



Trafficking in Human Beings for the Purpose of Organ Removal and the Ethical and Legal Obligations of Healthcare Providers:

Recommendations

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2. Organ recipients who paid for kidney transplantations abroad: a report (November 2014)
3. Trafficking in human beings for the purpose of organ removal: a case study report (November 2014)
4. Indicators to help data collection and identification of trafficking in persons for the purpose of organ removal (August 2015)
5. **Recommendations to improve non-legislative response (August 2015)**

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1. Introduction

Trafficking in human beings for the purpose of organ removal (THBOR) and human organ trade are universally condemned (1-3). But despite efforts to curb and to elucidate the illegal nature of the practice, the buying and selling of organs continues (4), involving patients traveling to countries throughout the world. It has been estimated that approximately 10% of all transplants may occur illegally (5).

Prior to travel, patients will often – of necessity – discuss their plans with their home jurisdiction health care provider, usually a physician who is a transplant professional, a nurse or a social worker (6). This interaction may include questions about the transplant process and the destination country and/or a request for relevant medical records and supporting documentation (7). In addition, returning patients will often re-engage with their home country physician for their required follow up care.

Given this interaction, physicians and other health care professionals seem well placed to play a role in the monitoring and, perhaps, the reduction of organ trafficking practices (8). They serve as important sources of information for patients and may have access to information that can be used to gain a greater understanding of organ trafficking networks. However, well-established legal and ethical obligations owed to their patients can create challenging policy tensions that can make it difficult to implement policy action at the level of the physician/patient.

In this paper, we outline the potential role of physicians during three key phases of the physician patient interaction. The first is the phase when the patient is investigating all the clinical options, including the possible purchase of an organ. The second phase is when the patient has made up his mind and has chosen to pursue the purchase of an illegal transplant. And the third phase is post-transplantation. Below we briefly explore the legal and ethical tensions at each phase and offer recommendations on how best to negotiate the relevant professional norms. While there are healthcare professionals involved throughout the organ trafficking process, the focus in this paper is on the role of physicians with patients considering the illegal procurement of an organ. It should also be noted that while the focus of our analysis has been on ways to eliminate the trafficking in human beings for the purpose of organ removal (THBOR), this paper considers illegal organ transplantation on a broader scale. This is because physicians may not be aware if THBOR is involved in their particular patients' situation. As such, from the perspective of the relevant physician, and for the purposes of this paper, the most salient issue is the decision by a patient to purchase an organ. Of course, addressing this broader issue also helps to address the critical issues associated with THBOR.

2. Information phase

Numerous studies have suggested that patients discuss their medical tourism plans with their physicians (6, 9, 10). This may include questions about transplant options and the appropriateness and safety of an organ trafficking procedure. At this phase, physicians should also be alert to patients who may be interested in or tempted to buy an organ – even if not explicitly noted by the patient. Physicians should provide information to the patient about the ethical issues associated with illegal buying an organ and an honest assessment of the health risks, such as possible complications and a lack of clinical continuity (11). The physician should also consider discussing the dangers for the organ donor (12, 13), particularly if there are signs that the patient is going to a country where donors are being paid poorly, treated badly or even being killed for their organs (5). There are questions around whether the informed consent obligation - buttressed in some jurisdictions by fiduciary duties (14) - creates an obligation to disclose to desperate patients the availability of organs “for sale” (15, 16). However, given the risks associated with the practice and the clinical uncertainty involved and the fact that it is illegal in all countries (except Iran) - to say nothing of the social harms - this would seem to fall outside the traditional bounds of the disclosure obligation.

While physicians likely do not, technically, owe a legal duty to the individual providing the organ (17), disclosure of the relevant ethical issues and social harms would seem to be something a reasonable person in the patient’s position would want to know and, as such, would fit with existing consent law (18). Moreover, as members of the medical community, all physicians have responsibilities to society and the health of others, as recognized in professional codes of ethics (19).

In addition, in some jurisdictions, physicians may have a responsibility to disclose their personal views, particularly if they conflict with a patient’s treatment decision (19). Such a conflict may impact the physician/patient dynamic and, as such, seems something that should be disclosed as part of a physician’s fiduciary and consent obligations (14).

Given this disclosure responsibility, there is a growing need to ensure relevant healthcare providers have the knowledge necessary to provide patients with the relevant information (see for example, www.declarationofistanbul.org). Resources should be made available that provide clinicians with a concise summary of the facts and ethical concerns about organ trafficking most relevant to this phase of the physician/patient interaction.

3. Pre-transplant stage

Once a patient has decided to purchase an organ, additional legal and ethical challenges emerge. In such situations, doctors must continue to act in the best interest of their patients, including performing appropriate investigations and prescribing medications that are necessary for current clinical management. And, of course, the patient maintains all his/her legal rights. These rights are not eroded as a result of the patient's 'wrong' decision.

For example, in most jurisdictions, patients retain the right to access and obtain a copy of their medical record (20, 21). This right is often supported by both legislation (22) and case law (14, 23). As such, if a patient requests a copy of his/her medical record, it must be provided (most jurisdictions allow for the charging of a reasonable fee) even if the physician knows the information will be used for the purchase of an organ. However, physicians have no obligation to take any actions that would facilitate an illegal transplant, such as providing a patient with a summary of the medical file or a letter for the surgeon that is going to perform the transplant. Nor are physicians obliged to do additional tests to facilitate transplantation. On the contrary, it seems appropriate for physicians to remind patients at this phase of the interaction of the continuity issues – such as a lack of access to records and medical information located at destination clinics – that may create clinical challenges for the patient (11, 24).

In some jurisdictions, physicians may also have a professional obligation to report colleagues who are facilitating illegal transplantations to the appropriate regulatory authority, as required by professional regulatory bodies ((19), article 48). This practice will help to reinforce professional practice norms that will clarify physician duties and, perhaps, reduce patient interest in accessing illegal organs, but more work is likely needed on the impact of physician advice in this context (25).

4. Post-transplant stage

There seems to be a broad consensus that when a patient returns, physicians continue to owe a duty of care to their patients. This is particularly so in the context of emergent care. For example, returning patients may require a range of tests and screens, such as for pathogens (26). In non-emergent situations, individual physicians may elect to defer care to another physician, so long as that referral does not prejudice the health of the patient. Having accepted professional responsibility for a patient, the physician must continue to provide services until they are no longer required or wanted, or until arrangements have been made for another suitable physician to assume care of the patient. Punishing returning patients seems an inappropriate policy lever as unequal treatment – including unequal compensation – creates justice issues, and it seems unlikely to be effective at deterring trafficking practices.

More controversial is whether a physician can disclose to a third party, such as some specified authority, that a patient has purchased and returned with an illegally purchased/procured organ. Collecting data about trafficking and reporting trafficking is a common recommendation (7, 27-29) as it is hoped that would both slow the practice of organ trafficking and provide valuable information that would inform policy. Such disclosure might support the police and judiciary in investigating, disrupting and prosecuting organ trafficking networks. Information might include the names of hospitals, clinics, cities and/or hospital staff that are involved in illegal transplant activities (7).

But in many jurisdictions, reporting a patient involved in trafficking – or even the existence of a trafficking network – would require a change in the law (i.e., new legislation, an amendment to an existing law or significant case law). This can be a complicated process. In some jurisdictions, it would require the coordination of numerous pieces of legislation (e.g., in Canada it would require each province to take action). Nevertheless, given the potential benefits of a reporting system it seems appropriate to urge policymakers to explore the possible benefits of a framework that would allow the reporting of basic information. Ideally, this could be done in a manner that does not disclose the identity of the patient (7). A system that allows for a clear accounting of the magnitude of the transplantation problem will both assist our understanding of the phenomenon and help to generate the political will necessary to generate policy change.

In order to justify the development of a legal exception to physician obligations, evidence will be required to support the contention that the exception is needed and can achieve the desired result. As noted in other domains - such as in the area of mandatory reporting of gunshot wounds (30) - without solid evidence, it may be difficult to justify the required change in the law, particularly given the strength of the norm of confidentiality, the fact that existing law often errs on the side of protecting confidentiality (31), and the limited breadth of the existing exceptions (e.g., in many jurisdictions they are limited to situations where there is an identifiable individual who may be in imminent harm (17)).

5. Conclusion

Physicians are well placed to play a role in the mitigation of the illegal organ trade, including trafficking in human beings for the purpose of organ removal. They have unique access to patient information and are in a position to provide patients with critical information about the nature of the illegal trade. The legal and ethical obligations physicians owe to their patients create challenges that complicate this role and their potential influence. Still, we feel several definitive statements can be made about how physicians should proceed.

- As part of the disclosure process, physicians should provide patients with a frank assessment of the relevant risks and social harms associated with the illegal organ trade and an honest account of the physician's own moral objections (in some countries, they may be ethically required to make this latter disclosure).
- If requested to do so physicians must – as per the law in many jurisdictions – provide patients with copies of their medical records, but they are under no obligation to facilitate the process by, for instance, providing referral letters.
- Legal and ethical obligations require that physicians must treat returning patients.
- In many jurisdictions, physicians have an obligation to report colleagues involved in the illegal trade to an appropriate regulatory authority.
- Existing legal and ethical obligations likely prohibit physicians from reporting patients who have received an illegal organ. This latter conclusion highlights an area that may require legal reform. It has been noted that real benefits may accrue from the collection of more information about the illegal transactions. As such, policymakers should consider the background research necessary for – and possible benefits and risks associated with – a change in existing norms.

While the focus of this paper is on the responsibilities of physicians to patients seeking illegal organs, there are, of course, many related issues that warrant further consideration, including the nature of the duties and responsibilities of physicians who deal with the victims of the organ trade. In addition, we encourage jurisdictions throughout the world to continue to support research into the nature and scope of the organ trafficking phenomenon. Such work is essential, as it will help to inform the development of needed regulatory frameworks. Finally, health professional bodies – such as the relevant regulatory entities for physicians and nurses – should provide guidance to their members on how best to proceed when a patient is involved with organ trafficking (9).

References

1. Steering Committee of the Istanbul Summit. Organ trafficking and transplant tourism and commercialism: the Declaration of Istanbul. *The Lancet*. 2008;372(9632):5-6.
2. World Health Organization. WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation. *Cell and Tissue Banking*. 2010;11(4):413-9.
3. European Parliament and Council of the European Union. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. *Official Journal of the European Communities*, 2011, L101/1.
4. Shimazono Y. The state of the international organ trade: a provisional picture based on integration of available information. *Bulletin of the World Health Organization*. 2007 December;85(12):955-62.
5. Delmonico FL. The implications of Istanbul Declaration on organ trafficking and transplant tourism. *Curr Opin Organ Transplant*. 2009;14(2):116-9.
6. Snyder J, Crooks VA, Johnston RB, Dharamsi F. "Do your homework... and then hope for the best": the challenges that medical tourism poses to Canadian family physicians' support of patients' informed decision-making. *Bmc Medical Ethics*. 2013;14:37-46.
7. Ambagtsheer F, van Balen LJ, Duijst-Heesters WLJM, Massey EK, Weimar W. Reporting organ trafficking networks: a survey-based plea to breach the secrecy oath. *American Journal of Transplantation*. 2015;15(7):1759-1767.
8. Bagheri A, Delmonico FL. Global initiatives to tackle organ trafficking and transplant tourism. *Medicine, Health Care and Philosophy*. 2013;16(4):887-95.
9. Johnston R, Crooks VA, Snyder J, Dharamsi S. Canadian family doctors' roles and responsibilities toward outbound medical tourists "Our true role is... within the confines of our system". *Canadian Family Physician*. 2013;59(12):1314-9.
10. Gill J, Madhira BR, Gjertson D, Lipshutz G, Cecka JM, Pham PT, et al. Transplant tourism in the United States: a single-center experience. *Clin J Am Soc Nephrol*. 2008;3(6):1820-8.
11. Gill J, Diec O, Landsberg DN, Rose C, Johnston O, Keown PA, et al. Opportunities to deter transplant tourism exist before referral for transplantation and during the workup and management of transplant candidates. *Kidney Int*. 2011;79(9):1026-31.
12. Ivanovski N, Masin J, Rambabova-Busljetic I, Pusevski V, Dohcev S, Ivanovski O, et al. The outcome of commercial kidney transplant tourism in Pakistan. *Clin Transplant*. 2011;25(1):171-3.
13. Biggins SW. Supply and demand in transplant tourism: Disclosure duties of the transplant physician and our global transplant community. *Liver Transplant*. 2010;16(2):246-7.
14. Canada. Supreme Court. *McInerney v. MacDonald*. *Dom Law Rep* 1992; 93: 415.
15. Ho D. Providing optimal care with dirty hands. *Am J Bioethics*. 2010;10(2):16-7.
16. Hippen B. Professional Obligation and Supererogation With Reference to the Transplant Tourist. *Am J Bioethics*. 2010;10(2):14-6.
17. *Tarasoff v. Regents of the University of California*, 131 Cal. Rptr. 14 (Cal. 1976).
18. *Reibl v Hughes*, [1980] 2 SCR 880, [1980] 114 D.L.R. (3d) 1 (SCC).
19. Canadian Medical Association. CMA Code of Ethics 2004: Available from: <http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD04-06.pdf>.
20. Canadian Medical Protective Association. Releasing a patient's personal health information: What are the obligations of the physician? 2012: Available from: https://www.cmpa-acpm.ca/duties-and-responsibilities/-/asset_publisher/bFaUiyQG069N/content/releasing-a-

patient-s-personal-health-information-what-are-the-obligations-of-the-physician-
;jsessionid=B65C4670035A2DA471BBC6938C53B0CD.

21. Ambagtsheer F, Zaitch D, van Swaaningen R, Duijst W, Zuidema W, Weimar W. Cross-border quest: the reality and legality of transplant tourism. *J Transplant*. 2012;2012:391-936.
22. Health Information Act, Revised Statutes of Alberta 2000 Chapter H-5. (current as of June 17, 2014).
23. *NM v Drew (Estate of)*, 2003 ABCA 231, 230 DLR (4th) 697.
24. Gill JS, Goldberg A, Prasad GVR, Fortin MC, Hansen TB, Levin A, et al. Policy statement of canadian society of transplantation and canadian society of nephrology on organ trafficking and transplant tourism. *Transplantation*. 2010;90(8):817-20.
25. Levine AD, Wolf LE. The roles and responsibilities of physicians in patients' decisions about unproven stem cell therapies. *Journal of Law, Medicine & Ethics*. 2012;40(1):122-34.
26. Kotton CN, Hibberd PL. Travel medicine and transplant tourism in solid organ transplantation. *Am J Transplant*. 2013;13(SUPPL.4):337-47.
27. Glaser SR. Formula to stop the illegal organ trade: presumed consent laws and mandatory reporting requirements for doctors. *Human rights brief*. 2005;12:20-46.
28. Cohen IG. Transplant tourism: the ethics and regulation of international markets for organs. *J Law Med Ethics*. 2013 Mar;41(1):269-85.
29. Council of Europe Resolution CM/Res(2013)55 on establishing procedures for the collection and dissemination of data on transplantation activities outside a domestic transplantation system, available at <https://wcd.coe.int/ViewDoc.jsp?id=2141341&Site=CM>, (2013).
30. Pauls MA, Downie J. Shooting ourselves in the foot: why mandatory reporting of gunshot wounds is a bad idea. *Canadian Medical Association Journal*. 2004;170(8):1255-6.
31. Renke W. The confidentiality of health information in the criminal law. *Health Law Rev*. 1998;6(3):3.