

# Organ Transplants: Responsa

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## Introduction

In *Mishna Avot* our rabbis declared: “The world is supported by three things – by Torah, by service (to God) and by kindness.”

“Torah,” teaching, refers to a person’s duty towards himself. A person’s first duty is to *educate himself*, to *teach himself*, to enrich himself with information that will enable him to conduct his life suitably and correctly in the best possible way, and to develop his abilities to the fullest possible extent.

“Service” means that when a person has developed and grown in the way he wished and in the direction he has chosen and through his talents and his determination has, with divine help, achieved success, *he should remember his Creator*. He should remember that it is his Creator who has granted him his existence, his talents and abilities, his effort, his will and his energy. “Let a clever man not praise himself for his cleverness, nor a strong man praise himself for his strength (*Jeremiah 9:22*).” To realise that all is a divine gift is the essence of “service,” which gives value and meaning, justification and direction to personal development.

The third category is “kindness.” Since all that you have, all that you have been given, is from divine kindness, you in turn are obliged to exercise kindness in the same way. A man should not live just for himself, but also for others. Whatever one is *able* to give to others one is *obliged* to give, within certain limits defined by the Torah. The concept of kindness is broad, incorporating many sub-concepts. Each individual has his own talents, his own qualifications and abilities, from which he is able to donate and to help others who are in need.

However, in respect to kindness the Torah sets limits which apply to duties and obligations relevant to organ transplantation.

**Question 1:****Organs from a Living Donor, Danger to the Donor, and Payment**

May a person endanger his own life by donating an organ or tissue, such as bone-marrow, kidney, liver-lobe or lung-lobe?

What degree of danger is allowed, and what degree of danger is forbidden?

Is a person obliged to donate an organ if it is needed to save another person's life?

**Reply**

The Torah imposes a duty to do whatever is necessary to save a person who is in danger. The safety of such a person is considered in the same category as "lost property:" if you encounter someone who is in danger, it is as if you have found something that he has lost. Halacha imposes on the finder the duty to restore lost property to its owner: "You are to return it to him."<sup>1</sup> This is extended by the Talmud to include someone who is in danger, where "you are to return his body [i.e. its safety] to him."<sup>2</sup>

There is also a warning: "You are not to stand alongside the blood of your fellow"<sup>3</sup> which means that you are not to stand by and do nothing, but must take all steps to prevent your fellow's blood being spilt."<sup>4</sup> The Talmud gives examples: if you see someone drowning, or being attacked by a wild animal or by robbers, it is your duty to rescue him by all possible means.<sup>5</sup>

The first law, the duty to "restore the [safe] body to its owner," merely imposes on the observer the duty to rescue the one in danger if he can. The second law, the warning not to stand idly by, imposes additional duties which do not apply to the restoration of ordinary lost property. These include the duty to *call others to help*, and if necessary even to *hire people at one's own expense* in order to rescue someone who is in danger.<sup>6</sup> Beyond that, it imposes the duty *even if it involves the rescuer putting himself in danger*.

To what extent are you required to endanger your own life in

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1. Deuteronomy 22:2.

2. *Sanhedrin* 73a, and *Rashi* there.

3. Leviticus 19:16.

4. *Rashi*, loc.cit.

5. *Baraita*, loc. cit.

6. The Talmud's explanation of the need for two verses.

order to rescue another? One of the leading authorities<sup>7</sup> explains that the obligation only applies if the risk to the rescuer is relatively small. It must be a risk that a person would normally be willing to take in order to earn a living, certainly not more than fifty per cent.<sup>8</sup> But if the risk is fifty-fifty, and certainly if the balance of probability is that you yourself will be attacked, you are not obliged to risk your life. Furthermore, to take such a risk is not even considered as a noble deed worthy of praise (*middat chasidut*), but as an act of well-intentioned stupidity (*chasid shoteh*).<sup>9</sup>

Furthermore, the examples given imply that the rescuer is obliged to take all necessary *trouble*, including any *physical effort*, and even a certain risk of danger, but is under *no obligation* to undergo pain and suffering, or to donate from his body any organ or tissue, such as a kidney, which does not regenerate in the body of the donor, even though the danger is, it is claimed, not great.<sup>10</sup> To

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7. Rabbi David ben Zimra (*Radbaz*), a contemporary of Rabbi Joseph Karo, author of *Shulchan Aruch*, in his Responsum 1052, points out that each of the examples quoted in the Talmud involves the rescuer risking his own life and raises two questions. To what extent is the rescuer *obliged* to risk his own life (i.e., what degree of risk is he obliged to take)? And to what extent is he even *allowed* to risk his own life?

From the law that nobody may save his own life at the expense of someone else's (since nobody knows whose life is worth more in God's eyes), *Radbaz* deduces the converse, that nobody is obliged (and possibly nobody is even allowed) to give his own life to save that of someone else. *Radbaz* assumes therefore that the examples given in the Talmud apply to circumstances where the risk is only slight and calls this a "possible danger", term which he uses frequently.

8. The Talmud in respect of a different matter points out that a worker often risks his life in order to earn a living by doing dangerous jobs (Talmud *Bava Metsia* 112a). However, *Radbaz* maintains that a person will not normally take a risk where the chances of his survival are fifty-fifty, and certainly not where the risk is greater than this.

The author in *Mishpat Kohen* §143 makes a similar point.

9. Even if the purpose is to save a life and there is a 50% chance or more that the rescuer will lose his own life in the process, he is certainly not obliged and not even advised to take such a chance. *Radbaz* calls such a person a well intentioned fool (*chasid shoteh*) but emphasises that though it is well-intentioned stupidity, it is not forbidden.

10. *Radbaz* deals separately with the question of someone saving another person's life at the cost (not just risk) of losing one of his own limbs or an organ of his body and states clearly that there is no obligation in such a case. Clearly *Radbaz* is not referring to the loss of the organ endangering the rescuer's life because he had already dealt with that. In other words, there is absolutely no obligation for a person to give an organ to save someone else's life, even if the risk to his own life is extremely small.

This could also be understood from the fact that the rescue is like restoring lost property: the obligation is to restore to the owner what is his (i.e., the safety of his

make such a donation in order to save someone's life would indeed be a noble deed worthy of praise "and happy is the one who can stand this,"<sup>11</sup> but there is no obligation.

Even if a donation of blood or bone marrow or something similar which the body regenerates and restores to its previous state is required to save a life, it seems that there is no halachic obligation,<sup>12</sup> though this should be encouraged as there is a moral obligation.<sup>13</sup>

### **Question 2:**

#### **Payment for Donated Organs**

Is a person allowed to donate an organ or tissue from his body for payment?

Is the sale of organs allowed or forbidden?

### **Reply**

We have a general principle that any duty imposed by the Torah to do something for someone else must be done without any payment.<sup>14</sup> For this reason, one who finds and restores lost property, regardless of how much trouble is involved in restoring it, may not

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body), but not to give him what is yours. There is no limit to the trouble that must be taken, the effort to be made, or the expense to be incurred, but *Radbaz* stresses that there is no legal or moral obligation to donate of oneself, or even to undergo pain and suffering, though one who is able and willing to do all this (*midat chasidut*) is to be praised.

This is relevant to our case of donating a kidney for transplant to save another's life. A person who has two kidneys can live to the age of 120 on just one and undergoes no immediate risk in donating one; yet there remains the small risk that should the donor later contract some illness, he may be in need of that second kidney. No obligation can be placed on a possible donor, even though the risk is small.

11. If he has the strength and volunteers, we should even encourage him. A comment by *Sifetei Kohen* on *Shulchan Aruch, Yoreh De'ah 157:3* which appears inconsistent with this, is in fact dealing with a different type of case, a man's obligation to himself, which in the circumstances is less limited than his obligation to another.
12. A kidney is an organ which will not regenerate, but even giving blood, which does not involve a risk, merely discomfort for a period and which regenerates, is not obligatory to save a person's life, since nothing that was previously his is being restored to the person in danger. It appears from the words of *Radbaz* that there is no legal obligation where the rescuer's body is affected.
13. A moral obligation (*lifnim mi-shurat ha-din*, which is the opposite of *midat sedom*) is more than a mere praiseworthy action (*middat chasidut*). In the latter case, a volunteer should be encouraged; in the former, one should be encouraged to volunteer.
14. *Bechorot 29a*.

take payment for his trouble, except where this necessitates his abandoning other work in which he is engaged, in which case he may receive compensation for loss of earnings.<sup>15</sup> It follows that payment may not be received for anything done to rescue another from death or even from illness, which is defined as returning “loss of [safety of] body.”<sup>16</sup>

We have explained that donating an organ or tissue for a transplant is not an obligation, and therefore the donor may take payment.

Halacha defines five types of payment that can be claimed as a result of injury by another: damage, pain, medical (including surgical) fees, unemployment benefit, and humiliation, and there is a set method for calculating the amount of the claim.<sup>17</sup>

Halacha further states that this duty of payment applies even when the injured party allows the other one to injure him, whether by a bruise or by the loss or destruction of an organ. Even if he explicitly tells him that he will be exempt from payment, there is no valid exemption since in law a person does not waive his rights to an organ.<sup>18</sup>

There is therefore no reason whatever to ban one who donates a part of his body from requesting and receiving payment. The amount of payment can be stipulated in advance and agreed between the donor and a member of the family of the recipient of the transplant.<sup>19</sup>

The same applies to donation of blood, even when it is required to save life, since there is no obligation involved.<sup>20</sup>

Such payment, provided that it is within reasonable limits, need not be seen as unethical since the donor undergoes physical and at times mental suffering and as previously stated a person does not waive his rights to his organs.<sup>21</sup>

At the same time, it must be pointed out that only *the donor himself* is allowed to receive payment for his donation. Any

15. *Bava Metsia* 30b.

16. *Sanhedrin* 73a.

17. Maimonides, *Laws of Assault and Battery*, chapter 1. Also *Shulchan Aruch, Choshen Mishpat* 420.

18. *Bava Kama* 93a; Maimonides 5:11; *Choshen Mishpat* 421:12.

19. *Shulchan Aruch, Choshen Mishpat* 264:7, with comments of Isserles and Gaon of Vilna, and *Netivot Hamishpat* §8.

20. See note 12 above.

21. Talmud *Bava Kama* 93a.

intermediary acting between the donor and the family of the recipient, whether an individual or an organisation that undertakes to deal with the matter, must act strictly within the halacha, which obligates everyone to “restoring the [safe] body” to its owner. They are therefore *forbidden* to accept any payment other than compensation for abandoning other work, (as explained above regarding restoring lost property). This should certainly be embodied in statutory law, to save us from the danger of a trade in human organs developing.

### **Question 3:**

#### **Organs from a Cadaver: the Status of the Deceased and of his Family**

Is a person obliged, or even allowed, to consent during his lifetime to the donation of organs after his death?

Is a person obliged, or even allowed, to sign a form of consent and to carry a donor’s card?

### **Reply**

A person has possession and ownership of his body while he is still alive,<sup>22</sup> but his rights are limited by certain bans determined by the Torah, namely: deliberate suicide,<sup>23</sup> self-inflicted injury,<sup>24</sup> endangering oneself<sup>25</sup> and similar things.

A person is not forbidden to donate an organ from his body to save someone else’s life,<sup>26</sup> or to donate blood to cure even a patient whose life is not at risk,<sup>27</sup> as he is doing this for an important reason where the ban on self-injury does not apply.<sup>28</sup>

It appears that a person has the same right to give permission to donate from his body even after his death for the purpose of

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22. See the author’s *Amud Hayyemini* 16:16 ff. where he expresses this opinion in disagreement with Rabbi Zevin (see *Le’Or Halacha* on “The Shylock Case”).

23. Maimonides *Laws of Homicide* 2:3.

24. Maimonides *Laws of Battery and Assault* 5:1; See also Talmud *Bava Kama* 93a.

25. Maimonides *Laws of Homicide* 12:6.

26. As explained earlier on the basis of the words of *Radbaz*, who calls this “praiseworthy”.

27. *Iggerot Moshe, Choshen Mishpat* part 1, §103.

28. *Radbaz Responsa* 1052 cited above, note 7.

rescue.<sup>29</sup> If he has clearly expressed his wish to do so, no member of the family has any right to object to it.<sup>30</sup> If there is good reason to suppose that were he asked he would agree, that is sufficient.<sup>31</sup> On the other hand, if he expressed his clear objection to it, his wish must be respected.<sup>32</sup>

One who asks advice on whether or not to grant permission for his organs to be used posthumously for saving life should be encouraged, in that it is a *mitzvah* (a worthy deed) which, although he is not duty bound to perform after death, will stand to his credit on the Day of Judgment.<sup>33</sup>

However, one who asks advice should *not* be advised to sign an authorisation or to carry a donor's card since this is meaningless except in the case of sudden death such as in an accident. It is not desirable for a person to express the possibility of some such occurrence, which he prays and hopes will never happen to him. The rabbis have already warned against this in their dictum: "A person should never open his mouth to Satan."<sup>34</sup>

#### **Question 4:**

#### **Consent of Donor's Family**

What is the status of the family of a deceased person in respect of consenting or refusing to donate organs?

#### **Reply**

Whenever someone suffers shame, disgrace or humiliation, this

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29. This is deduced from a case discussed in *Bava Batra* 154b, where a corpse has to be inspected, where the implication is that a person's rights over his body continue after death. See also *Sanhedrin* 46b, *Tosefot* s.v. *kevurah*.

30. See *Bava Kama* 91b "A person has the right to put himself to shame, even though this to some extent harms his family" and *ibid.* 86b "Disgrace of members of the family."

31. *Pesachim* 4b "A person is pleased to perform a duty (*mitzvah*) with his body... with his money." See also comment of *Rabbenu Asher* no.26 on *Chullin* 88.

32. Notwithstanding the importance of the duty to save life, since a person who is dead is exempt from all duties (*mitsvot*), he cannot be made liable during his lifetime where the performance of the duty takes place essentially after his death. Nor do we have any rights over his body, since, as shown above, a person's rights over his body remain his even after his death.

33. *Megillah* 12:2: A person is judged according to his own standards.

34. *Berachot* 19a.

affects his family who in turn suffer hurt, upset and humiliation.<sup>35</sup> In particular, they feel humiliated by the humiliation of the dead.<sup>36</sup> At the same time it is the duty of near relatives to deal with his burial.<sup>37</sup>

Consequently, when it comes to taking organs or parts of the body from a corpse for a transplant to save a Jew's life, the family does have a status.<sup>38</sup> They have status as interested parties and may prevent the use of the organs of the deceased if he had expressed clear opposition to this during his lifetime.<sup>39</sup>

However, where the deceased had agreed to donating an organ or where there is good reason to suppose that were he asked he would have agreed, their opposition may be disregarded since the saving of life is of such great importance.<sup>40</sup>

Likewise, if the wish of the deceased is unknown, the family is obliged to give their consent. This duty overrides the duty imposed on them to bury the dead, as far as the relevant organs are concerned,<sup>41</sup> but they should bury the remainder of the body in a suitably dignified manner.

We pray for and look forward to an era in which God will bless his people with good health so that such questions are no longer relevant, and with the Temple rebuilt may God bless his people with peace.

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35. *Bava Kama* 86b “put someone to shame while he was asleep and then he died”; *ibid.* 93a “on account of the stain on the family”; and see *Sanhedrin* 75a “on account of the stain on the family.”

36. *Sanhedrin* 46b, *Tosefot* s.v. *kevurah*.

37. *Sanhedrin* loc. cit. Also Talmud *Berachot* 283, and *Shulchan Aruch, Yoreh De'ah* 348. It is shown that although if there is an inheritance the costs of the funeral fall entirely on the heirs, the duty to deal with burying the deceased falls on the relatives.

38. See *Mishneh Lamelekh*, end of Laws of Mourning, and *Gesher Hachayyim* 1:16b regarding the duty to bury even a small part of a corpse. See also *Amud Hayyemini* pp. 330 ff.

39. See note 32.

40. See notes 30,31.

41. *Iggerot Moshe, Yoreh De'ah*, part 2, end of §174. See also note 38.