Hospitals face legal dilemma if they test incapacitated patients after needle accidents

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Anaesthetists are calling for greater clarity on the legal implications of testing incapacitated patients for blood-borne viruses, after a survey found that this is often done following staff needlestick injuries, in possible breach of UK legislation.

The paper, in the September issue of Anaesthesia, reports on the results of an anonymous survey of intensive care units in England, Wales and Northern Ireland.

It is accompanied by an editorial by Dr Andrew Hartle, chair of the multi-disciplinary working party set up by the Association of Anaesthetists of Great Britain and Ireland (AAGBI) to explore the legal dilemma facing healthcare professionals who carry out such tests.

UK researchers sent the survey to 225 intensive care units in England, Wales and Northern Ireland and 99 responded.

"Our survey showed that 63 per cent of the units who responded had recorded an incident where a member of staff had suffered a needlestick injury while caring for an incapacitated patient in the last 12 months" says the paper's lead author Dr Lorna Burrows.

Analysis of the results showed that:

- In just over 90 per cent of cases (56 patients) staff did not know

whether the incapacitated patient had a blood borne virus (BBV). Staff were already aware of the full BBV positive status of the remaining ten per cent.

- 36 patients were tested at the time of the injury and ten were found to have a BBV. In six cases this represented the first diagnosis of a BBV. In the other four cases staff knew the patient had at least one BBV, but felt the need to test for others.

- 22 patients were told they had been tested when they regained consciousness (61 per cent). Three were not told, one patient died before they could be spoken to and it is not known what happened in the other 10 cases.

- Less than a third of the healthcare workers took post-exposure medication following their injury and less than half took this action even when they knew the patient had a BBV.

"Needlestick injuries are very common in the UK National Health Service and account for 17 per cent of accidents" says Dr Burrows. "The annual incidence is estimated to be as high as 623 per 10,000 staff, but poor reporting could mean that it is even higher.

"Guidance issued by the Department of Health suggests that employers have a responsibility to assess and manage the risks associated with needlestick injuries and protocols are generally managed by occupation health departments. This includes screening for BBVs such as HIV and hepatitis.

"If the patient is conscious, they can be asked questions about their medical history and for permission for blood tests to be carried out. But if the patient is unconscious, they cannot give consent. If staff test a patient's blood without their consent, and this test is solely for the benefit

of the healthcare worker who has had the needlestick injury, then it could be argued that this is unlawful under the Human Tissue Act 2004 and the Mental Capacity Act 2005."

This means that UK hospitals - and the healthcare professionals who work for them - face the dilemma of how to protect staff after a needlestick injury, while at the same time protecting patients' rights.

The authors state that three possible arguments have been put forward for performing a BBV test on an unconscious patient after a needlestick injury.

1. It is likely to be in the patient's best interest to establish a diagnosis of HIV infection as this enables treatment to commence as soon as possible. Testing a patient who lacks the capacity to consent is therefore lawful.

2. The patient would be likely to provide consent, if asked, to avoid the healthcare worker having to suffer the side effects of unnecessary medication or the anxiety of not knowing the patient's BBV status. The problem with this argument is that it cannot be assumed that consent would be forthcoming - in fact, this research showed that one patient refused to be tested when they regained capacity.

3. It has been argued that the healthcare worker has a right to know the BBV status of the patient if they have sustained a needlestick injury. Under Article 2 of the Human Rights Act, the healthcare worker's right to know could be deemed greater than the right of the patient not to know. This has not been formally tested in a court of law, but this argument currently appears to be unlawful.

"Our survey shows that significant numbers of intensive care unit staff in the UK suffer needlestick injuries and it is not unusual that these can come from patients who test positive for BBVs" concludes Dr Burrows.

"It highlights the need for further discussion within the profession and with legislators regarding needlestick injuries and the legality of testing incapacitated patients for blood-borne virus infections."

"Dr Burrows' paper is very important because it highlights, once again, that legislation introduced with the best intentions has had unforeseen consequences and that urgent clarification is required" says Dr Andrew Hartle, Honorary Secretary Elect of the AAGBI and chair of the working party set up to explore this issue. "It is also very well timed, as a survey of working practices is one of the recommendations of the working group."

Dr Hartle's editorial provides a detailed analysis of the legal dilemma facing doctors, the possible implications for staff who test without consent and recommendations for change.

"We are very conscious that testing without consent could leave our members open to criminal law, civil law and professional misconduct proceedings" he says.

"That is why we and our working party colleagues - who include the Royal College of Anaesthetists, Intensive Care Society, Royal College of Nursing, ethicists and patient representatives - feel that urgent clarification is needed."

More information: A survey of the management of needlestick injuries from incapacitated patients in intensive care units. Burrow L A and Padkin A. Anaesthesia. 65, pp880-884. (September 2010). DOI: 10.1111/j.1365-2044.2010.06372.x

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