

## THE COURTS

<b>In the District Court of Jerusalem</b>	<b>Civil Cases 4298/02, 4418/02, 4352/02, 4353/02, 4351/02, 4419/02, 5020/03, 5101/03, 5104/03, 5143/03, 5103/03, 5076/03, 5102/03</b>
<b>Before:</b>	<b>Hon. Judge Yosef Shapira</b>
	<b>31 July 2006</b>

- In the matter of:**
- 1. Widen Eliahu**
  - 2. Gafni Esther**
  - 3. Eichner Shlomit**
  - 4. Alfasi David**
  - 5. Kimchi Ceila**
  - 6. Heyman Itamar**
  - 7. Ziserman Sara**
  - 8. Kessner Eran**
  - 9. Avitan Michal**
  - 10. Mentin Pinchas**
  - 11. Memma Tikva**
  - 12. Sabag Susie**
  - 13. Ben Shitrit Levana**

by their attorneys, Adv. Dr. S. Jellinek,  
S. Rubenstein, Y. Gutman, A. Goldman and A.  
Markovitz

**The Plaintiffs**

**- v e r s u s -**

**1. State of Israel**

by its attorneys M. Cherka and N. Brook-Shaki

**2. General Health Services**

**3. Maccabi Health Services**

by their attorneys Adv. A. Almagor, Y. Weisman, M.  
Almagor and S. Chadier-Moshesky

**4. The Sick Fund of the National Workers**

by its attorneys Adv. P. Moser, L. Cohen and Y. Shalmi

**5. The United Sick Fund**

by its attorneys H. Melamud and M. Dahan

**The Defendants**

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Summary: [Ratio]

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\* Health – National Health Insurance – Organ Donations

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\* Health – National Health Insurance – Kidney Transplant

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The Plaintiffs, who donated kidneys to their relatives, request compensation for their damages as a consequence of donating their kidneys. They allege that the donees were listed, or were entitled to be listed in the future in the National Waiting List managed by the National Transplants Center, and that due to the severe shortage of organs for transplant, the waiting period is prolonged, and the condition of the health of the donees deteriorated, to the extent of endangering their lives. The Defendants argued that this claim requires an amendment to the law, and that receipt of consideration for donating organs constitutes trading in organs. The trial focused mainly on the question of whether payment of expenses to a donor incurred directly from the surgery for removing the organ from his body and transplanting it to the body of the donee constitutes trading in organs.

In the judgment rendered by the District Court, it accepted the claim in part, and found as follows:

Even though procedures for organ transplants have not yet been prescribed in primary legislation, Israel, like all enlightened countries in the world, deems trading in organs as an action contrary to the public interest.

Giving compensation for the direct expenses as a result of the surgery itself does not diminish the value of the donation, which nobody denies was made with altruistic motives, arising from a special familial relationship.

Where the law imposes a material duty on the State, the State must perform its duty in full and cannot sidestep its duty by contending that budgetary problems prevent it from doing so. The burden is on the State to find a budgetary source for fulfillment of a duty imposed on it by the law. The issue of whether there is a specific law granting a private party concrete rights that are not dependent upon finding a budgetary source and imposing a duty on the State to fulfill such rights, or whether the law deals with limited rights that are dependent on a budgetary source, such that no budget means there is no right, is a question of interpretation.

Legislative interpretation according to the method of the intent of the statute is based on three basic principles of interpretation: the language of the law, the purpose and intent of the law, and judiciary discretion. These principles apply to interpretation of every statutory provision, including secondary legislation.

The procedure for a kidney transplant is included in the basket of health benefits provided under the Second Addendum to the National Health Law (hereinafter – the law). The purpose of the law is to provide residents of Israel with the best health services possible from the budgetary sources allocated to the "health basket", based on principles of justice, equality and mutual assistance. It is not possible to interpret the inclusion of the right to a kidney transplant as imposing a duty on the State and/or the sick funds to supply organs for transplant, as if they were a commodity readily available to everyone on demand. Donation of a kidney, lung or eye is not like a blood donation which the donor's body replenishes. The only reasonable interpretation that corresponds with the purpose and intent of the law is that the sick funds are required to provide kidney transplant surgery and the State must provide the financing. Nevertheless, the donor is entitled to coverage of all his direct damages as a direct consequence of performance of the transplant. All of this is

*Translation from Hebrew*

within the duty imposed on the sick funds, which are responsible for providing transplant surgery to donees, pursuant to the National Health Insurance Law.

The question of whether the donor of a kidney is also entitled to consideration for the missing organ, and if so, what are the level and nature of such consideration remains open. The answer will be given by the legislature if and when the task of preparing the law on this matter is completed, the sooner the better.

Under the circumstances, the conditions required by the Personal Injury Benefit Law for providing a cause of action are not fulfilled. This is both because the Defendants did not cause an illness and because the law does not impose on them any duty to provide monetary compensation for personal injury. Their only obligation is to finance kidney transplant surgery, and there is nothing in the law that imposes a duty on them to compensate for medical services provided to the insured by an external source.

The general principle of the duty of restitution under section 1 of the Unjust Enrichment Law should not be limited to a list of given circumstances. When the court comes to examine whether the duty of restitution exists, it must look to its sense of logic and justice for guidance. In the instant case, it was not proven that the Defendants were unjustly enriched by the kidney donations received from the Plaintiffs; and, therefore, it follows that the Plaintiffs have no cause of action against the Defendants under a section of the Unjust Enrichment Law. Even if definite unjust enrichment, as contended by the Plaintiffs, were proven, restitution under such circumstances would still not be justified, because the budget for dialysis treatment is taken from the health budget for the general public, and when there is a kidney transplant, this budgetary allocation is refunded to the general public by means of providing health services within the basket of health services; and, therefore, in accordance with the sense of justice and logic of the enlightened Israel public, there is no ground for imposing a duty of restitution on any of the Defendants.

The duty to rescue pursuant to law applies only when there is a sudden occurrence presenting a clear and present danger. Imposing a duty to rescue on the public whenever another person's life is endangered due to an illness, is a burden that the public cannot bear; and, therefore, the law to rescue does not apply in the instant case.

The moral duty to ensure the existence of an arrangement for transplants that is orderly and efficient does not generate a statutory duty requiring any of the Defendants to provide organs, as if they were a commodity that anyone may purchase on demand.

The court found that a duty is imposed on the sick funds to compensate the donors for their direct expenses arising from transplant surgery but emphasized that payment of such expenses to the donors does not constitute giving consideration for donation of a kidney.

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