

Ontario family's legal fight to keep daughter on life support could change how death is defined across Canada

Though at least five examining physicians have declared Taquisha Deseree McKitty brain dead, her family's refusal to discontinue life support kicked off a labyrinthine legal dilemma, which they're taking to the Ontario Court of Appeal this week

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Taquisha Deseree McKitty. McKitty's family has been fighting to keep her on life support at Brampton Civic Hospital.

FAMILY PHOTO

Your daughter is brain dead. We'll be turning her ventilator off.

Stanley Stewart remembers the sudden panic that set in on Sept. 20, 2017. Just six days earlier, his 27-year-old daughter, Taquisha Deseree McKitty, had been found without a pulse after taking a cocktail of drugs. First responders and physicians got her breathing, augmented by a ventilator, but for days she had been unconscious. Her brain was swelling, an effect of her oxygen deprivation after the overdose.

Now, hospital staff were telling Mr. Stewart that his daughter had stopped breathing on her own, at least 36 hours prior. The swelling had cut off oxygen and blood flow, once again, to her brain. To Brampton Civic Hospital, she was now dead by neurological criteria – an end commonly referred to as “brain death.” The hospital gave the family two hours to remove life support, Mr. Stewart alleges. But his Christian faith – forged in Baptist and Pentecostal churches, and shared with his family – led him to believe that as long as Ms. McKitty’s heart was beating, even with medical assistance, she was still alive.

The two perspectives proved irreconcilable that day. Mr. Stewart and Taquisha’s mother, Alyson McKitty, refused to let Dr. Omar Hayani switch off their daughter’s ventilator. (Hospital spokesperson Cara Francis and Dr. Hayani’s lawyer, Erica Baron, declined to comment on the two-hour timeline Mr. Stewart described, though the hospital said they typically cease physiological support within 24 hours and will usually accommodate “brief reasonable extensions.”)

For more than a year now, Ms. McKitty has been sustained on borrowed time in the Brampton Intensive Care Unit, her family providing round-the-clock attention to a woman they believe to be alive and deserving of a chance to recover. Though at least five examining physicians have declared Ms. McKitty brain dead, hospital nurses still rotate through her ICU room for care. The family’s refusal to discontinue life support kicked off a labyrinthine legal dilemma, which they’re taking to the Ontario Court of Appeal this week. The question of what constitutes death, and who decides when that line has been crossed, has no clear legislative answer across much of Canada. The case pulls on opposing threads of science and faith, evokes questions about Charter rights and challenges the role of cultural practices in modern medicine.

Ontario has no statutory definition of death; nor do most Canadian provinces and territories. The determination is instead left up to physicians. Doctors use one of two sets of criteria to declare a patient dead: either a stopped heart or a deceased brain. A brain-dead patient no longer has the capacity for consciousness, and is unable to breathe on their own – much less cough, gag, or blink. Some Christians, Muslims, Orthodox Jews and members of other religions feel that “brain death” doesn’t align with their definition of life’s end, especially if technology can preserve tissue,

send swells of air into lungs and keep a heart beating. In recent years, families around the world have sought legal protection for these views.



Stanley Stewart, father of Taquisha Deseree McKitty, poses for a photo at his Brampton, Ont., home on Dec. 5, 2018.

MICHELLE SIU/THE GLOBE AND MAIL

Since the fall of 2017, Ms. McKitty's exhausted family has kept a constant rotation of visitors by her side. They read to her, put small drops of vitamins into her feeding tube, brush and braid her hair. They brought 28th-birthday cards this September. Last week, a two-word daily objective was written on her whiteboard: "WAKE UP." The family's judicial appeal begins Wednesday, and if they're unsuccessful, Mr. Stewart would consider applying for their case to be heard in the Canadian Supreme Court.

A Supreme Court ruling would establish uniformity in the way brain death is approached across the country. Currently, the federal government only defines death if the case pertains to criminal law, federal pensions or income tax, Justice Department spokesperson David Taylor said. In provinces like Ontario, death is governed by a patchwork of rules around organ donation and vital statistics. Only Manitoba, Prince Edward Island, Nova Scotia and Northwest Territories have a legislative definition. In Manitoba, death is an "irreversible cessation" of all brain function. In P.E.I. and N.W.T., brain death must be declared by "generally accepted" medical criteria. In Nova

Scotia, death is the end of a person functioning as a whole, determined by an irreversible loss of the brain's ability to control and co-ordinate critical functions.

To be heard in Supreme Court, a case has to demonstrate public importance in Canada. That's certainly possible in the McKitty case, said Dr. Thaddeus Pope, a U.S. legal and bioethics expert who has followed around 25 cases that have challenged the notion of brain death worldwide. "It's not an Ontario-specific thing, it's about the interpretation of the Charter," he said. The ruling from Superior Court in June said that Ms. McKitty's Charter rights couldn't be violated, as such protection only applied to the living.

As long as the family's legal challenges continue, Ms. McKitty's ventilator is able to stay on.

If the family is successful at any level, and more leniency is added to the way the medical system defines death, physicians across borders are anxious that public trust in doctors may break down. If death is seen as a subjective determination, families may be less inclined to accept the conclusions of their loved one's critical care providers, several physicians and legal experts said in interviews with the Globe and Mail.



Stanley Stewart poses for a photo with Taquisha Deseree McKitty's 10-year-old daughter Khia McKitty, in their Brampton, Ont., home on Dec. 5, 2018.

Medical professionals also fear a resource crunch if similar cases start to arise with any frequency. It's unlikely there would be a flood of cases like Ms. McKitty's, said Dr. Kerry Bowman at the University of Toronto's medical school. But the province only has 1,378 critical care hospital beds with ventilation life support, intended for patients recovering from incidents like strokes and brain bleeds, and zero such beds in long-term care homes. This kind of medical intervention is expensive, too – though Toronto health law professor Trudo Lemmens cautions against quantifying the value of care in cases like Ms. McKitty's. "Do we start measuring in other circumstances how much people can cost to the health-care system to determine if we will still provide care?"

Then, there's the question of what potential impacts a changed definition of death could have on the organ donation system, which relies on dead patients to proceed. (Ms. McKitty had signed up to be an organ donor herself, which her parents learned about for the first time after her overdose.)

While the full implications of Ms. McKitty's case have yet to play out, her plight has already been referenced in another courtroom, in the case of an Orthodox Jewish man named Shalom Ouanounou. He was declared brain dead in Toronto, 10 days after Ms. McKitty. The pair shared a lawyer, and the issue again boiled down to faith – his Judaism dictated that a person was dead once their breath and heartbeat stopped. His heart and lungs did fail, though, before a court verdict could be reached.

Cases like these have played out around the world, as grief-stricken families have asked courts in the United States, England and Australia, among others, the very same question: who gets to decide when a life has ended? In Manchester, U.K., the Muslim parents of a one-year-old boy were told their son's brain stem died after he choked on a tiny piece of fruit. They begged the courts to keep his ventilator on, hoping to take him to Saudi Arabia, their home country, and give him more time. The presiding justice noted that the father clung to any sign that could undercut the catastrophic medical conclusion, like the residual twitching and retraction of his boy's legs.

Dr. Bowman sees it as problematic to insist that families are in denial, are unduly swayed by grief or need a doctor to educate them. "Death never really was owned by the medical profession until the last 50, 80, 100 years," he said. The moment of death was decided more by cultural norms than it was by science. Now, he sees doctors recoiling from discussion on Ms. McKitty's case, seeing brain death as an obvious end to a life. "With patients like McKitty, is she dead, or is she as good as dead?" Dr. Bowman questioned. "And are we saying that the distinction between those two things doesn't really matter?"

While many experts describe death as a process, some, like Ottawa critical care physician Sonny Dhanani, say it's nonetheless impractical for critical care to operate without a clear threshold between life and death. Medical definitions cannot stray into spiritual or religious death, nor when the biological body starts to break down, he argued. "We have to take a moment to determine death, and define it as a moment in time."

On a quiet afternoon inside the ICU this month, Ms. McKitty lay with a warming blanket pulled close to her chin. Freckles dotted her nose and cheeks, and a solution was being used to keep her eyes from drying out. The excess spilled from beneath her shut eyelids, making it look as though she'd been crying.



A photo of Taquisha Deseree McKitty with her daughter Khia McKitty before she was put on life support in September 2017.

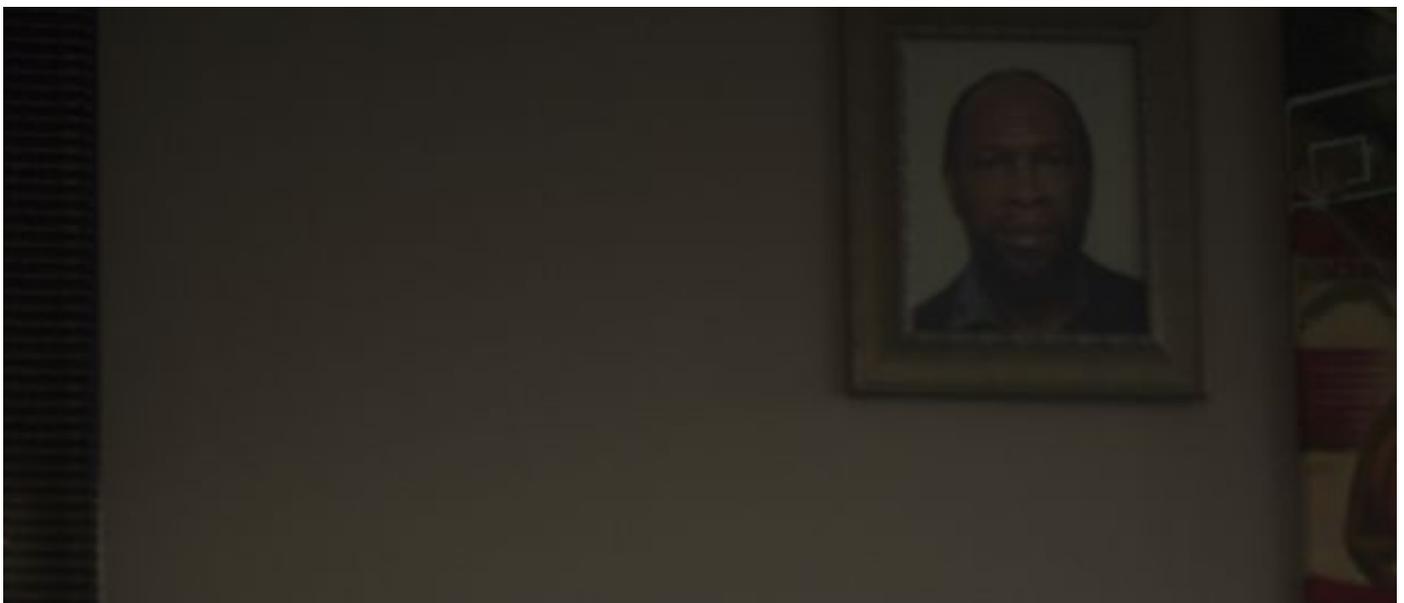
FAMILY PHOTO

She seemed more unwell than usual, Mr. Stewart noted. He tucked a small, folded towel under his daughter's head and gently brushed her hair back with his hand. His assessment of her health is based on a combination of changes to her stats displayed on a succession of monitors, and a gut feeling that he just knows. The markers of a family's support overwhelmed the room. A cousin settled into the recliner in the corner. A paper sign was hung on the wall, splashed with glitter, coloured paper and a child's scrawl: "I love you mommy wake up!" Ten-year-old Khia has only been brought here five or so times in the last year, but she often sends notes and crafts along with her relatives. Her grandfather visits daily.

Like the boy in Manchester, Ms. McKitty's body has been moving since she was declared brain dead, labelled by doctors in both cases as spinal reactions. These movements can further challenge a family's perception of the patient as "dead," experts told the Globe and Mail. The hospital says they've tested Ms. McKitty by stimulating her limbs, noting there was still no blood flow or electrical activity in her brain in reaction. But the family says the movements are atypical of patients in her same situation, both in duration and nature.

For the boy in Manchester, those movements were not enough to sway the judge, who ruled that the boy's ventilator could be removed. That case was a matter of days; others have been unrelenting, testing the courts and the medical system for years before reaching an ultimate finale. Jahi McMath, a young African American girl, died in June, according to her family. But according to an Oakland, Calif., hospital, the girl had been dead since 2013, from tonsil surgery complications. Her family battled the medical system to keep their daughter on life supports for more than four years – including moving Jahi across state lines to be cared for in New Jersey, where a decades-old law grants religious exemptions to brain death.

When Mr. Stewart talks about his daughter, whom the family calls Keesha, he talks about a young girl who danced through her childhood without ever taking a lesson. She was a French immersion student, a gymnast, a soccer player who learned taekwondo. She adored techno music. She was their peacemaker. Taquisha became a mother at just 17, and it was admittedly younger than Mr. Stewart hoped, but she still tried so hard, completing a year at Humber College and trying to plan her future. He can't pinpoint exactly when Taquisha switched from marijuana to more treacherous drugs, but he suspects a friend introduced her to cocaine. They'd been talking about options for help, though rehab was prohibitively expensive, in the year before the disastrous call – on Sept. 14, 2017 – that left her father speechless on the line with the officer who delivered the news. Mr. Stewart had to be carried to the car. His legs were weak beneath him.





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Mr. Stewart is by his daughter's side multiple nights a week now, turning to a chiropractor to undo the damage from his fitful sleeps on the hospital recliner. He's often roused by nurses, interludes between rest until morning comes, when he leaves for his job hours away in London, Ont. And despite the fervent fight to keep Ms. McKitty's ventilator on, Mr. Stewart knows he may never get his daughter back.

They had started the fight not to keep her on life support, but to continue giving her treatment, looking for some way to give her brain a fighting chance to heal. “Maybe her window of opportunity, to get the treatment she needed in the first 30 or 60 days, maybe that’s passed,” Mr. Stewart said, sitting in the hospital cafeteria before a recent visit to the ICU, pausing occasionally to make work arrangements over text message. No matter what, he said, he hopes this fight makes an impact on the medical system. “I think it’s important that families still have a say, especially when it comes to ending life,” he said. “Not to say that we can make a medical decision, or a medical opinion on the situation, but we are the ones that you’re affecting.” He believes there should be a level of review above physicians for issues like theirs. “That’s important,” he said firmly. “The medical world always goes towards science, and they start taking away the humanity part of it – life, the family.”

Ahead of this week’s round of legal sparring, Mr. Stewart admitted that he doesn’t know if his family has another year of fight left in them. They’ve already spent \$300,000 on legal bills. “I would love to take it as far as I could,” he said. “But to be honest with you, the physical, financial, mental stress is just kind of crushing me, and my family as well.” Still, he plans to keep pushing until he can’t go any longer.

“I think it’s just faith, you know?” he said. “And belief that we’re doing the right thing.”

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