Part II—Under Fire: Must Someone Be Saved from a Danger of His Own Making?

Adapted from the writings of Dayan Yitzhak Grossman
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Our previous article discussed a recent incident in which 38 migrants at a detention center in northern Mexico died in a fire set by the migrants themselves in protest of their impending deportation, after some guards walked away and made no apparent attempt to release the men. In that article, we discussed the obligation to rescue someone in danger, and the question of criminal liability for failing to do so; in this one, we discuss the question of civil liability. (As usual, we discuss these issues from the perspective of halacha as applicable to Jews.)

The Gemara cites a *breisa* that one who knows testimony in support of another but does not testify on his behalf is exempt from liability under human law (*midinei adam*) but liable under the law of Heaven (*bedinei shamayim*).[1] The Ramban and Nimukei Yosef explain that this is because the obligation to testify is merely a form of kindness (*gemilus chasadim*) mandated by the Torah,

> and if he does not wish to fulfill this mitzvah, there is no legal basis to hold him liable for compensation.
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> To what is this similar? To one who sees his friend's wallet being lost and does not save it, or to one who does not wish to give a *prutah* of his own to a pauper, whom the court does not hold liable for this. Here, too (with regard to one who is derelict in his duty to testify in support of another), the court does not obligate him to pay compensation out of his own resources, for the Torah does not obligate him in this; it is only like other mitzvos and is not a civil matter.[2]

According to the Sifra (cited by several *Rishonim*), one of the bases for the duty to testify in support of another is the general prohibition against standing idly by while harm befalls another (*lo sa'amod al dam reiecha*).[3] R' Yosef Shaul Natanson apparently understands that insofar as the obligation to save another from harm is included in the prohibition of *lo sa'amod*, this obligation could not possibly be described as merely a matter of *gemilus chasadim*, and he accordingly assumes that the Ramban and Nimukei Yosef reject the position of the Sifra and maintain that *lo sa'amod* is limited to cases of bodily harm and does not extend to cases of financial harm.[4] According to this approach, it is possible that the violation of *lo sa'amod* in a case of bodily harm would indeed engender civil liability.

The Ketzos Hachoshen, however, understands the Ramban to be saying that civil liability can only be engendered by action or verbal utterance, but not by a mere passive dereliction of duty.[5] The Me'iri as well explicitly states that the absence of liability for the failure to testify in support of another is due to the absence of harmful action.[6] According to this approach, it follows that there is never civil liability for a passive failure to save another from harm, even bodily harm.

According to all opinions, though, a dereliction of the duty to save someone from harm will at least engender liability *bedinei shamayim,* i.e., a moral obligation to compensate the victim (or in cases such as ours, where the dereliction resulted in the victim's death, his heirs) for the harm caused by the dereliction.

The above discussion concerns someone who has no relationship with the person he neglects to save from harm. But in our case, the guards are the custodians of the detainees. Some *Rishonim* rule that the laws of custodial responsibility (*chiyuvei shmirah*) apply to custodians of human beings as well as those of property, as per the Gemara's principle that "what difference is there whether someone injured one's body or one's property?"[7][8] A number of *Acharonim,* however, note the rule that at least in certain contexts, human beings are compared to real property (*karka*), a category of assets for which there is generally no custodial liability.[9] They reconcile the position of the *Rishonim* that custodial liability extends to human beings with this rule in various ways that are beyond the scope of this article, but which result in the applicability of custodial liability to our case being a matter of dispute[10] or otherwise uncertain.[11]

A further argument against the existence of custodial liability in our case stems from the fact that the fire was started by the detainees themselves. There are a number of cases in halacha where someone who would otherwise be liable as a tortfeasor or custodian is exempt because the harm suffered by his victim is in some sense the victim's own fault.[12] While none of these cases is an exact parallel to ours, it may nevertheless be argued that in our case as well, the guards cannot be held liable for negligence because the fire was started by the detainees themselves. This argument is somewhat speculative, however, and in any event, it would obviously only apply to those detainees who actually started the fire.

[1]Bava Kama 55b.

[2]Dina Degarmi LaRamban (Yerushalayim 5689) pp. 61a-b; Nimukei Yosef ibid. 24a in Rif pagination. Cf. Bach C.M. beginning of *siman* 28.

[3]Toras Kohanim Kedoshim *perek* 4; She'iltos DeRav Achai Gaon *siman* 69; Sefer Hamitzvos LehaRambam *lo sa'aseh* 297.

[4]Yad Shaul *siman* 221 *os* 11. Rav Natanson's suggestion that the Rambam (based on various passages in the Mishneh Torah) is also of this view seems to overlook the Rambam's explicit citation of the Sifra in Sefer Hamitzvos ibid. Perhaps Rav Natanson would assume that the Rambam changed his mind in the Mishneh Torah.

[5]Ketzos Hachoshen *siman* 66 *s.k.* 21.

[6]*Bais Habechirah ibid. (Yerushalayim 5710) 56a p. 167 s.v. Hayodeia.* Cf. Shu"t Maharsham *cheilek* 3 *siman* 96 s.v. *Umah shehe'erich ru"m*.

[7]Sanhedrin 2b.

[8]Mordechai Bava Metzia *simanim* 359, 461, and 367, but cf. Shu"t HaRosh *klal* 79 *siman* 4 end of s.v. Teshuvah. See Darchei Moshe C.M. *siman* 177; Rama C.M. 176:48; Shulchan Aruch ibid. 188:6; Sma *siman* 188 *s.k.* 11; Taz 176:48; Urim Gedolim (Mechon Mishnas R' Aharon 5763) *siman* 40 *limud* 214 p. 382; Shu"t Kehunas Olam *siman* 17 p. 24a; Shu"t R' Eliezer

(Gordon) *siman* 2 *anaf* 2 *os* 1.
[9]Sefer Yehoshua *psakim uchsavim siman* 472, and see the sources cited in the following two notes.
[10]Shu”t Be’er Moshe (Danishevsky) C.M. *siman* 11 end of s.v. *V’al pi msh”k*.
[11]See Nesivos Hamishpat *siman* 176 *biurim s.k.* 60; Shu”t Sho’el Umeishiv *mahadura tinyana cheilek* 2 *siman* 30.
[12]See the framework of *reshus* and *shelo birshus* in Bava Kama 31b-32b (and see our discussion of this framework in Rules of the Road: Laws and Liability. Bais HaVaad Halacha Journal. Nov. 11, 2021); the principle of *hava lah shelo sochal* in ibid. 47b (and see our discussion of this principle in Pay Per Click: Are Virus Senders Liable? Bais HaVaad Halacha Journal. Jun. 3, 2021); and the explanation of the Ramban (*Chidushim* to Bava Metzia 96b s.v. *Ha de’amrinan,* cited in Bais Yosef C.M. *siman* 340 and Shach ibid. *s.k.* 5) that the rationale for the dispensation of *meisah machmas melachah* is the presumption of *pshias mash’il*.