The Catholic Lawyer

Volume 27
Number 3 *Volume 27, Summer 1982, Number 3*

Article 12

September 2017

Determination of Death Legislation

Robert C. Robinson, Robinson & Kriger Portland, Maine

Follow this and additional works at: https://scholarship.law.stjohns.edu/tcl

 Part of the Legislation Commons

Recommended Citation

Robert C. Robinson, Robinson & Kriger Portland, Maine (1982) "Determination of Death Legislation," *The Catholic Lawyer*: Vol. 27 : No. 3 , Article 12.
Available at: https://scholarship.law.stjohns.edu/tcl/vol27/iss3/12

This Diocesan Attorneys' Papers is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

DETERMINATION OF DEATH LEGISLATION

ROBERT C. ROBINSON, ESQUIRE

Death and dying, common to all living creatures and accepted by all as the inevitable termination of our time on earth, is, nevertheless, misunderstood. During the last 200 years of our Anglo-American jurisprudential system there has been no problem in determining when an individual has died. If the person had stopped breathing and his heart had stopped beating, the physician, using standard medical criteria, would pronounce him dead.[1] Modern technology has advanced at so rapid a pace that it is now possible for respiratory and cardiac activity to be maintained artifically even when the brain has ceased to function. This has been referred to as "brain death," a diagnosis given by physicians in their effort to establish new criteria in determining the time of death.[2] The advances of medical technology have been remarkable. Physicians, enmeshed in their own web of technical proficiency, are now faced with problems never before encountered. Among the questions that have arisen are: Are all "life support" systems to be classified as extraordinary care? When may they be used? When must they be used? When may they be withdrawn? What is brain death?

The first attempt at legislative resolution of this problem occurred in 1970 when the state of Kansas adopted "An Act Relating to and Defining Death."[3] Because it employed alternative definitions of death, the statute was not well received and created a degree of confusion.[4] Two years before the Kansas statute was enacted, an ad hoc committee of the

---

[1] *See* BLACK'S LAW DICTIONARY 488 (4th ed. 1951). Death was defined as, "the cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration [and] pulsation . . . ." *Id.* The definition of death subsequently has been revised to recognize "statutory definitions of death which include brain-related criteria." BLACK'S LAW DICTIONARY 360 (rev. 5th ed. 1979).

[2] *See* Showalter, *Determining Death: The Legal and Theological Aspects of Brain-Related Criteria*, 27 CATH. LAW. 112, 113 (1982).

[3] KAN. STAT. ANN. § 77-202 (Supp. 1981).

[4] *See* Capron & Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87, 109 (1972).

Harvard Medical School undertook an examination of "brain death." The committee's report stated that its purpose was to define, for the first time, irreversible coma as a criterion for death thereby aiding its determination. This is particularly significant in the case of a comatose individual with irreversible injury to the whole brain, or of an individual who has sustained brain death and has been identified as an appropriate donor of organs for transplant.

The medical community now agrees on the important distinction between irreversible coma and brain death. The former is described as a negative state where all cerebrum functions are lost but other vital functions, such as heart beat, breathing, and temperature, persist.

There are presently at least thirty-five states which have some form of brain death legislation.[5] In 1972, Professor Alexander Morgan Capron of the University of Pennsylvania Law School and Leon R. Kass, Executive Secretary of the National Academy of Sciences, proposed their own model entitled *A Statutory Definition of the Standards for Determining Human Death*[6] which was the forerunner of later legislation. Their model statute defines death as the irreversible cessation of spontaneous respiratory and circulatory functions.[7] Where artificial means of support preclude such a determination, a person will be considered dead if he has experienced an irreversible cessation of spontaneous brain functions.[8] This act was an improvement over the Kansas Act, and the substratum for some of the acts which followed.

In 1975, the Law and Medical Committee of the American Bar Association (ABA) drafted a Model Definition of Death Act.[9] In 1978, the National Conference of Commissions on Uniform State Laws (NCCUSL) completed the "Uniform Brain Death Act."[10] In 1979, the American Medical Association proposed a model act entitled "Model Determination of Death Statute."[11] Although each of these acts is somewhat different, they all have the same purpose—to establish legitimate criteria by which a physician, using accepted medical practice, can diagnose brain death at the time when a patient is receiving life support for respiration and circulation. However, the existence of several different versions from both professional associations and individuals obscures the purpose.

The AMA version suggested that a single act might be created which

---

[5] Showalter, *supra* note 2, at 127; *see, e.g.*, ARK. STAT. ANN. § 82-537 (Supp. 1981); CONN. GEN. STAT. § 19-139i(b) (1981); MD. HEALTH-GEN. CODE ANN. § 5-201 to -203 (1982).

[6] *See* Capron & Kass, *supra* note 4, at 111.

[7] *Id.*

[8] *Id.*

[9] ABA MODEL DEFINITION OF DEATH ACT (1975).

[10] UNIF. BRAIN DEATH ACT § 1, 12 U.L.A. 16 (West Supp. 1982) (superseded in 1980 by the UNIF. DETERMINATION OF DEATH ACT, § 1, 12 U.L.A. 209 (West Supp. 1982)).

[11] AMA MODEL DETERMINATION OF DEATH STATUTE (1979).

would combine the best elements of all and produce a workable act. In May of 1980, the AMA met to consider several forms of legislation. Among the representatives were Dennis Horan, chairman of the Law and Medicine Committee; John Krichbaum and Bruce Nortell from the AMA's legal staff; George Keely of Colorado and former president of NCCUSL; Bill Wood of Pennsylvania, a chairman of the Standing Committee of Natural Death Act; and Alexander Capron, Executive Director of The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavorial Research. Being totally familiar with the problems of the physicians, the problems of the courts, and the attitude of the AMA, the ABA and NCCUSL, they reached a compromise which was, in August 1980, presented to the meeting of the committee of the whole of the NCCUSL. With very little debate the proposal received full approval. The language of the amended version was as follows: "An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards."[12]

A comparison of this act with the Uniform Brain Death Act reveals three important changes. First, the new act incorporates the common-law standard for determining death as well as the brain death standard. The Uniform Brain Death Act contains no language codifying the common law. Although the original work of the NCCUSL's special committee on the Uniform Determination of Death Act did codify the common law, the drafting committee, deciding to present the simplest act possible, eliminated that language.

The second important change is in the title. Since the act was a comprehensive act, the title "Uniform Brain Death Act" was inappropriate. The decision at the meeting was to return to the original title—"Uniform Determination of Death Act." The new act is not, precisely, a definition of death. It does not contain the clinical language with which physicians define death. What this act does, however, is to establish a general legal standard which permits the determination of death.

The third major change concerns the question of the applicable medical standard. The Uniform Brain Death Act used the term "reasonable" medical standards, while the new Uniform Determination of Death Act uses "accepted" medical standards. At the May 16th meeting, much time was spent considering the existing case law, including the latest cases incorporating the Uniform Brain Death Act. It was concluded that the basic language of either existing version would be appropriate, since courts would nevertheless continue to rely upon the expert testimony of physi-

---

[12] UNIF. DETERMINATION OF DEATH ACT § 1, 12 U.L.A. 209 (West Supp. 1982).

cians. The criteria that the medical profession utilizes will be left for the medical profession to establish. The term "accepted" medical standards appeared to be the most neutral phrase in the existing acts, and was thus selected.

The courts generally have followed expert testimony in making their way through this maze, in most instances, without benefit of legislative pronouncement. In 1979, the Supreme Courts of Colorado and Arizona adopted the Uniform Brain Death Act as the rule of law in their states without the approval of their respective legislatures.[13] *Lovato v. District Court,* the Colorado case, involved child abuse that ripened into homicide.[14] *State v. Fierro* involved a homicide by shooting.[15] In each instance, brain death was diagnosed while the victim was attached to respiratory and circulatory support systems. It seems clear that both courts used the Uniform Act to avoid complicating potential criminal prosecutions.[16] The Uniform Act eliminates a possible defense based on the doctors' decision. In *Lovato,* Justice Groves stated:

> We recognize the authority of, and indeed encourage, the General Assembly to pronounce statutorily the standards by which death is to be determined in Colorado. We do not, however, believe that in the absence of legislative action we are precluded from facing and resolving the legal issue of whether irretrievable loss of brain function can be used as a means of detecting the condition of death. Under the circumstances of this case we are not only entitled to resolve the question, but have a duty to do so. To act otherwise would be to close our eyes to the scientific and medical advances made world-wide in the past two or three decades.
>
> As the rule of this case and that to be followed until otherwise changed legislatively or judicially, we adopt the provisions of the proposed Uniform Act. We repeat its provisions:
>
> For legal and medical purposes, an individual who has sustained irreversible cessation of all functioning of the brain, including the brain stem, is dead. A determination under this section must be made in accordance with reasonable medical standards.
>
> Our recognition of this concept of brain death does not preclude continuing recognition of the standard of death as determined by traditional criteria of cessation of respiration and circulation. The effect of our opinion is the same as that of proposed H.B. 1416 introduced in the Colorado General Assembly and referred to earlier. . . . That [bill] provided for alternate determinations of death, the first being brain death as defined in the Uniform

---

[13] State v. Fierro, 124 Ariz. 182, 185, 603 P.2d 74, 77-78 (1979) (en banc); Lovato v. District Court, 198 Colo. 419, 432, 601 P.2d 1072, 1081 (1979) (en banc).

[14] 198 Colo. at 422-23, 601 P.2d at 1073.

[15] 124 Ariz. at 184, 603 P.2d at 76.

[16] *See id.* The defendant's arguments, that the termination of support systems was the cause of death and that the evidence was insufficient to support a guilty verdict to a murder charge, were rejected by the *Fierro* court. *Id.*

Act and the second being somatic death as traditionally defined.[17]

In *Commonwealth v. Golston*[18] the defendant was convicted of first-degree murder. His victim had been connected to a respirator immediately upon admission to the hospital.[19] Two days later he failed to breathe spontaneously when temporarily disconnected from the respirator.[20] In addition, there was no indication of cerebral electrical activity. Pursuant to consultation with his family, the respirator was removed from the victim and his heart stopped.[21] The defendant contended that the trial court had changed the law and invaded the province of the legislature when it instructed the jury that "the occurrence of a brain death . . . satisfies the essential element of the crime of murder requiring proof beyond a reasonable doubt of the death of the victim."[22] The Massachusetts court, rejecting the defendant's arguments, stated that the trial judge had taken into account significant technological advances in the area of artificial life support and merely had made an "evolutionary restatement" of the rule rather than a new substantive rule.[23] The court limited its approval of the concept of brain death, however, to situations where criminal convictions are concerned.[24]

In *In re Bowman*,[25] Matthew, age 5, was admitted to the Stevens Memorial Hospital on September 30, 1979 after suffering massive physical injuries inflicted by a nonfamily member who was caring for him.[26] This was an appeal brought by the guardian ad litem appointed for William Matthew Bowman challenging the decision of the Snohomish County Superior Court which had ruled that because he had suffered irreversible loss of brain activity he was in fact dead on October 17, 1979.[27] Chief Justice Robert F. Utter, in affirming the trial court determination, stated that clarification was necessary because "[w]ith the recent advancement of medical science, the traditional common law 'heart and lungs' definition is no longer adequate."[28] Some of the specific factors compelling a more refined definition are: (1) modern medicine's technological ability to sustain life in the absence of spontaneous heartbeat or respiration; (2) the advent of successful organ transplantation capabilities which creates a de-

---

[17] 198 Colo. at 432-33, 601 P.2d at 1081.
[18] 373 Mass. 249, 366 N.E.2d 744 (1977), *cert. denied*, 434 U.S. 1039 (1978).
[19] 373 Mass. at 251, 366 N.E.2d at 747.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 252, 366 N.E.2d at 747-48.
[23] *Id.* at 254, 366 N.E.2d at 748-49.
[24] *Id.* at 255, 366 N.E.2d at 749.
[25] 94 Wash. 2d 407, 617 P.2d 731 (1980) (en banc).
[26] *Id.* at 409, 617 P.2d at 732.
[27] *Id.*
[28] *Id.* at 412, 617 P.2d at 734.

mand for viable organs from recently deceased donors; (3) the enormous expenditure of resources potentially wasted if persons in fact dead are treated medically as though they were alive; and (4) the need for a precise time of death so that persons who have died may be treated appropriately.[29]

The courts are being confronted even more frequently with having to make decisions in an area of extraordinary technological advancement without the benefit of corresponding legislative advancement. In the case of *Eichner v. Dillon*, to which Dennis Horan alluded, Brother Joseph Fox, an 83-year-old Marianist Brother, on October 2, 1979, suffered a cardiorespiratory arrest with massive brain cell destruction, reducing him to a chronic vegetative state.[30] Neurological examination confirmed that Brother Fox would never gain any higher mental function.[31] "He could not hear, speak, move, recognize, think, or perform any but the most primative kidney and digestive functions."[32] When this was fully and completely established, his dear friend, Father Eichner, explaining the position of the church, asked to have the ventilator shut off. The hospital officials refused.[33] Later, the district attorney threatened that anyone who disconnected the respirator would be prosecuted for homicide.[34]

Father Eichner, after being appointed legal guardian, petitioned to disconnect the respirator. He based his petition on the constitutionally protected right to privacy.[35] Judge Meade in his decision rejected the *Saikewicz*[36] and *Quinlan*[37] rationale of "substituted judgment."[38] Since, however, Brother Fox had conveyed many times his own feelings concerning extraordinary care and artificial means to support life, Judge Meade

---

[29] *Id.* at 412-13, 617 P.2d at 734.

[30] *In re* Eichner, 102 Misc. 2d 184, 186-87, 423 N.Y.S.2d 580, 583 (Sup. Ct. Nassau County 1979), *aff'd*, 73 App. Div. 2d 431, 426 N.Y.S.2d 517 (2d Dep't 1980).

[31] 102 Misc. 2d at 189, 423 N.Y.S.2d at 584.

[32] Paris, *Brother Fox, the Courts and Death with Dignity*, 143 AMERICA 282, 282 (1980); *see* Eichner v. Dillon, 73 App. Div. 2d 431, 442, 426 N.Y.S.2d 517, 528 (2d Dep't 1980).

[33] 73 App. Div. 2d at 437, 426 N.Y.S.2d at 524.

[34] Paris, *supra* note 32, at 282. On the subject of possible prosecutions, the court noted that "[e]uthanasia . . . is proscribed by the criminal law, and any physician who, acting on his own, removes a life sustaining respirator arguably commits some form of homocide." 73 App. Div. 2d at 450, 426 N.Y.S.2d at 533.

[35] 102 Misc. 2d at 196, 423 N.Y.S.2d at 589.

[36] Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977). The guardian of a terminally ill 67-year-old severely retarded man was permitted by the court to refuse chemotherapy on his behalf. *Id.* at 753, 370 N.E.2d at 431.

[37] *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976). The court recognized an individual's right to privacy and stated that "[t]he only practical way to prevent destruction of the right is to permit the guardian and family of Karen to render their best judgment . . . as to whether she would exercise it in these circumstances." *Id.* at 41, 355 A.2d at 664.

[38] 102 Misc. 2d at 208-09, 423 N.Y.S.2d at 596-97.

approved the withdrawal of the life supports, based on Brother Fox's expressed personal desires.[39]

How would Judge Meade have decided the question if Brother Fox had not expressed himself in clear terms prior to surgery? Reverend John Paris, in his report on this case, states:

> Judge Meade's constricted ruling provided relief from the torture of useless treatment for one man, but it seemingly cut off the tentative efforts explored by *Quinlan* and *Saikewicz* for protecting that right for others. The *Fox* court, in fact, specifically states: "Perhaps some form of 'living will' legislation may be required if the cessation of artificial life-support systems is to be possible in other circumstances." That legal perspective—one which believes that an individual needs the state's authorization to die and all of its untoward implication—has been severely criticized.
>
> If Meade's ruling is taken to mean that life-supporting medical treatment may be terminated only on proof of a "living will" or other clear and undisputed evidence of the patient's determination not to undergo "extraordinary" life-prolonging procedures, Brother Fox's case will have been a compounded tragedy—an unnecessary and costly prolongation of his own dying and the judicial rejection of traditional Catholic doctrine that no one, competent or incompetent, articulate or uninformed, need be subjected to continuing efforts at useless treatment.[40]

The matter was appealed and Justice Milton Mollen, speaking for a unanimous five-member court, upheld Judge Meade's decision but with a substantially modified approach.[41] He insisted that the issue be decided on right of privacy grounds.[42] He also adopted the substituted judgment theory of *Saikewicz*, but restricted that right by ruling that it can only be employed in a narrow range of cases, and then only by court decree.[43] Subsequently, however, the court of appeals modified the approach, affirming the decision on the narrow grounds of the lower court by declining to reach the issue of a right to privacy.[44]

On January 30, 1981, Mrs. Bacchiochi, while having her wisdom teeth removed in the office of an oral surgeon in Hartford, Connecticut slipped into a coma.[45] She was removed to the Johnson Memorial Hospital where she stopped breathing, and was placed on life-support systems for a pe-

---

[39] *Id.* at 209, 423 N.Y.S.2d at 597.

[40] Paris, *supra* note 32, at 284-85 (citing R. MCCORMICK, LEGISLATION AND THE LIVING WILL (1977)).

[41] 73 App. Div. 2d at 435-36, 426 N.Y.S.2d at 524.

[42] *Id.* at 457, 426 N.Y.S.2d at 537.

[43] *Id.* at 473, 476, 426 N.Y.S.2d at 548, 550.

[44] 52 N.Y.2d at 377, 420 N.E.2d at 70, 438 N.Y.S.2d at 373. The court held that relief could be supported by common-law principles in light of clear and convincing evidence of Brother Fox's expressed desires. *Id.* at 377, 380, 420 N.E.2d at 70, 71, 438 N.Y.S.2d at 273, 274.

[45] Bacchiochi v. Johnson Memorial Hosp., No. 81-256126 (Conn. Super. Ct. Mar. 13, 1981).

riod of several weeks until the court determined that she had suffered brain death. After Mrs. Bacchiochi stopped breathing and was intubated, a neurologist was called in to examine her. He took one or two EEG's which showed a slight degree of vitality. The last three or four EEG's over a 3-week period were absolutely flat. He then performed a thorough examination, following the procedure recommended by the ad hoc committee of the Harvard Medical School, with the exception of "ice water in ear," and there was absolutely no response.[46]

Mr. Bacchiochi wanted the life supports removed; the hospital would not comply. Mr. Lester Katz, attorney for plaintiff, petitioned the court for a temporary injunction to enjoin the hospital from preventing removal of life support. After appointing a guardian ad litem, the court advised counsel that it wanted written notice to be given to the president of the bar association, the attorney general and district attorney, the president of the medical association, the hospital association, and representatives from all religious faiths so as to give each of them the opportunity to come before the court and voice their concern about the court's ultimate determination on the issue of brain death.

The plaintiff called Reverend John Paris, S.J., at the University of Massachusetts Medical Center as an expert witness. The court and Father Paris engaged in an extensive 90-minute colloquy on the subject of brain death and related matters. When asked by the court if he felt it was ethical to remove the life-support equipment in the instant case, Father Paris stated, "It was, of course, ethical to remove them. In fact to pursue a course of treatment which could not produce an improvement or any hope of benefit to the person was clearly unethical."

The court ruled that Mrs. Bacchiochi was "brain dead," meaning there was total destruction of the function of her brain, including not only the sapient cognitive cerebrum, but also the medulla or brain stem. The court, however, delayed action on the family's request to order the doctors to remove the life-support equipment. Instead, it told authorities to "do what they deemed necessary." The next day Mr. Bacchiochi and his wife's doctor removed the life supports.

CONCLUSION

The proliferation of model acts and state statutes, together with the rulings from courts, demands some order and design in an area which is so very important to society and which is already replete with complexity and confusion. The Uniform Determination of Death Act,[47] approved in

---

[46] *See* Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *A Definition of Irreversible Coma*, 205 J. A.M.A. 337, 337-40 (1968).

[47] UNIF. DETERMINATION OF DEATH ACT § 1, 12 U.L.A. 209 (West Supp. 1982). For an explan-

1980 by the National Conference of Commissioners on Uniform State Laws, the American Medical Association, and the American Bar Association, contains singular-purpose language which can develop uniformity in the several states and bring order and design to an area of the law at a time when it is so desperately needed. Although the adoption of the Uniform Determination of Death Act does not automatically solve the problem of when a brain irreversibly has ceased to function—since in any given case that may be a very difficult judgment to make—the legislation at least sets the framework, creating the forum in which to establish that when the whole brain has ceased to function, the person is dead.

---

atory discussion of the Act, see UNIF. DETERMINATION OF DEATH ACT, 12 U.L.A. 208 commissioner's prefatory note (West Supp. 1982).