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BRAIN DEATH IS A UTILITARIAN CONCEPT USED TO FACILITATE ORGAN TRANSPLANTATION

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Paul A. Byrne, M.D. column

Nevada Supreme Court protects Aden Hailu

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RENEW AMERICA

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[Emphasis in red type by Abyssum]

On November 16, 2015 the Nevada Supreme Court reversed the ruling of a District Judge that would have allowed doctors at St. Mary's Regional Medical Center in Reno Nevada to remove Aden Hailu from the life supporting ventilator. While this ruling restrains doctors from doing "as they see fit," as the District Court ruled, Aden and her family need a doctor and hospital to treat her. Please contact me immediately if you can help medically. Aden urgently needs a tracheostomy, a PEG tube for nutrition, and thyroid medication.

On April 1, 2015 Aden Hailu, a 20-year-old college student, went to the ER because of abdominal pain. Exploratory abdominal surgery was done but everything was normal. As the surgery was ending, Aden's blood pressure and heart rate went down. Since then Aden has not awakened.

On April 16, 2015 Aden was declared "brain dead." The doctors at St. Mary's Regional Medical Center in Reno, NV informed the family that the ventilator would be removed. Fanuel Gebreyes, father and legal guardian of Aden, believes that Aden, his daughter, is alive. Aden's father petitioned the court to restrain the hospital from removal of life support. The District Court ruled on July 28 that the hospital shall proceed "as they see fit," but did grant an injunction pending an appeal. Gebreyes on August 3 appealed to the Nevada Supreme Court, which issued a stay of the district court's order and directed St. Mary's not to terminate Hailu's life support pending resolution of the appeal. The ventilator was continued.

The statute for determination of death in Nevada is: "For legal and medical purposes, a person is dead if the person has sustained an irreversible cessation of. . . all functions of the person's entire brain, including his or her brain stem." NRS 451.007(1). The determination of death "must be made in accordance with accepted medical standards." NRS 451.007(2).

From the NV State Supreme Court:

Here, we are asked to decide whether the American Association of Neurology guidelines are considered "accepted medical standards" that satisfy the definition of brain death in NRS 451.007. We conclude that the district court failed to properly consider whether the American Association of Neurology guidelines adequately measure all functions of the entire brain, including the brain stem, under NRS 451.007 and are considered accepted medical standards by states that have adopted the Uniform Determination of Death Act. Accordingly, we reverse the district court's order denying a petition for temporary restraining order and remand. . . .

The briefing and testimony do not establish whether the AAN guidelines adequately measure the extraordinarily broad standard laid out by NRS 451.007, which requires, before brain death can be declared under the UDDA, an "irreversible cessation" of "*[a]ll functions* of the person's *entire* brain, including his or her brain stem." NRS 451.007(1) (emphases added). Though courts defer to the medical community to determine the applicable criteria to measure brain functioning, it is the duty of the law to establish the applicable standard that said criteria must meet.

The Nevada State Supreme Court identified that the NV statute and UDDA require "irreversible cessation of all functions of the entire brain, including the brain stem." Thus, if any brain function exists, the statute has not been fulfilled. The statute is expected to protect Aden from being killed or harmed by the doctors at St. Mary's Regional Medical

Center. Included are strong words: “irreversible cessation of *all* functions of the *entire*brain, including the brain stem.” The doctors at St. Mary’s claim to be following the Guidelines of the American Academy of Neurology and that these Guidelines are *the*medical standard. The NV Supreme Court is not convinced that the doctors at St. Mary’s have fulfilled the statutory requirement of cessation of all functions of the entire brain.
Fanuel Gebreyes, Aden’s father, instructed doctors at St. Mary’s not to do an apnea test. They did it anyway!

The apnea test is used to test the “function” of the brainstem respiratory center. It involves taking the patient off the ventilator for up to 10 minutes to allow the waste product, carbon dioxide, to rise in the blood. Oxygen may be given via the breathing tube, but that does not allow the waste product of normal metabolism, carbon dioxide to be eliminated. The respiratory centers in the brainstem normally respond to increasing levels of carbon dioxide by triggering breaths. In some patients the threshold amount at which a breath may be triggered may be increased. However, in a person with injury to the brain, these centers may not be “functioning” optimally even if the cells are not destroyed or dead. The increase in carbon dioxide will further increase swelling in the brain causing more damage and further decreasing the likelihood of not only “functioning” but of survival of these vital brainstem centers as well as other parts of the brain. The apnea test, often repeated, and done as “part of a neurological exam” without specific informed consent will do nothing for the patient with an injured brain except harm them. Essentially it can cause what it purports to test for – dead brain cells that will not function and then allows the diagnosis of “brain death.” Once “legally” “dead” the hospital and doctors can ask for/take organs and/or discontinue life support. The family, unless willing to fight, loses decision-making. Gebreyes is fighting.

When the apnea test was done on Aden, she became very acidotic and her carbon dioxide increased greatly. These could have only caused Aden’s brain swelling to increase.

More from the NV State Supreme Court:

On May 28, 2015, St. Mary’s performed an apnea test, which involved taking Hailu off ventilation support for ten minutes to see if she could breathe on her own; Hailu failed the apnea test, leading St. Mary’s to conclude that “[t]his test result confirms Brain Death unequivocally.” Based on Hailu’s condition, doctor . . . wrote the following in his notes: “Awaiting administration and hospital lawyers for direction re care – withdrawal of Ventilator support indicated NOW in my opinion as brain death unequivocally confirmed.” On June 2, 2015, St. Mary’s notified Hailu’s father and guardian, Fanuel Gebreyes, that it intended to discontinue Hailu’s ventilator and other life support. Gebreyes opposed taking Aden off life support and sought judicial relief.
[T]his court [NV Supreme Court] reviews the district court’s conclusions of law, including

statutory interpretation issues, de novo.
Torres v. Nev. Direct Ins. Co.,
131 Nev., Adv. Op. 54, 353 P.3d 1202, 1206 (2015). Brain death presents a mixed legal and medical question. Although "it is for [the] law to define the standard of death," courts have deferred to the medical community to determine the applicable criteria for deciding whether brain death is present.
In re Welfare of Bowman,
617 P.2d 731, 732 (Wash. 1980). However, the statutory requirements of Nevada's Determination of Death Act that death be determined using "accepted medical standards" and that the Act be applied and construed in a manner "uniform among the states which enact it," NRS 451.007, necessitates a legal analysis regarding what the accepted medical standards are across the country.
The legislative history of NRS 451.007 makes clear that the legislative purpose was to ensure there was no functioning at all of the brain before determining death.
Here the NV Supreme Court identified that doctors must ensure that there is no functioning at all of the entire brain. The Supreme Court went to the legislative history for the word, functioning. The Statute in Nevada is the Uniform Determination of Death Act (UDDA), which replaced "functioning" with "functions." The statute does not define functions. Doctors can know what a function is, but it is the functioning, or non-functioning, that is measured. Functioning can occur when life (Greek: *bios*) is present. Absence of functioning occurs as a result of disease and is described as pathological. The root of pathological, *pathos* (Greek), means disease. Cessation of functioning can have many causes rooted in disease that interfere with functioning but are not necessarily destruction, disintegration of the brain or death. The lack of functioning or functions is not necessarily lack of life. When life is not present, the function, functions and functioning are gone.
The NV Supreme Court asked: "*Are the AAN [American Academy of Neurology] guidelines considered 'accepted medical standards,' which adequately measure all functions of a person's entire brain, including the brain stem?*
The NV State Supreme Court stated:

[T]he district court and St. Mary's failed to demonstrate that the AAN guidelines are considered "accepted medical standards" that are applied uniformly throughout states that have enacted the UDDA as sufficient to meet the UDDA definition of brain death. . . . Contrarily, extensive case law demonstrates that at the time states began to adopt the UDDA, the uniformly accepted medical standard that existed was the then so-called Harvard criteria. The Harvard criteria require three steps, followed by a flat EEG as a confirmatory test: (1) unreceptivity and unresponsivity to painful stimuli; (2) no spontaneous movements or spontaneous respiration; and (3) no reflexes, as demonstrated by no ocular movement, no blinking, no swallowing, and fixed and dilated pupils. Ad Hoc Comm. of the Harvard Med. Sch.,
A Definition of Irreversible Coma,

205 JAMA 337, 337-38 (1968) [hereinafter Harvard Report];
see also In re Welfare of Bowman,
617 P.2d at 737. After the first three steps, the report recommends requiring flat EEGs, which serve as "great confirmatory value." Harvard Report,
supra,
at 338. "All of the above tests shall be repeated at least 24 hours later with no change."
Id.
It appears from a layperson's review of the Harvard criteria versus the AAN guidelines that the AAN guidelines incorporated many of the clinical tests used in the Harvard criteria. 9
See
Am. Acad. Of Neurology,
Update: Determining Brain Death in Adults,
74 Neurology 1911 (2010). However, the AAN guidelines do not require confirmatory/ancillary testing, such as EEGs.
Id.
Although the AAN guidelines state that ancillary testing should be ordered "only if clinical examination cannot be fully performed due to patient factors, or if apnea testing is inconclusive or aborted," the AAN's own study recognized that a decade after publication of the guidelines, 84 percent of brain death determinations still included EEG testing.
See
David M. Greer et al., Am Ass'n of Neurology Enters., Inc.,
Variability of Brain Death Determination Guidelines in Leading US Neurologic Institutions,
70 Neurology 1, 4 Table 2 (2007).
While the Harvard criteria may not be the newest medical criteria involving brain death, we are not convinced with the record before us that the AAN guidelines have replaced the Harvard criteria as the accepted medical standard for states like Nevada that have enacted the UDDA. We recognize the Legislature's broad definition of "accepted medical standards" to promote "the development and application of more sophisticated diagnostic methods."
People v. Eulo,
472 N.Ed.2d 286, 296 n.29 (N.Y. 1984) ("Any attempt to establish a specific procedure might inhibit the development and application of more sophisticated diagnostic methods."). Therefore, we hesitate to limit the criteria to determine brain death "to a fixed point in the past."
State v. Guess,
715 A.3d 643, 650 (Conn. 1998) ("We have searched unsuccessfully for evidence that the legislature intended to render immutable the criteria by which to determine death. In the absence of any such indication, we are loath to limit the criteria to a fixed point in the past.").
. . . [Footnote 11 includes:] A cursory review of medical research raises concerns about brain death testing comporting with NRS 451.007.

See
Choi et al.,
supra,
at 826 ("[S]ome features of brain function remain intact after brain death
(e.g.,
posterior pituitary secretion of anti-diuretic hormone and thermoregulation). This raises an inconsistency with the definition of brain death in the UDDA: 'irreversible cessation of all functions of the entire brain, including the brain stem.'"); Seema K. Shah,
Piercing the Veil: The Limits of Brain Death as a Legal Fiction,
48 U. Mich. J.L. Reform 301, 311-12 (2015) ("Many brain-dead patients still have at least one functioning part of the brain – the hypothalamus, which continues to secrete vasopressin through the posterior pituitary. . . . [M]any brain-dead patients do not lose all neurological function, as the UDDA and state laws explicitly require to determine brain death."); D. Alan Shewmon,
Brain Death or Brain Dying?,
27 J. Child Neurology 4, 5 (2012) ("It has long been recognized that in some cases of clinically diagnosed brain death, certain brain structures may not only be preserved but actually function, such as the hypothalamus (in cases without diabetes insipidus), relay nuclei mediating evoked potentials, and cerebral cortex mediating electroencephalographic activity.").
Laws and medical practice standards and guidelines should reflect objective reality. Neither the UDDA, the Harvard criteria, the AAN guidelines or the myriad of other criteria used by hospitals and some physicians to declare "brain death" do that because it has never been scientifically validated that "brain death" is true death, because it isn't, it can't be, and it won't be as long as the patient has a a beating heart with circulation and respiration, albeit with the aid of a ventilator. The vast majority who study this issue know that. "Brain death" is a utilitarian construct adopted by the legal and medical communities to label a person with a severely injured brain as "dead" in order to legally facilitate organ procurement and/or for the hospital to then be the decision-maker on discontinuation of treatment, including but not limited to use of a ventilator.
The ventilator could be used outside of the hospital intensive care setting, but facilitating treatment and care for either in-home care or at another institution would require a tracheostomy and feeding tube placement. The hospital has thus far refused to give Aden these necessary treatments that would optimize and facilitate ordinary care elsewhere, care which Aiden's father steadfastly is willing to provide. Instead of providing treatment and care to a young woman who suffered serious complications at their institution, they are using their administrative and financial resources to fight a legal battle, clinging to their own choice of "brain death" guidelines.
While the NV State Supreme Court takes on these issues, Aden is alive and needs treatment and care. Please help to find doctors and a hospital that will treat Aden.

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Dr. Byrne is past-President of the Catholic Medical Association (USA), formerly Clinical Professor of Pediatrics at St. Louis University in St. Louis, MO and Creighton University in Omaha, NE. He was Professor of Pediatrics and Chairman of the Pediatric Department at Oral Roberts University School of Medicine and Chairman of the Ethics Committee of the City of Faith Medical and Research Center in Tulsa, OK. He is author and producer of the film "Continuum of Life" and author of the books "Life, Life Support and Death," "Beyond Brain Death," and "Is 'Brain Death' True Death?"

Dr. Byrne has presented testimony on "life issues" to nine state legislatures beginning in 1967. He opposed Dr. Kevorkian on the television program "Cross-Fire." He has been interviewed on Good Morning America, public television in Japan and participated in the British Broadcasting Corporation Documentary "Are the Donors Really Dead?" Dr. Byrne has authored articles against euthanasia, abortion, and "brain death" in medical journals, law literature and lay press.

Paul was married to Shirley for forty-eight years until she entered her eternal reward on Christmas 2005. They are the proud parents of twelve children, grandparents of thirty-one grandchildren and 5 great-grandchildren.

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