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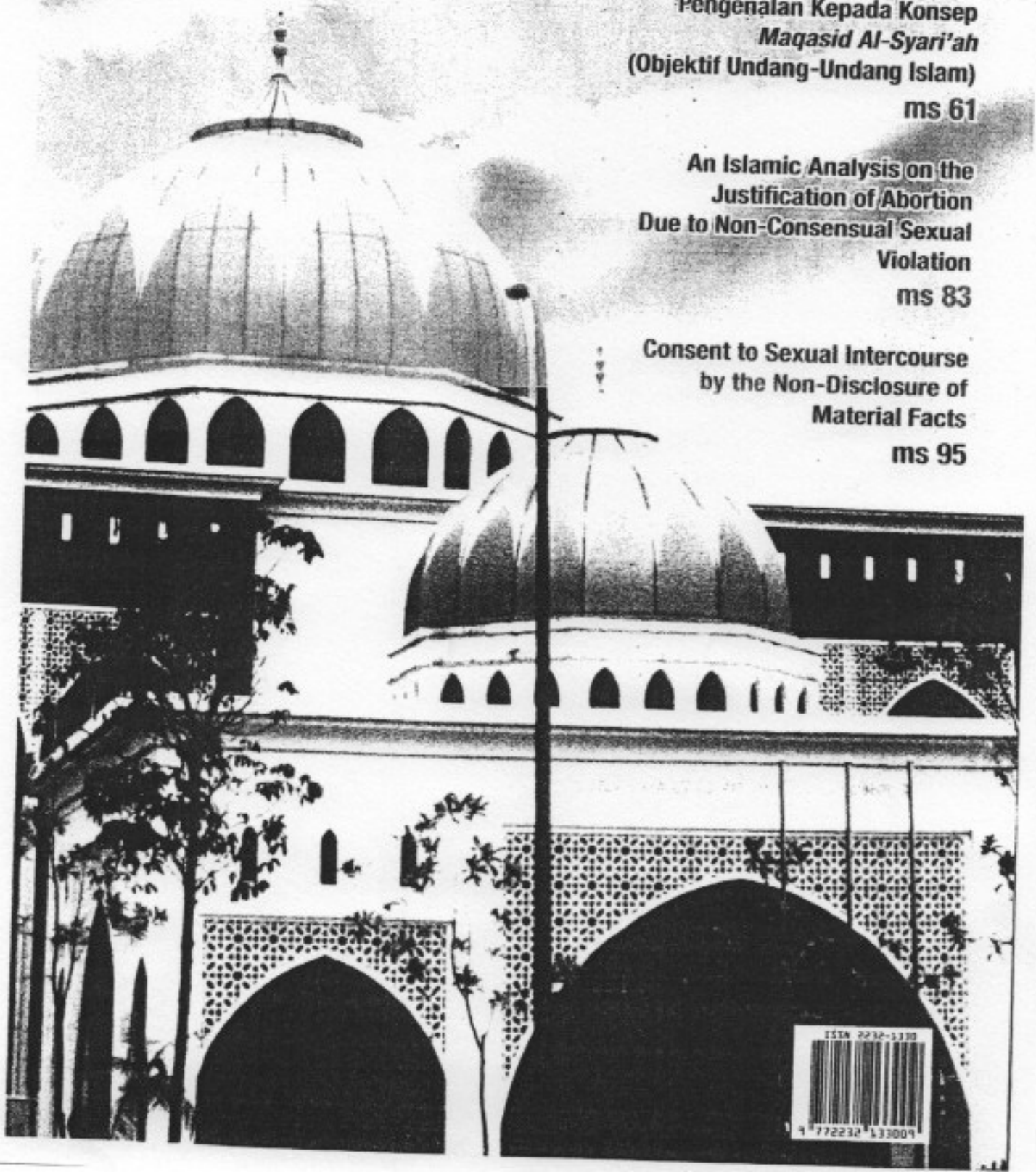

ISSN 2232-1330

Sidang Redaksi

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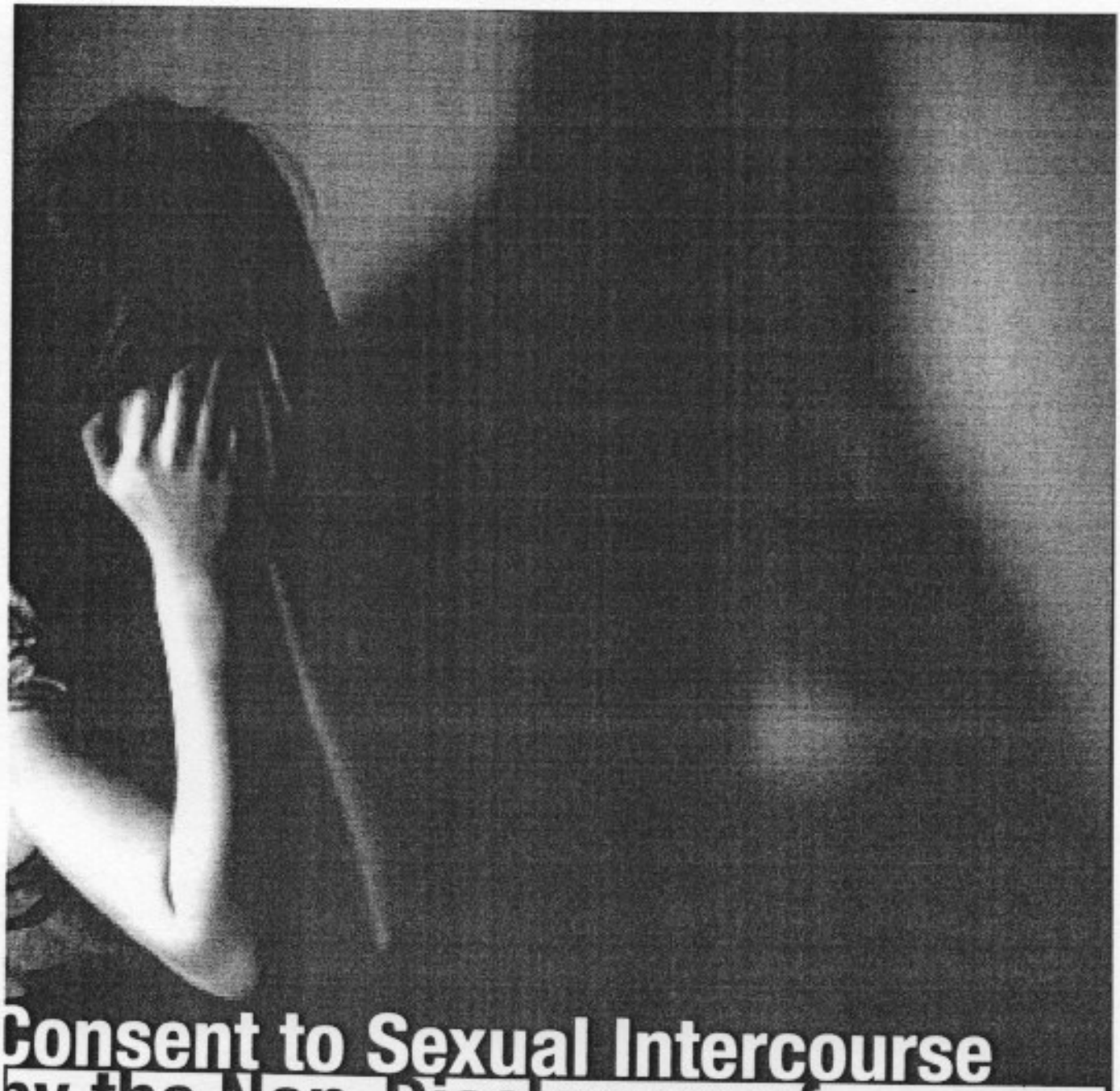

Consent to Sexual Intercourse by the Non-Disclosure of Material Facts

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troduction

a man who is suffering from venereal disease or ven AIDS conceals this fact from his sexual partner, ould her consent to the sexual intercourse be iated based on mistaken belief as to the nature id quality of the act?[1] An analogy to this situation would be such as the complainant consenting to an immunisation shot and, instead, being purposefully injected with cancerous cells. For sure, such consent to the application of force (the injection) has obviously been vitiated by the fraud.[2]

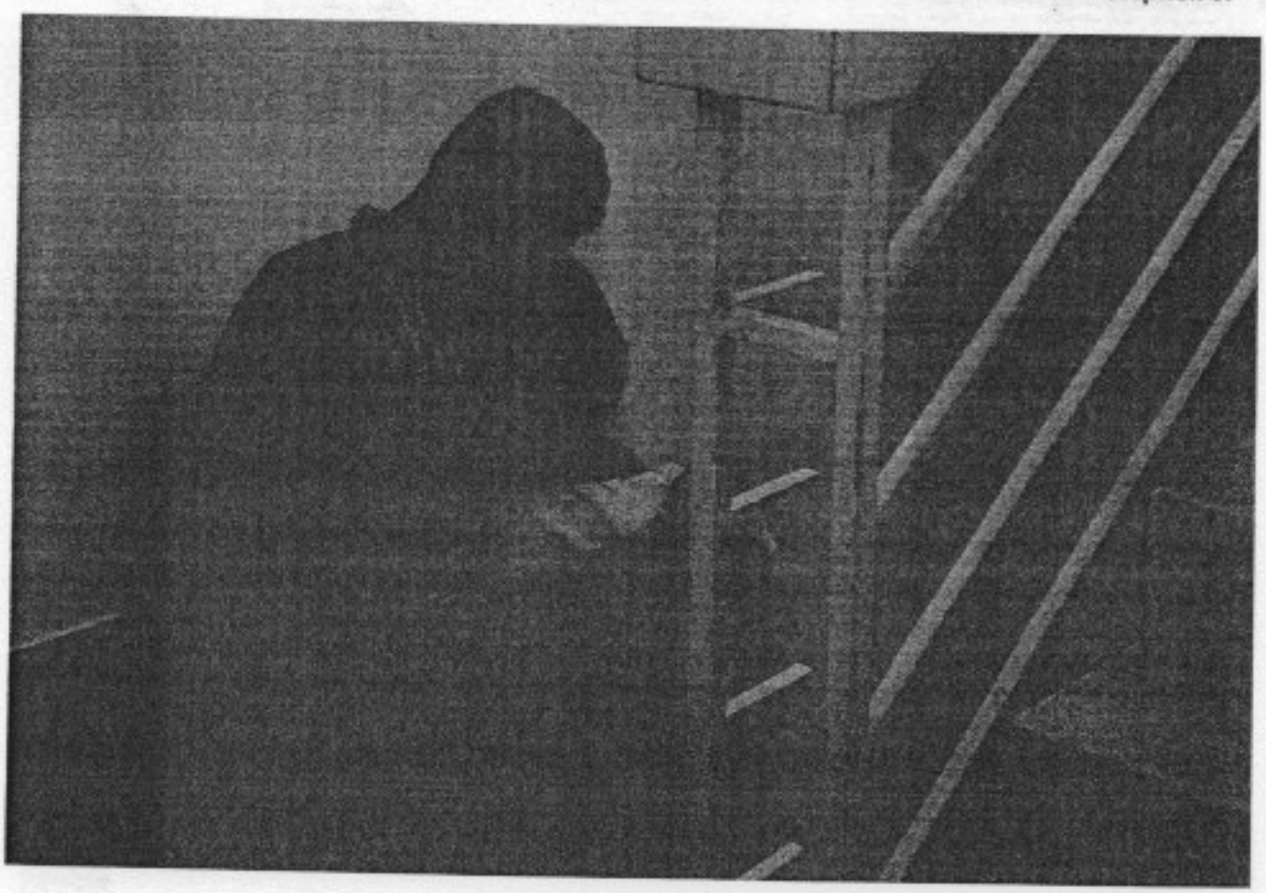
The Law Commission Consultation Paper No. 139 invites views on how the law should be deal with the obtaining of consent by the non-disclosure of material facts. Should a man be required to disclose anything else to a woman before taking advantage of her consent to intercourse? Should any sexually transmissible disease or illness qualify for this purpose? What about if the man suspects that he may have a disease, but does not know for sure? : see paras 6.19, 6.29, 6.30, 6.31 and 6.33.

One could argue, in the alternative, that the accused had gone beyond the scope of the consent by transmitting a disease to the complainant while engaging in a sexual act, the latter being the only thing to which the complainant had consented.

In the English case of R v. Clarence,[3] the accused was charged and convicted with "unlawfully and maliciously inflicting grievous bodily harm" upon his wife, and with "an assault" upon her "occasioning actual bodily harm".[4] He had sexual intercourse with her at a time when he knew himself to be suffering from gonorrhea and had thereby infected her. His wife did not know that the accused was diseased in this way and would withhold her consent to intercourse, which she would have been justified in doing, if she had known of his condition. The prosecution argued that the accused's suppression of this fact amounted in the circumstances to a fraud that vitiated his wife's consents to intercourse and therefore rendered the communication of the disease by intercourse an assault. The Court for Crown Cases Reserved held that even if the accused's concealment of his condition amounted to a fraud, the deception was not relevant to consent. His wife understood the act of intercourse and knew that the man with whom she was undertaking it was her husband. The communication of a disease was not in itself an unlawful degree of harm to inflict and thus the conviction was quashed.[5]

"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. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. The woman's consent here was as full and conscious as consent could be. It was not obtained by any fraud either as to nature of the act or as to the identity of the agent."[6]

Stephen J.



3. (1888) 22 Q.B.D. 23.

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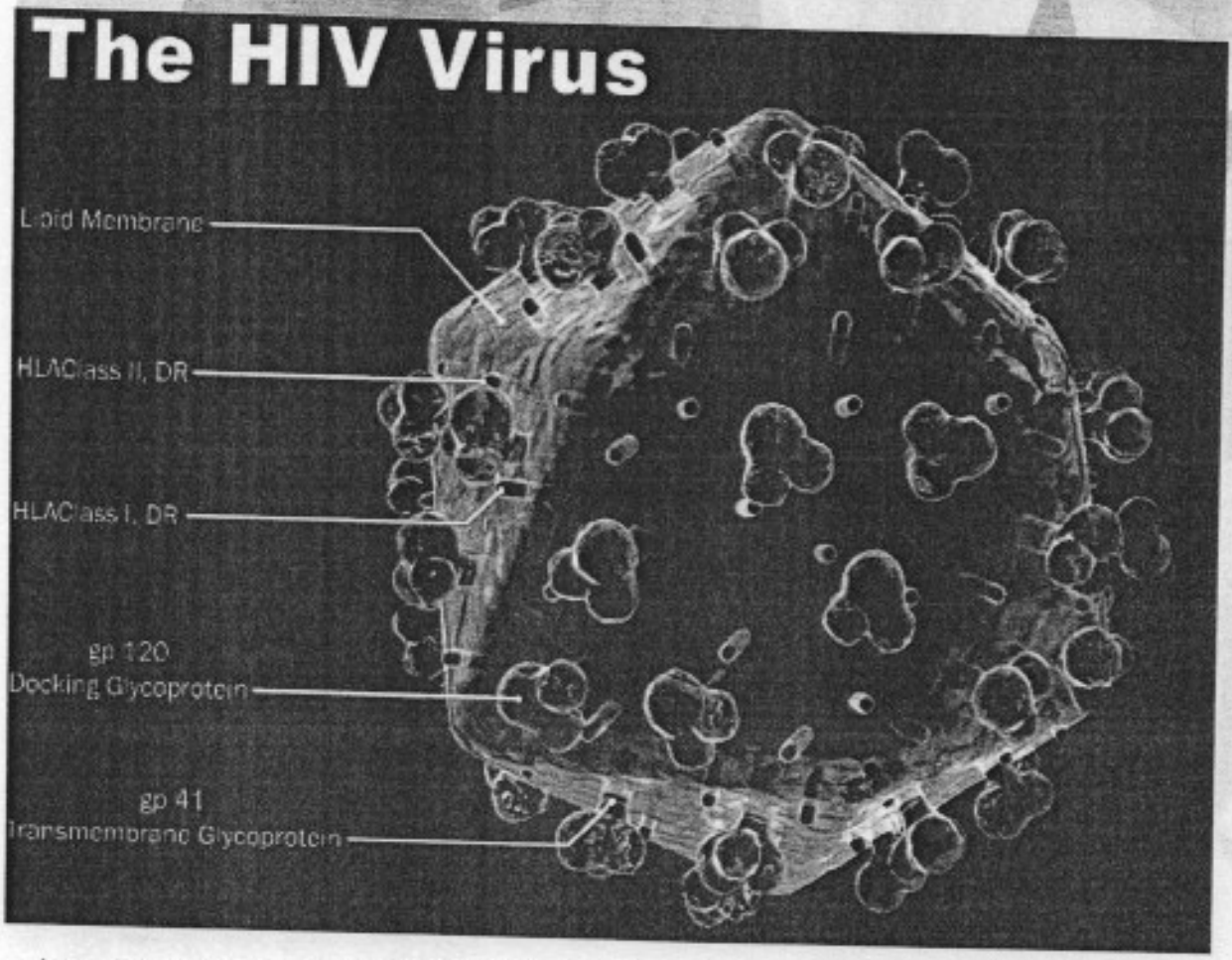
5. Prior to the leading case of R. v. Clarence, in R. v. Bennett (1866) 5 F. & F. 1105, 176 E.R. 925, in which Will J., decided that a man knowing that he had a foul disease, induced a girl of 13, who was ignorant of his condition, to consent to sleep with him, and infected her, might be convicted of an indecent assault and this assault is within the rule that fraud vitiates consent. This authority was followed in R. v. Sinclair (1867) 13 Cox C.C. 28 (C.C.C.) by Shee J. that failure to disclose a venereal disease to one's sexual partner was a deceit which vitiated consent and R. v. Bennett was disapproved in Hegarty v. Shine (1887) 14 Cox C.C. 124, though, as the Irish Courts carried out, the verdict may possibly have been justified by the facts as proved, the girl having sworn that she was asleep and could not recall what was happened to her.

6. (1888) 22 Q.B.D. 23, 43-44. The Law Commission provisionally proposes that self-induced mistakes nullifying consent should be extended to mistakes as to any circumstances such that, had the consent been obtained by a deception as to that circumstances, it would not have been treated as valid, if the defendant knows that such a mistake has been made or is aware that such a mistake may have been made. See Law Commission Consultation Paper No. 139 (1995), paras. 6.24-6.27 and 6.45.



e above decision illustrates that if the complainant derstands the nature and quality of the physical ntact made, and knows or aware who is making she cannot retrospectively withdraw her consent cause she failed to appreciate all the risks olved and if the complainant makes a fundamental stake as to nature of the act, there is no consent ether or not the mistake was induced by fraud. the Canadian case of *R. v. Ssenyonga*,[2] the cused knowing he was infected with HIV, and hout telling the three complainants of that fact, gaged in sexual intercourse with them, thereby posing them to the risk of HIV infection, which they osequently contracted. The accused moved for lirected verdict of acquittal on the three charges aggravated sexual assault on the ground that ch of the three complainants freely and voluntarily gaged in sexual intercourse with him without the of a condom.

The motion was granted. The complainants may not have consented to the transmission of the virus, nor even to the risk of that occurring, but the evidence was indisputable that they did consent to the application of force inherent in the acts of sexual intercourse, which force was not in itself excessive or dangerous. There was, furthermore, no evidence of fraud, as the complainants were under absolutely no misapprehension as to the nature of the acts in which they were engaging. They were fully aware that they were consenting to participate in acts of sexual intercourse with the accused.

In *R. v. Cuerrier*,[3] the accused had consensual unprotected sexual intercourse with the two complainants on a number of occasions. The accused knew that he was HIV positive, but did not inform the complainants of that fact misled them as to his status. He had been advised by public

1993) 81 C.C.C. (3d) 257 (Ont. Gen. Div.). Contrast R. v. Lee (1991) 3 OR (3d) 736
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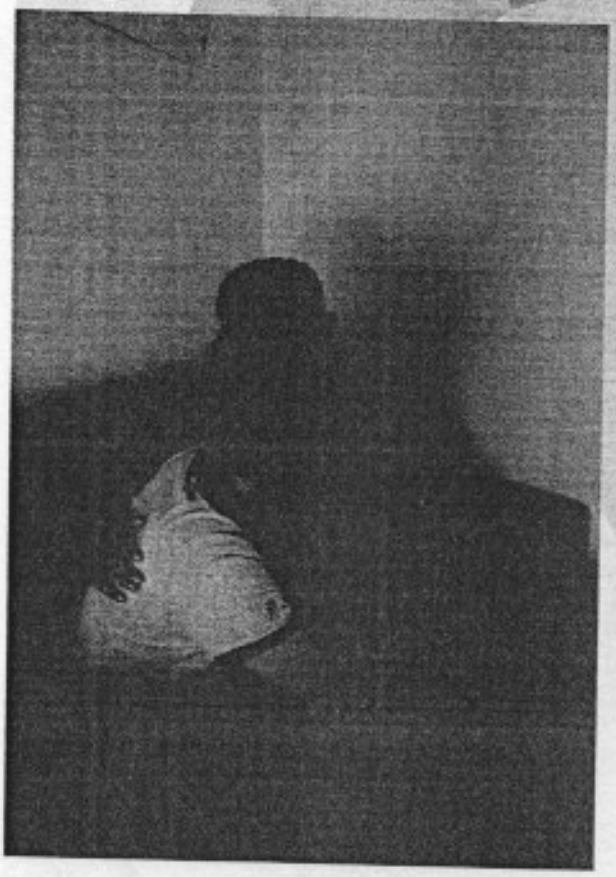
officials of the risk of transmission of the virus through unprotected intercourse. The complainants claimed that they would not have had sexual intercourse with the accused if they had known his status. The accused was later charged with assault and aggravated sexual assault. The Crown argued that the complainants' consents had been vitiated by fraud, that the accused's conduct exceeded the scope of the consents that the consents were of no effect because there were not informed consents and that the consents were vitiated by reason of public policy. The trial judge dismissed the Crown's arguments. He found the consents were valid and consequently acquitted the accused.

The authorities and the history of the assault provisions of the case revealed that the only categories of fraud which vitiated consent were "fraud as to the nature or quality of the act", that Parliament had not broadened the categories, and that the accused's conduct did not fall within either category. The courts should be reluctant to import the concept of informed consent from the context of civil medical malpractice proceedings into criminal cases. Even if Crown could succeed in drawing an analogy in a criminal context, it had not shown that the accused had exploited a power imbalance in his favour to obtain the consents. There was no evidence that the sexual activity engaged in by the accused and the complainants involved any more force than is naturally inherent in the act. The accused's actions were not outside the scope of the complainants' consents.

The complainant consented to the sexual act but not to the transmission of a deadly disease.[9] There was consent only to the sexual contact but no consent with

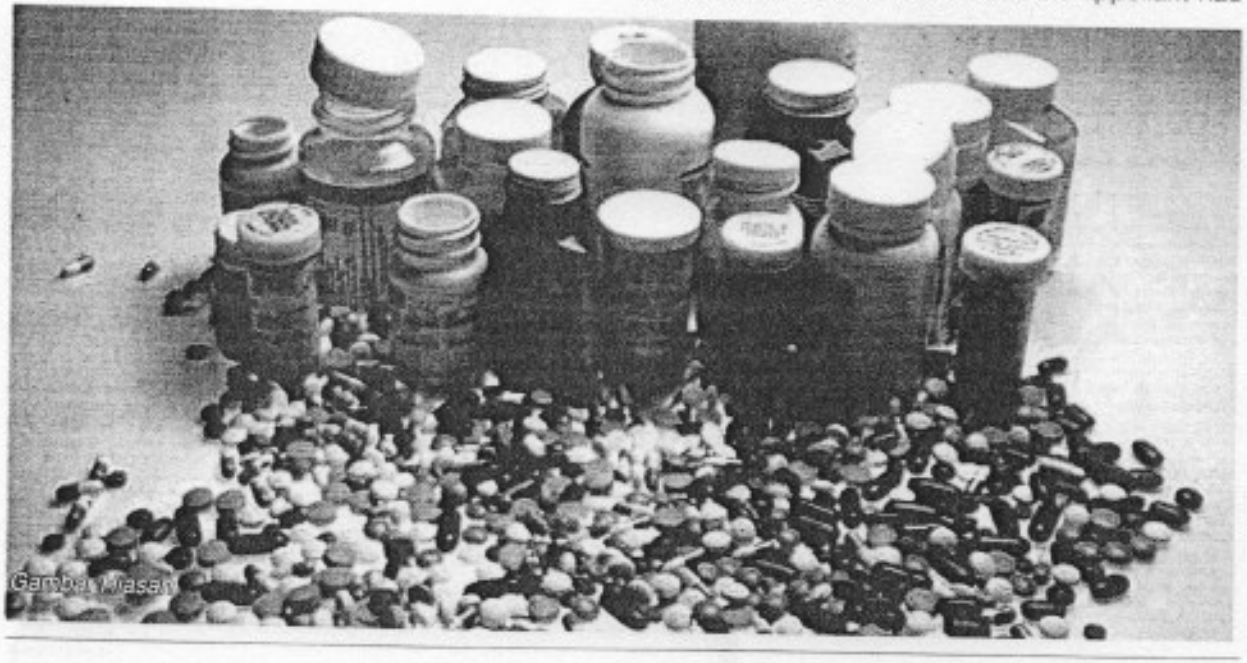
9. The Law Commission Consultation Paper No. 139 submitted that a mistaken belief in certain kinds of fact, such as the defendant's freedom from sexually transmissible disease, may arguably be tantamount to a mistake as the nature of the act: see para 6.27.



espect to the application of force involved resulting om the transmission of the disease. What is really bjected to is not the intercourse but the contact ith the virus. Hence, it may be argued that there is onsent for the purpose of intercourse but not consent for the purpose of assault. The communication of the disease may be regarded as different from the act of sexual assault for the purpose of consent."[9]

In the New Zealand's case of *R. v. Mwai*[10] the appellant had unprotected sexual intercourse with several women at a time when he was infected with the HIV virus. Two of those women also became infected, allegedly from him. Among the counts at trial were charges of offences against section 188(2) of the Crimes Act (NZ) 1961 in terms that he, with reckless disregard for the safety of the relevant complainant, caused her "grievous bodily harm".

On appeal it was submitted for the appellant that infecting a person with the HIV virus was not causing grievous bodily harm. Neither, the submission continued, was psychological harm sufficient. It was also submitted that because factors leading to actual infection are beyond the control of the carrier, the necessary causal connection between intercourse and infection could not be proved to the necessary criminal standard. Other counts alleged criminal nuisance, contrary to section 145 of the Crimes Act 1961. This section, in its material parts concerns the omission to discharge any legal duty that the accused knew would endanger the life, safety or health of any individual. The evidence was that the appellant had



K.L Koh. "Consent and Responsibility in Sexual Offences" [1968] Crim. L.R. 81, 89.

[1995] 3 NZLR 149. The issue of consent was not raised in this case.

failed to disclose to the complainants the fact that he was infected with the virus and also that he had not used a condom on any relevant occasion. For the appellant it was submitted that as he had no control over the virus he had not omitted to discharge any legal duty in respect of it.

The Court of Appeal held that it was not necessary in law for a particular act or omission to be the sole cause of the damage or injury in question. It was enough that it was a substantial cause. It had been the HIV present in the accused's semen that had infected the complainant and her bodily mechanisms which enabled the infection to occur. Without the accused's condition it would not have occurred. Thus the accused was a substantial cause of the infection. Appeals against conviction and sentence were dismissed.[12]

The problem arises when the complainant has not been informed of the risk and therefore gives an uninformed consent.[13] The transmission of the disease in analysed as a risk which does not fall within the ambit of consent to sex per se. The "quality" of the act has been misrepresented. The complainant consents to safe sex but partakes unwittingly in life-threatening sex. Therefore, if the accused induced the complainant to have sex with him by fraudulently presenting himself or the sexual act as healthy, then the complainant's consent to the act as whole is vitiated.

As a conclusion, if the fact in issue of the above cases to recur in Malaysia, the accused would probably be charged and convicted either under section 269 of the Malaysian Penal Code which provides for negligent act likely to spread infection of any disease dangerous to life or section 270 for malignant act likely to spread infection of any disease dangerous to life. Consent on the part of the complainant is immaterial for both sections. Section 338 which provides for causing grievous hurt by an act which endangers life or the personal safety of others also would be a relevant section to be invoked.

12. Ibid 150.

13. The Law Commission Consultation Paper No. 139 of the view that the fact of being HIV positive would seem one of the strongest cases for such a duty of disclosure, particularly in the context of consent to sexual intercourse. see para 9.30.