

Reflections on Bioethics and Law in the USA

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During 1993, Ron Paterson, Senior Lecturer in Law at Auckland University, spent some time as Visiting Professor at Case Western University, Cleveland, Ohio, USA. He was based at the Center for Biomedical Ethics in the Medical School, and taught a seminar on 'AIDS and the Law' in the Law School. He offers here some reflections on his time in America.

AIDS contrasts

It is perhaps a reflection of the curious nature of academic life that a New Zealander should go to the United States to teach a course on "AIDS and the Law". The NZ epidemic has been much smaller in scale than in the US: as at March 31, 1993, 373 people had been notified to NZ health officials as having AIDS, compared with the 1,175 AIDS cases reported for greater Cleveland alone (population 2.2 mill.) by the same date. There are also significant differences in the epidemiology of the disease: in the US, black and Hispanic Americans now account for 46% of AIDS cases, and the much higher prevalence of injection drug use in these communities is fuelling the spread of HIV. The recently disbanded National Commission on AIDS has identified racial inequality and poverty as major barriers in the fight against AIDS. Attitudinal differences between the two countries are also significant: the "safer sex" message seems to have been more effectively communicated to the NZ public (although sex is the pervading message in much US advertising and entertainment, there is a surprising degree of reticence about sex education) and a needle and syringe exchange programme would be unacceptable to the US public and its elected representatives (because it would be seen to run counter to the "war on drugs").

One noteworthy development in the response to the epidemic in the United States - likely to be reflected in future laws - is what Columbia University Professor Ron Bayer has called "an end to HIV exceptionalism". Many public health policymakers are

arguing that differential policies for AIDS are no longer justified and that HIV (and not just AIDS) should be a reportable condition, that partner notification programmes should be implemented, and that targeted populations (eg pregnant women and newborns) should be routinely screened for HIV. AIDS policy in New Zealand continues to reflect an exceptionalist perspective, but this may change in coming years, especially now that effective privacy and human rights legislation is in place.

My own interests have focused on how traditional concepts of doctor-patient confidentiality and informed consent apply in the HIV/AIDS context. The groups most affected by the AIDS epidemic - men who have sex with men, and injecting drug users - are already members of stigmatized groups in society.

An HIV-positive test result may, if leaked, lead to a double dose of discrimination. Yet these persons, with their heightened risk of contracting the virus, need to be encouraged to come forward for testing and counselling if the spread of the virus is to be checked. Against this background, the assurance of strict confidentiality of test results and the provision of anonymous test sites assumes importance for good public health reasons; so too does the need for anti-discrimination laws to protect persons whose HIV status is leaked.

The limits of confidentiality of HIV-related information have been widely debated. Are doctors free to pass that information onto other health care professionals? A South African court has ruled 'no' (*McGeary v Kruger*, 1993). In keeping with a policy of universal precautions - whereby all patients are assumed to be infectious - disclosure should be limited to situations where it is necessary for the effective treatment of a particular patient. The Ohio legislature has authorised disclosure to health care providers participating in the diagnosis, care, or treatment of the patient where there is a "medical need to know". What if a sexual partner is unknowingly at risk

of HIV infection from a patient who refuses to disclose his HIV-positive status? Does a doctor have a duty to warn the third party, analogous to the common law duty of a psychiatrist to warn a foreseeable victim of a dangerous patient? (see *Tarasoff v Regents of the University of California*, 1976). Many states, including Ohio, have authorised disclosure to sexual partners of HIV-positive patients, and most scholars agree that, in certain circumstances, courts would go further and find a duty to warn.

Concerns about HIV transmission in health care settings have raised another group of issues centred around informed consent. Early in the epidemic, there were numerous calls for mandatory testing of patients prior to surgery. As one provocatively captioned article by an Australian surgeon put it, "Do patients have a right to infect their doctor?" But once hospitals adopted universal precautions policies, the debate shifted to cases where a health care worker is stuck by a needle and the patient declines to take an HIV test to put the injured worker's mind at rest. Ethical and legal opinion is divided as to whether the patient should simply be assumed to be HIV-positive or whether a sample of the patient's blood may be tested without consent. In Ohio, involuntary testing is permitted in cases of "significant exposure to the body fluids" of a patient who refuses to consent to testing.)

The revelation, in 1990, that Kimberly Bergalis had been infected with HIV during oral surgery performed by Florida dentist David Acer, and the subsequent discovery that five other patients were infected with Acer's strain of HIV, shifted the focus of public debate to HIV-infected health professionals. Has a patient given fully informed consent to surgery if she has not been told in advance that her surgeon is HIV-positive? Although no case of doctor-to-patient HIV transmission has yet been discovered, four cases of patient-to-patient transmission in a surgical setting have recently been confirmed in Sydney and lawsuits are pending.

International Seminar on Bioethics

Patients who have subsequently learned that their surgeon is HIV-positive have begun to bring claims in US courts. The Maryland Court of Appeals has ruled (*Faya v Almaraz*, 1993) that patients have a potentially valid claim, even if they have suffered no physical injury, for the "reasonable window of anxiety" between learning of their possible exposure and testing HIV-negative. At the same time, HIV-infected physicians are fighting back, arguing that the "inform or don't operate" policies now being adopted by US hospitals effectively deny them the right to work and amount to unlawful discrimination in the workplace, under the Americans with Disabilities Act of 1990. The New Zealand Medical Council has sensibly eschewed such an approach in its 1993 Policy Statement on Transmissible Major Viral Infections.

Center for Biomedical Ethics

Spending my working day in a medical school, albeit with daily trips across campus to the law school, was a new experience (and something of a challenge for the law students who tried to find me!). The beneficial aspect was the opportunity to participate in the life of the Center for Biomedical Ethics, to discuss bioethics issues with colleagues there, to read from the Center's journal collection, and generally to expand my bioethics knowledge by osmosis. I particularly enjoyed the monthly gatherings of bioethicists from the greater Cleveland area to discuss readings or works-in-progress. I also followed with interest Tom Murray's work as chairman of the national Task Force on Genetic Information and Health Insurance, which resulted in the release, in May 1993, of an important report on "Genetic Information and Health Insurance". In its wide-ranging proposals, the Task Force has recommended that genetic information not be used to deny or influence the costs of health care coverage, and that disclosure of such information not be a condition of access to basic health care services. Significantly, a number of health insurers have endorsed the recommendations.

Over two hundred and fifty people from diverse groups including ethics committee members, health professionals, health consumers, lawyers and health managers, attended the Centre's International Seminar on Bioethics in November 1993.

The five day event, held at Knox College, began on Monday, 22 November with a Powhiri and the emphasis throughout the week was on biculturalism and multiculturalism.

A distinguishing feature was the wealth of overseas bioethics scholars participating, with speakers attending from India, Hungary, the United States, China, Italy, the UK, Argentina, Nigeria, Japan, Australia, Egypt and Chile.

The first half of the week concentrated on clinical issues including Genetic Research, Assisted Reproductive Technology, and STDs and AIDS. The second focused on health systems with sessions such as Prioritising, Research and Development and Information Use. The bridge between the two was Wednesday's sessions on Feminist Approaches to Bioethics and Bioethics in a Multicultural Context.

Public lectures in the evenings on Animal Rights, Maori Health Issues and the American Health System Post-Clinton meant a wider group from Dunedin was able to participate.

The emphasis during the Seminar was on interactive methods of communication such as panel discussions and hypotheticals.

Participants were also appreciative of workshops which allowed people to discuss issues raised in greater depth in small groups. Evaluation forms showed those who attended rated the Seminar very highly, particularly the friendly atmosphere among those participating and the general ambience of Knox College.

The importance of the event, for both the University and the City, was recognised by a Town and Gown reception on the Monday night when the Mayor and Pro-Chancellor welcomed participants to Dunedin. The Seminar was made possible by the remarkable support given by the professional Colleges, Regional Health Authorities, Ministry of Health, Core Services Committee, Health Research Council and the Legal Research Foundation.

It is hoped to produce a publication of selected papers from the Seminar. Tapes of all major sessions are available from Joy Miller, 5 Alana Place, Ellerslie, Auckland at a cost of \$8 per tape.

In view of the Seminar's success the Centre is planning to hold another gathering in late 1995 or early 1996.

Seminar Proceedings from the 1993 International Seminar on Bioethics are being compiled by the Centre.

Those interested in purchasing a copy are welcome to register their interest with the Centre.

Friends of the Centre

The number of people becoming Friends of the Centre continues to increase. The Centre has received positive comments about its publication (now renamed *Otago Bioethics Report*), and about the specialised information service available to Friends.

New subscribers are always welcome. Costs are \$25 for individuals, \$30 for institutions, \$15 for full time students, and NZ\$35 for overseas subscriptions. Payment should be enclosed with order, and sent to:

Bioethics Research Centre, PO Box 913, Dunedin.