Professional Malpractice : Part I Shiur

GENERAL MALPRACTICE

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

THE TWO CASES OF MALPRACTICE:

The topic of malpractice is discussed in two separate *sugyos* in Maseches Bava Kama. The first *sugya* speaks about a *shochet* who slaughters an animal improperly and, thereby, causes it to become not kosher, as well as other workers who do their job incorrectly and cause damage to the property of their employer. The Gemara discusses several conditions that must be met before these workers can be held liable.

The second *sugya* is about a moneychanger who is asked for his professional opinion regarding a coin that an individual is considering accepting as a payment. If the moneychanger wrongly advises the client that it is a valid coin, thereby causing him a loss because of this error of judgment, he may be liable to compensate him if certain conditions are met.

These two cases are discussed independently in the Gemara.

THE NEGLIGENT SHOCHET:

In the case of the *shochet* who ruined the cow, the Gemara cites a *machlokes*. Some Tannaim and Amoraim posit that the *shochet* is always liable to pay for the damage he caused, while others say that he is only obligated to pay if he is paid for his work and not if he is working for free. The practical ruling follows the second view.

The Gemara further states that the exemption for one who is unpaid for his services only applies to a professional *shochet*. If an ordinary person *shechts* a cow and ruins it, he is liable whether he is paid for the job or not.

The reason a professional *shochet* is exempt from paying if he is not paid for the job is the subject of much discussion. The glaring question asked about this is that there is a general rule of "*odom mu'ad l'oloam*," a man is always obligated to pay for damages he causes, even if he damages by accident. If so, why is a professional *shochet* not liable to pay if he is not paid?

A number of explanations are offered to answer this question:

Tosafos in Bava Kama explains that the rule of *odom mu'ad l'olam* is not absolute. Although a man is liable for damages he causes by accident (*oneis*), there are exceptions to the rule.

He says that if the damage is caused by a person's negligence or by an accident that is close to being his fault, the person is liable; however, if the damage is caused by a pure accident that he couldn't have done anything to prevent, and even if the accident is a bit more preventable but falls under the category of being similar to "*genaiva*," theft of the item, the person will not be liable.

He compares the case of the *shochet* who inadvertently ruined the animal to an *oneis* that is similar to *genaiva*, and, therefore, says that this is why he is exempt from paying if he was working for free.

Still and all, if he is paid for the job, the *shochet* is liable. This is because a paid worker is held to a higher standard and is expected to accept more responsibility. Such a worker is understood to be liable even for an *oneis* that is similar to *genaiva*.

The Ramban disagrees and states that the rule of *odom mu'ad l'olam is* meant to be taken literally; therefore, a man is liable when he damages someone else's property even if he is completely not at fault. According to this opinion, we would have to find another answer to the question of why the *shochet* is exempt from liability if he is not paid.

The Riva answers that a person is only subject to the obligations of *mazik* if he had no formal relationship with the person he damaged. If, however, a person is hired to work for someone else and has authorization to be handling his object, the laws of *odom hamazik* do not apply to him. Accordingly, a worker's obligation to pay if he damages the item he is working on is not because he is a "damager;" rather, it may be because he is a *shomer* on the item and is subject to the obligations of *shemirah*. The laws of *shemirah* have different levels (commonly known as *shomer chinam*, *shomer sachar*, *socher* and *sho'el*). A worker would be on his own level of *shemirah*, and the rules outlined in the Gemara are the obligations that such a *shomer* has.

It should be noted that the Riva himself does not agree with Ramban's assertion that the rule of *odom mu'ad l'olam* obligates a man to pay for a complete *oneis*. He is of the opinion that a man is not liable for an *oneis* that is completely out of his control; however, he does concur that a person is liable for an *oneis* that is similar to *genaiva*, and he offers this explanation to explain why the shochet would be exempt from liability in a case where he is paid and damages the animal in a way that is similar to *genaiva*.

A third approach to answer this question is offered by the Rosh. He says that when a professional is tasked with doing a job, we can assume that he would not normally make a mistake that would render an animal not kosher. If such a thing does happen, it is clear that it was the *mazal* of the owner that caused it to happen; therefore, the worker is not liable to pay for the damages, as it is assumedly the owner's fault that it happened.

The Avnei Nezer offers yet another approach. He says that if a worker is commissioned to do a job, it is as if there is a tacit understanding between the two parties that he will not be held liable as a *mazik* (unless he is blatantly negligent). This silent agreement exempts him from liability.

A final approach is offered by the Machaneh Efraim, based on a dispute between the Rambam and Raavid.

The dispute between the Rambam and Raavid revolves around a case where a wife breaks an item belonging to her husband while she is working around the house. The Rambam says that he cannot hold her liable to pay for the item she broke because this would lead to a breakdown in the day-to-day operations of the home. If a husband could demand money from his wife every time that she inadvertently breaks something, they would constantly be bickering and would have no *shalom bayis*; therefore, it is understood that she cannot be charged for such things. The Raavid says that this reasoning is unnecessary. He notes that there is a rule that a *shomer* is not responsible to pay for damages incurred when the owner is working together with him. This rule is known as "*ba'alav imo*." Since the woman's husband is with her in the house, the Raavid says that it is considered to be an instance of *ba'alav imo*, which exempts the wife from liability.

The Machaneh Efraim notes that the rule of *ba'alav imo* is an exemption from the obligations of a *shomer*. This rule does not exempt a person from the obligations of a *mazik*. If so, how does the Raavid justify exempting a wife who breaks an item from being held liable as a *mazik*?

He answers that a person is only considered a *mazik* if he actively breaks something. If, however, he is simply holding an item and it falls from his hands and breaks, he is not considered a *mazik* and is not liable to pay for damages for that reason. He says that this is why the wife who drops a household item is not subject to the laws of *odom hamazik*, and this is also why a worker who mishandles an item he is working with is also not deemed an *odom hamazik*.

WHAT QUALIFIES A PERSON AS AN EXPERT?

As mentioned above, the halacha is that an ordinary person is liable for any damage he causes to an item he is working on, while a professional, expert worker is only liable if he is being paid, and is exempt if he is working for free.

What qualifies a worker as an expert?

The Shach rules that a *shochet* is qualified as an expert if he has successfully slaughtered three animals of that specific type.

The Pischei Choshen discusses how this would apply to other professions. For example, is a watch repairer considered an expert if he has fixed three watches? There are many different kinds of watch repairs, and the fact that a person has fixed three watches may not mean that he is an expert on all watch repairs. So how does one become an expert watch repairer? Is it sufficient to have successfully serviced three customers?

While the Pischei Teshuva does not come out with a definitive answer to this question, the basic distinction between an expert and an amateur does remain in place. In any case, most malpractice cases today involve a paid worker, who would be liable for damages he causes. It is relatively rare to find a malpractice case involving a person working for free, in which case there may be an exemption to his liability if he is an expert.

Furthermore, the Gemara implies that even if the worker is working for free and is, therefore, exempt from liability, he still has an obligation to compensate the owner "*m'dinei shomayim.*"

BAD ADVICE FROM A MONEYCHANGER:

The second malpractice discussion in the Gemara involves the aforementioned case of the moneychanger who advised a customer that a coin he was in the process of accepting was valid, when it was, in fact, invalid.

Regarding this case, the Gemara says that if the moneychanger is an ordinary person, or even a run of the mill professional, he is liable to reimburse the customer for the loss he caused him. If, however, the moneychanger is a top-of-the-field expert, who knows everything there is to know about the industry and would never make a mistake, he is exempt from liability.

Unlike the case of the shochet, this Gemara makes no distinction regarding whether or not the moneychanger is paid for his service. Tosafos explains that this is because in the case of the moneychanger there is no difference if he accepts payment or works for free. The reason for this is that in a field like money changing one should not completely rely on his own judgment and offer definitive advice even if he is a professional; therefore, even a professional moneychanger who is not being paid is liable to pay for the loss he caused because he should not have given a definitive opinion. The only exception is a premier, expert moneychanger, who knows everything there is to know about the business. In such a case, if he does make an error in judgment, we can call that a complete *oneis* or blame it on the *mazal* of the customer; therefore, he is exempt from payment.

There is a disagreement amongst the Rishonim regarding whether the premier, expert moneychanger is exempt from liability even if he is paid for his services. The Rambam says that even this expert is held liable if he received payment, while the Rashba says that he is not liable in any case. The Rashba explains that an expert worker who is paid for his job is usually liable because he is working with his hands and, when one is doing physical labor, it is always possible for mistakes to happen. If he is paid, he is held to a higher standard and is liable to pay for any mistake he makes while working. In the case of a moneychanger, however, the worker is not doing manual labor and is simply offering a judgment. If he is really a premier expert, there is no room for error. If an error does occur, it cannot be blamed on the expert, even if he is being paid, and it can only be considered a complete *oneis*; therefore, he is not liable even in this case.

Most Poskim agree with the opinion of the Rambam, however, there is a minority view like the Rashba.

THE MISTAKEN SOFER:

Some Poskim apply the idea of the moneychanger to other "white collar" jobs that do not entail physical labor and are based solely on the expert's judgment.

The Chavatzeles Hasharon discusses a story where an individual who is considering purchasing a used *sefer Torah* brings it to a *sofer* for appraisal and to see if it can be fixed easily and made usable. The *sofer* advises him that it can be easily repaired, and he goes ahead with the sale, only to later discover that the *sofer* was wrong and it will be impractical to repair the old *sefer Torah*. If the

buyer cannot recoup his money from the seller, can he charge the *sofer* for malpractice?

The Chavatzeles Hasharon rules that the *sofer* can say that he holds ("*kim li*") like the opinion of the Rashba that an expert "white collar" worker is not liable for damages even if he is paid for his services, and he, therefore, can exempt himself from paying.

He adds that even though a moneychanger needs to have a tremendous level of expertise in order to exempt himself from liability, that only applies to money changing, where only rare experts can claim to know everything about every coin. When it comes to other areas of expertise such as a *sofer*, it is sufficient for him to be an established and competent authority in the field.

From the words of the Ketzos Hachoshen, it is evident that he disagrees. He discusses a case where a Dayan issued an erroneous ruling that caused a loss to one party and, in the course of the discussion, says that the exemption of being a premier expert that applies to a moneychanger does not apply to a Dayan. This is because it is possible for a moneychanger to be such a great expert that he knows everything there is to know and to be above making any mistakes, while it is impossible for any Dayan to claim that he knows everything there is to know about halacha and that he can never make a mistake.

In any event, we see that the Ketzos seems to hold that the need to be a premier expert in order to exempt oneself from liability in a white collar-type job does apply to other areas of expertise besides for moneychangers, although it does not apply to a Dayan.

RELYING ON THE WORKER:

When relating the case of the moneychanger, the Gemara mentions that the customer stated clearly that he intended to rely on the man's advice. There is a *machlokes* whether this is meant definitively and is a condition needed to obligate the worker or not. The Rif says that, indeed, the worker would only ever be liable if the customer told him that he is relying on his judgment. If the customer did not tell him this, he can exempt himself by claiming that he didn't know his advice was being relied upon. Tosafos disagrees and says that the customer does not have to make this pronouncement to the worker, and he can be held liable even if he wasn't explicitly told that the customer is relying on his advice.

The Nesivos Hamishpat says that the *machlokes* is only in a case where the worker is not being paid. If he is being paid, it is obvious that the customer is relying on him, and it does not need to be spoken out explicitly.

MAZIK OR SHOMER?

We previously touched on the discussion of whether a worker who causes a loss is subject to the laws of *odom hamazik* or the laws of *shomer*, and mentioned that the Riva says that the laws of *odom hamazik* do not apply to the worker and he can only be held liable as a *shomer*.

This discussion continues amongst the Acharonim, who discuss a case where a *shochet* failed to check his knife prior to slaughtering an animal, which led to it becoming non-kosher. The Levush rules that the *shochet* is liable in such a case because he was negligent by failing to do what he is supposed to do. He says that the *shochet* would be liable in this case even if he is not being paid because even someone who works for free is obligated to pay for losses caused by his own negligence.

The Taz disagrees and says that the *shochet* is not liable because the damage was caused indirectly. He says that this qualifies as a case of "*grama*," which a *mazik* is not liable to pay for. The Shach and Nekudas Hakesef take issue with this point and say that the fact that he did not check his knife, which led to the loss of the animal, can be considered direct damage.

The Tevuos Shor agrees with the Taz that the damage is indirect; however, he says that even though the *shochet* cannot be charged as a *mazik*, he can still be obligated to pay as a *shomer*, as *shomrim* are liable even for indirect damages caused by not properly watching an item left in their care.

The Divrei Yechezkel speaks about this topic at length and notes that while it may be possible to obligate a *shochet* to pay as a *shomer*, as he accepted to care for the animal left with him, but how could a moneychanger be considered a *shomer*? A moneychanger never accepted to care for the coin he was shown, which makes it hard to understand how he could be considered a *shomer*. If the liability of a worker really is, as the Riva and Tevuos Shor say, because he is a *shomer*, why would a moneychanger be held liable?

The Divrei Yechezkel concludes that this problem is "*tzarich iyun gadol*", very problematic.

Other Acharonim, however, including the Avnei Nezer, do say that a moneychanger or any worker who is hired to give a judgment or advice can be considered a *shomer* on the object they are looking at, even though they never accepted any kind of guardianship on the object. Although it is difficult to understand why a moneychanger would be considered a *shomer*, the Avnei Nezer says that engaging in an agreement to appraise an item is enough to say that the item was entrusted to the appraiser, which makes him a *shomer*.

The Divrei Malkiel also seems to take this position. He speaks about a story in which an individual paid an insurance agent to buy an insurance policy for him. The agent failed to properly file the paperwork with the insurance company, which rendered the policy invalid. When the man's house burned down, the company refused to pay because of the agent's error. The homeowner then demanded that the agent reimburse him for his loss as he was the cause of the damage.

The Divrei Malkiel that the agent cannot be obligated to pay as mazik because he did not directly cause the damage but says that it is possible that he is liable as a shomer. While the details of this teshuva are beyond the scope of this article, we do see from the Divrei Malkiel's words that he concurred with the opinion that a worker who does not actually take guardianship of any item can still be held liable according to the laws of shomer.

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