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HIV non-disclosure and the criminal law: A summary of two recent decisions of the Supreme Court of Canada

R. v. Mabior, 2012 SCC 47
R. v. D.C., 2012 SCC 48

The information contained in this publication is information about the law, but it is not legal advice. For legal advice, please contact a criminal lawyer.

On October 5, 2012, the Supreme Court of Canada released important decisions in two cases of HIV non-disclosure; namely, R. v. Mabior *and* R. v. D.C. *Mabior is a man who had sex with several women without disclosing his HIV-positive status. D.C. is a woman who had sex with her abusive former partner once before she disclosed her status. None of the complainants in these cases became HIV-positive.*

In both appeals, the Court was asked to decide the circumstances in which a person living with HIV (PHA) can be convicted of aggravated sexual assault for not disclosing his or her HIV-positive status to a sexual partner. Specifically, the Court had to determine how using a condom or having a low viral load (i.e., a low level of the virus in one's body) can impact criminal liability in cases of HIV non-disclosure. It is now well-established that using a condom or having low viral load (usually because of treatment) dramatically reduces what is already a low risk of HIV transmission.

In its 1998 decision in *R. v. Cuerrier*, the Court decided that PHAs had a legal duty to disclose before having sex posing a "significant risk" of serious bodily harm (i.e., HIV transmission). At that time, the Court said that not disclosing in such circumstances is a "fraud" that makes the partner's consent to sex legally invalid. This turns what would otherwise be consensual sex into a sexual assault. The Court further suggested that the use of condoms *may* reduce the risks of HIV transmission such that there may be no duty to disclose; however, they did not definitively decide on this issue. Since that time, a majority of the decisions of lower courts that considered this issue — including the Court of Appeal of Manitoba in *R. v. Mabior* — ruled that condom-use alone was enough to preclude criminal liability. Yet, in too many other cases, scientific evidence on HIV risks of transmission was disregarded. Some people ended up being charged and/or convicted even where the risk of transmission was exceedingly low (e.g., in cases of oral sex). The "significant risk" test adopted in *Cuerrier* resulted in a great deal of uncertainty and unfairness for PHAs.

The October 2012 Supreme Court of Canada decisions

In *R. v. Mabior* and *R. v. D.C.*, the Supreme Court of Canada had the opportunity to clarify the law in accordance with the current science of HIV transmission and treatment. Unfortunately, it failed to do so.

In fact, the Supreme Court of Canada made the law even harsher for PHAs: people must now disclose their status before having sexual relations that pose a "realistic possibility" of HIV transmission. But in the Court's view, a "realistic possibility" encompasses almost *any* risk, no matter how small. Based on the Court's decisions, people now have a legal duty to disclose their status before:

- having vaginal or anal sex without a condom (regardless of their viral load); or
- having vaginal or anal sex with anything higher than a "low" viral load (even if they use a condom).

In summary, either using a condom or having a low viral load is not enough to preclude criminal liability in cases of HIV non-disclosure when it comes to vaginal and anal sex.

At this point, the only sex that the Court clearly indicated does not pose a realistic possibility of HIV transmission, in terms of criminal law, is vaginal sex that takes place when a condom is used and the person living with HIV has a low/undetectable viral load. Because these decisions were about vaginal sex, it is not clear how the test of a "realistic possibility" will apply to other sexual acts (e.g., anal sex or oral sex). Anal sex poses higher risks of transmission than vaginal sex, so the duty to disclose is at least as strict as for vaginal sex (i.e., there is a duty to disclose before unprotected sex or when a person's viral load is higher than "low"). It might be the case that, as with vaginal sex, there is no duty to disclose before anal sex if a condom is used and viral load is low. But at this time, we can't say that for certain. As for oral sex (without a condom), this is usually considered very low risk, but we don't know at this point whether courts will find that there is a duty to disclose before oral sex without a condom.

These decisions are a major step backwards from the *Cuerrier* decision and subsequent case law. They push us further away from justice, fail to reflect a meaningful understanding of sexual autonomy, and undermine HIV prevention efforts. Just because a person would *like* to know what risks they are accepting when they have sex, no matter how small or what sort, one cannot logically conclude that as a society we should turn to our most blunt weapon — the criminal law — to compel full disclosure and punish non-disclosure in every circumstance.

These decisions create additional disincentives to HIV testing and hinder people talking openly with their counsellors and physicians about their sexual and disclosure practices, as medical and counselling records can be subpoenaed and used in criminal investigations. They will also disproportionately affect the most vulnerable. Access to treatment was once an issue of public health and social justice. Now it is also a criminal issue. People with inadequate access to care, treatment and support may not be able to establish a low viral load. If they do not or cannot disclose their status — including because of fear of violence or other negative consequences — they may face criminal prosecution, imprisonment and sexual offender registration. Finally, the Court has put another tool for coercion in the hands of abusive partners. This can only exacerbate the vulnerability of HIV-positive people in abusive and/or violent relationships to blackmail and threats of prosecutions and lead to more injustice.

For more information about the decisions of the Supreme Court of Canada, see the document *HIV non-disclosure and the criminal law: An analysis of two recent decisions of the Supreme Court of Canada.* Are you are living with HIV? Do you counsel people living with HIV? Learn more about the concrete implications of the decisions in *HIV non-disclosure and criminal law: Implications of recent Supreme Court of Canada decisions for people living with HIV (Questions & Answers*).