Ontario Court Confirms Intensive Care Of A Brain Dead Patient Can Be Discontinued Despite Family's Objections

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Justice Shaw in Brampton provides welcome clarification in the case of McKitty v. Hayani released on June 26, 2018

Background

Two similar but separate court applications have been pending in Ontario – one in Brampton and one in Toronto – in which the court has been asked to decide whether, at the insistence of the patient's substitute decision-maker(s) ("SDM"), a medical team must continue to provide intensive physiologic support (including mechanical ventilation) to a patient, until the time of irreversible cardiac arrest, even where that patient already meets the criteria for a neurological determination of death ("brain death").

We know from the 2013 Supreme Court of Canada decision in the Rasouli case that withdrawal of treatment from a person in an irreversible coma is governed by the *Health* Care Consent Act in Ontario. This means that the SDM gets to make the decision, but is subject to the overriding scrutiny of the Consent and Capacity Board in those cases where the physicians have grounds to challenge the SDM's decision. That said, being comatose is not the same as being dead.

In recent years, Ontario's Consent and Capacity Board ("CCB") had released three decisions concluding that it had no jurisdiction to hear cases involving brain dead patients because it was not the role of the CCB to question a determination of death made by a physician, and that in Ontario, neurological death is death according to the law. As we reported in a previous bulletin about two of these decisions, the CCB had held that:

Death terminates the person. Thus when death occurs, there is no longer a "person" who is subject to treatment under the *Health Care Consent Act [HCCA].* Since section 35 of the *HCCA* contemplates that an application for directions under that section

relates to treatment of a person, where there is no person to treat, neither the substitute decision maker nor the attending physician may apply under that section for directions.

And:

While cardiac death typically results in fairly short order following death by neurological criteria due to the role of the brain stem in supporting all body functions, it may take days or weeks leaving the health care team and family in a legal and medical limbo.

Such a circumstance creates a number of concerns for the health practitioners and broader health care team. Continuation of "treatment" for someone declared dead offers, obviously, no medical benefit and there would be no ethical or moral reason to continue.

It has long been the case, therefore, that the law did not require consent to halt medical interventions up to and including mechanical ventilation once the patient has been declared brain dead, even though cardiac death had not yet occurred. Given the tragic circumstances inherent in these sorts of cases, families who were having difficulty accepting the fact of their loved one's death would usually be provided with one or two days' grace before the mechanical ventilation was halted.

In the fall of 2017, however, two separate court applications were launched with the purpose of preventing the withdrawal of any of the intensive interventions being provided to young patients who had been declared dead according to the neurological criteria for death. In both cases, it was argued by the patients' SDMs that the Canadian Charter of Rights and Freedoms protected one's religious freedom to be exempted from a definition of death which was contrary to one's religious beliefs about death. It was argued, therefore, that any disputes around continued interventions were "treatment decisions" which could be dealt with in the same way that the CCB deals with other end-of-life disputes between physicians and SDMs.

Background: *McKitty v. Hayani*

The patient, 27 year-old Tacquisha McKitty, was admitted on September 17, 2017, to the intensive care unit of William Osler Health Centre, having suffered a brain injury secondary to a drug overdose. In spite of best medical efforts, by September 20 it was clear from repeated testing that she was brain dead. The death certificate was completed on September 21, and on that same day, Justice Shaw granted an interlocutory injunction, on consent, preventing the discontinuation of "life support" pending further evidence, including expert evidence, oral and written legal submissions, and her final decision.

Initially, Ms. McKitty's family took the position that she could not possibly be dead as there was still some bodily movement, but subsequent expert evidence was clear that these were merely spinal reflexes. Over time, the family's position expanded from a simple disbelief that she was dead, to a constitutional challenge to the declaration of death based on neurological criteria, as a violation of Ms. McKitty's right to religious freedom to reject such criteria for herself. It was asserted that she was a Christian who believed that life ends only when the heart stops beating, as that is when the soul leaves the body.

Justice Shaw ’s Decision and Analysis

Justice Shaw’s decision supports the physicians’ findings of death, and the lawfulness of removing the mechanical ventilation without the need for consent to do so.

In coming to her decision, Justice Shaw engaged in a thorough and well-reasoned analysis of the expert evidence, as well as the applicable jurisprudence in Canada, the UK and the United States. This indicated that the question about when death occurs is one of fact, and that the criteria to be used are medical standards. There is no statute nor any jurisprudence where a court has found that an individual's views, wishes and beliefs must be considered as part of the determination of death.

It was confirmed that Ms. McKitty meets the neurologic definition of death.

Justice Shaw acknowledged that many of Ms. McKitty's organs are physiologically functioning and that her heart is beating. She is being provided with nutrients and hydration which is being absorbed by her body, and waste products are being excreted through her bowel and kidney functions. She does not have capacity to breathe of her own volition, and her respiratory system is being maintained artificially through mechanical ventilation. The issue, in her view, was whether or not this biological and physiological functioning of the body constitutes life even when there is an absence of brainstem function, consciousness, and the ability to breathe.

The accepted medical practice used by all physicians throughout Canada to determine death based on neurologic criteria is set out in guidelines that were published in the Canadian Medical Association Journal in 2006 (“CMAJ Guidelines”). The CMAJ Guidelines are used in all hospitals in Ontario and throughout Canada and have been endorsed by numerous medical associations across Canada. Brain death is declared when it is found, through clinical testing, that there is a lack of capacity for consciousness, brainstem reflexes, and capacity to breathe. Justice Shaw upheld the findings of the five physicians who had examined Ms. McKitty and found that she meets the criteria for the neurologic determination of death in the CMAJ Guidelines. Based on expert opinion, Justice Shaw found that Ms. McKitty’s limb movements,on which her family is very focused, are consistent with spinal reflexes, which are not mediated by any brain activity, and are not inconsistent with the determination of brain death.

It was confirmed that the legal (common law) definition of death is consistent with the Charter.

Justice Shaw found there to be no basis to deviate from the recognition in the jurisprudence and legislation from other jurisdictions that the medical and legal definition of death includes brain death. Furthermore, the medical determination of death cannot be subject to an individual's values and beliefs. At common law, death includes brain death and brain death is to be determined based on medical criteria as set out in the CMAJ Guidelines. Death, as in the diagnosis of any other medical condition, is a finding of fact. To import subjectivity to the definition of death would result in a lack of objectivity, certainty and clarity. Such subjectivity could lead to an unacceptable level of medical, legal and societal uncertainty as well as potential adverse impacts on the health-care and organ donation systems.

In Justice Shaw's view, the applicant was proposing a radical and significant change to the definition of death and, in essence, the concept of life. She asserted that it is not the role of the court to engage in a social policy analysis that engages significant bio-ethical and philosophical considerations regarding the recognition of mere physiological functioning of the body as life.

Justice Shaw also pointed to wider policy issues which would have to be considered which she felt to be beyond the role of the court. For example, given that medical technology can maintain a body for an indefinite period of time after a declaration of brain death, that could have a significant financial impact on the health-care system if the body that is biologically or physiologically functioning must be maintained on mechanical ventilation until such time as the heart stops beating, at the request of an individual or their family on account of their personal values and beliefs. There could also be an indirect impact on others requiring medical services if health-care resources have to be directed to maintaining brain dead persons on the basis of religious belief. She wondered what other medical services beyond mechanical ventilation would have to be extended to maintain that functioning body as other organs failed – antibiotics, renal dialysis, colostomy …. ? She was also concerned about the possible adverse consequences to the organ donation system in Canada.

With respect to the Charter arguments, Justice Shaw, by analogy and relying on the analytical approach applied to the Supreme Court of Canada's consideration of fetal rights in the 1989 *Daigle* case, finds that brain death extinguishes personhood, and with it, the right to assert Charter protection: "*Just as the courts have not engaged in a theological debate on when life begins, so too should the court not become involved in a debate about when life ends.*" [para 205] Such decisions are appropriately left to the legislature, not to courts.

Furthermore, this was a legal action involving two private litigants, the patient and the ICU physician. The Charter applies only to government action. The determination of death [as distinct from *registration* of death] is not a government function; it is neither done at the direction of the government nor mandated by statute. It is not governed by statutory authority nor is it an act done in furtherance of a government policy or program. If it was so, the appropriate responding party would be the government and not the ICU physician.

In any event, the common law definition of death does not prevent persons from holding particular beliefs as to when death occurs. At the same time, the common law's definition of death provides predictability, objectivity, and certainty for those who provide medical services, and also for patients and family members. A uniform definition, based on medical and secular criteria, avoids favouring one religion over another. If the patient's religious beliefs must be accommodated to comply with Charter values, this would lead to a lack of certainty and predictability in the provision of medical treatment following a declaration of death in accordance with the CMAJ guidelines. Physicians would be required to determine if the individual had any religious belief that would necessitate ongoing mechanical support of the body. This could lead to disputes among family members regarding interpretation of their loved one's religious beliefs and/or disputes regarding the type, extent, and duration of medical services to be provided. Justice Shaw also expressed concerns around the significant costs to the system to provide medical support for someone whose religious belief is that death only occurs when there is a cessation of cardio or respiratory function.

Justice Shaw also briefly addressed the equality provisions of the Charter, as it was the applicant's submission that Ms. McKitty is a vulnerable, disabled person with a brain injury. Justice Shaw rejected this submission, referring to the uncontroverted medical evidence that there is no blood flow to the brain. She found that McKitty is not brain-injured; she is dead.

It was confirmed that the CCB has no role in these cases concerning disputes about brain death.

Justice Shaw agreed with the previous three decisions of the CCB that it has no jurisdiction in situations where a person has been declared dead. She distinguished this case from the Rasouli case, where that patient still had brainstem function and therefore was not brain dead. Ms. McKitty, however, having been declared brain dead, is not an incapable person for whom consent must be obtained from a substitute decision-maker for the withdrawal of mechanical ventilation, as it is not treatment. The mechanical ventilation is merely maintaining physiological functioning, and is not treatment for a therapeutic or other health-related purpose. A brain that has died cannot be treated and recover. As Ms. McKitty is not a person as defined medically or at law, there are no medical services that could be provided to her that would be considered treatment.

What's next?

Tacquisha McKitty's parents have a 30-day period in which to decide whether to pursue an appeal to Ontario's Court of Appeal.

In the meantime, in the second similar but distinctive case, *Ouanounou v. Humber River* Hospital et al, Justice Hainey has not yet released a decision, and is in the process of considering whether he still needs to render a decision in light of the case's 'mootness', *i.e.*, the fact that the patient Shalom Ouanounou did experience irreversible cardiac arrest in mid-March 2018, and now also in light of Justice Shaw's clarification of the law in the *McKitty* case. In the *Ouanounou* case, with the hospital as an additional respondent to the ICU physicians, there was more direct evidence placed before the court to substantiate the ethical and social concerns expressed by Justice Shaw, and the significant costs to the health-care system should the law be changed.

Takeaway

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 SDM. 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. Due to the potentially ongoing nature of the both the *McKitty* and *Ouanounou* cases in our courts, however, it remains possible that we might yet see a change in the law in the future. Legal consultation is therefore recommended where there are intractable disputes which arise in similar circumstances.

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By

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