Professional Malpractice : Part III Shiur

PROFESSIONAL LIABILITY

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

ARVUS:

We previously discussed how an individual guilty of malpractice may be held liable under the doctrines of *mazik* and *shomer*. There is one further doctrine under which some Poskim obligate a professional to pay for losses caused by his malpractice, which is the doctrine of *arvus*, guarantorship.

The general definition of *arvus* is that when an individual vouches for a transaction or for specific merchandise, and someone does the deal because he trusts the guarantor, it is considered as if the guarantor committed to accept liability for the deal, which would obligate him to pay if the transaction results in a loss. The classic case of *arvus* is when someone cosigns on a loan, thereby committing to be held responsible if the borrower fails to pay his debt. There is, however, a broader doctrine of *arvus* which may apply to general commercial transactions. If an individual convinces someone to go through with a transaction based on his word, and his advice ends up being detrimental, the guarantor may be held liable because the party only went through with the deal because it relied on him. Some Poskim say that the guarantor does not have to explicitly say that he is accepting liability if the deal goes sour. Their opinion is that the fact that he assured the party that it would not suffer a loss is sufficient to be considered to be a commitment to compensate for any losses. According to the opinion that such a form of *arvus* exists, some extend it to apply to cases of malpractice as well.

The source of the opinion that *arvus* applies in a case of a transaction even without an explicit commitment is a Gemara in Bava Metziah. The Gemara discusses a case where a businessman sends an agent to the fair to buy specific merchandise during a season when it is available for cheap. For whatever reason, the agent failed to make the purchase while the merchandise was inexpensive, which caused the businessman a loss of potential profit. Rav Chama says that the agent is liable to pay for the loss he caused, while Rav Ashi disagrees and says that he is not. The Gemara explains that the reason Rav Ashi holds the agent is not liable is because this case qualifies as an "*asmachta*", a conditional obligation.

The halacha follows the view of Rav Ashi that the agent would not be held liable in this case.

The Gemara also discusses another relevant case of a sharecropper who makes an agreement with a landowner to take care of his land in exchange for a share of the profits from the crops. The Gemara says that if the sharecropper does not do what he said, and thereby causes a loss of profits for the landowner, he is liable to repay him. This leads to the question of why this is different than the case of Rav Ashi, where the agent is not obligated to pay.

The Gemara answers that in the case of the sharecropper the situation is "*b'yado*", in his control. The sharecropper had the ability to work the field and chose not to; therefore, he is held liable. In the case of the agent, however, the situation was never fully in his control, as he couldn't know for certain that he would find a seller to purchase merchandise from; therefore, it cannot be considered as if he guaranteed that he would perform his mission.

THE OPINION OF THE RITVAH:

Some Rishonim understand this Gemara to be saying that whenever a situation is *b'yado*, the guarantor would be obligated to pay as an *areiv*. Others disagree and learn the Gemara differently.

The *machlokes* hinges on a Ritvah, who cites a Yerushalmi that says that a *mazik* is only obligated to pay for damage he causes and not for causing a loss of potential profits. If so, the Ritvah asks, why would the sharecropper be liable to pay?

The Ritvah answers that his obligation is not because he is a *mazik* but, rather, because he is an *areiv*, as he implicitly guaranteed that he would work the land on behalf of the landowner. In the case of the agent, the same logic would apply. Rav Ashi only disagrees because of the concept of *asmachta* and because it is not *b'yado*, if not for this peripheral problem, he would concede that the agent could be liable as an *areiv*.

The Rosh and other Rishonim seem to disagree and say that the *machlokes* in the case of the agent is only where the businessman explicitly stipulated with the agent that he would be liable if he caused him a loss of profits. They seem to say that if there is only an implicit agreement, then everyone would agree that there is no liability and *arvus* does not apply.

It should be noted that there are Acharonim, including the Chasam Sofer and Nesivos Hamishpot, who learn that the Rosh and other Rishonim do not actually disagree with the Ritvah and say that everyone agrees that there is no need to explicitly make any stipulations where a situation is b'yado and the areiv would be liable in such cases. Other Acharonim, including the Nachalas Tzvi, Imrei Bina and Pischei Teshuva, do learn that the Rosh argues with the Ritvah and holds that an *areiv* is only liable if there is an explicit stipulation.

ARVUS FOR BAD ADVICE:

One other place in halacha where we find the concept of implicit *arvus* is a *teshuva* of the Mahari Veil, as understood by the Rema. The *teshuva* is talking about a case where Person A is owed money

by Person B, who offers to pay him with an IOU from Person C who owes him money. Person D, a reliable source, assures him that he can rely on Person C to pay the debt, and he accepts the IOU as payment, based on this man's advice. Unfortunately, Person C ends up not being reliable and he does not pay the debt. The question is whether or not Person D is obligated to pay Person A for giving him bad advice?

The Mahari Veil says that if Person C was reliable at the time of the advice, and, for whatever reason, he became unreliable afterwards, Person D would not be liable, as the advice he offered was sound at the time he gave it. If, however, Person C was unreliable at the time of the advice, Person D would be liable for his bad advice.

The Mahari Veil explains this obligation by comparing this case to the case of the moneychanger, which we discussed in the previous parts of this series. In that case, the Gemara says that a moneychanger who wrongly assesses a coin, thereby causing a loss to the customer, is liable as a *mazik*. (Even though the damage is indirect, this qualifies as "*garmi*", the type of indirect damage that one is *chayav* for.)

He seems to be saying that the guarantor in the case he discusses is liable because he is a *mazik*. The Rema, however, cites this case in the laws of *arvus*, and says that the man who advised the lender to accept the bad IOU is liable as an implicit *areiv*.

This Rema is another source for those Poskim who accept the concept of implicit *arvus*.

ARVUS IN MALPRACTICE:

There were Acharonim who used these doctrines to obligate a worker for malpractice. Besides for the obligations of *mazik* and *shomer*, they argue that someone can be held liable for implicit *arvus* if he is guilty of malpractice.

The Divrei Malkiel discusses an individual who purchased an insurance policy through an agent. The agent failed to register the policy with the insurance company, which led to them denying the claim when the customer's house burned down. He says that the agent cannot be held liable as a *mazik*, as he did not cause the fire and, therefore, was not the one who damaged the house. He then discusses whether or not the agent can be held liable as an *areiv*.

He says that according to the opinion of the Ritvah the agent would be liable as an *areiv*; however, most opinions disagree with the Ritvah and it is questionable whether one can obligate the agent to pay because of an opinion that is not accepted by most Poskim.

He then suggests that perhaps even those who disagree with the Ritvah may agree with his reasoning in this case. He suggests that in the case of the merchandise, it is unclear if the businessman would have succeeded in making a profit at all; therefore, the agent cannot be held liable as an *areiv*. On the other hand, it is now 100% clear that if the insurance agent had properly registered the claim, then the insurance company would have paid the claim. Since it is clear that the agent caused this loss of profits for the homeowner, he suggests that the agent would be considered *areiv* who is liable according to all opinions.

A similar point is made in a *teshuva* of the Chavatzeles Hasharon. He cites the *teshuva* of the Mahari Veil, and notes that the Mahari Veil himself seems to say that the liability of the one who gave the bad advice is that of *mazik*, while the Rema says that it is because of *arvus*. In a lengthy discussion, he says that the liability of both *mazik* and *areiv* would apply in at least some cases. He says, specifically, that *arvus* would apply in the case of an expert, such as a professional moneychanger. If someone relies on an expert, there would be a liability of *arvus*, as it is certainly *b'yado* of the expert to give good advice. If the person giving advice is a non-professional, however, it would not be considered *b'yado* for him to give expert advice, which would mean that he can only be held liable as a *mazik* and not as an *areiv*.

MINHAG HAMAKOM:

There is another discussion in the Poskim about whether a professional can be held liable for malpractice because of the halachic concepts of "*minhag hamakom*", common custom, and "*dina d'malchusa*", the law of the land. According to these rules, some suggest that a professional could be held liable under societal and legal frameworks that go beyond the liabilities of halacha.

Rav Mendel Shafran was asked about an obstetrician who caused damage to a baby by being negligent during the delivery. He ruled that according to the law of the Torah, even if the doctor is deemed liable, he does not have to pay that much. He says that a negligent doctor only has to pay like a *mazik*, who is obligated to pay the "five forms of damage", which Rav Shafran says does not equal nearly as much as one would be liable to pay according to secular law. However, physicians today are only licensed to work if they accept responsibility for negligence, as defined by secular law. Accordingly, it is as if the doctor openly committed to being held accountable according to the accepted secular law, and, therefore, he could be made to pay to the full extent of this law.

Rav Zalman Nechemiah Goldberg disagrees with this reasoning. He says that *minhag hamakom* can be used to determine how many hours a worker is expected to work, how many breaks he deserves during the day, etc.; however, it cannot be used to create a whole new system of liability and to make a professional pay for things that the Torah says he is exempt from.

Rav Yitzchok Zilberstein also discusses a story where a baby was harmed during the delivery. He rules that the doctor is not liable according to halacha if he did his best; however, he suggests that the patient may be permitted to sue the doctor's insurance, as the insurance definitely works according to secular law and how they define malpractice.

Rav Elyashiv also rules that it is permitted to sue the insurance company. He adds that even if suing the insurance indirectly hurts the doctor by causing his premiums to go up, this is only an indirect cause of harm which is not prohibited by the Torah.

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