להתוודע ולהגלות מחמדי התורה בכל דף בש"ס
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Bava Kamma Daf 2

Owner's liability for damages by his property

בבבא קמא דף ב'. במשנה, ארבעה אבות נזיקין השור והבור והמבעה וההבער וכו'. הצד השוה שבהן שדרכן להזיק ושמירתן עליך, וכשהזיק חב המזיק לשלם תשלומי נזק במיטב הארץ.

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Is the owner's liability based on his being the owner of the property that caused damage, or is he liable because of his negligence in guarding it from causing damage

By entrusting his animal with a shomer, is the owner totally not liable? / Two fundamentally ways of understanding the owner's liability for damages caused by his property / The owner was negligent and left the door open and another person closed it, but the animal nevertheless got out and caused damage / The owner declared the animal hefker, ownerless, after it got out but before it caused damage

נמוקי יוסף, ראב"ד, אבן האזל, חי' רבי שמעון שקופ, חי' רבי נחום

The Nimukei Yosef[1] writes that the words *u'shmirasan alecha* in the *mishnah's klal* "הצד השוה שבהן הוא שדרכן להזיק ושמירתן עליך" teach two points regarding one's liability. One - that anytime you have an obligation to take care of something and guard it, whether it's because it's your property, or you've been entrusted with it, or you've done something that makes you responsible for its care, in all these situations, you are obligated to pay for any damage it causes. That's why the *mishnah* says, "*U'shmirasan alecha*, 'The obligation to guard them is upon you," to teach us that you are only liable for their damages when it's incumbent upon you to guard them and you were negligent and did not guard them properly, and as a result they caused damage. However, if the owner hands them over to someone else to look after, and that caretaker is negligent, the second person is liable for the damage, and the owner is exempt. Two - we also learn from this that if you safeguard them in a manner consistent with their typical care, and they nevertheless cause damage, you're exempt from liability.

Now, that which the Nimukei Yosef wrote that if someone entrusts his animal with a *shomer*, and it caused damage while in the hands of the *shomer*, the *shomer* is liable to pay for the damages, while the owner is exempt from payment, the Raavad[2] poses as a *shailah* whether by entrusting the animal to a *shomer*, the owner is entirely exempt from payment to the injured party, or perhaps the owner is still liable to pay the injured party, but he can then demand reimbursement from the *shomer*. And so, we need to understand the *machlokes* of the Nimukei Yosef and Raavad in whether the liability for payment falls solely on the *shomer*, or there's still an obligation on the owner as well?

There's a discussion in the *Acharonim* that there are two ways of understanding one's liability for damages caused by his property, which result in several relevant halachic differences.

The Even Ha'azal[3] explains the two ways as follows.

One - the liability for payment is because the Torah imposed an obligation upon the owner to guard his property to ensure that it does not cause damage. Therefore, if the owner was negligent and did not guard it adequately, and as a result, the animal caused damage,

the owner is liable for the damages because of his negligence.

Alternatively, it can be argued that the obligation to pay for the damages doesn't stem from the owner's negligence in guarding the animal but rather from the fact that his property caused damage. The Torah states that the owner is liable for damage caused by his property. However, if he safeguarded it properly, and it still caused damage, he is exempt. The Torah exempts him due to the concept of '*oiness*' (unavoidable accident) because he watched it properly. [1]

And the Even Ha'azal writes that from the words of the Rambam it seems that the Rambam learned like the second explanation. As the Rambam there[4] writes: Any living creature of a person that caused damage, its owner must pay for the damages because his property caused the damage. The Rambam doesn't mention his obligation to guard it. His liability stems merely from the fact that it's his property that caused the damage.

The Even Ha'azal continues that this *shailah* results in a relevant halachic question in the following case. The owner did not guard his animal properly - for example, he left the barn door open - but another person came along and closed the door. However, the animal nevertheless got out by digging under the door or wall and caused damage. If the owner's liability is because of his negligence in not guarding the animal properly, it follows logically that in this case he's not liable because his liability is only when the animal was unguarded at the time it caused damage, but in this case, it was guarded at that time. Even though its being guarded was not by the owner, but by another person, he cannot be held liable because the animal was not unguarded when it caused damage. However, if the owner's liability is based on the fact that his property caused damage, but when he guarded it he's exempt based on *oiness rachmana patrei*, because it was beyond his control, it follows logically that in this case he can be held liable for damage caused by his property, He cannot be exempted as an *oiness*, because since he did not guard it, he cannot claim the exemption of *oiness*, even though someone else guarded it and it nevertheless dug out of its enclosure. [2]

In Chiddushei Reb Shimon Shkop[5] he poses this very question and concludes that the owner's liability is not because of his negligence in not guarding his animal properly, but because of it being his property. He supports his reasoning from the *gemara* further in our *perek*[6] regarding the following case. The owner was negligent and left the door open. After his animal went out of the barn, he declared it *hefker*, ownerless, and it then caused damage. He's exempt from paying for the damages under the category of '*shor*' because he was not its owner at the time it caused the damage. However, he may be liable under the category of '*bor*' because it may

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[1] Regarding the *mishnah's* statement, "*Ha'tzad ha'shaveh she'bahen she'darkan l'hazik u'shmirasan alecha, u'keshe'hizik chav ha'mazik l'shalem*," the Minchas Shlomo asks that we do sometimes find a case where one is liable even if it was not *shmirasan alecha*? In the *gemara* further[11] Rav Ada bar Ahavah says that the words *'ha'tzad ha'shaveh she'bahen'* in the mishnah add the following case taught in a *braisa*. Those that are permitted to spill their wastewater into the public domain in the winter, are nevertheless liable for any resulting damage. Now, that case is not *shmirasan alecha*. The owner is not obligated to stand watch over it so that it does not cause damage. But he is nevertheless liable to pay for any resulting damage. And so, we find a case where one is liable even when it's not *shmirasan alecha*? However, he answers that this case is different. Under basic *halachah*, one would not be allowed to spill his wastewater into the public domain, even in the winter. However, the *chachamim* allowed it out of necessity. But they allowed it only on the condition that he remain liable for potential damage. Otherwise, they would not have allowed it. Therefore, he has an inherent obligation to guard it based on the original *halachah*, and it is considered *shmirasan alecha*.

[2] The Michas Shlomo[12] however, disagrees with this reasoning. He argues that even if his liability is based on his ownership, if the animal was guarded when it caused damage, he's exempt, even if it was guarded by another person. Even if we say that his liability is based on his ownership, he is liable only for his property that was not guarded. But he is not liable for his property that was guarded at the time it caused damage, even though he's the owner.

According to the understanding that his liability is based on his ownership, but he's exempt if he guarded it, his exemption is not because he's an *oiness* if he did all he could, to which we can argue that if he did not guard it, but someone else did, he's not considered an *oiness*. That's not so. Rather, he's exempt because he's only liable for unguarded property, but he's not liable for guarded property, regardless of who guarded it. Therefore, if it was guarded even by someone else, he has no liability to begin with.

be considered like leaving an open pit with the potential to cause damage. Now, if the owner's liability is because of his negligence, we could argue that in this case he would also be liable because he was the animal's owner at the time of his negligence. Therefore, his negligence made him responsible and liable for any resulting damage. And since the *gemara* teaches that he's exempt, it must be because one's liability is based on his property causing damage, and in this case, the animal was no longer his property at the time it damaged. Therefore, he cannot be held liable under the category of *shor*. Though, he might be liable under the category of *bor*. [3] [4]

With these two ways of understanding the owner's liability for damages caused by his animal, in Chiddushei Rabi Nachum[7] he explains the above-mentioned *machlokes* of the Nimukei Yosef and Raavad whether by entrusting the animal to a *shomer*, the owner is entirely exempt from payment, or perhaps the owner is still liable to pay the injured party, but he can then demand reimbursement from the *shomer*, as follows.

The Nimukei Yosef holds that his liability is because of his negligence. Therefore, he holds that if he entrusted it to a competent shomer, there was no negligence on the part of the owner and he's therefore not liable for the damage caused by the animal. The Raavad however holds that his liability is based on his ownership of the animal, but a proper *sh'mirah* exempts him from payment. However, if the *shomer* was negligent and the animal caused damage, it turns out that the animal was not under proper *sh'mirah*. Therefore, the owner is liable for the damage based on his ownership of the animal. He cannot claim that he was an *oniess* since he entrusted it to a *shomer* who did not end up guarding it properly. He should have watched it himself to prevent it from causing damage. [5]

Notes

[3] That which Reb Shimon Shkop cites the *gemara* further[13] that if the owner declared the animal *hefker* after it left the barn, he's exempt from paying for the damages under the category of '*shor*' because he was not its owner at the time it caused the damage, in Chiddushei Reb Shmuel[14] he cites the Yerushalmi[15] that disagrees and says that he is liable in this case. And he explains that the *Yerushalmi* holds that the owner's liability is because of his negligence. Therefore, since he was negligent when he 'was' the owner of the *shor*, he becomes liable even for damages caused when he was no longer the owner.

[4] Reb Shimon there cites another *gemara* where it seems that the owner's liability is based on his ownership and not because of his negligence. The *gemara* a bit further[16] says that the four main categories of *nezikin* mentioned in the *mishnah* at the beginning of the *perek* are *nizkei mamono*, damage caused by one's property. While those mentioned by Rabi Oishiya, among them the four *shomrim*, are *nizkei gufo*, damage caused by the person. And so, a *shomer's* liability is because of his negligence in not watching it adequately, and one's liability for the four *nezikim* of the *mishnah* is because it's his property.

Reb Shimon adds another indication of this distinction. The *gemara* there says that the four *nezikin* are *hezeika d'b'yadayim*, active and direct, while *shomrim* are *hezeika d'memeila*, not active and indirect. And he explains that for *nezikin* he's liable because his property actively caused damage. While *shomrim* are liable because they did not watch the item adequately, thereby causing its damage or loss indirectly. And so, we see that for *nezikin* his liability is based on his ownership of the property that caused the damage.

[5] In Chiddushei Reb Nachum he writes that some seek to prove that the owner's liability is because of his negligence from the fact that a *shomer* takes the place of the owner in being liable for damages. If the owner's liability is based on his ownership, why would the *shomer* be liable, after all, he's not the owner of the property that caused the damage?

However, he answers that this does not prove the point because even if we say that the owner's liability is based on his ownership, he does not need to be the actual owner of the animal. Rather, if the animal is under his care and responsibility, he's considered like the owner to be liable for damages. As Tosfos[17] writes regarding the *halachah* that a thief is liable for damages. Although he does not own the animal, and he has less responsibility than a *shomer*, the *gazlan* is liable for damages caused by the animal he stole. It's only logical that the *gazlan* take the place of the owner to be liable because since he removed it from the owner's domain and the owner who was responsible for guarding the animal can no longer do so, it is now incumbent upon the *gazlan* to guard it. The person who can, and must, guard it from causing damage, is considered the owner regarding liability for damages. And so, even if we learn that liability for damages is based on ownership of the property that caused the damage, a *shomer* and *gazlan* are considered the owners of this property regarding liability.

[And he adds that the Mechilta derives from a *pasuk* that the *shomer* takes the place of the owner regarding damages. Accordingly, even if it did not follow logically, the *pasuk* teaches that one is liable for damage caused by something under his jurisdiction and responsibility.]

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Does the owner need to prove that he was not negligent?

Can the damaged party collect even without proving negligence by the owner since the damage is before us? / Is a shomer believed that he was not negligent by a shevuah as in all claims of a shomer, or must he prove his claim that he was not negligent by eidim?

חזון איש, פני יהושע, חי' רבי שמואל

The Chazon Ish[8] poses the following question in the following case. One's animal went out and caused damage. The owner claims that he guarded it properly by locking it into its enclosure, but it got out by digging under the wall or door, and he's therefore not liable. Who has the burden of proof? Is it the owner who must prove his claim to be exempt from payment? And if he does not prove it by witnesses, he must pay for the damage. Or must the damaged party prove that the owner was negligent to be able to collect? And if he does not prove negligence, he cannot collect, as in any case of *hamotzi mei'chaveiro alav ha'rayah*?

The Chazon Ish concludes that the owner must prove that he was not negligent because the damage is before us, and his claim is unusual.

Accordingly, he writes that if this happened while the animal was with a *shomer*, he would likewise need to prove his claim that he guarded it properly, but it nevertheless got out. Even though in *Hilchos Shomrim*, for example, if the animal ran away and got lost, he could exempt himself from paying the owner for the loss of the animal by swearing to his claim that he guarded it properly, but it nevertheless got out. However, regarding *nezikin* there's no *halachah* of *shevuah*, and he can only exempt himself from paying for the damages by proving his claim by *eidim* that he guarded it properly, but it nevertheless got out.

The P'nei Yehoshua[9] however, concludes that the damaged party must prove that the owner was negligent.

In Chiddushei Reb Shmuel[10] he explains this *machlokes* with the above question of what makes the owner liable for damage caused by his property. If the owner's liability is based on his ownership, but he's exempt from payment if he guarded it properly as an *oneiss*, it is the owner that must prove his claim because the reason for his liability is fixed and certain, but the reason for his exemption is in doubt. Therefore, the owner must prove his claim, as is the opinion of the Chazon Ish. However, if the owner's liability is because of his negligence, he cannot be held liable until his negligence is established. Therefore, the damaged party must prove the owner's negligence, as is the opinion of the Pnei Yehoshua.

מראי מקומות

1. ד"ה ושמירתן 2. הלכות נזקי ממון פ"ד הלכה ד' 3. הלכות נזקי ממון פ"א הלכה א' (אות י"ד) 4. הלכות נזקי ממון פ"א הלכה א' 5. סי' א' 6. להלן דף יג: 7. בסוגיין 8. בבא קמא סי' ז' (אות ז') 9. להלן דף נ"ו: 10. סי' א' (סוף אות ב') 11. להלן דף ו'. 12. שיעורים סי' א' (אות ט') 13. להלן דף יג: 14. סי' א' (אות ג' ד"ה אמנם) 15. להלן פרק ג' הלכה ב' 16. להלן דף ד': 17. להלן דף נ"ו: (ד"ה פשיטא)