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CCB Rules No Jurisdiction Where Patient Declared Brain Dead

Every so often, we are consulted with respect to whether or not a medical team must keep a patient connected to life support at the insistence of a family, even where that patient meets the criteria for a neurological determination of death. We have consistently advised that the team may discontinue, without consent, because the continued interventions are not "treatment". The Consent and Capacity Board (CCB) has recently provided some welcome clarification supporting this view.

The CCB has released two decisions in the past month which conclude that it has no jurisdiction to hear applications connected to the withdrawal of mechanical ventilation from a patient in respect of whom there has been a neurological determination of death (brain death).[1]

The CCB held that the reason it does not have jurisdiction is because neurological death is "death according to the law of Ontario".[2] Panel member Mr. Eugene Williams outlined:

[D]eath terminates the person. Thus when death occurs, there is no longer a "person" who is subject to treatment under the *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.[3]

In the body of the Re *UH* decision, Mr. Williams highlights the fact that the finding of neurological determination of death was not contradicted and that two physicians had completed the testing to support the finding of brain death. Mr. Williams referenced the earlier decision of Re *EI* in which Vice Chair Lora Patton found that it was not the role of the Board to question a determination of death made by a physician. In that decision, she remarked:

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.[4]

While the CCB's analysis in *UH* does not specifically discuss the difference between brain death and a patient in a persistent vegetative state, the reasons include the submissions of the applicant physician that patients in a vegetative state have some degree of brain stem function that can permit them to respond to stimuli. The circumstances of a patient declared brain dead are therefore different that those in the *Rasouli* case.[5]

Summarizing this decision in another way, consent is not required to halt medical interventions up to and including mechanical ventilation once the patient has been declared brain dead (in keeping with the requirements of the *Trillium Gift of Life Network Act)*, although cardiac death has not yet occurred. An appropriate procedure in light of the tragic circumstances inherent to these cases is to provide the patient's family with a notice period, such as a day or two, prior to halting current interventions.

[1]Re *UH* (released October 28, 2016) and Re *EI* (released September 30, 2016)

[2] Re *UH* at page 8.

[3] *Ibid.* at page 10.

[4] Re *EI* at page 9.

[5] *Cuthbertson v. Rasouli,*[2013] S.C.C. 53.

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