Viral Vectors: Characterizing Cybercrime
Adapted from the writings of Dayan Yitzhak Grossman
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Our previous article considered R' Yaakov David Schmahl's analysis of whether one who sends a virus-laden email that causes damage to the recipient's computer is liable as a *mazik* (tortfeasor), or exempt because the recipient himself performed the action of opening and downloading the email, and there is a rule that when a victim "deliberately brings upon himself the thing that damages him," the *mazik* cannot be held liable.[1]

Bor and *keilim*

Rav Schmahl subsequently notes that even if we do consider the sender a *mazik*, it is unclear whether the virus would be considered a *bor* (pit), for which there is no liability for damage to inanimate objects (*keilim*), or an *aish* (fire), which has no such limitation. Since this is unclear, we cannot hold the sender liable *bedinei adam* for damage to the recipient's computer, only *bedinei shamayim*.[2]

There is the somewhat analogous case, however, of a shopkeeper who inadvertently gave salt to a customer who requested sugar, and the customer used it in cooking and ruined his food. R' Shlomo Zalman Auerbach, although ultimately recommending that the parties reach a mutually acceptable compromise, inclined toward the view that the shopkeeper could be held liable for the damage to the customer's food, apparently assuming that the salt had the status of *aish* and not *bor*.[3]

A similar case to that of R' Shlomo Zalman had been previously discussed by the Maharsham, who does not consider the possibility of *bor* at all. In response to his correspondent's suggestion that the misrepresented ingredient is analogous to a fire entrusted to a person lacking intelligence (*cheireish shoteh vekatan*), where the owner of the fire is liable for any damage it causes (as *aish*), Maharsham counters that in that case, the person entrusted with the fire has no intelligence at all, whereas in his case, the buyer could have inspected the ingredient for himself, and so the shopkeeper cannot be liable for *mamon hamazik*.[4] (Perhaps this argument of Maharsham could apply to our case as well, and the fact that the recipient could have inspected the email himself before opening it would eliminate the sender's liability for *mamon hamazik*.)

Dina degarmi

Rav Schmahl subsequently considers whether even if the sender of a virus is not liable *bedinei adam* under the rules of *mamon hamazik*, he might still be liable for having indirectly caused damage. Although indirect causation of damage does not generally engender liability (*grama benizakin patur*), the subcategory of *dina degarmi* is an exception. The Gemara never defines this subcategory, and the *Rishonim* struggle mightily to formulate consistent criteria that successfully explain why the Gemara categorizes

certain cases as mere *grama benizakin* and others as *dina degarmi*.[5] Most of the suggestions of the *Rishonim* are conceptual distinctions between various types of indirect harm; for some reason, Rav Schmahl makes no attempt to work out whether our case would be considered *dina degarmi* according to these criteria, but only engages with the position of Ritzba that explains the distinction to be a pragmatic one, that the liability for *dina degarmi* is simply a Rabbinic penalty aimed at deterring actions that were deemed particularly "common" and "frequent."[6] Rav Schmahl assumes that sending viruses in contemporary times falls into this category, but he cites a disagreement among the *Acharonim* as to whether Ritzba really means that *Chazal* instituted liability for any action that is common in the time period in which it occurs, or merely for those particular actions mentioned in the Talmud that *Chazal* considered common in their time,[7] and so once again, Rav Schmahl concludes that according to Ritzba, we cannot hold the sender liable *bedinei adam*.

Other *poskim* also consider the applicability of *dina degarmi* to similar cases. The Maharsham discusses whether *dina degarmi* applies even to inadvertent damage (*shogeig*), but he argues that in his case, the seller has a duty of care that results in his conduct being characterized as "virtually deliberate" (*karov lemeizid*). (As we noted in the previous article, it is unclear whether the email sender in Rav Schmahl's case was acting deliberately and maliciously or not.) Similarly, R' Tzvi Shpitz argues that in R' Shlomo Zalman's case the shopkeeper would be liable for *dina degarmi*, since he is considered negligent (*posheia*) rather than *shogeig*. (He assumes that this is true even according to Ritzba, although he does not acknowledge the dispute among the *Acharonim* about the scope of Ritzba's position discussed by Rav Schmahl.)[8]

[1]Shu"t Kisos Levais Dovid *cheilek* 2 *siman* 134 pp. 352-55.

[2]Cf. Shimru Mishpat (Zafrani) *cheilek* 1 pp. 396-97.

[3]Cited in Mishpetei HaTorah Bava Kama pp. 37-38, and see the author's analysis of R' Shlomo Zalman's position on p. 39.

[4]Shu"t Maharsham *cheilek* 5 *siman* 11 s.v. V'amnam.

[5]See Tosafos Bava Basra 22b s.v. *Zos omeres*; Piskei HaRosh ibid. *perek* 2 *siman* 17 and Bava Kama *perek* 9 *siman* 13; Mordechai Bava Kama *simanim* 114-16; Ramban Kuntres Dina Degarmi.

[6]Ritzba in Tosafos ibid.; Shach C.M. beginning of *siman* 386.

[7]See Shach ibid. *s.k.* 24.

[8]Mishpetei HaTorah ibid. pp. 40-41. Cf. R' Yaakov Hildesheim, *Machar Cheifetz Pagum beToras Chadash Vehizik*, Bais Hillel #37 (Shevat [5]769) pp. 40-44.