GMC challenges court ruling on end of life decisions

Clare Dyer *legal correspondent, BMJ*

The General Medical Council went to the Court of Appeal in London this week to try to overturn a landmark high court ruling. The ruling had declared that parts of the council's guidance to doctors on withholding and withdrawing life prolonging treatment were unlawful.

Last July, Leslie Burke, who is 45 years old and has cerebral ataxia, won the ruling, which was hailed as a breakthrough for the rights of vulnerable patients (*BMJ* 2004;329:309). Mr Burke, who is in a wheelchair, went to court because he feared that when he loses the power to swallow and to communicate, doctors might decide not to provide artificial nutrition and hydration, leaving him to die of thirst and starvation.

Mr Justice Munby, who delivered the high court judgment, ruled that the GMC's guidance placed too much emphasis on the right of a patient to refuse treatment and not enough on the patient's right to require treatment. He said it should be for patients not doctors to

decide what was in their best interests and that there should be a presumption in favour of prolonging life.

If patients were unable to make their own decisions, the touchstone for deciding whether it was in their best interests to withdraw treatment was whether the life which would be prolonged was "intolerable."

The guidance, the judge said, was also deficient because it failed to spell out that if a patient wanted artificial feeding but the doctor was against it, the doctor had a duty to look for another doctor who was willing to carry it out and to continue treating the patient until that doctor took over. It also did not make clear that doubtful or disputed cases should be referred to the courts.

Philip Havers QC, for the GMC, told three appeal court judges, headed by the master of the rolls, Lord Phillips, that Mr Justice Munby's judgment, if upheld, could put doctors in "an impossibly difficult position."

It meant that "the doctor

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Leslie Burke fears that when he loses the power to communicate, doctors might decide not to provide artificial nutrition

must provide the treatment which the patient demands notwithstanding that the doctor's clear professional view is that the treatment will provide the patient with no clinical benefit or will be futile."

He added that a doctor should never have to give a patient a particular form of treatment that he or she does not

consider clinically appropriate.

Mr Havers said that Mr Justice Munby had "set the bar too high" in saying that artificial nutrition and hydration should be provided unless the patient's life would be intolerable. The correct test was whether the treatment was in the patient's best interests.

Judgment was reserved.

Private sector operations to rise from 4% to 11% of total

Zosia Kmietowicz *London*

The NHS is to more than double the number of operations it commissions in the private sector to help deliver the government's targets on waiting times, Patricia Hewitt, the new health secretary announced last week.

In her first speech in her new role, Ms Hewitt told delegates at an NHS managers conference that she was determined to carry on the pace of reform started by her predecessor, John Reid, to create a patient led health service.

She announced that £3bn

(\$5.5bn; €4.4bn) will be spent on 1.7 million elective operations over the next five years as the second wave of independent treatment centres starts functioning. The new deals will take the proportion of operations conducted by the private sector from 3.9% at the moment to 11% and will help the government achieve its target of cutting the maximum wait for treatment on the NHS to 18 weeks by 2008.

Ms Hewitt said there would be "faster treatment for

orthopaedic surgery; general surgery; ear, nose, and throat; and urology. All [would be] free at the point of care—the founding and eternal principle of the NHS. [This would be] not 'dismantling' the NHS, but giving NHS patients more choice, more innovation, faster, better ways of getting the care they need."

Figures released last week show that waiting times for treatments have fallen in recent months, with targets for heart and cataract operations being met ahead of schedule. The annual report of the NHS chief executive, Nigel Crisp, claims that more than 99% of patients with suspected cancer are being seen by a specialist within two weeks of referral.

However, Ms Hewitt's plans to involve the private sector more in providing NHS treatment has led doctors' leaders and NHS managers to express concern that they could lead to hospital closures.

Mr James Johnson, chairman of the BMA, called for greater clarity on the government's long term plans. "Competition in itself is not a bad thing, but the government must ensure that it does not destabilise NHS services. It would be unfair if specialties such as accident and emergency—which the private sector has been less interested in providing—were undermined because NHS hospitals were unable to survive in a competitive market," he said. See p 1170.