

Ethical and Medico-legal consequences of healthcare rationing under budgetary constraints

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Health is a fundamental human right

World Health Organization constitution declares health a fundamental human right.

South African Constitution Bill of Rights states:

In 27(1)(a) that ***"Everyone has the right to have access to health care services, including reproductive health"***

In 27(1)(c) that ***"no-one may be refused emergency medical treatment"***

In 27(2) that ***"the State must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of each of these rights"***

South African Constitutional Court 1997 (CCT 32/97)

- Extracts from this Constitutional Court judgement that are relevant are:
- The State's failure to provide renal dialysis for all patients suffering from chronic renal failure was not a breach of the obligations imposed on it by Section 27 of the Constitution.
- ***"the inescapable fact is that if governments are unable to confer benefit on any person unless it confers an identical benefit on all, the only viable option would be to confer no benefit at all"*** quoting from a Canadian court judgement.
- ***"Difficult and agonizing judgements have to be made as how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgement which a court can make"*** quoting from a United Kingdom court judgement.

Rationing of healthcare

- If it is accepted that the ability to provide healthcare will be less than the need however it is defined and
- If it is accepted that it is legally and ethically justified to limit the degree to which health care can be provided to an individual and a population,
- Then there is the question how this should and can be done?

Biomedical Ethics

- Ethics is the discipline of dealing with what is good and bad and with moral duty and obligation.
- **Consequentialism** is the moral theory that actions are right or wrong according to their consequences and the most often utilized in health issues is **utilitarianism**.
- The principle of **utility** indicates that an action is justified if it produces more “good” than any alternative action and that this will determine if an action is morally right or wrong.
- A **rule utilitarian** applies a set of moral rules and a moral code to the principle of utility in decision making This is where I would place myself.

Cost and Risk benefit analysis

- Cost-effectiveness analysis – measures the benefit in non-monetary outcomes such as QALYs. E.g. two therapeutic procedures have an equal outcome but one is less expensive, then that procedure is more cost-effective.
- Cost-benefit analysis – measures the benefit to cost ratio of various and differing programs or policies.
- Risk analysis – identifies the risk of a policy or intervention.
- Risk-benefit analysis – assesses the risk in relation to the possible benefits.
- In medical decision-making and health policy, the acceptability of risks set against the likelihood and degree of risk and possible benefits must be determined. E.g. policies should be put in place to reduce the risk of medico-legal claims against health facilities and health workers

Rationing –
implies that
potentially
beneficial
treatment is
denied to a
patient

- In South Africa, as in many countries, social services depend on funding from a common pool derived from tax revenue.
- Rationing occurs at various levels
- Macro-allocation – at a national level funds are allocated to various functions such as health, education and welfare services for example.
- Micro-allocation occurs at the level of an individual with a decision whether or not an individual patient will receive a scarce medical resource.

United States Oregon Health Plan

Most often quoted
example of rationing of
health services

- Macro-allocation on this plan balanced state healthcare (Medicaid) against competing social goods such as education and infrastructure.
- Traded providing a larger range of health care to less than half the population for providing a basic level of healthcare to all unable to afford private healthcare.
- A prioritized list of health services was developed by a Health Services Commission consisting of consumers and providers of health services.
- The list of conditions and treatments was ranked according to four factors – cost, duration of benefit, likelihood to alleviate symptoms or death and the views of citizens on the seriousness of symptoms and functional limitations.

South Africa two-tier health system

Private health
sector serves
16% of the
population

- Access to Private health sector determined by the ability to overcome a financial barrier.
- The provider in most cases advises on the need for the service, then provides the service and is typically paid by volume of services provided.
- Private health care is generally perceived as “**quality**” by the general population but Health Market Inquiry highlights the “**information asymmetry**” where the doctor has more information than the recipient of health care.
- Infringes the ethical principle of “**autonomy**” which implies a free informed choice.
- Before rationing or limitation of private health care is considered, it is essential that resources allocated within the private health sector are utilized to the maximum benefit of the recipient.

South Africa two-tier health system

Public health
sector serves
84% of the
population

- Characterized by continued and oft publicized failures to provide quality health care, which is characterized as Safe, Effective, Timely, Efficient, Equitable and People-centered.
- Cannot be attributed solely as a resource issue but rather reflects the burgeoning burden of disease coupled with lack of leadership, management capacity and systems hampering the delivery of quality health care.
- Further exacerbated by fruitless and wasteful expenditure within the public health sector as well as well documented cases of fraud, wastage and corruption in health departments across the country.
- In the light of this before rationing is considered, it is essential that all of the funds allocated for the delivery of health services are indeed utilized for that purpose.

National Health Insurance - what is the relevance?

- The Health Benefits Advisory Committee (Clause 25(1) NHI Bill) must determine:
- (a) the health service benefits and types of services to be reimbursed by the Fund at each level of care.
- (b) detailed and cost-effective treatment guidelines that take into account the emergence of new technologies.
- (c) in consultation with the minister and the Board, the health service benefits.
- It is a concern that this committee that will in effect potentially ration health care for the South African population must (i) meet the requirements of transparency, (ii) make decisions based on reasoning according to information and principles that all accept as relevant, (iii) have procedures of appeal and review of individual decisions and involve meaningful public support.

Medico-legal implications of withholding healthcare

- Can a health care professional be held medico-legally liable for failing to provide a therapeutic intervention that would have prevented harm of death within the context that I have discussed?
- Reassurance in CCT 32/97 that states, *"However the right to life may be defined, there is in reality no meaningful way in which it can be constitutionally extended to encompass the right to indefinitely evade death"* Further, that, *"Difficult and agonizing judgements have to be made as how a limited budget is best allocated to the maximum advantage of the maximum number of patients"*
- Thus in the absence of acts of medical negligence or willful omission, given that resources are limited and that a fair, transparent and ethical process adhering to the principles of distributive justice has been followed to reach the decision to withhold a particular therapeutic intervention, a legal action to prove medical malpractice or negligence will fail.

Conclusion

- In conclusion, I am aware that some may contest the views that I have expressed on moral and ethical grounds.
- I have resorted to these debates with myself and with colleagues when faced with decision of this nature both as a practicing paediatrician and later while heading two provincial health departments.
- I agree with Judge Chaskalson that at times the decisions that I have had to take have been both difficult and agonizing as they have resulted in potentially beneficial treatment being denied to a patient with negative consequences for the patient and their families.

THANK YOU