

## Focus PERSONAL INJURY

# Liability and the sexually transmitted disease

Supreme Court rulings map out the case for civil compensation claims based on failure to disclose



Anna Matas

Consider this scenario: Following consensual sex, an individual discovers they have been infected with a sexually transmitted disease. If he or she had known their partner was infected, they would not have consented to unprotected sex. Although this potential plaintiff may have a civil claim for battery and/or negligence, there have been no reported trial decisions in Canada regarding such a compensation claim based solely on the transmission of an STD. It is more likely the scenario above would result in criminal charges for sexual assault.

In *R. v. Cuerrier* [1998] S.C.J. No. 64, the Supreme Court of Canada ruled that an accused's failure to disclose HIV-positive status to his sexual partners amounted to fraud vitiating consent to sexual intercourse. In *obiter*, the majority noted this standard was sufficient to encompass other STDs that constitute a significant risk of serious harm.

The test was refined in *R. v. Mabior* [2012] S.C.J. No. 47 and *R. v. D.C.* 2012 [S.C.J. No. 48]. Post-*Mabior*, failure to disclose HIV-positive status constitutes fraud vitiating consent only when there is a "realistic possibility" of HIV transmission. The SCC declined to provide guidance on where the line should be drawn with respect to the transmission of other STDs.

All provinces have some form of legislation that provides rights to victims of crime, but the contents of those laws vary dramatically. In Ontario, the *Victim's Bill of Rights, 1995*, S.O. 1995, c. 6, provides that individuals convicted of sexual assault under the *Criminal Code* are liable to their victims for emotional distress arising from the crime and bodily harm resulting from that distress. Victims of sexual assault are, under this legislation, presumed to suffer emotional distress. Although there are several Ontario cases where convictions have been granted for the transmission of STDs, including HIV and herpes, there are no reported cases which rely on the Ontario *Victim's Bill of Rights* to award civil damages based on those convictions. In other provinces, including British Columbia and Alberta, vic-



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tims' rights legislation explicitly states that it does not create a cause of action.

Of course, neither a Victims' Bill of Rights nor a criminal conviction is a prerequisite for a successful civil suit. Absent a criminal conviction in Ontario, or for cases which arise in other Canadian provinces or territories, plaintiffs may wish to bring actions in negligence and/or battery where knowledge of their partner's infected status would have caused them to withhold consent to sexual relations.

*M.F. v. I.S.* [2013] O.J. No. 939, an action for malicious and negligent prosecution, involved a motion to add a counter-claim in battery based on the risk of acquiring herpes. Although the motion was denied, the court commented in *obiter* that failure to disclose a serious risk to a sexual partner may well result in liability for negligence or battery.

Citing an earlier decision, *Bell-Ginsburg v. Ginsburg* [1993] O.J. No. 1471, the court noted there are circumstances in which courts have held that failure to disclose the risk of a potentially life-threatening infection, such as HIV, can support such claims. In *Bell-Ginsburg*, after discovering that her husband engaged in high-risk extra-marital sexual activities exposing the couple to the risk of contracting STDs, a wife alleged several causes of action including negligence and battery. The court refused to strike the plaintiff's statement of claim. With respect to battery, the court noted that consent is a defence to battery, but is not available to a defendant who

was not struck, no trial decision was reported.

Despite the finding in *Bell-Ginsburg*, it is not obvious a duty of care would be found to exist in all cases where negligence is alleged based on the transmission of STDs. However, claims in battery are based on the autonomy of the individual, and the right of each person to control his or her body and who touches it: *Non-Marine Underwriters, Lloyds of London v. Scaler* [2000] S.C.J. No. 26. Battery will be made out where there is intentional touching that is offensive or harmful and to which the person touched has not given meaningful consent: *Norberg v. Wynrib* [1992] S.C.J. No. 60.

The SCC decisions in the criminal context provide some guidance for how claims brought in civil courts would likely be treated. A potential plaintiff who is unaware that his or her sexual partner may infect them with an STD cannot be said to have provided meaningful consent to the sexual relationship. On the right facts, we can expect to see courts award compensation on the basis that failure to disclose a known STD to a sexual partner amounts to fraud or deception and vitiates the partner's consent to sexual intercourse.

Anna Matas is a civil litigation associate at Lerner in Toronto whose practice includes a focus on sexual abuse and sexual assault.

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Anna Matas  
Lerner

obtained consent through fraud or deception. With respect to the claim in negligence, the court found that the defendant owed the plaintiff a duty of care. Although the plaintiff's claim

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