PROXIMATE CAUSE AND FAILURE TO DIAGNOSE

Fact Pattern:

Mr. Pitts went to his health cooperative complaining of chest pain and coughing. Treating physicians took a chest X-ray but did not perform any other tests. Mr. Pitt's condition was treated with a cough suppressant. Mr. Pitts' chest pain and coughing persisted, and he went to another physician for a second medical opinion. The second physician diagnosed Mr. Pitts with an advanced form of lung cancer, and he underwent an operation to remove the cancerous lung but died 20 months later. Mr. Pitts' wife, as administratrix of his estate, filed a wrongful death suit against the health cooperative. The second physician testified for the Estate that had the physicians from the health cooperative detected the cancer, Mr. Pitts' possibility of a five-year survival would have been 39 percent. Due to the failure to detect the cancer, Mr. Pitts' chance of survival was reduced to 25 percent. The Estate argued that the reduction in the chance of survival from 39 percent to 25 percent was sufficient evidence to allow a jury to consider the proximate cause issue.

Question:

Can a patient with less than 50% chance of survival bring a cause of action against a Defendant when they are negligent and the cause the chances of survival to drop?

Rule

A defendant's conduct that increases the risk of death by decreasing the chances of survival is sufficient to take the issue of proximate cause to the jury.

Discussion

In a typical torts case, the "but for" test is used; however, here the Defendant's act or omission failed in a duty to protect against harm. Therefore, it is necessary to consider not only what did occur but also what might have occurred. A defendant's conduct that increases the risk of death by decreasing the chances of survival is sufficient to take the issue of proximate cause to the jury. It is not required that the Plaintiff must have a 51% chance of survival before the negligence. A 36% reduction in Mr. Pitts' chances of survival is sufficient evidence of causation for a jury to consider the possibility that the Defendant's failure to timely diagnose Mr. Pitts' illness was the proximate cause of his death.

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The most common test of proximate cause under the American legal system is foreseeability. It determines if the harm resulting from an action could reasonably have been predicted. In other words, a person is negligent for ignoring foreseeable risks and when those risks cause injury, liability follows, because ignoring those risks was negligent. If, however, an act of negligence results in unforeseeable damage or harm the defendant will not be liable for all consequences. Example: a ship spills oil into a bay. Some of the oil adheres to the wharf. Then, the oil is set afire by some molten metal dropped by a dock worker which ignites a cotton rag floating on the water. This causes the whole dock to burn. It is not reasonably foreseeable that the oil would be set afire on the water and, therefore, the burning of the wharf was also an unforeseeable result of the spilage.

"The proximate cause of an injury is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred." *Gulledge v. Shaw*. In Mr. Pitts' case, the result is his death due to cancer. It cannot be said, however, that without the negligence of his physician Pitts' death "would not have occurred" since he would have still been more likely than not to die regardless of the delay in diagnosis. This "all or nothing rule" is generally applicable to tort cases and provides that a plaintiff may recover damages only by showing that the defendant's negligence, more likely than not caused the ultimate outcome—in this case, Mr. Pitts' death. This "but for" analysis would hold that since Mr. Pitts would have died even if his physicians had not been negligent, the defendant's negligence is not a substantial factor and not a proximate cause. Courts have recognized, however, that the all-or-nothing rule provides a blanket release from liability for doctors and hospitals any time there is less than a 50 percent chance of survival, regardless of how flagrant the negligence. The "all or nothing" rule would serve to immunize all medical areas from liability and would do nothing to deter medical negligence. Considering proximate cause even when the chance of survival is low ensures that victims harmed by the loss of an opportunity for a better outcome are fairly compensated for their losses. In Pitt's situation, the failure of his physician to provide appropriate care resulted in the loss of a probability of improvement in his condition or a better result. He was denied a chance of a cure.

Outcome

California is a 'pure comparative fault' jurisdiction in that the money damages awarded will be decreased by the percent at fault so that if a plaintiff who was 90% to blame for an accident could recover 10% of his losses.

Ex:
Drunk Apple employee making 1 million a year crosses the street at night outside of a crosswalk and is hit by FedEx Truck. Attorney independent investigation through its own experts determine that FedEx Truck was going 10 mph over the speed limit and if truck was going the speed limit would have been able to avoid hitting Drunk Apple employee. Lost Wages is determined to be 18 million dollars by economist and future medical care is determined to be 2 million dollars from a Certified Life Care Planner.

Drunk Apple Employee found to be 80% at fault. Drunk Apple Employee receives 4 million dollars.

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