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Legal and Bioethical Implications of a Misdiagnosed Brain Death – *Spears v. Rosen*¹

– In 2013, Jahi McMath was diagnosed with sleep apnea by Dr. Frederick Rosen, an otolaryngologist.² Dr. Rosen recommended an adenoid tonsillectomy (removal of her tonsils and adenoids), a uvulopalatopharyngoplasty (removal of her uvula), and a submucous resection of her bilateral turbinates.³ Jahi's surgery was performed on December 9, 2013 at Children's Hospital and Research Center at Oakland.⁴ After her surgery, Latasha Winkfield, her mother, found Jahi coughing up blood in her hospital room. The nurses stated that the bleeding was normal, and showed Winkfield how to suction the blood out of her daughter's mouth.⁵ After Jahi started bleeding more, Winkfield requested that Dr. Rosen be called to examine her daughter. Sandra Chatman, Jahi's grandmother and a nurse, also came to visit Jahi and expressed concern at the amount of blood Jahi had lost.⁶ The McMath family states that even when Jahi's night nurse documented her hemorrhaging as critical, no physicians intervened on her behalf.⁷ Early in the morning on December 10, 2013, Chatman noticed the oxygenation levels in Jahi's blood had dropped tremendously along with her heart rate. Chatman called for the nurse and medical staff. The code was called within the hour.⁸

Between December 11, 2013 and December 12, 2013, two electroencephalograms ("EEGs") were given – both indicating severe brain damage.⁹ The hospital staff informed Winkfield and Jahi's other family members that she had suffered severe brain damage, that her life support would be terminated the next day, and that Jahi would be placed on the organ donor list.¹⁰ The relationship between the hospital staff and the family grew to be increasingly hostile. The family did not feel the hospital adequately explained Jahi's condition and did not understand why the hospital wanted to remove her life support.¹¹ To quote the complaint, "David J. Duran, M.D., the Chief of Pediatrics, began slamming his fist on the table and said, 'What is it you don't understand? She is dead, dead, dead, dead!'"¹² Winkfield also made it clear that they were Christians who only believed in heart lung death – not brain death.¹³ Other hospitals then offered to admit Jahi, but the family was not informed by the administration at the Children's Hospital of Oakland.¹⁴

¹ See Motion for Summary Adjudication Denied at 2, *Spears v. Rosen*, No. RG15760730 (Cal. Super. Ct. September 5, 2017).

² See Plaintiff's Complaint for Damages and Wrongful at 2, *McMath v. Rosen*, No. RG15796121 (Cal. Super. Ct. Dec. 9, 2015).

³ *Id.*

⁴ *Id.* (now UCSF Benioff Children's Hospital of Oakland).

⁵ *Id.* at 3.

⁶ *Id.* at 4.

⁷ See Motion for Summary Adjudication Denied, *supra* note 1, at 5–6.

⁸ *Id.*

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 6.

¹² *Id.*

¹³ See Complaint for Declaratory Relief and Request for Temporary Restraining Order and Injunctive Relief at 4, *Winkfield v. Children's Hosp. Oakland*, No. C 13-5993 SBA, 2014 U.S. Dist. LEXIS 8560 (N.D. Cal. Jan. 22, 2014) (No. 4:13-cv-05993).

¹⁴ See Plaintiff's Complaint for Damages and Wrongful, *supra* note 2, at 6.

irreversible cessation of circulatory and respiratory functions, or 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."²⁷ Due to the conflict between the statute and Jahi's current condition, the Court denied the motion for summary judgment and held that the defendants failed to show that there was no triable issue. The Court also overruled the majority of the objections against the evidence presented by Dr. Shewmon.²⁸

Spears v. Rosen is significant for various reasons. Firstly, it displays the impact of religious exemption statutes and faith in healing. Catholicism, Protestantism, and Judaism have all accepted brain death and heart lung death as acceptable definition of death.²⁹ However, in the Islamic faith, there is not a general consensus on whether brain death is considered an acceptable definition of death.³⁰ Winkfield moved her daughter to St. Peter's Hospital in New Jersey based on a religious exemption in the state's brain death statute.³¹ According to the complaint submitted to the District Court for the restraining order against the Hospital, the McMath-Winkfield family states that they "are Christians with firm religious beliefs that as long as the heart is beating, Jahi is alive."³² The dominant Christian religions in the United States consider brain death to be an acceptable definition of death.³³ The concept of faith and personal conviction is common in most religions. This case has set a precedent that personal convictions, though not in line with a religion's traditional belief, can now have merit in brain death cases. This is not a completely new concept. Some scholars have advocated for hospitals to accommodate religious beliefs more fully, and certain state statutes require hospitals to create policies that reflect these ideas.³⁴ However, this case is a recent example of how honoring this dynamic can lead to positive legal results for a family. Her family's belief in heart death versus brain death allowed for Jahi's medical condition to be revisited.

This case is also significant because it highlights the legal implications of patient-physician relationships. Though kindness is not perfectly correlated to better patient outcomes, personal testimonies for patients and data do show that kindness and empathy never hurts a patient.³⁵ However, a lack of kindness and empathy combined with an alleged medical malpractice in this case actually bolstered evidence for a tort claim of emotional distress from the McMath-Winkfield family. Traditional United States tort claims of emotional distress are based on *Dillon v. Legg* – emotional distress is recoverable if the plaintiff was located near the scene of the injury.

²⁷ See CAL. HEALTH & SAFETY CODE §7180 (West 1982).

²⁸ See Motion for Summary Adjudication Denied, *supra* note 1, at 4-6.

²⁹ See Samantha Weyrauch, *Acceptance of Whole Brain Death Criteria for Determination of Death: A Comparative Analysis of the United States and Japan*, 17 UCLA PAC. BASIS L.J. 91, 106 (1999).

³⁰ See Andrew Miller et al., *Brain Death and Islam: The Interface of Religion, Culture, History, Law, and Modern Medicine*, 146 CHEST 1092, 1092 (2014).

³¹ See Motion for Summary Adjudication Denied, *supra* note 1, at 2; see Complaint for Declaratory Relief and Request for Temporary Restraining Order and Injunctive Relief, *supra* note 13, at 4.

³² See Plaintiff's Complaint for Damages, *supra* note 9, at 4.

³³ See *supra* note 19, at 106.

³⁴ See N.Y. COMP. CODES R. & REGS. tit. 10, § 400.16; see Robert D. Orr & Leigh B. Genesen., *Requests for "Inappropriate" Treatment Based on Religious Beliefs*, 23 J. MED. ETHICS 142, 147 (1997) (This article discusses the importance of respecting religious beliefs during end of life – even if the treatment is perceived to be inappropriate.).

³⁵ See Michael Stein, *We All Want Our Doctors to be Kind. But Does Kindness Actually Help Us Get Well?*, WASH. POST, August 11, 2016, https://www.washingtonpost.com/opinions/we-all-want-our-doctors-to-be-kind-but-does-kindness-actually-help-us-get-well/2016/08/11/95306e06-1091-11e6-8967-7ac733c56f12_story.html?utm_term=.118827def10c.

contemporaneously observed the accident, and the plaintiff and the victim were closely related.³⁶ However, a more narrow test was applied in *Marsala v. Yale-New Haven Hosp., Inc.* for intentional infliction of emotional distress.³⁷ Intentional infliction of emotional distress can be established if

(1) . . . the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe.³⁸

The facts of *Spears v. Rosen* satisfy both the *Dillon* test and the test applied in *Marsala*. Applying *Dillon*, Latasha Winkfield observed her daughter's excessive bleeding post-operation and was by her side throughout her injury.³⁹ Applying *Marsala*, the physicians should have known that emotional distress would have resulted from the medical staff's conduct and interactions.⁴⁰ The conduct was also extreme and was more than likely the cause of Winkfield's distress.⁴¹ Lastly, according to Winkfield's complaint, she experienced severe emotional distress that was to be proven at trial.⁴² The lapse of kindness and compassion from the medical staff at Children's Hospital of Oakland would actually strengthen Winkfield's claim.⁴³ This could potentially be an incentive for hospitals to support continuing education centered on patient sensitivity and bedside manner – especially at the end of life.

Lastly, this brings up legal questions regarding what hospitals and health care providers should do if their diagnosis of brain death in the long term is wrong. In 2013, Jahi appeared to fit the criteria of brain death based on California law.⁴⁴ However, her status has appeared to change upon reexamination. She has commenced puberty which is a function of the brain. She also appears to follow directions to move specific fingers.⁴⁵ This has been confirmed by video evidence, her current physician, and an expert in pediatric neurology.⁴⁶ Though the courts have chosen not to change the status of her death certificate in 2013, it is apparent that medically something for Jahi.⁴⁷ This will raise issues of timing and hospitals potentially rushing to declare someone brain dead. It took four years since Jahi's initial declaration of brain death for alternative evidence to pass through the legal system. This poses the question: would it be reasonable for brain death statutes to have extensions upon a second opinion from a physician? This is something that the courts may have to decide, especially with younger patients.

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³⁶ See *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968).

³⁷ See *Marsala v. Yale-New Haven Hosp. Inc.*, 142 A.3d 316, 330 (2016).

³⁸ See *id.* at 330-331.

³⁹ See Plaintiff's Complaint for Damages and Wrongful, *supra* note 2, at 3-6.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 10.

⁴³ See Motion for Summary Adjudication Denied, *supra* note 1.

⁴⁴ *Id.* at 1.

⁴⁵ *Id.* at 2.

⁴⁶ See *id.*

⁴⁷ See *id.*