

# Hepatitis

## The law and the operating room nurse

By L. E. & F. A. Rozovsky

With the current discussion surrounding the AIDS crisis, it is easy to forget that AIDS is not the only communicable disease which could threaten the O.R. staff. Various forms of hepatitis are more prevalent. What makes one form, hepatitis B different from AIDS is that there is a vaccine and it is not necessarily fatal. Nonetheless many issues affecting the disease and the O.R. nurse must be considered:

1. Does the O.R. nurse have a duty to the patient to be vaccinated? The answer to this question depends on whether it could be shown that a patient is at risk of contracting hepatitis from an infected staff nurse. Since this is very unlikely, there would ordinarily be no such duty. Similarly, the hospital has no duty to the patient to have its staff vaccinated unless there is a risk of exposure.
2. Do operating room nurses have a legal right to compel their employing hospital to supply them with hepatitis B vaccine? Much depends on the requirements of provincial occupational health and safety legislation and any collective agreement that requires an employer to supply a vaccine in order to provide a safe working environment. It may be argued under some legislation that the establishment of proper safety procedures may be sufficient and that hepatitis B is an inherent risk in the job of an operating room nurse.
3. Can a hospital require all operating room nurses to be vaccinated as a condition of employment? If it can be shown that vaccination is a reasonable job requirement, it can be made mandatory. To make such a requirement into a reasonable job requirement, it would be necessary to prove that vaccination of staff is of benefit to either the workers

themselves, patients or other employees or members of the medical staff.

4. If a hospital has the legal right to require vaccination of all employees, who pays for it?

Much depends on the interpretation of health and safety legislation which differs from province to province (or territory) and the interpretation of the collective agreement, if one exists. Legal advice should be sought.

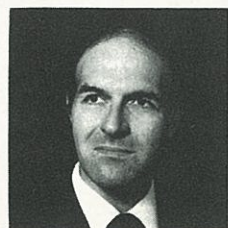
5. If the hospital does not supply the vaccine and does not require it, can an O.R. nurse refuse to participate in surgery in which transmission of hepatitis B is a threat?

The answer to this question also may differ across the country. In some occupational health and safety laws, the employee has a legal right to refuse work

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without danger of dismissal, on the basis that the work is unsafe. It could be argued that prior to the introduction of the vaccine, exposure to an infected patient was unsafe but an inherent risk accepted by all O.R. nurses. The vaccine, however, has changed the situation. It can be said that it is no longer an inherent risk since it can be removed. It is questionable therefore, whether a nurse who refuses to be vaccinated can refuse to work with an infected patient on the basis of a risk which can be removed.

6. Does the hospital have a duty to warn the O.R. staff of the presence of an infected patient?

A good argument can be made in favour of such a duty. Without the warning, precautions against infection may not be taken. The hospital would therefore know or ought to have known that such a warning causes precautions to be implemented and would prevent reasonably foreseeable injury. This would impose a duty on the hospital to warn the staff.

7. Does the admitting physician, the surgeon or any other physician who knows of the presence of the disease have a duty to advise the operating room staff or at least the O.R. supervisor or infection control officer?

Because of the known dangers of the disease that can be avoided or at least reduced by giving a warning, a similar duty rests with the doctor. Failure to warn the staff who would then not take ordinary precautions may result in injury. This would provide the basis of a negligence suit against the doctor for compensation.

8. Does the patient have a duty to warn the hospital that he or she is infected?

If the patient knows or ought to know that he is contagious, there is a very strong argument to be made that he has a duty to advise the hospital of that fact. The difference between such a duty on the patient and a similar duty on a doctor, is that the patient may not be expected to know that he is infected. He may honestly believe that he is not contagious. He may also believe that the hospital has already been informed of his condition.

Based on these possibilities, it would be very difficult to prove that even if the patient had such a duty, he had breached it by not informing the hospital.

9. Do staff members have a duty to one another with respect to the spread of the disease?

It is this situation which has already been dealt with by at least one Canadian court. In a New Brunswick case, the surgeon and the staff knew that

the patient was infected. After using a needle on the patient, the surgeon laid it against the patient rather than handing it to the scrub nurse. The nurse failed to remove it promptly and the surgeon stabbed himself with the needle. The result was that he contracted hepatitis and was forced to give up his profession. He sued the nurse and won since her carelessness was considered negligence. The surgeon was also found partially to blame for the incident.

It is extremely important, therefore, to take all reasonable precautions when dealing with a patient suffering from hepatitis. These precautions should be geared toward minimizing the possibility of injury to other members of the operating team.

**Editorial note:** Many hospitals are in transition from a category-specific or disease-specific form of isolation to their own adaptation of "universal precautions" - treating all blood and body fluids of all patients as potentially infected.

### Reducing the potential for legal problems

The risk of a nurse, a doctor or a patient contracting hepatitis B can be minimized. As a result, the legal problems can also be substantially reduced. The following rules may be of assistance.

1. All patients who are suspected of having a communicable disease should be "flagged" in the records as soon as the suspicion is known. The flagging should be recorded in such a way that anyone looking at the chart will immediately be drawn to it.
2. A definite infection control procedure should be implemented on the basis of the suspicion in order to confirm or eliminate it.
3. A suspicion or a confirmation of a communicable disease should automatically cause the implementation of infection control procedures with respect to the patient regardless of where the patient may be located at any particular time.
4. Staff and visitors who may be exposed to the disease should be notified of the suspicion or confirmed presence.
5. The appropriate medical and nursing staff member should be immediately notified when a suspicion is recorded to make certain that appropriate precautions are taken.