

MEDICINE AND THE LAW

Do COVID-19 patients needing extended care in an intensive care unit fall under the ‘emergency medical treatment’ provisions of the South African Constitution?

D J McQuoid-Mason, BComm, LLB, LLM, PhD

Centre for Socio-Legal Studies, University of KwaZulu-Natal, Durban, South Africa

Corresponding author: D J McQuoid-Mason (mcquoidm@ukzn.ac.za)

Whether COVID-19 patients in need of extended care in an intensive care unit qualify for ‘emergency medical treatment’ is answered by considering the Constitution, the meaning of emergency medical treatment, and whether such patients are in an incurable chronic condition. Considering ethical guidelines for the withholding and withdrawal of treatment may assist a court in determining whether a healthcare practitioner has acted with the degree of skill and care required of a reasonably competent practitioner in his or her branch of the profession.

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To answer the question whether COVID-19 patients in need of extended care in an intensive care unit (ICU) qualify as requiring ‘emergency medical treatment’,^[1] it is necessary to consider: (i) the healthcare provisions in the Constitution; (ii) the meaning of ‘emergency medical treatment’; (iii) whether such patients requiring long-term ICU care have an incurable chronic illness; and (iv) the ethical guidelines for the withholding or withdrawal of treatment.

Constitutional provisions regarding healthcare

The South African (SA) Constitution provides for the right of ‘access to healthcare services’.^[1] It further provides that the state must take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of this right. Therefore, the right of access to healthcare services is not absolute. However, in the case of medical emergencies, the Constitution provides that nobody ‘may be refused emergency medical treatment’. There is no internal limitation regarding the availability of resources. According to the Constitution, children have ‘the right to basic health care services’ – not merely ‘access to healthcare’. This right is also not subject to the internal limitation of ‘available resources’.

Although the right of patients requiring emergency medical treatment, and the right of children to basic healthcare services, are not subject to the internal limitation of ‘available resources’, such rights may still be subject to the external limitation provisions in the Constitution.^[1] All rights may be limited, provided that they are ‘in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. However, children may be in a better position to demand healthcare services than adult patients requiring emergency medical treatment, because a ‘child’s best interests are of paramount importance in every matter concerning the child’.^[1]

The Constitutional Court in the *Soobramoney* case^[2] stated that if the right not to be refused emergency medical treatment was unlimited, ‘it would make it substantially more difficult for the state to fulfil its primary obligations to provide health care services to

‘everyone’ within its available resources’. The consequence would be ‘prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening’.^[1]

In the *Grootboom* case,^[3] involving the constitutional right to have access to adequate housing, the Constitutional Court pointed out that measures excluding ‘a significant segment of society’ would not be reasonable. Such exclusionary measures would not be ‘of general application’ as provided for in the Constitution. Consequently, COVID-19 patients with comorbidities and a hopeless prognosis should not be singled out for the withholding or withdrawing of treatment. They should be treated like other patients with similar comorbidities and a hopeless prognosis.

Meaning of ‘emergency medical treatment’

In the *Soobramoney* case,^[2] the Constitutional Court observed that the term ‘emergency medical treatment’ does not include ‘ongoing treatment of chronic illnesses for the purpose of prolonging life’, as this was not specifically provided for in the Constitution. It held that ‘emergency medical treatment’ applies to ‘remedial treatment that is necessary and available [to] be given immediately to avert ... harm’ arising from ‘a sudden catastrophe which calls for immediate medical attention’. ‘Emergency medical treatment’ does not encompass ongoing chronic illnesses that are incurable and do not call for ‘immediate remedial treatment’.

Is a patient who has contracted COVID-19 and requires long-term ICU care suffering from an incurable chronic condition?

The meaning of ‘chronic’ in describing a disease or condition is ‘continual’ or ‘lasting for a long time’.^[4] It has also been defined as ‘a condition lasting from days to years (as opposed to acute), with or without any worsening’.^[5] A chronic illness or disease is not defined as

incurable. The Constitutional Court in the *Soobramoney* case^[2] did not deal with chronic illnesses in general, but with a case of chronic and incurable renal failure. It stated that chronic illnesses that were incurable or would require treatment ‘for the purpose of prolonging life’ fell outside the purview of section 27(3).

As *Soobramoney*’s condition fell outside the ‘emergency medical treatment’ provisions, the Court decided the issue in terms of the ‘right of access to health care services’ within ‘available resources’. It recognised the worldwide shortage of resources and that ‘in open and democratic societies based upon dignity, freedom and equality ... the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care’. In interpreting the ‘right to life’ in the Constitution, ‘there is in reality no meaningful way in which it can constitutionally be extended to encompass the right indefinitely to evade death’.

Although the cure rate for COVID-19 patients on ventilators is low,^[6] some patients may recover after several days or weeks on a ventilator, so their condition is curable. However, the position is different if such patients suffer from comorbidities that make their prognosis hopeless and treatment futile. Life-support measures may then be withheld or withdrawn, as for other patients for whom treatment would be futile.^[7] There is no ethical or legal duty on healthcare practitioners to provide futile treatment.^[8]

It may be argued that an extended stay on a ventilator does not satisfy the *Soobramoney* case decision that for ‘emergency medical treatment’ the ‘remedial treatment’ must require ‘immediate medical attention’ to ‘avert [the] harm’. In the case of COVID-19 patients requiring ventilation, if they are not immediately placed on a ventilator, the ‘harm’ of their dying may not be averted. Should the patient’s condition deteriorate and the prognosis become hopeless, such ventilator assistance may be withdrawn.^[7] The *Soobramoney* case further held that even if such a stay qualifies as ‘emergency medical treatment’, the constitutional right not to be refused such treatment may still be limited.

Ethical guidelines for the withdrawal or withholding of treatment

Ethical guidelines may assist the courts in determining whether healthcare practitioners acted with the necessary skill and care of reasonably competent practitioners in their field of practice.^[9] The Health Professions Council of South Africa (HPCSA) ethical guidelines on the withholding and withdrawal of treatment^[10] provide that healthcare practitioners may not discriminate against patients because of their ‘age, disability, race, colour, culture, beliefs, sexuality, gender, lifestyle, social or economic status or other irrational grounds’ when choosing the treatment, to ensure that they provide the general standard of care required. Decisions to withhold or withdraw life-prolonging treatment must be made by the senior treating clinician, considering the views of the patient or ‘those close to the patient’. When deciding whether to withhold or withdraw treatment, the practitioner must assess the patient’s condition and likely prognosis, while ‘taking account of current guidance on good clinical practice’. In such circumstances, practitioners should always consider obtaining a second opinion and should discuss with patients how their care can be managed if such a decision were to be made. They should mention the arrangements for providing ‘basic care and other appropriate treatment; and what might be [the patient’s] palliative or terminal care needs and how these would be met’.

The HPCSA guidelines recognise that sometimes it is permissible to withhold treatment ‘even if it is not in the best interest of the patient’, e.g. in the case of ‘continued care in special units such as critical care and chronic dialysis units for end stage kidney failure’. While healthcare institutions have ‘the right to limit life-sustaining interventions without the consent of a patient or surrogate by restricting admission to these units’, such restrictions ‘must be based on national admission criteria agreed upon by the expert professional bodies in the relevant speciality, as well as the HPCSA’. Such institutions must, however, provide ‘the appropriate palliative care and follow up when specialised care is withheld’.

The Critical Care Society of Southern Africa (CCSSA) has published guidelines dealing with the allocation of scarce resources for situations in which critically ill COVID-19 patients require ICU admission.^[11] These guidelines, or similar guidelines widely accepted by the medical profession, would qualify as ‘national admission criteria agreed upon by the expert professional bodies in the relevant speciality’, as required by the HPCSA ethical guidelines.^[8]

Conclusions

The following conclusions may be drawn regarding the triaging of COVID-19 patients requiring extended ICU ventilation:

- COVID-19 patients with comorbidities requiring ventilation should be treated the same as other patients with comorbidities, and may not be unfairly discriminated against on the basis of age, disability, race, colour, culture, beliefs, sexuality, gender, lifestyle, social or economic status or other irrational grounds.
- COVID-19 patients requiring extended ventilator care may qualify for emergency treatment, because they require ‘immediate medical treatment’ to ‘divert harm’, and their condition, which may become chronic, is not incurable.
- Even if such COVID-19 patients are classified as requiring ‘emergency medical treatment’ such treatment may be limited – provided the limitation is ‘reasonable and justifiable’.
- For the limitation to be reasonable, it must be ‘of general application’ and not exclude ‘a significant segment of the population’, which could apply to COVID-19 patients requiring ventilation – given the extent of the pandemic in SA.
- Should ventilation treatment of COVID-19 patients be reasonably and justifiably withheld or withdrawn, healthcare establishments must still provide palliative care.
- While ethical guidelines are not law, they may be considered by the courts in determining whether healthcare practitioners have acted with the necessary skill and care.
- When deciding to withhold or withdraw ventilator treatment for COVID-19 patients, healthcare practitioners should follow the HPCSA and CCSSA (or similar national guidelines) widely accepted by the medical profession.

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