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SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

Copyright

Common law recognizes an author's proprietary interest in his work and protects him against unauthorized publication. Copyright laws in virtually all countries spell out an author's rights subsequent to publication, and indicate when and under what circumstances a published work enters the public domain. Jewish law with regard to an author's proprietary interest in his published or unpublished work is far from unequivocal. A survey of the literature on this topic is presented by Rabbi Samuel Rubenstein in the 5737 issue of *Torah she-be'al Peh*. This topic is also the subject of a monograph by Rabbi Nahum Rakover entitled *Mekorot le-Ikaron Zekhut ha-Yotsrim*, published by the Ministry of Justice of the State of Israel (Jerusalem, 5730).

The earliest references to this matter in rabbinic literature focus upon ascription of authorship rather than upon proprietary rights and the concern expressed is for recognition of intellectual prowess rather than protection of pecuniary interests. Thus *Avot* 6:6 declares that one who repeats a *halakhah* or insight in the name of its original exponent brings salvation to the world. This doctrine is supported by the verse ". . . and Esther told the king in the name of Mordecai" (Esther 2:22). Esther's report to Ahasuerus in the name of Mordecai set in motion a train of events which led to the salvation of the Jewish people. An even stronger statement establishing an absolute obligation to acknowledge the source of scholarly insights is found in a midrashic statement recorded in *Tanhuma, Parashat Bamidbar*, 22, and in *Yalkut Shimoni, Proverbs* 22:22, and cited by *Magen Avraham, Orah Hayyim* 156:2: "One who does not repeat a matter in the name of the person who said it transgresses the negative commandment 'Rob not the weak because he is poor (Proverbs 22:22).' "

Nevertheless, when proper credit is given, permission need not be sought to repeat the insights of a scholar. The Tosefta, *Baba Kamma* 7:3, speaks of such conduct as "theft" but as being a meritorious practice nonetheless. The Tosefta declares, "But one who stealthily places himself behind a scholar and then goes and teaches [the scholar's] lesson, even though he is called a thief, acquires merit for himself as it is said 'They do not despise a thief if he steals to satisfy his soul (Proverbs 7:30).' In the end he will be appointed an official over the community and will bring merit upon the multitude and merit upon himself." *Shakh, Hoshen Mishpat* 292:35, cites this source as providing justification, not simply for freely quoting a scholar's novellae, but as establishing license for copying them for personal use without permission. It would appear to this writer that these sources also provide justification for recording Torah lectures without obtaining prior permission of the lecturer. Indeed, the lecturer would not ordinarily have justifiable grounds upon which to withhold such permission. [See also R. Abraham Price, *Sefer Hasidim im Mishnat Avraham*, II, 75.] (See note on pg. 360.)

Nevertheless, *Teshuvot ha-Rif*, no. 133, cited by *Teshuvot ha-Rashba*, VI, no. 286, rules that it is forbidden to appropriate a scholarly work for purposes

Tradition, 19(4), Winter 1981

of reproduction. *Sedei Hemed, Pe'at ha-Sadeh, ma'arekhet ha-gimel*, no. 5, cites a scholar who deemed *Teshuvot ha-Rif* to be in contradiction to the earlier cited statement of the Tosefta. It would appear, however, that the Tosefta can be adduced only in support of permission to appropriate the scholarly content of a work but not to steal the book itself. A scholar lacks title to his scholarly insights but certainly does retain title over his manuscripts. No material object may be removed from the possession of its owner without permission. Such removal, even with intention to return the object, constitutes a theft. Indeed, *Shakh* applies the Tosefta in permitting the copying of a manuscript in a situation in which the manuscript was entrusted to another scholar for safekeeping. Accordingly, it would appear that reproduction of a manuscript can be sanctioned only when no act of theft is involved with regard to the manuscript itself. [Cf., *Teshuvot Bet Yitshak, Yoreh De-ah*, II, no. 75, sec. 3.]

As has been shown Judaism fails to recognize a right of privacy with regard to scholarly productivity. Indeed, there are grounds upon which it may be argued that a Torah scholar may be compelled to make his work available to others. Rema, *Hoshen Mishpat* 292:30, rules that, where books are not readily available, owners of volumes required for Torah study may be compelled by the *Bet Din* to make their personal libraries available to others without charge. The *Bet Din* may exercise this power in order to prevent neglect of Torah study. Arguably, the same consideration would augur in favor of enabling a *Bet Din* to compel a Torah scholar to make the fruits of his own studies available to others. [Cf., R. Naftali Zevi Yehudah Berlin, *Teshuvot Meshiv Davar*, I, no. 24.]

Commercial publication, however, is another matter entirely. Such publication involves two considerations: 1) A scholar's or author's rights with regard to the fruits of his intellectual labor; and 2) a publisher's rights to be protected against loss of capital invested in a publishing enterprise.

The second question was first addressed by R. Moses Isserles, *Teshuvot Rema*, no. 10, in conjunction with a controversy which arose over publication of Rambam's *Mishneh Torah*. A corrected edition of Rambam's *Mishneh Torah* was published by Maharam of Padua in partnership with a non-Jewish Venetian publisher, Alvise Bragadini in 1550–1551. A similar edition was published in the same city almost simultaneously by another Christian publisher, Marco Antonio Giustiniani. The latter edition was published, not in order to satisfy market demand, but because Giustiniani was incensed because Maharam of Padua had entered into partnership with his competitor and was motivated by a desire to cause serious financial loss to Maharam of Padua. In order to achieve this end, the Giustiniani edition was offered for sale at a price significantly lower than that of Maharam of Padua. [See Meir Benayahu, *Haskamah u-Reshut be-Defusei Venetsi'ah* (Jerusalem 5731), pp. 23–25.] Rema's responsum, which is a primary source regarding certain aspects of Noachide law, focuses upon whether the non-Jewish publisher had a right to republish a work still in print and thereby cause a financial loss to the previous publisher. Relying in part upon provisions of Jewish law which forbid competition which results in financial damage to a competitor, Rema concludes that the second publisher was not entitled to sell his edition until all copies of the edition published by Maharam of Padua had been sold. Accordingly, Rema declared it to be forbidden for any Jew to purchase the Giustiniani edition upon pain of excommunication. It is of interest that in issuing the pronouncement Rema took note of the fact that Giustiniani had previously performed valuable services on behalf of the Jewish community in publishing religious works but observed that there need be no fear of offending

that publisher and thereby causing him to refrain from further undertakings of a like nature since his Hebrew publishing ventures were based upon motivations of profit.

R. Shlomoh Luria, *Teshuvot Maharshal*, no. 36 and R. Mordecai Benet, *Perashat Mordekhai, Hoshen Mishpat*, no. 7, disagree with Rema in part. These authorities argue that competition of such nature is banned by rabbinic edict rather than by biblical law. Rabbinic forms of "theft," they argue, are forbidden only to Jews but not to Noachides. [Cf., however, *Hiddushei Hatam Sofer, Baba Batra* 21b, and *Teshuvot Hatam Sofer, Hoshen Mishpat*, no. 79, s.v. *pasik ha-shem ha-revi'i*.]

Subsequently, it became common practice for an author or prospective publisher to protect himself against financial loss by approaching a rabbinic authority and securing a formal *herem* or ban against publication of the same work by any other party for a stipulated period of time. The text of this ban was then customarily published in the prefatory section of the book. [*Teshuvot Hatam Sofer, Hoshen Mishpat*, no. 79, s.v. *mi-zeh nireh li*, points out that the *herem* was customarily issued against the future publisher rather than against the purchasers of the illicitly published volumes. However in two other responsa, *Hoshen Mishpat*, no. 41, and VI, no. 57, *Hatam Sofer* declares that if a *herem* against the publisher proves to be ineffective a *herem* may be pronounced against the purchasers as well.] The halakhic efficacy of such a *herem* is the subject of dispute between R. Mordecai Benet and R. Moshe Sofer.

The controversy arose with regard to the rights enjoyed by the publishers of the famed Rödelheim holy day prayer books. The publisher, Wolf Heidenheim, had secured a *herem* against republication by other persons for a period of twenty-five years. The same prayer books were published shortly afterward by a firm in Dyhrenfurth. R. Mordecai Benet publicized the ban prohibiting the latter edition and cautioned against purchase of those prayer-books. Thereupon, the publisher, a gentleman by the name of Schmidt, summoned R. Mordecai Benet to appear before the civil court alleging his conduct to be contrary to the law of the land since Schmidt had secured permission from the civil authorities to publish his edition of the prayer book. As a result, R. Mordecai Benet withdrew his earlier pronouncement forbidding purchase of that edition. In *Perashat Mordekhai*, no. 7, he explains that, as recorded by *Shulhan Arukh, Yoreh De'ah* 232:12, written oaths are of no validity. Similarly, rules *Perashat Mordekhai*, only a *herem* delivered orally is enforceable. Since the ban in question was issued solely in writing it could have no legal effect. This point is disputed by *Hatam Sofer, Hoshen Mishpat*. no. 79, s.v. *ve-gam ha-herem be-ktav*, who rules that both an oath and a *herem* in writing are valid. [See also *Teshuvot Hatam Sofer, Yoreh De'ah*, nos. 220 and 227.]

R. Mordecai Benet found the *herem* to be of no effect for yet another reason as well. Citing *Teshuvot Rivash*, no. 271, he argues that a ban pronounced by a rabbinic authority is valid only in the city or area subject to that authority's jurisdiction but is not binding upon persons living in another locale. R. Moshe Sofer, *Teshuvot Hatam Sofer*, VI, no. 57, in an opinion rendered in a later dispute which arose between the publishers of the Vilna edition of the Talmud and the publisher of the earlier Slavuta edition, takes sharp issue with R. Mordecai Benet with regard to this point as well. *Hatam Sofer* regards a ban against publication which may cause harm to an earlier publisher to be simply the instantiation of an edict of the "ancients" which was promulgated in earlier times in order to facilitate Torah study and which was accepted by all Jewish communities. In the opinion of *Hatam Sofer* that early edict provided that any rabbinic authority might issue a ban in any specific case for any specified period of time in accordance with his judgment

which would be binding upon all of Israel by virtue of the original edict. The view expressed in this responsum is a forceful reiteration of the position earlier expressed in *Teshuvot Hatam Sofer, Hoshen Mishpat*, no. 41.

There may however appear to be somewhat of a contradiction between *Hatam Sofer*'s position in VI, no. 57 and in *Hoshen Mishpat*, no. 79. In VI, no. 57, he declares that the *herem* protecting the publishers of the Slavuta edition of the Talmud is binding upon all Jews. Nevertheless, *Hatam Sofer* adds that, regardless of the time period specified in the *herem*, it is of no further effect once the original printing has been fully sold, even if the time period specified in the *herem* has not yet elapsed. *Hatam Sofer* reasons that a *herem* is binding even beyond the jurisdiction of the authorities who issue such a *herem* only because, as has been noted earlier, it is encompassed within an ancient edict. That edict, argues *Hatam Sofer*, was designed, not for the benefit of publishers, but for the purpose of achieving the widest possible dissemination of Torah. This rationale applies only to a *herem* designed to protect investors against loss. Hence there exists no broad authority to impose such a *herem* beyond the term necessary to sell the original printing. The time period specified in the *herem* should be understood as limiting the force of the *herem* to the specified time period or to the period of time necessary for the sale of the printing, whichever elapses first. [See also R. Barukh Teumim Frankel, *Ateret Hakhamim, Yoreh De'ah*, no. 25, who cites numerous sources which declare that the force of a *herem* is limited to prevention of loss by the publisher and hence does not prevent subsequent publication by others after the earliest printing is exhausted. Therefore, opines *Ateret Hakhamim*, if a publisher wishes to protect himself in a second printing he must secure a second *herem* even though the time stipulated in the first *herem* has not yet elapsed.] A *herem* which extends beyond the sale of the published edition can be construed only as being designed for the benefit of the publisher and hence may be binding within the jurisdiction of the authority who issues such a *herem* but is not binding upon residents of any other area. *Hatam Sofer* further declares that if the original printing has been exhausted it is even meritorious for other publishers to print further editions in order to make volumes of the Talmud more widely available. Yet, in *Hoshen Mishpat*, no. 79, *Hatam Sofer* upholds the validity of the *herem* in favor of the publishers of the Rödelheim prayer books for the entire twenty-five year period of the *herem* even though the prayer books were reprinted many times during that period.

However, it is clear from *Hatam Sofer*'s discussion in *Hoshen Mishpat*, no. 79, that two factors obtained in the Rödelheim dispute which were not present in the Slavuta case: 1) The expenses incurred in compiling and printing the material for the Rödelheim prayer books could not have been recouped other than through multiple printings; 2) R. Wolf Heidenheim was not simply an entrepreneur engaged in publishing a religious work but had personally expended much effort in gathering and editing manuscripts. *Hatam Sofer* cites the *halakhah* recorded in *Ketubot* 106a which provides that those employed in correcting manuscripts in Jerusalem and the scholars who taught the laws of ritual slaughter, etc. received compensation for their efforts from Temple funds. Since the labor of compiling and editing manuscripts deserves communal remuneration, argues *Hatam Sofer*, the *Bet Din* may provide compensation by prohibiting others from engaging in a similar publishing enterprise.

R. Mordecai Benet, *Perashat Mordekhai*, no. 8, argues, in effect, that no ancient edict of the nature described by *Hatam Sofer* could have been promulgated. In his opinion "public policy" required, not protection of the publisher, but promotion of inexpensive editions of Torah works. As a parallel he cites *Baba*

Batra 22a which declares that local tradesmen cannot prevent itinerant peddlers of cosmetics from selling their wares. Ezra decreed that peddlers be permitted to travel from city to city so that cosmetics and jewelry be readily available for Jewish women. The goal of his decree was to assure that husbands would find their wives attractive. Although protecting local merchants and assuring them a livelihood would also have served to further that purpose, Ezra quite obviously considered that any measure designed to lower prices would, in the long run, be more effective in achieving this goal. Similarly, argues *Perashat Mordekhai*, widespread distribution of sacred texts is better achieved by promoting competition rather than by protecting a publisher's monopoly. *Hatam Sofer*, *Hoshen Mishpat*, no. 79, s.v. *ve-nireh* counters, in effect, that local tradesmen are unlikely to close their businesses because of the competition of itinerant peddlers but publishers, if put at risk, are likely to seek other investments for their capital.

Rabbi Benet does, however, distinguish between the rights of an author or editor and those of a publisher. A publisher is entitled to no protection with regard to a work which is in the public domain. However, it is inequitable for a person to make use of another's labor and talent in order to jeopardize the commercial interests of the latter. He justifies Rema's ruling with regard to Maharam of Padua's rights to the publication of Rambam's *Mishneh Torah* by pointing out that Maharam of Padua laboriously corrected the manuscript versions and, in addition, composed explanatory notes.

The extent of an author's proprietary interest in his work is the subject of dispute between two eminent nineteenth century authorities, R. Joseph Saul Nathanson and R. Isaac Schmelkes. The controversy arose in the wake of the republication by R. Joseph Hirsch Balaban of an edition of the *Shulhan Arukh* which included the responsa precis *Pithei Teshuvah*. A complaint was lodged against the publisher by R. Abraham Joseph Madfis of Lemberg. The latter claimed that he had purchased the publication rights of *Pithei Teshuvah* from the author. The case was heard by Rabbi Samuel Waldberg of Zolkiew who ruled that the plaintiff could claim no greater right as the successor to the publication rights than could be claimed by the author himself. Rabbi Waldberg ruled that the author of *Pithei Teshuvah* in publishing the *editio princeps* of the work in 5596 had forfeited all subsequent rights through his failure to publish an *issur*, or warning tantamount to a copyright notice, prohibiting publication by other parties. [See also R. Isaac Schmelkes, *Teshuvot Bet Yitshak*, *Hoshen Mishpat*, no. 80.] Moreover, since all copies of the original publication had been sold, the author could not plead unfair competition and potential loss of capital. Rabbi Waldberg, however, conceded that, had such "copyright notice" been published, the author would have retained a proprietary interest and might have conveyed such interest to whomever he desired.

Rabbi Joseph Saul Nathanson, *Sho'el u-Meshiv*, *mahadura kamma*, I, no. 44, sharply disputes this view and finds for the plaintiff. In his opinion, an author retains publication rights for an unlimited period of time. Publication of an *issur* for a specified period of time, argues *Sho'el u-Meshiv*, is designed, not to protect the author, but, on the contrary, is designed to grant permission to all and sundry to republish the work upon expiration of the stipulated time period. The author does this, says *Sho'el u-Meshiv*, because he wishes his work to have the widest possible circulation. However, asserts *Sho'el u-Meshiv*, absent such a specified time period, publication rights remain vested in the author forever.

Sho'el u-Meshiv makes another interesting distinction between the rights of a publisher and those of an author. A *herem* in favor of the publisher, he

declares, is designed to promote dissemination of the publication rather than to protect the publisher's rights. Hence, rules *Sho'el u-Meshiv*, a *herem* cannot prevent publication in a foreign country which bans the import of the already published edition. [See also *Teshuvot Bet Yitshak*, *Hoshen Mishpat*, no. 80, and *Ateret Hakhamim*, *Yoreh De'ah*, no. 25.] The author, however, declares *Sho'el u-Meshiv*, has an absolute proprietary right over his work and may ban publication under any and all conditions.

R. Isaac Schmelkes, *Teshuvot Bet Yitshak*, *Yoreh De'ah*, II, no. 75, rules that an author enjoys the right to publish his own work and thereby to preserve the *mitsvah* of disseminating his Torah novellae for himself. A similar right is also reserved to the author's heirs. Nevertheless, he argues, no person has a pecuniary right with regard to Torah. Hence no author can restrain publication of a previously published work. A similar opinion is expressed by R. Abraham Rothenberg in a letter of approbation published in the Lublin, 5648 edition of the *Kitsur Shulhan Arukh*. Nevertheless, *Bet Yitshak*, employing the concept *dina de-malkhuta dina* concedes that such action is forbidden by *halakhah* when prohibited by civil law. *Bet Yitshak* rules that the "law of the land" is binding in Jewish law when the secular law is designed to promote a valid public policy. Protection of authors is a valid consideration and hence, when forbidden by civil law, a work cannot be republished without permission of the author. This position is reiterated in *Teshuvot Bet Yitshak*, *Hoshen Mishpat*, no. 80. However, in this responsum, written at a later date, *Bet Yitshak* concludes his remarks with the statement: "Nevertheless, I make no final determination for perhaps there is some right with regard to this on the basis of Torah law or perhaps the author possesses some right by virtue of custom."

Teshuvot Hatam Sofer, Hoshen Mishpat, no. 79, s.v. *ve-im ken be-sha'arei madfisim*, distinguishes between authors of halakhic compendia or Torah novellae and editors of prayer books and the like. Although he concedes that an author is entitled to compensation for his labor, he argues that every person is nevertheless obligated to teach Torah without compensation. Accordingly, although an author or publisher is entitled to protection against loss of capital ventured in a publishing enterprise, *Hatam Sofer* argues that an author is not entitled to profit from the dissemination of Torah. Editors of manuscripts, on the contrary, are entitled to be compensated for their labor. It does, however, appear to be arguable that authors are entitled to similar compensation, not for making their insights available to others, but for the physical labor expended in preparation of manuscripts, proofreading, etc.

Regardless of whatever proprietary rights a scholar may enjoy with regard to the product of his studies, Torah scholars were wont to be more concerned with dissemination of their scholarship than with pecuniary profit. *Hatam Sofer*, in the introduction to his responsa volume on *Yoreh De'ah*, writes ". . . everything with which G-d has graced me, whether in *halakhah* or in *aggadah*, lies as *res nullius*; anyone who wishes to copy them may come and copy them and thus did our predecessors do before the printing press." The Chafetz Chaim, in a letter which appeared in the Warsaw newspaper, *Der Yid*, 27 Sivan 5673, wrote, "I grant permission for all time to any Jew to reprint [the *Mishnah Berurah*], but only as is now printed, viz., *Shulhan Arukh*, *Be'er Heitev*, *Sha'arei Teshuvah*, together with my explanations, *Mishnah Berurah*, *Bi'ur Halakhah* and *Sha'ar ha-Tsiyun*, without change. However, I grant permission in this manner: that from each hundred copies which are printed [the publisher] is obligated to give 4 percent to Houses of Study, i.e. 4 volumes out of every hundred to House[s] of Study. . . ."

Physicians' Fees

The physician's right to some form of compensation is clearly evident from the discussion recorded in *Baba Kamma* 85a. A person who has caused physical harm to another is obligated to bear the expenses of medical treatment of the victim. The assailant does not have the option of offering the ministration of a physician who will not demand a fee for his services for the victim may counter, "A physician who heals for nothing is worth nothing." A survey of halakhic sources which define the limits placed upon the fee a physician may charge for his services is presented by R. Chaim David Halevy, the Sephardic Chief Rabbi of Tel Aviv, in the Kislev 5737 issue of *Shevilin*. This material appears to be based in large measure upon Rabbi Eliezer Waldenberg's discussion of the same topic in his *Ramat Rahel*, nos. 24 and 25.

Rambam, in his *Commentary on the Mishnah*, *Nedarim* 4:4, and in *Hilkhot Nedarim* 6:8, declares that the obligation to heal is encompassed within the *mitsvah* of returning lost property. Restoration of life and health is no less a *mitsvah* than is restoration of property. It should then follow, *mutatis mutandis*, that just as one may not accept a fee or reward for returning a lost object so also is it forbidden to accept a fee for rendering medical services. The general principle is that one may not accept a fee for the performance of a *mitsvah*. Nevertheless, some forms of compensation are justified even for the performance of a *mitsvah*. With regard to lost property, the *Mishnah*, *Bekhorot* 29a, states that a finder who neglects his own labor in order to preserve the property of another is entitled to compensation for loss of earnings. However, the compensation to which he is entitled is not to the full extent of loss of earnings, but is limited to payment as an "idle worker" (*po'el batel*), i.e., the amount a worker would accept in return for sitting idle and not engaging in his usual labor. It is presumed that a laborer would prefer not to work and to receive somewhat lower remuneration rather than to work and to receive his usual wage. Although compensation for the actual performance of a *mitsvah* is limited to payment as an "idle worker" for the time expended, compensation may also be accepted for labor performed or services rendered in preparing artifacts to be used in performance of a *mitsvah*. The Gemara, *Berakhot* 29a, declares that although one may not accept a fee for performing the ritual of purification it is nevertheless permitted to accept compensation for the labor involved in transporting the ashes of the red heifer and in drawing water for this purpose.

Ramban, in his *Torah ha-Adam*, in the concluding section of *Sha'ar ha-Sakanah*, applies these principles to the remuneration of a physician and rules that a physician is permitted to accept compensation for his labor and for the time in which he could otherwise have been gainfully employed, but is not entitled to compensation for his "wisdom" or for his "instruction" in advising the patient how to restore himself to good health. Applying this principle, *Arukh ha-Shulhan*, *Yoreh De'ah* 336:3, rules that a physician may not accept a fee for proffering medical advice but may demand a fee for his labor and exertion in visiting a patient or in writing a prescription. Rabbi Eliezer Waldenberg, *Ramat Rahel*, no. 24, adds that a physician may accept a fee for the labor involved in conducting a physical examination even if the examination is performed in his office, but not for simply offering medical advice since the time expended in merely offering advice (usually) is minimal. A fee for the effort involved in examining the patient is permissible since the examination is merely preparatory to therapy. The *mitsvah* itself is fulfilled only in providing treatment and offering medical advice. In light of this distinction Rabbi Waldenberg questions *Arukh ha-Shul-han*'s statement that the physician may accept a fee for writing a prescription since, he argues, the writing

of a prescription involves no significant expenditure of time or effort, and is, in fact, no different from offering advice orally.

The compensation of an "idle worker" is calculated in terms of the type of labor which the worker ordinarily performs. A person who earns a living by means of heavy labor is deemed to be willing to accept a significantly lower wage if he is permitted to remain idle, whereas one who "pierces pearls" would be willing to accept only a smaller reduction in his earning capacity. It is therefore relatively simple to calculate the value of a person who is regularly employed in a craft or trade and does not devote his time entirely to the practice of medicine. In such circumstances it is possible to calculate the value of the person's time and to determine the amount he would willingly accept not to engage in his particular occupation. [For other opinions regarding the assessment of the value of the time of an "idle worker" see Rashi and *Tosafot*, *Bekhorot* 29b.] However, in modern times, physicians customarily devote themselves exclusively to the practice of medicine. How, then, is the value of the physician's time to be calculated? Rabbi Halevy suggests that a parallel may be drawn from the principle established with regard to teachers of Torah. *Tur*, *Yoreh De'ah* 246, rules that such teachers may accept a salary since they have foresaken all other means of earning a livelihood. Similarly, he argues, physicians who might have applied their talents in pursuing some other profession are entitled to receive compensation for having renounced such occupations. The total income a physician might have anticipated in practicing some other profession minus the amount he would be willing to forego not to have to engage in any profession may be deemed the compensation to which the physician is entitled as an "idle worker" and may thus be apportioned among the physician's patients. Accordingly, the general practitioner and the neurosurgeon, assuming they are capable of earning identical salaries in other professions, are entitled to equal annual compensation, the total sum to be apportioned among their respective patients in accordance with the time spent with each patient.

However, *Tosafot*, *Ketubot* 105a, states that teachers of Torah who have no other occupation may not receive compensation as "idle workers" since they have no other trade, but the community is nevertheless obligated to support them since they have no means of earning a livelihood. According to *Tosafot* the compensation to which Torah teachers are entitled is, in effect, a form of charity. Undoubtedly, the community would have a similar obligation with regard to the support of a physician who has no other means of earning a livelihood. However, Rabbi Halevy fails to note that, according to this analysis, it would appear that a physician could not legitimately command the type of fee to which he would be entitled according to the thesis of the *Tur*. However, even according to the *Tur*, a physician is not entitled to demand compensation in excess of the amount he would be capable of earning in another profession.

The physician is obviously entitled to recover the expenses he incurs in conjunction with his practice by apportioning those costs among the patients whom he treats. *Teshuvot Maharam Schick*, *Yoreh De'ah*, no 343, rules that the physician may also legitimately charge a fee for services which are non-therapeutic in nature such as pronouncing death and signing a death certificate. *Maharam Schick* does, however, raise a problem with regard to accepting compensation for pronouncing death and signing a death certificate on other, although similar, grounds. By reason of civil law it is necessary for a physician to pronounce a patient dead and to sign a death certificate in order for burial to take place. Hence the physician's services are intrinsic to fulfillment of the *mitsvah* of burying the dead, which encompasses all matters necessary to facil-

itate timely and dignified interment of the deceased. Nevertheless, rules *Maharam Schick*, a fee is justified for precisely the same reasons which warrant a fee for rendering therapeutic services. It would appear, however, that a physician is fully entitled to establish a fee for filling out insurance forms and the like without regard to the considerations earlier outlined since such services are not related to the cure of the patient.

It would also appear that physicians who have busy practices and therefore turn away patients because of pressures of time have a ready means of calculating *sekhar batalah*. If, as is generally the case, they might accept additional non-Jewish patients, their time may be valued in terms of the fees they might charge non-Jewish patients. Non-Jews recognize neither a legal nor a moral obligation which obliges a physician to treat those in need of his services. This is reflected in the code of ethics of the American Medical Association which specifies that a physician may choose whom he shall treat. Concomitantly, Jewish law places no restriction upon the fee which may be charged a non-Jewish patient. Since there is no restriction upon the fee which physicians may charge non-Jewish patients, it would appear that they may then charge their Jewish patients the amount they would be willing to accept in order to remain "idle" and treat no patients during that time. A physician who commands high fees is likely to be willing to accept a sum only moderately less than his customary fee in order to remain idle and to forego such income-producing opportunities, as indeed is the case with regard to the artisan engaged in "piercing pearls."

Thus far the question revolves around the physician's obligation to heal and the limits placed upon the compensation he may justifiably demand in return for his services. If, however, as a condition of treatment, the physician demands a fee in excess of that to which he is morally entitled, is the patient subsequently obligated to pay the fee in full?

The paradigm applicable to the resolution of this question is the case discussed by the Gemara, *Yevamot* 106a, involving an escaping prisoner who finds it necessary to traverse a river in order to make good his escape. Even if the escapee has promised a ferryman an exorbitant sum in order to transport him over the river he need pay only the fee which is usual and customary for such services on the plea that "I was but making sport of you" in promising an exorbitant fee, i.e., the obligation is not binding because of the absence of seriousness of intent. All authorities agree that an apothecary who demands an exorbitant price for a drug has no actionable claim for an amount in excess of the item's fair market value since it is obvious that the patient's acquiescence to payment of a higher sum was secured under duress. This ruling is recorded in *Shulhan Arukh, Yoreh De'ah* 336:3.

Ramban, *loc. cit.*, whose opinion is followed by *Shulhan Arukh, Yoreh De'ah* 336:2, distinguishes between the case of the physician who demands an exorbitant fee and that of the apothecary who engages in price-gouging and the case of the boatman who demands inordinately high wages. The latter, declares Ramban, have set and determined values whereas the physician, although he has acted unethically, "has sold his wisdom and [his wisdom] is priceless." Therefore, the patient may not claim that, in agreeing to the fee stipulated by the physician, he was merely "making sport." Accordingly, the physician has a cause of action for the collection of any fee which has been agreed upon.

Ritva, cited by *Nemukei Yosef, Yevamot* 106a, adopts an opposing view. Ritva maintains that, despite his explicit undertaking to pay a stipulated fee, the patient need pay only for the time and labor expended by the doctor since the physician is obligated to treat

the patient by virtue of the *mitsvah* incumbent upon him. Ritva, as his position is interpreted by Ramban, apparently understands that the ferryman who is the subject of discussion in *Yevamot* 106a has no claim for exorbitant compensation, even though such compensation has been stipulated by the parties, for the identical reason. The ferryman, in preserving the life of the escaped prisoner, is also engaged in restoring a "lost body." The rejoinder "I was making sport of you," according to this analysis, is based, not upon the claim of duress, but upon the premise that the boatman cannot demand more than payment for time and labor since he is bound to render service by virtue of the *mitsvah* incumbent upon him. Thus, according to Ritva, there is no consideration and hence no concomitant seriousness of intent which would serve to establish a binding contract. [This explanation serves to dispel the difficulty expressed by Rabbi Charles B. Chavel, *Kitvei Ramban*, II, 45, note 84.] Ritva's opinion is, however, rejected by all subsequent authorities. Indeed Ritva himself, in his commentary on *Kiddushin* 8a, agrees with Ramban.

Nevertheless, it appears from Ramban's discussion of the position subsequently espoused by Ritva that he concedes the basic point, viz., that an agreement to pay for services which, absent such agreement, are already incumbent upon the individual is not actionable. Ramban's disagreement appears to be based entirely upon the contention that the physician may claim that he has no personal obligation to treat the patient. The *mitsvah*, in the words of Ramban, "is incumbent upon the entire world" and therefore an individual physician has the legal capacity to enter into a binding contract for payment in return for his professional services. Hence *Teshuvot Radbaz*, III, no. 556, declares that in a situation in which no other physician is available or in which "there is no physician as expert as he, it appears to me that even Ramban concedes "that the physician's claim is limited to payment for time expended as an "idle worker." Rema's language, *Yoreh De'ah* 336:4, readily lends itself to a similar inference.

Nevertheless, Rabbi Waldenberg, *Ramat Rahel*, no. 25, argues that the physician's claim is actionable even under such circumstances. Rabbi Waldenberg argues that since, at present, physicians customarily, albeit unethically, charge high fees the patient can no longer claim, "I was making sport of you." If, however, the analysis of Ramban presented earlier is correct Rabbi Waldenberg's conclusion is unwarranted. If Ramban is understood as agreeing that there can be no binding contract for payment of services which are already incumbent upon the individual it then follows that the patient is not obligated to pay such fees when no other equally competent physician is available.

One final consideration must be mentioned. R. Menachem ben Zerah, in a work composed on behalf of Isaac Abarbanel, *Tsedah la-Derekh*, Fifth Treatise, *klal* 2, chapter 2, presents a very practical consideration which augers in favor of paying any fee which has been agreed upon. This authority advises that the physician's fees be paid in full "for if not, you have closed the door before [other] patients," i.e., physicians may decline to treat other patients in the future.

R. Eliezer Fleckeles, *Teshuvah me-Ahavah*, III, no. 408, rules that physician must treat the poor, who cannot afford even the permitted payment for time and effort, entirely without charge. In support of this position he cites Rema, *Yoreh De'ah* 261:1, who rules that if a father cannot afford the *mohel*'s fee, the *Bet Din* may compel the *mohel* to render his services without a fee. Rema explains this ruling by stating that such a case is comparable to the situation of a child who has no father. In such circumstances the members of the *Bet Din* are themselves obligated to perform the circumci-

sion. Although it is not entirely clear that this consideration applies with regard to treatment of the sick, R. Elijah of Vilna, *Bi'ur ha-Gra, Yoreh De'ah* 261:7, amplifies Rema's statement in a manner which makes it readily applicable to treatment of the sick as well. *Bi'ur ha-Gra* explains that in the father's absence the *mitsvah* of circumcision is actually incumbent upon each and every Jew and that the *Bet Din* act merely to enforce fulfillment of the personal obligation incumbent upon the *mohel*. [Cf. *Ramat Rahel*, no. 24, sec. 3]. This consideration certainly applies to treatment of the sick as well. Rabbi Waldenberg, *Ramat Rahel*, no. 24, sec. 4, draws attention to the source of this ruling, *Teshuvot ha-Rashba*, I, no. 472, in which Rashba rules that in such circumstances the father has no obligation to seek charity in order to provide for the *mohel's* fee. Similarly, rules Rabbi Waldenberg, neither the patient nor the community is obligated to raise funds for payment of the physician's fee for the treatment of an indigent patient. Rather, if the patient lacks personal resources the physician may be compelled to treat him without charge. Rabbi Waldenberg, however, points out that, as has been noted earlier, when there is more than one *mohel* or physician available each one may claim that he is under no personal obligation to render his services without fee. Each *mohel* or physician may, in such circumstances, plead that he is under no greater obligation than his fellow. Under such circumstances, concludes Rabbi Waldenberg, the community must either make charitable funds available for this purpose or else the *Bet Din* may obviate this disclaimer on the part of the *mohel* or physician by apportioning the burden among the available practitioners in an equitable manner.

Tuna Fish: Continued

The question of the permissibility of canned tuna fish was examined in this column in the Winter, 1980 issue of *Tradition*. This topic is also discussed in Rabbi Ya'akov Breisch's *Helkat Ya'akov*, III, no. 10, in a responsum whose composition is attributed to "a son of the author." *Ḥelkat Ya'akov* reaches a conclusion at variance with the position of both Rabbi Henkin and Rabbi Feinstein which was previously discussed in this column. *Magen Avraham, Orah Ḥayyim*, 20:1 states that the principle that an artisan or tradesman will not ruin his reputation (*uman lo mera umnateh*) establishes the credibility of such persons, not only with regard to possible adulteration of materials or food products offered for sale, but even with regard to the intrinsic species which he offers for sale provided that such substitution would destroy his credibility not only in the eyes of Jews but in the eyes of his non-Jewish clientele as well. Thus, the testimony of a non-Jewish tradesman may not be accepted in order to verify that an animal has been slaughtered in the prescribed manner since this is not a matter of concern to non-Jews and hence a falsehood would not damage his reputation in their eyes. However, argues *Ḥelkat Ya'akov*, since substitution of another species of fish is forbidden by law, such substitution, if detected, would damage the processor's reputation in the eyes of non-Jews as well and, accordingly, his statement with regard to the contents of the can may be relied upon.

However, as *Ḥelkat Ya'akov* hastens to add, *Magen Avraham*'s position is rejected by *Noda bi-Yehuda, Orah Ḥayyim*, II, no. 72. *Noda bi-Yehudah* maintains that although it is not to be presumed that a tradesman will establish his business on the basis of fraud he must nevertheless be suspected of being ready to profit from the substitution of one species for another when an inferior product has come into his possession, even when, if detected, his reputation would be damaged in the eyes of non-Jews.

Nevertheless, argues *Ḥelkat Ya'akov*,

even *Noda bi-Yehuda* would concede that the tradesman's declaration may be relied upon when his statement is subject to independent verification even if such verification can be accomplished only with some difficulty. In support of this position he cites *Avodah Zarah* 34b which states that a certain fish known as *ḥeilek* may be purchased from a fishmonger but not from other non-Jews. Rashi explains that these are small fish of a kosher species which do not develop fins and scales until they mature. The young of such species are permissible even though they do not yet manifest fins and scales. However, fish of a similar, and not readily distinguishable, non-kosher species are frequently caught with them in the same net. A tradesman is presumed to have the expertise which enables him to distinguish between the diverse species and may be relied upon to remove the non-kosher fish. Rashi carefully adds the comment that these fish are removed by the tradesman because they are of inferior quality and, if not removed, will spoil the taste of the entire batch of fish. Thus, the principle established seems to be that a tradesman's declaration is deemed to be reliable when substitution is detectable and immediately prejudicial to his own economic interests. Despite Rashi's comment, *Ḥelkat Ya'akov* opines that the tradesman's word may be accepted simply because it is subject to independent confirmation. Applying this principle to canned tuna, *Ḥelkat Ya'akov* argues that the manufacturer's labeling may be relied upon because the identity of the species within the can can be confirmed by "experts." Whether or not the identity of the species can in fact be confirmed by experts is an empirical question which is not addressed by *Ḥelkat Ya'akov*. It should also be noted that in the immediately preceding responsum, no. 9, Rabbi Ya'akov Breisch himself expresses reservations with regard to the permissibility of such products on a number of grounds, including the question of identification of species.

The selfsame question with regard to the permissibility of tuna fish quite obviously applies to other forms of processed fish, such as fish filets, fish sticks, chopped fish and the like, in which the species is not recognizable. *Ḥelkat Ya'akov*, III, no. 10, sec. 5, states that this problem does not arise with regard to canned sardines even though fins and scales (and often the skin as well) have been removed since, in his opinion, sardines are readily recognizable and hence substitution of a non-kosher species would immediately be detected by the consumer.

Maternal Identity

The question of whether or not a host mother is, for halakhic purposes, considered to be the mother of the fetus to which she gives birth was discussed in this column in the Fall, 1972 issue of *Tradition*. A similar, although somewhat different, question arises with regard to *in vitro* fertilization. In the latter case, the ovum which is fertilized does belong to the mother who bears the child. Conception, however, does not take place within the mother's body. The question which must be considered is whether, for purposes of Jewish law, maternal identity is established by conception, by parturition or, perhaps, by genotype.

Rabbi Moshe Hershler, *Halakhah u-Refu'ah*, I (Jerusalem, 5740), 316, adduces an interesting proof demonstrating that, at least for some purposes, maternal relationship is established by the act of parturition. The Gemara, *Yevamot* 97b, describes the case of a pregnant woman who became a convert to Judaism and then gave birth to twins. Since conception took place prior to her conversion, Jewish law recognizes no halakhic paternity and hence no levirate obligations devolve upon the twins since they are not deemed to be paternal siblings. Levirate obligations are imposed only upon brothers sired by the same father. The Gemara does, however, declare that,

since the twins are maternal siblings, the wife of either twin is forbidden to the other as the wife of a half-brother, i.e., as "the wife of a brother on the mother's side." It must be remembered that were the mother's conversion to have taken place after the birth of the twins no halakhic relationship would be recognized subsequent to the twins' own conversion to Judaism and hence no biblical prohibition would prevent either twin from marrying the widow of the other. Since conception while the mother is yet a non-Jewess does not establish a maternal relationship which survives conversion, the maternal relationship posited by the Gemara in the case of a pregnant woman who became a proselyte must come into being by virtue of parturition.

An argument based upon an aggadic source establishing the opposite conclusion was first advanced by R. Menasheh Grossberg, *Sha'arei Torah, Sha'ar Menasheh*, XV (5684), no. 3. The Gemara, *Berakhot* 60a, declares that Dinah was born a female as a result of Leah's prayers during her pregnancy. Knowing that Jacob would become the father of a total of twelve sons and not wishing her sister Rachel to bear their husband fewer sons than the maidservants, Bilhah and Zilpah, Leah prayed that her already conceived fetus be born a female. It is clear from the parallel narrative recorded in the Palestinian Talmud, *Berakhot* 9:3, that the phenomenon described by the Sages involved an *in utero* sex change. However, *Targum Yonatan*, Genesis 30:21 states that what transpired was not a sex change in Leah's fetus but a physical exchange of the fetus from the womb of Leah to the womb of Rachel and vice versa, i.e., Dinah was conceived by Rachel but transferred to the womb of Leah while Joseph was conceived by Leah and transferred to the womb of Rachel. *Maharsha, Niddah* 31a, asserts that this is also the correct interpretation of the narrative recorded in *Berkhot* 60a. *Kotnot Or* cites *Targum Yonatan* in resolving a question posed by R. Elijah Mizrahi in the latter's commentary on Genesis 46:10 with regard to the tradition which teaches that Simeon took Dinah as a wife. R. Elijah Mizrahi is troubled by the fact that even a Noachide is forbidden to marry his sister. *Kotnot Or* points out that only a maternal sister is forbidden to a Noachide; a half-sister who is a paternal sibling is permitted to a Noachide. *Kotnot Or* observes that, according to *Targum Yonatan*, Dinah was really the daughter of Rachel and hence not a maternal sister of Simeon. The implication of *Kotnot Or*'s thesis is that the maternal relationship is established by conception rather than birth. [See also R. Yonatan ha-Levi Eibeschutz, *Ha-Be'er*, VII (5693), no. 3.]

Rabbi Hershler, apparently unaware of this earlier discussion, cites *Targum Yonatan* as establishing that maternal identity is established by parturition and indeed it may be noted that Genesis 34:1 does speak of "Dinah the daughter of Leah." The diverse conclusions reached on the basis of the same narrative illustrates the cogency of the position of R. Joshua Feigenbaum, author of *Teshuvot Meshiv Shalom,* expressed in a contribution to *Sha'arei Torah*, vol. XV, no. 4. In disagreeing with *Sha'ar Menasheh*, Rabbi Feigenbaum points out that halakhic principles are not derivable from aggadic sources.

Author's Addendum: This paragraph will be qualified further in a future column.