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

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Conflict of interest

Based upon data from the largest ongoing prospective cohort study in history, there is a very high likelihood (RR = ∞, p<0.0001) that I will die

Many not happy with this set of options

“Elect” to treat dead as alive

6 parts

So too with brain death. Many want a third option
What is brain death

Clinician duties at BD

Growing resistance to BD

Reasons for resistance

Responding to objections
3 legal attacks on BD

Brain Death 1968

Wrong

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
UDDA

All 56 US jurisdictions
(narrow exception in NJ)

Legally settled since 1980s

Remains settled (legally)

“durable worldwide consensus”

2008

Total brain failure = death

Controversies in the Determination of Death
A White Paper by the President’s Council on Bioethics

Acknowledge conceptual problems
"After a patient... brain dead... medical support should be discontinued."

"Once death has been pronounced, all medical interventions should be withdrawn."

Consent is not required to stop physiological support.

Also a bright line rule.
BUT

Part 3 of 6

Surrogate resistance is growing

More families dispute DDNC

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


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


56 DDNC 2014-2016 Conflicts in 10%
August 2016

NEUROLOGY

50% report families request continued organ support after DNC

Many cases going to court

Lisa Avila

Alan Sanchez

Israel Stinson

Part 4 of 6

Why do these families resist

Michael Todd v. University of Kansas Hospital
“Since there is a heartbeat (and he is warm), he is alive.”

“He’s in a coma.”

“He’s in a coma.”

“With rehab/time he’ll get better.”

“Brain dead” implies not really “dead”
"she is 'brain dead' and . . . being kept alive by life support to enable the family to say their goodbyes."

*Daily Mail, 03-18-09*

**Miracles**

If the doctors treating your family member said futility had been reached, would you believe that divine intervention by God could save your family member?  
Yes 57.4%  
No 42.6%
Prognostic Mistrust

wrong before

wrong now
wrong before wrong now

Clinicians were correct

But many other times, wrong

Medical error
Medical error—the third leading cause of death in the US

<table>
<thead>
<tr>
<th>Cause</th>
<th>Deaths</th>
</tr>
</thead>
<tbody>
<tr>
<td>Heart disease</td>
<td>600,000</td>
</tr>
<tr>
<td>Cancer</td>
<td>600,000</td>
</tr>
<tr>
<td>Medical error</td>
<td>400,000</td>
</tr>
<tr>
<td>COPD</td>
<td>140,000</td>
</tr>
<tr>
<td>Stroke</td>
<td>130,000</td>
</tr>
<tr>
<td>Accidents</td>
<td>120,000</td>
</tr>
</tbody>
</table>

**Los Angeles Times**

Close call in death ruling of potential organ donor (April 12, 2007)

John Foster at Fresno Community

**DDNC medical error**

Anahita Meshkin

Sept. 15, 1989 DDNC
Sept. 21 social worker
Sept. 22 parents file
Oct 13 independent expert
Oct 18 order
Appeal dismissed (not dead)

**Alvarado**

Anahita Meshkin

Sept. 15, 1989 DDNC
Sept. 21 social worker
Sept. 22 parents file
Oct 13 independent expert
Oct 18 order
Appeal dismissed (not dead)
They were declared brain dead. It was written in their chart as such. And here they are, sitting up talking to me.

More culpable errors

Confusion & mistrust exacerbated

Negligent errors

$1.2 million settlement in 'organ harvest' case

Taphophobia
Taphophobia: people want to be sure

Part 5 of 6

Strategies to avoid conflict
Diagnostic confusion

Do not use the term “brain death”

Use decision aids

Mistrust
2 Independent second opinion

Part 6 of 6

3 attacks on brain death

But some conflicts are intractable

Attack 1 of 3

Accommodation after death
Not questioning brain death criteria
Not questioning application to this patient
But want continued organ support

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

“reasonably brief period”
24 - 48 hours

Indefinite accommodation
(until CP death)
Uniformly denied

Better response

**Expand** duty of accommodation to other states

Dead → No duty treat

Dead → Temp duty treat

1

BD imposes on profound beliefs
Accommodation has worked for decades in 3 populous states.

No complaints

Brain death < 1% hospital deaths

Objections < 2% US population

0.3 Japanese Shinto
0.3 Orthodox Jew
0.3 Native American
0.7 Buddhist

2% of 1% = 0.0002
1 in 5000 deaths
400 cases nationwide annually

Most in CA, NY, IL, NJ

Minimal net marginal burden

4

Limited in type

“hospital is required to continue only . . . cardiopulmonary support. No other medical intervention is required.”

5

Limited duration

24 h
“in determining what is reasonable, a hospital shall consider . . . needs of other patients . . . .”

6

Conceptual flaws

Value laden judgment about when it is worthwhile to continue physiological support

“reasonably brief period”
24 - 48 hours

Attack 2 of 3

Consent for apnea test

Final confirmatory test before declaring death
Remove ventilator

No drive to breathe $\rightarrow$ dead

No right to treatment after death

Prevent from being declared dead

Refuse consent to apnea test

No apnea test

No determination of death

No DDNC

Treatment duties do not end

Do clinicians need consent for apnea test?

Yes
Allen Callaway

Billings, Montana

6-year-old “Drowned” July 22, 2016

St. Vincent Healthcare SCL Health

Tasha Dawn Stone

Consent required if risks

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

II. A.C.’s guardian and mother has the sole authority to make medical decisions on A.C.’s behalf, including the decisions as to whether any future brain functionability examinations should be administered.
Do clinicians need consent for apnea test?

MT said “yes”

KS also said “yes”

MT & KS said “yes”

22% neurologists say need consent

Brett Shively
2yo “drown”
Wichita, 2006

Feb. 1, 2006
TRO forbid brain viability exam
Discharged home March 17
VA said “no”

Mirranda Lawson

Richmond, Virginia

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

June 10, 2016

The respondent is hereby allowed to administer the spina test on the subject infant child, who is two years of age, unless 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 or recommend any treatment or in the alternative, make a determination of death as provided by law pursuant to Va. Code § 54.1-2972.

IN THE
SUPREME COURT OF VIRGINIA
Record No. 161321
PATRICK B. LAWSON and
ALISON J. LAWSON,
Appellants,
v.
VCU MEDICAL CENTER, INC.
CHILDREN’S HOSPITAL OF RICHMOND
AT VCU, and VCU HEALTH SYSTEM,
Appellees.
IN RE: MIRANDA GRACE LAWSON
Appeal From The
Richmond Circuit Court – Case No.: CL16-2358
VCU HEALTH SYSTEM AUTHORITY’S
BRIEF IN OPPOSITION

CP this week (7 mo later)
Upshot

Dead → No duty treat

Dead → No duty treat

US ICUs will have more (probably) dead kids

Often full
Others denied opportunity of ICU benefit

Attack
3 of 3

Most troublesome of the 3 legal attacks

Are medical criteria for DDNC legally sufficient?

AAN does not measure what the UDDA requires
Aden Hailu

Reno, Nevada

Aden Hailu

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

Supreme Court of Nevada
November 2015
Irrelevant if Aden meets AAN criteria. They are not the “right” criteria.

DDNC requires “irreversible cessation . . . all functions of the . . . entire brain”


Trial court did not consider whether AAN measures “irreversible cessation . . . all functions of the . . . entire brain”

Alan She worm

Heal wounds
Fight infections
Gestate fetus
Stress response

UMN, J Neurosurgery 35(2): 211-18
Brain dead subjects sexually responsive

The Beating Heart Donors
They urinate. They have heart attacks and bedsores. They have babies. They may even feel pain. Meet the organ donors who are “pretty dead.”

By Tali Trevis | Wednesday, May 02, 2012

REVIEWED BY: KOAN THROUGHOUT RENES
DDNC “must be made in accordance with accepted medical standards.”

Trial court did not consider whether AAN are “accepted medical standards”

Number of physicians
Qualifications
How tests administered

Legal standard may demand more than medical criteria

Upshot
May need to amend
Legal criteria
Medical criteria
Both

Attack
3 of 3
part 2

Jahi McMath

Dec. 12, 2013
Declared dead

Lost lawsuits against hospital
Map
• declare dead
t.f on ophys sup to NJ
Transferred to NJ
Sustained on organ support almost 3 years
Mar. 2015
Med Mal lawsuit

Seeking future medical expenses

Dead people do not have medical expenses

Re-litigate status as alive

Defendants
Demurrer

Collateral estoppel

If true, allegations are sufficient
Affirmed on appeal

Upshot

Does not attack the AAN criteria themselves

No longer meets AAN criteria

Contrast Aden Hailu

Hailu = AAN
AAN ≠ UDDA

AAN = UDDA
Jahi ≠ AAN

Argument over facts, not law

If alive, must reexamine medical criteria for DDNC
Death should be irreversible

Accuracy is essential

One final case from Kansas

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

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

Conclusion
“well settled yet still unresolved”

Debate has been academic

Now it is a public policy question

Not just more scrutiny more debate

Fundamental reassessment of settled laws & practices

References

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 republishers 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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