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***RAMBAN's Inyan haSakanah***

A translation

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INTRODUCTION

"RAMBAN" – Rabbi Moses ben Nahman/Nahmanides/Bonastruc de Porta (1194-1270, Girona) was a scholar and mystic, and his pupil Rabbi Solomon ben Abraham Adret (Rashba) reports that he also treated patients<sup>1</sup> - his writings certainly demonstrate his detailed knowledge of the medicine of his age. His halakhic writings show his strong dependence on the works of the *geonim* and especially on the *She'iltot* of Rav Aha(i) Gaon of Sabha (8<sup>th</sup> century), and on the *Halakhot Gedolot* (8<sup>th</sup> century – Rav Yehudai Gaon or Rabbi Shimon Kiara) as well as the *Sefer haHalakhot* commentary on the Babylonian Talmud – nowadays more commonly known as the "RIF" - by Rabbi Isaac Alfasi (1013-1103). He relates frequently to his closer contemporaries, especially Maimonides (1135-1204), with great respect, though often in order to dispute his opinion. When he quotes Maimonides to agree with him, he uses such terms as "Rabbi Moses of blessed memory," but when he disagrees with him he refers to him as "some authorities say".

Among his many other works, RAMBAN wrote *Torat haAdam*, which deals with illness, death, bereavement and salvation. The chapter called *Inyan haSakanah* (On Danger) was the first compendium of medical *halakhah* ever to be written. Some issues are developed in

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<sup>1</sup> The evidence for RAMBAN practicing as a physician is found in two *responsa* of Rashba. Responsum 1:120 reports "I have seen our rabbi Rabbi Moses ben Nahman of blessed memory treating a non-Jewish woman ... for a fee". However, the treatment here was for infertility not for an illness. Responsum 1:167 has "I have heard that my teacher Rabbi Moses ben Nahman of blessed memory created this image of a lion for a particular illness as you have described, and did not worry at all". (This is repeated verbatim in responsum 1:825.) In this case he used a magical amulet, which he himself defines as non-medical. However, since the sixteenth century he has been assumed to have also been a regular physician – see, D Margalith (Ramban the physician. *Koroth* 1(9-10), 1956:303-315) who quotes Rabbi Gedaliah ibn Yahya and subsequently the 17<sup>th</sup> century Rabbi Yosef Solomon Delmedigo.

greater detail elsewhere, such as in his *Milhamot haShem*<sup>2</sup> or in his commentary on the Torah<sup>3</sup>, but most of his medical writing is concentrated here. His *halakhah* on medical matters was followed almost verbatim by Rabbi Jacob b. Asher one generation later (1270-1340) in his *Arba'ah Turim (Yoreh Deah 336)*, commonly known simply as the *Tur*, which was the first systematic code of Jewish law. This subsequently formed the basis for Rabbi Joseph Karo's *Shulhan Arukh* (1563), the basic canonical reference for *halakhah* ever since.

*Inyan haSakanah* deals sequentially with all aspects of medical law found in the Talmudic sources – Mishnah, Tosefta, Sifra, and the two Talmuds – concerning medical danger when faced with the necessity to desecrate *Shabbat*, to eat on *Yom Kippur*, to eat forbidden foods; to suffer exposure to pagan rites, or to face sexual temptation. The main topics covered are:

- urgency in giving medical aid;
- women, children, heathens, magicians and Samaritans as medical caregivers;
- patients' capacity to assess the severity of their own condition;
- medical expertise;
- conflicts of opinion;
- leniency and stringency in medical *halakhah*;

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<sup>2</sup> For example, this terse comment in *Inyan haSakanah* is difficult to understand: "[the prohibition of] seduction is not suspended at all even for healing. Since we rule that it is not suspended at all, we understand this to mean - even if the motive is self-indulgence." However, in *Milhamot haShem*, *Sanhedrin* chapter 8, RAMBAN makes it clear that the reason for the prohibition of transgressing the three cardinal sins even under duress is not in order to sanctify God's name by resisting conversion, but they are absolute and non-contingent prohibitions. It is therefore forbidden even when the non-Jew coerces the Jew simply in order to indulge himself, with no motive of corrupting the Jew and converting him to his pagan faith. In contrast, all other, lesser, sins may be transgressed under duress if the motive is merely self-indulgence, though not if the motive is to force conversion.

<sup>3</sup> *Inyan haSakanah* has: "It is not natural for people to go to doctors, though they have become accustomed to do so, as [when the rabbis criticized King Asa - Chronicles II 16] 'when ill he did not seek God's help, but the doctors' ". In RAMBAN's earlier Torah commentary on *Behukotai* he states this position more explicitly - that though the doctor may have license to treat the patient, the patient does not have divine permission to seek the doctor's help, but rather should seek to mend his ways and beg forgiveness.

the status of the pregnant woman and her foetus;  
 complications of childbirth and circumcision;  
 internal conditions and external wounds;  
 bites and poisons;  
 vital signs;  
 blood-letting;  
 terminal illness;  
 medical error;  
 the duty to heal;  
 professional fees.

No English translation of *Inyan haSakanah* has been published to date, though the introduction to *Torat haAdam* and several other parts of it were translated as a doctoral thesis in 1977<sup>4</sup>. Professor Samuel Kottek has published a summary with initial comments on RAMBAN's use of Talmudic texts.<sup>5</sup> The text used for this translation is that published by Chavel,<sup>6</sup> which differs in many places from the other widely used text, in the Bar-Ilan University Responsa Project.<sup>7</sup> The provenance of the latter is not clearly described, which is why I have preferred to use Chavel's text here. Chavel bases his text on the Venice (1595) and Warsaw (1841) printed editions, as well as on the manuscript editions in the Jewish Theological Seminary, New York, and in the British Museum. He also follows the annotated edition by Rabbi Isser Zalman Meltzer, (Jerusalem, 1955), but adds his own extensive footnotes. Where I have provided a translation of these, they are designated by the letter [C]. Explanatory phrases inserted into the text are in square brackets. Abbreviations: BT - Babylonian Talmud, *Bavli*; JT - Jerusalem Talmud, Palestinian Talmud, *Yerushalmi*; Yad – Maimonides' *Yad Hakhazakah*.

In many places the Talmudic texts quoted in *Torat haAdam* differ from our standard version. I have left these differences in the translation.

In understanding the text I have been guided by Chavel's footnotes and by my learned but modest *hevruta* in Tzefat who wishes to

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<sup>4</sup> Edward Ruttenberg *Towards a critical edition of Torat haAdam with translation and commentary* (Hebrew Union College, 1977). I thank Dr Ruttenberg for giving me access to his work.

<sup>5</sup> SS Kottek: Medical practice and Jewish Law: Nahamanides' *Sefer Torat Haadam*. In: *Medicine and Medieval Ethics in Medieval and Early Modern Spain. An Intercultural Approach*, edited by Samuel S. Kottek and Luis Garcia-Ballester (Magnes: Jerusalem, 1996), 163-172

<sup>6</sup> חיים דוד שעוועל, כתבי רבי משה בן נחמן, עמודים כב-מה, ירושלים תשכ"ד

<sup>7</sup> The Bar-Ilan Responsa (ver. 19+) uses the text bound in with חידושי רמב"ן, ברכות וסדר מועד, המרכז לחינוך התורני, זכרון יעקב תשנ"ד.

remain nameless. In the end all interpretation inherent in the translation is my own.

**RAMBAN: Inyan haSakanah (On Danger)**

We learn from *Yoma*:

R. Matia ben Heresh said that we give medicine to someone with a sore throat on *Shabbat*, because he may be in danger and any possible danger overrides the *Shabbat*. This principle also covers a risk [of danger] on the next *Shabbat*. How so? For example, when we prescribe an eight-day course of treatment starting on *Shabbat*, should we delay starting the treatment until after *Shabbat* so that it will not include two *Shabbatot*? The principle implies not. It was also taught here that we may warm water for a patient on *Shabbat* either to drink or for comfort; we do not say wait until he recovers, but rather we heat the water immediately. (BT *Yoma* 84b)

This source has been interpreted to mean that if professional physicians say that hot water is necessary for drinking but extra is needed for the comfort of washing the patient after drinking, we do not say wait and see if he feels better after just drinking so that we would not need to desecrate *Shabbat* twice, but rather we do everything at once so as not to delay recovery. For it is good to be swift when there is danger, and the risk of danger overrides *Shabbat* – not only this *Shabbat*, but even next *Shabbat*.

We do not give these things to gentiles or to children to do, but to Jewish adults.<sup>8</sup>

Another manuscript version has:

We do not say, give these things to gentiles or to children to do, but even to Jewish adults.

Similarly, in the *Yerushalmi*:

– even to adults, even a Jew. (JT *Shabbat* 16:7)

The reason we say that these things should not be done by women or Samaritans is that they take on other opinions. (BT *Yoma* 84b)

An alternative reading has:

but their opinions are only accepted as support for other opinions.

The *Tosefta* reads:

We do not rule that these things should be done if they are recommended by women or Samaritans, but we add a Jewish opinion to theirs. (*Tosefta Shabbat* 15:15)

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<sup>8</sup> The phrase *Gedolei Yisrael* usually means the leaders of the people. The literal translation is either "great", or "adult". Using the literal translation here anticipates RAMBAN's argument that follows. Maimonides maintains the meaning of great and learned men (*Yad Shabbat* 2:3).

This has been interpreted [by Rashi] to mean that if women or Samaritans say that desecrating *Shabbat* is necessary, we do nothing until we seek a Jewish professional opinion and if he says it is necessary, we follow all these opinions. This is consistent with what they said in *Rosh Hashana*:

Their evidence is invalid but it may be used when combined with other witnesses. (BT *Rosh Hashana* 24a)

This interpretation is wrong as far as women are concerned. For a professional woman's opinion is definitely relied upon to permit desecrating *Shabbat*, as we have learned:

We call a midwife for a woman in labour, to come from afar. The rabbis taught us that if a woman in labour needs a lamp, her [female] attendant lights it up for her, and if she needs oil, her attendant fetches her oil. (BT *Shabbat* 128b)

Furthermore, since we do not accept the textual version that says we do not desecrate *Shabbat* on the recommendation of women or Samaritans, but rather we accept the version: "these things should not be done [by women and Samaritans]"<sup>9</sup>, therefore it has nothing to do with their expertise. Here, then, is the explanation: We never have gentiles or children do these things lest bystanders say that we only permit desecration of *Shabbat* reluctantly where there is a risk to life and do not permit it *a priori* using those who are bound by Jewish law. This could lead to neglect of the patient. Even though in a case where there is no danger of life to the patient we do use a gentile to do what is necessary, in this case where there is danger we do not use them, but rather we ask adult Jews to do it. However, if women or Samaritans happen to be there, we do let them act, for they are obliged to observe *Shabbat*, and we assume they do so, but we do not specifically assign them by name to this work with the dangerously ill patient lest they hesitate, arguing to themselves that the Jewish men do not want to desecrate *Shabbat* themselves, but do not care if we [women and Samaritans] do. This is because the Samaritans do not recognise the principle of "do not put a stumbling block in the path of the blind", as it says in the [talmudic] chapter starting 'Slaughtering ordinary animals':

[The Jew should] cut off the head of one of the chickens [that the Samaritan slaughtered] and give it to him. (BT *Hullin* 4a)<sup>10</sup>

As for women, they may make mistakes because they are easily swayed, and that is what is meant by – "they take on other opinions", that is,

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<sup>9</sup> The translation here follows the Responsa Project text which is more comprehensible

<sup>10</sup> If the Samaritan eats it then the Jew may eat it too – because although the Samaritan would not eat non-kosher meat he might give it to a Jew to eat.

unorthodox and erroneous opinions. Following the other textual versions that have – "we do not rule that gentiles and children should do it" lest the Jew may say since there is nobody around to do it we will not desecrate the *Shabbat* unnecessarily, but even adult Jews should do it - and if they wish they may do it together. The later section about women and Samaritans not doing it at all "but we add a Jew's opinion to theirs", means that we do not leave them alone to administer the help themselves lest they behave lazily or negligently, but we join a Jew with them and hand it [the responsibility] to the Jew. A Samaritan may share life-saving management with a Jew because while the Jew is active he too will be encouraged to act. This then is the best textual version.

Our rabbis taught:

Desecrate *Shabbat* in order to save life, and it is good to be swift, and there is no need for a court permit. How so? If you see a baby falling into the sea you spread a fishermen's net and pull him out, and it is good to be swift. If the baby fell into a well, you remove the upper rim and haul him up, and it is good to be swift and there is no need for a court permit, even though it means forming a shelf in the soil. If a baby was locked in a room, you break down the door and let him out, and it is good to be swift and there is no need for a court permit, even though it means splitting the wood and making it useable as a tool. You put out a fire and douse the cinders and it is good to be swift and there is no need for a court permit, even though you are left with useable hot charcoal. (BT *Yoma* 83a)

The *Yerushalmi* has:

It is good to be swift; he who is consulted is blameworthy<sup>11</sup>; and he who consults is guilty of bloodshed. (JT *Yoma* 8,5)

[On Yom Kippur] the patient is fed on experts' orders. Where there is no expert available, the patient is fed by his own request (*Mishna* in BT *Yoma* 82a). And why? - "Each heart knows its own bitterness" (Proverbs 14:10). If the doctor says it is necessary but the patient says it is not, we feed him following the doctor's orders. Why so? We assume the illness has affected the patient's better judgment. In conclusion, Rav Ashi says that whenever the patient says he needs to eat, even if there are a hundred contrary opinions, we listen to the patient, for "each heart knows its own bitterness". (BT *Yoma* 83a)

The analysis of the discussion is this:

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<sup>11</sup> He should have taught the public not to seek permission before acting in situations of danger.[C]

If one doctor says the patient needs to eat and the patient says he does not, and another doctor also says he does not need to eat, we do not feed him, because the single opinion does not outweigh the two others. If the patient and two or three or even a hundred doctors say he does not need feeding, but two say he does need, we take their opinion and feed him, for where there is a risk of danger we take the lenient path, and we do not use the majority principle. If the patient says he needs food, even if a hundred experts say he does not, we feed him, accepting his own judgment. This ruling is the conclusion of the discussion and the topic.

We are aware that some authorities<sup>12</sup> do use a majority principle and so does the *She'iltot* as well. Even though the position of the *Bavli* is clearly that the majority principle applies to assessing monetary cases, but here, in assessing danger to life, we use the leniency principle, it is apparent that these authorities who argue for the majority principle do not accept the way the text is generally read.<sup>13</sup> Since [the Talmud] queries the need to interpret "experts" as meaning two expert opinions, this being obvious, the case in point should be read as a case where there are two opinions in favour of feeding and two against, and so<sup>14</sup> we use the leniency principle. When Rav Ashi comes and says that where the patient says he needs to eat, we listen to him even against a hundred who say he does not need feeding, the *Mishna* could still be construed as above – that alongside the patient there is another supporting opinion, [even if a hundred] say he does not need feeding, we feed him on the basis of the opinion of the "two experts"<sup>15</sup>.

You might have thought that just as where the patient says he needs to eat we listen to him even against a hundred experts, so where he says he does not need to eat, we listen to him too, for in both cases "each heart knows its own bitterness". However, we apply the leniency principle [that dictates that the patient's opinion trumps a majority]. When it comes to being stringent [the patient saying he does not need to eat], the patient is considered as just one expert opinion, not as two.

Therefore, where the patient and the one expert say that he does not need to eat, and two experts say he does need to, we take the latter's opinion

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<sup>12</sup> viz RAMBAM

<sup>13</sup> RAMBAN now goes on to show how the majority principle can be maintained and the text read to reach the same conclusion using the device of adding an expert opinion to support the patient against other experts.

<sup>14</sup> there being no majority to go by

<sup>15</sup> i.e. the patient's opinion together with one supporting expert, against a hundred experts who also count as equal to only two, as will be explained presently, so we do not need to reject the majority principle.

[on the leniency in danger principle]. But if there was only one expert opinion that he needs to eat, we ignore him [using the majority principle – and the patient is not fed]. On this reading<sup>16</sup> we do not construe the patient as being incompetent because that would leave just one opinion against eating [the expert], not two [the patient and the expert].<sup>17</sup>

We do find (BT *Bava Kama* 90b) the use of the majority principle in order to establish presumption in capital cases, such as whether the means of murder were sufficient to kill – an injury to the chest is more commonly fatal than an injury to the leg. The majority principle applies routinely in legal proceedings, and this supports the position of those who said [that it applies here too]. However, since the talmudic text states that presumption concerning sick patients does not employ the majority principle, we will not prefer the merely theoretical argument over the expressly stated text. The standard legal situation could be seen as different [from the medical one] since there all opinions are of judges<sup>18</sup>. But here, since where there are already two opinions that the patient needs to eat, we do not require any more opinions [who might think the patient does not need to eat] to arrive at a valid assessment of the patient's condition, and they are considered as non-existent. Furthermore, legal proceedings have special rules, such as that in order to convict you need a majority of two, not just a simple majority (BT *Sanhedrin* 32a) whereas in assessing medical danger there is no majority principle. The rabbinical and halakhic authorities rule this way.

There is an opinion (RAMBAM, *Yad Shevitat Assor* 2:8) that argues that where the *Mishna* says that we listen to the experts, that means a reputable and knowledgeable expert, as opposed to doctors who are not so wise or expert. This seems an unlikely view, for we do not find that courts rule according to the wisest opinion but by the majority opinion. It is true that we find (BT *Avoda Zara* 7a) that where rabbinical opinion is divided, one ruling pure and one ruling impure, or one permitting and one forbidding, if one rabbi is wiser than the other his opinion prevails, and therefore where medical opinion is equally divided we do take the more wise and expert opinion. In the situation of the law-court, although in principle we require consensus before ruling, all the judges present are required to express an opinion and the Torah stipulated that the majority decides. But here [in medical issues] we listen to the expert, and there is

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<sup>16</sup> used to demonstrate the possible use of the majority principle

<sup>17</sup> and no majority. RAMBAN now goes on to defend his own position, that we do not use a majority principle in cases of danger.

<sup>18</sup> and we routinely seek the opinion of all of them before coming to a majority decision

no reason to seek a second opinion from a lesser expert - his opinion would be void. However, where two doctors are opposed by one, since they are all equally competent professionals, the single opinion cannot prevail. Nonetheless, if one of them is exceptionally wise we do prefer his opinion even if he is a small minority. This is true in order to enable the patient to eat, but if he says the patient does not need to eat where other less expert doctors say he needs to eat, he is considered as a lone voice and is not heeded.<sup>19</sup> There is a source for this (BT *Yevamot* 14a) in the dispute between the schools of Shammai and Hillel where the school of Shammai is the more convincing. We rule that the majority opinion applies where the opposing opinions are of equal authority, but nonetheless we take the wiser and more expert opinion in order to rule more strictly. In our context the "stricter" ruling means leniency [with the *Yom Kippur* fast] in cases of medical danger, allowing you to supply the patient with all he needs.

*Yerushalmi:*

When the patient says I can fast, and the doctor says he does not know, R. Abahu, quoting R. Yohanan, says this is a situation of risk to life, and where life is at risk we rule leniently even overriding the *Shabbat* observance laws. (JT *Yoma* 8:4)

The assumption here is that the patient says he can fast only because his better judgment is affected by the illness, but where the doctor says the patient can fast and the patient says I do not know, we take the doctor's opinion. This is because the patient's lack of opinion is worthless - for on what basis can patients know, most of them having no expertise or knowledge of their illness? So we take the opinion of he [the doctor] who says he knows.

We feed a "*bolmos*"<sup>20</sup> patient even with ritually impure foods [if he is a priest] until his eyes clear. The *tannaim* say we feed a *bolmos* patient, but with the minimal possible infringement of the law. If we have untithed food or non-kosher *nevelah* meat, we use the latter; *nevelah* or sabbatical year produce, we use the latter; the priestly tithe portion or untithed food, we give the patient untithed food and not tithes. Ben Teima says that we give the patient tithes, not untithed food. Rabbah says there is no argument where there is tithed food available, but only where there is no option of using ordinary tithed food. One opinion is that un-tithed food is the more problematic [being forbidden to everybody], because tithes may be eaten by a priest. The other opinion is that tithes are the more

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<sup>19</sup> This conclusion contrasts with RAMBAM who respects the more expert opinion in all cases.

<sup>20</sup> Probably, hypoglycaemic

problematic, because un-tithed food may be made permissible [by taking the tithe from it]. (BT *Yoma* 83a)

Rabbi Abraham ibn Daud of blessed memory<sup>21</sup> was asked about a case where the choice was between *nevelah* and food cooked on *Shabbat*.<sup>22</sup>

The chapter starting "Rabbi Yishmael" in *Menahot*:

Rava says that if [on *Shabbat*] a patient is estimated to need two figs, and ten people went simultaneously and brought him ten figs [from outside where they are forbidden to carry on *Shabbat*], they are all innocent, and even if they arrived one after another, and even if the patient recovered after eating the first one. Rava was asked for his ruling where there is a choice between picking two branches with one fig on each and picking one branch bearing three figs, where the patient is estimated to need two figs to recover. Do we bring the two branches which is just what he needs, or do we bring the single branch because there is less [forbidden] picking involved? Obviously we bring the single branch with the three figs, since less picking is involved. A pregnant woman [fasting on *Yom Kippur*] who smells a dish [and craves it] is fed until she calms down. The *tannaim* taught that if a pregnant woman smells sanctified meat or pig meat we [let her taste from] a skewer dipped in the sauces and if she settles that is fine, and if not, we give her the meat-fat itself – for nothing overrides danger to life except for idolatory, incest and murder. (BT *Menahot* 64a)

Clearly the situation is that we cannot estimate medically what is needed to settle a pregnancy craving, sometimes it will be the taste of the sauce and sometimes the fat itself. A patient, on the other hand, is fed right from the start, following professional opinion as to what and how much he needs. We do what the doctor says and do not try and minimize the infractions of the law.

The chapter in *Keritut* starting "They said to him" has:

We allow a pregnant woman to eat repeated small portions that are each below the minimum forbidden size, because she is in danger. This ruling is queried; if she is in danger, let her eat more. Rav Papa said the correct reading is: We allow a pregnant women to eat repeated small portions, and even more if she is danger. (BT *Keritut* 13a)

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<sup>21</sup> 1125-1198, Provence

<sup>22</sup> The clarification is that it is the *Shabbat* that stops the patient eating otherwise totally kosher food, therefore it is *Shabbat* that is overridden, not the kashrut laws.

This means that even if she needs a full [forbidden] quantity, we feed her in repeated small portions so that it does not add up to the full amount within a short time<sup>23</sup>. Thus rules the author of *Halakhot (Sefer Halakhot Gedolot* – at the end of the Yom Kippur Laws). It seems to me that this applies to a sick patient as well, sparing him from eating quantities that would normally be punishable by *karet* or flagellation. You may wonder then why the Talmud says you feed the patient with the minimum infringement of the law, choosing tithes where there is a choice between un-tithed food and tithe, both of them being simply forbidden<sup>24</sup>. In cases where eating the full quantity of different foods would lead to punishments of different severities, where the patient eats less than the punishable quantity eating the one food is considered more serious than eating the other. Another approach is to say that the Talmud refers to the case of the sick patient who is estimated to need a full quantity within the specified [normally punishable] time.<sup>25</sup>

Also from *Halakhot Gedolot*:

It is right to feed a pregnant woman if we know that fasting would cause her to abort, even though we are not sure whether the foetus is viable. Furthermore, Rav Yitzhak ben Giat said that this depends on the woman's judgment of her condition, not on ours, so when she smells the food she becomes like a sick patient and we give her the food to eat.(loc. cit.)

It appears reasonable to rule with the author of the *Halakhot Gedolot* that if the pregnant woman says she needs to eat, obviously we give her something to eat, but even if we merely see her craving for that smell and her face changing colour, we give her something to eat for fear of an abortion. Since he also refers here to the danger to the foetus, we may infer that even where there is no danger to the mother we override the law.

We have a text near the end of the first chapter of *Arakhin*:

Rav Nahman said in Shmuel's name: If a woman dies in childbirth on *Shabbat* we fetch a knife, open her belly and extract the foetus. Is that not obvious – all he is doing is cutting into flesh? Rava said that the point is that we fetch the knife through the public thoroughfare. We derive from here that we override the *Shabbat* laws in case of doubt. The *Mishna* states: if we do not know

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<sup>23</sup> halakhically defined as the time span within which the total forbidden quantity is deemed to accumulate

<sup>24</sup> with equal punishments

<sup>25</sup> Therefore the ruling is to give the less forbidden food rather to give the food in small quantities.

whether the injured person is alive or dead, whether an idolator or a Jew, we continue with rescue operations. That is understandable, because the default position is that the injured person is alive, whereas in the case of death in childbirth, there is no such default assumption concerning the foetus. Nonetheless the doubt is sufficient to override the *Shabbat*. (BT *Arakhin* 7a)

However, chapter 7 of *Mishna Ohalot* has:

If a woman is in obstructed labour we fetch a knife and dismember the fetus, but if the head has already been delivered we do not touch the baby, for we do not sacrifice one life to save another. (*Mishna Ohalot* 7:6)

from which we see that in principle we do not have to save the life [of the foetus]. We also have another tannaitic source that killing a baby on its first day of life is murder (BT *Nidda* 44a) - that is, specifically after birth but not as a foetus. The Torah says that killing a foetus [only] entails paying damages (Exodus 21:22). Nonetheless, when what is at stake is the law, we do desecrate *Shabbat* to try and save a foetus. As the Torah says<sup>26</sup> "desecrate this one *Shabbat* to give him a chance of observing many [in the future]." Therefore, even where the foetus is less than 40 days gestational age and still non-viable, we desecrate *Shabbat* to save it, as the *Halakhot Gedolot* author holds. There are some opinions that we do not desecrate *Yom Kippur* in the case of the craving mother in order to prevent a stillbirth, but rather to save the life of the pregnant mother herself, for any aborting mother is in danger. The reasoning in the case of the mother who dies in childbirth is different, for as soon as she dies, the foetus is considered as already born, since it is no longer a constituent limb of its mother and it is no longer dependent on her, but it is a living being who is trapped behind a closed door. Albeit there is no default assumption of it being alive, but when in doubt we are lenient with the law in order to save life.

Chapter "Even though":

Amemar, Mar Zutra and Rav Ashi were once sitting at the gate of King Yezdjird when the king's table-steward passed them by. Rav Ashi, observing that Mar Zutra turned pale in the face, took up [some food from the King's dish] with his finger and put it to his mouth. ... 'Why did you rely upon a miracle?' the Rabbis asked him. 'I saw', he replied, 'the demon of leprosy hovering over him'. (BT *Ketubot* 61a,b)

So we derive that turning pale is a sign of danger. In the same text, Rav Hamnuna says:

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<sup>26</sup> as derived in BT *Shabbat* 141b

All food may be withheld from the waiter except meat and wine... Rav Ashi said: I was once standing with Rav Kahana when they brought him thin slices of turnips in vinegar, and had he not given me some I would have been put in danger. Rav Papa said that even [if you smell but do not eat] a fragrant date [you are in danger].

This is the rule: Any food that has a strong flavour or an acrid taste [will expose people to danger if they are not allowed a taste of it].

From this we derive that if a healthy person smells a food and becomes distressed, we give him that food to eat either on the basis of his reaction alone, or on the advice an expert who knows him. Thus writes RAMBAM of blessed memory (*Yad Maakhalot Assurot* 14:15).

Chapter "One may clear away":

One may deliver a pregnant woman on *Shabbat* and call for a midwife from a distant place, desecrating the *Shabbat* on her behalf. What does this last phrase add? — It adds the following taught by the Rabbis: If she needs a lamp, her friend may light a lamp for her. And if she needs oil, her friend brings her oil in the palm of her hand; but if that is not enough, she brings it in her hair; and if that in her hair is insufficient, she brings it to her in a vessel, through the public thoroughfare. Mar said: 'If she needs a lamp, her friend may light a lamp for her.' Is that not obvious? Rav Ashi says: It is necessary [to state this] only in the case of a blind [woman]. You might argue that since she cannot see it, it is forbidden, hence the text informs us that we calm her mind, for we desecrate *Shabbat* for an ordinary sick person over something that could cause them danger. 'If she needs oil, her friend brings her oil in the palm of her hand; but if that is not enough, she brings it in her hair.' [But why not] deduce [forbidding her to bring oil in her hair] on the grounds of wringing out? Rabba and Rav Joseph both answer: [The ban on] wringing out does not apply to hair. Rav Ashi said: Even if you say that wringing out does apply to hair, let her bring it to her in a vessel by means of her hair, [because] we vary the way we do things as much as we can. (BT *Shabbat* 128b)

From this we understand that even if there is danger we provide for the needs of the patient wherever possible in a way that is different from the normal way of doing things and avoids desecration of *Shabbat* – on condition that this does not delay the patient's needs at all.

We also learn concerning circumcision:

We circumcise, expose [the corona], aspirate [the wound], and place a compress with cumin on it. If someone did not crush [the cumin] on the eve of *Shabbat*, he must chew it with his teeth and apply [it to the wound]; if he did not beat up wine and oil on the eve of *Shabbat*, each must be applied separately. We may not make

a *haluk*<sup>27</sup> for it in the first place, but should wrap a rag around it. If this was not prepared before *Shabbat*, he should wrap it round his finger even fetching it from another courtyard. (BT *Shabbat* 133a)

We derive from this that even though [the baby] is in danger we do not desecrate a law of *Shabbat* that is stated in the Torah but we do the actions in a different manner so that we desecrate [merely] a rabbinic injunction – on condition that all the patient's needs are fulfilled swiftly.

Rav Yehudah quotes Shmuel as saying that all the time the womb is open we desecrate the *Shabbat* for a woman in labour, whether she says she needs it or whether she says she does not need it. When the womb closes, if she says she does not need help, we do not desecrate *Shabbat* for her, but if she does not say so, we do desecrate *Shabbat* for her. At what stage does the womb open? Abaye said, with the onset of labour. Rav Hunna the son of Rav Yehoshua said from the time blood starts draining out, and some say when she needs support in walking. (BT *Shabbat* 128a)

Our great rabbi [Alfasi] wrote in his *Halakhot* that the talmudic rabbis were careful to note that Rav Hunna did not say "**when** the bleeding starts" which implies that he meant before the onset of labour. We rule according to Abaye and do not desecrate *Shabbat* until blood starts draining out and labour begins. This ruling of the rabbis is problematic. First, the reason Rav Hunna the son of Rav Yehoshua did not use the phrasing "**when** the bleeding starts" was because he was responding to the question: at what stage does the womb open? - and the usual response to this is "**from the time** that", as we read in the *Mishna*:

From what stage do we start reading the *shema* in the evening?

From the time that we start *Shabbat* on a Friday evening – so says R. Eliezer. R. Yehoshua says from the time the priests go to the Temple to eat their tithes, which is indicated by the time the stars start to shine. (*Mishna Berakhot* 2:2)

R. Eliezer's time is the earlier one and he uses the phrase "**from the time that**". Similarly in *Pesahim*:

From what stage is work forbidden on the fourteenth of Nissan? R. Eliezer ben Yakov says from the time of daylight. Rabbi Yehuda says from the time of sunrise. (*Mishna Pesahim* 2:2)

And the rabbis taught concerning the onset of mourning:

At what stage do we overturn the beds? When the corpse is brought out of the house, so says Rabbi Eliezer. Rabbi Yehoshua says when the grave is covered. (BT *Moed Katan* 27a)

Rabbi Eliezer's time is earlier, but Rabbi Yehoshua said "**when**". There are also many similar instances.

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<sup>27</sup> a type of dressing

And apart from this, why do we rule according to Abaye, when the principle is that we rule leniently in cases of danger to life? Indeed, in this very passage we read:

Ravina said to Maremar: where Mar Zutra rules leniently and Rav Ashi stringently, whom do we go by? He answered: we rule according to Mar Zutra, for we rule leniently when there is danger to life. (BT *Shabbat* 129a)

So it is clear that the timing does not depend on these definitions, and there are even some women who have no labour at all as the baby is born quickly. So we desecrate *Shabbat* for the mother either when she goes into labour, or when she starts to bleed, or when she can no longer walk unaided – in all these situations she is considered to be in danger. And when R. Moses [Maimonides] of blessed memory wrote that we desecrate *Shabbat* from the time that bleeding starts, in his opinion that is the earliest stage, and we rule leniently in situations of danger.

Till when is the womb open?

They conclude thus:

The Nehardaian rabbis said that after childbirth there are three phases – three days, seven days and thirty days. Till the third day whether she said she needs help or whether she said she does not need help, we desecrate *Shabbat* for her. Till the seventh day if she said she needs help we desecrate for her, and if she said she does not need help we do not desecrate *Shabbat* for her. That is just like anyone else in danger who when they say they need help we desecrate *Shabbat* for them. Till thirty days, even if she says she needs help we do not desecrate *Shabbat* for her, but ask a non-Jew to do what is needed. This ruling follows Rav Ulla son of Rav Ilai, who said that we provide for all the needs of a sick person on *Shabbat* by asking a non-Jew. (BT *Shabbat* 129a)

The ruling that we desecrate *Shabbat* for her in the first three days whether she says she needs it or not, is in the situation where there is no midwife or doctor around. However, it is common knowledge what a new mother needs on any weekday and so even if she says she does not need anyone to desecrate *Shabbat* for her and that she can wait till the evening, since these are things we do for any mother and they all need them, so she is defined as in danger in regard of this particular action and we desecrate *Shabbat* for her. We ignore her opinion and regard her as having impaired capacity to decide. After the first three days she is no longer considered as in a state of transient danger, and if she says she does not need it we listen to her. From the seventh to the thirtieth day we do not listen to her even if she says she needs us to desecrate *Shabbat*. This is if we know that she does not have any other illnesses, and she says so too. Any lay person is considered expert in this respect since there is no danger in

waiting till the evening, after *Shabbat*, for hot water or anything else the mother may need.

This is how Rav Aha explained it in his *She'iltot*:

For a woman who gave birth on *Shabbat* or even if *Shabbat* was the third day after delivery, even if she says she feels well and does not need a fire or hot water, and even if the doctors say she does not need them, [we make a fire]. For the rabbis have said that in the first three days after childbirth a mother's feeling well does not define her as healthy, and we make a fire, and heat water and cook, and do for her anything that a woman after childbirth needs.

(*She'iltot*: Exodus 38)

However the Gaon's [Rav Aha, above] opinion that we desecrate *Shabbat* even if both the mother and the doctors say there is no need, is implausible since many mothers after childbirth do not have hot water boiled for them every day, even on a weekday. We also read in *She'iltot* that a woman is not allowed to fast on *Yom Kippur* during the first thirty days after childbirth, but that is not accurate, because it only applies if she says that she needs to eat. We rule that she is automatically exempt only from not wearing shoes, but not from fasting, for eating and drinking are forbidden on pain of *karet*. Furthermore, when Shmuel (BT *Shabbat* 129a) speaks of the thirty day rule after childbirth and we asked concerning what, the answer was concerning ritual immersion and they did not add fasting to that, meaning that she is not exempt from fasting. However she is certainly exempt from fasting during the first three days. Up to seven days, if she says she does not need food she may carry on fasting and if not, we give her food. After this stage she is like all other women who have to fast on *Yom Kippur*.

Rav Yehuda, quoting Shmuel, said that we make up a fire on *Shabbat* for a woman after childbirth. Can he mean only for a woman after childbirth but not for a sick person, or only in the winter? Elsewhere Rav Yehuda, also quoting Shmuel, said we make up a fire for a person who caught cold after a blood-letting, even at the Tammuz solstice [mid-summer], all the more so for a sick patient. (BT *Shabbat* 129a)

However, R. Moses [Maimonides] of blessed memory, (Yad *Shabbat* 2:14) wrote that we may make up a fire for a woman after childbirth but not for a sick patient - but we cannot understand that.

In the chapter entitled "We do not put":

Shmuel said: an open wound is to be regarded as a danger for which *Shabbat* may be desecrated. Rav Hisda said: A berry-like blister is a harbinger of the Angel of Death. Rava said: An abscess leads to fever. Rav Shaman son of Abba said in the name of R.

Yohanan: internal disease does not require a medical opinion [to justify desecrating *Shabbat*]. (BT *Avodah Zara* 28a)

We know that sores on the back of the hand or the foot do not require a medical opinion, as we find:

Rabina visited Rav Ashi. He saw that an ass had trodden on his foot, and he was sitting and reducing the swelling in vinegar. He said to him: do you not think that is forbidden? [A wound on] the back of the hand or on the foot is different, he replied...for Rav Adda said in Rav's name: [A wound on] the hand or on the foot is like an internal wound. (BT *Shabbat* 109a)

Which lesions are internal? Rav Ammi explained: those on the lip and inward. Dental disease is also dangerous and we desecrate *Shabbat* for it, as we learn from a *mishna* [in BT *Shabbat* 111a]. If someone has a toothache, we give him medication on *Shabbat*.

R. Yohanan was troubled with *tzafidna*<sup>28</sup> and he went to a certain [heathen] lady who attended to him on the Thursday and the Friday. He asked: What about tomorrow?....

Concerning which the text says:

*tzafidna* is different, because though starting in the mouth it extends to the intestines. What are its symptoms? If he places anything between his teeth, the gums bleed. (BT *Avoda Zara* 28a)

My interpretation is that internal disorders do not need an expert, that is, even if there is no doctor around and the patient says nothing, we do for him everything we would normally do for him on a weekday, including foods and medications a patient needs, desecrating *Shabbat*, without consulting anybody. However, if we recognize the condition as allowing of delay in treatment and not needing desecration of the *Shabbat*, it is definitely forbidden to do so. Even more so if the patient or the doctor says it is unnecessary, we would never desecrate *Shabbat* even for an internal disorder, whereas for an external wound we ask the expert or the patient and only desecrate *Shabbat* if one of them says it is necessary, or if one of them considers the condition to be dangerous.

In the chapter headed "Before their festivals":

Rabbi Hanina said: For one who swallows a water leech... R. Nehemiah declared it permissible to get water heated for him on the *Shabbat*. Rav Huna son of Rav Joshua said: meanwhile [while the water is heating up] let him sip vinegar. (BT *Avoda Zara* 12b)

In the chapter headed "On *Yom Kippur*":

If there is a fall of debris, and it is doubtful whether or not anyone is buried there, or whether [anyone trapped] is alive or dead, one should excavate the heap of debris for the sake [of a possible

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<sup>28</sup> possibly scurvy

survivor, even on *Shabbat*]. If one finds someone alive one should remove the debris, but if he is dead one should leave him there [until after *Shabbat*]. (BT *Yoma* 83a)

If one finds him alive, one should evacuate the debris ... even if he has only a short while to live. (BT *Yoma* 85b)

From the statement that we desecrate *Shabbat* for a short life expectancy, we learn that we transgress commandments to keep someone alive for a short while just as we would to keep him alive for many days – “you shall live by them” (Leviticus 18:8) interpreted as “you should not die because of them” - even for a short life expectancy.

How far does one examine [the trapped person]? Until [one reaches] his nose. Some say: to his umbilicus. If one searches and finds the upper organs to be dead, one must not assume those below are definitely dead. Once it happened that those above were dead and those below were found to be alive. ... Rav Papa said: The dispute arises only as to from below upwards, but if from above downwards, since he has already checked above<sup>29</sup> and found no sign of life, one need not search any further, as it is said: (Genesis 7:22) ‘In whose nostrils was the breath of life’. (BT *Yoma* 85a)<sup>30</sup>

Coming back to the issue of idol-worship, incest and murder:

When Rabin arrived, he said in R. Yohanan's name: We may cure<sup>31</sup> ourselves with everything except idolatry and incest (BT *Pesahim* 25a)

We are not concerned here to say that idolatrous rites, incest and murder are forbidden, but to say that we are forbidden to derive any benefit at all from them, including for healing.

R. Yohanan: we may cure ourselves with everything except the wood of the *asherah*. How so? If there is danger, even the wood of the *asherah* too [is permitted]; while if there is no danger, all [other] forbidden things of the Torah are also not [permitted]? — Indeed [he was referring to a situation of] danger, yet even so *asherah* wood [must] not be used (BT *Pesahim* 28a)

Now, even though chewing *ashera* wood or rubbing it does not constitute a pagan ritual, nonetheless we are forbidden to do so, for it would be a transgression of the biblical verse (Deuteronomy 13:18) “none of the unholy thing shall stick to your hand”, so it too is forbidden. Similarly with incest and murder:

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<sup>29</sup> i.e. the nose

<sup>30</sup> There follows a passage on the principle of majority, which does not appear in all versions of *Torat Ha'adam* and is omitted here.

<sup>31</sup> i.e. save

Rav Yehudah said in Rav's name: A man once lusted after a certain woman, and his heart was consumed with his desire<sup>32</sup>. When the doctors were consulted, they said: his only cure is for her to submit [to his lust]. Whereupon the rabbis said: let him die rather than that she should yield. Then [the doctors said]: let her stand naked in front of him. [The rabbis answered] let him die rather than she should stand in front of him naked.[The doctors said]: so let her converse with him from behind a fence. [Let him die, the rabbis replied, rather than she should converse with him from behind a fence.] (BT *Sanhedrin* 75a)

So we see that for these three sins we do not use them for healing purposes, neither the sin itself not its derivatives. Nor do we restrict this principle to the situation of duress where a non-Jew is trying to force the Jew to convert, but even where the non-Jew is simply reveling in the Jew's tribulation. A person does not use *ashera* wood for healing in order to transgress but for his own benefit and health, and nonetheless it is not allowed. Similarly, a man wants to fulfil his lust for his own benefit, and even though refraining puts him in danger, it is not allowed. In *Kiddushin* (BT *Kiddushin* 40a) we read of a woman who tempted Rav Kahana, who then went up to the roof and jumped off it to his death. The same thing happened with R. Zaddok, they both endangered their lives and went to their deaths. Lest you think that sinning is allowed when the non-Jew's self-indulgence is involved, here they endangered themselves [rather than sin in exactly this situation].

You should not think that it is righteousness for a dangerously ill patient to refuse to desecrate *Shabbat*, against doctors' orders. It is bloodshed, as it says (JT *Yoma* 8:5) he who responds quickly is praiseworthy, he who is asked is reprehensible, and he who stops to ask is guilty of bloodshed. All the more so, he who refuses treatment is guilty. But we do come to the conclusion that these three serious sins are always forbidden even if only [pressed on the Jew] for the non-Jew's enjoyment. Thus Mordechai endangered his life, and put all the Jews in danger, because Haman himself had become an object of pagan worship, even though [from his own point of view] he actually only sought enjoyment and glorification – "Ahasuerus raised Haman to glory...and all the king's servants kneeled and bowed down to Haman" (Esther 3:1-2). Now you might wonder about Esther who did submit to a forbidden sexual relationship and the Talmud concludes that it was permissible because the King was acting for his own enjoyment. That is a different case because sexual relations out of wedlock with a non-Jew were not forbidden by the Torah but only by Shem's Court. The discussion (BT *Yevamot* 45a) rules that her offspring

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<sup>32</sup> thus putting his life at risk

would also be legitimate. This was a promiscuous relationship for he gathered all the girls and slept with them one by one. You might think that in Esther's case there was a marriage, for he crowned her queen, but there is no such thing as a forced marriage. Furthermore marriage to a non-Jew is like any other prohibition and not in the category of incest, which only includes adultery with a Jewish married woman. In addition, a Jewish man who has sex with a non-Jewish woman is liable to the death penalty - for he may be summarily killed by a zealot - and is also liable to *karet*, as Rav remembered learning from the verse (Malachi 2:12) "May the Lord cut off anyone who does this" (BT *Sanhedrin* 82a) – but a non-Jewish man having sex with a Jewish woman is just an ordinary sin, derived from "do not intermarry with them" (Deuteronomy 7:3). This is made explicit in the chapter headed "A wayward son" (BT *Sanhedrin* 73b) – that ordinary sins are not derived from the paradigmatic case of the seduction of an engaged girl, only capital crimes or those incurring *karet*. You might wonder too why we are allowed to give an idol-worshipper shovels for hot coals for his own use, of the sort they also use for their pagan fire rituals (BT *Sanhedrin* 74b). In this case the question is not one of pagan rituals or their derivatives but one of setting a stumbling block in the path of the blind, which is an ordinary prohibition just like any other in the Torah, whereas the prohibitions of idol-worship and their derivatives are always forbidden even for simple enjoyment or for healing. Similarly for murder and incest. This what the *Sifra* teaches us:

[In certain cases] we suspend the principles of *Shabbat*, but the principles of [the prohibition of] seduction of a betrothed girl cannot be suspended. (*Sifra* Leviticus *Hatat* 1:11)

and the *Yerushalmi* explains:

that means that we may not heal by means of forbidden sexual relations. [The *Sifra* states that in certain cases] we suspend the principles of *Shabbat* – does that not mean that *Shabbat* is suspended for healing? According to this, [the prohibition of] seduction is not suspended at all even for healing. Since we rule that it is not suspended at all we understand that means even if the motive is self-indulgence, and we cannot move from this position. (JT *Avoda Zara* 2:2)<sup>33</sup>

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<sup>33</sup> RAMBAN makes this clear in *Milhamot Hashem*, *Sanhedrin* chapter 8. The prohibition of transgressing the three cardinal sins under duress is not in order to sanctify God's name by resisting conversion, and it is therefore forbidden even when the motive is the self-indulgence of the coercive non-Jew. All other sins may be transgressed under duress only if the motive is self-indulgence but not if the motive is to force conversion.

Mar bar Rav Ashi found Ravina massaging his daughter with unripe olives of *orlah*<sup>34</sup>. He said to him: Granted that the rabbis ruled [thus] in time of danger, was it [likewise] ruled when there is no danger? He answered: This inflammatory fever is also like a time of danger. Others say, he answered him: Am I then using it in the normal manner of its usage? (BT *Pesahim* 25b)

The explanation is that a forbidden action carried out in a different way from usual is classified as a rabbinical transgression - as it says in the same text:

[With regard to] all the prohibited actions in the Torah, we only punish with the whip when they are performed in their normal manner, excluding if someone rubbed on his wound the fat from an ox which was stoned, in which case he is exempt. (BT *Pesahim* 24b)

Since rabbinical transgressions are allowed for the treatment of sick patients, even if they are not in danger, we derive that we may use things as cures that we are otherwise denied benefit by rabbinical law, even where there is no danger, such as *hametz* which was not discarded for all of Passover, and mixed crops outside the Land of Israel. Nonetheless we have no source to allow eating these things<sup>35</sup> for then they are considered as transgressions of the Torah and allowed only in situations of danger.

Chapter "One should not place":

We may allow them [heathens] to heal us when the healing relates to money, but not personal healing<sup>36</sup> (*Mishna*). What is healing involving money and what is personal healing? Shall we say that healing involving money means where no danger is involved and personal healing where there is danger? But has not R. Yehudah said in the name of Rav: even a scar over the puncture wound caused by blood-letting should not be healed by them? Healing involving money therefore relates to one's cattle, and personal healing to one's own body, as Rav Yehudah said. Rav Hisda said quoting Mar Ukba: even though the ruling is that we may not be treated by heathens, if [a heathen physician on being consulted] says that such and such medicine is good, and such and such medicine is bad, it is permitted [to follow his advice] for he will think that he is merely asking him, and just as he is asking him so he will also ask others, so that [by giving wrong advice] he would have his reputation spoilt. Raba bar Bar Hanna said in the name of

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<sup>34</sup> The early fruit of a tree that are forbidden for use

<sup>35</sup> rather than using them as external applications

<sup>36</sup> The concern here is lest the heathen physician use his skill to kill the Jew rather than to cure him.

R. Yohanan: In a case where it is doubtful whether [the patient] will live or die, we must not allow them to heal; but if he will certainly die, we may allow them to heal. Surely there is still the possibility of depriving him of a short time alive? A short time alive is not considered relevant, as it says (Kings II:7,4) "If we say: we will enter into the city, then the famine is in the city". They might have been forfeiting an extra short time alive. This implies that a short time alive is not considered relevant. (BT *Avoda Zara* 27a)

This means that when faced with a possibly short life versus a possibility of a regular lifespan, we do not consider the former [as sacrosanct].

Rabba bar Bar Hanna said in the name of R. Yohanan: Any lesion for which the *Shabbat* may be desecrated should not be healed by a heathen. Others report that Rabba bar Bar Hanna said in the name of R. Yohanan: no internal condition should be healed by them. How do these versions differ? — They differ in the case of a swelling of the hand or a swelling of the foot. For Rav Hanna son of Mattana said in the name of Rav: a swelling of the hand or a swelling of the foot is to be regarded as [serious as] an internal lesion, and the *Shabbat* may be desecrated for them. (BT *Avoda Zara* 27a-b)

It seems that R. Yohanan does not disagree with what Rav Yehudah said in the name of Rav, that even a scar over the puncture wound caused by blood-letting should not be treated by a heathen, for it is considered to be an internal injury, and so even though it is a small lesion, it is not to be treated by a heathen. Rabbi Yohanan holds that a heathen may not be asked to treat any lesion for which we would desecrate *Shabbat*, meaning that since life is dependent on it even though it is presently a very small lesion and both patient and doctor say that there is no danger from it and thus no need to desecrate *Shabbat*, nonetheless we do not let a heathen treat it.

The second version of this discussion specifies internal lesions, and here too even if the lesion is small, since it is in a sensitive position a heathen is not allowed to treat it. The reason for this is that the heathen may give a drug that causes damage, as happened to R. Abahu in an episode which we will presently write about, or that he might give a drug which aggravates the condition, and since it is in a sensitive position, the patient's life may be endangered. Thus, if a bad drug is introduced into the scar above a blood-letting puncture wound, death can follow quickly, because this is a totally dangerous situation since the sinews of the heart and the head lead to the same site. Since Rav Yehudah specified that the scar above the puncture wound is small and in a sensitive position, we infer that if it were not in a sensitive position and so would not lead to

danger, we could let a heathen treat it, agreeing with R. Yohanan's ruling. Coming back to the answer that "healing involving money" refers to non-dangerous conditions and "personal healing" refers to dangerous conditions, even R. Yohanan would reject this, for he agrees that treating blood-letting puncture wounds would not be called "personal healing" for they are not dangerous in themselves for their treatment to be called "personal". Therefore he would reject that solution and understand "healing involving money" to refer to treating animals and "personal healing" to refer to humans. Even though the *Mishna* only allows [a heathen] to treat animals, wherever a lesion [of a human] is not internal it would also be allowed. The *Mishna* permits [the heathen to treat] relating to money but forbids personal treatment and it is the talmudic rabbis' interpretation that any non-dangerous lesion is like healing involving money. Furthermore, even if we understand the *Mishna* as does Rabbi Yohanan, that healing involving money refers to non-dangerous conditions and personal healing to dangerous conditions, even though at first we understood R. Yohanan as rejecting this solution, now we can definitely accept both ways of understanding the phrase, as they follow the same reasoning. So we see in the words of Rav Hananel of blessed memory<sup>37</sup>:

The *Mishna* follows R Yehudah in concluding that healing involving money refers to animals and personal healing to humans, and at the same time rules according to R Yohanan.

It seems that our great rabbi of sacred memory [Alfasi], in his *Halakhot*, thinks the same way, though there is an opinion<sup>38</sup> that rejects Rav Yehudah's suggestion in the face of Rabbi Yohanan's.

The ruling that follows from this discussion is that any lesion that warrants desecrating *Shabbat*, i.e. any dangerous lesion, is not to be treated by a heathen, and those for which we would not desecrate *Shabbat* may be treated by heathens. Where the patient is an eminent Jew and the non-Jew an expert physician, the Jew may be treated by the non-Jew, for when R. Yohanan had *tzafidna* he went on a Friday to the *matronita* who gave him a course of treatment. We wonder how Rabbi Yohanan could have done this since he himself says that any lesion for which we desecrate *Shabbat* should not be treated by a heathen. We conclude that since R. Yohanan was an eminent man, the expert physician would not risk her good name with the authorities in causing him harm.

What is the ruling on heathens administering kohl<sup>39</sup>? The Rabbis say – if you want to go blind, go blind. Levi says – if you want to

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<sup>37</sup> 10<sup>th</sup> century Italy, commentary on Talmud Bavli ad loc.

<sup>38</sup> Rabbi Zerahia HaLevi of Gerona, 12<sup>th</sup> century – his commentary *Baal HaMaor* on Alfasi ad loc.

die, die. The Rabbis were not used to using kohl on their eyes, but Levi was. Rava said: we have seen them [the heathens] tasting the paint<sup>40</sup>. But, perhaps they taste it when it is unadulterated [in order to deceive us] and afterwards they add the poison and then it can blind. "*Opion*" is dangerous. R Simon forbids the use of "*thariaki*" [in the hands of a heathen], R Yohanan permits it. (JT *Avodah Zarah* 2:2)

"*Opion*" means opium, a drug prepared from poppies and dangerous if used in the hands of a heathen other than under expert supervision. But their "*thariaki*" is allowed because it is expensive and they make it with special care.

No man should have any dealings with magicians<sup>41</sup>, nor are we allowed to be healed by them even [if it may save] an hour's life. Ben Dama the son of R. Ishmael's sister was once bitten by a serpent and a man from Kefar Sekaniah came to heal him but R. Ishmael did not let him. [Ben Dama] said: my brother Ishmael, permit it for me. I will even cite a verse from the Torah that it is to be allowed. But he did not manage to finish his sentence before he died. Rabbi Akiva exclaimed: happy are you Ben Dama for you were pure in body and your soul likewise left you in purity. Nor have you transgressed the words of your colleagues, who said: (Ecclesiastes 10:8) "He who breaks through the fence, a serpent shall bite him". Even though we allow non-Jews to treat when only a short life expectancy is at stake, the case of magic is different, for it draws one in. (BT *Avodah Zarah* 27b)

Therefore it is forbidden to be treated by magicians even for a non-internal lesion which is not dangerous.

Jacob the magician prepared for R. Abahu a medicine for his leg, and were it not for R. Ami and R. Assi who licked his leg, he would have lost his leg. The gemara asks: R. Abahu was an eminent man and he was an expert physician, [so he should not have been in danger from the magician]? The gemara answers: the case of R. Abahu is exceptional because the magicians took the attitude of (Judges 16:30) "let me die with the Philistines". (BT *Avodah Zarah* 28a).

Let us challenge this. It may be true that R. Abahu was unaware of the magician's hatred for him, and so he relied on his being an eminent person with the expertise of a doctor, but should he not have been concerned that the magic might draw him in to it, and even where there is

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<sup>39</sup> a medicinal eye paint

<sup>40</sup> before use – so we should not be afraid of their harming us

<sup>41</sup> in our *gemara* texts: *minim*

no danger one may not use magicians? Was he not aware of the *baraita* where Rabbi Akiva said "happy are you Ben Dama for you were pure in body and your soul likewise left you in purity. Nor have you transgressed the words of your colleagues"? And why did Rabbi Ami and Rabbi Assi, who were present, not say anything? Even assuming neither of them had heard [Rabbi Akiva's] *baraita*, why did the *gemara* not ask how R. Abahu could have done such a thing – for already before the Ben Dama episode we have learned that we do not go to them for treatment even for a short life-expectancy? It seems that we only make a special rule against magic because it draws one into it when the healer uses magic with a pagan component, as in the Ben Dama case where he was bitten by a snake and the magician wanted to whisper an incantation which incorporated the names of pagan gods. The reason we say that magic is a special case for it draws one into it, is that were he to have recovered he may, Heaven forbid, have started to believe in it. In this way [magic] is similar to *ashera* wood and pagan rites which we may never use therapeutically. To begin with, the *gemara* thought that we never use [heathen rites] therapeutically because the heathens may try and endanger the patient, and so it makes a special case for magic which might draw one in, where the objection is due to their magic [leading the patient astray, and not due to any physical danger they might want to cause]. But if the [magicians] practice as a regular expert physician, and use medicines to heal, they are as acceptable as any other non-Jew.

We find a similar episode discussed in the *Yerushalmi*:

Once Rabbi Joshua the son of Ben Dama was bitten by a snake and a man from Kfar Sekaniah came to heal him with an incantation.

And further on:

[Rabbi Joshua ben Levi's] grandson swallowed something and someone came and whispered a single incantation over him, and it came out at once. He asked him: what did you say over me? He answered: such-and-such. He said: it were better for me, had I died and not heard that word (Ecclesiastes 10:5) "as an error committed by a ruler". (JT *Avodah Zarah* 2:2)

The explanation is this: he swallowed a water leech or a snake, and the person whispered an incantation over him using the names of pagan gods. When the creature [he had swallowed] came out, and he heard that pagan gods' names were included in the incantation, he said: rather had I died than come to this. From this we learn that the objection to the magician comes from the names he utters, and not because magic draws one in and leads the innocent astray. But if they use regular medical drugs, magicians are the same as any other non-Jew. This is the correct understanding of the R. Abahu incident.

Chapter "He who injures" has:

R. Yishmael taught: we derive the doctor's license to heal from (Exodus 21:19) "you shall surely heal".(BT *Bava Kama* 85b)

This means, lest the doctor say, what do I need this trouble for, perhaps I will err and find myself guilty of manslaughter; so the Torah gives him permission to heal. I find this difficult in light of what was taught in the *Tosefta*:

If an expert doctor licensed by the authorities causes damage <sup>42</sup> he is exiled<sup>43</sup>. (Tosefta *Bava Kama* 9:3)

from which we see that accidental medical error **is** punishable. One could argue that a doctor, like a judge, is required to deliberate, and if he erred but did not declare it, there is no punishment at all, as we see:

lest the judge say what do I need this trouble for, the Bible says "[God] is with you in judgment"<sup>44</sup> – the judge can only judge the case as it appears in his own eyes. Nonetheless, if he erred and the court found out, he has to pay reparation out of his own pocket, according to the set rules.(BT *Sanhedrin* 6b)

Even though the licensed judge is innocent, and the doctor who has inflicted damage or directly killed is also not legally liable for damages, nonetheless, if it becomes public knowledge he is not absolved in the eyes of God until he has made reparation for the damage, or gone into exile for the death of the patient.

On the issue of [someone who is] innocent in a human court but liable by heaven

If an expert and licensed doctor [inflicts damage] he is innocent at a human court and his punishment is left to Heaven.(Tosefta *Bava Kama* 6:6)

In any case, if he does not declare his error he not liable at all, just as the judge is completely absolved both in the human court and from heavenly punishment. The doctor, then, should take all precautions expected of him

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<sup>42</sup> i.e. kills the patient accidentally

<sup>43</sup> In our texts this appears as "if he caused damage he is not responsible` if he caused exceptional damage he is liable". The RAMBAN's version (he goes into voluntary exile) is given as law in *Shulhan Arukh YD* 336a.(see the *Hagahot haGRA* ad loc. #6, who points out that the author ruled this way following RAMBAN's version). See too the comment on the *Tosefta's* approach and on RAMBAN's words, in Rabbi Meir Simha's *Or Sameah – Hilkhoh Rotzeah* 5,6. [C]

<sup>44</sup> II Chronicles 19:6 concerning Jehosephat, meaning – by what is in your mind, the way your heart inclines; that is concerning the arguments they present you in court, judge by those things and you will not be punished – Rashi, BT *Sanhedrin* 6b [C]

when there is danger to life so as not to cause damage through negligence.

It is reasonable to give an alternative explanation for the license given to doctors to heal, other than relieving them of worrying over accidental errors, and that is, lest the doctors say: God causes illness and He heals – for it is not natural for people to seek medical cures<sup>45</sup>, though they have become accustomed to do so<sup>46</sup>, as [when the rabbis criticized King Asa - Chronicles II 16] "when ill he did not seek God's help but the doctors". However, this permission imposes a positive duty<sup>47</sup>, for there is a duty to heal, which is in the category of saving life, as was taught:

We feed him [on *Yom Kippur*] according to experts' [advice]. (BT *Yoma* 82a).

It was taught: a person seized with ravenous hunger is given honey and all kinds of sweet things, for honey and very sweet food enlighten the eyes of man. (BT *Yoma* 83b)

In all these cases the patient should be fed only under the guidance of an expert, because if the ravenous hunger was accompanied by a fever, eating honey could be fatal. Similarly, we learn that we give medicine for a sore throat on *Shabbat* (BT *Yoma* 84a), and that Rabina massaged his daughter with unripe olives of *orlah* because of her fever, and that we may use everything as medicine except *ashera* wood, in all cases following accepted medical practice which is only known to medical science. Similarly it is permitted to put *kohl* on an inflamed eye<sup>48</sup> on *Shabbat*; *kohl* is a sort of medical eye-ointment. Seeing that we desecrate

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<sup>45</sup> In BT *Berakhot* 60a this appears as " for it is not natural for people to heal, though they have become accustomed to do so " [C]

<sup>46</sup> They should not have been busy with medicine, but with praying for mercy (Rashi BT *Berakhot* 60a). "Though they have become accustomed to do so", meaning illegitimately (*Perisha, Tur YD* 336:2). In RAMBAN's Torah commentary (on *Bekhukotai: venatati mishkani*) he makes his position explicit – [the rabbis] did not say that the Torah gave license to the patient to be healed, but if someone fell ill and comes to be healed as is his custom...then the doctor should not refrain from treating him, neither for fear of his dying at his hand, as the doctor is expert in his art, nor arguing that God alone is our physician, as this has become customary [C].

<sup>47</sup> When Rabbi Yishmael spoke of the permission to heal given to the doctor, he simply meant that healing is not forbidden. RAMBAN thinks that given there is no ban on healing, it is clearly a *mitzvah* (*Perisha, Tur YD* 336:6, and ruled into law in *Shulhan Arukh loc. cit.*) [C]

<sup>48</sup> The eye protrudes, like a rebellious person who stands out (BT *Avodah Zarah* 28b, Rashi *ad loc.*) [C]

*Shabbat* for medicine, we understand that this is in the category of saving life. Saving life is a major *mitzvah*, he who is swift to use his medical knowledge is praiseworthy, he who is consulted is unworthy and he who consults is as bad as a murderer, all the more so he who gives up and does nothing. From this we conclude that a doctor who knows his science and craft is obliged to practice it, and if he refuses to do so he is as bad as a murderer.

I find the following section in the chapter starting "These are strangled" difficult:

May a son let blood for his father? — Rav Matana ruled: "Love thy neighbour as thyself"<sup>49</sup>. Rav Dimi son of Hanania said: (quoting Leviticus 24:21) "And he that kills an animal [has to restore it] and he that kills a man [is put to death]." Just as one who damages an animal while trying to heal it is not liable for damages, so if one wounds a man to heal him he is not liable. Mar the son of Rabina would not permit his son to lance a blister<sup>50</sup> for him, lest he wound him and thus unintentionally transgress a prohibition. If so, even a stranger should be forbidden?<sup>51</sup> In the case of a stranger, the unintentional transgression is in respect of a mere negative precept<sup>52</sup>: but his son's transgression would incur the punishment by strangulation. (BT *Yoma* 84b)

The law follows this argument. That makes me wonder - if so, an expert should not practice medicine at all, in case he makes a mistake and become liable to be executed by the sword<sup>53</sup>.

Where the text refers to a son letting his father's blood, or someone else letting another person's blood, in both cases there is danger involved inherently in the process of blood-letting. Not only the doctor should be worried about mishaps, the patient too should be concerned lest the drugs he consumes or the potions he is given to drink were prescribed wrongly

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<sup>49</sup> Leviticus 19:18 – Israel was warned not to inflict on others what it would not want done to itself (Rashi, BT *Sanhedrin* 84b) [C]

<sup>50</sup> The *gemara* has "a burn", meaning draining the fluid from a burn blister [C]

<sup>51</sup> The question here is: if the reason is fear of causing harm, that would apply to everybody and not specifically to a son treating his father, for every Jew is forbidden to harm his fellow man, based on the exegesis on the words (Deuteronomy 25:3) "you shall not continue, lest being flogged further, to excess, your brother be degraded before your eyes " (Rashi, BT *Sanhedrin* 84b). The response follows: In the case of a stranger... [C]

<sup>52</sup> If the action were intentional it would have counted as an infraction of a relatively minor law; when unintentional, even less than that [C]

<sup>53</sup> Intentional murder is punishable by death by the sword [C]

or the diagnosis was wrong, and he is effectively committing suicide, for medical errors are fatal. So the patient too enters uncertain territory<sup>54</sup>. A possible solution is that the doctor has nothing to worry about, since the Torah gave him permission to heal, and the All-merciful even placed on him an obligation to do so. If he uses his judgment to practice well, he is only fulfilling his duty as the All-merciful commanded, even if he may make mistakes unwittingly. In contrast, in the case of the son treating his father, there are others who could remove the thorn or lance his abscess, so we do not allow the son to do it so as not to put him into a situation of possible capital punishment. Similarly, the challenge<sup>55</sup> based on the *mishna* (BT *Shabbat* 122a) that removing a thorn with a needle on *Shabbat* might be considered as incidentally wounding the patient, an action punishable by stoning if done intentionally, is met by the argument that since that is neither a situation of danger nor of illness, he should have waited until after *Shabbat* and avoided a possible desecration of *Shabbat*.

In the same way, in the process of blood-letting, the wounding itself is the medicine, so a son may let his father's blood, the son and anyone else being equal in this respect. If blood-letting is medicine, both are allowed to do it, and for both it is a *mitzvah*. If they made a mistake resulting in death, both would be liable to punishment for something punishable by death if done intentionally. So the ruling of Rav Papa<sup>56</sup> and Mar son of Rabina [forbidding their sons to remove thorns or lance their abscesses] does not contradict the permission given by Rav Matana and Rav Dimi [for a son to let his father's blood].

But our great teacher of blessed memory [Alfasi] wrote:

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<sup>54</sup> RAMBAN maintains here a fine balance – doctors may be afraid to practice and patients may be afraid to go to doctors. Both are reassured by these rules of medical error.

<sup>55</sup> This challenge is found in BT *Sanhedrin loc cit.* and the argument runs as follows:

- a. the son's transgression would incur the punishment by **strangulation** (BT *Yoma* 84b)
- b. BUT removing a thorn with a needle on *Shabbat* might be considered as incidentally wounding the patient, an action punishable by **stoning** if done intentionally (BT *Shabbat* 122a)?
- c. RESOLUTION: it is neither a situation of danger nor of illness and therefore should not be performed on *Shabbat* i.e. the issue is infringement of *Shabbat*, not the type of punishment [C]

<sup>56</sup> In the *gemara loc. cit.* this is presented as pertaining to Rav: Rav did not allow his son to remove a thorn from him (though RIF has Rav Papa, see below) [C]

In answer to the question whether a son may let his father's blood, the Talmud responded that Rav Papa would not let his son remove a thorn from him, etc. (Alfasi on BT *Sanhedrin*, chapter 10)

One could say [in response to this] that even though generally wounding in the course of medical treatment is not culpable, and it is covered by the principle of 'love your neighbor as yourself'<sup>57</sup>, since somebody else could do the treatment we do not let a son do it, for he might accidentally cause a worse wound than is normal in the course of the medical procedure, and that is a situation which would be punishable by strangulation (were it done intentionally). But we do not worry that either the son or somebody else would actually kill the father, since the Torah imposed the duty of healing on them and all medicine involves a risk to life – what heals one patient kills another.

The talmudic dictum "the best of doctors [end up in hell]" (BT *Kiddushin* 82a) criticizes doctors who cause damage intentionally, but does not imply any prohibition of the practice of medicine, as in the accompanying dictum that the best of butchers [are partners of Amalek], for a good butcher is especially commendable, for though his calling is that of gangsters, he did not follow their example.

There the *Mishna* teaches:

If one is forbidden by his own vow to take any advantage from his neighbour, may visit him<sup>58</sup> [when he is sick]. He must stand, but not sit. He may offer him personal healing, but not healing related to money... (BT *Nedarim* 38b)

What does this mean? Shall we say that personal healing means without payment, and healing involving money is for a fee? If so, the text should have read: He may heal him without payment, but not for a fee? But by personal healing his own person is meant, whilst healing involving money refers to his cattle. (BT *Nedarim* 41b)

The *Yerushalmi*<sup>59</sup> also relates to this issue, saying that even if there is an attending physician, another physician may take over, for one is not destined to be healed by just anyone. So we see that the physician is doing a *mitzvah*, returning to the patient the health his body has lost. This is true only of a skilled and knowledgeable expert, and where there is no greater physician present, but someone who does not understand the

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<sup>57</sup> This was the argument used by Rav Matana above [C]

<sup>58</sup> The *gemara* and *mishnayot* have "if he visits". RAMBAN has "may visit" and so does Rabbeinu Nissim (RAN). The situation is one where it is not the patient's goods that are forbidden to the visitor, but quite the opposite, the visitor's goods are forbidden to the patient [C]

<sup>59</sup> JT *Nedarim* 4:2 quoted by RAN on BT *Nedarim* 41b [C]

nature of the profession should not practice it. Similarly, if there is a greater physician present, he is forbidden to practice at all. This is derived from other legal situations, for how could someone rule on a capital case where a greater judge was available, and if he did so it would certainly be considered bloodshed<sup>60</sup>. If a doctor was licensed by the authorities but caused damage, if he was an expert<sup>61</sup> he has to pay damages, and all the more so if he was not licensed, for the authorities only license experts.

As for doctors' fees<sup>62</sup>, it seems to me that he may charge for his time and work<sup>63</sup> but not for his knowledge<sup>64</sup>, for he is returning lost health and the Torah has instructed us to return lost property<sup>65</sup>, and when it comes to *mitzvot* we say:

just as I [God] act for free, so you [humans] should [do *mitzvot*] for free. (BT *Bekhorot* 29a)

Hence charging for knowledge and study is not allowed – it is comparable to charging for [the Temple rites of] sprinkling and

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<sup>60</sup> *Tur* has: If he does not practice at all, that is bloodshed and he certainly deserves to end up in hell. *Bet Yosef* (Rabbi Yosef Caro) notes this difference between *Torat haAdam* and the *Tur* and writes that the *Tur* is talking about a practitioner who refrains from practicing when there is no greater practitioner present, whereas RAMBAN refers to practicing in the presence of a greater practitioner. In law it comes to the same thing. [C] In Caro's *Shulhan Arukh* he quotes both – see below.

<sup>61</sup> See below *Shulhan Arukh* YD 336:1 "even if he is expert" [C]. Caro's distinction is whether or not the physician is licensed rather than whether he is expert or not. He takes RAMBAN to say that medical expertise is defined by the licensing authority.

<sup>62</sup> See on this: Y Tzvi Langerman, Fixing a Cost for Medical Care: Medical Ethics and Socio-Economic Reality in Christian Spain as Reflected in Jewish Sources. In: *Medicine and Medieval Ethics in Medieval and Early Modern Spain. An Intercultural Approach*, edited by Samuel S. Kottok and Luis Garcia-Ballester (Magnes: Jerusalem, 1996), 154-162.

<sup>63</sup> For how this is estimated, see RAMA in *Shulhan Arukh Hoshen Mishpat* 265 [C]

<sup>64</sup> For the doctor teaches the patient or the caregivers what they need to do to treat him (*Perisha*, YD 336:11) [C]

<sup>65</sup> The exegesis on Deuteronomy 22:2 "you shall give it back to him": including his bodily losses, is found in BT *Sanhedrin* 73a and quoted in *Tur* [C]

sanctifying<sup>66</sup>, whereas charging for work is allowed and is comparable to charging for fetching the ashes and the water<sup>67</sup>, which is allowed. So too, charging for time is allowed as the *Tanna* says:

If the priest was an old man you mount him on an ass and pay him on the scale ... of a workman idled from his particular occupation<sup>68</sup>  
(BT *Bekhorot* 29b)

If someone has drugs that a patient needs he may not overcharge for them, even if under pressure they offer him a higher price, because only he has the drug he may only charge the real value<sup>69</sup>. As it says in *Bavli Yevamot*:

A daughter of Rav Papa's father-in-law was required to marry her brother-in-law in a levirate marriage, but he was considered unworthy of her. When the case came before Abaye ... Rav Papa said to him... let her release you on condition that she gives you two hundred *zuz*. After the *halitzah* ceremony, Abaye said to her: give him [the stipulated sum]. Rav Papa replied: she was not serious [in her offer of paying him off]. Was it not in fact taught: If a man escaping from prison came across a ferry boat and said [to the ferryman]: take me across and I'll give you a *dinar*, [the ferryman] can only claim his ordinary fare. From this then it is evident that the one can say to the other: my offer was not serious. Here too [the woman may say]: I was merely fooling you.(BT *Yevamot* 106a)

The explanation of this passage is as follows: even though in general the court will not force a woman to pay the two hundred *zuz* for her divorce if her husband wants to make the divorce conditional on this payment, but if

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<sup>66</sup> It is forbidden to charge for these services - sprinkling the purifying water, and sanctifying i.e. mixing the ashes of the red heifer with fresh water in the designated vessel (Rashi, BT *Bekhorot* 29a) [C]

<sup>67</sup> When he has had to travel from afar to Jerusalem in order to fetch the ashes (*loc. cit.*) [C]

<sup>68</sup> Rashi comments here: if his work was to pierce pearls, which is easy and profitable, if someone asked him to take a day off, he may charge almost his full daily earnings because his days are easy anyway. But if his work was hard like a carpenter's if he is offered one *zuz* for a day's easy work in place of three *zuz* he could have earned normally, it is to his advantage to have an easy day and earn one *zuz*. Similarly here, [the old priest] is paid for his time, for he has to leave his usual occupation, but he does not get a full remuneration because his work here is not onerous. See *Tosafot loc cit.* [C] *Tosafot* does not accept Rashi's logic and suggests alternatives.

<sup>69</sup> This is the law in *Shulhan Arukh* YD 336:3

she did pay, the divorce holds and if she did not pay it does not. In the case of the levirate marriage there cannot be a financial condition, but Abaye required her to pay on the basis that it is as if the man was being hired to work for his employer on this condition. Rav Papa responded that the price was extortionate, taking advantage of her distress, and so she was not required to pay it, just as in the case of the ferryboat. Even though the price asked of the woman in this case was not too high, since the man can claim that by not marrying her he is losing a wife and her property, as we read at the end of the discussion:

if the [escaping prisoner] says [to the ferryman] take a *dinar* as your wage, he has to pay him [the full *dinar*]<sup>70</sup>

nonetheless since the man was not worthy of her, the Torah provides them with a reasonable solution, *halitzah* – in the words of the Scripture (Deuteronomy 25:8) "and they speak to him"<sup>71</sup> - so he is not really losing anything that he could reasonably have expected. Therefore he is considered to be claiming an excessive fee, and she is exempt from paying it. This is the explanation of this approach, and we derive from this<sup>72</sup> that wherever someone takes advantage of a customer's immediate distress and duress to increase the charge for services, the customer can subsequently default on the payment and say he was not serious about agreeing to the price. This applies to someone who overcharges for drugs taking advantage of the patient's distress - the patient only has to pay the market value. Employers and customers are equal in this respect. However, if he promised the doctor<sup>73</sup> a high fee he has to pay, because he is buying the doctor's knowledge, which has no fixed market value. There are those<sup>74</sup> who see the ferry-boat owner as legally bound to save the fugitive, on the principle of restoring lost property, and therefore not

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<sup>70</sup> RAMBAN's argument may be understood from the discussion in BT *Bava Kama* 116a: QUESTION: what is the difference between the beginning - If a man escaping from prison came across a ferry boat and said [to the ferryman]: take me across and I'll give you a *dinar*, [the ferryman] can only claim his ordinary fare – and the end - if the [escaping prisoner] says [to the ferryman] take a *dinar* as your wage, he has to pay him [the full *dinar*]? ANSWER: Rami bar bar Hama says that the later section refers to a ferryman who is a fisherman who can claim he is missing a catch because of his ferry passenger. Similarly the man in the levirate marriage situation can claim that he is losing a wife and her property.[C]

<sup>71</sup> See BT *Yevamot* 101b

<sup>72</sup> See *Shulhan Arukh Hoshen Mishpat* 264:6-7

<sup>73</sup> See *Shulhan Arukh YD* 336:3

<sup>74</sup> A source for this view remains to be identified [C]

deserving of payment at all, other than compensation for his working time. In their opinion the doctor may charge only for his working time – if his time was worth one *sela*, and the patient promised in advance to pay him [more], then he is only paid one *sela*. But this argument is unreasonable. Let us compare it to *halitzah*, where the financial condition of 200 *zuz* does not lead to a legal obligation on the woman, but using this clause punitively is also not forbidden, showing that there is no legal liability. However, it is simply logical not to countenance overcharging where the other party is under duress. So legally, the doctor can insist on any charge he fixes, his advice itself being priceless. Even though the doctor is obliged to heal, just as the ferry-boat owner is obliged to save the fugitive<sup>75</sup>, as far as any obligation that applies to everybody is concerned, if any particular person makes his action conditional on payment the court will not exact payment on his behalf or collect his debt<sup>76</sup>. This is unlike the situation of illegal interest where the court does intervene<sup>77</sup>, following the exegesis on the biblical phrase (Leviticus 25:36) "your brother shall dwell with you": give his money back to him so that he may continue to live with you. (BT *Bava Metziah* 61b)

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<sup>75</sup> Even though the ferryman is obliged to save the fugitive he is still owed the *dinar* fare he was offered for this [C]

<sup>76</sup> Clearly, if the doctor has already been paid the agreed fee, he is not forced to forfeit it i.e. he is not told to keep a fair fee and repay the excess. Even where he has not yet been paid and an exorbitant fee was agreed upon in advance, he is paid the whole sum agreed upon. This because he is selling his expertise and that is worth any amount of money, unlike drugs which have a market value and may not be sold for more. From *Bayit Hadash* on *Tur* [C]

<sup>77</sup> Even though the law against lending with interest applies universally, if someone chose to ignore the law and lent on interest, the court will extract the money from him even after he collected the interest, that is a special case. This because the Torah added an extra verse "your brother shall dwell with you", understood to imply that you must give his money back to him so that he may continue to live with you. This what it says in BT *Bava Metziah* 61b: Rav Nahman bar Yitzhak said the reason for Rav Elazar's opinion [that the court recoups unfair interest] is that the Torah says "your brother shall dwell with you", meaning that if you give his money back to him he will be at rest. In other cases where there is no special verse, the court will not exact repayment. (*Bayit Hadash*) [C]