Montana Court Rules in Favor of Aid in Dying

BY JOYCE FRIEDEN

Physicians in Montana may legally assist terminally ill patients in hastening death, according to a ruling by the Montana Supreme Court.

The decision in the case of *Baxter v. State of Montana* concerned Robert Baxter, a retired truck driver from Billings, Mont., who was terminally ill with lymphocytic leukemia with diffuse lymphadenopathy. As a result of the disease and its treatment, Mr. Baxter suffered from symptoms including "infections, chronic fatigue and weakness, anemia, night sweats, nausea, massively swollen glands, significant ongoing digestive problems, and generalized pain and discomfort," according to the decision.

The court said further, "The symptoms were expected to increase in frequency and intensity as the chemotherapy lost its effectiveness. There was no cure for Mr. Baxter's disease and no prospect of recovery. Mr. Baxter wanted the option of ingesting a lethal dose of medication prescribed by his physician and self-administered at the time of Mr. Baxter's own choosing."

Mr. Baxter, along with four physicians and Compassion & Choices, a group that advocates for aid in dying, filed suit in Montana's district court for the first judicial district, challenging the constitutionality of Montana homicide statutes being applied to physicians who provide aid in dying to mentally competent, terminally ill patients. Mr. Baxter's attorneys contended that the right to die with dignity was constitutional under Montana law.

The district court ruled in favor of Mr. Baxter, but the state appealed the ruling to the Montana Supreme Court. On Dec. 31, 2009, that court also ruled in favor of Mr. Baxter, by a vote of 5-2, although it declined to comment on whether aid in dying complied with the Montana constitution. Mr. Baxter had died in December 2008.

"This court is guided by the judicial principle that we should decline to rule on the constitutionality of a legislative act if we are able to decide the case without reaching constitutional questions," Justice W. William Leaphart wrote. "We find nothing in Montana Supreme Court precedent or Montana statutes indicating that physician aid in dying is against public policy. … Furthermore, the Montana Rights of the Terminally Ill Act indicates legislative respect for a patient's autonomous right to decide if and how he will receive medical treatment at the end of his life. … We therefore hold that under [Montana law], a terminally ill patient's consent to physician aid in dying constitutes a statutory defense to a charge of homicide against the aiding physician when no other consent exceptions apply."

Justice James Rice, one of the two dissenting judges, argued that under current Montana law, a physician can be prosecuted for helping a patient commit suicide—if the patient survives, the crime falls under the category of aiding suicide; if the patient dies, the crime is regarded as a homicide.

"It is also very clear that a patient's consent to the physician's efforts is of no consequence whatsoever under these statutes," he wrote. "In my view, the Court's conclusion is without support, without clear reason, and without moral force."

In the wake of the court ruling—which cannot be appealed—opinions vary as to whether more Montana physicians will now provide aid in dying to terminally ill patients. Chicago health care attorney Miles J. Zaremski, who wrote a "friend of the court" brief in support of Mr. Baxter in the Montana case, said that even though the decision came out in their favor of the plaintiff, physicians in Montana will be reluctant to aid terminally ill patients in dying until legal protocols for the procedure have been established.

"In Montana, if the patient gives the doctor consent to provide aid in dying, the physician can escape homicide laws," said Mr. Zaremski, who is also a former president of the American College of Legal Medicine. "Well, how was that consent given? Were there witnesses to it? Did you wait 10 days? I think you need protocols and standards in place."

Oregon and Washington, the only states with aid-in-dying statutes, have protocols written into their laws, he noted.

Kathryn Tucker, legal director of Compassion & Choices, noted that another aid-in-dying case with which her group is involved is being litigated in Connecticut. Ms. Tucker disagreed with the idea that Montana physicians would not immediately feel freer to provide aid in dying to terminally ill patients in the wake of the state supreme court decision.

"Montana physicians can feel safe that in providing aid in dying they don't run risk of criminal prosecution," she said. "We know aid in dying happens in every state, even where the legality is unclear. In Montana, this [decision] brings clarity to this issue."

Ms. Tucker added that most medical care "is not governed by statute; it's governed by the standard of care and best practices. So most physicians will approach aid in dying in Montana as something regulated by the standard of care. I think what's going to happen with Montana [is that this case] will move aid in dying into normal medical practice that's governed by the standard of care and we'll get away from the notion that there needs to be elaborate statutes."

As to whether other states will adopt aid-in-dying statutes, Mr. Zaremski made the analogy that "gay marriage and rights for gay couples was an unknown and foreign concept, and now it's inching forward bit by bit, so maybe someday aid in dying will be the norm and not the exception." ■

POLICY & PRACTICE

WANT MORE HEALTH REFORM NEWS? SUBSCRIBE TO OUR PODCAST — SEARCH 'POLICY & PRACTICE' IN THE ITUNES STORE

FDA: Reduce Radiation Exposure

The Food and Drug Administration has launched an initiative to reduce unnecessary radiation exposure from three types of medical imaging procedures: CT, nuclear medicine studies, and fluoroscopy. The FDA said it will issue targeted requirements for device manufacturers to develop safer technologies and to provide training to support safe use. In addition, the agency said it will help develop a patient medical imaging history card for patients to track their own medical imaging history and share it with their physicians. The FDA also recommended that professional societies continue to develop diagnostic radiation reference levels for medical imaging procedures and increase their efforts to develop one or more national registries for radiation doses. "The goal of FDA's initiative is to support the benefits associated with medical imaging while minimizing the risks," Dr. Jeffrey Shuren, director of the FDA's Center for Devices and Radiological Health, said in a statement.

Cephalon Reveals M.D. Payments

Drug manufacturer Cephalon said it paid more than 900 physicians for speaking services or consulting in 2009. Most physicians received less than $10,000, while 17 earned more than $100,000, the drug company said in its online disclosure. Although the 2009 figures include only fees for speaking and consulting for Cephalon, the company said it has begun tracking other "items of value" it provides to health care professionals, including meals, educational items, and payments for research studies, and will disclose those online beginning in March 2011. In posting the payments online, Cephalon became the first drug manufacturer to report payments to physicians under a corporate integrity agreement with the Department of Justice. The 2008 agreement resulted from a $425 million settlement of charges that Cephalon marketed three drugs for unapproved uses. Other drug makers will be disclosing payments to physicians under similar corporate integrity agreements.

FEMA to Pay $475 Million to La.

A federal arbitration panel has ruled that the Federal Emergency Management Agency must pay nearly $475 million to replace Charity Hospital in New Orleans, which sustained massive damage in Hurricane Katrina. The panel's decision, which is binding, gave Louisiana nearly all the money it had requested and means the state can afford to build the new $1.2 billion academic medical center it wants to replace Charity Hospital. Louisiana officials had pressed FEMA for 4 years to agree to replace Charity rather than repair the facility, but FEMA had argued that the state could repair the hospital for much less money. The binding arbitration between the state and FEMA was mandated by language inserted into the federal stimulus bill last year by Louisiana Sen. Mary Landrieu (D).

Report: U.S. Not Ready for Attack

The United States is unprepared for a major attack with biological weapons and has fallen behind in its capability to rapidly produce vaccines and therapeutics, which are essential for responding to a biological threat, a congressionally appointed commission said. "H1N1 came with months of warning. But even with time to prepare, the epidemic peaked before most Americans had access to vaccine. A bioattack will come with no such warning," said the report from the Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism. "A revolution in biotechnology continues, expanding potentially dangerous dual-use capabilities across the globe." The commission gave the government an "F" grade for failing to develop the capability to effectively counter a biological attack.

More Americans Buy GI Drugs

Almost 10% of Americans purchased at least one prescription gastrointestinal drug in 2007, compared with fewer than 7% in 1997, according to the Agency for Healthcare Research and Quality. Total expenses for prescription GI drugs rose from $7 billion in 1997 to $18.9 billion in 2007. The total number of prescriptions filled increased from nearly 78 million in 1997 to more than 158 million in 2007, the report said. The average expenditure for a single GI prescription drug increased from $90 to $120, and the average annual expense per person rose from $386 to $653 for those with at least one GI-related prescription. Those aged 65 years and older were most likely to use prescription gastrointestinal drugs, the AHRQ report said.

FDA Warns Lilly on Promos

The FDA has warned Eli Lilly and United Therapeutics that a Web page and two patient videos were in violation of the agency's promotional rules. Adcirca (tadalafil) is indicated for improving exercise ability in pulmonary artery hypertension patients. The FDA cited the Web page for failing to include any contraindications, warnings, or precautions for the drug, which "misleadingly suggests that Adcirca is safer than has been demonstrated," said the warning letter. The two patient videos "seriously misrepresent what is known about the efficacy of Adcirca," the FDA said.

—Jane Anderson