Legal Developments in Clinical Ethics

HCA Healthcare Webinar
January 11, 2016

Thaddeus Mason Pope, JD, PhD
Mitchell Hamline School of Law

Brain death

Medical futility

Brain death

3 parts

1

Clinician **duties** at brain death

2

2 new & significant **cases**

Jahi McMath

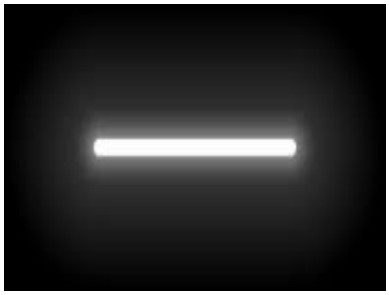
Aden Hailu

3

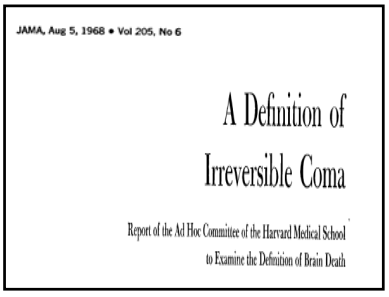
Implications for clinical ethics

Clinician duties at brain death

After death, **nothing** more for medicine



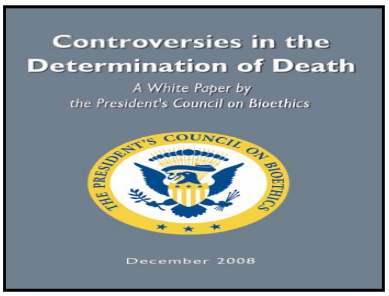
total brain failure = death


JAMA, Aug 5, 1968 • Vol 205, No 6

A Definition of Irreversible Coma

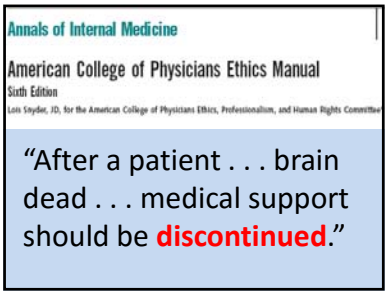
Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death

Legally **settled** since 1980s

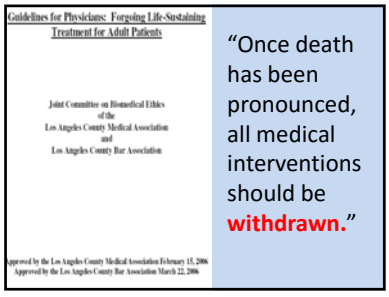


total brain failure = death

Dead → **stop** physiological support



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



"Once death has been pronounced, all medical interventions should be **withdrawn.**"

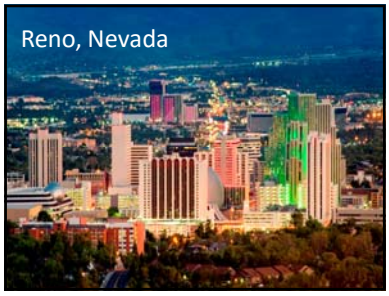
Dead → Not a patient

Not a patient → No duty to treat

BUT...

Surrogate resistance is **growing**

Aden Hailu



April 1, 2015

Catastrophic anoxic brain injury during exploratory laparotomy

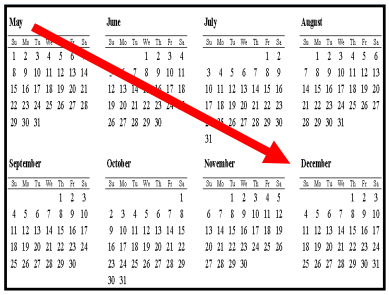
May 28, 2015

Met AAN criteria for brain death

Jan. 4, 2016

Still on organ support in hospital; dies per CP criteria

Dead **7 months** in ICU



Why?

Court **injunctions** pending litigation

Aden's father

Argues she is **not** dead

Trial court

AAN criteria met

→ Aden **is** dead

→ Hospital may **stop**

Aden's father

Appeals to Nevada Supreme Court

Father argues

Irrelevant if Aden meets AAN criteria

They are the **"wrong"** criteria

1

DDNC requires "irreversible cessation . . . **all** functions of the . . . **entire** brain"

Nev. Rev. Stat. 451.007(1)

Trial court did **not consider** whether AAN measures

"irreversible cessation . . . **all** functions of the . . . **entire** brain"

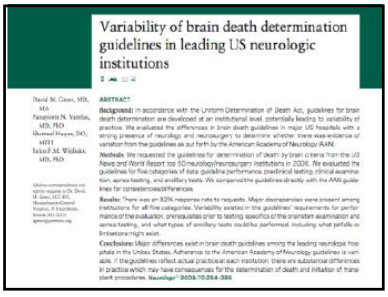
2

DDNC "must be made in accordance with **accepted medical standards**."

Nev. Rev. Stat. 451.007(2)

Trial court did **not consider** whether AAN are

"accepted medical standards"


Variability of brain death determination guidelines in leading US neurologic institutions


Research

Original Investigation

Variability of Brain Death Policies in the United States

Remanded back to trial court

Evidentiary hearings

Dec. 29, 2015
Jan. 22, 2016

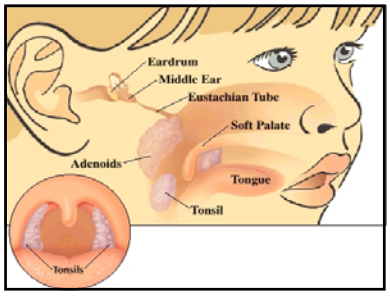
Jan. 4 2016

Dead per CP criteria

Moot if dead re BD criteria

Might proceed **despite** mootness

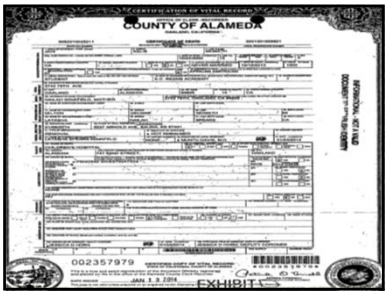
Jahi McMath

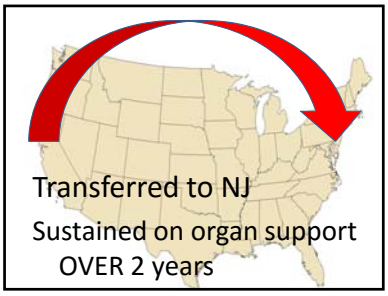


Dec. 12, 2013

Declared dead per BD criteria

Litigation until early Jan. 2014





6 separate lawsuits

1


Case 3:15-cv-06042 Document 1 Filed 12/23/15 Page 1 of 57

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JAHI MCMATH and
NAILAH WINKFIELD

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAHI MCMATH, a minor; NAILAH WINKFIELD, an individual, as parent, as guardian, and as next friend of JAHI McMath, a minor

Plaintiffs,

v.

STATE OF CALIFORNIA; COUNTY OF ALAMEDA; ALAMEDA COUNTY DEPARTMENT OF

Case No.

COMPLAINT FOR DECLARTORY AND INJUNCTIVE RELIEF

1. Civil Action for Deprivation of Civil Rights in Violation of 42 U.S.C. § 1983: Violation of the Right to Due Process of Law Guaranteed Under the Fifth and Fourteenth Amendments of the United States Constitution.
2. Civil Action for Deprivation of Civil Rights in Violation of 42 U.S.C. §

2

Mar. 2015

Medical malpractice lawsuit

Seeking **future** medical expenses

Dead people do **not** have medical expenses

Re-litigate status as alive

Hospital moves to dismiss

Death **already** determined in Dec. 2013

Collateral estoppel

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Oct. 2015

May allege more facts to establish alive

Amended complaint Nov. 6

More specific & concrete allegations that she is alive (e.g. she responds)

Hospital **again** moves to dismiss

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

January 8, 2016

If true, new allegations sufficient

Factual vs. legal dispute

No disputed **facts**

Dispute over what **law** requires

Met AAN criteria in April

Always met AAN criteria

Family questions whether AAN criteria are **right** criteria per UDDA

Dispute over **facts**

Not questioning the validity of AAN criteria

Question Jahi's **satisfaction** of AAN criteria

Met in Dec. 2013

Not met now

Potential impact

1

Even **without** rulings in Hailu or McMath

High **salience** of these cases in media

More families dispute DDNC

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

AL Flamm et al, "Family members' requests to extend physiologic support after declaration of brain death: a case series analysis and proposed guidelines for clinical management," J Clin Ethics (2014) 25(3):222-37.

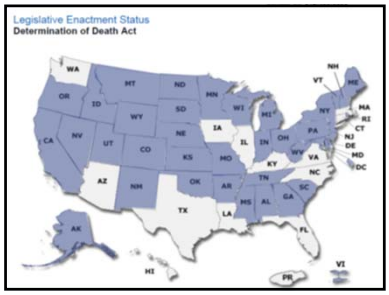
"in recent months . . . the **families of two patients** determined to be dead by neurologic criteria have **rejected** this diagnosis"

JM Luce, "The Uncommon Case of Jahi McMath," Chest (2015) 147(4):1144-51.

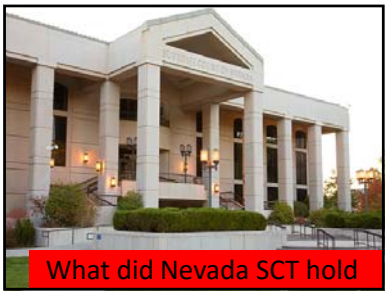
2

Nevada law is not unique

>40 states adopted UDDA



If **legal** standard demands more than **medical** standard, must revise medical standard



Did **not** say AAN criteria fail to establish legal death

But seriously **questioned** whether they do

3

If McMath is determined alive, must reexamine medical criteria for DDNC

Zero tolerance for false positives

AAN criteria fail to measure "irreversibility"

4

Not changing clinician duties at BD

But **may** change BD itself

5

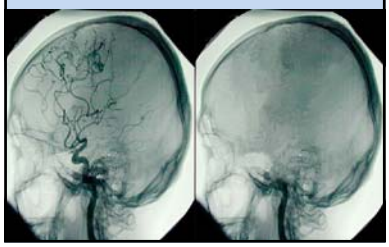
Families get injunctions, even if temporary

Accommodation
24 hours → 24 **days**

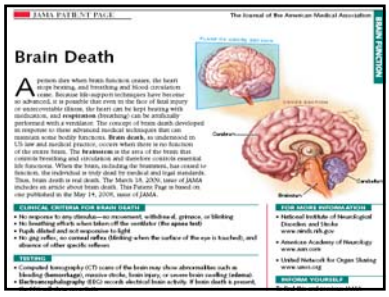
Responses

Diagnostic confusion

Patient decision aids

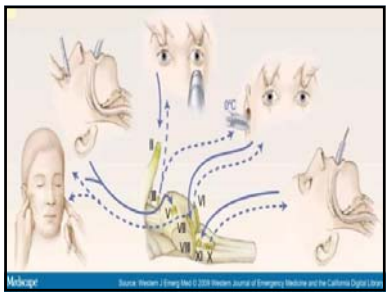


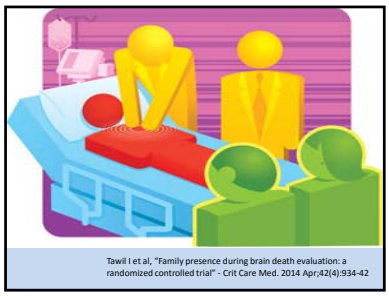
THE COCHRANE COLLABORATION



Do **not** use the term "brain death"

Mistrust





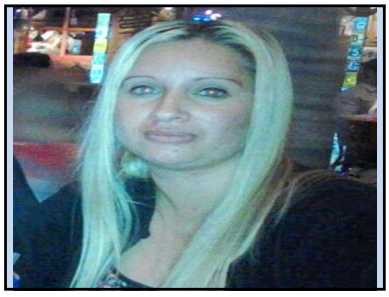
Tawil I et al, "Family presence during brain death evaluation: a randomized controlled trial" - Crit Care Med. 2014 Apr;42(4):934-42

Independent second opinion

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.



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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

LISA AVILLA, ROBERTO CHAVEZ,
Plaintiffs,
vs.
AHMC ANAHEIM REGIONAL MEDICAL CENTER, L.P., a Partnership, doing business as AHMC ANAHEIM REGIONAL MEDICAL CENTER; AHMC HEALTHCARE INC., a California Corporation; FREDERICK DIETERICH, M.D.; FREDERICK W. DIETERICH, M.D., A PROFESSIONAL CORPORATION, a California Corporation;

Case No. 30-2015-00774798-CU-MM-CXC
Judge Thierry Colaw
COMPLAINT FOR DAMAGES FOR MEDICAL MALPRACTICE
1. Negligence
2. Loss of Consortium

Medical Futility

Way more **frequent** than brain death conflicts

13%

ethics consults

MEMORIAL SLOAN-KETTERING CANCER CENTER

J. Oncology Practice (June 2013)

> 16%

ethics consults

HEC Forum
DOI 10.1007/s10730-015-9293-5

What Ethical Issues Really Arise in Practice at an Academic Medical Center? A Quantitative and Qualitative Analysis of Clinical Ethics Consultations from 2008 to 2013

Katherine Wasson · Emily Anderson ·

> 33%

ethics consults

University of Michigan Health System

Physician Executive Journal (37 no. 6)

Feb 2015

700 acute care clinicians

Typical dispute resolution

Consensus

Intractable

Negotiation

Mediation

145

95%

146

Earliest

147

Prendergast (1998)

57% agree immediately

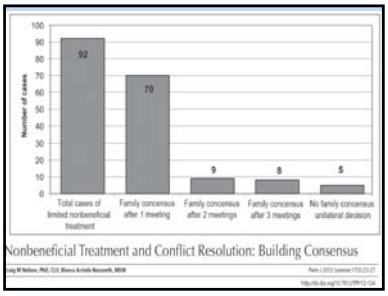
90% agree within 5 days

96% agree after more meetings

148

Latest

149



What about the 5%

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TABLE 3. Support for Proposed Solutions to Nonbeneficial Treatment

Proposed Solution	Effective (% "Somewhat" or "Completely" Agree)	Morally Acceptable (% "Somewhat" or "Completely" Agree)
Creating and implementing committees (with medical and nonmedical representatives) who could be consulted to resolve cases that are felt to be NBT. These committees would issue binding decisions about the care to be provided	61	60

DOI: 10.1097/CCM.0000000000000704

Texas

Operation

Attending may stop LSMT

for **any reason**

with immunity

if review comm. agrees

Tex. H&S 166.046

6 steps

Step 1

Attending refers to "review committee"

HEC

MARC

Step 2

Hospital provides notice to surrogate

Step 3

Open meeting

Step 4

Review committee decides & serves "written explanation"

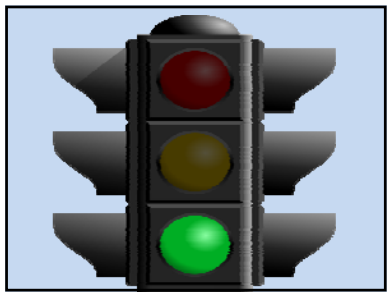
Step 5

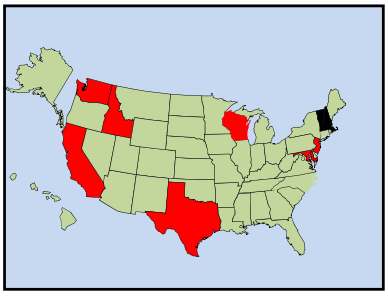
Attempt to transfer (10 days)

Step 6

Treating hospital may stop LSMT

Safe harbor
legal immunity





TADA

under attack

2 attacks:

1. Legislature
2. Courts

Texas

Legislative Attack

2003 2009
2005 2011
2007 2013

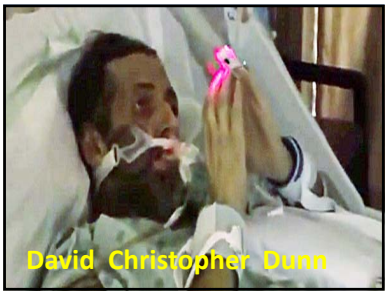
H.B. 3074

artificially administered nutrition & hydration

Same as before:
- Vent
- Dialysis
- ECMO . . .

Texas

Court Attack



HOUSTON Methodist LEADING MEDICINE

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13 November 2015

By Hand Delivery

Dear Ms. Evelyn Kelly and Mr. David Dunn:

On behalf of every member of the Houston Methodist Hospital Biomedical Ethics Committee, I express our sadness that your son, David "Chris" Dunn, is so ill. Thank you for meeting with the Committee to tell us of your hopes for Chris and of your request to continue life-sustaining treatment. After hearing from you and from Chris's physicians, the Committee has decided that life-sustaining treatment is medically inappropriate for Chris and that all treatments other than those needed to keep him comfortable should be discontinued and withheld.

Procedural Due Process

Life
Liberty
Property

- Notice
- Opportunity to present
- Opportunity to confront
- Statement of decision
- Independent decision-maker
- Judicial review

Neutral & independent decision maker

<u>Who</u> Makes the decision?

Intramural institutional ethics committee

But the HEC is controlled by the hospital

1-5 members	48%
5-10 members	34%

Mostly physicians, administrators, nurses

No community member requirement, like IRB

< 10% TX HECs have community member

Lack of Notice

Only **48 hours** to prepare for the review committee meeting + notice often on FRI

Surrogate may **attend**.

But unclear right to **participate**

More PDP problems

TADA is **silent** not only on substantive criteria but also on procedures and methodology

- *E.g.* quorum
- *E.g.* voting

No judicial review

HEC is forum of last resort

Dunn **died** December 23

Might proceed despite mootness

Oklahoma

"opposite" of Texas

Consent **always**

Nondiscrimination in Treatment Act

November 2013

"health care provider **shall not deny** . . . life-preserving health care . . . directed by the patient or [surrogate]"

Medical Treatment Laws Information Act

November 2014

1st year in effect

Jan. 1 2015

to

Jan 1, 2016

1

Information for Patients and Their Families

Your Medical Treatment Rights Under Oklahoma Law

No Discrimination Based on Mental Status or Disability:

Medical treatment, care, nutrition or hydration may not be withheld or withdrawn from an incompetent patient because of the mental disability or mental status of the patient.

Required by: Section 3080.5(B) of Title 63 of the Oklahoma Statutes)

What Are Your Rights If A Health Care Provider Denies Life-Preserving Health Care?

• If a patient or person authorized to make health care decisions for the patient directs **life-preserving treatment** that the health care provider gives to other patients, your health care provider **may not deny it**.

Report suspected violations of any of the laws summarized in this brochure listed above, or attempts to violate any such laws, to the state Licensing Board of the profession(s) of all health care providers involved in the violation.

Oklahoma Board of Medical Licensure and Supervision
www.okmedicalboard.org
405-962-1400
1-800-381-4519 (Toll free outside the 405 area code)

2

Oklahoma Health Care Providers' Responsibilities and Rights Under Certain Medical Treatment Laws

I hereby certify that I have read this brochure in its entirety and that I understand my legal duties pursuant to the laws described in it.

Printed name _____

Licensing entity _____

Employer _____ Date _____

Signature _____

Please complete all information requested above the signature line. Once complete give to your employer to be placed in your personnel file for a maximum of four (4) calendar years.

Review & sign once per year

3

Oklahoma Board of Medical Licensure and Supervision

CME

Oklahoma Health Care Providers' Responsibilities and Rights Under Certain Medical Treatment Laws

Introduction

- Course Info & Objectives, Target Audience OSMA Accreditation Statement and Disclosures
- Introduction to OMTLA

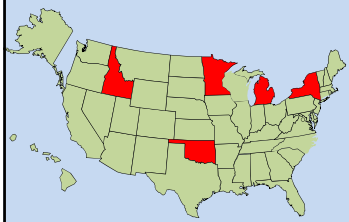
Part 1 - Disagreement with Medical Treatment Directive

Part 2 - Withholding or Withdrawing Medical Treatment

Every 2 years

Oklahoma is emblematic

More red lights



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References

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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 one million** direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like Westlaw, Bioethics.net, Wellsphere, and Medpedia.

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