

CITATION: McKitty v. Hayani, 2017 ONSC 6697
COURT FILE NO.: CV-17-4125
DATE: 20171107

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TAQUISHA DESEREE MCKITTY, BY HER SUBSTITUTED
DECISION MAKERS, STANLEY STEWART AND ALYSON
SELENA MCKITTY, Applicant

AND:

DR. OMAR HAYANI AND WILLIAM OSLER HEALTH CENTRE,
BRAMPTON CIVIL HOSPITAL, Respondent

BEFORE: Shaw J.

COUNSEL: Hugh Scher, counsel for the Applicant
Erica Baron, counsel for the Respondent

HEARD: November 6, 2017

ENDORSEMENT

Background

[1] The Applicant seeks leave to permit videotaping of Taquisha McKitty (“Taquisha”) for a period of 72 hours, by a number of cameras, positioned at different angles, at William Osler Health Centre, Brampton Civic Hospital (“William Osler”). Taquisha has been at William Osler since September 14, 2017 after being found unconscious on a sidewalk. She was transported to William Osler where she has remained.

[2] By September 18, 2017, Taquisha required a ventilator to support her breathing. On September 20, 2017, she was examined by Dr. Hayani, a critical care physician. He and Dr. Patel, another critical care physician used the testing set out in the Canadian Medical Association Journal (“CMAJ Guideline”) to determine if Taquisha met the criteria for neurological determination of death (“NDD”), commonly referred to as brain death. As both doctors determined that the criteria were met, Taquisha was declared brain dead and Dr. Hayani signed a death certificate on September 21, 2017 which indicated that Taquisha died on September 20, 2017.

[3] This application was commenced on September 21, 2017 and on that date, an *ex parte* order was granted that Taquisha not be removed from the ventilator.

[4] On September 22, 2017, Dr. Healey, a critical care physician at William Osler repeated the testing for death by neurological criteria. He found that the criteria for NDD were met.

[5] This matter was in court again on September 28, 2017. On that day, I ordered that the matter be adjourned to October 17, 2017 and in the interim, Dr. Byrne, a physician who was retained by the Applicant, could make arrangements to do an investigation of Taquisha, including performing tests. I also ordered that Dr. Baker, a critical care physician at St. Michael’s Hospital in Toronto, could

examine Taquisha and administer tests to determine if Taquisha met the neurological criteria for death. All tests were to be completed by October 5, 2017.

[6] When this matter was back in court on October 17, 2017, the Respondent had filed an Affidavit from Dr. Baker. He assessed Taquisha on September 30, 2017 and found that Taquisha demonstrated all the criteria for identifying and declaring death using neurological criteria as per the CMAJ Guidelines. While Dr. Byrne visited Taquisha twice, on September 27 and 28, 2017 and made observations of her, he did not conduct any other tests.

[7] By way of oral and then written reasons dated October 21, 2017, I found that Dr. Byrne, who had been proffered by the Applicant as an expert, was not qualified to give expert evidence. I then granted the Applicant a further adjournment to November 6, 2017 for the purpose of retaining another expert.

[8] On November 6, 2017, after hearing submissions, I granted a further adjournment as the Applicant did not have sufficient time to retain an expert to assess Taquisha and then prepare a report to provide assistance to the court.

Movements of Taquisha's Body

[9] Affidavits sworn by Stanley Stewart, Taquisha's father, have been filed with the court describing movements of her body since she was declared brain

dead. Other Affidavits have been sworn by Marquel Stewart, Taquisha's brother and Angela Downey, Taquisha's cousin, describing movement that they observed. In addition, cell phone videos were filed with the court recording some of the observed movement. These videos have been reviewed by Dr. Baker, Dr. Healey and by Dr. Shewmon, a neurologist from California. The Applicant filed an Affidavit from Dr. Shewmon in which he described the movements he observed on the videos. I note that based on his CV, Dr. Shewmon has experience in dealing with brain death.

[10] The Applicant's position is that 72 hours of videotaping of Taquisha is required to provide an objective and systematic assessment of her movements. The Applicant's position is that her movements, which are alleged to be responsive to commands, are indicative of brain function and not spinal reflexes.

[11] Both Dr. Healey and Dr. Baker have given evidence that the movements of Taquisha's body, as shown on the videos, are consistent with spinal reflexes or automatisms and not reflective of brain function. I note that Dr. Healey and Dr. Baker have both had the opportunity to observe and assess Taquisha whereas Dr. Shewmon has only seen the videotapes provided by the Applicant.

Ancillary Tests

[12] According to the CMAJ Guidelines, when it is impossible to complete the minimum criteria for a neurological determination of death, further testing should

be performed. While the Respondent's position is that ancillary testing is not required, given the Applicant's views that Taquisha's movements were more than spinal reflexes and therefore not consistent with brain death, further tests were conducted by Dr. Baker on October 12, 2017. Despite submissions from the Applicant's counsel, there is no evidence that these tests were conducted for any reason other than to respond to the Applicant's views about Taquisha's movements.

[13] The first test was a Nuclear Brain Blood Flow Study to determine if there is any blood flow to the brain over a period of time. According to Dr. Healey's Affidavit sworn November 2, 2017, these tests demonstrated that there was no blood flow and no perfusion of blood to Taquisha's brain. According to Dr. Healey, when there is no blood flow to the brain, the brain will die and death of the brain cannot be reversed even if blood flow could be reinstated.

[14] The second test was a somatosensory evoked potentials ("SSEP") which determines if there are any electrical signals to the brain when the limbs are stimulated. According to Dr. Healey, the test results indicate that there is no electrical activity in Taquisha's brain when her limbs are stimulated. His evidence is that this test also demonstrates that the movements of Taquisha's limbs are spinal reflexes.

[15] These test results were also reviewed by Dr. Shewmon. In paragraph 25 of his Affidavit sworn November 5, 2017, he indicated that he was aware that the Applicant was seeking to videotape Taquisha to determine her responsiveness to verbal commands in a systematic way. He then swore as follows: “Although, given the blood flow results, such a recording may not be expected to demonstrate responsiveness, I believe that the Applicant’s request is not unreasonable in light of the atypicality of the movements, their duration and the Applicant’s conviction that some movements are in response to command.”

[16] In paragraph 26, Dr. Shewmon deposes that “If such a video were to demonstrate only a chance relationship between the commands and the movements that could help the family accept the likely spinal origin of the movement and resolve the conflict that faces the court.”

Analysis

[17] I was not provided with any judicial authority to address the issue of videotaping after there has been a determination of death by neurological criteria. I have not been provided with any scientific literature that supports the proposition that such videotaping should be used in order to determine if brain death has or has not occurred. In reaching my decision, therefore, I have considered the medical evidence of Dr. Hayani, Dr. Healey, Dr. Baker and Dr. Shewmon. I am also mindful of the Applicant’s belief that Taquisha’s movements

are in response to commands and reflective of brain function despite the determinations made by the doctors who have assessed her and the results of the ancillary tests that have now been conducted.

[18] The evidence of all doctors who have sworn Affidavits in this matter is that there can be bodily movements after a determination of brain death and that it can be difficult for family members to determine if those movements are spinal reflexes, which are not governed by brain function, or something more volitional in nature.

[19] While this is a tragic situation, I must consider the evidence that is before me to determine if 72 hours of videotaping, by a number of cameras, would be of any assistance to the court given the results from four physicians who determined that the criteria for NDD has been met and the results of the ancillary tests.

[20] While an adjournment has been granted so that the Applicant can retain an expert, that does not mean that videotaping should be ordered on the basis that Taquisha will remain on a ventilator pending the adjournment. I must be satisfied that the videotaping will be of assistance to the court in making a final determination of this matter.

[21] There is no evidence before the court supporting the request for the duration of videotaping that is proposed. There is no medical opinion or scientific

support for the proposal that 72 hours of continuous videotaping is required to provide an objective and systematic assessments of Taquisha's movements. While Dr. Shewmon's opinion is that 72 hours is required, he does not identify why such a length of time is necessary.

[22] Furthermore, there is no scientific literature before the court regarding the use of videotaping to determine if brain death has occurred. The only evidence is that Dr. Shewmon was consulted on a case involving Jahi McMath from the United States. According to Dr. Shewmon, he had experience reviewing her videos in great detail to assess her alleged responsiveness to command.

[23] Evidence that videotaping was used in one case in the United States, the particulars of which are not before this court, is insufficient to support a request for 72 hours of videotaping when I consider the totality of the medical evidence before the court.

[24] In paragraph 24 of his Affidavit, Dr. Shewmon acknowledges that the blood flow test results strongly implies that Taquisha's movements are likely of spinal origin despite their atypical appearance and duration. Nonetheless, Dr. Shewmon's opinion is that videotaping may help the family accept the likely spinal origin of the movements.

[25] While this is difficult for the Applicant, this court should not make orders for ongoing testing, which I consider videotaping to be, unless satisfied, after

considering all the medical evidence, that such testing is necessary and will be of assistance to this court.

[26] Dr. Shewmon relied on an article entitled "*Brain Death: Associated Reflexes and Automatism*" authored by Samy Jain and Michael DeGeogia. That article described observed movements after brain death and noted that head-turning was a movement observed after a finding of brain death. This differs from Dr. Shewmon's evidence as set out in paragraph 19 wherein he deposes that head- turning has not been described in the literature on spinal movements in brain-dead patients. That was the one specific movement described by Dr. Shewmon from the videotape that he observed that he stated was not indicative of a spinal reflex.

[27] Dr. Shewmon deposed that this article suggests that spinal cord reflexes and automatism associated with acute brain death do not last longer than 72 hours. Dr. Baker's evidence, however, was that he was unaware of any study where ventilation was continued more than 72 hours after a declaration of brain death. It was also his evidence that there was no reason from a physiological perspective that spinal reflexes would stop after 72 hours. I was not provided with any scientific literature documenting studies of movement or lack thereof after 72 hours of ventilation that would support the Applicant's position that the

duration of Taquisha's movements since the date she was declared brain dead are atypical of someone declared brain dead.

[28] The Applicant's position is that Taquisha's movements are atypical given their frequency, intensity and duration. In paragraph 3 of his Affidavit sworn October 15, 2017, Dr. Baker deposed that he had reviewed the videotapes and that the movements were consistent with spinal reflexes. He also deposed that the frequency of the movements was not relevant to the source of the movement as spinal reflexes can occur once or continuously. He also deposed that the nature and extent of the movements was consistent with spinal reflexes, including head movements. Dr. Baker did not describe the movements to be atypical.

[29] In paragraph 19 of his Affidavit sworn November 5, 2017, Dr. Shewmon deposes that some of the movements which he described as complex, squirming movements that involve multiple body parts, cannot be described with any degree of certainty to be of spinal origin.

[30] While these two opinions regarding the nature of Taquisha's movements differ, I prefer the opinion of Dr. Baker who has also assessed Taquisha whereas Dr. Shewmon has not. I have also considered the evidence of Dr. Healey whose evidence was that he also reviewed the cell phone videotapes and that the movements were consistent with spinal reflexes and that these were the type of

movements that would be expected after a declaration of brain death. It was also his evidence that that he was unaware of any physiological reason why body movements would stop after any period of time.

[31] Given the test results to date from the various physicians who have examined Taquisha and Dr. Shewmon's evidence that the blood tests results strongly imply that Taquisha's movements are likely spinal in origin, I am not satisfied that there is sufficient evidence that videotaping for 72 hours would be of any assistance to the court. There is insufficient evidence to support the position that the observations regarding Taquisha's movements that have been made by the various doctors who have assessed Taquisha to date are inadequate to address the nature of her movements and whether those are spinal reflexes or reflective of brain function.

[32] The Applicant has been granted an adjournment to retain an expert to assess Taquisha and provide a report to the court. That assessor, who the Applicant indicates should be a neurologist, will be in a position to observe Taquisha during the assessment and comment on her bodily movement.

[33] The Respondent raised issues with privacy and logistical concerns for the videotaping. Had I found that there was support for the request for videotaping for a 72 hour period, I would not have considered such issues to prevent the

testing. I am certain that with accommodations such issues would have been addressed.

[34] I therefore decline the Applicant's request for 72 hours of videotaping of Taquisha.

Shaw, J.

Date: November 7, 2017

CITATION: McKitty v. Hayani, 2017 ONSC 6697
COURT FILE NO.: CV-17-4125
DATE: 20171107

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TAQUISHA DESEREE MCKITTY, BY HER
SUBSTITUTED DECISION MAKERS,
STANLEY STEWART AND ALYSON SELENA
MCKITTY, Applicant

AND:

DR. OMAR HAYANI AND WILLIAM OSLER
HEALTH CENTRE, BRAMPTON CIVIL
HOSPITAL, Respondent

ENDORSEMENT

Shaw J.

Released: November 7, 2017