



## BRAIN DEATH: A REVIEW OF RECENT CASES IN THE MEDIA

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Every few years a case that raises challenging medico-legal issues seems to capture media attention and arouse public emotion. Recently, the media followed two such cases that led commentators to address issues involving death, women's rights, patient rights, and the law.

One case, that of 13 year-old Jahi McMath, demonstrated the challenge our society faces in understanding brain death. In brief, Jahi suffered complications following a tonsillectomy, and after numerous neurological tests, Jahi's physicians declared her brain dead. In accordance with hospital policy, the physicians and the hospital began the process of disconnecting Jahi from medical equipment. Jahi's parents objected, arguing that the hospital had no right to unilaterally disconnect the equipment that was keeping her "alive." Her parents, disagreeing with the medical team's determination that their daughter was dead, desired to transfer Jahi to another facility. Ultimately, Jahi was transferred to an undisclosed long-term care facility.

The second case, that of Marlise Munoz, demonstrated the tension between patient rights, Texas law, and the rights of unborn children. I will focus on this second case as, from a purely medico-legal perspective, it raises more challenging questions.

On November 26, 2013, Ms. Munoz, a 33 year-old wife and mother of one, collapsed at her home. At the time, she was approximately 14 weeks pregnant with her second child. She was transported to the local hospital and, despite the efforts of the medical team, she was declared brain dead. According to her husband, hospital personnel informed him that the fetus was still viable since a fetal heartbeat was detected. Ms. Munoz, a trained paramedic, did not have an advance directive, but had informed her husband, also a trained paramedic, that she would not want aggressive medical intervention should she be in a condition with little to no hope of meaningful recovery. In recognition of her wishes, and the fact that she was declared brain dead, her husband directed hospital personnel to disconnect

all medical equipment. Surprisingly, the hospital refused. The hospital based its refusal on one provision in Texas' Advance Directive Law. Before reviewing Texas' law, it is important to understand how states define death.

All states have enacted laws defining death. Most states, Pennsylvania included, have adopted the Uniform Determination of Death Act (the "UDDA"), which defines death as follows:

"Only an individual who has sustained either: (1) irreversible cessation of circulatory and respiratory functions; or (ii) irreversible cessation of all functions of the entire brain, including the brain stem is dead."<sup>1</sup>

Texas has not adopted the UDDA. Instead, Texas has enacted a law defining death as follows:

"(a) A person is dead when, according to ordinary standards of medical practice, there is irreversible cessation of the person's spontaneous respiratory and circulatory functions. (b) If artificial means of support preclude a determination that a person's spontaneous respiratory and circulatory functions have ceased, the person is dead when, in the announced opinion of a physician, according to ordinary standards of medical practice, there is irreversible cessation of all spontaneous brain function."<sup>2</sup>

The physicians treating Ms. Munoz had determined, following numerous tests and according to medical standards, that Ms. Munoz was brain dead. Why, then, did the hospital refuse Mr. Munoz's request to remove all equipment?

Like most states, in addition to defining brain death, Texas enacted an advance directive statute that governs advance directives and decision-making by surrogates. According to the hospital, one provision of this law prohibited the hospital from complying with Mr. Munoz's request:

“A person may not withhold life-sustaining treatment . . . from a pregnant patient.”<sup>3</sup>

Mr. Munoz, failing in his quest to honor his wife’s wishes, filed a lawsuit seeking court approval to disconnect his wife from medical equipment. Mr. Munoz argued that his wife, being dead, cannot be considered a patient under Texas law. Further, he argued the hospital’s position violated his wife’s autonomy. The hospital argued that it was not legally authorized to disconnect medical equipment because Ms. Munoz was pregnant and the fetus was still viable. Finally, in January 2014, a court heard the case. By this time, however, the hospital, after conducting additional tests, had conceded that the fetus was no longer viable. As a result, the court ordered the hospital to disconnect Ms. Munoz from all medical equipment. Finally, on January 24, 2014, almost two months following her initial event, Ms. Munoz was disconnected from all medical equipment.

Many medical experts raised questions about the hospital’s initial position regarding the viability of Ms. Munoz’s fetus. Most medical experts indicate that a fetus is not viable until approximately 24 weeks gestation. Fetal viability is often defined as the ability of the fetus to survive outside of the uterus. Therefore, in Ms. Munoz’s case, at the time of her event, the fetus, at 14 weeks gestation, was not viable. Ironically, by the time Ms. Munoz was disconnected from medical equipment on January 24, 2014, her fetus was approximately 22 weeks gestation, nearing the edge of viability.

Ms. Munoz’s tragic circumstance created a mountain of opinion and emotions. Many medical experts and ethicists focused on the gestational age and the determination of brain death, and argued that the hospital should disconnect all medical equipment. Additionally, many contended that the Texas law did not apply. First, being dead, Ms. Munoz was not a patient. Second, it is difficult to grasp the concept of providing life-sustaining treatment to a dead person. Further, authors of the Texas law publically stated that the Texas law was not intended to apply in Ms. Munoz’s circumstances.

What, then, led to the protracted battle and legal intervention? Many argued, not surprisingly, that the Texas law was intended to protect Ms. Munoz’s unborn child. By allowing Mr. Munoz to direct removal of medical equipment, a potential life would be ended. Also, many pointed to other cases in which a fetus was

brought to term, delivered, and survived, despite the mother being brain dead. As a result, they argued that the state has the right, and the obligation, to protect the unborn child. Therefore, the court system is the most appropriate venue in which to resolve these challenging issues.

Lost in most of these arguments and emotions is the right of patients, and their legal representatives, to make their own decisions regarding medical care. Mr. Munoz, as his wife’s surrogate, was honoring his wife’s wishes in directing the removal of support. This case presented a circumstance in which the patient’s autonomy, an essential principle of medical ethics, directly conflicted with the law.

Further, both Ms. Munoz’s and Ms. McMath’s circumstances demonstrate our society’s misunderstanding of brain death. An individual who is brain dead is legally dead, even though medical technology can make it appear that an individual is still “alive.” As a result, families have difficulty disconnecting their loved ones from medical equipment. If anything, these cases have forced the medical community to reevaluate the criteria we use to determine brain death.

Pennsylvania, like Texas, has an advance directive statute that governs living wills, healthcare powers of attorney, and surrogate decision makers.<sup>4</sup> Pennsylvania’s law contains a provision that addresses the application of a patient’s living will when the patient is pregnant. Recall that a living will only applies when an individual is incompetent and either is permanently unconscious or suffers from an end-stage medical condition. In Pennsylvania, if an individual is pregnant and is in a condition in which the living will is applicable, regardless of the directions contained in the living will, life-sustaining treatment must be provided unless it: (i) will not maintain the pregnant woman in a way as to permit continuing development and life birth of the fetus; (ii) will be physically harmful to the pregnant woman; or (iii) will cause pain to the pregnant woman that cannot be alleviated by medication.<sup>5</sup>

In the media spectacle around Ms. Munoz’s case, many commentators focused on the political and cultural leanings of Texas’ leaders and residents and maintained the “this could only happen in Texas” mantra. However, one can easily see that, based on Pennsylvania’s law, a similar circumstance could arise in Pennsylvania. The argument would revolve around whether the individual, though brain dead, could be

maintained “in a way as to permit continuing development and live birth of the fetus.”

*Editor’s Note: A particular irony about the cultural implications of this case in the State of Texas merits comment.*

*As pointed out above, “Lost in most of these arguments and emotions is the right of patients, and their legal representatives, to make their own decisions regarding medical care.” Texas is usually a place where individual autonomy is held in the highest regard, and any perception that the government is interfering with individual liberty is met*

*with fierce opposition. Apparently, however, it is ok for the authorities to undermine the principle of individual liberty in order to enforce the ethical, moral, or religious principles of the majority.*

*Second, although it may appear that this same legal dilemma involving a fetus could arise in Pennsylvania, the deliberation would revolve around the ability to maintain the mother until the fetus is viable. Hopefully, in such a case, at least the argument would be based on a medical determination, uncomplicated by questions related to personal views, or matters of individual liberty vs. the state.*

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## REFERENCES

1. 35 P.S. §10203
  2. TEX. HEALTH & SAFETY CODE §671.001
  3. TEX. HEALTH & SAFETY CODE §166.049
  4. 20 Pa.C.S.A. §5421 et. seq.
  5. 20 Pa.C.S.A. §5429
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