



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

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Healthcare rationing under budgetary constraints

- It is common knowledge that certain entities in the provincial public healthcare systems are almost dysfunctional because of budget overruns, negligence, maladministration, corruption and indifference by healthcare administrators and some healthcare practitioners.
- The Esdimini tragedy involving the deaths of over 143 mentally ill patients and the oncology crisis in KwaZulu-Natal which has caused the death of about 300 to 500 women who were originally suffering from treatable cervical cancer, have been widely publicized.
- Both these tragedies have in part emanated from budgetary constraints caused by maladministration and corruption on the part of public sector health administrators and their political superiors.
- It is intended to deal with the ethical and legal liability of both the healthcare administrators for causing the budgetary constraints and the healthcare practitioners working in a resource-starved environment.

Ethical liability of healthcare administrators for causing budgetary constraints.

- Healthcare administrators who are registered with the HPCSA are subject to the ethical rules of the HPCSA whether they are acting in administrative or professional roles.
- MECs responsible healthcare who are political appointments and are registered with the HPCSA or South African Nursing Council are also subject to the ethical rules of their professional bodies.
- The Public Finance Management Act states that heads of department are responsible for the day-to-day management of public entities – not the MECs.
- However, if MECs or politicians interfere in the day-to-day management by the heads of departments – as happened during the Esedimini tragedy and allegedly in the KZN oncology crisis – they will be held personally ethically and legally liable.

Ethical liability of healthcare administrators for causing budgetary constraints (continued).

- Healthcare administrators need to ensure that ethically their conduct is in line with the bioethical principles of patient autonomy, beneficence, non-maleficence and justice or fairness.
- While patient autonomy may be limited by resource constraints in the public sector patients should still be informed about the limited choices available to them and allowed to decide which they want.
- When alternative health services are available (e.g. a health service is offered by an NGO) patients should be informed about them.
- Health administrators who do not respect patient autonomy – even when it is limited – may also be violating the other principles of beneficence, non-maleficence and justice or fairness.
- Health administrators who cause budgetary constraints through maladministration, negligence, indifference or corruption will be violating all four of the bioethical principles.

Legal liability of healthcare administrators when causing budgetary constraints.

- Healthcare administrators who cause budgetary constraints and harm to patients through maladministration, negligence, indifference or corruption may be criminally or civilly liable in law.
- If they intentionally cause the death of patients – i.e. they subjectively foresee that their conduct may lead to the deaths of patients (e.g. by transferring patients to unregistered healthcare facilities for mentally ill patients or not repairing oncology machines) – they will be liable for murder.
- If they negligently cause the death of patients – i.e. there is no legal intention but they objectively ought to have foreseen that their conduct may cause death – they will be guilty of culpable homicide.
- If they intentionally injure patients or aggravate their illness they may be criminally liable for assault. There is no criminal liability for negligently causing such injury or illness – but civil liability arises.

Legal liability of healthcare administrators when causing budgetary constraints (continued)

- If healthcare administrators are found to have intentionally contributed the death of patients through unlawfully causing shortages of resources, they may be sued by the dependents of such patients for financial and sentimental damages suffered.
- If they negligently contribute to the death of patients through unlawful conduct causing scarce resources, they may be sued by the patients' dependents for only financial loss – not sentimental – damages.
- If they intentionally injure patients or aggravate their illness through their unlawful conduct causing resource shortages, they may be sued by the harmed patient for financial and sentimental damages.
- If they negligently cause such injury or illness by unlawfully causing a scarcity of resources, the harmed patient can sue them for financial loss suffered plus pain and suffering.

Ethical liability of healthcare practitioners when providing healthcare services during budgetary constraints

- Ethically healthcare practitioners are required to comply with the ethical standards of their professional bodies - even when there is a shortage of resources (e.g the HPCSA or SA Nursing Council).
- The most useful framework for determining whether healthcare practitioners are following the ethical standards of their professions is to measure their conduct against the bioethical principles.
- Even when faced with a shortage of resources practitioners need to ask themselves whether they are:
 - Respecting the autonomy of their patients – within the resources available – by informing them of the limited options available .
 - Acting to the benefit of their patients – within the limited resources.
 - Not-harming their patients – by best using the limited resources available to prevent harm.
 - Treating all patients justly and fairly – ensuring that there is a fair distribution of the limited resources without discrimination.

Legal liability of healthcare practitioners when providing healthcare services during budgetary constraints

- The test of whether a healthcare practitioner is legally liable is judged by how a reasonably competent practitioner in his or her field would have behaved in a similar situation.
- Thus in the case of budgetary constraints and shortages of resources the test will be:
 - Has the healthcare practitioner conducted himself or herself in the manner that a reasonably competent practitioner in the same field, faced with the same shortage of resources, would have acted.
- If the answer is in the affirmative the healthcare practitioner concerned will not be held legally liable.
- If the answer is in the negative the practitioner will be liable.
- The court will decide whether or not such healthcare practitioner had acted lawfully based on the evidence of medical experts – but has the discretion to decide whether or not such evidence is tenable.

Conclusion

- Ethically healthcare administrators and political appointees registered with professional bodies can be held liable for unlawfully causing budgetary constraints.
- Legally healthcare administrators who unlawfully contribute to budgetary constraints causing harm to patients may be held criminally and civilly liable.
- Healthcare practitioners who break ethical rules when providing healthcare services during budgetary constraints may be disciplined by their professional bodies.
- Healthcare practitioners who fail to act like reasonably competent practitioners in their field of practice when faced with similar budgetary constraints may be criminally and civilly liable for their conduct.

Scenario 1: Who is liable - the healthcare administrators or the healthcare practitioners and the workers?

- P is 23 years old and at full-term pregnancy. Her transfer from a district hospital, where she presented, to a provincial hospital is delayed by 3 hours because of lack of transport. At the provincial hospital, a fetal monitor is not available as only 4 of the 12 are functional. Only 4 midwives are available for the 9 women in the labour ward where P is in labour with a cervical dilation of 5 cm. After 45 minutes in the labour ward, P is given the first available monitor because she had a previous caesarean section with a stillborn child. The monitor shows severe fetal distress. All 4 theatres are busy, with the first one available in only 20 - 30 minutes' time. P is sent to theatre but waits 40 minutes for a lift before she arrives there. The lifts regularly malfunction and are continually repaired rather than being replaced or upgraded. P is taken to theatre and, within 15 minutes of her arrival, is anaesthetised and the C-section commenced. The uterus is found to be ruptured, with the fetus in the abdomen. Attempts to resuscitate the child are unsuccessful. The baby could have been saved if the inter-hospital transfer had been quicker, the fetal state had been detected earlier, and there had not been a 40-minute delay for a lift. Management has regularly over a number of years been informed by clinicians at the provincial hospital of long delays in inter-hospital transfers, shortage of labour ward staff, deficiencies in fetal monitoring, and malfunctioning lifts. The excuse for these shortcomings has been lack of funds. However, the provincial health budget has been overdrawn for some years because of maladministration such as unlawful tendering practices, wasteful expenditure on travel, entertainment and study tours, high expenditure on consultants, etc., which has led to substantial cuts in expenditure on the provincial health care services. Who is liable for what?

Scenario 2: The Esedimini tragedy

Mentally ill patients were transported from private psychiatric facilities 'like cattle on the back of open bakkies, to ill-equipped and unlicensed NGOs, where unqualified staff had no idea how to care for them' and 143 patients died. It was stated that the former MEC for health and other public health officials had ignored 'protests, pleas, warning after warning, and even court action by activists'. The former MEC in her evidence said: 'I cannot carry personal blame because I wasn't working for myself. I was an elected official'.

– [Kotze A, Lopez Gonzalez L and Malan M. Life, death and political gain. Mail & Guardian 2018: January 26 to February 1: 15].

- Could the former MEC and responsible health officials be liable:
- 1. Ethically? If so, for breaching which ethical principles?
- 2. Criminally? If so, for which crimes?
- 3. Civilly? If so, for what damages?

Scenario 3: The Oncology crisis

- A provincial hospital purchases two state of the art oncology machines that can each treat 100 patients a day. The purchase includes a five year service contract to ensure that the machines operate properly. At the end of the five years the MEC for health refuses to renew the contract. An ex-employee of the department of health establishes a company that is unqualified to service the machines, and is contracted to fix them. It is unsuccessful. The provincial heads of health departments are complicit with the MEC in making the decisions. Hundreds of cancer patients, who in the past would have been treated with the two hospital oncology machines within two weeks of being diagnosed, now have to wait for nine months for treatment. Their cancer progresses from treatable to terminal and they die. The hospital's oncology staff leave because they can no longer treat cancer patients ethically and effectively as they lack the necessary equipment.
- Can the MEC and heads of departments be held ethically and legally liable? If so, for what? If not, why not?

Scenario 4: The Paediatric ICU - failing to do more with less

- A provincial hospital has a paediatric ICU where the ratio of nurses is 1one nurse to 5 neonates (1:5). The recommended ratio is 1:1. A 16 week-old neonate has a tracheostomy tube on which she is dependent for ventilation. The tube becomes displaced and this is not noticed by the nurses. The neonate suffers cerebral hypoxia with irreversible brain damage and is reduced to a persistent vegetative state. The parents sue the hospital for the negligence of the nurses. The hospital defends the action alleging that because of a shortage of resources, instead of a 1:1 ratio in the paediatric ICU, the limited resources meant that there was a 1:5 ratio and the nurses could not be held liable for negligence.
- If you were the judge how would you decide the case?
- Would you hold the hospital vicariously liable? Why or why not?
- What kind of damages would you award?