual risk taking is impractical because of the “haphazard nature” of its impact. Because of the “complexity of bedroom and sex negotiations”, it would be unrealistic to impose a *legal* expectation that people will be paragons of sexual behaviour and set about informing each other in advance of possible risks.¹⁵⁸

¹⁵¹ *Ibid*, at [73] citing *R v Cuerrier* at [72].

¹⁵² *Ibid*, at [77].

¹⁵³ *Ibid*, at [85] and [86].

¹⁵⁴ *Ibid*, at [97].

¹⁵⁵ *Ibid*, at [91] and [92].

¹⁵⁶ *Ibid*, at [93].

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid*.

3. Regardless, even if thought to be desirable, interference of this kind with personal autonomy may only be made by Parliament.¹⁵⁹

Nevertheless, and without any substantive discussion or resolution of these important objections, the Court of Appeal concluded that its approach best reflected our statutory scheme.¹⁶⁰

(iii) Result

The Court concluded that in the case before it, where there had been unprotected sexual intercourse without disclosure as to HIV status, the appellant's consent was vitiated.¹⁶¹ The Court reached this decision on the basis that such a non-disclosure gave rise to a mistake as to the 'nature and quality' of the sexual act (s 128A(7)). It stated that in the alternative the case "fell within" s 128A(8), consistent with the focus on the need for consent to be 'informed'.¹⁶²

C Analysis

Ultimately, of course, and regardless of how Courts may conceptualise or justify them, in cases such as *KSB*, normatively contestable judgments must be made about whether a particular misunderstanding or mistake will be fundamental to the validity of a purported consent to sexual intercourse.¹⁶³ On this basis, the superficial reaction might be that *KSB* provides the 'right' answer, because deliberate non-disclosure of HIV-positive status before unprotected sex is undoubtedly reprehensible conduct that the law should not condone. *KSB* might also be seen as an essentially pragmatic decision on its facts to grant ACC cover, leaving the exact parameters of 'nature and quality' and 'informed' consent for another day in a more appropriate context.

Upon closer examination, however, the decision is highly unsatisfactory. The Court of Appeal's reasoning (including its heavy reliance on parts of *R v Cuerrier*) is not persuasive. Furthermore, the decision potentially opens problematic highly 'floodgates', or, at the very least, gives rise to

¹⁵⁹ Ibid, at [93] and [94].

¹⁶⁰ Ibid, at [97].

¹⁶¹ Ibid, at [99].

¹⁶² Ibid, at [98]. As Connell has noted, this is an odd use of language: "s 128A(8) states that s 128A "does not limit the circumstances in which a person does not consent to sexual activity" and it is not clear how a case can "fall within" a subsection which proclaims that the section as a whole is not exhaustive."

¹⁶³ See Temkin, above n 29, at 199.

considerable uncertainty as to how far the Court of Appeal's reasoning might extend in future cases.

D Issues with the Court's reasoning

1. Inconsistency with existing precedent

As outlined in Chapter 1, prior to *KSB*, what the 'nature and quality' of a sexual act encompasses has been settled in New Zealand and other jurisdictions. Mistakes about sexually transmitted diseases, including HIV, have never been considered to go to the 'nature and quality' of a sexual act, but instead to relate to the risk of infection or harm.¹⁶⁴ Likewise, no Court in New Zealand (or any other jurisdiction) has considered consent given in ignorance of HIV status as not sufficiently 'informed' to be valid.¹⁶⁵ While the Court of Appeal's finding that non-disclosure of HIV status vitiates consent might have some *superficial* attractiveness, perhaps because such conduct is intuitively reprehensible, the idea that it changes the 'nature and quality' of the act or renders consent not sufficiently 'informed' is not something that the criminal law has ever recognised.¹⁶⁶

The Court found support for the idea that 'nature and quality' might not be limited solely to mistakes about the physical act in D Stuart's *Canadian Criminal Law: a treatise*, in which it is suggested that all that is needed for a wider interpretation of 'nature and quality' is a "different attitude".¹⁶⁷ With respect, a "different attitude" is an unsatisfactory justification for departing from a line of clear common law authority dating back to 1888.¹⁶⁸ Extending 'nature and quality' and 'informed' consent in this manner ignores sound reasons for the line that has always clearly been

¹⁶⁴ See above n 49.

¹⁶⁵ Although this was considered a *possibility* in *Lee*, the issue was not addressed in detail, and the suggestion was considered by the majority in *Barker* to be extremely problematic.

¹⁶⁶ See Gallavin, above n 17, at 156.

¹⁶⁷ *KSB v ACC*, above n 11, at [84] citing D Stuart *Canadian Criminal Law: a Treatise* (4th ed, Toronto, 2007) at 572, footnote 101, where Stuart suggests that all that is needed for a wider interpretation is a "different attitude".

¹⁶⁸ It has similarly been said of the Canadian Supreme Court's approach in *R v Cuerrier*: "The Court's decision in *R. v. Cuerrier* is a classic example of the judiciary overstepping its bounds. Although *Cuerrier*'s actions were repugnant, the Justices should not have considered those facts in their analyses. By reinterpreting a single word – "fraud" – the Court has overturned 110 years of legal precedent in order to criminalize *Cuerrier*'s behavior." See Ronald Yamada "Fraud, HIV and unprotected sex: *R v Cuerrier*" (1999) 6 SW J L & Trade Am 157 at 176.

drawn between the fundamental nature of the act and its consequences.¹⁶⁹ As Dr Gallavin has argued, in cases that do not involve fraud, but rather silence in combination with the wearing of a condom and perhaps the taking of antiretroviral medication, the “leap of a change” to the ‘nature and quality’ of the act is further undermined.¹⁷⁰

2. An ‘incomplete’ analysis

The Court of Appeal adopted McLachlin J’s reasoning in *Cuerrier* that non-disclosure of HIV status transforms an act with natural consequences of “pleasure, pain or pregnancy” into “a potential sentence of disease or death”.¹⁷¹ As Dr Gallavin has argued, such an analysis is surely incomplete:¹⁷²

Any responsible citizen is aware of the risk of disease from sexual relations, particularly in the case of a new sexual partner. Therefore the possible infliction of disease is an ever present and well understood consequence of sexual activity...*it does not change the nature of the act.*

(Emphasis added.)

The Court’s reference to a “potential sentence” of disease or death gives superficial attractiveness to the idea that the conduct might be as serious as rape. However, in reality, it is simply a pejorative and unnecessarily emotive characterisation of the conduct, and adds nothing objectively to the test suggested. Adults consenting to unprotected sexual intercourse have always taken risks, and as such, consent in that context has always been taken as consent to every possible outcome of that activity, including pregnancy and sexually transmitted disease.¹⁷³

¹⁶⁹ See generally, Temkin, above n 29, at 104. See also, Neil Morgan “Oppression, Fraud and Consent in Sexual Offences” [1996] 26 UW Austl L Rev 223 at 223 onwards, where Morgan notes that it would be oversimplistic and impractical to adopt the view that consent is vitiated *whenever* it can be proved that the complainant is deceived into agreeing to sexual contact. Although, on one view, a wide range of oppressive and intimidatory behaviour should be capable of vitiating consent, the courts have drawn limits in the area of fraud to ensure that the law of sexual assault does not become unworkable. Morgan argues that, in the absence of detailed statutory provisions, the concept of fraud as to the nature of the act is the best mechanism for explaining when fraud should vitiate consent. He acknowledges that under this analysis, some controversial cases will still fall outside the scope of sexual assault laws, particularly those cases where the defendant has put a partner at risk of contracting a serious disease through sexual contact.

¹⁷⁰ Gallavin, above n 17, at 157.

¹⁷¹ *KSB v ACC*, above n 11, at [73].

¹⁷² Gallavin, above n 17, at 157.

¹⁷³ See *R v Dica*, above n 80 at [50] and [51] per Judge LJ: “Risks, have always been taken by adults consenting to sexual intercourse. Different situations, no less potentially fraught, have to be addressed by them. Modern society has not thought to criminalise those who have willingly accepted the risks, and we know of no cases where one or other of the consenting adults has been prosecuted, let alone convicted, for the consequences of doing so. The problems of criminalising the consensual taking of risks like these include the sheer impracticability of enforcement and the haphazard nature of its impact. The process would undermine the general understanding of the community that sexual relationships are pre-eminently private

However ill-advised it may be to engage in unprotected sex, the criminal law has never classified as rapists those who may impose such risks.¹⁷⁴ The Court of Appeal considered it appropriate to “exclude some risks as acceptable” while criminalising others.¹⁷⁵ Not only is this an undesirable intervention into essentially pre-eminently private and personal behaviour, it is also a wholly artificial and overly fine distinction of the kind that the criminal law traditionally avoids drawing.

3. *The Court’s reliance on R v Cuerrier*

The Court’s reliance on the minority reasoning of McLachlin and Gonthier JJ can also be criticised. Five out of seven judges in *Cuerrier* considered the change in wording from “nature and quality” to “fraud” as significant evidence of Parliament’s intention to depart from the common law position that only mistakes as to the ‘nature and quality’ of the act could vitiate consent.¹⁷⁶ This change was, on the majority’s view, significant for the result in the case as it allowed a much more flexible approach to factors that *could* vitiate consent than the constraining

and essentially personal to the individuals involved in them. And if adults were to be liable to prosecution for the consequences of taking known risks with their health, it would seem odd that this should be confined to risks taken in the context of sexual intercourse, while they are nevertheless permitted to take the risks inherent in so many other aspects of everyday life, including, again for example, the mother or father of a child suffering a serious contagious illness, who holds the child’s hand, and comforts or kisses him or her goodnight.

See also Rebecca Bennett, Heather Draper and Lucy Frith “Ignorance is bliss? HIV and moral duties and legal duties to forewarn” (2000) 26 *Journal of Medical Ethics* 9 at 11. The authors suggest that, with sex education in schools and extensive educational campaigns and media coverage it is reasonable to suppose that most adults are aware of the existence of HIV and have some elementary knowledge of its transmission routes. It is arguable then, that it can be assumed that any consent given to, say, “high-risk” sexual activity includes consent to the background risk of HIV infection without specific information about the particular sexual partner in question. The view that such risks have always been understood and accepted by those participating in unprotected sexual activity is consistent with the law’s treatment of other ‘risks’ and consequences of such activity: it would be difficult for a woman who becomes pregnant to blame her partner for this on the grounds that he did not warn her of this possibility. It is not unreasonable for men to suppose that women who are competent to consent to sex are also aware of the risk of pregnancy and it is not, therefore, morally irresponsible of them to fail to make a specific warning about this risk.

¹⁷⁴ See Edwin Cameron, Scott Burris and Michaela Clayton “HIV is a virus, not a crime: ten reasons against criminal statutes and criminal prosecutions” (2008) 11 *Journal of the International AIDS Society* 7 [“HIV is a virus”] at 10. The idea that only one sexual partner (the infected one) should bear *all* responsibility for the risk is arguably artificial, and criminalization places blame on one person instead of responsibility on two. This is described as a “hard but important thing to say”. The authors go on to note: “HIV has been around for nearly three decades. For nearly three decades the universal public information message has been that no one is exempt from it. So the risk of getting HIV (or any sexually transmitted infection) must now be seen as an inescapable facet of having sex. We cannot pretend that the risk is introduced into an otherwise safe encounter by the person who knows or should know he has HIV. The risk is part of the environment, and practical responsibility for safer sex practices rests on everyone who is able to exercise autonomy in deciding to have sex with another. The person who passes on the virus may be ‘more guilty’ than the person who acquires it, but criminalisation unfairly and inappropriately places all the ‘blame’ on the person with HIV.”

See also CEF Rickett “AIDS, sexually transmitted diseases and the criminal law” (1990) 20 *Victoria U Wellington L Rev* 183 at 192: “Transmission of a virus does not fit neatly into the model of a guilty offender and an innocent victim. Both parties engaged in a relationship can, and are advised to, take precautions to avoid exchange of bodily fluids. It is usually problematic to allocate blame to one of the partners.”

¹⁷⁵ *KSB v ACC*, above n 11, at [75].

¹⁷⁶ See *R v Cuerrier*, above n 1.

qualification of ‘nature and quality’.¹⁷⁷ The Court of Appeal viewed the change in the Canadian statutory wording as relevant, but not determinative, of the decision in *Cuerrier*. Yet, given that much of the discussion in *Cuerrier* centred on the implication of the wording change, and the majority of the Justices found that the change represented Parliament’s intention to “move away from the rigidity ...of the common law”, to “provide a more flexible concept of fraud” and “unburden the notion of fraud by removing the qualification that it must relate to the nature and quality of the act”,¹⁷⁸ it is hard to accept that the change in statutory wording in Canada was *anything but* determinative of the approach and outcome in *Cuerrier*.¹⁷⁹

Furthermore, given that Canada replaced the phrase “nature and quality” with “fraud” in 1983, whereas New Zealand has retained the “nature and quality” wording, the Court of Appeal’s assertion that the *Cuerrier* approach reflected *our* statutory scheme is certainly questionable.¹⁸⁰

4. “Rape or nothing”

Because the Court of Appeal was constrained by the offences listed in Schedule 3 of the 2001 Act to determine the appellant’s eligibility for cover, its analysis was entirely focused on whether non-disclosure of HIV status could *vitiating* consent (i.e. whether the offence of sexual violation had been committed). In that respect, the Court addressed the case on a “rape or nothing” basis. As Dr Gallavin notes, this is not an accurate description of the situation under the criminal law:¹⁸¹

It is not a case of rape or nothing. This seems a point lost on the Court as evidenced by their citation of McLachlin J when her honour stated that she found it “shocking” that “the law should condone a person who has been asked whether he has HIV, ... [lies] about the fact in order to obtain consent” (at [74]). The law in New Zealand does no such thing.

The non-disclosure of HIV status has, in the past, been adequately addressed through various lesser criminal offences, including criminal nuisance:¹⁸²

As the Attorney-General submitted, the current law seems capable of providing a response to conduct like that of KSB’s partner — he was convicted of criminal nuisance, and if she had been

¹⁷⁷ *Ibid*, at [105].

¹⁷⁸ *Ibid*, at [9] and [105].

¹⁷⁹ In any event, *Cuerrier* is *not* authority for the proposition that the non-disclosure of HIV results in the victim being mistaken about the ‘nature and quality’ of the sexual act, or that a consent given in ignorance of HIV status is invalid because it is not ‘informed’.

¹⁸⁰ *KSB v ACC*, above n (), at [97].

¹⁸¹ Gallavin, above n 17, at 157.

¹⁸² Connell, above n 16, at 136.

infected then the offence of infecting with disease could have been available. The Court of Appeal's decision does not plug a hole in the criminal law, but elevates conduct that would previously have been addressed by other offences to sexual violation.

It is highly disappointing that, because of the Court of Appeal's narrow focus, the adequacy of the criminal law in addressing conduct such as that of KSB's partner was not given proper weight.

5. *Reference to 'informed' consent without further explanation*

Although the Court held that the non-disclosure of HIV status gave rise to a mistake about the 'nature and quality' of the act, it considered that in the alternative, the appellant's consent was vitiated under s 128A(8), consistent with the focus on the "need for consent to be informed".¹⁸³ As Simon Connell has argued, the Court's suggestion that the 'lack of consent' element of sexual violation actually means a 'lack of informed consent' may be more significant than the Court's specific findings on s 128A(7),¹⁸⁴ given that the law has never, before *KSB*, treated 'informed' consent as requiring the positive disclosure of particular information, including sexual health.

As discussed in the previous chapter, the discrepancies between *Cox*, *Herbert*, *Lee* and *Barker* give rise to real doubt as to whether 'informed' consent has a place in our law at all. To clear up this uncertainty, the Court of Appeal should have taken the opportunity to actually explain what 'informed' consent requires in the context of otherwise consenting adults of full capacity and outside of the specific fact situation. Instead, the Court's almost 'throwaway' reference to "the need for consent to be informed" becomes a matter of interpretation for a future court, and represents a very unsatisfactory grey area in the meantime. While requiring 'informed' consent might be a "laudable goal"¹⁸⁵ or "suggest a certain degree of sophistication"¹⁸⁶ in the law of consent to sexual activity, the Court's indiscriminate reference to 'informed' consent, without more, is both an unconvincing and unsatisfactory way to purport to provide an alternative justification for its decision.

¹⁸³ *KSB v ACC*, above n 11, at [98].

¹⁸⁴ Connell, above n 16, at 136.

¹⁸⁵ *Ibid.* Connell argues: "while building a law of consent to sexual activity based on full and informed consent might be a laudable goal, substantive changes to the criminal law should come through the Parliamentary process."

¹⁸⁶ See generally Skegg, above n 50, at 137.

6. *Uncertainty resulting from the decision*

The Court of Appeal noted the importance of certainty in the line between criminal and non-criminal behaviour.¹⁸⁷ However, with respect, the Court's expansive approach to 'nature and quality', and its conclusion regarding s 128A(8) and 'informed' consent, has left the law in an extremely uncertain state. While noting that its approach raised a number of significant issues, the Court refused to go beyond the factual situation before it, leaving most of the unanswered questions to be "dealt with as they arise".¹⁸⁸ Not only does the decision create uncertainty about the proper interpretation of 'nature and quality' and 'informed consent,' it creates doubt about what conduct might constitute the offence of sexual violation in the future, which is highly unsatisfactory.

(i) *Application to other sexually transmitted diseases*

It is certainly arguable that the Court of Appeal's reasoning has further application beyond the non-disclosure of HIV to other sexually transmitted diseases. The Court's formulation regarding what could change the 'nature and quality' of a sexual act was a risk of disease *or* death so that, in their view, there is no requirement that the disease is *necessarily* one with fatal consequences. If any mistake which changes a sexual act from one with consequences of "pleasure, pain or pregnancy" to a "*potential sentence of disease or death*" is now considered a mistake about the 'nature and quality' of a sexual act thus vitiating consent, 'mistakes' about other undisclosed sexually transmittable diseases which also carry an associated risk of serious harm such as Hepatitis B,¹⁸⁹ Human Papilloma Virus,¹⁹⁰ Syphilis,¹⁹¹ Chlamydia¹⁹² and Gonorrhoea¹⁹³ must,

¹⁸⁷ *KSB v ACC*, above n 11, at [96].

¹⁸⁸ *Ibid*, at [97].

¹⁸⁹ Vladimir Sentome "Attacking the Hidden Epidemic: Why a Strict Liability Standard Should Govern the Transmission of Sexually Transmitted Diseases" [2006] U Chi Legal F 409 at 414: Hepatitis B remains incurable, and often asymptomatic. It can cause chronic liver infections and persons infected with the hepatitis B virus are about one hundred times more likely to develop cancer than individuals who are not infected.

¹⁹⁰ *Ibid*, at 414. Human Papilloma Virus (HPV) causes genital warts, and other strains can lead to cervical cancer. The disease is transmitted through close, direct contact with no known consistently effective treatment.

¹⁹¹ *Ibid*, at 412. Untreated syphilis can also lead to serious long-term complications and even death. Late stage syphilis can impact a patient's cardiovascular and neurological systems. Women infected with the disease can pass the disease to their foetuses at any time during pregnancy, and congenital syphilis can cause stillbirth, death soon after birth, as well as neurological problems in the children who survive.

¹⁹² *Ibid*. Chlamydia is usually asymptomatic, and if left untreated, can have disastrous health consequences for women, including: pelvic inflammatory disease, ectopic pregnancy and infertility.

¹⁹³ *Ibid*. Gonorrhoea, although treatable, is showing increased levels of antibiotic resistance. If left untreated, gonorrhoea can cause epididymitis, a painful condition of the testicles that can lead to infertility. In women, this STD can also lead to pelvic inflammatory disease, ectopic pregnancy and infertility.

on the basis of the Court of Appeal’s reasoning, also vitiate consent to sexual intercourse. This is, potentially, a hugely significant change in the law:¹⁹⁴

What we know about the spread of HIV and other venereal diseases suggests that thousands of people engage in just such conduct every day. Henceforward, if the sweeping changes suggested are accepted, these people will be criminals, subject to investigation, prosecution and imprisonment. Literally millions of acts, which have not to date been regarded as criminal, will now be criminalized. Individual liberty will be curtailed. Police, prosecutors, the courts and the prisons will be dramatically affected.

It appears that the Court of Appeal gave little consideration to the potentially immense scope of its approach, and the implications of expanding settled legal concepts without adequately redefining their boundaries. It is highly unsatisfactory that the criminal law has been left in an uncertain position until a future Court is able to test the extent of *KSB*’s application.

(ii) ‘Floodgates’

There is scope to consider whether the Court’s reasoning, amounting to a radical departure from established principles, might have even wider implications than simply the non-disclosure of other serious sexually transmitted diseases. In *CLM v ACC*, Randerson J considered it inappropriate to extend the law in such a manner because of the considerable difficulties in ‘line drawing’:¹⁹⁵

If the non-disclosure of the risk of contracting a fatal disease is said to be sufficient to vitiate consent in this context, how does one treat failure to disclose a family history of cancer, obesity or mental illness to a woman desiring to have children? Or the existence of a sexually transmitted disease which does not usually carry fatal consequences?

While ‘floodgates’ arguments are often overused, unreal examples can be distinguished from those with obvious force. It is not suggested, for example, that following *KSB*, mistakes about “marriage, money or a fur coat” will turn consensual sexual acts into sexual violation.¹⁹⁶ However, on the basis of the approach in *KSB*, it is not difficult to come up with further examples

¹⁹⁴ *R v Cuerrier*, above n 1, at [54] per McLachlin J.

¹⁹⁵ *CLM v ACC*, above n 68, at [79].

¹⁹⁶ “Marriage, money or a fur coat” was used in *Cuerrier* as an example to distinguish deception regarding HIV status from deception as to consideration given for consent.

of ‘mistakes’ that could arguably affect the ‘nature and quality’ of a sexual act, or go to ‘informed’ consent, and thus vitiate consent in the future:

1. What about the non-disclosure of contagious diseases, albeit not sexual diseases, that are passed on during close and intimate contact such as sexual activity?
2. In the case of a couple trying to have children, could known genetic deficiencies or hereditary conditions become relevant to the ‘nature and quality’ of the sexual act or to ‘informed’ consent?¹⁹⁷
3. Should consent given in ignorance of gender history, or of past gender reassignment surgery, be regarded as mistaken or misinformed and thus not valid?
4. If a man who is infertile misrepresents this fact to his sexual partner, who believes he is fertile and wants to have sexual intercourse in order to try to conceive, should her consent be vitiated?
5. Conversely, a woman asserts to a man that she wants to have sexual intercourse in order to get pregnant whereas in fact she wants the pleasure of the physical relationship and is using a contraceptive. Does that change the ‘nature and quality’ of the act for the man in that situation?
6. Is sexual intercourse with someone under the ‘legal age’ an act wholly different in ‘nature and quality’ to sexual intercourse with someone who is over it? Thus, if a girl who is only 15 misrepresents her age as 19 in order to have sexual intercourse with a 19-year old man, and he gives consent on the basis of that “mistake”, should his consent be vitiated and she guilty of sexual violation?¹⁹⁸

The above examples illustrate the problems inherent in an expansive approach to concepts like ‘nature and quality’ and ‘informed’ consent. As soon as the traditional line is blurred between the fundamental nature (i.e. the sexual character) of the act itself on one hand, and the possible consequences and risks of the act on the other, what is merely morally reprehensible or lesser criminal conduct is inappropriately elevated to serious sexual offending. To the extent that this does occur, the offence of sexual violation will begin to take on an entirely different and, it is

¹⁹⁷ As suggested by Randerson J, see above n 195.

¹⁹⁸ This possibility has been considered in the United States by Russell Christopher and Kathryn Christopher “Adult impersonation: rape by fraud as a defence to statutory rape” (2007) 101 NW U L Rev 75. The authors describe “another type of rape – with the roles of perpetrator and victim reversed – that has never been noticed.” They use the example of a fifteen-year old who falsely represents to a nineteen-year old that she is eighteen. The authors suggest: “by obtaining intercourse with the nineteen-year old through a false representation of a significant or material matter, the fifteen-year old commits rape by fraud” because “the age of one’s sexual partner is a crucially significant and material matter when it makes the difference between lawful intercourse and criminal intercourse (statutory rape).”

argued, lesser meaning (further considered in the next chapter under the heading of ‘fair labelling’).

E Inappropriate forum for such a determination

In addition to the criticism of the Court of Appeal’s reasoning, it is submitted that *KSB* itself was not an appropriate forum in which to make such a substantive change to the criminal law.

1. ACC appeal

It is both “odd” and “troubling” that fundamental questions of criminal law were addressed in a civil appeal from an ACC decision.¹⁹⁹ The result of the case (the appellant being granted cover) *might* have made sense for the purpose of the Accident Compensation Act (to provide compensation for mental injury suffered as a result of non-consensual sex). Nevertheless, because of the “uneasy link” between the accident compensation provisions and the criminal law, the Court was forced to decide the case for the purpose of both the accident compensation regime *and* the substantive criminal law.²⁰⁰

This is troubling, because the imperatives that lead to the Court’s conclusion in *KSB* are not necessarily the same as those that would have been seen as important in a purely criminal context. For example, the Court gave no consideration to a fundamental element of the offence of sexual violation - the absence of a reasonable belief in consent²⁰¹ - for the purpose of its decision, leaving future Courts with no guidance as to how that element should be considered in future non-disclosure cases. When the ‘tail wags the dog’ in this manner – i.e. when considerations that are seen as important in a relatively minor and specialised area of law (accident compensation) are able to trump fundamental principles of criminal law – Courts need to tread carefully:²⁰²

¹⁹⁹ Manning, above n 132, at 496: “oddly, and it is suggested, inappropriately, for such a significant change in the criminal law, the proceedings in *KSB* were not criminal.” See also Connell, above n 16, at 136: “That this matter was decided in an ACC appeal is troubling, for several reasons.”

²⁰⁰ Andrew Beck “Accident Compensation and the Supreme Court” (2012) 5 NZLJ 162 at 164.

²⁰¹ The Court considered there was no need to establish the absence of a reasonable belief in consent for the purpose of determining cover for the appellant. See *KSB v ACC*, above n 11, at [31].

²⁰² Connell, above n 16, at 136.

There is a risk that giving injured persons access to compensation becomes a consideration when interpreting the criminal law.... Criminalizing conduct, or regarding it as sexual violation, so as to provide compensation to the victim, ought be treated with much care.

A related point is that the state of mind and criminal intent (*mens rea*) of the alleged wrongdoer are all important in the criminal context, whereas our no-fault accident compensation regime has exactly the opposite focus. That regime looks at the consequence of an accidental injury (accidental in the sense of unintended by the victim) and is not concerned at all with the intentions or state of mind of the person who inflicted the injury. It could hardly be a more unsatisfactory regime in which to make findings about whether the conduct of the party inflicting the injury amounted to criminal conduct.

The ACC context is even more inappropriate, because the ACC Act only provides a right to review ACC determinations and subsequent appeals up to the Court of Appeal.²⁰³ Thus, the Supreme Court did not have the opportunity to consider the correctness or otherwise of the Court of Appeal's reasons in *KSB*, which might have provided an entirely different final judicial analysis of the relevant issues.

2. *Parliament*

Instead of making such a substantive change to the criminal law, the Court of Appeal should have left such changes to Parliament, being the only appropriate body to ascertain society's values and expectations and legislate appropriately to reflect those, and to consider the wider social, legal and public health implications of such a change in the law.

The Court's almost 'dismissive' approach to the complex legal and social issues before it confirms that it was not equipped to adequately resolve them.²⁰⁴ As Dr Gallavin has noted:²⁰⁵

²⁰³ See Connell, above n 16, at 136.

²⁰⁴ The Court sidestepped a number of important issues in its refusal to go beyond the factual situation before it, leaving issues of application and retrospectivity for "another day" to be dealt with "as they arise". See *KSB v ACC*, above n 11, at [97]. Furthermore, as Connell has noted at 136: "The public discussion stirred up by *KSB* certainly suggests that there are a number of points of view. A number of interested parties may have wished to provide submissions on this complex question of health and social policy, including the Law Commission, academics, criminal practitioners, and organisations representing HIV-positive citizens. A limited number of viewpoints were presented in *KSB*. Given that the case was an ACC appeal, the only parties were the appellant and the Accident Compensation Corporation, and the Attorney-General was granted leave to intervene on this important issue of the criminal law."

²⁰⁵ Gallavin, above n 17, at 157.

Ultimately the quality of the decision illustrates that the radical expansion of factors that may vitiate consent, the role of fraud and silence, and the differences between attributes, inducements and matters going to the nature and quality of the sexual act are for Parliament to consider.

If the existing laws *are* now thought to be inadequate, the proper course is for Parliament to make appropriate amendments to those laws to reflect the perceived policy considerations of the day and to make any adjustments to those offences and penalties accordingly.²⁰⁶ Chapter 4 suggests one such possible legislative approach.

²⁰⁶ As the Appellate Court in *Cuerrier* stated, “if no other section of the Criminal Code catches the conduct complained of...then it is a matter for Parliament to address through legislation.” See *R v Cuerrier* (1996) 141 DLR (4th) 503 (BC).

III Should non-disclosure of HIV status vitiate consent?

A Overview

Despite the perceived inadequacies of *how* the Court of Appeal's decision was reached, this Chapter considers whether, in principle, the non-disclosure of HIV status *should* vitiate consent to unprotected sexual intercourse, giving rise to the serious offence of sexual violation (rape). As Manning has suggested:²⁰⁷

Balancing the moral issues with the public health concerns, there seems to be an intuitive consensus that there must be some criminalisation, to reflect the widely held response that knowing non-disclosure is sufficiently wrongful that justice requires a criminal response. But the issue is the *level* of criminal response: should it amount to the serious offence of sexual violation...as *KSB* would have it, through vitiating consent?

In this Chapter it is argued that for fundamental legal reasons the non-disclosure of HIV status *should not* vitiate consent to unprotected sexual intercourse and turn the act into the offence of sexual violation. Before addressing these reasons, the likelihood of the reasoning in *KSB* actually being applied in a criminal context is examined.

B Likelihood of criminal application

A number of criticisms²⁰⁸ of *KSB* assume that the Court of Appeal's reasoning will be adopted to support criminal prosecutions for sexual violation following unprotected sexual intercourse without disclosure of HIV status.²⁰⁹ Despite *KSB* being strictly obiter in a criminal context, the

²⁰⁷ Manning, above n 132, at 498. (Emphasis added).

²⁰⁸ See generally – Connell, above n 16, Gallavin, above n 17, and Manning, above n 132.

²⁰⁹ Of course, a criminal prosecution would still require the prosecution to prove, beyond a reasonable doubt, that the accused has the absence of a reasonable belief in consent. As noted at n 21 above, this is a “mixed subjective and objective mens rea formula”. The defence of a reasonable belief in consent is available only if the defendant actually believed the other person consented, and only if such a belief was based on objectively reasonable grounds. It seems reasonable to assume, and for the purpose of this discussion it is assumed, that while an accused might have a subjective belief in consent (because the activity *would be* prima facie or ostensibly consensual), that belief would not be considered objectively reasonable because of

Court specifically addressed the issue of whether non-disclosure of HIV positive status could vitiate consent in relation to both ACC cover *and* the substantive criminal law.²¹⁰ Consistent with this, throughout its judgment, the Court referred to the role of the *criminal* law, and the effect of *criminalising* the conduct at issue.²¹¹ Crucially, the Court referred to the exact boundaries of a mistake as to ‘nature and quality’ being for another day “in the context of a *criminal* case with appropriate evidence.”²¹² As such, it is difficult to imagine a High Court Judge, faced with such a charge and substantially similar facts, feeling able to depart from the Court of Appeal’s reasoning.

This is an extremely undesirable position. While the non-disclosure of HIV status prior to unprotected sexual intercourse is certainly criminally reprehensible on some level, a number of fundamental legal reasons suggest that such conduct should not amount to sexual violation.

C *Principles of criminal law*

When addressing what level of criminalisation is appropriate with respect to particular conduct, it is useful to consider criminal theory and address the specific principles and standards that shape the criminal law. General principles of the criminal law embody fundamental ideas about how good criminal law *should* operate in practice.²¹³ With reference to three particular principles - (1) proportionality of harm, (2) fair labelling, and (3) certainty - it is argued that the non-disclosure of HIV status should not vitiate consent to unprotected sexual intercourse.

their non-disclosure. Because “ignorance of the law is no excuse”, an accused would be presumed to know (on the basis of *KSB*) that the non-disclosure of HIV status vitiates consent. Thus, if an accused does not disclose his HIV status, and ‘knows’ that such a non-disclosure vitiates his partner’s consent to the sexual activity, it must follow that any belief he might have in her consent could not be considered ‘reasonable’.

²¹⁰ *KSB v ACC*, above n 11, at [5].

²¹¹ *Ibid*, at [87], [93], [94] and [96].

²¹² Furthermore, Canada, since *Cuerrier*, has witnessed one of the highest levels of prosecution for the non-disclosure of HIV status of any developed country in the world. Isabel Grant notes that over 100 prosecutions have been documented in Canada compared to 17 in England and Wales, around 25 in Australia and 7 in New Zealand. Furthermore, where other jurisdictions use lesser criminal offences (including New Zealand, before *KSB*), in Canada the same charge of aggravated sexual assault is typically used, regardless of the nature of the deception or whether the virus is actually transmitted. Canada is also the only jurisdiction of those discussed that labels the offence as a sexual offence – in other jurisdictions, the offence is characterized as an assault, or an infliction of harm, rather than non-consensual sexual contact. So, before *KSB*, the Canadian approach was anomalous compared to all other Commonwealth jurisdictions. See generally Grant, above n 85.

²¹³ Simon Bronitt and Bernadette McSherry *Principles of Criminal Law* (LBC Information Services, New South Wales, 2001) at 67.

1. *Proportionality of harm*

The ‘harm’ principle in relation to the criminal law has been expressed as follows: “the only purpose for which power can be rightfully exercised over any other member of a civilised community, against his will, is to prevent harm to others.”²¹⁴ The principle is most often expressed as a negative or limiting principle - an “exclusory guide”²¹⁵: the criminal law is not justified in penalising conduct *unless* it causes harm, despite being immoral or otherwise unacceptable.²¹⁶ While not every aspect of the criminal law accords with the principle of harm,²¹⁷ criminal sanction of fundamentally ‘harmless’ conduct cannot usually be justified.

Furthermore, because one of the basic aims of the criminal law is to ensure a proportionate response to law breaking,²¹⁸ even where particular conduct warrants criminal sanction per se, the sanction available must be *proportionate* to the harm caused.

Of course, the non-disclosure of HIV status without transmission is not *harmless*, such that no criminal response at all is justified.²¹⁹ The more questionable proposition is whether a potential conviction for sexual violation with a maximum penalty of up to 20 years imprisonment is proportionate to the harm caused by the non-disclosure of HIV status when no transmission of the virus occurs.

(i) **The harm of sexual violation**

Of the sexual offences in our Crimes Act, sexual violation by rape is considered the most serious. The offence is traditionally associated with personal devastation for the victim: “Rape is an experience which shakes the foundations of the lives of the victims. For many its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values

²¹⁴ Simester and Brookbanks, above n 18, at 8.

²¹⁵ Bronnitt and McSherry, above n 213, at 51.

²¹⁶ Andrew Ashworth *Principles of Criminal Law* (5th ed, Oxford University Press, New York, 2006) [“Principles”] at 30.

²¹⁷ For example, the harm of ‘public welfare’ or ‘quasi-criminal’ offences is recognised to be a more general harm in the broadest sense of “harm to the community”. Public welfare offences are really matters of public administration, given the “teeth” of the criminal law to ensure compliance. They do not depend on ‘harm’ in the traditional criminal law sense.

²¹⁸ Ashworth “Principles”, above n 216, at 30.

²¹⁹ The non-disclosure of HIV status prior to unprotected sexual intercourse is considered a breach of the statutory duty on persons in charge of dangerous things (s 156), amounting to criminal nuisance (s 145). Thus, there is a settled view that the harm or the exposure to a risk of harm inherent in such conduct warrants criminal sanction in the form of a maximum penalty of imprisonment of one year (as well as the stigma of a criminal, but non-sexual, offence).

and generating fear.”²²⁰ Many victims suffer from what has been classified as ‘rape trauma syndrome’,²²¹ experiencing “persistent psychological distress” which can disrupt their lives and show “little resolution with time”.²²² The serious harm experienced by victims of sexual violation is reflected in the proportionately significant consequences of the offence: it carries a maximum penalty of 20 years imprisonment, a statutory presumption in favour of imprisonment, and the stigma and social condemnation which attaches to sexual offenders generally.

(ii) The harm of non-disclosure of HIV-status

The appellant in *KSB* suffered Post-Traumatic Stress Disorder but did not contract the HIV virus. Clearly, most who find themselves in *KSB*’s position would suffer shock and distress; feel deceived, angry and perhaps ‘violated’. When there is non-disclosure but no transmission of the virus, however, the nature and gravity of the harm caused is actually quite limited - in particular where the deception is discovered a long time after the sexual act. Certainly, not everyone in *KSB*’s position would necessarily suffer mental anguish on the level of post-traumatic stress disorder.²²³

(iii) Discussion

While ‘harm’ is not an element of the offence of sexual violation, the seriousness of the offence contemplates that a significant harm has been done to victims, justifying a maximum penalty of 20 years imprisonment. Because, in the overwhelming majority of cases, the offence is committed where no consent is *actually given* at the time of the sexual connection, resulting in both serious physical harm and mental trauma as described above, principles of harm and proportionality are not usually called into question.²²⁴

²²⁰ Temkin, above n 29, at 2.

²²¹ *Ibid*, at 1.

²²² *Ibid*, at 3.

²²³ For example, in *R v Mwai*, following the non-disclosure of HIV status without transmission of the virus, there was no evidence that the victim (B) had suffered serious psychiatric injury. B’s description of her own state of mind was not evidence of a disorder of the mind, but of the almost inevitable emotional consequence of the situation in which she found herself. The only evidence from a doctor who had examined B was that of her general practitioner, and she spoke only of physical symptoms. See *R v Mwai*, above n 15.

²²⁴ Equally, the majority of the vitiating circumstances in s 128A are all implicitly harmful in that they clearly involve a lack of choice and an absence of voluntary consent given at the time of the sexual intercourse. In that sense, where the victim is so intoxicated or mentally impaired that he or she cannot consent, or is unconscious, or submits because of the threat of force, the sexual activity is still physically and mentally harmful.

In contrast, where sexual intercourse is agreed to under mistaken belief (about something other than the ‘nature and quality’ of the activity), the act is still a consensual, pleasurable act, which at the time is participated in willingly. The harm - a different harm, if any - comes later when the truth is uncovered. Whether the harm is considered to be ‘in the deception’,²²⁵ or in a breach of the duty owed to one’s sexual partner,²²⁶ it is *unquestionably* different in nature and severity than the harm reflected in the offence of sexual violation:²²⁷

(It is) difficult to classify an activity which in and of itself is not perceived to be personally harmful, but quite the opposite, at the time of its occurrence by the victim, as a *harm* for the purpose of basing criminal liability (for rape) on it. ... That is not what the archetypal offence of rape was meant to cover. Rape traditionally – and in the vast majority of cases still today – involves the fact that the woman has to *endure* intercourse *against her will* because she is forced, threatened or finds herself in an exploitative situation which leaves her no choice.

(Original emphasis).

When non-disclosure of HIV status without transmission is elevated to the offence of sexual violation, there is a very real discrepancy between the seriousness of the criminal response and the actual harm suffered by the victim. On this basis, the criminal response proffered by *KSB* is argued to be a fundamentally disproportionate one.

Furthermore, if someone *wilfully spreads* HIV,²²⁸ and commits the offence of ‘infecting with disease’ they are potentially liable for a maximum penalty of 14 years imprisonment.²²⁹ In contrast, if someone simply fails to disclose his HIV status and no transmission occurs, on the basis of *KSB*, that conduct amounts to the offence of sexual violation, with a maximum penalty of 20 years imprisonment. The former is clearly much more reprehensible than the latter, and yet the maximum penalty of each offence communicates the opposite. Such a discrepancy in our criminal law supports the argument that non-disclosure of HIV status without more should not vitiate consent and give rise to the offence of sexual violation. It also illustrates the significant

²²⁵ See Michael Bohlander “Mistaken consent to sex, political correctness and correct policy” [2007] J Crim L 412 at 414 – 415. Bohlander argues that the harm in such cases is that the victim is “being duped” rather than “being penetrated”, and thus that “harm is...psychological, not physical, and it only achieves its effect after she finds out”.

See also: Richard Posner *Sex and Reason* (Harvard University Press, Cambridge (Mass), 1994) at 392: “Seduction, even when honeycombed with lies that would convict the man of fraud if he were merely trying to obtain money, is not rape. The thinking may be that if the woman is not averse to having sex with a particular man, the wrong if any is in the lies (and we usually do not think of lying in social settings as a crime) rather than in an invasion of her bodily integrity.”

²²⁶ See generally *R v Mwai*, above n 15.

²²⁷ Bohlander, above n 225, at 415.

²²⁸ *R v Mwai*, above n 15, confirms that it is not enough that the causative act was deliberate. ‘Wilfully’ means that the defendant intended to cause or produce the disease, and recklessness will not be sufficient.

²²⁹ Crimes Act s 201(1).

problem when the criminal law is ‘moulded’ to fit the ACC scheme without regard for the effect that might have on the criminal law, discussed in the previous Chapter.

2. *Fair Labelling*

The principle of ‘fair labelling’ requires that widely-felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of law-breaking.²³⁰ The principle is called into question when conduct that has been consistently and appropriately labelled as a ‘breach of duty’ amounting to ‘criminal nuisance’ is elevated to the serious crime of ‘sexual violation’. To understand the importance of this point, it is useful to examine some of the reasons that fair labelling is considered fundamental to the operation of good criminal law.

(i) **An accurate reflection of public opinion**

Fair labelling requires that criminal offences accurately reflect public opinion. Andrew Ashworth has suggested that where people generally regard two types of conduct as distinct, the law must reflect this difference.²³¹ Because different offences criminalise actions that have different social significance, on an impressionistic or intuitive level a particular criminal offence must reflect the sentiment of ordinary people regarding the reprehensibility of the conduct that it is directed towards.²³²

(ii) **The communicative function of an offence**

Because offence names have an educative or declaratory function,²³³ the accuracy of a label given to a particular offence is important for public communication.²³⁴ Because an offence label “can symbolise the degree of condemnation that should be attributed to the offender and signals to

²³⁰ Ashworth “Principles”, above n 216, at 88.

²³¹ Ibid, at 89.

²³² James Chalmers and Fiona Leverick “Fair Labelling in Criminal Law” (2008) 71(2) The Modern Law Review 217 at 218 – 219.

²³³ Ashworth “Principles”, above n 216, at 88.

²³⁴ Ibid, at 89.

society how the particular offender should be regarded,”²³⁵ the label given to particular criminal conduct should accurately reflect the degree or nature of the actual wrongdoing.²³⁶

It is all the more important that the communicative function of an offence is fair and accurate when information regarding a person’s offending affects his or her wider reputation, the most obvious example being his or her employment:²³⁷

The public record matters. While an employer may have few qualms about hiring a convicted fraudster as an orderly in a children’s hospital, it would be an entirely different matter to contemplate employing someone who has been in jail for paedophilia.

(iii) Fairness to the offender and the victim

Fair labelling is also crucial for fairness to both victim and offender. As Jeremy Horder explains:²³⁸

[W]hat matters is not just that one has been convicted, but *of what* one has been convicted. If the offence in question gives too anaemic a conception of what that might be, it is fair neither to the defendant, nor to the victim. For the wrongdoing of the former, and the wrong suffered by the latter, will not have been properly *represented* to the public at large.

(Emphasis added).

Horder’s point is equally valid if the offence in question gives too strong a conception of the nature of the offence of which the perpetrator has been convicted.

Regarding fairness to an offender, the label given to a particular offence also communicates society’s ‘view’ of the offender to the offender himself. The law must make clear “what sort of criminal each offender is”, and “communicate this to the (offender), so that he may know exactly what he has done wrong and why he is being punished, in order that his punishment appears meaningful to him, not just an arbitrary harsh treatment.”²³⁹

²³⁵ Chalmers and Leverick, above n 232, at 226.

²³⁶ *Ibid.* The symbolic function of the name of an offence has, for example, been cited as a reason to retain a distinction between murder and manslaughter rather than to merge the two.

²³⁷ *Ibid.*, at 234.

²³⁸ *Ibid.*, at 225.

²³⁹ *Ibid.*, at 229.

Similarly, victims must feel that the label the law places on the wrong that they have suffered accurately reflects that experience.²⁴⁰ In one sense, it is important that the legal record (the name of the offence) accords with the victim's own perception of the nature and seriousness of the wrong done to them.²⁴¹ In a wider sense, fairness to *all* victims requires that the experience of a particular victim is not devalued or diminished by the criminal law *equating* experiences of other victims that are in fact wholly different in nature or seriousness.

(iv) Discussion

The non-disclosure of HIV status before unprotected sex is, unquestionably, reprehensible conduct. Nevertheless, there is an intuitive difference or widely felt distinction between the non-disclosure of HIV status, and what is generally regarded as rape. In equating the two, labelling someone who fails to disclose his HIV status as a 'rapist', the victim of such a non-disclosure as a victim of rape, and communicating those labels to the public, the principle of 'fair labelling' is contravened. Dr Gallavin has illustrated this point by example:²⁴²

Sally meets Harry in a bar. Sally is the sexual aggressor and will not take no for an answer. Harry is happy to go along with the sexual advances of Sally but plays an entirely passive role. Sally takes Harry by the hand, leads him to her flat and has sex with him. Sally discovers the next day that Harry is HIV positive. On the principle established in *KSB* Harry is guilty of rape. I contend that Harry ought to be found guilty of a breach of his duty of care to Sally but not rape. To contend otherwise is to contravene the notion of fair labelling.

When HIV status is not disclosed prior to what is otherwise consensual, pleasurable sexual intercourse and there is no transmission of the virus, the offending party has intuitively been 'dishonest', and breached important duties to his sexual partner.²⁴³ However, if he is punished and labelled as a 'rapist', the criminal law fails to accurately describe what sort of criminal he is. Omitting to disclose one's HIV status, even where that omission exposes a sexual partner to the risk of physical harm, is *not* the same wrong as rape, and, as such, should *not* be given that label.

Furthermore, when the law equates the experience of someone who has suffered mental shock upon learning of her partner's HIV status some time after consensual unprotected sex with the experience of a 'traditional' rape victim, the experience of the latter is arguably devalued or

²⁴⁰ *Ibid*, at 235.

²⁴¹ *Ibid*, at 236.

²⁴² Gallavin, above n 17, at 157.

²⁴³ See generally *R v Mwai*, above n 15.

diminished. The two experiences are, quite clearly, wholly different in nature and seriousness. To the extent that they are equated in the eyes of the criminal law, the special significance with which sexual violation/rape is held out is diminished and the notion of rape generally is devalued or trivialised.

3. *Certainty*

While the State has a legitimate role in defining criminal conduct and providing penalties for such conduct, it must do so within certain parameters or boundaries. In particular, the Rule of Law requires certainty, clarity and prospectivity in the criminal law,²⁴⁴ so that citizens are able to live within the law by “deriving guidance from the law itself.”²⁴⁵

(i) **Liability for omissions in criminal law**

The requirement that the law (and especially the criminal law) must be certain, clear and prospective is particularly important in the case where liability can result from an omission to act as opposed to positive conduct. As Ashworth notes, for this reason, liability for omissions in criminal law is widely regarded as “exceptional”.²⁴⁶

Ashworth sees two particular problems with imposing liability for omissions through duties created at *common law*. First, because the list of duty situations remains open for judicial development, individuals often cannot know whether a failure to act in a given situation will lead to liability for a serious offence. Secondly, there may be nothing to put an individual on notice of the duty-situation.²⁴⁷

The New Zealand Law Commission, similarly, has found difficulty with the notion of duties imposed at common law.²⁴⁸

²⁴⁴ Simester and Brookbanks, above n 18, at 22.

²⁴⁵ *Ibid*, at 22.

²⁴⁶ See Andrew Ashworth “Public duties and criminal omissions: some unresolved questions” (2011) 1 *Journal of Commonwealth Criminal Law* 1 [“Public Duties”] at 11. Ashworth notes that, according to the principle of legality or the ‘rule of law’: “legal norms, and especially those of the criminal law, must be clear, stable and not retrospective in their operation. The law’s primary function is to guide people’s conduct, and in this context Lon Fuller, in his catalogue of “eight ways to fail to make a law”, emphasised the fundamental importance of publicizing laws and making them available to citizens.”

²⁴⁷ *Ibid*, at 12.

²⁴⁸ Law Commission Review of Part 8 of the Crimes Act 1961: Crimes Against the Person (NZLC R111, 2009).

We feel uneasy with the notion that uncodified duties can form the basis for criminal offences... It is a cornerstone of the rule of law that people should only be held criminally liable for conduct that was criminal at the time that it occurred, so that, if they were inclined to do so, they would be able to ascertain whether it is prohibited. This is not possible in relation to common law duties discerned by the courts from time to time... *We therefore consider that the basis of omissions liability in the criminal law of New Zealand needs to be comprehensively established by statutory duties, and confined to the scope of those duties.*

(Emphasis added).

(ii) The KSB duty to disclose

In finding that the non-disclosure of HIV status vitiates consent, the Court of Appeal has imposed a novel duty to disclose one's HIV status prior to unprotected sexual intercourse, and serious criminal liability can result from an omission to do so. While the Court discussed factors such as careful condom use, viral load and antiretroviral therapy, it did not indicate what effect - if any - they might have on the duty to disclose,²⁴⁹ thereby leaving the exact scope of the duty to disclose unclear.²⁵⁰ Furthermore, while KSB is limited to disclosure of HIV, the Court of Appeal's reasoning might apply to other serious sexually transmitted diseases (discussed in Chapter 2).

²⁴⁹ It is submitted that such factors are relevant and any 'duty to disclose' should be dependent on them, rather than apply absolutely in all circumstances. Where the risk of transmitting HIV is below a material level, either because of the nature of the sexual activity or because precaution was taken to lower the risk beneath this level, a defendant should not be considered criminally liable for sexual violation on the basis that he failed to disclose his HIV status. As noted by Janine Benedet, as the scientific understanding of HIV transmission has advanced and new treatments have become widely available, for some individuals, drug therapy may substantially reduce the risk of transmission, even for unprotected sex, by diminishing viral loads to nearly undetectable levels. Given such variables, an absolute duty to disclose seems inappropriate. See generally – Janine Benedet "Fraud Vitiating Consent to Sexual Activity after Mabior and C. (D.)" (2012) 96 Criminal Reports (Articles) 6th Series 33.

²⁵⁰ The ratio of KSB, that non-disclosure of HIV status before unprotected sex vitiates consent, is substantially broader than the Supreme Court of Canada's formulation in *Cuerrier* (which itself was even further qualified in *Mabior*). In *Cuerrier*, the Court decided that a complainant's consent to sexual intercourse can properly be found to be vitiated by "fraud" if the accused's failure to disclose his HIV-positive status is 'dishonest' and 'results in deprivation' by putting the complainant at a 'significant risk of suffering serious bodily harm'. The Court considered that 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". In *Mabior*, the Canadian Supreme Court noted the uncertainty in the "significant risk of suffering serious bodily harm" test in *Cuerrier* and varied the test, requiring disclosure only where there is a "realistic possibility of transmission of HIV". In *Mabior*, the Court found that a low viral load without a condom still required disclosure, however the combination of a low viral load and the use of a condom meant that there was no realistic possibility of transmission and thus no disclosure required.

(iii) Discussion

These contentions are particularly significant. Sexual activity between adults is a common and fundamental aspect of human behaviour and one that is inherently lawful, yet it is not consistently participated in on a totally honest basis. Therefore, to the extent that liability can arise for the omission to disclose a particular fact to a sexual partner, because there are a potentially unlimited number of facts that two sexual partners do not know about each other, and given the “stark dichotomy” between consensual sex and the serious consequences of the offence of sexual violation,²⁵¹ the law needs to be exceedingly clear as to which facts are deemed crucial to a valid consent and not merely trivial. The imposition of such duties of disclosure on a case-by-case basis erodes the ability to derive guidance from the law and clearly ascertain whether a failure to act in a particular situation might give rise to criminal liability.

The Law Commission has suggested that the basis of omissions liability in the criminal law of New Zealand needs to be comprehensively established by statutory duties. Such a suggestion is particularly important with respect to the newly imposed duty to disclose one’s HIV status. If Parliament in fact endorses such an extension to the crime of sexual violation, the extension should be specifically clarified through specific provision in the Crimes Act which sets out clearly and in advance which facts will be deemed crucial or fundamental to the validity of consent.

D *Existing criminal offences*

Any suggestion by the Court of Appeal that its approach – to elevate such conduct to sexual violation – was necessary to ‘fill a gap’ in our law is questionable, having regard to a number of existing offences that adequately deal with deceptive and risky sexual behaviour.²⁵²

1. *Criminal nuisance*

Before *KSB*, the law in New Zealand had dealt with the non-disclosure of HIV as a breach of duty amounting to criminal nuisance. Section 145 provides:²⁵³

²⁵¹ Dingwall, above n 25, at 32.

²⁵² See *KSB v ACC*, above n 11, at [72] and [74].

Every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual.

In *R v Mwai*, it was held that the offence of criminal nuisance was committed by an HIV-positive person who had unprotected sexual intercourse which in the absence of knowledge of the risk by the endangered person.²⁵⁴ Such conduct was found to breach both the statutory duty imposed on persons in charge of dangerous things by s 156,²⁵⁵ and the common law duty “not to engage in conduct which one can foresee may expose others to harm.”²⁵⁶

In *Police v Dalley*, the defendant (who was the appellant’s former partner in *KSB*) was charged with criminal nuisance.²⁵⁷ In this instance, he was held to have taken reasonable precautions by using a condom during sexual intercourse, so that, despite not disclosing his HIV status, he had discharged the relevant duties.²⁵⁸

2. *Wounding with intent*

In some circumstances, a charge of ‘wounding with intent’ may be appropriate. Section 188(2) provides:²⁵⁹

Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to injure anyone, or with reckless disregard for the safety of others, wounds, maims, disfigures, or causes grievous bodily harm to any person.

In *Mwai*, the court considered that not every kind of reckless infection with disease would fall within the section. The Court described HIV as a disease “so simply communicated” and “so

²⁵³ Crimes Act, s 145.

²⁵⁴ See *R v Mwai*, above n 15.

²⁵⁵ Crimes Act, s 156: “Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, operates, or maintains anything whatever, which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.”

²⁵⁶ *R v Mwai*, above n 15 at 11. The Court considered the duty in s 156 as “no more than a particular aspect of the more general common law duty not to engage in conduct which one can foresee may expose others to harm.” The Crown formulated the duty in terms of s 156 in *Mwai* as follows: “the appellant had under his charge and control seminal fluid infected with the HIV virus, in the absence of precaution or care that infected semen might endanger human life; reasonable precautions and reasonable care required that he use a condom if engaging in sexual intercourse; and that he therefore had a duty to use one.”

²⁵⁷ *Police v Dalley*, above n 82.

²⁵⁸ *Ibid*, at [49] and [50]. His failure to disclose his HIV status to the complainant, while perhaps a breach of moral duty, could not alter this.

²⁵⁹ Crimes Act, s 188(2).

deadly in its outcome”, and held that a charge of wounding with intent would be pre-eminently appropriate.²⁶⁰

In addition to requiring intent to injure or reckless disregard for the safety of others, the section requires proof of grievous bodily harm. The Court in *Mwai* found that such harm could include “really serious psychiatric injury”.²⁶¹ Evidence of the victim’s state of mind did not indicate such mental harm had been suffered, and accordingly the charge was not available in that particular case.²⁶²

3. *Infecting with disease*

Where the conduct is more serious (i.e. where there is an intention to cause the disease and actual transmission of the virus) infecting with disease might be an appropriate charge. Section 201 provides:²⁶³

Every one is liable to imprisonment for a term not exceeding 14 years who, wilfully and without lawful justification or excuse, causes or produces in any other person any disease or sickness.

Under s 201, it is not enough that the causative act was deliberate: “wilfully” means that the defendant intended to cause or produce the disease: recklessness is not sufficient.²⁶⁴ In *Mwai*, s 201 was held not to be an appropriate charge for the jury to consider because the situation was “plainly a case of reckless rather than wilful harm.”²⁶⁵

E Conclusion

For a number of important legal reasons, the non-disclosure of HIV status *should not* vitiate consent and turn an otherwise consensual sexual act into the crime of sexual violation. The final Chapter suggests possible legislative amendment if considered necessary to address any ‘gap’ that might remain in the law.

²⁶⁰ *R v Mwai*, above n 15 at 4.

²⁶¹ *Ibid*, at 7 – 8.

²⁶² *Ibid*, at 8.

²⁶³ Crimes Act, s 201.

²⁶⁴ Robertson “Adams looseleaf”, above n 20, at CA201.01.

²⁶⁵ *R v Mwai*, above n 15 at 3.

IV Proposed amendments as an alternative to the approach in *KSB v ACC*

A Overview

This Chapter suggests that *if* the non-disclosure of HIV and/or other serious sexually transmitted diseases is considered to be inadequately addressed by the criminal law at present, the addition of a new sexual offence to the Crimes Act 1961 is a possible solution. The inclusion of this new offence in Schedule 3 of the Accident Compensation Act could also be used to extend the provision of accident compensation cover for mental injury resulting from such conduct.

This would be the preferable route to achieving in future the ACC compensation result for a person suffering mental injury in the circumstances of the victims in the *KSB* and *CLM* cases (and avoids viewing the non-disclosure of HIV status as amounting to non-consensual intercourse).

B Cover for mental injury following the non-disclosure of diseased-status

CLM illustrated that if a victim suffered mental injury as a result of later discovering a partner's non-disclosure, no cover was available under the Accident Compensation Act because of the limited Crimes Act offences set out in Schedule 3. In *KSB*, the Court of Appeal's conclusion to the contrary was that the law should regard the act of sexual intercourse in those circumstances as non-consensual and hence to be sexual violation or rape, making ACC cover available to the victim by reason of the cross-reference to that offence in Schedule 3. Regarding the adequacy of the Court's response, Joseph Fitzgerald has argued:²⁶⁶

The end result appears to be a fair one. However, the path the court had to take to get there leaves me a bit uneasy. [A]ssuming (the non-disclosure of HIV status) does warrant a criminal sanction, achieving that sanction by bundling it into s 128 seems like a rushed response. The harm being addressed here is the exposure of an individual to a potentially life-threatening

²⁶⁶ Joseph Fitzgerald "Does HIV-positive status vitiate consent? An analysis of *KSB v Accident Compensation Corporation*" (2012) Young Lawyers Committee Advocate <http://issuu.com/rwalthall/docs/advocate_autumn12>

disease: a very different harm to that addressed by s 128, and one that probably deserves its own offence to avoid distorting the purpose of s 128. The result seems just, however, the method highlights the need for some legislative attention in this area.

A superficially simple legislative alternative to *KSB* might be to include ‘criminal nuisance’ in Schedule 3 to the ACC Act. However, this would likely be inappropriate for a number of reasons. Apart from the offence of ‘infecting with disease’ (s 201 of the Crimes Act), the Schedule 3 offences are all of a serious sexual nature. In contrast, criminal nuisance is an extremely wide offence, encompassing “any unlawful act or omission to discharge any legal duty” (including uncodified common law duties) where such an act or omission is known to “endanger the lives, safety, or health of the public, or the life, safety, or health of any individual.” Thus inclusion of criminal nuisance in Schedule 3 could result in ACC cover for mental injury becoming available for an extremely wide range of acts and omissions. It can be assumed that, on the contrary, Parliament’s intention has been to specifically limit cover for mental injury in particular to specific criminal acts.²⁶⁷

C Proposed offence

If considered by Parliament to be desirable, to give effect to the Court of Appeal’s ‘ACC thinking’ in *KSB* and to ensure victims in *KSB*’s situation are granted cover for mental injury, a new provision could be enacted in Part VII of the Crimes Act of ‘infecting with or exposing to sexually transmitted disease’.

Such a new offence should specifically and carefully define the risky sexual conduct which is worthy of the attention of the criminal law in a measured and appropriate way which is commensurate with the harm it causes including, in particular, mental injury to the victim.

²⁶⁷ See generally the Court of Appeal’s analysis to this effect in *KSB v ACC* at [23] to [29].

Such a provision might provide as follows:

Infecting with or exposing to sexually transmitted disease

Every person who has knowledge that he or she has a sexually transmitted disease and, through sexual activity with another person who does not have that knowledge –

(1) infects that other person with that sexually transmitted disease, or

(2) exposes that other person to a realistic possibility of transmission of that sexually transmitted disease,

commits an offence and is liable, on conviction, to a fine not exceeding \$2,000 or to imprisonment for a term not exceeding 2 years, or to both.

(3) for the purposes of this section sexually transmitted disease shall mean HIV, ...

For the reasons discussed in previous Chapter, certainty is fundamental to the criminal law. As such, “sexually transmitted disease” would need to be clearly and expressly defined. Which diseases were included in the definition would have to be carefully considered by the relevant appropriate medical experts, having regard to their seriousness, the consequences of infection and whether (to use the terminology of the Courts) they might, if passed on to a victim, impose a sentence of disease (or death) which affects the victim “in a profoundly serious way that merits the criminal sanction”.²⁶⁸

In particular, the criminal provision and the definition of “sexually transmitted disease” should not be framed so widely as to open the ‘floodgates’ to criminalising all consensual sexual activity carrying risks of disease or to the provision of ACC cover for mental injury suffered when the risk or the activity became apparent.

An exact definition of ‘sexually transmitted disease’ is not proposed here. HIV would of course be included in the definition, as would any other diseases widely regarded as comparably ‘serious’, and with long term negative consequences, even if they were not necessarily fatal.

A number of points are relevant to this proposed legislative ‘solution’:

1. HIV (and other diseases that *can* be transmitted sexually) are clearly not *always* transmitted sexually. For example, HIV can be spread through needle sharing and other risky activities that involve a transfer of blood or other bodily fluids. The proposed

²⁶⁸ *R v Cuerrier*, above n 1, at [72] per McLachlin J.

offence *does not* seek to criminalise infection in non-sexual circumstances.²⁶⁹ This is addressed by the requirement that infection or exposure must be done “through sexual activity.”

2. The proposed offence recognises the potential harmfulness of the non-disclosure in the context of sexual activity of HIV status and other comparatively serious STDs. The proposed maximum penalty (2 years imprisonment, or a \$2000 fine, or both) is proportionate to the gravity of the harm that results from such behaviour. It is suggested that imprisonment would only be warranted in particularly serious or repeat cases.
3. The offence is specifically targeted at conduct such as that in *KSB* and it fairly and accurately labels such conduct, as opposed to inappropriately classifying it as sexual violation/rape. While the offence does overlap with criminal nuisance (as far as non-disclosure of potentially seriously harmful sexual diseases is concerned), it avoids labelling such conduct overly widely. As noted, criminal nuisance is an extremely broad offence and is not inherently sexual in nature.²⁷⁰
4. The proposed offence requires that the accused knew of his diseased status and the victim did not. In that respect, it does not overlap with or detract from either ‘wounding with intent’ or ‘infecting with disease’. ‘Wounding with intent’ requires an intent to injure or reckless disregard for the safety of others, and ‘infecting with disease’ requires ‘wilfulness’ (and as such is reserved for the most serious conduct). These higher *mens rea* requirements are reserved for more serious conduct, reflected in their higher penalties (7 years and 14 years, respectively).
5. Non-disclosure with actual knowledge of a serious disease is obviously reprehensible and warrants the intervention of the criminal law at an appropriate level. A person who had obvious physical symptoms but for whatever reason ‘didn’t want to know’ if he was actually infected and ‘turned a blind eye’ to confirming his STD status should not escape liability, given the criminal law’s approach to treating such a person – someone who is

²⁶⁹ Consideration of wider criminalisation is outside the scope of this dissertation. The discussion in this dissertation is limited to the non-disclosure of HIV status prior to sexual intercourse, as opposed to exposure to or transmission of HIV more generally.

²⁷⁰ By way of illustration, in *R v Turner* (1995) 13 CRNZ 142 (CA), the appellants breached the duty imposed by s 156 in that they failed to take reasonable precautions against, and use reasonable care to avoid, the danger to life if contaminated mussels reached consumers.

‘wilfully blind’ – as having requisite knowledge in certain circumstances.²⁷¹

6. The offence is committed if transmission does occur, or, in the case of exposure but no transmission, if there was a “realistic possibility” of transmission. In covering both situations, the offence reflects that knowing non-disclosure can be harmful (or at least risk harm) whether or not transmission occurs, but avoids criminalising exposure when the risk of transmission is negligible (because in such cases the criminal law has no place to intervene). This also allows factors such as condom use, a person’s viral load, the effectiveness of any viral therapy or other treatment, the stage of the disease (i.e. whether it is in remission), and the nature of the sexual activity itself to be taken into account when assessing culpability.
7. “Realistic possibility of transmission” is a standard adopted from *R v Mabior*. The Supreme Court of Canada found such a standard to overcome the uncertainty of the “significant risk of serious bodily harm” test proffered by the Court in *R v Cuerrier*.²⁷² The Court considered that drawing the line between criminal and non-criminal misconduct at a “realistic possibility of transmission” would strike an appropriate balance between the complainant’s interest in autonomy and equality, and the need to prevent the over-extension of criminal sanctions.”²⁷³ The Court found that as a general matter, a realistic possibility of transmission of HIV would be negated if the accused’s viral load at the time of sexual relations was low and condom protection was used.²⁷⁴ While “realistic possibility” does not appear to be a standard used often in our criminal law, the high level consideration by the Supreme Court of Canada of the phrase, specifically in relation to HIV transmission and factors such as viral load, would make it an appropriate test in

²⁷¹ See generally *R v Crooks* [1981] 2 NZLR 53 (CA) and *R v Martin* [2007] NZCA 386 for a discussion of knowledge and its interrelationship with wilful blindness. In *R v Martin*, the Court of Appeal noted the very useful discussion on the topic in Simester and Brookbanks *Principles of Criminal Law* (3ed 2007) at [4.5.1]: “the concept of “wilful blindness” can arise in two situations. The first arises where the accused ‘shuts his eyes and fails to inquire ‘because he knows what the answer is going to be’ (*R v Crooks* [1981] 2 NZLR 53 at 58 (CA). The second situation arises ‘if the means of knowledge is easily to hand and D realises the likely truth of a matter but refrains from inquiry in order not to know’.” If someone had physical symptoms commonly associated with a sexually transmitted disease, for example, yet failed to inquire further, it is argued that either of these tests would be satisfied.

²⁷² *R v Mabior*, above n 127, at [88]: “The common law and statutory history of fraud vitiating consent to sexual relations supports viewing “significant risk of serious bodily harm” as requiring a realistic possibility of transmission of HIV. This history suggests that only serious deceptions with serious consequences are capable of vitiating consent to sexual relations. Interpreting “significant risk of serious bodily harm” in *Cuerrier* as extending to any risk of transmission would be inconsistent with this. A realistic possibility of transmission arguably strikes the right balance for a disease with the life-altering consequences of HIV.”

²⁷³ Considerations expressed in *R v Mabior*, above n 127, at [89].

²⁷⁴ *Ibid*, at [101].

relation to an offence such as that suggested.

8. The adoption of a new criminal offence like the one proposed would be consistent with society's changing views of the criminality of certain sexual conduct. The offence of 'female genital mutilation', for example, was added to the Crimes Act in 1996,²⁷⁵ while the offence of 'anal intercourse' was deleted in 2005.²⁷⁶

D Amendment to the Accident Compensation Act

In addition, it is suggested that the proposed new criminal offence should be added to Schedule 3 of the Accident Compensation Act, so that, if a victim suffered a qualifying mental injury such as PTSD, accident compensation for that mental would be available. In contrast to criminal nuisance, the proposed provision would be an appropriate addition to the Schedule. Although the suggested maximum penalty (2 years imprisonment) is at the lower end of the penalties for the offences already in the Schedule, the emphasis of the Schedule is principally compensation for the mental impact of sexual offences on the victim, and, as the Courts have now recognised in cases such as *KSB*, the impact of such non-disclosure in cases of sexual activity can be particularly serious.

E Conclusion

While the addition of a new criminal offence such as that suggested above is not the only (or necessarily the best) alternative legislative response, it does demonstrate the existence of more appropriate alternatives to the Court of Appeal's approach in *KSB v ACC*.

²⁷⁵ Crimes Act, s 204A: inserted, on 1 January 1996, by section 3 of the Crimes Amendment Act 1995 (1995 No 49).

²⁷⁶ Crimes Act, s 142 (repealed): 20 May 2005, by section 7 of the Crimes Amendment Act 2005 (2005 No 41).

Conclusion

Human beings are not paragons of sexual behaviour, and intimate sexual relationships are frequently manipulative and dishonest. Whether such dishonesty is trivial or serious, the most serious end of the criminal law is hardly an appropriate mechanism to attempt to regulate such intensely personal and private behaviour.²⁷⁷ While requiring that consent be ‘informed’ or expanding ‘nature and quality’ might be superficially admirable objectives, it is not feasible for the criminal law to require positive informational obligations or bring a regime of mandated disclosure into sexual negotiations.

This dissertation establishes that until the Court of Appeal’s decision in *KSB v ACC*, the position under the criminal law had been clear and consistent with comparable overseas jurisdictions. Before *KSB*, a ‘mistake’ on the part of one party as to the sexually-diseased condition of the other did not amount to a mistake about the ‘nature and quality’ of the sexual act, so as to vitiate the consent of the ignorant party, and render the party with such undisclosed knowledge guilty of sexual violation or rape. Nor was the consent to the sexual activity in such circumstances vitiated because it was *not* ‘informed’ consent.

The Court of Appeal’s reasoning in *KSB* has unconvincingly reversed that position. On the facts the ratio relates only to the disease of HIV, but on the reasoning all serious diseases (which can be sexually transmitted) would appear to be covered. This dissertation argues that the Court’s reasoning is not persuasive, and was inconsistent with established case law - including with the careful and comprehensive analysis of the issue on virtually identical facts by Randerson J in *CLM v ACC*. Similarly, the Court of Appeal’s apparently heavy reliance on parts of the minority reasoning in *Cuerrier* was misplaced given the materially wider criminal law provision under consideration in that jurisdiction.

It is argued that the non-disclosure of HIV status should not vitiate consent for a number of important reasons, including the principles of proportionality, fair labelling and certainty that underpin the criminal law, and the existing offences that provide sanctions against such conduct which do meet and are consistent with the above principles.

Even if the existing laws are now thought to be inadequate, the proper course is for Parliament to make appropriate amendments to those laws to reflect the perceived policy considerations of the

²⁷⁷ Unless, of course, the dishonesty goes to the very root of the transaction, as in cases of a mistake about the ‘nature and quality’ of the act or the identity of the sexual partner.

day and to make any adjustments to those offences and penalties accordingly. If there is considered to be a gap in the treatment of risky and deceptive sexual behaviour, and the provision of cover for mental injury that results from such behaviour, amendment to the law such as those proposed in the previous Chapter could adequately address it.²⁷⁸ Regardless, there should be a prompt and careful review of the law in this area by Parliament or the Law Commission with a view to amending the Crimes Act to remove the effect of the *KSB* decision on the criminal law.

If the criminal law does have a legitimate role to play in determining standards of disclosure where serious health risks are involved, then it should separately and accurately provide for clear minimum requirements in appropriate legislation, even if such provisions appear artificial in the context of intimate ‘risky’ human encounters. Because, in the criminal law, ‘ignorance of the law is no excuse’, it is vital that no one should be ignorant of the fact that what he or she is saying - or more importantly, *not saying* - may be regarded by the law as converting ostensibly consensual sexual activity into the crime of sexual violation, carrying with it a maximum penalty of 20 years in prison.

²⁷⁸ Or, if Parliament in fact endorses such an extension to the crime of sexual violation, to clarify the extent of the extension and to close the “floodgates” that the Court of Appeal has possibly opened (or at least to remove the considerable uncertainty as to how far the Court of Appeal’s reasoning might extend).

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