

HIV non-disclosure and the criminal law: Implications of recent Supreme Court of Canada decisions for people living with HIV

Questions & Answers

On October 5, 2012, the Supreme Court of Canada released its decisions in the cases of Mabior and D.C. The Court decided that people living with HIV have a legal duty, under the criminal law, to disclose their HIV-positive status to sexual partners before having sex that poses a “realistic possibility” of HIV transmission. Not disclosing in such circumstances means a person could be convicted of aggravated sexual assault. This document explains what the Court’s decisions mean for people living with HIV, although many questions remain.

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*.

When do you have a legal duty to disclose your HIV-positive status to a sexual partner?

The Supreme Court of Canada says that you must disclose your status before having sex that poses “a realistic possibility of transmitting HIV.” But the Court also found that almost any risk is “realistic,” no matter how small.

Based on the Court’s decisions, you have a legal duty to disclose:

- before having vaginal or anal sex* without a condom (regardless of your viral load); or
- before having vaginal or anal sex* with anything higher than a “low” viral load (even if you use a condom).

** See below for more information on the duty to disclose and anal sex.*

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.

When don’t you have a duty to disclose?

The Supreme Court of Canada was clear that you do not have a duty to disclose before having *vaginal* sex if (1) your viral load is low or undetectable and (2) you use a condom. Both of these are required.

- NOTE: Your viral load does not need to be “undetectable.” A “low” viral load is sufficient. What this means remains to be defined in subsequent cases. However, based on the Supreme Court of Canada decisions, it seems that it should at least include any viral load below 1500 copies of the virus per millilitre of blood.

What is still unclear?

There is still a lot of uncertainty in the law. Because the cases before the Supreme Court of Canada only dealt with HIV non-disclosure in the context of vaginal sex, it is not clear how the test of a “realistic possibility of transmission” will be applied to other sexual acts.

- *What about anal 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. In other words, you have a duty to disclose before having unprotected anal sex or when your viral load is higher than “low.” It might be the case that, as with vaginal sex, if you use a condom and your viral load is low, you don’t have a legal duty to disclose. But at this time, we can’t say for certain if satisfying both these requirements (condom use plus a low viral load) will be enough to avoid convictions in the case of anal sex.
- *What about oral sex?* Oral sex (without a condom) is usually considered very low risk (i.e., an estimated risk ranging from 0 to 0.04%). We don’t know at this point whether courts will find that there is a duty to disclose before oral sex without a condom. We also don’t know whether it makes a legal difference if you are receiving or performing oral sex, or whether the amount of semen or vaginal fluid that the person performing oral sex is exposed to can make a legal difference.

What if you have a low or undetectable viral load AND use a condom but the condom breaks?

This is a very difficult question to answer and there are several factors that you should take into account:

- Although this issue was not addressed by the Supreme Court of Canada, you may have a duty to disclose in the case where a condom breaks.
- Disclosing your status after a condom breaks could be relevant to your sexual partner in deciding whether to seek “post-exposure prophylaxis” (PEP) with antiretroviral drugs to further reduce any risk of infection.
- But disclosure in such circumstances may also expose you to an increased risk of violence and/or threat of prosecutions. HIV continues to generate a lot of fear and misconception. Your partner may have a bad reaction if he or she discovers that you are HIV-positive after a condom breaks.

How can you protect yourself against prosecutions?

There is no guaranteed way to avoid being accused of HIV non-disclosure. People may lie or make mistakes about whether disclosure took place and/or whether a condom was used. But there are things you can do that may reduce the risk of criminal prosecutions or conviction for HIV non-disclosure.

- Tell your sexual partners that you are HIV-positive before sex, and try to get proof that you told them about your status (e.g., disclose your status in front of a witness before having sex, such as a counsellor or doctor, who can document that disclosure took place, or sign a joint document). *N.B.: Please be aware that any document that would establish that you had sex prior to disclosure might work against you. This could especially be the case if you had vaginal or anal sex before you first disclosed and, at the time of that*

sexual act, you did not use a condom or you cannot establish that your viral load was low or undetectable at that time.

- Use a condom when you have vaginal or anal sex and see a doctor regularly to create a record of your viral load test results showing lowered viral load.

Other important things to know about the Supreme Court of Canada decisions and the legal duty to disclose:

- *There is no distinction between silence and a lie.* People may face criminal charges for not disclosing their status whether their partners inquired about their HIV status or not.
- *There is no distinction based on the circumstances of a particular encounter, including the type of relationship.* People may face criminal charges whatever the type of relationship they had with their partner (e.g., whether with a casual partner versus a spouse) and whether the sex was for love, fun, money, procreation or drugs.
- *People living with HIV can be prosecuted even if they had no intent to harm their partner.*
- *People living with HIV can be charged with aggravated sexual assault for not disclosing their status.* An aggravated sexual assault is a sexual assault that “endangers the life” of the other person. It carries a maximum penalty of imprisonment of life and mandatory registration as a sexual offender.

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.