When Is the Patient Dead? When May California Clinicians Stop Treating Dead Patients? Growing Challenges to the Legal Status of Brain Death

Cedars-Sinai Medical Center, Ethics Noon Conference • December 21, 2016
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Thank you for inviting me back
Brain death

New science
New ethics

Old science
Old ethics

Brain death is different

Unraveled

>40 years

Distinguish

Balmy
Brain death in California courts

Anahita Meshkin

Lisa Avila

Jahi McMath

Roadmap

4 parts
1. What is brain death?

2. Growing resistance to BD

3. Clinician duties at BD

4. Legal attacks on BD

Part 1 of 4
Brain Death

1959

1968

Wrong

Risk averse clinicians want certainty & clarity

A Definition of Irreversible Coma
Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death

Legislation Proposed to Recognize Brain Death

If this position is adopted by the medical community, it can form the basis for change in the current legal concept of death. No statutory change in the law should be necessary, since the law treats this question essentially as one of fact to be determined by physicians.
An individual . . . . is dead . . . who has sustained either
(1) irreversible cessation of circulatory and respiratory functions, or
(2) irreversible cessation of all functions of the entire brain
Legally settled since 1980s

Remains settled (legally)

“durable worldwide consensus”

UDDA beyond California

All 56 US jurisdictions (narrow exception NJ)

BUT

“well settled yet still unresolved”
Clinic duties after BD

“After a patient . . . brain dead . . . medical support should be discontinued.”

Consent not required

“Once death . . . pronounced, all medical interventions should be withdrawn.”

Dead → Not a patient
Not a patient → No duty to treat

Also a bright line rule

BUT

Dead → No duty treat

Dead → Temp duty “treat”

1983
Dority v. Superior Court, 145 Cal. App. 3d 273

"does not mean . . . doctors . . . green light to disconnect a life-support . . . without consultation . . . ."

"We are in accord with . . . deferring . . . until the initial shock . . . dissipates; and would encourage other . . . providers to adopt a similar policy."

**Obiter dictum**

"by the way"  
"said in passing"

2008

"ought to be a law" contest

2007

Constituent's mother experienced severe stroke

Eventually diagnosed as neurologically dead.

Physician took 15 hours to notify the family

Mike Eng
Family given only 3 hours to pay their final respects
1 family member out of town
Family's spiritual leader could not be reached.

California Health & Safety Code § 1254.4

AMENDED IN ASSEMBLY APRIL 3, 2008
CALIFORNIA LEGISLATURE—2007-08 REGULAR SESSION
ASSEMBLY BILL No. 2565

Introduced by Assembly Member Eng
February 22, 2008

An act to add Section 1254.4 to the Health and Safety Code relating to health facilities.

Amendment.

What

“hospital shall adopt a policy for providing family or next of kin with accommodation”

“continue only previously ordered cardiopulmonary support.”

“No other medical intervention is required.”

How long

“reasonably brief period”

“amount of time . . . to gather family . . . at . . . bedside”
“in determining what is reasonable . . . consider the needs of other patients and prospective patients in urgent need of care.”

Early versions of the bill – 1 or 2 days

<24 x x x x
24 x x x x x x
36
48 x
72 x x x

Usually 2-3 days

BUT

Accommodation not enough for some

Part 3 of 4
Surrogate resistance is growing

More families dispute DDNC

50% report families request organ support after DNC

“in recent months... families of... patients determined... dead by neurologic criteria have rejected this diagnosis”


13 ethics consults “family members asked... to deviate from standard procedures following brain death”


56 DDNC (2014-16) Conflict in 10%
Many cases going to court

Part 4 of 4

5 attacks on brain death

Attack 1 of 5

Confusion Mistrust

Wrong before → wrong now too
Tawil et al, "Family presence during brain death evaluation: a randomized controlled trial" - Crit Care Med. 2014 Apr;42(4):934-42

**Attack 2 of 5**

- Want religious exemption

**Contrast 1254.4**

- Religious objection → No death by BD

- Dead → No duty treat

- Dead → No duty treat

- Dead → Temp duty “treat”

NY CA IL change this
NJ

Opposite

Dead ➔ No duty treat
NJ changes this

Changes definition itself

“[D]eath . . . shall not be declared upon the basis of neurological criteria . . . when . . . violate the personal religious beliefs . . .”

Indefinite accommodation

Until death by CP criteria

California rejected (twice)
1986

Richard Katz

1987

Rejected everywhere outside NJ

AMENDED IN ASSEMBLY APRIL 10, 1986
CALIFORNIA LEGISLATURE—88TH REGULAR SESSION
ASSEMBLY BILL
No. 311

Introduced by Assembly Member Katz
February 13, 1990

An act to amend Section 1250.5 of the Health and Safety Code, relating to health care facilities.

LEGISLATIVE COUNCILS REPORT
AB 311, as amended, Katz. Health care facilities: general acute care hospitals.

AMENDED IN ASSEMBLY APRIL 6, 1987
CALIFORNIA LEGISLATURE—88TH REGULAR SESSION
ASSEMBLY BILL
No. 1290

Introduced by Assembly Member Katz
March 4, 1987

An act to amend Section 1250.5 of the Health and Safety Code, relating to health care facilities.

LEGISLATIVE COUNCILS REPORT

Motl Brody (DC)

Shahida Virk (Mich.)

Cho Fook Cheng (Mass)
BUT

Israel Stinson

Attack 3 of 5

Consent for apnea test

Final confirmatory test before declaring death

Remove ventilator

No drive to breathe → dead

No right to treatment after death

Other than brief accommodation
Prevent from being declared dead

Refuse consent to apnea test

No apnea test
    No determination of death

No DDNC
    Treatment duties do not end

Effectively same as NJ

Prevent determination instead of declaration

Do clinicians need consent for apnea test? Yes

Allen Callaway
Billings, Montana

6-year-old “Drowned” July 22, 2016

Tasha Dawn Stone

Consent required if risks

1. SWH’s request for a judicial declaration permitting SWH to conduct testing on A.C. to determine his brain activity over the guardian’s objections is denied.

2. A.C.’s guardian and mother has the sole authority to make medical decisions on A.C.’s behalf, including the decision as to whether any future brain functionality examinations should be administered.

Do clinicians need consent for apnea test?

MT said “yes”

KS also said “yes”

Brett Shively
2yo “drown”
Wichita, 2006

Forbid brain viability exam
TRO 02/01/06
D/C home 03/17/06

VA said “no”

MT & KS said “yes”

¼ neurologists say need consent
IN THE
SUPREME COURT OF VIRGINIA
Record No. 161321

PATRICK B. LAWSON and
ALISON J. LAWSON,
Appellants,

v.

VCU MEDICAL CENTER, d/b/a
CHILDREN'S HOSPITAL OF RICHMOND
AT VCU, and d/b/a VCU HEALTH SYSTEM,
Appellees,

IN RE: MIRANDA GRACE LAWSON
Appeal From The
Richmond Circuit Court — Case No.: CL15-2358

VCU HEALTH SYSTEM AUTHORITY’S
BRIEF IN OPPOSITION

New strategy

Miranda Lawson
Richmond, Virginia

2-year-old
Choked popcorn - May 11, 2016

June 10, 2016
The respondent is hereby allowed to administer the apnea test on the subject infant child, who is two years of age, under such mitigating and supportive measures as may be medically necessary and required for the purpose of a determination of the existence, extent, and viability of brain stem activity and thereafter to make
To the Dir of Israel & Senor
I will be stepping away from the hospital scene. Please do not hesitate to call me if anything happens with my son. I’m not in my own presence. Please do NOT govern in stealth or in silence. 
Please maintain my concern or presence. Thank you so much.

P.S. I claim on any agenda for that may be presented.

On Israel Stinson

Aug. 9, 2016
to CHLA

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Israel Stinson (CA)

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Upshot

Dead → No duty to treat

US ICUs will have more (probably) dead kids

Often full
Others denied opportunity of ICU benefit
Attack 4 of 5

Most troublesome attack

Are medical criteria for DDNC legally sufficient?

AAN does not measure what the UDDA requires

April 1, 2015
Catastrophic anoxic brain injury during exploratory laparotomy

May 28, 2015
Met AAN criteria for brain death

Dad: “she is not dead”
**Trial court**
AAN criteria met
Aden *is* dead

**Aden’s father**
Appeals to Nevada Supreme Court

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Irrelevant if Aden meets AAN criteria
They are not the “right” criteria

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AAN does not measure what the UDDA requires

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2 reasons

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1

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UDDA

“irreversible cessation . . . all functions of . . . entire brain”
BUT

Brain dead people do stuff

Heal wounds
Fight infections
Stress response

AAN measures only cessation of some functions of part of brain

Supposed to measure:
“all functions”
“entire brain”
UDDA

“must be made in accordance with accepted medical standards”

BUT

Number of physicians
Qualifications
How tests administered

Hailu = AAN
AAN ≠ UDDA

Upshot

Legal standard may demand more than medical criteria
UDDA

“irreversible cessation... all functions of... entire brain”

Deferred to medical profession how to measure

UDDA requires
Clinicians measure

May need to amend
Legal criteria
Medical criteria
or Both

Jahi McMath

Attack
5 of 5

Jahi McMath
Dec. 12, 2013
Declared dead

Lost lawsuits against hospital

Mar. 2015
Med Mal lawsuit

Seeking future medical expenses

Dead people do not have medical expenses

Transferred to NJ
Sustained organ support over 3 years!!
Re-litigate status as alive

Defendants Demurrer

Collateral estoppel

If true, allegations are sufficient

Affirmed on appeal

Chance to prove

Does not attack the AAN criteria themselves

No longer meets AAN criteria

Contrast Aden Hailu
Aden

Hailu = AAN
AAN ≠ UDDA

Jahi

AAN = UDDA
Jahi ≠ AAN

Upshot

Argument over facts, not law

If alive, must reexamine medical criteria for DDNC

Death should be irreversible

Accuracy is essential
One final case used by CMA

But we've got to **verify** it legally, to see if she is morally, ethnically spiritually, physically positively, absolutely undeniably and reliably Dead

And she's not only **merely** dead, she's really most **sincerely** dead.

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**Conclusion**

Life | Death

Life | Death
Debate has been academic

“critics and skeptics have not gained much traction with lawmakers”

Not true anymore

Now it is a public policy question

Not just more scrutiny more debate

Fundamental reassessment of settled laws & practices
Medical Futility Blog

Since July 2007, I have been blogging, almost daily, to medicalfutility.blogspot.com. This blog focuses on reporting and discussing legislative, judicial, regulatory, medical, and other developments concerning medical futility and end-of-life medical treatment conflicts. The blog has received over 2 million direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like WestlawNext and Bioethics.net.


Brain Death: Legal Duties to Accommodate Religious Objections 147 CHEST e69 (2015).


Pregnant and Dead in Texas: A Bad Law, Badly Interpreted, LOS ANGELES TIMES (Jan. 16. 2014) (with Art Caplan).


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