

R (Leslie Burke) v General Medical Council [2004] EWHC 1879 (Admin)

General Medical Council appeal granted.

Current Guidance on “Withholding and Withdrawing Life-Prolonging Treatment: Good Practice in Decision Making” Lawful.

Court of Appeal criticises both the scope of the declarations sought by Mr Burke’s advisors and the parameters of Munby J’s analysis.

The Court of Appeal has this morning granted the General Medical Council’s (“GMC”) appeal in this case. [For key practice points, turn to Page 5.](#)

In approaching the appeal, the Court decided in its (single) judgment, that the decision of Munby J, while canvassing many important ethical and legal principles of general concern to medical practitioners and their advisors, failed to deal correctly with the one narrow issue raised by the facts of the case.

Mr Burke, on the Court of Appeal’s analysis, simply wanted reassurance that the GMC’s guidance “*Withholding and Withdrawing Treatment*” did not allow or authorise doctors to withdraw life-prolonging artificial nutrition and hydration (“ANH”) from him, as a competent patient, in contradiction to his expressed wish to receive it. The Court of Appeal held that if he were concerned about any other issue, including whether ANH could be withdrawn once he were incompetent and in the final stages of his life, his application for judicial review was premature.

Having determined these parameters, the Court of Appeal concluded that Mr Burke’s fears were already addressed by the common law and there was nothing unlawful in the GMC guidance (para 23). Any declaratory relief was unnecessary and inappropriate and each of the declarations made below were overturned.

The Court, reversing Munby J’s decision, give a firm indication that no part of Munby J’s wide-ranging analysis should be relied upon to support any future applications (para 24).

Their key conclusions are as follows:

- The current GMC guidance on “*Withholding and Withdrawing Life-Prolonging Treatment*” is lawful, at least in so far as it is concerned with the withdrawal of life-prolonging ANH from competent patients who express a wish to continue to receive ANH (paras 41 – 48, 64 – 66).
- If a doctor withdraws ANH, which is required to prolong a competent patient’s life, against that patient’s wishes and with the intention of hastening his death, he would find no defence in the common law to a charge of murder (para 34).
- In such circumstances, it is not the patient’s wish to receive the treatment that is determinative, but the doctor’s duty to care. That duty involves the duty to provide such treatment as is in the patient’s best interests (para 49) and generally to take such steps as are reasonable to keep the patient alive (para 32).
- While the patient’s right to autonomy gives rise to an absolute right to refuse treatment, there is no comparable right to treatment on demand, whether ANH or some other treatment. (paras 30 – 31). What is in a patient’s best interests should not be automatically equated with the wishes of the patient (para 49).
- The decision as to what treatment is clinically indicated, and so should be offered to the patient, remains with the doctor. The decision whether to accept any treatment offered, or which treatment if several are offered, remains with the patient (paras 50 – 51).
- If ANH is required to sustain life, it is impossible to suggest that ANH is not a clinically indicated treatment (para 53). Where ANH cannot prolong life, but may cause suffering or hasten death, the patient cannot by requesting such treatment oblige the doctor to provide treatment that is not clinically indicated (paras 54 – 55).

- There is no legal obligation to refer any decision to withdraw ANH to the Court. Where a decision is controversial, it may be a matter of good practice for an application for a declaration to be made. In requiring the clinician in such circumstances to seek legal advice, the current GMC guidance is adequate and thus lawful (paras 74, 80).

The Court of Appeal also made the following obiter comments on Munby J's treatment of clinical decision-making in respect of incompetent patients:

- Where a patient is incompetent, a doctor's decision as to what is in that patient's best interests will be determinative of the treatment that patient should receive.
- A decision as to whether it is in an incompetent patient's best interests to withdraw ANH is not limited to those circumstances where a patient's continued life with the treatment can be considered "intolerable". It is not possible to define what is in the best interests of any patient by reference to a single test, applicable in all circumstances. "Intolerability" does not replace "best interests" as the appropriate test, nor should it be considered the "touchstone" of best interests in every case (paras 62 – 63).
- A distinction should be drawn between those cases where a patient's life can be prolonged indefinitely by treatment, but only at a cost of great suffering, and those cases where the incompetent patient is in the final stages of life and although treatment could prolong the dying process, this would be at the cost of comfort and dignity (para 58).
- In both cases, the doctor must consider all the circumstances of the case and take an objective decision. In the former, doctors should follow the guidance in *Re J*. In the latter, doctors should be consider that the goal of treatment "may properly be to ease the suffering and, where appropriate, to 'ease the passing' rather than to achieve a short prolongation of life" (para 62).

While the current GMC guidance is lawful, the Court stressed that it should be considered against the requirements of the common law and that it should always be implemented in a manner that allowed people with disabilities to be confident that “they will be treated properly and in accordance with good practice, and that they will not be ignored or patronised because of their disability” (para 83). In the circumstances, clinicians may be best advised to read the guidance together with the judgment of the Court of Appeal.

28 July 2005

Eleanor Sharpston QC and Angela Patrick of Hailsham Chambers appeared on behalf of the Catholic Bishops Conference of England and Wales, which intervened in the appeal.

Prepared by Angela Patrick on behalf of Hailsham Chambers Medical & Clinical Law, Professional Disciplinary & Employment and European and Human Rights Groups.

Practice Points:

- **Advising medical professionals, hospitals and NHS trusts:**
 - **The current GMC guidance is lawful, but should be read together with the Court of Appeal's judgment.**
 - **The decision as to what treatment is clinically appropriate and in the best interests of any patient is for the treating doctor.**
 - **While the competent patient has an absolute right to refuse treatment, there is no individual right to demand treatment that is not clinically indicated;**
 - **Where a competent patient requires ANH to prolong his life, and asks that that treatment be provided, that treatment should generally be provided.**
 - **If ANH will not prolong life, but will cause suffering, a doctor cannot be forced to provide treatment that is not clinically indicated, but that doctor should take into consideration any distress a patient will suffer if the treatment is withdrawn.**
 - **Lawful withdrawal of treatment from incompetent patients is not limited to those circumstances where their continued life would be considered "intolerable".**
 - **If dealing with an incompetent patient, the decision as to what treatment is in the "best interests of the patient", including withdrawal of treatment or provision of ANH, is an objective one. It remains with the treating doctor, whose decision should take into account all the circumstances of the case and the guidance in *Re J*.**
 - **If dealing with a patient who is in the process of dying, that is, in the last days of their life, in considering the patient's "best interests", doctors should have regard to all the circumstances, including whether the goal of treatment may properly be to ease suffering rather than prolong life.**
 - **There is no legal obligation to refer any decision on withdrawal of ANH or life-prolonging treatment to the Court.**
 - **As a matter of good practice, where a decision is disputed or controversial, doctors should follow the GMC guidance and seek legal advice. It may be advisable to seek a declaration where it is uncertain that proposed treatment is lawful.**

- **In applications for judicial review, advisors should be very careful to identify the remedy sought clearly and by reference to their client's complaint. The Court will not be slow to determine an application premature.**