



HIV testing

Confidentiality, communication and follow up

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This article discusses a recent Supreme Court case¹ that made findings on several important issues in general practice.

- What is the duty of general practitioners when ordering HIV testing and undertaking post-test counselling of an HIV positive patient?
- Can GPs disclose a patient's HIV status to their sexual partner in the absence of the consent of the patient?
- Do GPs have a duty to third parties who may be exposed to the risk of HIV infection?
- Do GPs have a duty to ensure patients attend for follow up specialist appointments?



Case history

On 16 November 1998, Ms P D and Mr F H consulted Dr H together for the purpose of having blood tests to ensure that neither carried the human immunodeficiency virus (HIV) or any other sexually transmitted infection as they were proposing to get married.

At the time of the consultation with Dr H they were not living together but had a sexual relationship and practised protected sex. During the consultation, Dr H was told Mr F H came from Ghana. Ms P D said she was concerned about the sexually transmitted health status of her future husband because she believed there was a higher risk that a person from Africa would be HIV positive than from Australia.

Dr H made the following notes of the consultation with Ms P D and Mr F H:

In Ms P D's medical records:

'16.11.98 Low risk lifestyle. Nil IVDU No anal sex, wants STD check. Investigation - HIV, Hep B/RPR See 1/52'.

In Mr F H's medical records:

'16.11.98 Low risk lifestyle. Nil IVDU from Ghana. About to engage in new relationship. Counselling wants blood test for STD, talk about...nil, investigation HIV, Hep B/RPR See 1/52'.

No mention was made in either Ms P D's or Mr F H's medical records that a joint consultation had been held and there was no mention in Ms P D's medical records that she was about to enter into a new relationship. Dr H did not inform either Ms P D or Mr F H that unless consent was given he was legally prohibited from disclosing any information concerning HIV about one to the other. Indeed, there was no discussion about how the information was to be dealt with. At the conclusion of the consultation, Dr H asked Ms P D and Mr F H to return to the surgery in about a week's time when the pathology results would be available.

On 23 November 1998, Dr H received Ms P D's pathology report. It noted she was negative for both hepatitis B and HIV. On 24 November 1998, Dr H received Mr F H's pathology report which recorded he was positive for hepatitis B and HIV. Dr H subsequently rang Mr F H and told him he had 'very bad news'; he had tested positive. He told Mr F H that he had made an appointment for him to attend the immunology clinic and he should take a positive attitude toward his condition because of the enormous advances that had recently been made in treating people with HIV. Dr H advised Mr F H not to have unprotected sex and that he could not father a child. Dr H did not

raise any issue arising out of the joint consultation and, in particular, he asked no questions about whether Mr F H was proposing to tell Ms P D the results of his tests. Dr H never saw Mr F H again and there is no record of Mr F H having attended the immunology clinic. Dr H never spoke to Ms P D again, although she attended the practice on 31 December 1998 for the oral contraceptive pill and on 11 February 1999 for vaccines because she was travelling to Ghana.

On 25 November 1998, Mr F H attended the practice and asked for his pathology results. Mr F H's medical records note: '25.11.98 Patient called into medical centre for results. Dr C spoke to patient re: HIV positive status and need for review at RPAH. Letter for appointment at immune clinic given'.

Dr C spoke to Mr F H on the occasion of handing him the letter of referral to the immunology clinic and urged him to attend the appointment. He advised Mr F H that he had AIDS and 'it kills'.

Approximately 1-2 weeks after the consultation with Dr H, Ms P D returned to the surgery. The receptionist gave her a copy of her pathology report. Ms P D asked the receptionist for a copy of Mr F

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Continued from previous page

H's pathology report but was told it was confidential and could not be given to her. After Ms P D was refused access to Mr F H's test results, she telephoned him and told him she had tested negative. Mr F H said he had tested negative also. She asked to see his results. Ms P D says she was shown a pathology result showing Mr F H was HIV and hepatitis B negative. The report was either a forgery or fraudulently obtained.

At the time of the consultation in November 1998 and for some months after, Ms P D and Mr F H were living apart and were not having unprotected sex. They were married in July 1999 and a child was born in February 2000.

In May 1999, Dr H received a questionnaire from the department of health seeking information about Mr F H's HIV status which had been routinely notified to the department by the pathology laboratory. Dr H did not contact Mr F H. On 15 June 1999, the medical centre received a letter from the immunology clinic advising it had no record that Mr F H had ever attended the clinic. No attempt was made by Dr H, Dr C or the medical centre staff to contact Mr F H.

In September 1999, Ms P D was admitted to hospital with a fever and rash. Later this illness was recognised to be a seroconversion illness indicating that Ms P D had become HIV positive. In fact, she did not find out she was HIV positive until January 2000, just before the birth of her child. Ms P D became aware Mr F H was infected with HIV because she found a copy of the genuine pathology report among his papers at the end of 1999 or early 2000. Before she became aware that she was HIV positive, Ms P D went to the medical centre and spoke to Dr C demanding to know, in effect, why she was not told of her husband's HIV status. The following note was made in Mr F H's records:

'Dr C addendum Patient came (wife) requesting records and Info about husband. Explain clearly husband may be unwell – confidentiality issues apply. Need to take precautions and advise husband to attend here or any other doctor for R/V ASAP, if still has not resolved last 1–2 years issues. Explained records cannot be given to her. Attend with husband to resolve issues best options'.

Ms PD subsequently commenced legal proceedings against Dr H and Dr C.

Medicolegal issues

In the Statement of Claim, Ms P D alleged Dr H and Dr C were negligent in that:

- they failed to provide any pre-test counselling to either patient
- they failed to determine what Ms P D and Mr F H intended to do if one or the other was HIV positive
- failed to personally counsel or arrange counselling for Ms P D when she attended for her results
- failed to provide any post-test counselling to Ms P D or Mr F H
- failed to inform Ms P D that Mr F H was HIV positive
- failed to take any adequate measures to ensure Mr F H attended for specialist treatment and/or counselling in relation to his infection
- failed to warn Ms P D of the risks of unprotected sexual intercourse given

that Mr F H was HIV positive

- failed to take any steps to protect Ms P D from HIV infection where they knew, or ought to have known, that Mr F H was intending to engage in unprotected sexual intercourse with her.

Dr H and Dr C denied any negligence and argued that even if they were in breach of their duty of care to Ms P D, the conduct of Mr F H in forging his test results operated to break the chain of causation between the breach and the consequential HIV infection suffered by Ms P D. The GPs argued that there was no obligation for them to direct Ms P D's attention to the possibility of discordant HIV test results and there was no obligation once they knew Mr F H was HIV positive to have any further contact with Ms P D or raise with her, on the occasions she was seen, any aspect of the joint con-

sultation after the discordant results were known. It was submitted that by referring Mr F H to the immunology clinic the members of the practice no longer had a legal obligation to make further efforts to protect Ms P D. This was regardless of whether or not other doctors thought they would have a 'moral' obligation to track down Mr F H and persuade him to tell Ms P D of his condition and, failing that, to report the matter to the department of health.

The judge found there were at least two consultations with Ms P D when it was open to the GPs to raise with Ms P D her future intentions concerning her marriage to Mr F H. At that point the GPs would have been on notice that Mr F H must have lied to her about his HIV status. The judge found the GPs 'were not at liberty to tell her of the information they had concerning Mr F H's HIV status but they could and should have taken other steps to ensure that, as far as was legally possible, Ms P D was aware of the danger she was in'. The judge concluded that if the GPs had contacted their medical defence organisation they would have been told that although they could not warn Ms P D, under the provisions of the Public Health Act 1991, the Director General of the Department of Health and/or his delegate could. Also, if the GPs had discussed the matter with HIV specialists they would have been told that Mr F H should be referred for counselling if he could not be persuaded to disclose his condition to Ms P D. With respect to the referral to the immunology clinic, the judge noted:

'Ordinarily if an appointment is made for a patient and that patient does not keep the appointment it may be that the medical practitioner is not under an obligation to chase them up. But in the present case most GPs, I think, would consider they had an obligation to ensure a person in Mr F H's position kept an appointment with the RPAH (immunology clinic). They would recognise a public duty to prevent, as far as legally possible, the

spread of HIV into the community and, in the particulars of the present case, to protect, as far as they were legally able to do so, their own patient'.

The judge concluded that 'had the process of counselling been properly commenced before the end of 1998, Ms P D, more probably than not, would have become aware of the HIV status of Mr F H well before August 1999 when she became infected'. Ms P D was awarded damages in the amount of AUD727 437.00.

Discussion

A GP has both a legal and ethical duty to maintain patient confidentiality. This duty forms the basis of trust and honesty in the doctor-patient relationship. It encourages patients to disclose personal information truthfully, without fear of embarrassment, harm or discrimination that may arise from dissemination of the information.

General practitioners may provide information to a third party without it constituting a breach of confidentiality in any of the following circumstances:

- the patient consents to the release of the information
- disclosure to another health professional to ensure appropriate medical care of the patient
- mandatory disclosure of information is required by law, eg. a subpoena or other court document
- there is an over-riding duty in the 'public interest' to disclose information, eg. a patient who threatens harm against a particular person.

Interestingly, in this case the judge did confirm the GPs' duty to maintain Mr F H's confidentiality. However, the judge found that the GPs had breached their duty of care in not providing Ms P D and Mr F H with appropriate pre- and post-test HIV counselling. Dr H was found negligent in not following the guidelines issued by the New South Wales Department of Health for patients undergoing HIV testing and, in particular, for not explicitly raising with Ms P D and Mr

F H at the first joint consultation whether they agreed to the disclosure of their test results to each other. The judge found that proper counselling and post-test appointments would have led to steps being taken to notify Ms P D in time to prevent her HIV infection. In essence, the GPs in this case were found to have been negligent with respect to their communication (both doctor-patient and doctor-doctor) and patient follow up systems.

Risk management strategies

This case highlights the importance of undertaking appropriate pre- and post-test counselling for HIV. According to the New South Wales Department of Health guidelines² pre-test HIV counselling may need to encompass the following:

- assessment of the person's risk of exposure to HIV with frank discussion of sexual activity and safe injecting drug use, exposure to blood products and other risk factors
- exploration of the person's understanding of HIV transmission and provision of information about safe sex and safe injecting drug use
- explanation of the meaning of a positive and negative result
- explanation of the inability of the test to detect recent exposure to HIV (the three month 'window period') and of the necessity to re-test after three months of safe behaviour if the risk assessment reveals any possibility of recent exposure
- brief explanation of the legal issues associated with a positive result, and
- explanation of coded notification procedures and confidentiality arrangements.

With respect to post-test HIV counselling, the guidelines state:

'HIV antibody positive and negative results should be given in person and not by telephone. The provision of these results provides an opportunity for health workers to reinforce essential preventive information.

Negative result

A negative result should be accompanied by reinforcement of safe sex and safe injecting drug use information including specific assistance to develop skills in negotiating safe behaviour, if required.

Positive result

Notification of a positive result will usually precipitate a crisis and the person may for some time be unable to absorb any information. It is therefore important that information is reinforced at a follow up appointment soon after diagnosis.

HIV positive people need information about the following:

- the difference between HIV infection and AIDS
- the availability of support groups and/or individual counselling
- options for medical follow up and treatments
- safe sex and injecting drug use, and
- partner notification'.

Conflict of interest: none declared.

SUMMARY OF IMPORTANT POINTS

- GPs should follow the department of health 'Guidelines for counselling associated with HIV antibody testing'.
- GPs have an obligation to follow up a patient in circumstances in which any delay could place the patient's health in jeopardy.
- GPs have a duty to maintain patient confidentiality. In circumstances in which there is a concern that a patient may not disclose their positive HIV status, GPs should ensure the patient is appropriately counselled and seek advice from the department of health and/or their MDO.

References

1. PD v Dr Nicholas Harvey & 1 Ors [2003] NSWSC 487.
2. New South Wales Department of Health. Circular 92/20 Guidelines for counselling associated with HIV antibody testing. Issued 16 March 1992. Accessed at <http://www.health.nsw.gov.au/fcsd/rmc/cib/circulars/1992/cir92.20.pdf>.

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