Keith Syrett argues for a reappraisal of the role played by public law adjudication in questions of healthcare rationing. As governments worldwide turn to strategies of explicit rationing to manage the mismatch between demand for and supply of health services and treatments, disappointed patients and the public have sought to contest the moral authority of bodies making rationing decisions. This has led to the growing involvement of law in this field of public policy. The author argues that, rather than bemoaning this development, those working within the health policy community should recognise the points of confluence between the principles and purposes of public law and the proposals which have been made to address rationing’s ‘legitimacy problem’. Drawing upon jurisprudence from England, Canada and South Africa, the book evaluates the capacity of courts to establish the conditions for a process of public deliberation from which legitimacy for healthcare rationing may be derived.

DR KEITH SYRETT is a Solicitor and Senior Lecturer in Law at the University of Bristol.
This series of books was founded by Cambridge University Press with Alexander McCall Smith as its first editor in 2003. It focuses on the law’s complex and troubled relationship with medicine across both the developed and the developing world. In the past twenty years, we have seen in many countries increasing resort to the courts by dissatisfied patients and a growing use of the courts to attempt to resolve intractable ethical dilemmas. At the same time, legislatures across the world have struggled to address the questions posed by both the successes and the failures of modern medicine, while international organisations such as the WHO and UNESCO now regularly address issues of medical law.

It follows that we would expect ethical and policy questions to be integral to the analysis of the legal issues discussed in this series. The series responds to the high profile of medical law in universities, in legal and medical practice, as well as in public and political affairs. We seek to reflect the evidence that many major health-related policy debates in the UK, Europe and the international community over the past two decades have involved a strong medical law dimension. Organ retention, embryonic stem cell research, physician-assisted suicide and the allocation of resources to fund health care are but a few examples among many. The emphasis of this series is thus on matters of public concern and/or practical significance. We look for books that could make a difference to the development of medical law and enhance the role of medico-legal debate in policy circles. That is not to say that we lack interest in the important theoretical dimensions of the subject, but we aim to ensure that theoretical debate is grounded in the realities of how the law does and should interact with medicine and health care.

General Editors
Professor Margaret Brazier, University of Manchester
Professor Graeme Laurie, University of Edinburgh

Editorial Advisory Board
Professor Richard Ashcroft, Queen Mary, University of London
Professor Martin Bobrow, University of Cambridge
Dr Alexander Morgan Capron, Director, Ethics and Health, World Health Organization, Geneva
Professor Jim Childress, University of Virginia
Professor Ruth Chadwick, Cardiff Law School
Dame Ruth Deech, University of Oxford
Professor John Keown, Georgetown University, Washington, D.C.
Dr. Kathy Liddell, University of Cambridge
Professor Alexander McCall Smith, University of Edinburgh
Professor Dr. Mónica Navarro-Michel, University of Barcelona
Marcus Radetzki, Marian Radetzki, Niklas Juth  
*Genes and Insurance: Ethical, Legal and Economic Issues*  
978 0 521 83090 4

Ruth Macklin  
*Double Standards in Medical Research in Developing Countries*  
978 0 521 83388 2 hardback  978 0 521 54170 1 paperback

Donna Dickenson  
*Property in the Body: Feminist Perspectives*  
978 0 521 86792 4

Matti Häyry, Ruth Chadwick, Vilhjálmur Árnason, Gardar Árnason  
*The Ethics and Governance of Human Genetic Databases: European Perspectives*  
978 0 521 85662 1

Ken Mason  
*The Troubled Pregnancy, Legal Wrongs and Rights in Reproduction*  
978 0 521 85075 9

Daniel Sperling  
*Posthumous Interests: Legal and Ethical Perspectives*  
978 0 521 87784 8
Law, Legitimacy and the Rationing of Healthcare

A Contextual and Comparative Perspective

Keith Syrett
To the memory of my father and of my mother
# Contents

<table>
<thead>
<tr>
<th>Table of Cases</th>
<th>page x</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acknowledgements</td>
<td>xiii</td>
</tr>
</tbody>
</table>

1 Introduction  1
2 Why ‘Ration’ Healthcare Resources?  15
3 How Rationing Takes Place  45
4 Rationing and the Problem of Legitimacy  75
5 Rationing and the Courts: Theoretical Perspectives  120
6 Rationing in the Courts: England  159
7 Rationing in the Courts: Canada  179
8 Rationing in the Courts: South Africa  207
9 Conclusion  230

Index  246
# Table of Cases

1. **Canada**

   
   
   
   
   
   
   
   
   *Newfoundland & Labrador v. Sparkes* 2004 NLSCTD 16 184
   
   *Prince Edward Island (Minister of Health and Social Services) v. Morgentaler* (1996) 139 DLR (4th) 603 180
   
   *Reference re Manitoba Language Rights* [1985] 1 SCR 721 201
   
   *R v. Mills* [1999] 3 SCR 668 200
   
   *R v. Oakes* [1986] 1 SCR 103 190
   
   
   
   *Stein v. Québec (Tribunal administratif)* [1999] RJQ 2416 181

© Cambridge University Press www.cambridge.org
Table of Cases

Titreault-Gadoury v. Canada (Employment and Immigration Commission) [1991] 2 SCR 22 188

2. England

Attorney General of Hong Kong v. Ng Yuen Shiu [1983] 2 AC 629 144
Council of Civil Service Unions v. Minister for the Civil Service [1985] 1 AC 374 129, 166
International Transport Roth GmbH v. Secretary of State for the Home Department [2003] QB 728 133
McInnes v. Onslow-Fane [1978] 1 WLR 1520 166
Padfield v. Minister of Agriculture, Fisheries and Food [1968] AC 997 167
R (on the application of Daly) v. Secretary of State for the Home Department [2001] 2 AC 532 167
R (on the application of Pfizer Ltd) v. Secretary of State for Health [2003] 1 CMLR 19 132, 175–6, 177–8, 180, 188, 232
R (on the application of Rogers) v. Swindon NHS Primary Care Trust and Secretary of State for Health [2006] EWHC 171 (Admin.); [2006] 1 WLR 2649 (CA) 6, 46, 54, 55, 121, 162, 163, 176–7
R (on the application of Watts) v. Bedford Primary Care Trust [2006] QB 667 162
R v. Central Birmingham Health Authority, ex parte Collier (unreported) 133, 164–8, 169, 174, 177, 180, 232
R v. Central Birmingham Health Authority, ex parte Walker (1987) 3 BMLR 32 133, 164
R v. Higher Education Funding Council, ex parte Institute of Dental Surgery [1994] 1 WLR 241 143
### Table of Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Year/Citation</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>R v. North and East Devon Health Authority, ex parte Coughlan</td>
<td>[2001] QB 213</td>
<td>163</td>
</tr>
<tr>
<td>R v. Secretary of State for the Home Department, ex parte Brind</td>
<td>[1991] 1 AC 696</td>
<td>167</td>
</tr>
<tr>
<td>R v. Secretary of State for Social Services, West Midlands Regional Health Authority and Birmingham Area Health Authority (Teaching), ex parte Hincks</td>
<td>(1980) 1 BMLR 93</td>
<td>132, 164</td>
</tr>
<tr>
<td>Stefan v. General Medical Council</td>
<td>[2000] HRLR 1</td>
<td>166</td>
</tr>
</tbody>
</table>

#### 3. European Court of Human Rights

<table>
<thead>
<tr>
<th>Case</th>
<th>Year/Citation</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nitecki v. Poland, Application No. 65653/01</td>
<td>(21 March 2002)</td>
<td>163</td>
</tr>
</tbody>
</table>

#### 4. South Africa

<table>
<thead>
<tr>
<th>Case</th>
<th>Year/Citation</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>B v. Minister of Correctional Services</td>
<td>[1997] 6 BCLR 789</td>
<td>214</td>
</tr>
<tr>
<td>Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa</td>
<td>1996 (4) SA 744</td>
<td>209</td>
</tr>
<tr>
<td>Treatment Action Campaign v. MEC for Health, Mpumalanga and Minister of Health</td>
<td>TPD 35272/02</td>
<td>226</td>
</tr>
<tr>
<td>Treatment Action Campaign v. Minister of Health</td>
<td>2001 SACLR Lexis 123</td>
<td>225</td>
</tr>
</tbody>
</table>

© Cambridge University Press
I would like to thank those with whom I have worked both at the University of Bristol and at the University of East Anglia for their friendship, encouragement and advice in the years leading up to the publication of this book. Particular thanks are due to Caroline Ball, Dave Cowan, James Davey, Bronwen Morgan, Jill Morgan, Tony Prosser, Oliver Quick, Mike Radford, Claudina Richards and Mark Stallworthy.

My understanding of the Canadian perspective was enormously enhanced by a research trip to the country in 2005, funded by Foreign Affairs Canada. I would especially like to thank Colleen Flood and Rebecca Cook of the University of Toronto, and Martha Jackman of the University of Ottawa, both for their helpful advice and for their generous hospitality towards me.

I have also benefited immensely from discussions with Charles Ngwena of the University of the Free State and Marius Pieterse of the University of the Witwatersrand in South Africa.

Last, but certainly not least, I thank Paula for her help, support and love. I could not have written this book without her.

The law is stated as of 1 January 2007.