

The onus is on the person with HIV to disclose



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TORONTO – An aggravated sexual assault conviction will stand for a man who had unprotected sex with two other men without telling them he was HIV-positive.

In a ruling this week, Ontario's top court upheld the December 2012 jury conviction against Steven Boone, who argued the complainants would have had sex with him anyway.

Among other things, Boone argued the trial judge should have instructed jurors to acquit him if they found the complainants were reckless or prepared to assume the risk of unprotected sex without knowing the sexual health of their partner.

"It is one thing to be careless or reckless about whether a risk exists – and quite another to assume a known risk," the Appeal Court said in rejecting the argument.

"Even if the complainants were reckless in their sexual behaviour, whether in the past or at the time of their sexual encounter with the appellant, this has no bearing on the issue whether they would have consented had they known of the appellant's HIV-positive status."

Evidence shows Boone knew in October 2009 he was infected – a fact he failed to mention before the impugned sexual activity in March 2010 in Kitchener, Ont.

After two sexual rounds, one of which involved a foursome, Boone sent a text to one of the complainants to let him know – much to his horror – that he was HIV-positive.

Neither complainant, who sought immediate medical attention, contracted the virus that can lead to AIDS.

At trial, Boone admitted to the unprotected sex and withholding his health status. The complainants testified they would not have had sex with him had they known – the central issue at trial.

Before the trial, Boone's lawyer won permission to grill the complainants on their prior sexual conduct – normally off-limits in cases of sexual assault. Both admitted to regularly having unprotected sex – including group sex – with men whose HIV status they did not know, court records show.

Boone argued the evidence showing they had been sexually careless in the past cast doubt on their claim that they would not have had sex with him had they known he was HIV-positive. The Appeal Court disagreed.

In its ruling, the court said a person must disclose their HIV-positive status before having sex – an obligation that doesn't end if the proposed partner had previously been reckless.

The decision includes a discussion – at the Crown's request – of the earlier ruling allowing Boone's lawyer to cross-examine the complainants on their prior sexual conduct.

In his reasons, Justice Robert Sharpe said he wanted to clarify the law, which aims to protect sexual-assault complainants from the "twin myths" that their past sexual behaviour either made it more likely they had given consent or that they were less worthy of belief. Ultimately, Sharpe decided, the judge had been wrong to allow the questioning.

"There are many cases, among them sexual assault, where consent is at issue in which the accused is faced with incriminating evidence from a witness that is difficult to challenge," the decision states.

"Such difficulties do not justify changing, bending or distorting the law to make it easier for the accused to raise a reasonable doubt."

In an interview with [AdvocateDaily.com](#), Toronto civil litigator [Sarah O'Connor](#) says it's surprising that Boone's lawyer won permission by the trial court to grill the complainants about their previous reckless behaviour.

"Boone's lawyer never should have been allowed to engage in that type of questioning and I'm happy to see the Court of Appeal said the lower court was wrong in allowing it," she tells the online legal publication.

O'Connor, principal of [O'Connor Richardson Professional Corporation](#), says the outcome of this matter is important because the complainants' previous actions of being reckless have no bearing on their actions in this case.

"Regardless if you are previously reckless, that does not negate your option to change your mind for each separate act," she says.

"The court got it right – the person with HIV must disclose; they can't assume that their partner would engage in intercourse because they were previously reckless or didn't ask previously," she says. "The onus is on the person with the disease to disclose."

O'Connor says Boone's argument "would be akin to an alleged rapist saying, 'one gave consent before so I didn't need consent again.'"

– With files from [AdvocateDaily.com](#)