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לע"נ הרב יוסף ישראל
ב"ר משה גרוסמן זצ"ל

Dedicated in loving memory of HaRav Yosef Grossman zt"l

PART II—UNDER FIRE: MUST SOMEONE BE SAVED FROM A DANGER OF HIS OWN MAKING?

Adapted from the writings of Dayan Yitzhak Grossman

Our previous article discussed a recent incident in which 38 migrants at a detention center in northern Mexico died in a fire set by the migrants themselves in protest of their impending deportation, after some guards walked away and made no apparent attempt to release the men. In that article, we discussed the obligation to rescue someone in danger, and the question of criminal liability for failing to do so; in this one, we discuss the question of civil liability. (As usual, we discuss these issues from the perspective of halacha as applicable to Jews.)

The Gemara cites a *breisa* that one who knows testimony in support of another but does not testify on his behalf is exempt from liability under human law (*midinei adam*) but liable under the law of Heaven (*bedinei shamayim*).[1] The Ramban and Nimukei Yosef explain that this is because the obligation to testify is merely a form of kindness (*gemilus chasadim*) mandated by the Torah,

> and if he does not wish to fulfill this mitzvah, there is no legal basis to hold him liable for compensation.
>
> To what is this similar? To one who sees his friend's wallet being lost and does not save it, or to one who does not wish to give a *prutah* of his own to a pauper, whom the court does not hold liable for this. Here, too (with regard

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1 Bava Kama 55b.

The Bais Havaad on the Parsha
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PARSHAS TAZRIA-METZORA

HALF AND HALF

Excerpted and adapted from a shiur *by HaRav Yechiel Biberfeld*

On the eighth day, the flesh of his foreskin shall be circumcised.

Vayikra 12:3

It happens sometimes that the father of a newborn boy wishes to perform his son's milah himself but wants to leave the *priah* (pulling back of the foreskin) to the mohel. If milah and *priah* are done by different people, has each fulfilled part of the mitzvah or no mitzvah at all? The same question arises in other contexts, like if one person does *bedikas* chametz in one half of a house and another, not appointed by the first as his *shaliach* (proxy), searches the other half.

The Shulchan Aruch (Y.D. 266:14) rules that on Shabbos, milah and *priah* must be done by the same mohel, but the Rama allows one mohel do the milah and another the *priah*. Although the Rama concludes that one should ideally avoid this division on Shabbos, many *Acharonim* allow it *lechat'chilah*. The Mishnah Brurah (331:36) writes that it was customary in Poland to always have two mohalim perform a bris together, and it seems that our question is the subject of

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Finders Keepers

Q May I discard a lost object that I found years ago but was never claimed?

A Those who lose inexpensive items often don't invest effort to retrieve them, so they remain in the finder's possession for years. Although *yiush* (despair of ever getting the item back) usually renders a lost object *hefker* (ownerless), in this case the object was found before *yiush* occurred (C.M. 262:3). Therefore, the item is subject to *yehei munach*—it is to be set aside until the advent of Eliyahu Hanavi.

But this doesn't necessarily mean that the lost object itself must be retained; in certain cases, it may be appraised and sold to others or to the finder, who will eventually return its value to its owner. For example, the Gemara (Bava Metzia 29b) permits the finder of tefillin to appraise

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to one who is derelict in his duty to testify in support of another), the court does not obligate him to pay compensation out of his own resources, for the Torah does not obligate him in this; it is only like other mitzvos and is not a civil matter.[2]

According to the Sifra (cited by several *Rishonim*), one of the bases for the duty to testify in support of another is the general prohibition against standing idly by while harm befalls another (*lo sa'amod al dam reiecha*).[3] R' Yosef Shaul Natanson apparently understands that insofar as the obligation to save another from harm is included in the prohibition of *lo sa'amod*, this obligation could not possibly be described as merely a matter of *gemilus chasadim*, and he accordingly assumes that the Ramban and Nimukei Yosef reject the position of the Sifra and maintain that *lo sa'amod* is limited to cases of bodily harm and does not extend to cases of financial harm.[4] According to this approach, it is possible that the violation of *lo sa'amod* in a case of bodily harm would indeed engender civil liability.

The Ketzos Hachoshen, however, understands the Ramban to be saying that civil liability can only be engendered by action or verbal utterance, but not by a mere passive dereliction of duty.[5] The Me'iri as well explicitly states that the absence of liability for the failure to testify in support of another is due to the absence of harmful action.[6] According to this approach, it follows that there is never civil liability for a passive failure to save another from harm, even bodily harm.

According to all opinions, though, a dereliction of the duty to save someone from harm will at least engender liability *bedinei shamayim*, i.e., a moral obligation to compensate the victim (or in cases such as ours, where the dereliction resulted in the victim's death, his heirs) for the harm caused by the dereliction.

The above discussion concerns someone who has no relationship with the person he neglects to save from harm. But in our case, the guards are the custodians of the detainees. Some *Rishonim* rule that the laws of custodial responsibility (*chiyuvei shmirah*) apply to custodians of human beings as well as those of property, as per the Gemara's principle that "what difference is there whether someone injured one's body or one's property?" [7,8] A number of *Acharonim,* however, note the rule that at least in certain contexts, human beings are compared to real property (*karka*), a category of assets for which there is generally no custodial liability.[9] They reconcile the position of the *Rishonim* that custodial liability extends to human beings with this rule in various ways that are beyond the scope of this article, but which result in the applicability of custodial liability to our case being a matter of dispute[10] or otherwise uncertain.[11]

A further argument against the existence of custodial liability in our case stems from the fact that the fire was started by the detainees themselves. There are a number of cases in halacha where someone who would otherwise be liable as a tortfeasor or custodian is exempt because the harm suffered by his victim is in some sense the victim's own fault.[12] While none of these cases is an exact parallel to ours, it may nevertheless be argued that in our case as well, the guards cannot be held liable for negligence because the fire was started by the detainees themselves. This argument is somewhat speculative, however, and in any event, it would obviously only apply to those detainees who actually started the fire.

2 Dina Degarmi LaRamban (Yerushalayim 5689) pp. 61a-b; Nimukei Yosef ibid. 24a in Rif pagination. Cf. Bach C.M. beginning of *siman* 28.

3 Toras Kohanim Kedoshim *perek* 4; She'iltos DeRav Achai Gaon *siman* 69; Sefer Hamitzvos LehaRambam *lo sa'aseh* 297.

4 Yad Shaul *siman* 221 *os* 11. Rav Natanson's suggestion that the Rambam (based on various passages in the Mishneh Torah) is also of this view seems to overlook the Rambam's explicit citation of the Sifra in Sefer Hamitzvos ibid. Perhaps Rav Natanson would assume that the Rambam changed his mind in the Mishneh Torah.

5 Ketzos Hachoshen *siman* 66 *s.k.* 21.

6 Bais Habechirah ibid. (Yerushalayim 5710) 56a p. 167 s.v. *Hayodeia.* Cf. Shu"t Maharsham *cheilek* 3 *siman* 96 s.v. *Umah shehe'erich ru"m.*

7 Sanhedrin 2b.

8 Mordechai Bava Metzia *simanim* 359, 461, and 367, but cf. Shu"t HaRosh *klal* 79 *siman* 4 end of s.v. Teshuvah. See Darchei Moshe C.M. *siman* 177; Rama C.M. 176:48; Shulchan Aruch ibid. 188:6; Sma *siman* 188 *s.k.* 11; Taz 176:48; Urim Gedolim (Mechon Mishnas R' Aharon 5763) *siman* 40 *limud* 214 p. 382; Shu"t Kehunas Olam *siman* 17 p. 24a; Shu"t R' Eliezer (Gordon) *siman* 2 *anaf* 2 *os* 1.

9 Sefer Yehoshua *psakim uchsavim siman* 472, and see the sources cited in the following two notes.

10 Shu"t Be'er Moshe (Danishevsky) C.M. *siman* 11 end of s.v. *V'al pi msh"k.*

11 See Nesivos Hamishpat *siman* 176 *biurim s.k.* 60; Shu"t Sho'el Umeishiv *mahadura tinyana cheilek* 2 *siman* 30.

12 See the framework of *reshus* and *shelo birshus* in Bava Kama 31b-32b (and see our discussion of this framework in Rules of the Road: Laws and Liability. Bais HaVaad Halacha Journal. Nov. 11, 2021); the principle of *hava lah shelo sochal* in ibid. 47b (and see our discussion of this principle in Pay Per Click: Are Virus Senders Liable? Bais HaVaad Halacha Journal. Jun. 3, 2021); and the explanation of the Ramban (*Chidushim* to Bava Metzia 96b s.v. *Ha de'amrinan*, cited in Bais Yosef C.M. *siman* 340 and Shach ibid. *s.k.* 5) that the rationale for the dispensation of *meisah machmas melachah* is the presumption of *pshias mash'il.*

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RAV ARYEH FINKEL

them and take them for himself, with the explanation that tefillin are easily accessible in the marketplace. The cash value may even be used by the finder for his personal use, so long as he pays when the owner is eventually identified.

Some *poskim* limit this to mitzvah items like tefillin (Shach C.M. 267:16), but most (including Igros Moshe C.M. 2:45) don't differentiate, allowing any item readily available for sale to be liquidated. Today, common household products meet this criterion, given their mass production and universal availability online.

R' Moshe (ibid.) writes that the appraisal may be done by the finder himself if the item's price is fixed. Otherwise, the appraisal should be performed by three people who know the market. He further instructs that all pertinent information be written down and saved. If the item has a *siman* (identifying characteristic), it should be recorded, so that the item's ownership can eventually be determined. It is advisable to photograph the item, record the *simanim*, and note the location in which it was found and any other useful information. This information may be saved physically or digitally, ideally with a cloud storage service for security.

Typically, a found object is used rather than new, so its current value is low. Some *poskim* require appraising the object as new, because paying its true (depreciated) value wouldn't restore the owner's loss (Orchos Rabeinu, citing the Steipler's view). But this depends on the item. There is no market for used hats, so a hat must be appraised as new. Laptop computers have an established secondhand market, so they may be appraised by current value (R' Yosef Fleischman, Alon Mishpat, Issue 73, 5775, *Hashavas Aveidah*).

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the above dispute: The Shulchan Aruch holds that if milah and *priah* are done by different people, neither mohel fulfills a mitzvah, so there is no mitzvah of bris milah here that can override Shabbos. But the Rama's initial statement and other *Acharonim* maintain that one who performs half of a mitzvah has fulfilled part of the mitzvah, so the division is allowed on Shabbos.

R' Chaim Kaufman (Mishchas Shemen, Mas'ei) offers support for the latter view from the Sforno (Devarim 4:41), who writes that Moshe designated three *arei miklat* in *Eiver HaYardein* even though they would not be operational until the *arei miklat* in Eretz Yisrael were established later by Yehoshua, because this was a valid partial mitzvah.