

Health-care providers who ignore patients' wishes to withhold life-saving treatments in certain circumstances may be doing so at their peril.

It was unthinkable just a few years ago that a provider could be held liable for saving a patient's life, but the tide appears to be turning. A 2017 trial court decision from New Jersey recognizing a cause of action for wrongful prolongation of life has sparked renewed interest in the idea that providers should answer for unwanted life-saving treatment.

The issue should be on providers' radar because, while there haven't been many cases to date, courts may be more open to allowing individuals to sue providers who keep them alive against their wishes. Damages potentially could be rising in these cases, given the soaring costs of caring for patients who are left in very fragile conditions. Additionally, providers can face state licensing board or regulatory actions for acting against a patient's will. There even is the potential that payers could be considering fraud actions against providers.

New Jersey Case

The decision prompting the renewed interest is *Koerner v. Bhatt*, in which a New Jersey Superior Court said a woman could sue her mother's health-care providers for reviving her after she went into cardiac arrest. The mother, Suzanna Stica, had an advance directive telling providers not to use extraordinary measures to save her if she went into cardiac arrest, but the providers either ignored or didn't know about the directive. Stica lived for several more months, but had a "terrible" quality of life, according to plaintiff's attorney, Timothy L. Barnes, of counsel at Porzio, Bromberg & Newman PC, Morristown, N.J.

The providers didn't appeal. They settled the case in early 2018 for an undisclosed sum, Barnes told Bloomberg Law. The providers didn't admit liability in the settlement agreement, he said.

The case is generating a lot of interest, but attorneys need to be aware of its limitations, Samuel D. Hodge Jr. told Bloomberg Law. The opinion was handed down by a trial court judge on a pretrial motion, cited very few cases, was based explicitly on New Jersey law, and wasn't appealed, said Hodge, a professor of legal studies at Temple University, Philadelphia. Hodge wrote a 2011 article on tort claims stemming from the wrongful prolongation of life. He found that the claim hadn't gained much traction, despite the U.S. Supreme Court's recognition in 1990 of a constitutional right to die in *Cruzan v. Director, Missouri Dep't of Health*.

The key for future cases, he said, is whether a state's law will recognize a right to sue a provider who ignores an advance directive. New Jersey has been at the forefront of recognizing rights to sue based on end-of-life issues since the mid-1970s case of Karen Ann Quinlan, a young woman whose family claimed the right to remove her from a ventilator after she fell into a persistent vegetative state, he said.

Still, Hodge is somewhat optimistic that, as more plaintiffs sue for wrongful prolongation of life, the courts eventually will catch up. Nadia N. Sawicki, a professor at the Beazley Institute for Health Law & Policy at Loyola University Chicago School of Law, told Bloomberg Law she also expects to see more wrongful prolongation of life cases filed. Whether those cases will succeed "is a larger issue," said Sawicki, who also has written about the subject.

Damages Issue Problematic

The biggest barrier Sawicki sees at this point is damages. So far, the few courts to have considered the issue have focused on economic damages, such as the costs of providing health care after a person has been

revived against his or her will. Those costs could add up, depending on how long the person lives, but additional damages attributable to harm to a person's dignity rarely have been awarded, she said. These damages also could be limited in some states by a cap on noneconomic damages, Sawicki said.

Additionally, several of the known cases have settled out of court on the condition that the amount remains confidential, she said. The inability to put a dollar figure on a provider's failure to follow an advance directive makes it difficult for attorneys to evaluate cases and may be leading them to turn down otherwise meritorious lawsuits, Sawicki said.

One notable exception is a decision from Georgia, *Doctors Hosp. of Augusta LLC v. Alicea*, which led to a \$1 million settlement. That amount, negotiated after the Georgia Supreme Court said the state's advance directive law didn't immunize the provider, suggests the provider thought the damages could be much higher if the case went to trial, Thaddeus M. Pope, the director of the health law institute and professor of law at Mitchell Hamline School of Law in St. Paul, Minn., and a national authority on end-of-life issues, told Bloomberg Law.

Pope agreed with Sawicki that noneconomic damages caps could limit damages in some states. He raised the possibility that punitive damages could be available, based on whether the provider deliberately ignored a patient's decree, but said those damages also could be capped.

Momentum Building

Pope believes the tort of wrongful prolongation of life is gaining momentum. Society "is in a different place in 2018" than it was in the 1980s and 1990s, when cases weren't succeeding, Pope said. Judges are more apt to accept that people have the right to refuse health care and that keeping a person alive against his or her wishes isn't always the best or appropriate action, Pope said.

The idea of stopping or refusing to give live-saving treatment seemed "exotic or unthinkable" in the mid-1970s when the Quinlan case gained national attention, Thomas W. Mayo, a professor at Southern Methodist University Dedman School of Law, Dallas, added. Over 40 years later, most people accept and understand that others may not want their lives prolonged if their quality of living is severely compromised, he told Bloomberg Law. Mayo is a Bloomberg Law advisory board member who serves on several hospital ethics committees.

Moreover, there is no reason for courts not to accept a wrongful prolongation tort, Pope and Mayo both said. A doctor who provides care against a patient's wishes has committed a medical battery. That tort has been recognized widely for a long time, they said.

Incentive for Change

Pope told Bloomberg Law that a widening recognition that people can sue health-care providers for failing to honor advance directives may provide incentives for health-care systems to improve their communications with patients. Sawicki agreed, suggesting that providers have discussions with their patients before any life-saving measures are needed and that providers who have moral or religious objectives to honoring advance directives make that clear to their patients upon admission.

Providers also need to ensure advance directives are accessible, Pope said. Electronic medical records "theoretically" should help, he said, but an advance directive may not be easy to find within the record. There also is a question about whether anyone will go looking for an advance directive in the midst of an emergency. Electronic records also don't always follow patients from one facility to another and, when they do, the

receiving facility's software may not be compatible with the record.

Providers could have even greater incentives than avoiding civil litigation for ensuring patients who want them have advance directives and that those directives are honored, Pope said. He told Bloomberg Law he could envision payers, like Medicare, bringing fraud and abuse actions raising the question of whether providing extraordinary life-saving care was medically necessary in a given, discrete case. Reviving a person who has no chance of recovery may become a "never event," he said.

Pope said such a course of action would be "politically uncomfortable," but not outside the realm of possibility.

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