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## ERRING ON THE SIDE: IS PFIZER LIABLE FOR HARMFUL SIDE EFFECTS OF ITS PRODUCTS?

Adapted from the writings of Dayan Yitzhak Grossman

Our previous article, on the liability of vaccine manufacturers for deleterious side effects of their products, discussed the rescuer's exemption—the Rabbinic enactment that one who damages property in the process of saving a life is exempt from payment. In this article, we discuss several other potential issues concerning vaccine manufacturers' liability for the side effects of their products.

As noted last week, a whistleblower has filed a lawsuit in U.S. District Court accusing Pfizer of committing fraud, abuse, and protocol violations in its COVID vaccine clinical trials. It seems likely to this author that if those allegations are actually true, the rescuer's exemption would not apply. But some of the defenses against liability discussed below still might, as we shall see.

### IT SHOULDN'T HAVE EATEN IT

We have previously discussed<sup>1</sup> the Gemara's rule that

One who places poison before another's animal is exempt under human law but liable under the laws of Heaven.

The exemption under human law is due to the fact that

...[The animal] should not have eaten it.<sup>2</sup>

The Rosh apparently understands that this exemption is based on the assumption that it is unlikely that an animal will eat something that is harmful to it, so it is not the responsibility of the placer of the poison to anticipate that possibility. Rather, it is the duty of the animal's

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<sup>1</sup> Pay per Click: Are Virus Senders Liable? The Bais HaVaad Halacha Journal, Jun. 3, 2021.  
<sup>2</sup> Bava Kama 47b.

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PARSHAS MIKEITZ

### THE LAW OF CONSERVATION OF MASS

Excerpted and adapted from a shiur by  
Dayan Daniel Dombroff

Then seven years of famine will arise after  
them and all the abundance in the land  
of Egypt will be forgotten; the famine will  
ravage the land.

Bereishis 41:30

During times of plenty, may one reduce  
his food intake by choice in order to lose  
weight?

According to R' Elazar Hakapar (Ta'anis  
10b), a *nazir* is considered a *chotei* (sinner)  
for refraining from wine, and the same  
is presumably true of other foods. The  
Shulchan Aruch HaRav indeed derives  
from there that one may not deprive or  
afflict himself, except for the purpose of  
spiritual growth and gaining control of  
his *yeitzer hara*. Indeed, Chazal note that  
Yosef's brothers had not drunk wine for  
twenty years prior to drinking with Yosef  
(in Bereishis 43:34).

However, R' Moshe Feinstein writes that  
dieting to improve one's mental state,  
e.g., to gain confidence by improving  
his appearance, is permitted, just as one  
may undergo surgery because it is for his

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## Sabbatical Smoldering

Q I am in Eretz Yisrael for Chanukah, and many Shmitah products are still available for purchase here. Is there a reason to refrain from using Shmitah olive oil for the menorah?

A The Torah commands that Shmitah produce must be used for *achilah* (eating) and not *hefseid* (waste). *Achilah* includes any use akin to eating, in that benefit is derived from the item as it is consumed. Using oil to fuel a flame meets this criterion, as the user benefits from the light as the oil is depleted (Rambam Shmitah 5:1).

For *ner* Chanukah, many *poskim* object to the use of Shmitah oil, because benefiting from the

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owner, if present, to prevent it from doing so.<sup>3</sup> According to this understanding, the Gemara's rule obviously has no relevance to our case.

But Tosafos explains the Gemara to mean that since the animal brought upon itself the thing that damaged it, it is not appropriate to hold liable the one who placed the poison.<sup>4</sup> According to this approach, the rule would indeed seem to extend to vaccine manufacturers.

R' Yaakov Hildesheim, a contemporary author, maintains that even according to Tosafos, the rule does not apply when the damage is certain to occur (*bari hezeika*).<sup>5</sup> The liability of vaccine manufacturers would then hinge on whether the side effects in question are considered *bari hezeika*. As this author understands, while in most cases side effects are not certain to occur as a consequence of any particular vaccination, the law of large numbers will often imply the near certainty of the occurrence of at least some side effects when a large number of vaccinations is administered; whether this would be considered *bari hezeika* is an interesting question.

### DINA DEGARMİ

Even if the manufacturers are not liable under the standard laws of torts (*nezikin*), they may nevertheless be liable under the rubric of *dina degarmi*. Although indirect causation of damage does not generally engender liability (*grama benizakin patur*), the subcategory of *dina degarmi* is an exception. An analysis of the various opinions regarding the distinguishing characteristics of *garmi* is beyond the scope of this article,<sup>6</sup> but we will note that various *poskim* do consider the applicability of *dina degarmi* to cases similar to ours:

The Maharsham discusses the case of a woman who purchased a chemical leavening agent from a peddler to bake honey cakes for a wedding. The cakes failed, apparently because the peddler inadvertently supplied the wrong ingredient. In the course of his analysis of the question of liability, the Maharsham discusses whether *dina degarmi* applies even to inadvertent damage (*shogeig*), but he argues that in his case, the seller has a duty of care that results in his conduct being characterized as virtually deliberate (*karov lemeizid*).<sup>7</sup>

<sup>3</sup> Piskei HaRosh *ibid.* siman 3. Cf. Sma C.M. siman 393 s.k. 4; Shimru Mishpat (Zafrani) *cheilek* 1 pp. 396-97.

<sup>4</sup> Tosafos *ibid.* s.v. Hava lah sheilo sochal.

<sup>5</sup> R' Yaakov Hildesheim, *Ma'achar Cheifetz Pagum Betoras Chadash Vehizik*, Bais Hillel #37 (Shvat [5769] pp. 40-44; Rav Hildesheim's understanding of our Tosafos does not seem compelling to this author, but he is correct that this is explicitly the position of Tosafos Rabeinu Peretz (*ibid.* 56b s.v. Hama'arid).

<sup>6</sup> See Pay Per Click, footnotes 5-7.

<sup>7</sup> Shu"t Maharsham *cheilek* 5 siman 11.

The contemporary *dayan* R' Tzvi Shpitz discusses a similar case, initially considered by R' Shlomo Zalman Auerbach (whose analysis is not directly applicable to our case), of a shopkeeper who inadvertently provided sugar to a customer that asked for salt. The buyer cooked with it and ruined his food. Like the Maharsham, Rav Shpitz argues that the shopkeeper would be liable under the rule of *dina degarmi*, because he is considered negligent (*posheia*) rather than *shogeig*.<sup>8</sup>

Rav Hildesheim considers the case of someone who sold a used electric iron with the assurance that it was in excellent condition. The seller actually knew the iron to be defective, and as a result of its defect it burned the buyer's garment. Rav Hildesheim considers it obvious that the seller is liable under *dina degarmi*. (He then proceeds with a lengthy analysis of the defense of "it should not have eaten it," which he ultimately concludes does not apply in his case, in part because he considers the damage to the clothing to be *bari hezeika*, which he maintains negates the rule's applicability, as discussed above.)

So according to these authorities, if the vaccine manufacturers were indeed guilty of fraud, abuse, and protocol violations, and knew (or should have known) about and failed to disclose the potential side effects of their products, then there would be a strong case to hold them liable for *dina degarmi*. If they acted responsibly, their liability is less clear.

One final consideration is the question we raised earlier: Are side effects that are not certain to occur as a consequence of any particular vaccination, but are a near statistical certainty to befall at least some individuals when a vaccine is administered at scale, considered *bari hezeika*? We initially raised this question in the context of Rav Hildesheim's position that the "it should not have eaten it" defense does not apply in a case of *bari hezeika*. But this question is also crucial to the very applicability of the category of *dina degarmi* to our case, because according to some *Rishonim*, the characteristic of *bari hezeika* is one of the criteria distinguishing *dina degarmi*, for which there is enforceable liability, from *grama benizakin*, for which there is not.<sup>9</sup>

<sup>8</sup> Mishpetei HaTorah Bava Kama pp. 37-41. See also Rav Hildesheim's discussion of a similar case at the end of his article (p. 44).

<sup>9</sup> Piskei HaRosh Bava Kama perek 2 siman 17; Trumas Hadashon *cheilek* 1 siman 315.

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benefit. The Radvaz discusses the propriety of refraining from a practice due

to a *chumra*. He writes that if the *chumra* is extreme and not accepted by the mainstream, it might violate R' Elazar Hakapar's directive, because *batlah dato*

(his opinion is negated by the mainstream opposition to it).



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lights is forbidden, which renders the use *hefsek* (Sheivet Halevi 1:184).

Others argue, reasoning that although it is forbidden to benefit from the Chanukah lights directly, e.g., by using

them to count money, one is allowed to sit in a room illuminated by the *neiros* and deliberately enjoy the ambiance they provide. This is considered *achilah* for Shmitah purposes and is permitted.

R' Shlomo Zalman Auerbach (Minchas Shlomo 1:42) gives another reason for leniency: The very fact that a mitzvah is fulfilled renders the usage *achilah* and not *hefsek*. The opposition observes that mitzvos *lav leihanos nitnu* (mitzvah fulfillment is not considered personal benefit).

R' Shlomo Zalman offers another rationale: The purpose of *ner Chanukah* is *pirsumei nisa* (publicizing the miracle), and that is a legitimate Shmitah use, just as a store owner may light lamps with Shmitah oil in order to attract customers.

Since the *poskim* disagree, one should preferably avoid Shmitah oil. This is true even for the menorah of a child who has reached the age of *chinuch*, whose *ner Chanukah* holds *kedushah* (holiness) like an adult's and may not be used for mundane purposes (Halichos Shlomo 15:11).

It stands to reason that the *shamash* (service light) may be lit with Shmitah oil, because benefiting from it is permitted.

Aside from the prohibition of wasting Shmitah produce, there is an obligation of *biur* (to dispose of Shmitah produce when it is no longer found out in the fields). This is inapplicable to olive oil this year, because the *zman biur* for olives won't come until Shavuos time (Derech Emunah Kuntres Shvi'is II; each species has its own *zman biur* based on its growth cycle).



RAV ARYEH FINKEL

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