

Getting medical treatment for Covid 19 and other conditions

What are my rights?

The current lockdown continues. What are our rights to receive medical treatment during it? While the most immediate need is for treatment for Covid 19 there are other medical conditions which can also arise which need immediate treatment.

These are uncertain times. Thankfully we are not yet at the stage where decisions are being made as to who should and shouldn't be put on a ventilator. The NHS have made it clear that notwithstanding the pandemic other life-threatening conditions will still be treated. What is the position, however, if the need for treatment outstrips supply? To some degree that has always been the case with the NHS and its waiting lists. The legal position as to how this policy should be applied during a pandemic is untested as we have not been here before. We have set out below some guidelines on the points to be considered.

The right to medical treatment

While we have the right to refuse medical treatment, we don't have the right to receive it. The NHS has the obligation to provide services to such extent as it considered necessary to meet all reasonable needs. There is no obligation to provide treatment which is futile or not in a person's best interests. In saying that there is no such thing as a standard reasonable patient. What amounts to a reasonable quality of life is wholly subjective.

NICE guidance states "That the admission of individual adults to critical care should be based on the likelihood of their recovery, taking into account the likelihood that a person will recover from their critical care admission to an outcome that is acceptable to them".

Available resources and prioritisation

While the NHS have a duty to meet all of our reasonable requirements, That is subject to the rider; "such as can be provided within the **resources available**." Its established case law that in times of scarce resource the NHS can decide who gets treated and who doesn't

The decision making process

While we have no absolute right to medical treatment, its refusal must be on a reasoned and not an arbitrary basis. It should not be discriminatory on the grounds of age or disability and must have regard to our human rights. British Medical Association (BMA) guidance makes it clear that decisions must be made in an open and transparent manner and be the result of a reasonable process. Under the Human Rights Act there is a right to be heard on decisions which affect you.

Preservation of life or accelerated death?

Would it be right to take person A off a ventilator and give it to person B? These are difficult decisions with no easy answer. In a case concerning conjoined twins their separation would preserve the life of one but result in the death of the other. The intent here was to preserve life not

to cause death. Similar principles may well be applied in the current pandemic if that stage is reached.

The Equality Act 2010

This prohibits amongst other things discrimination, directly or indirectly against people on the grounds of their age or disability unless it is a proportionate means of achieving a legitimate aim. Disability is defined as:

“A physical or mental impairment that has a ‘substantial’ and ‘long term’ negative effect on your ability to do normal daily activities.”

The Equality Act Code of Practice makes it clear that services should be adapted so that disabled people can access them as fully as reasonably possible to the level enjoyed by the general public.

Any decision made solely on age is discriminatory under the Equality Act. BMA guidance states:

“It would be wrong to deny treatment to a healthy 75 year old. The identification of clinically relevant facts and the likelihood of benefitting from available resources is required. The presence of pre-existing medical conditions however, and the development of secondary conditions such as severe respiratory failure must be taken into account and may preclude treatment.

A test as to whether a patient would benefit quickly from a treatment would be indirect discrimination but it could be regarded as a proportionate means of achieving the legitimate aim of using limited resources to their best effect.

Where a decision is made to withdraw or withhold some forms of treatment then patients should still receive the best form of alternative care that is available.”

What you can do

Doctors must bear in mind a patient’s wishes and feelings about any treatment when making a decision about their care. What do you do when the patient can’t make those feelings known? Doctors and the NHS should listen to a patient’s family but they are not obliged to follow the wishes or beliefs of a patient’s family if they do not think that it would be the right thing to do. The only way to ensure that your family (or someone you trust) can make decisions about your care, and make sure that they are listened to, is to formally appoint them as your attorneys using a health and welfare power of attorney. This means that they can speak for you if you are not able to make your feelings known, for example if you are under sedation in a hospital.

Conclusion

While doctors recommend medical treatment, its ultimately a question of law as to what treatment an individual should receive. As we state above there is not currently any national applicable guidance and local health trust are likely to form their own criteria. These must however be open and transparent. Medical and other service providers are generally expected to follow codes of practice and when they depart from them must have a good reason for doing so.

Any blanket approach which is applied is going to be unlawful. However what criteria it is justifiable to apply is as yet undecided. Anyone suffering from any illness will see their health fluctuate during its progression. At what stage do you decide to give their ventilator to someone else? There are no right answers and some difficult decisions may need to be made. When they are however it’s important they are not done in an arbitrary manner with assumptions being made as to a person’s chances of survival based on their age, appearance, disability or other label. All parties affected must have the reasons for any treatment or its withholding explained to them and they must be given the opportunity to state their case.

Steps to take

1. It's important to plan ahead never more so than at the moment for both yourself and your loved ones.
2. The only person who can make decisions about the medical treatment you receive is you and the NHS. If you are not well enough to make those decisions then the only other parties who can intervene can be your attorney under a Health & Welfare power of attorney or the courts. A Health LPA is a quick and simple way to have your case properly argued and your rights protected. These take time to register and so should be created ASAP. We can help you appoint a health advocate while the LPA is being registered. Treat it like an insurance policy. You may never need it but will be very glad you have it if you do.
3. If you feel treatment is being refused then ask for an explanation. Try and get it in writing or if its verbal, try and record it (with permission) or make a written note as soon after as possible.
4. Put your concerns in writing to the hospital/GP listing the matters they have failed to properly consider and ask for a written reply within 7 seven days.
5. **If you receive no reply or if urgent action is required then contact us**

Contact Nigel George nggeorge@garner-hancock.co.uk or

Daniel Flynn dflynn@garner-hancock.co.uk

Call 020 8232 9560

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