

Professional Malpractice : Part II Shiur

MEDICAL MALPRACTICE

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

MEDICAL MALPRACTICE:

The topic of medical malpractice begins with four Toseftas, two in Bava Kama, one in Gittin, and one of Makkos. There are several approaches to understand these Toseftas, with the view of the Ramban being accepted by the Tur and Shulchan Aruch.

As explained by the Ramban, the general halachos of medical malpractice are as follows:

If a doctor causes damage to a patient in the course of his work, he is not liable in a halachic court ("*dinei odom*"); however, he does have an ethical responsibility ("*dinei shomayim*") to compensate the patient. Furthermore, if a doctor accidentally kills a patient, he is obligated to go into exile ("*golus*").

The Poskim explain that the reason a doctor is not liable in court is because of *tikkun olam*. The world needs doctors to treat patients, and if they would be held monetarily responsible for anything that goes wrong, they would be unwilling to attempt to treat people; therefore, they are exempted from paying for damages that result from their work.

The halacha is that a doctor is only exempt from liability if he is working with what is known as "*reshus beis din*" (literally, "permission from beis din"). We will discuss the definition of this term below.

Furthermore, it is stated that a doctor is only exempt from liability if he does not do something beyond the realm of what is appropriate. The exact parameters of what falls under this category are not fully clear but the Shevet Halevi cites a case of a dentist drilling the wrong tooth as an example of a medical professional doing something totally unnecessary.

THE MITZVAH TO TREAT PATIENTS:

The Shulchan Aruch says that it is a mitzvah for a doctor to treat and heal patients. If a doctor could treat a patient but decides not to, and the patient subsequently dies as a result, the doctor is guilty of bloodshed.

However, if a doctor with more expertise is available, a standard doctor should not treat the patient and should step aside to allow the greater doctor to do the job.

If a doctor insists on treating a patient even though he is not qualified, and thereby causes the death of the patient, he is guilty of bloodshed.

TWO TYPES OF TREATMENTS:

The Tashbatz makes a distinction between a surgeon who performs invasive surgery by entering the body of the patient and a doctor who prescribes medicines and potions to treat a patient.

He says that only a surgeon who enters the body of the patient bears a responsibility for damages *b'dinei shomayim*, while a physician who prescribes medicines and only treats the external body is not even

liable in *dinei shomayim*. He says that the reason such a doctor bears no liability at all is because he did the best he could do and cannot be expected to do more than that.

This distinction is hard to understand, as a surgeon also did the best that he could do but is still held liable in *dinei shomayim*.

The Minchas Yitzchak suggests that the difference between the two types of doctors is that a surgeon who cuts open a patient's body could be deemed a direct *mazik*; therefore, he bears a higher level of responsibility. A doctor who only prescribes medicine, however, only damages a person indirectly, and, therefore, cannot be held liable for any damages.

While the Tur and Shulchan Aruch do not cite the Tashbatz as binding halacha, the Shevet Halevi notes that they do not explicitly rule against him. Accordingly, an external doctor could say "*kim li*" that he holds like the Tashbatz, and thereby exempt himself from the type of damages that an internal doctor would be liable for in *dinei odom*.

RESHUS BEIS DIN:

As we mentioned above, a doctor is only exempt from most damages if he has "*reshus beis din*."

The Poskim discuss the definition of this term and offer a number of explanations:

The Shoel U'Meishiv says that this literally means that a doctor needs permission from the local beis din to treat patients. Others understand that the intent is not that an actual beis din needs to give permission. The Bais Hillel says that one who is an expert in medicine, has accreditation from the body that certifies doctors, and is accepted as a medical authority by the community is considered a person who has *reshus beis din*. He adds that the main criteria is being accepted by the community as a professional, and a doctoral degree is not necessary if a doctor has that acceptance.

The Aruch Hashulchan says that it was accepted in his time that *reshus beis din* is defined as having accreditation from the governmental authorities.

The Tzitz Eliezer notes that today's batei din are not qualified to certify doctors, as they usually lack a broad knowledge of the medical field; therefore, we rely on the government to certify doctors and this certification qualifies as *reshus beis din*. The Shevet Halevi says similarly that today's batei din delegate the authority to certify doctors to the government.

WHEN THERE IS A GREATER DOCTOR:

As mentioned above, the Shulchan Aruch says that a doctor should not treat a patient if a greater doctor is available.

Does that mean that one has to seek out the best doctor in the world for any type of treatment?

The Tzitz Eliezer says that this rule only applies if the greater doctor is readily available and the patient is able to make an appointment with

him. If that is not plausible, any capable doctor may treat the patient. He further says that this rule only applies to a very challenging or unique treatment or procedure. For more simple, typical procedures, any capable doctor may perform the treatment.

WHAT QUALIFIES AS NEGLIGENCE:

As previously stated, if a doctor damages a person while treating him, he is not liable in *dinei odom* but bears liability in *dinei shomayim*.

The Aruch Hashulchan and Rav Shlomo Zalman Auerbach say that a doctor only bears even this level of responsibility if he was negligent in some way. For example, if a doctor causes damage to a patient because he did not examine him thoroughly enough or was not careful enough during a procedure, he is liable in *dinei shomayim*; however, if he did the best he could do at the time and followed the best medical advice, he bears absolutely no responsibility if the procedure ends up harming the patient. In such a case, the doctor would also not be obligated to go into exile if the patient dies as a result of the procedure.

Rav Zalman Nechemiah Goldberg notes that some medical procedures inherently contain calculated risks. A doctor may perform surgery on a patient with the hope that the procedure will cure him or extend his life, with the knowledge that there is always some risk that the patient will die on the operating table. The doctor may be willing to take the risk in order to give the patient a good chance of recovery. If the doctor does a thorough and competent job, he bears no liability for any damage or loss of life the procedure may result in and has no obligation to go into exile if the patient dies.

The Poskim discuss a case where a doctor damages a patient through carelessness – for example, he wants to give him a certain bottle of medication and accidentally hands him the wrong bottle or if he accidentally grabs an unsterilized knife to perform surgery when he intended to take hold of a sterilized knife. In such a case, Rav Shlomo Zalman Auerbach rules that the halachos of the Tosefta would apply and the doctor would be liable in *dinei shomayim* but not in *dinei odom* (and he would have to go into exile if the patient dies). The Tzitz Eliezer and Minchas Yitzchak disagree and say that if a doctor is careless in this manner, he has no excuse for the damage he caused and he is liable even in *dinei odom*.

A MEDICAL UNDERLING:

It is common for a doctor to make a decision as to how to treat a patient and then assign the actual procedure to be carried out by a lower-level doctor or nurse. If the doctor offered detrimental instructions that damaged the patient, who is responsible? The authorizing doctor or the one who actually performed the procedure?

Rav Zalman Nechemiah Goldberg says that if the doctor gave faulty instructions, he may be held liable at least in *dinei shomayim*. (He discusses whether this indirect form of damage would be classified as “*grama*”, which only bears liability in *dinei shomayim*, or “*garmi*”, with bears liability even in *dinei odom*.)

He says that the underling who actually performed the procedure would have no liability, as he is merely following orders.

If, however, he has the knowledge and expertise on his own to know that the higher doctor's orders are detrimental, and he follows them anyway, he does bear responsibility. He proves this from the Gemara that says that if a *beis din* accidentally loses count of how many lashes a person received and hits him additional times, the agent of *beis din* who is actually doing the hitting is held liable and has to go into exile if the person dies. The reason for this is because the agent was capable of counting on his own; therefore, he can be held responsible for striking the man more than was warranted. We can learn from here that if a lower-level doctor is capable of knowing on his own that the higher doctor is giving bad orders, he would be responsible for the outcome.

IF THE DOCTOR IS PAID:

There is a discussion amongst contemporary Poskim if the halacha would change at all if a doctor is paid for his services (as is the case with almost all doctors today).

Rav Yosef Fleischman argues that if a doctor is paid there are a number of reasons that he could be held liable even in *dinei odom*. Firstly, he says that doctors are supposed to work for free according to halacha. (We learn this from the Gemara's famous *drasha* of “*Mah ani b'chinam af attah b'chinam*.” Just like Hashem does not charge, man is also not supposed to charge for spiritual work.) Accordingly, he says that if a doctor charges his patients money, it cannot be said that he has *reshus beis din*, which means that he is not exempt from paying for his mistakes.

Secondly, he says that the only reason a doctor is exempted from liability is because of *tikkun olam*. Again, if a doctor is going against halacha and charging for his services, he says that his work cannot be considered *tikkun olam*, which would mean that he is not exempted from liability.

Finally, he shows that the Ramban compares a doctor to other types of professionals. As we explained in Part 1 of this series, other professionals who are paid for their services are liable for damages. Accordingly, he says that if a doctor is paid he should be held liable as well.


He notes that although it is against halacha for a doctor to charge in order to make a profit, he is definitely permitted to charge “*schar beteilah*”, an amount of money to cover the cost of his own expenses and lost time; therefore, if a doctor is only charging *schar beteilah*, the first two reasons to obligate him to pay for damages would not apply, but the third reason would still be applicable.

Rav Fleischman's first two reasons are very debatable. While it is true that the Gemara says that doctors should practice for free, the Poskim offer numerous reasons why there is no problem for doctors to charge in contemporary society. Rav Moshe Feinstein says that Jewish people prefer using Jewish doctors. If Jewish doctors wouldn't charge, they wouldn't be able to make a living and would be unable to retain a practice; therefore, it is in the public interest for them to charge a fee and is certainly not prohibited. The Nishmas Avrohom quotes Rishonim who say that people who devote their lives to public service are allowed to be compensated and, in fact, need to be paid in order to be able to live. He says that when the Gemara says that Jews should treat others for free, it is not talking about doctors who practice their craft for a living. Rav Shlomo Zalman Auerbach says that a Jewish doctor's fee can be considered *schar beteilah* because he could have treated non-Jewish patients and made money that way, and he is giving up that money to treat Jews.

In any event, a Jewish doctor today is certainly permitted to charge a fee, which makes it very difficult to accept that a doctor who charges would automatically not be considered to have *reshus beis din*.

Rav Fleischman's third reason sounds more plausible; however, the idea that a doctor who is paid is not exempt from liability is not mentioned in any of the earlier Poskim and is, therefore, hard to accept.

Another contemporary Posek, Rav Shlomo Zafrani, does seem to lean towards accepting the idea that a doctor who is paid bears more liability. He discusses a case where a mohel is negligent and causes damage to a baby that the parents had to pay to fix. He compares a mohel to a doctor and says that the mohel would not be liable if he is an expert and was working for free. From his words, it seems that he is saying that the mohel is only exempt from liability if he is working for free, and he would not enjoy this exemption if he was being paid.

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