The Uncommon Case of Jahi McMath

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No Conflicts of Interest

Background

• Most families of patients declared dead by neurological criteria accept the diagnosis and agree that life support may be withdrawn unless it is continued prior to organ donation.
• Occasionally, families reject the diagnosis, refuse to withdraw support, and bring lawsuits against physicians and hospitals.
• The case of Jahi McMath is one of those uncommon cases.

Objectives

• To describe chronologically how a California teenager became the focus of campaigns to challenge the concept of determining death by neurological criteria, prevent physicians and hospitals from limiting treatment, and increase their medical malpractice liability. All the information presented is in the public record.
• To discuss the medical-legal aspects of the case and their implications.
• To make recommendations regarding the management of such cases in the future.
Early Hospital Course

- Dr. Frederick Rosen performed an adenotonsillectomy, uvulopalatopharyngioplasty, and bilateral submucous resection of inferior nasal turbinates on Jahi for obstructive sleep apnea at Children’s Hospital, Oakland (CHO) on 12/09/13.
- After surgery, in the presence of her mother, Nailah Winkfield, and her grandmother, she bled from her mouth and experienced cardiopulmonary arrest and resuscitation.
- Jahi was ventilated thereafter in the PICU.

Post-Resuscitation

- Jahi was declared dead by neurological criteria on 12/11/13 by the CHO Chief of Neurology.
- Her electroencephalogram showed electrocerebral silence.
- Her death was confirmed by neurological criteria by a second CHO physician on 12/12/13.

Legal Basis of Death in California

- HSC 7180 (CA’s Uniform Determination of Death Act [UDDA]): Death is “either (1) irreversible cessation of cardiovascular and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brainstem. A determination of death must be made by acceptable medical standards.”
- HSC 7181: Independent confirmation is required if death is declared by neurological criteria.

Family Accommodation After Declaration of Brain Death

- HSC 1254.4: Hospitals must adopt policies providing families a “reasonably brief period of accommodation” before cardiopulmonary support is withdrawn. “During this reasonably brief period of accommodation, a hospital is required only to continue previously ordered cardiopulmonary support. No other medical intervention is required. For the purposes of this statute, a ‘reasonably brief period’ means an amount of time afforded to gather families or next of kin at the patient’s bedside.”
Family Accommodation After Declaration of Brain Death

- Hospitals must make “reasonable efforts” to accommodate families’ religious or cultural practices or concerns. “For purposes of this section, in determining what is reasonable, a hospital shall consider the needs of other patients and prospective patients in urgent need of care.”

Legal Basis of Death in Other States

- As of 2007, 32 states and D.C. had adopted UDDA or modifications; 14 states had written statutes, 4 had incorporated the determination of death by neurological criteria into statutes or case law.
- New York requires hospital procedures for the reasonable accommodation of religious objections to neurological death which “may include the continuation of artificial respiration.”
- New Jersey allows physicians to declare death solely by cardiopulmonary criteria if families object to neurological death and prohibits payers from denying coverage in these circumstances.

Nailah Winkfield and Omari Sealey

The Family Response

- Jahi’s mother, uncle, and other family members rejected the diagnosis of death by neurological criteria, noting that Jahi’s heart was still beating, and blamed CHO for her arrest after a “simple tonsillectomy.”
- Jahi’s mother refused organ donation and requested that Jahi remain on the ventilator at least through Christmas.
- On 12/15/13, the family was told that the ventilator would be removed the following morning after other relatives arrived. That night, Sealey contacted San Francisco plaintiff attorney Christopher Dolan, who agreed to represent the family on a pro bono basis. The next afternoon, CHO assented to his demand to continue support pending judicial review.
Christopher Dolan

Family Remarks

- Jahi’s mother: “I can feel my daughter ... she wants to scream out and tell me something ... It’s cheaper for them to get rid of her because her living is killing their bills.”
- Jahi’s uncle: “It’s all business. The reason they want her off is because this is the difference between a $30,000,000 lawsuit and a $250,000 lawsuit.”

The First Press Conference, 12/16/13

California’s Medical Malpractice Law

- BPC 6146, 3333.1, 3333.2 (California Medical Injury Compensation Act [MICRA]): $250,000 cap on compensation for pain and suffering, disability, death, and other non-economic losses; also limits attorney fees.
- MICRA places no limits on economic losses.
- Consumer Attorneys of California has sought to overturn MICRA, noting that the cap has never been adjusted upward for inflation.
- Dolan is a former president of Consumer Attorneys of California, a plaintiff attorneys group.
Could Jahi’s Family be Compensated?

• Jahi’s family could receive $250,000 under MICRA for wrongful death but would have to agree she was dead.
• A Southern California plaintiff attorney estimated that Jahi would live another 69 years; at $7500/day, her economic costs would be $189,000,000 – assuming she was in ICU and actually alive.
• Her mother and grandmother might be compensated for negligent infliction of emotional distress if Jahi’s arrest was proved to result from negligence that they appreciated, along with her probable outcome, at the time.

The Hospital’s Response

• “Our hearts go out to the patient and her family. Unfortunately, we have not been authorized by the family to share information with the public about this matter. Consequently, we are not able to correct misperceptions created in this sad situation. Nevertheless, we want to assure the community that we are doing everything in our capacity to provide support for the grieving family.”

Battle in the Media

• Dolan: “The family believes she is alive. It is our position that no doctor can make a determination about end of life without parental consent.”
• Singer: “The family attorney is perpetuating a tragic hoax on the public as well as misleading the public. Jahi McMath is deceased...No amount of time, no amount of surgery, and no amount of hope will bring her back. We hope the family finds peace in 2014 and is able to move forward.”
Legal Action

• On 12/20/13, Dolan sought in Alameda County Superior Court a restraining order enjoining CHO from removing the ventilator and compelling it to place a tracheostomy and a feeding gastrostomy.
• Dolan also requested a third evaluation of Jahi’s neurologic function.
• He asked that it be performed by Paul Byrne, a pediatrician who does not accept the concept of brain death.

Judge Grillo’s Ruling

• On 12/23/13, Grillo appointed Paul Fisher, Chief of Pediatric Neurology at Stanford, to evaluate Jahi. Fisher determined that Jahi was dead by neurological criteria and cerebral blood flow testing (which Dolan witnessed).
• On 12/24/13, Grillo ruled that Jahi was legally dead but granted the injunction to maintain her on the ventilator until 12/30/13. He did not order a tracheostomy or feeding gastrostomy.

Evilio Grillo

Further Legal Action

• On 12/30/13, Dolan sought injunctions through the California Court of Appeal and the US District Court, arguing that California’s Uniform Determination of Death Act violated Winkfield’s constitutional rights of religious freedom and privacy.
• On 01/03/14, the parties reached an agreement with Judge Grillo that CHO could release Jahi’s body to the Alameda County Coroner’s Office.
• The prior motions to the state and federal courts were rendered moot, so the constitutional issues were not resolved.
Supporting the Family

• Jahi’s family had already begun raising money on their website for her transfer to another facility.
• On 12/31/13, the Terri Schiavo Life & Hope Network revealed that it was helping the family find an accepting hospital.
• On 01/02/14, the Life & Hope Network released a statement questioning brain death and stating that hospital corporations have a “vested interest in discontinuing life.”

The Terry Schiavo Life and Hope Network

• “Where there’s life there’s hope – promoting a culture of life by embracing the true meaning of compassion by opposing the practice of imposed death.”

The Transfer

• On 01/05/14, Jahi’s family accepted responsibility for her body, which was moved to an undisclosed facility.
• That same day, the Alameda County Coroner issued a death certificate saying that Jahi died on 12/12/13, the day of her second determination of death by neurological criteria at CHO.
• The Coroner did not state a cause of death, awaiting a return of the body for autopsy after Jahi was declared dead, presumably by cardiopulmonary criteria.

The Campaign Against MICRA

• On 01/05/14, Jamie Court, the President of Consumer Watchdog, and Bruce Fagel, a Beverly Hills plaintiff attorney, wrote in The Chronicle that MICRA created “a financial incentive for doctors and hospitals to bury their mistakes...Indexing the (MICRA) cap for inflation is one of the main aims of the Troy and Alana Pack Patient Safety Act.”
Jamie Court and Bob Pack

The Troy and Alana Pack Patient Safety Act (Proposition 46) Would:
• Adjust the MICRA cap for inflation (> $1,000,000);
• Require hospitals to perform random alcohol and drug testing of physicians;
• Test physicians after death or serious injury occurs to their patients;
• Suspend physicians from practice who test positive or refuse to be tested, pending investigation by the Medical Board;
• Presume that physicians who test positive are guilty of negligence in malpractice actions; and
• Require that physicians consult a statewide data base before prescribing certain controlled substances.

Fundraising

• On 01/08/14, The Chronicle revealed that Court had sent a fundraising letter for the Patient Safety Act, noting that “Oakland Children’s Hospital is going to be a poster child for reform.”
• Dolan responded that using Jahi’s case for fundraising was “a bad thing to do,” but The Chronicle noted that Consumer Attorneys of California, of which Dolan once was president, was a major supporter of the Patient Safety Act.
• Singer called the fundraising letter “reprehensible.”

Aftermath

• On 01/08/14, Dolan told the media that Jahi had received a tracheostomy and feeding tube at an undisclosed facility.
• On 03/13/14, The CA Department of Public Health found CHO to be in “substantial compliance” in its review. Dolan said this was similar to “the fox guarding the henhouse” and said the family would pursue legal action.
• On 03/27/14, Jahi’s family were guests of honor at the Terry Schiavo Life & Hope Network’s Second Annual Awards Gala.
Aftermath

• On 06/20/14, KPIX reported that Jahi was in the Pediatric ICU of St. Peter’s University Hospital System in New Brunswick, New Jersey.
• Dolan told the media that Jahi might be moved soon to another facility where she could receive “a lower level of care.”

Battle in the Media

• Dolan: the family is not opposed to further neurological testing because “it may show something different than when Jahi was under the most acute stress of swelling of the brain and lack of food and nutrition.”
• Singer: “The news media, independent physicians and the medical community ought to be allowed in, so they can make a judgment themselves as to whether this is the greatest miracle known to man, or a hoax. Sadly, I think this is a hoax.”
Recent Events

• On 09/30/14, Judge Grillo held a case management conference at which Dolan requested a hearing, scheduled for 10/09/14, at which he would present videotapes and other evidence suggesting that Jahi is not neurologically dead.
• According to The Chronicle, Dolan hoped to have the Alameda County Coroner’s Death certificate revoked and Jahi returned to California from a private residence at the expense of CHO.

• On 10/06/14, Paul Fisher, the Stanford neurologist whom Grillo originally appointed to examine Jahi, wrote the judge saying that Dolan’s evidence was unconvincing.
• On 10/08/14, Dolan postponed the hearing set for the next day, saying that he needed time for his “team of international brain death experts” needed time to review Fisher’s letter.

Recent Events

• On 11/04/14, Proposition 46 was turned down by the California electorate by a 67%-33% margin.
• On 03/04/15, The Chronicle reported that Jahi’s family had filed a suit in Alameda County for unspecified damages against Dr. Rosen and CHO through plaintiff attorney Bruce Brusavich of Southern California.

Discussion

• Although most families accept the concept of determining death by neurological criteria, some reject it, ostensibly on religious grounds.
• The laws in New York and New Jersey that grant a religious exception to the UDDA may contribute to confusion over the concept.
• Dolan and others, including Rachel Delaney, would argue that the a universal religious exception is desirable.
### Delaney's Thesis
- The UDDA violates Orthodox Jews’ rights of religious freedom and privacy.
- States have an interest in uniform standards, preserving life through organ transplantation, and maintaining hospital efficiency and financial survival.
- Nevertheless, these interests would not be burdened because neurologically dead patients don’t need prolonged ventilation and only a few Orthodox Jews would exercise the exception.

### Counter Arguments
- In *Employment Division v. Smith*, the U.S. Supreme Court determined that neutral laws of general applicability that further rational state interests do not require religious exceptions.
- The Supreme Court does not acknowledge a constitutional right to privacy.
- The Court has never found that families have a right to determine when death occurs or to demand treatment of patients who are dead.

### Counter Arguments
- Jahi’s case illustrates that not just Orthodox Jews may seek a religious exception to the UDDA, and that some neurologically dead patients can be maintained for months or years, usually at home or in long-term care facilities.
- If such cases become more common, state interests such as preserving life and maintaining hospital efficiency may be compromised.
- The state’s interest in preserving the integrity of the medical profession also may be compromised.

### Conclusions
- The UDDA and similar laws have served to support a scientific consensus about what death is, to facilitate organ transplantation, and to make the best use of medical resources.
- These laws probably can withstand constitutional challenge, should it occur.
- Families that reject the concept of determining death by neurological criteria should be reasonably accommodated, but society should not pay to maintain neurologically dead patients unless the state requires it – as only New Jersey does.
Recommendations

- Hospitals should expect cases similar to Jahi’s; in fact, two such cases recently occurred at San Francisco General Hospital.
- Hospital legal counsel and medical staffs should prepare for these cases.
- Hospitals and physicians should provide a “reasonably brief period of accommodation” to families and otherwise follow state laws.

Recommendations

- Contentious cases should be dealt with in the legal system. Good public relations may be required if families and their attorneys go before the media.
- An educational campaign may be necessary to offset the efforts of those who challenge the concept of neurological death.
- The campaign will be more difficult if Jahi is not neurologically dead or if the law defining neurological death is changed.