

# Can HMOs avoid liability for withholding care and shortening the life of a terminally ill plan member?

By Jeffrey Isaac Ehrlich<sup>1</sup>

## Introduction

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 164, 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 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 risk. Terminally ill members are likely to make high demands for services, and therefore would likely to be at risk for having 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.

In Bromme v. Pavitt (1992) 5 Cal.App.4<sup>th</sup> 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 not show that there was at least a 50% chance that the patient would have survived the cancer. 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.

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This article will analyze this argument, and show that Bromme is an aberration that is inconsistent with controlling California Supreme Court precedent.

**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.4<sup>th</sup> 1750, 1754 [explaining that before 1991, the BAJI 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 establishing

proximate cause in civil cases became arguably lower than in criminal cases. (*Cf.* CALJIC 3.40 [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 was 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, *supra*, the decedent suffered a head injury when the defendant struck him with a thick piece of rubber hose during a fight. (*Id.*, 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. (*Id.*, 35 Cal.App. at 48.)

At trial, the plaintiff's physician testified, based upon an autopsy, that the decedent died because of the head injury. (*Id.*, 35 Cal.App. at 47.) Both at trial and on appeal the defendant contended that the death was caused by the pneumonia, not by his conduct. (*Id.*, 35 Cal.App. 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. (Kerby, *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. (*Id.*, 1 Cal.App.2d at 249.) However, an autopsy showed that the aneurysm might have ultimately have caused the death on its own. (*Id.*, 1 Cal.App.2d at 251.)

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.*, 1 Cal.App.2d at 252-253

Hughey v. Canoli (1958) 159 Cal.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.*, 159 Cal.App.2d 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.*, 159 Cal.App.2d 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.*, 159 Cal.App.2d 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.*, 159 Cal.App.2d at 240-241.)

The decision in Pulvers v. Kaiser Foundation Health Plan, Inc. (1979) 99 Cal.App.3d 560 also follows this same analytical framework in an action against a health plan. While Pulvers is primarily an instructional error case, its significance lies in the fact that it is consistent with the approved and accepted causation analysis. This consistency is shown by its reliance on Cullum v. Seifer (1969) 1 Cal.App.3d 20, 27-28 (disapproved on other grounds in Scala v. Jerry Witt & Sons, Inc. (1970) 3 Cal.3d 359, 364), an earlier decision which recognized that causation exists where a defendant's conduct (or omission) leads to premature death:

“We cannot narrowly construe the testimony relative to early prognosis and prompt treatment. We observe testimony throughout the record . . . which, if believed, would support the inference that it is a reasonable medical probability that the plaintiff would have benefited, i.e., by possible ***lengthening of her life*** and/or her personal comfort – even if no cure would have resulted from more prompt diagnosis and treatment. These are

matters of injury proximately caused by delay, and support the granting of a new trial.” (Cullum, *supra*, [emphasis added].)

Pulvers stands for the proposition that wrongful death liability will lie where evidence in the record, even if disputed, is sufficient to prove that the decedent’s *premature death* was caused by defendant’s wrongful conduct. (Pulvers, *supra*, 99 Cal.App.3d at 567.) Pulvers explains:

“The evidence was sharply conflicting on whether the monitoring was properly carried out on whether chemotherapy should have been started at a much earlier time, *and whether, had this treatment been given earlier, Mr. Pulvers’ life would have been extended*. We cannot say that the trial court erred in finding as it did, that the evidence for plaintiffs on those issues, accepted by the jury in its verdict, supported that verdict.” (*Ibid.* [emphasis added].)

### **Bromme v. Pavitt Is An Aberrant Decision That Conflicts With Controlling Authority**

In Bromme, the plaintiff’s wife died from colon cancer, and he brought a wrongful death action against his wife’s physician, contending that the failure to timely diagnose and properly treat his wife’s colon cancer caused her wrongful death. (Bromme v. Pavitt, *supra*, 5 Cal.App.4th at 1492-1493.)

The evidence at trial indicated that “before June 1981, it was medically probable the cancer, if detected, could have been treated successfully. After that time, the successful treatment became medically improbable, i.e., the chance of success was less than 50 percent.” (*Id.*, 5 Cal.App.4th at 1492.) Based upon this evidence, the trial court granted a partial nonsuit in favor of defendant. (*Ibid.*) Thereafter, the jury rendered a verdict in favor of defendant. (*Ibid.*)

On appeal, the plaintiff contended that a statutory wrongful death action could lie even if the decedent had a less than 50 percent chance of survival at the time the wrongful act or omission occurred. (*Ibid.*)

Reasoning that defendant’s wrongful conduct could not be deemed a “substantial factor” in causing the decedent’s death if death would have occurred even without the

defendant's wrongful conduct, the Bromme court held that causation could not be established, as a matter of law, unless (1) the plaintiff could prove, to a reasonable medical probability, that the decedent had a better than 50 percent chance of survival absent the defendant's wrongful conduct, and (2) the defendant's wrongful conduct could "of itself" cause the death. (*Id.*, 5 Cal.App.4th at 1497-1499.)

Because the decedent had less than a 50 percent chance of surviving her colon cancer at the time of defendant's wrongful conduct, the Bromme court concluded that defendant's wrongful conduct could not be considered a cause-in-fact of the decedent's death. (*Ibid.*)

Bromme suffers from two fundamental analytical flaws. First is Bromme's failure to determine whether the "death" at issue in the case before it was premature and, therefore, wrongful. Rather than following existing legal precedent which clearly established that "death" is to be defined specifically in terms of *both* "when" it occurred (*i.e.*, this death, at this time) and "how" it occurred (by the defendant's wrongful act) Bromme views the decedent's death only in terms of its physical cause. (*Id.*, 5 Cal.App.4th at 1493-1496 ["The cancer later metastasized to Bromme's lungs, causing her death in 1984." (p. 1494)].)

By failing to analyze the "when" component of the decedent's death by, for example, comparing the actual time of death to the time the decedent would have died had she received a timely diagnosis and proper treatment (*i.e.*, the decedent's "natural" life span), Bromme skips an essential step in determining whether the decedent's death was "wrongful" under California's wrongful death statute.

The second fundamental flaw is Bromme's determination that a defendant's wrongful act or neglect can be a legal cause of death only where that "wrongful act or neglect" was sufficient "*of itself*" to bring about death. (*Id.*, 5 Cal.App.4th at 1498-1499.) This view is directly contrary to controlling precedent.

In civil cases, "causation" is defined in these terms: "[a] cause of injury, damage, loss or harm is conduct that is a substantial factor in bringing about that injury, damage, loss or harm." (BAJI 3.76; see Mitchell v. Gonzales (1991) 54 Cal.3d 1041, 1052-1054.

Nothing more is required. In a wrongful death case, the “harm” is the decedent’s premature death. (Phillips, 64 Cal.2d at 579.)

The Bromme court’s insistence that the defendant’s wrongful act, “of itself” be sufficient to bring about the harm cannot be squared with the California Supreme Court’s decision in Mitchell v. Gonzales. In effect, Bromme resurrected the “but for” test that the Supreme Court abandoned in Mitchell in favor of the “substantial factor” test.

Mitchell explains that the “substantial factor” test subsumed the “but for” test, because, “if the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries.” (Mitchell v. Gonzales, 54 Cal.3d at 1052.)

Mitchell also explains that the substantial factor test assists in resolving a class of cases that had proved troublesome -- cases where a similar, but not identical result would have followed without the defendant’s act. (54 Cal.3d at 1053.) This describes the situation where a terminally ill patient is going to die from the progression of the illness, but died sooner as a result of the HMO’s conduct.

In Mitchell, the decedent, a young boy, died when he did both because he could not swim and because the defendants failed to supervise him while he played in the lake with their son. (54 Cal.3d at 1054.) The Supreme Court found that the defendants’ failure to supervise could be a substantial factor in causing the death. Yet, the failure to supervise “of itself” could not have caused the decedent to drown. The failure to supervise could only operate in conjunction with some other cause or causes, essentially by failing to break the chain of causation that the other factors had been set in motion.

## CONCLUSION

California has chosen for reasons of public policy to adopt a host of rules that restrict a patient’s rights to recover against a physician who commits medical malpractice. *Bromme* is certainly consistent with this approach, which may account for why it has not met with a more critical reception. It is doubtful, however, that California

is ready to give HMOs carte blanche to deny care to terminally ill enrollees. Bromme is contrary to controlling authority and should not be relied on to justify that result.