

Peshara and Din

PART 2

Rav Dovid Josilowsky - Dayan at the Bais Havaad

A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

UMDENAH:

A *teshuva* from the Rosh reveals another set of circumstances where it may be proper not to *pasken* according to the letter of the law.

The Rosh relates a story where a man, whom we shall call Reuven, invested a large sum of money with a business partner named Shimon. After quite a while, Reuven returned to find out how his investment was doing. Shimon answered that he no longer had any partnership with him and owed him nothing.

When the case came to the Rosh's *bais din*, Shimon admitted that Reuven had given him the money, but he claimed that it had been paid back. Reuven denied this, but, unfortunately for him, the *shtar* attesting to the debt had been lost. The Rosh questioned Shimon and asked him a number of pertinent things: When was the money repaid? Who witnessed the repayment? What framework was the payment made in? How was it given to Reuven?

Shimon evaded every question and refused to give a solid answer. All he would say was that he didn't owe Reuven anything and he would not say any more than that. His evasive behavior made his entire story very suspicious.

According to the letter of the law, the halacha would be "*hamotzi m'chavero alav haraya*." Since Reuven is trying to extract money from Shimon, he has to bring proof that he is owed the money. Since he has no *shtar*, he has no proof – which would mean that Shimon has no obligation to pay him. However, the Rosh writes that it is possible to force Shimon to pay what is being demanded of him. He cites numerous Gemaras where Amoraim issued rulings based on "*umdenah*", their evaluation of a particular case. Using *umdenah*, they issued a ruling that may not have been based on strict halacha but which seemed to be the truth in their estimation.

To this end, the Gemara in Shavuot says that a *dayan* also has a prohibition of "*midvar sheker tirchak*." He is not allowed to issue a ruling if he believes it to be false. Even if the strict halacha dictates a certain *p'sak*, if the *dayan* feels that this would be facilitating an injustice, he is not allowed to go with that ruling. For example, if witnesses testify that a certain party is correct but the *dayan* evaluates all the details and is fairly certain that they are lying, he cannot ignore his intuition and *pasken* according to the letter of the law.

The Rosh cites another Gemara that describes a case where

it would be improper to rule according to the strict halacha and would be more appropriate for the *dayan* to offer his own *peshara*. In Bava Metziah, the Gemara relates a story where a guardian who was appointed to oversee the assets of young orphans uses their funds to purchase a cow from a broker, which he gives to a cowherd for safekeeping. Ultimately, the cow died. It was soon discovered that the cow had no teeth and was unable to graze, which led to its death.

The Gemara says that the purchase of the cow was a *mekach ta'os*, an erroneous sale that was never valid, which means that, according to *din*, the broker must return the money he received for the cow. However, it is ruled that the cowherd also bears some responsibility because he should have checked out the cow and noticed the problem. Therefore, the final ruling is that the cowherd should pay two-thirds of the cost back to the broker after he reimburses the orphans. Rashi understands that this ruling is a *peshara* that can be enforced based on an evaluation of the situation. According to the strict letter of the law, the cowherd is not liable for the death because the sale was never valid. *Bais din*, however, has the ability to obligate him to pay if they evaluate the situation and decide that he should bear some of the responsibility because of his negligence. Tosafot learns the Gemara differently and understand that the cowherd is liable to pay two-thirds of the cost according to the *Din*. This is because if he had noticed the problem earlier, he could have returned the cow to the broker when it was still alive, and it could have been sold for two-thirds of its normal sale value. Thus, the cowherd is considered negligent, and his negligence caused this loss, which obligates him to pay this amount.

The Rosh understands the Gemara like Rashi and says that we see from this Gemara that a *dayan* is permitted to unilaterally impose a *peshara* when he feels that it is the correct thing to do.

Accordingly, in the case in question, he says that the *dayan* can rule according to *umdenah* and obligate Shimon to pay. Since his evaluation of the situation is that Shimon is clearly not being truthful, he has the authority to enforce a ruling against him, even though this is not in line with the general halacha of *hamotzi m'chavero alav haraya*.

The Rambam writes that although we do find the concept of ruling according to *umdenah* in the Gemara, this idea cannot be imposed in contemporary times. He says that the *dayanim* of old had the ability to issue rulings based on their evaluations, but we are not as clever as them and we cannot rely on our own intuition to reach a ruling. Instead, he suggests that if a

dayan feels that the ruling according to *din* would be false, he should thoroughly interrogate the witnesses to try to disprove them or he should suggest that the parties make a *pesbara*. The Vilna Gaon notes that the Rambam specifically says that the *dayan* should encourage the parties to reach a *pesbara*, which indicates that he cannot force them to accept a compromise that he offers.

It is interesting to note that the Shulchan Aruch cites these words of the Rambam but also quotes the Rosh. The Rema also cites the Rosh as being the practical halacha.

It is possible to say that even though we rule like the Rambam and say that today's *dayanim* cannot make their own *umdenah*, the case of the Rosh may be different. In that story, Shimon undermined his own case by refusing to answer the simple questions directed at him. In this instance, the *dayan* didn't make the *umdenah* on his own; rather, Shimon created it through his strange behavior. Perhaps everyone would agree that in such a case, the *dayan* is permitted to rule according to the *umdenah* against Shimon.

HALACHIC DOUBTS:

Another instance when *pesbara* may be imposed is in a case of halachic doubt. The Shevus Yaakov speaks about a story involving what is known as "*takanos shu"m*". This term refers to a dowry that was customarily presented to a new son-in-law upon marriage. The conditions of the dowry were that if the son-in-law died within one year of marriage without fathering a child, the money returns to the father-in-law. In this story, the groom died within a year but he did father a child that passed away shortly after birth. It was unclear if according to halacha this baby counted as the type of child that stops the dowry from returning to the father-in-law. Since this is a *safek* in halacha, it was ruled that a *pesbara* should be imposed by the *dayan*, and the parties would be forced to abide by it.

While we can determine from here the idea that a *safek* in halacha should be resolved by *pesbara*, there is a conflicting rule that when there is an uncertainty in halacha, the ruling is *hamotzi m'chavero alav haraya*, which would mean that whichever party is currently holding the money gets to keep it. These two rules seem to be contradictory; in some cases we apply the rule of *hamotzi m'chavero alav haraya*, while in others the rule is that *pesbara* should be imposed. So, how are we to know when to use *pesbara* and when not to?

The defining factor seems to be that when there is a strong case not to say *hamotzi m'chavero alav haraya*, it is up to the *dayan* to make a *pesbara*. To give an example: If there is a "*da'as yachid*" that rules that the party holding the money is correct, while dozens of Poskim rule that he is in the wrong, the consensus in halacha is that the one opinion cannot override many and the ruling would be in accordance with the vast majority. If two Poskim rule on the side of the one holding the money, even while many more rule against his position, the halacha is

that the *muchzak* can say "*kim li*" like the two Poskim in order to retain his money. Furthermore, even if he only has a *da'as yachid* on his side, if that singular Posek is an established *gadol b'dor*, there is room to say that he can claim "*kim li*" in order to keep the money.

In such cases, the *muchzak* has a case to keep the money in his possession, but it is a very weak case. It would seem that this is the type of scenario where a *dayan* can impose a *pesbara*. In other words, this case would, in fact, qualify as a *safek* in halacha, but since it is not clear that any doubt really exists and the vast majority of opinions are against the *muchzak*, it would be proper for the *dayan* to issue a *pesbara*, rather than allowing the *muchzak* to keep all of the money.

LIFNIM MISHURAS HADIN:

One final case when a *dayan* might issue a ruling that is not the strict halacha, would be a case of *lifnim mishuras hadin* – when a person may be expected to go beyond the letter of the law.

The Gemara speaks of a case where an Amora hired porters to move his barrel; they proceeded to break the barrel of wine he had hired them to transport. Although the Amora was entitled to hold them accountable for the loss, and certainly was not bound to pay their wages, the Gemara says that he was obliged to pay them *lifnim mishuras hadin*. Although the Rosh says that he was only encouraged to pay them but was not actually obligated to do so, the Mordechai goes so far as to say that he can be coerced to pay them. The Bais Yosef is puzzled by this Mordechai and wonders how someone can be forced to go *lifnim mishuras hadin*. The Urim V'Tumim explains that the Mordechai doesn't really mean that one can be forced to go beyond the letter of the law; rather, it means that he can be spoken to strongly and told that it is the right thing to do. Put simply, while this is not the actual halacha, *bais din* can apply verbal pressure to a person who has the means to pay and persuade him to go *lifnim mishuras hadin*.

This concept was illustrated in a recent story where a *talmid chochom* hired workers to bake matzohs for him and indirectly caused them a loss by canceling the job. In such a case, most Poskim rule that the man would be obligated to pay the workers. One reason why he is liable is that the Poskim view this as a case of *garmi*, the type of indirect damage that one is liable for. However, there is a minority opinion – that of the Maharam Rottenberg – that this type of case falls under the category of "*grama*", the type of indirect damage that one is exempt from paying for.

When this *talmid chochom* asked a *shailoh* whether he should pay or not, the Rov told him that because he is a Torah scholar, it would be proper for him to pay the workers and not rely on the minority opinion that would exempt him.

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