ETHICS MAN **Daniel K Sokol**

Bariatric surgery and justice in an imperfect world

The appeal court did not, as headlines suggest, make a moral judgment about Tom Condliff's case

"Dying granddad loses appeal for gastric band op" read one headline. The dying granddad is Tom Condliff, 62. He is morbidly obese and has diabetes, renal failure, and various other comorbidities. His deteriorating condition has left him depressed, incontinent, and unable to shower or dress himself. With a life expectancy of less than 12 months, he desperately needs to lose weight. Non-surgical attempts at weight loss—diet, changes in lifestyle, and drug based interventions—have failed. The remaining option, given his frail condition, is laparoscopic gastric bypass surgery (*BMJ* 2011;343:d4894).

His primary care trust offers bariatric surgery, but a criterion for eligibility is a body mass index in excess of 50. Mr Condliff's is 43. As he was not eligible under the trust's general policy on bariatric surgery, his GP asked the trust to consider him an exceptional case. The GP noted that Mr Condliff's misfortunes included confinement to a wheelchair and to his home, inability to pursue his interests of attending church and playing the guitar, and being a considerable burden on his wife.

The trust is under a legal obligation to break even at the end of each financial year. Legally prohibited from going over budget, it must balance the clinical effectiveness of treatments with cost considerations. The money withheld from one patient will be spent on another, bringing to mind a line from Samuel Beckett's *Waiting for Godot*: "The tears of the world are a constant quality. For each one who begins to weep, somewhere else another stops." Under these constraints, the trust rejected the GP's "individual funding request." Mr Condliff took the case to court.

The trust's policy on whether to treat a case as exceptional ignores social factors, such as age, sex, and parental status. Only clinical factors are considered. The rationale is threefold. Firstly, non-clinical factors, such as being married, cannot be readily assessed by the primary care trust and could lead to subjective and unfair judgments. Secondly, if an exception was made in one case on non-clinical grounds, how could the trust know that other excluded patients would not qualify for treatment on such grounds? Finally, making decisions on the basis of non-clinical factors runs a risk of discrimination. The policy on individual funding requests gives an example: "If a treatment were provided differentially to patients who were carers this would tend to favour treatment for women over men." Such discrimination triggers a cacophony of legal and ethical alarm bells.

The court case was not about the morality of the trust's decision to withhold funding for Mr Condliff but whether it could lawfully refuse to consider non-clinical factors in its individual funding request policy. Mr Condliff's barrister invoked a breach of article 8 of the European Convention of Human Rights, which states that "everyone has the right to respect for his private and family life." By ignoring non-clinical factors, he said, the trust failed to respect Mr Condliff's private and family life, a life whose quality was rapidly deteriorating for want of effective treatment. Further, he argued, the trust may have a duty not only to consider social factors but to provide medical treatment under article 8.

No, said the Court of Appeal for England and Wales. The case law does not support the barrister's proposition, which in effect would require the trust to favour some patients on social grounds. In his judgment Lord Justice Coulson wrote, "The policy . . . is intentionally non-discriminatory." The trust is fulfilling its legal duty to provide healthcare within a context of limited financial resources. The policy itself shows no lack of respect for Mr Condliff's private and family life.

The decision in this sad case is consistent with the reluctance of the European Court of Human Rights to meddle with agonising decisions on resource allocation. It allows the state a margin of discretion when pitting the interests of the individual (Mr Condliff) against those of the broader community (the current and future patients in the trust's catchment area).

"If Mr Condliff had been 35 years old, and the sole parent and financial provider for three young children, would the outcome have been the same?"

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In the concluding paragraphs of the judgment Lord Justice Toulson rejects the argument that article 8 comes into play in this case. Even if it did, he notes, the trust had "legitimate equality reasons" to adopt its policy. In other words, there would be a valid exception to justify the trust's breach of article 8. As article 8 is a qualified rather than an absolute right, the state may interfere with it in certain circumstances, such as for the protection of the rights of others. This would be one such circumstance.

The appeal court did not, as some headlines suggested, make a moral judgment on the merits of Mr Condliff's case. No one disputes that his dire predicament is regrettable. The court merely dismissed his claim that the trust's policy, by refusing to consider non-clinical factors, was unlawful. In so doing the court resisted an attempt to catapult human rights into the already contentious domain of resource allocation decisions in medicine. Primary care trusts will breathe a collective sigh of relief.

The practical lesson for GPs is to examine closely the criteria in the policy when deciding to seek an individual funding request. I can't help but wonder, however, whether the judges would have been swayed by more dramatic social factors. If Mr Condliff had been 35 years old, and the sole parent and financial provider for three young children, would the outcome have been the same?

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