Prioritising access to life-saving treatment – Legal considerations

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Introduction

- Legal basis for prioritisation
- Policies which NHS bodies are adopting
- Discrimination issues arising under the Equalities Act 2010
- Human rights considerations

Context

- Demand outstrips supply
- Inevitable tension between what clinicians want to offer/continue to offer and what they can/should offer
- 2 questions arise:
  - Is it lawful for clinicians to prioritise access to life-sustaining treatment?
  - On what basis can and should clinicians decide?

Prioritisation – legal basis

- Section 3 NHS Act 2006
  - Duty on CCGs to provide services "to such extent as it considers necessary to meet all reasonable requirements"
  - Who it applies to (sections 3(1A), general, 3(1C) specific emergency care)
- *R v. Secretary of State for Social Services ex parte Hincks* (1980) 1 BMLR
  - Duty not absolute

Prioritisation – BA

- Latest illustration
- *R. v. Secretary of State for Health ex parte BA* [2019] 1 WLR 2979
  - Different Context
  - Question: did SoS have power to make a direction which prioritised treatment for particular persons and/or groups of people?

Prioritisation – BA (2)

– Answer: yes

- [62] SoS entitled to exercise judgment as to what was necessary to meet the reasonable requirements at any particular moment if time, if necessary by prioritising.
- [64] ambit of judgment is wide
- [67] scarcity of resources is a legitimate consideration

Prioritisation of life-sustaining treatment

- <u>Some (uncontroversial) propositions</u>
  - Artificial ventilation is medical treatment
  - Withholding and/or withdrawing the ventilator is characterised as an omission by a clinician
  - Therefore, withholding or withdrawing the treatment is not unlawful unless there is duty to provide it
  - No duty to provide it if futile or not in P's interests

Prioritisation of life-sustaining treatment (2)

- What if not futile/cannot be said to be in P's best interests not to provide?
- Where the treatment is adjudged to be of overall benefit to P, can it be lawfully withheld or withdrawn?
  - Either because it is not available or because someone else is adjudged to derive greater benefit from it

Duty to (continue to) treat?

- A prioritisation decision has to be made
- Not a best interests decision, so continued benefit in treatment cannot be determinative
- But, on what basis can and should it be taken?
- What if there is no policy/guidance to follow?

Unlawful killing?

- Withholding/withdrawing amounts to accelerating death
- Intent?
- Conjoined twins case, [2001] Fam 147
- Different context
- Conclusion: Brooke LJ, necessity
  - (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; (iii) the evil inflicted must not be disproportionate to the evil avoided.

Unlawful killing? (2)

- Robert Walker LJ
  - Different basis: purpose of the act was to preserve life of J, not to cause death of M
  - Therefore inappropriate to characterise foresight of M's accelerated death as amounting to criminal intent
  - "intentionally", ordinary/natural meaning applied only to cases where the purpose of the prohibited action was to cause death

Guidance

- Long-standing from the GMC
- Treatment and care towards the end of life: good practice in decision-making (July 2010)
  - *If resource constraints are a factor, you must:*
  - *…. (c) make sure that decisions about prioritising patients are fair and based on clinical need and the patient's capacity to benefit, and not simply on grounds of age, race, social status or other factors that may introduce discriminatory access to care*
  - *You should not withdraw or decide not to start treatment if doing so would involve significant risk for the patient and the only justification is resource constraints.*"

Guidance (cont)

- GMC updated its guidance
  - Under the section "Prioritising Access to Treatment" it states, *"If more individuals have life-threatening conditions than can be treated at once, doctors will have to make very difficult decisions about how to allocate resources. We advise doctors who are faced with these decisions to: take account of current local and national policies that set out agreed criteria for access to treatment…"*
- NICE, https://www.nice.org.uk/guidance/ng159
- RCP, Ethical dimensions of COVID-19 for front-line staff
- BMA, COVID-19 – ethical issues. A guidance note
- Scottish Guidance, Covid-19 Guidance: Ethical Advice and Support Framework

A National Framework

- Tentative thoughts (ethical and legal considerations)
  - Clearly identified aims
  - Defined criteria (although need to be flexible)
  - Process for decision-making, which is reasonable, inclusive and accountable
  - Treatment offered on a time-limited basis

Prioritising treatment – discrimination and human rights considerations April 2020

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This presentation is intended for general information and should not be relied upon in relation to any individual case.

Duties not to discriminate

1. Equality Act 2010
   1. Direct discrimination
   2. Indirect discrimination
   3. Discrimination arising from disability
   4. Failure to make reasonable adjustments
2. Human rights
   1. Article 14 ECHR
   2. Requires another ECHR right – eg Article 8
   3. Brings in other international law principles, eg children's best interests

EA 2010

The gateway – section 29

(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public…must not discriminate against a person requiring the service by not providing the person with the service.

EA 2010

The gateway – section 29 (cont)

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

EA 2010

The gateway – section 29 (cont)

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

EA 2010

The gateway – section 29 (cont)

(7) A duty to make reasonable adjustments applies to—

(a) a service-provider...;

(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.

EA 2010

Protected characteristic – disability

6(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

No need for cause of impairment to be known

Cancer, HIV, MS = disabled

EA 2010

Direct discrimination – s 13

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

…

(3) [re disability], and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

EA 2010

Direct discrimination – s 13 (cont)

EHRC Services Code :

4.12 'The characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause'

…

4.14 '…necessary to look at why the service provider treated the service user less favourably to determine whether this was because of a protected characteristic'

EA 2010

Direct discrimination – s 13 (cont)

EHRC Services Code :

Paras 4.15-4.16 – direct discrimination can be unconscious and / or based on stereotypes relating to a protected characteristic

Comparators – no material difference in circumstances, but circs don't have to be identical (s 23, Code para 4.22)

EA 2010

Discrimination arising – s 15

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

EA 2010

Discrimination arising – s 15 (cont)

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

EA 2010

Indirect discrimination – s 19

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

EA 2010

Indirect discrimination – s 19 (cont)

(a) A applies, or would apply, it to persons with whom B does not share the characteristic [particular impairment],

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

EA 2010

Indirect discrimination – s 19 (cont)

EHRC Services Code at para 5.27

‘ The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages:

- Is the aim of the provision, criterion or practice legal and nondiscriminatory, and one that represents a real, objective consideration?
- If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?’

EA 2010

Indirect discrimination – s 19 (cont)

EHRC Services Code at para 5.28

‘Legitimate aim’ ‘is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and it must represent a real, objective consideration.’

Para 5.30: ‘Examples of legitimate aims include:

- ensuring that services and benefits are targeted at those who most need them;
- the fair exercise of powers;

EA 2010

Indirect discrimination – s 19 (cont)

Code at para 5.34-5.35

In a case involving disability if the service provider has not complied with its duty to make relevant reasonable adjustments, it will be difficult for the service provider to show that the treatment was proportionate.

The more serious the disadvantage caused by the discriminatory provision, criterion or practice, the more convincing the objective justification must be.

EA 2010

Indirect discrimination – s 19 (cont)

BMA view:

‘*Although a ‘capacity to benefit quickly’ test would be indirect discrimination, in our view it would be lawful in the circumstances of a serious pandemic because it would amount to ‘a proportionate means of achieving a legitimate aim’, under s19 (1) of the Equalities Act – namely fulfilling the requirement to use limited NHS resources to their best effect.*’

EA 2010

Reasonable adjustments ss 20-21

20(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

EA 2010

Reasonable adjustments ss 20-21 (cont)

20(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

EA 2010

Reasonable adjustments ss 20-21 (cont)

Schedule 2, para 2

(5) Being placed at a substantial disadvantage in relation to the exercise of a function means—

(a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, or

(b) if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment.

EA 2010

Reasonable adjustments ss 20-21 (cont)

Schedule 2, paras 7-8

(7) If A is a service-provider, nothing in this paragraph requires A to take a step which would fundamentally alter—

(a) the nature of the service…

(8) If A exercises a public function, nothing in this paragraph requires A to take a step which A has no power to take.

EA 2010

Reasonable adjustments ss 20-21 (cont)

EHRC Services Code, para 7.4

The policy of the Act is not a minimalist policy of simply ensuring that some access is available to disabled people; it is, so far as is reasonably practicable, to approximate the access enjoyed by disabled people to that enjoyed by the rest of the public. The purpose of the duty to make reasonable adjustments is to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large

EA 2010

Reasonable adjustments ss 20-21 (cont)

EHRC Services Code, para 7.30 – relevant factors:

- whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the services in question;
- the extent to which it is practicable for the service provider to take the steps;
- the financial and other costs of making the adjustment;
- the extent of any disruption which taking the steps would cause…

PSED

Section 149 of the Equality Act 2010

Requires public bodies to have ‘due regard’ to a series of specified needs when carrying out their functions.

Includes needs to eliminate discrimination and advance equality of opportunity

Bracking – two key issues:

1. Proper understanding of impact of the decision on disabled children and families
2. Specific regard to the specified needs

Key human rights instruments

- European Convention on Human Rights (ECHR)
  - Incorporated into English law through Human Rights Act 1998 – see section 6
- UN Convention on the Rights of Persons with Disabilities (CRPD)
  - Not part of English law, but relevant in three ways

Relevant ECHR rights

- Article 2 – right to life
- Article 3 – right to be free from inhuman and degrading treatment
- Article 8 – right to respect for private and family life
- Article 14 – non-discrimination in enjoyment of other Convention rights

Relevance of CRPD

From *SG v SSWP* ('Benefit Cap' case)

1. Inform decisions on whether ECHR rights have been infringed – e.g. *Mathieson* in relation to children's best interests

2. Help resolve any ambiguity in domestic legislation

3. Inform development of common law

Key CRPD Rights

1. Article 5 – Equality and Non-Discrimination
2. Article 10 – Right to life – 'on an equal basis with others'
3. Article 11 – situations of risk
4. Article 17 – physical and mental integrity
5. Article 25 – 'right to the enjoyment of the highest attainable standard of health without discrimination'

Participation

- Article 8 ECHR
  - Right to be heard on decisions which impact on your private life (inc ‘physical and psychological integrity’), family life and home
- Article 12 CRC / Article 7 CRPD
  - Children’s right to participate – views given ‘due weight in accordance with the age and maturity of the child’
- Article 3(c) CRPD – general principle of participation

Condliff

- Article 8 does not give rise to a positive duty on a statutory health care provider to consider non-clinical, social or welfare considerations wider than the comparative medical conditions and medical needs of different patients when deciding on the allocation of funding for medical treatment.

McDonald v UK

- Withdrawal of overnight care from elderly person considered to be an ‘interference’ for purposes of Article 8(1)
- Breach of Article 8 during limited period for which there had been no reassessment (not ‘in accordance with law’)
- Could withdrawal of treatment therefore be seen as an ‘interference’?

Burke v GMC

The Court of Appeal:

‘[The Judge’s conclusion] does not, however, lead to the further conclusion that if a National Health doctor were deliberately to bring about the death of a competent patient by withdrawing life-prolonging treatment contrary to that patient's wishes, Article 2 would not be infringed. It seems to us that such conduct would plainly violate Article 2.’

But context is everything…

Article 14

- Encompasses both direct and indirect discrimination
- Issue must be within the ‘ambit’ of a substantive Convention right
  - Does *Condliff* preclude an Article 14 claim premised on Article 8?
- There must be a recognised ‘status’ (v broad)
- If differential treatment / differential impact / failure to treat differently (*Thlimmenos*), state must justify
  - But bar is low – ‘manifestly without reasonable foundation’

EU Charter

Article 35

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

EU FRA – "The prioritisation of tackling the spread of COVID-19 puts the right to equal access to healthcare enshrined in Article 35 of the Charter at risk.'

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