

AIDS

Halachic Questions

Representative from the Audience

1. An AIDS carrier refuses to inform his spouse of his situation. Is the doctor permitted halacha or obligated halacha to divulge the information to the spouse of the carrier?
2. Is the spouse of an AIDS carrier entitled to demand the dissolution of the marriage and a *get* (religious divorce)? Is he/she permitted to remain married and continue marital relations despite the illness? If the spouse wishes to remain married to the AIDS carrier, is the male permitted – or obligated – to use a condom?
3. Under which circumstances may one compel an individual to be tested for HIV? When do the rights and responsibility of the community supercede those of the individual?

AIDS

Synopsis of the Responsa

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I. Disclosure

Disclosure Before Marriage

The prohibition of exploitation in Jewish law¹ includes a prohibition of concealing any significant relevant facts before entering into a business or marital relationship.

Concealing significant facts from an intended partner before marriage is not only an offense against the law of exploitation, but also creates a doubt regarding the validity of the marriage. The author of *Sefer Chasidim*, therefore, wrote 700 years ago:

If a person's children or relatives wish to marry, he should not conceal any defect, such as an illness which would have dissuaded the parents from marrying them had they known of it; he should not conceal it, but reveal the facts, lest they claim that the marriage was a "mistaken marriage." It is better to separate them (i.e. disclose that which may prevent the marriage) than that they should live together in conflict.

The Duty to Protect vs. Tale-bearing

As a general rule the Torah forbids relating anything derogatory about another person. However, where a person's life is in danger or he is in danger of suffering financial loss as a result of another person's activity, one is allowed and even obliged to warn him of the danger caused by the other person.² In such cases not only does the ban on tale-bearing not apply, but there is a positive duty to rescue his life or his property.

One who fails to rescue another's life is guilty of infringing the law "You are not to stand by the blood of your fellow."³ One who

1. Lev. 25:17

2. *Pitchey Teshuvah, Orach Chayyim*, 156

3. Lev. 19:16; Maimonides, Laws of Murder 1:14

fails to rescue another's money is guilty of infringing the law "You are not able to ignore."⁴

Consequently, anyone who knows that someone is suffering from an illness that can affect an intended spouse is obliged to inform the intended partner if the sufferer is not prepared to disclose the information to the intended. This law also applies to physicians.

According to the *Chafetz Chayyim* disclosure has three conditions:

1. Absolute certainty that a real illness is involved.
2. The information must be given objectively and without exaggeration.
3. There must be no intention of injuring the party who is ill, but solely an intention of preventing harm to the other side.

Rabbi S. Z. Auerbach added that the seriousness of the illness must also be taken into account:

1. Where there is a medical problem that does not pose any real danger, the fact may be revealed to the other side to enable them to make a fair judgment, but there is no obligation to disclose the fact.
2. Where there is a serious illness and a reasonably good chance that the marriage will break up once the facts are discovered, then the physician is actually obliged to disclose the facts to the other side to prevent serious future damage.

Conclusion

If one partner to an intended marriage is a carrier of AIDS and does not intend to disclose this, there is an obligation to reveal the fact to the healthy partner.

Even when a couple are already married and one partner is infected with AIDS and does not wish to reveal this to the other, there is an obligation to inform the partner in order to save his or her life. There is in this no prohibition of tale-bearing, and one who withholds the information is infringing the law not to stand by another's blood.

4. lit. hide yourself; Deut. 22:3

II. Marriage and Divorce

Invalidating Marriage following Concealment of AIDS

Halacha distinguishes two types of defect or illness:

1. A very serious illness or defect, which a partner normally cannot tolerate.
2. A moderate defect that can be tolerated.

In the first case, where one partner concealed a serious defect or illness from the other before marriage, the marriage is defined as a “mistaken marriage,” which is similar to a “mistaken bargain” and is declared null and void *ab initio*. The woman is free to remarry.

In the second case, where there is a defect that might be tolerated, the status is that of a marriage of doubtful validity since it is not absolutely certain that it is considered a “mistaken marriage.”

Sources: *Shulchan Aruch Even Ha’ezer* 39:5; *Levush* *ibid*; *Bet Shemuel* chapter 15 *ibid*.; *Shulchan Aruch Even Ha’ezer* 154:3; *Talmud Bava Kamma* 110b-111a.

AIDS is a very serious illness. In general, a person would not wish to marry one who carries the disease. Consequently, if the fact is concealed before the wedding, the marriage is null and void. In practice one should not rely on one’s own judgment, but turn to an authorized Rabbinical Court or consult a qualified Rabbi.

Compulsory Divorce due to AIDS

If one partner contracts AIDS after marriage and the other in consequence wants a divorce, the court may force the granting of a divorce. *Shulchan Aruch Even Ha’ezer* 154:1 states that if a husband is afflicted with even a disfiguring disease he may be forced to divorce his wife and pay the *ketubbah*.

Maintaining the Marriage without Protection against AIDS

There are cases where despite the fact that one of the partners is a carrier of AIDS, both partners wish to maintain the marriage without using a condom to give themselves an opportunity of producing healthy children through which they can be remembered. If the carrier is considered as a potential killer of the healthy partner, such attempted killing cannot be permitted even with the other’s consent.

If however the chances of infection are low and the healthy partner wishes to continue the marriage despite the risk, such a risk

may be taken in order to bring offspring into the world just as a person is allowed to risk his life in certain other situations.

It is therefore difficult to forbid the couple to continue their marriage despite the danger involved.

Danger to an Infant Born to a Mother with AIDS

In the past a 50% chance was reported of a child being infected by AIDS from a mother who carried the disease. In recent years this statistic has fallen to between 20% and 30%.

From the remarks of halachic authorities in similar cases (such as *Iggerot Moshe, Even Ha'ezer* 4:73), it appears that parents may not be forbidden to try to bring a healthy child into the world despite the high risk of an infected child being born.

In practice, an expert rabbi should be consulted, who should clarify the situation with a medical expert before giving the family his opinion.

A Spouse with AIDS

Protection against AIDS

If both sides agree to continue the marriage despite the fact that one of the partners has AIDS, physicians recommend the use of a condom to prevent infection of the partner. This raises a very serious halachic problem since the use of a condom is in general connected with the prohibition of wasting sperm.⁵

Here we are admittedly dealing with a special case involving danger to life and a reasonable chance of the marriage breaking up if a condom cannot be used.

There is disagreement between the authorities regarding the use of a condom in special cases. Rabbi Chayyim Ozer⁶ and Rabbi Moshe Feinstein⁷ permitted the use of a condom in special cases.

On the other hand, the author of *Shevet Sofer*⁸ *Maharsham*,⁹ Rabbi S. Z. Auerbach and Rabbi S. Eliashiv¹⁰ prohibit this.

In view of the seriousness of the problem, a rabbi who is an expert in such matters should be consulted before taking any action.

5. *Shulchan Aruch, Even Ha'ezer* 23:3

6. Responsa *Achiezer* 3:24

7. *Iggerot Moshe, Even Ha'ezer* 1:63

8. *Even Ha'ezer* 2

9. Part 3, indices section, page 317a

10. *Nishmat Avraham* 4, *Even Ha'ezer* p.182

III. Compulsory AIDS Testing for Medical Staff

According to the halacha¹¹ any obstacle that involves danger to life must be removed. This is based on a positive command in the Torah: “Be careful to guard your life.”¹² If a particular physician is suspected of being a carrier of AIDS he is under an obligation to undergo tests. If the suspicion is found to be valid, the doctor must cease all direct work with patients.

Source: The First International Colloquium on Medicine, Ethics & Jewish Law, July 1993, pp. 207-210 (Schlesinger Institute, Jerusalem, 1996)

11. *Shulchan Aruch, Choshen Mishpat* 427:8-9

12. Deuteronomy 4:9