Prefatory Remarks

Southern California Bioethics Committee Consortium
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Roadmap

1. Legal duties after DDNC
2. History of 2008 CA accommodation statute
3. Meaning of 2008 statute

Determination of Death by Neurological Criteria: What Is Reasonable Accommodation? Are We Doing It?

International Business Ethics Case Competition (IBECC)
Center for Ethics and Society, Loyola Marymount University, Los Angeles, California
University of St Thomas, Saint Paul, Minnesota

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

**total brain failure** = death

Legally **settled** since 1980s

Remains settled (legally)
All 56 US jurisdictions (narrow NJ exception)

"durable worldwide consensus"

Consent not required to stop LSMT

Dead → Not a patient

Not a patient → No duty to treat

The rule almost everywhere

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

"Once death has been pronounced, all medical interventions should be withdrawn."
California rule for 34 years

DDNC in California

1974

California Health & Safety Code § 7180

1982

California Health & Safety Code § 7180

History of DDNC Accommodation Laws: NY, NJ, IL

NY, NJ, IL have laws

But custom & practice of accommodation in other states
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.

“Each hospital shall establish and implement a written policy . . . a procedure for the reasonable accommodation of the individual’s religious or moral objection to the determination . . . .”

10 N.Y.C.R.R. § 400.16(e)(3)

Dead → No duty treat

NY changes this
NY
Changes duties to treat after DDNC

1. Hospital discretion to write policy
2. Only for objections that are religious or moral
3. Only “reasonable” accommodation

1991

Did what NY originally planned:
Religious exemption

New York | Accommodation | Dead but ongoing rights
---------|---------------|------------------------
New Jersey | Exemption     | Not dead

“The death of an individual shall not be declared upon the basis of neurological criteria . . . when the licensed physician . . . has reason to believe . . . that such a declaration would violate the personal religious beliefs of the individual.”

Dead        No duty treat
NJ changes this

NJ
Changes definition itself

Assures payment
Also directly required
| Shewmon       | 1. Only religious objections  
<table>
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<th>2. Only objections of the individual</th>
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<td>80% &lt; 4 weeks</td>
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<td>20% &gt; 4 weeks</td>
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<tr>
<td>10% &gt; 8 weeks</td>
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<td>5% &gt; 6 months</td>
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Barnert Hospital v. Moreno (NJ. Sup. 1998)

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**2007**

“Every hospital must adopt policies and procedures to . . . take into account the patient's religious beliefs concerning the patient's time of death.”

**2008 - 2015**

MA  Cho Fook Cheng  
DC  Motl Brody  
MI  Shahida Virk  

RFRA
Religious objectors may demand **exemptions** from generally applicable laws that substantially burden the objectors’ religious practice.
Close call in death ruling of potential organ donor (April 12, 2007)

John Foster at Fresno Community

They were declared brain dead. It was written in their chart as such. And here they are, sitting up talking to me.

Not in NY, NJ, IL

Only moral & religious
Orthodox Jews
Japanese Shinto
Native Americans
Buddhists

History of DDNC
Accommodation
Laws in CA

1983

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

DDNC “does **not mean** the hospital or the doctors are given the green light to disconnect a life-support device from a brain-dead individual without consultation . . . .”

“We are in accord with . . . deferring to parental wishes until the initial shock of the diagnosis dissipates; and would **encourage** other health care providers to adopt a similar policy.”

**Obiter dictum**
“by the way”
“said in passing”
Would have made CA = NJ

1986

1987

2008
California Health & Safety Code § 1254.4

Made CA like NY

CA broader duty accommodation

NY & NJ: moral & religious objections
CA: other objections too

Examine accommodation duties separately
1. Non-moral
2. Moral, cultural

Non-moral

What does 1254.4 require of hospitals?
What: "reasonably brief period"

Plain language:

1254.4 on non-moral objections

How long:

"hospital is required to continue only previously ordered cardiopulmonary support. No other medical intervention is required."

Accommodation:

What (type)

How long (duration)

"amount of time afforded to gather family or next of kin at the patient's bedside"

"in determining what is reasonable, a hospital shall consider the needs of other patients and prospective patients in urgent need of care."

"reasonably brief period"
“hospital shall adopt a policy for providing family or next of kin with a reasonably brief period”

Delegation
Deference
Discretion

Legislative history
1254.4 on non-moral objections

2007 “there out to be a law” contest

Constituent's mother experienced a severe stroke
Patient eventually diagnosed as neurologically dead.
Physician took 15 hours to notify the family

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

Early versions of the bill suggested 2 days

Annual cost per hospital = $78,000
Based on 1 patient per month at $6500 for 24 hours

Custom, Practice
1254.4 on non-moral objections
Irvine v. California Employment Commission (Cal. 1946)

Delegation
Deference
Discretion

“hospital shall adopt a policy for providing family or next of kin with a reasonably brief period”

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

CHO
Usual: 2-3 days
Actual: 8 days

Hiram Lawrence
CHO
> 1 week

1254.4

Examine accommodation duties separately
1. Non-moral
2. Moral, cultural
4 types of sources
Plain language
Legislative history
Custom & practice
Court rulings

Plain language
1254.4 on moral & cultural objections

“reasonable efforts to accommodate . . . special religious or cultural practices and concerns”

practice and concerns “of the patient or the patient's family”

Not drafted as exemption (indefinite) but as accommodation (definite)

Perverse if mandated to continue DDNC but not for PVS
Dead have more rights than the living?

“A health care provider . . . may decline to comply . . . medically ineffective health care or . . . contrary to generally accepted health care standards . . . .”

Cal. Prob. Code 4735

Delegation
Deference
Discretion

Requires more than “reasonably brief period” to gather family
“give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous.”

Klein v US (Cal. 2010)

Separate sections

(a) “reasonably brief period of accommodation”

(c) “reasonable efforts to accommodate”

(d) “in determining what is reasonable, a hospital shall consider the needs of other patients and prospective patients in urgent need of care.”

Legislative history

1254.4 on moral & cultural objections

1986 bill failed

“special religious or cultural practices and concerns”

“ritual”

Not about continuing physiological support

Rituals within the “reasonably brief period”
Custom & Practice

1254.4 on moral & cultural objections

Look to NY custom since similar rule

Mariah Scoon
Admit Feb. 19, 1996
DDNC Feb 21, 1996
Hospital gives 5 day (Wed - Mon)
TRO to Feb. 28
Hospital wins
Stay to Mar. 7
Transferred on Mar. 1

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

Reasonable accommodation after the determination of death includes the continued provision of ventilator support and routine nursing care for a reasonable period generally not to exceed 72 hours from the time of pronouncement. Treatment for an indefinite period of time after the determination of death is not required.

Los Angeles Times
A Debate Over Life After Death
February 10, 1997
10-year old girl

Transfers:
McMath (CA)
Hamilton (FL)
Koochin (UT)
Scoon (NY)
Shively (KS)
Court rulings

1254.4 on
moral objections

18. Plaintiffs are Christians with firm religious beliefs that as long as the heart is beating, the body is alive. Plaintiff Wolffield has personal knowledge of others who had been diagnosed as brain dead, where the decision makers were encouraged to “pull the plug,” yet they didn’t and they lived. One emerged from legal brain death to where they had cognitive ability and some even fully recovered. These religious beliefs are to provide all treatment, care, and sustenance to a body.
Conclusion

TYPE
Ventilator only
Permit rituals

LENGTH
24 hours
Unless HTO

Flexibility
Sensitivity

References

Medical Futility Blog
Since July 2007, I have been blogging, almost daily, to medicalfutility.blogspot.com. This blog is focused on reporting and discussing legislative, judicial, regulatory, medical, and other developments concerning medical futility and end-of-life medical treatment conflict. The blog has received over 750,000 direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like Westlaw, Bioethics.net, Wellsphere, and Medpedia.
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<td>Pregnant and Dead in Texas: A Bad Law, Badly Interpreted, LOS ANGELES TIMES (Jan. 16, 2014) (with Art Caplan).</td>
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