When Is a Patient "Too Old" for Organ Transplant?

The subject of "*Kedima*" (priority), for medical treatment is extremely complex. We have discussed it in several essays in the past. This essay will examine the age criteria for receiving an organ transplant, focusing in particular on the considerations that arose in a multidisciplinary committee convened by the Israeli Ministry of Health in 2013.[1]

In the ideal world, there would be an adequate supply of organs such that the only consideration in deciding whether to perform an organ transplant would be whether the patient will benefit or be harmed. However, the unfortunate reality is that the demand for organ transplants far outstrips the supply. Therefore, priority and selection criteria must exist; patients that meet the criteria are placed on a waiting list and are assigned a level of preference. In Israel, about 8% of people on the waiting list die before receiving a transplant.

Until several years ago, an age limit was set on eligibility for transplants. Above a certain age, depending on the specific organ, one could not be placed on the waiting list.[2] However, the committee reexamined this issue. Among other things, it took into account the fact that abolishing the age criteria would lengthen the waiting list by about 30%.

The consideration that led to the imposition of an age limit were the decidedly poorer results in heart or lung transplant patients over the age of 65. However, with regard to the five-year survival rate, there were no significant differences between younger and elderly people. Following liver transplant, there are almost no differences in the first year, but over a five-year period there is a significant difference between young adults (18-29) and transplant recipients aged 50 or above.[3]

The committee drew the following conclusions and made these recommendations:

1. The age limit should be abolished.
2. Age should not be considered in the allocation formula except when there is medical justification for it (for example, in kidney donations).

[1] The reference to the committee's work below is from its concluding report.
[2] An additional rule is that anyone placed on the waiting list who passes the age threshold before transplant does not lose his place on the list, but each patient's chances of survival must be considered before performing a transplant. This scenario is rare in patients awaiting heart transplants.
[3] At other ages (i.e., 30-49), no significant differences in survival were found compared to the other groups.

3. Other tools, such as the Fragility Index, should be used, not as threshold conditions, but as part of the allocation formula.

The committee's recommendations were based on several considerations:

First, in heart, lung and liver transplants, the surgery is usually lifesaving. Excluding somebody from the waiting list is a death sentence. However, those waiting for kidney transplants can usually be maintained with dialysis, although this severely impairs their quality of life.

Second, the reference to age per se is arbitrary; it is based on the number of years a person has lived rather than his "biological age" (his physical condition).

Third, a gap had emerged between the age of the donors, which had increased over the years, and the age of the recipients who could not receive organs at that age due to the age limit. This created a situation where organs donated from the body of a 75-year-old could be used, but a person of the same age would not be entitled to a donation.

The question of applying age limits to recipients of transplants revolves around two different approaches to transplantation. One approach, which favors age discrimination, would argue that the main consideration should be to cause maximum benefit, which is achieved by taking into account the recipient's chances of surviving the surgery, as well as the estimated number of years he can benefit from the transplant. This approach would likely be preferred by donors who would want the organ(s) they donate to provide the maximum benefit. The second approach would argue that considerations of justice and equality preclude any such distinctions.

Kedima

The Mishna in *Bechoros* delineates an order of preference that applies in several circumstances (3:6-8):

> *Anyone who is more frequent than his fellow takes precedence over his fellow, and anyone who is more sacred than his fellow takes precedence over his fellow... A man takes precedence over a woman to revive and to return loss property, and a woman takes precedence over a man to clothe and redeem from captivity. A Kohen takes precedence over a Levi, and a Levi takes precedence over a Yisrael, A Yisrael takes precedence over a Mamzer; a Mamzer takes precedence over a Nasin; a Nasin takes precedence over a convert; a convert takes precedence over a slave who has been freed. When is this the case? When their statuses are equal. But if a*

Mamzer is a Talmid Chacham and a Kohen Gadol is an Am haAretz – the Mamzer who is a Talmid Chacham takes precedence over the Kohen Gadol who is an Am haAretz.

The *Rema (Y.D*. 252:8)[4] rules that the order of precedence outlined in these *Mishnayos* also applies to saving lives[5]. However, the Poskim write categorically that the order is only upheld when the patients arrived at the medical facility at the same time, have an equal chance of surviving, and their treatment is equally urgent. If this is not the case, treatment is offered to the patient who is in the most danger or to the one for whom the treatment will be most effective.[6]

The *Shevet haLevi* (10:167) writes similarly:

And, as for the point you raised regarding "Ein Ma'avirin Al haMitzvos"; certainly if one person arrived first, the doctor must treat him first even if he knows that others are soon coming, be they Kohanim, Levi'im, men or women. But if they all are waiting in front of him, or if other injured people arrive while he is still preparing to treat the first patient and he hasn't yet begun treating him, one would need to consider whether there would be an issue of "Ein Ma'avirin Al haMitzvos" that would override the order of precedence given by Chaza"l. At any rate it is obvious that if the condition of somebody who would not have precedence is worse, and is in greater danger, one should certainly turn to deal with him first. Moreover, if one has begun treating one patient, it is forbidden to abandon him on the basis of adhering to the order of precedence.

HaGaon Rav Asher Weiss *Shlit"a* came to the same conclusion:

When we speak of Pikuach Nefesh and saving lives, these two factors should be paramount and the only consideration. I have written similarly in a letter to those who work for Hatzalah who want to know whose life takes precedence in the case of vehicular accident or terrorist attack. I explained that precedence is not given to the Kohen over the Levi or man over woman. Rather they should prioritize those who are in imminent danger and those whom there is a greater chance of saving.

However, as stated, in the hypothetical, unlikely scenario that all else is equal, there is an order of precedence as to whom should be treated first.

---

[4] See *Beis Yosef* (*ibid*. 251) in this regard.
[5] This is the accepted Halachic position, although there are Poskim who disagree.
[6] See *Tzitz Eliezer* (17:72) in the name of the *Shulchan Atzei Shitim* (by the author of the *Mirkeves haMishna*) 1:6, *Igros Moshe* (*C.M*. 2:73:2), *Minchas Shlomo* (2:82:2), '*Asya'* (59-60 *Iyar* 5757) in the name of Rav Shlomo Zalman Auerbach *zt"l*, *Shevet haLevi* (10:167) and *Kovetz Teshuvos* (3:159).

Rav Yaakov Emden *zt"l* (*Migdal Oz*, Chapter '*Even Bochen' Pina Alef*) adds a number of other categories of precedence that do not appear in the Mishna in *Horayos*. He writes that one should save a younger person before an older one, and a healthy elderly person before a sick one.

Why should the life of a younger person take precedence over that of an older one? One possibility is that a younger person has his whole life ahead of him, or that he is still able to procreate. In fact, Rav Yaakov Emden states explicitly that a person who is able to procreate should be given precedence to a person who can't. Another possibility is that the chances of successfully saving lives are generally higher among younger people and, as stated above, one always gives priority to the person who has the greater chance of surviving.

Either way, the Poskim roundly dismiss the words of Rav Yaakov Emden. Their reactions give us an insight into the Halachic approach to the elderly.

Rav Moshe Feinstein *zt"l* argues as follows:

> *Regarding an extremely old person who has taken ill. Certainly we are obligated to treat him as best we can, just like we would treat a younger person, even if he is no longer interested in living and asks that we do not treat him. In fact, it is forbidden even to contemplate heeding his request, even if a revered doctor advises it. In fact, even as far as giving priority for receiving medications, one should probably not take his request into account. (Igros Moshe, C.M.* 2:75*)*

Rav Shlomo Zalman Auerbach *zt"l* (in a letter to Professor Shimon Glick) states:

> *…Therefore we mainly need to take into consideration the level of danger and the chance of saving lives. Considering the age of the patient does not come into the reckoning at all.*

In other words, it is true that if the chances of saving an older person are lower than saving the younger one, then we should prioritize the younger one, but *not* just because he is younger.

It is clear that Rav Moshe and Rav Shlomo Zalman *zt"l* entirely dismissed the notion of favoring the lives of the youth over the elderly. Why were they so certain? What led them to this definite conclusion?

It is probable that it was based upon an appreciation of the inherent value of life. In their eyes, one moment of life is worth all the riches in the world. Therefore, an older person, though he cannot expect many more years of life, is fully deserving of lifesaving interventions, for every remaining moment of his life is infinitely precious.

We cannot place a value on life based on a person's potential or his possibility to procreate for there are infinite possibilities and achievements open to everybody – even the most aged individual. Therefore, there is no way of measuring or comparing people's lives in order to determine whose is more important.

From a purely scientific standpoint one could consider the following question. If one patient is expected to live for five years following a transplant, and another patient would live for ten years, may we give precedence to the recipient that will live longer?

From a Halachic standpoint, there would seem to be no place for this question. We believe that God grants life to every living thing; He alone determines their lifespan. We therefore only consider one criterion, namely, whether the transplant will be successful and the patient will survive

Halacha might also consider whether a patient with a chance of "*Chayei Olam*" takes precedence over one who will only attain "*Chayei Sha'ah*". That is, if one patient, in spite of the transplant, will only live a short while longer due to a terminal illness, whereas another patient is likely to live for a considerable amount of time, one might consider giving precedence to the latter patient.

However, if both patients are expected to live for at least a year after the surgery, but according to statistics one is likely to live for another five years and the other will live for another ten, we do not give any precedence. We cannot measure the value of life or its importance in Heaven such that we could determine that "ten years are worth more than five".

The will of the donor is also not taken into account. He has no authority to determine what should be done with the organ he donated. Halacha does not consider man to be the owner of his body. In any case, when an organ is available for transplant, the only determining factor is saving lives according to the order of precedence delineated above.[7]

[7] This essay should not be seen as expressing a position on the complex halachic issues relating to organ donations.