

## WHAT IS THE HALAKHAH FOR ORGAN TRANSPLANTS?

In a recent interview Dr. Christian Barnard is quoted as saying: "No heart condition is hopeless anymore. Anything can be treated."<sup>1</sup>

Whatever may be the ultimate validity of this opinion, Dr. Barnard has certainly earned a place for himself in history as the man who, contrary to the unanimous exegesis of all commentators both ancient and modern, introduced a strictly literal interpretation of the prophetic admonition: "Get yourself a new heart . . . , why should you die?" (Ezekiel 18:31). One who is given to whimsy might even adduce support from the prophet in favour of transplanted hearts rather than artificial ones. Twice Ezekiel repeats the Divine promise: "I will take the stony heart out of their flesh and give them a *heart of flesh*" (11:19 and 36:26).

The staggering dimensions of the technological revolution in medicine and the biological sciences were thrust upon the consciousness of the whole world by the exploits of the cardiac surgeons. Such is the cultural significance of the heart that the announcement of the synthesis of a self-reproducing virus raised barely a ripple of public attention in a world intently absorbed in every detail of the goings-on in Capetown's Groote Shuur Hospital.

Small wonder then that the ethical, moral and legal problems involved in these medical miracles have become the subject of spirited discussion. It is, of course, not true that the questions raised are really new. However, the novel applications and the prospect of increasing frequency of cases requiring ethical decisions of this nature lend an air of urgency to these considerations.

While practical halakhic decisions are obviously beyond the scope of this article and, furthermore, each case must be weighed on its own merits, nonetheless it seems not inappropriate to review some of the general halakhic issues which may be relevant.

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It is clear that there are two types of acts involved in any transplant — those performed upon the recipient and those carried out on the donor. It seems more expedient to consider the various questions likely to be asked, under these two headings. Removing a living person's heart or other vital organ is murder. Even if it is done with the intent to implant a substitute is it not perhaps still prohibited? Dr. Barnard has admitted to being over-awed by the sight of an empty pericardial cavity. The question is especially relevant in view of the experimental nature of some of the transplant operations.

An established principle of Jewish Law is that "The Torah has granted permission to the authorized physician to heal, and it is a commandment included in that to save life. He who refrains from healing is shedding blood, even if other physicians are available."<sup>2</sup>

The freedom of action of the physician is far wider than that granted to any other agent performing a commandment. For example, for a father who is permitted to discipline his child in order to teach him, or for an official of the court whose duty it is to administer stripes, certain actions which are ordinarily considered assault are allowed. Yet these are strictly limited, whereas a surgeon is permitted any kind of incision, or even amputation, designed to save his patient; and a physician may administer drugs which are fatal to ordinary people, if they are calculated to produce a beneficial effect on his patient.

Nonetheless, if an accused should accidentally die under the hand of a duly authorized court official, the killer is blameless and is not required to be exiled like the inadvertent murderer.<sup>3</sup> But if a patient dies as a result of treatment and the doctor discovers that he erred, the doctor is subject to the law of exile as an unintentional slayer.<sup>4</sup> Precisely because the physician, unlike others, is given complete discretion in deciding what treatment is appropriate, any error of judgment on his part renders him liable as an unwitting killer.

However, the recognition of error requires a prior definition of correct procedure. What techniques can be regarded as right and proper in an art which is constantly developing and progressing? Maimonides sets forth two categories to define admis-

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sible procedure:

- 1) Anything which has been proven effective in practice, even though it is not understood how it operates and why.
- 2) That which follows as a rational deduction from generally accepted physical theory.<sup>5</sup>

Naturally, the second class of treatments again depends upon the trained judgment of the seasoned practitioner. The integrity of the physician in examining and re-examining his reasoning and his conclusions is the final guarantor. Moreover the advice and opinions of his peers must always be sought.<sup>6</sup>

This question has often been dealt with: a patient is suffering from a condition which will certainly cause death — may one administer a treatment which will, if it fails, kill him immediately, but, if it succeeds, prolong his life? Although ordinarily it is murder to shorten the life of even a terminal patient,<sup>7</sup> yet where there is a possibility of improving his chances, we consider him as if he has nothing to lose.<sup>8</sup> In fact one authority applies this not only to a terminal case but even to one where the disease is estimated to cause death within one year.<sup>9</sup> Where there is only a prospect of short-term life this may be risked in favour of a possibility of extended life.

It would appear, then, that where informed judgment considers transplantation a reasonable procedure, since in such cases one is always dealing with critically ill patients, the possibility of even a partial cure is sufficient warrant to attempt a graft.

b) Another question that has been posed and there have even been suggestions of legislation on it, is that of priorities. Already there are waiting lists of people with renal failure who can be saved by kidney transplants, but there are no organs available. Clearly, a valid criterion is probability of success, but given two patients equally likely to respond to treatment, who should get the available organ?

Framed in this way it seems a new question. However, it is really a question of priority for survival which has many precedents. Thus when a man and a woman both need food desperately, the woman precedes the man<sup>10</sup> in order to preserve her dignity.<sup>11</sup> The same is true if they are captives and need to be ransomed.<sup>12</sup> On the other hand, if they are both drowning, sav-

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ing the man takes precedence<sup>13</sup> because he is subject to more commandments.<sup>14</sup> In general, the Mishnah<sup>15</sup> rules that scholarship and meritorious deeds accord one priority, since these serve the primary needs of society.<sup>15\*</sup>

II. (a) Suppose that the recipient and the likely donor have been selected. In general, the donor who is chosen is an accident victim, close to death. As soon as possible after death, the organ must be removed. In fact, in some sense, the organ must still be alive or at least be capable of living again. This poses the problem: what is the definition of death, or conversely, life?

A precise definition of death has always been important for the Halakhah for several reasons. The commandment to save life over-rides all others.<sup>16</sup> As long as the state of death is not confirmed, the commandment applies. An interesting Talmudic<sup>17</sup> precedent codified in the Shulchan Aruk is that of a woman who dies in childbirth but one can still detect the movements of the foetus.<sup>18</sup> Even on the Sabbath, one is obligated to remove the child by section in the hope that it may yet be alive. However, some authorities raised the objection that the usual symptoms of death detectable by the gross senses may be inadequate in certain cases of stupor or coma, where there is apparent cessation of breathing and heartbeat. A hasty incision to save the child would in such an instance be murder of the mother.<sup>19</sup> In the absence of suitable surgical techniques to preclude this likelihood, the practice in doubtful cases was to wait. However, where death is certain, as for example, if the mother was accidentally beheaded, an immediate section is required.<sup>20</sup>

It would seem that the halakhic definition of death is based upon two criteria.

- 1) There is complete cessation of biological functions as far as can be determined by the gross senses, i.e., no breathing, no heartbeat, etc.<sup>21</sup>
- 2) The body can no longer be restored to function as an organism, although individual limbs or organs may still exhibit muscular spasms.

While the first condition is fixed and self-evident, the second is subject to constant change as medical science advances. That the first condition alone was regarded as inadequate is clear

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from the case already cited. Where there is even a slight possibility to restore life by natural means of resuscitation, the commandment to do so applies, even if all the observable signs of life have ceased. Thus Tosafot<sup>22</sup> maintains that Elijah was permitted to defile himself by contact with the dead child only because he knew for certain that he would revive him solely by the power of God. The implication is clear that if there was some natural means of resuscitation, he would have been obligated to risk defiling himself in order to try to save him even if the outcome were in doubt.

It is also clear from the case mentioned of the woman who was decapitated that the absence of any possibility of revival confirms the status of death even though there may still be muscular spasms. Maimonides explains that the organism is no longer considered to be alive "when the power of locomotion that is spread throughout the limbs does not originate in one centre, but is independently spread throughout the body."<sup>23</sup> It follows that if the restoration of central control is feasible, the commandment to save life applies. Obviously then the definition of death depends upon the availability of more sophisticated techniques of resuscitation. Here again, the applicability of such methods and the consequent decision as to the onset of death is determined according to the judgment of the physicians.<sup>24</sup>

Crucial to the possibility of successful homografts is the drawing of the line defining death at some point before the tissues begin to deteriorate, and as we have seen, this is halakhically established.

Jewish law is very strict in its prohibition of

- 1) mutilating the lifeless body<sup>25</sup>
- 2) deriving any use or benefit from a cadaver<sup>26</sup> and
- 3) delaying the interment of any part of a corpse.<sup>27</sup>

Do any of these prohibitions apply to transplants?

The subject of wanton mutilation and needless autopsies has recently been in the public eye in Israel and throughout the Jewish world. However, it is clear that where there is an immediate possibility of saving life, the commandment to save life makes it not only permissible, but even obligatory, to suspend all prohibitions.<sup>28</sup> It goes without saying that in removing an

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organ, meticulous care must be taken to avoid unnecessary mutilation.

c) Another question that has been raised is that of ritual defilement. Since the donor is dead, any organ removed from his body is a source of defilement.<sup>29</sup> While this is of concern only to *Kohanim*, it is still a problem to consider.

In dealing with internal organs it would seem that the question of *Tum'ah* cannot arise because anything which is absorbed within a living body does not defile.<sup>30</sup>

In any case, however, the status of a transplanted organ is changed. If the transplant takes, it is no longer dead: it becomes a part of the living host body. This concept has been discussed in connection with corneal transplants by Chief Rabbi Unterman and others.<sup>31</sup> Precedent may perhaps be found in the Talmudic case of a certain type of rodent that was thought to originate from inorganic earth. On death, this rodent defiles, while of course ordinary earth does not. However, such earth that was presumably being assimilated into the body of the rodent is considered as being part of it already and therefore is unclean.<sup>32</sup> Maimonides, while expressing amazement at the possibility of such generation, explains the basis of the Mishnah ruling as follows:

“The rodent in process of becoming from earth is partly flesh and partly clay but *all of it moves together.*”<sup>33</sup>

Thus, although to all appearances the clay in question is as yet unchanged, because it has become somehow part of the rodent's body and moves with it, its status is that of flesh. Certainly, an organ which functions within another body is no less part of it and is therefore alive when the host is living.

A new era has begun in man's never-ending struggle against death. Millions listen daily to the bulletins on the progress of heart transplants and pray for their success. Now that it is literally possible to “get . . . a new heart,” is it not time to give heed to the prophet's next sentence?

“For I have no pleasure in the death of any one, says the Lord God: so turn and live!” (Ezekiel 18:32).

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1. Toronto Globe and Mail, January 16, 1968.
2. יורה דעה שלו—א.
3. רמב"ם הלכות רוצח הו, ז.
4. יורה דעה שם.
5. מורה נבוכים ג—לז; ועיין מאירי שבת סז.
6. תפארת ישראל בביאור המשנה סוף קידושין אות עז.
7. יורה דעה שלט—א.
8. שבות יעקב ג—עה (הובא בפתחי תשובה שלט—א) על יסוד התוספות עבודה זרה כז ב ד"ה לחיי: "שבקינן הודאי למיעבד הספק", והרמב"ן בתורת האדם: "לספיקא דחיי שעה מקמי דאפשר דחי טובא לא חיישינן"; ועיין ריטב"א עבודה זרה שם ד"ה ודאימת: "ודטבא ליה עבדינן ליה"; ועיין בגליון מהרש"א יורה דעה קנה.
9. דרכי תשובה יורה דעה קנה אות ו בשם חכמת שלמה.
10. יורה דעה רנא—ח.
11. ש"ך שם ס"ק יב.
12. יורה דעה רנב—ח.
13. שם בהגה.
14. טורי זהב שם ו.
15. סוף הוריות.
- 15\*. עיין הוריות יג א: חכם שמת אין לנו כיוצא בו, מלך ישראל שמת כל ישראל ראויים למלכות.
16. רמב"ם יסודי התורה הו.
17. ערכין ז א.
18. אפילו אינו מפרנס מחללין להוציא—אורח חיים שלה—ה.
19. הגה שם ובמגן אברהם יא: "דשמא נתעלפה ואם יתכוה תמות".
20. שו"ת שבות יעקב אי"ג.
21. אורח חיים שכט—ד.
22. בבא מציעא קיד ב ד"ה אמר ועיין בהגהות מהר"ץ חיות שתמה על דברי התוספות וכן בשם כמה אחרונים ולפי פרושנו לכאורה מתיישבים דבריהם.
23. פירוש המשנה אהלות א"ז.
24. השווה רמב"ם הל' רוצח ב"ח.
25. ערכין ז א: "כדי שלא תבוא לידי נוול".
26. רמב"ם הלכות אבל ידכא; יורה דעה שמט—ב.
27. יו"ד שנזא, ועיין יחזקאל לט"טו ומועד קטן ה ב.
28. עיין נודע ביהודה תניינא יורה דעה סימן רי: "למה לכם כל הפלפול זהלא זה דין ערוך ומפורש שאפילו ספק דוחה שבת החמורה . . . ביש סכנת נפשות לפנינו כגון חולה." ועיין יורה דעה קנה—ג: "בשאר איסורים מתרפאים במקום סכנה אפילו דרך הנאתן ושלא במקום סכנה . . . שלא כדרך הנאתן מותר."
29. רמב"ם הל' טומאת גיא; יורה דעה שסט"א.
30. מקוואות י"ח; רמב"ם הל' טומאת מת א"ח.
31. שבט מיהודה—עמוד שיג.
32. חולין קכו ב.
33. כך היא הנוסחה כפי שהועתקה במאירי שם: "פי' הויית העכבר בלבד מן האדמה עד שנמצא קצתו בשר וקצתו עפר וטיט והוא מתנועע כולו . . ."

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אולם בפירוש המשנה הנדפס בש"ס חסרה הפיסקה והוא מתנוועע כולו, ועיין בתפארת ישראל יכין אות ע. שוב ראיתי בתרגום החדש של הר"י קאפח שליט"א שהעתיק מעצם כי"ק של הרמב"ם שמביא את הפיסקה והוא מתנוועע כולו כמו במאירי.  
דין זה אמור אף להקל שהרי הנוגע באדמה שכנגד בשר שרץ זה ונכנס למקדש מביא קרבן ואין חוששין לחולין בעזרה.