Legal conversations
Clinical decision making - a legal perspective

Hi. This is a podcast from the Open University Centre for Law.

I'm Phil Bates

I'm Marc Cornock

Hi.

Phil Bates
Today we're going to be asking how should health professionals make clinical decisions? How much involvement should the patient have and do professionals need more guidance or is there too much already.

Marc, what do you mean by clinical decision making?

Marc Cornock
I think we mean the whole gamut of a situation where someone a health professional is making decisions for, with and about a patient, a client. So including things in the hospital, in GP surgeries, in the community, anywhere really where someone has a condition, a disease, where someone is helping them with it.

Phil Bates
So it sounds like you are talking about a whole range of health professionals not just doctors

Marc Cornock
Yeah we I mean we mean everything. I mean everything from sort of the doctor, the nurse, the physio, the chiropodist, podiatrist, through even and including social workers and sort of the auxiliary professions, health care assistants for instance.

Phil Bates
So how much guidance is there to guide that decision-making?

Marc Cornock
Sorry –

Phil Bates
Do you want me to ask the question again?

Marc Cornock
Please –

Phil Bates
So how much guidance already exists to guide that health professional decision making?

Marc Cornock
I think that's possibly one of the areas where there is actually an issue in that there's a lot of guidance and the guidance has different weight to it. There's legal guidance. I mean for instance the law as a whole and then specifically legal guidance for instance the Mental Capacity Act of 2005 through to professional guidance, ethical principles. So there is a lot of guidance out there and one of the problems a health professional sometimes has is knowing which guidance to follow. There can be conflicting guidance. Ethical principles, legal principles, whilst usually following the same channel, can sometimes conflict with each other.

Informed consent is one area where the law has a different view to the ethical principles for instance.

Phil Bates
And how do health professionals find out about all this guidance

Marc Cornock
That's quite an interesting area. I mean medical students at the moment their curriculum has to include ethical guidance as part of their training. Other health professionals it's not mandatory that it's included but generally it's included in sort of their pre-registration training and education. The problem that exists is the professionals who qualified some time ago where it wasn't mandatory. And essentially they are picking up on the job.

Phil Bates
So what – where – sorry. Start again.

So in all this guidance, where's the patient's position?

Marc Cornock
With that if we – I think – the patient's position today is a lot better than it was twenty, thirty years ago. I think if we look at for instance thirty years ago there was quite a paternalistic attitude. Doctors were generally in charge of health care. Nurses and the other health professionals could be said to be subservient to them in some ways. And it was generally the doctor's perspective on what the patient needed or what they felt they needed. So the doctor would make a decision and the patient would receive that treatment with very little input from the patient in most instances. Whereas nowadays there tends to be more of a teamwork so the patient has their needs considered, gives their opinion, is involved in a kind of partnership. The problem with that is that kind of implies, with autonomy, that there is an equal partnership between the health professional and the patient. Whereas it's not really equal. The person, the health professional, the doctor, the nurse, the physiotherapist, has the knowledge and the skills to know what treatment could be offered and also how that treatment will affect the patient. Whereas the patient is generally a passive receiver of the information and then is asked to make a decision based upon that information in quite a short time space usually. So the patient is there. They are involved but one has to consider whether that is the best – the best –

Sorry. Can't think –

Whether that's the best outcome for the patient. I mean the recent White Paper has a wonderful phrase in it: "No decision for me, without me." Well, that's a good principle but not every patient can actually sort of have that fulfilled for them. Though some patients actually don't want to be involved, that they'd much rather take you know the old paternalistic view where they go in, someone gives them a diagnosis, explains their condition to them and then makes decisions or offers a treatment and the patient receives the treatment.

Phil Bates
Don't most patients just agree to whatever the professional tells them is – is the best thing to do

Marc Cornock
In terms of not requesting different treatments I would think so. I think – I wouldn't say they just receive the treatment. I think they probably ask questions and they want information about it. But I think they will take the treatment that's offered without sort of necessarily asking for a second opinion or asking for alternative treatments. They may go in - I don't know if I had cold and I went to my GP I would probably would ask for antibiotics and be told I'm not going to have the antibiotics. And I would go out without the antibiotics. But I think I wouldn't go in and then demand I have some complementary therapy. So I think you're right in general, yes.

Phil Bates

And you said there is all of this guidance and sometimes it is conflicting or confusing. Do we need to simplify things and reduce the amount of information that's out there?

Marc Cornock
I think that would be a good start in principle would be to reduce the information. And I think the way possibly we could do that or the way we could do that would be to actually limit who can – who can issue the guidance. I think if we are having guidance in terms of law as in laws of the land, Mental Capacity Act, mental Health Act, I would consider that to be more than guidance. Then we have the professional bodies issuing guidance, suggesting things on what should be done for consent involving the patient, ensuring the patient's voice is heard. And then we have guidance from other bodies. For instance The Consumers Association will give guidance, National Institute on Clinical Excellence releases guidance on certain treatments, the Care Quality Commission I think at one stage when I did a count there was about thirty one different bodies that can issue guidance which – I mean any situation where there's a numerous number of bodies that can give guidance reducing it is good for a start.

Phil Bates
But aren't most health professionals going to want to have guidance that's specifically from their own professional group so that nurses will want there to be a particular guidance for nurses and so on?

Marc Cornock
I think you're right but I think that is part of the problem. I think every group, the podiatrist wants it from their council, the optician from theirs. And I think that's what you said and I think you're right. But one asks the question is that right? Because if we are all doing or if health professionals are all doing the same job in terms of they're all looking after the patient, have the patients' best interest at heart and there's guidance on consent, it would be reasonable to assume that the consent for the doctor, for the nurse, for the physiotherapist, for the podiatrist, should all say the same thing. Therefore does it matter whether the guidance comes from the Medical Council, the Nursing Council or should it just be that someone, some body issues guidance on consent for the healthcare professional. And one can – you could even argue that you know why do we have all these separate bodies representing all these different organis – all these different groups. We could argue why do we have separate bodies for each distinct health professional? Shouldn't we have one body that covers all of them?

Phil Bates
But isn't part of being a profession that you're self-regulating, that you make rules for yourself? If you're being told what to do by official guidance are you still a professional?

Marc Cornock
I think the notion of self-regulating professionals has gone. I think it was a great principle, a great ideal and in the 1800's when professions were being set up it was one of the guiding principles. I think with the aftermath of the Shipman enquiry, the Bristol Royal Infirmary enquiry, I don't think it exists any more. There are so many bodies that can impact on a healthcare professional that the notion that they are self-regulating I think is gone. But even – even accepting that it's gone I still don't think that means that a health professional can't – sorry can I start again –

I think the fact that the healthcare professional isn't self-regulating doesn't mean they are not professional. I think what they – what they should realise and what they do realise – actually no I don't - - -

What I think is that a health professional realises that because the patient is in a vulnerable position then the power is basically with them. Their professional role is to assist the patient through that therefore they assist the patient, they help the patient, advise them, they guide them, they coach them where necessary. Therefore the fact that they are not self-regulating that there is guidance coming from other areas is actually useful in terms of what they can do is ---

What they can do is use that guidance for the benefit of the patient. Therefore the fact that it hasn't - if it was a nurse for instance it hasn't come from the nursing council but it's come from the Council for Healthcare Regulatory Excellence isn't a negative aspect. It's positive. And it allows them to interact with the patient in a far better way.

Phil Bates
Great. One final thing. Is all of this guidance national or do we have international guidance as well that we need to take into account?

Marc Cornock
We have international guidance. We have national guidance. And then we have more local guidance. When we talked earlier about the influence of the guidance and the amount of guidance I think that's part of the problem as well in that you can have international ethics and international codes. I mean you know the Helsinki Code for instance. That is then sort of filtered down into a national code. So for instance the doctors have Good Medical Practice. The nurses have the Code of Conduct. And from that a Local Trust, an Ambulance Trust, Hospital Trust, the GP's surgery will distil that into their own local policy. So if you work in that area there are three key areas or three key –

There are three key principles of guidance that you have to consider where essentially if there was the one guidance that affected everyone it would be much easier for the person involved and also patients would be able to read it and understand what they can expect from a healthcare professional.

Phil Bates
Great. Thank you. That's been really interesting. That will give me a lot of new things to worry about the next time I go and see a doctor.

Phil Bates
If we have all this guidance and some of it is legally binding and some of it is ethical is there ever a situation where there's a conflict between the legal requirements and the ethical guidance?

Marc Cornock
I think there is yes. The problem with having guidance that comes from various quarters is as you say legal guidance is considered to be legally binding. The healthcare professional thinks they have to follow it and do. Ethical guidance is generally there to give an over view for someone to work within a boundary. And from the ethical guidance usually the professional guidance flows and also takes consideration of the legal perspective. And if we take the issue of consent the legal perspective is very clear. The Mental Capacity Act lays down certain procedures have to be followed in situations. Whereas the ethical guidance is more lose. It allows people to work within a boundary. One of the problems we have is for instance with informed consent. There isn't a legal principle in informed consent in English law. However, the ethical principles always put it forward and say the patient should receive all the information regarding a procedure. Yet from a professional perspective that isn't practical and doesn't happen which leads you to believe that if that isn't happening does that mean the health professional is failing the ethical principle? But then when you look at the legal perspective it says it doesn't have to be as long as you give the right amount of information. So they conflict, which isn't a satisfactory situati