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PAY PER CLICK: ARE VIRUS SENDERS LIABLE?

Adapted from the writings of Dayan Yitzhak Grossman

Our previous article discussed the permissibility of businesses paying ransoms for the release of data held hostage by ransomware cyberattacks. In this article, we consider whether cyberattackers who cause financial harm by sending emails bearing viruses can be held halachically liable for their activities.

R' Yaakov Dovid Schmahl, a *dayan* in Antwerp, was asked about someone who sent an email containing a computer virus to someone else, and the virus damaged the recipient's computer data. (It seems that the sender sent the virus knowingly and maliciously, although this is not explicit.) Rav Schmahl notes various arguments for exempting the sender from liability *bedinei adam* (under human law), including the Talmudic rule that

One who places poison before another's animal is exempt according to human laws but liable according to the laws of Heaven.¹

According to Rav, this is due to the principle that "[the animal] should not have eaten it," which Tosafos explains to mean that "since [the animal] deliberately brings upon itself the thing that damages it, it is not appropriate to hold [the one who placed the poison] liable for this."² In our case as well, argues Rav Schmahl, since the virus is activated by the recipient opening his mailbox and downloading the infected email to his computer, there should be no liability *bedinei adam*.

The Rosh, however, apparently understands that the exemption of the placer of the poison is based on the assumption that an animal eating something that is harmful to it is unlikely, and it is therefore not the responsibility of the placer of the poison to anticipate the animal eating it, but rather that of the animal's owner, if present, to prevent his animal from doing so.³ While many users do run effective

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² Tosafos *ibid.* s.v. *Havah Lah shelo sochal*.

³ Piskei HaRosh *ibid.* *siman* 3. Cf. *Sma C.M. siman* 393 s.k. 4; *Shimru*

¹ *Bava Kama* 47b.

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Dedicated in loving memory of
 HaRav Yosef Grossman zt"l



PARSHAS SHLACH

A GRAVE ERROR?

Excerpted and adapted from a shiur by
 HaRav Yechiel Biberfeld

They went up in the south, and he came to Chevron...

Bemidbar 13:22

Why does the *pasuk* begin with the plural "they" and continue with the singular "he"? Rashi (referencing Sotah 34b) explains that all the spies went up in the south, but Kaleiv alone went to Chevron, to daven at the Me'aras Hamachpeilah that he be saved from the counsel of the other *meraglim*. Nevertheless, the *poskim* disagree whether it is generally permitted to visit a cemetery for the purpose of davening.

According to R' Chaim Paltiel (cited by Bach Y.D. 217, and Shach Y.D. 179:15), one should not daven at a cemetery because it is similar to *doreish el hameisim* (necromancy), which is forbidden *mid'Oraisa* (Devarim 18:11).¹

The Bach (cited above) argues that davening at a cemetery is a widespread custom and has a firm basis in the Zohar. In

¹ See Sanhedrin 65b and Shulchan Aruch Y.D. 179:13, where the prohibition is described as not eating and sleeping in the cemetery in order not to invoke a spirit of *tumah*.

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Taking Stock

Q I purchased a stock for \$100 a share using an online broker. I'm anticipating that its price will increase to \$105 over the next few weeks. I placed a limit order to sell at \$105, which means that my broker is instructed to sell the stock when its price reaches that number. (This is commonly done when an investor suspects that the stock price may drop a short time after rising.) It is possible that the share price will reach \$105—and my stock will be automatically sold—on a Shabbos. May I keep the order in effect over Shabbos?

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antivirus software, some do not, and some viruses may slip by such software; and while some users scrupulously follow the strong recommendations of security experts to avoid opening dubious emails and certainly their attachments, not all do. It can thus be argued that it is not unlikely that a user will open a virus-laden email (particularly if the sender is someone he knows, or if the fraudulent email is well disguised as a legitimate one), and so according to the Rosh, the Gemara's principle might not apply to our case.

Rav Schmahl does not mention the opinion of the Rosh, but he does cite the Chazon Ish who points out that the Torah holds the digger of a pit liable for damage caused to a victim who stumbles into it, despite the fact that the pit's victim, too, brings upon itself the thing that damages it. The Chazon Ish explains the distinction to be that in the case of the pit, although the victim intended to approach the pit, it did not intend to fall into it, and the act of falling in happened against its will, whereas in the case of the poison, the victim brought the damage upon itself "from beginning to end."⁴

Accordingly, Rav Schmahl argues that the email virus is analogous to the pit rather than to the poison, because unlike in the case of the poison, where the animal did choose to eat the poison (although this was due to its failure to discern its harmful nature), the recipient of the email intended to download a legitimate email, and not a malicious virus, and the sender is therefore liable just as is the digger of the pit.

This analysis is debatable; it could easily be argued that the animal, too, did not wish to eat poison, but rather wholesome food, but it is still considered to have "brought upon

itself the thing that damaged it" since ultimately it did intend to eat the stuff before it. Likewise, the email recipient intended to download the email, even though this is because he assumed it to be a legitimate email rather than a virus.

Moreover, as Rav Schmahl himself notes, the Shach extends the exemption from liability for poisoning to someone who adulterates legitimate animal food with poison.⁵ In this case, in the context of the Chazon Ish's distinction, it would certainly seem plausible to view the animal as having intended to eat only the wholesome food and not the poison. Rav Schmahl is forced to explain that since the animal deliberately ingested the food, which turned out to have been adulterated with poison, it is considered to have deliberately ingested the poison. It can similarly be argued that intentionally downloading an email that turns out to have been malicious is likewise considered the equivalent of intentionally downloading the malicious content.

Rav Schmahl himself ultimately concedes that his distinction between the poison and the virus is debatable, and the recipient of the virus may indeed be considered to have brought upon himself the thing that damages him. He records that he posed the question to R' Mendel Shafran, a leading *dayan* in Eretz Yisrael, who responded that our case "is exactly like a pit," and the sender is therefore liable. He explains the distinction between the cases of the poison on the one hand, and the pit and the email on the other, to be that when the victim's action that triggered the harm is one that is generally performed as a matter of routine, without conscious thought, such as walking or opening email, we do not exempt the tortfeasor from liability on the grounds that the victim is considered to have brought the harm upon himself; the

Mishpat (Zafrani) *cheilek* 1 pp. 396-7.

⁴ Chazon Ish Bava Kama *siman* 8 os 9.

⁵ Shach C.M. *siman* 386 s.k. 23.

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fact, the Shulchan Aruch and Rama mention the custom multiple times regarding specific occasions during the year.² But the Bach emphasizes that only davening to Hashem for assistance in the merit of

the deceased is permitted; davening directly to the dead is forbidden. This approach is taken by the Mishnah Berurah (581:16) as the practical halacha.

A third approach is mentioned by the Pri Megadim and the Elef Lamagein (O.C. 581), citing the Shelah. In their opinion, it is permitted even to directly ask the deceased to intervene with Hashem for salvation. Accord-

² See Shulchan Aruch and Rama O.C. 581:4, 605:1, 559:10, and 579:3.

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A Three distinct *isurim* are relevant to this case:

1. *Mekach umemkar b'Shabbos* (transacting business on Shabbos)
2. *Amirah lenochri* (telling a non-Jew to perform a Shabbos prohibition)
3. *S'char Shabbos* (profiting from Shabbos activity)



RAV ARYEH FINKEL

R' Shmuel Vosner (Sheivet HaLevi Vol. II, 84) discusses your case and concludes as follows regarding the applicability of the three *isurim*:

1. *Mekach umemkar b'Shabbos*: Chazal forbade performing transactions on Shabbos because it could lead to writing. This includes virtually all financial dealings (see Beitza 37a), so a stock may not be sold on Shabbos. But in your case, the sale is executed not by you but by the non-Jewish broker on your behalf. This is not subject to the prohibition.
2. *Amirah lenochri*: The Rama (O.C. 307:4) permits giving merchandise to a non-Jew before Shabbos with instructions to sell it, provided one doesn't specify that it be sold on Shabbos. This describes your case.
3. *S'char Shabbos*: Chazal prohibited producing profits on Shabbos in any manner, including receiving wages for a service performed on Shabbos and collecting profits gained on Shabbos from an asset (S.A. O.C. 246:1, M.B. *ibid.* 3). Even automatically-generated profits are included in the *issur*, so this prohibition applies in your case. If this is a case of *hefsed merubeh* (significant monetary loss), you should consult a *rav* to discuss your particular situation.

You may wish to place a stop-loss order—which instructs the broker to sell the stock if its price drops below a certain figure, in order to cut your losses—at any level at or below your purchase price. Because no profit is generated from the sale, this order may be kept active over Shabbos.

only time this exemption applies is when the victim's action is the product of deliberate intent and a conscious decision, such as eating.⁶

⁶ Shu"t Kisos Levais Dovid *cheilek* 2 *siman* 134 pp. 352-5.

ing to this approach, it would seem that the custom to daven at the cemetery is relevant only to the graves of upright family members and *tzadikim*.

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