

# Rationing NHS Services in a pandemic

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## The background

- NHS rations services all the time and has since the commencement of the NHS
- Rationing of healthcare is true for all healthcare systems throughout the world
  - Private Insurance based systems
  - Public Insurance Systems
  - Self-rationing by self-payment
- Not just financial demands but rationing of ICU beds, equipment (ventilators, dialysis machines) and organs

## Is rationing lawful?

- Yes – both lawful and inevitable. Secretary of State has a duty under s 1 NHA Act 2006 to promote a comprehensive health service, not to provide one: *R (Coughlan) v Devon HA* [2001] QB 213.
- Not a breach of ECHR: *Re v Cambridge HA ex parte B* [1995] and *Condliff v Staffordshire PCT* [2012] PTSR 460
  - ECHR rights not even engaged
- Doctors have duties to the individual patient but also duties to patients generally – so as much duty to the next person to occupy an ICU bed as the present occupant

## Rationing not based on money

- Rationing of organs was lawful:
  - Preference for organs for UK residents is lawful : *R (BA) v The Secretary of State for Health and Social Care* [2018] EWCA Civ 2696
- Rationing of hospital bed occupancy is lawful:
  - See *University College London Hospitals NHS Foundation Trust v MB (Rev 1)* [2020] EWHC 882 (QB)
- Limited NHS resources should be best “*allocated to the maximum advantage of the maximum number of patients*” (as per Lord Bingham in the *Cambridge Health Authority* case).

## Sources of Guidance for decision makers

- No Department of Health Guidance
  - Draft guidance was prepared but not published
  - JR proceeding at the moment about the legality of not producing guidance
- BMA Ethics Committee have produced guidance.
  - Generally welcomed as practical, sensible and informed
  - Criticised by a solicitor as being a “*brutally utilitarian ethical approach seems to cut across fundamental values of English medical law*”
  - But that approach seeks to give priority to the treated patient over the untreated patient

## Critical issue?

- Can medics withdraw ICU treatment from a stable but not improving patient, who may die without ICU support, in order to give other patients a better chance of recovery
- Can the NHS lawfully impose time limits on limited ICU facilities
- Answer is “Yes” under clear policies and arguably it would be unfair to waiting patients not to do so
- This is a variation on the conjoined twins problem.