

## MEDICINE AND THE LAW

# Age discrimination in critical care triage in South Africa: The law and the allocation of scarce health resources in the COVID-19 pandemic

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No one may be refused emergency medical treatment in South Africa (SA). Yet score-based categorical exclusions used in critical care triage guidelines disproportionately discriminate against older adults, the cognitively and physically impaired, and the disabled. Adults over the age of 60, who make up 9.1% of the SA population, are most likely to present with disabilities and comorbidities at triage. Score-based models, drawn from international precedents, deny these patients admission to an ICU when resources are constrained, such as during influenza and COVID-19 outbreaks. The Critical Care Society of Southern Africa and the South African Medical Association adopted the Clinical Frailty Scale, which progressively withholds admission to ICUs based on age, frailty and comorbidities in a manner that potentially contravenes constitutional and equality prohibitions against unfair discrimination. The legal implications for healthcare providers are extensive, ranging from personal liability to hate speech and crimes against humanity. COVID-19 guidelines and score-based triage protocols must be revised urgently to eliminate unlawful discrimination against legally protected categories of patients in SA, including the disabled and the elderly. That will ensure legal certainty for health practitioners, and secure the full protections of the law to which the health-vulnerable and those of advanced age are constitutionally entitled.

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In March 2020, the World Health Organization (WHO) declared COVID-19 a global pandemic.<sup>[1]</sup> Without a cure, critically ill patients were dying in hospital corridors and waiting rooms in northern Italy, sitting in their chairs, with too few critical care beds and ventilators to meet demand.<sup>[2]</sup> Arguments ensued in the Northern Hemisphere about who should be denied ventilators:<sup>[3]</sup> the cognitively or physically impaired,<sup>[4]</sup> the old,<sup>[5]</sup> or those presenting with an array of comorbidities.<sup>[6]</sup> Old age – the common denominator in all three – topped the list.<sup>[7]</sup>

## COVID-19 triage protocols

Intensive care units (ICUs) function at close to maximum capacity at the best of times, around 80% and 50% in the public and private sectors, respectively.<sup>[8]</sup> Predicting ICU mortality and 6-month survival odds to determine who would benefit most from admission to an ICU during triage, frontline physicians, nurses<sup>[9]</sup> and internists<sup>[10]</sup> beat objective score-based systems consistently.<sup>[11]</sup> Yet it is score-based protocols such as Sequential Organ Failure Assessment (SOFA) that are routinely used to justify the exclusion of entire categories of patients from ICUs.<sup>[12-14]</sup>

The Critical Care Society of Southern Africa (CCSSA), for example, compiled a score-based emergency triage consensus guideline in 2019<sup>[15]</sup> and a COVID-19 triage guideline in 2020.<sup>[16]</sup> Age is used as tie-breaker, so that the older the patient, the lower they rank in priority for ICU admission. The South African Medical Association (SAMA) adopted the CCSSA Clinical Frailty Scale (CFS) in its COVID-19 triage guidelines,<sup>[17]</sup> in which even the mildly frail (evident slowing, needing help with shopping) are excluded from admission to an ICU.

Disabilities and comorbidities naturally increase with age.<sup>[18]</sup> Pre-pandemic ventilator guidelines in other countries justified the

indirect, and ostensibly lawful, exclusion of older adults from admission to ICUs based on this fact.<sup>[13]</sup>

## Constitutional imperatives

In South African (SA) law,<sup>[19]</sup> both direct and indirect unfair discrimination<sup>[20]</sup> based on age, mental and physical disability, and HIV/AIDS status are prohibited (Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000,<sup>[21]</sup> section 1: ‘discrimination’, ‘prohibited grounds’, and sections 12 - 14). The inclusion of even a single unfair provision renders the guidelines actionable: discrimination is presumed unfair in terms of the SA Constitution, unless and until established as objectively fair by a court,<sup>[21]</sup> or reasonably and justifiably limited by a law of general application (Constitution,<sup>[19]</sup> sections 9 and 36). The CCSSA and SAMA triage guidelines discriminate on at least these four prohibited grounds.

A landmark SA case, *Soobramoney v Minister of Health, KwaZulu-Natal*,<sup>[22]</sup> held that the state may limit scarce chronic life-saving healthcare in futile cases, but not emergency care. Constitutionally, no one may be refused emergency medical treatment, which is binding on all<sup>[19]</sup> (sections 8 and 27(3)). Without express legal endorsement, there can be no justification for the CCSSA and SAMA triage guidelines to deny patients admission to an ICU on the prohibited grounds of belonging to a particular age group or matching a predetermined frailty score.<sup>[23]</sup>

## Where, why and how have SA triage guidelines erred?

Some 9.1% of the SA population, approximately 5.4 million people, are over the age of 60 years.<sup>[24]</sup> With an average life expectancy of another 17.5 years,<sup>[25]</sup> the potential for mass casualties in this age group as a result of prejudicial triage protocols is extensive.

Compared with one critical care reference two decades ago,<sup>[26]</sup> modern triage guidelines seem shockingly expedient.<sup>[15]</sup>

Within weeks of the COVID-19 pandemic hitting Europe and North America, a public outcry arose regarding prejudicial treatment of the elderly and the disabled.<sup>[27,28]</sup> Against the threat of legal action,<sup>[29]</sup> medical authorities<sup>[30,31]</sup> moved quickly to amend categorical exclusions to avoid the impression that some lives were 'not worth saving'.<sup>[14]</sup>

Where the CCSSA and SAMA guidelines erred was to adopt wholesale into SA medical practice foreign triage protocols incompatible with SA law. Responding to stinging criticism,<sup>[32]</sup> the CCSSA quoted UK<sup>[33]</sup> and Canadian precedent<sup>[34]</sup> to protest that their 'only absolute exclusion' for admission to an ICU was a 'high CFS'.<sup>[35]</sup> Imported British<sup>[36]</sup> and European COVID-19 guidelines<sup>[37]</sup> relied extensively on Chinese<sup>[38]</sup> and other studies listing advanced age as a 'risk factor' or 'prognostic indicator' for COVID-19 mortality, since shown likely to be highly biased.<sup>[39]</sup> An early Canadian collaboration to develop a triage protocol as far back as 2006 found that old age was not in fact a strong predictor of ICU mortality, yet the authors reported that they were compelled by experts and stakeholders to add age as an exclusion criterion.<sup>[12]</sup> Patients older than 85 were duly denied access to an ICU at triage. Switzerland<sup>[40]</sup> and the UK,<sup>[41]</sup> while not members of the European Union, incorporate the European Convention on Human Rights<sup>[42]</sup> into their domestic law.<sup>[43,44]</sup> Public health authorities invoked the European legal principle of proportionality<sup>[45]</sup> to justify their limitation of the scarce ICU resource to vulnerable groups.<sup>[46]</sup> The British Medical Association declared that, while direct discrimination based on age or disability would be unlawful, indirect discrimination, given its 'legitimate aim' to save the most lives during the pandemic, would be lawful.<sup>[36]</sup>

The adverse conclusion to be drawn from such approaches is that expensive and scarce ICU health resources should be reserved for the fittest and least vulnerable in society. Recommendations that triage committees or 'death panels' be appointed to distance individual clinicians from the emotional and moral 'trauma' of prohibitive choices<sup>[47]</sup> only serve to confirm the inherent inhumanity and deadly implications of so doing.

What the COVID-19 pandemic has revealed all too starkly is the hidden political and social prejudices that endure within modern health systems,<sup>[48]</sup> in which selective care is dispensed mainly for profit at the expense of the socially vulnerable.

It is for these reasons that, after all ethical arguments for and against the allocation of scarce critical care resources are exhausted, the minimum standard expected of any democratic society is compliance with its own law. The SA law is the Constitution, its domestic enabling legislation, and decided cases securing equality and dignity for all.<sup>[49]</sup> Those are the standards with which the CCSSA and SAMA triage guidelines must comply, unless or until legislation or the courts determine otherwise.

## Legislation

The Constitutional Court has held that SA public health providers are liable for undue delays in providing appropriate emergency care. It exhorts healthcare providers not to slavishly follow protocols that fall short of the standards of emergency care that the public is entitled to expect.<sup>[50]</sup>

The dissemination or publication of unfairly discriminatory material in the form of exclusionary triage guidelines, even in non-binding form,<sup>[21]</sup> flouts SA equality law: once discrimination exists (which the CCSSA admits it does), the burden of proof that the impugned guidelines are objectively fair, reasonable and

justified shifts to the CCSSA and SAMA. They must show that the COVID-19 triage guidelines they recommend are legally and contextually defensible.<sup>[21]</sup> Healthcare providers remain personally and professionally liable for their own conduct,<sup>[51]</sup> regardless of whether they have followed guidelines.<sup>[50]</sup>

The incitement or propagation of harm towards others by recommending the denial of emergency critical care and ICU admission on unfair grounds may further offend as hate speech,<sup>[52,53]</sup> criminal intimidation,<sup>[54]</sup> and civil or criminal injury.<sup>[52]</sup> All are as infectious and harmful to society as health epidemics,<sup>[55]</sup> and can be just as deadly.<sup>[56]</sup> Only in states of emergency may derogable guaranteed rights be suspended (Constitution,<sup>[19]</sup> section 37), and no state of emergency was declared for SA COVID-19 pandemic regulation.<sup>[57]</sup>

In May 2020, the United Nations announced that the COVID-19 pandemic was causing 'untold fear and suffering for older people across the world',<sup>[58]</sup> echoing domestic prohibitions against hate speech, criminal intimidation, and definitions of crimes against humanity specified in the Rome Statute.<sup>[59]</sup> State or organisational policy that intentionally causes 'great suffering', serious injury or criminal harm to civilian populations must be prosecuted by the signatory country according to the Rome Statute adopted into SA law.<sup>[60]</sup> Failing that, the International Criminal Court may intervene. The UK, where some 16 000 elderly have succumbed to COVID-19 in care homes,<sup>[61]</sup> is bound by the Rome Statute, as are Switzerland and more than 120 other countries.<sup>[62]</sup> The USA, where more than 75 000 have succumbed to COVID-19 in long-care nursing homes, is not.<sup>[63]</sup> Victims blame discriminatory critical care protocols for their loss. Judicial reviews will inevitably follow.<sup>[64,65]</sup>

Representative plaintiffs are afforded broader powers under the Constitution<sup>[19]</sup> (section 38) to enforce guaranteed rights than was previously possible at common law.<sup>[66]</sup> Unfair and discriminatory triage practices and protocols may be challenged in court if necessary.<sup>[67]</sup>

## Conclusions

Medical professionals are acutely aware that they bear the burden of professional negligence and unlawful conduct towards patients at the frontlines of the pandemic.<sup>[68]</sup> Their disquiet at the lack of clear guidance is well founded.<sup>[69,70]</sup> SA constitutional law sets a higher human rights benchmark than the jurisdictions from which the CCSSA and SAMA draw their triage guidelines. It is for medical authorities and practitioners to rise to the constitutional standard.

## Recommendations

- No patient in pandemic conditions should be unfairly discriminated against when the threat to life for everyone is indiscriminate.
- The COVID-19 scarce resource triage guidelines need to fully align with SA law to provide practitioners with certainty.
- Unfair healthcare discrimination targeting protected groups should be eliminated from ICU triage protocols.
- Less disadvantageous means to achieve the same ends should be applied.<sup>[21]</sup>
- Clinical criteria<sup>[71]</sup> and professional judgement ought to suffice to assess short- and near-term survivability in triage prioritisation.<sup>[32]</sup>
- Individual circumstances<sup>[14]</sup> should be determined at point of care.<sup>[72]</sup>
- No one may be refused emergency medical treatment, regardless of age or pre-existing conditions.<sup>[23]</sup>
- If clinical assessment scores are used (such as SOFA or LAPS2 (Laboratory-Based Acute Physiology Score)<sup>[14]</sup>), the lungs ought to be excluded in single-organ failure in influenza or COVID-19 triage conditions.<sup>[12]</sup>

South Africa has a proud history of human rights activism.<sup>[73]</sup> This is no time for complacency.<sup>[74]</sup>

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