

Tandler- Responsa of Rav Moshe Feinstein

HADDI MOSES FEINSTEIN
485 F. D. H. DRIVE
NEW YORK, N. Y. 10002
ORC 0001 7-1222

11-77-A
To be signed
by Mr. Shereff

(H)

משה פינשטיין
ראש תולדות ירושלים
בנו יארק

M-v 24, 1976

נ"מ

Honorable Herbert J. Miller
Chairman Assembly Committee on Health
New York State Assembly
Albany, N.Y. 12224

Dear Assemblyman Miller:

I have reviewed once again all the data relevant to Assembly Bill 4140/A, a bill in relation to determination of death.

It is my carefully considered opinion that:

1) This bill as written is and has always been unacceptable.

2) Any bill defining death must contain the following clarification as I wrote in my responsum:

"The sole criterion of death is the total cessation of spontaneous respiration.

In a patient presenting the clinical picture of death, i.e., no signs of life such as movement or response to stimuli, the total cessation of independent respiration, is an absolute proof that death had occurred. This interruption of spontaneous breathing must be for a sufficient length of time for resuscitation to be impossible (approximately 15 min.).

If such a "clinically dead" patient is on a respirator it is forbidden to interrupt the respirator. However, when the respirator requires servicing, the services may be withheld while the patient is carefully and continuously monitored to detect any signs of independent breathing no matter how feeble. If such breathing motions do not occur, it is a certainty that he is dead. If they do occur the respirator shall be immediately restarted.

I must emphasize that any bill which does not contain these criteria is unacceptable.

3) In the event that these specific requirements will not be incorporated in your bill, I strongly endorse and support the "religious exemption" clause in the Governor's Program Bill, a concept which is in keeping with religious rights and social ethics.

Sincerely yours,
Moshe Feinstein
Rabbi Moshe Feinstein

venting the saving of human life, human life that is of infinite worth.

Additional Note

The Nisan 5755 issue of *Hamaayan*, a journal published by Poalei Agudas Yisrael, printed a eulogy of HaGaon Rav S. Z. Auerbach זצ"ל which had been delivered by Rav Y. Neuwirth שליט"א. In the course of his remarks, however, Rav Neuwirth introduced a revisionist version of the halakhic rulings of Rav Auerbach זצ"ל regarding brain death, and likewise of HaGaon, Posek HaDor, Rav Moshe Feinstein זצ"ל. The following is a response submitted to *HaMaayan*.

Clarification of the Halakhic Rulings of Rav Moshe Feinstein and of Rav Shlomo Zalman Auerbach זצ"ל in Regard to Brain Death

Since Rav Neuwirth's שליט"א remarks reveal a certain confusion regarding the opinions of these two Gaonim on this important and controversial subject, I hope the following will clarify the matter as succinctly as possible.

Concerning the view of Rav Moshe זצ"ל

Some ten years before his passing, my father-in-law informed me in a letter that total cessation of respiration in a brainstem-dead patient is tantamount to decapitation, since this would constitute halakhic death. Such a patient is not a *safek goses*, but rather a *vadai mes*; the action of the ventilator in oxygenating the patient is not to be confused with breathing. Rav Moshe published this *pesak din* in *Iggeros Moshe* Y. D. III:132. If such a brainstem dead patient would be considered a *safek goses*, as suggested by Rav Auerbach, Rav Moshe would oppose Rav Auerbach's decision to permit removal of the ventilator, such this would constitute *safek retzihah*. He so stated this point in *Iggeros Moshe* H. M. II:73:1 and 74:3, based on the Talmudic rulings in Sanhedrin 77a.

109

The opinions I have publicized in the name of Rav Moshe were not inferred from his writings, but are direct quotations of his statements to me and from what he actually decided in the many cases presented to him. Tens of his students can testify that they heard from him the Torah truth that when a patient appears to be dead, totally unable to breathe independently, he is considered halakhically dead, without any reservation. When Rav Moshe was alive, no one dared question either the accuracy or the veracity of my report of his *pesak*. Only after the "death of the lion" have some individuals attempted to distort his words in an attempt to nullify his *pesak*. Although it is unnecessary to affirm the above statement, below I will review some of the written evidence to emphasize the accuracy of my report of Moshe's opinion on this matter.

(1) In a responsum to Dr. E. Bondi (grandson of HaGaon Rav Yosef Breuer ז"ל and a leading pulmonologist), written Kislev 5745:

"Since the patient cannot breathe independently, he is considered to have died, even if the heart continues to beat for several days, as I wrote in my responsum in Y. D. III:132."

(2) Rav Dovid Feinstein שליט"ו wrote to a questioner on Kislev 5753:

"I have already written that the responsum of my father ז"ל in Y. D. III:132 is an accurate statement [of his view that brain death is halakhic death], but as further clarification I state his opinion once more. "If the patient is motionless, even if his heart is still beating, since he cannot breathe autonomously he is absolutely dead."

(3) A confirmatory letter published in *Assia*, Kislev 5750, by his editor and grandson, Rav Shabsai Rappaport שליט"ו:

"There is absolutely no doubt that *Iggeros Moshe* Y. D. III:132 refers to a brain dead patient whose heart is beating. I confirmed this directly from my grandfather,

both by phone and in person, during the printing of the *sefer*.

(4) Concerning organ donation, Rav Moshe expressed his opinion in *Iggeros Moshe*, Y. D. II:174, Tammuz 5728, in a responsum to HaGaon Y. Y. Weiss ז"ל when the latter was Rav of Manchester, England. Rav Moshe's *pesak* clearly enunciated the view that it is a great mitzvah to donate organs from the deceased in order to save someone's life.

I will now clarify the view of Rav Shlomo Zalman Auerbach ז"ל.

(1) 18 Av 5751: In a four-line opinion printed in the *Jewish Observer*, the official organ of Agudas Israel of America, Rav S. Z. Auerbach is quoted to the effect that "it is not permissible to remove any organ [from a brain dead patient], for this is an act of murder."

(2) After I wrote a lengthy analysis of Rav Moshe's opinion to Rav S. Z. Auerbach on 23 Elul 5751, Rav Shlomo Zalman wrote [in an opinion now printed in *Nishmas Avraham*]: "In my opinion, someone needing an organ transplant in America may receive one, and it is *not* an act of murder. According to the description of Rav Tendler, since it is determined by radioactive injection that the brain is not being perfused with blood. If this test (nuclide scan) is performed, and if the experiment now being planned to prove that a pregnant sheep can continue to gestate a lamb even after decapitation will so confirm, a brain stem dead patient is tantamount to one who has been decapitated or as an elderly man whose neck was broken even if there is no external wound [cf. Chulin 231a]."

Rav Shlomo Zalman thus repeated verbatim the opinion of Rav Moshe in Y. D. III:132! This clearly-stated opinion was never questioned in his subsequent writings or verbal comments. Brain stem death is final, absolute, halakhic death!

However, erroneous "facts" transmitted to him by his medical advisor caused him to doubt the "safety" of the test to confirm brain stem death. Rav Shlomo Zalman then wrote:

"The brain stem dead donor will surely die, but [until the death is confirmed,] he has the halakhic status of a *goses* and it is forbidden to touch him. Despite Rav Tendler's claim that [the nuclide scan] can be performed without even touching the potential donor, I have heard from my medical advisor that it cannot be performed without moving the patient. Moreover, the injection of the isotope is even more stressful to the patient than moving him would be, or closing his eyes, acts which are themselves forbidden, since these [tests] are done for the benefit of others and not for the benefit of the patient."

It is indeed astounding that Rav Shlomo Zalman did not have available to him a medical advisor of both competence and integrity to provide him with accurate information. The "facts" he was given were erroneous.

- a) The test to determine brain stem death are done for the benefit of the injured patient. If it is determined that he is not brain dead, aggressive medical or surgical treatments will be initiated.
- b) It is absolutely false to state that the injection of a radio-isotope is in any way harmful to the patient.
- c) The injection can be given without touching the patient, since there is always an intravenous line in the patient, and the isotope is injected through this line.
- d) A portable "camera" can be brought to the bedside to measure the radioactivity in the head region in order to determine whether the brain is being perfused with blood.
- e) The conclusion of Rav Shlomo Zalman is most difficult to fathom. He wrote: "... In conclusion, outside of Israel, where most inhabitants are non-Jews, it is permitted to receive an organ transplant, but in Israel it is forbidden."

Is it permissible to kill a non-Jew to save a Jew? Even if non-Jews do not accept our halakhic standards, we are

required to apply these standards to Jew and non-Jew alike. If brain death is not an acceptable criterion for determining halakhic death for a Jew, it should not apply to a non-Jew either.

(3) Rav Shlomo Zalman wrote to me [Nisan 5752] to reaffirm his concurrence with the view that brain death is halakhic death, but he was still concerned about the test protocol. He therefore suggested:

- a) removal of the ventilator;
- b) waiting until the heart beat ceases for 30 seconds;
- c) the organ can then be removed or the heart beat restored, if possible.

(4) In Elul 5754 he published the above instructions in *Assia*, in a note originally written for Dr. Schulman whom he mentioned in Rav Neuwirth's eulogy of 2 Adar 5752. There R. Shlomo Zalman זצ"ל reduced the time of asystole (no heart-beat) to 15 seconds. Several leading transplant surgeons announced that they would accept such a donor (i.e., after 15 seconds asystole) if it would increase the size of the donor pool.

(5) Rav Dr. Abraham Steinberg and Rav Yigal Shafran שליט"א confirmed that Rav Shlomo Zalman concurred with the *pesak* of Rav Waldenberg שליט"א to perform a Caesarian section on a brain dead woman in an attempt to save the fetus, even though this surgery would cause the cardiac-pulmonary death of the woman. Surely, if he did not fully agree that brain stem death is halakhic death he would not have agreed. But since the tests to confirm brain stem death had already been completed, his concern for the safety of these tests was now a moot point. He therefore ruled on the *post facto* acceptability of the brain death criterion.

In sum, therefore, although he was unwilling to approve *initiating* the test protocol, once the tests were performed and brain stem death was confirmed, Rav Shlomo Zalman זצ"ל

ruled that the patient was halakhically dead and could serve as an organ donor.

6) On Jan 9, 1994, the Anglo-Jewish press reported that Rav Shlomo Zalman זצ"ל joined Rav Dovid Feinstein and Rav Tuvia Goldstein זצוק"ל שליט"א in an appeal to the Orthodox Jewish community to find a lung donor for a young woman, though the donor could only be someone who was a *brain dead relative* of those he addressed.

7) Several personal communications affirmed that numerous times Rav Shlomo Zalman approved the donation of vital organs from Jews, if the brain stem test protocol had already been completed.

It should be carefully noted that most *poskim*, Rishonim and Aharonim, permit an individual to assume significant personal risk in order to save someone else from certain death. Therefore, even if the brain dead test-protocol would involve some danger to the patient (which it does not), the signing of a donor card would constitute the voluntary assumption of this risk in order to save someone threatened by certain death because of the failure of a vital organ.

(8) In *Assia*, Elul 5754, Rav Shlomo Zalman introduced a final variation in the halakhic ruling on brain death.

"I have been informed that a portion of the brain, the *hypothalamus*, remains alive after brain stem death has been confirmed. Therefore a doubt has been introduced; perhaps a 30-second asystole is not sufficient and we must wait until the hypothalamus also dies."

The source of this information was presumably Rav Shlomo Zalman's medical advisor, who should surely know that the issue at hand concerns the halakhah to which Rav Shlomo Zalman referred in his article in *Nishmas Avraham*—that one whose neck is broken is considered as though he were decapitated [Chulin 21a]. Such an individual is unquestionably considered to be dead; see Shulchan Arukh Y. D. 370. Anyone with an elementary education in biomedical subjects

surely knows that the hypothalamus is fully viable immediately following this grievous injury. Thus the viability of the hypothalamus is entirely irrelevant to the question of determination of death! Yet Rav Shlomo Zalman's source of information seems to have misled Rav Shlomo Zalman with the information that the hypothalamus is part of the brain in regard to the halachic determination of death.

The Rambam in his commentary on Mishnah Oholot 1:7 defines the "halachic brain" as the control center for bodily movements. The hypothalamus is not part of the halachic brain, but rather a secretory tissue, no different from other glands of the body which secrete hormones. It does not control the body's motion. Upon death many parts of the body remain viable for various lengths of time without affecting the decision to declare the patient dead.

I hope that the above analysis finally puts to rest the doubts that have been raised in this connection, doubts which are based on erroneous information. HaGaon Rav Moshe Feinstein זצ"ל ruled that after brain death has been confirmed, organ donation is a great mitzvah. HaGaon Rav Shlomo Zalman Auerbach זצ"ל concurred fully with this position, but was concerned with the test-protocol used to verify brain death. This concern was a direct result of the erroneous information provided him by his medical advisor. Indeed, it is sad to realize that this great *posek*, to whom every doctor in Israel and outside Israel was available for consultation, chose as his advisor one who was unable or unwilling to provide him with accurate information on which to base his halachic ruling.