

# BMA guidance on assisted suicide violates human rights, barrister says

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BMJ

The BMA's guidance to doctors whose patients request assisted suicide is "wrong," and the General Medical Council's draft guidelines on the issue would be unlawful if brought into effect, a leading health law barrister has told the High Court in London.

The BMA guidance advises doctors to "avoid all actions that might be interpreted as assisting, facilitating, or encouraging a suicide attempt" and gives examples such as advising patients on what constitutes a fatal dose or on antiemetics in relation to a planned overdose.

Philip Havers QC said that the BMA's guidance, issued in July 2010, "discourages acts that do not, in fact, amount to an offence, acts that may be commendable and, most tellingly, acts the discouragement of which may violate the fundamental human rights of others."

Havers is asking three senior judges to rule that the policy of the director of public prosecutions for England and Wales on prosecuting assisted suicide and GMC draft guidance violate the human rights of "Martin," who is almost completely paralysed after a brainstem stroke and wants a doctor's help to end his life. His family members are unwilling to help him kill himself.<sup>1</sup>

Assisting a suicide is a crime carrying a maximum sentence of 14 years in prison in England and Wales. In February 2010 the director of public prosecutions, Keir Starmer, issued guidance on the factors that would influence him for or against prosecution.<sup>2</sup> He was required to draw up the policy by the House of Lords in the case of Debbie Purdy, who has multiple sclerosis and wanted her husband's help in going to Switzerland, where assisted suicide is legal.<sup>3</sup>

In his written arguments for the judges, Havers quoted one of the law lords in the Purdy case, Simon Brown, who said that "there are not many crimes of which it can be said that their discouragement by the state may violate the fundamental human rights of others. Yet undoubtedly that is true in certain circumstances of the conduct criminalised by section 2(1) of the Suicide Act [encouraging or assisting a suicide]."

Havers added, "Lord Brown spoke of circumstances in which assisting suicide may be altruistic and may warrant commendation rather than condemnation."

He argued that the director of public prosecutions' policy, which puts healthcare professionals at greater risk of prosecution than relatives, breaches Martin's rights under article 8 of the European Convention on Human Rights, the right to respect for private and family life.

The convention says that article 8 rights may be interfered with but only "in accordance with the law." To satisfy this requirement, the courts have said, there must be "foreseeability." In other words, the person concerned—in Martin's case, a doctor who wants to help him—must be able "to foresee, if need be with appropriate legal advice, the consequences which a given action may entail," as Lord Hope put it in the Purdy case.

But despite the director of public prosecutions' guidelines, as the Commission for Assisted Dying concluded, "there remains considerable uncertainty about what conduct will attract criminal prosecution." The commission noted that the guidelines are "only indicative" and "cannot cover every factual situation."

Havers said that the policy was unlawful in Martin's circumstances because there was insufficient foreseeability for a doctor who might want to help him: the doctor would be "entirely in the dark" about the likelihood of prosecution.

He said that the GMC's draft guidance presumed that assisting a suicide was wrong, which was a serious error. "The GMC's draft guidance will produce the wrong result, contrary to the public interest, and will almost inevitably discourage assistance and so violate others' fundamental human rights."

Martin's lawyers are not formally challenging the BMA's guidance, which is not binding on doctors, but have invited the judges to comment on it. Havers said, "The guidance . . . privileges concerns without substance over doctors' primary concern, the care of their patients. It adopts a blanket approach, apparently through an excess of caution, and effectively asks doctors not to think. This guidance is wrong."

A BMA spokesperson said, "We will monitor proceedings in the Martin case. If the court issues further advice on this issue, we will of course review and update our own guidance, as we would with any of our written publications."

The case of Martin, who has been granted an anonymity order by the court, is being heard along with that of Tony Nicklinson, who is even more disabled after a catastrophic stroke.<sup>1 4</sup> He cannot swallow and wants a doctor to help him die by voluntary euthanasia. The judgment is not expected for several weeks.

- 1 Dyer C. Two men plead with judges to allow doctors to end their life legally. *BMJ* 2012;344:e4270.
- 2 Dyer C. Doctors face greater risk of prosecution than the public for assisting suicide. *BMJ* 2010;340:c1167.
- 3 Dyer C. Purdy wins battle for clarity of law for people who accompany relatives abroad for assisted suicide. *BMJ* 2009;339:b3131.
- 4 Dyer C. "Locked-in" patient asks for ruling on mercy killing. *BMJ* 2010;341:c3943.

Cite this as: *BMJ* 2012;344:e4353

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