

## UNOFFICIAL TRANSLATION

This document has been translated from its original language using DeepL Pro (AI translation technology) in order to make more content available to HIV Justice Academy users. We acknowledge the limitations of machine translation and do not guarantee the accuracy of the translated version.

No copyright infringement is intended. If you are the copyright holder of this document and have any concerns, please contact [academy@hivjustice.net](mailto:academy@hivjustice.net).

## TRADUCTION NON OFFICIELLE

Ce document a été traduit de sa langue d'origine à l'aide de DeepL Pro (une technologie de traduction en ligne basée sur l'intelligence artificielle) pour offrir aux utilisateurs de HIV Justice Academy une plus grande sélection de ressources. Nous sommes conscients des limites de la traduction automatique et ne garantissons donc pas l'exactitude de la traduction.

Aucune violation des droits d'auteur n'est intentionnelle. Si vous êtes le détenteur des droits d'auteur associés à ce document et que sa traduction vous préoccupe, veuillez contacter [academy@hivjustice.net](mailto:academy@hivjustice.net).

## TRADUCCIÓN NO OFICIAL

Este documento fue traducido de su idioma original usando DeepL Pro (una aplicación web basada en inteligencia artificial) a fin de facilitar la lectura del contenido para los usuarios de la HIV Justice Academy. Reconocemos las limitaciones de las traducciones realizadas a través de este tipo de tecnología y no podemos garantizar la precisión de la versión traducida.

No se pretende infringir los derechos de autor. Si usted es el titular de los derechos de autor de este documento y tiene alguna duda, pónganse en contacto con [academy@hivjustice.net](mailto:academy@hivjustice.net).

## НЕОФИЦИАЛЬНЫЙ ПЕРЕВОД

Этот документ был переведен с языка оригинала с помощью DeepL Pro (технологии перевода на основе искусственного интеллекта), чтобы обеспечить доступ пользователей Академии правосудия по ВИЧ к большему объему контента. Мы отдаем себе отчет в ограниченных возможностях машинного перевода и не гарантируем точности переведенной версии документа

Мы не имели намерения нарушить чьи-либо авторские права. Если вам принадлежат авторские права на этот документ, и у вас имеются возражения, пожалуйста, напишите нам на адрес [academy@hivjustice.net](mailto:academy@hivjustice.net)

# R2012/1093, Taltio 2133, Supreme Court of Finland KKO:2015:83<sup>1</sup>

## Causing danger

Diary number:	R20 12/1 093
Date of administration:	16/1 1/20 15
Volume:	213 3

A, aware of his HIV infection, had several times unprotected anal sex with B without telling him about his illness. B had not been infected with HIV. The question of whether A had caused a serious danger to B's life or health. (Voice.)

[Case handling in lower](#)

[courts Appeal in the Supreme Court](#)

[Interim measures](#)

[Oral](#)

[proceedings Decision of the Supreme Court](#)

## Processing of the case in lower rights

### Judgment of the Helsinki District Court on May 26, 2011

The district court considered A's cause for causing danger.

The district court considered it settled that A was 3.2. between 11.3.2009 and several times had unprotected sex with B. A had known that he has the HIV virus and that it is transmitted through unprotected sex. A had failed to tell B about his illness. By thus denying B the opportunity to protect himself from infection, A had shown obvious

<sup>1</sup> Original text available in <https://finlex.fi/fi/oikeus/kko/kko/2015/20150083>

indifference to B's life and health. With his actions, A had caused B serious life and health danger with gross negligence.

Internal medicine and infectious disease specialist C, who was heard as a medical expert witness in the case, had told, among other things, about the Swiss position that an HIV-positive person was not contagious if the prescribed conditions were met. C had characterized A's condition as one where the risk of infection was only theoretical. On the other hand, the severity and incurability of the infection, which C had told about, were, according to the district court, notorious, i.e. facts that were also known to A.

Witness C had further clarified that, despite the Swiss position statement he referred to and a couple of other foreign studies, in Finland the instructions for an HIV-infected person were always to tell the sexual partner about the infection and to use a condom. According to the district court, this showed that the possibility of infection could not be ruled out in that the carrier of the disease had not had to give his partner the opportunity to refuse sexual contact and that he would not have been obliged to use a means of protection to fight the disease. In this view, it was about the real risk of causing a life-threatening disease.

A had no explanation as to why he had not told B about his illness. A had also claimed to have used a condom. This supported that he must have been aware of his responsibilities as a carrier. Although, according to what he said, A had gotten the idea from the Swiss statement mentioned by the witness that the disease could not infect him further, looking at the matter objectively, there was no way to leave it. The question had been about the real danger of causing a life-threatening disease.

Despite his disease stage, by concealing his HIV infection and engaging in unprotected sexual intercourse, A had seriously endangered B's life or health with gross negligence.

The case has been resolved by district judge Markku Saalasti and the board members.

## **Judgment of the Helsinki Court of Appeal on 25 October 2012**

A appealed to the Court of Appeal and demanded that the charge be dismissed.

The Court of Appeal considered that it had no reason to evaluate the evidence in contrast to the district court.

When evaluating A's procedure with regard to the "serious danger" characteristic of the crime, the Court of Appeal stated that, based on the explanation presented, HIV infection was an incurable lifelong disease that requires lifelong medication and that usually shortens the life of the plaintiff by at least some years. It would therefore have been a very serious consequence.

With regard to the probability of a consequence, the court of appeals evaluates the importance of the antiviral medication used by A on contagiousness. The Court of Appeal held that, based on the evidence presented, there was no reason to doubt the appropriateness of A's medication and the low viral concentration in the blood at the time of the crime.

The Court of Appeal considered that the risk of infection had been quite small in practice. On the other hand, the danger could not be completely ruled out. It was not impossible for the HI virus to infect B.

In its overall assessment, the Court of Appeal considered, taking into account the probability of the consequence on the one hand and its seriousness on the other, that A had caused B a serious health risk with his actions.

When evaluating A's productivity and its degree, the Court of Appeal found that A had shown obvious indifference to B's health by his actions. A had thus violated the duty of care required by the circumstances and required of him, even if he had been able to comply with it. Taking into account the importance of the breached duty of care, the importance of the interests at stake and other factors mentioned in Chapter 3, Section 7 of the Criminal Code, the negligence could be considered gross.

The Court of Appeal did not change the judgment of the district court.

The matter has been resolved by members of the Court of Appeal, Risto Hänninen, Paula Salonen and Marja Kartano.

## Appeal to the Supreme Court

A was granted permission to appeal in the case.

In his appeal, A demanded that the charge be dismissed.

In their answers, the prosecutor and B demand that the complaint be dismissed.

## Interim measures

The Supreme Court requested expert statements from the Institute of Health and Welfare and the Hospital District of Helsinki and Uusimaa, as well as statements from the parties involved. Statements were made.

## Oral processing

The Supreme Court conducted an oral hearing in the case, where B and experts were heard.

## The decision of the Supreme Court

### Reasoning

#### *Starting points and question formulation*

1. The district court has considered it settled that A was staying with B on 3.2. between 11.3.2009 and had unprotected sex with him several times without a condom. A, being aware of his HIV-positivity, had failed to tell B about his illness and thus denied him the opportunity to protect himself from HIV infection. Although the possibility of infection due to the antiviral medication used by A had been only theoretical, according to C, a

specialist in internal medicine and infectious diseases who was heard as a witness in the case, it could not be ruled out as the carrier of the disease had not given his partner the opportunity to refuse sexual intercourse and that the person engaging in sex in this situation had no had the obligation to also use other means of protection to combat the disease. The district court has considered

2. The Court of Appeal, like the district court, has considered it settled that A and B had had unprotected anal intercourse several times. The Court of Appeal has stated that there was no reason to doubt that, at the time of the indictment, A's HIV medication had been appropriate and the virus content in his blood was low. The Court of Appeal has considered it clear that the risk of contracting the virus was practically quite low. However, the transmission of the HI virus due to A's procedure was not impossible. The Court of Appeal has stated that HIV infection is an incurable lifelong disease that requires lifelong medication and that usually shortens the carrier's life by at least some years. It would therefore have been a very serious consequence. The Court of Appeal has considered, taking into account the probability of the consequence and its seriousness on the one hand, that A had caused B a serious health risk with his actions. A's negligence had been gross. The Court of Appeal has held that A is guilty of causing the danger that the district court attributed to him.

3. Based on A's complaint, the issue in the case is whether, while having unprotected anal intercourse with B, he is guilty of causing danger as referred to in Chapter 21, Section 13 of the Criminal Code, and in particular, what importance should be given to the antiviral medication he is using in this assessment.

4. The Supreme Court has last assessed the criminal liability of an HIV-positive person in unprotected sex in the preliminary decision KKO 1993:92. According to the medical report referred to in the judgment, the probability of infection of the receiving party in unprotected anal intercourse had been at least 10 percent in the years 1986 - 1987. Since that time, the treatment of HIV infection has significantly developed and the picture of the disease has changed. Because of this, it is appropriate to first examine what is now known about HIV infection, its ways of transmission and the importance of drug treatment on the contagiousness of the disease in the light of research data.

5. For this purpose, the Supreme Court has obtained expert opinions from the hospital district of Helsinki and Uusimaa and the Institute of Health and Welfare. In the oral proceedings, the Supreme Court has heard as experts about the signatories of the statements C (HUS) and research professor D (THL). The statements and the statements presented by them as experts are explained below. Similarly, the studies referred to by C are explained, the literature references of which are evident from his statement.

#### *General information about HIV infection*

6. The HI virus (human immunodeficiency virus) is a virus that destroys the body's defense system. The HI virus infects and destroys blood helper cells (CD4 lymphocytes) and weakens the patient's immune response. The virus concentration in the infected person's blood increases, so the viruses continue to infect new cells.

7. Within a few weeks of infection, about half of the patients get initial symptoms, such as fever, fatigue and sore throat. The asymptomatic phase that follows this can last for years. Without drug treatment, the HIV-infected body's own defenses gradually weaken. If left untreated, HIV infection leads to AIDS and ultimately the patient's death in about ten years on average.

8. In the 1990s, new drugs were used as a combination treatment of three drugs. Although HIV infection cannot be cured with current treatment, with the help of medication, the multiplication of viruses can be prevented and their amount in the plasma can be kept below the measurement threshold. As a result of successful treatment, the number of CD4 cells increases and the number of secondary diseases decreases.

9. As a result of starting the medication, the amount of virus in the blood drops to a hundredth in a few weeks, after which a slower phase follows. It takes at least three, sometimes even six months for the virus count to fall below the measurement threshold. The virus count may also increase from time to time. In practice, the amount of virus is unmeasurable when the medication has been used for at least a year.

10. Continuous adherence to antiretroviral medication instructions is an absolute prerequisite for medication success. If the medication is followed irregularly, there is a risk of developing drug resistance and losing the effectiveness of the drug treatment. When the use of drugs is stopped, the viral load in the blood rises from unmeasurable to the pre-treatment level in about two weeks. Recounting the viral load to an unmeasurable level requires almost the same time as when treatment was started.

11. Drug treatment requires special expertise and it is carried out in Finland within the scope of specialized medical care. The aim is to choose the best option for the patient from several drug combinations. In the initial phase of drug treatment, the patient is monitored more frequently than after the virus concentration in the blood has stabilized, first every month, then three and six months, later permanently at least every six months.

12. If drug treatment is started in time and implemented successfully, HIV infection usually does not have a significant effect on the patient's lifespan compared to the background group. If the infection is acquired at a young age, under the age of 25, it can shorten the patient's life by several years. According to D, an unequivocal answer cannot be given in this regard. Finding patients, especially asymptomatic patients, in time has been considered the biggest challenge in HIV diagnostics.

#### *Transmission of the HIV virus during sexual intercourse*

13. HIV infection can be transmitted through sexual intercourse, through blood, and from mother to child during pregnancy, childbirth or breastfeeding. Infection during sexual intercourse is influenced by several factors, such as the viral content of the HIV-positive person's blood, the method of sexual intercourse, the use of condoms, the condition of the sexual organs and mucous membranes exposed to the HIV virus, antiretroviral medication, and the immunological characteristics of the persons practicing sexual intercourse.

14. According to C's estimate, the risk of infection in unprotected vaginal intercourse, if an HIV-positive person does not use antiviral drugs, is 1:200 - 1:2,000 for a woman and 1:700 - 1:3,000 for a man. The risk of infection can be 1:100 if the infection is recent or the person has another sexually transmitted disease. In unprotected anal intercourse, the risk is higher than vaginal intercourse, an estimated 14 infections per 1,000 unprotected intercourses, and the risk range is estimated to be 1:20 to 1:300. Furthermore, the risk of the receiving party getting infected during anal intercourse is estimated to be about twice as high as that of the active party. A venereal disease that causes ulcers has been found to increase the risk of HIV infection in unprotected intercourse by 5 to 10 times. The risk of HIV infection in unprotected oral sex is lower than in vaginal or anal sex.

*Research information on the effects of antiviral medication on the infectivity of the HI virus*

15. C and D have referred, first of all, to a statement published by Swiss infectious disease doctors in their country's medical journal in 2008.

16. According to the statement, an HIV-positive person does not contract the HI virus during sexual intercourse, if he is using antiretroviral medication, the HIV concentration measured in his blood is below 40 copies/milliliter, he does not have another sexually transmitted disease at the same time, genital ulcers, and there are no other factors that increase the risk of infection when having sex factors. In the statement, the condition for the validity of the statement is that the HIV-positive person uses medication consistently and is regularly examined by a doctor, that the amount of virus in his blood has been unmeasured for at least six months and that he does not have any other sexually transmitted diseases. The statement further emphasizes that even established couples should accept that,

17. The HPTN 052 follow-up study referred to second by C involved 1,763 couples. One of the couples was HIV-positive, the other HIV-negative. HIV-infected persons were randomized to either starting HIV medication immediately or delaying the medication until the CD4 lymphocytes in the blood decreased to the level that was the limit for starting drug treatment in that country. The study was stopped prematurely because 27 infections were found in the delayed treatment group and one infection in the immediate treatment group, where the HIV most likely came from one's own partner. Antiretroviral medication was 96 percent effective in preventing HIV infection. C has stated that the infection in the immediate treatment group was acquired when three months had passed since the start of medical treatment,

18. The conclusion of the HPTN 052 study has been that early initiation of antiretroviral medication is beneficial for both the HIV-infected person and the other party to the relationship. On the other hand, the study found that it had several limitations. The study involved people in established relationships who were offered counseling and condoms, which probably contributed to the low incidence of HIV infection. Condom use during intercourse has been reported to be almost one hundred percent (Cohen MS, Chen YQ et al, HPTN 052 Study Team; Prevention of HIV-1 Infection with Early Antiretroviral Therapy. N Engl J Med. 2011 Aug 11; 365 (6): 493 - 505 ). According to C, only very few male couples participated in the study.

19. In his statement, C has further referred to a group of Canadian researchers who had analyzed studies on the infectious effects of antiretroviral medication. In the analyzed studies, four infections had occurred during the medication, all in the initial phase of the medication. In situations where the effectiveness of the medication had been confirmed by testing the HIV concentration in the blood, no infection had been found.

20. A Canadian study has stated, referring to the opinion of Swiss doctors, that unprotected sexual intercourse is a possible option in established heterosexual relationships, if the viral level of the HIV-infected partner is completely under control and both parties understand the limitations imposed by the available information. The study has further established that further studies are needed, among other things, to find out the effect of medication on infectivity among same-sex couples. Further studies were also needed on condom use and its importance (Loutfy MR, Wu W. et al; Systematic Review of HIV Transmission between Heterosexual Serodiscordant Couples where the HIV-Positive Partner Is Fully Suppressed on Antiretroviral Therapy; PloS ONE 8(2): 10 137; 13 February 2013).

21. C has also referred to the Partner study carried out in Europe, in which the HIV-positive of the couples taken for follow-up had used antiretroviral medication and the HIV concentration in his blood had been below 50 copies/milliliter. The couples had had unprotected intercourse during the previous month. Couples were informed about safe sex and the protective effect of condoms.

22. According to the congress abstract published on the Partner study (Rodger A., Bruun T et al; HIV Transmission Risk Through Condomless Sex If HIV+ Partner On Suppressive ART; Partner Study; Abstract 153LB), the background for the study was that there was no information on the absolute risk of HIV infection in situations where the person's virus level is stable as a result of medical treatment and where a condom is not used during sexual intercourse. The limited information that exists was largely focused on vaginal sex. According to the summary, the study did not detect any infections that could be linked to HIV infection received from the spouse. According to the statistical analysis, the result closes with a 95 percent probability a risk level higher than 0.4 infections per 100 person-years of follow-up, if all unprotected intercourse is analyzed, and an HIV risk level greater than 1 infection per 100 person-years of follow-up if only anal intercourse is considered. The risk level for the receiving couple in anal intercourse is 1.97 infections per 100 person-years of follow-up, if condoms are not used. The conclusion of the summary is that the risk of infection is generally very low in both vaginal and anal sex, but more information is needed regarding sex between men.

23. C has stated that the aforementioned statistical analysis and reported confidence intervals have caused debate among researchers. As C's statement shows, the follow-up of the Partner study has ended for heterosexual couples. Regarding male couples, the management of the study plans to continue the study until 2017, because it is estimated that there is a higher risk of HIV infection associated with anal intercourse and because there is less information on the effect of antiretroviral medication in preventing HIV infection in sexual intercourse between men than for heterosexual couples.



24. According to C, antiretroviral medication is the best way to prevent infections. Condoms can be important in addition to medical treatment, because they prevent mucosal contact.

*Guidelines for HIV patients*

25. In 2009, patients at Aurora Hospital were told that HIV can be transmitted from one person to another during sex and through blood. In addition, it has been reported that patients had to tell their sexual partners about their HIV infection and that there could be legal sanctions for concealing the matter. Furthermore, according to C, patients have been told, in accordance with general international practice, that using a condom during intercourse prevents HIV infection. The patients have been told that if the condom breaks, they can contact the infectious disease clinic or the on-call infectious disease doctor, and that in these cases the partner can be given a four-week protective medication with a protective effect of at least 80 percent. According to C, the instructions have not been changed since 2009.

26. According to D's statement, the Institute of Health and Welfare does not have accurate information about the instructions given to patients in 2009. However, it is known that there has been an HIV nursing manual used by doctors and health care. According to it, the sexual partner should always be told about the infection, careful use of a condom is the surest way to prevent infection, water-soluble or silicone-based lubricant must also be used during anal intercourse; a condom must also be used with an HIV-positive partner, as the virus strain may be different and unprotected intercourse may accelerate the progression of the disease for both parties.

*Applicable provision*

27. According to Chapter 21, Section 13 of the Penal Code, anyone who deliberately or with gross negligence causes serious danger to the life or health of another person is convicted of causing danger, unless an equally severe or more severe punishment is provided for the act elsewhere in the law.

28. The punishability of causing danger thus requires, first of all, that a serious danger is caused to the life or health of another. As stated in the presentations on the legal point, the serious danger must be concrete (HE 94/1993 vp p. 99).

29. How serious the danger and the degree of its imminent realization must be at any given time in order for it to be concrete cannot be decided unequivocally. The law applies to all possible situations. It appears from the drafts of the law (HE 94/1993 vp p. 99) that the wording of the provision was intended to emphasize that the assessment of seriousness involves both the probability of the occurrence of a consequence and the seriousness of possible consequences.

30. In its ruling practice, the Supreme Court has taken a position on the fulfillment of the hallmarks of causing danger in its preliminary decisions KKO 1995:143, KKO 1997:108 and KKO 2003:115, which have concerned shooting into an inhabited apartment. It appears from the decisions that there may be a serious danger as defined by the regulation, even though the damage was not likely to occur. In the preliminary ruling KKO 1995:143, a person was sentenced for causing danger in a situation where

it was visible at the time of the shooting that there was no one on the firing line. The Supreme Court considered that it was not quite likely that the shot shower would hit a person directly, or even more likely than that the death of the person in the apartment could have resulted from the ricochets or glass shards of the shots. In the decision KKO 2003:115, the concreteness of the danger is assessed in the situation, where the apartment had been shot through the door with a shotgun. The Supreme Court stated that all occupants of the apartment had been at risk of death or serious injury as referred to in Chapter 21, Section 13 of the Penal Code, regardless of where they were in the apartment at the time of the shooting or whether it was quite likely or even probable that the shots would hit them directly.

*Is HIV infection a serious danger*

31. Based on the report received, the Supreme Court states that if the HIV infection is not detected in time and treated appropriately, the HIV infection will continue to progress to the AIDS stage and eventually lead to the patient's death. If the infection is identified and its treatment is carried out appropriately, the infection no longer leads to death and otherwise has no effect on the life and lifespan of the infected person as before. The life expectancy of an HIV patient approaches that of a healthy person.

32. As shown in point 7, not all infected people develop initial symptoms. The disease can continue without symptoms for several years. Even with drug treatment, the HI virus cannot be removed from the body, and if the medication is not followed regularly, the virus can reactivate. Irregular use of medicines may also create resistant strains of the virus. The absolute prerequisite for the success of drug treatment is that the drugs are taken regularly every day for the rest of your life. In addition, the infected person must undergo regular blood tests and medical examinations. Treatment of the disease requires self-discipline from the infected person.

33. The Supreme Court considers that even though HIV infection can be effectively treated today and was able to be treated effectively in 2009, the infection itself is a serious consequence as referred to in Chapter 21, Section 13 of the Criminal Code. As stated above, diagnosing the disease involves uncertainty and delay, the disease is chronic and keeping it under control requires a commitment to careful treatment and monitoring for the rest of your life.

*Is the risk of infection likely?*

34. As stated in section 29, in the assessment of the serious danger referred to in the provisions of Chapter 21, Section 13 of the Criminal Code, the issue is not only the seriousness of the consequence, but also the probability of its occurrence.

35. According to the current information, antiretroviral medication used by an HIV-positive person in accordance with the instructions lowers the viral concentration in the blood to a level that cannot be measured with available methods. Statistically speaking, this significantly reduces the risk of infection. When used regularly, antiretroviral medication must therefore be considered an effective way to reduce the risk of infection.

36. On the other hand, the risk of infection is still associated with unprotected sexual intercourse in all instructions for HIV patients. For example, in the instructions given to HIV patients at Helsinki University Central Hospital, it is recommended to use a condom. It is assumed that patient instructions given to HIV-positive patients in specialized medical care are based on the latest medical knowledge. If the use of condoms was not important at all in terms of the transmissibility of HIV infection, this would also be reflected in the patient instructions. According to the report received, the protective effect of condom use in addition to drug treatment is based on the fact that it prevents mucosal contact.

37. The Supreme Court states that, in the light of the research data explained above, the possibility of infection related to unprotected sexual intercourse can be considered very small, if an HIV-positive person is on effective medical treatment, and there are no other factors that increase the risk of infection. However, the mere fact that the medication is properly followed does not mean that unprotected sexual intercourse with an HIV-positive person is not associated with a concrete and serious danger as referred to in the criminal law and jurisprudence. As stated several times above, the infectivity of the HI virus is increased by ulcers of the mucous membranes exposed during intercourse and other sexually transmitted diseases, of which the parties themselves are not necessarily aware. The risk of infection in anal intercourse is greater than in vaginal intercourse. The magnitude of the risk of infection in a single sexual contact cannot be assessed directly on the basis of studies. Research data always describe an average risk. The probability of infection must be assessed in each case separately. The Supreme Court's assessment of the probability in this case is below.

*Can neglect related to sexual intercourse be considered gross*

38. The implementation of the hallmarks of Chapter 21, Section 13 of the Criminal Code requires, as stated in Section 27, that a serious danger has been caused intentionally or with gross negligence. According to Chapter 3, Section 7, Subsection 1 of the Criminal Code, the perpetrator's conduct is negligent if he violates the duty of care required by the circumstances and required of him, even if he was able to comply with it (responsibility). According to subsection 2, whether the negligence is considered gross is decided based on the overall evaluation (gross production). The evaluation takes into account the significance of the breached duty of care, the importance of the interests at risk and the probability of the violation, the awareness of risk-taking, and other circumstances related to the act and the perpetrator.

39. The reprehensibility of the author's negligence has been assessed in the preliminary decision KKO 2014:41. The solution concerns the situation where A had given methadone to B, who had been poisoned by methadone. For A, the dangers of using methadone were emphasized in the replacement treatment and it was emphasized that methadone was not to be given to others. He had known that B had taken drugs and alcohol. Although A had known that B was a habitual drug user, he had not known or ensured that B was aware of the special dangers caused by methadone. When A had handed over the methadone to B under these circumstances, he was deemed to have breached his duty of care required by the circumstances. The negligence was considered gross and A was considered guilty of causing danger.

40. In a similar way, when evaluating the claim of violation of the duty of care in connection with sexual intercourse, importance can be given to what the HIV-positive person knows about his disease, the associated risks of infection and means of protection, as well as whether the other party is aware of his health condition. Everyone is personally responsible for their own sexual behavior and protection, regardless of their health status. Basically, however, the party to a sexual relationship can only know about the prevalence of diseases in general, but not about whether the other party is sick and in what way, nor about how and with what accuracy the disease has been treated and what kind of risks are associated with sexual intercourse.

41. The Supreme Court considers that when a person is aware of his own HIV-positivity, his responsibility to take care of the precautions required for sexual intercourse is emphasized, and that the question of the alleged neglect of the duty of care and its degree is justified in assessing not only the awareness of both parties about each other's health, especially the awareness of the HIV-positive person about his disease state and the necessity of protective measures related to it.

#### *Evaluation of A's procedure*

42. A has been 3.2. between 11.3.2009 and 11.3.2009 several times in anal intercourse with B without telling her about his HIV-positivity. A must have known the instruction according to which an HIV-positive person had to use a condom during sexual intercourse, and know that the knowledge of the infection would possibly have an essential meaning for B's attitude towards sexual intercourse with him, according to the statement of lower rights. The connections have been unprotected.

43. It appears from the laboratory test results presented by A that the number of HI virus copies in his blood was measured on 21 October 2008 and 15 January 2009. The number of virus copies had been below the measurement limit in both studies, in the first one below 47 and in the second below 30 copies/milliliter. The number of virus copies had remained below the measurement limits in the seven measurements made between April 2, 2009 and October 6, 2010. According to the German doctor's announcement dated April 1, 2011, the number of virus copies in A's blood had been unmeasurable since June 2007. Based on the report, C has considered that the risk of infection was very low during the time of the crime referred to in the indictment.

44. The number of HI virus copies in A's blood has been low during the time of the crime referred to in the indictment. The risk of contracting an HIV infection has thus been minimal. On the other hand, by taking care of condom protection alongside medical treatment, A would have acted in accordance with the guidelines generally given in health care, in which case there would have been practically no risk of infection.

45. A has also not told B about his infection, which in turn would have made it possible for B to have made a conscious decision on his own about starting a relationship, using a condom, and whether it is appropriate to apply for tests later anyway. B has said that he would not have agreed to sexual intercourse if he had known about the disease.

46. The Supreme Court has considered in paragraph 33 that HIV infection is a serious consequence. With the procedure described above, A has caused B a serious health

risk. Considering the significance of the duty of care due to the seriousness of the HIV infection and the importance of the interests at stake and the awareness of risk-taking, A's negligence is gross.

47. There is no question of imposing a penalty.

## Sentence

The outcome of the Court of Appeal's judgment will not be changed.

The case has been resolved by legal advisors Liisa Mansikkamäki, Pertti Välimäki (dissenting), Juha Häyhä (dissenting), Jorma Rudanko and Tuula Pynnä. Presenter Jukka Siro (report).

## The rapporteur's report and the statements of dissenting members

Temporary legal secretary Siro : The rapporteur's report was in accordance with the Supreme Court's decision regarding points 1 to 14. After this, the report was as follows:

A report on the transmission of HIV infection

The expert testimony received at the Supreme Court has also revealed the following about the probability of HIV infection.

The probability of HIV infection in unprotected sexual intercourse is significantly influenced by the HIV-positive partner's HIV concentration in the blood. The more likely the infection is, the higher the HI virus concentration in the blood. The viral load can be affected by antiretroviral medication. While the blood of an HIV-positive person who is not taking medication can contain up to tens of thousands of HI virus copies per milliliter, with antiretroviral medication, the number of virus copies can be reduced to such a low level that they cannot be measured with current detection tools. Today, the limit of immeasurability is usually a few tens of virus copies per milliliter.

In recent years, several studies have been carried out in which the effect of antiretroviral medication used by an HIV-positive person on the infectivity of HIV infection has been investigated (especially the Partner and HPTN 052 studies). The background has been the statement published by Swiss infectious disease doctors in 2008, according to which HIV infection would not be transmitted through unprotected sex from an HIV-positive person to an HIV-negative person if the following conditions are met: (i) the HIV-positive person is under medical treatment and has used antiretroviral medication, (ii) his blood The HIV copy number has been undetectable for the previous six months and (iii) he has not had any other venereal disease or genital ulcers. It is still required that the sex has not been accompanied by other factors that increase the risk of infection, such as sex toys, rape or other activities that damage mucous membranes. In the mentioned studies or otherwise, not a single case has been observed in which the HIV infection would have been contracted in unprotected sexual intercourse from an HIV-positive person to an HIV-negative person under these conditions.

The current research data is focused on heterosexual couples and requires further studies in some areas. Despite this, it can be said that the probability of contracting an

HIV infection is at most very low, even in unprotected sex between men, if the above-mentioned conditions are met. However, since the HI virus cannot be completely removed from the body, the possibility of infection cannot be completely excluded.

The effectiveness of antiretroviral medication requires regular use of the medication. If the patient stops or interrupts the medication, the number of viral copies in his blood can increase in less than two weeks to the level at which the number of viral copies would be without the medication. Counting the number of virus copies back to unmeasurable takes almost as long as if the medication had never been started. However, this does not happen from not taking a single medicine yet. If the patient's viral values are constantly unmeasured, it can be considered very likely that he has used the medication appropriately.

Thanks to modern medication, HIV infection no longer leads to AIDS, but the patient has to use drugs for the rest of his life. However, there are no significant side effects associated with the medication, and the treatment of HIV infection is free of charge for the patient in Finland. HIV infection has no significant effect on the patient's life expectancy, at least when the patient is over 40 years old. On the other hand, HIV infection is still associated with a strong social stigma, which can hinder the patient's quality of life, such as partner formation.

Despite the development of medical science, both at the time of the accusation and today, people with HIV infection have been instructed to always use a condom and to tell their sexual partner about their HIV infection. Although properly managed medication is more effective protection than condoms, condoms are important for genital ulcers or other sexually transmitted diseases.

#### Applicable provision

According to Chapter 21, Section 13 of the Penal Code, anyone who deliberately or with gross negligence causes another serious risk to life or health is convicted of causing danger.

It is clear from the provisions of the provision that the wording "serious danger to life or health" has been used to emphasize that the assessment of seriousness involves both the probability of a consequence occurring and the seriousness of possible consequences (HE 94/1993 vp p. 99). However, the government's proposal also states that the danger referred to in the law must be tangible (p. 99). This has been established to mean that the life or health of another person has actually come to be in danger. Causing a danger is therefore not punishable only by causing a theoretical or very unlikely consequence to the life or health of another person, even if the consequence itself is serious.

In its decision-making practice, the Supreme Court has taken a position on the realization of the hallmarks of causing danger in its preliminary decisions KKO 1995:143, KKO 1997:108 and KKO 2003:115, which have concerned shooting into an inhabited apartment. It appears from the solutions that there may be a serious danger referred to in the symbol for causing danger, even though it was not likely that damage would be caused. In the case of attempted HIV infection KKO 1999:102, the Supreme Court dismissed the charge of attempted murder, considering that there was no real

risk of HIV infection caused by the act of biting, spitting, and scratching with bloody fingers, because the risk of infection had been purely theoretical.

#### A report on A's state of health

In this case, it appears from the laboratory test results presented by A that the number of HI virus copies in A's blood was measured on 21 October 2008 and 15 January 2009. The number of HI virus copies in both studies was below the measurement limit, which had been 47 in the former study and 30 HI virus copies per milliliter in the latter. The test results show that the number of virus copies had remained unmeasured in the seven measurements made between April 2, 2009 and October 6, 2010, where the measurement limit had been 16 and 20 HI virus copies per milliliter. In addition, A has presented a doctor's report dated April 1, 2011, according to which the number of virus copies in A's blood had been unmeasurable since June 2007. Based on the report, C has considered that the risk of infection was very low at the time of the accusation.

Based on the explanation of A's viral load, there is no reason to suspect that A has used antiretroviral medication appropriately. There are no indications in the case that A had other sexually transmitted diseases or ulcers in the genital area, or that other factors increasing the likelihood of infection were associated with sexual contact.

#### Conclusions

The Supreme Court states that there has been no reason to question the validity of the expert report on HIV infection. The probability of HIV infection in the circumstances of the case must therefore be evaluated based on what has been clarified in expert statements and hearings.

The Supreme Court considers the general probability of contracting HIV infection and the report obtained on A's illness to show that the probability of A contracting HIV infection to B has been very small. Although HIV infection can still be considered a serious disease, despite the development of medicine, its transmission to B has been so unlikely under these conditions that there has not been a danger referred to in the sign of causing danger.

The Supreme Court still considers that there is no reason to evaluate the matter differently on the basis that HIV-positive people are instructed to always use a condom and to tell their sexual partner about their infection in connection with the treatment of the infection. In this matter, it is to be examined whether A has caused a danger to B's life or health, as referred to in the symbol of causing danger. This question must be evaluated on the basis of the mentioned provision of the Criminal Code and the up-to-date medical report presented in the case. On the other hand, in the patient instructions, it has been possible to assess the HIV patient's operational obligations and the probability of infection from other, for example, medical points of view.

On these grounds, the charge of causing danger was dismissed.

Counselor Häyhä : I accept the report.

Counselor Välimäki : I agree with Counselor Häyhä.

