

Cold comfort for healthcare workers? Medico-ethical dilemmas facing a healthcare worker after occupational exposure to HIV

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Abstract

Following exposure to the human immunodeficiency virus (HIV) it is advisable for the healthcare worker (HCW) to take post-exposure prophylaxis. A prerequisite for this is the establishment of the HIV status of the HCW and the patient. Ordinarily, this would be preceded by the ascertainment of the HIV status of the HCW and the patient. This should be done as soon as possible after exposure, usually within 24 hours. If the exposure takes place when the patient is under anaesthetic, which is often the case, consent for HIV testing is not readily forthcoming and this poses an ethical dilemma. A similar dilemma is posed by a patient who, having awoken, is not in a position or is unwilling to give consent. This paper discusses the ethical and legal constraints on the HCW and the employer in circumstances where the patient is not in a position to give consent. The paper concludes by restating the need to respect confidentiality and the autonomy of the patient and that informed consent is paramount in testing for HIV status. The paper proffers the view that testing the patient will not substantially alter the course of action open to the HCW and, in any event, will do little to allay the fears of HCWs.

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Introduction

A patient's right not to be tested for the human immunodeficiency virus (HIV) or any other condition without his or her consent is sacrosanct in South African law. Such a position is elaborated both in the Constitution, which states that "everyone has the right to bodily and psychological integrity, which includes the right ... to security in and control over their body"¹ as well as in the National Health Act, which requires that "a health service may not be provided to a user without the user's informed consent", subject to certain exceptions.² Thus, as a general rule, a patient cannot be tested without consent even in circumstances where a healthcare worker (HCW) encounters occupational exposure to the patient's blood or body fluids.

But what of the rights of an HCW exposed to the risk of HIV infection in this manner? If the patient is under anaesthetic or sedation or is otherwise unable to give consent or if he or she refuses to give consent to testing, is the HCW not to be afforded an opportunity to learn whether he or she has been exposed to the risk of infection? Is the HCW to be left without a remedy?

The issues raised in this paper are (i) whether an HCW who has sustained a needle-stick injury or a blood splash

is entitled to test the patient for HIV infection without the patient's consent; (ii) whether the HCW should inform the patient of the latter's HIV status after testing; (iii) if the patient has already been tested for HIV, whether it is fair to refuse to disclose to the HCW the patient's HIV status when knowledge of that status can determine whether or not to resort to post-exposure prophylaxis (PEP), simply because the patient is unconscious or refuses consent; and (iv) what are the options available to the HCW and the employer with regard to post-exposure management?

Occupational exposure

Exposure to HIV occurs by contamination with body fluids through sexual intercourse and other exposure to body fluids.³ In the context of the operating room, the most common exposures are needle-stick injuries and splashes with body fluids, more especially blood.⁴ The HIV status of many patients undergoing surgery may not be known because the majority of patients are not tested prior to surgery. Indeed it is not, and should not be, compulsory to test patients for HIV simply for surgery.⁵

When accidents involving needle-stick injuries or body fluid exposure do occur, the HCW must have a clear idea of what needs to be done.⁶ All healthcare establishments should

have freely available policies and guidelines on what to do in the event of an occupational injury. As soon as possible after exposure, usually within 24 hours (but up to 72 hours), both the HCW and the patient should be screened for HIV.⁷ The aim is manifold: to document the infection for both medical and legal reasons, identify infected individuals as early as possible in the course of their disease and ameliorate the fear and anxiety of the HCW when it is not warranted,⁸ and for purposes of the right to compensation if an HCW is infected with HIV at work. If the HCW tests positive there is no need for PEP, but if he or she tests negative and the patient tests positive, the HCW has the choice to initiate PEP in order to reduce the risk of infection.

The guidelines of the Centers for Disease Control and Prevention (CDC)⁹ and the Joint World Health Organization/International Labour Organization Guidelines on Occupational and Non-occupational HIV Post-exposure Prophylaxis⁷ provide recommendations on the measures to be employed after occupational exposure. These include vigorous washing of the area and irrigation of conjunctiva with 0.9% sodium chloride or appropriate sterile irrigants. The exposure should be reported to the designated department or person, followed by screening for HIV of both the HCW and the patient. Consideration should then be given to initiating PEP.

In terms of South African legislation, HIV has been classified as a hazardous biological agent capable of causing severe disease and which presents a serious health hazard.¹⁰ The Hazardous Substances Act requires employers, such as healthcare establishments, to take measures to prevent and, where this is not reasonably practicable, control exposure in the work environment.¹⁰ Furthermore, the Department of Health's policy on occupational exposure¹¹ promotes measures to minimise the risk of exposure as well as steps to mitigate the risk, which include standard universal precautions, counselling and PEP.

However, testing the source patient is a complex issue in view of the requirement for consent and is compounded by the fact that the patient may be under anaesthetic.

The question to be asked is, "Is the immediate testing of the patient under anaesthetic warranted? Will the HCW who has sustained the injury also have blood drawn immediately in order to check for HIV antibodies, and will PEP be commenced in the operating room?"

Legal and ethical position

The legal framework in South Africa with regard to confidentiality of status and testing for HIV is informed by the Constitution,¹² the National Health Act,¹³ the Department of Health's National Policy on Testing for HIV¹⁴ as well as decisions of the courts (*vide infra*). In addition, there are

several sets of guidelines on the ethical requirements for confidentiality and testing emanating from various professional associations of HCWs such as the Health Professions Council South Africa (HPCSA) and the South African Medical Association (SAMA).

The National Health Act stipulates that a health service, such as an HIV test, may not be provided to a patient without his or her informed consent.² When the occasion arises to take blood for HIV testing, as in the case of needle-stick or other occupational injury, the healthcare provider must take all reasonable steps to obtain the patient's informed consent. It is worth taking cognisance of the fact that the HCW will still be able to have himself or herself tested for HIV, even if consent is refused either by the patient or by the proxy.

The National Policy on Testing for HIV imposes the following conditions for HIV testing¹⁴: Testing for HIV may only be done with informed consent (except for a few exceptions). Pre-test and post-test counselling must be provided to each person before and after the test (with guidance on the appropriate behaviour in respect of a positive or negative result).

HIV-infected patients or those suffering from AIDS are, like all persons, entitled to have their right to dignity respected and protected.¹⁵ The Constitution states that everyone has the right to privacy, which includes the right not to have the privacy of their communications *with the HCW* about their status infringed on¹⁶ (emphasis added). Medical practitioners are required by law to maintain the confidentiality of their patients' health status, which ought not to be divulged.¹⁷

The National Health Act also emphasises confidentiality of the results of HIV testing.¹⁸ It further advises that disclosure of the HIV status is permissible only when (i) the patient consents to that disclosure, (ii) a court order or any law requires that disclosure and (iii) non-disclosure of the information represents a serious threat to public health.¹⁸ Health professionals are enjoined to follow the General Rules of Good Practice of the HPCSA, which state that the test results of HIV-positive patients should be treated with the highest possible level of confidentiality.^{17,19} The SAMA Guidelines confirm the notion that every person in South Africa has a right to privacy.²⁰

Recent legislation has introduced a provision for compulsory testing with the promulgation of the Sexual Offences Amendment Act,²¹ According to the provisions of this act a victim or survivor of rape may within 90 days of the commission of the offence make an application for an order that the alleged offender be tested for HIV.²² We return to this issue later.

South African case law

There is a long list of court decisions impacting on the issue of consent for medical procedures from the early 20th century. The case of *Stoffberg v Elliot*²³ addressed the duty of the doctor to inform. Judge Watermeyer stated,

In the eyes of the law, every person has certain absolute rights which the law protects. They are not dependent on statute or contract, but they are rights to be respected, and one of the rights is absolute security to the person ... Any bodily interference or restraint of man's person which is not justified in law, or excused in law or consented to is a wrong ... A man entering a hospital does not submit himself to such surgical treatment as the doctors in attendance upon him may think necessary ... he still has the right to say what operation he will submit to, and, unless his consent to an operation is expressly obtained, any operation performed upon him without his consent is an unlawful interference with his right of security and control over his own body, and is a wrong entitling him to damages if he suffers any.

A more recent decision is that in *Castell v de Greef*²⁴ in which the defendant had been sued for damages by the plaintiff because of an unsuccessful mastectomy. The defendant had failed to inform the plaintiff of the likely complications. The court, in agreeing with the plaintiff, held that the defendant had been under an obligation to warn her of the material risks and complications attached to the procedure and that he had failed to do so.

In the *McGeary* case²⁵ the attending doctor had disclosed the patient's HIV status to his colleagues during a game of golf. The court held that the patient's privacy had been invaded and found in favour of McGeary's estate. The case of *C v Minister of Correctional Services*²⁶ addresses HIV testing of a prisoner without his consent. The court held that "there can only be consent if the person appreciates and understands what the object and purpose of the test is, what an HIV positive result entails and what the probability of acquired immunodeficiency syndrome (AIDS) occurring thereafter is" and ruled in the prisoner's favour.²⁶

The AIDS Law Project²⁷ reports on a number of cases where employees have been forced to undergo an HIV test. Although these cases were settled out of court, there is still a concern that not a single doctor reported to the HPCSA by the AIDS Law Project has been found guilty of misconduct, unethical behaviour or unprofessional behaviour for testing domestic workers for HIV without their consent.²⁸ This might be an indication that the unlawful testing of, particularly, domestic workers is widespread.

Discussion of legal and ethical rules

According to the foregoing guidelines, the patient can only be tested after he or she has given informed consent. In a conscious patient, this poses less of a problem as the

patient can be asked for permission. However, if he or she refuses consent, the HCW cannot compel the patient to undergo testing nor can the test be conducted under false pretences.²⁹ In addition, the patient's HIV status should remain confidential because of the patient's right to privacy under the Constitution, the National Health Act and the HPCSA provisions.

Furthermore, the patient's rights are not absolute and may be limited, under the Constitution, in the face of legitimate, competing interests.²⁹ If, for example, non-disclosure may result in a threat to the health or life of others, it may be necessary to disclose the patient's HIV status.³⁰ The HCW is under an ethical obligation to warn anyone who is in danger of contracting HIV infection.³¹ Can this duty be extrapolated to HCWs under circumstances where the patient poses a danger of infecting the HCW through a blood splash or needle-stick injury? This would require that the patient be tested and, if he or she refuses, be forced to submit to testing. To what extent can such an incursion into the autonomy of a patient be justified? In an unconscious patient or one who refuses consent, taking blood without his or her consent would amount to assault as well as violation of the person's dignity and integrity, both of which are protected by the Constitution. It is, therefore, not a path to be taken.

It may be argued that a person under anaesthetic does not have legal capacity to give a valid consent. Under the National Health Act such a person must authorise, before the event, someone else to give proxy consent.³² This function cannot be undertaken by the HCW. If the patient is under the influence of anaesthesia and no consent has been obtained prior to the procedure, the patient needs to recover from the anaesthetic and can then be asked for consent to the test. Many procedures are such that patients can be awakened within 24 hours and, since the PEP should be administered within 24 hours, it is again feasible to wait for 24 hours for the patient to awaken and then request consent. However, patients who remain under sedation for longer periods, such as those in intensive care units, may not be in a position to give consent even after 24 hours. Again, testing cannot be done under false pretences, as doing so would constitute a violation of the patient's human rights. However, proxy consent for HIV testing can be obtained from a spouse, sibling, parent or major child.

The question also arises as to whether the provisions of the Sexual Offences Amendment Act³³ can be extrapolated to these patients. This act compels the perpetrator to be tested for HIV should the victim request so. The act appears to be in conflict with the Constitution,³⁴ the National Health Act¹³ and the provisions of the HPCSA¹⁷ to the extent that the patient's rights under the Constitution may be violated, mainly the rights to be asked for consent and the right to privacy and confidentiality.

Another approach might be to consider the 'compulsory' testing of the patient as a justifiable limitation of the patient's rights in favour of an HCW who has a 'stronger' right to know the patient's status. The right not to be tested without informed consent (i) may be limited only in terms of law of general application (Section 7 of the National Health Act); (ii) to the extent that the limitation is reasonable and justifiable in an open and democratic society (society's interests being served by healthcare providers' having reassurance of the status of their patients); (iii) based on the foundational values of our democracy and taking into account all relevant factors.³⁵

In terms of the limitations clause, a possible opening is the proviso of "...taking into account all relevant factors".³⁵ Such relevant factors may include the right not to be tested being superseded by the right of the HCW to know the patient's status for the purpose of protecting his or her own health, with the possibility of utilising an existing contemporaneous blood sample as a less restrictive means to achieving the purpose of protecting the HCW.³⁵ However, this approach would be difficult to sustain on moral grounds.

The nature of the right and the purpose of the limitation as provided for in Section 36 of the Constitution may not be convincing enough to sustain the limitation in the context of HIV testing, as the limitation of the patient's right can be considered a very serious inroad into the patient's human rights and, further, will not fundamentally alter the course of action to be adopted by the HCW, given that PEP will have to be administered in any event.

Another consideration is the use of the emergency provision in the National Health Act to test patients under these circumstances. According to the National Health Act, emergency treatment can be given or testing done without consent if it is necessary to save the patient's life.¹³ HIV testing does not fall under this category as it is unlikely that an HIV test can be part of emergency life-saving medical treatment. Taking a blood sample for HIV testing on this pretext would therefore be unlawful.²⁷ The HPCSA ethical guidelines go on to emphasise that, with regard to HIV testing, it would be legally very difficult to justify testing without consent as a necessity to save a person's life, in other words that of the HCW.³⁶

If the patient awakens and refuses consent for testing, consent can be requested for the use of the stored blood, if it is available for HIV testing. In such instances, the patient must be informed that the blood sample will be tested but that he or she may elect whether or not to receive the results of the test. Further, the patient must be informed that the results of the test may be disclosed to the HCW but will otherwise remain confidential.

In order to clarify this problem the HPCSA has published ethical guidelines for good practice with regard to HIV in 2007.³⁶ According to these guidelines, testing any existing blood specimen from the source patient is permissible but this should be done with the source patient's consent. If consent is withheld, the specimen may nevertheless be tested but only after informing the source patient and providing for the protection of privacy. If there is no existing blood specimen and the patient still refuses to give consent to an HIV test, the patient should be treated as HIV positive and prophylaxis should be initiated.

The testing of an existing/stored blood specimen raises another ethical dilemma. If the patient needs to give consent for HIV testing, this requirement will need to be fulfilled even if the blood specimen is stored because the blood was not drawn for this purpose in the first place. However, this requirement is waived by the provisions of the HPCSA.³⁶

Another consideration relates to a patient who has already tested positive for HIV. Is it fair to refuse to disclose to the HCW the patient's HIV status when knowledge of that status can determine whether or not to resort to PEP simply because the patient is unconscious or refuses consent?

The HCW has an ethical and legal duty to warn anyone who is in danger of contracting HIV, as provided for by the National Health Act¹⁸ and the case law.³¹ Knowledge of the patient's status by a colleague of the HCW who may have been exposed to HIV infection in the operating theatre falls under the same category. It is therefore acceptable for this colleague to disclose the patient's status, based on the provision of the National Health Act, and the need for retesting goes away. At any rate, patients are unlikely to refuse consent for disclosure to an HCW under the circumstances.

In order to avoid this anxiety after HIV exposure, an argument can be made for inclusion of HIV testing in the general consent obtained for surgery for all patients. The problem with this approach is that it may be construed as an attempt to bypass the legal and ethical requirements and obtain consent 'through the back door'. Furthermore, such a suggestion would be premised on the assumption that HCWs do not adhere to universal precautions.

Conclusion

The various ethical codes, the Constitution as well as the National Health Act protect the patient against HIV testing without consent. For patients who refuse to give consent or those remaining unconscious for longer than 24 hours, it is reasonable to wait until they are awake in order to request consent for the use of stored blood, if it is available for HIV testing. Patients cannot and should not be forced to test for HIV and the test cannot be conducted under false

pretences. Where such stored blood is not available, the patient should be regarded as HIV positive and PEP should be commenced by the HCW.

Clearly, this application of the legal and ethical principles would appear to leave the HCW without a remedy should he or she desire to ascertain the status of the patient implicated in an occupational injury. However, it may be argued that the need for testing the patient may be moot, as testing serves little purpose other than providing a limited form of security to the HCW. A negative result on the patient would hardly provide reassurance because he or she may be in the 'window period' of HIV infection. The HCW, if tested negative, would in any event be advised to initiate PEP and follow the recommended periodic testing to determine his or her status, together with the requisite counselling. Thus, testing the patient offers cold comfort to the HCW.

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