



# Covid-19: Guidance is urgently needed on who should be treated in event of shortages, say lawyers

Clare Dyer

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Healthcare lawyers and doctors' defence bodies have said that national guidance is urgently needed on how to allocate scarce resources such as ventilators during the covid-19 pandemic.

The calls came as a law firm threatened to seek a judicial review of the government's failure to issue official guidance on how doctors should decide between patients if not everyone who needs intensive care treatment can access it.

Rook Irwin Sweeney, newly set up by solicitors from the leading law firm Irwin Mitchell, has written a letter before action to Matt Hancock, the health and social care secretary for England, and to NHS England. Acting for a group of disabled campaigners, the firm is challenging the government's failure to provide guidance for doctors who have to decide who should get lifesaving treatment. The letter asked for a government response by 16 April, failing which the firm promised to launch its legal challenge in the week beginning 20 April.

The law firm Bindmans has also written to the government and NHS England on behalf of a client with physical problems, asking for a national policy framework on decisions. The firm argued that the absence of such a policy was a breach of the rule of law, irrational, and a breach of their client's human rights. If both firms get permission to go ahead with their legal challenges, the two cases could be combined.

Doctors' defence organisations fear that without national action, individual doctors could face legal consequences for their decisions and even possible prosecutions for gross negligence manslaughter.

The Medical Protection Society has called on the government to introduce emergency laws to protect doctors and the clinical decisions they make during the coronavirus crisis, as New York state has done. "It is simply not fair for doctors already under immense pressure to be asked to make difficult treatment decisions based on a hope that the courts and the General Medical Council will treat them favourably and protect them in the future if their decisions and actions are challenged," said Rob Hendry, the society's medical director.

The Medical Defence Union has advised members faced with competing interests between two patients, and the possibility of withdrawing treatment that is in one patient's best interests to give it to the other, to first ensure that their employing trust applies to the Court of Protection. The union's chief executive, Christine Tomkins, said, "No action to withdraw lifesaving treatment which is in the patient's best interests should occur unless the court rules this is lawful. Emergency declarations of this kind can be obtained very swiftly."

Anne-Marie Irwin of Rook Irwin Sweeney said that the firm was also concerned about guidance from the BMA on resource allocation during the pandemic.<sup>1</sup> The guidance states, "If demand outstrips the ability to deliver to existing standards, more strictly utilitarian considerations will have to be applied, and decisions about how to meet individual need will give way to decisions about how to maximise overall benefit . . . Health professionals may be obliged to withdraw treatment from some patients to enable treatment of other patients with a higher survivor probability."

It goes on, "This may involve withdrawing treatment from an individual who is stable or even improving but whose objective assessment indicates a worse prognosis than another patient who requires the same resource."

In a statement clarifying the use of age and disability in the guidance, the BMA said that neither was in itself a relevant criterion for making treatment decisions. But where age, disability, or comorbidities meant that a patient was less likely to survive treatment in an intensive care unit, it would be lawful and ethical to take those factors into account, it said.<sup>2</sup>

1 Mahase E. Covid-19: Patients who are improving could have treatment withdrawn if others could benefit more. *BMJ* 2020;369:m1382. 10.1136/bmj.m1382 32241813

2 BMA. Statement/briefing about the use of age and/or disability in our guidance. <https://www.bma.org.uk/media/2283/bma-ethics-guidance-and-age-and-disability-statement-april-2020.pdf>

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