Medical Malpractice in *Halakha*

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I. Introduction[1]

Being a physician is an awesome privilege and responsibility. We live in a society today that is the most medically advanced it has ever been, and the depth and breadth of knowledge a physician utilizes in the daily practice of medicine has enabled our society to become healthier than ever. In practicing medicine, physicians face daily challenges in their knowledge, judgment, and treatment of patients and their illnesses. These challenges are compounded by the fact that physicians may feel compelled to diagnose and treat illness based on legal concerns, practicing medicine in a way that would prevent them from being held accountable for medical malpractice. In addition, as malpractice insurance premiums are at an all time high, patient care may ultimately suffer because qualified students are discouraged from going into the medical field in favor of less stressful and more lucrative careers. This article will discuss the approach Jewish law,

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halakha, takes toward physicians' liability in medical malpractice. It will become apparent that *halakha* attempts to reconcile some of the aforementioned challenges, and seeks to create a medico-legal system that incorporates the goals of appropriately compensating victims of medical error, deterring physicians from being careless, and encouraging physicians to practice medicine within the framework of laws governing malpractice. This article will also discuss relevant applications of the levels of responsibility, the different categorization of medical error, as well as the legal responsibility of residents, or training physicians.

II. General Principles of Tort Law in *Halakha*

In *Halakha*, man's actions are governed by the principle of *adam muad le'olam*, literally, man is always forewarned.[2] This means that man is held to a level of strict liability, accountable for any injury caused to another regardless of intent or fault.

In Bava Kamma 27b, Tosafos limits this strict liability to circumstances of negligence or cases approximating negligence, and therefore, instances of pure accident are exempt. Tosafos brings numerous proofs showing that the one who damages is not always liable, and argues that these cases must be cases of *ones*, accident, and therefore, *adam muad le'olam* doesn't apply. One proof that Tosafos brings is the *Gemara*'s exemption of an unpaid slaughterer (in contrast to a paid slaughterer who is liable)[3] who damages a customer's property, assuming that in this case, the only reason not to evoke the *adam muad le'olam* principle must be because of a low level of culpability, namely a

2 Bava Kama, Mishnah 2:6

3 See note 5 below.

circumstance of *ones*, accident, which is an exemption to the strict liability standard.

Ramban[4] disagrees with Tosafos' proofs, and thus with his exemption of *ones* from the strict liability principle. He argues that the damager is not held accountable for pure accident only when there is an element of *peshiat hanizak*, contributory negligence by the injured party. He says that the examples Tosafos uses must be cases of contributory negligence, and that is why the damager is exempt, not because in general *ones* is exempt. The example of the unpaid slaughterer poses a challenge to Ramban, because there is no element of contributory negligence; the slaughterer single-handedly did the damage in that case. But Ramban answers that the nature of a professional's work removes him from the *shem mazik*, or the status of a tortfeasor, and the principles of strict liability in tort law do not apply to a professional engaged in his professional duties.[5] But in general, according to Ramban, *adam muad le'olam* sets a standard which places culpability on the one who damages, even in cases of pure accident.

In an article comparing American and Jewish approaches to malpractice, Joshua Fruchter[6] conceptually explains the argument between the Tosafos and Ramban, basing it on their respective understandings of the purpose of *adam muad le'olam*. He asserts that Tosafos hold that

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4 Shita Mekubezes, Bava Metzia 82b

5 One possible explanation why the paid slaughterer doesn't have this exemption despite being a professional engaged in his field of expertise is because when one is paid for his work, he must exercise extreme caution in his craft, and if damage does result, it is assumed to be secondary to his contributory negligence.

6 Joshua Fruchter, "Doctors on Trial: A Comparison of American and Jewish Legal Approaches to Medical Malpractice." American Journal of Law and Medicine. Vol XIX No.4 1993.

the primary purpose is to deter conduct that may cause damage to another, and thus demanding strict liability in circumstances that are the result of an accident or unforeseeable chain of events does nothing to deter negligent conduct. Ramban on the other hand believes that the purpose of tort liability is to compensate the injured party, and therefore, the questions of fault or intent are not important, as long it is proven that the damager caused the damage. This also explains why in the case of contributory negligence, the damager would be exempt as well according to Ramban; since the plaintiff is no longer passive, he forfeits his right to receive compensation.

There are a number of contemporary sources that seek to interpret the rationale for the Torah exempting a professional for unintentional and accidental damage while engaged in professional activities. Rabbi Mordechai Ilan[7] asserts that since the professional had the permission and authority to work on the object that became damaged, this removes him from the category of *mazik*, a damaging outside party. Alternatively he proposes that since the professional is working for the benefit of the injured party, there is a basis for exemption. Rabbi Yeshaya Blau,[8] giving a similar but different explanation, says that since the professional does not usually err in his skill, it must have been the misfortune of the customer that 'caused' the damage. Rabbi Mordechai Willig[9] proposes a more novel and comprehensive approach, relating the exemption of a

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7 Rabbi Mordechia Ilan, "Chiyuv Nezikin B'rofeh she-hizeek…" *Torah She'beal Peh,* 1976, page 70

8 Rabbi Yeshaya Blau, Pitchei Choshen, *Hilchos Sechlios,* Ch. 13 at 322

9 Audio recording of lecture given to RIETS students in 1992, quoted in Fruchter, see note 3 above

professional to the exemption of contributory negligence. He explains that *peshiat hanizak* does not only include negligence committed by the damaged party, but also includes an assumption of risk. In a normal tort case, the tortfeasor (*mazik*) solely acts and damages the injured party's (*nizak*) property. However, in the case of a professional, the customer initiates a relationship, entrusting his property to another, implicitly assuming and accepting a level of risk that some damage may result. Therefore, the damaging professional cannot be held accountable in circumstances of accident, since the *nizak* 'contributed' to the damage of his property by assuming risk of damage.

III. Background of Medical Malpractice

The classic rabbinic source and still the accepted text governing all areas of Jewish law is the *Talmud Bavli*. One of the six orders of the Talmud is *Nezikin*, or damages, which contains ten volumes pertaining to civil and criminal law, and the Jewish court system. Curiously, in all of the pages of *Nezikin*, there is not one direct discussion of a physician who errs. However, there are a few brief sources in the *Tosefta*, the addendum to the Mishna, that discuss medical malpractice.

1. The *Tosefta* (*Bava Kamma* 6:5-6) states, "a skilled physician who treated a patient with the permission of the court and caused damage in the process is not liable by human law but his judgment is given to Heaven (*dino massur l'shamayim)*."

2. Another *Tosefta* from later in the same tractate *(Bava Kamma 9:3)* states: "A skilled physician who treats with the permission of the court and damages a patient

is not liable, but if he wounded more than necessary, the physician is liable."

3. A third *Tosefta* (*Gittin 3:13)* further states, "A skilled physician who treats with permission of the court and damages the patient: if unintentionally, he is not liable, but if he did so intentionally, he is liable; in order to preserve the social order." The commentaries explain that the exemption of liability in cases of unintentional error is because of the desire to "preserve the social order."

4. A final *Tosefta* (*Makkot 2:5-6)* discusses a case in which a physician error results in the unintentional death of his patient: "A skilled physician who has permission of the court and treats a patient but the patient died unintentionally, the physician is exiled." Exile is both a penalty and an opportunity for atonement, and the *rotzeyach be'shogeg*, unintentional murderer, must flee and remain in a city of refuge, an *ir miklat*, until the high priest dies.

There are related cases in the *Talmud* that do not directly discuss the case of the physician who errs, but still have relevant application to our topic and will be discussed below. The questions raised by these sources are certainly relevant to the practicing physician today and the degree in which he or she is held accountable by Jewish law, and will be the focus of our discussion.

IV. Physician's Exemption from Tort liability

What emerges from the *Toseftot* quoted above is that Jewish law has generally exempted physicians from liability for unintentional injury to their patients "in order to preserve the social order." It is clear that in differentiating unintentional from intentional injury (*shogeg* and *mayzid*),

the *halakha* does not subscribe to a principle of strict liability (*adam muad le'olam* that governs torts in general), but rather uses fault litigation, or intent, as the basis for medical malpractice.

This exemption raises some very important questions. While both the second and third *Toseftot* above seem to exempt the physician for unintentional damage unconditionally, the first *Tosefta* says that while there is legal immunity, there is a residual obligation, as we see from "*dino massur l'shamayim*." What is the nature of this obligation? Additionally, the term "unintentional (*shogeg)*" that we are talking about, to which level of culpability is this referring: *ones*, accident, or even *peshiya*, negligence? If we assume that the level of *shogeg* is the same for all four *Toseftot*, then the legal immunity of the first three *Toseftot* must be limited to cases in which the physician's act occurred accidentally, with either very little, or no fault at all, because the *shogeg* of the fourth *Tosefta* obligating the physician to exile is limited to these levels.[10] A third question that arises is what is the source and rationale for legally exempting the physician in any case? What does "in order to preserve the social order" mean? In what circumstances would this legal immunization not apply?

In *Toras Ha'adam*[11], Ramban develops a theory of medical liability from the aforementioned *Toseftot*. He raises an important question regarding this "exemption" in cases of *shogeg*. Assuming that the term *shogeg* is consistent, since it seems that there is legal immunity from monetary payment for damaging, then why would it be that there

10 As discussed in Tractate Makkos

11 Toras Ha'adam. Sha'ar Hasakana, page 41 in Mossad Harav Kook edition

is a punishment of exile if the injury were to result in the patient's death? It seems from the fourth *Tosefta* that legal liability does exist.

He develops a theory based on the verse "And he shall cause him to be thoroughly healed[12]," which is generally assumed to be the Biblical commandment for the physician to treat and heal patients. Many commentators ask why there is a need to have an affirmative commandment. Would it be forbidden if it weren't for this permissive allowance? Rashi and Tosafos answer with a theological argument – if God chooses to make someone ill, one might have thought that without a positive *mitzvah*, it would have been against the Divine decree, and an illegal intervention in God's plan. However, the Ramban offers a novel interpretation of this *mitzvah*. He writes that this verse serves as an encouragement to the physician who may be anxious and concerned with making errors and be liable for his mistakes, which may ultimately lead to disillusionment with his skill, and refrain from practicing as a result. Thus, the verse says to the physician- 'do not think that engaging in medicine is forbidden because you may damage and possibly even cause someone's death. It is not only permitted, but a *mitzvah*!'

Ramban states that if a patient is injured, but the physician never learns of the injury, or does not find there to be any error, then he is entirely exempt, legally and morally. But, if the physician realizes that he did indeed err and caused damage, then even though he is legally immune, morally he is obligated to compensate the victim, and if it were to result in the death of his patient, obligated to exile.

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12 Exodus 21:19

This is what is meant by the first (*dino massur l'shamayim)* and last *Toseftot* (exiling the physician). Thus, according to Ramban, the malpractice exemption is complete (legally and morally) in circumstances of a bad outcome for the patient when at no fault of the physician, and only legally, not morally, if the physician were at fault. But the question that remains is what level of fault – *ones*, accidental and unintentional, or even *peshiya*, negligence? To this Ramban states that the Torah exempted the physician who was "*ta'ah*," mistaken, provided he was "as careful as he should have been with respect to matters of life and death and did not injure his patient negligently (*b'peshiya)*." This clearly excludes the negligent physician from this malpractice exemption, and would make him both morally *and* legally liable for acting carelessly and recklessly. This describes a 'partial exemption theory' which would exempt a physician for a bad outcome completely, and for errs in judgment legally, but not morally, and would hold the negligent physician legally liable for his actions.[13]

V. Similar Cases, Dissimilar Liability

In the aforementioned *Tosefta* (*Makos 2:5*), where a doctor errors and unintentionally causes the death of his patient, the physician is obligated to go into exile. In the same *Tosefta*, there is the same ruling regarding a messenger of the court, who while performing the *beis din*'s mandate

13 The question raised by Rabbi Bleich is powerful: what kind of reassurance does this *mitzvah* provide if we know from the above discussions, that in certain circumstances, he will be held liable (at the very least, morally) for his errors? Even stronger, if the physician is commanded to practice medicine and to ignore the potential for error, how can he be liable for what he is commanded to do? See Rabbi Bleich's article (note 22 below) for a novel, although somewhat perplexing explanation.

of giving lashes, unintentionally causes the death of the criminal and is obligated to go into exile as well.

However, the Gemara in *Makkos 8b* seems to contradict this second ruling of the *Tosefta*. The Mishna quotes Abba Shaul who states that a father and teacher while disciplining the child, and the officer of the court who administers lashes and unintentionally cause the death of the child or criminal are exempt from the punishment of exile, because they are engaged in a *mitzvah*. The reason is that exile is only imposed in cases similar to the paradigmatic case of exile, in which the unintentional murderer and the victim were both engaged in an activity of *reshus*, voluntary action, in contradistinction to one who is commanded by a *mitzvah* to engage in the activity.

The questions that are raised by the *Rishonim* and *Achronim* are what is the difference between the two contradictory statements regarding a court appointed messenger, and why would a doctor who presumably is engaged in healing, not be exempt based on the fact that he too is engaged in a *mitzvah*?

The Or Sameach[14] resolves the problem by saying that the *Mishna* which exempts the father, teacher, and court officer, is the minority opinion of Abba Shaul, and the majority opinion, the *Tanna Kamma* (whose opinion is omitted from the *Mishna*), which is consistent with the opinion of the *Tosefta*, disagrees, and holds the father, teacher, court officer, and the doctor liable. The problem with this answer is that the Shulchan Aruch[15] quotes both the opinion of Abba Shaul exempting the father, teacher, and court officer, while

14 Or Sameach, Hilchos Rotzeach 5:6

15 Shulchan Aruch, Yoreh Deah 336:1

also ruling that the doctor is still exiled.

One *Rishon* who discusses this, the Tashbetz,[16] gives a cryptic explanation saying that the doctor is distinct from the case of the father, but fails to explain how. The *Yad Avraham*[17] and *Besamim Rosh* both give similar explanations. They hypothesize that the physician who errs and kills, although he had the intention of performing a *mitzvah*, with the unintentional death of his patient the doctor shows that he is not engaged in the *mitzvah* to heal. As a result, he does not gain the exemption of *osek b'mitzvah* in this case, and is thus distinct from the father, teacher, and court officer, who are still engaged in a *mitzvah* even with the unintentional death, since their obligation was to discipline or punish, whereas the doctor's was to heal.

One thing to note is that both the Yad Avraham and the Besamim Rosh[18] hold that since there was a bad outcome, retroactively the doctor shows that he was not engaged in the obligation to heal. This is a matter of dispute by the *Birchei Yosef*[19] who similarly makes the distinction that the doctor is not engaged in a *mitzvah*, but not exclusively because of the bad outcome, but rather the difference is that the doctor made an **error** that resulted in the patient's death, whereas the father, teacher, and court officer did not make an error at all in fulfilling their obligation. The important difference between these opinions is a case in which a physician did not make an error, but the patient suffered an adverse outcome – the first two authorities

16 Shut HaTashbetz Vol. 3 no. 82

17 Yad Avraham, Yoreh Deah, 336:1

18 Teshuvos Besamim Rosh, no. 386

19 Birchei Yosef, Yoreh Deah 336:1

would exile him, whereas the latter opinion would exempt him as in the *Mishna*'s cases.

VI. Contemporary Opinions Regarding the Physician Who Kills

The Rabbinic authorities of our time discuss this case of the physician who unintentionally causes the death of his patient, and, although often at variance with the discussion in the previous section, try to relate it to general principles of damages. Rabbi Zalman Nechemia Goldberg[20] writes that if the patient dies, but it is determined to be exclusively a bad outcome without any element of physician error, then the case is not that of *shogeg*, unintentional murder, but rather *ones*, complete unavoidable accident, for which there is no punishment of exile.[21] Rabbi J. David Bleich[22] argues with this conclusion. He writes that inherent in most medical and surgical treatments, there is a risk of adverse event, including the risk of death. As such, when the physician knows and assumes this statistical risk, it cannot then be categorized as pure accident, *ones*.

The Aruch Hashulchan[23] provides a lenient opinion. He writes that even if the physician was in error in his treatment of the patient, and as a result the patient dies, the

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20 Rabbi Zalman Nechemia Goldberg, "Rishlonot Refuit," Techumin 19 (1999)

21 This implies that only if there is an element of error, then it would be a case of *shogeg*, and the exile imposed on him by the *Tosefta* would apply. The reason why he would not be exempt, is the same explanation given by the Birchei Yosef, that when he errs, he is not engaged in a *mitzvah*, whereas if he were to act appropriately, he is fulfilling the *mitzvah* of healing, despite the poor outcome.

22 Rabbi David J. Bleich, "Medical Malpractice in Jewish Law," Tradition, Spring 2005, Vol. 39, no. 1

23 Rabbi Yechiel Michel Epstein, Aruch Hashulchan, Yoreh Deah 336:2

physician will still be exempt if it was an error in judgment. He asserts that a physician would get exile only if there was an element of recklessness or laziness in which "*lo iyen yafeh,"* he didn't interrogate the illness well. This assumes that if the doctor did perform a thorough investigation into the illness and the treatment, and despite this, he made an error, he is exempt from exile, whereas if his investigation into the diagnosis or therapy were inadequate, he would be exiled. This seems to imply that the physician will get exile for negligent conduct. It is with this point that Rabbi Shlomo Zalman Auerbach and Rabbi Moshe Feinstein disagree, although they come to different conclusions.

Rabbi Auerbach[24] maintains that errors **in judgment** are exempt, and the case of the *Tosefta* which exiles the physician is for an error in action (i.e. the physician performed an unintended act of reaching for one medicine and grabbing another, or grabbing an unsterilized scalpel). Rabbi Feinstein[25] disagrees and holds that errors which result from unintended actions are not ordinary negligence which gets the penalty of *galus*, but rather they are cases of gross negligence since the physician acted in haste, and the punishment of exile is insufficient. Rabbi Feinstein holds that when the physician had due deliberation in the diagnostic and therapeutic approach to his patient's illness, yet there is a bad outcome, it is considered *ones*, and completely exempt from *galus*. According to Rabbi Feinstein, exile is imposed only on a physician who errs in a situation where he was not the most qualified to treat

24 Quoted by Abraham S. Abraham in Nishmas Avraham, Yoreh Deah 376:1, note 7

25 Rabbi Moshe Feinstein, Iggeros Moshe, Even Ha'ezer IV, no. 31

this illness, and the matter was not urgent and could have waited for a more qualified physician to be consulted.

Rabbi Bleich[26] offers a practical difference between the opinions of the Aruch Hashulchan, Rabbi Auerbach, and Rabbi Feinstein. In discussing a case of nonfeasance, in which a physician does not perform a therapeutic intervention that would be beneficial, Rabbi Bleich believes that according to the Aruch Hashulchan, since the physician had not considered this possible intervention, he was *lo iyen yafeh*, negligent in his investigation, and therefore would be exiled. According to Rabbi Auerbach, since this nonfeasance results from an error in judgment (not considering all diagnostic and therapeutic options), the physician would be exempt from exile. According to Rabbi Feinstein, if due to lack of deliberation, the doctor did not think of all the options, then since he acted in haste and was grossly negligent, if it resulted in the patient's death, exile would be inadequate.

VII. *Tashbetz* and Proximate Cause

Until this point, our discussion about the physician who errs has been about the general category of any doctor with a medical license. But the *Tashbetz*[27] presents a novel interpretation of all of the *Toseftot*, and as a result, the entire discussion this paper has presented. He writes in his *Teshuvos* that the term employed by all of the sources, "*rofeh uman*," refers exclusively to a surgeon who works with his hands and instruments in treating his patients. It is only about a surgeon that the *Tosefta* says is exempt as a matter of law from inadvertent damages, but still has a heavenly

26 See note 22 above

27 Shut HaTashbetz vol. 3 no. 81

obligation, and gets exiled for the accidental killing of his patient. A physician who heals with medicines and other non-invasive treatments, namely a doctor of internal medicine, according to the *Tashbetz*, is not mentioned at all in the sources for medical malpractice in *halakha*.

A logical conclusion that one would reach from the *Tashbetz's* distinction between a surgeon and an internist, is that just as an internist is not given the exemption of the surgeon for acts of *shogeg*, so too he would also be held liable for all acts of accidental injury under the general tort principle of *adam muad le'olam*. However, the *Tashbetz* presents a contradictory and seemingly difficult opinion. He states that an internist, in contrast to a surgeon, would be completely exempt, legally and morally, for any accidental injury or death that results from medical treatment of his patient. The *Tashbetz* explains that damage caused by medicines is "not in the realm of wounding for which he is liable for damages," and an internist is "only responsible for what he sees with his eyes."

In *Tzitz Eliezer*,[28] Rabbi Waldenberg disagrees with this distinction of the *Tashbetz*. He questions why a potent medicine that directly damages one's internal organs is not considered *chavala*, wounding, which would be under the realm of damages for which one would be liable under general tort principles, were it not for the exemption provided by the *Tosefta*.

In explaining the rationale for the *Tashbetz*, Rabbi Bleich[29] also answers Rabbi Waldenberg's challenge. He

28 Rabbi Eliezer Yehuda Waldenberg, Shut Tzitz Eliezer, Ramat Rachel vol. 4 ch. 13

29 See note 22 above

writes that the *Tashbetz's* opinion touches on the *halakhik* definitions of *gerama* and *garmi*, two categories of indirect damage. The reason why an internist, according to the *Tashbetz*, is completely exempt and not included in the *Toseftos*, is because the internist generally lacks proximate cause, or initiating the direct injury to the patient. But a surgeon directly causes damage, and as such this case of damage can be considered *garmi*, or as Tosafos[30] write, a "necessary and inescapable result of the tortfeasor's act," and without an exemption of the *Tosefta*, the physician would in fact be liable.

Rabbi Zalman Nechemia Goldberg[31] rules that the liability of *garmi* would extend even further, obligating an internist for simply prescribing a harmful medication, or referring a patient for a harmful surgery. But this assumes that what the doctor orders will necessarily and inescapably result, namely that the prescription will be filled by a pharmacist, or a nurse will administer the harmful medication, or the surgeon will act based solely on this recommendation and not on his own examination and assessment, which in today's healthcare field, is highly unlikely and uncertain to occur. In addition, the Rosh[32] limits liability for *garmi* to an immediate result of the indirect action, and as a result, the applicability of the internist's potential liability is extremely unlikely to occur. Thus perhaps the Tashbetz simply categorizes direct damage of a surgeon's error to be included in the *Tosefta*, although theoretically he would agree to an internist's *garmi* actions as well.

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30 Bava Basra 26b

31 See note 20 above

32 Bava Kamma 9:13

VIII. Chasam Sofer – At Variance With Accepted *Halakha*?

In the early 19th century, the Chasam Sofer was asked if a woman who inadvertently killed her maidservant should be punished or required to perform some act of *teshuva*, repentance, for her actions. The case was as follows: the maidservant fainted from fright, and perceiving her as being in physical danger, the mistress attempted to revive her by giving whiskey. In her haste, she accidentally took a bottle of kerosene, and poisoned the maid ("went down into her innards and the lass was burned")[33], causing her death. In his response, Rabbi Sofer asserted that the woman was far less responsible for the death of her maidservant than a father or teacher who disciplines a child, causing his death, which the *Tosefta* rules are exonerated.

There are many objections to the Chasam Sofer's ruling. The most powerful of which is based on the *Tosefta* quoted above and accepted as *halakha* in the Shulchan Aruch[34]: why is this woman not liable to exile just like a physician would be.

The *Divrei Aharon*[35] argues in favor of the Chasam Sofer's ruling by using the *Tashbetz's* distinction between a surgeon and an internist, based on the underlying principle of *gerama*, lacking proximate cause. He writes that since the poison must first be absorbed by the body and the harm which results is indirect, therefore the woman is exempt from any responsibility. Rabbi Bleich[36] disagrees based on the language employed by the Chasam Sofer in

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33 Teshuvot Chasam Sofer, Orach Chayim, no. 177, as quoted in Tradition.

34 Shulchan Aruch, Yoreh De'ah, 336:1

35 Rabbi S.A. Polonski, Divrei Aharon, no. 34, sec. 2

36 See note 22 above

describing the effect of the poison – it "burned her insides." This describes direct damage of her internal organs, no less a proximate cause of the surgeon's scalpel causing direct damage, for which the Chasam Sofer agrees is liable.

Rabbi Z. Spitz[37] attempts to resolve this conflict. He writes that the Chasam Sofer's ruling regarding a layperson is appropriately more lenient than the ruling regarding the physician. This is not just for their expected level of knowledge and skill, but also for their expected poise and level of composure in an emergent situation. A layperson who acts in haste and mistakenly gives the wrong bottle of medicine is considered non-negligent because of the excited and panicked state of mind she was in at the time, but a physician who is trained to be cautious and calm during an emergency situation, who panics and acts in haste would be liable for his carelessness.

The ruling of the Chasam Sofer may have further implications; it seems to underlie the principles of the good Samaritan law in the United States and other countries that provides legal immunity for accidental injury committed by first responders to a person in an emergency situation. It is interesting to note that in a few states, the good Samaritan law may only provide exemption from liability to laypeople and not to trained healthcare professionals, perhaps to encourage laypeople to act quickly to help save a victim of illness, but at the same time, encouraging a healthcare professional to be extremely cautious in tending to an incidental patient.[38]

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37 Mishpetei HaTorah, I, no. 12, note 3

38 Cameron DeGuerre, "Good Samaritan Statutes: Are Medical Volunteers Protected." Virtual Mentor. American Medical Association. April 2004. Vol. 6, no. 4

IX. Residents – Duty hours and Supervision

Effective July 1st, 2011, the new guidelines of the Accreditation Council for Graduate Medical Education (ACGME) went into effect for all residents in U.S. residency programs. These requirements are an attempt to deal with the challenges of medical errors made by overworked, fatigued, and under-supervised training residents. In Section VI of the guidelines, resident duty hours per shift will be significantly limited compared to the previously published guidelines, particularly for first year residents. In addition, the same section mandates direct supervision, or indirect supervision with direct supervision immediately available, of first year residents by an attending physician. According to the guidelines, supervision "has the goals of assuring the provision of safe and effective care to the individual patient; assuring each resident's development of the skills, knowledge, and attitudes required to enter the unsupervised practice of medicine; and establishing a foundation for continued professional growth."[39]

Of note, in *halakha*, it seems that for the physician to have the exemption "for the welfare of society," he must first have the "permission of the court" to engage in the practice of medicine. There is a debate between the Aruch Hashulchan and the Tzitz Eliezer about what exactly this means, and also what it means today. The Aruch Hashulchan[40] writes that nowadays, since the licensure by Jewish court has elapsed, the physician must be licensed and credentialed by the local government to practice medicine. This means that not only is the exemption

39 Recovered online from www.acgme.org

40 See note 23 above

granted exclusively to those who have a medical license granted by the government, but also that one possessing medical knowledge and skill is forbidden from engaging in medicine without this license. Rabbi Waldenberg in Tzitz Eliezer[41] disagrees. He argues that anyone who possesses the knowledge and skill necessary to treat patients is allowed to, regardless of licensure. The requirement of *reshus beis din,* court authorization, is only regarding the exemption of liability in the event of inadvertent error "in order to preserve social welfare." Rabbi Waldenberg believes that without such a license to practice medicine, the erring physician would be treated no differently than any tortfeasor, but is nevertheless permitted to practice medicine.

Rabbi Waldenberg seems to base his opinion on that of a commentator on the Shulchan Aruch, the Beis Hillel,[42] who writes than any physician who has been accepted by the community can practice medicine. The rationale is that in licensing a doctor, the court is not acting in a judicial function, but rather as a representative of the community to preserve the health and welfare of that society. Therefore, court licensure is not necessary if the community accepts a qualified expert to be their community physician.

In general, all residents in the United States must graduate from an accredited medical school and successfully complete the first two exams for either the United States Medical Licensing Examination or the Comprehensive Osteopathic Medical Licensing Examination to practice medicine. But it must be understood, as stated by the

41 Rabbi Eliezer Yehuda Waldenberg, Tzitz Eliezer, Ramat Rachel, Ch. 22

42 Beis Hillel, Yoreh Deah 336:1

ACGME, that residents are still in their training and at this point in their professional careers should not be treating patients alone. The question then is how are we to understand the resident's role in treating patients, when the Shulchan Aruch writes that even one who has a medical license "should not engage in treating patients unless he is an expert, and there is no one greater than him to treat the patient?"[43] Furthermore, the *Chazon Yechezkel* writes that a doctor who does not refer a case to a more skilled physician, discredits his medical license by such an act, and would be treated as a non-licensed physician in the event of medical error.[44]

Rabbi Waldenberg[45] writes that when both the patient's illness and treatment are routine and without doubt, there is no requirement to refer to or consult a more expert physician. The *Shevet Halevi*[46] believes that in our day, all physicians are more or less qualified and all of them are licensed, and thus, the requirement to refer is obsolete.[47] Rabbi Waldenberg disagrees if the case is more complicated, and requires referral to a specialist in such a case.

While medical residents are certainly less qualified, less experienced, and with less expertise than attending physicians, at the very least, 'simple' cases that don't have

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43 Shulchan Aruch, Yoreh Deah, 336:1

44 Chazon Yechezkel, Bava Kamma 9:3

45 See note 40 above

46 Shevet Halevi vol. 4, Yoreh Deah, no 151

47 Interestingly, the Tzitz Eliezer believes that even in a non-routine and challenging case which requires referral to a more qualified specialist, if the specialist is too busy to see the patient in a timely manner due to the volume of patients that specialists usually see, it is not only permitted, but an obligation on the less qualified physician to treat as long as he is the most qualified doctor available to the patient.

an element of doubt can be treated by them without consulting a more senior physician according to Rabbi Waldenberg. However, in today's healthcare system and with the institution of the ACGME guidelines regarding direct or indirect but immediately available supervision, consulting with a more senior physician is a routine and requisite part of a patient's management, and the questions above can be considered moot.

X. Conclusion

The challenges of utilizing acquired knowledge, judgment, and skill to perform a thorough investigation of each patient's illness and provide the appropriate therapy on a daily basis can be daunting, and the responsibility that physicians carry on their shoulders is undoubtedly great. It is clear that the *halakha* attempts to deal with many of the questions and challenges that physicians face in their daily practice of medicine. From the preceding discussion it is evident that the laws of medical malpractice successfully accomplish often conflicting objectives: to deter careless practice of medicine, compensate victims of medical error and malpractice, and encourage physicians to practice medicine within the framework of the laws governing malpractice.