

Medical Error and Halacha

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Introduction

The human and financial burden of physician error is staggering. In the United States, an estimated 100,000 hospitalized patients die yearly as a result of medical mistakes.¹ In developed countries, medical malpractice ranks as one of the top ten causes of disability and premature death.² The cost to society in terms of lost wages and medical expenditure resulting from physician error is approximated to be between 17-29 billion dollars annually in the United States alone.³

The gravity of physician error has, understandably, generated an elaborate and well developed body of secular legal literature. Surprisingly, *halachic* literature, until relatively recently,⁴ has dealt only sparingly with this topic. Excepting a number of brief statements found in the Tosefta⁵ and one citation in the Babylonian Talmud,⁶ no primary Jewish sources directly addressed this issue

¹ American Hospital Association, *Hospital Statistics*, Chicago 1999. See also *NEJM* 324:370, 1991.

² Centers for Disease Control and Prevention, *Deaths: Final data for 1997*. 47(19):27, 1999.

³ *JAMA* 267:2487, 1992.

⁴ A partial list of citations includes: R. Mordechai Elon, *Chiyuv Nezikin Be-Rofeh She-Hizik* (Hebrew), *Torah She-be-al Peh* (5736) pp. 70-77, R. Yitzchak Zilberstein, *Rofeh she-ta-ah* (Hebrew), *Halacha Ve-refuah* (5741) pp. 287-294, R. Yosef Baumel, *Be-din Rofeh she-ta-ah* (Hebrew), *Emek Halacha* (5749) pp. 135-138, R. Zalman Nechemia Goldberg, *Rashlanut Refuit* (Hebrew), *Tehumin* 19 (5756) pp. 317-322, Dr. Abraham S. Abraham, *Nishmat Avraham* (Hebrew), *Yoreh De'ah* Sec. 2, pp. 229-232, and Sec. 5, pp. 88-92, R. Avraham Steinberg, *s.v. Rashlanut Refuit* (Hebrew), *Encyclopedia of Medical Halacha*, vol. 6, pp. 255-270, R. Mordechai Willig, *Rofeh She-ta-ah* (Hebrew), in *Bracha Le-Avraham* (ed. R. Yitzchak Steinberg (5768) pp. 257-266, and R. JD Bleich, *Medical Malpractice and Jewish Law*, *Tradition* 39(1), 2005 pp. 72-117.

⁵ *Bava Kama* 6:6, *Bava Kama* 9:3, *Gittin* 3:13, *Makkot (Hashmatot)* 2:5.

⁶ BT *Bava Kama* 85a. An additional source relating to physician error is cited by R. Nissim (*Chidushei ha-Ran*, BT *Sanhedrin* 84b) in relation to the ruling of the *amora* R. Papa. R. Papa did not allow his son to remove from him a splinter due to the concern that as a result of error his son would injure him and thereby violate, inadvertently, the capital prohibition of wounding one's parent. Ran addresses a number of general principles regarding medical error based on R. Papa's position. In this article I analyze the *halacha* as codified by *Tur* and *Shulchan Aruch* who base

until Ramban's *Torat ha-Adam*.⁷ The paucity of available sources makes it difficult to readily identify the appropriate legal framework within which this topic should be analyzed. Is, for example, the physician who errs similar to a bailee who is remiss in his duties or should he more properly be compared to a tortfeasor who has damaged his friend's property or injured his person? Perhaps the physician more closely resembles an artisan who damages goods given him or a judge who errs in judgment. Since the legal principles governing the errors of, for example, bailees, tortfeasors, artisans and judges are fundamentally different one from the other, it is of paramount importance to determine which of these cases, if any, physician error most closely resembles.

Identifying the legal model upon which physician error is based, is particularly challenging when addressing cases in which the patient dies as a result of the error. In a narrowly defined set of circumstances in which death results from negligence, *halacha* mandates *galut*, exile to a designated city of refuge, for the one who kills through an act of negligence. Furthermore, once relegated to the city of refuge, he may not leave for fear of being killed by the *goel ha-dam*, the blood avenger of the deceased. Do the laws of *galut* and *goel ha-dam* apply to the physician whose patient dies due to error? If *galut* does apply to the physician, what obligation devolves upon the physician in the current historical epoch in which there are no cities of refuge and *galut* is inoperative?

In a recently published comprehensive review of this topic,⁸ Rabbi JD Bleich addresses these questions by citing authorities who analyze existing *halachic* models of monetary damages and *galut* in order to develop a framework in which to assess physician error. These authorities mine the vast literature of *chiyuvei mamon* (monetary obligations) and *chiyuvei galut* (the obligation for exile) in non-medical settings and arrive at *halachic* conclusions based upon the specific model they deem most closely resembles medical error. According to this approach, physicians who harm or kill a

their rulings on the writings of Ramban in his *Torat ha-Adam*. Ramban addresses R. Papa's concern but appears to understand that removal of a splinter is not considered a medical ministrations and is therefore not governed by the principles of medical error. As such, this source is not addressed in the body of the article.

⁷ *Kol Kitvei ha-Ramban*, ed. R. Chavel. II, 42. In this article, the translations of all Hebrew sources are my own.

⁸ "Medical Malpractice and Jewish Law", *Tradition* 39(1), 2005 pp. 72-117.

patient due to error are judged in accordance with the classic laws of *chiyuvei mamon* or *chiyuvei galut*.

In this article,⁹ I attempt to demonstrate that the codifiers of normative *halacha*, R. Yaakov ben Asher (*Tur*) and R. Yoseph Karo (*Shulchan Aruch*), based on the position taken by Ramban in his *Torat ha-Adam*, do *not* view the case of physician error through the lens of classic *chiyuvei mamon* and *chiyuvei galut*. Rather, I suggest, that these authorities understand physician error to be a unique *halachic* category with its own distinct rules and regulations. In order to clarify the approach I am advancing, and to best understand its practical ramifications, I will begin with a brief overview of the primary sources addressing medical error.

Primary Sources

Sources regarding *Galut*:

Medical error resulting in the patient's death is addressed in the Tosefta and the Talmud, each on one occasion:

“An expert physician who received permission from the courts to practice medicine (and kills his patient in the course of medical treatment) is exiled.”

Tosefta Makkot, Hashmatot 2:4

“Rabbi Ishmael taught: ‘*verapo yerapeh* – and He shall cause him to be thoroughly healed’ (Shemot 21:19) from this verse (you derive) that permission was granted the physician to heal.”

BT Bava Kama 85a

Tosefta *Makkot* makes an unqualified statement that a physician is exiled if his patient dies as a result of medical error. Based on this source, some authorities¹⁰ arrive at the conclusion that the physician

⁹ In a letter of correspondence printed in *Tradition* 40(1), 2007 pp. 98-100 I proposed an approach to physician error at variance with that advanced by R. Bleich. This article is an expansion of the ideas expressed in that letter and addresses the criticisms leveled against my analysis in R. Bleich's published response to my letter in *Tradition* 40(1), 2007 pp. 101-102.

¹⁰ See, for example, *Ohr Sameach*, *Hilchot Rotzeach* 5:6, and *Birkei Yosef*, *Yoreh De'ah* 336:6.

has a classic *chiyuv galut* if his error is similar to the type of error that, in non-medical settings, would obligate *galut*.¹¹

It is unclear, however, whether Rabbi Ishmael's Talmudic statement is in agreement with the Tosefta *Makkot*. Indeed, when Rabbi Ishmael refers to the permission granted to heal, to what permission does he refer? Is the physician not obligated to heal based on the verse "do not stand idly by your brother's blood?" (*Vayikra* 19:16). Why would permission be required in order to discharge an obligation?¹² Perhaps then, Rabbi Ishmael's biblically based "permission" is to be understood to refer to an exemption from culpability rather than an allowance to heal.

I will, indeed, attempt to prove that both *Tur* and *Shulchan Aruch* understand that according to Rabbi Ishmael there exists a biblical exemption from *galut* based on the verse "*verapo yerapeh*." Prior to providing proof for this contention, I will turn briefly to three sources in the Tosefta which touch upon financial obligations arising from medical error.

Sources regarding monetary obligations:

"An expert physician who received permission from the courts to practice medicine, if he harms his patient, is exempt from payment according to the laws of man and his judgment is given to (the court of) heaven."

Tosefta, *Bava Kama* 6:6

"An expert physician, who received permission from the courts to practice medicine, if he harms his patient, is exempt (from payment)"

Tosefta, *Bava Kama* 9:3

"An expert physician who received permission from the courts to practice medicine, if he harms his patient through

¹¹ I do not attempt to define the type of error which would, in a non-medical setting, obligate *galut*. The definition of error, as it applies to *galut*, is complex and is beyond the scope of this brief article. It would appear, however, that physician error would have to meet the same stringent criteria of error generally required for *galut*, if the physician is to be exiled.

¹² Rashi, BT *Bava Kama* 85a, s.v. *nitna reshut*, explains that since human illness results from a Divine decree, permission is, indeed, necessary to allow man to intervene in God's plan. Ramban, as will be seen, offers an alternate explication of R. Ishmael's statement which bears on the issue of physician culpability in the event he errs in the course of his medical ministrations.

negligence is exempt (from payment)... this is so due to a societal need.”

Tosefta, *Gittin* 3:13

Tosefta *Gittin* (3:13), refers to an exemption the physician enjoys from payment. It provides a rationale for this immunity by stating that it is “due to a societal need.”¹³ According to this source, the rabbis enacted a rabbinic decree providing for financial immunity to the physician due to society’s need to attract and retain qualified physicians. If physicians would have to pay for injuries every time they erred, few individuals would enter the field of medicine. Accordingly, this source implies that from a biblical standpoint a fundamental *chiyuv mamon* exists between the physician and the patient from which the rabbis exempted the physician.

The two sources in Tosefta *Bava Kama*, similarly refer to an exemption the physician enjoys from paying in the court of law. Neither of these sources, however, provides a rationale behind the physician’s exemption and in neither is mention made of a rabbinic decree. I will attempt to demonstrate that the two Tosefta in *Bava Kama* are, in fact, in disagreement with Tosefta *Gittin*. These sources view the physician’s dispensation as biblical, and not rabbinic in origin. Indeed, I will establish that *Tur* and *Shulchan Aruch* understand that Rabbi Ishmael’s biblical dispensation from *galut*, derived from *verapo yerapeh*, applies to monetary payment as well.

It is this proposed biblical exemption from *galut* and monetary payments that, I suggest, confers upon the laws of medical error a unique character, distinct from classic *chiyuvei mamon* and *chiyuvei galut*. In order to prove this thesis we start with an analysis of the codified laws in *Tur* and *Shulchan Aruch* regarding a physician’s obligation of *galut*.

Galut

Tur (*Yoreh De’ah* 336), in discussing the laws of medical malpractice writes, “If the physician (in the course of medical administration) causes the death of his patient, and becomes aware

¹³ The manner in which I have translated and structured this source is in accordance with R. Bleich’s reading of the Tosefta as explained in his above mentioned article and further clarified in footnote 52 of that same article.

of his error, he is exiled – *goleh* – on this account.” R. Yoseph Karo (*Shulchan Aruch, Yoreh De’ah* 336:1) rules similarly.

Tur’s codification of *galut* is most perplexing. Indeed, in *Tur’s* introduction to *Yoreh De’ah* he defines the purpose of that book as “providing knowledge to adjudicate laws that apply in these times.” Of course, the laws of *galut* had lapsed long before *Tur* wrote his work. In fact, *Tur* (*Choshen Mishpat* 425) expressly states that *galut* is one of the areas of Jewish law that can no longer be practically implemented. Accordingly, *Tur* does not cite the obligation of *galut* anywhere else in his work. Why then is *galut* codified exclusively regarding physician error?

A number of possible answers have been advanced to explain *Tur’s* curious mention of *galut*. Some authorities have suggested that *Tur* is emphasizing the gravity of medical error. Others see *Tur’s* inclusion of *galut* as an indication of a present day obligation for repentance and expiation for *galut* that would have been mandated had cities of refuge been operative.¹⁴ These approaches leave unanswered, however, why *galut* is mentioned solely in the context of medical malpractice. Surely, the gravity and the need of repentance for inadvertent homicide are no less applicable to a wide array of other, non-medical, settings. Why codify *galut* only here?

It appears, therefore, that *Tur’s* unique ruling regarding *galut*, in the context of physician error, does not refer to its conventional definition. In fact, *Tur* (*Yoreh De’ah* 335) in his introduction to *Hilchot Rofim* states that his laws governing physicians are “a compilation derived from the great master, Ramban” and *Beit Yosef* explicitly attributes *Tur’s* ruling regarding *galut* to *Torat ha-Adam* (*Inyan ha-Sakanah*). In that work, Ramban explains that the verse “*verapo yerapeh* – and He shall cause him to be thoroughly healed” (*Shemot* 21:19) exempts the physician from actual *galut*. Indeed, Ramban states that despite the seemingly unqualified declaration of Tosefta (*Makkot, Hashmatot* 2:4) that a physician who kills in the context of his work is condemned to *galut*, that statement is *not* to be understood at face value. Instead, *galut* is the physician’s “**obligation to heaven** to exile himself for the death of his patient” and is incumbent only if “the physician is aware of having erred”.

¹⁴ See *Encyclopedia of Jewish Medical Ethics* (Hebrew, Second Edition), ed. Dr. Abraham Steinberg, vol. 7 p. 274, footnotes 106-108 for references espousing this approach. See also R. JD Bleich *Tradition* 40(1), Spring 2007 p. 101.

Tur apparently views Ramban's obligation to heaven as distinct from true *galut*. The physician who errs is exempt from true *galut*.^{15,16} *Tur's* normative codification of *galut* refers to a timelessly

¹⁵ Ramban's Biblical immunity from *galut* should not be understood to mean that the physician enjoys immunity for any type of injury he might inflict on a patient. Certain types of mistakes may result from a degree of negligence so egregious that they cannot be classified as falling under the *halachic* category of error. Under such circumstances, the physician would indeed be culpable in the court of man yet there would be no obligation of *galut* since *halachic* exile is limited to cases which are classified as arising from error.

¹⁶ According to Ramban, the physician is exempt from literal exile on the basis of a unique biblical verse. An analysis of the general laws of *galut*, however, would indicate that the physician should be exempt from *galut* without the need for a profession specific dispensation. Indeed, Mishna BT *Makkot* 8a states that a court messenger, who, in the process of administering lashes, inadvertently kills his ward, is exempt from *galut*. This exemption is explained by the Mishna as arising from the fact that *galut* is limited to cases in which death results from an activity that is discretionary in nature. Since the court messenger is performing an obligatory mitzvah in delivering lashes, he is exempt from *galut* (Ramban in *Chidushei ha-Ramban*, *Makkot* 8a offers a number of explanations to explain the exemption of the court messenger, one of which is based on the messenger's performing a mitzvah). If this is so, we would expect the physician, who in delivering medical care is performing a mitzvah, to be similarly exempt from *galut*. Why then does Ramban require the unique verse '*verapo yerapeh*' to exempt the physician from *galut*?

Yad Avraham (*Yoreh De'ah* 336), who understands *Tur* to refer to actual *galut*, proposes a distinction between the court messenger and the physician. Unlike the court messenger, who in administering lashes is performing a mitzvah, the physician is not considered to have performed the mitzvah of healing if the patient dies. This distinction is, however, difficult to understand. Surely, the messenger, upon killing his charge, has not performed the mitzvah of delivering lashes. Rather, his *intention* of performing a mitzvah is presumably what affords him dispensation from *galut*. A physician, then, should be similarly exempt from *galut* if his intention was to heal his patient.

I believe that Ramban's citation of a unique verse to exempt the physician from *galut* may be understood in light of BT *Bava Kama* 32b. In that source, the Talmud rules that a court messenger who, upon the direction of the bailiff, administers more lashes than the number assessed by the court, and thereby kills his charge, is, in fact, exiled. Yet, this ruling appears to be inconsistent with *Makkot* 8a which exempts the court messenger from *galut* in the case where the ward dies as a result of the lashing administered by the court messenger in accordance with the instructions of the court. Perhaps, the two Talmudic rulings can be reconciled by noting that the error, which resulted in death, is fundamentally different in the two Talmudic sources. *Makkot* 8a refers to an instance in which the court erred in its assessment of how many lashes the recipient could safely sustain. *Bava Kama* 32b, on the other hand, describes an error in the implementation of the lashes. Apparently, errors in assessment are exempt from *galut* when undertaken with the intention of performing a mitzvah whereas errors in implementation are not.

If this distinction is correct, the need to cite a unique verse in exempting the physician from *galut* becomes clear. In cases in which the physician causes the death of a patient due to an error in assessment, he is immune from *galut* due to the general dispensation afforded to anyone who kills while attempting to perform a

applicable obligation to heaven rather than a commandment to flee to a city of refuge. *Galut*, in this context, is a moral imperative for introspection and self improvement.¹⁷

Tur's understanding of Ramban, explains the latter's unusual caveat that *galut* is obligatory only if the physician is "aware of having erred." Were *galut* to refer to its' conventional definition, awareness of error would prevent the practical implementation of *galut* but would have no bearing on the fundamental obligation of exile. Since in the case under discussion, however, *galut* is a requirement to perform self-examination and reflection, cognizance of error is, understandably, a prerequisite. Absent awareness, no self-reflection can take place.

It should be noted that according to Ramban, the verse "and He shall cause him to be thoroughly healed" serves a dual purpose. On the one hand it provides a dispensation from classic *chiyuvei galut*, and at the same time it generates a residual obligation of repentance.

Monetary Damages

In addition to dealing with cases in which the patient dies due to physician error, *Tur* (*Yoreh De'ah*, 336) addresses circumstances in which the physician harms but does not kill his patient. *Tur* writes, "If (the physician) practices medicine with a license but errs and causes harm, he is not liable according to the laws of man but he is liable according to the laws of heaven."

The traditional understanding of *Tur*, as posited by the authorities cited in R. Bleich's article, assumes that the monetary dispensation enjoyed by the physician is rabbinic in origin. *Tur's* ruling is presumed to be based on Tosefta *Gittin* (3:13) which states that due to a societal need to attract physicians, the rabbis enacted a degree of financial immunity to the physician. According to this

mitzvah. If, however, the physician errs in implementation of a medical ministration, he, unlike the court messenger, enjoys a unique, profession specific, dispensation from *galut* based on the verse 'verapo yerapeh'.

¹⁷ The manner in which self improvement, in this context, is to be accomplished is not specified. A form of symbolic *galut* exists in halachic literature and it is unclear whether the obligatory repentance of the physician requires symbolic *galut* or suffices with other forms of expiation. In any event, according to the approach I am advancing, the physician would not be obligated to flee to a true city of refuge, even in historical epochs in which such cities are operative.

reading of *Tur*, an underlying Biblical monetary obligation exists between the physician and the patient and while the courts will not enforce payment of damages, the physician is none-the-less expected to discharge a classic *chiyuv mamon* which is present according to the laws of heaven.

Tur writes, however, that his rulings on these matters are based on Ramban's *Torat ha-Adam*. In that work Ramban in discussing the physician's financial obligations first quotes Tosefta *Bava Kama* (6:6), "An expert physician who received permission from the courts to practice medicine, if he harms his patient, he is exempt from the laws of man and his judgment is given to (the court of) heaven." Ramban continues by saying "the expert, licensed, physician who harms or kills his patient is exempt from paying according to the laws of man but is not exempt from the **law of heaven until he pays or exiles himself since he has become aware of his error**".

Ramban's formulation, "until he **pays or exiles himself**" equates the laws governing the physician's financial obligations and his obligation of *galut*. Ramban implies that the source of the physician's immunity from payment "according to laws of man" is identical to the immunity from exile. Although he does not state so explicitly, Ramban, in parallel to his position regarding *galut*, apparently substantiates his position regarding monetary immunity by reference to the verse "and He shall cause him to be thoroughly healed." According to Ramban, this verse effectively removes the physician from financial liability for tortious battery.¹⁸ So long as the practitioner is expert and licensed, he is defined as a "physician" and thereby granted a biblically based immunity from financial liability.

Of note, Ramban makes no reference to the Tosefta (*Gittin* 3:13) or to a rabbinic decree in establishing the physician's immunity from payment. Instead Ramban quotes Tosefta (*Bava Kama* 6:6) which itself makes no mention of a rabbinic decree and

¹⁸ As in the case of *galut* (see footnote 15), Ramban's position should not be understood to imply that the physician enjoys financial immunity irrespective of the type of error he commits. Certain types of mistakes would be of such an egregious nature that they would be classified as gross negligence. No dispensation would be available to the physician in such a case. The exact parameters defining which types of error are to be categorized as gross negligence is a matter of substantial debate (see R. Bleich's article, *ibid*, where a variety of opinions are cited regarding this matter). Ramban is stating, however, that so long as the medical mistake is assessed as arising from error, the physician has a biblically based dispensation from payment.

is apparently understood by Ramban to argue with Tosefta (*Gittin* 3:13) and to view the monetary dispensation as biblical in nature. It is upon Tosefta *Bava Kama* that Ramban, and in his wake *Tur* and *Shulchan Aruch*, base their legal positions.

According to Ramban, whom *Tur* identifies as his source, just as the “obligation to heaven” for a physician to exile himself does not refer to a classic *chiyuv galut*, so too, the monetary “obligation to heaven” does not refer to a classic, *chiyuv mamon*. Like *galut*, payment is symbolic and is a means of achieving self improvement. Unlike tort litigation, which emphasizes the entitlements of the damaged party, payment by the physician, in the face of error, is a matter between the physician and God.

It is presumably for this reason that *Tur* and *Shulchan Aruch* codify the laws of medical malpractice, which superficially resemble cases of torts, in *Yoreh De'ah*, rather than in *Choshen Mishpat*. Whereas *Choshen Mishpat* addresses *mamona*, the financial responsibilities of bailees, tortfeasors and artisans, *Yoreh De'ah* deals with matters of *issura*, laws defining man's responsibilities to God. *Yoreh De'ah* is the appropriate location to place the laws of medical error if, as I suggest, the physician's obligation in such circumstances, is *issura*, between the physician and God.

This reading of Ramban explains his unusual caveat that monies are owed only if the physician is “aware of having erred.” In classic cases of *chiyuv mamon*, awareness of error would have no bearing on the fundamental monetary obligation. Since in the case under discussion, however, payment is a form of expiation and self examination, cognizance of error is understandably a prerequisite. Absent awareness, no self reflection can take place.

As in the case of *galut*, the verse “and He shall cause him to be thoroughly healed” serves a dual purpose regarding the physician's financial responsibilities. On the one hand it provides a dispensation from a classic monetary obligation, and at the same time it generates a residual obligation of repentance.

Practical Ramifications

The *halachic* framework for analyzing medical error suggested in this article is distinct from the one utilized by most contemporary scholars who address this topic. When contrasting two *halachic* models, it is common practice to sharpen the conceptual distinctions

between the two by testing a variety of practical differences that arise when applying each model to real life scenarios.

Several important practical differences arise between the position of those who understand physician error to be governed by classic *chiyuvei galut* and by a classic *chiyuv mamon* with a rabbinic dispensation on the one hand and the approach I am proposing.

The first difference relates to the physician whose patient dies due to a type of error which would, in a non-medical setting, require *galut*. According to those who view the physician as being obligated in actual *galut*, were cities of refuge to be operative, the physician would, indeed, have to flee the blood avenger and remain in exile. If, however, as I suggest, the physician is exempt from literal *galut*, medical error would never engender true *galut* even if the laws of the city of refuge were to be reinstated.¹⁹

Additionally, according to my suggested reading of the sources, in cases of monetary payment by the physician, the patient, although a recipient of the funds, is not a claimant. Payments, which arise as a result of a biblical obligation to heaven, are paid to the injured party despite the fact that the monies are not, technically, owed him. According, however, to those authorities who view physician error as generating an underlying *chiyuv mamon*, the patient is, fundamentally, a claimant.

Halacha views the rights of a claimant as distinct from one who is a recipient of funds but does not enjoy the status of claimant. One such distinction relates to the laws of *tefisa*; seizing monies without the authorization of *beit din*. *Tefisa* is applicable when payment is an obligation *ben adam le-chavero* (between the tortfeasor and the injured party) and in cases in which the *beit din* can not act on behalf of the injured party. In such circumstances the interested party may take the law into his own hands. If, in the case of medical error, the rabbis decreed that monies may not be obtained via court order yet a fundamental biblical *chiyuv mamon* exists, the patient might enjoy the right of *tefisa*. If, however, payment is not statutory but rather *ben adam la-Makom* (between man and God), the patient would have no recourse to this option.²⁰

¹⁹ Rambam (*Hilchot Rotzeach* 8:4) states that in the days of the Messiah, cities of refuge will again be operable.

²⁰ For a survey of the *halachic* opinions regarding *tefisa*, see *Encyclopedia Talmudit*, vol. 7, section *Dinei Shamayim* pp. 395-396. Although a variety of opinions exist

An additional distinction relates to whether the estate of the physician would pay the patient if the physician died prior to discharging his financial obligation. If a statutory monetary obligation to the patient exists, the estate would likely be required to pay the patient. If, however, as I suggest, payment is made solely as a means of expiation, this obligation would presumably fall on the physician alone.²¹

Furthermore, if the physician's payment is an ethical imperative, factors other than restitution (*e.g.* recurrent error *vs.* first time error) could potentially play a role in determining the amount paid. A classic *chiyuv mamon*, on the other hand, would likely leave no room for such considerations.

Finally, the legal status of the physician who has harmed his patient may depend on whether medical mistakes generate a true *chiyuv mamon*. R. Menachem Me'iri (BT *Bava Kama* 56a) rules that an individual, who is obligated to pay an injured party according to the court of heaven, is disqualified as a witness until payment is made. As Me'iri explains "the unpaid monies are a form of theft in the hands of the tortfeasor." Me'iri's statement is made in the context of one who damages the property of another via an indirect action. Certain types of indirect actions, referred to in *halacha* as *grama*, are not actionable in court but, rather, generate a heavenly mandated obligation to compensate the injured party. Me'iri's viewing non-payment, in the case of *grama*, as a form of theft implies that he understands that a *chiyuv mamon* exists in the eyes

regarding the laws of *tefisa*, according to most authorities, Ramban is of the opinion that it does not apply in cases which are non-statutory in nature (see for example *Shach, Choshen Mishpat* 28:1, *s.v. ve-chayyav*).

²¹ To the best of my knowledge, the question as to whether *adam morish chiyuv bidinai shamayiman le-banav* (an obligation to heaven is inherited by the estate of the deceased) is dealt with minimally in *halachic* literature. The one instance in which such a case is discussed relates to an individual who obtains monies in violation of the laws of usury. In such a case, while the individual himself must, according to the law of heaven, return the funds, those who inherit the funds do not assume this responsibility (see for example *Rashba Bava Metzia* 61b *s.v.* R. Yochanan. I am indebted to R. Yaakov Epstein for alerting me to this source). Of note, however, the BT *Bava Kama* 112a explains that a unique Biblical verse exempts inheritors from returning monies in such a case. This would imply, perhaps, that in cases other than usury, in which no biblical dispensation exists for the inheritors, that they do, in fact, assume their father's monetary obligation to heaven. I suggest, however, that the inheritors would assume such an obligation to heaven only when it resulted from a true *chiyuv mamon*.

of heaven. Were, however, a case to exist in which the heavenly mandated payment is symbolic, it appears likely that Me'iri would not categorize the unpaid funds as theft. Thus, in cases of medical error, if the monetary obligation represents a true *chiyuv mamon*, the physician would be disqualified as a witness until payment is made. Alternatively, if, as I suggest, no true *chiyuv mamon* exists and payment is a symbolic means of achieving self awareness and expiation, non-payment by the physician would presumably not categorize him as a thief or disqualify his testimony.

Conclusion

This article has attempted to demonstrate that according to Ramban, *Tur* and *Shulchan Aruch*, a physician enjoys a biblically based immunity from statutory *galut* and monetary payment. His obligation in cases in which he injures or kills his patient, as a result of error, is a matter between him and God.²²

Ramban, in *Torat ha-Adam*, delineates the behavior to which the biblical exoneration from *galut* and payment applies. Ramban states, “[the immunity from payment and *galut*] is present so long as the physician takes the appropriate precautions called for in life threatening situations and does not harm the patient through gross negligence”. If the suggested readings in this article are correct, a physician who exercises appropriate caution is exempt from statutory culpability according to *Torat ha-Adam*, *Tur* and *Shulchan Aruch*. When, however, the physician learns that he has nonetheless erred, he must discharge an ethical obligation to heaven, having assumed agency for the One in whom all healing lies.

Source: ASSIA – Jewish Medical Ethics,

Vol. VI, No. 2, October 2008, pp. 52-59.

²² The position advanced in this article is consistent with the conclusion of R. Judah Ayash, Responsa *Shevet Yehuda*, *Yoreh De'ah* 336 (cited by R. Bleich in footnote 13 of his article). R. Ayash, who, utilizes a line of reasoning different from that suggested herein, concludes that both *galut* and payment are non-statutory according to Ramban and *Shulchan Aruch*. Additionally, R. Yitzchak Yaakov Weiss, Responsa *Minchat Yitzchak* III, 104 states that *Tur* and *Shulchan Aruch* refer to a *galut be-dinei shamayim*. Prior to submitting this article for publication, I was pleased to come across the writings of, the contemporary scholar, R Yaakov Epstein who in his Responsa *Chevel Nachalato*, vol. 5, sec. 33 writes that Ramban understands the Biblical verse “*verapo yerapeh*” to provide the physician with statutory immunity from both *galut* and payment. This article is predicated on a similar reading of Ramban.