

AIDS: Legal, Public, and Pastoral Implications

Questions and Answers

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AIDS: LEGAL, PUBLIC, AND PASTORAL IMPLICATIONS

QUESTIONS AND ANSWERS

PHIL HARRIS, USCC: All three of you spoke to the question of confidentiality. I understand each of your views coming from a legal and pastoral concern on that question. I wonder whether or not we also need to consider whether there is a duty to warn persons who might come in contact?

MR. MORRIS: I think that is an excellent question. In most circumstances, however, I would suggest that the current state of medical knowledge would lead us to the conclusion that, because there is a very limited risk of transmission, most circumstances would not require any notice to a colleague, a co-worker, or other students, that someone apparently had the AIDS virus.

The more difficult question that I would like my colleagues to share their thoughts on was raised in a newspaper article concerning a San Francisco hospital which treats many of the public AIDS cases. The article concerned the high incidence of AIDS in the population there and the woman who was the chief emergency room surgeon. She said that in surgery there was a lot of blood around routinely and in the population served by this public hospital where she was doing six or eight operations a shift the chances of her coming in contact with blood products from an individual who carried the virus, or maybe had full blown AIDS, were extremely high.

I am not so clear about what is appropriate in that particular circumstance. It raises the issue of do we demand tests of hospital patients? While some people have argued for it, that has not been an adopted policy.

UNIDENTIFIED: I cannot specify the case, but was not there a case in Massachusetts last year where the specification was set forth that you had the right of privacy versus public danger and in that instance if the public danger prevailed that the duty to warn did exist?

MR. MORRIS: I think that is the approach many courts would adopt. Under the circumstances in most cases, however, I think they would come to the conclusion that the risk of transmission was still so low that there would be no duty to warn. I can construct certain settings where you get to the very edge of that consideration and I cannot say that no court would conclude there was a duty to warn, particularly for example, in the emergency operating room situation.

JOHN WEBER, DIOCESE OF MARQUETTE: What do you think about the wisdom of diocesan written AIDS policies or a diocesan school system having a written policy on AIDS as opposed to dealing with the problem on an ad hoc basis?

MR. MORRIS: As always there is a certain virtue and a certain vice in either one of those approaches. I think the virtue of having a diocesan policy whether it be with regard to the schools, employment, or treatment in health care facilities, is that it may tend to dampen hysteria and problems because it is seen that we have thought out in advance the kinds of situations that are most likely to occur, what the response will be, and that individuals do not react on the spur of the moment without adequate consideration for the variety of difficult issues that can be involved. My thought is that we are better off to have a well thought out policy, such as in New Jersey, rather than to deal with the issues on an ad hoc basis.

I do add the caveat that our policies ought to be flexible enough so that if we are confronted with a problem of a dimension we have not been able to think about we can move to add to or amend our policy. I think the chances of misstepping or of having some individual misstep are less when we have a generally applicable, carefully thought out policy in place.

MR. BOLAN: I would add that, if you are going to opt for a written policy, it should be statewide rather than diocesan, in order to avoid any potential discrepancies in standards from diocese to diocese.

MARTIN NUSSBAUM, DIOCESE OF COLORADO SPRINGS: I too question the wisdom of a written policy, especially with regard to an area of medical science that is developing so rapidly in large part because we cannot anticipate everything. The New Jersey policy seems to do two things: one, it restates some of the law of New Jersey that we shall not discriminate against those with a handicap, and the state has apparently described AIDS patients as handicapped. But it also goes beyond that and I think perhaps sets a standard of care that as a litigator I would like not to have to deal with.

Let me give two specific examples that I see could be a problem under the New Jersey policy. One with regard to protecting and main-

taining confidentiality. Consider a religious hospital with an AIDS ward and common liturgical celebrations of people celebrating with a common cup. Can we maintain confidentiality in that type of situation?

Secondly, with regard to the policy that we will not discriminate with regard to the provision of social services. Consider if you will an adoption agency, both trying to determine whether a baby might have AIDS or whether the adopting family might be an AIDS family. Is not discrimination in fact appropriate in that circumstance?

MR. BOLAN: As far as the hospital situation, our preamble has a specific disclaimer with respect to Catholic health agencies. We take the position that this policy does not apply to them. Secondly, we stress current medical knowledge and law for the very reason that, if there is some change in the medical situation, we would amend the policy accordingly.

Thirdly, with respect to the confidentiality question I think you have to take a common sense approach. Obviously, in the situation we were talking about earlier in the hospital, I think there is confidentiality in medical records. We had many questions from chancery offices such as, "Well, if the personnel director knows, can he tell the bishop, can he tell the chancellor?" I think it is a broader concept of confidentiality. Obviously there are a number of people in any kind of an administrative set up who have to know certain confidential things. As long as they keep it within the context of the administrative set up, you are not breaching the confidentiality we are talking about. Obviously if the bishop tells the chancellor and the chancellor tells the personnel director, or the other way around, I do not view that as a breach of confidentiality. However, if they put on the bulletin board that "John has AIDS," you have trouble. I think ours is broad enough to be fleshed out in a more common sense way.

DON RICHARD, DIOCESE OF NEW ORLEANS: I guess I will plead ignorance on the way AIDS is transmitted. I have read all the articles in TIME magazine, etcetera. I wonder if Sister can bring us up to date on what is the current medical knowledge about transmission. I have a specific question dealing with diocesan attorneys.

For instance, would the blood-to-blood situation occur if two children are playing together on the schoolground and have a common accident and somehow their blood is mixed. One kid has a nick on the finger and the other has a nick on the head and they touch. If one of those children had AIDS, would that be a way of transmitting? I understand with IV drug users it is blood-to-blood from the same needle. I know dentists wear gloves because they worry about nicks on their fingers and blood from the patient. Is that something to be concerned about? Can it be occasional? Are we learning more as we go along on these lines?

SISTER LUCID: I don't feel prepared to answer that question. In terms of transmission, you give a graphic example of children. There would be more or less likelihood, but nothing absolute. This is why we are having the problems we have; there are no absolutes in terms of transmission. That is why we have a particular problem regarding children and the fear surrounding that sort of description of a case. We would say less than one percent of a possibility there, but it is still not an absolute.

MR. MORRIS: The only thing I could add to that is the courts that have looked at the school cases where school districts, diocesan schools, whatever, would have excluded someone, have generally ordered the student reinstated. I think that you cannot exclude a risk in the situation you mentioned, but the alternative there would be mandatory testing of all the students and then presumable exclusion for those who tested seropositive. I doubt if most people want to undertake that step. If you were trying to totally remove all risks, I guess that would be what you would do but I do not think anyone is suggesting it as the appropriate way to handle the situation.

JIM TIERNEY, DIOCESE OF KANSAS CITY, MO: Our diocese received a deacon from another diocese who had AIDS at the time he came to us. He was recommended by people from a very distant diocese. He was good for about two months work before he became totally disabled. The receiving diocese picks up quite a burden of health care. With the estimates I hear, the burden runs to several hundred thousand dollars in handling the health care of someone you receive.

I would like to pose the question in terms as though I were the lawyer for the sending diocese. We have kept the AIDS infected person and it has been a burden. Suppose you were the lawyer for the diocese who has a deacon known to have AIDS and who desires to transfer to another diocese, perhaps for a fresh start, perhaps to get away from all that has happened before. We were told nothing about the AIDS virus, about the difficulty. What would your advice be?

MR. MORRIS: Well, there was an undercurrent of a three letter word, sue the sending diocese. That is certainly a lawyer's response but not the most compassionate. I do not know; that is an interesting question. I suppose in the situation you describe there was no question asked by the receiving diocese at the front-end so there was no misrepresentation. The next question then that it would make sense to ask of someone wishing to transfer, was whether or not they had a medical history that showed AIDS. I think that would generally run counter to the notions we believe we are subscribing to.

It may be as a matter of fairness and equity the sending diocese should disclose and, it seems to me, make some arrangement to at least

participate in the funding of the future treatment and health care costs that are associated with this disease. There is an additional issue raised by your question: negligent hiring. We are already past wrongful discharges as the hot new item, although that area continues to expand. But negligent hiring is now the issue. Can someone bring a negligent hiring claim against us because we did not seek certain information or learn of it in the hiring process? This may go a little beyond the current negligent hiring cases but maybe not entirely beyond it. I would think that maybe this is not a question we should answer in a strict legal sense but rather we should look at how we might want to be treated in that circumstance if we were the diocese that had the individual. Perhaps they were looking for a place where they might continue their ministering activities without the notoriety that might affect them in their current location, and that some sharing of the costs associated in an up front way would be a reasonable approach.

MR. BOLAN: The only thing I can suggest is that we ask ourselves if there would be the same duty to disclose of an individual who had cancer or heart disease who was being sent on. There are many life threatening illnesses. It could be more expensive because the life expectancy of AIDS persons is not very long. I think confidentiality would apply, at least under our policy in that situation.

MR. TIERNEY, DIOCESE OF KANSAS CITY, MO: Under your policy you would not tell these other bishops he had AIDS?

MR. BOLAN: That is right, just as I would not tell the other bishop if he had cancer or heart disease or some other life threatening illness.

MR. TIERNEY, DIOCESE OF KANSAS CITY, MO: What about medical costs, the justice of payment assistance?

SISTER LUCID: In general, the expenses around the AIDS patients are less than \$100,000. The average age of a person being diagnosed currently is about thirty-seven years of age. I also very much agree with the idea that in this illness there is a fear about the AIDS disease and underneath that, possibly, some discrimination we feel toward homosexuals or drug abusers. Those are two ordinary ways of transmission currently. What I am getting at is, if we could integrate the AIDS disease, a human disease, and integrate it better into our society, this would affect for instance a transfer from one diocese to another. If I had cancer or heart disease, how would I be treated? First of all, how would I be welcomed, what information am I needing to share with my employer for reasons of support? There are a lot of pastoral issues around that.

MR. MORRIS: Let me reflect for one more minute on that question. I think it is a very good question, but I would also take the position that

if you were the acquiring diocese and, because you learned that the deacon had AIDS, made the determination not to employ that individual, to the extent you were in a jurisdiction with an applicable handicap discrimination law, if that person was presently able to perform, the risk of future higher medical and associated costs would not be a defense.

There are a number of cases, a leading one out of Hawaii is *E. E. Black Company*, where a back condition was likely to lead an individual who was going to be employed in a construction job to future difficulties with a fairly high degree of certainty. Based on the results of a pre-employment physical, the employer took the position that it would not employ the individual. The case was litigated and the conclusion was that it was an impermissible decision on the part of the employer because although statistically there was a significant chance the person would develop difficulties from performing the work, there was no present disqualification and there was no absolute certainty that he would be injured from work related causes at some point in the future. Therefore, they were not privileged to refuse to hire on that basis. I would think that the same analysis could apply here, despite the increased costs, because increased costs are generally not a defense in this area.

BOB ROBINSON, DIOCESE OF PORTLAND, ME: In your comments you mentioned several times either in our thinking or in our written policies, we should not be static and thereby avoid consideration of a possible prospective flux in the medical technology that would justify our changing. Do you know of any credible medical intelligence at the present time that would establish that AIDS could be developed through casual contact?

MR. MORRIS: I am unaware of any responsible medical knowledge that at this point suggests that casual contact will transmit the virus. I am working with the President's Commission on Employment of the Handicapped on the legal issues surrounding AIDS with the Chief of the Virology Section at Walter Reed Hospital who addressed the current medical beliefs on AIDS transmission. Tomorrow, because research is literally going on around the world in a variety of circumstances, new medical opinions may be forthcoming. But as of today, no, I am unaware of any.

MR. BOLAN: I think what you may have been referring to is the new book by Masters and Johnson that takes the position that there are some casual ways, kissing and so forth, which is not so casual I suppose—at least not in the workplace. As I recall from the media, they were roundly and soundly criticized for that view by the Center for Disease Control and medical experts at the leading university hospitals.

BOB CASTAGNA, OREGON CATHOLIC CONFERENCE: Would

you see any problems with seminaries adopting admissions policies which require, as part of that policy, a declaration of medical history and seminaries prohibiting the admission of future seminarians based upon their medical history which may or may not include an AIDS test as part of the admission policy?

MR. MORRIS: Before you leave the microphone, would that policy depend on whether they had full blown AIDS, ARC, or merely tested seropositive?

BOB CASTAGNA, OREGON CATHOLIC CONFERENCE: I think ARC or seropositive tests and a blanket policy that says, "We shall not admit to the seminary." I think we may get into free exercise questions here because there may be some provisions in canon law which speak to the good health of seminarians and priests.

MR. MORRIS: What would be the justification in your mind for that policy?

BOB CASTAGNA, OREGON CATHOLIC CONFERENCE: The potential is great for seropositive tests, if there is an indication of ARC, for that to turn into a full blown AIDS case and the inability of that potential seminarian or priest to be able to perform ministerial functions.

MR. MORRIS: This is the type of question I would not answer with any confidence off the top of my head. We would need to address whether either the seminarians or the seminary receive federal or state financial assistance. Do seminarians get G.I. benefits or Basic Educational Opportunity Grants (BEOGs)? Do the federal or state rehabilitation or handicap laws apply? We would have to spend a little time and hit the books. If they apply, it seems to me there would clearly be a difference between adopting that proposed policy with regard to those who merely test positive for HIV antibodies because, as of yet, the lack of correlation to those who would test positive to development either of ARC or AIDS.

To the extent that the policy was limited to those who had ARC or full-blown AIDS now, then the consideration might be a little different and I would have to think more about it. Certainly if they had full-blown AIDS and because of the general statistics we could look at as to the survival rate, then considering the time and expense to complete the seminary process, I think it might be a fair consideration to say, should we devote those resources in that circumstance? The case gets a little further removed if it is ARC as to whether it will go to full-blown AIDS.

There might be a defense that one could assert and I am forgetting for a moment the free exercise issue here and whether or not that might provide a ground because it might. Looking at it without regard to that, certainly in a number of our equal employment cases, for example, we

have seen that while we generally may not discriminate against pregnant women as a result of the pregnancy discrimination amendment, if you have a position that involves a lengthy training program and the training program is going to be adversely impacted by the pregnancy, that is a situation where there may be a legitimate job-related reason for not hiring a pregnant person who would have to go into that training program.

I could argue on the same theory that we ought not to put in the seminarian process an individual who has full-blown AIDS and maybe someone who has ARC. On that theory, however, I would be very concerned about a policy of exclusion merely for individuals who tested seropositive. I would have to think a lot more about that. I think that is a really good question and there may be some grounds for such a bar to admission to the seminary, but I might distinguish based on whether they had full-blown AIDS versus merely testing seropositive.

TOM SHEPARD, DIOCESE OF STOCKTON: I would like your legal and practical comments on what happens when a principal learns that a young student has AIDS and the student is enrolled in school. Does the principal inform the classroom teacher, the volunteer aid who works in the classroom, the teachers who supervise the playground or nobody? How widely should that be disseminated among those who deal with the child from both a legal and practical point of view?

MR. BOLAN: The New Jersey Department of Education takes the position that the principal does not disclose that information to the teacher or any of the other individuals you mentioned.

MR. MORRIS: I think you would want to deal with the state department of education and state health department to some extent on what they would recommend. It intrigues me a little bit to know, for example, whether that child had a particular history of biting fellow students before I gave an absolute answer. I think the general answer is that confidentiality is probably the right response. As in many of these cases, I could construct a difficult circumstance where I might want to rethink that general answer.

One last thought on the question regarding the principal learning a student carried the virus; I will give you one example. If that student was also a hemophiliac, that would be a different situation and in such a case those supervising the child should be informed. Otherwise, I think the general policy of confidentiality would hold.

MIKE DOLAN, DIOCESE OF BRIDGEPORT: On a related issue, in the policy you developed for New Jersey, the arrangement is if an impasse is reached on admitting a student, if the parents and doctors cannot agree with either the principal or the pastor, it is referred to the superintendent of schools. We are in the process of trying to develop a policy and

it is based upon yours.

We came up with the concept of developing a board to refer these cases for due process considerations, fair hearing considerations. I would like to know what you think of the wisdom, or the lack thereof, in having a standing board to refer these types of cases to. The board would be composed of physicians, health people, school people and a lawyer. Is there anything to recommend for or against it?

MR. BOLAN: That is the approach the State of New Jersey takes for the public schools. They have a medical review board set up to handle disputes of that kind. We do not have access to that board so we opted for the approach you find in our policy.

I think it is a good approach; it is a little more complicated than ours. I am at a loss. I think it was for reasons of complication that we decided not to use that approach.

BROTHER PETER CAMPBELL, CATHOLIC HEALTH ASSOCIATION: This is not so much a question as a comment about the seminarian, whether or not you have a series of tests regarding health. The same context comes up in relation to entering religious life. While I would not want to see discrimination as a policy, I think the question is a bit different than an employment situation. So often religious and even diocesan priests are looked upon as entering into a training program to work. I think the relationship that is established is different and would then allow a variety of issues to be raised, some supported in canon law regarding the health of the individual.

While I think you want some enlightened direction in these areas, I think to dwell just on employment consequences misses much of the relationship that exists between a bishop and his priests, between a religious superior and the members of his or her community. The analysis built on that different relationship will often come to a very different set of answers than one built on my right to a job. I think both bishops and religious superiors can easily look around at the people under their supervision and find they have a number who really do not work, yet they are responsible for them. So it is not just a working relationship.

