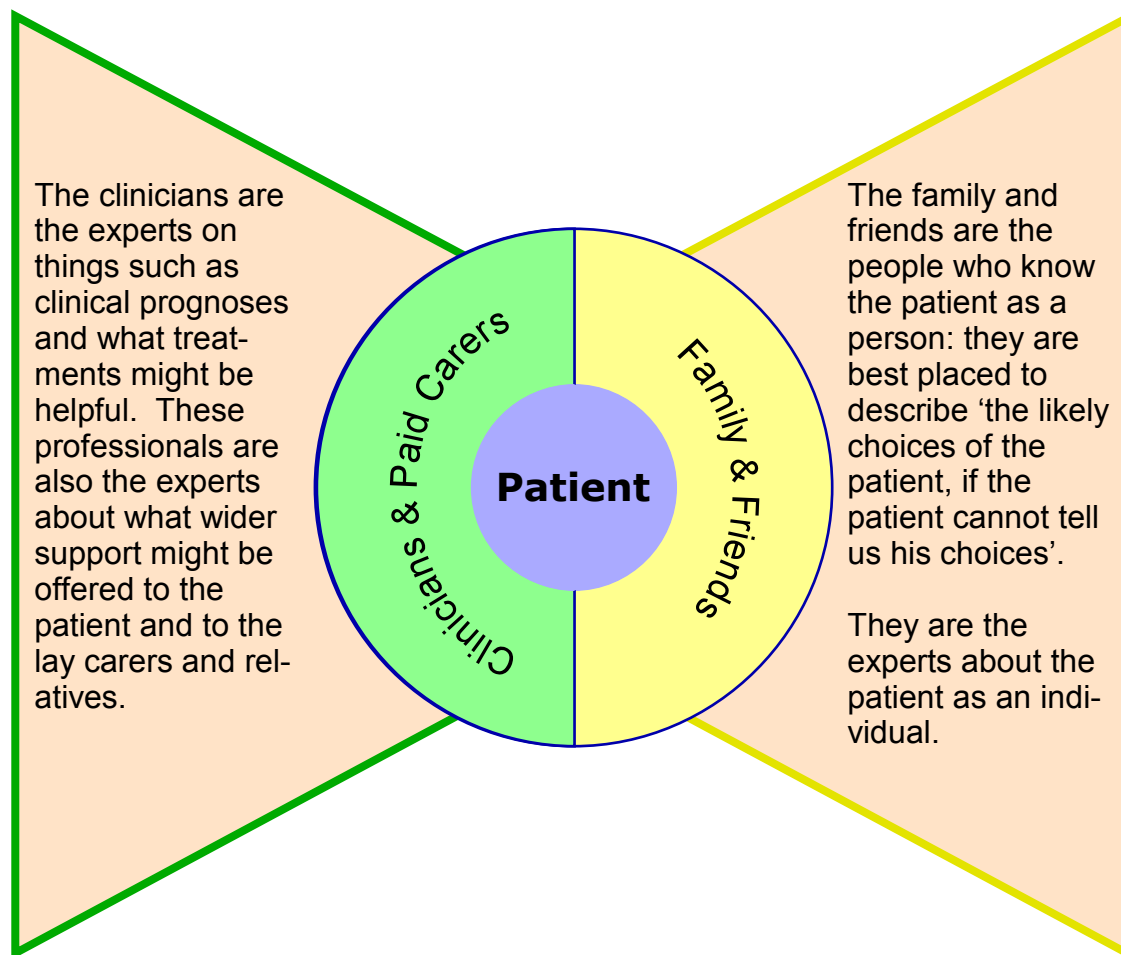


**The difference in the application of section 4(6) of the MCA for 'those close to the patient' and the patient's clinicians - IT IS EXTREMELY IMPORTANT TO UNDERSTAND AND AGREE THIS!**

**My main 'problem or objection', is that the current clinically-authored guidance is offensive to relatives of EoL patients, especially live-with relatives of patients who are in their own homes, because it seems to default to 'we can distrust relatives' as opposed to the more logically correct but less restrictive 'relatives are not usually clinicians'.**



The diagram above is centred on the patient, and explains who he is most often 'supported by and in contact with, in an ongoing way'.

Of course, the significance of the yellow and green regions, will vary according to the exact situation: but the expertise of the two groups of 'support providers' will tend towards remaining unchanged.

Section 4(6) of the Mental Capacity Act gives this guidance to any person who is making a best-interests decision:

4(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

Traditionally, most clinicians and many judges have considered that section 4(6)(c) is describing something which all decision-makers must be able to do with equal competence: in my view correctly, Mr Justice Hayden has over-turned that position [and recently Mr Justice Charles has agreed with the approach of Hayden] relatively recently, by explicitly stating what amounts to:

**Close family and close friends can use their own 'life-experience of the patient' when they consider 4(6) - something the clinicians cannot do.**

Mr Justice Hayden explains this at; <http://www.bailii.org/ew/cases/EWCOP/2014/4.html>

53. If ever a court heard a holistic account of a man's character, life, talents and priorities it is this court in this case. Each of the witnesses has contributed to the overall picture and I include in that the treating clinicians, whose view of TH seems to me to accord very much with that communicated by his friends. I am left in no doubt at all that TH would wish to determine what remains of his life in his own way not least because that is the strategy he has always both expressed and adopted. I have no doubt that he would wish to leave the hospital and go to the home of his ex-wife and his mate's Spud and end his days quietly there and with dignity as he sees it. Privacy, personal autonomy and dignity have not only been features of TH's life, they have been the creed by which he has lived it. He may not have prepared a document that complies with the criteria of section 24, giving advance directions to refuse treatment but he has in so many oblique and tangential ways over so many years communicated his views so uncompromisingly and indeed bluntly that none of his friends are left in any doubt what he would want in his present situation. I have given this judgment at this stage so that I can record my findings in relation to TH's views. Mr Spencer on behalf of the Trust does not argue against this analysis, he agrees that nobody having listened to the evidence in this case could be in any real doubt what TH would want.

... he has in so many oblique and tangential ways over so many years communicated his views so uncompromisingly and indeed bluntly that none of his friends are left in any doubt what he would want in his present situation.