

October 09, 2019

ARTICLE

Ontario Court of Appeal Releases Decision Confirming Common Law Definition of Death but Leaves Door Open to Future Challenge

The Court of Appeal for Ontario released its highly anticipated decision in *McKitty v Hayani*. The patient's family brought a freedom of religion challenge to the medical and common law definition of death – i.e., that neurological death constitutes death. Specifically, the claim was that the adoption of neurological criteria to establish death to those persons who hold a religious belief that life only ends when the heart stops beating, violates such persons' freedom of religion. The patient's family had asked that the patient continue to be accommodated through artificial means until she suffered cardiac arrest.

The Court of Appeal accepted the common law definition of death, as informed by medical criteria.

However, the Court left it open that this common law definition may be challenged in the future on the basis of freedom of religion. The Court was not satisfied that it had a sufficiently robust record about the patient's religious beliefs to make a determination as to whether her freedom of religion was infringed in this case. Furthermore, the Court cautioned that this Charter challenge was brought against a private party — a physician — and that it would have been preferable for the Attorney General of Ontario to respond to the application.

As such, whether the common law should be crafted to provide accommodation for persons whose religious convictions cannot accept neurological criteria for death, must, unfortunately, be left for another case. At the very least, the Court crafted a legal framework for how this issue should be addressed in the future.

In the meantime, physicians and hospitals are advised to continue with the status quo in terms of declarations of neurological death. At this point in time, there is no legal obligation on a medical team in Ontario to maintain physiological support of a brain dead patient at the insistence of the patient's family. Usual practices in this regard can continue, which usually do include an empathetic grace period of one or two days before the machines are turned off. It remains, possible, however, that we might yet see a further challenge to the law in the near future. Legal consultation is therefore recommended where there are intractable disputes which arise in similar circumstances.

By: Daphne G. Jarvis, [Katharine Byrick](#), Ewa Krajewska


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Related Contacts

Katharine Byrick
Partner

 Toronto

 KByrick@blg.com

 [416.367.6012](tel:416.367.6012)