The Coronavirus and Older People: Legal and Ethical Concerns

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Introduction

• Legal and Ethical Public Health Authority
  – Federal level
    • Interstate commerce power
    • Taxing and spending power
  – State and local level
    • Police power
    • Parens patriae power
• **Limits** on govt. public health authority
  – Federal constitutional rights
  – State constitutional rights
  – Federal and state statutes and regulations
  – Common law doctrines

Selected Issues

• End of life planning and care in a pandemic
• Crisis standards of care/Allocating scarce resources
• LTC duties to isolated/quarantined residents
• Legal immunity legislation for HC/LTC providers
End of Life Planning and Care in a Pandemic

- Attention focused on mortality among older persons
  - Institutional reputational and legal/regulatory anxieties
  - Cultural (death=failure) biases
- Are all deaths bad? Are some deaths implementation of, or at least consistent with, patient/resident autonomy?

- How to protect individual autonomy in a PH crisis?
  - Providers likely are strangers
  - No planning documents or inaccessible
  - Sufficient specificity of prior statements/Need for particularity?
  - Availability of surrogates/advocates
• How to provide a humane dying experience for patient/resident and family while managing institutional risks (legal and health)?


Crisis Standards of Care/Allocating Scarce Resources

- Prime goal: Avoiding scarcity
- Allocating resources, Triage ≠ Rationing
- Avoiding discrimination based on irrelevant factors, while taking [clinically] relevant factors into account

- Potential criteria:
  - First come, first served
  - Lottery
  - Financial capacity
  - Most in need
– Social worth (Utilitarian)
– Most likely benefit
  • Survival (e.g., Sequential Organ Failure Assessment [SOFA] score to predict mortality
  • Life-years saved
  • Quality-adjusted life-years (QALYs)

• “ETHICS GUIDELINES FOR CRISIS STANDARDS OF CARE IN PUBLIC HEALTH EMERGENCIES” published by Florida Bioethics Network (May 1, 2020), endorsed by Florida Hospital Association Board of Trustees


• J.P. Leider et al., Ethical Guidance for Disaster Response, Specifically Around Crisis Standards of Care: A Systematic Review, AMERICAN JOURNAL OF PUBLIC HEALTH 107(9):e1-e9 (2017)
LTC Duties to Isolated/Quarantined Residents

- Primary concerns
  - Avoiding resident deaths
  - Avoiding other resident infections
  - Avoiding staff and visitor infections
- Deleterious physical and mental health ramifications of prolonged isolation
- How to reconcile competing interests?
- What weight to give family interests?
  - Assumption of risk?

Assigning Authority:
- CDC Guidelines
- CMS Rules
- State emergency rules
  - [https://www.floridadisaster.org/globalassets/covid19/de m-order-20-009-signed.pdf](https://www.floridadisaster.org/globalassets/covid19/de m-order-20-009-signed.pdf) (Sept. 1, 2020)
- Facility discretion


• Toby Jackson, *My Benevolent Incarceration in a New Jersey Senior Home*, WALL STREET JOURNAL (June 5, 2020).


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### Liability Shield Legislation for HC/LTC Providers

- Balancing competing considerations
  - Traditional goals of tort liability
    - Compensate injured victims
    - Deter undesirable behavior
  - Competing goals
    - Consumer need for **access** to services
    - Avoiding danger of **overdeterrence/ negative defensive practice**
• Is legislation good policy?
  – Details of legislation?
    • Total immunity?
    • Time-limited?
    • Compliance with applicable regulations sufficient?
• Federal +/- or State action?
  – Federalism/Decentralization
  – Traditionally, tort liability is a state matter

• A.W. Mathews 7 J. Gershman, Hospitals, Nursing Homes Seek More Liability Shields, WALL STREET JOURNAL (May 23, 2020).
• S. 4317—Safe to Work Act
  – Subtitle B: Health care Providers
  – Limits claims for 5 years to *willful* misconduct or *gross* negligence
  – Clear and convincing evidence requirement
  – Limits punitive damages
  – All claims must be filed in *federal* court