

Corona and Triage: Doctors should not be burdened with legal questions

With limited resources, doctors have to decide who to treat. There is now both clinical and ethical advice to treat as many patients as possible. That's a good thing, says Eric Hilgendorf - even if it creates a queasy feeling among lawyers.

The corona virus pandemic is no longer just a huge medical challenge, but is increasingly raising legal and ethical problems. One of the most difficult is the prioritisation of seriously ill patients in situations where there are insufficient medical resources.

There are reports from Italy that very old patients in intensive care units are turned away from the outset in order to be able to treat younger people with better chances of recovery in the - too few - intensive care beds. Similar reports are now coming in from French hospitals.

It is obvious that such decisions are highly problematic both ethically and legally. For the people who have to make them, they constitute a huge emotional burden. Thus far there are no [bright lines in terms of legal obligations]. Seven German medical professional associations, including the German Interdisciplinary Association for Intensive and Emergency Medicine (DIVI), therefore adopted "clinical-ethical recommendations" on Wednesday, on the basis of which comparable cases in Germany are to be treated.

Lawyers: Because what is not allowed to be cannot be?

Triage (from french trier: to sort), a concept originating from military medicine, means the prioritisation of urgently needed medical aid without which the most serious injuries or even death can occur. This obviously raises the question of the criteria to be applied for prioritisation. In emergency medicine, too, there are corresponding catalogues of criteria that are usually incorporated into decision-making schemes that those responsible on site can apply directly. Such a decision scheme has also been attached to the new DIVI recommendations.

Triage decisions are particularly problematic when life stands against life, i.e. when the refusal of medical care means a certain death sentence for the untreated patient. In the current crisis, it is mainly such cases that are at stake.

In the legal literature it is often said that [rights to this or that] human life "could" not be weighed against each other. However, this statement is obviously wrong, because in many triage situations lives are actually weighed against each other. What is meant is that lives should or may not be weighed against each other. A similar formulation is also found in the recommendations by medical experts presented on Wednesday [25th March]: "For constitutional reasons, human life must not be weighed against human life".

If one takes this literally, it would mean that in the triage situation one should not look for reasons to structure one's decision rationally, i.e. one should not even enter into a process of reflection and consideration. Or is it meant that the saving of human life can never justify the sacrifice of other lives?

Such questions are familiar from the debates on the "trolley problem" and were last discussed in Germany in connection with automated driving. In triage situations such as the one we are now experiencing, the weakness of some positions becomes apparent: Do we really want to claim that doctors who connect an infected person to the only available vital respirator but are unable to connect another one, are acting illegally?

Not yet fully developed in legal terms: the justifiable conflict of duties

The idea of a justifiable conflict of obligations is known from criminal law and could also be applied here. Whoever of two equal duties to act, which he cannot both fulfil, acts justifiably. In the case of unequal duties requiring action, the higher-ranking one must be fulfilled. However, the justifying conflict of duties can only justify acts of omission, such as the sacrifice of a person by refusing treatment, but not active action, such as direct killing.

If obligations to act and obligations to refrain from acting collide with each other (for example, if a ventilator is to be removed from one patient in order to connect another), § 34 of the German Criminal Code (justifying state of emergency) is generally applicable. However, this provision does not help in cases of equal urgency, as Till Zimmermann already explained a few days ago at LTO. And what factors may play a role at all, and who decides on them? What does it look like when the device can be used to ventilate either a single patient continuously or two infected persons alternately? So far, the prevailing view has been that quantitative aspects (one life against 500) should not play a role in the weighing of life against life. One life, they say, "weighs" as much as five or 500 lives. So could the doctor let two infected people die to save another? These are questions that have not yet been sufficiently addressed in jurisprudence.

We lawyers would do well not to settle our disputes at the expense of the medical profession. A pragmatic solution is to accept, first of all, any medical decision that still appears justifiable, and only to classify decisions that are obviously no longer justifiable as illegal. It makes no sense to burden doctors in such extreme situations with legal problems. It is the task of jurisprudence to solve them.