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Can HMOs Avoid Liability for Withholding Care and Shortening the Life of a Terminally Ill Plan Member?

Introduction

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To "ration" something is to "restrict use of (scarce goods) to authorized people in authorized amounts." In Pegram v. Herdrich (2000) 530 U.S. 211, 221 [120 S.Ct. 2143, 147 L.Ed.2d 1641, the Supreme Court acknowledged, without qualification, that HMOs "ration" health care to their members. This is not an aspect of how HMOs provide care that is ever addressed in the plans' marketing materials, or in the contracts with plan members.

Inherent within the concept of rationing healthcare is the concept that the amount allotted to some members will not be sufficient. This is likely to put members who make the most demands on the plan for care at the greatest risk. Terminally ill members are likely to make high demands for services, and are therefore the most likely to have their needs go unmet.

When faced with a wrongful death claim arising from the denial of care to a terminally ill plan member, the plans will argue that they should not be held liable because the member's illness was likely to cause them to die anyway, and therefore the plan did not "cause" the member's death. It is not surprising that plans are willing to make this argument; what is surprising is that there appears to be support for it in the law. But the goal of this article is to show you how to educate the court so that it will - properly - reject this defense.

In Bromme v. Pavitt (1992) 5 Cal.App.4th 1487, the court held that a physician could not be held liable for wrongful death for failing to timely diagnose and treat his patient's cancer unless the plaintiff could show that there was at least a 50% chance that the patient would have survived the cancer had it been diagnosed at a time that was within the standard of care. Relying on Bromme, health plans argue that their failure to provide care is not actionable, even if it shortens the member's life, if the member had a terminal illness.

This article will analyze this argument, and show that Bromme is an aberration that is inconsistent with controlling California Supreme Court precedent and which should not apply in the HMO context in any event.

California Recognizes a Wrongful Death Claim Based on the Shortening of Life

It is well established in California that causing the premature death of a terminally ill person constitutes culpable conduct. In People v. Phillips (1966) 64 Cal.2d 574, for example, the Supreme Court held that a murder charge could lie against a chiropractor who induced a terminally ill child's parents to cancel an operation for her based on his claims that he could cure her cancer. The prosecution's experts at trial testified that, had the child had the operation, there was a reasonable medical probability that she would have lived two months longer than she did without the surgery. The California Supreme Court stated:

The showing that the length of Linda's life had thus been limited sufficed for this aspect of the prosecution's case; no burden rested upon the prosecution to prove that the operation would have cured the disease. Murder is never more than the shortening of life; if a defendant's culpable act has significantly decreased the span of a human life, the law will not hear him say that his victim would thereafter have died in any event. [Citations.] The jury could properly have found that defendant's conduct proximately caused Linda's death. (Phillips, 64 Cal.2d at 579, emphasis added.)

Notably, at the time Phillips was decided, the standard California jury instructions in civil and criminal cases defined "proximate cause" identically. (People v. Temple (1993) 19 Cal.App.4th 1750, 1754 [explaining that before 1991, the BAR 3.75 and CALJIC 3.40 defined causation identically].)

After the Supreme Court's decision in Mitchell v. Gonzales (1991) 54 Cal.3d 1041, which disapproved BAJI 3.75 in favor of BAJI 3.76, the burden of estab-lishing proximate cause in civil cases became arguably lower than in criminal cases. (Cf. CALJIC 3.4 [proximate 'cause must be "direct, natural and continuous"] to BAJI 3.76 [proximate cause must be a substantial factor"].)
Hence, it takes less to find an actor civilly liable for wrongful death than criminally liable for homicide. If, under California law, a defendant can be convicted of homicide for prematurely shortening the decedent's life, then, a fortiori, a defendant who causes a premature death can be held liable in tort for wrongful death.
The purpose of the wrongful death statute is to compensate a decedent's heirs for the losses they sustain and will incur because of the decedent's premature death that results from a defendant's wrongful act or failure to act. (See, e.g., Marks v.Reissinger (1917) 35 Cal.App. 44, 52 [intention of the wrongful death statute is to give surviving heirs of the deceased who may themselves be damaged by his death in a wrongful manner the right to sue for compensation].)

Clearly, this purpose cannot be fulfilled unless the "death" at issue is defined by comparing the time of the death to the time death would have otherwise occurred absent the defendant's wrongful conduct. Put differently, the wrongful death statute is intended to provide compensation for losses caused by the decedent's having died before he or she otherwise would have.

Several cases, all of which predate Bromme, make clear that the wrongful death statute is concerned with the premature death of the decedent that results from the defendant's wrongful act. Thus, the cases have established a three-part test for determining whether a defendant is liable for a decedent's wrongful death: (1) Was the death premature; (2) Was the untimely death caused or contributed to by an act traceable to the defendant; and (3) Was the defendant's act wrongful under existing legal principles? (See, e.g., Kerby v. Elk Grove Union High School District (1934) 1 Cal.App.2d 246, 252-253.)

For example, in Marks v. Reissinger the decedent suffered a head injury when the defendant struck him with a thick piece of rubber hose during a fight. (Marks, supra, 35 Cal.App. at 45-49.) While being treated for this head injury, the decedent contracted pneumonia, from which he recovered, although after the bout of pneumonia his symptoms from the head injury became more serious and he eventually died. (1d., at 48.)
At trial, the plaintiff's physician testified, based upon an autopsy, that the decedent died because of the head injury. (1d,, at 47,) Both at trial and on appeal the defendant contended that the death was caused by the pneumonia, not by his conduct. (Id., at 48.)

In affirming the judgment on verdict for wrongful death, the Third District Court of Appeal (the same court that decided Bromme) held that a defendant must be deemed liable for the death of a decedent under the wrongful death statute (the provisions of which at that time were substantially similar to the current statute) if that defendant's wrongful conduct caused the decedent to die "when he did" even though another event might have been a concurrent cause of death. (Id., 35 Cal.App. at 59, emphasis added.)

Similarly, in Kerby, the decedent, a 16 year-old boy in apparent good health, died due to the rupture of a congenital aneurysm of a cerebral artery. (erby, supra, 1 Cal.App.2d at 248-249.) The rupture was precipitated by the decedent's being hit in the forehead by a basketball during physical education class. (1d., at 249.) However, an autopsy showed that the aneurysm might have ultimately have caused the death on its own. (Id., at 25 1.)

Notwithstanding that the decedent might well have died from the chronic aneurysm even absent the blow from the basketball, the Third District Court of Appeal (again, the same court that decided Bromme) held that the blow by the basketball was a proximate cause of the decedent's death if it caused that death to occur when it did due to an aggravation or acceleration of the defect in the cerebral artery. Ultimately, the Third District Court of Appeal reversed the wrongful death judgment. The reversal, however, was based upon its determination that the defendant committed no "wrongful act" upon which liability could be imposed, not based upon any failure of causation. (Id., at 252-253.)

Hughey v. Canoli (1958)159Cal.App.2d 231 is another example. In Hughey, the defendant caused an automobile accident that injured a pregnant woman. The woman's placenta separated in the accident causing her to deliver her child prematurely. (Id., at 238.) The infant was never able to successfully breathe on his own and died within 24 hours. Ibid.) An autopsy revealed that the infant had a congenital heart problem that would have resulted in the infant's death anyway. The parents brought a wrongful death action. (Id., at 234.) The verdict was for the defendant, but the trial court granted a motion for new trial, which was affirmed by the appellate court.

The critical issue on appeal was whether the infant's death was caused by the defendant. (Id., at 239-240.) In affirming the new trial order and rejecting the defendant's contention that he did not cause the infant's death, the Court of Appeal held that the defendant could properly be held liable for the wrongful death of the infant, whether as an unsegregated concurring cause of the death or because the defendant's conduct operated as a precipitating or accelerating cause of death. (Id., at 240-241.)