

Consent and confidentiality in occupational health reports

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- We must consult
 - (a) the common law;
 - (b) the ethical rules of the health care professional bodies such as the GMC;
 - (c) statutes

The common law

- This is the law created by judges by deciding cases through the doctrine of precedent without reference to statute

Informed consent

- The doctrine of patient autonomy was developed by the courts in the context of clinical care
- Sidaway v Royal Bethlem and Maudsley Hospital (1984)
- The doctor must tell the patient what a reasonable doctor would disclose
- Bolitho v City and Hackney HA (1998)
- The practice of doctors must be reasonable and responsible

- The doctrine of informed consent also applies to the disclosure of confidential information to third parties
- GMC: Confidentiality: Protecting and Providing Information (2004)
- “The doctor must ensure that the patient understands what is to be disclosed, the reasons for disclosure and the consequences thereof”.

GMC guidance (2004)

- “Where doctors have contractual obligations to third parties, such as companies or organisations, they must obtain patients’ consent before undertaking any examination or writing a report for the organisation. Before seeking consent they must explain the purpose of the examination or report and the scope of the disclosure. Doctors should offer to show patients the report, or give them copies, whether or not this is required by law”.

- There will be exceptional cases where consent to reveal confidential information is not required by law eg where the worker is a risk to others and the doctor cannot persuade him to reveal information himself
- *W v Egdell* (1990)
- or where there is a court order or a statutory duty, as under the Public Health Act

Consent

- Therefore, in my view, an OH physician or nurse must obtain the consent of the worker before sending a report to management about him, and informed consent means that the worker must know in broad terms what is to be said before it is sent
- If the worker refuses, the report cannot be sent, though in that case the employer can act without it, and OH may have to tell the manager that the worker is unfit, if that is the case, in order to protect others

Legislation

- The common law may be supplemented or supplanted by statute
- Parliament has power to repeal any common law rule

Statutory health surveillance

- A number of regulations require the employer to undertake health surveillance of employees, for example
- Reg 11 COSHH Regs 2002:
- (8) An employee subject to health surveillance shall, when required by the employer, present himself for such health surveillance procedures as may be required (**ie statutory duty to undergo health surveillance**).

- (9) Where as a result of health surveillance an employee is found to have an identifiable disease or adverse health effect which is considered by a relevant doctor or other OH professional to be the result of exposure to a substance hazardous to health, the employer shall provide the employee with advice, review the risk assessment, consider assigning the employee to alternative work etc
- What if the employee refuses consent to the disclosure to the employer of the adverse health effect?

COSHH ACOP, para 232

- The health record should not include confidential clinical data,
- BUT should include the conclusions of the doctor or OHA **relating to the employee's fitness for work**
- Does this imply that the doctor/nurse is entitled to state that the employee is fit/unfit without consent?

Working Time Regulations 1998

- Regulation 7(5) (Night work)
- Workers employed on night work must be given the opportunity of a free health assessment (**ie no obligation on the worker to undergo the assessment**)
- No person shall disclose an assessment made for the purposes of this regulation to any person other than the worker to whom it relates, unless
- (a) the worker has given his consent in writing to the disclosure, **or**
- **(b) the disclosure is confined to a statement that the assessment shows the worker to be fit**
- **(ie envisages that there can be a statement of fit/unfit without the worker's consent)**

Data Protection Act 1998

- Health records are defined as:
- (a) consisting of information relating to the physical or mental health or condition of an individual and
- (b) which has been made by or on behalf of a health professional in connection with the **care** of an individual
- Must apply to OH records?

Subject access

- Section 7
- Data subjects have the right of access to data, whether manual or computerised
- except where release of information would be likely to cause serious harm to the physical or mental health of the data subject or another person or
- would reveal the identity of a third party, other than another health professional, who does not want it revealed

- This means that the worker is entitled in most cases to see his OH records, including any reports written to management
- but the Act does not require disclosure of a report **before it is sent**

Access to Medical Reports Act 1988

- This adds little of substance to the doctrine of informed consent and the Data Protection Act
- What it does add is a cumbersome procedure whereby the employer must first ask the worker whether he/she consents to a medical report being sought, and, if the worker wants to see the report before it is sent, he/she must be allowed to see the report **before it is sent to the employer and can then withdraw consent for it to be disclosed**
- The worker has to arrange access within 21 days, but
- **there is no time limit on how long the worker has to decide whether he/she agrees to the report being disclosed**

- In practice, the potential delays in the Act make it unsuitable for application to OH reports to management, but does the law demand that it be complied with?

When does the Act apply?

- It only applies to **medical reports**
- Supplied by a **registered medical practitioner** (not a nurse)
- for employment purposes or insurance purposes
- medical report means a report relating to the physical or mental health of an individual prepared by a medical practitioner **who is or has been responsible for the clinical care of the individual**

- **Responsible** is not defined
- **Clinical** is not defined
- **Care** includes examination, investigation or diagnosis for the purposes of, or in connection with, any form of medical treatment

The dilemma

- Is an OH physician ever **responsible for clinical care**?
- If yes, **when** is an OH physician responsible for clinical care?

Referral to a counsellor or physiotherapist?

Post-exposure prophylaxis?

Vaccination eg for swine flu?

Summary

- It is clear that clinical information should not be disclosed without consent, unless there is a court order, a statutory duty or it is necessary to protect third parties
- It is also clear that employees should be informally made aware of what the OH professional intends to say in a report to management before the report is sent, in order that he/she can give informed consent. If the OH physician is responsible for clinical care the procedure in the 1988 Act will have to be followed, but this will be exceptional.

Summary

- If the employee withdraws consent to a report being sent to management from OH that is probably their right
- BUT there is an argument that OH is entitled to state that the employee is fit/unfit without consent, especially when the employee is subject to statutory health surveillance, or where they are a danger to others