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Liability for Violating Directives To Forgo Life-Sustaining Treatment

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By **Thomas A. Moore and Matthew Gaier** | June 06, 2022

More than a century ago, Judge Benjamin Cardozo wrote, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-30 (1914). Since that time, the Supreme Court of the United States has recognized that "Due Process protects an interest in life as well as an interest in refusing life-sustaining treatment." *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 281 (1990). More recently, the Court of Appeals observed, "[t]he right to refuse medical intervention is at least partially rooted in notions of bodily integrity, as the right to refuse treatment is a consequence of a person's right to resist unwanted bodily invasions." *Myers v. Schneiderman*, 30 N.Y.3d 1, 14 (2017).

Based upon this well recognized right, the Court of Appeals, in *Matter of Storar*, 52 N.Y.2d 363 (1981), held that a surrogate may refuse to consent to provide life-sustaining medical treatment to an incompetent patient, where the patient's personal wishes and the incompetence are established by clear and convincing evidence. Relying upon the same right, the court held in *Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218 (1990), that a competent patient has "a personal common-law and statutory right to decline" necessary blood transfusions. Both *Matter of Storar* and *Matter of Fosmire* cited Public Health Law §2504, which prescribes who may give consent to medical procedures, and Public Health Law §2805-d, which pertains to claims for lack of informed consent. In 1988, the Legislature passed Article 29-B of the Public Health Law, which addresses multiple issues concerning resuscitation of residents in mental hygiene facilities.

Notably, after citing the "right of a competent adult to determine the course of his or her own medical treatment," the court in *Matter of Fosmire*, 75 N.Y.2d at 226, observed: "Although this rule was originally recognized in personal injury actions brought by patients against doctors for performing unauthorized acts, it has been held equally applicable in cases where doctors or hospitals seek a court order authorizing essential treatment" (citations omitted).

We have now apparently come full circle: A person's right to decide to forgo life-sustaining treatment is recognized in this state, but whether a violation of that right gives rise to liability in tort has somehow been called into question.

In *Cronin v. Jamaica Hosp. Med. Ctr.*, 60 A.D.3d 803 (2d Dept. 2009), the Second Department found that a patient who was twice resuscitated in violation of do-not-resuscitate (DNR) orders did not sustain a legally cognizable injury. The plaintiff's 72-year-old decedent was admitted to the defendant hospital with various illnesses. During the hospitalization, he was resuscitated on two occasions, allegedly in violation of two DNRs that had been issued by the hospital and executed by members of the decedent's family. After the second resuscitation, the decedent was removed from life support and died the same day. His wife, as the administratrix of his estate, commenced an action against the hospital alleging that it wrongfully prolonged the decedent's life by resuscitating him against his express instructions and those of his family. As described by the Appellate Division, the Supreme Court granted the defendant summary judgment dismissing the complaint on the ground that "the plaintiff was asserting a claim for 'wrongful living' and that no such cause of action could be maintained." The Second Department affirmed.

A review of the parties' briefs indicate that the plaintiff argued on appeal that "this is not an impermissible action for 'wrongful life,' but one that asserts valid claims for damages based upon Defendant's negligent/intentional invasion of and injury to Mr. Cronin's person, in contravention of his express wishes to the contrary." The defendant argued: "This is not—as the plaintiff argues—an issue of first impression: Whether couched in terms of wrongful birth, wrongful life or wrongful living, the courts have consistently declined to award damages for simply being alive, even if being alive yields pain and suffering."

The defendant further argued that "[t]his incontrovertible and established rule of law is codified by Public Health Law §2974(2)(a), which grants immunity from civil or criminal liability when a health care provider, acting reasonably and in good faith, fails to follow a 'DNR'...."

A review of Public Health Law §2974, which is part of Article 29-B, referenced above, does indeed establish a conditional immunity, providing, in pertinent part:

> 2. No physician, health care professional, nurse's aide, hospital, or person employed by or under contract with the hospital shall be subjected to criminal prosecution, civil liability, or be deemed to have engaged in unprofessional conduct for providing cardiopulmonary resuscitation to a patient for whom an order not to resuscitate has been issued, provided such physician or person; (a) reasonably and in good faith was unaware of the issuance of an order not to resuscitate; or (b) reasonably and in good faith believed that consent to the order not to resuscitate had been revoked or cancelled.

The allegations by the plaintiff in *Cronin* were such that there was neither a lack of awareness of the DNRs, nor a reasonable or good faith belief that they had been revoked. Moreover, as noted above, Article 29-B of the Public Health Law (of which §2974 is a part) applies only to residents in mental hygiene facilities, and the definition of "hospital" in that Article is limited to such facilities (see Public Health Law §2961[9]). Since the defendant in *Cronin* was a general hospital, the statute would appear not to apply.

In deciding the appeal, the Second Department did not address the defendant's statutory immunity argument, but it adopted the defendant's first argument, stating:

> The defendant established its prima facie entitlement to judgment as a matter of law ..., by demonstrating that the decedent did not sustain any legally cognizable injury as a result of the defendant's conduct. In opposition, the plaintiff failed to raise a triable issue of fact. As the Supreme Court properly determined, the status of being alive does not constitute an injury in New York (see *Alquijay v St. Luke's-Roosevelt Hosp. Ctr.*, 63 NY2d 978, 979 [1984]; *Becker v Schwartz*, 46 NY2d 401, 412 [1978]).

Both of the cases cited by the court were relied upon by the defendant in support of its argument that "[b]eing alive is not an 'injury.'" In *Becker v. Schwartz*, 46 N.Y.2d 401 (1978), the court held that a child born with birth defects cannot maintain a cause of action for "wrongful life," in which recovery is sought for pain and suffering and costs associated with the defective condition that would have been avoided had he or she not been born at all, but that the parents of such a child may bring a cause of action for the pecuniary expenses they would incur for the care and treatment of the child. In *Alquijay v. St. Luke's-Roosevelt Hosp. Center*, 63 N.Y.2d 978 (1984), the court reaffirmed the principle that there is no cause of action for wrongful life, and that a child with a birth defect cannot maintain her own cause of action for extraordinary expenses she will incur over her life. There is nothing in either of those decisions indicating that being kept alive against one's wishes is not actionable or not a legally cognizable injury.

The court in *Cronin* appeared to leave open the possibility that the plaintiff could recover for injuries improperly inflicted during the resuscitation efforts, but found no evidence to support that claim in that case, stating:

> Moreover, contrary to the plaintiff's contention, she did not submit evidence raising a triable issue of fact as to whether the decedent was injured as a result of the resuscitations themselves. The plaintiff's medical expert failed to address this issue in his affidavit, and the hearsay statements of the decedent to the plaintiff as recounted in the plaintiffs typewritten notes were, by themselves, insufficient to raise a triable issue of fact ....

This was apparently addressing the argument in plaintiff's brief that the decedent was subjected to severe pain during the resuscitation efforts, in addition to suffering from the prolonged process of dying.

Until recently, *Cronin* was the only New York appellate decision addressing the issue and, hence, was binding on the trial level courts. This changed when the First Department decided *Greenberg v. Montefiore New Rochelle Hospital*, 205 A.D.3d 47 (1st Dept. 2022). The plaintiff's decedent in that case executed a health care proxy and a living will. The latter provided that, if he has an "incurable or irreversible mental or physical condition with no reasonable expectation of recovery," or is in a terminal condition, permanently unconscious, or conscious but with irreversible brain damage and unable to regain the ability to make decisions and express his wishes, then he directed that his treatment be limited to measures to keep him comfortable and relieve pain. The living will specified that the decedent did not consent to cardiac resuscitation, mechanical respiration, tube feeding, or antibiotics. The health care proxy and living will both identified plaintiff, who was the decedent's wife, as his health care agent to act in accordance with his wishes if he was unable to make his own health care decisions, and their two adult sons were designated to act as substitute health care agents.

At age 63, the decedent was suffering from advanced Alzheimer's disease, residing in a residential treatment facility, and unable to recognize his wife or children or to communicate in any meaningful manner. After being found lying on the floor at his residential facility, he was admitted to defendant hospital, which had been given copies of his living will and health care proxy. One of the decedent's sons—the only health care agent present in the hospital—also provided a completed and executed form for Medical Order for Life-Sustaining Treatment (MOLST), which provided that decedent was to receive only comfort measures and no intravenous fluids or antibiotics.

The first physician to evaluate the decedent in the hospital determined he was suffering from sepsis and noted the advance directives and their prohibitions of life-sustaining treatment. That doctor contacted the plaintiff by telephone, received confirmation that the directives were correct, and was verbally instructed that the decedent was not to receive interventional treatment, but only "measures to alleviate pain, so that his suffering would end as quickly as possible."

Shortly thereafter, the decedent was examined by the defendant attending physician, who noted that the record indicated he was not to receive antibiotics or intravenous fluids, and that a MOLST was in place. This doctor nevertheless directed that the decedent be given intravenous antibiotics, and ordered a brain CT, chest X ray, ECG, and blood tests, as well as the administration of other medications that were not to alleviate pain. According to the plaintiff's expert, the decedent would likely have died from sepsis within a few days, but that as a result of the treatment he was administered in contravention of his wishes and his health care agents' instructions, he "endured pain and suffering over a period of approximately 30 days" before he died.

The plaintiff filed a medical malpractice action, alleging that the defendants departed from the standard of care by failing to abide by the decedent's wishes, the directives of his health care agents, and the MOLST, and that as a result he endured pain and suffering for over a month. The defendants moved to dismiss the complaint for failure to state a cause of action, arguing that the claim is "one for 'wrongful life,' and is thus disallowed under [*Cronin*]." The Supreme Court granted the motion under constraint of that binding appellate precedent.

The First Department reversed and reinstated the complaint. In reaching that result, the court distinguished *Cronin* and found its reasoning inapplicable. Initially, the court noted:

> ... in *Cronin*, it appears that plaintiff sought damages based on a claim "that the defendant wrongfully prolonged the decedent's life by resuscitating him against the express instructions of the decedent and his family" (*Cronin*, 60 AD3d at 804). In contrast, here, plaintiff seeks damages for decedent's pain and suffering, which the complaint alleges was the result of medical malpractice in that defendants breached the standard of care by administering treatments without consent and in direct contravention of decedent's

> wishes expressed in his advance directives as reaffirmed by his health care agents and in the MOLST. Defendants do not address these allegations at all, arguing only that plaintiff asserts a "wrongful life" claim like the one asserted in *Cronin*. Since I find that plaintiff has adequately stated a medical malpractice claim that is not barred by *Cronin*, defendants are not entitled to dismissal of the complaint.

The First Department further observed that it is not bound by *Cronin*, and found that "the reasoning in that case, and in the Court of Appeals cases on which it relies, do not apply here." It noted that the defendant in *Cronin* was awarded summary judgment "based on the Second Department's determination that 'the status of being alive does not constitute an injury in New York,'" and that *Alquija*y and *Becker*, upon which *Cronin* relied in making that determination, are inapplicable for two reasons. First, the court explained, while there is no precedent recognizing the right of a child "'to be born as a whole, functional human being,' … a competent adult's right to refuse medical treatment, even where refusal may result in death, is well established by case law …." The second distinction identified in *Greenberg* is that the Court of Appeals:

> … found that the type of claim at issue in *Becker* and *Alquijay* is unsuited to judicial determination, since "a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence" … and because "[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians"…. In contrast, courts can and regularly do determine damages for pain and suffering. Moreover, when a competent adult has executed advance directives specifying the conditions under which they refuse certain life-sustaining treatments, and there has been a medical determination that those conditions are present, no philosophical guesswork is required as to what is best for such a patient. Accordingly, I find that the holdings in *Becker* and *Alquijay* do not bar plaintiff from proceeding with the medical malpractice claim set forth in the complaint on the theory that the failure to follow decedent's directives was a departure from the standard of care.

While there may be subtle distinctions between the claims as articulated by the plaintiffs in *Greenberg* and *Cronin*, the decisions in those cases are in conflict. As demonstrated by the brief of the plaintiff in *Cronin* (as set forth above), her claim was for damages based on the defendant's "negligent/intentional invasion of and injury to Mr. Cronin's person, in contravention of his express wishes to the contrary." The plaintiff in *Greenberg* alleged that the defendants' committed malpractice by failing to abide by the wishes and directives of the decedent and his agents, as a result of which he endured pain and suffering. Those claims are ostensibly the same—that the health care providers' tortious conduct in disregarding the patients' wishes caused injury to the patients. Analyzing the issue as whether "the status of being alive" constitutes a cognizable injury, the court in *Cronin* concluded such a claim is not actionable. Conversely, the court in *Greenberg* analyzed the issue as whether allegations that a departure from the standards of care that caused pain and suffering is actionable, and concluded that it is. While *Cronin* did indicate that evidence of injury from negligence during the performance of the resuscitation would be actionable, that is very different than the 30 days of pain and suffering found actionable in *Greenberg* as a result of being kept alive against one's wishes. These results represent a conflict that should ultimately be resolved by the Court of Appeals.

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