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Yorucha
weekly overview

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Partnerships & Corporations: Part IV

Rav Yitzchak Grossman

WHEN A PARTNER ENGAGES IN MISCONDUCT:

When a partner deviates from a partnership agreement, he may be liable to pay for any losses he causes. The Poskim discuss four doctrines under which he may be held liable.

1. *Shnui* – Deviation from the partnership.
2. *Peshiah* – Acting negligently by engaging in improper activity that led to a loss.
3. *Hezek* – Causing damage to the business's assets.
4. *Loveh* – Becoming a "borrower" of the assets, and thereby becoming responsible for anything that happens to them.

We will discuss all of these doctrines and when they do and don't apply below:

DEVIATION:

The Gemara in Bava Kama discusses a case where a *shliach* is sent to buy one item and instead buys another - for example, he is sent to buy wheat and buys barley. The halacha in such a case is that if there are profits, the profits are split according to the original arrangement, but if there are losses, the *shliach* has to take the loss because he deviated from the agreement.

In regards to partnerships, the same rules apply. If one partner deviates from the partnership and a profit was realized, the partners split it according to their original agreement. If they lost money, the partner who deviated bears the loss on his own.

There is a major dispute whether the rule that a partner who deviates and causes a loss must bear the entire cost also applies in a case where the loss is not a result of the partner's deviation, but rather is caused by an outside factor – for example, if the assets are stolen - which would have happened even if he had stuck to the terms of the agreements. The Mabit, Shach and others rule that if the loss was not a result of his deviation, he does not bear the responsibility. The Bais Yosef, Ketzos Hachoshen and others disagree and rule that if one partner deviates, he is responsible for any losses, even if they would have occurred anyway and are not the result of his improper actions.

The Techebiner Rov offers a compromise and says that it depends what his deviation was. If he purchased something he should not have bought – for example, he bought barley instead of oats - he is now fully responsible for that merchandise, and if there are any losses, even if they are not a result of his deviation, such as in the case of theft, he bears sole responsibility. But if he bought the right product but deviated with their handling – for example, by shipping them the wrong way – in such a case, losses that are not a result of his improper actions would not be solely his responsibility and they would be divided according to the regular rules of the partnership.

NEGLIGENCE:

The Shulchan Aruch states that *shutfim* are generally considered *shomrei sachar*, bailees who are paid to watch an item, which means they are liable not only for negligence but even for theft or loss. There is, however, a major exception to a *shomer's* liability, the case of "*be'alav imo*". This rule states that if the owner of an item was working for the *shomer* when he accepted to watch the item, the *shomer* has no liability for the property in his custody.

The Poskim rule that if the partners began the partnership together, then each one is "*be'alav imo*" with the other one; therefore, neither of them will bear liability as a *shomer* for any loss of the assets in his custody, even in the case of negligence. If one partner started working before the other, he would not have this exemption, although his partner would, because the first partner was already working with him when he joined the partnership. (This is the general rule, although there is considerable discussion in the *poskim* as to whether a partner is indeed considered a *shomer* in all cases, as well as of circumstances in which he may be considered merely a *shomer chinam* [unpaid bailee]).

If one partner actively causes a loss to the partnership by handling it in an unsafe manner or providing merchandise to customers on credit when there is no guarantee the money will ever be recovered or in any other way, there is a dispute amongst the Poskim if the exemption of *be'alav imo* would apply. The Radvaz, Toras Emes, Chasam Sofer and others say that *be'alav imo* is only an exemption from the obligations of a *shomer*; however, they do not exempt someone from paying for damages he causes. If one damages something, he becomes a *mazik*, and is liable to pay the cost of whatever damage he caused. Thus, they rule that when a partner acts improperly, he is considered to be a *mazik* of the assets whose loss he caused, and would not be exempted from paying because of *be'alav imo*.

There is a view that even a *mazik* has an exemption of *be'alav imo*. This view is based on a *machlokes* between the Rambam and Raavad in a case where a wife breaks household items while doing housework. The Rambam says that she is not liable to pay her husband for the damage because of a *takanah*, Rabbinic decree, that states that we cannot force a housewife to pay for any item she breaks around the house, as this would lead to endless quarrels between the couple. The Raavad also says she is not liable to pay, but for a different reason. He says that a lady's husband can be considered to be "working for her" as he is responsible to care for her needs; therefore, there is a situation of *be'alav imo*, which would exempt her from paying for something she breaks. The Magid Mishneh says that, in theory, the Rambam would agree that an exemption of *be'alav imo* could apply when an individual breaks a household item, but he says that the Rambam's opinion is that because a husband is not constantly at his wife's beck and call, he cannot be considered "with her".

The Mishneh Le'Melech asks why the exemption of *be'alav imo* should apply - after all, she broke the item and is a *mazik*? He answers that we can distinguish between a case where someone damages something intentionally and a case where someone damages something accidentally. He says that if someone causes damage inadvertently, the exemption of *be'alav imo* would apply, but it would not apply if someone damaged something on purpose.

Accordingly, it would seem that according to this view, if a partner causes damage unintentionally, even though he acted improperly by deviating from the partnership agreement, he still would have the exemption of *be'alav imo* to exempt him from being deemed liable as a *mazik*.

The Mishneh Le'Melech explains, however, that even according to the Raavad, a partner who deliberately deviates from what is expected of him is considered a *mazik* and does not have the exemption of *be'alav imo*, despite the fact that he acted in good faith and did not intend to cause harm to his partner, since he nevertheless acted deliberately in choosing to commit the deviation.

The opinion of the Rif is that a partner who improperly extends credit is indeed exempt from liability under the rule of *be'alav imo*. The Or Sameach explains that this does not contradict the principle that *be'alav imo* does not apply to a *mazik*, but is due to the fact that in the Rif's particular case, the partner's conduct was considered negligent but not outright tortious.

Additionally, the Riva rules that someone with authorized access to property cannot be labeled a *mazik*, even if his negligence causes a loss. The Avnei Nezer invokes this idea of the Riva to explain

the position of the aforementioned Raavad, and this would be another argument against holding a partner liable as a *mazik*.

LOVEH:

Some Poskim use a different rationale to hold a partner liable once he deviates. They say that when he deviates from what he was supposed to do, he is considered to have "borrowed" the assets, and he is solely and absolutely responsible for them. Since he has the halachos of a borrower, these Poskim say that he is liable for anything that goes wrong with the assets, and he will have no exemption of *be'alav imo*.

The Ketzos Hachosen also invokes the doctrine of *loveh* to explain his abovementioned ruling that a deviating partner is liable to pay for losses that were not caused by his deviation, but rather through outside means. He says that since such a partner becomes a *loveh*, he can be held responsible for anything that subsequently happens to the assets, even if the damage is not a result of his negligence.

The Bais Shmuel Acharon argues and brings a proof from the Rama that a partner does not become a *loveh*. He says that from the fact that the Rama rules that a partner is not liable for simple negligence when it was *be'alov imo*, we see that he does not become a *loveh*. He seems to be saying that if a partner could become a *loveh*, he would become one even if he does not deviate from the agreement and is simply negligent; therefore, from the fact that he is not liable for negligence, it is clear that he never becomes a *loveh*. Those who disagree with him could claim that although a partner does not become a *loveh* if he is simply negligent, he would become one if he acts unilaterally and deviates from an agreement.

ARVUS:

There is one final aspect of liability a partner may bear if he deviates from the terms of an agreement, which is based on a Rama that rules that if a partner sells early without the authorization of the other partners – meaning that he got the price available at that time but could have made a larger profit if he had waited longer to sell – he is liable to cover the loss of anticipated revenue.

The Poskim struggle with this halacha. They note that even if someone steals property, he is only liable to pay the worth of the property at the time he stole it. The same is true if someone damages property. If someone burns down a house, he is only liable to pay the worth of the house at the current time. We cannot say that he has to pay more because the house would have had more value in a year. It is, therefore, very puzzling why a partner should be liable for more than the current market value of the merchandise.

The Nesivos Hamishpat, based on a Ritvah, takes the position that partners have a greater degree of mutual liability than a tortfeasor has to a victim with whom he has no relationship. This is because when one relies on someone else to act in his best interest, the person who is relied upon automatically assumes the role of "*arev*", meaning he is akin to someone who acted as a guarantor on a loan; therefore, even though he never explicitly agreed to be a guarantor, since he was relied upon, he is liable for any damages he causes as if he guaranteed to pay for them, even if he only caused a loss of potential future revenue. The Ritvah extends this concept of reliance leading to *arvus* to anyone who enters a relationship where he is relied upon, such as an employee or employer, a *shliach* or a *shomer*.

Many acharonim argue that many rishonim do not accept this idea of the Ritvah, and there is a great debate over whether it is accepted as normative halacha.

Another approach as to why a partner is liable if he sells early is as follows: There is a halacha cited in the Yerushalmi called "*bitul kis*", which means that if someone takes action that causes someone else not to realize projected revenue, he is not liable for this (although the victim is justified in having *ta'arumos* (complaints) against him). Such damages are considered a form of "*grama*", indirect harm, and a *mazik* is not liable for causing such losses. These poskim say that a *shomer*, and a partner who is considered such, as above, have a higher level of accountability, and are responsible even for "*grama*" and "*bitul kis*". A partner is therefore liable even for indirect damages and even for loss of future revenue.

While many poskim agree that partners and *shomrim* are liable for *grama*, most seem to assume that we do not go so far as to say that they are liable for *bittul kis*.