

Civil liability issues for PHAs and service providers



Civil liability of people living with HIV

As of this writing, we are not aware of any successful civil lawsuits against a person living with HIV (PHA) for not disclosing his or her HIV-positive status to a sexual partner. However, we know that at least two individuals have been sued by their ex-partner after being found guilty of non-disclosure in a criminal proceeding.¹

Given that there is no Canadian decision to date on this particular issue, the following analysis is a description of how a court *may* decide civil cases on HIV non-disclosure.

Civil liability of PHAs under Quebec law

- Quebec is the only jurisdiction in Canada that applies the **civil law**. In civil matters, it is governed by the *Civil Code of Québec*.
- The *Civil Code of Québec* governs persons, relations between persons, and property. The Civil Code is the foundation of all other laws enacted by the Quebec legislature, although other laws may complement the Civil Code or make exceptions to it.
- The Civil Code establishes a **cause of action for civil liability**. Article 1457 of the Civil Code provides:

Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as **not to cause injury to another**. **Where he** is endowed with reason and **fails in this duty, he is responsible for any injury he causes to another person by such fault** and is liable to reparation for the injury, whether it be bodily, moral or material in nature. He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody [emphasis added].

This is the general civil liability provision in Quebec. It would be the legal basis of a sexual partner's lawsuit against a PHA for not disclosing his or her HIV status.

¹ One of the proceedings is ongoing. The second has been dismissed for procedural reasons but might be restored in the future.

- The criminal law sets out a particular **rule of conduct** for PHAs requiring them to disclose their HIV-positive status to their sexual partners in some circumstances. For more information about the criminal law see the section on “Criminal law and HIV non-disclosure,” also in this resource kit.
- Quebec court judges will determine exactly what duties PHAs have under the civil law. But there is a risk that a PHA who did not disclose his or her HIV-positive status before engaging in sexual activities requiring disclosure under the criminal law may be found civilly liable if the plaintiff can prove that he or she suffered damage as a result of the non-disclosure.

Civil liability of PHAs in other provinces and territories

In provinces other than Quebec, and in the territories, a PHA may be liable in **tort** for having sex without first disclosing his or her HIV status. A tort is a **civil wrong** (other than a breach of contract) that can be the basis of a lawsuit for monetary damages. If a sexual partner brings a civil court case against a PHA, the partner will likely rely on the **tort of battery** and the **tort of negligence**.

Tort of battery

- Battery is the **intentional, unconsented contact of one person** by another person. The person need not cause any harm or even intend harm to the other person. Offensive contact is enough. **Consent is a defence against a charge of battery**. However, a person who has obtained consent by deception cannot rely on the defence of consent.
- Because not disclosing HIV status to a sexual partner may vitiate consent to sex under criminal law, it is likely to do so under civil liability law.

Tort of negligence

- In its legal sense, **negligence is a cause of action in tort**. Negligence protects the interest of anyone who is injured because another **person did not do something he or she had a legal duty to do, or did something he or she had a legal duty not to do**.
- In order for a plaintiff to be successful in a lawsuit based on the tort of negligence, he or she must **prove three elements**:
 1. a **duty of care** exists between the plaintiff and the defendant;
 2. the defendant **breached that duty**; and
 3. the plaintiff suffered **foreseeable damage as a result** of the breach.

- Although no Canadian court has decided the issue, it is very likely that a PHA owes a **duty of care** to his or her sexual partner(s). The **content of the duty of care that is owed to another person is called the standard of care**. The standard of care depends on what the reasonable person would expect from the HIV-positive person in all circumstances of the case. In the context of HIV non-disclosure, it is likely that a court would, at least, say that the standard of care requires a PHA to disclose her or his HIV-positive status to a partner in circumstances where disclosure is required under the criminal law. For more information about the criminal law see the section on “Criminal law and HIV non-disclosure,” also in this resource kit.
- Finally, in a negligence action, the sexual partner would have to prove that he or she suffered **damage as a result of the non-disclosure by the PHA**. A court would almost certainly consider being infected with HIV a “damage.” But a plaintiff might also be successful even if he or she was not infected. He or she may be able to show other damage, such as psychological injury in exceptional cases.

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