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TRIAGE AND VENTILATORS: THE POSITION(S?) OF RABBI SHLOMO ZALMAN AUERBACH ZT"l

Rabbi Aryeh Klapper, Dean

In the second edition of Responsa Minchat Shlomo (vol. 2-3), #86 Section 1 is titled "Rules of Priority with regard to Treatment and Ventilators". The section is only three paragraphs long, and yet succeeds in contradicting itself twice, once in a way that has important practical halakhic implications.

The responsum opens by citing Pri Megadim (Mishbetzot Zahav 328:1):

"If there is one whom the doctors et al say is definitely in danger (of dying), and another who may be in danger, and there is only enough medication for one of them – the definite pushes aside the doubtful."

Pri Megadim cites no evidence for this position, and it seems plainly to contradict the statement in Mishnah Ohalot 7:6 that "we do not push aside one *nefesh* because of another *nefesh*".

Nonetheless, Rabbi Auerbach treats it as dispositive precedent. More than that – he uses it as the basis for a more expansive claim:

ולכן צריכים בעיקר להתחשב עם גודל הסכנה
ועם הסיכויים להצלה

Therefore, one must essentially consider the extent of the danger

and the odds of saving

Pri Megadim made no reference to the "odds of saving", only to "the extent of the danger".

If one treats Pri Megadim's statement as the product of formal legal reasoning, there seems no basis for Rabbi Auerbach's extension. Rabbi Auerbach also does not discuss what happens if his two criteria point in opposite directions, such as if the more endangered patient is less likely to respond to treatment.

It therefore seems that Rabbi Auerbach understood Pre Megadim as making a general claim, based on reason, that the obligation to save lives, or more precisely the prohibition against failing to save lives, should be fulfilled in the manner that will statistically save the most lives.

Rabbi Auerbach acknowledges that allowing any such choices risks a slippery slope. He immediately denies that the relative age of the patients plays any role, without explaining why. He references the last Mishnah in Horayot, which can be understood as giving priority to men over women, kohanim over Levites, etc., but states – again without explaining why- that "I think it is difficult to act in accordance with this".

He then expresses strong doubt as to whether the standard derived from Pri Megadim justifies removing a ventilator. This doubt is formulated via a loose analogy – it may be "as if the first patient has acquired the machine". Even Pri Megadim would concede that a dangerously ill patient has no personal **obligation** to give way to someone sicker or more likely to be saved. If a patient is entitled to resist the machine's removal, then the doctor has no right to remove it without consent.

Another loose analogy suggests that doctors involved in treating a patient cannot decide to abandon them for another on the basis of efficiency, because "one engaged in a mitzvah is exempt from another", and in some cases is even forbidden from switching to the second mitzvah.

Rabbi Auerbach ends the first paragraph by commenting that he is not seeking to nail the Halakhah down, because the questions are grave, and he has no clear evidence from precedent.

The second paragraph opens by endorsing a hospital protocol that refuses ventilators to patients who are described as *treifot*, on the grounds that experience shows that non-*treifot* patients will soon arrive. Rabbi Auerbach says that this makes sense because it would be forbidden to remove the ventilator from the *treifah* patient, since that removal would be active killing, and it is taken as given that a subsequent healthier patient would not be allowed to kill the *treifah* and seize the ventilator.

Rabbi Auerbach closes by apparently endorsing the order of priority in Horayot should two patients arrive in

medically identical condition, but acknowledges that other decisors disagree.

The two contradictions I see are:

The first paragraph forbids removing ventilators based only on the loose analogy to ownership. The second describes removing ventilators as active killing.

The first paragraph states that the objection to using the order in Horayot is practicality, while the third paragraph mentions only that its use would be controversial.

In addition, the Hebrew term for ventilator in the first paragraph is *machshir banshamah*, while the second paragraph uses *mekhonat bachaya'ah*.

All this suggests that this responsum is cobbled together from multiple sources. Such an approach is methodologically risky when speculative. In fact, I initially developed an imaginative but completely wrong reconstruction. But happily there ends up being no need for speculation.

The first edition of Minchat Shlomo prints our responsum as #82 Section 2, **and provides separate headings for the paragraphs**. Paragraph 1 is addressed to Dr. Shimon Glick, while Paragraphs 2-3 are addressed to Rabbi Moshe Shternbuch.

Even the first edition does not provide the text of the initial questions. However, Rabbi Shternbuch prints his question in his own responsa collection, Teshuvot veHanahagot 1:858. At the suggestion of SBM alum Rabbi Elli Fischer, I wrote to Dr. Glick, who graciously searched his files and emailed me a pdf of his question and Rabbi Auerbach's answer. (A photo of the answer, but not the question, was published in the periodical Assia.) With the questions in hand, we may be able to explain why Rabbi Auerbach's response to Rabbi Shternbuch says that removing a ventilator is forbidden as killing, while his response to Dr. Glick mentions only the concern that the patient has acquired a right to treatment.

But first we need to make the contradiction worse. As Rabbi Dr. Avraham Steinberg notes in a forthcoming article, the second edition of Minchat Shlomo **simply left the penultimate line out of the first paragraph**. Here it is:

ובנוגע למכשיר הנשמה
חושבני שתלוי בשיקול הדעת של הרופא,
ואם על פי רוב זה כבר ללא תועלת –
מוטב להעביר את זה לשני

Regarding the ventilator –

I think that it depends on the doctor's judgment
and if the odds are that it is already not purposeful –
it is better to move it to the second patient.

Now we have three positions regarding removal of ventilators. (Or even four: the manuscript shows that Rabbi Auerbach originally wrote that it was *barur kashmesh*, clear as day, that it depends on the doctor's judgement, but crossed that out and wrote instead "I think".) Can they be brought together into a coherent whole?

A key starting point is that Dr. Glick and Rabbi Shternbuch asked different questions. Dr. Glick discussed triage choices without using technical halakhic descriptors such as *treifah*, and made no statements about existing policy. Rabbi Shternbuch reports a question from a doctor that specifically discusses choosing non-*tereifot* over *tereifot*, and in the context of an established policy refusing treatment to *tereifot*.

Rabbi Auerbach's response to Rabbi Shternbuch is that removal of ventilators **in the context of patients who will clearly die without the ventilator** is likely murder, and therefore forbidden. Dr. Glick's question however extends even to choices between patients both whom may live regardless, although their odds of survival are increased by ventilation. In such cases, the issue of murder may not apply, but the question of a right to treatment may.

The key practical question is what standard Rabbi Auerbach intended by saying "if the odds are that it is already not purposeful". The understanding that seems to me most likely is that he meant "if the odds are that ventilation is not prolonging the patient's life". This position is not obvious, and therefore must be stated, it might be forbidden to remove a ventilator so long as there is **any chance** that it is prolonging life. It seems to me that this is the only case involving dying patients that would not run afoul of the position in the letter to Rabbi Shternbuch that removing a ventilator is considered active killing.

I need to make clear that I am not endorsing either Rabbi Auerbach's conclusions or his reasoning. My own strong preference, and ongoing effort, is to develop a halakhic ethics of triage that fiercely resists any efforts to attenuate the force of the statement that we do not push aside one *nefesh* for the sake of another. I am very grateful to those who have challenged and honed my thinking in the series of ZOOM shiurim on this topic, and invite you to join us this coming week.