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## THE DEFINITION OF DEATH IN JEWISH LAW

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## THE DEFINITION OF DEATH IN JEWISH LAW

### *Introduction*

Recent heart transplant operations have raised moral, religious, ethical and legal problems relating to life and death and have been discussed at length in medical<sup>1</sup> and lay<sup>2</sup> journals. The ascertainment of the death of the donor is a major problem confronting heart transplants. When exactly is the donor dead so that his heart or other organ may be removed for transplantation?

### *Medico-legal Definition of Death*

Medical and legal definitions of death while similar in certain respects differ from others.<sup>3</sup> Even among various physicians or medical groups there is no unanimity of opinion nor uniformity in defining death, and religious definition may be at variance with either those of the medical or legal professions.

The criteria for defining death acceptable to many physicians include<sup>4</sup> complete bilateral, pupillary dilatation with no reaction to local constricting stimuli, complete abolition of reflexes, complete cessation of spontaneous respiration, absence of measurable blood pressure and a flat electro-encephalogram.

One neurologist<sup>5</sup> requires that

. . . there can be no induced or spontaneous purposeful movements, and reflex responses should be consistent with a decorticate or decerebrate state. Pupillary light responses should be absent and dilation present. The electroencephalogram should be isoelectric, or flat, in-

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dicating no cortical potentials are being produced. To further substantiate the degree of central nervous system damage, and its irreversibility, the neurovegetative reaction of respiration should be absent as evidenced by the lack of spontaneous respiration for at least two minutes. Finally these observations of the brain and lower nervous system functions should be consistently present for a minimum of two or three days, after resolution of the process which induced cerebral death . . .

These criteria may seem quite strict. However, they are not much less rigid than the criteria proposed by a special commission consisting of surgeons, neurosurgeons, anesthesiologists and medicolegal experts formed by the German Society of Surgery. This commission proposed that

. . . if the patient is unconscious for at least 12 hours and if spontaneous respiration ceases, bilateral mydriasis sets in, pupils do not react to light, all reflexes are extinct, and the encephalographic tracing shows an isoelectric line for at least one hour without interruption, then the patient can be considered dead notwithstanding the fact that the heart may still respond to artificial stimulation . . .<sup>6</sup>

At the recent 1968 national meeting of the American Medical Association, guidelines for organ transplants were approved by the House of Delegates. One of the major guidelines states:<sup>7</sup>

When a vital single organ is to be transplanted, the death of the donor shall have been determined by at least one physician other than the recipient's physician. Death shall be determined by the clinical judgment of the physician. In making this determination, the ethical physician will use all available, currently accepted scientific tests.

How does one ascertain the irreversibility of the process of life? The Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death has recently arrived at a definition of irreversible coma.<sup>8</sup> The Canadian Medical Association had named its own committee of experts to come up with a legal and ethical definition of death before the 1969 convention.

At what point need a physician no longer attempt to resuscitation? The 22nd World Medical Association meeting in Aus-

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tralia on August 8, 1968 adopted a statement, known as the Declaration of Sydney, which states in part that a physician's determination of death "should be based on clinical judgment, supplemented if necessary by diagnostic aids, of which the electroencephalograph is the current most helpful single one." Drafters of the statement admitted its indefiniteness and stressed that there are no precise scientific criteria nor a definition for what is the moment of death.

When is the dying patient beyond help? When is the physician guilty of a grave moral and religious sin by not doing everything possible to "maintain" his patient? Just as one cannot properly define health as the absence of disease, it seems totally inappropriate to define death as the absence of life. While society in general and the medical and legal professions in particular are struggling to come up with an acceptable definition of death, it is desirable to review some of the religious attitudes toward death.

#### *Religious Definition of Death*

The Catholic Church is on record<sup>9</sup> as not requiring a physician to use "extraordinary" means to prolong the life of a hopelessly ill patient. The term "extraordinary" is not defined, however. The Church is also opposed to the removal of hearts from persons certainly not dead.<sup>10</sup> The Church requires "clear and reasonable" evidence for death before a heart can be removed for transplantation. However, "clear and reasonable" remain to be defined.

#### *Definition of Death in Jewish Law*

Jewish law requires the physician to do everything in his power to prolong life<sup>11</sup> but prohibits the use of measures which prolong the act of dying.

The definition of death in Jewish law is first mentioned in the fifth century Babylonian Talmud. The Mishnah in *Yoma* 8:6-7 enumerates circumstances under which one may desecrate the Sabbath:

. . . every danger to human life suspends the [laws of the] Sabbath. If debris [of a collapsing building] falls on someone and it is doubtful

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whether he is there or whether he is not there, or if it is doubtful whether he is alive or whether he is dead or if it is doubtful whether he is an Israelite or a heathen, one must probe the heap of the debris for his sake [even on the Sabbath]. If one finds him alive, one should remove the debris but if he is dead, one leaves him there [until after the Sabbath].

The Talmud (*Yoma* 85a), commenting on the above Mishnah, states as follows:

. . . How far does one search [to ascertain whether he is dead or alive]? Until [one reaches] his nose. Some say: Up to his heart . . . life manifests itself primarily through the nose as it is written "In whose nostrils was the breath of the spirit of life" [Genesis 7:22] . . .

The renowned Biblical and Talmudic commentator Rashi explains that if no air emanates from his nostrils, he is certainly dead. Rashi further explains that some people suggest the heart be examined for signs of life, but the respiration test is considered of greatest import.

The Palestinian Talmud (*Yoma* 8:5) quotes certain authorities who require "until one reaches the navel" but this is a minority viewpoint.

The above rule from the Mishnah is codified by Maimonides as follows:<sup>12</sup>

If upon examination no sign of breathing can be detected at the nose, the victim must be left where he is [until after the Sabbath] because he is already dead . . .

The *Shulkhan Arukh* states:<sup>13</sup>

Even if the victim was found so severely injured that he cannot live for more than a short while, one must probe [the debris] until one reaches his nose. If one cannot detect signs of respiration at the nose, then he is certainly dead whether the head was uncovered first or whether the feet were uncovered first.

Neither Maimonides nor Karo seem to require examination of the heart or navel, both mentioned as minority opinions in the Babylonian and Palestinian Talmuds respectively. Cessation of

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respiration seems to be the determining physical sign for the ascertainment of death.

Another pertinent passage found in Karo's Code<sup>14</sup> states as follows:

If a woman is sitting on the birthstool [i.e., about to give birth] and she dies, one brings a knife on the Sabbath, even through a public domain, and one incises her womb and removes the fetus since one might find it alive.

Rabbi Moses Isserles adds to this statement:

However, today we do not conduct ourselves according to this [rule] even during the week [i.e., even *not* on the Sabbath] because we are not competent to recognize precisely the moment of maternal death . . .

Several commentators explain that Isserles is concerned that perhaps the mother only fainted and incising her abdomen might kill her. Maimonides, five centuries earlier,<sup>15</sup> had already raised the problem of fainting complicating the recognition of death when he stated:

. . . whosoever closes the eyes of the dying while the soul is about to depart is shedding blood. One should wait a while; perhaps he is only in a swoon . . .

Both Maimonides and Isserles, however, agree that the Talmudic description of death for all practical purposes is the absence or cessation of respiration. We are not primarily concerned with the extremely rare case of someone recovering from what appears to be the deceased state. Such an example is described in *Semachot* 8:1. Rather, Jewish law follows the rule of the majority. Rabbinic responsa on the definition of death are summarized by Rabbi Eliezer Waldenberg,<sup>16</sup> chief judge in the Jerusalem Rabbinic court. In brief, all agree that death is established when respiration ceases. Absence of breathing is thought to be a direct result of cessation of cardiac action. However, some Rabbis also require a 20 minute to half hour wait after respiration has stopped in order for all doubts to be set aside. This is in compliance with the ruling of Maimonides that one should

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wait a while after death is thought to have occurred to make sure the patient didn't just faint. However, continues Rabbi Waldenberg, if any bodily movement or pulsation is noted, then the cessation of respiration is no longer a reliable indicator of death and other means must be employed in such an unusual instance.

The Chief Rabbi of Israel, Issac Yehuda Unterman, addressing the Eleventh Congress on Jewish Law in August 1968, stated that by Jewish law one is dead when one has stopped breathing. Thus, most Talmudic and post Talmudic Sages agree that the absence of spontaneous respiration is the only sign needed to ascertain death. A minority would also require cessation of heart action. Thus a patient who has stopped breathing and whose heart is not beating is considered dead by Jewish law.

These classic sources and rulings may be insufficient to meet the entirely new need for the most precise definition of death arising from the recourse to organ transplantations. However, the tentative conclusion of the Chief Rabbi of the British Commonwealth,<sup>17</sup> based in part on the judgments of several leading Jewish Sages in various parts of the world is as follows: "the classic definition of death as given in the Talmud and Codes is acceptable today and correct. However, this would be set aside in cases where competent medical opinion deems any prospects of resuscitation, however remote, at all feasible." To further come down on the precise definition of death in Jewish law, an Institute of Judaism and Medicine has been established and commissioned, as its first assignment, to assemble the relevant medical and Jewish legal material on the determination of death.<sup>18</sup>

FOOTNOTES

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