Mazik

PART II THE RULES OF DIRECT CAUSATION

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

DEFINING GARMI:

The subject of *garmi*, direct causation which carries the same liability as a direct action, is a difficult one because the parameters that define causation are not as clear-cut as outright acts of damage. However, we will attempt to demonstrate how certain principles of real *mazik* are applicable for *garmi* as well.

There is a seminal case of *garmi* discussed by the rishonim. The case is first mentioned in the Mordechai (bava kamma, perek vav), where Shimon borrows a sword from Reuven and loses it. This sword did not actually belong to Reuven, rather, it was owned by a non-Jew who had left it with him as collateral for a loan. Shimon is willing to pay for the value of the sword, but the non-Jew wasn't satisfied with that amount, and was suing Reuven for a lot more than just the value of the sword.

Apparently, this was a common practice in those times. A Jewish lender who lost a non-Jew's collateral faced various questionable charges which he was then forced to pay. Reuven wished to pass on those extra fees to Shimon who had borrowed the sword from him and lost it. The ruling of the Rishonim, which is cited in the Shulchan Aruch (CM 72:8), was that Shimon does not have to pay for the extra fees, only for the value of the item. The Sema seems to understand that Shimon was not fully aware of the situation when he borrowed the sword – either he did not know it was a non-Jew's item, or he was not aware that the owner would overcharge if it got lost. Had Shimon been aware of these facts, he would need to pay for everything. The Shach however, argues and says that even if Shimon was aware, he's exempt from paying any extras because they are only indirectly his fault.

The Ketzos Hachoshen cites earlier Poskim who side with the Sema, explaining that Shimon owes the extras because of the doctrine of garmi. Clearly, this was a frequent occurrence in the region (Poland Cir. 1600), as they write, "and so is the custom to rule here in the community of Brisk."

This argument is a compelling one because this case seems to be a classic *garmi*. After all, it is *bari hezeikah*, a case where the causative damage is certain to occur, because there's no doubt that the non-Jew will demand the extra payment. Why would the Shach and others not call it *garmi*? The truth is that there are several lines of reasoning, but for now, we'll focus on the one mentioned by the Ketzos Hachoshen, as it illustrates a fundamental aspect of *garmi*.

STEALING A CONDEMNED OX:

The Ketzos begins by citing a case from the Gemara (71b) where someone was given an ox to safeguard, and under his jurisdiction, it gored a person to death. The animal was brought to trial and sentenced to be put to death, as the Torah prescribes. Says the Gemara, if the *shomer* manages to return the ox to its owner before it is killed, he need not repay the owner for its subsequent loss, even though the ox is already worthless because Beis Din will be killing it. Whereas, if the ox were to be stolen or lost, he would need to pay its full value like any guardian who loses the item entrusted to him.

Now, such a condemned ox has no value, and if someone were to steal or damage such an ox, he would be exempt from paying. But, what if someone steals the ox from the guardian, thereby requiring him to pay its value to the owner? Must he pay for causing a loss to the shomer; or, perhaps, he's exempt because the actual object is worthless? The Gemara goes on to cite a dispute on this matter, based on the question of whether a *davar hagorem l'mamon k'mamon dami*, something that is a direct cause of value, is considered valuable. This ox, while its inherent value is zero, allows the shomer to save money. Its existence causes the shomer a monetary gain, and is therefore considered valuable according to one opinion. The Halacha, however, follows the chachamim who argue and say that we look only at intrinsic value. In this case, since it's inherently worthless, the thief doesn't pay.

WHAT HAPPENED TO GARMI?

Tosafos ask, leaving aside *davar hagorem l'mamon*, why isn't the doctrine of *garmi* a reason to hold him liable? Tosafos answers that an item needs to be of equal value to all people to qualify as a *garmi*. For example, the classic case of *garmi* is burning a lender's loan document, thus preventing

him from collecting payment. There, the loan note holds value – whether intrinsic or not - for all people equally. The loan can be of financial interest to anyone interested in it. The ox, however, has no financial interest to anyone but the shomer who needs it to clear himself from the owner by returning his now worthless animal. This is not *garmi*.

This teaches us that garmi follows some of the guidelines of regular damages. Meaning, just as a mazik only pays for damaging an object that has value, garmi works the same way. The novelty of garmi is that we don't need a physical action done directly to the damaged item, but we still need the damaged item to be of value. But if the item is worthless, there's no legal "*hezek*", despite the fact that side losses will come about through the damage.

In the aforementioned case as well, the sword's value is its literal value. The extra money that the non-Jew demands are only a *davar hagorem l'mamon*. It's not *garmi* because no one other than Reuven has that level of financial interest in the sword. This is something very important to be remembered when dealing with cases of *garmi* - the damaged item must itself have value, not only a potential value to some people.

However, the Ketzos points out that this *sevara* is not universal. The Ramban holds that the *shor haniskal* case would in fact qualify as *garmi*. Apparently, the Ramban doesn't require this condition to be considered *garmi*.

DELAYED CAUSATION:

There is another *sevara* relevant to this case that would exempt the borrower even if he had all the information. The Rashba (shut 1052) deals with an appointed third party who was holding a loan document in escrow. Presumably, the borrower had probably issued some form of payment and the lender didn't want to give him the loan note until the payment was settled. The appointee was convinced by the lender that the payment was invalid and without any evidence carelessly returned the note to him, leaving the borrower at his mercy. Of course, the lender went and collected again. When the borrower later proved that the payment was legitimate, the money could no longer be recouped, so he sued the appointee for the losses that he had caused. The Rashba ruled that he is exempt because it is only grama. This ruling is quoted by the Rema (55:1). The Rashba, however, doesn't go into detail to explain why garmi is not applied here.

The sefer Divrei Mishpat (C.M. siman 72), explains the reason. He points out that the damages hadn't occurred at the time of his action, only later when the lender collected the debt a second time. In the case of the sword as well, the action of losing the sword doesn't generate a loss until the non-Jew raises his ire and overcharges his lender.

This reasoning is drawn from a distinction that the Mas'as Binyomin (Ch. 85) makes regarding the Rashba's verdict. He writes that if the opposite had happened, i.e. the appointee handed the loan note to the borrower without evidence of payment, and consequently, he does not pay the lender, the appointee would be liable to pay the lender. Why? Because the moment he releases the note to the borrower, the loan is lost. Just like burning a loan document; returning it to the hands of the borrower is akin to destroying it. The borrower doesn't need to go through any steps to get out of the debt, he's already off the hook! Whereas in the Rashba's case, the borrower's money is not lost until the lender goes ahead and makes the dishonest collection.

Here too, we see that garmi requires certain qualities of a genuine mazik. The action needs to cause an immediate effect, just as active damage would

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