J Korean Med Sci. 2022 Feb 7;37(5):e43
https://doi.org/10.3346/jkms.2022.37.e43
eISSN 1598-6357·pISSN 1011-8934

JKMS

Opinion
Medicine General & Policy

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Prioritizing ICU Care and Legal Liability During the COVID-19 Crisis in Korea

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OPEN ACCESS

Received: Dec 20, 2021
Accepted: Dec 30, 2021
Published online: Jan 27, 2022

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Disclosure
The author has no potential conflicts of interest to disclose.

On November 1, 2021, Korea started the mitigation strategy for coronavirus disease 2019 (COVID-19). Since then, the number of confirmed cases of COVID-19 in Korea has risen rapidly. The number of daily confirmed cases rose from 1,589 on November 1 to 7,850 on December 15, a record high. The number of critically ill patients also increased from 347 on November 1 to 989 on December 15. The intensive care unit (ICU) utilization rate exceeded the critical level of 75% on November 11 and recorded 81.6% on December 15, raising serious concerns.[1]

The Korean Society of Critical Care Medicine proposed to establish priority criteria for ICU admission and discharge.[2] It was a proposal to save more lives by using ICUs more efficiently. However, in a country that experienced an explosion of critically ill patients before Korea, an issue was raised that medical staff could be held legally responsible in the process of applying the priority criteria.[3] Therefore, there was a recommendation that the local legal aspects should be considered when establishing the priority criteria for ICU admission and discharge.[4]

The efforts of medical staff to save many lives during the COVID-19 crisis should be respected. And medical staff should receive reasonable legal protection. From this perspective, legal aspects that should be considered when establishing the priority criteria for ICU admission and discharge are presented below.

Criminal Liability

When applying the priority criteria for ICU admission and discharge, the criminal liability at issue is death and injury by occupational negligence (Article 268 of the Criminal Act) and murder (Article 250 of the Criminal Act).

First of all, concerning the admission of COVID-19 patients to the ICU, it is unlikely that the medical staff will be charged with death and injury by occupational negligence. This is because it is not easy for the prosecutor to prove beyond a reasonable doubt that the patient expired due to the negligence of the medical staff if treatment was continued in the semi-intensive care unit (semi-ICU) or general ward. Also, if discharge from the ICU was unavoidable to treat other critically ill patients and the discharged patient received continuous medical care in the semi-ICU or general ward, the medical staff's actions can be justified.

However, if the patient expired because medical staff removed the ventilator, the crime of murder may become a liability. In the Boramae Hospital case, where the patient expired after discharge from the hospital at the family's request when the ventilator was removed, the Supreme Court convicted the doctors involved as aiding and abetting murder.[5]

Civil Liability

Civil liability in relation to the priority criteria for ICU admission and discharge is tort liability (Article 750 of the Civil Act). There is little possibility that medical staff will be held liable for illegal acts concerning the admission of COVID-19 patients to the ICU. If the medical staff continued to treat the patient in the semi-ICU or general ward, it is not easy to prove that the patient expired due to the medical staff's negligence. Even if the patient expired after discharge from the ICU, if the medical staff continued to treat the patient in the semi-ICU or general ward, it is not easy to prove that the patient expired due to the medical staff's negligence.

However, if the patient expired immediately after the medical staff removed the ventilator, it is difficult for the medical staff to escape civil liability, even if it was to treat other patients.

Emergency Medical Service Act

The Emergency Medical Service Act stipulates that emergency medical care should be provided first to the more urgent patient when there are two or more emergency patients.[6] It does not consider criteria regarding therapeutic efficacy. This appears to be inconsistent with the priority criteria for ICU admission and discharge proposed by the Korean Society of Critical Care Medicine

In the Boramae Hospital case, the lower court applied the Emergency Medical Service Act. However, there was criticism that it was not reasonable to impose legal liability on the medical staff of the ICU based on the Emergency Medical Service Act because this act is a law that is applied to emergency situations. The final verdict of the Supreme Court did not apply the Emergency Medical Service Act.

Therefore, when a COVID-19 patient receives treatment for the first time in the emergency room, the Emergency Medical Service Act applies. However, once the emergency room treatment is finished, the patient is no longer subject to the Emergency Medical Service Act.

Life-Sustaining Treatment Decision Act

The Life-Sustaining Treatment Decision Act distinguishes between a patient at the end of life and a terminal patient. The term 'patient at the end of life' means a person who is at a state of imminent death. The term 'terminal patient' means a patient who has been diagnosed as expected to die within a few months. According to this act, life-sustaining treatment for patients at the end of life can be stopped, but life-sustaining treatment for terminally ill patients cannot.[7]

Termination of life-sustaining treatment must be in accordance with the life-sustaining treatment plan. If the patient's intention is unknown because he or she has not prepared a

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life-sustaining treatment plan, the decision to terminate life-sustaining treatment can be made by the consent of the entire patient's family. However, the Life-Sustaining Treatment Decision Act does not address the issue of ICU admission and discharge.

If a COVID-19 patient is a patient at the end of life, it is necessary to follow the life-sustaining treatment plan or the consent of the entire patient's family. If removal of a ventilator for a terminally ill COVID-19 patient at the request of a patient's family is against the Life-Sustaining Treatment Decision Act and the patient subsequently dies, the medical staff may be held criminally responsible.

Establishing Guidelines and the Legal Considerations

The purpose of medical staff to efficiently use the ICU are based on good intentions and public interest. Therefore, it is quite persuasive to introduce immunity provisions to legally protect medical staff. The law of the state of Maryland in the United States provides that a health care provider is immune from civil or criminal liability if the health care provider acts in good faith and under a catastrophic health emergency proclamation.[8]

The efforts of medical staff to save more lives during the COVID-19 crisis should be respected. In Korea, the Ministry of Health and Welfare urgently needs to establish 'ICU Care Priority Guidelines.' In this case, the legal considerations are as follows.

First, it should clarify that the Emergency Medical Service Act does not apply to the priority guidelines for ICU admission and discharge.

Second, although it should clarify that the termination of life-sustaining treatment for a COVID-19 patient at the end of life must be in accordance with the Life-Sustaining Treatment Decision Act, it should specify that the Life-Sustaining Treatment Decision Act does not apply to the priority guidelines for ICU admission and discharge.

Third, it should specify more stringent requirements for ICU discharge than for ICU admission.

Fourth, it should clarify that treatment should be continued in the semi-ICU or general ward for those who are restricted from ICU admission.

Fifth, it should specify transparent priority guidelines. Transparency in the operation of the priority guidelines is very important in gaining the trust of the patient, his/her family, and society.

Sixth, it should clarify how medical staff must clearly document relevant decisions.

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