Healthcare rationing could see 'unlawful deaths' from COVID-19, researchers claim

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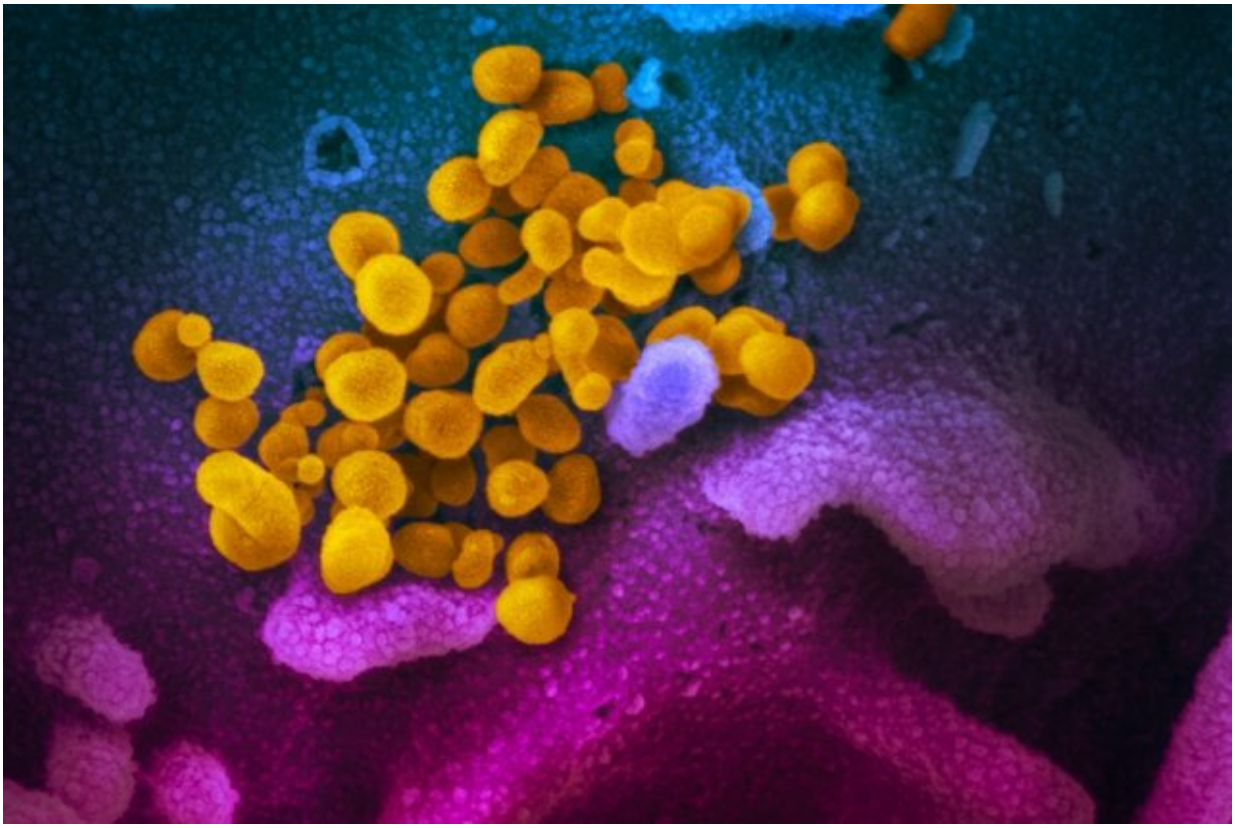

This scanning electron microscope image shows SARS-CoV-2 (yellow)—also known as 2019-nCoV, the virus that causes COVID-19—isolated from a patient, emerging from the surface of cells (blue/pink) cultured in the lab. Credit: NIAID-RML

While the initial coronavirus peak is starting to pass—in Europe, at

least—without the ventilator shortages many feared, the spectre of a second wave or future outbreak means questions of medical rationing still hold sway.

New research suggests that current ICU protocols and ethical guidelines lack detail, and leave doctors exposed to legal liability if another contagion surge forces them to make painful snap decisions due to insufficient resources.

While the latest analysis focuses on ventilators, University of Cambridge researchers say that many of their arguments apply to other potential medical shortages e.g. a lack of properly staffed ICU beds, dialysis machines or related supplies or equipment.

If shortages lead to denial of treatment based on disability—including 'chronic illness' - or age, or treatment withdrawal during sedation, it could violate patient rights and cause unlawful death, argue the Cambridge lawyers.

They say that legal liability could extend to the UK Government if it is required to defend failures to purchase more medical supplies or publish ICU rationing guidance, despite knowledge of risks to life posed by the pandemic.

The study, published in the *Journal of Medical Ethics*, is based on UK law, but researchers say it is relevant to other European nations.

"We're definitely not out of the woods," said Dr. Kathy Liddell, Director of the Cambridge Centre for Law, Medicine and Life Sciences. "With lockdown easing, we might well see a second Covid-19 spike in intensive care units, and health services should be prepared legally as well as medically."

"The law requires more of hospitals, doctors and clinical commissioning groups than is currently set out in the guidelines provided by the British Medical Association, the Intensive Care Society and medical ethicists."

"The legal rights of patients matter, and they are not being given the attention they deserve," she said.

Around 2.5% of Covid-19 patients require mechanical ventilation to live while they fight the virus, and a patient can need assisted breathing for up to three weeks.

Early concerns that the virus would see patient demand overwhelm ventilator supply prompted researchers to investigate the legal limits of ventilator allocation.

They found "little concrete guidance" centrally in the UK, and argue that a shortage could see "postcode lotteries" of patient rights to life saving treatment—as decisions are taken at a local level by hospitals and doctors.

"The guidelines we reviewed differed in many ways," said co-author Dr. Jeff Skopek, from Cambridge's Faculty of Law. "But they generally had the same goal: save as many lives as possible. While this is of course a worthy goal, it can lead to the violation of patients' rights—rights are not suspended merely because we are in a crisis."

The researchers argue that a ventilator cannot be denied on the grounds that a patient has a disability. "Denying treatment because of a disability, which includes chronic illness, violates the Equalities Act 2010. Denying treatment based on age may also do so," said Liddell.

"In fact, the Equalities Act requires efforts be taken not to disadvantage disabled people. This may mean giving people with disabilities longer

assessment periods on ventilation, or actually not de-prioritising them," she said.

The analysis points out that if an initial trial of treatment is proposed, it must not be too short. No one should be taken off a ventilator for reallocation purposes until the trial has been long enough to generate reliable evidence for predicting the patient's outcome.

Any decision to withhold or remove ventilation must involve consultation with the patient or their family. Moreover, withdrawing a ventilator without bringing the patient out of sedation risks unlawful killing.

"Even though returning to consciousness would be deeply distressing, all patients must be given a chance to breathe independently if they have a meaningful chance of surviving until another ventilator is available," said Liddell.

If some of these scenarios occur during another virus spike, the researchers say doctors could be directly liable under criminal law for charges such as gross negligence manslaughter, criminal battery or willful neglect.

Even the UK Government could be held responsible. As Skopek highlights, the decision taken by government in April 2020 not to provide a national policy on handling ICU shortages—despite recommendations from its Moral and Ethical Advisory group—could result in a violation of its obligations under Article 8 of the European Convention on Human Rights.

"Without a national policy, the task of drawing up ICU rationing guidelines was left to individual CCGs and hospitals, and many lacked support to ensure their guidelines were legal and ethically sound," he

said.

Added Skopek: "If we end up with another surge in patients that overwhelms our critical care infrastructure, hospitals and doctors may end up acting unlawfully—and worse, patients may end up dying unlawfully."

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