Brigid Dimond discusses the legal issues surrounding patient consent to blood tests for infectious diseases after a health professional incurs a sharps injury

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Gaining patient consent for blood tests following sharps injuries

There is a high risk of staff receiving needlestick and other sharps injuries while working in health care. Concern is so great that a seminar on sharps injury prevention and single-use medical devices was held in March 2003 at the European Parliament in Brussels. Injuries caused by needles and other sharp medical devices, and the related risk of potentially fatal disease transmission, remain a major threat to the health and safety of health care workers across the European Union.

Also, the distress, sickness and absenteeism of staff as a result of receiving sharps injuries are a considerable strain on the already limited human resources that are available in health care services (The European Medical Technology Industry Association (Eucomed), 2003).

The potential for fatal disease transmission following a sharps injury makes it extremely important to identify the disease status of the patient on whom the sharp instrument was used. This involves obtaining a blood test from the patient.

This article explores the issues relating to consent in obtaining the sample, using case examples of different patients and circumstances.

BOX 1. THE MENTALLY COMPETENT ADULT

Tom Ellis is in hospital for a routine hernia repair. Unfortunately, after surgery, staff nurse Delia Grant sustains a needle stick injury after giving Mr Ellis a painkilling injection. Ms Grant is anxious to know if there is any danger of her acquiring an infectious disease from Mr Ellis, who is a mentally competent adult.

The mentally competent adult

In the case outlined in Box 1, the usual procedure would be to ask Tom Ellis to give consent to a blood test, so that any danger to Delia Grant can be evaluated.

With Mr Ellis’ consent, blood can be taken and, again with his consent, the results can be given to Ms Grant. Without his consent, revealing the results would be a breach of confidentiality.

However, since the intention would be to test his blood for HIV, Mr Ellis should be offered counselling before he gives consent. This is because he may find it difficult to obtain insurance cover or a mortgage, or may experience other detrimental effects if he has to acknowledge in future that he has been tested for HIV.

Mr Ellis would also be entitled to receive counselling for the possibility that he was HIV positive, since knowing this would have dramatic effects on his life and family.

If Mr Ellis refused to give a blood sample for testing, as a mentally competent adult his refusal could not be overruled. Compulsory measures permissible under public health legislation would only be available if there were real concerns on public health grounds about his status.

According to the Public Health (Control of Disease) Act 1984, a medically competent person can refuse any invasion of their person for a good reason, a bad reason or no reason at all. The refusal of a mentally competent person to give consent could only be overruled if there were statutory justification.

For example, patients detained under the Mental Health Act 1983 could, if specified circumstances exist, be compelled to have treatment for mental disorder. However, this would not apply to the case outlined in Box 1.

BOX 2. THE MENTALLY INCOMPETENT ADULT

George Barlow is in hospital for a hernia repair. He has severe learning disabilities. After surgery, staff nurse Delia Grant sustains a needlestick injury after giving him a painkilling injection. Ms Grant wants to know the risk of her acquiring an infectious disease from Mr Barlow.

The absence of consent: the mentally incapacitated adult

In Box 2, George Barlow has severe learning disabilities. He would probably not be able to give valid consent to providing a blood sample. He would also not understand why such a test was warranted. Relatives do not have the right to give consent on behalf of persons more than 18 years old.

The House of Lords has recognised that there is a right to act in the best interests of a mentally incapacitated person who is incapable of giving consent (F v West Berkshire HA & Another, 1989).

In the case in Box 2, it would certainly be in the best interests of Ms Grant for Mr Barlow to be tested, but is it in the best interests of Mr Barlow? It could be argued that if HIV or hepatitis were treatable, and therefore finding out Mr Barlow’s immune status could lead to treatment, then a test would definitely be in his best interests.

However, on the basis of this argument, all people with learning disabilities could be tested justifiably at any time in their best interests and not only when a needlestick injury had been sustained by a member of staff.

Instead of applying a best-interest test to the situation, a substituted judgement test could be applied, which would look at the situation from a different perspective – if Mr Barlow had the mental capacity to give consent,
would he want to help Ms Grant by agreeing to a blood test, so that she could find out if she had been infected as a result of the needlestick injury? If the answer is yes, then presumably the blood test could be taken.

The Law Commission (1995), in proposals for legislation on behalf of mentally incapacitated adults, suggested that in making decisions on behalf of those unable to give consent, a modified best-interests test could be applied. This would take into account what a person would have wanted had they not lost their capacity.

The test could be possible for those who had once had the requisite mental capacity (such as people who had developed Alzheimer’s disease). However, it would not be possible for a person such as Mr Barlow, who had never had the necessary mental capacity.

**BOX 3. THE UNCONSCIOUS PATIENT**

James Rigby is in hospital for a routine hernia repair. After surgery, he has a cardiac arrest and is transferred to intensive care. Staff nurse Delia Grant receives a needlestick injury after giving him an injection. She is anxious to know if there is any danger of her acquiring an infectious disease from Mr Rigby.

The unconscious patient In the case outlined in Box 3, although James Rigby is mentally incapacitated, it is hoped that this will only be a temporary state and that he will soon regain consciousness.

Unless urgent action needs to be taken in his best interests, elective choices could be left until he has the mental capacity to give consent to blood being taken and tested.

Clearly Delia Grant’s interests require a speedy test to be taken and results to be provided of any cross-infection. However, there does not appear at the moment to be any legal power to test Mr Rigby’s blood for a reason that is not in his best interests.

**BOX 4. A CHILD UNDER 16 YEARS OF AGE**

Alan Jones is in hospital for a hernia repair. He is eight years old. After surgery, staff nurse Delia Grant receives a needlestick injury after giving him a painkilling injection. She is anxious to know if there is any danger of her acquiring an infectious disease from him.

A child under 16 years of age Parents have the right to give consent on behalf of their children up to the age of 18, after which time the young person can give consent on his or her own behalf as an adult (see Box 5 for young persons over 16 years of age).

Alan’s parents have the legal power to give consent for any treatment that is in their son’s best interests.

However, in this situation, would a blood test really be in Alan’s best interests? It is probably highly unlikely that Alan has HIV or hepatitis, so he is therefore unlikely to benefit from earlier treatment for an infectious disease.

If Alan were ‘Gillick competent’ (Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS [1986]) – that is, if he had sufficient understanding and intelligence to enable him to understand fully what is being proposed – he could give consent on his own behalf, if the treatment were in his best interests.

**BOX 5. A PERSON MORE THAN 16 YEARS OLD**

Ben Morgan is in hospital for a hernia repair. He is 16 years old. After surgery, staff nurse Delia Grant receives a needlestick injury after giving him a painkilling injection. She wants to know the risk of her acquiring an infectious disease from him and wants him to be tested.

A young person more than 16 years of age

A young person aged 16 or 17 years of age has a statutory right to give consent to treatment, under the Family Law Reform Act 1969. In this act, treatment is widely defined and includes medical, surgical and dental treatment, as well as diagnostic procedures and anaesthesia.

In the case outlined in Box 5, the question that has to be asked is: can taking the blood test be seen as treatment for Ben, and does it therefore come within the definition of treatment for the purposes of section 8(1) of the act?

The blood test may lead to treatment if it is discovered that Ben is HIV positive, so in this respect it could be seen as part of the diagnostic process.

However, the real reason for the test is not the treatment of Ben but the identification of any danger to Ms Grant, in which case it would not come under the statutory provisions of the act.

Under the act, Ben’s parents could also give consent on behalf of their son up to 18 years of age. However, exactly the same problems would then arise as discussed in the case outlined in Box 4.

Even if Ben does not have a statutory right to give consent in these circumstances, he could, if Gillick competent, give consent at common law (judge-made law or case law).

If the risk of harm to him were very small, and if Ben had the mental competence as defined by the House of Lords in the Gillick case, then he could agree to the blood test being taken.

REFERENCES

Department of Health (2001a)

Department of Health (2001b)
Good Practice in Consent: Implementation Guide. London: DoH.


F v West Berkshire HA & Another [1989] 2 ALL ER 545.

Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS [1986] 1 AC 112.

However, he should receive the same counselling advice and information that Mr Ellis in Box 1 would be entitled to receive.

**Public health laws** There are powers under the Public Health (Control of Disease) Act 1984 that enable a Justice of the Peace to make an order for a person believed to have Aids to be medically examined by a registered medical practitioner.

However, these regulations would not cover the situation of staff nurse Ms Grant, who wanted to check on the disease status of the patient in her own best interests.

Epidemiological research on an anonymous basis using blood left from other tests is being carried out in order to assess the level of HIV in the UK. However, for cases in which tests on named patients are to be carried out, then the consent of the mentally capable person is required.

In May this year, it was reported that the General Medical Council was carrying out an investigation into complaints that doctors had broken medical guidelines by testing patients for hepatitis C without their consent.

If such allegations were proven to be true, the doctors could face professional conduct proceedings which could lead to them being struck off the register. Their employers could also face civil litigation.

**Conclusion** From the perspective of the health practitioner, the fact that a patient cannot be compelled to have blood tests following sharps injuries to staff is disappointing. Staff would want to know what the risks are as soon as possible following the injury.

Public health legislation wider than that currently in place may be justifiable to enable tests to be taken without consent. However, this would be a significant invasion of the patient’s right of autonomy.

Prevention of such injuries must take priority. The Needle Stick Injury Bill is currently before parliament, and could lead to regulations being passed to prevent such injuries and to require statutory reporting of such incidents.

However, the bill does not propose to enable regulations to be drafted to compel patients to be tested. Further information on the topic of consent can be obtained from the Department of Health’s reference guide (DoH, 2001a), implementation guide (DoH, 2001b) and the book *Legal Aspects of Consent* (Dimond, 2003).

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**Update**

It is now widely accepted that the administration of enteral feeds contaminated with micro-organisms can lead to serious infections in patients, both in hospital and at home. In response to this, the Infection Control Nurses Association has published the document *Enteral feeding: Infection Control Guidelines*. It is divided into seven sections including the microbiological hazards of enteral tube feeding, practical aspects, site care, patient and carer education, and enteral feeding in the community and in children. It also includes a discharge planning summary. Copies can be obtained from Fitwise, Drumcross Hall, Bathgate EH48 4JT; e-mail: Lynn@fitwise.co.uk or by visiting www.icna.co.uk The cost is £5 for ICNA members, £10 for non-members. The guidelines are sponsored by an educational grant from Nutricia Clinical Care.

Kimberley Clarke Health Care has introduced a new line of Kimguard sterilisation wraps. The wraps are graded from KC100 to KC600, with higher numbers indicating a stronger wrap. Various shades of blue also indicate different grades of strength. For more details on the range, tel: 01604 591993 or visit the website www.kchealthcare.com

The September issue of Professional Nurse provides a guide to providing malaria prophylaxis to children. The authors suggest it is best to avoid travelling to areas affected by the disease. If people do travel, they should take prophylactic medication and other precautions to avoid being bitten by mosquitoes.


The Scottish Executive has launched a number of initiatives aimed at lowering the incidence of health care-associated infections. One of them is the introduction of the new role of cleanliness champion which aims to promote the prevention and control of HAIs in NHS Scotland. Staff from all sectors of NHS Scotland can be selected for the new role. An education programme will equip them with the skills and knowledge to ensure good practice in preventing HAIs, such as ensuring safe practice and maintaining a safe environment. For details visit www.nes-hai.info