

# Medical Error and Malpractice

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**Translated from the Hebrew by Uriah F. Cheskin & Yitzchak Pechenic**

## **A. Drug Therapy and Surgery**

### **1. The Wrong Drug or Injection**

Rabbi Eliezer Yehuda Valdenberg, in *Tsits Eli'ezer*, distinguishes between two types of physician error. If the physician mistakenly thought that a drug or injection would heal but the drug or injection proved harmful or even killed the patient, the physician is neither responsible nor culpable. Physicians are entitled to rely on their informed perception of the situation; after all, every medical therapy entails an element of risk and what may cure one patient may kill another.

But if, through inattention or haste, the physician prescribed the wrong drug – one not sanctioned by medical science – the physician is certainly culpable. Even by medical standards, the physician was not engaged in the mitzva of healing. On the contrary: due to negligence, a dangerous drug was substituted for a salutary one. The physician's oversight is considered a willful action. Similarly, the physician is culpable if, due to inattention, he gave an unwarranted injection which harmed or even killed the patient.<sup>1</sup>

### **2. Death Caused by Erroneous Administration**

Rabbi Meir Tsvi Vitmeir<sup>2</sup> wrote in responsa *Ramats* that a physician who caused the death of a patient by administering a medicinal cream in the wrong place is liable to exile. This differs from other cases, such as the father who accidentally killed his son while disciplining him and the teacher who accidentally killed his pupil under similar circumstances. The father and the teacher were engaged in mitsvot incumbent upon them as parents and teachers,

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1. Responsa *Tsits Eli'ezer*, pt. 5; *Ramat Rahel*, ch. 23.

2. Nineteenth century, Poland.

but the physician was not engaged in the mitzva of healing even though that was his intent. Like the court functionary whose duty was to administer a punishment of forty lashes but accidentally added an extra lash, which resulted in the person's death, the physician is culpable. The Mishna rules that he is guilty of manslaughter and liable to exile.<sup>3</sup>

### 3. Injection of a Poisonous Substance

What is the law regarding a physician who mistakenly injected a patient with a lethal substance instead of the required drug? How can the physician do penance?

Rabbi Yitzhak Weiss<sup>4</sup> answers this question in *Minhat Yitshaq*, basing his ruling that a physician who injected a poisonous substance is liable to exile on the *Shulhan Arukh*, which states that the physician who kills unintentionally is liable to exile.

Rabbi Weiss cites Rabbi Valdenberg on the various approaches to medical error, according to which physicians who make a judgmental error in giving what they think is an effective injection or drug may not legally be considered liable. But if the wrong drug was administered because of inattention, the physician is liable on the basis of the principle that "a human is always forewarned." The unintentional act is considered intentional because the physician acted negligently.<sup>5</sup>

### 4. Dentistry

In *Shevet ha-Levi*, Rabbi Shemuel ha-Levi Vosner<sup>6</sup> addresses the question of dentist liability when the dentist's drill slipped from the intended tooth to another tooth, causing the patient considerable monetary loss.

Rabbi Vosner cites *Tosefta*: a qualified physician who practices medicine with the court's consent is not liable if damage was caused in the course of his treatment, but if he did more than was appropriate then he is liable. Rabbi Vosner explains that even if the damage occurred in the course of the physician's treatment, he is exempt from punishment because his work contributes to "the general good." This ruling ensures that physicians will not refrain

3. *Makkot* 22; responsa *Ramats*, addenda to *Orah Hayyim* and *Yoreh De'ah* 11.

4. Head of the rabbinical court of the *Eida Hareidit*, Jerusalem.

5. Responsa *Minhat Yitshaq*, pt. 3, 104, 105.

6. Rabbi of *Zikhron Meir*, Bnei Beraq, Israel.

from practicing medicine. Were it not for this consideration, the law would require the physician to pay damages.

The exemption from liability of a physician who caused damage is therefore limited to when he or she did what was called for, in the appropriate part of the body, without success. However, the law is different if the physician did more than was appropriate, such as cutting or drilling. Even though the physician did so unintentionally, he or she was nonetheless negligent and is judged as though the damage were intentional. Therefore, the physician is liable for damages.

Rabbi Wosner concludes that the law requires the physician to compensate the patient for damages. Similarly, a physician is liable for damages in every medical procedure performed by mistake on healthy, instead of diseased, parts of the body when injury results. Of course, this applies only when the physician clearly could have ascertained which part of the body required treatment but was nevertheless negligent.<sup>7</sup>

### **5. Unwarranted Surgery or Drug Therapy**

Rabbi Samuel Turk explains the difference between the parallel cases of the father or teacher exempt from punishment for killing in the course of performing a mitzva and that of a physician liable to exile for killing unintentionally. The Torah does not require a father who struck his son in order to educate him to gauge whether or not the son is able to bear the blow. If the child died, therefore, the father is not responsible and if the blows were administered for educational purposes, he is exempt from exile. The physician, though fulfilling a mitzva, is obligated to weigh the appropriate treatment extremely carefully before proceeding and if he fails to do so he is certainly not considered a mere victim of circumstances, but rather an unintentional, neglectful perpetrator. Even though he was engaged in a mitzva, he is liable to exile if the patient died as a result of the administered treatment.

Physicians are obligated to check and examine the procedures they employ with extreme circumspection. Thus, a physician who performed an unnecessary operation due to lack of circumspection, resulting in the patient's death, is certainly liable to exile. But a physician who did everything in accordance with accepted medical

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7. Responsa *Shevet ha-Levi*, *Yoreh De'ah* 4:151.

procedure and the patient nonetheless died is exempt from the punishment of exile. He is not responsible because the mitzva to heal requires treatment of the patient.<sup>8</sup>

### 6. Error Due to Nervousness or Confusion

Rabbi Hayyim David ha-Levi<sup>9</sup> rules that a physician who makes a correct diagnosis but out of nervousness or confusion commits a fatal error during a medical procedure, is exempt from “human prosecution.” No court can obligate the physician, often a surgeon who works under extreme pressure, to pay compensation. The basis for the exemption is the imperative to ensure “the general good.” As applied here, this means that if we were to judge as liable the physician under whose care the mishap occurred, then physicians would generally refrain from performing delicate and difficult treatments, fearing potential consequences. In such an event, the real losers would be the sick themselves. Therefore, the physician is exempted on account of “the general good” – that is, the long-range good of the sick.

The physician is, however, not completely absolved in the eyes of God. A physician who is truly interested in fulfilling moral obligations in relation to God will make a personal effort to placate and compensate the victim.<sup>10</sup>

### 7. Surgical Malpractice

If a patient dies as the result of an operation, the surgeon is generally exempt from punishment since it is not known if the surgeon erred during the operation. If, however, expert physicians determine that the surgeon did err in performing more than required or unnecessary surgery, then he is liable for punishment and the court is obligated to punish him with a prison sentence.<sup>11</sup>

### 8. Direct and Indirect Procedure

The following case is addressed in *Besamim Rosh*.<sup>12</sup> A patient died after taking medicines prescribed on the basis of a medical examination. Under questioning, the attending physician admitted

8. R. Turk, *Ha-Darom* 10: 114-19.

9. Chief rabbi and head of the rabbinical court, Tel Aviv-Jaffa.

10. *Aseh Lekha Rav*, pt. 3, 30.

11. R. Ya'akov Meshulam Ginsburg, *Mishpatim le-Yisrael*, p. 324.

12. Attributed to R. Asher ben Yehiel and other great Spanish Torah scholars of the thirteenth century.

erring in his diagnosis and prescribing drugs that caused the patient's death. Should the physician be punished with exile?

The author cites *Tosefta*, which states that a qualified physician who killed a patient through treatment is to be exiled, but he distinguishes between types of error. *Tosefta* refers, he notes, to cases such as that of the surgeon who mistakenly cuts an organ, causing the patient's death. The surgeon is liable to exile since the same act, committed deliberately, would require the death penalty. But when the error is drug prescription and no direct physical procedure is performed on the patient's body, the physician is not liable to exile because even deliberate prescribing of lethal drugs, which is not considered a direct cause of death, does not require the death penalty. In our case, the physician is exempt even from punishment at the hand of God since he intended to cure the patient using his best medical knowledge. What more could be expected of him? Only afterwards did he realize that he had been mistaken in his diagnosis.

In summary, a distinction should be drawn between an error in surgery or other medical procedures performed directly on the patient's body and an error in drug prescription. In the latter instance, the patient's death is caused not by a direct manual action, but rather by an indirect action.<sup>13</sup>

## 9. Distinction between Malpractice in Drug Therapy and in Surgery

Rabbi Shim'on ben Tsemah (*Tashbets*)<sup>14</sup> distinguishes between surgeons and physicians who treat through drugs. He explains that *rofeh uman* ("qualified physician" or "medical craftsman") in *Tosefta* refers to "a physician who does manual work: his unintentional and intentional errors, both injury and killing, are committed with iron instruments." This describes a surgeon, who alone is subject to the laws mentioned in *Tosefta*.

An internist, who treats through drugs – "by potions, laxatives, compounds, and baths" – is not called a *rofeh uman*; rather, he is called an ordinary physician. He cannot be held responsible for the harm he may cause. "If he erred, whether wittingly or not, and thereby killed the patient or increased his pain while intending to

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13. Responsa *Besamim Rosh* 386.

14. Fifteenth century, Algeria.

heal, he is exempt from both divine judgment and the punishment of exile.” This is because he can only rely on his informed perception. The distinction, then, is between the error of a surgeon who causes injury and that of an internist who causes harm by drug therapy.<sup>15</sup>

Rabbi Valdenberg expresses surprise at the ruling in *Tashbets* cited above: Why cannot the rationale that he can only rely on his informed perception, invoked to exempt the physician who uses drug therapy, also be invoked in the case of the surgeon? Regarding the statement in *Tashbets* that a physician who uses drug therapy is not liable because he does not cause injury with his hands, shall we say that if one person gives another person a drug that damages an organ, he is not liable? Similarly, if one person gives another a drug which kills him, is the former not considered a murderer?<sup>16</sup>

Rabbi Wosner cites the distinction mentioned in *Tashbets* above, commenting that in the late twentieth century the distinction is usually no longer applicable because of the capacity for precise internal examinations. Therefore, a physician who causes harm through drug therapy when modern testing could have ascertained if the therapy would harm the patient is not exempt on the grounds cited in *Tashbets*, “He has only what his eyes see.” He is fully responsible in the same way a surgeon is.<sup>17</sup>

For further elaboration on the distinction in *Tashbets*, see Rabbi Yitzhak Zilberstein’s opinion below.

## **B. Malpractice Due to Lack of Basic Medical Knowledge**

Rabbi Menahem Castilnodo<sup>18</sup> writes in *Misgeret ha-Shulhan* that if a “convincing assessment,” based on the physicians’ judgment, indicates that a medical error is due to lack of basic medical knowledge, the physician is considered “one who erred in a fundamental matter” and is liable for damages.

The only kinds of errors for which the Sages exempted the perpetrators are those to which a learned physician might fall prey. But if it is clear that the physician erred in a clear and well-known matter because of a lack of basic medical knowledge, he is liable

15. Responsa *Tashbets*, pt. 3, 82.

16. Responsa *Tsits Eli’ezer*, pt. 4, 13.

17. Responsa *Shevet ha-Levi*, *Yoreh De’ah* 4:151.

18. Nineteenth century, Italy.

like anyone who unintentionally causes injury.<sup>19</sup>

### C. Mistaken Diagnosis

#### 1. Determining the Appropriate Drug

A qualified physician who administered a fatally inappropriate treatment, such as giving the “appropriate” drugs to a patient too weak to bear them, is not considered a murderer.

According to the Torah, a murderer is one who intends to kill; as it is written, “When a person contrives against his neighbor to kill him with premeditation” (Exodus 21:14). The Sages interpreted this as “excluding the physician who kills.”<sup>20</sup> Even though the physician deliberately prescribed drugs that have the potential of harming the patient, he did not try to kill the patient premeditatedly. Indeed, the intention of the physician was to heal, not to harm. It is appropriate to exempt the physician from punishment on the basis of the principle of the general good cited earlier. If physicians were not exempted when intending to heal, many would refrain from practicing medicine.<sup>21</sup>

#### 2. Mistaken Diagnosis

A four-year-old boy was brought to the hospital complaining of stomach pains. The physician on duty diagnosed appendicitis and performed an operation, during which it became clear that the diagnosis was incorrect. Due to both the appendectomy and his real condition – serious inflammation of the intestine and liver – the boy developed a severe illness accompanied by high fever, inflammation of the liver, and severe hemolysis and as a result lost use of his kidneys and required either dialysis or a kidney transplant.

Should the physician be punished for his tragic mistake? In general, what is the law regarding a physician who committed an unwitting error in judgment in diagnosing and treating a patient, causing the patient’s death? In his answer, Rabbi Zilberstein first elucidates the distinction in *Tashbets* between a surgeon who killed unintentionally and an internist who erred in drug therapy.

It is essential to distinguish between an error resulting from carelessness during treatment and an error in the diagnosis.

It is the surgeon who killed by cutting an organ or artery out of

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19. *Misgeret ha-Shulhan, Yoreh De'ah* 336:1.

20. *Mekhilta, Mishpatim* 58.

21. R. Ya'akov Meshulam Ginsburg, *Mishpatim le-Yisrael*, p. 323.

carelessness who is liable to the punishment of exile. This is similar to the case mentioned in the Torah of “a man who goes into the forest with his neighbor to cut wood and...the head of the ax slips off the handle...killing the neighbor” (Deuteronomy 19:5). Such a person is liable to exile. But if the internist who decides on the type of treatment on the basis of his judgment errs in the diagnosis, the punishment of exile does not apply because one is entitled to rely on informed perception of the situation. This ruling assumes that the error did not result from negligence or an inadequate investigation. On the contrary; despite having investigated and run precise tests, the illness was misdiagnosed and incorrectly treated. In this case, the physician is also exempt from punishment at the hands of God.

Based on this explanation of the distinction in *Tashbets*, Rabbi Zilberstein concludes that a physician who made a judgmental error and misdiagnosed the illness is exempt; he is not considered legally responsible. This, of course, assumes that the error did not stem from negligence and also that there was no opportunity to consult with an experienced physician. Even so, it stands to reason that some penance for this fatal error is required in light of the principle that “Salutary events are brought about by God through a meritorious person and the opposite through a guilty person.”<sup>22</sup>

### 3. Reasonable Error

A physician who made a reasonable error in the diagnosis, treatment, or prescription of appropriate drugs – an error which any physician might make – is not liable for damages. He is also not culpable in God’s eyes because he did what was incumbent on him to do. In view of the physician’s proper intention, why should he be obligated to make monetary compensation (for harm done to the patient) or to go into exile (if the patient dies)?<sup>23</sup>

## D. Failure to Perform an Early Examination

### 1. Insufficient Probing of the Nature of the Illness

*Hida*<sup>24</sup> explains in *Birkei Yosef* why the punishment of the physician who unintentionally causes death is different from that of the father or teacher who does the same. He explains that the

22. R. Zilberstein, *Sefer Halacha u-Refu'a*, pt. 2, pp. 287-94.

23. R. ha-Levi, *Aseh Lecha Rav*, pt. 3, 30.

24. R. Hayyim Yosef David Azulai (eighteenth century, Israel/Italy).



former is liable to exile while the latter two are not because they were engaged in a mitzva.

He points out that the father and the teacher struck their young charges to punish and train them. They made no error. But the physician erred in this treatment or diagnosis because there was insufficient probing into the nature of the illness. The physician learned of the error in diagnosis or prescription of drugs only after the fact. Thus, although intending to perform a mitzva, the physician is liable for the patient's death because of not being extremely careful and neglecting to probe. In contrast, the father and rabbi who wanted to train the child by means of corporal punishment, as is the general custom, were not required to have precisely gauged the child's hardness. Consequently, they are exempt from punishment.<sup>25</sup>

*Hida* also addresses the case of the physician who knew that he was unfamiliar with the disease confronting him and still did not probe into it deeply. As a result, he prescribed the drugs that caused the patient's death. This physician is a criminal because he should have probed deeply into the nature of the illness and the appropriate drugs to prescribe.<sup>26</sup>

## 2. Insufficient Examination of Patient

Rabbi Yehiel Epstein<sup>27</sup> rules in *Arukh ha-Shulhan* that if a physician errs and causes harm while practicing medicine with the court's consent, he is not liable to punishment by the courts but he is liable to divine punishment. This applies when the harm results from the physician's negligence either in not probing deeply or in not monitoring the treatment. But if sufficient probing took place, the physician cannot be held responsible because there is a mitzva to heal. As one Sage put it, "The unintentional error of a physician is God's intention."

The law is otherwise when the patient dies and a physician error comes to light. If it can be assumed that the physician caused the death through negligence or insufficient probing, he is liable to exile. But where negligence such as failure to perform a thorough examination cannot be attributed to the physician, the punishment of exile cannot be applied. This is like the exemption in the cases of

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25. *Birkhei Yosef*, *Yoreh De'ah* 336:6.

26. *Responsa Tov Ayyin* 9:8.

27. Nineteenth and twentieth centuries, Lithuania.

the father and the teacher mentioned above.<sup>28</sup>

### **3. Lack of Consideration of Medical Information Provided by the Patient's Family**

Rabbi Avraham Ashkenazi<sup>29</sup> was asked about a physician who was called to cure a sick girl. He determined that she was suffering from frostbite and prescribed medication. The following day, a neighbor noticed that the girl had the same facial marks that she had observed on her own two daughters, who had been sick with smallpox. She suggested that the girl should not take the pills prescribed by the physician.

On hearing the neighbor's diagnosis, the family unsuccessfully tried to locate the physician. They did, however, find another physician who examined the girl and concluded that the neighbor might be correct in her diagnosis of smallpox and that it would therefore be risky for the patient to continue taking the pills prescribed by the first physician. He added that even if she was suffering from frostbite, she ought not take the drug because she had a high fever.

After a while, the first physician returned to see the patient. The family informed him that they had not administered the prescribed medication because a neighbor had suggested that she had smallpox and a second physician had recommended that the medication not be continued because of the risk involved. The first physician became incensed, rebuked the family, and went into the patient's room and personally administered the medication. By evening, the girl was covered with a rash from head to toe, indicating that she indeed had smallpox, and it was obvious that first physician's treatment had done her harm. The family sued him for malpractice.

After considering the various sides of the case, Rabbi Ashkenazi ruled that the physician was guilty of malpractice. He had failed to correctly diagnose the patient and ignored the suggestion of the neighbor, who had observed smallpox in her daughters. He administered a medication that might have killed the patient – and did indeed aggravate her illness, bringing her close to death. He should have probed more deeply and weighed the suggestions of the neighbor – as the Sages say, “Do not scorn

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28. *Arukh ha-Shulhan, Yoreh De'ah* 336:2.

29. Eighteenth century, Turkey.

anyone.” In light of the above, the physician is not acquitted in God’s eyes until he remits compensation for the harm done. If the patient had died, he would have been liable exile.<sup>30</sup>

#### **4. Error Due to the Physician’s Laziness in Examining the Patient**

A physician who makes an obvious mistake that would not be made by other physicians, such as a mistake resulting from laziness in examining the patient, is liable for harm done to the patient if this can be proven in court.<sup>31</sup>

*Source: ASSIA – Jewish Medical Ethics,  
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30. See a lengthy discussion of this ruling in *Beit Aharon*, pt. 1, *Yoreh De’ah* 2:3.

31. *Aseh Lecha Rav*, pt. 3, 30.