

## SPECIAL FEATURES

# Current legal status on HIV blood testing

Would a doctor attract civil liability for testing the blood of a patient for HIV without the patient's consent? Depending on the circumstances, this could sustain an action either for battery or negligence.

If a doctor takes the blood of a patient without obtaining any consent and against his wishes, he could be sued for battery and held liable for substantial damages, and the defence of fear of contracting HIV will not stand.

On the other hand, if the doctor gets blood from the patient without his consent while he is conscious with the intention to test for HIV infection and the doctor:

□ although able to do so, refrains from revealing the intentions before the patient becomes unconscious, □ makes a decision to test only after the patient becomes unconscious, or □ during emergency medical treatment, the doctor finds it necessary to test, the question in law is — why is the blood taken?

It could be either

- to further the patients' care, or
- to protect the doctor and others from any perceived risk.

If the purpose falls under the latter, the law does not ordinarily allow a person to touch another without consent when the purpose of touching is not to protect the person touched but the person touching.

If however, the testing is for the patients' sake, the first two reasons for testing must be separated from the third. Any justification must demonstrate that it was necessary for the patient's health interests and that it had to be carried out before he could regain consciousness. Deliberate delay as in the first instance cannot be justified.

Where it could be foreseen before unconsciousness, no justifica-



In this fifth article in a series on the position of the law on Aids/HIV by lawyer OTIENDE OMOLLO, he examines the legal implications of the testing of blood for the disease. He argues that the law demands that HIV tests must be done with the explicit consent of the person to be tested. He also brings into focus the conflict of the medical practitioner's role of patient confidentiality and his duty to protect the carrier's unsuspecting partners.

tion would exist, and rarely will there be an unforeseeable necessity for HIV testing.

Where the doctor takes blood from the patient and tests for HIV infection *inter alia* without his explicit consent for any testing of blood, it might be opined that the patient impliedly consented to a blood test merely by holding out his hand. However, the better view is that only an explicit consent is valid. Also, where the doctor gets blood from the patient and wilfully tests for HIV but consent granted was only to test blood generally or for other specified conditions, there emerges interesting issues.

For the former, a general consent will not in law be taken to extend so as to include consent to touchings which are on their face contrary to public policy.

To this extent, the argument that the doctor may test without explicit consent to avoid alarming patients would be misleading unless the test was for the patients' benefit or it otherwise conforms to the professional practice of a body of responsible medical opinion.

If the consent was for other specified conditions, the argument above still stands, for if the patients' consent cannot be inferred

from general consent, neither can it go from particularised conditions which do not include HIV.

The doctors lie or half-truth would vitiate the consent as the English case of *Peek versus Gurney* held.

However, explicit consent will stand all tests.

An action may also lie against a doctor for breaching the requirement of medical confidentiality.

A doctor is under a duty to maintain the Hippocratic oath which binds a doctor to preserve absolute secrecy on all he knows about his patients because of the confidence entrusted in him.

This norm has known judicial approval in the case of *Evans versus Fraser* where Denning M.R. stated that no person is permitted to divulge to the world information which he has received in confidence unless he has a just cause or excuse for so doing.

What amounts to a just cause is a matter of interpretation. It is our view that a court would hardly hold a doctor liable where the information is purveyed to protect third parties against the infection that the victim has been willingly exposing them to.

We are strengthened in this view



A bed-ridden Aids victim: Doctors are liable for legal action for testing for the disease or revealing a patient's HIV status without his express consent.

by the judgment in *Rock Hudson's* case alluded to earlier where a suit against the personal physician of the late Aids victim for concealing the infection from the plaintiff to the plaintiff's detriment succeeded.

A further buttress is the postulation offered by some argumentators that silence over a known case of sero-positivity where a spouse makes a specific inquiry may in fact lead to liability in tort where the spouse, who would have avoided infection, were to sue the health care worker who knew but refused to divulge the information.

But the latitude of disclosure is very slim. For example, a plaintiff who claimed to have contracted Aids as a result of blood transfusion and sued the blood donor service seeking to know the identity of the donor of the HIV contaminated blood with a view to suing has failed.

Indeed, in the American case of

*Re Worcester Hospital*, the hospital was held liable for posting the names of HIV positive patients on a laboratory bulletin board.

Persons whose confidentiality is breached may have remedies such as actions for defamation and negligent or intentional infliction of psychological harm.

Professor Winfield defines defamation as the publication of a statement which tends to lower a person in the estimation of right-thinking members of the society generally, or which tends to make them shun or avoid a person.

Drawing from that definition, it is plainly defamatory to allege that a person is HIV positive or otherwise an Aids victim.

This draws from the stigma that attaches to Aids and the misconception at the back of almost everybody's mind that Aids victims must have acquired the disease sexually

and the concomitant importation of the conclusion of promiscuity — the part of the carrier for in Kenya, and elsewhere in Africa, we still look at Aids victims as debauchers.

Further, there is authority that is defamatory and actionable, without proof of damage, to attribute to the plaintiff certain contagious or infectious diseases because all prudent persons will avoid the company of a person having such distemper, and it makes no difference whether the distemper be owing to visitation of God, to accident, or indiscretion of the party.

Aids is not strictly classifiable as infectious, contagious, venereal, or even as a disease. But the *raison d'être* in the above is nevertheless germane to Aids because the jurisprudence transcends the bounds of definitions and applies to all maladies with such qualities as venereal diseases do — and Aids finds abode therein. (Continues on Thursday)

## Anger over SA high-cost Aids play



A scene from *Sarafina*: Its sequel, *Sarafina 2*, a play, has stirred controversy in South Africa.

By GLENN MCKENZIE, JOHANNESBURG, Sunday

When Whoopie Goldberg and Leteti Khumalo starred in the pop musical film *Sarafina*, South African and international audiences applauded the music and the basic message — apartheid is evil.

Now, nearly two years after the end of white minority rule, *Sarafina 2*, this time a play, is tackling another thorny topic — Aids. But this time, the production is being widely condemned by public groups and the local media for its message and lavish government-sponsored budget.

The play, which was commissioned by Health Minister Nkosazana Zuma, will cost 14 million rand (about \$5.7 million) as it tours the country. The playwright, Mbonengi Ngema, will apparently collect at least 300,000 rand (\$85,000) in government funds. About 900,000 rand (\$250,000) of the budget has not been accounted for according to one government source.

In the past month, more than 100 Aids organisations have called for a public inquiry into the play's funding. Several minority political parties have demanded that Mr Mandela fire Zuma. And the

government's public protector has initiated an internal investigation into the play's funding.

"In a country which cannot provide adequate treatment and care for all persons with HIV or Aids, it is morally indefensible to waste precious resources on the play," said the protesting organisations in a joint statement.

*Sarafina 2* is a sequel to the popular story of a South African schoolgirl who rebelled against white police who ruled over the country's black schools with an iron fist. In the sequel, Khumalo, who won a Grammy award nomination for her part in the original, again plays the title character, *Sarafina*, who has now grown up and counsels love stricken youngsters. Khumalo exhorts students to "wear condoms and be safe", while other characters portray the pains and travails of discovering that they have tested positive for Aids.

The production boasts similar Broadway values and acting talent to the original, and young audiences who have seen the play have widely applauded the catchy songs and dances.

But some people infected with the Aids virus say the play does not

adequately explain the intricacies of the disease to young people.

"I don't want to totally say it was terrible, but it leaves a lot to be desired. You really don't learn anything about Aids and if Aids education was this play's aim, then it failed," said Mr David Patient, a prominent activist who has been HIV positive for at least 13 years.

Others criticise the play because it is performed in English, which means that many of South Africa's rural population will have trouble understanding its message.

South Africa's opposition political parties have also attacked the government. Some suggested that puppet plays would be a more effective use of funds. Others said the money should be channelled into clinical education programmes.

"There is something really horrifying about this level of frivolity and playfulness with 14 million rand," said Azanian People's Organisation spokesman Vuyisa Qunta. "The government has gone over the top in terms of misplaced priorities," he added.

Democratic Party Health spokesman Mike Ellis called for the resignation of Ms Zuma, saying: "She deliberately misled a government

committee by telling them that the 14 million rand for the play had come from funds donated by the European Union, and that the EU was aware of the expenditure."

As it turned out, EU spokesmen have said they were never informed that their money would be spent on the expensive play.

Meanwhile, Director Ngemi has defended the production telling Johannesburg's *Mail and Guardian* newspapers that he deserved to be paid "one million rands instead of three hundred thousand".

Mr Ngema said there were no other directors in South African who were of his calibre.

To complicate matters, several other theatre groups, including the highly acclaimed Windybrow theatre in Johannesburg, have claimed the government did not allow other groups to bid for the right to produce the Aids production.

Mr Walter Chakela, director of Windybrow, claimed that his group had been approached to apply just a day before the deadline.

Ms Zuma has steadfastly defended the play, and Mr Mandela has said he believed there was no wrongdoing on the part of the Minister. (AIA)