

For All Intents: Does Mind Matter?

The significance of a perpetrator's purpose

Adapted from the writings of Dayan Yitzhak Grossman

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Several months ago, we discussed Sarah Palin's defeat in her libel lawsuit against The New York Times, which hinged on whether former Times editorial page editor James Bennet acted with "actual malice" against a public figure or with reckless disregard for the truth.[1]

In a recent post-trial development,

The judge who presided over [the case] denied [Palin's] request Tuesday for a new trial, saying she failed to introduce "even a speck" of evidence necessary to prove actual malice by the newspaper... [U.S. District Judge Jed] Rakoff wrote that regardless of her post-trial motions, Palin was required at a trial earlier this year to show that an error in a published editorial was motivated by actual malice—a requirement in libel lawsuits involving public figures.

"And the striking thing about the trial here was that Palin, for all her earlier assertions, could not in the end introduce even a speck of such evidence," he said.[2]

In that article, we discussed the halachic perspective on various types of claims for defamation. In this article, we focus on a halachic requirement for a claim for humiliation (*boshess*) somewhat analogous to the legal requirement, in the case of defamation of a public figure, of "actual malice"—i.e., malicious intent.

The basic requirement of intentionality for a claim of humiliation is set forth in the Mishnah:

A sleeping person who humiliates someone is exempt.

If one fell from the roof onto another person and thereby caused him damage and humiliated him, then the one who fell is liable for the damage, because a person is always considered forewarned, but is exempt from liability for the humiliation, as it says: "and she extended her hand and took hold of his private parts" (Devarim 25:11); one is not liable for humiliation unless he intends to humiliate.[3]

The Gemara expands this criterion from *intent to humiliate* to the broader *intent to damage*:

But if he tumbled while falling so he could fall on that person, in order to protect himself from impact with the ground, he is liable to pay compensation for humiliation as well, because although he did not intend to cause shame, he did intend to land on the person.

The halacha that one is exempt from paying for humiliation unless he intended to strike his victim is as it is taught in a *breisa*:

From the fact that it says "and she extended her hand" (Devarim 25:11), do I not know that she took hold of something? So what is the meaning when further on in the *pasuk* it says "and took hold of his private parts"? It is to teach you that one who intends to cause

damage, even if he does not intend to humiliate, is liable to pay for the humiliation.[4]

The meaning of “intent to damage,” however, is the subject of debate. The above translation, which assumes that a falling person’s intent to land on his victim in order to protect himself constitutes intent to damage, follows Rashi[5] and the Tur,[6] who apparently understand that intent for an outcome which will inevitably entail injury to the victim constitutes intent to damage despite the lack of actual malicious intent. The Maharshal, however, disagrees and argues that the Gemara’s language, intent to damage, should be taken at face value, with this criterion being met only where the perpetrator actually desires to cause damage, not where he is motivated by self-interest.[7]

Although the Maharshal himself concedes that he has not seen “any of the geonim” explain the passage differently from Rashi and the Tur, the Gaon of Vilna argues that other major authorities also implicitly endorse the Maharshal’s interpretation of the passage, as we shall explain.

R’ Menachem (Maharam) Mirzburk rules:

One who complains about his fellow that he has informed against him or stolen from him, since he spoke in the form of complaint, there is no punishment in this matter (i.e., for the humiliation he caused his fellow, even though he cannot prove his case).[8]

Based on this precedent, R’ Yaakov (Mahari) Weil rules that “a wife who sued her husband and humiliated him, etc.” is not liable for the humiliation she has caused her husband, although he adds that the woman must declare (under penalty of anathema) that her intent was not to humiliate him.[9] (This ruling of the Mahari Weil is codified by the Rama.[10])

Similarly, the Trumas Hadeshen rules that the target of a complaint cannot sue the complainant for humiliation, because

One is not liable for humiliation unless he intends to humiliate, and this [person] intended [to further] his own interests and to publicize his claims, and what could he have done [differently]?[11]

The Bach[12] and the Shvus Yaakov[13] accept this doctrine as well, but they qualify it with the “great principle” that the court should exercise its judgment as to the good faith of the complainant, and if it considers it certain that the complainant actually knew his allegations to have been false, then it should indeed impose sanctions upon him.

The Gaon of Vilna explains that this doctrine exempting a complainant from liability for humiliation (so long as he didn’t act in bad faith) is based on the Maharshal’s understanding of the above Gemara as opposed to that of Rashi.[14] (According to Rashi, since humiliation was the inevitable outcome of the complaint, this would constitute intent to damage, despite the actual motive being self-interest. It is only according to the Maharshal that the criterion of intent to damage has not been met because humiliation was not the purpose of the complaint).

Other *Acharonim*, however, disagree with the Vilna Gaon and maintain that the rule exempting a complainant from liability for humiliation is indeed consistent with the position of Rashi (which they consider normative) that in

general, a motive of self-interest does constitute intent to damage. The Avodas HaGershuni rules that a woman who breaks an engagement is liable for the humiliation she causes her fiancé, despite the fact that she does not intend to humiliate him but is simply unable to marry someone whom she finds unacceptable. He writes this based (in part) on Rashi's understanding of the criterion of intent to damage. He acknowledges the apparent contradiction between this position and the ruling of the Maharam Mirzburk, but he dismisses it with the assurance that it is easy to distinguish between them.[15] R' Meir Arik cites the Avodas HaGershuni and rules similarly, and he explains the distinction between breaking an engagement and bringing a complaint to be that in the latter case, he desires to save that which is his, and he does not benefit from the humiliation of his fellow.[16] (I do not understand this distinction, why the breaker of an engagement is considered to benefit from the humiliation of his fellow but one who brings a complaint is not so considered.)

[1] Libel! Liable? The Consequences of Defamation. Feb. 24, 2022.

[2] Larry Neumeister. Judge: No 'speck' of proof in Palin's libel case against NYT. AP News.
<https://apnews.com/article/sarah-palin-government-and-politics-50c4dbda3c9435e08053d7e01965128e>.

[3] Bava Kama 8:1.

[4] Bava Kama 27a.

[5] Ibid. s.v. *Ve'im nis'hapeich*.

[6] C.M. *siman* 421.

[7] Yam Shel Shlomo ibid. *siman* 39.

[8] Nimukei R' Menachem Mirzburk, beginning of *Dinei Boshess*.

[9] Shu"t Mahari Weil *siman* 168.

[10] Hagahas HaRama to Shulchan Aruch ibid. *se'if* 1.

[11] Psakim Uchsavim *siman* 265.

[12] Shu"t HaBach Hayeshanos *siman* 9.

[13] Shu"t Shvus Yaakov *cheilek* 2 *siman* 136. Cf. Shu"t Sho'el Umeishiv *mahadura tinyana cheilek* 2 end of *siman* 30 s.v. *Vehinei beShu"t Shvus Yaakov*.

[14] Biur HaGra ibid. *s.k.* 2.

[15] Shu"t Avodas HaGershuni *siman* 74 s.v. *Amnam nir'eh*.

[16] Shu"t Imrei Yosher *cheilek* 1 *siman* 133. Cf. Shu"t Minchas Shlomo *tinyana* (5760) *siman* 133 p. 472.