

Ontario Court of Appeal File No. C65690

**ONTARIO
COURT OF APPEAL**

BETWEEN:

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

Appellant

- and -

DR. OMAR HAYANI

Respondent

NOTICE OF APPEAL

THE APPELLANT, Taquisha Deseree McKitty, by her substituted decision makers, Stanley Stewart and Alyson Selena McKitty, APPEAL to the Court of Appeal from the order of the Honourable Justice Shaw, dated May 26, 2018, made at Brampton, Ontario.

THE APPELLANT asks that the Order be set aside and an Order be granted rescinding the death certificate of Taquisha McKitty and restraining the Respondent from withdrawing life support measures until such time as Taquisha McKitty irrevocably ceases to have cardiorespiratory function or a further order is rendered by the Consent and Capacity Board in respect of ongoing treatment measures for Taquisha McKitty.

THE GROUNDS OF APPEAL are as follows:

COURT OF APPEAL FOR ONTARIO
FILED / DÉPOSÉ
JUL 26 2018
REGISTRAR / GREFFIER
COUR D'APPEL DE L'ONTARIO

Court disregarded Statutory Regime

1. The Court committed a fundamental legal error by disregarding the statutory authority legislatively imposed by the requirements of the *Public Hospitals Act* and its Regulations, the *Vital Statistics Act* and the *Coroner's Act* on Doctors and Coroners to determine and certify death in the exercise of a legally prescribed statutory duty and inherently state function;
2. The Court erred in law in finding that the statutory regime under the terms of the *Public Hospitals Act*, its regulations, the *Vital Statistics Act* and the *Coroner's Act* are constitutional given that they fail to provide for a religious exemption to the application of the neurological criteria for death where a person has a *bona fide* religious belief that is violated by the application of these criteria and where those beliefs can be reasonably accommodated;
3. The Court made a fundamental error of law by ousting the statutory authority relative to the process to determine and certify death in Ontario and supplanting it with the Common Law, and thereby improperly negated review of the application of Taquisha's rights under the *Charter* and *Human Rights Code*;
4. The Court failed to apply the protections of the *Charter* or the *Human Rights Code* or the underlying values relative to the Charter and Code in its definition and application of the Common Law standard for the determination of death at law;

The Court denies that Biological Life is Life at Law

5. The Court erred in law and fact and deprived Taquisha of procedural fairness by denying independent experts the opportunity over a 72 hour period to

- conduct a systematic assessment of her movements that differ in nature, quality and duration from spinal cord reflexes, and which have been ongoing for many months after the disputed determination of death by neurological criteria;
6. The Court erred in finding that Taquisha's head movements are consistent with spinal cord reflexes;
 7. The Court erred in law by not allowing Taquisha's physical movements to be videotaped for a period of 72 hours in order to allow for a proper systematic assessment as to whether or not Taquisha met the requirements for a determination of death by neurological criteria;
 8. The Court erred in disqualifying and striking the expert opinion of Dr. Paul Byrne;
 9. The Court erred in fact and law in finding that Taquisha meets the requirements for death by neurological criteria, particularly given her ongoing biological life, evidence of hypothalamic brain function, and her ongoing physical movements that don't conform to recognized spinal cord reflexes in their nature, quality and duration;
 10. The Court improperly found that Taquisha's ongoing body movements that are not consistent with the nature, quality or duration of recognized spinal cord reflexes can nevertheless give rise to the neurological determination of death;
 11. By accepting death by neurological criteria as legal death, and then by disregarding evidence of hypothalamic brain function, the Court erred by applying a legal definition of death that fails to conform with a biological definition of death and that fails to meet the standard of whole brain death;

12. The Court improperly rejected the evidence of Harvard Bioethics Chair, Dr. Robert Truog in favour of Dr. Baker based upon the determination that the US and Canadian health care systems are fundamentally different. The Court did so based solely on speculation and without any evidence upon which to base its conclusions;

Court denied application of the Charter to the Statutory Duty to Determine Death

13. The Court made a fundamental error of law in finding that the Charter of Rights did not apply to doctors in the exercise of the legislatively prescribed statutory requirement to legally determine and certify death. The doctor is effectively acting as a state actor in carrying out the statutory duty to legally determine and certify death. The doctor is and should be subject to the same *Charter* scrutiny as any other state actor in carrying out this duty, including a coroner;

14. The Court made a fundamental error of law in finding that the State function to determine and certify death was governed by the Common Law and not by the Statutory Authority imposed under the terms of the *Public Hospitals Act* and its regulations, the *Vital Statistics Act* and the *Coroner's Act*;

15. The Court erred in fact and law in concluding that the individual physicians in this case were not fulfilling a state function and were not engaged in the exercise of a statutory authority in the process of determining and certifying Taquisha's legal death;

16. The Court erred in finding that the determination of death is solely a medical and not a legally prescribed statutory duty that is subject to *Charter* scrutiny

and compliance with the terms and requirements of the *Charter* and the *Ontario Human Rights Code*;

The Court erred in Failing to Recognize and Apply Taquisha's Charter Rights

17. The Court further erred in fact and law in predetermining Taquisha to be dead and thus improperly depriving Taquisha of the benefit of the application of her Charter Rights under Section 2, 7 and 15 of the Charter, and Section 2, 9 and 11 of the *Human Rights Code*, particularly while the dispute over the withdrawal of mechanical ventilation and the question of Taquisha's legal death was still being adjudicated;
18. The Court's predetermination of Taquisha's death to justify non-application of the *Charter of Rights and Freedoms* and *Human Rights Code* amounts to a tautology. This error effectively deprived Taquisha of any consideration of her individual wishes, values and beliefs, or her consent with respect to the withdrawal of treatment. It also completely and improperly deprived her of any protection under the *Charter of Rights and Freedoms* and *Human Rights Code* by dehumanizing Taquisha as a non-person from the outset;
19. The Court failed to recognize Taquisha's individual wishes, values, and beliefs as relevant to the decision to stop all life sustaining treatment, or as relevant to the determination of her death. This failure contributed and was directly connected to the breach of Taquisha's *Charter* rights;
20. The Court made a fundamental error of law when it failed to recognize the direct connection between the breach of Taquisha's *Charter* rights and the determination of her death;

21. The Court erred in fact and law by not finding that Taquisha's ongoing biological life represents life consistent with the protections set out under the terms of the *Charter of Rights and Freedoms*, and that Taquisha is an individual under the law deserving of *Charter* protection;
22. In failing to consider whether biological life amounts to personhood, the Court abdicated its responsibility in legally defining death in Ontario and committed a fundamental error of law;
23. The Court erred in fact and law in finding that Taquisha's *Charter* protections of her right to life, liberty and security of the person, equality and religious liberty were not engaged in any manner relative to the legal process to determine her death;
24. The Court further erred in finding that Taquisha had no legal standing to assert a *Charter* claim;

The Court failed to consider Taquisha's Individual Wishes, Values, and Beliefs

25. The Court erred in finding that the determination of death requires no assessment whatsoever of Taquisha's individual wishes, values and beliefs, but only requires the assessment of certain value-laden, limited, arbitrary, and evolving medical considerations;
26. The statutory duty to determine death imposes on doctors a duty to inquire as to the nature of an individual's wishes, values and beliefs in the same manner as required by the *Health Care Consent Act*. They failed to do so;

Section 2(b) of the Charter

27. The Court erred in fact and law by defining legal death as a matter of Common Law, and by finding that its own Common Law definition of death was constitutional without applying a religious exemption to the application of the neurological criteria for death where a person has a *bona fide* religious belief that can be reasonably accommodated. As such, the Court has defined an overbroad definition of death that fails to minimally impair Taquisha's *Charter* and human rights;
28. The legal error in the interpretation and application of s.2(b) of the *Charter* compels Taquisha to act in a manner contrary to her own beliefs and requires her to adhere to an alternative legal and philosophical definition of the moment of death that does not comport with her own and it does so without any reasonable accommodation;
29. The Court improperly found that the process to determine and certify death did not include a requirement to consider and abide by religious beliefs and to provide an exemption for those who hold a religious belief that death only occurs when there is a loss of cardiorespiratory function, and not merely of neurological function;
30. The Court erred in fact and law in ruling that the Respondent's conduct in interfering with Taquisha's ability to hold and act in accordance with her beliefs was trivial or unsubstantiated;
31. The Court erred in finding that Taquisha's beliefs about the moment of her death were an object of her faith rather than actual religious beliefs subject to

protection under s.2(b) of the *Charter* and s. 9 of the *Ontario Human Rights Code*;

32. The Court fundamentally misconstrued the underlying values that define and give meaning to the freedom of religion protection under s.2(b) of the *Charter*, and misapplied the proper legal test under s.2(b) of the *Charter*;

Section 7 of the Charter

33. The unilateral decision to withdraw mechanical ventilation that will result in Taquisha's biological death necessarily engages the *Charter* protections of s.7 as well as broader *Charter* values;
34. The Court failed to properly apply the Supreme Court's ruling in *Carter v. Canada* that an individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. Interference with their ability to make decisions concerning their bodily integrity and medical care trenches on liberty and necessarily engages *Charter* review;
35. The Court erred in law in interpreting section 7 in a manner that deprived Taquisha of procedural fairness and the basic protections of life, liberty and personal security;
36. The Court's interpretation of s. 7, and particularly the finding that s. 7 is not engaged in these circumstances represents a fundamental deprivation of individual autonomy, dignity, liberty and personal security for Taquisha and ultimately nullified Taquisha's rights to life, liberty and security of the person;
37. The Court also mischaracterized the rights sought to be protected, incorrectly finding that Taquisha was seeking to institute positive obligations surrounding

declarations of death when what is really at issue is the imposition of a set of value-laden criteria to determine death on Taquisha in an arbitrary manner that violated her express individual wishes, values and beliefs and adversely impacted her life, dignity, autonomy and personal security, as well as her equality;

Section 15 of the Charter

38. The Court erred in law by applying a facially neutral standard of death by neurological criteria in a manner that adversely effected Taquisha resulting in discrimination against her contrary to s.15 of the *Charter* and s.9 of the *Ontario Human Rights Code* on the basis of her religion and disability;
39. The Court erred in finding that practices that are neutral on their face but have an unjustifiable adverse impact based on prohibited grounds will not be subject to a requirement to “accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them;
40. The Court erred by applying a formal equality test and by failing to recognize that the equality necessary to support religious freedom does not require identical treatment of all religions. The interests of true equality frequently require differentiation in treatment. As such, the Court erred in its consideration of Taquisha’s religious freedom and equality;

Objective and Minimal Impairment

41. The Court erred in arbitrarily determining that the objective of the Common law standard to determine death was certainty, predictability, clarity, and objectivity. Such a determination belies the evidence, the experience in other jurisdictions, and the requirement to minimally impair and accommodate an individual's rights mandated by the *Charter* and human rights law in Ontario;
42. The fact that neighbouring jurisdictions in New York and New Jersey have adopted religious exceptions to the neurological standard demonstrates that the current regime in Ontario is overbroad in its scope and as such is both a failure to accommodate Taquisha's rights under the *Human Rights Code* and constitutes an unreasonable limit on her s.2, 7, and 15 rights under the *Charter*;
43. The Court improperly relies upon assumptions of unproven financial and resource allocation factors to justify its acceptance of neurological death and to reject the requirement of reasonable accommodation of religious beliefs that don't accept neurological death as death but that recognize cardio-respiratory death as legal death;
44. The Court also made a finding not supported by any evidence that the requirement of reasonable accommodation of religious beliefs would have an adverse impact on organ donation;

Consent and Capacity Board Jurisdiction Improperly Denied

45. Principles of due process and fundamental justice mandate the need for oversight when withdrawing life sustaining treatments without a patient's consent, contrary to their express wishes or best interests, and in a manner likely

to result in their death. In Ontario, the Consent and Capacity Board has been legislatively mandated with the task of adjudicating and settling such disputes as found by the Supreme Court of Canada in *Rasouli*;

46. The Court erred in predetermining Taquisha to be dead as a matter of fact and law before the dispute about her ongoing treatment and plan of treatment and the unilateral withdrawal of mechanical ventilation without consent could be determined by the Consent and Capacity Board;

47. The Court erred in law in ruling that it was bound by the CCB decisions in *EI* and *UH*;

48. The Court improperly found that the Consent and Capacity Board lacked jurisdiction to resolve disputes regarding the withdrawal of mechanical ventilation treatment in circumstances where the question of the legal death of a patient remains in dispute;

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- (a) Section 6(1)(b) of the *Courts of Justice Act*;
- (b) Rule 61 of the *Rules of Civil Procedure*;

July 26, 2018

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TAQUISHA DESEREE MCKITTY
Appellant

v. **DR. OMAR HAYANI**

Respondent

**ONTARIO
COURT OF APPEAL**

Proceedings commenced at Toronto

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