



UNIVERSITY OF TM
KWAZULU-NATAL
—
INYUVESI
YAKWAZULU-NATALI

Returning to basics in ethical healthcare practice in Africa

PROFESSOR DAVID McQUOID-MASON
CENTRE FOR SOCIO-LEGAL STUDIES



EDGEWOOD CAMPUS



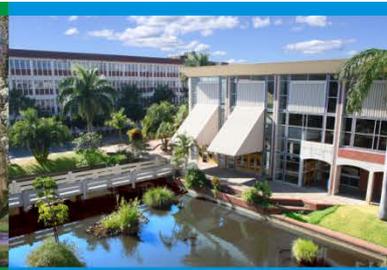
HOWARD COLLEGE CAMPUS



NELSON R MANDELA SCHOOL OF MEDICINE



PIETERMARITZBURG CAMPUS



WESTVILLE CAMPUS

UKZN INSPIRING GREATNESS

Outline

- Introduction.
- The bioethical principles.
- Autonomy and the International Human Rights instruments.
- Autonomy and the Ghanaian and South African Constitutions, statute law and Common law.
- Beneficence and the International Human Rights instruments.
- Beneficence and the Ghanaian and South African Constitutions, statute law and Common law.
- Non-maleficence and the International Human Rights instruments.
- Non-maleficence and the Ghanaian and South African Constitutions, statute law and Common law.
- Justice and the International Human Rights instruments.
- Justice and the Ghanaian and South African Constitutions, statute law and Common law.
- Conclusion.

Introduction

- The bioethical principles provide a convenient framework for training healthcare practitioners to avoid the increasing tendency of medical malpractice litigation in Africa and elsewhere.
- Healthcare practitioners must be made aware of their country's international obligations and the provisions of their Constitutions, relevant statute law and aspects of the Common law that affect their professional conduct.
- It will be demonstrated how the bioethical principles relate to the provisions of some relevant international and regional instruments affecting African countries and others, and some examples from the Constitutions, statute law and Common law of Ghana and South Africa.

The bioethical principles

- Bioethical principles:
 - Autonomy.
 - Beneficence.
 - Non-maleficence.
 - Justice.

Autonomy and the International Human Rights instruments

- Autonomy recognizes the duty on doctors to respect the freedom of patients to make decisions for themselves.
- Universal Declaration of Human Rights (1948) (UDHR)
- Recognizes autonomy in the right to security of the person (article 3) and the right to privacy (article 12).
- International Covenant on Civil and Political Rights (1966) (ICCPR)
- Recognizes autonomy in the right to security of the person (article 9).
- African Charter on Human and People's Rights (1981)
- Recognizes autonomy in the rights to respect for the integrity of a person (article 4), respect for their dignity (article 5) and the recognition of their right to the security of their person (article 6).

Autonomy and the Ghanaian and South African Constitutions and statutes

- Ghana: Autonomy is recognized in the Ghana Constitution 1992, Act 527 in the provisions concerning the right to dignity (s 15.1) and privacy (s18.2).
- South Africa: Autonomy is recognized in the Constitution, 1996, in the provisions concerning the right to bodily and psychological integrity (s 12(2)) and privacy (s 14).
- Ghana: Autonomy is recognized in Statute law in the Ghana Public Health Act 851, 2012, in the provisions requiring an informed consent for clinical trials (s 158) and informed consent and privacy in the Patients Rights Charter in the Sixth Schedule to the Public Health Act.
- South Africa: Autonomy is recognized in Statute law in the National Health Act, 61 of 2003, in the provisions requiring an informed consent (s 7) and confidentiality (s 14).

Autonomy and the Ghanaian and South African Common law

- Ghanaian/English law: Autonomy is recognized in the Common law in the provision that:
- A negligent medical procedure may result in an action for personal injury if there is no informed consent (*Chester v Afshar* [2004] 3 WLR 927 (HL) - failure to warn about risks in spinal surgery).
- An intentional breach of confidentiality may result in an action for a breach of confidentiality (*Cornelius v De Taranto* (2001) 68 BMLR 62 - defamatory psychiatric report circulated without consent).
- South Africa: Autonomy is recognized in the Common law in the provision that a negligent medical procedure may result in an action for personal injury if there is no informed consent (*Van Wyk v Lewis* 1923 AD 438) and that an intentional breach of confidentiality may result in an action for invasion of privacy (*Jansen van Rensburg v Kruger* 1993 (4) SA 842 (A)).

Beneficence and the International Human Rights instruments.

- Beneficence recognizes the duty on doctors to do good for their patients, e.g.:
- International Covenant on Economic, Social and Cultural Rights (1966)
- States Parties must take steps to create 'conditions which would assure to all medical service and medical attention in the event of sickness' (article 12).
- African Charter on Human and People's Rights (1981)
- States Parties 'shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick' (article 16).

Beneficence and the Ghanaian and South African Constitutions and statute law

- Ghana: Beneficence is recognized in statute law in:
 - The Ghana Public Health Act 851, 2012, by providing that individuals have the right to ‘an easily accessible, equitable and comprehensive health care of the highest quality within the resources of the country’ and ‘quality basic health care irrespective of the patient’s geographical location’ (Patient’s Charter);
 - The Ghana Health Service And Teaching Hospitals Act 525, 1996 which provides that the Health Service must ‘increase access to improved health services’ (s 3).
- South Africa: Beneficence is recognized in the Constitutional provision of access to health care – except in the case of children who may claim it as a right (s 28: *Minister of Health v Treatment Action Campaign* 2002 (5) 721 (CC)), and emergency medical treatment (s 27):
- Beneficence is recognized in statute law in the National Health Act 61 of 2003 requiring access to health (s 2), and in the Choice on Termination of Pregnancy Act 92 of 1996 (s 2) and the Children’s Act 38 of 2005 regarding the right to health care of children (s 2).

Beneficence and the Ghanaian and South African Common law

- Ghana: Beneficence is found in the Common law provision requiring doctors to do good for their patients by demonstrating the level of skill expected of reasonable medical practitioners in their field of expertise as evidenced by expert witnesses:
- English law:
 - *Bolam v Friern Hospital Management Committee* [1957] WLR 582 (mentally ill patients hip fractured during ECT – no warning given)
 - The *Bolam* approach which tends to defer to the medical profession has been challenged as too deferential:
 - cf. *Hucks v Cole* [1993] 4 Med LR 393 (failure to prescribe penicillin to a pregnant woman who then developed puerperal fever).
- South African law: Beneficence is found in the Common law provision requiring doctors to do good for their patients by demonstrating the level of skill of a reasonably competent practitioner in their field of expertise:
Castell v De Greeff 1994 (4) SA 408 (C) (failed mastectomy).

Non-maleficence and the International Human Rights instruments

- Non-maleficence recognizes the duty on doctors not to harm their patients, e.g.:
- Universal Declaration of Human Rights (1948)
- ‘No one shall be subjected to cruel, inhuman or degrading treatment’ (article 5) or to ‘arbitrary interference’ with their privacy’ (article 12).
- International Covenant on Economic, Social and Cultural Rights (1966)
- ‘No restriction or derogation from fundamental rights’ in any country may be made because the Covenant ‘does not recognize’ them or ‘recognizes them to a lesser extent’ (article 5).
- African Charter on Human and People’s Rights (1981)
- No one may be arbitrarily deprived of their right to life and integrity of the person (article 4).
-

Non-maleficence and the Ghanaian and South African Constitutions and statute law

- Ghana: Non-maleficence exists in the Ghana Constitutional provisions that state that no person should be subjected to a condition that detracts or is likely to detract from his dignity and worth as a human being (s 15.2.b) and 'no child shall be deprived by any other person of medical treatment' (s 28.2.2).
- Statute law provides that no person shall deprive a child of medical attention or deny them such by reason of religious or other beliefs (Ghana Children's Act 560, 1998 s 8(1) and 8(2)).
- South Africa: Non-maleficence exists in the Constitutional provisions regarding the right that nobody may be refused emergency medical treatment (s 27(3)) and nobody may be 'subjected to medical or scientific experiments without their informed consent' (s 12(2)).
- Statute law provides that 'health providers may not refuse a person emergency medical treatment (National Health Act 61 of 2003 s 5) and nobody may be subjected to hate speech (Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s 10).

Non-maleficence and the Ghanaian and South African Common law

- Ghana: Non-maleficence is recognised in the Common law rule that health practitioners may not make defamatory statements about their patients (e.g. disclosing that a patient is a prostitute).
- English law: Patients presenting at hospitals in emergency situations may not be refused medical treatment (*Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 - not treating a poisoned night-watchmen).
- South Africa: Non-maleficence is recognised in the Common law rule that healthcare providers will be liable for harming their patients by not treating them properly (*Edouard v Administrator, Natal* 1989 (2) SA 368 (D) - failure to carry out a sterilization by tying the wrong tube) or disclosing information about them without their consent (*Jansen van Vuuren v Kruger* 1993 (3) SA 842 (A) – disclosure of HIV status of a patient to non-treating medical colleagues).

Justice and the International Human Rights instruments

- Justice recognizes the duty on doctors to treat patients equally and fairly.
- Universal Declaration of Human Rights (1948)
- Recognizes that: 'All human beings are born free and equal in dignity and rights' (article 1).
- International Covenant on Economic, Social and Cultural Rights (1966)
- Recognizes 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (article 12).
- African Charter on Human and People's Rights (1981)
- 'Every individual shall have the right to enjoy the best attainable state of physical and mental health' (article 16).

Justice and the Ghanaian and South African Constitution and statute law

- Ghana: Justice is enshrined in the Ghana Constitutional provisions concerning equality and non-discrimination (s 17).
- Ghanaian statute law promotes justice by:
 - Ensuring equal and fair treatment of children and providing sanctions for infringements of the principles of equality and fairness through discriminatory acts or omissions (Children's Act 560, 1998 (s 6(3))).
 - By providing that the Health Service is for all people living in Ghana irrespective of age, sex, ethnic background or religion (Ghana Public Health Act 851, 2012 (Patient's Charter)).
- South Africa: Justice is enshrined in the Constitutional provisions concerning equality and non-discrimination (s 9)
- *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (1) SA 6 (CC) (unequal treatment of same sex and married partners).
- Statute law promotes justice by ensuring equal and fair treatment of everyone and providing sanctions for infringements of the principles of equality and fairness through discriminatory acts or omissions (Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ss 7, 8 and 9).

Justice and the law: Ghanaian and South African Common law

- Ghana: The Common law has recognized the justice principle where patients have been ‘irrationally’ discriminated against regarding new forms of medical treatment because their cases were not ‘exceptional’:
 - *R (Ann Marie Rogers) v Swindon Primary Care Trust and Secretary of State* [2006] EWCA Civ 392 (costly new drug for breast cancer).
 - *R on Application of Otley v Barking and Dagenham NHS Primary Care Trust* [2007] EWHC 1927 (Admin) (colorectal cancer drug)
- South Africa: The Common law has recognized that justice is closely linked to dignity and during the pre-Apartheid era was used e.g. where a person was ejected from a public bus because of his race: *Purshotam Dagee v Durban Corporation* (1908) NLR 39).

Conclusion

- As previously mentioned, the bioethical principles provide a convenient framework for training healthcare practitioners to avoid the rising tide of medical malpractice litigation in Africa and elsewhere.
- The paper has attempted to demonstrate how examples of each of the bioethical principles can be found in certain international and regional human rights instruments and some of the provisions of the Constitutions, statute law and Common law of Ghana and South Africa.
- Generally practitioners who abide by the bioethical principles will also be conforming to the requirements of their country's international obligations, and their country's Constitution, statute law and Common law.