British Medical Association

HIV Antibody Testing

OPINION

1. It must be appreciated that such effect as the resolution may have is limited to the domestic policy of the BMA (and, possibly, disciplinary proceedings before the General Medical Council). It does not, affect the law of the land.

2. It is a fundamental principle of the English common law that every adult human being of sound mind has a right to determine what shall be done with his own body ("the right to bodily integrity"). It is through the application of this principle that the tort of battery has developed. In relation to medical practitioners the Courts have more recently encouraged the use in this context of claims for damages for negligence. A **"battery"** is the unlawful application of force to the person of another. "Assault" is a term commonly used to include not only an overt threat of bodily harm, but also a battery. We shall so refer to it.

3. It will be apparent, therefore, that any medical treatment which involves physical contact with the patient's body is a potential battery, which may give rise to a legal liability on the doctor's part, or which may found an allegation of negligence or professional misconduct. It is the existence of the patient's **consent** to the touching which renders the touching legally unobjectionable. We shall use the term "treatment" to include "testing" in this context.

Consent

4. As a general rule, the consent of the patient is an essential prerequisite to medical treatment of any kind, even that of a relatively minor nature. To be effective the consent must be genuine. Where it has been obtained by misrepresentation, fraud, deceit or duress it will not be genuine and, accordingly, the doctor will be answerable for a breach of legal duty and/or be liable to face a charge of professional misconduct. It is no defence, subject to very rare and narrow exceptions, for a doctor to assert that although consent was not obtained, he was prompted to perform the treatment by the best of motives.

5. In a few limited circumstances the patient's consent may be dispensed with altogether. These exceptions are, however,

rare and were not those contemplated by the Motion. The major exception arises where the patient is unconscious and therefore unable to give consent and it is regarded as essential that treatment be given. Two Canadian cases illustrate the position. These cases are not binding on the English Courts, but are of persuasive value and the principles are likely to be followed:

In **Marshall -v- Curry** [1933] 3 DLR 260, the Supreme Court of Nova Scotia found in favour of a surgeon who, in the course of a hernia operation, discovered that the patient had a grossly diseased testicle and removed it in the interests of the patient's health and life. The Court stated that "where a great emergency which could not be anticipated arises" a doctor is justified in acting "in order to save the life or preserve the health of the patient." However, in **Murray -v- McMurchy** [1949] 2 DLR 442 a surgeon during the course of a Caesarian section discovered a number of fibrous tumours in the wall of the patient's uterus, and decided to sterilise her because of the risk of future pregnancy. The patient succeeded in her claim for damages. The judge said that the position was different from the situation which had arisen in the **Marshall** case where the procedure had been "necessary in the sense that it would be unreasonable to postpone [it] to a later date." In **Murray's** case it had been merely "convenient" to perform the operation without waiting for the patient's consent and the doctor was held liable in damages.

6. A practitioner will therefore, in our opinion, only be justified in proceeding in circumstances where consent cannot be obtained due to the patient being unconscious or unfit to give consent and where the treatment is necessary for the protection of the life or the preservation of the health of the patient. In all other cases the patient's explicit consent should be sought. With regard to the Motion under consideration, it appears to be open to doubt whether tests for HIV antibody taken in an emergency involving an unconscious or desperately ill patient would be justified in any event because of the length of time taken to obtain a result.

Implied Consent.

7. In certain, very rare circumstances the patient's consent to treatment may be implied in that by presenting himself for, and requesting, treatment he has impliedly acquiesced in any routine procedures necessary to comply with his request. In our opinion the doctrine of implied consent is not at all likely to be held to cover testing for HIV antibody. The taking and testing of a sample, though it may commonly be carried out, would not, in our opinion, be considered "routine" by the courts. Given the far-reaching implications

of a positive result it cannot reasonably be contended that an HIV test can be covered by the notion of implied consent and, in the light of what appears to be current medical opinion on the subject, it is equally unlikley that the Courts will decide that an HIV test should be classified as routine. Accordingly, a medical practitioner is under a duty to ensure that the patient's explicit consent to the testing is obtained.

"Informed" Consent.

8. Because the patient's consent must be genuinely given the following question arises:

"Exactly how much does the patient need to be told?"

(a) This question has recently arisen in a number of cases in the English courts. To understand their effect it is first of all necessary to understand that in certain situations a patient may be able to bring a claim against his doctor in two ways: damages for assault and/or negligence.

(b) Patients have alleged that they did not give genuine consent to their operations because they were not fully informed of the risks involved in them. Their claims were in respect of assault and negligence. The latter allegation was made on the footing that the doctors had been negligent in failing to explain to the patients the possible risks they were facing.

(c) In **Chatterton -v- Gerson** [1981] Q.B. 432 it was decided that a negligent failure by a practitioner to disclose information to a patient was not in itself sufficient to prevent the patient's consent to the operation being genuine and effective. Bristow, J. said:

> "Once the patient is informed **in broad terms** of the nature of the procedure which is intended, and gives her consent, that consent is real, and the cause of action upon which to base a claim for failure to go into the risks and implications is negligence, not trespass. Of course, if information is withheld in bad faith, the consent will be vitiated by fraud."

Turning to the practitioner's obligation to explain what was happening to the patient he continued:

> "The duty of the doctor is to explain what he intends to do, and its implications in the way a careful and responsible doctor in similar circumstances would have done."

(d) Further, in **Sidaway -v- Governors of Royal Bethlem**

Hospital [1985] 2 WLR 480, the House of Lords undertook an extensive review of the authorities in this area and unanimously decided that inadequate disclosure of information **did not in itself vitiate** the patient's consent to treatment. They therefore urged that actions based upon the practitioner's failure to supply sufficient information as to the risks involved in the operation should be based in negligence and not in assault.

(e) On the question of how much the patient should be told, the majority of the Law Lords in the **Sidaway** case appear to have taken the view that a doctor would not be negligent in failing to provide information if he acted in accordance with the practice accepted at that time as proper by a responsible body of medical opinion. However, they qualified this by stating that there could be some circumstances where the proposed treatment involved a substantial risk of grave consequences in which a judge could conclude that, notwithstanding any practice to the contrary, a patient's right to decide whether to consent to the treatment was so obvious that no prudent medical man could fail to warn of the risk save in an emergency or for some other sound clinical reason.

The Law and the HIV Testing Resolution
Some further practical considerations (but by no means exhaustive):

(1) If the patient was only told that a sample was being taken for "tests" and no specific reference was made to HIV testing the doctor would be in some difficulty in justifying the taking of the sample, unless he could establish wholly exceptional circumstances. If the patient were to ask "Are you going to carry out an HIV test?" or "What tests are you going to carry out?" the practitioner would be obliged to answer truthfully. If he did not, the consent to the taking of the sample would be vitiated either by fraud or deceit or misrepresentation. In the **Sidaway** case Lord Bridge stated:

> "...when questioned specifically by a patient of apparently sound mind about risks involved in a particular treatment proposed, the doctor's duty must, in my opinion, be to answer both truthfully and as fully as the questioner requires".

If the patient made no such enquiry then it is strongly arguable, and in our opinion likely to be held, that there was no valid consent since there is an implied representation on the part of the practitioner that the tests to be carried out are merely routine. If the doctor knows that he intends to carry out an HIV test and deliberately conceals this from the patient in the hope of securing his consent to giving a sample for testing then he does so at his peril; it is clearly open

to the patient to assert in these circumstances that he was misled and that there was no genuine consent. As Bristow J. stated in **Chatterton -v- Gerson:** "...if information is **withheld** in bad faith, the consent will be vitiated by fraud."

(2) Even if the practitioner feels that, despite what the patient may think, the carrying out of an HIV test is in the patient's best interests there is, nevertheless, once again, a serious risk that the practitioner will be laying himself open to a legal liability. It cannot be said that such a view brings the carrying out of the test within the exception of necessity considered above: it is not **necessary** for the protection of the life or the preservation of the health of the patient. A positive result will not, in the light of current medical knowledge, lead to the patient receiving life saving treatment. Indeed, the revelation of a positive result may have more serious effects than the latent existence of the infection.

(3) What is the position where a doctor reaches the conclusion that it would be negligent on his part not to arrange for HIV antibody tests because a specific treatment or drug for an infected (or high-risk group) patient might be contra-indicated (for example, where the treatment would reduce the reservoir of antibodies remaining available to the patient)? In our opinion, if a practitoner has reached any of these conclusions he would be under a duty to explain the situation to the patient and seek his consent to the tests being carried out in his own interests. A refusal of consent, like the giving of consent, should be recorded in writing and signed by the patient.

(4) What is the position where a doctor, rightly or wrongly, reaches the conclusion that in the interests of his own safety and, for example, that of his surgical team or of the equipment he uses, or of other patients (for example, in a renal unit) HIV testing is necessary? Again, the general answer would be the same ,save that in this instance the doctor should counsel the patient and explain frankly to him that it is also in the doctor's, his colleagues' and the public interest that the patient should consent to the testing. Any patient who refused consent could then be treated as if they were infected.

Conclusions.

12. The implementation of the resolution under discussion has the potential for placing medical practitioners in an extremely difficult position. As the law stands at present, the consent of the patient is **essential** if the act of taking a sample for testing is not to constitute an assault or expose the practitioner to a claim in negligence for failing to

inform the patient of the nature of the test and possible consequences of a positive result. This leaves aside any questions of professional misconduct which may arise.

13. It is clear that the courts will strive to uphold the individual's bodily integrity and attempts to subvert it through passive or active misrepresentation, even for the best of motives, will render the practitioner open to legal action. The patient is entitled to a remedy if that bodily integrity is improperly invaded:

(i) deliberately: because it is an assault; and/or
(ii) carelessly: because it is the duty of doctors and everyone else to take reasonable care to avoid invading that integrity

and his compensation is the civil remedy of damages (or a compensation order from a criminal court).

14. We are of the opinion that, where, in essence, a medical practitioner has, without the genuine consent of the patient, obtained a blood sample for the pre-dominant purpose of testing for HIV antibody, the Courts are likely, in the end, to accept the formulation expressed by Lord Scarman in the course of his speech in the **Sidaway** case:

> "It is, I suggest, a sound and reasonable proposition that the doctor should be required to exercise care in respecting the patient's right of decision. He must acknowledge that in very many cases factors other than the purely medical will play a significant part in his patient's decision-making process. The doctor's concern is with health and the relief of pain. These are medical objectives. But a patient may well have in mind circumstances, objectives, and values which he may reasonably not make known to the doctor but which may lead him to a different decision from that suggested by a purely medical opinion. The doctor's duty can be seen, therefore, to be one which requires him not only to advise as to medical treatment but also to provide his patient with the information needed to enable the patient to consider and balance the medical advantages and risks alongside other relevant matters, such as, for example, his family, business or social responsibilities of which the doctor may be only partially, if at all, informed."

In the final analysis, it is our opinion that the Courts will continue (until legislation provides otherwise) to hold that the right to decide rests with the patient and not with his medical adviser. It would be unwise for practitioners to adopt a course which pre-empts possible legislation and

exposes them to both criminal and civil proceedings. The role of the BMA, one would imagine, would be to instigate and influence sensible, public protection legislation when the scientific data is more fully available and the practical implications are better understood.

GRO-C

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