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MEDICAL MALPRACTICE IN JEWISH LAW: SOME PARALLELS TO EXTERNAL NORMS AND PRACTICES

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Abstract: This article raises the possibility that the Jewish law of medical malpractice may have been influenced by the medical theories and liability standards of surrounding cultures. After reviewing the role of medicine in the Biblical and Talmudic periods, the article focuses on the medieval sources, and concludes with a review of developments in the twentieth century. The article discusses several parallel developments and suggests that one may be able to gain a better understanding of the medieval Jewish sources by understanding the medical theories and practices of that time, the role of the community physician, and the increased professionalization of medicine. The twentieth-century sources may indicate a desire to achieve results that parallel those of secular courts. Although the sources do not address the issue of external influence, they suggest that it is possible that external norms and practices may have played a role, if only indirectly, by shaping people's expectations.

INTRODUCTION

If a dentist drilled on the wrong tooth or if a doctor injected a patient with a medicine that was other than what the doctor intended, one would not be surprised if an American court would hold the dentist or the doctor liable for malpractice,¹ such that the patient would be able to recover for pain and suffering, medical expense and lost wages.² That such is the case in twentieth-century rabbinic law may seem equally unsurprising, except that the rabbinic responsa

^{*} Professor of Law, Rutgers University at Camden. My thanks to Arnold Enker, Gilad Gevaryahu, Michael Lewyn, and Shimon Taub for their helpful comments on an earlier draft. The Babylonian Talmud consists of two parts, the Mishna, which was compiled in Palestine about the year 200 of the Christian Era, and the Gemara, which was completed in Babylonia about 300 years later. The other main sources used in this Article are four codes: the Mishneh Torah written by Maimonides (circa 1135-1204) the Tur written by Jacob ben Asher (circa 1270-1343), the Shulhan Arukh written by Joseph Caro (circa 1488-1575), and the Arukh Ha-Shulhan, written by Jehiel Michal Epstein between 1884 and 1907. The Talmud and the medieval codes are heavily supplemented by commentaries. The most important Talmudic commentary is by Rashi (circa 1040-1105). Another important kind of source used in this Article is the responsa literature, the "case law" of Jewish jurisprudence. This Article discusses responsa from the medieval and modern periods. Quotations from the Talmud are based on Isidore Epstein, *The Babylonian Talmud* (1935). References to tractates in the Babylonian Talmud are indicated by prefacing the name of the tractate by a "B." Sections of the Mishnah are indicated by prefacing the name of the tractate by an "M." Unless otherwise indicated, translations of other works are mine.

¹ See *Hubbard v. Reed*, 168 N.J. 387, 774 A.2d 495 (2001) (affidavit of merit not required in suit for extraction of wrong tooth because jury can determine fault without expert's assistance); *Steinke v. Bell*, 32 N.J. Super 67, 107 A.2d 825 (1954) (jury can determine for itself that dentist's extraction of wrong tooth was malpractice); *McClees v. Cohen*, 158 Md. 60, 148 A. 124 (1930) (same); see also *Brown v. Meda*, 74 Md. App. 331, 342, 537 A.2d 635, 641 (1988) (giving examples of where *res ipsa loquitur* can be applied in a medical malpractice case).

² See, e.g., *McDougald v. Garber*, 73 N.Y.2d 246, 538 N.Y.S.2d 937, 536 N.E.2d 372 (1989).

favoring that outcome³ appear to be unsupported by the codes of Jewish law. Those sources provide that a doctor who causes unintentional harm is liable at most only in a Heavenly court,⁴ and even then the doctor might have no liability for medical expense or pain and suffering.⁵ Several of the twentieth-century rabbis who favored broader liability, all leading authorities in the Orthodox community, have reasoned that the injuries described above were all intentional. A doctor or anyone else causing intentional injuries is liable in Jewish law for a full range of damages, and such liability may be imposed by a court of man.

What led these rabbis to characterize the injuries as intentional? It seems like a mischaracterization of the dentist's or the doctor's conduct, and indeed one of the rabbis described the dentist who drilled on the wrong tooth as having acted negligently and inadvertently.⁶ The decisions seem result oriented, and they raise a more interesting question: why did the rabbis stretch the rabbinic law to impose liability? Is it possible that these rabbis recognized that the larger society holds doctors to a higher standard than was the case previously, and that secular courts would compel doctors to compensate victims of malpractice?⁷ Could it be that these rabbinic authorities responded to the felt needs and expectations of the Jewish communities, and that those feelings and expectations were influenced by the surrounding culture?

³ See *infra* text accompanying notes 119-125.

⁴ See *infra* text accompanying note 53.

⁵ See *infra* text accompanying note 36.

⁶ See *infra* text accompanying note 121.

⁷ See KENNETH ALLEN DE VILLE, *MEDICAL MALPRACTICE IN NINETEENTH-CENTURY AMERICA* (1990); Atul Gawande, *The Malpractice Mess*, *THE NEW YORKER*, Nov. 14, 2005, at 63 (malpractice suits are "a common event in a doctor's life"); Sal R. Nuccio, *Costs of Malpractice Insurance On Increase for Physicians Here*, *N.Y. TIMES*, Aug. 25, 1962, at 43, col. 4 (quoting the director of the law department of the American Medical Association as saying, "A couple of generations ago, or less, the average person wouldn't even think of suing his doctor. Not so today.").

One cannot be sure if this is the case. The responsa involved, like nearly all rabbinic writings on this or any subject in Jewish law, do not directly address these issues.⁸ Yet the similar results reached in these recent rabbinic decisions and in secular court decisions suggest that such influence is a possibility. Further, some of the medieval rabbinic writings on the subject also suggest the possible influence of external norms and practices. In part these developments may have come about because the earliest rabbinic sources on medical malpractice are in conflict and so permit a variety of outcomes. However, the changes in Jewish law on the subject both in the medieval and modern period also suggest that the law may have adjusted to changing values and practices.

Part I of this Article will discuss the treatment of medicine in the Bible and medical malpractice in early rabbinic sources. Part II will discuss the development of medical malpractice as reflected in Jewish medieval sources and suggest the possible influence of prevailing theories and practices of medicine. Part III will show development in modern Jewish sources and suggest that it has may have been influenced by secular legal norms.

I. THE BIBLE AND EARLY RABBINIC SOURCES ON MEDICAL MALPRACTICE

Because the medieval and modern rabbinic writings are based on the Bible and earlier rabbinic sources, it is necessary to understand how the earliest sources treated medicine and medical malpractice. The Bible does not deal specifically with medical malpractice. The

⁸ There is a wide literature on the subject of medical malpractice in Jewish law. *E.g.*, J. David Bleich, *Medical Malpractice and Jewish Law*, 39:1 TRADITION 72 (2005); Joseph S. Ozarowski, *Malpractice*, 14 J. OF HALACHA AND CONTEMP. SOC'Y 111 (1987); 2 AVRAHAM STEINBERG, ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS 623-33 (Fred Rosner trans., 2003); IMMANUEL JAKOBOVITS, JEWISH MEDICAL ETHICS 214-21 (1959); David Lau, *Ahrayut Rofe L-Nizkei Tipulo*, 16 TECHUMIN 187 (1995/96) (Hebrew); Joshua Fruchter, *Doctors on Trial: A Comparison of American and Jewish Legal Approaches to Medical Malpractice*, 19 AM. J.L. & MED. 453 (1993); Michael Broyde & Channah S. Broyde, *On the Assessment of Damages in Jewish Tort Law and its Application to Medical Malpractice*, 5 NAT'L JEWISH L. REV. 93 (1990-91); Mordechai Ilan, *Hiyyuv Nezikin B'Rofe She'hezik, Hovat Ha-hochakha B'nidon, Ve-ne'emanut Ha-rof'im Ba-halacha*, 18 TORAH SHE'BE'AL PEH 70 (1976) (Hebrew); Arthur Jay Silverstein, *Liability of the Physician in Jewish Law*, 10 ISR. L. REV. 378 (1975).

doctor's role in treatment is secondary to God's. According to the Bible, illness and death are caused by sin,⁹ health is restored by prayer, repentance and adherence to God's teaching.¹⁰ Nonetheless, as later rabbinic authorities recognized,¹¹ other portions of the Bible recognize that doctors play a role in healing. When a person injures another he is to pay for his cure.¹² More generally, a person must rescue others in distress,¹³ and even must rescue another's endangered property.¹⁴ Because trust in God does not preclude personal involvement in another's distress but indeed compels such involvement, it would seem to follow that doctors are also expected to attempt to cure the ill.¹⁵

By the Mishnaic period, roughly the first 200 years of the Common Era, doctors had become a feature of Jewish life. Although the Mishnah mentions that the Temple employed a

⁹ See *Num.* 12:1-14 (Miriam was smitten with a skin disease for complaining about the wife of Moses); *Num.* 21:4-6 (many Israelites die from serpent bites as punishment for their complaint).

¹⁰ See *Ex.* 15:26 (If Israel will keep God's commandments, He will not inflict them with the diseases brought on the Egyptians for He is their healer); *Deut.* 32:39 (God is sole source of deliverance); *Ps.* 19:8 (God's teaching renews life); *1 Kings* 13:4-6 (when King Jeroboam's arm became paralyzed as a result of his sin, God cured it after a man of God prayed for his recovery); *Ps.* 30:9-12 (prayer to God for health); *Ps.* 103:3 (God forgives sin and heals illness); *Prov.* 4:22 (Wisdom provides healing for the entire body).

When King Hezekiah became deathly ill, the prophet Isaiah told him to set his affairs in order because he would die. *Isaiah* 38:1 Thereupon the king prayed to God, and God answered his prayer by granting him an additional fifteen years of life. *Id.* 38:2-5. By contrast when King Asa became ill with an acute foot ailment he did not pray for relief but sought help from physicians and died within two years. The Bible is critical of Asa. "Ill as he was," says Chronicles, "he still did not turn to the Lord but to physicians." *2 Chron.* 16:12.

¹¹ E.g., Nahmanides, *Torat Ha-Adam* in 2 Chaim Dov Chavel, *Kitvei Rabbenu Moshe ben Nahman* at 42, 44 (1963/64); Maimonides, *Commentary on the Mishnah*, *Nedarim* 4:4.

¹² *Ex.* 21:19. The Hebrew text if read literally could mean that the injurer must himself heal the victim. The King James Version says that "he shall cause him to be thoroughly healed." However, the early Aramaic and Greek translations, Targum Onkelos and the Septuagint, interpret the text to mean that the injurer must pay the doctor's fee.

¹³ *Lev.* 19:16 (literally, "Do not stand upon the blood of your fellow.") Rabbinic tradition has interpreted this to impose an obligation to rescue others in danger of death. E.g., *B. Sanhedrin* 73a.

¹⁴ *Ex.* 23:4-5.

¹⁵ If illness is God's punishment for sin, how can a doctor's attempt to cure that illness be compatible with God's will? The apocryphal book of Ecclesiasticus, known in Hebrew as Ben Sira and dating from the second century B.C., reconciled these conflicting attitudes. God created physicians and medicines and gave these doctors knowledge of the cures. When one becomes sick because of his sin, he ought to pray and make a sacrifice to God and then seek out the physician. The physician is also to pray that God grant relief through the remedy that the physician offers. *Ecclesiasticus* 38:1-15.

physician to care for the priests who served there, the Mishnah also records the view that the best of physicians is destined for purgatory.¹⁶

The Babylonian Talmud contains extensive information about medical treatment for a variety of illnesses. Medical treatment included diet,¹⁷ ointments,¹⁸ hot baths,¹⁹ and surgery.²⁰ But it also consisted of the use of amulets and incantations to protect against demons who, it was thought, could cause disease.²¹ Astrology also played a role in medical treatment.²²

Some rabbis continued to believe that illness is caused by sin and that a cure can only occur if God forgives the sufferer.²³ There was a saying, “the door that is not open to commandments is open to the doctor.”²⁴ These rabbis thought that healing was miraculous

¹⁶ [M. Shekalim 5:1](#); M. Kiddushin 4:14. Further, the Mishnah reports that Hezekiah had ordered that a medical text be placed in a *genizah*, a place for hiding books, and that the rabbinic sages approved of his action. M. Pesahim 4:9.

¹⁷ *E.g.*, B. Gitin 67b, 69a-70a (a variety of illnesses and treatments).

¹⁸ *E.g.*, B. Avodah Zarah 28a (treatment for gum disease).

¹⁹ *E.g.*, B. Shabbat 41a.

²⁰ *E.g.*, B. Shabbat 134a (newborn whose anus is not visible); B. Bava Mezia 83b (abdominal surgery to remove fat; the patient was put to sleep by taking medicine and the operation was carried out in a marble room).

²¹ *E.g.*, M. Shabbat 6:2; B. Avodah Zara 12b and Rashi's commentary s.v. *Shabriri* (the demon Shabriri causes blindness but its effects can be guarded against by an incantation). *See generally* 5 ENCYCLOPAEDIA JUDAICA 1527-28 (1971). Demons could also cause property damage. *See* B. Hulin 105b. *See also* B. Shabbat 67a (incantations to prevent illnesses). Medical knowledge reflected that of the surrounding culture which included a belief that demons caused illness. *See* 2 ISAAC HIRSCH WEISS, DOR DOR VEDORSHAV 13 (1923/1924); JULIUS PREUSS, BIBLICAL AND TALMUDIC MEDICINE 140 (Fred Rosner trans., 1978) (a translation of *Biblisches-talmudische Medizin*, first published in 1911). For a discussion of similar beliefs in ancient Babylonia prior to 2000 B.C., *see* Erica Reiner, *Astral Magic in Babylonia* 85:4 TRANSACTIONS OF THE AM. PHIL. SOC'Y 1, 47 (1995).

Some rabbis sought to minimize the danger of demons. Rava, who emphasized the method of seeking to understand the purpose of a rule, taught for example that demons were responsible for the wear of the scholar's clothing and fatigue in the knees. *See* B. Berakhot 6a-b.

²² For example according to Samuel, a Babylonian sage of the second and third centuries who had a great knowledge of science and medicine, one should not let blood on Tuesday because Mars rules that day at even numbered hours. Astrology was not controlling, however. One could let blood on Friday even though Mars also ruled then at even numbered hours because this was a popular day for bloodletting and God would protect the simple. B. Shabbat 129b.

²³ *See* B. Nedarim 41a (“R. Alexandri said in the name of R. Hiyya b. Abba: A sick man does not recover from his sickness until all his sins are forgiven him, as it is written, Who forgiveth all thine iniquities; who healeth all thy diseases. (Ps. 103:3).”) A rabbinic legend held that until Hezekiah's time no one had ever recovered from illness, and Hezekiah convinced God to allow people to be cured by repentance. Genesis Rabbah (Vilna ed.) 65:9. Some rabbis maintained that people who suspected an innocent man would be afflicted, B. Shabbat 97a, that those who despised a scholar would have no remedy for their wounds, B. Shabbat 119b, and that a pupil who gave a legal ruling in the presence of his master would soon die because of his impertinence. B. Eruvin 63a.

²⁴ Num. R. 9:13 (Vilna ed. 1877/78).

because God caused the illness.²⁵ The study of Torah was considered to be the best medicine because it can heal any bodily injury whereas other medicines are only good for certain types of illnesses.²⁶ Other rabbis saw nothing inappropriate in obtaining medical care,²⁷ and some rabbis instructed their disciples on medical treatment and prevention of disease.²⁸

Although some rabbis thought that it was inappropriate to seek medical care, medicine was widely practiced and generally accepted.²⁹ The Talmud quotes a folk expression, “[o]ne who has a pain goes to the house of a physician.”³⁰ Moreover, the Talmud records a view that a scholar is not permitted to live in a town that does not have a doctor and a surgeon,³¹ thus insuring at least that someone could let blood and perform circumcisions.³²

Turning to the issue of tort liability, Talmudic law distinguishes five states of mind that are relevant to most personal injury cases: intent, inadvertence that is close to intent, inadvertence, inadvertence that is close to accident, and accident.³³ The hallmark of

²⁵ *Id.* (“R. Alexandri also said in the name of R. Hiyya b. Abba: Greater is the miracle wrought for the sick than for Hananiah, Mishael and Azariah. [For] that of Hananiah, Mishael and Azariah [concerned] a fire kindled by man, which all can extinguish; whilst that of a sick person is [in connection with] a heavenly fire, and who can extinguish that?”). Even when illness was caused by natural means, such as eating a poisonous substance, the cure might be achieved through prayer. B. Eruvin 29b

²⁶ B. Eruvin 54a.

²⁷ *E.g.*, *Midrash Temurah*, J. D. EISENSTEIN, OTZAR MIDRASHIM, ch. 2, at 580-81 (1915), *trans. in* J. DAVID BLEICH, JUDAISM AND HEALING 7-8 (1981) (attributing to Rabbi Akiva and Rabbi Ishmael the view that it is just as proper for a physician to treat with drugs as it is for the tiller of the soil to fertilize the soil). *See also* Maimonides, Commentary to M. Pesahim 4:10 (one acknowledges God for medicine that cures illness just as one acknowledges God for food that removes hunger).

²⁸ *See* B. Shabbat 82a.

²⁹ The Talmud suggests three different viewpoints. One opinion was that people only go to doctors because it has become a habit, even though humans cannot cure anything. Abaye disagreed, reasoning that since the Torah gives doctors permission to heal, it is appropriate to seek medical care. Rabbi Aha apparently took a middle view, that indeed only God heals, and as a bonus God does not charge for his care, but it is appropriate to seek medical care. B. Berakhot 61a according to the emendation suggested by *Hagahot R. Zevi Hirsch Chajes*.

³⁰ B. Bava Kamma 46b (used as a metaphor to explain that the burden of proof is on the plaintiff).

³¹ B. Sanhedrin 17b.

³² *Compare* Rashi, B. Sanhedrin 17b s.v. *Rofe, Uman* (the doctor, *rofe*, circumcises and the surgeon, *uman*, lets blood), Rashi, Niddah 20a s.v. *Umana* (surgeon, *umana* in Aramaic, lets blood) *with* Rashi, Bava Metzia 109a s.v. *Umana* (surgeon, *umana*, circumcises). *See also* Rashi’s 7b s.v. *Neima lamul* (one doctor, *rofe*, would circumcise all babies born to members of the town).

³³ *See* B. Bava Kamma 26b-27a; B. Bava Mezia 83a. Intention refers to the intention to come into contact with the victim, not necessarily intention to cause injury. B. Bava Kamma 27a and Rashi’s commentary s.v. *V’im nithapech* and following. Inadvertence that is close to intention refers to a mental state where a person knows of the risk of

inadvertence is one who knew of a risk but forgot about it at the time of action that caused the injury.³⁴ One who kills is subject to exile only if he did so inadvertently.³⁵

Under Talmudic tort law a person was liable for causing direct personal injury; the actor's state of mind was relevant only to the types of damage owed. One who acts inadvertently was only liable for the injured party's loss of value (*nezek*). A person was liable for pain and medical expense only if he acted either intentionally or with inadvertence that was close to intention. One was not liable for humiliation unless he acted with intention.³⁶

Although these general tort rules play a role in the later development of malpractice law, the early rabbinic sources applied other rules for malpractice cases. These early sources contain conflicting rules. The Tosefta, which was probably completed in the fourth century but which contains earlier material, mentions medical malpractice in four places. The Tosefta of Bava Kamma provides in chapter 6 that a skilled physician who healed with permission of the court and caused injury is exempt under the laws of man but the case is referred to Heaven.³⁷ In chapter 9, the same work provides that if a skilled physician who healed with permission of the court caused injury, he would be exempt, but if he caused more injury than was appropriate then he would be liable.³⁸ The Tosefta of Gitin provides that if a skilled physician who healed with permission of the court caused injury, then he would be exempt if injury was inadvertent but would be liable if the injury was intentional, and that this rule was "for the better ordering of

injury when he acts. *See* B. Bava Kamma 32b. Accident means that the actor never knew of the risk of injury. *See* B. Bava Kamma 26b. Inadvertence that is close to accident describes activity that is commonly engaged in by people but which involves a risk of injury. *See* B. Bava Mezia 83a and Rashi's commentary s.v. V'zutar. These mental states do not correspond to the modern concept of negligence. *See* Arnold N. Enker, *Error Juris in Jewish Criminal Law*, 11 J.L. & RELIGION 23, 27 n.15 (1994/95). However, others have made that connection. *E.g.*, 15 ENCYCLOPAEDIA JUDAICA 1273 (1971).

³⁴ *See* B. Bava Kamma 26b-27a (and Rashi's commentary there).

³⁵ B. Bava Kamma 26b.

³⁶ *See* B. Bava Kamma 26b-27a and Rashi's commentary there.

³⁷ Tosefta Bava Kamma 6:17 (Zuckerman ed.). The Lieberman edition reads "he is liable under the laws of Heaven" in place of "his case is referred to Heaven."

³⁸ Tosefta Bava Kamma 9:11 (Zuckerman ed.).

society,”³⁹ meaning that it was a product of rabbinic legislation. Finally, The Tosefta on Makkot provides that if a skilled physician (*rofe umman*) healed with permission of the court and kills a patient, then he is exiled.⁴⁰ A further complicating factor is a brief mention in the Babylonian Talmud that suggests that a possible interpretation of a Biblical verse is that there is total immunity for anyone who causes injury while trying to heal.⁴¹

II. MEDIEVAL SOURCES ON MEDICAL MALPRACTICE

Based on the views expressed in the Tosefta and in the Talmud, Rabbinic authorities in the medieval period expressed a variety of views on malpractice, ranging from total exemption to full liability for surgeons. At one extreme is Meiri, who lived in Provence in the thirteenth and fourteenth centuries, and who would totally exempt a doctor from liability for unintentional injury, even if the doctor had cut off a limb, provided that the doctor had acted to treat the victim.⁴² A slightly later commentator in Barcelona, the RaN, took a similar position but limited the exemption to expert doctors.⁴³ This commentator elaborated that the exemption was necessary so as not to discourage bloodletters and other medical practitioners from exercising their craft since all medical treatments run a risk of death. As long as the doctor is an expert, his errors are considered to be accidental (*o'ness*) rather than inadvertent (*shogeg*).⁴⁴ Moreover, the

³⁹ Tosefta Gitin 3:6 (Zuckerman ed.).

⁴⁰ Tosefta Makkot 2:5. The exile lasted until the death of the High Priest. Exile protected the manslayer, and the High Priest's death provided atonement. See *infra* text accompanying note 102.

⁴¹ B. Sanhedrin 84b. “Just as one who strikes an animal to heal it is not liable, so if one wounds a man to heal him he is not liable.” The discussion concerns *Lev. 24:21*.

⁴² Meiri, commentary on B. Sanhedrin 84b.

⁴³ RaN, commentary on B. Sanhedrin 84b. The commentary was erroneously attributed to Rabbenu Nissim ben Reuben Gerondi who lived in Barcelona in the fourteenth century. It is believed that the commentary was written earlier by another Barcelona rabbi having the same acronym. 12 ENCYCLOPAEDIA JUDAICA 1186 (1971). The term used by the RaN to describe an expert doctor is *rofe mumhe*.

⁴⁴ *Id.*

RaN argued that a doctor who unintentionally kills a patient is not liable even according to Heavenly law because the doctor had the good intention of trying to cure.⁴⁵

At the other extreme is the Tashbetz, Simeon ben Tzemach Duran, who lived in Majorca and Algiers at the end of the fourteenth and beginning of the fifteenth centuries. The Tashbetz, who had trained as a doctor, offered an original interpretation of the conflicting Tosefta passages that we saw earlier. According to the Tashbetz the term *rofe uman*, which up until now we have understood to mean “skilled physician,” in fact means a surgeon.⁴⁶ He wrote that if a surgeon does what is appropriate, it is considered a case of inadvertence for which he is exempt because of rabbinic legislation. However, if a surgeon does more than what is appropriate, it is deemed a case of intention.⁴⁷ The Tashbetz thereby resolves the conflict between two parts of the Tosefta of Bava Kamma, one that exempts a doctor from injury under the laws of man but not under of the laws of Heaven, and the other that imposes liability when a doctor does more than what is appropriate.⁴⁸ The Tashbetz goes further than any other Jewish medieval authority in exposing surgeons to liability. Because a surgeon’s mistake might be regarded as intentional, the Tashbetz exposed surgeons to full liability, including liability for pain, medical expense and humiliation.⁴⁹

In between these two extremes was the view of Nahmanides that ultimately was codified in the Tur⁵⁰ and the Shulhan Arukh.⁵¹ Nahmanides, who spent most of his life in Spain during the thirteenth century, gives a qualified exemption to expert physicians, to those he called

⁴⁵ RaN, commentary on B. Sanhedrin 84b.

⁴⁶ Responsa Tashbetz 3:82.

⁴⁷ *Id.*

⁴⁸ See *supra* text accompanying notes 37-38. He also interprets the Tosefta of Makkot, which imposes exile on a physician, as applying only to a surgeon who did what was appropriate.

⁴⁹ See *supra* text accompanying note 36.

⁵⁰ The Tur was written by Jacob ben Asher (1270?-1340).

⁵¹ The Shulhan Arukh was written by Joseph Caro (1488-1575).

“expert and knowledgeable in the science and practice”⁵² of medicine. As codified in the Shulhan Arukh,

A person should not practice medicine unless he is an expert and unless there is none present who is greater than him, for otherwise he sheds blood. If he treated without the permission of the court, he is liable to make compensation even if he is an expert. If he treated with permission of the court and erred and caused injury, he is exempt under the laws of man but liable under the laws of Heaven, and if he killed [the patient] and it is known to him that he was inadvertent, he goes into exile on his account.⁵³

These medieval materials raise several questions. One is what it meant for a Jewish doctor to have “permission of the court,” a term first used in the Tosefta.⁵⁴ A second question, raised by Nahmanides’s description of an expert as having training in the “science and practice” of medicine, relates to the professional standards that were expected. A third issue is the source of the Tashbetz’s distinction between surgery and medicine, and more generally, what the medieval rabbis regarded as proper medical practice. The fourth issue is the significance of the curious provision of exile in the codes, long after exile was no longer practiced in Jewish law. The discussion of each of these issues may be informed by observing parallel developments in the surrounding cultures.

A. “Permission of the Court” and the Community Physician

⁵² Nahmanides, *supra* note 11, at 43. The words in quotation marks are a translation of “*baki ve-yode’a be-hokhmah u-ve-melakha*.” The Tur adopts the same terminology. Tur, Yoreh Deah §336. Maimonides, who lived from 1135-1204, also expressed the idea that a doctor needs both theory and practice. See Ariel Bar-Sela et al., *Moses Maimonides’ Two Treatises on the Regimen of Health*, 54:4 n.s. TRANSACTIONS OF THE AM. PHIL. SOC’Y 29 (1964). He thought that many acts of malpractice did not result in harm but he thought that the majority of persons who die do so as a consequence of medical treatment, “because of the ignorance of most physicians about Nature.” *Id.* at 21. Maimonides quoted this from a text that he attributed to Aristotle. See also HERBERT A. DAVIDSON, MOSES MAIMONIDES, THE MAN AND HIS WORKS 481 (2005).

⁵³ Tur, Yoreh Deah § 336; Shulhan Arukh, Yoreh Deah 336:1.

⁵⁴ See *supra* text accompanying notes 37-40.

Many of the rabbinic sources we have seen provided that a doctor must have “permission of the court” in order to be exempt from liability. What did this mean in the Middle Ages? How did it differ, if at all, from a doctor who qualified as an expert?

Part of the answer may lie in understanding that an important feature of the non-Jewish society in this period was the town or community physician. European communities hired physicians to take care of their residents.⁵⁵ The contracts often specified a term of service, a payment or exemption from taxes, and required the doctor to treat all residents while charging only the wealthy for their service.⁵⁶

The structure of the doctor-patient relationship within Jewish communities in the Middle Ages paralleled surrounding practice. Each *kahal*, the local Jewish community that had a semi-autonomous function, had a parallel practice of hiring a doctor to treat its members.⁵⁷ Although Jewish communal doctors may have been a feature of Talmudic times,⁵⁸ it is likely that the legal status of these doctors changed in the medieval period. Each *kahal* had acquired powers of a “court” by the thirteenth century.⁵⁹ Whether Jewish authorities had their own licensing system is

⁵⁵ See Vivian Nutton, *Continuity or Rediscovery? The City Physician in Classical Antiquity and Mediaeval Italy*, in *THE TOWN AND STATE PHYSICIAN IN EUROPE FROM THE MIDDLE AGES TO THE ENLIGHTENMENT* 9 (Andrew W. Russell ed., 1981).

⁵⁶ Vivian Nutton, *Medicine in Medieval Western Europe, 1000-1500*, in LAWRENCE I. CONRAD, MICHAEL NEVE, VIVIAN NUTTON, ROY PORTER & ANDREW WEAR, *THE WESTERN MEDICAL TRADITION* 166-67 (1995).

⁵⁷ Joshua O. Leibowitz, *Town Physicians in Jewish Social History*, in *INTERNATIONAL SYMPOSIUM ON SOCIETY, MEDICINE AND LAW* 117, 121-122 (H. Karplus ed., 1972). Dr. Leibowitz presents there the contract between Joseph Solomon Delmedigo and the Frankfurt Jewish community from 1631. Dr. Delmedigo was a great scholar of Jewish and secular studies. See 5 *ENCYCLOPAEDIA JUDAICA* 1477 (1971). See JOHN M. EFRON, *MEDICINE AND THE GERMAN JEWS* 37 (2001) (each *kahal* ran hospices, hospitals and provided physicians, surgeons, apothecaries and bathhouses for its members). The early codes' provision that a bloodletter could be fired without warning refers to a person hired by the community. See Rif, Bava Metziah 66a in the printed edition; Maimonides, *Hilkhot Sekhirut* 10:7; Rosh, Bava Metziah 9:38. Maimonides indicates that this refers to a bloodletter hired by the community. See Magid Mishneh's commentary, *Hil. Sekhirut* 10:7. See also Rashi, B. Pesachim 7b s.v. Neima lamul (one doctor would circumcise all babies born to members of the town).

⁵⁸ A scholar was expected to live in a town that had a doctor and surgeon. See *supra* text accompanying note 31.

⁵⁹ See, e.g., Responsa Rashba (1235-1310) attributed to Nahmanides 59 (expropriation by *kahal* is valid by comparison to power of a court to expropriate). See also Responsa Rivash (1326-1408) 214 (the *kahal*'s council of 30 is like a court).

unknown, but by medieval times the concept of a physician having “permission of the court” probably included the physician hired by each *kahal*.

In all probability, having permission of the court to practice did not necessarily mean that the doctor was an expert or that he would be exempt from liability. For example, Menahem ben Aaron ibn Zerah (c.1310-1385) who lived in Spain, ruled that if a doctor practiced medicine without permission of the court, he would be liable to pay damages even if he were an expert. If, however, the court gave permission to one who was not an expert, he would be exempt under the laws of man but liable under the laws of Heaven.⁶⁰ As Ibn Zerah contemplated, not all who were approved by the court were necessarily experts.⁶¹ Why would the court approve of a non-expert? Records from that time indicate that the secular authorities often licensed doctors that lacked either training or experience.⁶² Licensing of physicians was a relatively recent phenomenon, having begun around the thirteenth century and having become a requirement for practice by the fourteenth century.⁶³ Apparently there was a lack of qualified doctors, and the authorities, both Jewish and secular, did their best to provide some medical care for their citizens.⁶⁴

B. Professional Skills and Training

The skills and training that were expected or at least hoped for in a licensed physician in medieval secular society appears to have had parallels in contemporary rabbinic writings. Although the Tosefta spoke of physicians having “permission of the court,” the requirements for this permission were not described. As we saw, however, Nahmanides required that to obtain a

⁶⁰ Menahem ben Aaron ibn Zerah, *Zeidah la-Derekh* 5:2:2.

⁶¹ The Tur disagreed, stating, “A court does not give permission to one who is not an expert.” Tur, *Yoreh Deah* § 336.

⁶² JOSEPH SHATZMILLER, *JEWS, MEDICINE, AND MEDIEVAL SOCIETY* 19 (1994).

⁶³ *Id.* at 14.

⁶⁴ See MICHAEL R. MCVAUGH, *MEDICINE BEFORE THE PLAGUE: PRACTITIONERS AND THEIR PATIENTS IN THE CROWN OF ARAGON, 1285-1345*, at 192 (1993) (it was unusual for practitioners to have even a limited amount of university training in the early fourteenth century).

measure of immunity, doctors must be “expert and knowledgeable in the science and practice”⁶⁵ of medicine. This concern mirrored the requirements of licensing of physicians in secular society. At least on paper, to obtain a license candidates were required to show that they had both theoretical and practical knowledge of medicine.⁶⁶ It may seem to us natural to ask that doctors possess both theoretical and practical medical skills. Such was not always the case as there were many untrained medical practitioners at this time.⁶⁷

C. Proper Medical Practice

Rabbinic ideas about what constituted proper medical practice had direct parallels to ideas that were prevalent in medieval secular society. There has never been such a thing as Jewish medicine.⁶⁸ Although there have been many skilled Jewish physicians, these Jewish physicians adapted the medical practices of surrounding peoples.⁶⁹ In the medieval period some rabbis distanced themselves from many of the medical remedies described in the Talmud.⁷⁰

Medieval medicine was heavily influenced by the schools of thought of Greek medicine including, primarily, the Dogmatic, the Methodist, and the Empiricist schools of thought.⁷¹ The leading figures of the Dogmatic school were Hippocrates and Galen. As understood in the middle ages, Dogmatic medical theory was divided into a consideration of naturals (such as

⁶⁵ Nahmanides, *supra* note 11, at 43.

⁶⁶ See Luis García-Ballester, Michael R. McVaugh & Agustín Rubio-Vela, *Medical Licensing and Learning in Fourteenth-Century Valencia*, 79:6 TRANSACTIONS OF THE AM. PHIL. SOC’Y 27 (1989); SHATZMILLER, *supra* note 62, at 16-19. Secular authorities also required Jewish doctors to obtain licenses, at least if they wanted to treat non-Jewish patients. *Id.* A similar situation existed in Moslem societies centuries earlier. See Ghada Karmi, *State Control of the Physicians in the Middle Ages: an Islamic Model*, in Andrew W. Russell ed.; *supra* note 55, at 66-67.

⁶⁷ See SHATZMILLER, *supra* note 62.

⁶⁸ EFRON, *supra* note 57, at 13-14.

⁶⁹ SHERWIN B. NULAND, MAIMONIDES 8 (2005).

⁷⁰ *E.g.*, Tosafot, Mo’ed Katan 11a s.v. Kavra (prescriptions in the Talmud are not good today). See Efron, *supra* note 57, at 14; *but see* Solomon ben Abraham Adret (c. 1235- c. 1310), Responsa Harashba 1:413 (approving of use of amulets to heal disease).

⁷¹ RON BARKAI, A HISTORY OF JEWISH GYNECOLOGICAL TEXTS IN THE MIDDLE AGES 38 (1998); I.E. Drabkin, *Soranus and his System of Medicine*, 25 BULL. OF THE HIST. OF MED. 503, 504-05 (1951). There is no relation between the Methodist school of medicine and the Methodist denomination of Christianity that arose in 18th century England.

elements and humors), non-naturals (six categories of things that affected one's health and which could be controlled) and contra-naturals (disease, causes of disease and symptoms).⁷² The Methodist school assumed that the human body had three states, lax, constricted, and mixed, and that treatment had to be based on this theory. In addition, some Methodists insisted on external treatment rather than internal intervention.⁷³ The third school, the Empiricist, rejected all theory and taught that medical treatment could be guided only by experience.⁷⁴

A striking parallel to the Methodist school of thought is seen in the writing of Abraham ibn Ezra (1089-1164). Ibn Ezra limited the scope of allowed medical practice to the treatment of external injuries.⁷⁵ He also maintained that God's healing is gentler than that of a doctor.⁷⁶ Although Ibn Ezra did not spell out the legal consequences, it would seem that the doctor who treated an internal ailment would be liable for any resulting injury.

Some later rabbis rejected Ibn Ezra's limitation on the role of the physician as contradicting Talmudic precedents allowing treatment of various internal ailments.⁷⁷ What, then, was Ibn Ezra's basis for preference for gentle treatments and in restricting medical practice to

⁷² See Joannitius (809-877), *Isagoge*, in EDWARD GRANT, *A SOURCE BOOK IN MEDIEVAL SCIENCE* 705 (H.P. Chomeley trans., 1974). The *Isagoge* was well known in the medieval world, and was translated into Hebrew in the fourteenth century; the work recognizes seven naturals. See Luis García-Ballester, *Changes in the Regimina sanitatis, The Role of the Jewish Physicians*, in *HEALTH, DISEASE AND HEALING IN MEDIEVAL CULTURE* 119, 121-22 (Sheila Campbell, Bert Hall & David Klausner eds., 1992).

⁷³ See BARKAI, *supra* note 71, at 40; Drabkin, *supra* note 71, at 510; see also T. CLIFFORD ALLBUTT, *GREEK MEDICINE IN ROME* 181, 196-97 (1921).

⁷⁴ See ROSWELL PARK, *AN EPITOME OF THE HISTORY OF MEDICINE* 14 (1897).

⁷⁵ Commentary of Abraham ibn Ezra to the Torah, Exodus 21:19 (the longer version). This was followed by Bachya ben Asher (13th century) in his commentary on the same verse. It is possible that Bahya meant to disallow any form of surgery. His commentary describes only two forms of treatment, a medical ointment and a bitter liquid that was to be swallowed. Ibn Ezra's view was adopted by Jonathan Eybeschütz (1690-1764). He applied to doctors who treated internal injuries the Talmudic dictum that even the best of physicians is destined for purgatory. Eybeschütz, *Kereti Upleti*, *Yoreh Deah* 188. A similar view was held by Eybeschütz's bitter adversary, Jacob Emden, who held that a patient could be forced to undergo medical treatment only to correct an external injury and only if the doctor was certain that the patient would recover. Jacob Emden (1697-1776), *Mor U-ketziah* 328. The Vilna Gaon, Elijah ben Solomon Zalman (1720-1797), also held this view. See Humash Ha-Gra, *Ex. 21:19* (Weinreb ed. 2004).

⁷⁶ Commentary of Abraham ibn Ezra to the Torah, Exodus 21:19 (the longer version). Ibn Ezra relied on linguistic evidence that the verb "to heal" used when God heals is "*rafah*" whereas that for human treatment is "*rapeh*." The latter is an intensive form, suggesting that greater pain and effort is involved.

⁷⁷ Menahem Ibn Zerah, *Zeidah Laderekh* 5:2:2; Moses Mat (c. 16th century), *Mateh Moshe* 4:3.

external injuries? It seems possible that Ibn Ezra, who was trained as a doctor, was influenced by the Methodist school of medicine. Dating back to the Greek physicians Themison (c.50 B.C.) and Soranus (c.100 AD), this school held that a doctor should not theorize about what is hidden and that treatment should only be external and should avoid violent intervention.⁷⁸ The school did not proscribe surgery, but it was to be undertaken cautiously and for few diseases.⁷⁹ Although Soranus's work was not yet translated into Hebrew in Ibn Ezra's lifetime,⁸⁰ Ibn Ezra's ideas about proper medical treatment parallel his teachings.

The Methodist preference for gentle treatments, its general disapproval of surgery, and its opposition to Empiricism may also have influenced the Tashbetz. As we saw, the Tashbetz thought that surgeons who did more than what was appropriate would be deemed to have injured their patients intentionally.⁸¹ The Tashbetz's expansive view of the surgeon's liability was in sharp contrast to his view of the physicians' exposure. As for the latter, the Tashbetz says that they are exempt even under the laws of Heaven provided that the physicians intended to heal.⁸² The physician, however, also is not to speak in the presence of another having greater knowledge. The Tashbetz adds, "[n]or is he to rely upon his own experiments, for concerning him it says, 'the best of physicians is destined for purgatory.'"⁸³

What, one might wonder, is the harm of relying on one's experiments, and why does the Tashbetz heap upon only such a physician so much opprobrium? It is very likely that the Tashbetz condemned Empiricism, the school of medicine that believed that treatment could be

⁷⁸ See *supra* note 73 and accompanying text.

⁷⁹ ALBUTT, *supra* note 73, at 222; Drabkin, *supra* note 71, at 511-12 (Soranus advocated surgery only if diet and drugs were of no avail, and regarded surgery as inappropriate for most acute and chronic diseases).

⁸⁰ BARKAI, *supra* note 71, at 56.

⁸¹ See *supra* text accompanying note 47.

⁸² Responsa Tashbetz 3:82. The Tashbetz says that a physician is one who treats patients with only "liquids, laxatives, drugs, baths, and rest." *Id.*

⁸³ Quoting the Mishnah's statement, see *supra* text accompanying note 16.

based only on experience, not on any theory of the causes of disease.⁸⁴ In time an empiric was regarded as nothing more than a quack.⁸⁵ It would appear that the Tashbetz rejected experimentation unsupported by those “having greater knowledge,” that is, knowledge derived from a study of medical theory.

The Tashbetz offers two bases for distinguishing between doctors and surgeons, one based on law and the other based on etymology. The first basis is that the Talmud rules that any metal weapon, even the point of a metal pin, is capable of killing a person if it pierces the flesh.⁸⁶ The linguistic basis for the distinction is that the Tosefta’s rules only apply to surgeons because they use the term *rofe uman* and the word *uman* means a craftsman and who uses a metal implement, such as one who circumcises or lets blood.⁸⁷ Neither of these two bases is convincing and has not been generally followed by other rabbinic authorities.⁸⁸ That any metal object can cause death is unrelated to whether doctors other than surgeons are to be liable for injuries or death. Nor is the linguistic argument sound, as the Talmud uses the terms *rofe*

⁸⁴ See *supra* text accompanying note 74.

⁸⁵ E.g., JOHN MILTON, *PARADISE LOST* bk. V:440 (1667). See JAMES WYNBRANDT, *THE EXCRUCIATING HISTORY OF DENTISTRY* 30 (1998).

⁸⁶ B. Sanhedrin 76b. If death results from other weapons that are adjudged to be incapable of killing, the killer is not executed.

⁸⁷ Compare Rashi, B. Sanhedrin 17b s.v. *Rofe, Uman* (the doctor, *rofe*, circumcises and the surgeon, *uman*, lets blood), Rashi, Niddah 20a s.v. *Umana* (surgeon, *umana* in Aramaic, lets blood) with Rashi, Bava Metzia 109a s.v. *Umana* (surgeon, *umana*, circumcises).

⁸⁸ An exception is the responsum collected by Isaac Molina, *Besamim Rosh* 386 (16th century) which reached a similar result. Some have explained that the Tashbetz’s distinction between surgery and medicine was based on the rule in Jewish law that tortfeasors are only liable for harm that is deemed to be direct. Surgery, but not medicine, is thought to cause direct harm. See Bleich, *supra* note 8, at 87, 101-03. There are several difficulties with this explanation. Aside from the lack any mention of it by the Tashbetz, the explanation is both over- and under-inclusive. Some non-surgical treatments can cause direct harm and some surgeries can cause indirect harm. There are several rabbinic views concerning direct and indirect harm, and all of them are indeterminate. See Steven F. Friedell, *Nobody’s Perfect: Proximate Cause in American and Jewish Law*, 25 *HASTINGS INT’L & COMP. L. REV.* 111 (2002).

(doctor) to include a surgeon⁸⁹ and uses the term *rofe uman* to refer to a skilled doctor who is not a surgeon.⁹⁰

The Tashbetz ideas about surgery paralleled the Methodist theory of medicine and the public attitude that surgery was more dangerous than other forms of medicine. In medieval Europe, surgeons were of a lower class than physicians.⁹¹ Surgeons, often little more than barbers, had less training than other doctors and were generally of inferior status.⁹² In non-Jewish courts surgeons were also more likely than physicians to be sued.⁹³

D. Exile in Case of Death

As we have mentioned,⁹⁴ the Tur and the Shulhan Arukh provide that if an expert doctor inadvertently killed a patient and “it is known to him that he was inadvertent, he goes into exile on his account.”⁹⁵ The provision for exile for inadvertent killing, originally found in the Tosefta,⁹⁶ seems out of place. The law of exile was not applied in this period, and these codes did not generally codify rules that were no longer applicable. Indeed, the introduction to the Tur made clear that the purpose of the work was to instruct as to those matters that were then practiced.⁹⁷ In the section of the Tur dealing with personal injuries, it is said that capital cases are no longer practiced and that cities of refuge have been abolished.⁹⁸ The Jewish communities

⁸⁹ E.g., M. Keritot 3:8 (amputation); M. Ohotot 2:3 (use of small trephine).

⁹⁰ B. Sanhedrin 91a. See also Saul Lieberman, Tosefta Ki-Fshutah, part 8, Order Nashim 840 (1973).

⁹¹ See Bryon Grigsby, *The Social Position of the Surgeon in London, 1350-1450*, 13 *ESSAYS IN MEDIEVAL STUD.* 71 (1996); Charles Greene Cumston, *Law Governing Civil Malpractice in the Middle Ages*, 15 *GREEN BAG* 409, 412 (1903).

⁹² MCVAUGH, *supra* note 64, at 183 (1993); Grigsby, *supra* note 91, at 71 (1996). Even in the nineteenth century it was thought that surgery was mostly “merely mechanical,” whereas “a physician exercises a profession often beset with great difficulties.” *Sumner v. Utley*, 7 Conn. 257, 260 (1828).

⁹³ MCVAUGH, *supra* note 64, at 183.

⁹⁴ See *supra* text accompanying note 53.

⁹⁵ Tur, Yoreh Deah § 336; Shulhan Arukh, Yoreh Deah 336:1.

⁹⁶ See *supra* text accompanying note 40.

⁹⁷ *Id.*

⁹⁸ Tur, Hoshen Mishpat 425.

retained the power to punish murderers under their emergency powers,⁹⁹ and some ethical writings prescribed a form of exile for an intentional murderer,¹⁰⁰ but there was no procedure for exiling an inadvertent manslayer as an emergency matter.

According to Jewish law, an inadvertent killer was to remain in a city of refuge maintained by the Levites until the death of the High Priest.¹⁰¹ The High Priest's death, not the exile, was the atonement for the killing,¹⁰² so that if the High Priest were to die after the killer's conviction but before he had gone into exile, the killer did not go into exile.¹⁰³ If no High Priest was in office upon the killer's conviction, he was to remain in exile for his entire life.¹⁰⁴ A killer who intentionally leaves the city of refuge can be killed.¹⁰⁵ The concept of exile in the context of medical malpractice in the Middle Ages raises several difficulties. First, there were no Levitical cities of refuge to which one could flee. Further, since there was no High Priest, would a doctor who inadvertently killed a patient need to remain in exile all his life?

Others have grappled with these difficulties. Some see the requirement of exile as a way of emphasizing the seriousness of the harm¹⁰⁶ or a suggestion that the doctor must atone for his error if he is to fulfill his Heavenly obligation.¹⁰⁷ These efforts fall short of providing a satisfactory explanation. Why should the codes of Jewish law prescribe a novel punishment only for a doctor's inadvertent homicide? Moreover, it seems to undermine the concern of the codes

⁹⁹ *Id.*

¹⁰⁰ Eleazar ben Judah of Worms (c. 1165-1230), *Sefer Rokeah* § 23 (exile for three years); Darkhei T'shuva in *Responsa Maharam Rothenberg* 4:1023 (same). *But see* Or Zarua 1:112 (we have no power to execute, beat or exile the killer but can only avoid contact with him). *See also* Rabbi Meir Eisenstadt (1670-1744), *Responsa Panim Me'irot* 1:85 (the form of exile prescribed by the Rokeah differed in several respects from the exile described in the Bible for inadvertent killers).

¹⁰¹ *Nu.* 35:28.

¹⁰² B. Makkot 11b.

¹⁰³ M. Makkot 2:6.

¹⁰⁴ *Id.*

¹⁰⁵ B. Makkot 12a

¹⁰⁶ *Nishmat Avraham*, *Yoreh Deah* § 336 at p. 231 (quoting Rabbi Shlomo Zalman Auerbach).

¹⁰⁷ *Reponsa Minhath Yitzhak* 3:104.

that doctors not be deterred from practicing medicine—indeed the codes provide that one who withholds treatment is deemed to shed blood.¹⁰⁸

A possible explanation is that in non-Jewish societies during the Middle Ages, a doctor's exile was a common punishment for causing a patient's death.¹⁰⁹ Also, some physicians fled the city rather than face trial.¹¹⁰ This seems to have been a particular problem for Jewish physicians who appear to have been a frequent target of disappointed patients.¹¹¹ Although exiled doctors probably established a medical practice in another town, the practice was a way of ridding a community of a bad doctor. The Jewish codes appear to have reflected this practice.

III. MODERN JEWISH SOURCES ON MEDICAL MALPRACTICE

In his code of Jewish law completed almost 100 years ago, Rabbi Jehiel Michal Epstein summarized the law of medical malpractice based largely on the Tur and the Shulhan Arukh.¹¹² Recognizing that the secular state licenses doctors to practice, Epstein provided that if a one practices medicine without a state-issued license, that he would be liable for resulting injuries even if he were an expert. However, he maintained, "If he healed with permission and erred and caused damage, he is exempt under the laws of man but is liable under the laws of Heaven if it was on account of his neglect (*hitrashluto*) in that he did not investigate carefully."¹¹³ Under this formulation, the licensed physician's exposure for negligence is at most a Heavenly obligation to

¹⁰⁸ Along those lines the Shakh, a leading commentary to the Shulhan Arukh, wrote that despite the threat of exile under the laws of Heaven, the doctor is not required to refrain from treatment and that such treatment is in fact commanded by God. Shakh, Yoreh Deah 336:3.

¹⁰⁹ See Cumston, *supra* note 91, at 411.

¹¹⁰ See Joseph Shatzmiller, *Doctors' Fees and Their Medical Responsibility, Evidence from Notarial and Court Records*, in SOURCES OF SOCIAL HISTORY: PRIVATE ACTS OF THE LATE MIDDLE AGES (PAPERS IN MEDIAEVAL STUDIES, 5) 201, 207 (Paolo Brezzi & Egmont Lee eds., 1984).

¹¹¹ McVAUGH, *supra* note 64, at 186. See Shatzmiller *supra* note 110, at 206-07. Most of these cases involved Christian patients, but Shatzmiller discusses a criminal case involving a Jewish patient who had died. *Id.* at 206.

¹¹² The work, *Arukh Ha-Shulhan*, was completed in parts between 1884 and 1907. See 6 ENCYCLOPAEDIA JUDAICA 831 (1971).

¹¹³ Jehiel Michal Epstein, *Arukh Ha-Shulhan* 336:2.

compensate. Epstein's position is essentially the same as that of Nahmanides seven centuries earlier.

As we noted at the outset, the Twentieth Century witnessed a dramatic change in the rabbinic attitude to the question of liability. In several instances, rabbis determined that a doctor's fault can result in full liability in courts of man. For example, the Chief Rabbi of Tel Aviv, Rabbi Hayyim David Halevi, was asked if Jewish law would impose tort liability on a doctor as is the case under Israeli law. Rabbi Halevi wrote that if a doctor made the correct diagnosis and established the correct treatment but the doctor's careless act or omission caused damage, then the doctor would be liable only under the laws of Heaven.¹¹⁴ However, he added, if a doctor erred either in making a diagnosis or in designing a course of treatment, he would be liable under the laws of man if the error was one that no doctor having the appropriate intelligence would make.¹¹⁵

More recently, Rabbi Shlomo Dichovski, a member of Israel's Rabbinical High Court of Appeals, has written that it is hard to assume that the doctor's liability under the laws of Heaven as laid out in the Arukh Ha-Shulhan refers to professional malpractice.¹¹⁶ He suggested that it instead refers to a doctor who makes a misdiagnosis of what appears to be a routine illness where the doctor fails to make a fundamental analysis. However, he wrote that doctors would be liable under the laws of man if they provide negligent treatment, either by neglecting a patient or by failing to perform appropriate tests.¹¹⁷

¹¹⁴ Responsum No. 30, 3 Hayyim David Halevi, *Aseh Lekha Rav* 138, 142 (1978/79).

¹¹⁵ *Id.* at 143.

¹¹⁶ Shlomo Dichovski, *Mitshuvotav shel rav l'rofe*, 17 *TECHUMIN* 327, 332 (1996/97).

¹¹⁷ *Id.*

Going further, other rabbis took the view that a doctor's error can be deemed to be intentional, thereby exposing the doctor to full liability in the courts of man.¹¹⁸ For example, a major authority of Jewish law, Rabbi Shmuel Vosner of Bnei Berak, Israel, ruled in a responsum where a dentist accidentally moved a drill onto one of his patient's healthy teeth causing damage.¹¹⁹ Under the Shulhan Arukh one would think that the dentist would at most be liable under the laws of Heaven for his inadvertent mistake. However, Rabbi Vosner adopted the Tashbetz's conclusion that "if he did more than was appropriate, it is a case of intention for which he is liable."¹²⁰ Rabbi Vosner thus treated what he admitted was inadvertent and negligent behavior as if it were done intentionally so that liability in the court of man applies.¹²¹

Two other leading authorities extended liability even further. Rabbi Isaac Jacob Weiss (1902-1989)¹²² and Rabbi Eliezer Judah Waldenberg (1917-)¹²³ were asked what the rule would be for a doctor who injected a patient with a medicine that was other than what the doctor intended. Both rabbis ruled that the doctor would be liable because the rabbis would regard the doctor's error as an intentional wrong.¹²⁴ Rabbi Weiss sought to limit the ruling, distinguishing a case where a doctor injected the intended medicine but erred in deciding what type of medicine to give.¹²⁵ Rabbi Waldenberg took a more expansive view. According to him, the doctor's mistake counted as an intentional breach because "doctors are expected to give close attention to

¹¹⁸ See *supra* text accompanying note 36. But see 1 Zevi Shpitz, *Mishpitei Ha-Torah* 51-54 (1998) (imposing no more than liability in the court of Heaven for errors of a licensed doctor).

¹¹⁹ Shmuel Halevi Vosner, *Responsa Shevet Halevi* 4:151 (1981). *Accord*, Mosheh Ze'ev Zorger, *Vayashev Moshe* 2:8 (1988).

¹²⁰ For a discussion of the Tashbetz, see *supra* text accompanying note 47.

¹²¹ The responsum says that a matter of inadvertence is treated as intentional and also says that the ruling applies when the doctor acted negligently ("she *hitrashef*").

¹²² Rabbi Weiss was the head of the *haredi* (Ultra-Orthodox) community in Jerusalem.

¹²³ Rabbi Waldenberg is currently a member of Israel's Supreme Rabbinical Court. He is a major authority on medical issues within Jewish law.

¹²⁴ Isaac Jacob Weiss, *Minhat Yitzhak* 3:104-105 (1961); Eliezer Judah Waldenberg, *Tzitz Eliezer* (Ramat Rahel) 5:23 (responsum undated, volume first published in 1956/57).

¹²⁵ *Minhat Yitzhak* 3:105.

the ways of giving medicine.”¹²⁶ It would seem to follow that any error concerning a matter where doctors are expected to give close attention would also be regarded as an “intentional” breach subjecting the doctor to liability under the laws of man. Along these lines, a lawyer in the Israel rabbinical court has argued that doctors are deemed to act intentionally if they fail to use treatments that they are unaware of or if they fail to order tests to clarify a diagnosis in a situation where other doctors would have done so.¹²⁷ In short, a doctor’s failure to act according to the profession’s standards will subject the doctor to full liability for harm.

Although it might shock some to have a doctor’s negligence regarded as an “intentional” tort, this sort of characterization has its precedents in Jewish law. It will be recalled that the RaN regarded a doctor’s errors as accidental rather than inadvertent to avoid liability.¹²⁸ Here the tables are turned, and the doctor’s state of mind is deemed to be more culpable. Outside of the medical malpractice area, Maimonides argued that careless conduct could make one liable for a collision as if he acted intentionally.¹²⁹ These developments show that legal reform can be achieved by adjusting the evaluation of the actor’s state of mind. The RaN expressed the desire not to discourage doctors from practicing medicine, recognizing that all medical treatments had a

¹²⁶ Rabbi Waldenberg drew support from a comment by the Hida, Rabbi Hayyim Joseph David Azulai in *Tov Ayin* 9:8 (1786). According to the Hida, “if the doctor knew that he did not recognize the illness and did not pay attention but gave him medicine that caused his death, and was careless in that he could have paid attention, then all the rabbis agree [that he is liable to be exiled].” The comment relates only to exile and does not suggest that careless injury would amount to an intentional tort. *See also* the Hida’s gloss in *Birkei Yosef* 336:6 (1774), where the Hida tried to explain the distinction between a doctor who inadvertently kills a patient and a teacher, bailiff, or father who accidentally kills a person while punishing them. The doctor is exiled; the others are not. According to the Hida, the doctor should have been more careful whereas the others only did what people ordinarily do.

¹²⁷ Yosef A. Cohen, “Rofe She-hezik—ha’im hayyav b’tashlumim?,” *available at* <http://www.moriya.org.il/Art/print.asp?id=418> (as of March 16, 2006). Cohen wrote:

A doctor injures intentionally if, for example, he did not know that there were other methods of treatment such as newer treatments, or further, if he suspected that a patient was suffering from a condition but did not refer him for additional tests to clarify the matter. If in a similar occurrence another doctor would have had doubt and would have sent for additional tests, then the one who did not do so has entered the category of ‘intention,’ for he has injured and is liable to pay for his negligence.

Id.

¹²⁸ *See supra* note 44.

¹²⁹ Maimonides, *Hil. Hovel U-mazik* 6:8 (one who is carrying a beam and breaks a barrel carried by someone in front of him is liable “for it is as if he broke it intentionally with his hand.”).

risk of fatal risk.¹³⁰ In modern times the need is the opposite, to discourage substandard practice and to compensate the victims of such treatment.

In the space of a century, Jewish law has moved from regarding a doctor's neglect as calling only for liability in the court of Heaven to regarding this neglect as an "intentional" tort that subjects the doctor to liability in the courts of man.¹³¹ What accounts for this remarkable transformation? As we suggested in the Introduction,¹³² it seems that the answer may lie in the recognition that the larger society holds doctors to a higher standard than was the case previously, and it is expected that doctors will be sued and that they or their insurers will have to compensate victims of malpractice. Rabbinic authorities may be responding to the felt needs and expectations of the Jewish communities, and those feelings and expectations may be influenced by the surrounding culture.¹³³

A similar development took place in the field of lawyers' professional. In fifteenth-century Germany, Rabbi Israel b. Hayyim Bruna adopted the standard of non-Jewish courts that forbade a lawyer from switching sides in the middle of litigation. He wanted to make sure that Jewish courts not be seen as tolerating a lower standard of ethical behavior on the part of lawyers.¹³⁴ Similarly today, knowing that doctors are subject to being held liable in non-rabbinic

¹³⁰ *Id.*

¹³¹ Cohen attempts to reconcile his view with that of Epstein's. He wrote that the author of the Arukh Ha-Shulhan meant to exempt the doctor only if he was not really neglectful but only if he tried to heal but did not do so thoroughly. *See Rofe She-hezik, supra* note 127. In the expanded version of the article, Cohen admits that Epstein's views may conflict with his own. *Id.*

¹³² *See supra* text accompanying note 7.

¹³³ For example, the question addressed to the Chief Rabbi of Tel Aviv specifically wanted to know if Jewish law would hold a doctor liable as is the case under Israeli law. *See supra* text accompanying note 114.

¹³⁴ Responsa Mahari Bruna 132, *trans. in* 1 JEWISH LAW AND JEWISH LIFE 17 (Jacob Bazak & Stephen M. Passamaneck eds., 1977). *See generally*, 1 MENAHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 62-64 (Bernard Auerbach & Melvin J. Sykes trans., 1994).

Another example of this type of transformation in the medical area is in the issue of patient autonomy. Older sources suggest that the doctor's obligation to heal overrides a patient's wishes and that the person does not own his own body but holds it in trust from God. *See* Tosefta Shekalim 1:6; Jacob Emden, Mor Ukeziah 328; Responsa Rosh 68:10; David ibn Zimra, commentary to Maimonides, Hil. Sanhedrin 18:6. *See* Daniel Sinclair, *The Obligation to Heal and Patient Autonomy in Jewish Law*, 13 J.L. & RELIGION 351, 366 (1996-99). In the modern era, this view has

courts, rabbinic authorities may feel pressure not to tolerate a lower standard of behavior by doctors or to appear to give less regard to a patient's protection.

CONCLUSION

A study of the medieval rabbinic materials is enhanced by study of the medical knowledge of that time. The presence of town and Jewish communal physicians, the licensing of doctors, the distinction between medicine and surgery, and the distinct schools of medicine may all be reflected in the rabbinic writings of this time.

There appears also to be a move towards greater liability than would have been imposed in the fourteenth century. As medical care became licensed and standardized, the rabbinic law imposed liability on those who lacked the skills to practice or did not possess a license.

Although some of the earlier authorities gave immunity to expert doctors, at least to those who were not surgeons, the codes of the Tur and the Shulhan Arukh exposed the licensed, expert physician to liability in the court of Heaven for error. Their exemption from liability in the courts of man was felt necessary to encourage doctors to practice; their moral or religious obligation provided some possibility of compensation for the injured patients. If the doctor's fault resulted in death, however, the doctor might have left town to avoid further difficulties.

The increased professionalization of medicine may have led to a greater expectation that doctors would incur legal or social penalties for their failure to meet the profession's standards. In the twentieth century the trend has been to impose greater liability on doctors, mirroring the development in secular society.

begun to give way to an acknowledgment that a patient's wishes must be taken into account in a variety of circumstances, including high-risk treatments and treatments that if forced upon a patient would likely have traumatic effects. Sinclair, *id.* at 370; *but see* Shmuel Halevi Wosner, Responsa Shevet Halevi 8:251 (1993/94) (if a patient's refusal of medical treatment is not based on a trust in God but on a desire to commit suicide or out of foolishness, then a rabbinic court can require treatment).

Jewish law, as a religious legal system, has some special features. It has historically imposed a limited scope of liability within the formal law, known as the *din Torah*, either reserving to the organized Jewish communities the power to impose greater liability as the need arose or informing the parties that liability may be imposed in a court of Heaven.¹³⁵ The latter-type liability would vary with the circumstances, including such factors as the defendant's state of mind. In addition, rabbinic courts favored the imposition of a compromise.¹³⁶ Although these features make comparisons difficult,¹³⁷ the study of medical malpractice demonstrates that Jewish law has been able to adjust to the changing needs of society, whether that be for protection of physicians or for protection of patients. Such a study also demonstrates that one may be able to gain a fuller understanding of rabbinic texts, both ancient and modern, by understanding the context including the social circumstances in which those texts arose, and one aspect of that social circumstance is non-Jewish law, at least as it was put into practice.

¹³⁵ See Steven F. Friedell, *Jewish Tort Law Remedies not Based on Torah Law—An Approach Based on the Ran and the Rivash*, 10:3-4 JEWISH POL. STUD. REV. 47 (1998).

¹³⁶ See 5 ENCYCLOPAEDIA JUDAICA 857 (1971).

¹³⁷ See Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 894 (1993); Steven F. Friedell, *The "Different Voice" in Jewish Law: Some Parallels to a Feminist Jurisprudence*, 67 IND. L.J. 915, 949 (1992).