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Survey of Recent Halakhic Periodical Literature

MEDICAL MALPRACTICE AND JEWISH LAW

My God, heal me and I shall be healed.
Let not Your anger be kindled that I be consumed.
My drugs and potions are Yours, whether good or bad,
whether strong or weak.
It is You who shall choose and not I;
Of Your will is the harmful and the effective.
Not upon my healing do I rely;
Only for Your healing do I watch.

Judah Halevi[1]

I. INTRODUCTION

Common law categorizes efficacious treatment carried out without consent of the patient, not as malpractice, but as simple battery. Unlike common law which regards any intentional non-consensual tactile contact with another person as a tort, Halakhah does not regard therapeutic "wounding" (*havalah*) as a tortious battery. Jewish law does not accept the notion that lack of consent renders medical intervention tortious and certainly provides no basis for monetary recovery unless there is resultant physical harm. But, when the physician does cause damage, it would seem at least as a first impression, that the usual rules governing battery are applicable. Thus, in principle, Jewish law regards malpractice, not as an independent tort, but as a form of *havalah* or battery.

In general, Jewish law assigns to the tortfeasor absolute liability for harm to person or property arising from his or her physical act. The connotation of the talmudic principle formulated by the Gemara, *Bava Kamma* 26b, "*Adam mu'ad le-olam*" ("Man is always forewarned") is that a person is always liable for damage resulting from an act committed by his body. It would then follow that a physician whose treatment results in harm to the patient should be liable for compensation even if

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the harm is the result of misadventure rather than negligence.[2] Nevertheless, in point of fact, Jewish law does not hold the physician liable in any sense unless he has been negligent in his treatment. The reason or reasons for treating malpractice differently from ordinary forms of *adam ha-mazik* (lit.: man as tortfeasor) require elucidation. Moreover, the definition or delineation of culpable negligence as applied to medical malpractice is problematic.

The task of determining with precision the circumstances in which a physician will be held culpable is made difficult by the fact that the talmudic sources are sparse and cryptic. Moreover, early-day commentaries and codifiers offer little further clarification; quite to the contrary, their comments present further difficulties. In addition, at least until the contemporary period, the topic has, relatively speaking, received but scant attention in the writings of latter-day authorities.

One can but speculate with regard to the relative paucity of material devoted to this issue. It may well have been the case that during the medieval period, when in some countries Jewish medical practitioners were common, modalities of treatment were quite limited with the result that demonstrable malpractice was much rarer than at present. In later times, with the exception of observant physicians of German extraction, the religious commitment of most Jews who entered the medical profession was generally quite tenuous rendering it unlikely that such a physician would heed the summons of a *bet din* or feel himself bound by the provisions of Jewish law.

At present, although the Jewish community is graced by a sizeable and growing number of observant physicians, adjudication of a malpractice suit by a *bet din* is a rarity for the simple reason that, at present, all physicians are covered by malpractice insurance. Insurance companies are publicly held corporations and are hardly likely to avail themselves of the services of a *bet din*. Elsewhere,[3] this writer has expressed the opinion that a Jew may properly sue a fellow Jew in a secular court provided that he does not accept a recovery greater than the insurance coverage. Although, technically, it is the insured who is the named defendant, the actual party interest is, and is commonly know to be, the insurance company. Hence, since the real party in interest is not Jewish, the prohibition against recourse to civil courts is not operative.[4]

Recovery from a insurance company, in this writer's opinion, is appropriate even in instances in which such recovery would not be available in a *bet din* or in which the sum awarded is greater than would

be allowed by a *bet din*. That is so even if, as a matter of Jewish law, the Jewish plaintiff cannot directly claim that, in an action against a non-Jew, the appropriate measure of damages is the enhanced standard adopted by the civil legal system.[5] The insurance company is liable in contract rather than in tort. The claimant is a third party beneficiary of that contract. The contractual obligation is to indemnify the policyholder or the victim to the extent that a civil court would award damages against the insured. Thus, whether or not Jewish law would make a similar award for tort damages is rendered irrelevant. The insurance company has contracted to indemnify its insured in that amount simply because, in fact, it has been, or would have been, awarded by the court.

Parenthetically, the question of whether a contract of that nature is invalid by reason of *asmakhta*, i.e., lack of anticipation that the circumstances necessitating performance would actually arise, is a moot point.[6] Any insurance company that might choose to deny an otherwise valid claim on the plea that the insurance policy serving as the basis of the claim is unenforceable by reason of *asmakhta* would not long remain in business. No rational policyholder would continue to pay a premium for coverage once he has discovered that the insurer will not honor any legitimate claim.[7]

II. EARLY SOURCES

1. The Tosefta

The principles governing financial liability for malpractice are closely tied to the principles governing punishment for inadvertent manslaughter applicable in situations in which malpractice leads to death. Jewish law denies recovery of damages for wrongful death regardless of whether the death results from an act of homicide, negligent manslaughter or misadventure. Under certain carefully defined circumstances Jewish law prescribes exile to one of the designated cities of refuge as punishment for negligent manslaughter. Exile was imposed only during the historical period in which there was an incumbent High Priest and in which capital punishment might be imposed for willful acts.[8]

In limiting the circumstances in which exile was required the Mishnah, *Makkot* 8a, states:

> If [a person] throws a stone into his courtyard and slays: if the victim had permission to enter therein [the slayer] goes into exile; but if not,

> he does not go into exile, as it is written "and when a person goes with his friend into a forest" (Deuteronomy 19:5)—just as a forest [both] the victim and the slayer are permitted therein, similarly [the law applies] in every domain in which [both] the victim and the slayer are entitled to enter, to the exclusion of the courtyard of the householder since the victim does not have the right to enter therein. Abba Saul says: Just as the cutting of wood is a discretionary act, similarly [the law applies] in all instances of discretionary acts, to the exclusion of a father who beats his son, a teacher who strikes his pupil and a messenger of the court [who administers lashes].[9]

Abba Saul's distinction is quite easy to grasp. The paradigm presented in Scripture involves accidental death resulting from an attempt to fell a tree in a forest. Such activity is entirely discretionary; the slayer was perfectly free to refrain from wood-chopping. Had he done so, no misadventure would have occurred. Since he was under no legal or moral duty to engage in that activity, he is held to a relatively high standard of prudence. A father who punishes his son, a teacher who chastises a pupil and the court official who administers punishment to a miscreant are all engaged in discharging a duty. Since they are duty-bound to perform such acts they are not punished even in cases of avoidable misadventure.

The Tosefta, *Makkot*, addenda 2:5, presents a rather different rule:

> A messenger of the court who administers lashes with permission of the court goes into exile [if the victim dies]. A skilled physician who heals with license of the court and kills [his patient] goes into exile. One who performs an embryotomy [upon a fetus] in the woman's womb with licence of the court and kills [the mother] goes into exile.[10]

The rule formulated by the Tosefta seems to be at variance from the rule presented in the Mishnah in the name of Abba Saul. Abba Saul formulates the principle that a person who causes the death of another in the course of performing a duty is exempt from exile. The examples presented by the Tosefta, viz., a messenger of the court and a physician, seem similarly to be instances of persons engaged in discharging a duty and, in accordance with the rule formulated by Abba Saul, such persons should not be subject to exile.

R. Meir Simchah of Dvinsk, *Or Sameah, Hilkhot Rozeah* 5:6, suggests that the Tosefta expresses a view that is in disagreement with Abba Saul. Indeed, as recorded by the Gemara, *Makkot* 8a, in presenting his

principle, Abba Saul appears to be disagreeing with the anonymous, and hence presumably majority, view recorded in the immediately prior sentence of the same Mishnah.[11] The principle presented in the earlier statement of the Mishnah is predicated upon the identical biblical verse adduced by Abba Saul in support of his rule and appears to be an alternative, and hence conflicting, exegetical interpretation of the cited phrase. Assuming that there is a controversy between Abba Saul and the exponents of the first principle, the statement recorded in the Tosefta may be understood as an expression of the view of those who, as recorded in the Mishnah, disagree with Abba Saul.[12]

Or Sameah, however, recognizes a difficulty inherent in his position. Rambam, *Hilkhot Rozeah* 5:6, rules in accordance with the position of Abba Saul in exempting a father and a messenger of the *bet din* from exile.[13] Hence, according to *Or Sameah*, it logically follows that a physician is also exempt from exile. *Or Sameah* expresses amazement that Ramban, in his *Torat ha-Adam*,[14] cites the Tosefta's ruling with regard to the culpability of the physician without noting that the Tosefta's statement is at variance with the position of Abba Saul. *Or Sameah* further observes that the Tosefta is cited as normative by both *Tur* and *Shulhan Arukh*, *Yoreh De'ah* 336:1.

Moreover, it is far from clear that there exists a controversy between Abba Saul and the authors of the first principle recorded in the Mishnah. R. Menachem ha-Me'iri, *Hiddushei ha-Me'iri*, *ad locum*, expressly declares that there is no controversy and that the two principles are not mutually exclusive.[15] Me'iri regards the diverse exegetical interpretations of the phrase "in a forest" presented in the Mishnah as complementary rather than contradictory. For Me'iri, the term "*ya'ar*" is paradigmatic in serving to exclude arenas that are not comparable to a "forest" in any salient respect. Moreover, Rambam, *Hilkhot Rozeah* 6:11, codifies the principle formulated in the earlier clause of the Mishnah. Thus, Rambam who, as previously noted, rules in accordance with Abba Saul, apparently saw no contradiction between Abba Saul's view and the principle earlier formulated in the Mishnah.

In stating that the Tosefta expresses a view at variance from that of Abba Saul, *Or Sameah* does not expressly assert that the Tosefta follows the position expressed in the initial statement of the Mishnah. *Or Sameah* may not have intended to posit a controversy between the Tanna'im cited in the Mishnah but rather to have regarded the Tosefta as expressing the novel, extra-canonical view of a Tanna whose position

was rejected by the Mishnah.[16] If so, the ruling of *Shulhan Arukh*, *Yoreh De'ah* 336:1, in accordance with the Tosefta is all the more astonishing.

The apparent contradiction between the principle formulated by Abba Saul and the ruling of the Tosefta was first commented upon by R. Simon ben Zemah Duran, *Tashbaz*, III, no. 82. *Tashbaz* raises the objection that "the physician is also engaged in a *mizvah*" and hence questions why the Tosefta regards the physician as culpable for misadventure. *Tashbaz* cryptically comments that the case of the physician can be distinguished from that of a father or a teacher but fails to indicate the substantive nature of the distinction. That lacuna is filled by *Teshuvot Besamim Rosh*, no. 386, a work of uncertain provenance commonly, but probably spuriously, attributed to Rabbenu Asher.[17] *Besamim Rosh* observes that, whatever the result, in striking a child or a student, the father and the teacher are engaged in chastising the youth. Thus, even if the act had an untoward outcome it was nevertheless designed for an entirely different effect and, indeed, despite the subsequent tragic consequence, may well have served to cause the child to resolve to correct his behavior.[18] Not so a battery committed by a physician that fails in the therapeutic goal. The physician's obligation is to heal; an act that causes the death of patient is not at all an act of healing. Hence the act, albeit well-intended, does not serve to fulfill any *mizvah*.[19] Accordingly, since it turns out that a physician who causes the death of his patient has not fulfilled any *mizvah* or discharged a duty, he is not excused from the penalty of exile. A similar distinction is drawn by *Yad Avraham*, *Yoreh De'ah* 336:1, in the name of *Ma'aseh Rokeah*.

R. Chaim Joseph David Azulai, *Birkei Yosef*, *Yoreh De'ah* 336:6, also presents the same solution in the name of the author of *Ma'aseh Rokeah*, R. Eli'ezer of Cracow, but with a slight variation. That authority asserts that the Mishnah's exoneration of the father and the teacher is limited to usual situations in which the misadventure occurred despite the fact that the father or the teacher did not employ excessive force, i.e., they acted in a manner that was incumbent upon them.[20] However, the physician who causes the death of a patient has erred either in his assessment of the nature of the malady or of the appropriateness of the therapy he has administered.[21] Since the physician's act was performed in error,[22] the physician, despite his noble intentions, cannot be described as having been engaged in performing an act endowed with the nature of a *mizvah*.[23] It would follow that, according to *Birkei Yosef*, a physician who properly assesses his patient's condition and administers appropriate treatment is not subject to exile if the patient unpredictably dies for an unknown reason.

As will be shown subsequently, a number of contemporary authorities also understand the Tosefta's statement with regard to imposition of exile to be limited to situations involving particular forms of negligence on the part of the physician. If so, there is no contradiction between the Tosefta and the general rule formulated in the Mishnah.

2. Ramban

The Gemara, *Bava Kamma* 85a, declares "'. . . and he shall cause him to be thoroughly healed' (Exodus 21:19.)—From here [it is derived] that the physician has been given authority to heal." In Jewish law, as in all coherent legal systems, all activities are permissible unless they are expressly prohibited or contraindicated on the basis of some legal or moral consideration. If so, in the absence of any countervailing consideration, why should a physician require explicit permission to practice the healing arts? Absent the scriptural dispensation provided by this verse, why should a physician shrink from using his skills in order to cure a patient? In their respective commentaries on this talmudic passage, Rashi, *Tosafot* and Rashba explain that the constraint is theological in nature. To paraphrase Rashi's formulation: "If God afflicts, how dare man attempt to cure?" Or, as expressed by *Tosafot*, in curing the patient, the medical practitioner "appears to thwart the divine decree." Such would be the physician's concern in the absence of specific dispensation; once permission is given, practice of the healing arts becomes intrinsic to God's providential guardianship of man and hence medical ministration is not only permissible or even commendable but is mandatory.[24]

In his *Torat ha-Adam*, *Shaar ha-Sakanah*,[25] Ramban presents the foregoing rationale for the need of specific authorization to practice medicine but prefaces that comment with an entirely different explanation. The verse in question, declares Ramban, is necessary in order to teach that the practice of medicine is not forbidden because of the possibility of a disastrous outcome. The physician is given authority to heal "lest the physician say: 'Why should I [seek] this vexation? Perhaps I will err with the result that I become an inadvertent slayer of human souls.'"[26] Elsewhere in his *Torat ha-Adam*,[27] Ramban writes, ". . . since license was given to the physician to heal and, moreover, it is a *mizvah* that is incumbent upon him, he need have no concern; for if he conducts himself appropriately in accordance with his opinion he has naught but a *mizvah* in his medical ministrations, for God commands him to heal and his intellect coerced him to err."

Ramban is however troubled by the fact that, despite scriptural reassurance that he should have no moral qualms, the physician who errs and causes the death of his patient is nevertheless held culpable of manslaughter and, if his error is non-lethal, is liable—at least according to the "laws of Heaven"—to pay compensation to his victim. If the physician is commanded to treat his patient and to ignore the potential for inadvertent error, how can he be held liable for doing what he is duty-bound to do?

Ramban's resolution of the problem is startling, to say the least. His solution is novel but seemingly paradoxical. Ramban responds by stating that the situation of the physician is analogous to that of a judge. The *dayyan* is commanded to sit in judgment and, declares the Gemara, *Sanhedrin* 6b, "Lest the judge say, 'Why should I seek this vexation?' the verse states '[God is] with you in the matter of judgment' (II Chronicles 19:6)—the *dayyan* has only what his eyes see." Nevertheless, in some circumstances, the *dayyan* will be held liable for judicial malpractice. Ramban adds the remarkable comment that the judge is liable "if he errs and it becomes known to the *bet din* that he erred . . . similarly [in the case of the physician], according to the laws of man he is not liable to payment but according to the laws of Heaven he is not quit until he pays for the damage and goes into exile for the death *since it has become known that he erred* [emphasis added] and has caused damage or caused death by means of a direct act."

Ramban formulates the curious position that the judge and the physician are liable in the eyes of Heaven—but only if they are found out. It is of course readily understood that neither the judge nor the physician can be required, even by Heaven, to make restitution if he remains unaware of his error and hence of his liability. But certainly Heaven is aware of the error and hence the person should not be guiltless in the eyes of Heaven even if, as a practical matter, he cannot be called upon to redress the wrong. A layman who commits an ordinary tort without ever becoming aware of the damage he caused, e.g., a person who throws a rock and unknowingly shatters a valuable vase, and whose act was unobserved, will never be called upon to make restitution simply because he is not identifiable as the tortfeasor but, assuredly, he is not guiltless in the eyes of Heaven. Yet the *dayyan* and the physician, declares Ramban, are guilty "at the hands of Heaven" only if it becomes known to them that they have caused harm.

Furthermore, Ramban's thesis is formulated in an attempt to resolve a difficulty but apparently falls short of doing so. Absent scrip-

tural reassurance, the prudent physician and judge are pictured as abjuring their callings for fear of potential punishment. Assurance that liability is contingent upon actual awareness of resultant harm hardly seems to assuage such a concern.[28]

It seems to this writer that Ramban's comment must be understood in light of the dual nature of the transgression inherent in misappropriation of property, commission of a tort and manslaughter. A person who deprives another of his property has committed an act of theft and in doing so has sinned against his fellow. In addition, he has violated the divine commandment prohibiting theft and has thereby sinned against God. The *dayyan*'s putative concern that he may err in rendering judgment is not born of a concern for the welfare of the financially harmed litigant but of the *dayyan*'s fear of sullying his own immortal soul by sinning against God. The verse "God is with you in the matter of judgment" serves to assure the judge that God joins in the judgment even if it is in error, i.e., insofar as God is concerned, the qualified judge who errs commits no sin. Indeed, theologically speaking, his error may, in a certain sense, be providentially ordained.[29] In concurring in the judgment of the *bet din*, The Heavenly Court renders judgment not simply upon the pleadings of the litigants but upon a totality of considerations, many of which are likely to be unknown to mortals.

That consideration, however, is relevant only from the divine perspective; insofar as the obligations of a man to his fellow man are concerned, "[the Torah] is not in Heaven" (Deuteronomy 30:12). Hence the *dayyan* may be required to compensate the victim of his mistake if, in terms of terrestrial considerations, the *dayyan* has committed a culpable error. But, since in the eyes of Heaven he is entirely guiltless and a person who is unaware of any harm that he may have caused cannot compensate the victim, Heaven must hold him guiltless in every sense unless he becomes aware of his error. Thus assured, the *dayyan* has no reason to shirk the duties of his office. The *dayyan* is dedicated to his sacred calling and, if competent, dare not be dissuaded by fear of potential financial loss.[30] If the *dayyan* errs, he will dutifully make restitution. His real fear is the fear of inadvertent sin and on that score the biblical verse serves to put his mind at ease.

Ramban, in this comment, formulates a remarkable thesis: Every trespass against one's fellow man constitutes a dual infraction: 1) an offense against one's fellow (*bein adam le-havero*); and 2) an offense against God. Halakhah is replete with examples in which a *bet din* will not issue a monetary reward but the individual remains liable "at the

hands of Heaven." In such cases, Heaven will not grant forgiveness despite the fact that the aggrieved party is non-suited by the *bet din*. The dual nature of the infractions explains why there may be an obligation "at the hands of Heaven" even when there is no obligation at the hands of man.

Herein, in effect, Ramban posits the converse, i.e., an obligation "at the hands of man" despite the absence of liability in the eyes of Heaven. The *dayyan* who, in his error, unwittingly carried out a divine decree has committed no transgression against Heaven, but since the Torah "is not in Heaven" and since in terms of human considerations he has ruled improperly, he may be required to make restitution entirely as a matter of *bein adam le-havero*. But such an obligation, since it is entirely between man and his fellow man, can be meaningful only when and if the existence of such an obligation becomes known to the guilty party. If it fails to become known, Heaven will impose no penalty because in the eyes of Heaven the individual in question is guiltless.

Having established this principle with regard to the *dayyan*, Ramban applies it as well to the physician who errs is treating his patient. A person who commits a battery commits a transgression *vis-à-vis* his fellow man as evidenced by the requirement to compensate for the harm done. In causing physical harm to another, he also transgresses the divine commandment "he shall not exceed" (Deuteronomy 25:3).[31] The physician who errs in treating his patient is not engaged in therapeutic "wounding" excluded from that prohibition; he has committed a simple battery and has reason to fear that he has committed an offence against the Deity. Fear of committing such a transgression might well serve to discourage the physician from engaging in his profession. The verse "and he shall cause him to be thoroughly healed," according to the understanding of the passage advanced by Ramban, serves completely to exonerate the physician from any transgression. In drawing a parallel between the *dayyan* and the physician Ramban undoubtedly intends to assert that any harm caused by the physician is the result of Heavenly decree. That concept is eloquently captured in the medical context in an aphorism coined by R. Moshe Hagiz: "The unintentional act of the physician is the intent of the Creator."[32] Since the erring physician is, in effect, a divine messenger, Heaven can hardly hold him responsible for the untoward results of his ministration.

But, again, the Torah "is not in Heaven." Hence, in terms of obligation to his fellow man, the physician remains responsible for making his victim whole. But that is an obligation the physician incurs entirely *vis-à-*

vis his fellow man and is devoid of any "religious" implications. In other cases failure to satisfy a financial obligation constitutes a "religious" infraction as well. Depending upon the circumstances, the "religious" obligation with regard to monetary compensation is born of an obligation to restore stolen or lost property, of contractual liability or of an obligation in tort. The physician's "religious" obligation could only be of the latter category but since he acts at the divine behest no such "religious" obligation exists. Accordingly, his obligation is solely in the nature of a duty owed a fellow man with no parallel duty to God to fulfill that duty. Hence, according to Ramban, if the physician remains unaware of his error he cannot be held culpable in any sense of the term.

However, it should then follow that when the error becomes known, the physician, no less so than the *dayyan*, should be held liable by the *bet din*. That is indeed the case accordingly to biblical law. However, the Tosefta, *Gittin* 3:13, declares that the Sages found it necessary to grant the physician immunity "for of the welfare of society" (*mipnei tikkun ha-olam*). In effect, they recognized that failure to hold a physician guiltless in instances of misadventure would result in many physicians declining to practice medicine for fear of financial liability. Nevertheless, the obligation "*bein adam le-havero*" remains "at the hands of Heaven" even though in the eyes of Heaven the physician has done no wrong. The guilt recognized by Heaven is not for a sin against the Deity but for an offense against the victim. Apparently no similar conferral of immunity was regarded as necessary in order to entice a qualified scholar to serve as a *dayyan*.[33]

The statement that the physician is liable "at the hands of Heaven" even though in the eyes of Heaven he has committed no harm means simply that a moral obligation *bein adam le-havero* does exist. Moreover, the statement has a very practical effect, *viz*, the victim is entitled to exercise self-help (*tefisah*), i.e., seizure of property or funds, without authorization of the *bet din*. According to many authorities self-help is a remedy available in all cases in which Halakhah posits an obligation "at the hands of Heaven"[34] particularly in instances in which the obligation is biblical in nature.[35]

Ramban's comment with regard to culpability for exile may be understood in a similar fashion. The nature of exile in instances of inadvertent manslaughter is complex. In a number of instances[36] the Gemara describes exile as a form of expiation, i.e., as atonement for inadvertent transgression of the prohibition against homicide. However, since Ramban asserts that the physician who "conducts himself appro-

priately . . . has naught but a *mizvah*," such a physician is clearly not in need of expiation.

Exile serves not only as expiation but as a punishment as well.[37] Evidence that exile is also a form of punishment is found in the discussion of the Gemara, *Makkot* 2b, regarding the punishment of witnesses who by accusing a person of manslaughter seek to have him banished to one of the cities of refuge and whose testimony is impeached (*edim zomemim*). The general rule is that such witnesses receive punishment in kind, i.e., they are accorded the selfsame punishment they sought to have meted out to the defendant against whom they testified. Witnesses who testify with regard to unintentional manslaughter but who are impeached are not themselves subjected to exile. However, that is so only because they are expressly excluded from exile on the basis of exegetical interpretation of a biblical verse. It is readily established that the punishment of impeached witnesses in not designed to expiate their transgression as evidenced by the fact that the Gemara, *Makkot* 2b, declares that witnesses are not liable to monetary payment in the form of *kofer*, or "atonement," if their testimony concerning an ox that gores a person is impeached. The master of an ox that has previously committed such acts and who has been properly admonished regarding the irascible nature of his animal is liable to payment of a sum of money in an amount equal to the amount the victim might have commanded were he to be sold as a slave. That payment is designated as "*kofer*" or "atonement," i.e., it is designed, not as restitution, but as expiation of the transgression inherent in the master's negligence in not exercising proper supervision over his ox. However, in contradistinction to other cases of false testimony, witnesses who seek to subject the master of an ox to such punishment but whose testimony is impeached are not subject to monetary punishment in the form of *kofer*. The principle reflected in this provision is that impeached witnesses are subject to punishment but their punishment does not serve to expiate their transgression.[38] Accordingly, since the essence and purpose of *kofer* is expiation, and atonement, whereas the punishment of impeached witnesses is not designed to serve as expiation, impeached witnesses are not called upon to make such payment. Thus, since an explicit biblical verse is necessary to exclude impeached witnesses from the penalty of exile, it is evident that the exile to which impeached witnesses would have been subjected had Scripture not excluded them from that penalty would have been in the nature of punishment rather than of expiation. But, assuredly, the physician who "has naught but a *mizvah*" does not deserved to be punished.

However, exile serves a third purpose as well, *viz.*, it serves to preserve the perpetrator from vengeance at the hands of the blood-avenger.[39]

Ramban's comment to the effect that the verse "and he shall cause him to be thoroughly healed" serves to assure the physician that he need not be concerned over possible unintentional manslaughter "unless he becomes aware that he has erred" can be understand on the basis of the multifaceted purpose of exile. In this case as well, the physician whom Scripture seeks to reassure is not a physician whose concern is his own safety or well-being but the physician whose concern is the possibility of transgression. The verse serves to establish that a physician who errs inadvertently has committed no transgression whatsoever. Hence, he incurs no Heavenly punishment and requires no expiation. Accordingly, if he never discovers his error, nothing is lost. He is, however, subject to the wrath of the blood-avenger.[40] That, however, is a contingency that he need not fear unless his error becomes known. But even if his error becomes known he faces no temporal danger because of the safety afforded him through exile in a city of refuge.[41]

III. EXCLUSION FROM CULPABILITY FOR EXILE

As noted earlier, *Shulhan Arukh*, *Yoreh De'ah* 336:1, in accordance with the statement recorded in the Tosefta, rules that a physician who causes the death of his patient is liable to exile. Ostensibly, the sources recording the physician's culpability for exile declare that he is liable to banishment for causing the death of the patient regardless of whether he has been negligent. Ofttimes a surgeon performs an operation knowing quite well that there is a statistical probability that the patient will not survive the surgery. Nevertheless, both the surgeon and the patient assume that risk because, absent surgical intervention, death is either a certainty or more likely to occur. However, on the basis of the distinction drawn by the *Birkei Yosef* between a father or a teacher on the one hand and a physician on the other, there would appear to be no reason to require exile in such circumstances. In such an instance the physician commits no error. He is engaged in an attempt to perform a *mizvah* no less so than the father who engages in an attempt to chastise a son or a teacher who endeavors to correct a pupil. However, that conclusion does not flow from the earlier-cited distinction formulated by *Besamim Rosh*.[42]

The question of the culpability of a physician who causes the death of his patient but who has committed no error is also addressed by a

number of contemporary authorities. R. Zalman Nechemiah Goldberg, *Tehumin*, XIX (5759), 320, asserts that, since there is no element of "error," the situation is comparable to a case of *ones*, or unavoidable death, which does not entail exile. That analysis is imprecise in the sense that in cases of statistical danger the physician knowingly and willingly assumes the attendant risk.[43] Assuming that negligence is not a necessary element in imposition of the penalty of exile, the physician should indeed be culpable since the situation is not akin to a case of unavoidable or unpreventable death and certainly not to a case of *force majeure.*

Other scholars clearly go beyond Rabbi Goldberg's position and maintain that a physician who causes the death of a patient through no fault of his own but as the result of a *bone fide* error of judgment is not liable to exile. One authority, R. Yechiel Michal Epstein, *Arukh ha-Shulhan*, *Yoreh De'ah* 336:2, asserts that a physician is exiled only if the misadventure he has caused was the result of "laziness" (*hitrashlut)* or failure to exercise due diligence (*lo iyein yafeh*). From a parenthetical comment incorporated in that ruling it appears that *Arukh ha-Shulhan* understands that the distinction between a father or a teacher and a physician as reflected in the Tosefta lies in the consideration that the physician to whom the Tosefta refers is a physician who has been negligent in discharging his duties whereas the father and the teacher of whom the Mishnah speaks have not been negligent.

R. Shlomoh Zalman Auerbach, as quoted by Abraham S. Abraham, *Nishmat Avraham*, *Yoreh De'ah* 376:1, note 7, suggests that the penalty of exile is not imposed in instances of an error in judgment. That penalty he suggests, is imposed only if the physician performs an unintended act, e.g., he reaches for the wrong medicine or erroneously takes hold of a non-sterilized scalpel.

A similar but markedly different view is reflected in the comments of R. Moses Feinstein, *Iggerot Mosheh*, *Even ha-Ezer*, IV, no. 31, s.v. *u-mah she-nizkar*. *Iggerot Mosheh* declares that as long as there is no better qualified physician available and the physician has acted with due deliberation in accordance with his knowledge and skill his act is regarded as tantamount to that of an *anus* i.e., a person whose act is unavoidable, and he is not liable to exile. Action on the part of the physician in accordance with the dictates of his intellect resulting in misadventure is thus equated with *force majeure.* Thus, *Iggerot Mosheh* is in agreement with *Arukh ha-Shulhan* and Rabbi Auerbach in ruling that non-negligent error does not render the physician culpable for exile. However,

unlike *Arukh ha-Shulhan*, *Iggerot Mosheh* asserts that if the physician acted "in haste" *(be-behilut)*, even if it seemed to him that no further reflection was necessary, the physician is also exempt from exile. In that case, however, the physician is exempt from exile, not because he is without guilt, but because the physician's negligence is of a magnitude for which exile is an insufficient punishment. Exile, opines *Iggerot Mosheh*, is reserved solely for situations in which

> the matter was not urgent and it would have been possible to wait for a more highly qualified physician or in situations in which the physician was the most highly qualified but he did not reflect more than his wont, then if [he acted] in accordance with the manner of physicians [in which case] there is no negligence, he is liable to exile and [exile] serves as expiation [for his transgression].

Presumably, reaching in haste for the wrong medicine or for an unsterilized scalpel, according to *Iggerot Mosheh*, would not result in exile because such an act constitutes gross negligence for which exile is an insufficient expiation.

Failure to administer a diagnostic test that would have led to proper treatment represents an act of nonfeasance rather than malfeasanse. Accordingly, it would follow that such forms of malpractice should not result either in subjecting the physician to exile or to liability to tort damages. However, if failure to administer such a test leads to overt intervention resulting in the death of the patient, the physician, according to *Arukh ha-Shulhan*, would seem to be culpable for such intervention since failure to administer such a test represents failure to exercise due diligence (*lo eyein yafeh*). Similarly, according to *Iggerot Mosheh*, the physician must be judged to have acted "in haste" (*be-behilut*). However, according to Rabbi Auerbach, if the physician did not order the test because he erroneously regarded it to be unnecessary, and proceeded with treatment that results in harm he has committed an error of judgment for which he does not incur the penalty of exile.

Similarly, an act of omission cannot result in liability for tort damages, although if the physician is regarded as a bailee, as will be discussed later, he may be liable for resultant damages by virtue of having failed to perform his duties as a bailee.[44] Tort liability for harm caused by active intervention that would have been avoided had the diagnostic test been ordered must be examined in the context of the general provisions governing a physician's liability and, as will be discussed subse-

quently,[45] may be contingent upon a possible distinction between ordinary negligence and gross negligence in the physician's failure to administer the diagnostic test.

R. Moses Sofer, *Teshuvot Hatam Sofer*, *Orah Hayyim*, no. 177, presents a position that appears not only to qualify the ruling of *Shulhan Arukh* but also to be at variance from that normative ruling. In that responsum *Hatam Sofer* addresses a tragic case of inadvertent poisoning. A servant girl fainted from sudden fright. Her mistress sought to revive her by giving her whiskey to drink. However, in reaching for the flask of whiskey she inadvertently took hold of a jar of "petrol" (probably kerosene). The liquid poured into the young lady's throat "went down into her innards and the lass was burned." Her mistress, understandably consumed by feelings of guilt, sought advice with regard to a proper form of expiation. In his responsum, *Hatam Sofer* opines that the woman who administered the poisonous substance was far less culpable than a father or a teacher who chastises a child. Hence, asserts *Hatam Sofer*, were such a penalty still imposed in our day, she would not be subject to the punishment of exile. *Rav Pe'alim*, III, *Orah Hayyim*, no. 36, s.v. *ve-atah*, objects to *Hatam Sofer's* analysis on the grounds that the case of the woman is comparable to that of a physician who, according to the Tosefta and the ruling of *Shulhan Arukh*, *Yoreh De'ah* 336:1, is liable to exile. The same objection was later raised by R. Yitzchak Ya'akov Weisz, *Teshuvot Minhat Yizhak*, III, no. 104, sec. 5.[46]

R. Samson Aaron Polonski, *Divrei Aharon*, no. 34, sec. 2, attempts to defend *Hatam Sofer*'s response by arguing that it is predicated upon an earlier ruling of R. Simon ben Zemah Duran, *Tashbaz,* III, no. 82. As will later be more fully discussed, *Tashbaz* asserts that a physician is culpable only for death resulting from an act performed by his own hand or by an instrument wielded by him, but that a physician who treats patients by means of "liquids or medicaments" is not similarly liable even "at the hands of Heaven." *Tashbaz*' distinction is presumably based upon the consideration that culpability is contingent upon proximate cause which, in Jewish law, is narrowly defined.[47] Harm done by a hand is direct; poison, however, must first be absorbed by the body and hence the resultant harm is indirect, i.e., it is effected through a form of *gerama*.[48]

That analysis of *Hatam Sofer*'s position seems implausible. *Hatam Sofer*'s choice of words in describing the effect of the poison as "burning" internal organs was probably expressly intended to distinguish the case under discussion from the type of act for which *Tashbaz* declined

to assign culpability.[49] Pouring acid on a person's body is no less the proximate cause of resultant harm than is incision with a scalpel. The effect of acid is far different and far more immediate than poison that, to do harm, must first enter the bloodstream. *Hatam Sofer*'s description of the "burning" effect of "petrol" clearly indicates that he presumed the effect to be comparable to that of acid.

Even more problematic is the fact that, in addressing an entirely different incident in *Teshuvot Hatam Sofer*, *Hoshen Mishpat*, no. 184, *Hatam Sofer* remarks, "for indeed the Sages, *ipso facto*, exempted from exile a physician who causes the death of a patient." That categorical statement seems to be erroneous since the only explicit mention of a physician occurs in the Tosefta and the Tosefta declares the physician to be subject to exile.[50]

IV. FINANCIAL LIABILITY

1. The Problem

Unlike exile, which has lapsed in our era, a suit for actual physical harm continues to be actionable before a *bet din*. The rule with regard to financial liability in instances of malpractice is recorded in *Shulhan Arukh*, *Yoreh De'ah* 336:1. *Shulhan Arukh* declares:

> [A physician] should not engage in the practice of medicine unless he is proficient and [only if] there is no one greater than he in that [locale] for otherwise he is a shedder of blood. If [the physician] practices medicine without license of a bet din [and causes harm] he is liable for payment even if he is proficient. However, if he practices medicine with license of a *bet din* but errs and causes harm he is not liable according to the laws of man but he is liable according to the laws of Heaven.

That ruling is based upon two separate statements of the Tosefta. The Tosefta, *Bava Kamma*, 6:6, states that a physician who practices with license of a *bet din* and causes harm "is exempt according to the laws of man but his judgment is turned over to Heaven" and posits the same rule with regard to a physician who performs an embryotomy. In antiquity, since a Caesarian section almost always resulted in the death of the mother, an embryotomy was the sole available means of preserving the life of a woman carrying a hydrocephalic fetus whose head was too large to pass through the birth canal. The rule with regard to medical malpractice is repeated in somewhat different language by the

Tosefta, *Bava Kamma* 9:3. In the latter formulation the rule pertaining to the physician is coupled with identical rules applicable to a father, a teacher and an agent of the *bet din*. With regard to each of those individuals the rule presented by the Tosefta provides that when the individual acts with permission of the *bet din* he is not liable but includes the caveat that "if he wounds more than is proper he is liable."

Magen Avraham, in his commentary on the earlier statement of the Tosefta, *Bava Kamma* 6:6, explains that the provision indicating that the judgment of the physician who causes harm "is turned over to Heaven" connotes nothing more than a declaration of the physician's liability for intentional infliction of harm.[51] *Magen Avraham* understands the Tosefta as declaring simply that, since God knows the physician's intention, He will hold the physician liable for willful battery; however, a physician who had no intention of causing harm is guiltless even in the eyes of Heaven. *Magen Avraham's* analysis of the Tosefta is clearly contradicted by *Shulhan Arukh*. Following Ramban's earlier-cited statement, *Shulhan Arukh* declares unequivocally that the physician "is liable according to the laws of Heaven." Unlike the phrase "turned over to Heaven," which may connote that the matter is left to Heaven for adjudication in light of the attendant circumstances, the term "is liable according to the law of Heaven" is a declaration of absolute liability that is quite independent of intent. *Shulhan Arukh* and Ramban apparently understood the phrase "but his judgment is turned over to Heaven" as an unqualified statement indicating liability, at least in the eyes of Heaven, for even inadvertent harm.

The notion of exoneration by a human court but culpability in the eyes of Heaven is not immediately recognizable as an application of general principles of tort liability with regard to battery. As previously noted, The Gemara, *Bava Kamma* 26b, establishes the principle that, unlike harm caused by a person's animal or property, a person is always liable for damage caused by his body (*adam ha-mazik*). If so, it would follow that a physician should be held responsible for any harm that he causes, regardless of whether the damage is the result of negligence or of misadventure. Although Ramban, *Bava Mezi'a* 82b, and as cited by *Shitah Mekubbezet*, *Bava Mezi'a* 82b, s.v. *ve-ata be-shem*, disagrees, *Tosafot*, *Bava Mezi'a* 82b, do carve out an exception to that rule in instances of an entirely unavoidable harm (*ones gamur*) as, for example, in the case of a person who rolls over in his sleep and in the course of doing so breaks utensils that have been placed next to him.

Presumably, the harm for which a physician is not liable by a *bet din* but for which he is held accountable in the eyes of Heaven is not of the nature of an entirely unavoidable misadventure for which, according to *Tosafot*, there is no liability. This assessment is based upon two factors: 1) according to *Tosafot*, if the harm was entirely unavoidable, there is no liability even in the eyes of Heaven; 2) *Shulhan Arukh* rules that the same act, if it leads to the death of the patient, results in exile of the physician. As shown earlier, many latter-day authorities maintain that a physician is subject to exile only if he could have avoided the death of the patient by modifying the therapeutic procedure or if the procedure was performed in error. It is certainly the case that, according to *Tosafot*, a physician who properly performs a needed procedure that inadvertently results in harm as a result of sheer misadventure incurs no liability even in the eyes of Heaven. Thus, according to *Tosafot*, the liability "according to the laws of Heaven" of which the Tosefta and *Shulhan Arukh* speak is limited to instances of harm resulting from some form of negligence. According to *Tosafot*, there are no exemptions from tort liability with regard to harm caused by a person; hence, according to *Tosafot*, financial liability should exist not only "according to the laws of Heaven" but should be imposed by a terrestrial *bet din* as well.

2. Mipnei Tikkun ha-Olam

a) *Financial Immunity*

The concept of liability "at the hands of Heaven" must be understood on the basis of yet a third statement recorded in the Tosefta. The Tosefta, *Gittin* 3:13, declares: "A physician who practices medicine with the license of a *bet din* and causes harm: if inadvertently, he is not liable; if intentionally, he is liable—because of the welfare of society (*mipnei tikkun ha-olam*)." The phrase "*mipnei tikkun ha-olam*" must be understood as explaining the first portion of the Tosefta's compound statement, i.e., as explaining why the physician is exonerated in cases of inadvertent harm, rather than as explaining why he is liable for intentional harm as recorded in the second portion of that statement.[52] Thus the Tosefta, in effect, informs us that, the physician in principle should be fully liable even for harm caused inadvertently but that he is exonerated because of concern for the welfare of society, i.e., he is exonerated from tort liability by rabbinic decree designed to promote the welfare of society. The Sages were concerned that a person possessing medical skills

might be fearful of malpractice liability and therefore renounce the practice of medicine. Accordingly, the Sages conferred qualified immunity upon the physician in order that he not be discouraged from practicing his profession. The Sages decreed only that the *bet din* not render judgment against the physician; they did not seek to abrogate the fundamental biblical law. Accordingly, the physician remains liable "at the hands of Heaven."

Thus the basic problem is resolved: In terms of biblical law the physician is fully liable in accordance with the principle *adam mu'ad le-olam*; he is exonerated solely by reason of rabbinic enactment *mipnei tikkun ha-olam*. The remaining question is a determination of the parameters of the immunity conferred upon the physician by the Sages.

b) *Exclusions from Immunity*

(1) *Improper Conduct*

As noted earlier, the Tosefta, *Bava Kamma* 9:3, declares that a physician who "wounds more than is proper" is liable for damages. The clear implication is that such damages are to be awarded by the *bet din*. In order to make that statement compatible with the statements of the Tosefta, *Gittin* 3:83 and *Bava Kamma* 6:6, exonerating the physician in cases of error, R. Simon ben Zemah Duran, *Tashbaz*, III, no. 82, explains that the phrase "more than is proper" refers to intentional infliction of harm for which the physician is, of course, liable as is expressly stated by the Tosefta, *Gittin* 3:13. A similar act resulting in the death of the victim, adds *Tashbaz*, would not lead to exile because a person who willfully takes a life is not subject to exile even though he cannot be executed because of lack of prior admonition. R. Yechezkel Abramsky, *Hazon Yehezkel*, *Hiddushim*, *Bava Kamma* 9:3, *Hiddushim*, depicts wounding "more than is proper" as an act that is "*ke-mezid*," i.e., as an act that is akin to an intentional act. In his *Bi'urim*, *loc. cit.*, Rabbi Abramsky adds the comment "for to that extent it is within his power to safeguard himself that he not wound."

There appears to be a significant difference between the comments of *Tashbaz* and those of Rabbi Abramsky with regard to the proper understanding of the Tosefta. According to *Tashbaz*, a physician can never be held liable for negligence; his liability, as announced by the Tosefta, is limited to wanton infliction of harm that is tantamount to mayhem. Rabbi Abramsky, however, understands the Tosefta as extending the physician's liability beyond intentional infliction of harm.[53] According to Rabbi Abramsky, the phrase "wounding more than is

proper" connotes extending an incision or incising the wrong area and is paradigmatic of an act that a prudent physician would not perform even inadvertently. As noted earlier, according to *Tosafot*, a person is never liable, even in the eyes of Heaven, for a harm that is entirely unforeseen and hence completely unavoidable.

In what case, then, is there liability in the eyes of Heaven but no award of damages by a *bet din*? The Tosefta, according to Rabbi Abramsky's understanding, seems to refer to an act that in other legal systems would be categorized as gross negligence as opposed to ordinary negligence. Constant vigilance requires uninterrupted attention and concentration and a person, although endeavoring to be prudent, may momentarily relax his vigilance and commit a negligent act that might have been avoided, but only with a greater degree of attentiveness. Gross negligence results, not from a momentary lapse of concentration, but from a type of thoughtlessness or inattention that is readily avoidable. The Tosefta presumes that cutting tissue more extensively than is necessary is an example of gross negligence. In exempting the physician from liability lest he be deterred form practicing medicine, the Sages found it necessary to exempt the physician only from liability resulting from ordinary negligence. Since no person is always unflaggingly vigilant, sooner or later every physician will commit an act that must technically be categorized as negligent act. Failure to protect a physician from liability that he must anticipate as a virtual certainly may prompt the physician to seek another means of earning a livelihood. Therefore, the Sages conferred immunity from financial liability upon him "*mipnei tikkun ha-olam*." Gross negligence, however, is not at all inevitable. A competent physician does not anticipate that in the course of his career he will be guilty of gross negligence. Hence the specter of liability in instances of gross negligence will not induce him to forsake medicine. Moreover, it may well be assumed that the Sages would have indeed preferred that a person who, knowing his own nature, recognizes that he will be prone to gross negligence desist from the practice of medicine.

Curiously, R. Samuel ha-Levi Woszner, *Teshuvot Shevet ha-Levi*, *Yoreh De'ah*, no. 151, cites *Tashbaz*' interpretation of the phrase "more than is proper" verbatim but proceeds to rule in a manner consistent with Rabbi Abramsky's understanding of the Tosefta. The question that came before Rabbi Woszner involved a dentist who, in the course of drilling a diseased tooth, caused the drill to penetrate a healthy tooth. The issue confronting Rabbi Woszner was the dentist's liability for expenses incurred in the repair of the healthy tooth that the dentist had

damaged. In his responsum *Shevet ha-Levi* cites the comments of *Tashbaz* and without further elaboration adds "but if . . . he drilled in a site in which he did not need [to drill], even if it was in the nature of an inadvertent act, with regard to the law of compensation, it is [regarded as] purposeful."[54]

As *Shevet ha-Levi* himself notes, there are situations in which cutting or drilling healthy tissue is not necessarily indicative of negligence. Nevertheless, in the overwhelming majority of cases, it is likely that incision of healthy tissue occurs because of negligence. Somewhat surprisingly, *Shevet ha-Levi* concludes that the physician or dentist cannot be exonerated unless the practitioner "had no control over his hand whatsoever." That conclusion is surprising since *Shevet ha-Levi* presumably accepts a distinction between what has earlier been categorized as "gross negligence" versus ordinary negligence.[55] If so, there are undoubtedly some situations in which a practitioner has not lost control of his hand but, nevertheless, has not been grossly negligent.[56]

(2) *Absence of Licensure*

In conferring financial immunity upon the physician the Sages limited this enactment to a physician who ministers to patients "with permission of the *bet din*. Since, in our day, the practice of *bet din* licensure of physicians has lapsed, the applicability of the rule providing for such immunity is subject to question. Citing Maharil, *Birkei Yosef*, *Shiyurei Berakhah*, *Orah Hayyim* 328:1, declares that when the civil authorities regulate the practice of medicine and grant licenses to practitioners no further permission from a *bet din* is needed. *Arukh ha-Shulhan*, *Yoreh De'ah* 336:2, also seems to regard government licensure as tantamount to authority conveyed by a *bet din*. In his earlier-cited responsum, *Shevet ha-Levi* is even more explicit in stating that, in our day, the *bet din*, in effect, constructively acquiesces to licensure by civil authorities.

Divrei Sha'ul, *Yoreh De'ah* 336:1, cites *Bet Hillel* who defines a "proficient" physician (*mumheh*) as one who possesses a "document [issued] by the great physicians in the places where he studied the science [testifying] that he studied and is proficient."

Bet Hillel, *Yoreh De'ah* 336:1, declares that the status of any physician accepted by the populace of the city is identical to that of a physician who has been licensed by a *bet din*.[57] *Bet Hillel* 's ruling is predicated upon the consideration that, in licensing the physicians, the *bet din* is not performing a judicial function. Rather, the *bet din* is acting in an administrative capacity in order to preserve the health and welfare of the members of

their society. Preservation of social welfare is an inherent right and duty of society. Thus, in this matter, as in other matters, the *bet din* acts in a representative capacity in exercising the regulatory power of the society it represents. Nevertheless, in a final comment, *Divrei Sha'ul* seems to bemoan the fact that licensure by the *bet din* has lapsed.

Shulhan Arukh, *Yoreh De'ah* 336:1, rules that, despite having received permission of the *bet din* to practice medicine, a physician should not treat a patient if a more qualified practitioner is available. That ruling apparently applies even to a physician who has been granted permission to practice medicine by a *bet din*. *Hazon Yehezkel*, *Bava Kamma* 9:3, explicitly declares that a physician who fails to defer to a more qualified practitioner "has no license from the *bet din*" and, in case of misadventure, is to be held liable as would be the case were he an unlicenced practitioner. In effect, the license granted a physician by the *bet din* is qualified in nature and is contingent upon the unavailability of a more proficient practitioner.

Shevet ha-Levi, IV, *Yoreh De'ah*, no. 151, expresses doubt with regard to whether, in contemporary society, the obligation to defer to a more qualified practitioner remains in effect since, in our day, physicians who are both "more and less qualified practice this profession and all of them are licensed." Although R. Eliezer Waldenberg, *Ramat Rahel*, no. 22, sec. 5, declares that it is not necessary to refer a patient to a more competent specialist when both the complaint and the treatment are well-known and routine, *Shevet ha-Levi* is certainly in error with regard to any non-routine matter requiring informed medical judgment and sophisticated decision-making. In such cases the patient must be referred to the more competent and more experienced specialist provided that time permits and that the specialist is willing and able to treat the patient. Similarly, when the sheer number of patients is so great that the more proficient specialist cannot adequately treat all who are in need of his services, a less competent physician is not only permitted to treat, but must treat, the patient as long as he is the best qualified of the physicians available to the patient.[58]

(3) Mipnei Tikkun ha-Olam *in Light of Ramban's Analysis of the Liability of an Artisan*

According to Ramban, who, as noted earlier, maintains that an individual is liable for even unforeseen and unavoidable harm caused by his person, it would seem that a rabbinic decree conferring immunity from tort liability was necessary to provide immunity not only in instances of ordinary negligence but in cases of absolutely unavoidable harm as well.

However, such a conclusion may not be correct. Indeed, according to Ramban, *Bava Mezi'a* 82b and as cited by *Shita Mekubbezet*, *ibid*., s.v. *ve-atah be-shem*, the principle *adam mu'ad le-olam* should not apply to a physician acting with the consent of his patient and not compensated for his services. The Gemara, *Bava Kamma* 99b, declares that an uncompensated ritual slaughterer who, in the process of slaughtering the animal, inadvertently renders it non-kosher is not liable for damages; if, however, he receives a fee for his services he is liable. Ramban apparently maintains that an artisan is not liable for damages in tort since he acts with the permission of the owner of the property. In effect, Ramban concedes that although, in principle, a person who causes unavoidable harm is liable for his act, nevertheless, one who performs the act with the permission of the person harmed thereby is not liable in tort for unavoidable damage. Hence an artisan is liable as a bailee rather than as a tortfeasor. There is, however, a difference between liability as a tortfeasor and liability as a bailee. Were the artisan to be regarded as a tortfeasor, his liability would be absolute; whereas, as a gratuitous bailee, he is liable only if he is negligent. If the artisan receives compensation his status is that of a bailee for hire who is liable for all damages other than those incurred as a result of *ones*, i.e., damages totally beyond his control.

The statement of the Tosefta indicating that a physician is immune from liability only by virtue of rabbinic decree is problematic when examined from the vantage point of Ramban's position. It would stand to reason that the status of the physician should by identical to that of the slaughterer, i.e., the physician who acts with the consent of the patient should not be liable as a tortfeasor just as the slaughterer is not regarded as a tortfeasor. Thus a physician who receives no fee should not be liable for damages. Even assuming that the physician is regarded in Halakhah as a bailee,[59] the physician who has faithfully discharged his duties cannot be held liable even in the eyes of Heaven unless he is compensated for his services. However, in assigning liability to the physician according to biblical law, the Tosefta makes no distinction between a physician who charges a fee and a physician who renders his services *pro bono*. The problem, then, is that, even if he is regarded as a bailee, a physician who is not compensated should, according to Ramban, have the status of a gratuitous bailee who, even absent a rabbinic decree, is not liable other than for damage that occurs as a result of negligence.[60]

R. Yechezkel Abramsky, *Hazon Yehezkel*, *Bava Kamma* 9:3, in

drawing a distinction between a physician and a father or a teacher identical to the distinction cited earlier in the name of *Besamim Rosh*, asserts that Ramban's rationale in exempting an artisan from tort liability is applicable only if the damage is caused by the artisan in the course of fulfilling his function as an artisan. However, argues Rabbi Abramsky, a physician who harms rather than heals is not engaged in medical ministration and hence is not functioning in his capacity as an artisan.[61] Hence, according to Ramban, absent a rabbinic decree, even an uncompensated physician would be liable for damages.

However, even conceding that a physician who commits an error is not functioning in his capacity as a physician, that consideration does not seem to explain the physician's liability according to Ramban. There is no reason to assume that an artisan is not liable for damages simply because of the fact that he is an artisan as Rabbi Abramsky seems to imply. Rather, as explained earlier, his immunity from liability is based upon the consideration that he has been granted license to perform the act that caused harm. In effect, his act becomes a licensed tort for which there is no liability as *adam ha-mazik*. The artisan remains liable only for such loss as a bailee is liable by virtue of his duty of care as a bailee.

The problem is resolved somewhat differently and, in this writer's opinion, more cogently by R. Joshua of Kutna, *Yeshu'ot Yisra'el*, *Hoshen Mishpat* 25:3. *Yeshu'ot Yisra'el* asserts that an artisan is immune from liability according to Ramban only because he was granted permission to ply his craft by the owner of the property. However, a physician who performs an unnecessary procedure does not act with the permission of the patient since the patient does not give permission for unnecessary procedures and hence the physician is exonerated only by virtue of rabbinic enactment "for the welfare of society." *Yeshu'ot Yisra'el* apparently maintains that this is also the case in situations in which the patient did not survive the surgery because of "weakness;" in effect, such a procedure is unwarranted and the patient did not give permission for an unwarranted procedure. That analysis is similar to the earlier-cited distinction between a father or teacher, who are not culpable because they were engaged in discharging a duty, and a physician who, if acting in error, fulfills no obligation and would not apply to a case in which the procedure was appropriate but a mishap occurred in the course of its execution. Accordingly, if the surgery was appropriate but the patient succumbs as a result of inadvertent error committed by the surgeon, Ramban, according to *Yeshu'ot Yisra'el*, would maintain that the surgeon would not be held liable even absent the consideration of "the welfare of society."

V. DIVERGENT POSITIONS

1. Rabbenu Nissim

Rabbenu Nissim (Ran), in his commentary on *Sanhedrin* 84b, espouses a view entirely at variance with that of Ramban and *Shulhan Arukh* and apparently also in contradiction to the rule formulated by the Tosefta. Rabbenu Nissim maintains that a physician is in no way liable for inadvertent error.[62] Rabbenu Nissim explains that "when a proficient physician errs in his medical ministrations he is not acting inadvertently (*shogeg*) but out of compulsion (*ones)* for he heals with [divine] authority. . . and he has only that which his eyes see as we say with regard to a judge who has erred, [i.e.], that his heart coerced him."[63]

Despite the rejection of the view by both Ramban[64] and *Shulhan Arukh*, Ran's position is cited with approbation by the nineteenth-century authority, R. Joseph Saul Nathanson, *Divrei Sha'ul, Yoreh De'ah* 336:1. *Divrei Sha'ul* notes, as did *Besamim Rosh* before him, that a person who inadvertently commits a transgression in the course of attempting to fulfill a *mizvah* is exempt from the sacrificial offering required for expiation of inadvertent sin. By the same token, asserts *Divrei Sha'ul*, it would be reasonable to assume that if a person commits a tort in the course of fulfilling a *mizvah* there should be no financial liability in the eyes of Heaven. More significantly, the Gemara, *Sanhedrin* 84b, establishes that therapeutic "wounding" is not proscribed by the biblical prohibition against battery. The exclusion of therapeutic "wounding" is predicated upon a principle of rabbinic exegesis knows as a *hekesh*, i.e., the juxtaposition of two different legal categories, which has the effect of transposing one or more halakhic provisions already established in one of those categories to the other category. In this instance the *hekesh* is based upon the juxtaposition of references to the smiting of an animal and the smiting of a man in Leviticus 24:17-18. The Gemara declares, "Just as a person who smites an animal for therapeutic purposes is not liable so also a person who smites a man for therapeutic purposes is not liable." The inference to be drawn from that statement, argues *Divrei Sha'ul*, is that a person who inadvertently causes harm in the course of attempting to perform a therapeutic procedure is totally exonerated even in the eyes of Heaven, as is the case with regard to a person who causes harm to an animal in the course of a failed attempt to cure the animal. *Divrei Sha'ul* apparently regards the Gemara's formulation of this rule to be at vari-

ance with the rule posited by the Tosefta holding the physician accountable at the hands of Heaven and, applying usual canons of halakhic decision-making, *Divrei Sha'ul* asserts that the rule formulated by the Gemara should be given preference over that recorded in the Tosefta.[65]

As noted earlier, *Arukh ha-Shulhan*, *Yoreh De'ah* 336:2, rules that a physician is culpable at the hands of Heaven only if he has been remiss in some manner in his treatment of the patient or if he has not been sufficiently diligent in determining the proper treatment. Although his view appears to reflect the position of Rabbenu Nissim, *Arukh ha-Shulhan* surprisingly asserts that his view reflects his understanding of the Tosefta as well as of the rulings of Ramban and *Shulhan Arukh*.

Despite the fact that Rabbenu Nissim is widely regarded as ruling that the physician is immune to suit for usual forms of medical malpractice, thoughtful application of his position to many common instances of malpractice results in an entirely different conclusion. Rabbenu Nissim's position exonerating a physician from malpractice liability is limited to genuine, albeit avoidable, errors of judgment as reflected in his appeal to the concept of "his heart compelled him." A surgeon who removes the wrong organ because he failed to consult the patient's medical chart or who fails to read the label on a vial of medicine and administers a toxic drug has not committed an error of judgment compelled by his intellect.[66] The same is true in the situation of a physician who simply fails to examine a patient properly because of the pressure of time or because of sheer laziness.[67] Those situations represent examples of negligence for which immunity has not been conferred upon the physician. Moreover, according to Rabbenu Nissim, the physician is liable for such forms of negligent malpractice not only "at the hands of Heaven" but will be held liable by the *bet din* as well. Relief from of liability by operation of rabbinic decree is recorded in the Tosefta solely in conjunction with the Tosefta's formulation of a biblical law doctrine of strict liability applicable to a physician. If the Tosefta's position is rejected in favor of the authoritative ruling of the Babylonian Talmud, there is no other evidence pointing to the existence of a rabbinic decree circumscribing the power of a *bet din* to order compensation.[68]

2. Tashbaz

(a) *Gerama* vs. *Garni*

R. Zalman Nechemiah Goldberg, *Tehumin*, XIX (5759), 321, asserts that a physician who causes harm by offering poor advice, recommending a harmful procedure or prescribing a medication that is deleterious

is liable not simply because of *gerama* but because his act is in the nature of *garmi*. In his initial discussion Rabbi Goldberg expresses some doubt with regard to whether, even according to the ruling of the Tosefta, a physician who incorrectly prescribes a medication, but does not personally administer the drug, bears liability even in the eyes of Heaven. He similarly expresses some doubt with regard to liability at the hands of Heaven with regard to a physician who orders an injection or counsels surgery but does not himself perform the procedure. Nevertheless, he concludes that, at the minimum, such acts constitute *gerama*, or an indirect cause, for which there is liability in the eyes of Heaven. Moreover, Rabbi Goldberg further declares the matter to be analogous to *mesirah*, i.e., "informing" an evildoer of the location of money or property and thereby enabling the malfeasor to seize the property. Such an act is categorized as *garmi* for which there is complete liability, i.e, for which there is liability not only in the eyes of Heaven but which is actionable before a *bet din* as well.

Jewish law recognizes two distinct forms of indirect causation: *gerama* and *garmi*. Damage caused by *gerama* results in liability only at the hands of Heaven; damage as a result of *garmi* is actionable before a *bet din* despite the absence of proximate cause. The precise nature of the distinction between the categories of *gerama* and *garmi* is the subject of considerable controversy among early-day authorities.[69] In defining the concept of *gerama* in contradistinction to that of *garmi*, *Tosafot*, *Bava Batra* 26b, assert that, when the harm is a necessary and inescapable result of the tortfeasor's act, the tortfeasor is liable even if the resultant damage is caused by the tortfeasor only indirectly.[70]

If the physician's referral to the surgeon or his order to the nurse is deemed to be in the nature of *garmi*, the physician would be fully liable but for the immunity conferred upon him by rabbinic edict. In comparing dispensing medical advice with "informing" and categorizing such conduct as *garmi*, Rabbi Goldberg's theory is based upon the presumption that the specialist's advice will certainly be heeded, i.e., the nurse will obey his orders and the patient will fill the prescription, and is further predicated upon the premise that even an indirect act that will inevitably result in pecuniary harm constitutes actionable *garmi*. There are, however, grounds to question whether erroneously prescribing a medication, ordering an injection or counseling surgery generate liability even at the hands of Heaven. In point of fact, other than perhaps in the case of an order issued to a nurse, it is far from certain that there is a necessary causal relationship between the practitioner's advice and the

resultant harm since patients frequently seek second opinions or ignore medical advice.

Quite apart from the foregoing consideration, it would appear that the harm caused by a physician is not in the nature of *garmi*. The relevant paradigm is the case of a person who consults a money-changer (*shulhani*) with regard to the value of a coin proffered to him. A proficient *shulhani*, i.e., a master money-changer requiring no further training, who renders an erroneous opinion regarding the value of a coin is not liable for any loss incurred in acceptance of the coin since he has not been negligent in any way. There is a dispute between early-day authorities with regard to whether the money-changer incurs no liability even if the recipient of the coin expressly indicates that he is relying upon the money-changer's opinion.[71] The consensus of opinion is that there is no obligation even under such circumstances.[72] The same rule would apply to a proficient physician who makes a *bona fide* error in prescribing a medication or the like.

Most significantly, as explained by Rosh, *Bava Kamma* 9:13, liability by virtue of *garmi* is limited to situations in which the harm is immediately consequent upon performance of the culpable act. Since the money-changer's liability in terms of *garmi* is predicated upon the fact that the resultant damage is not only certain to occur but is also immediate, i.e., the proferred coin is immediately accepted in reliance upon the money-changer and the person who presents the coin has no further liability. Accordingly, no such liability would result from the writing of a prescription which must be taken to a pharmacy or from an order directed to a nurse in any situation in which the order is not carried out immediately.

Of course the issue is entirely theoretical since, even if the internist's referral to the surgeon or the physician's order to the nurse constitutes a form of *garmi*, any resulting liability is cancelled by virtue of the rabbinic decree promulgated *mipnei tikkun ha-olam*.

The liability of a nurse who administers an injection at the direction of a physician or of a surgeon who heeds the internist's diagnosis and performs an operation is a separate issue. It would certainly seem that according to the ruling of *Shulhan Arukh*, the nurse and the surgeon are culpable in the eyes of Heaven. Thus it would follow that both the physician and the nurse, as well as the internist and the surgeon, are equally liable, at least in the eyes of Heaven. Rabbi Goldberg, however, seems to imply that liability cannot be shared jointly by the physician and nurse or by both the internist and the surgeon.

It should also be noted that, according Rabbenu Nissim, it would appear that the nurse and the surgeon are not culpable since they are "coerced" by the advice they have received and upon which they have every right to rely. Thus, according to Rabbenu Nissim, under such circumstances the nurse or surgeon cannot be deemed liable. Rabbi Goldberg makes a different and more novel point in asserting that the actions of individuals such as the nurse or the surgeon who act upon the advice of a qualified professional are in the nature of an *ones gamur* for which, according to the opinion of *Tosafot*, there is no liability.

b) *Tashbaz' Ruling*

In his earlier-cited responsum, *Tashbaz* draws a distinction between physical intervention in the form of a surgical procedure or the like and the administration of medication, just as he drew such a distinction with regard to exile in instances of inadvertent manslaughter. In support of that distinction *Tashbaz* asserts that the term "*uman*" employed by the Tosefta denotes an artisan who employs a sharp instrument and hence all references in the Tosefta are to a surgeon (*rofeh uman*) who heals by means of "work of the hand" but that a physician who cures the sick by means of potions, laxatives or medicaments is not referred to by the appellation "*rofeh uman*." Thus the doctrine of liability formulated by the Tosefta is limited solely to a surgeon whose intervention results in misadventure but does not apply to a physician since the latter's ministration "does not enter into the realm of wounding that he be liable for damages. [Therefore] whether [he acts] unintentionally or intentionally and causes death or adds suffering to the sickness, [since] he intended to cure and did not intend to do harm, he is not liable even according to the laws of Heaven."

As explained earlier, the distinction drawn by *Tashbaz* reflects the halakhic notion of proximate cause.[73] A tortfeasor is liable only for damages that are a direct result of his act; he is not liable for damages he causes only indirectly. Damage to a limb or organ arising from "wounding," i.e., surgical incision or excision is clearly direct; harm caused by drugs or medications, even if administered directly by inoculation or the like, is regarded by *Tashbaz* as indirect.[74] Even those authorities who regard the harm caused by injection or ingestion of a drug to be the direct effect of that cause must concede that merely prescribing, or even handing a patient, a drug can be no more that a *gerama*. That conclusion is evident from the statement of the Gemara, *Bava Kamma* 47b, describing the act of placing a poison before an animal as a mere *gerama* with the result that, although a person causing such harm is liable "according to the laws of Heaven," a *bet din* cannot require compensation.

Tashbaz' distinction between a surgeon and a practitioner of internal medicine presents a number of difficulties. As noted earlier, the salient distinction between mere *gerama* and *garmi* is that in instances of *garmi*, despite the absence of proximate cause as defined by Halakhah, the resultant harm is certain to occur. Erroneous injection of a toxic substance, for example, should, in light of the previously cited comments of *Tosafot*, *Bava Batra* 26b, be treated no differently than an error committed in the course of surgery. *Tashbaz* may well have accepted the position of the early-day authorities who, because of a lack of proximate cause, regard even such harm to be in the category of unactionable *gerama*.[75]

A close reading of *Tasbaz*' comment "since [the physician] intended to heal and did not intend to harm," reveals that *Tashbaz* regards the physician to be free of liability for harm resulting from administration of medication only if the improper medication was administered in error. The implication of that statement is that if the physician intentionally administers a harmful medication he is indeed liable. However, as Rabbi Mordecai Elon, *Torah she-be-al Peh*, XVIII, 74, points out in questioning *Tashbaz*' comment, a tortfeasor is not liable even for intentional damage arising only indirectly from his act.

An even greater difficulty lies in the fact that a tortfeasor is liable in the eyes of Heaven even when the damages result from an act in the nature of *gerama*. Indeed, as recorded by Rema, *Hoshen Mishpat* 346:3, although the *bet din* is not empowered to order compensation directly and hence may not seize the tortfeasor's property, the *bet din* may nevertheless apply sanctions against the tortfeasor in the form of excommunication in order to prompt him to discharge the obligation that exists in the eyes of Heaven. *Tashbaz* does not at all explain why a physician should not be held accountable in the eyes of Heaven for malpractice in the form of *gerama*. This difficulty is noted by *Minhat Yizhak*, III, no. 104, sec. 1.

It seems to this writer that *Tashbaz*' position should be understood in light of the view expressed by Me'iri, *Bava Kamma* 56a. Me'iri maintains that liability "at the hands of Heaven" in instances of *gerama* is limited to situations in which the tortfeasor "intends to do harm." Thus, the physician, even if he has erred in his ministrations, certainly did not intend to cause harm and hence he incurs no liability even "at the hands of Heaven." Indeed, *Tashbaz* qualifies the scope of his ruling by describing the salutary intention of the physician to heal and adds the phrase "and he did not intend to do harm." If *Tashbaz* maintains, as did Me'iri before him, that liability for *gerama* "in the eyes of Heaven" is limited to situations in which there is intention to do harm, the incorporation of

that phrase seems to explain why the physician's act, unlike other forms of *gerama*, does not result in culpability in the eyes of Heaven.

R. Chaim Joseph David Azulai, *Birkei Yosef*, *Yoreh De'ah* 336:7, notes that, in affirming the physician's liability in the eyes of Heaven, both Ramban and *Shulhan Arukh* are apparently in disagreement with *Tashbaz*, since they do not in any way qualify or limit their assertion that the physician is liable in the eyes of Heaven. In light of the foregoing discussion it is not difficult to explain why those authorities maintain that the physician is liable in the eyes of Heaven even in instances of *gerama*. Moreover, there are numerous authorities who maintain that harm caused by administration of medication must be regarded as direct rather than as indirect.[76] Nevertheless, *Shevet ha-Levi*, IV, *Yoreh De'ah*, no. 151, comments that "it is difficult" to dispute *Tashbaz*' opinion or to rule contrary to the position of *Tashbaz*.[77]

VI. LIABILITY AS A BAILEE

R. Meir Auerbach, *Imrei Binah, II*, *Dinei Dayyanim*, no. 30, accepts *Tashbaz*' distinction insofar as tort liability is concerned in principle but does not agree that either the Tosefta or Ramban intended to draw such a distinction. Nevertheless, argues *Imrei Binah*, although in the absence of proximate cause there may be no tort liability, the physician is also a bailee and is liable for violation of his duties as a bailee. The rule with regard to an artisan is that an artisan who receives no compensation is a gratuitous bailee with regard to any property entrusted to him in the practice of his craft. However, as stated in the Mishnah, *Bava Mezi'a* 80b, if the artisan is compensated for his services, his status is that of a bailee for hire. A gratuitous bailee is liable only if he is negligent; a bailee for hire is liable for any loss except that which occurs through *ones*. *Imrei Binah* notes that physicians are generally compensated for their services. When compensated, writes *Imrei Binah*, a physician has the status of a bailee for hire.[78] Thus, even if he has not been negligent, the physician should be liable for any harm that he causes, even if he causes such harm only indirectly, unless the harm is in the nature of *ones*. In exempting the physician from financial liability, the Sages, *ipso facto*, exempted him not only from tort liability but also from liability as a bailee. However, since that exemption is only from liability imposed by a *bet din*, the physician remains liable in the eyes of Heaven even for damage caused indirectly, albeit not as a tortfeasor, but as a bailee.

Imrei Binah's thesis presents a number of difficulties:

1) A bailee for hire, as *Imrei Binah* notes in a different context, becomes liable only upon receiving payment in advance or upon taking custody of the bailment by means of formal *kinyan*, e.g., by means of lifting or moving the object. A physician enters into no such *kinyan* and is generally not paid for his services before they are rendered. That objection may be resolved on the basis of a comment of Ramban cited by *Nimukei Yosef*, *Bava Mezi'a* 94b. Ramban states that a *kinyan* is necessary solely in order to demonstrate that the bailed object has been accepted as a bailment by the bailee and that he has assumed the obligations of a bailee. An artisan who acquires the status of a bailee does so by commencing his labor; for the artisan, commencement of his work is, in effect, commencement of the bailment. Accordingly, the physician, if he has the status of a bailee, acquires that status immediately upon commencement of medical ministration.

2) As recorded in Exodus 22:14, a bailee is not liable in situations in which the bailor accompanies his property at the inception of the bailment and is himself in a position to participate in the safeguarding of his property. Granted that the patient has the status of a bailed item, the patient who is also the bailor, is physically present during treatment[79] and indeed is present at the time that the harm occurs.[80] That factor would serve to exonerate the physician from liability as a bailee.

3.) The most complex problem is *Imrei Binah*'s assumption that a human being can be bailed and that the obligation of a bailee can extend to a physician who assumes a duty of care vis-à-vis a patient. The general rule, recorded by Rambam, *Hilkhot Sekhirut* 2:1, is that a bailee incurs no disability with regard to real property, slaves or promissory notes. As will be shown, there are authorities who regard not only slaves but all human beings as not subject to bailment.

Although Ra'avad disagrees, Rambam, *Hilkhot Sekhirut* 2:3, maintains that a bailee, although exempt from liability in the event of damage resulting from other causes, nevertheless remains liable for negligence even with regard to real property, slaves and legal instruments. However, even according to Rambam, physicians might be held accountable according to the "laws of Heaven" only if the harm suffered by the patient results from the physician's negligence, whereas Ramban and *Shulhan Arukh* apparently assign such liability even in the absence of negligence.

Moreover, the status of a human being as a bailed object for purposes of liability under the laws of bailment is far from clear.[81] Among

early-day authorities, Rashi, *Kiddushin* 7a, s.v. *sheyesh lahem aharayut*, states clearly that all human beings have the halakhic status of real property in this regard.[82] However, *Tosafot*, *ad. locum*, s.v. *im ken*, followed by Ramban, Rashba and Ritva, *ad locum*, take issue with Rashi[83] and declare that the principle is limited to Canaanite slaves.[84]

Among latter-day authorities, R. Jonathan Eibeschutz, *Urim ve-Tumim*, *Tumim* 95:7, maintains that only slaves have the status of real property. Adopting a somewhat different position, *Shulhan Arukh, Hoshen Mishpat*, 227:19, implies that a Hebrew slave and an employee contracted for his services also have that status but that a freeman does not. However, *Shakh, Hoshen Mishpat* 95:17, rules in accordance with the view of Rashi in extending that status to all human beings. Hence, whether or not a patient has the status of real property and, consequently, whether a patient can or cannot be the subject of a bailee's liability is a matter of considerable controversy among both early-day and latter-day authorities.[85]

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The physician, far more so than the practitioner of any other profession, must maintain constant and uninterrupted vigilance. Any momentary lapse on his part can lead to disastrous consequences. The physician's responsibilities are awesome and indeed they strain the limits of human capability. He or she cannot possibly maintain ongoing vigilance without a firm and dedicated resolve to do so and even then the physician must rely upon divine assistance. As expressed in the final section of the "Daily Prayer of a Physician," attributed (probably spuriously) to Rambam, the physician must constantly pray:

> Illumine my mind that it recognize what presents itself and that it may comprehend what is absent or hidden. Let it not fail to see what is visible but do not permit it to arrogate to itself the power to see what cannot be seen, for delicate and indefinite are the bounds of the great art of caring for the lives and health of Your creatures. Let me never be absent-minded. May no strange thoughts divert my attention at the bedside of the sick or disturb my mind in its silent labors, for great and sacred are the thoughtful deliberations required to preserve the lives and health of Your creatures.[86]

NOTES

1. *Kol Shirei Rabbi Yehudah ha-Levi*, ed. Israel Zemorah, 2nd ed. (Tel Aviv, 5730), II, 227.
2. It is indeed the case that *Tosafot*, *Bava Kamma* 27b, *Bava Mezi'a* 82b and *Bava Batra* 93b, maintain that there is no liability in instances of *ones gamur*, i.e., in situations in which the harm is entirely unforeseeable. For a detailed discussion of the position of *Tosafot* and concurring authorities see *Ozar Mefarashei ha-Talmud*, *Bava Kamma*, II (Jerusalem, 5748), pp. 31-36 and accompanying notes. That exclusion is not applicable to medical ministration. *Tosafot*'s position is disputed by Ramban, *Milhamot ha-Shem*, *Bava Kamma* 29a, as well as in his commentary on *Bava Mezi'a* 82b and cited by *Shittah Mekubezet*, *Bava Mezi'a* 82b. For sources concurring in and elucidating Ramban's opinion see *Ozar Mefarashei ha-Talmud*, *Bava Kamma*, II, p. 33, note 123. For an analysis of Rambam's view see *Maggid Mishneh*, *Hilkhot Hovel u-Mazik* 1:11, 1:16, 6:1 and 6:3, as well as *Shakh*, *Hoshen Mishpat* 378:1. See also *Sema*, *Hoshen Mishpat* 378:2 and 421:8, as well as *Mahaneh Efrayim*, *Hilkhot Nizkei Mamon*, no. 5.
3. J. David Bleich, *Contemporary Halakhic Problems*, V (Southfield, Michigan, 2005), 33-35.
4. See *ibid*., pp. 35-37.
5. Rambam, *Hilkhot Melakhim* 10:22, codifies the rule that provides that in a controversy involving a non-Jew a Jewish litigant may claim any advantage accruing to him under applicable civil law. However, R. Akiva Eger, in his glosses to the Mishnah, *Bava Kamma* 1:3, sec. 11, and *Hazon Ish al ha-Rambam*, *Hilkhot Melakhim* 10:12, declare that this rule applies only to a defendant but not to a plaintiff seeking recovery. See also Rosh, *Bava Kamma* 1:19.
6. See the dispute between R. Isaac ben Sheshet, *Teshuvot Rivash*, no. 308, and R. David ibn Zimra, *Teshuvot Radvaz*, I, no. 797, regarding insurance of merchandise against loss at sea. The salient portions of those responsa are translated by Stephen M. Passamaneck, *Insurance in Rabbinic Law* (Chicago, 1974), pp. 33-41. Sources dealing with the issue of *asmakhta* as it relates to insurance contracts are also cited by R. Menachem Slae, *Ha-Bituah be-Halakhah* (Tel Aviv, 5740), pp. 79-82. That work also contains a valuable historical survey of the treatment of insurance in rabbinic literature as well as a discussion of a number of halakhic theories for enforcement of insurance contracts. See in particular pp. 72-78. In the English translation of that work by Bracha and Menachem Slae, *Insurance in the Halakhah* (Tel Aviv, 1982), this material is presented on pp. 98-113.
7. Cf., R. Zalman Nechemiah Goldberg, *Tehumin*, XIX (5759), 322.
8. See *Encyclopedia Talmudit*, VI (Jerusalem, 5714), 135.
9. There is a significant disagreement among early-day authorities with regard to the nature of the activity undertaken by the agent of the *bet din* that, when it results in unforeseen death, is not punishable by exile. Rambam, *Hilkhot Rozeah* 5:16, codifies the rule formulated in the Mishnah as applicable to a bailiff who seeks to compel a litigant to appear before the court.

Ra'avad, *ad locum*, disagrees and asserts that the reference in the Mishnah is to an agent of the court who administers the punishment of flogging. Rabbenu Yonatan of Lunel limits the agent's immunity from exile to situations in which the judges erred in ordering more than the appropriate number of lashes and the agent simply carried out their instruction. R. Jacob Reischer, *Teshuvot Shevut Ya'akov*, III, no. 140, understands Ra'avad as adopting that position as well. However, Ramban, *Makkot* 8a, apparently understands the reference to be to an agent of the *bet din* who administers the proper number of lashes as determined by the *bet din* in accordance with the transgressor's physical condition but who nevertheless causes the death of the transgressor. See also R. Jacob Ettlinger, *Arukh la-Ner*, *Makkot* 22b; R. Zevi Alexander Halperin, *Imrei ha-Zevi*, *Bava Kamma* 32b; and R. Yitzchak Ya'akov Weisz, *Teshuvot Minhat Yizhak*, III, no. 10, sec. 2.

10. The identical rule with regard to both a messenger of the court and a physician is also formulated in the Tosefta, *Bava Kamma* 9:3.
11. See also R. Samuel Schoppen, *Kos ha-Yeshu'ot*, *Makkot* 8a, who writes that there appears to be a controversy between Abba Saul and the anonymous author of the earlier statement.
12. Cf., R. Jacob Ettlinger, *Teshuvot Binyan Zion*, no. 111, who questions whether the physician's act is in the nature of a permissible *davar she'eino mitkhaven* (unintended effect) for which there can be no culpability and suggests that the Tosefta must either maintain that, by its nature, the physician's act is not a *davar she'eino mitkhaven* or that the Tosefta rejects the permissibilty of any *davar she-eino mitkhaven*.
13. R. Judah Ayash, *Matteh Yehudah*, *Yoreh De'ah* 336, advances the curious view that, in actuality, the culpability of a physician is no greater than that of a father or teacher and hence the exile referred to by the Tosefta and *Shulhan Arukh* is not statutory in nature but a voluntary undertaking "in order to satisfy the requirements of Heaven."
14. See *Kol Kitvei ha-Ramban*, ed. R. Bernard Chavel (Jerusalem, 5724), II, 41.
15. See also *Ozar Mefarashei ha-Talmud*, *Makkot*, p. 350, note 12. R. David Pardo, *Shoshanim le-David*, *Makkot* 8a, points out that the first rule enumerated in the Mishnah and Abba Saul's rule are derived from different words in the verse. The first rule is derived from the word "*ya'ar*" while, as explained in the Gemara, *Makkot* 8a, Abba Saul derives his rule from the word "*asher*" that, in this context, is rendered as "if" and thus, according to Abbu Saul, the verse should be rendered "and if a person goes with his friend into a forest." The term "if" in this context is understood as having the connotation that the slayer's presence is discretionary. *Shoshanim le-David* further points out that Abba Saul's rule is subsumed in the Mishnah's earlier statement: Culpability is assessed only if the slayer had no right to be in the victim's domain. The individual seeking to fulfill a *mizvah* has an obligation to enter the domain of the victim. On the basis of that argument it should follow that Abba Saul may indeed disagree in rejecting the broader exclusion of the author of the first statement of the Mishnah but that Abba Saul's rule is accepted by all: If permission of the householder to be present in his courtyard is sufficient to exonerate the slayer from the penalty of exile, *a fortiori*, divine dispensation to engage in an act that

results in misadventure must be sufficient to exonerate a person who does so from the penalty of exile.

16. This possible reading of *Or Sameah* seems to have eluded the editors of *Ozar Mefarashei ha-Talmud*, *Makkot*, p. 351 and p. 351, note 19, who cite *Or Sameah* as postulating a controversy within the Mishnah.
17. See particularly, *Teshuvot Hatam Sofer*, *Orah Hayyim*, no. 154 and R. Shlomoh Yosef Zevin, *Ha-Mo'adim be-Halakhah* (Tel Aviv, 5720), p. 247. R. Chaim Joseph David Azulai, *Shem ha-Gedolim*, II, *Ma'arekehet Sefarim*, sec. 127, opines that the work was authored by Rabbenu Asher but that portions of the text reflect tampering in the form of interpolations and modifications. Cf., R. Joseph Saul Nathanson, *Divrei Sha'ul*, *Yoreh De'ah* 336:1 and R. Yechezkel Abramsky, *Hazon Yehezkel*, *Bava Kamma* 9:3. In a posthumously published article that appeared in *No'am*, II (5719), 317-324, R. Yerucham Fishel Perla presents a critical survey of all prior discussions of the authenticity of *Besamim Rosh*, including discussions that appeared in the periodical literature, and provides his own evidence of the spurious nature of *Besamim Rosh.*
18. Cf., however, *Teshuvot Hatam Sofer*, *Orah Hayyim*, no. 177, who remarks that "neither the father nor the teacher nor the agent of the *bet din* has fulfilled his *mizvah*."
19. Students of Plato will hear in these words an echo of Plato's comments in his *Republic*, I, 340. Plato remarks that at the moment at which a craftsman's knowledge fails him he is no longer a craftsman. By way of example Plato comments that, at the moment that a physician makes a mistake in treating his patient, he cannot, properly speaking, be called a physician.
20. See R. Gershon Koblentz, *Kiryat Hannah*, no. 22, who distinguishes between chastisement that may legitimately be administrated by a father and force used by a teacher to correct a student. The latter may utilize only "a small strap" in order to impose discipline whereas the father, whose corrections go beyond assuring that the child is attentive, may engage in corporal punishment. Hence, the Mishnah speaks of a father who "beats" his son in contradistinction to a teacher who may only "strike" a pupil. According to *Kiryat Hannah*, a teacher who employs excessive force does not therein fulfill a *mizvah* and hence, if the child dies as a result, the teacher is exiled. That position is consistent with the comment of *Besamim Rosh*; cf., however, R. Joshua of Kutna, *Teshuvot Yeshu'ot Yisra'el*, *Hoshen Mishpat* 25:3, cited *infra*, note 22.

    For a fuller discussion of appropriate versus inappropriate forms of chastisement see R. Ya'akov Meir Stern, *Imrei Ya'akov* (Bnei Brak, 5756), *Bi'urim*, pp. 39-43.
21. See *infra*, notes 47 and 48 and accompanying text.
22. *Teshuvot Yeshu'ot Yisra'el*, *Hoshen Mishpat* 25:3, formulates the distinction in a somewhat different manner: The father and the teacher commenced their act in an entirely legitimate manner; only later, in not curtailing the chastisement, did they apply excessive force. Hence, they are not punished by exile. In effect, asserts *Yeshu'ot Yisra'el*, since the battery is privileged, they are immune to punishment despite their abuse of the privilege. The physician, on the other hand, erred in the first instance in attempting to amputate a limb or in making an incision. From its very inception, his act

served to fulfill no *mizvah* and hence was not privileged. It would seem to follow that, according to *Yeshu'ot Yisra'el*, the case of a surgeon who correctly commences a procedure but, for example, later negligently nicks an artery and thereby causes the death of his patient is analogous to the case of the father and the teacher and, in such instances, the physician is not punished by exile. R. Shlomoh Zalman Auerbach, as cited by Abraham S. Abraham, *Nishmat Avraham*, *Yoreh De'ah* 336:1, note 7, makes much the same point in suggesting that the physician is liable to exile only if his act was not at all appropriate, e.g., he made a surgical incision in the wrong site, in which case he was not at all engaged in a *mizvah*. If, however, he commences a procedure that is indeed therapeutic but errs in assessing its execution his situation is comparable to that of a father or teacher who errs in assessing the proper measure of chastisement.

23. The third example of an individual who is forced to go into exile offered by the Tosefta, i.e., a messenger of the *bet din* who causes death, remains somewhat problematic since the act of the agent of the *bet din* seems to be analogous to that of a father or a teacher and indeed Abba Saul, as recorded in the Mishnah, explicitly exempts such an official from exile. Nevertheless, the Tosefta may be understood as referring to an agent of the *bet din* who erroneously administers more than the prescribed number of lashes. In no way does the additional stroke of the lash constitute fulfillment of a duty. Accordingly, Rambam, *Hilkhot Sanhedrin* 16:2, rules that under such circumstances the messenger is liable to the punishment of exile. See *Ozar Mefarashei ha-Talmud*, p. 351, note 20. Rambam, *Hilkhot Rozeah* 5:5, understands Abba Saul's exemption of the agent of the *bet din* from exile as applying to the case of a messenger who uses physical force to compel the appearance of a person summoned by the *bet din*. That situation is comparable to the case of the father or teacher in that the messenger is indeed properly discharging a duty incumbent upon him.
24. See this writer's "The Obligation to Heal in the Judaic Tradition," *Jewish Bioethics*, ed. Fred Rosner and J. David Bleich, 2nd edition (New York, 2000), pp. 22-30.
25. *Kol Kitvei ha-Ramban*, ed. R. Bernard Chavel (Jerusalem, 5724), II, 42.
26. *Ibid.*, p. 41.
27. *Ibid.*, p. 43.
28. Cf., R. Zalman Nechemiah Goldberg, *Tehumin*, XIX, 318-320. Rabbi Goldberg accepts the notion that liability "at the hands of Heaven" is triggered by awareness. In this writer's opinion that thesis is unsubstantiated and counterintuitive. Moreover, it fails to explain how the concerns of the judge or the physician are thereby assuaged.
29. In explaining why false witnesses whose testimony leads not only to conviction but to actual execution are not put to death, Ramban, *Commentary on the Bible*, Deuteronomy 19:19, asserts that God does not abandon the totally guiltless and, moreover, God Himself participates in the judgment of the court.
30. Regarding the obligation of a qualified scholar not to demur when requested to serve as a *dayyan* see R. Moses Sofer, *Teshuvot Hatam Sofer*, *Hoshen Mishpat*, no. 169 and this writer's elucidation of that obligation in *Or ha-Mizrah*, vol. 49, no. 3-5 (Nisan 5764), pp. 13-14.

31. The literal import of the verse is an admonition no to impose more than the prescribed number of lashes in punishing a miscreant. According to the Oral Law tradition the prohibition applies *a fortiori* to beating or "wounding" an innocent person. See Rashi, Deuteronomy 25:3; *Sanhedrin* 85a and Rashi, *ad locum*, s.v. *ve-aher*; and Rambam, *Hilkhot Hoval u-Mazik* 5:1.
32. This aphorism appears in R. Moshe Hagiz' letter of approbation to R. Shlomoh Zalman Henne's work on grammar, *Sha'arei Torah* (Hamburg, 5478).
33. For a detailed survey of the circumstances in which a *dayyan* is liable for judicial error see *Encyclopedia Talmudit*, XX (Jerusalem, 5751), 620-637.
34. See *Nimukei Yosef*, *Bava Mezi'a* 67b and *Pithei Teshuvah*, *Hoshen Mishpat* 28:6. For a survey of the various opinions regarding this question see *Encyclopedia Talmudit*, VII (Jerusalem, 5716), 395-396. It is indeed the case that Ramban, as cited by *Teshuvot Rivash*, no. 392, rejects self-help as a remedy with regard to an obligation "at the hands of Heaven." However, Ramban's comment is limited a situation in which the plaintiff asserts a claim certain and the defendant professes ignorance. In such a situation the nature of the obligation "at the hands of Heaven" is to abjure tainted funds. But if the claim is false there can be no obligation even "at the hands of Heaven." Since in such a case no evidence is offered in support of the claim, Ramban maintains that self-help is not available. It cannot be deduced from that position that self-help is not a legitimate remedy in situations is which the obligation in the eyes of Heaven is a certainty.

    It is further arguable that the opinion of the authorities who maintain that self-help is of no avail is limited to situations in which the obligation, by virtue of its nature, is only in the eyes of Heaven but not to the situation addressed by Ramban in which, according to the analysis presented herein, the claim is fully actionable according to biblical law but the victim is non-suited by rabbinic decree "for the benefit of the universe." In such instances it might well be maintained that the rabbinic decree merely constrains the *bet din* but does not extinguish underlying liability and hence self-help may be warranted.
35. See R. Jacob Reischer, *Teshuvot Shevut Ya'akov*, I, no. 146, cited by *Pithei Teshuvah*, *Hoshen Mishpat* 28:6.
36. See *Makkot* 2b, 8b and 11b and *Ketubot* 36b and 38a. See also the early-day commentators cited in *Encyclopedia Talmudit*, VI, 123, note 16.
37. See *Ner Aharon*, no. 6.
38. See Ritva, *Makkot* 2b.
39. Indeed, Maharsha, *Hiddushei Aggadot*, *Makkot* 10b, asserts that this is the sole purpose of exile. For sources raising obvious objections to the *Maharsha*'s position see *Encyclopedia Talmudit*, VII, 123, note 15. See also *Or Sameah*, *Hilkhot Rozeah* 6:12.
40. The blood-avenger lacks licence to execute a father or teacher who inadvertently causes the death of a child because, in committing the ill-fated act, they were actually engaged in fulfilling a *mizvah*. See *supra*, note 18, and accompanying text. The physician who inadvertently causes harm intends to perform a *mizvah* but does not actually do so. See, however, *infra*, section III.

41. This analysis assumes that the blood-avenger has license to seek vengeance but is not engaged in a form of extra-judicial punishment. Cf., however, *Or Sameah*, *Hilkhot Melakhim* 3:10.

    An interesting question presents itself in the case of a physician who inadvertently causes the death of a Canaanite slave. Canaanite slaves have no halakhically recognized biological relatives; hence a Canaanite slave can have no blood-avenger. If, as Ramban is herein understood, the physician is not subject to punishment and requires no expiation, a physician who causes the death of a Canaanite slave should be exempt from exile since he is not at risk of vengeance at the hands of the blood-avenger. Cf., *Or Sameah*, *Hilkhot Rozeah* 6:12.

    It cannot be countered that the regulations pertaining to exile are rules of general application that do not admit exceptions. Although it is the case that they do not admit of *ad hoc* exceptions, e.g., in the case of a particular individual, such as a proselyte who does not happen to have a blood relative, they do admit of exceptions in instances in which a particular concern cannot possibly be manifest. For example, a resident-alien is not subject to exile because he is not thereby granted immunity from the blood-avenger. Nevertheless, as recorded by Rambam, *Hilkhot Rozeah* 5:3, a resident-alien who causes the death of a Canaanite slave is exiled even though the Canaanite slave cannot possible have a blood-avenger; in that instance, exile is required for purposes of expiation. See *Or Sameah*, *Hilkhot Rozeah* 6:12. In light of the herein presented understanding of Ramban, it stands to reason that a physician who causes the death of a Canaanite slave should be exempt from exile since he requires neither expiation nor refuge from the blood-avenger.
42. Nor does it flow necessarily from the distinction drawn by *Yeshu'ot Yisra'el* and R. Shlomoh Zalman Auerbach, cited *supra*, note 21. Nevertheless, Rabbi Auerbach asserts that a physician is liable to exile only if the patient's death results from an error in judgment. See *Nishmat Avraham*, *Yoreh De'ah* 376:1, note 1.
43. See R. Chaim Ozer Grodzinski, *Teshuvot Ahi'ezer*, II, no. 16, sec. 6, with regard to whether or not there must be a fifty percent chance of survival in order to justify the risk.
44. See *infra*, section VI.
45. See *infra*, note 54 and accompanying text.
46. Cf., the view of *Matteh Yehudah*, *Yoreh De'ah* 336, discussed *supra*, note 13.
47. See *Teshuvot Minhat Yizhak*, III, no. 104, sec. 1, who understands *Tashbaz'* distinction as reflecting this consideration. However, R. Yitzchak Zilberstein, *Halakhah u-Refu'ah*, ed. R. Moshe Hershler, II (Jerusalem, 5741), 288, [reprinted with minor additions in *Emek Halakhah*: *Assia*, ed. R. Mordecai Halperin (Jerusalem, 5746), p. 131], understands the distinction as reflecting an entirely different concept. Rabbi Zilberstein asserts that *Tashbaz* is distinguishing between *bone fide* error and negligence: the internist diagnoses and provides treatment in accordance with his assessment of the malady; the surgeon of whom *Tashbaz* speaks harms the patient as a result of negligent cutting. Hence, he asserts, a surgeon cannot be held culpable for honest misdiagnosis that leads him to perform an

unnecessary surgical procedure. If so, *Tashbaz'* comments are simply the harbinger of the position later advanced by *Arukh ha-Shulhan*, Rabbi Auerbach and *Iggerot Mosheh*. Needless to say, if such a distinction were indeed intended by *Tashbaz* he would have been expected expressly to indicate that the surgeon is not liable in any and all circumstances.

48. R. Joseph Chaim David Azulai, *Birkei Yosef*, *Yoreh De'ah* 336:8, cites *Tashbaz*' ruling but notes that neither Ramban nor *Tur* nor *Shulhan Arukh* makes such a distinction and suggests that *Tashbaz*' position is open to rebuttal. A point similar to that of *Tashbaz* is made by R. Jacob Schorr in a responsum published in *Teshuvot Ge'onei Batra'i* (Prague, 5576), no. 6, a compendium edited by *Sha'agat Aryeh*. R. Judah Ayash, *Teshuvot Bet Yehudah*, *Even ha-Ezer*, no. 14, maintains that abortion induced by chemical potions is rabbinically forbidden whereas direct destruction of the fetus is biblically proscribed. See also R. Ovadiah Yosef, *Yabi'a Omer*, IV, *Even ha-Ezer*, no. 1, sec. 5. Cf., R. Eliezer Waldenberg, *Ziz Eli'ezer*, VIII, no. 36, who fails to make this distinction but who indicates elsewhere, *Ziz Eli'ezer*, IX, no. 51, *sha'ar* 3, chap. 3, sec. 11 and *sikum*, sec. 16, that, when termination of pregnancy is permissible, it is preferable to induce abortion by chemical means.
49. Cf., *Teshuvot Minhat Yizhak*, III, no. 104, sec. 1, who suggests that *Hatam Sofer* sought to exclude the possibility of some other supervening cause of death. *Minhat Yizhak*'s further suggestion that an act of *garmi* constitutes capital homicide is rather novel.
50. See *Teshuvot Minhat Yizhak*, III, no. 104, sec. 4.

    Hatam Sofer may perhaps be understood as accepting the view postulated by *Arukh ha-Shulhan* to the effect that the physician is subject to exile only in cases of negligence. See Rabbi Zilberstein, *Halakha u-Refu'ah*, p. 293 and *Emek Halakhah* p. 135. However, the terminology employed by *Hatam Sofer*, *viz.*, "for indeed the Sages exempted a physician who causes the death of a patient" would seem to indicate an explicit, rather than an inferential, exemption.

    R. Zevi Spitz, *Mishpetei ha-Torah*, I, no.12, note 3, seems to follow *Arukh ha-Shulhan* is assuming that a physician is liable to exile only if he is negligent. He then proceeds to argue that a physician is held to a higher standard of care than is a layman, *viz.*, while treating his patient the physician must remain calm and collected. Hence a physician who panics or acts precipitously is liable to exile whereas the woman in question was exonerated by *Hatam Sofer*, claims Rabbi Spitz, because her state of excitement rendered her act non-negligent in nature. It should be noted that *Rav Pe'alim* pointedly states that the woman, who was surely aware of the presence of the poisonous substance in proximity to the whiskey, was negligent in not inspecting the flask. Moreover, Halakhah does not follow community standards in assessing negligence. If panic vitiates negligence, it does so for a physician no less so than for a layman. In addition, Rabbi Spitz overlooks the most significant point, *viz.*, in *Teshuvot Hatam Sofer*, *Hoshen Mishpat*, no. 184, *Hatam Sofer* declares that even a physician is exempt from exile.
51. R. Menachem Azariah Meir Castelenuovo, *Misgeret ha-Shulhan*, *Yoreh De'ah* 336:1, declares that only if the physician "errs" is he exonerated but

if he has been negligent in any manner he is culpable because "negligence is close to intent."

52. The contention of R. Moshe Ze'ev Zorger, *Va-Yashev Mosheh*, II, no. 8 sec. 2, that the concept "*mipnei tikkun ha-olam*" is adduced by the Tosefta, not to explain conferral of immunity upon the physician in instances of negligence, but to explain why there is actionable liability in cases of purposeful malpractice is untenable. *Va-Yashev Mosheh* suggests that the harm caused by the physician is a *hezek she-eino nikkar*, i.e., the harm is not physically perceivable as, for example, is the case with regard to damage inflicted in defiling a foodstuff. Harms of that nature are not actionable other than on the basis of rabbinic decree. That principle cannot be applied in instances of malpractice since, assuredly, physical harm resulting from malpractice is recognizable. Cf., R. Mordecai Elon, *Torah she-be-al Peh*, XVIII (Jerusalem, 5737), 75.
53. *Misgeret ha-Shulhan*, *Yoreh De'ah* 336:1, similarly declares that only if the physician "errs" is he exonerated but if he has been "negligent in any manner" he is liable because "negligence is close to intent." See *supra*, note 51. *Misgeret ha-Shulhan* seems to assert that *Tashbaz* would concede that, if the physician made a factual error because of failure to master the appropriate medical information, the physician is liable. It would follow that *Misgeret ha-Shulhan* understands gross negligence to be included in *Tashaz*' concept of intentional harm but has a broader view of the definition of gross negligence than is found in other sources. According to *Misgeret ha- Shulhan* the concept includes not only carelessness in performing an act but also undertaking an act one is not qualified to perform.
54. *Shevet ha-Levi*'s understanding of *Tashbaz* is probably also shared by R. Chaim Joseph David Azulai, *Tov Ayin*, no. 9, sec. 8. *Tov Ayin* quotes *Tashbaz* and comments that, according to all authorities, it is possible that, if the physician did not properly diagnose the illness and therefore prescribed a drug that caused the patient's death, he is liable "because it was possible for him to reflect and to be accurate." *Tov Ayin* apparently understands the "willfulness" to which *Tashbaz* refers as reflection of a rather broad concept. Conceptually, however, it is readily understandable that the Sages did not seek to excuse the physician from liability in instances of gross negligence.
55. Cf., *Va-Yashev Mosheh*, II, no. 8, sec. 3, who take issue with *Shevet ha-Levi* and asserts that the phrase "more than is proper" connotes *hitrashlut*, i.e., laziness or inattention.
56. In all cases in which the physician denies negligence there is a significant question with regard to which party bears the burden of proof. Does the patient have the burden in conformity with the general rule that burden of proof is on the plaintiff or, since the act has certainly been committed, is absence of negligence merely an affirmative defense with the burden of proof upon the putative tortfeasor? See *Olat Shmu'el*, no.73; R. Shlomoh Heyman, *Hiddushei Rabbi Shlomoh*, II, nos. 14-15; *Hazon Ish*, *Bava Kamma* 7:18 and R. Mordecai Elon, *Torah she-be-al Peh*, XVIII, 71-73 and 75.
57. See also *Ramat Rahel*, no. 22.
58. See *ibid.*, secs. 2 and 5.

59. Cf., however, *infra*, section VI.
60. See Rabbi Zilberstein, *Halakhah u-Refu'ah*, II, 125.
    Rabbi Mordecai Elon, *Torah she-be-al Peh*, XVIII, 73f., develops a theory according to which Ramban would regard an artisan who is compensated for his services as exempt only from liability for damage to property but not from harm to another individual's person. However, Rabbi Elon does not support that theory with citation of precedent or evidence from earlier sources.
61. See *supra*, note 19.
62. R. Menachem ben Zerah, *Tzeidah la-Derekh, ma'amar* 4, *klal* 2, chapter 2, interprets the Tosefta in a manner that dispels any contradiction to the position of Rabbenu Nissim. *Tzeidah la-Derekh* understands the comment of the Tosefta, *Bava Kamma* 6:6, declaring that the judgment of the physician is "delivered to Heaven" as restricted to a physician who, although licensed by the *bet din*, is, in reality, unqualified to practice medicine. Presumably, that individual was licensed by the *bet din* because the *bet din* erroneously believed him to be a qualified practitioner. The same position is espoused by R. Moses Mat of Premishla (Przemysl) in his *Matteh Mosheh*, part V, chapter 3. According to this view, it is only an unqualified physician who, although exonerated by the *bet din* because of his licensure, remains guilty in the eyes of Heaven whereas a qualified and properly licensed physician is absolved from liability even in the eyes of Heaven if he causes damage inadvertently. *Ramat Rahel*, no. 23, sec. 3, rather implausably suggests that this position can be read into the words of *Shulhan Arukh* as well.
63. *Tosafot* cannot be understood as accepting the notion that "his heart coerced him" as constituting, not simply an *ones,* but an *ones gamur* for which there is no liability since, were that so, there would be no liability even "at the hands of Heaven" as posited by the Tosefta.
64. *Divrei Sha'ul*, *Yoreh De'ah* 336:1, attempts to show that Ramban, as cited in Ran's commentary on *Rif*, contradicts the position Ramban espouses in his *Torat ha-Adam* and is in agreement with Rabbenu Nissim's view. However, as shown by *Ziz Eli'ezer*, IV, no. 13, sec. 3, *Divrei Sha'ul*'s analysis is not compelling.
65. See *Ziz Eli'ezer*, IV, no. 13, sec. 3.
66. See R. Eliezer Waldenberg, *Ramat Rahel*, no. 23, sec. 2.
67. See *Tov Ayin*, no. 9, sec. 8, cited *supra*, note 54.
68. Of course, as shown earlier, according to *Hazon Yehezkel*'s understanding of the Tosefta, the physician is liable for gross negligence even according to the normative view of the Tosefta and *Shulhan Arukh.*
69. For a survey of the various opinions regarding this question see *Encyclopedia Talmudit*, VI, 461ff.
70. The Tosefta, *Bava Kamma* 6:5, declares that a person who pours poison down the throat of an animal is not held liable for damages by a *bet din. Hasdei David*, in his commentary *ad locum*, explains that the Tosefta, contrary to the position of *Tosafot*, maintains that there is no liability for indirect damages even in cases of *garmi*. The inference is that direct injection of a deleterious substance by a physician is in the category of *garmi* and, according to *Tosafot*, the physician would be culpable. See *Minhat Yizhak*,

III, no. 104, sec. 1.

71. See *Hagahot Asheri*, *Bava Kamma* 9:18.
72. See *Shiltei Gibborim*, *Bava Kamma* 99b. However, a *shulhani* who receives a fee for his services is liable as a bailee for hire. See *Shulhan Arukh*, *Hoshen Mishpat* 306:6.
73. See *supra* note 47 and accompanying text. Cf., R. Yitzchak Zilberstein's analysis of *Tashbaz* discussed in that note.
74. See *supra*, note 47 and accompanying text. The incredulity voiced by *Ziz Eli'ezer*, IV, no. 13, sec. 3, in the form of a rhetorical question, "If someone administers a poisonous drink to his fellow and causes him to die thereby, shall he not be culpable for murder?" is understandable but misplaced when analyzed in terms of the distinction between proximate cause and *gerama* as formulated by many halakhic authorities. Cf., however, *supra* note 70.
75. See *Encyclopedia Talmudit*, VI, 464-467.
76. See *supra*, note 39 and accompanying text was well as *Ziz Eli'ezer*, IV, no. 13, sec. 2. See also *Imrei Binah*, II, *Dinei Dayyanim*, no. 30, who remarks that he sees no difference between "wounding by means of iron or by means of a compress or some other remedy."
77. *Shevet ha-Levi* cites *Tashbaz*' employment of the phrase "for [the physician] has only that which his eyes see" in support of a caveat to the effect that *Tashbaz* ruling does not apply in situations in which the error would have been avoided had an x-ray examination been undertaken. However, that conclusion is simply unwarranted. Cf., *Va-Yashev Mosheh*, II, no. 8, sec. 3. *Shevet ha-Levi*'s comment might be cogent in elucidating Rabbenu Nissim's position but for the fact that a *bona fide* error in deciding that x-rays are superfluous (and, if so, to be avoided for sound medical reasons) is also within the category of "his heart compelled him."
78. It may be argued that even a physician who receives no remuneration for his services has the status of a bailee for hire. The Gemara (*Bava Kamma* 56b; *Bava Mezi'a* 29a and 82a; *Shevu'ot* 44a; and *Nedarim* 33b) records a controversy between Rabbah and Rav Yosef with regard to whether a person engaged in restoring lost property has the status of a gratuitous bailee or of a bailee for hire. Rav Yosef maintains that since the finder is engaged in fulfilling a *mizvah* he is exempt from discharging other obligations and hence enjoys the tangible benefit of not being required to bestow even minimal alms upon a mendicant. That dispute is mirrored in a controversy recorded by *Shulhan Arukh* and Rema, *Hoshen Mishpat* 267:16.

    The Gemara, *Sanhedrin* 73a, declares that the obligation to restore lost property entails, *a fortiori*, an obligation to prevent loss of life. Rambam, *Commentary on the Mishnah*, *Nedarim* 4:4, states that a physician is obligated to treat a patient by virtue of that commandment. Hence, it should follow that a physician, assuming he is a bailee, is similarly exempt from the *mizvah* of charity while treating patients. Therefore, according to the earlier-cited opinion with regard to the status of the finder of lost property, he should have the status of a bailee for hire even if he is not compensated for his services.

Similarly, although *Imrei Binah* presents a detailed analysis of the category of bailment ascribed to a *dayyan*, he fails to analyze the possible status of every physician as a bailee for hire. One argument made by *Imrei Binah* with regard to a *dayyan*, *viz.*, that while committing an error he performs no *mizvah* and hence is not exempt from the *mizvah* of charity may be applicable to the physician as well. Cf., *supra*, note 18.

79. As stated by Ra'avad in a gloss to a ruling of Rambam, *Hilkhot Sekhirut* 2:1, presence of the owner does not serve to exonerate the bailee from liability in tort. This is true despite the ostensibly contradictory ruling of Ra'avad, *Hilkhot Ishut* 21:9, declaring that, by virtue of the husband's presence in the home, a housewife is exempt from liability for household utensils that she may break. The housewife, however, is exempt from tort liability because she has the status of an artisan and an artisan who labors with permission of his or her client is not liable in tort for unintentional damage. See *Teshuvot Rabbi Eli'ezer*, no. 2. Cf., *Mahaneh Efrayim*, *Hilkhot Shomrim*, no. 39.
80. See R. Mordecai Elon, *Torah she-be-al Peh*, XVIII, 76.
81. See the discussion of this issue by R. Moshe Bleich, "The Halakha Corner: A School's Liability for a Student's Injury," *Ten Da'at*, vol. X, no. 1 (Spring, 1997), p. 79, note 1.
82. For additional halakhic ramifications of such classification see *Encyclopedia Talmudit*, I, 2nd ed. (Jerusalem, 5733), 160-161.
83. See, also Rashba, *Shevu'ot* 42a and *Maggid Mishnah*, *Hilkhot To'en ve-Nit'an* 5:12.
84. For further analysis of the positions of Rashi and *Tosafot* see *Sha'ar ha-Melekh, Hilkhot To'en ve-Nit'an* 5:2. *Shakh*, *Hoshen Mishpat* 95:18, marshals sources in support of each of these contradictory views but concludes by affirming Rashi's position that all human beings have the status of real property. An opposing conclusion is reached by R. Jonathan Eibeschutz, *Urim ve-Tumim*, *Tumim* 95:7.

    It should be noted that R. Akiva Eger, in his glosses to the Palestinian Talmud at the beginning of the seventh chapter of *Bava Kamma*, accepts the view of *Tosafot* to the effect that a Canaanite slave has the status of real property. Cf., however, *Or Sameah*, *Hilkhot To'en ve-Nit'an* 5:2. It should also be noted that R. Akiva Eger in his glosses to Yoreh De'ah 6:2 and in his responsa, *Teshuvot R. Akiva Eger*, no. 51, upon analyzing the ruling of *Shulhan Arukh*, arrives at a conclusion that is at variance with that of *Shakh* and maintains that only a Canaanite slave has the status of real property. Cf., *Or Sameah*, *Hilkhot Gerushin* 1:6, who resolves the difficulties identified by R. Akiva Eger in a different manner. For an analysis of the parameters and limitation of the parallels (*hekesh*) between an *eved* and real property see R. Chaim Soloveichik, *Hiddushei ha-Grah al ha-Rambam*, *Hilkhot Geneivah ve-Aveidah* 9:1 and Rabbi Leib Mallen, *Hiddushei Rav Aryeh Leib*, I, no. 62.
85. See, R. Ya'akov Y. Blau, *Pithei Hoshen*, II, *Hilkhot Pikadon u-She'elah* 1:21, note 49.
86. Translated by Harry Friedenwald, *The Jews and Medicine* (Baltimore, 1944), I, 29.