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## *LIVING DONOR ORGAN TRANSPLANTS*

*Rabbi Tzvi Flaum*

### INTRODUCTION

This essay will attempt to provide a halachic perspective of the various concepts involved in live donor organ transplants and illustrate some of the practical applications and specific halachic rulings.

Live donor transplantation involves healthy donors who give a kidney, bone marrow, skin, blood or portions of their liver to another individual. Different halachic parameters concern the recipient and the donor. Is the recipient, the person who is dying of organ failure, allowed to undergo dangerous surgery to receive a potentially life-saving organ? On the other hand, does the donor have a halachic obligation to give an organ to a fellow human being who needs this organ?

The famous verse in the Torah (Ex. 21:19) *ve-rappo yerappe* (and heal he shall heal) is interpreted by the talmudic Sages (*Bava Kamma* 85a) to mean that the Torah gives permission to a doctor to practice his medical art and to treat people who are sick. The Talmud categorizes

this concept as a "permission." However, Nachmanides, in his *Torat Ha-Adam*, states that healing is not only permissible, but obligatory (*reshus d'mitzvah*). He rules that there exists a halachic obligation for a doctor to go out of his way to treat a patient.

The Talmud in *Baba Kamma* focuses on the doctor. Elsewhere (*Berachot* 60a), the Talmud states that *ve-rappo yerappe* not only applies to the doctor's halachic responsibility to treat the patient, but also applies to the patient's halachic obligation to be treated by a physician. Just as it is a biblical obligation for a doctor to treat a patient, the patient has exactly the same biblical responsibility to seek out a doctor when the patient is ill. This talmudic passage is codified by Rabbi Shlomo ben Avraham Aderet (Responsa *Rashba* #1:413) who says that a patient *must* seek out a doctor when sick, and it is prohibited to rely upon miracles. This concept is also codified by Rabbi Yosef Karo (*Shulchan Aruch, Yoreh De'ah* 336:1). The commentary known as *Birkei Yosef (Yoreh De'ah* 336:1) records the custom of the righteous throughout the generations, when ill, to seek out a doctor, and, therefore, it is prohibited to rely upon miracles. One must be treated medically if one has a malady that can be treated. One provision, however, all Jewish sources point out is that patients and doctors must realize that "I am the Lord that heals you" (Ex. 15:26); that the ultimate healer is God Himself and that the doctor is God's messenger or helper on earth. In Jewish law, a messenger or agent has the same status as the sender. Doctors should heal and patients should seek out healing from physicians with this concept in mind.

### THE RECIPIENT

So far, the halachic obligation for the patient to undergo medical treatment has been emphasized. What if the treatment involves danger to the patient? A famous statement of R. Chaim ha-Kohen is quoted by the biblical commentary known as *Moshav Zekeinim* on the verse "and heal he shall heal" (Ex. 21:19). The doctor's obligation to heal should have been included under the general precept of saving lives. The

reason that the Torah gave the special dispensation of *ve-rappo yerappe* to doctors to heal is to indicate that when a doctor heals and cures his patient, he is allowed to subject that patient to momentary danger and harm, if that is the way the specific medical treatment and care has to be administered. Therefore, according to Rav Chaim Hakohen, in *ve-rappo yerappe* there is already biblical sanction for the doctor to put the patient in harm's way, either through a dangerous surgical procedure or by exposing the patient to toxic medications, if the ultimate motivation is to cure the patient. This is *ve-rappo yerappe*.

If *ve-rappo yerappe* applies to both physician and patient, as aforementioned, and if there is an obligation for the doctor to expose the patient to danger in order to heal him, then logically the patient has an obligation to expose himself to danger in order to be healed. This means that the obligation applies from both directions. The crucial question is how much danger? How much danger is a person allowed or obligated to expose himself to without violating the biblical prohibition of not watching over one's body (Deut. 4:15). Maimonides (Rambam) defines this prohibition to include people who bring themselves into a place of danger. What is the ceiling of this danger? A famous responsum of R. Yaakov Reischer (*Shevut Yaakov* 3:75) answers this question. The following inquiry was directed to him. A person was deathly ill. His life expectancy was only a few days. The medical community offered a very toxic but potentially curative remedy. If unsuccessful, the remedy might even shorten the patient's life from a few days to a couple of hours. The question posed to R. Reischer was: is the patient allowed to jeopardize his minimal life span of a few days with the hope and aspiration of perhaps being cured and prolonging existence by months or years? In halachic terminology, may one endanger one's *chayei sha'ah* (very short life expectancy) for the anticipation of gaining *chayei olam* (long life)? Is a person allowed to do such a thing? Is one allowed to take such a gamble according to Jewish law (halachah)? Rabbi Reischer points out the talmudic narrative (*Avodah Zarah* 27b) which allows a Jew who is definitely going to die soon to jeopardize his short life expectancy called *chayei sha'ah* in order to undergo a dangerous type of medical procedure, with the hope that if the doctor succeeds the patient will have

a prolonged existence in this world (i.e., *chayei olam*). The ruling of R. Reischer is affirmative and is later cited by many subsequent great rabbinic decisors (*gedolei ha-poskim*).

What are the halachic parameters of this permissive ruling? Let us define them. First, what type of dangerous medical treatment is permitted? The consensus of rabbinic opinion is that treatment has to be what is called *refu'ah bedukah*, a tried and tested therapeutic procedure that has efficacy. Rambam adds that if medical science has good reason to believe that the therapy will work, or if it had been proven to work in the past, it is called *refu'ah bedukah* and is permitted even if the risks and dangers of the treatment are significant.

Second, what is considered to be *chayei sha'ah* as opposed to *chayei olam*? The author known as *Darchei Teshuvah* (*Yoreh De'ah* 155:6) quotes Rav Shlomo Kluger who says that if a person lives less than twelve months—that is considered *chayei sha'ah*. Therefore, concludes R. Moshe Feinstein (*Igrot Moshe, Yoreh De'ah*, Part 2, no. 58), if a person is destined to live less than a year, and by undergoing this procedure may be able to live a year longer, he is permitted to do so and risk his *chayei sha'ah* for the sake of *chayei olam*.

Who makes the decision as to whether or not the proposed medical treatment is proper? R. Reischer says that one needs a two to one majority of doctors, what he calls a *rov kaful* of doctors—to agree upon the therapy. In addition, a competent rabbinical authority should hear all the facts and agree with the medical assessment. Then the rabbi can give a permissive ruling for the patient to undergo the treatment or procedure.

What does the "guaranteed" success rate need to be in order to allow a dangerous therapy or procedure to be undertaken? What should be the mortality rate? What should be the success rate in previous trials? The question generated a major disagreement among the rabbinic decisors. Rabbi Chaim Ozer Grodzinski (*Achiezer, Yoreh De'ah*, Part 2, no. 16) quotes Rabbi Yosef Hochgelernter (*Mishnah Chachomim*) who says that there has to be a fifty percent success rate in order to allow the patient to undergo a dangerous treatment or procedure. R. Grodzinski, R. Feinstein (*Igrot Moshe, Yoreh De'ah*, Part 2, no. 58), Rabbi Issur

Yehudah Unterman (*No'am*, Vol. 12, 5730) and others respectfully disagree. They claim that even if there is a remote chance of success (even one in a thousand) a patient is allowed to subject himself to the danger of the specific procedure in the hope and desire to gain *chayei olam*. One does not need a fifty-fifty chance of success. Even the slimmest or very remote possibility (*safek rachok me'od*) can be used as justification to undergo the dangerous treatment or procedure.

However, all these rabbinic decisors say that such treatments or procedures are not obligatory upon the patient, but optional. The patient is allowed but not obligated to accept the dangerous but potentially life-saving therapy. The physician's obligation to heal and the patient's obligation to seek healing apply under normal types of endangerment. When considerable danger is involved, it becomes an option and not a requirement. One cannot force a patient to undergo a dangerous therapy or procedure.

Thirteenth century R. Yehudah *he-Chasid* in his *Sefer Chassidim* #467, discusses the community in which he lived. A special type of procedure was used by women who were involved in medical arts. Within seven days the procedure either cured the patient or killed him or her. *Sefer Chassidim* characterizes the people who practiced such medical arts as murderers (*shofechei damim*). The obvious question is how to reconcile *Sefer Chassidim* with the talmudic ruling (*Avodah Zarah* 27b) that it is permissible to take this type of chance in order to be cured. Rabbi Shalom Mordechai Schwadron (*Da'at Torah, Orach Chayyim* 328:10) answers the problem as follows: the Talmud concerns a patient who has no other choice, whose only option is to try the dangerous procedure or treatment. No other less dangerous procedure is available. On the other hand, *Sefer Chassidim* is talking about a case where a conventional, much less dangerous procedure is available. The woman who used the very dangerous procedure put the patient in more danger. That is why *Sefer Chassidim* calls them murderers. The permissive ruling in the Talmud only applies if there is no alternative to the dangerous therapy. If a much more conventional, less dangerous procedure is available, one should use it.

## THE DONOR

Regarding the organ donor, the halachic question revolves around a different source entirely, namely the Jerusalem Talmud (*Terumot*, end of Chapt. 8). A person who donates a part of his body to save another human's life is putting himself in danger. The danger of the surgery may be small but it is not negligible. The Jerusalem Talmud discusses whether or not a person has a halachic obligation to place himself into possible danger (*safek sakanah*), to save someone else from definite danger (*vadai sakanah*), or death? Two talmudic sages, Reish Lakish, and Rabbi Yonasan differ in their views. Reish Lakish says that one is obligated, and in fact the Talmud describes a case where he so ruled, with a successful outcome. On the other hand, Rabbi Yonasan rules that one is not required to endanger oneself to save another person.

The great rabbinic decisors (*gedolei ha-poskim*) differ in their application of the Jerusalem Talmud discussion. Rabbi Yair Bacharach (Responsa *Chavat Yair* #146) rules, like Reish Lakish, that a person is obligated to put himself into possible danger to save himself or others from definite danger. On the other hand Rabbenu Yonah (*Sefer Issur ve-heter* 59:8) rules like Rabbi Yonasan that it is permitted to do so.

This issue is therefore a disagreement among the rabbinic decisors. Interestingly, the author known as *Meirat Einayim* or *Sema*, in his commentary on R. Yosef Karo's *Shulchan Aruch* (*Choshen Mishpat* 426) wonders why none of the codifiers of Jewish law including Karo, Isserles (Rama), Maimonides (Rambam), Asheri (Rosh) or Jacob ben Asher (Tur) quote the above passage from the Jerusalem Talmud. The answer is that the final normative halacha is not in accordance with the Jerusalem Talmud. The consensus of rabbinic opinion is that one is not obligated to endanger one's life to save another person from serious and definite danger and even death.

However, there is a great problem. The Babylonian Talmud (*Sanhedrin* 73a) discusses the case of a person drowning or being mugged or being mauled by a wild animal. Anyone else in the vicinity is obligated to attempt to rescue the victim, based on the biblical commandments of restoring a lost object (Deut. 22:2) which includes the restoration of one's health, and not standing idly by the blood of one's

fellow man (Lev. 19:16). Yet, all such saving of life is associated with some risk to the rescuer. How can one reconcile the two seemingly opposite rulings in the Jerusalem and Babylonian Talmuds?

The answer to this question is provided by R. David ben Zimra, known as Radvaz, in many of his responsa (*Leshonot Ha-Rambam*, Part 2:218) which deal with this topic. He says that it depends on the level of danger into which the rescuer is placing himself. If the probability of danger to the rescuer is greater than fifty percent, one is not obligated to assume that level of risk. One is perhaps permitted but not obligated to endanger oneself to save another person. That is the discussion in the Jerusalem Talmud.

The Babylonian Talmud which requires one to endanger oneself to save another person from drowning or a mugging or a wild animal attack refers to a lesser risk such as a thirty percent or forty percent risk. Radvaz, however, characterizes a person who endangers himself to save another when the risk is greater than fifty percent to the rescuer as a pious fool (*chasid shoteh*). Such a person is guilty of endangering his life inappropriately (*mitchayev be-nafsho*). Such an act might be classified as a form of suicide and is halachically prohibited.

The level of endangerment to the rescuer is a very crucial point. When a person is asked to be an organ donor, one must ask oneself which level of danger is involved. Is this the less than fifty percent chance where one is obligated to accept the risk? Is this a fifty percent chance of danger where one is allowed but not obligated to be a donor? Or is this a more than fifty percent risk where one is prohibited from endangering oneself?

Radvaz makes an additional point which is also crucial. He says that the Talmud and Maimonides' *Mishneh Torah* (*Hilchot Rotzeach* 1:14-17) refer to the saving of lives (*hatzalat nefashot*) and the possible danger to the rescuer. In his talmudic commentary (*Nedarim* 4:4), Maimonides states that one can save another person's life with one's body, one's money, or one's knowledge. What does body mean? It means I must use my physical strength to extract a drowning victim from water. None of the Jewish sources talk about cutting off a part of one's body or sacrificing an organ to save another human being. Therefore, Radvaz concludes that it is halachically impossible to

conceive that the Torah whose ways are those of pleasantness (*deracheha darchei no'am*) would mandate a Jew to excise any part of his body to save another Jew. It could never be an obligation. The most it could be would be an act of piety (*middat chassidut*). This major point of Radvaz is later codified by all the rabbinic decisors including R. Feinstein and many others. To sacrifice a limb or organ to save another person is never an obligation. If it is done where the risk to the donor or rescuer is less than fifty percent, it is an act of piety, permitted but not required.

Let us now apply this discussion of halachic parameters in cases of danger to the organ transplant situation. In his responsum on kidney transplants (*Yechaveh Da'at* 3:84), Rabbi Ovadiah Yosef writes that the danger to the donor (surgery, anesthesia, being left with only one kidney) is less than one percent. Hence, according to the Talmud (*Sanhedrin* 73a) it should be obligatory for a potential donor to give a kidney to save another's life. However, Radvaz clarified that there is never an absolute obligation to give a part of one's body. If one does so, nevertheless, it is an act of piety. It is only optional, not obligatory to donate an organ.

Some rabbinic decisors such as R. Moshe Meiselman (*Halachah U-Refu'ah*. Vol. 2, pp. 121-141) express concern as to whether or not the recipient is allowed to undergo the danger of having a kidney transplanted into his body if other viable alternatives such as dialysis exist. Which is preferable: dialysis or a kidney transplant? If life expectancy is increased by transplantation, it is halachically justifiable to undergo this kind of danger. If transplantation offers greater ability to exist and to flourish, the kidney transplant surgery is also halachically allowed. If dialysis and transplantation were identical in terms of longevity and quality of life expectation, R. Meiselman would prohibit the recipient from undergoing the operation and putting himself into that type of danger. Medically, kidney transplant recipients live longer and with a better quality of life than do patients with dialysis.

In liver transplants, the portion of the liver removed from the donor regenerates in a matter of weeks. There is minimal or moderate risk to the donor, and the result to the recipient is similar to that

achieved by using cadaveric liver donors. However, because of the shortage of cadaveric livers for transplantation, there is no other option but to use the live donors who offer part of their livers at some risk to themselves. Such donations are certainly not obligatory but are optional and considered acts of piety.

Blood donations are certainly permissible since the risk to the donor is infinitesimally small. The wound or vein puncture required to remove the blood is halachically considered a *makkah* but is permissible for the saving of human life. That type of *makkah* is not considered halachically prohibited according to R. Feinstein (*Igrot Moshe, Choshen Mishpat* no. 50) who quotes Rambam (*Hilchot Chovel u-Mazik* 5:1) who only prohibits wounding for frivolous or shameful purposes. A wound induced for healing purposes, of oneself or another human being, is certainly permitted. Giving blood for the purpose of saving life is unquestionably halachically permissible. Some rabbinic decisors even allow one to sell one's blood (*Igrot Moshe, Choshen Mishpat* 4:103).

Regarding skin grafts, it is not so much a question of danger as a question of inflicting pain on oneself to save another human being. There is a major difference of opinion among the rabbinic decisors (*poskim*) about inflicting pain upon oneself to save others. The pain and suffering may last a few days or weeks but the danger is minimal. Some rabbis rule that it is obligatory to do so whereas most rabbis rule that it is optional and an act of piety.

Bone marrow transplants are similar to blood donations. Blood cell precursors are harvested from the donor from multiple punctures in the marrow. Only the liquid portion of the bone marrow is used, somewhat like a blood donation. No bone is excised from the donor but the marrow aspiration is performed under general anesthesia and leaves the donor with mild to moderate discomfort at the puncture sites for days or weeks. The danger of the anesthesia is minimal. Is a potential donor obligated to give bone marrow to save another's life? No, he is not obligated, but he is permitted to do so as an act of piety, as per the reasoning of Radvaz, discussed above. The recipient is certainly allowed to receive the bone marrow transplant as a life-saving treatment.

### CONCLUSIONS

Healthy people are allowed (but not obligated) to donate a kidney as an act of piety. A person dying of kidney failure is allowed to receive a kidney transplant because that is preferable to permanent dialysis. The same reasoning and halachic parameters apply to live partial liver transplants since the risk to the donor is far below the danger threshold of fifty percent.

Regarding skin transplants from live donors, because of the pain and discomfort it is only an option but not obligatory. The same reasoning applies to bone marrow transplants. Blood donations may be obligatory because of the infinitesimally small risk to the donor.

Donations of organs from children or mentally incompetent adults is a large topic for discussion. A classic rabbinic responsum dealing with this issue is that of Rabbi Moshe Hershtler (*Halachah U-Refuah*, Vol. 2, pp. 122-128) who points out that the talmudic sages were very protective of minors. In the absence of parents, guardians are appointed by the court (*Bet Din*) to take care of minors. Since a minor cannot give consent for an organ donation, it is doubtful whether they can serve as organ donors according to Jewish law.